

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**INCOME TAX REFERENCE No. 257 of 1995**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE D.A.MEHTA**

**HONOURABLE MR.JUSTICE Z.K.SAIYED**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**COMMISSIONER OF INCOME TAX - Applicant(s)**

**Versus**

**SHAHIBAUG ENTERPRISES (P) LTD - Respondent(s)**

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**Appearance :**

MR MANISH R BHATT for Applicant(s) : 1,

MR RK PATEL for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**

**and**

**HONOURABLE MR.JUSTICE Z.K.SAIYED**

**Date : 22/01/2008**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)**

1. The Income Tax Appellate Tribunal, Ahmedabad Bench-C, has referred the following question at the instance of Revenue under section 256(2) of the Income Tax Act, 1961 (for short 'the Act'):

"Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs. 1,85,93,546/- holding that the amount in question represented capital gains and the said capital gains was exempt under section 47(iv) of the Income Tax Act?"

2. The assessment year is 1979-80 and the relevant accounting period is financial year ended 31.3.1979. The assessee company sold certain shares of Suhrid Geigy Ltd., which had been acquired on 1.1.1974 to Koshalya P. Ltd. which was a wholly owned subsidiary company of the assessee. Similarly, the assessee had also sold certain shares of Wadi Chemicals P. Ltd. which had been acquired on 1.8.1977 to another wholly owned subsidiary company. The assessee worked out capital gains and claimed the said capital gains to be wholly exempt from tax under section 47(iv) of the Act. The claim of the assessee was negatived by the Assessing Officer on the ground that the assessee had been carrying on the business of purchasing and selling shares. The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals) who dismissed the appeal on this count.

3. In the second appeal, the Tribunal accepted the stand of the assessee on the basis: (i) in assessment order for Assessment Year 1978-79 the Assessing Officer had taxed the profit on sale of investment as capital gains and not as business profit; (ii) the Assessing Officer rejected the claim of the assessee regarding investment being stock in trade; (iii) in earlier assessment year the profit or loss were treated as capital gains or capital loss and had never been treated as business income or business loss; (iv) the shares in question were reflected under the head of Investments in the balance sheet of the company.

4. The Tribunal also relied upon its own order in the case of one Sercon P. ltd. In ITA No. 393/Ahd/1984 for assessment year 1978-79 decided on 4.1.1988 involving identical facts. The Tribunal also relied upon assessee's own case where similar view had been taken.

5. Heard the learned Senior Standing Counsel for the applicant - Revenue as well as Shri R.K. Patel learned advocate for the assessee. It is an accepted fact between the parties that in case of Sercon P. Ltd., the order of Tribunal was carried before this Court by way of Income Tax Application No. 253/1988 under section 256(2) of the Act and vide order dated 16.4.1980 the application was rejected refusing to direct the Tribunal to raise and refer any question of law, either as proposed or otherwise. In the fact

situation when on similar facts the issue stands concluded in favour of one assessee and there is nothing on record to suggest that the aforesaid order dated 16.4.1990 in case of Sercon P. Ltd. has been challenged further, the order made by the Apex Court in the case of Union of India & Ors. vs. Kaumudini Narayan Dalal & Anr., reported in (2001) 249 ITR 219, wherein, it is held that "it is not open to the Revenue to accept the judgment in case of one assessee and challenge its correctness in the case of other assessee without just cause" applies with full force. No distinguishing feature has been pointed out and hence in absence of any just cause the question referred to the Court requires to be answered in the affirmative upholding the view taken by the Tribunal considering the fact that in case of Sercon P. Ltd. similar issue stands concluded against the revenue. The question is, therefore, answered in the affirmative, that is, in favour of assessee and against the revenue.

6. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A. MEHTA, J.)

(Z.K. SAIYED, J.)

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