

आयकर अपीलिय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./**I.T.A.No.123&124/Vizag/2016**
(निर्धारण वर्ष / Assessment Year: 2007-08 & 2008-09)

ITO, Ward-2(3),
Vijayawada

(अपीलार्थी / Appellant)

Shri Pedarla Srinivasa Murthy
Vijayawada
[PAN No.AHUPP6051B]

(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri Y. Sessa Srinivas, DR
प्रत्यार्थी की ओर से / Respondent by : Shri M. Madhusudan, AR
सुनवाई की तारीख / Date of hearing : 18.04.2018
घोषणा की तारीख / Date of Pronouncement : 09.05.2018

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

These appeals filed by the revenue are directed against order of the Commissioner of Income Tax (Appeals) {CIT(A)}, Vijayawada vide ITA No.168&170/CIT(A)/VJA/2014-15 dated 30.12.2015 for the assessment years 2007-08 & 2008-09. Since, the facts are

identical and issues are common, they are clubbed, heard together and disposed-off by way of this common order for the sake of convenience.

2. The assessment for the assessment year 2007-08 is completed u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter called as 'the Act') by an order dated 28.3.2014 on total income of ₹ 40,87,610/- and for the assessment year 2008-09, the assessment was completed u/s 143(3) r.w.s. 263 of the Act by an order dated 28.3.2014 on total income of ₹ 1,20,96,380/-. The assessee is engaged in the activity of purchase and sale of shares of different companies through Kotak Securities Ltd and Zen Securities Ltd and has admitted the income under the head "Capital gains", whereas the A.O. is under the impression that the income should be assessed as "business income". The only issue involved in this appeal is whether the income derived from purchase and sale of shares is to be taxed under the head "business income" or under the head "capital gains". The A.O. observed that the assessee had purchased the shares of ₹ 19,31,76,052/- and sold the shares of ₹ 19,25,14,414/- for the A.Y. 2007-08 thus involving huge transactions in purchase and sale of shares. The assessee admitted the resultant profit/loss under the head short term capital gain (loss) and long term capital gains depending on the holding period. The income on account of long term capital gains was claimed as exempt u/s 10(38) of the Act.

The A.O. called for the explanation of the assessee as to why the resultant profit on purchase and sale of shares should not be assessed as business income. The assessee submitted his reply stating that the assessee is engaged in purchase and sale of shares and claimed long term capital gains in respect of shares held for a period of more than 6 months and shares sold less than the period of 6 months were admitted as short term capital gains. The assessee further stated that assessee has purchased the shares from recognised stock exchange and paid the Security Transaction Tax (STT) taken the delivery of the shares and deposited in DEMAT account. The assessee declared the shares as investment and continued to be held as investment till the shares were sold. The intention of the assessee was investment but not trading. As and when the shares were sold, they were sold from the DEMAT account and gave delivery through recognized stock exchange and the recognised stock broker. When stocks are sold and delivered and STT is paid and the transactions were done through recognised stock exchange, thus argued that the same amounts to capital gains. The assessee further submitted that the assessee declared shares in the balance sheet as investments and treated the asset as capital assets and not as stock in trade. The assessee also valued the assets as capital assets and repeatedly told the A.O. that his only intention was buying in

shares was to investment and not to trade in shares. However, the A.O. was not convinced with the explanation of the assessee and observed that by going substantial nature of transactions, the magnitude of purchase and sales the nature of transaction is certainly trade transaction but not the capital gains. Accordingly, assessed the entire capital gains claimed by the assessee as business income and disallowed the expenses claimed by the assessee in respect of DP charges, interest charges, service tax brokerage and brought to tax the net profit of ₹ 40,63,301/- to tax.

3. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A). During the appeal hearing, the assessee filed written submissions before the Ld.CIT(A), which the CIT(A) has forwarded to the A.O. for his remand report. The A.O. submitted the remand report stating that right from the commencement of the activity, the assessee has treated the activity as investment and the same was reflected in the balance sheet for the earlier years and declared the value of shares as investment in the balance sheets in the impugned A.Y also. The A.O. further stated that during the remand proceedings, he has verified the contract notes with reference to the statements filed by the assessee for day to day transactions, and the bifurcations for Intra-day transactions, short term capital gains and long term capital gains. However the AO in

the remand report viewed that in view of magnitude of transactions the same should be held as business activity. The Ld. CIT(A) given the copy of the remand report to the assessee and called for his counter comments. In reply to the remand report, the assessee reiterated the submissions made before the A.O. contending that the assessee had regularly admitted the income under the head capital gains. The CIT(A) after considering remand report and the submissions made by the assessee held that the income derived by the assessee from purchase and sale of shares required to be taxed as capital gains but not under the head "business income" and accordingly deleted the addition.

4. Aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before us. During the appeal hearing, the Ld. D.R. argued that the A.O. made the addition after detailed examination of the nature of transactions and concluded that the assessee has done trading activity and held that the intention of the assessee was to gain profits by dealing in share transactions. The Ld. D.R. also further argued that the magnitude of transactions dealt with by the assessee establishes that the assessee is engaged in share trading and intention of the assessee is not investment. Further, Ld. D.R. argued that the assessee also dealt in Futures and options, intra-day trading, therefore, the entire activity of the assessee in the nature of business but not in the nature of

investment. Hence, argued that the A.O. has rightly assessed the income under the head "business income" which required to be upheld.

5. On the other hand, the Ld. A.R. supported the order of the Ld. Ld.CIT(A).

6. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee is engaged in the activity of making investment in shares, apart from Intra day trading and dealing in futures and options. Separate portfolio is maintained by the assessee for each type of transaction. The investments are separately bifurcated and shown as the investments in the balance sheet. Merely because the assessee has made huge transactions in purchase and sale of shares, the same cannot be held to be business activity. The intention of the assessee has to be verified and it is observed from the financial statements that the assessee has declared the assets as capital assets in the balance sheet but not as stock in trade. This fact was not disputed by the A.O., rather the A.O. has confirmed the fact in his remand report also. The assessee also did not claim any benefit of increase or decrease of the value of shares by declaring the same in closing stock, no other business expenditure was claimed by the assessee on the shares. The CIT(A) has

elaborately discussed the issues and held that all aspects such as the facts and circumstances of the case, receipt of dividend, volume and frequency of transaction shows the investment but not trading. The same facts were discussed in detail in the Ld. CIT(A)'s order which is made available in para Nos.5.3 to 5.4 of the Ld. CIT(A) order, and the same is extracted as under:

5.3 *I have perused the reply of appellant, remand report of Assessing Officer and Income Tax records and other submissions of appellant.*

Present Assessing Officer during remand proceedings had the advantage of complete break up of details of share transactions with supporting evidence indicating period of holding (i.e.) retention period of shares, etc. and these details were not made available to the predecessor Assessing Officer while concluding the assessment order dated 28.03.2014. Hence present Assessing Officer's reliance on his predecessor's stand (even after verification of all relevant details) appears to me to be contradictory to his own observation in para (1) and (2) of remand report dated 09.12.2015

5.4 *I fail to persuade myself to agree with the remarks of Assessing Officer that appellant had done trading activity under the heed business for the following reasons:*

- 1. The question as to whether the appellant has earned capital gain or business profit on the shares sold by him depends on the facts and circumstances of each case. Such decision is to be arrived at by taking into account the intention of the appellant while purchasing the shares, as to whether the same was acquired for holding as investment or for doing business therein. The treatment given by the appellant in his books of account is also one of the decisive factors to find out whether the shares were held as investment or stock-in-trade. If the shares are bought with the intention of earning capital gains thereon and also dividend income by keeping the same as investment, the gain arising therefrom is required to be treated as capital gains. On the other hand, if the shares are purchased with the intention to earn profit and the same is treated as stock-in-trade in the books of account, the profit arising out of sale of such shares is liable to be*

treated as business income.

2. *In the Balance Sheet of the appellant, the appellant is valuing the assets as capital assets and not as stock-in-trade from the very beginning (i.e.) appellant's intention in buying shares was to invest and not to trade in shares. By this principle, the appellant is an investor.*

3. *Hon'ble Supreme Court in the case of CIT Vs Associated Industrial Development Co.(P) Limited (1971) 82 ITR 586 (SC) made the following observations:*

"whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment"

The appellant admitted his share transactions as investment in his capital account consistently ever since he started dealing in shares in all the Returns of Income filed by him. The stand of appellant was accepted by the Department upto Asst. Year 2005-06. For Asst. Years 2006-07, 07-08 and 08-09, the Assessing Officer took a different stand though facts remained the same even during the relevant asst. years.

4. *Intention of the person in undertaking the activity is a relevant factor. The appellant had received substantial dividend income which implied that the appellant had invested in shares and it is not a revenue receipt on account of trading in shares.*

5. *Appellant had retained shares for longer period and derived long term capital gains in respect of more than 100 shares (as could be seen from the statement enclosed to the return of income) indicates that the appellant is basically an investor in shares and not a trader as held out by Assessing Officer. Length of period of ownership is one of the factors to decide whether appellant is an investor or trader in shares.*

6. *Volume and frequency of transaction is also one of the guiding factors to find out whether the appellant is engaged in the business of purchase and sale of shares or making investment to have capital gains. In appellant's case, appellant had invested in shares of several companies which is clear from the statement of share holding of the appellant. Thus the fact of the appellant investing in shares for the last several years is not in dispute. There is also no dispute that the appellant has treated the equity shares of companies as investment (i.e.) capital asset all along. The appellant had*

also taken the shares at cost of acquisition thus given a particular treatment to the shares held as investment, therefore, without bringing on record any contrary material the Assessing Officer cannot change the intention and manner of investment made by the appellant. Had the appellant valued the shares at cost or market price whichever is lower, the gain arising out of sale of shares could be treated as business income. Appellant had not valued the shares as stock but valued the same as investment.

Thus, what was a capital asset will remain a capital asset unless the person holding the asset himself changes the nature by a specific action like conversion of capital asset into stock-in-trade. In the appellant's case, he has not treated the investment in equity shares as stock-in-trade. In view of the decision of Hon'ble Supreme Court in the case of Ram Kumar Agarwal & Brothers 205 ITR 251, Assessing Officer was not justified in treating the capital gain earned from sale of those shares as business profits, which were entered by appellant as investment in books of account.

7. *The idea behind introduction of Security Transaction Tax (STT) is to end the litigation on the issue, whether the profit earned from delivery based sale of shares is capital gains or business profit.*

With effect from 01.10.2004, on the share transactions subjected to STT, concessional tax rate @10% (which has been increased to 15% from Asst. Year 2009-10) is applicable in respect of STCG whereas no tax is chargeable in respect of LTCG.

8. *It is also to be noted that CBDT vide its Circular No.4/2007 dated 15.06.2007 has recognized possibility of two portfolios (i.e.) one "Investment portfolio" comprising securities which are to be treated as capital assets and the other "Trading portfolio" comprising stock-in-trade which are to be treated as trading assets. In view of these, profits that arose on shares in respect of delivery based transactions are liable to be taxed as capital gain and not as business income.*

9. *Further appellant has been purchasing shares from recognized stock exchanges, maintains Demat Account and the stocks are also delivered and STT is also paid.*

Appellant paid a sum of Rs.3,78.6251- during the Asst. Year 2007-08 as STT indicates that the income on account of sale of such shares should be treated as only 'capital gains' and not business income.

10. *Appellant was in receipt of dividends. The details of extent of capital gains and dividends admitted by appellant are as follows:*

Asst. Year	Amount of dividend (Rs.)	LTCG exempt u/s 10(38)	STCG/STCL
2005-06	1,89,080	10,33,691	9,05,824
2006-07	3,61,275	26,22,175	(-) 2,43,010
2007-08	8,95,840	1,55,20,412	(-) 1,26,94,353
2008-09	7,58,588	Nil	71,99,080

The very fact of earning dividend for different Asst. years stands to testify that the appellant undertook 'investment activity' and not 'trading activity' and such dividend was claimed as exempt u/s 10(38) of the Act in view of the fulfillment of the conditions laid therein.

The above share transactions were done through stock brokers (registered brokers) and appellant paid STT and deliveries were taken to the DEMAT account held by appellant.

The shares held as investment activity and those covered by Futures and options are distinguished by appellant that the shares held as 'investment' were recorded in the financial statements as Capital Assets only as could be seen from the statements forming part of the Return of income for relevant Asst. year.

The income derived by appellant from 'Futures & Options' was accounted for by him under the head 'business' only and it is explicit from the assessment record itself.

11. Appellant reported loss of ₹ 26,578.70 on account of intra-day transactions. In respect of trading in Futures and Options (F&O), appellant admitted loss of ₹ 8,81,601/- under the head "Business loss" in respect of Asst. year 2007-08.

12. Hence, in my view, the decision of ITAT, Mumbai in the case of Hema Hiren Dand Vs. JCIT dated 18.2.2015 is squarely applicable to facts of the appellant's case.

Therefore, profits on account of sale of shares of appellant, in my view, are to be treated as capital gains only and not as business profit as held by Assessing Officer."

7. It is settled issue that if the shares are held by the assessee as stock-in-trade, profit on sale of such shares would constitute business income, and be subject to tax at a higher rate. In order to ascertain as to whether the shares were purchased by the

assessee as investment or stock-in-trade, the most relevant aspect which is to be seen is the intention of the assessee behind the purchase of shares and such intention has to be gathered from the facts of the case including the conduct of the assessee. In the instant case, the assessee has declared the purchase and sale of shares as capital gains. The assessee has purchased the shares through recognised stock exchange taken delivery of shares and passed through DEMAT account and sale also made through recognised stock exchange and through DEMAT account. The assessee also paid service transaction tax on the purchase and sale of shares. The assessee declared the value of shares as at the end of the year in the balance sheet as capital asset but not stock in trade. The assessee is permitted to maintain separate portfolios, one for investment portfolio and the other for trading portfolio as noted from the CBDT circular No.4 of 2007 dated 15.6.2007. This view is supported by Hon'ble Madras High Court decision in the case of CIT Vs NSS Investments(P) Ltd, [2005] 277 ITR 149 (Madras). The capital asset would be remained as capital asset unless the person holding the asset himself changes the nature by specific action like conversion of capital asset into stock in trade. Except stating that the assessee had involved in large number of transactions,

no evidence was brought on record by the A.O. to hold that subject income is a business income. Hon'ble Gujarat High court in the case of

Principal Commissioner of Income-tax-1.v.Ramniwas Ramjivan Kasat, 2017] 82 taxmann.com 458 (Gujarat) held that

6. *Whether to tax the income generated from the sale of shares as capital gain or business income is an issue of frequent dispute between the revenue and the assesseees. The Courts in the past have had occasions to consider such issue and through judicial pronouncement various parameters have been laid down to check whether the sale of shares would lead to business income or capital gain. Despite several judicial pronouncements, the controversy did not subside. Each case would have to be considered individually leading to long drawn litigations. The CBDT therefore in order to reduce the litigations, issued the said circular dated 29.2.2016, relevant portion which reads as under:—*

"2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following-

(a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

(b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

(c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

5. *It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities."*

7. *Two things emerge from this circular. One is that the CBDT desires to obviate the difficulties of the assessees and simultaneously to reduce the litigation. In paragraph 3 of the circular, certain parameters have been laid down. Clause (b) thereof in particular provides that in respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. In other words, the Revenue would not pursue this issue if the necessary ingredients are satisfied, only rider being the stand taken by the assessee in a particular year would be followed in the subsequent years also and the assessee would not be allowed to adopt a contrary stand in such subsequent years.*

ITAT MUMBAI BENCH 'D' in Dharmesh R. Shah. v Joint Commissioner of Income-tax, Range No. 19(2)* [2013] 36 taxmann.com 588 (Mumbai - Trib.) held that IT: Where assessee had consistently held shares as investments and valued them at cost, gain from sale of shares could not be held as business income.

Hon'ble High Court of Delhi, in Commissioner of Income-tax, Delhi-II v. Jubilant Securities (P.) Ltd.* [2011] 11 taxmann.com 88 (Delhi) that held

Findings of facts were recorded by the two authorities below that the assessee was maintaining two portfolios and insofar as shares in question were concerned, they were taken as investment from the date of purchase itself and shown in investment portfolio. The profits resulted therefrom was capital gain. The revenue could not show any perversity in those findings. Those were pure findings of facts. Therefore, the appeal was to be dismissed.

Further, in the assessee's own case for the earlier assessment year, the income was assessed as capital gains but not as business income. Though rule of res judicata does not apply to Income tax proceedings, rule of consistency does applicable in income tax proceedings. Therefore, we do not see any reason to interfere with the order of the CIT(A), and accordingly, we uphold the order and dismiss the appeal of the revenue.

8. In the result, the appeals filed by the revenue for the A.Ys 2007-08 and 2008-09 are dismissed.

The above order was pronounced in the open court on 9th May'18.

Sd/-

(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 09.05.2018

VG/SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The ITO, Ward-2(3), Vijayawada
2. प्रत्यार्थी / The Respondent – Shri Pedarla Srinivasa Murthy, T-1, Sri Sai Nilayam Apts, Maruthi Colony, Patamata, Vijayawada-520 010.
3. आयकर आयुक्त / The Pr. CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The CIT (A), Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

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Sr. Private Secretary
ITAT, VISAKHAPATNAM