

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE MURALI PURUSHOTHAMAN

FRIDAY, THE 10TH DAY OF DECEMBER 2021 / 19TH AGRAHAYANA, 1943

WP(C) NO.9255 OF 2021

PETITIONER:

EQUITY INTELLIGENCE INDIA PRIVATE LIMITED
REPRESENTED BY ITS DIRECTOR, ABHILASH VARGHESE,
5TH FLOOR, AREEKAL MANSION, MANORAMA JUNCTION,
MAIN AVENUE, PANAMPILLY NAGAR, COCHIN - 682 036.

BY ADV SRI.P.K.RAVI SANKAR

RESPONDENTS:

- 1 DEPUTY COMMISSIONER OF INCOME TAX
CORPORATE CIR 1(1), KOCHI, CENTRAL REVENUE
BUILDING, I.S.ROAD, KOCHI - 682 018.
- 2 PRINCIPAL COMMISSIONER OF INCOME TAX
KOCHI - 1, CENTRAL REVENUE BUILDING, I.S.PRESS
ROAD, COCHIN - 682 018.
- 3 COMMISSIONER OF INCOME TAX (APPEALS)
KOCHI, POORNIMA BUILDINGS, PANAMPILLY NAGAR, KOCHI
- 682 036.

SRI.P.K.RAVINDRANATHA MENON (SR.)
SRI.JOSE JOSEPH, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 15.11.2021, THE COURT ON 10.12.2021 DELIVERED THE
FOLLOWING:

JUDGMENT

The petitioner, a Company registered under the Companies Act, is a “Portfolio Manager” as defined under the Securities and Exchange Board of India (Portfolio Managers) Regulations, 1993. The petitioner Company invests surplus funds from its principal business of Portfolio Management in equities of Indian Companies, apart from parking the funds in bank accounts. The 1st respondent issued a notice under Section 143(2) of the Income Tax Act, 1961 (for short, 'the Act') asking the petitioner Company to explain why profit on sale of shares should not be treated as business income. In response to the said notice, the authorised representative of the petitioner Company appeared before the 1st respondent and relying on Circular Nos.4/2007 and 6/2016 dated 29.02.2016 issued by the Central Board of Direct Taxes (CBDT) contended that the profit on sale of shares is capital

gain. Clauses (a) and (b) of paragraph No.3 of Circular No.6/2016 (Ext. P3) are extracted hereunder:-

“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;”

2. Relying on the said clauses, it was contended that the income sale of listed shares sold after holding them for more than 12 months amounting to Rs.3,08,67,375/- should be assessed as long term capital gains and should not be treated as business profit.

3. The 1st respondent passed Ext.P2 assessment order wherein the 1st respondent took a stand that the short term capital gains of Rs.1,43,14,697/- and long term capital gains of Rs.3,08,67,375/- earned by the petitioner Company from the sale of listed equity shares of Indian Companies should be treated as Business Profit and not Capital Gain.

4. Challenging Ext.P2 order of assessment, the petitioner Company preferred an appeal under Section 246 of the Act before the 3rd respondent and the same is pending. In the meanwhile, the petitioner Company preferred Ext.P6 rectification application before the 1st respondent under Section 154 of the Act. It was contended therein that the 1st

respondent, while passing Ext.P2 order, went wrong in disregarding Ext.P3 Circular No.6/2016 of CBDT and treated the long term capital gain from sale of listed shares as taxable under the head business and therefore, there is a mistake apparent from the record which requires to be rectified.

5. The 1st respondent, by Ext.P7 order, dismissed the application for rectification reiterating the reasons stated in the assessment order. Against Ext.P7, the petitioner Company preferred Ext.P8 revision petition before the 2nd respondent under Section 264 of the Act contending that the assessing authority, while passing the said order, did not advert to Ext. P3 Circular relied on by the petitioner. The 2nd respondent rejected the revision petition by Ext.P9 order. Exts.P7 and P9 are impugned in this writ petition.

6. A statement has been filed on behalf of the respondents wherein it is stated that the petitioner Company has already instituted a Regular Statutory Appeal against Ext.

P2 order of assessment and that Ext.P6 rectification application filed under Section 154 of the Act pertains to the same issue. Being a parallel proceedings instituted by the assessee on the very same issue, Ext.P6 application for rectification is not maintainable. It is also stated that the petitioner Company, whose business is trading in shares, is not covered by Ext.P3 circular and the scope of power under Section 154 is very limited.

7. Heard Sri.P.K.Ravi Sankar, learned Counsel for the petitioner and Sri.Jose Joseph, learned Standing Counsel for the respondents.

8. Sri.Ravi Sankar, learned Counsel for the petitioner Company contended that Ext.P6 rectification application under Section 154 of the Act is to correct mistake apparent on the face of record and notwithstanding the appeal filed against the order of assessment, the application for rectification of mistakes is independently maintainable.

9. According to Sri.Ravi Sankar, the Assessing Officer refused to consider Ext.P3 Circular while issuing Ext.P2 assessment order and the same is a mistake apparent from the record and the assessing authority is bound to rectify such mistake and amend Ext.P2 assessment order when the same is brought to the notice of the said authority by Ext.P6 application. He also contends that Section 119 of the Act provides for powers of the CBDT to issue Circulars and the assessing authority is bound to observe and follow such circulars and instructions. Sri.Ravi Sankar has also relied on the decision reported in **Catholic Syrian Bank Ltd. v. Commissioner of Income Tax [2012 (3) SCC 784: 2012 KHC 4121]** wherein the Apex Court has held that the circulars issued by the CBDT under Section 119 of the Act are binding on the Income Tax Authorities and the same has to be followed for a uniform and proper administration and application of the provisions of the Act. He also contends that

the objection regarding parallel proceedings is raised for the first time by the respondents in the statement filed before this Court and there is no such objection in Exts.P7 and P9 orders. Sri.Ravi Sankar further contends that, since the main factor for consideration by the assessing authority is whether the profit on sale of shares is capital gain or business income, for determining the said issue, Ext.P3 Circular is relevant and the assessment order passed without reference to such circular suffers from mistake apparent from the record and the said mistake is liable to be rectified by the 1st respondent in exercise of the powers under Section 154 of the Act. The 1st respondent has to exercise the powers under Section 154 of the Act even if an appeal is pending consideration before the appellate authority against the order of assessment or even when the matter has been concluded by the appellate authority.

10. Per contra, Sri. Jose Joseph would rely on the

decision reported in **T.S.Balaram, Income Tax Officer, Company Circle IV v. Bombay Volkart Brothers and Others [1971 (82) ITR 50 : 1971 KHC 576 : 1971 (2) SCC 526 : AIR 1971 SC 2204]** wherein the Hon'ble Supreme Court held that it is not open to the assessing authority to go into the true scope of the relevant provisions of the Act in a proceedings under Section 154 of the Act and that a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. Sri.Jose Joseph also made available a copy of the appeal preferred by the petitioner against Ext. P2 order of assessment and contended that the main issue raised therein is with regard to non-consideration of Ext.P3 Circular by the assessing authority. He submits that what has been raised in Ext.P6 rectification application touches on the merits of the assessment order

which can be considered only in appeal. Non-consideration of the circular being a matter pending consideration in appeal, the application for rectification amounts to institution of parallel proceedings.

11. I do not find any merit in the contention of the petitioner that the refusal to consider Ext.P3 Circular amounts to mistake apparent from the record which is to be rectified in a proceedings under Section 154 of the Act. As submitted by the learned standing counsel for the respondents, the petitioner has raised the very same issue in the rectification application as well in the appeal filed against Ext.P2 assessment order which is pending consideration before the appellate authority. The contention of the petitioner in Ext.P6 rectification application touches on the merits of the grounds raised in the Regular Statutory Appeal filed against Ext.P2 assessment order. The applicability of the circular and whether the assessing authority went wrong in disregarding

the CBDT circular are grounds raised in the appeal by the petitioner. This question requires an adjudication in the appeal by hearing parties on questions of facts and law. Therefore, the issue raised in Ext.P6 application is not a mistake apparent from the record which is to be rectified in a proceedings under Section 154 of the Act. There is no merit in the challenge against Exts.P7 and P9 orders. The writ petition is dismissed. However, I make it clear that the statutory appeal filed against Ext.P2 order shall be considered and decided by the appellate authority in accordance with law, untrammelled by any observations in Exts.P7 and P9 orders. There will be no order as to costs.

Sd/-

MURALI PURUSHOTHAMAN
JUDGE

APPENDIX OF WP (C) 9255/2021

PETITIONER'S EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE ARTICLES OF ASSOCIATION OF THE PETITIONER COMPANY DT. 7/12/2002.
- EXHIBIT P2 TRUE COPY OF THE ORDER OF ASSESSMENT DATED 27/12/2019 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT P3 TRUE COPY OF THE CIRCULAR NO.6 OF 2016 DATED 29/2/2016 ISSUED BY THE CENTRAL BOARD OF DIRECT TAXES, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA.
- EXHIBIT P4 TRUE COPY OF THE JUDGMENT DATED 18/2/2020 IN WP(C) NO.4618 OF 2020 OF THIS HONOURABLE COURT.
- EXHIBIT P5 TRUE COPY OF THE JUDGMENT DATED 29/6/2020 IN WP(C) NO.10002 OF 2020 OF THIS HONOURABLE COURT.
- EXHIBIT P6 TRUE COPY OF THE RECTIFICATION PETITION DATED 22/1/2020 SUBMITTED BY THE PETITIONER COMPANY BEFORE THE 1ST RESPONDENT.
- EXHIBIT P7 TRUE COPY OF THE ORDER DATED 4/2/2020 OF THE 1ST RESPONDENT REJECTING THE RECTIFICATION PETITION.
- EXHIBIT P8 TRUE COPY OF THE REVISION PETITION DATED 10/2/2020 SUBMITTED BY THE PETITIONER COMPANY BEFORE THE 2ND RESPONDENT.
- EXHIBIT P9 TRUE COPY OF THE ORDER DATED 29/3/2021 ISSUED BY THE 2ND RESPONDENT.

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