ORDER SHEET

G.A.NO.1480 OF 2016
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ITAT 224 OF 2016
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction[Income Tax]
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME-TAX-15, KOLKATA

Versus

SHRI DAULAL KOTHARI

BEFORE:

The Hon'ble ACTING CHIEF JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARIJIT BANERJEE

Date : 9TH SEPTEMBER, 2016.

Mr. S.N.Dutta,Advocate
...for the appellant
Mr. J. P. Khaitan, Sr. Advocate.
.. for the respondent.

The Court : Delay in preferring the appeal is condoned.

The appeal is directed against the judgement and order dated 27th July, 2015 passed by the learned Income Tax Appellate Tribunal, Kolkata “A” Bench, Kolkata in ITA No.1159/Kol/2011 pertaining to the assessment year 2007-2008 by which the learned Income Tax Appellate Tribunal dismissed ITA No.1159/Kol/2011 which was an appeal preferred by the revenue and partly allowed Cross-objection being C.O.No.56/Kol/2011 filed by the assessee.

The aggrieved the revenue has come up in appeal.

Mr.Dutta, learned advocate for the revenue pressed the following questions of law :

"(a) Whether the shares dealings of the assessee will be treated as investment in shares or business transaction ?

(b) Whether from the nature of transactions of shares by the assessee will be treated as business transactions and such the income to be determined as business profit under section 28 of the Income tax Act but the Income Tax Appellate Tribunal held otherwise ?"

The question whether any particular transaction is on account of the investment or on account of the trading essentially is a question of intention. Intention is locked in the mind of the person concerned. Intention can only be ascertained from the circumstantial evidence including contemporaneous Books of Accounts of the assessee. Almost similar view was taken by the Supreme Court in the case of *CIT vs. ASSOCIATED INDUSTRIAL DEVELOPMENT CO.(P) LTD. reported in (1971) 82 ITR 586* at Page-590 as follows:

> *"It can hardly be disputed that there was no bar to a dealer investing in shares. But then the matter does not rest purely on the technical question of onus which undoubtedly is initially on the revenue to prove*

> *that a particular item of receipt is taxable. 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."*

It may be pointed out that in the case of CIT vs. Associated Industrial Development Co.(P)Ltd (supra) there were both types of transactions some were on investment accounts and some were in trading account. In the present case, the case of the assessee is that all transactions were on investment account. Therefore, the assessee has to prove that it was a case of investment and not a case of trading.

In the case before us, contention was raised before the assessing officer by the assessee that "the transactions this year are mere change of investment portfolios from bad performing sectors to good performing sectors". This contention of the assessee essentially means that there was buying and selling of shares.

The assessing officer did not accept the contention of the assessee that it was a case of long or short term capital gain. He held it to be a case of business income. The CIT(Appeals), however, held otherwise and his reasoning is as follows :

> *"It is seen that the appellant has consistently been showing its shares as investments and the same has been accepted as such by the department in earlier years and the Assessing Officer has not brought in any evidence in his Assessment Order for the present year to the contrary"*

The learned Tribunal has upheld the finding of CIT(A) in dismissing the appeal preferred by the revenue.

We are inclined to think that neither the assessing officer nor the CIT (Appeals) insisted upon the assessee to produce evidence from its records to show that the transactions were intended to be investments and not mere dealing in shares. The substance of the matter was not thus adverted to. Stress was laid on the treatment given in earlier years which is not of much importance because a wrong view taken in the earlier years is not binding on the revenue in the subsequent years. Mr.Khaitan, learned Senior Advocate appearing for the assessee submitted that there is evidence to show that shares were held for a period between 18 and 39 months. We are unable to find any evidence in that regard except that the shares of McDowell and Macmillan were according to him held for the period between 18 and 39 months. It is nobody's case that the gains being subject matter of discussion arose out of sale of those shares. On the contrary, the case of the assessee himself is that "the transactions this year are mere change of investment portfolios from bad performing sectors to good performing sectors." Bad performing shares could not have yielded profit to the assessee as rightly pointed out by the assessing officer.

For the aforesaid reasons we are inclined to think that the matter should go back to the assessing officer.

The questions quoted above need not be answered at this stage because we have directed remand of the matter. Therefore, orders passed by the learned Tribunal, CIT (A) and the assessing officer are all set aside. The matter is remanded for reconsideration after giving an opportunity of hearing to the assessee in accordance with law.

The appeal and the application are thus disposed of.

(GIRISH CHANDRA GUPTA, ACJ.)

(ARIJIT BANERJEE, J.)

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