

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 240 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

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 or any order made thereunder ?	

CAMBAY INVESTMENT CORPN. LTD.....Appellant(s)

Versus

D.C.I.T.....Opponent(s)

Appearance:

MR JP SHAH, ADVOCATE for the Appellant(s) No. 1

MR MANISH J SHAH, ADVOCATE for the Appellant(s) No. 1

MR M.R. BHATT, SENIOR ADVOCATE WITH MR KARAN SANGHANI,
ADVOCATE AND MRS MAUNA M BHATT, ADVOCATE for the Opponent(s)
No. 1CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and

HONOURABLE MR.JUSTICE G.R.UDHWANI**Date : 16/06/2016****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE KS JHAVERI)**

1. This Tax Appeal under Section 260A of the Income-tax Act, 1961 is filed against the order dated 29.08.2005 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C' (for short, "the Tribunal") in ITA No.2463/Ahd/1998 raising the following substantial question of law:

"(i) Whether on the facts and in the circumstances of the case the Tribunal was right in law in upholding the order of the Commissioner under section 263 ?

(ii) Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Commissioner had held that the shares sold were stock-in-trade and not investment ?"

2. Briefly stated, the facts are that the assessee is a widely held public limited company engaged in the business of trading in cement, paper, AC sheets, pipes, etc. In the Assessment Year 1994-1995, the assessee sold certain shares

and claimed the same as capital gains, on which indexing benefit was allowed by the Assessing Officer. Till 31.03.1993 these shares were held as stock-in-trade and they were converted into investment by Resolution dated 31.03.1993. Therefore, it was claimed that the shares were investment during the Assessment Year 1994-1995 and the sale thereof was liable to capital gain. The Assessing Officer, however, allowed the indexation benefit not from the date of alleged conversion but, from the date of purchase, which resulted in long term capital loss.

3. Against the order of Assessing Officer, the assessee filed appeal before the CIT(A). However, the lower appellate authority initiated proceedings u/s.263 of the Act by issuing Notice to the assessee on the ground that the Assessment Order passed u/s.143(3) of the Act was erroneous and prejudicial to the interests of the Revenue. Thereafter, vide order dated 30.11.1998, the CIT(A) set aside the assessment and issued direction to the Assessing Officer to frame the assessment afresh.

4. Being aggrieved by the aforesaid order, the assessee preferred appeal before the Tribunal. However, the Tribunal dismissed the appeal filed by the assessee, vide order dated 29.08.2005.

Hence, this Tax Appeal.

5. Mr. J.P. Shah, learned counsel appearing for the appellant-assessee, submitted that the basis of the Notice issued by CIT(A) was the assertion that up to 31.03.1993, the shares sold were stock-in-trade and had been converted to investment. Therefore, business profit and short term capital gain had arisen because they were sold within one year from their becoming capital asset. However, the Tribunal misunderstood the order of CIT(A) as if the CIT(A) never accepted the factum of conversion of shares to investment.

5.1 Learned counsel Mr. Shah placed reliance upon the decision of this Court in the case of **Ranchhodbhai Bhaijibhai Patel v. Commissioner of Income-tax**, [1971] 81 ITR 446 wherein, it has been held that the only circumstance which must be satisfied in order to attract the charge to tax on capital gains u/s.45 is that the property transferred must be a capital asset at the date of transfer and it is not necessary that it should have been a capital asset on the date of acquisition by the assessee. It was further held that where the property transferred was not a capital asset on the date of its acquisition but became one subsequently, only its character has changed and there cannot be two different

acquisitions of the property, one as a non-capital asset and the other as a capital asset.

5.2 Learned counsel Mr. Shah further submitted that Notice issued by the CIT(A) u/s.263 of the Act is bad in law inasmuch as it does not state the reasons for issuance of such Notice. Further, there was no reason for the lower appellate authority to issue such Notice since the order passed by the Assessing Officer was completely germane in the eyes of law. It was, therefore, submitted that the entire proceedings conducted by the CIT(A), as confirmed by the Tribunal, is erroneous and deserves to be quashed and set aside.

5.3 In support of his submissions, reliance is placed on the following decisions:

(A) In **Malabar Industrial Co. Ltd. v. Commissioner of Income-tax, [2000] 243 ITR 83**, the Apex Court held that the phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to

the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

(B) In **Commissioner of Income-tax v. Max India Ltd.**, [2007] 295 ITR 282 (SC), the Apex Court took a similar view. Similar view was taken by this Court in a decision rendered in the case of **Commissioner of Income-tax v. Nirma Chemicals Works P. Ltd.**, [2009] 309 ITR 67. In **Commissioner of Income-tax v. Vodafone Essar South Ltd.**, [2012] 28 taxmann.com 273 (Delhi), the High Court of Delhi also took similar view.

6. Mr. M.R. Bhatt, learned Senior Advocate appearing on behalf of the Revenue, submitted that shares and securities of Rs.47,00,048.58 were shown in the total of closing stock in the Trading and Profit & Loss Account of the assessee

company and thereby, the assessee had treated the same as stock-in-trade. It was submitted that the Board of Directors of the assessee company had passed a Resolution on 31.03.1993 whereby, it was resolved that stock-in-trade was being converted into investment.

6.1 Learned Senior Advocate contended that the aforesaid act of the assessee shows that shares were held as stock-in-trade and that claim of capital gain was made to derive the tax benefit. In the proceedings initiated u/s.263 of the Act, the CIT(A) pointed out the aforesaid inconsistency in the Trading Account and claim of the assessee. Hence, the CIT(A) had not committed any error in exercising powers u/s.263 of the Act and the Tribunal was also justified in dismissing the appeal filed by the assessee.

6.2 Learned Senior Advocate Mr. Bhatt submitted that even in the decision rendered in *Malabar Industrial Co. Ltd.* (supra) relied upon by learned counsel for the assessee, the Apex Court observed that an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to

an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. It was, therefore, submitted that both the CIT(A) and the Tribunal were justified in passing the impugned orders.

7. We have heard learned counsel Mr. J.P. Shah appearing on behalf of the assessee and learned Senior Advocate Mr. M.R. Bhatt appearing on behalf of the Revenue. Both the questions are inter-connected and therefore, we shall decide them together.

8. It is a matter of fact that shares and securities of Rs.47,00,048.58 were shown in the total of closing stock in the Trading and Profit & Loss Account of the assessee Company as on 31.03.1993, relevant to Assessment Year 1993-1994. Here, it is pertinent to note that on 31.03.1993 the Board of Directors of the assessee Company adopted a Resolution to the effect that stock-in-trade was converted into investment. The assessee raised objections to the Notice issued by CIT(A). However, the order of CIT(A) clearly indicated the treatment of sale as regular profits or business profits and / or short terms capital gains. The CIT(A) pointed out the inconsistency in the Trading and Profit & Loss

Account of the assessee Company and its claim. Therefore, in our considered opinion, it cannot be said that the order passed by the CIT(A) u/s.263 of Act was erroneous or bad in law or was different from the contents of the Notice issued.

9. In Rachhodbhai Bhaijibhai Patel's case (supra) relied upon by learned counsel for the assessee, the lands were not agricultural lands within the meaning of Section 2(14) of the Act at the time of sale. Therefore, profits from the sales were chargeable as capital gains. The cost of acquisition of the lands was their cost when they were first acquired by the assessee and since the lands had been acquired prior to 1st January, 1954, the assessee had the option u/s.55(2) to substitute the fair market value of the lands as on 1st January, 1954. The facts in the afore-mentioned case and the facts of this case are completely different.

9.1 In the present case, the shares and securities were acquired much earlier and all throughout they were treated as stock-in-trade. It was only on 31.03.1993, viz. when Resolution was passed by the Board of Directors of the assessee company, that they were converted into investment. Therefore, for the purpose of the Act, the relevant date shall be the date on which

the asset was acquired, which is 31.03.1993. The Assessing Officer completely lost sight of the aforesaid relevant aspect while passing the assessment order, which was corrected by the CIT(A) in proceedings u/s.263 of the Act and rightly affirmed by the Tribunal.

10. In view of the aforesaid discussion, both the questions are answered in favour of the Revenue and against the assessee. The appeal stands disposed of accordingly.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

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