

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DIVISION BENCH, CHANDIGARH**

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND MS. RANO JAIN, ACCOUNTANT MEMBER

**ITA No.906/Chd/2013**  
(Assessment Year : 2006-07)

Smt.Shikha Gupta,  
Shop No.7, Modi Complex,  
Karta Ram Street,  
Ludhiana.

PAN: ABFPG5151J

(Appellant)

Vs.

The D.C.I.T.,  
Circle II,  
Ludhiana.

(Respondent)

Appellant by : Shri Hari Om Arora  
Respondent by : Mrs.Rajinder Kaur, DR

Date of hearing : 24.08.2015

Date of Pronouncement : 15.10.2015

**O R D E R**

**PER RANO JAIN, A.M. :**

This appeal filed by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-II, Ludhiana dated 27.8.2013 for assessment year 2006-07.

2. Briefly, the facts of the case are that the assessee filed return of income for the relevant assessment year declaring income of Rs.11,95,283/- on 31.10.2006. During the assessment proceedings, the Assessing Officer noted that the assessee had shown income under the head 'short term capital gain' amounting to Rs.10,99,268/- and under the head 'Long Term Capital Gain' amounting to Rs.20,133/- on

account of sale and purchase of shares. The Assessing Officer was of the view that the sale and purchase of shares was regular business of the assessee. Therefore, the income from the same was liable to be assessed under the head 'income from business and profession' and not under the head 'short term capital gain'. When confronted, the assessee submitted that he was not a trader in shares but had made investments in shares. It was also submitted that she had invested in only 83 scrips out of which 33 scrips had been purchased in the earlier year thus implying that the transactions of sales and purchases were of small quantity and small amount. The Assessing Officer referring to the CBDT Instruction No.1827 dated 31.8.1989 and another Circular No.4 of 2007 dated 15.6.2007 analyzed the various issues and in the light of following findings held the profit from purchase and sale of shares amounting to Rs.11,189,401/- (Rs.10,99,268 + Rs.20,133) and taxed the same as business income :

- i) As per the Assessing Officer, the frequency of transactions is very high as there were 121 transactions of purchases and sales of shares.
- ii) The assessee had not invested the amount in a few selected dividend yielding scrips and then kept holding them long with a view to earn dividend income therefrom but she swiftly purchasing and selling the shares.
- iii) During the year the assessee has earned a meager dividend income of Rs.12,825/- only. Therefore, the object cannot be held to be to earn dividend income.

- iv) After analyzing the figure of opening and closing stock of shares and the average holding of shares, the Assessing Officer held that the assessee is holding a share on an average for four months only. Therefore, she cannot be said to have made investment for earning dividend but is certainly doing business of trading in shares because dividends are not declared every third month.
- v) It was the duty of the assessee to prove that her intention was to earn dividend, which she had not proved.
- vi) The assessee has spent a lot of time, energy and application of mind in studying the possible ups and downs in large number of scrips.
- vii) The assessee has dealt in purchase and sale of shares throughout the year. Therefore, it is a regular business activity of the assessee.
- viii) If the shares were not held as stock-in-trade but as an investment, then they could not be valued at cost or realizable value, whichever is lower as done by the assessee.

3. Before the learned CIT (Appeals), the assessee submitted that she had made investment in shares and mutual funds from time to time with clear intention of treating the same as investment. The intent is clearly manifest in the balance sheet of the assessee where annexure appended and forming part of the same show that the investment in shares has been held as investment for many years. The assessee had earned substantial dividend on these investments during the year. It was further submitted

that the profits on investment cannot be the criteria for assessing it as business income. She also pointed out that in the earlier assessment years, she has invested in mutual funds and shares and the same had been accepted as investment by the Department. Therefore, there is no reason to depart from earlier finding. Moreover, a total of 117 transactions made during the whole year are very negligible when compared to billions of transactions done on the stock exchange every day. Relying on a number of judgments of various High Courts and different Benches of the Tribunal, it was prayed before the learned CIT (Appeals) that the transactions of sale and purchase may be treated as investment.

4. The learned CIT (Appeals) did not find himself in agreement with the submissions of the assessee. His view was that the contention of the assessee that the sale and purchase was of small quantity of same amount is factually incorrect. There were 121 transactions of sales and almost equal transactions of purchases. Further, the total amount of sales was Rs.73.47 lacs and total amount of purchase was Rs.95.08 lacs. Therefore, the transactions pertaining to sales and purchases were neither of small quantity, nor of small amount. It was further observed that the assessee had not been able to controvert any of the facts analyzed by the Assessing Officer, nor she has been able to controvert the reasons given by the Assessing Officer towards his decision. In this view, he upheld the action of the Assessing Officer in

holding that the shares were held by the assessee as stock-in-trade and she was carrying out the business of sale and purchase of shares.

5. Aggrieved by this order of the learned CIT (Appeals), the assessee has come up in appeal before us raising as many as six grounds of appeal.

6. The learned counsel for the assessee at the time of hearing before us argued that the assessee has made investment in shares and mutual funds from time to time with clear intention of treating the same as investment. The assessee is in the business of manufacturing and trading of knitted cloth under the name of M/s YSR Enterprises of which the assessee is a proprietor since the inception of the business. It was brought to our notice that the speculative/derivative transactions done were considered under business income by the assessee. Only the transaction done with pure intention of investment, which ranged from couple of days to couple of months to even couple of years, to earn dividend and short term and long term appreciation are treated as investments by the assessee. The chart giving us bifurcation of all transactions pertaining to sales and purchases resulting in profit or loss on the basis of period of holding was submitted before us. On the basis of that, it was submitted that total number of 117 transactions were made during the whole year. It was argued that the amount of dividend received during the year cannot be one of the criteria for concluding that the intention of the assessee is to make

investment or to do business. During the year, only transactions in 83 scrips were made, out of which 33 scrips were bought in the earlier years. Therefore, only 50 scrips were bought during the relevant assessment year. Physical delivery of all the shares has taken place and due securities transaction taxes have been paid which is one of the indicator to differentiate the transaction from the business transaction. Reliance was placed on a number of judgments of various High Courts and Benches of the Tribunal. It was also brought to our notice that the assessee has been treating the transactions relating to sale and purchase of shares as investment in the last many years and no dispute is arising with the Department on this issue. In view of these submissions, it was prayed that the transactions of sale and purchase of shares be held to be relating to investment and not for the purpose of any business income.

7. The learned D.R. relied upon on the orders of the Assessing Officer as well as of the learned CIT (Appeals).

8. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. For holding a transaction relating to sale and purchase of shares to be relating to business or that of investment, the most important criteria is to see the intention of the assessee while making these transactions. A number of judicial pronouncements have been cited at every stage of proceedings by the Assessing Officer, by the learned CIT (Appeals) and also by the learned

counsel for the assessee before us. However, we see that to decide the issue in question, the facts of each case are to be considered independently. The cases are there on both the sides. However, these cases decided by the authorities give us certain guidelines on the basis of which the issue has to be decided. However, the crux of the matter is always the intention of the assessee which we have to figure out on the facts and circumstances of each case. Even the CBDT Circular relied upon by the Assessing Officer has just given the authorities certain parameters on the basis of which the intention of the assessee has to be made out.

9. The undisputed facts of the case are that the assessee is in the business of manufacturing and trading of knitted cloths under the name of M/s YSR Enterprises as a proprietor. It is also not in doubt that during the year under consideration, the assessee was involved in the transaction of sale and purchase of shares also. From the perusal of the balance sheet and the audit reports filed before us, it is seen that the assessee is maintaining separate set of books for her business of knitted cloths. The transaction entered into by the assessee with respect to derivative and commodity have also been treated by her as her business activities. Only the transactions relating to sale and purchase of shares on delivery basis are treated as investment by the assessee. From the perusal of page 23 of the Paper Book, it is seen that the trading account on account of long term and short term sale and purchase of share have been maintained separately

while that relating to commodity and derivative have been maintained separately. The income/loss of trading on commodity and derivative have been added in the Profit & Loss Account relating to business and income from trading of long term and short term shares is treated as capital gain in computation of income. It is a trite law by now that the assessee can maintain two portfolios, one for regular business and other for sale and purchase of shares as has been held by the Hon'ble Bombay High Court in the case of CIT Vs. Gopal Prohit (2011) 336 ITR 257 (the SLP filed by the Department having been dismissed by the Hon'ble Supreme Court). It is also undisputed that the assessee has earned an amount of Rs.12,824/- as dividend during the year. On the basis of these undisputed facts, now we proceed to analyze the issues raised by the Assessing Officer to determine whether the assessee was engaged in the business of sale and purchase of shares or investment:

- i) As per the Assessing Officer, there were very high frequent transactions of sale and purchase of shares. It was brought to our notice through the help of chart filed by the assessee that in total 117 transactions were entered into during the year in 83 number of scrips. Out of these 83 scrips, 33 scrips were bought during the earlier years while 50 scrips were bought during the relevant assessment year.
- ii) On the issue of swift purchase and sale of shares, it was brought to our notice again with the help of the chart that the transactions were entered into within a span of one day to more than seven hundred days. There was only one transaction which was entered

into within a span of one day. There were only 28 transactions which were done with the span of 15 days and there were around 50 transactions which were held within a span of more than 180 days. There was no intra-day transaction.

- iii) As per the Assessing Officer, the assessee has received only an amount of Rs.12,825/- as dividend during the year. As per our understanding, the amount of dividend received during the year cannot be the one of the criteria for deciding the issue.
- iv) As regards the analysis of the Assessing Officer that the assessee is holding a share for four months only. This analysis made by the Assessing Officer is not relevant and also not appropriate to decide the issue concluding that no company declare dividend every three months is a very weird conclusion drawn on an equally weird analysis made by the Assessing Officer.
- v) As regards the intention of the assessee, it has to be come out from the facts and circumstances of the case and no direct evidence as such, can be given by the assessee.
- vi) As regards large number of scrips, it has already been stated in point No.(i) above that there were only 83 scrips, out of 33 were from the earlier years.
- vii) Making purchase and sale throughout the year does not make an activity a business activity. As a wise investor assessee can make purchase and sale of shares throughout the year.
- viii) As regards the treatment of shares in the books of account, the finding of the Assessing Officer that the shares have been shown at cost or realizable value in the books of account is factually incorrect.

10. In view of the above facts, we are unable to find ourselves in agreement with the findings of the Assessing Officer as well as that of the learned CIT (Appeals) that the intention of the assessee was to earn profits from the transactions of sale and purchase of shares. Apart from the above facts, it is also seen that the Assessing Officer has observed in his order that the assessee has used borrowed funds for the purpose of making these investments. However, during the course of hearing, as shown to us by the learned counsel for the assessee with the help of the balance sheet of the assessee filed in the Paper Book, the assessee has utilized her owned funds to make investment in shares. This fact also supports the contention of the assessee that these transactions relating to purchase and sale of shares are for the purpose of investment and not for the purpose of business. In view of the above, we hold that the intention of the assessee in the present case in engaging herself in the transactions of sale and purchase of shares was to earn dividend income and not to earn business income.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 15<sup>th</sup> day of October, 2015.

Sd/-  
**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Sd/-  
**(RANO JAIN)**  
**ACCOUNTANT MEMBER**

Dated : 15<sup>th</sup> October, 2015

\*Rati\*

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,  
ITAT, Chandigarh

