

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No.1057 /Ahd/2011

निर्धारण वर्ष/Asstt. Year: 2006-2007

ACIT, Cir.7
Ahmedabad.

Smt.Jayshree M. Patel
Vs A-901, 9h Floor, Asawari Apartment
Opp: Karnavati Club
Satellite, Ahmedabad.

अपीलार्थी (Appellant)

प्रत्यर्थी (Respondent)

Revenue by : Shri Narendra Singh, DR
Assessee by : None

सुनवाई की तारीख/Date of Hearing : 16/09/2015

घोषणा की तारीख/Date of Pronouncement: 23/10/2015

आदेश O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

The Revenue is in appeal before us against the order of the CIT(A)-XIV, Ahmedabad dated 28.12.2010 passed for the Asstt.Year 2006-07.

2. Solitary grievance of the Revenue is that the Id.CIT(A) has erred in directing the AO to treat Rs.14,11,723/- as short term capital gain returned by the assessee instead of business income assessed by the AO.

3. Brief facts of the case are that the assessee has filed her return of income on 19.03.2007 declaring total income of Rs.14,94,460/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee has shown income at Rs.14,91,321/- from short term capital gain from the activities of purchase and sales of equities. The Id.AO has noticed the following features in the transactions of the assessee:

"3.4 Therefore, we have to examine the case of the assessee in the light of the parameters set and judicial decisions quoted above.

- (1) Nature of transaction : On examination of list of transactions, it is seen that the assessee has traded in shares of about 3 companies, but the volume of shares is approximately 615000.*
- (2) Frequency of transactions: as already stated above more than 12 transactions have been entered into by the assessee during the course of year. There is not only frequent buying but there is equally frequent selling of the shares throughout the year right from 01-4-2005 to 1-3-2006. Therefore, the frequency of purchase and sell of shares is very high as is evident from sale and purchase of 617400 shares of a single company namely Intradeco Co.*
- (3) Magnitude of transactions: The assessee has purchased and sold shares worth more than Rs.1102923/- and Rs.2588850/- respectively. It is noticed that on a single day, the assessee had made transactions worth Rs.707821/- in a particular share."*

4. On the basis of the above features, the Id.AO has treated the assessee as trader in the shares, and assessed the income as business income instead of short term capital gain disclosed by the assessee.

5. On appeal, the Id.CIT(A) has accepted the contentions of the assessee and held that the AO failed to bring any specific material on

the record which can indicate that the assessee was trading in the shares. The Id.CIT(A) has treated the assessee as an investor.

6. In response to the notice of hearing, none come present on behalf of the assessee. With the assistance of the Id.DR, we have gone through the record carefully.

7. Before we embark upon an inquiry on the facts of present case so as to find out, whether assessee is to be termed as involving in the trading of shares or is to be treated as an investor *simplicitor*. We would like to refer certain broad principle culled out by ITAT Lucknow Bench in the case of Sarnath Infrastructure Pvt. Ltd. reported in 120 TTJ 216. These tests read as under:-

“13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

(2) Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.

(3) What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).

(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.

(5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.

(6) How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice verse.

7. It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.

8. The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.

9. One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?

10. It is permissible as per CBDT's Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.

11. Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."

8. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

"After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

- (a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.
- (b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.
- (c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.
- (d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a

relevant circumstance to be considered in the absence of any satisfactory explanation.

- (e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.
- (f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.

9. In the light of the above, if we examine the facts of the present case, then it would reveal that the Id.AO has unnecessarily treated the investment of the assessee as venture-in-trade. The assessee has purchased shares of three companies. She has undertaken only 12 transactions in the year. She has not used any borrowed funds and the frequency of the sales is not to that extent. We find that the Id.CIT(A) has appreciated the facts and circumstances in right perspective and no interference is called for in the order of the CIT(A). The appeal of the Revenue is dismissed.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 23rd October, 2015 at Ahmedabad.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 23/10/2015