

(2017) 02 GUJ CK 0012
In the Gujarat High Court
Case No : Tax Appeal Nos. 35, 34 of 2017

Commissioner of Income-Tax

APPELLANT

Vs

M/s. Tejas Securities

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

Income Tax Act, 1961 — Section 111A

Citation : (2017) 393 ITR 132 : (2017) 245 Taxman 362

Hon'ble Judges : Mr. M.R. Shah and Mr. B.N. Karia, JJ.

Bench : Division Bench

Advocate : Mr. Sudhir M. Mehta, Advocate, for the Appellant No. 1; Mr. S.N. Soparkar, Senior Advocate with Mr. B.S. Soparkar, Caveator, for the Opponent No. 1

Final Decision : Dismissed

Judgement

Mr. M.R. Shah, J.(Oral) - As common question of law and facts arise in both these Appeals and as such are with respect to the same assessee but with respect to different Assessment Years, both these Appeals are decided and disposed of by this common judgment and order.

2. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the learned Income-Tax Appellate Tribunal, Ahmedabad "C" Bench (hereinafter referred to as "the learned tribunal") in IT(SS) Nos. 531 & 532/Ahd/2011 for the Assessment Years 2008-09 to 2009-10 by which the learned tribunal has dismissed the said Appeals preferred by the revenue and has confirmed the order passed by the learned CIT(A) directing the Assessing Officer to treat the amount earned on sale of shares as short term capital gain and not business income and consequently to levy tax under Section 111A of the Income Tax Act (hereinafter referred to as "the Act"), revenue has preferred the present Appeals with the following proposed questions of law;

"(A) Whether the ITAT was justified in confirming the decision of the learned

CIT(A) in holding the share transactions as investments despite the fact that motive of transactions admittedly was earning the profit (maximization of wealth in words of assessee) coupled with huge number transactions 160 sales to 123 purchases, with very less holding period, many were less than a month, transaction to stock ratio was as high as 4?

(B) Whether ITAT was justified in giving decision on the basis that department accepted the order of learned CIT(A) in earlier years, while department had just not gone in appeal as tax effect was below the prescribed monetary limits?

(C) Whether ITAT was justified in giving its finding by misinterpreting the numbers of days when transactions has been done to numbers of transactions, which make its order perverse?"

3. For the sake of convenience the facts in Tax Appeal No.35/2017, arising out of IT(SS) Nos.531/Ahd/2011 for the Assessment Year 2008-09, are narrated and considered. The assessee filed the return of income for the Assessment Year 2008-09 showing the total income at Rs.8,18,67,567/-. The assessee claimed Rs.2,59,43,473/- as short term capital gain on the transactions of shares. However, the Assessing Officer made addition of Rs.2,59,43,473/- on account of short term capital gain on the shares treating it as business income on the basis of frequent transactions of purchase and sale of shares and framed scrutiny assessment under Section 143(3) read with Section 153C of the Act and determined the total income at Rs.11,59,62,307/-.

Feeling aggrieved and dissatisfied with the order passed by the Assessing Officer making the addition of Rs.2,59,43,473/- on account of short term capital gain on the shares treating the same as business income, the assessee preferred Appeal before the learned CIT(A). By a speaking and reasoned order, the learned CIT(A) directed to delete the addition made by the Assessing Officer of Rs.2,59,43,473/- on account of short term capital gain on the shares treating as business income and directed the Assessing Officer to determine the tax under Section 111A of the Act by directing the Assessing Officer to treat the same as short term capital gain.

Feeling aggrieved and dissatisfied with the order passed by the learned CIT(A) in directing the Assessing Officer to treat the amount of Rs.2,59,43,473/- as short term capital gain and consequently to levy tax under Section 111A of the Act, revenue preferred Appeal before the learned tribunal. By the impugned judgment and order, the learned tribunal has dismissed the said Appeal and has confirmed the order passed by the learned CIT(A).

Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned tribunal for the Assessment Year 2008-09, revenue has preferred Tax Appeal No.35/2017 with the aforesaid proposed questions of law.

3.1. Similar order came to be passed by the learned CIT(A) confirmed by the learned tribunal for the Assessment Year 2009-10, which is subject matter of Tax

Appeal No.34/2017.

4. Shri Sudhir Mehta, learned Counsel has appeared on behalf of the revenue and Shri S.N. Soparkar, learned Senior Counsel has appeared on behalf of the assessee in both the Appeals.

5. Shri Sudhir Mehta, learned Counsel appearing on behalf of the revenue has submitted that looking to the frequent transactions of purchase and sale of shares and the duration of purchase and sale were very short, the learned tribunal ought to have held that the income derived by the assessee on shares was required to be treated as business income. It is further submitted by Shri Sudhir Mehta, learned Counsel appearing on behalf of the revenue that considering the aforesaid circumstances, in fact the CBDT issued instructions No.1827 dated 31/08/1989 for the Officers and Circular No.4/2007 dated 15/06/2007 for the Officers and taxpayers. It is submitted that the aforesaid Circulars were issued based on the analysis of factors considering various judgments of various High Courts. It is submitted that to consider whether the purchase /sale transactions constitute investment or trading the following facts as mentioned in the aforesaid Circulars are required to be considered;

1. motive for the original purchase as perceived at the time of sale.
2. The length of period of holding of the shares
3. the frequency of sale of shares
4. the circumstances responsible for the sale of shares
5. the presence of a clearly discernible motive for purchase of shares
6. the relation of the share transactions to the normal business of the assessee
7. treatment of shares and profit /loss on their sale in the accounts of assessee
8. the source of funds out of which the shares were acquired - borrowed or owned
9. in the case of company, existence of objects clause permitting it to trade in shares
10. the manner of acquisition of shares
11. the infrastructure employed for the share transactions
12. marketability of the shares.

5.1. It is submitted that therefore while considering whether the purchase and sale transactions constitute investment or trading, the magnitude of purchase / sale of shares and dividend income in relation to holding, which are relevant factors are required to be considered. It is submitted that applying the aforesaid factors the Assessing Officer rightly held the income from the transactions of shares as business income. It is submitted that while passing the impugned judgment and order and treating the amount of Rs.2,59,43,473/- as short term

capital gain, the learned tribunal has not properly appreciated and considered the above factors.

5.2. Shri Sudhir Mehta, learned Counsel appearing on behalf of the revenue has taken us to number of statements of purchase transactions during the year under consideration as well as the statements of sale transactions during the year under consideration in support of his submissions that the assessee was dealing in trading of shares, and therefore, the income /profit earned was to be treated as business income and not as short term capital gain.

Making the above submissions and relying upon the decision of the Delhi High Court in the case of Manoj Kumar Samdaria v. Commissioner of Income Tax, reported in 2014 (45) Taxman.com 394 [Del] against which SLP has been dismissed by the Hon"ble Supreme Court Manoj Kumar Samdaria v. Commissioner of Income Tax, (2014) 52 Taxman.com 247[SC]), it is requested to admit /allow the present Appeals. Shri Sudhir Mehta, learned Counsel appearing on behalf of the revenue has also relied upon the admission order in Tax Appeal No.251/2016 and has submitted that on similar questions Appeal has been admitted.

6. The present Appeals are vehemently opposed by Shri S.N. Soparkar, learned Senior Counsel appearing on behalf of the assessee. It is submitted that by giving cogent reasons both the learned CIT(A) and the learned tribunal have concurrently held that the activities of the assessee were not in trading but in investment, and therefore, the amount of Rs.2,59,43,473/- is rightly directed to be treated as short term capital gain and not as business income as observed and held by the Assessing Officer. It is submitted that both the learned CIT(A) and the learned tribunal have considered in detail the intention of the assessee and the Clause contained in the partnership deed by which there is prohibition of trading in the shares and even the losses incurred by the assessee was never considered and treated as business, and therefore, as such, no substantial question of law arise in the present Appeals. Shri S.N. Soparkar, learned Senior Counsel appearing on behalf of the assessee has relied upon the decision of the Division Bench of this Court in the case of Commissioner of Income-tax, Ahmedabad v. Nita M. Patel reported in (2014) 42 taxmann.com 125 (Gujarat). Making the above submissions and relying upon the above decision, it is requested to dismiss the present Appeals.

7. Heard the learned Counsels appearing on behalf of the respective parties at length. The short question, which is posed for the consideration of this Court is, whether the activity of the assessee can be said to be in the nature of trader or as investor, and therefore, the amount earned i.e. Rs.2,59,43,473/- by the assessee on the transactions of the shares can be said to be short term capital gain as claimed by the assessee or as business income, as claimed by the revenue?

7.1. From the order passed by the Assessing Officer, it appears that the

Assessing Officer has treated the aforesaid amount as business income considering the number of sales and purchase transactions during the year under consideration and the holding period. On appeal, the learned CIT(A) by giving cogent reasons and considering the entire material on record has allowed the Appeals preferred by the assessee and has deleted the addition made by the Assessing Officer treating the aforesaid amount as business income and has directed the Assessing Officer to treat the aforesaid amount as short term capital gain. While holding so, the learned CIT(A) has observed in paragraph nos.5.1 to 5.6 as under;

"I have given a careful consideration to the basis given by the Assessing Officer for his findings as also the detailed submissions made on behalf of the appellant-firm and also perused the decisions cited by the learned A.R. In my view the question in the present case has to be considered and determined on the basis of the factual position which emerges from the records and from the discussion given above. In the written submissions the appellant has commented on the various grounds indicated by the Assessing Officer for treating the short term capital gain as business income. The most important point which can be said to be relevant for deciding the issue is the motive and intention of the appellant at the time of purchase of shares. The Assessing Officer has mentioned that the shares were purchased with the motive of selling within a short period of time ranging from one month to three months with the motive to earn quick business profit. In this regard he has also brushed aside the term and condition in partnership deed debarring the firm to engage in trading of shares and mutual funds. Having regard to the clear facts of this case, I do not find any substance in this assumption of the Assessing Officer. From the details furnished, which are part of the record, it is clear that on sale of such shares which have been held by the appellant - firm for various periods ranging from 1 day to 180 days, the appellant has incurred loss of around Rs.1.27 crores. There could have been no motive to incur such loss by way of short term capital loss and get a set off against short term capital gain which would save tax @ 10%. The appellant could have very well shown the above loss as business loss and could have set off this loss against other business income which would have saved substantially more tax. Further, the stipulation of the partnership deed reproduced above is clear and categorical. While the firm is permitted to carry on trading in bonds, debentures and derivatives, it is debarred from engaging in trading in shares and mutual funds. The partnership deed is a legal document and is binding on all the partners. There are four partners in the appellant - firm and the terms and conditions of the partnership deed are binding on them. If a partnership firm flouts mandatory provisions of the partnership deed which is a legal contractual agreement, the opposing partners can always challenge and all the legal consequences would follow. Further, a legal document has to be read as a whole and not in piecemeal and on selective basis. While the Assessing Officer accepts the authenticity of the one part of the partnership deed he has brushed aside another part which is not fair.

5.2. Another important feature which has to be noted here is that separate books of account have been maintained for the business activity and for the investment activity. Investment in shares, from the very beginning, has been reflected at cost price in the balance sheet under the head investment and was never reflected in trading and P&L account even if the market value of shares went below the cost. This policy is being followed by the appellant-firm for the past several years. The Assessing Officer has not rejected these books of account and he has not disturbed the quantum of the income. He has only treated the short term capital gain as business income. Another important point is that the appellant has been following the same system of accounting much prior to the insertion of Section 111A in the I.T. Act with effect from 01/04/2005. This shows that there was no motive or intention on the part of the appellant to take any undue advantage of the newly inserted provision to reduce its tax liability.

5.3. I also find that the transactions cannot be said to be frequent transactions of purchases and sales with a view to earn quick profit. A trader in shares would purchase and sell shares frequently within a short period of time. In the present case, as per details given above the net short term capital gain entirely comprises of sales of shares of RNRL. As mentioned above, the shares of this Company were purchased from 5th April, 2007 to 2nd July, 2007. These shares were held by the appellant for various periods ranging from 246 days to 334 days and were sold on 4th March, 2008 on one day. Obviously, this was done by the appellant having regard to the market trend. It is also significant to note that the shares of this Company were accumulated without any sales having taken place before purchases of total accumulated shares of particular script. Thereafter, the shares were held for sufficiently long period of time. In my view there can be no assumption that the motive was to trade in shares of this company. I also find that similarly in respect of other scripts also the shares are not frequently purchased and sold but are purchased from time to time and thereafter accumulated shares were sold. Even the assessee firm has not involved itself in hedging transactions of shares. Summary of some transactions are as under;

Statement of scrip

Gain on investments during the year 2007-08

Date of purchase

Date of sale

Acq. Nos.

Act. Rs.

Sale Nos.

Sale Value

STCG Rs.

GMDC

30th July 07

2500

517087

GMDC

12th Oct 07

2500

937458

12th Feb 08

5000

1847705

393160

Hindustan Copper

7th Nov 07

1000

427000

Hindustan Copper

10th Dec 07

500

220896

Hindustan Copper

2nd Jan 08

3500

20006551

13th Feb 08

5000

2658551

5000

1437832

-1220719

RIIL

5th April 07

1000

1211423

RIIL

10th May 07

1000

3076828

RIIL

23rd May 07

1500

4188931

RIIL

2nd Jul 07

1000

2439738

RIIL

2nd Jul 07

1000

2163709

14th Feb 08

5500

13080630

5500

7959408

-5121222

Infosys

4th Aug 08

12th July 07

1000

1695632
1000
1918327
222695
Infosys
12th Oct 06
12th July 07
350
709708
350
6771685
-38022
Infosys
21st Oct 06
12th July 07
251
524524
251
481694
-42830
Infosys
3rd Jan 07
12th Jul 07
500
1151933
500
959551
-192382
Laxmi Machine
15th Sept 06

90

210779

Laxmi Machine

15th Sept 06

400

943578

1st April 07

490

1154357

490

409322

-94036

I also feel that the Assessing Officer was not justified in drawing any adverse inference from the Board's circular referred to above. The Circular only stipulates certain guidelines which can be applied to the particular facts and circumstances of a given case. In any case, even this circular is not adverse to the assessee firm considering the purchase and sales of shares, the period of shareholding, delivery of shares, payment for purchase of shares, registry of shares in its name etc.

5.5 Another important feature is that the appellant has not utilized any borrowed funds for purchases of shares and only surplus funds have been invested.

5.6 I also find that the shares which have been purchased by the appellant-firm have been delivered and registered in the name of the firm through a demat account and the transactions have not been settled through a broker without registration in the name of the firm. Further, different broker-codes have been used for F & O transactions and for purchases and sales of shares. In any case, there is no connection between F & O transactions and share transactions as assumed by the Assessing Officer. F & O transactions are only in derivatives and not actual purchases or sales took place. In F & O transactions even at the time of entering into a contract there is no intention on the part of the concerned parties to purchase or sell shares and transactions are ultimately settled without actual purchases and sales and without the delivery of shares."

7.2. The aforesaid findings and the orders passed by the learned CIT(A) has been confirmed by the learned tribunal by making the relevant observations in paragraph nos.9 and 10 as under;

"We have heard both the parties. Case file perused. The sole issue on merits is

as to whether the assessee profits of Rs.2,59,43,473/- are to be treated as short term capital gains arising from investments or business income. We have already narrated relevant facts in preceding paragraphs. There is no dispute that the assessee has not used any borrowed funds in its share transactions. Hon"ble Jurisdictional High Court in Tax Appeal 77 to 78 of 2010 CIT v. Vaibhav J. Shah decided on 27/06/2012 holds that this issue has to be adjudicated in view of no. of shares sale /purchase transactions, volume, frequency, continuity and regularity followed by necessary inference to be drawn from magnitude of transactions and holding period etc. A perusal of the case file reveals that the assessee has always been treated as an investor and not a trader. Case records contained CIT(A)'s different orders; all dated 07/07/2011 in Assessment Years 2003-04 to 2007-08 treating assessee's short term capital gains /loses of Rs.2,12,522/-, Rs.1,45,680/-, Rs.3,10,332/-, Rs.9,63,528/- and Rs.17,32,831/- not as business losses. The revenue does not point out any exception in the impugned assessment year. It also does not indicate that the same have not attained finality till date or any litigation therefrom is pending in any higher forum. It is further to be seen from the case file pages 51-60 that the assessee's partnership deed contains a negative covenant that its business shall not include trading in equity shares and mutual funds units as under:-

"The business of the partnership shall not include trading in equity shares and units issued by mutual funds. The partnership, can however, invest the funds of the partnership into equity shares through the primary or secondary market or through any portfolio management schemes recognised by the Securities and Exchange Board of India and/or in units of mutual funds and such equity shares / units shall constitute the investment portfolio of the partnership and not stock in trade"

10. We proceed further and find that the assessee has always valued its investments at cost price and not market price. Its short term capital gains read the impugned sums of Rs.2,59,43,473/- comprising a sum of Rs.2,95,48,114/- from a single scrip namely M/s. Reliance Natural Resources Ltd. purchased on 05th April, 10th May, 23rd May and 2nd July, 2007 (this last day involves three transactions). This followed shall of the scrip involving all shares on 04/03/2008. The same makes it clear that the assessee's holding period of these shares ranging from 8 to 11 months during which not even a single share was sold. If we exclude this scrip, what is left is net result of loss of Rs.36 lacs approximately. We confronted the Revenue with all this factual evidence. It fails to controvert the lower appellate authorities' findings that the assessee has always been treating its shares and mutual funds in question as investments by maintaining a separate account accepted for the last many years. This is not the Revenue's case that assessee has been engaged in any intra-day sale /purchase transactions. We repeat that assessee has carried out 85 purchase transactions and 67 sale transactions during the relevant previous year. Meaning thereby that there is no transaction carried out in more than 1/2 of the relevant previous year. We conclude in these peculiar facts and circumstances that the CIT(A) has rightly

treated assessee's profits of Rs.2,59,43,473/- a short term capital gain and not business income. We reject Revenue's contentions seeking to revive Assessing Officer's finding herein above. Its ITA 531/Ahd/2011 fails. Our these findings on merits render assessee's CO. No.205/Ahd/2011 as to have become infructuous accordingly"

8. We are in complete agreement with the view taken by the learned CIT(A) confirmed by the learned tribunal. The learned CIT(A) has considered in detail the duration of the transactions, holding period etc. and has specifically held that the transactions cannot be said to be frequent transactions of purchase and sale with a view to earn quick profit. The learned CIT(A) as well as the learned tribunal has taken note of the fact that the profit was earned by the assessee only in one scrip. The learned CIT(A) and the learned tribunal have also taken note of the Clauses in the partnership agreement /deed by which the partners / partnership firm were debarred from doing trading activities in the shares / mutual funds. The learned CIT(A) as well as the learned tribunal have also taken note that wherever the assessee has earned /incurred losses the assessee has never claimed it as business losses. Considering the aforesaid facts and circumstances of the case, it cannot be said that both the learned CIT(A) as well as the learned tribunal have committed any error in directing the Assessing Officer to treat Rs.2,59,43,473/- for the Assessment Year 2008-09 as short term capital gain and consequently to levy the tax under Section 111A of the Act. The findings recorded by the learned CIT(A) as well as the learned tribunal are on appreciation of evidence. Under the circumstances, the decision of the Delhi High Court relied upon by the learned Counsel appearing on behalf of the revenue shall not be applicable to the facts of the case on hand. However, the decision is required to be considered in light of the facts of the case in each case. Considering the aforesaid findings recorded by the learned CIT(A) as well as the learned tribunal the decision of the Delhi High Court shall not be applicable to the facts of the case on hand.

Now so far as admission of Tax Appeal No.251/2016 also shall not help the revenue so far as the present Appeals are concerned.

9. In view of the above and for the reasons stated herein above, we find no substantial question of law in the present Appeals. Under the circumstances, both these Appeals deserve to be dismissed and are accordingly dismissed.