
(2010) 10 GUJ CK 0065
In the Gujarat High Court
Case No : Tax Appeal No. 836 of 2009

Commissioner of Income Tax	Vs	APPELLANT
Niraj Amidhar Surti		RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 260A, 54EC

Citation : (2011) 238 CTR 294

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : B.B. Naik, for the Appellant; S.N. Soparkar and Swati Soparkar, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—In this appeal u/s 260A of the Income Tax Act, 1961 (the Act), Appellant-Revenue has proposed the following questions:

(i) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in coming to the conclusion that profit of transaction of purchase and sale of shares in the sum of Rs. 1,73,32,347 is long-term capital gain and not business income by treating the said transaction as adventure in the nature of trade?

(ii) Whether, on the facts and in the circumstances of the case, the orders passed by the Tribunal and the Commissioner (Appeals)-II, Ahmedabad, are contrary to the evidence and material on the record of the case and hence, perverse or not?

2. The Respondent-Assessee, filed return of income on 31-2001 declaring total income of Rs. 58,69,534 for the assessment year 2001-02. The Assessee is a chartered accountant, has derived income from his profession and also from purchase and sale of shares shown as short-term and long-term capital gain and also interest income. He had also shown income from speculation business. After examination of the books of accounts and details of purchase and sale of shares

of Euro Asian Securities Ltd. (substituted by shares of Home Trade Ltd.), the assessing officer came to the conclusion that the income shown from sale of shares of Euro Asian Securities Ltd. was, in fact, assessable as business income of the Assessee. According to the assessing officer the dealing in the shares of Euro Asian Securities Ltd. was an adventure in the nature of trade and assessable as business income. The assessing officer framed assessment u/s 143(3) of the Income Tax Act, 1961 (the Act) vide assessment order dated 9-10-2003 determining the total income at Rs. 1,90,11,008 and treated an amount of Rs. 1,72,86,250 as income from adventure in the nature of trade and also disallowed interest of Rs. 5,63,089. Being aggrieved, the Assessee preferred appeal before Commissioner (Appeals), who allowed the appeal of the Assessee by treating receipts of Rs. 1,72,86,250 as capital gains and not income from business and also deleted disallowance of interest amounting to Rs. 5,63,089. The revenue carried the matter in appeal before the Tribunal, but did not succeed.

3. Assailing the impugned order of the Tribunal, Mr. B.B. Naik, learned senior advocate appearing on behalf of the revenue submitted that the Tribunal had erred in coming to the conclusion that the sale and purchase of shares during the year under consideration was not "adventure in the nature of trade", but that the receipt was capital gain. It was submitted that the Tribunal had failed to take into consideration the fact that the investor generally purchases shares in his own name by making proper application to the company when the shares are to be allotted, whereas, in the present case, the Assessee had not made any application to any company for allotment of shares but shares were purchased from Maniram Consultants & Investments (P) Ltd. (hereinafter referred to as "Maniram Consultants"), and thereafter, the shares were sold by the Assessee which clearly indicates that it was not with intention to make long-term investment but that the said transaction was an "adventure in the nature of trade". Therefore, the receipts of the said transaction have to be treated as business income and not long-term capital gain. It was pointed out that the Assessee entered into an agreement with Maniram Consultants and the said company granted loan of Rs. 12,50,000 to the Assessee. Maniram Consultants had purchased the said shares in its own name and, thereafter, when the said amount of Rs. 12,50,000 was repaid by the Assessee with interest, the shares were given to the Assessee and the Assessee sold them immediately thereafter. The Assessee had not deducted interest payment from the sale proceeds of the said shares but had deducted the same from "business income". It was submitted that if the transaction was to be treated as a capital asset transaction, the interest payment for the borrowed capital should have been deducted from the sale proceeds.

4. Learned Counsel further pointed out that the assessing officer had issued summons directing M/s Maniram Consultants at three different addresses available on the record to produce necessary details regarding the transaction in question. However, the said summonses were returned by the postal authority with the remark "not known". Thereafter, the Assessee was asked to produce

representative of Maniram Consultants along with the information called for from them, but the Assessee failed to produce the director of the said company and also did not furnish any information called for by the assessing officer from Maniram Consultants. In the circumstances, the Assessee had failed to prove as to when the shares in question were transferred in the name of the Assessee. It was urged that the assessing officer had rightly drawn inference from the facts and material on the record of the case, that the transaction in question was an adventure in the nature of trade and hence, the income earned on account of purchase and sale of the shares of Home Trade Ltd. was business income of the Assessee and could not be treated as long-term capital gain. It was submitted that the assessing officer had recorded categorical finding that 12,500 shares of Home Trade Ltd. were sold by M/s Yatin Shah & Co., a share broker and sale consideration was credited in his account on realization of sales of such shares on 5-1-2001. It was pointed out that the assessing officer had found, as a matter of fact, that the shares in question had never been physically received by the Assessee in his possession and that the Assessee had failed to prove when the said shares were transferred in the name of the Assessee as the said shares were originally allotted to Maniram Consultants. It was submitted that in the background of the aforesaid facts it is amply clear that the purchase and sale transaction in relation to shares of Euro Asian Securities Ltd./Home Trade Ltd. was an "adventure in the nature of trade" and therefore, the income derived by the Assessee from the said transaction of Rs. 1,72,86,250 was in the nature of business income and could not be treated as long-term capital gain.

5. Mr. S.N. Soparkar learned senior advocate appearing on caveat on behalf of the Respondent Assessee vehemently opposed the appeal. Inviting attention to the findings recorded by the Commissioner (Appeals) it was submitted that the Assessee had purchased shares of various companies, however, the assessing officer had treated only the purchase of shares of M/s Home Trade Ltd. as "adventure in the nature of trade". It was pointed out that the main reason for the assessing officer to come to the conclusion that the transaction was an adventure in the nature of trade" was that the Assessee had obtained a loan of Rs. 12,50,000 from Maniram Consultants on interest @ 30 percent. It was contended that merely because the Assessee had obtained a loan at high rate of interest for the purpose of purchasing the said shares, it would not change the nature of the transaction to being an adventure in the nature of trade". It was submitted that it was always the intention of the Assessee to invest the moneys in the shares in order to derive income from such investment and not with a motive of earning profit by purchase and sale of shares. The Assessee had also treated the investment in Home Trade Ltd. as an investment and had received dividend on those shares, which was utilized for the repayment of the loan. Even after the sale of the shares, the sale proceeds were invested in the bonds of NABARD for taking benefit u/s 54EC of the Act, which clearly shows that the Assessee had always treated the same as capital realization. That, had the transaction been an "adventure in the nature of trade", he would have invested

the proceeds from the shares in other shares. Inviting attention to the order made by the Commissioner (Appeals) it was submitted that the Commissioner (Appeals) has considered the evidence in detail and has come to the conclusion that the transaction in question is not an adventure in the nature of trade", but that the amount realized from the sale of shares is a capital gain. That the Tribunal, upon appreciation of the evidence on record, has concurred with the findings of fact recorded by the Commissioner (Appeals). That both the appellate authorities having recorded concurrent findings of fact, in absence of any material to the contrary having been produced on record by the revenue, no interference is warranted by this Court and as such, the appeal deserves to be dismissed at the threshold.

6. The undisputed facts of the case are that, in the return of income, the Assessee had claimed that an amount of Rs. 1,72,86,250 was exempt in view of the provisions of Section 54EC of the Act as the Assessee had made investment in the bonds of NABARD at Rs. 1,03,00,000 and differential amount of Rs. 69,87,500 was taxable as long-term capital gain. The capital gain was shown in respect of sale of shares of Euro Asian Securities Ltd. (Home Trade Ltd.). According to the assessing officer, the shares were not purchased by the Assessee, but were allotted as firm allotment and purchased by Maniram Consultants. The Assessee had entered into a loan agreement dated 25-1999 with Maniram Consultants, the contents whereof are reproduced at p. 2 of the assessment order. According to the assessing officer, in view of the clauses of the agreement, the deal appeared to be a "transaction in the nature of trade or business" rather than normal investment. The assessing officer, therefore, issued notice to the Assessee raising various queries. In reply, the Assessee submitted that he was having source of income by way of professional receipts, long-term capital gains, interest and dividends. In the past also, shares were held by way of investment only, from which the Assessee received dividend and interest income and that most of the shares acquired were held and very few of them were sold out. It was submitted that the Assessee had purchased shares of certain companies and such shares are still being held as investment. The shares of Euro Asian Securities Ltd. were purchased out of the finance obtained from Maniram Consultants. That the shares of Euro Asian Securities Ltd. were expected to give good and regular return by way of dividend. The Assessee was also holding shares of IT companies and he wanted to make investment in one more company. It was explained that the dividend received on the shares by Maniram Consultants was used for repayment of loan by the Assessee and was also considered in his income. That it was not unusual in the transactions with banks and financial institutions where the shares are held as securities against loans given by them in the names of the banks and the financial institutions. Hence, the transaction in question was not abnormal. It was submitted that in the facts of the present case, the purchase consideration for purchase of shares was paid and that the sale consideration was also received. It was explained that in the case of the Assessee, share transactions were not voluminous and that the

Assessee not being a trader, shares had been shown as investment in the books of account. The Assessee also produced a copy of the agreement with Maniram Consultants. The assessing officer issued summons to Maniram Consultants, but the same were received back unserved with the remarks "not known". Summonses were also issued to M/s Yatin Shah & Co., the share broker, which was served, but no reply was received.

7. The assessing officer observed that the quantum of dealing, its frequency and its repetitive transactions tantamount to dealings in shares and not investments. According to the assessing officer, one of the criteria to decide the nature of income is to ascertain the nature of commodity purchased, quantity of purchase and subsequent improvement. In the present case, the nature of the commodity purchased is shares, which is a highly commercial commodity commanding premium price. That in todays context, purchase of shares takes precedence over any other commodity like gold, diamonds, land, etc. and has higher margin of profitability. The assessing officer did not accept the explanation of the Assessee that the transactions should be viewed in the normal circumstances, as according to him the entire economy today is controlled by movement of shares and the rise and fall of the sensx is a barometer of the countrys economy. The assessing officer noted that the Assessee had purchased 25,000 shares of Euro Asian Securities Ltd., which finally became 1,25,000 shares of M/s Home Trade Ltd., which according to him was a staggering figure from the viewpoint of any investor looking from any angle. The assessing officer was further of the view that shares in such a large quantity could only be purchased by a dealer in shares and no other person. He noted that the shares were not under the legal ownership of the Assessee, and were not even physically possessed by him. That, the Assessee might not even be aware as to which particular part of the shares was actually purchased by him. It was further noted that the Assessee had raised loan @ 30 per cent interest for financing the purchase of shares, which had been provided by Maniram Consultants. According to the assessing officer, the rate of interest was exorbitant, and that it was not known as to what had prompted the Assessee to raise finance of Rs. 12.50 lakhs at such a high rate. In the opinion of the assessing officer the Assessee was a resourceful person, as was evident from the balance sheet and therefore, raising finance of comparatively small amount of Rs. 12.50 lakhs at normal rate would not have been difficult for him. By agreeing for the rate of interest at 30 per cent, the Assessee had undertaken much greater risk, which directly pointed towards the transaction being an "adventure in the nature of trade". According to the assessing officer, normally, an investor would not raise funds at such a high rate of interest for purchase of shares as the investor acts with a sense of moderation and security. According to the assessing officer, the continuous, systematic, and organized manner in which the Assessee was carrying out deals in shares in large quantum with repeated frequency, gave rise to the perception that the sole intention behind the purchase and sale of shares was to make profit. According to the assessing officer the factors for considering purchase and sale of shares of

Home Trade Ltd. as an "adventure in the nature of trade" are borrowing at higher rate; entering into one sided agreement; disposing of the shares at the first available opportunity when the shares reached the highest in the terms of market price (the shares were purchased at Rs. 50 and were sold at Rs. 750 within a period of 14 months). Therefore, looking from any angle, the whole transaction proves the profit making intention of the Assessee. The assessing officer, ultimately, held that the transaction of purchase and sale of shares of Euro Asian Securities Ltd. (Home Trade) was an "adventure in the nature of trade" and as such, was required to be taxed under the head of "Income from business or profession" and not as "long-term capital gain".

8. Before the Commissioner (Appeals), on behalf of the Assessee, it was inter alia submitted that the profit on purchase and sale of shares or investment in mutual funds is always shown as on capital account, that is, capital gain either short-term or long-term and it had been accepted as such in the earlier years. Merely because the Assessee was a chartered accountant and was conversant with the share market, it could not be concluded that the intention of the Assessee was that of carrying on business of trading in shares. It was pointed out that the assessing officer had wrongly concluded that majority of the shares were disposed of within a period of 6 to 12 months so as to arrive at the conclusion regarding frequency and magnitude of the transactions, whereas, in majority of the cases, the shares had been disposed of after more than one or two years. Merely because the shares were split by the company into five shares for each share, it cannot be presumed that the number of shares is large. It was the decision of the company and that too, after the shares were allotted. It was submitted that the investment made by the Assessee in Home Trade shares was to the tune of Rs. 12.50 lakhs, whereas the total investment of the Assessee in shares and equity funds aggregated to around Rs. 80 lakhs. Thus, the transaction in question cannot be highlighted as a big investment made with the motive of carrying on business. It was pointed out that the Assessee possessed large number of shares in various companies and that the transactions in such shares were shown as on capital account and it was accepted as such by the assessing officer in earlier years. The Assessee was basically an investor, but in case of every investor reshuffling becomes necessary and in that background, shares held as investment are sold. There is only one solitary transaction which has been disputed by the department whereas the Assessee has purchased/sold other shares and units of mutual funds. The Assessee has done nothing to improve the quality of purchase. It was contended that if the assessing officers conclusion that the Assessee was not the legal owner of the shares and was not having physical possession thereof is to be accepted, then there was no transaction in the hands of the Assessee and as such, there was no question of taxing such transactions merely on the ground that the Assessee had offered the same as capital gain.

9. The Commissioner (Appeals), based upon findings of facts recorded after appreciation of the evidence on record, arrived at the following conclusions:

(22)(a) Merely because the Appellant is a chartered accountant and has knowledge regarding share market, the transactions do not become an adventure in the nature of trade.

(b) Much of the shares held by the Appellant have been disposed of after more than a year or 2 years. Thus, the assessing officer has failed to prove its case of frequency of transactions.

(c) The investment in shares of Home Trade Ltd. was also not very high. The investment of Rs. 12,50,000 in the present times, has to be held as normal and cannot be called high investment by any standards.

(d) The fact that one share splits into 5 shares and the shareholding of the Appellant swelled by 5 times, could not be attributed to the Appellant. It was not an act of the Appellant. Further, as held by the Honble Supreme Court in the case of Rameshwar Prasad Bagla Vs. The Commissioner of Income Tax, Lucknow, the volume of the shares purchased and sold cannot be the sole reason for treating the transaction as adventure in the nature of trade.

(e) The transactions in question are at arms length. The assessing officer has not been able to prove the nexus between the Appellant and the other parties. There is no evidence on the record to suggest or to substantiate the claim of the assessing officer that a syndicate had been formed among the 4 above-mentioned parties.

(f) In the present scenario, there is an unprecedented boom in the stock market whereby FI Is have invested in a big way. These FI Is are not treated as traders and their income in spite of huge volume and frequency, is treated as capital gains. Even the Life Insurance Corporation of India has been indulging in the reshuffling of shares. But by that reason alone, the department cannot tax the surplus on the sale of other shares as business income.

(g) The Appellant has not repeated the transactions of purchase and sale of shares of M/s Home Trade Ltd. Further, the dividend on the sale of shares has come to the Appellant and none else. Thus, conduct of the Appellant does not show that he is dealing in shares.

(h) The assessing officer has inferred that the Appellant was not legal owner of the shares and did not have physical possession of the shares. Therefore, there is no transaction in the hands of the Appellant. If this is the case, then the department must prove that in such an event, in whose hands the surplus on the sale of shares should be taxed. Besides above, the Supreme Court has held in the case of Commissioner of Income Tax, Bombay etc. Vs. M/s. Podar Cement Pvt. Ltd. etc., that for income from house property, it is not necessary that the Assessee should be legal owner of the property in question. Thus, even the beneficial owner of the property in question could offer the income as income from house property having regard to ground realities.

As regards pride of possession, one may be proud of owning an object without its

actual possession also. It is a feeling which may arise to a person by mere fact of being the beneficial owner of an object even though the possession of the object is with somebody else for the time being.

(i) Similarly, if the parties in question i.e. M/s Yatin Shah & Co., had received the summons, but did not appear, the Appellant could not be blamed since he had discharged the initial onus of giving complete name and address of the parties, copies of bills and confirmations. Therefore, it was for the department to show that the explanation rendered by the Appellant was untrue. On the other hand, the inquiries made by the undersigned have proved beyond doubt that the parties M/s Maniram Consultants & Investment and M/s Yatin Shah & Co. in question had entered into genuine transactions with the Appellant.

In view of the above discussion, it is held that surplus arising on the transactions of the shares of M/s Home Trade Ltd. should be treated as capital gain and not adventure in the nature of trade.

10. The Tribunal, in the impugned order, has concurred with the findings of fact recorded by Commissioner (Appeals). The Tribunal upon appreciation of the evidence on record has found that the facts and circumstances of the present case satisfy all the tests laid down by the Supreme Court in P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala, and Khan Bahadur Ahmed Alladin and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, and that the issue involved in the present case is squarely covered in favour of the Assessee and against the revenue by the said decisions.

11. From the facts noted hereinabove, it is apparent that both the Tribunal as well as Commissioner (Appeals) have recorded concurrent findings of fact to the effect that the Assessee had disposed of most of the shares held by him after more than a year or two; the investment made in the shares of Home Trade Ltd. was not very high; the Assessee had not repeated the transactions of purchase and sale of shares of M/s Home Trade Ltd.; the Assessee had not shown the shares in question as stock in trade; after the shares in question were sold, the Assessee made investments under the provisions of Section 54EC in the bonds of NABARD, and the profit of purchase and sale of shares or investment in mutual fund was always shown on capital account, that is, capital gains either short-term or long-term, and that the same was accepted as such in earlier years.

12. On a perusal of the assessment order, it appears that the main consideration which has weighed upon the assessing officer for the purpose of holding that the transaction in question is an "adventure in the nature of trade" and not an investment, is that for the purpose of purchasing the shares in question, namely, the shares of Euro Asian Securities Ltd. (Home Trade Ltd.), the Assessee had obtained loan from M/s Maniram Consultants & Investments (P) Ltd. on interest @ 30 per cent, which according to the assessing officer, was an exorbitant rate. Though the Assessee had purchased/sold other shares and units of mutual funds, this solitary transaction had been disputed by the assessing officer mainly

because the Assessee had purchased the shares in question from borrowed funds obtained on high rate of interest, which also forms the basis for the conclusion arrived at by the assessing officer that the transaction in question is an "adventure in the nature of trade or business" rather than a normal investment.

13. Another reason for holding that the transaction in question is an "adventure in the nature of trade or business" is that the shares in question were held by Maniram Consultants till the entire loan was paid and were initially purchased in the name of Maniram Consultants in terms of the agreement between the Assessee and Maniram Consultants. According to the assessing officer, since the Assessee had not obtained physical possession of the shares in question at the relevant time, the Assessee was not the owner of the shares in question.

14. However, the reasoning adopted by the assessing officer loses sight of the fact that merely because the shares had been purchased from borrowed funds obtained on high rate of interest would not change the nature of the transaction from investment to one in the nature of an "adventure in the nature of trade". Moreover, in the light of the findings recorded by Commissioner (Appeals) that the Assessee had held the shares in question for fourteen months, which is a long period for the purpose of long-term capital gain, the intention of the Assessee had always been that of making investment in shares and not dealing in shares, which was also apparent from the fact that the shares had not been treated as stock in trade by the Assessee; even after the sale, the Assessee had made investment in bonds of NABARD, indicating that he had treated the same as long-term capital gain; as well as the fact that the Assessee had not split the shares in lots but had sold the same in one lot; it is not possible to agree with the contention raised on behalf of the revenue that the transaction in question is an "adventure in the nature of trade" and therefore, the income derived by the Assessee from the said transaction is a business income and cannot be treated as capital gain. Insofar as the second ground for holding the transaction in question to be an adventure in the nature of trade, viz., that the Assessee was not the legal owner of the shares and was not having physical possession thereof, is concerned, if the said ground were to be accepted, then, as had been rightly contended on behalf of the Assessee, there was no transaction in the hands of the Assessee and as such, there was no question of taxing the said transaction merely on the ground that the Assessee had offered the same as capital gain. It is nobody's case that delivery of shares allotted was not taken at all. The shares were held by Maniram Consultants as security towards loan advanced to the Assessee indicating that the Assessee was the owner of shares which were offered and held as security.

15. The Apex Court in the case of *Khan Bahadur Ahmed Alladin & Sons v. CIT* (supra) has held that the question as to whether the transaction is an adventure in the nature of trade must be decided on a consideration of all the relevant facts and circumstances which are proved in a particular case. The answer to the question does not depend upon the application of any abstract rule, principle or

formula but must depend upon the total impression and effect of all the relevant facts and circumstances established in the particular case.

16. In the case of the Commissioner of Income Tax, Nagpur Vs. Sutej Cotton Mills Supply Agency Ltd., the Supreme Court has held that a capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment.

17. Examining the facts of the present case, in the light of the aforesaid principles, it is apparent that both the appellate authorities have recorded concurrent findings of fact which indicate that the relevant factors and circumstances proved therein determine the character of the transaction in question to be one of capital gain and not an adventure in the nature of business or trade, as contended on behalf of the revenue. On behalf of the revenue, no evidence to the contrary has been pointed out, nor is it the case of the revenue that the Tribunal has taken into consideration any irrelevant material or that any relevant material has been ignored. In the circumstances, it is not possible to state that the conclusions arrived at by the Tribunal on the basis of the concurrent findings of fact recorded by it, are in any manner unreasonable or perverse so as to warrant interference.

18. In the light of the aforesaid discussion, it is not possible to state that the Tribunal has committed any legal error so as to warrant interference. No question of law, as proposed or otherwise, much less, a substantial question of law, can be stated to arise out of the impugned order of the Tribunal. The appeal is, accordingly, dismissed.