(2018) 04 RAJ CK 0170

In the Rajasthan High Court

Case No : Income Tax Appeal No. 85 of 2010

Devendra Mittal @APPELLANT@Hash Deputy Commissioner of Income Tax

Date of Decision : 11-04-2018

Acts Referred:
Income Tax Act, 1961 — Section 2(29A), 2(29B), 2(42A), 2 (42B), 111A, 112, 260A

Citation : (2018) 04 RAJ CK 0170

Hon'ble Judges : GOPAL KRISHAN VYAS, J;RAMCHANDRA SINGH JHALA, J

Bench : Division Bench

Advocate : Suresh Ojha, K.K. Bissa

Final Decision : Dismissed

Judgement

In this Income Tax appeal, the following substantial question of law was framed while admitted the present appeal on 27.09.2010:Â

Â â??Whether Tribunal was justified in holding that transaction in question is a business transaction and not short term/long term capital?â??

Â As per facts of the case, appellant is HUF, headed by Devendra Kumar Mittal, as â??Kartaâ?. For the relevant year, source of income of the

appellant HUF were interest income and income from purchase and sale of shares of listed companies through different stock exchanges. The holding

of shares by the appellant HUF in some cases was for more than one or two years and in some cases the shares were purchased and sold within a

period of one year. The assessee claimed this income from the transactions in the purchase and sale of shares under the head of short term and long

term capital gains. No tax was paid on the long term capital gains claiming the same to be covered under Section 112 and paid tax @ 10% on the

short term capital gain as per provisions of Section 111A. The Assessing Officer while examining the case treated these transactions of purchase and sale of shares as income from business and profession and taxed the same accordingly.Â

Â According to facts, the Assessing Officer made enquiry at the time of assessment, details as required by it, were submitted by the appellant. All the

transactions were found recorded in the Demate Account of the appellant through recognized stock exchanges. The aforesaid facts are not in dispute.

At the time of assessment, the Assessing Officer while deciding the case observed that in the A.Y. 2005-06, number of transactions of purchase and

sale was 247 times and the sale were 263 times, and thus looking to the volume of transactions, it was presumed that transaction of shares are in the

nature of trade and business and not in the nature of investment. The Assessing Officer further observed that the appellant has not earned much

dividend and thus it cannot be said that the amount was invested in the shares to earn dividend income and presumed that the shares were purchased

to earn the profit and so these are trading transactions. The Assessing Officer made observation that purchase and sale through sister concern and

also that shares were purchased by borrowed funds and while considering the Circular No.4/07 dated 15.06.2007 issued by the CBDT finally passed

the order of assessment.Â

Â Against the assessment order, an appeal was preferred by the appellant before the C.I.T. (Appeals), Bikaner and the learned C.I.T. (A), Bikaner

vide its judgment dated 30.05.2008 allowed the appeal (Appeal No.132A/ BKN/2007-08 and held that the action of the Assessing Officer treating

these transactions as business transactions, is hereby cancelled.Â

Â Against the order dated 30.05.2008 passed by CIT (A), Bikaner, an appeal was preferred by the Revenue before the Income Tax Appellate

Tribunal, Jodhpur Bench, Jodhpur (ITAT) and the learned ITAT while deciding the appeal filed by Revenue, allowed the same vide its order dated

26.06.2009 and the order dated 30.05.2008 passed by learned CIT (A), Bikaner was set aside and the order of the Assessing Officer, was restored.

Â The instant appeal has been filed by the appellant-assessee under Section 260A of the Income Tax Act, 1961 assailing the order dated 26.06.2009

passed by the ITAT, Jodhpur in Appeal No.499/JU/2008.Â

Â Learned counsel for the appellant vehemently argued that complete wrong finding was given by the Assessing Officer to treat the transactions of purchase and sale of the shares as business transactions because as per law, the transaction of purchase and sale of shares by the appellant was in

the nature of investment, therefore, the short term and long term capital gains claimed by the appellant are correct. Learned counsel for the appellant

further submitted that an affidavit was filed by the appellant before the C.I.T. (A), Bikaner, which was accepted by the CIT (A) because the facts,

which were narrated before the Assessing Officer or before the CIT (A) were verified on oath. According to learned counsel for the appellant an

error has been committed by the Assessing Officer in not accepting the income from sale of shares as income from short term and long term capital

gains and to treat the said income from business solely on the ground that during the said year, transactions of the appellant were in 100. The

Assessing Officer, referred one Circular of CBDT for treating the income as business income because the sales and purchases were 247 and 263

times respectively. On the basis of number of transactions of purchase and sale, the Assessing Officer changed the head from capital gains to

business income, which is incorrect.Â

Â It is further argued by the learned counsel for the appellant that from the section of Statute it is clear that in respect of head under which income of

the assessee should be taxed and provisions of Sections 2 (29A), 2 (29B), 2 (42A) and 2 (42B) are applicable only in case of sale of capital assets.

Therefore, it is a case in which wrong finding is given by the Assessing Officer, whereas the learned CIT (A), Bikaner, rightly considered the whole

aspect of the evidence and passed order in favour, but unfortunately the learned ITAT set aside the order of the CIT (A) on wrong premise.

Therefore, the order of learned ITAT may kindly be set aside and the order of the CIT (A), Bikaner, may kindly be restored.Â

Â Per contra, Mr. K.K. Bissa, learned counsel for the Revenue vehemently argued that no error was committed by the Assessing Officer or by the

learned ITAT while treating the income of the appellant arising out from the share trading and other source as business income because indisputably

the transactions of purchase and sale were made by the assessee for 247 time and 263 times respectively, and this fact is not disputed by the

appellant. The learned Tribunal while following the judgment of Apex Court in the case of CIT Vs. Associate Industrial Development Company Pvt.

Ltd. reported in 82 CTR 586 held that holding of shares is by way of investment or fall part of stock in trade is within the knowledge of the assessee

and he is only in a position to produce any evidence from his records to show whether he has maintained distinction between those shares which are

stock in trade and those which are held by way of investment. But, in this case it can be seen from the evidence produced by the assessee before the

Assessing Officer or the learned CIT (A), it is obvious that he could produce this type of evidence, whereas the Assessing Officer has categorically

observed while taking into consideration the number of transactions of purchases and sale made by the assessee viz. 247 times purchase and 263

times sales. Therefore, the substantial question of law framed by this Court, deserves to be answered in favour of respondent Revenue because the

finding recorded by the learned Assessing Officer and learned ITAT, Jodhpur, is based upon factual aspect of the matter. He, therefore, prayed that

this appeal may kindly be dismissed.Â

Â After hearing the learned counsel for the parties, it is obvious that the appellant is not disputing that he has purchased shares for 247 times and sold

263 times. It also emerges from the facts that it was for the assessee-appellant to establish the intention by producing his accounts before the

department disclosing that he maintained distinction between those shares which are held as stock in trade and those shares which are held as

investment. In our opinion, the aforesaid burden was lying upon the appellant to prove this material aspect before the Assessing Officer but it is

obvious from the material available on record that he has not been able to produce any material to show that he maintained distinction between the

share held in stock in trade or those held by way of investment. If the assessee has failed to discharge his burden, caste upon him by law in support of

his claim, then obviously he is not entitled to claim any benefit.Â

The whole basis of argument of learned counsel for the appellant is that an affidavit was filed by him in which everything was explained that too

before the CIT (A), Bikaner. However, in our opinion, it was the duty of the assessee to maintain record for distinction between the shares held in

stock in trade and those held by way of investment, then obviously evidence was to be produced by him, therefore, we are of the opinion that the

entire case is based upon factual aspect of the matter, hence, we do not think that the question of law framed in this appeal is having any significance

so as to adjudicate the same.Â

Â Accordingly, the substantial question of law, framed above, is answered against the appellant and in favour of respondent- Revenue. Resultantly,

the present Income Tax Appeal filed by the appellant/assessee is hereby dismissed.Â