

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**RESERVED ON: 01.04.2014
PRONOUNCED ON: 16.04.2014**

+ **ITA 180/2013**

COMMISSIONER OF INCOME TAX-IIAPPELLANT

Through : Mr. Kamal Sawhney, Sr. Standing
Counsel with Mr. Raghvendra Singh,
Advocate.

Versus

ASHOK WADIARESPONDENT

Through : Mr. G.C. Srivastava, Advocate.

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR**

MR. JUSTICE S.RAVINDRA BHAT

1. The Revenue today impugns concurrent findings of the Commissioner of Income Tax (Appeals) ("CIT(A)") and the Income Tax Appellate Tribunal ("ITAT"). They had reversed the findings of the Assessing Officer ("AO"), who treated the assessee's income from sale of shares as business income, as opposed to Short Term Capital Gain ("STCG"), as was originally claimed in assessment proceedings. The assessee appealed the order of the AO on various grounds to the CIT(A), of which only

the issue of income from sale of shares arises in this appeal. The following question of law arises for decision:

Did the ITAT fall into error in upholding the assessee's contention that the latter earned Short Term Capital Gain on account of sale of shares.

2. During the course of assessment proceedings, the assessee had made a claim of STCG for Rs. 3,10,62,544. On the basis of details of the sale and purchase transactions, the AO reached the *prima facie* opinion that the income was business income, and so, on 18th October, 2010, the assessee was asked to explain reasons for claiming STCG. The assessee supplied reasons on 13th December, 2010, which were rejected by the final assessment order made on 2nd August, 2012. The AO relied on various judgments of the Supreme Court to recount (a) whether the holding of shares is by way of investment or forms part of stock in trade is a matter within the knowledge of the assessee and depends on how it is shown in its accounts; (b) that *res judicata* does not apply to these proceedings and assessments in previous years as STCG is not conclusive; (c) there is no universal standard to determine whether the income is from business or STCG; this depends on the nature, frequency, volume of the transactions, ratio between sales and purchases, period for which shares are held, and whether dividend was earned before the sale; (d) nothing prevents the assessee from maintaining two portfolios, one for business and the other for investment. Based on these aspects, the AO recorded that the income in this case was business income:

“Viewed even against the above back drop the assessee is not fulfilling majority of the above principles and thus cannot be treated as a investor for the short term capital gains so claimed at Rs. 3,10,62,544/-

- a) In the case of assessee it is seen that he is dealing in stock on continuous and aggressive basis.*
- b) The frequency of trades and the time gap between buying and selling of various scrips does not warrant investment for appreciation but a cautious decision to earn from price movement of stocks on regular basis.*
- c) The account indicates a cautious activity on persistent basis.*
- d) The pattern of account, indicates a level of volume that would engage considerable time and attention of the assessee.*

Conclusion

- a) The assessee has chosen to take undue benefit of the amended provisions of the act vis-à-vis the quantum of activity to the period prior to amendment.*
- b) The treatment given to the shares transaction by the assessee company is quiet arbitrary and is just to suit its convenience with an eye to reduce tax liability. The assessee has parked shares accordingly and there is no plausible logic for such action.*
- c) Majority of the shares have been acquired, have disposed off in a very short period of time and by any yard-stick they cannot be considered to be as investment. The frequency and volume of transaction in the instant case give an impression and is a strait pointer to the fact that the assessee did not intend to*

acquire the share with investment motive. In the case of an investment a person usually watches the market over a longer period of time before selling of the shares purchases were completed on the very same day.

Virtually there is no dividend income earned on holding of such shares on which the short term capital gain is claimed from which it is very clear that apart from other consideration to this limited issue the assessee is a trader and not an investor as the assessee is not having an eye on the capital appreciation and that of earning a dividend. The earning of dividend and appreciation of the shares is the primary consideration. It is only a trader who would look for short term gains from the purchase and sell of shares and the entries in the books of accounts or balance sheet can not over ride them and be taken as decisive of the assessee's intentions.

The examination of computation of income along with profit and loss account has shown that on massive turnover on which the so called Rs. 2,88,801/- has been shown which also pertains to investment in shares on which long term capital gain has been shown Even out of nominal dividend income shown substantial dividend income pertains to long term capital gain from which it is crystal clear that the shares which have been claimed to have been investments are in fact the stock in trade only when viewed examined and analyzed against the parameter of dividend income alone, though in the instant case this is only one of the factors apart from others which have been discussed in the body of others.

Thus in nutshell given the present situation of the assessee, I find that he is dealing in stocks on

continuous and aggressive basis. The frequency of trades and the time gap between buying and selling of various scrips does not warrant investment for appreciation but a cautious decision to earn from price movement of stocks on regular basis. Further the account indicates a cautious activity on persistent basis. Further the pattern of account indicates a level of volume that would engage considerable time and attention of the assessee.

In view of the above discussion the claim of the assessee regarding short term capital gain on sale of shares at Rs. 3,10,62,544/- in not a short term capital gain but a business income having been earned on account of share trading though the same of share trading particular of income penalty proceedings u/s 271(l)(c) are separately initiated for furnishing of inaccurate particulars, by showing the income under wrong head though it pertain to a different head.”

3. The CIT (A) reversed this decision, at the assessee's behest, holding that (a) the AO confused the guidance provided by the Central Board of Direct Taxes (“CBDT”) in Circular No. 4/2007 dated 15th June, 2007 with an amendment in the provisions of the Income Tax Act (“the Act”); (b) the fact that the assessee had always shown the shares as investment in his accounts; (c) while the volume of transactions of transactions is an important indicator of the intention of the assessee, it is not the sole criterion; (d) the AO's conclusion that that since sale and purchase has been determined by the volatility of the market, it cannot be classified as investment is incorrect, as there is no bar in law to liquidating investment based on market factors; (e) dividend income is always

based on the holding of shares on the record date, and thus, will not arise in case of shares sold before the record date or purchased after the record date. Absence of dividend income thus does not lead to any conclusive findings.

4. On appeal, the ITAT sustained findings, holding that in more than 90% of the cases there has been only one transaction of sale and purchase. Further, the share of dividend income to investment income was considered to be insufficient, by itself, to bracket the income as business income. On the basis of the frequency and volume of transactions, thus, the ITAT held that the income was STCG.

5. Impugning this decision of the ITAT, learned counsel for the Revenue argues that a closer look at the accounts indicates that the dealing in shares in this case was not as investment, but rather, to transact in them as business. Though the shares were listed as investment, the frequency and volume in which they were dealt strongly supports their characterization as a business income. Further, it is argued that the dividend earned on the shares, which is important in order to hold that they are an investment, is extremely low compared to the profits earned through the sale of these shares. Learned counsel argues that while even shares held for investment may be sold, the manner in which the shares have been dealt with in this case, and the routine transactions, are not in response to market volatility, but rather, to earn an income through the business of trading in these shares. Thus, learned counsel

argues that such an aggressive pattern of sale/purchase transactions cannot go along with their characterization as investment.

6. The short issue that arises in this case is whether the income is business income or STCG. It is important to extract the accounts, as presented before the CIT(A) and the ITAT, on the basis of which the decisions were made. It is important to note here that the assessee is claiming that STCG only in respect of the sale of 13 scrips, and the Court will confine its observations to the accounts relating to these scrips.



Particulars	Opening Balance as on 01.04.2007		No. of Shares (Pur.)	Date of Purchase	Amount (In Rs.)	No. of Shares (Sold)	Date of Sale	Amount (In Rs.)	Gain (loss)
	Shares	Amount							
IDBI Ltd.	-	-	6,000	27.04.2007	5,06,934.44	6,000	29.06.2007	7,03,320.00	1,96,380.00
Deccan Aviation	45,000	63,51,130.93	-	-	-	45,000	30.05.2007	59,98,759.10	(3,52,371.83)
IFCI	10,000	1,08,300.00	-	-	-	10,000	30.05.2007	4,77,714.27	3,69,414.27
REL Capital	-	-	2,000	06.06.2007	19,61,040.22	2,000	08.06.2007	19,74,659.19	13,618.97
	-	-	2,000	08.06.2007	19,60,740.20	2,000	15.06.2007	20,33,443.87	72,703.67
Sub Total									86,322.64
United Brew	16,180	Bonus Issue	-	-	-	3,820	08.06.2007	23,32,224.60	23,32,224.60
	-	-	-	-	-	9,360	14.06.2007	56,45,390.40	56,45,390.40
	-	-	-	-	-	3,000	28.06.2007	17,80,606.25	17,80,606.25
Sub Total									97,64,583.62
Bhagya Nagar ndt.	1,62,312	33,06,295.44	-	-	-	12,663	06.06.2007	5,24,474.75	2,66,556.15
	-	-	-	-	-	52,000	08.06.2007	20,73,443.11	10,14,000.00

	-	-	-	-	-	1,500	29.06.2007	60,177.05	29,625.00
	-	-	-	-	-	6,149	02.07.2007	2,45,894.68	1,20,643.38
	-	-	-	-	-	5,000	02.07.2007	2,02,390.06	1,01,100
	-	-	-	-	-	40,000	04.07.2007	15,90,576.29	7,75,600.00
	-	-	-	-	-	10,000	10.07.2007	4,09,114.99	2,05,400.00
	-	-	-	-	-	10,000	10.07.2007	4,22,590.52	2,18,900.00
	-	-	-	-	-	5,000	12.07.2007	2,08,612.83	1,06,750.00
	-	-	-	-	-	20,000	16.07.2007	9,32,265.96	5,24,800.00
Sub Total									33,63,547.30
GTL Infrastucture	30,000	Bonus Issue	-	-	-	30,000	29.06.2007	14,83,895.52	14,83,895.52
NIIT	125	Bonus Issue	-	-	-	125	13.02.2008	13,105.00	13,105.00
NIIT Technologies	37	Bonus Issue	-	-	-	37	13.02.2008	4,331.22	4,331.22
All Cargo	-	-	20,000	07.02.2008	1,44,16,747.40	-	-	-	-
	-	-	30,000	13.02.2008	1,97,46,747.41	50,000	15.02.2008	3,74,12,500.00	32,49,038.19
Sub Total									32,49,038.19

Dhanustech	-	-	10,000	13.02.2008	14,64,000.00	10,000	10.03.2008	18,42,200.00	3,78,200.00
Unity Infra	-	-	50,000	11.02.2008	3,61,40,323.50	50,000	12.02.2008	4,08,26,291.84	46,85,968.34
Sharyan	-	-	2,500	24.01.0228	6,97,770.00	-	-	-	-
	-	-	2,500	25.01.2008	7,66,400.00	5,000	19.02.2008	13,69,050.00	(95,120.00)
	-	-	10,000	01.02.2008	29,93,953.39	-	-	-	-
	-	-	56,000	07.03.2008	1,29,15,175.98	66,000	10.03.2007	1,67,47,500.00	8,38,370.63
Sub Total									7,43,250.63
Total									2,39,85,664.90

7. The legal standards concerning whether income is to be treated as business income or STCG have been the subject-matter of various decisions of the Supreme Court and this Court. They have also been recounted at length in the orders of the AO, CIT(A) and the ITAT, and the Court does not wish to repeat them. Suffice it to say that there is no single, universal standard to distinguish between the two. The Court must instead look into the nature of the shares, the volume and frequency of the transactions, the manner in which the shares have been shown by the assessee in its own books of account, dividend earned on the shares, if any. Rarely will any one factor be conclusive; the purpose of the exercise is to ascertain the true intention through a composite test. In some cases, volume

becomes determinative; in others the duration of time it is held; at times it can be the manner it is shown in the books whereas in still, the use of borrowed funds could be decisive.

8. On a reading of the above accounts, the Court agrees with the concurrent findings of the ITAT and CIT(A). The shares were shown as investments by the assessee, and not as stock in trade. This is an important (though not conclusive) factor. Further, of the 13 scrips in question, 8 were transacted only once; two have been transacted twice; one each has been transacted thrice and four times, and only one has been transacted regularly, i.e. ten times. The frequency of transactions speaks greatly to whether the shares were traded, i.e. whether the income earned was business income, or held for investment. The fact that in this case the shares were traded irregularly is a strong pointer that they were held as investment, lest there be a new category of static trading or business. The fact that there was a limited dividend drawn from these shares, though relevant, does not displace this conclusion, since dividend earned depends on whether the shares were held on the record date, and does not directly correlate to the time for which they have been held. The other factors, considered cumulatively, carry greater weight in this case. Trading contemplates a frequent sale and purchase of the commodity being traded. Infrequency, as in this case, as the *general* trend (notwithstanding only one share) cannot color the *entire* portfolio as business.

9. The fluctuation in the number of shares held, and also the companies in which shares are held, is minimal. The accounts extracted above indicate that the same scrips were held throughout the entire period, with the (limited) change occurring within the shares already held. Even the sale/purchase transactions that have taken place as a ratio of the total shares held for that company is low, thus indicating the volume of shares held has not varied much. Just as aggressive and constant behavior as regards the portfolio suggests business activity, its absence suggests that the shareholding was as an investment. In fact, four of the shareholdings benefited from a subsequent bonus issue of shares, which again supports this characterization. In such circumstances, to hold that the portfolio is to be treated as business would deny the possibility of selling an investment based on a market factors, or dealing in them it at all. Indeed, the category of STCG, as opposed to a long term capital gain at one extreme and business at the other, precisely fits the bill in this case.

10. The fact that the assessee has transacted in shares does not necessarily mean that it is a *trading* activity; shares held as investment may also be sold and purchased, the crucial factor being the frequency and volume of the trades to determine the true intention for which they are held. Considering the limited activity surrounding the shareholding of the assessee in relation to the 13 scrips, as discussed, the Court is not inclined to interfere with the concurrent findings of the CIT(A) and the ITAT. It is held, therefore, that the amount reported by the assessee is to be treated as

STCG. The question of law is answered against the revenue and in favour of the assessee.

For the above reasons, the Court finds that the appeal has no merit, and is accordingly dismissed. No order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

APRIL 16, 2014

