

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 09.01.2013

+ **ITA No.703/2012**

COMMISSIONER OF INCOME TAX-VII

..... Appellant

versus

AVINASH JAIN

..... Respondent

Advocates who appeared in this case :

For the Appellant : Mr Sanjeev Rajpal, Adv.

For the Respondent : None

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V. EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

This appeal has been filed by the revenue against the order dated 20.07.2012 passed by the Income Tax Appellate Tribunal in ITA No.3379/Del./10. That appeal had also been filed by the revenue in which the following ground was raised in relation to the assessment year 2007-08:-

“The Ld. CIT(A) erred in law and on the facts in holding that the action of the Assessing Officer in holding short Term capital gain and long term capital gain be treated as business income has no substance and are without any cogent reason and thereby deleting addition of ₹1,38,015/- and

₹1,07,44,493/- made by the AO on account of Short Term capital gain and Long Term capital gain respectively.”

The assessee is engaged in sale and purchase of shares and maintains two separate portfolios. One is an investment portfolio and the other is a trading portfolio. This practice of the assessee has been going on for earlier years also and this has been recognized by the revenue as also by the Tribunal in the impugned order. It is only in this year that the assessing officer made additions of ₹1,38,015/- and ₹1,07,44,493/- on account of short term capital gains and long term capital gains respectively in relation to the sale of shares out of the assessee's investment portfolio. The assessing officer did so by treating both the short term capital gain as well as the long term capital gain as business income by construing the entire activity of the assessee as a business activity.

2. The Commissioner of Income Tax (Appeals) by an order dated 24.06.2010 allowed the appeal of the assessee. Being aggrieved thereby the revenue preferred the said ITA No.3379/Del./10 before the Tribunal on the above mentioned ground.

3. The Tribunal noted that the Commissioner of Income Tax (Appeals) had placed reliance, inter alia, on the CBDT circular No.4/2007 dated 15.06.2007 as also upon decisions of the Supreme Court in the cases of *CIT Vs. Associated Industrial Development Co. (P) Ltd.* : 82 ITR 586 (SC) and *CIT Vs. H.Holck Larsen* : 160 ITR 67 (SC).

4. The said circular of the CBDT reads as under:-

“CBDT also wishes to emphasize it is possible for a tax payer to have two portfolios i.e. an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock in trade which are to be treated as trading assets. Where an appellant has two portfolios, the appellant may have income under both heads i.e. capital gains as well as business income.

Assessing Officer are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the appellant as investment (and therefore giving rise to capital gains) or as stock-in-trade and therefore giving rise to business profits). The Assessing Officer is further advised that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the appellant as investment or stock-in-trade.”

After concurring with the views expressed by the CIT(Appeals), the Tribunal held as follows :-

“6. We have heard rival contentions and gone through the relevant material available on record. CBDT by way of above Circular has allowed the assessee to maintain two types of portfolios in their books of accounts - one on account of investment and the other on account of trading. It is not the case that the assessee started these activities in the year under consideration. The practice is supported by earlier years also which is not disputed. The department has earlier accepted the assessee's practice and treatment under heads of capital gains and business. Assessee's separate activities in share are further supported and endorsed by the fact that separate de mat accounts, bank accounts are being maintained and separate trading account and investment accounts are maintained in the books. Under these circumstances it leaves no room for doubt that the assessee was dealing in different activities of trading and investment. In view thereof we find no infirmity in the order of CIT(A) which is upheld.”

5. Before us the Id. Counsel for the revenue submitted that while the CBDT circular only mentioned that it was “possible” for a tax payer to have two portfolios, namely, an investment portfolio and a trading portfolio, the Tribunal has misunderstood the said circular by holding that the circular had “allowed” the assessee to maintain two types of portfolios. Although technically the Id. Counsel for the revenue may be right but that really does not make any difference when the entire circular is considered. The intent and purport of the circular is to demonstrate that a tax payer could have two portfolios, namely, an investment portfolio

and a trading portfolio. In other words, the assessee could own shares for the purposes of investment and/or for the purposes of trading. In the former case whenever the shares are sold and gains are made the gains would be capital gains and not profits of any business venture. In the latter case any gains would amount to profits in business. This has been made clear by the CBDT circular in the remaining portion of the circular itself.

6. On facts, the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal have held that the short term capital gains and the long term capital gains in the present case were out of the investment account and were not related to the trading account of the assessee. That being the position, no interference with the decision of the Tribunal is called for. No question of law arises for our consideration.

The appeal is dismissed.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 09, 2013

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