

\$~15

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

Date of decision: 6th August, 2014

+ **ITA 1241/2011**

CIT Appellant
Through Mr. Ruchir Bhatia, Jr. Standing
Counsel.

versus

CNB FINWIZ LTD Respondent
Through Mr. S. Krishnan, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

This appeal by the Revenue, which pertains to assessment year 2005-06, in the case of CNB Finwiz Ltd., raises the following substantial question of law:-

“Whether the Income Tax Appellate Tribunal was right in holding that the income from sale of shares should not be assessed as ‘business income’ but as ‘short-term capital gains’?”

3. The respondent-assessee, had for the assessment year 2005-06, filed original return on 30th October, 2005, declaring income of Rs.1,46,09,330/-. The assessment order records that the respondent-

assessee was a share broker registered with the National Stock Exchange and Bombay Stock Exchange and engaged in business of sale and purchase of shares. The respondent-assessee had declared short-term capital gain of Rs.82,32,316/- from sale and purchase of shares. After referring to Circular No.4/2007 dated 15th June, 2007 and judgment of Supreme Court in the case of *CIT (Central), Calcutta Vs. Associated Industrial Development Company (P) Ltd.* (1971) 82 ITR 536 (SC) and some other decisions, the Assessing Officer had held that profit from sale and purchase of shares should be treated as “income from business” as the shares were held as “stock-in-trade” and not as an “investment”. However, there was no adjudication and reference to facts, except noticing that the assessee, who had no opening stock, had purchased shares for Rs.2,95,00,155/- and sold shares for Rs.2,40,11,239/-. The Assessing Officer recorded that nearly 81% of shares purchased were sold during the year in question and the respondent-assessee had not earned any dividend. The Assessing Officer has in a chart reproduced details of sale and purchase of shares subject matter of short term capital gains. The chart reads:-

“Company	Purchased on	Sold on	Period holding	of	Whether divided received or not
NTPC	03.11.04	28.02.05	3 mth & 25 days		NO

Dena Bank	23.02.05	10.03.2005 & 11.03.05	15 days & 16 days	NO
SBI	01.11.04	29.03.05	4 mth & 28 days	NO
SBI	30.11.04 & 01.12.04	30.03.05	4 months	NO”

The Assessing Officer highlighted that the period of holding was between 15 days to about 5 months. The Assessing Officer contradicted himself and accepted that dividend had been received on account of shares of NTPC, which had not been sold till 31st March, 2005. He emphasised that no dividend was received on shares, which were sold before the said date.

4. Commissioner of Income Tax (Appeals) decided the issue in favour of the Revenue and confirmed the said addition for similar reasons given by the Assessing Officer. He observed that the holding period was very short and the respondent-assessee had not received any dividend on the shares sold. He referred to the chart relating to sale and purchase of shares of NTPC, Dena Bank and the State Bank of India.

5. It is noticeable that there were only two transactions for purchase of shares of NTPC and Dena Bank and three transactions were for purchase of shares of State Bank of India. Similarly, there were two transactions for sale of shares of NTPC and Dena Bank and two transactions for sale of shares of State Bank of India. We also

notice that the appellant had shown “business income” of Rs. 63.77 crores, which was in addition to the short-term capital gain of Rs. 82,32,316/- from sale of shares.

6. The respondent-assessee had submitted that their total turnover was Rs.4697.23 crores, as against investment in shares of Rs.2.95 crores. In the previous assessment years they were maintaining dual portfolio of investment (capital asset) and stock-in-trade (trading asset). The gains from investment were shown as “short-term capital gains”, whereas the profits earned from sale of shares were shown and treated as “business income” in the earlier years.

7. The Tribunal, in view of the reasons given in paragraph 6 of their order dated 13th May, 2011, accepted the submission of the respondent-assessee. We deem it appropriate to reproduce the said paragraph:-

“6. We have heard both the parties and gone through the material available on record. The assessee had filed minutes of the meeting of Board of Directors of the CNB Finwiz Ltd. held on 12th October, 2004 and 19th October, 2004. In meeting dated 12th October, 2004 it was resolved that an application for purchase of 20,25,000 shares at the rate of Rs.62/- in the Initial Public Offer of equity shares of NTPC should be made for the purpose of investment. Shri Chand Rattan Bagri, the Director of the company was authorized for applying for shares of NTPC by opening depository account in the name of IL & FS services. In Board meeting dated 19th October, 2004 it was resolved that equity shares of State Bank of India may be purchased from secondary market for a sum not exceeding Rs.1,50,00,000/- for the purpose of investment. Again as

per minutes of the meeting held on 28th January, 2005 it was resolved to purchase 25,00,000 shares of Dena Bank for the purpose of investment in the Initial Public Offer. The assessee had filed photo-copy of investment register for the relevant period. On perusal of register of investment it is seen that the assessee has acquired shares of NTPC as per Board resolution dated 12th October, 2004 and shares of State Bank of India on different dates from secondary market. The shares of Dena Bank has been purchases by making application in public offer as per Board's resolution. The acquisition of these shares in the investment register has been shown out of surplus funds. These shares were credited in Demat account and have been sold during the year except 25,000 shares of NTPC. Therefore, from the Board resolutions and entries in the books of accounts it is proved that these shares were held as investments and not as stock-in-trade. The assessee had also received dividend from the shares which were held as stock-in-trade. Merely because the dividend has not been received from shares held as investments, the nature of such shares cannot be treated as stock-in-trade. The assessee has maintained investment portfolio as well as trading portfolio. The shares in the investment portfolio have been held in Demat account. Therefore, profit on sale of shares will be assessable under the head 'short term capital gain' and not as business income. The assessee's case is squarely covered by the decision of Hon'ble Bombay High Court in the case of Gopal Purohit Vs. JCIT (supra). In view of the above discussion, it is held that the profits earned on sale of shares held as investment will be assessable under the head 'short term capital gains' and not as 'business income'. We, therefore, decide this issue in favour of the assessee."

8. It is clear from the aforesaid finding that the respondent-assessee, though a member of Bombay Stock Exchange and National Stock Exchange, had maintained two portfolios. One relating to investments and other relating to stock-in-trade. Profits and losses from investments were shown as "capital gains" either long-term or short-term and profits and losses from "stock-in-trade" were shown as "business income". This position was also accepted in earlier assessment years i.e. 2002-03 onwards. The respondent-assessee had

turnover of more than Rs.4697.23 crores, whereas investment in shares in comparison was a small amount of Rs.2.95 crores. The assessee had declared “business income” of Rs.63.77 crores in respect of transactions as a member of the stock exchanges and as a result of carrying on trade in shares. The shares held as investment were kept in a separate portfolio. The said shares related to only three companies. Shares of Dena Bank and NTPC were purchased in the initial public offer as has been recorded in paragraph 6 above. This was the stand of the respondent-assessee before the lower authorities. Shares of State Bank of India were also purchased and kept in the investment portfolio account and not treated as stock in trade. These shares were sold after a gap of 4 months or more.

9. In view of the facts stated above, we do not think that the order passed by the Tribunal requires any interference. The question of law is accordingly answered in favour of the respondent-assessee and against the appellant-Revenue. The appeal is dismissed. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

AUGUST 06, 2014

NA