

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.4995/Del/2011
Assessment Year : 2006-07

M/s D.D. Merchant Bankers
Limited,
F-1/9, Okhla Industrial Area,
Phase-1,
New Delhi.

PAN : AAACD9790R.

(Appellant)

Vs. Assistant Commissioner of
Income Tax,
Circle-10(1),
New Delhi.

(Respondent)

Appellant by : Shri Prem Nath Monga, Advocate.
Respondent by : Shri Anil Kumar Sharma, Senior DR.

Date of hearing : 30.11.2016

Date of pronouncement : 09.12.2016

ORDER

PER G.D. AGRAWAL, VP :-

This appeal by the assessee for the assessment year 2006-07 is directed against the order of learned CIT(A)-XIII, New Delhi dated 1st September, 2011.

2. The only ground raised by the assessee reads as under :-

"1(a). That the Id.CIT(A) has erred in law in confirming the erroneous order passed by the Id. AO by upholding that short term capital gain transactions/long term capital gain transactions shown by the appellant from its investments through Kotak Securities Limited represented the trading transactions of the assessee, treating the same as business income.

1(b). That the reasoning of the Id.CIT(A) given in the impugned order is based on erroneous and insufficient grounds and also contrary to the statutory provisions of

law, leading to wrong conclusion which needs to be set aside by accepting the assessee's appeal."

3. The other grounds raised by the assessee are only arguments in support of this ground.

4. At the time of hearing before us, the learned counsel for the assessee stated that this appeal was kept pending because the similar issue was pending before the Special Bench in the case of Suraj Overseas vide ITA No.3827/Del/2009. In the aforesaid case, the Special Bench declined to answer the question because the issue is now squarely covered by the decision of Hon'ble Jurisdictional High Court. That the Division Bench of the ITAT, after considering the decision of Special Bench as well as Hon'ble Jurisdictional High Court in the case of Maxopp Investment Ltd. – 347 ITR 272 (Del), set aside the matter to the file of the Assessing Officer. He also pointed out that the issue is also covered by the decision of Hon'ble Jurisdictional High Court in the case of Radials International Vs. ACIT – [2014] 367 ITR 1 (Delhi). He stated that the issue may be set aside to the file of the Assessing Officer to be re-examined in the light of the above decisions of Hon'ble Jurisdictional High Court.

5. Learned DR has no objection to the above suggestion of the learned counsel for the assessee.

6. We have considered the submissions of both the sides and have perused the material placed before us. We find that Hon'ble Jurisdictional High Court in the case of Radials International (supra) has accepted that the profit from sale of shares was assessable as capital gains and not as business income. The relevant finding of their Lordships reads as under:-

"Held, allowing the appeal, (i) that from the terms of the agreement it did not emerge that the intention of the

investors was to make profits. The terms, on the other hand, indicated that regardless of the level of discretion handed over to the portfolio manager, there was neither any guarantee that the securities invested in would appreciate nor was the portfolio manager responsible to the client for any loss from the deficiency of value of the securities. Thus, the portfolio management scheme agreement at best, embodied the intention to appoint an agent with limited liability, who would invest on behalf of the investor and nothing more. While a transaction may be motivated by the intention to resell at an enhanced value, it would not be possible to evaluate whether the transaction was actually in the nature of trade, until the securities are actually resold. Moreover, in a discretionary portfolio management scheme, it becomes all the more relevant and necessary to evaluate the intention of the assessee in conjunction with his conduct and other circumstances since the intention of the assessee could not be ascertained at the time of depositing the money in the investment because the actual sale and purchase of securities happens at the hands of the portfolio manager, a mere agent. Second, since the intention of the assessee could not be ascertained, and the investments were made by the portfolio manager without the knowledge of the assessee in a discretionary portfolio management scheme, the manner in which the securities have been treated by the assessee can and ought to be evaluated only post the fact of investment and not at the time of depositing the money. The portfolio management scheme agreement in this case was a mere agreement of agency and could not be used to infer any intention to make profit. The intention of an assessee must be inferred holistically, from the conduct of the assessee, the circumstances of the transactions and not just from the seeming motive at the time of depositing the money. Along with the intention of the assessee, other crucial factors like the substantial nature of the transactions, frequency, volume, etc., must be taken into account to evaluate whether the transaction are adventure in the nature of trade. In the instant case the source of funds of the assessee were its own surplus funds and not borrowed funds.

(ii) That it was clear that about 71 per cent of the total shares had been held for a period longer than 6 months and had resulted in an accrual of about 81 per cent of the total gains to the assessee. Only 18 per cent of the total shares were held for a period less than 90 days, resulting in the accrual of only 4 per cent of the total profits. This showed that a large volume of the shares purchased were,

as reflected from the holding period, intended towards the end of investment. The profit from sale of shares was not assessable as business income."

7. Thus, considering the facts of the aforesaid case i.e., 71% of the total shares have been held for a period larger than six months which has resulted in accrual of about 81% of total gains and only 18% of the shares were held for a period of less than 90 days. However, in the case of the assessee, no such working is available with regard to average holding of the shares. In view of the above, we deem it proper to set aside the orders of authorities below on this point and restore the matter to the file of the Assessing Officer. The Assessing Officer will re-examine the facts of the case and adjudicate the issue in the light of the decisions of Hon'ble Jurisdictional High Court. Needless to mention that he will allow adequate opportunity of being heard to the assessee while readjudicating the issue.

8. In the result, the appeal of the assessee is deemed to be allowed for statistical purposes.

Decision pronounced in the open Court on 09.12.2016.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(G.D. AGRAWAL)
VICE PRESIDENT

VK.

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1. Appellant : **M/s D.D. Merchant Bankers Limited,
F-1/9, Okhla Industrial Area,
Phase-1, New Delhi.**
2. Respondent : **Assistant Commissioner of Income Tax,
Circle-10(1), New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar