IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(1) I.T.A. No.39 of 2012.
Decided on:-April 11, 2014.

The Commissioner of Income Tax-II, Ludhiana. .....Appellant.

Versus

M/s Pooja Investment Pvt. Ltd., Ludhiana. .....Respondent.

(2) I.T.A. No.226 of 2012.

The Commissioner of Income Tax-II, Ludhiana. .....Appellant.

Versus

M/s Hero Investments Pvt. Ltd., Ludhiana. .....Respondent.

(3) I.T.A. No.227 of 2012.

The Commissioner of Income Tax-II, Ludhiana. .....Appellant.

Versus

M/s Bahadur Chand Investment Pvt. Ltd., Ludhiana. .....Respondent.

CORAM: Hon'ble Mr. Justice Rajive Bhalla
Hon'ble Mr. Justice Dr. Bharat Bhushan Parsoon.

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Argued by:- Ms. Savita Saxena, Advocate for the appellant.

Mr. Akshay Bhan, Advocate for the respondent.

Dr. Bharat Bhushan Parsoon, J.

By way of this order, we shall dispose of ITA Nos.39, 226 and 227 of 2012 as common questions of fact and law are involved in these appeals. For convenience and clarity, facts have been taken from ITA No.39 of 2012.

2. The assessee dealing in shares and securities filed its return for the assessment year 2006-07 declaring an income of Rs.1,27,80,378/-. After processing the return, the case was selected for scrutiny. Notices under Sections 143(2) as also 142(1) of the Income Tax Act, 1961 (for short, the Act) were issued. From information supplied by the assessee, it was found that the assessee was normally deriving its income from the following sources:

(i) Dividends received from mutual funds and equity shares; and,

(ii) Interest from investment of capital in partnership firm.

3. During regular course of its business, the assessee made an investment of Rs.3 crores during the year in Tata Service Industries Fund (Dividend Plan) on 5.4.2005 for the purpose of earning dividend but this investment was prematurely redeemed on 21.12.2005 for Rs.4,24,70,700/-. The assessee had booked this profit as a short-term capital gain. The Assessing Officer (hereinafter mentioned as the AO), from the record, had found that the assessee had shown no intention of holding this investment

for the full term and rather not even for a year and that the assessee redeemed the investment with a purpose to earn more profits. The AO came to the conclusion that the assessee had made profits from its investment without waiting long enough for the investment to yield benefits in the form of dividends. Consequently, the AO treated the investment shown by the assessee as its stock-in-trade and the revenue generated i.e. Rs.1,24,70,700/- was taken as business income of the assessee vide an order dated 30.12.2008.

4. The Commissioner of Income Tax (Appeal), Ludhiana [hereinafter mentioned as the CIT(A)] disagreeing with the AO took the purchase of shares as an investment. Addition made in the income, taking it to be income from business, was deleted. In the appeal against this order of CIT(A) preferred by the revenue before the Income Tax Appellate Tribunal (hereinafter mentioned as the ITAT), the revenue had taken the following ground:

> *"That the learned CIT(A)-II has erred in law and on facts in directing the Assessing Officer to consider the income of Rs.1,24,70,700/- as short term capital gain instead of business income assessed by the Assessing Officer.*"

5. The revenue had sought restoration of the order of the AO on reversal of the order of the CIT(A).

6. The ITAT disagreeing with the AO, refused to set aside the order of the CIT(A) and held that units of Tata Mutual Funds (Dividend Plan) are assessable in the hands of the assessee as income from short term capital gains, and not as business income.

7. In appeal before this Court, following question of law has been posed for adjudication:

> "*Whether on the facts and in law, the Hon'ble ITAT was*

> *legally justified in upholding the decision of CIT(A)-II, Ludhiana and in holding that the income on sale of Tata Mutual Funds (dividend plan) are assessable as income from Short Term Capital Gain interealia on the ground that the units of mutual funds are not tradable and that therefore the assessee had made investment in non-tradable commodity?*"

8. Plea of the revenue is that the impugned transaction entered into by the assessee was conducted by it in the usual course of its business of trading in shares and securities. It is contended that the assessee was indulging in sale and purchase of securities as a routine and not for making static investments. Claims of the assessee, on the other hand, is that merely because the securities were not kept for their full term and were redeemed earlier than the stipulated period, profits on premature redemption were not earned in the conduct of business of sale as also transfer of shares and securities, but the same was on premature redemption of an investment.

9. Hearing has been provided to the learned counsel for the parties while perusing the paper book.

10. Before rival claims of the parties are adjudicated in the context of factual matrix and attending circumstances, it would be appropriate to analyse the backdrop in which concurrent findings by the CIT(A) and the ITAT were returned against the assessment framed by the AO. The matters which weighed with both the appellate authorities in returning finding in favour of the assessee, are as below:

(i) Intention of the assessee at the time of making deposit was to make capital investment. Sequelly, the impugned deposit was shown under the head "investment" and not under the head "stock in trade" in the balance sheet ending 31.3.2006;

(ii) Even in assessment-year 2005-06, such deposit made by the assessee had been shown under the head "investment" and not under the head "stock in trade" in the balance

sheet for the year ending 31.3.2005, assessment for which was made in the assessment year 2005-06 and this stand taken by the assessee was not interfered with. Principle of consistency was in favour of the assessee.

(iii) Deposit from which the taxable income was generated cannot be termed as tradeable item in the sense of shares etc. Units of the mutual funds are allotted as well as redeemed by the managers of the mutual funds itself at the prescribed rates. Such units have no secondary market for buying and selling as is the case with other shares and securities. In short, such units are not transferable in the same manner as other shares and securities are transferred;

(iv) There is no bar in redemption of an investment after a short period and there cannot be any change of nature of investment merely because it was not held by the assessee for the complete term; and,

(v) No borrowed funds were used by the assessee for the impugned deposit but it was surplus out of the earned income of the assessee, which was used for such deposit.

11. Notwithstanding such strong observations of the CIT(A) as also of the ITAT in their respective orders in favour of the assessee, there are certain important aspects which either got ignored or had not engaged the quantum of attention, these deserved by these appellate authorities. Those aspects are being considered herebelow.

12. The assessee is not a business entity in the nature of a manufacturing unit or marketing concern which, making departure from its normal business or marketing activities, had acquired a 'capital asset' as distinguished from 'business asset'. In case of such an assessee, as is mentioned earlier, making investment to raise a 'capital asset' would definitely be not in the nature of stock-in-trade and such transaction would

also not be a venture in the nature of trade. Thus, ***CIT Versus Principal Officer, Laxmi Surgical (P) Ltd [1993] 202 ITR 601 (Bombay)*** where the asset had been acquired by the assessee as a capital asset with an intention of earning profits because the company had suffered losses in the past in conduct of its normal business activities, was not taken in the nature of normal business activity. Similarly, in yet another case as ***Janak S. Rangwalla Versus Assistant Commissioner of Income Tax [2007] 11 SOT 627 (Mumbai)*** investment made in purchase of shares had been held to be income from capital gains as the assessee was not treated as a trader in shares and deposits. These authorities do not help the present assessee as it is dealer in stocks, shares and deposits etc. and conduct this trade of investments as its normal business activity.

13. Unlike circumstances of ***CIT Versus Kethan Kumar A. Shah [2000] 242 ITR 83 (Kerala)***, ***J.M. Share & Stock Brokers Ltd. Versus Jt. CIT, Special Range-22 (Mumbai)*** and ***CIT Versus Girish Mohan Ganeriwala 260 ITR 417 (P&H)*** cited by the assessee, deposit had not been made by the assessee departing from its normal business activity. Rather, in the case in hand, the assessee used to earn its bread and butter only from dividends etc. earned from its investments made in the nature of equity shares, securities, debentures etc. It also had its earnings from interest accruing on its investments made in the partnership firm which again is engaged in earning income from investments etc. In short, the assessee is fully engaged in whole time business and trading activity of dealing in investments in shares, debentures, mutual funds etc. These are its stock-in-trade as is raw material for a manufacturing concern. To demonstrate, as time is stock-in-trade for a chartered accountant or for a lawyer or for a practising engineer or for a professional alike similarly money and cash put in investments, deposits or even capital for earning profits as a regular course turns out to be stock-in-trade for an investment company, as is the

assessee.

14. The assessee in that sense trades in money; it is its stock-in-trade and thus, it earns its income by profits in sale and purchase of shares, securities and other investments as also by earning out of dividends and interest on money invested as capital which, in fact, all through forms its stock-in-trade only.

15. Thus, deposit of Rs.3 crores in Tata Service Industries Fund in the nature of units of a mutual fund was not in the nature of building up of capital but was in the nature of normal business activity of making investments to earn profits in the regular course of such business. Contention of the assessee that such deposit was merely to earn dividend and thus,was in the nature of capital investment different from the normal business activity of dealing in shares and debentures, is an argument, devoid of any merit.

16. Assessee, a company earning its income from sale and purchase of shares, securities as also from dividends and interest from its investments, as all other such investment companies do, acted intelligently in managing its portfolio. When sale and purchase of shares, debentures and other securities are subjected to vagaries of market forces which considerably affect quantum of profits and at times even results in losses, investments enuring for fixed returns are safe and are sometimes used by investment companies to offset their possible losses in trading of other scrips. Consequently, impugned deposit was not at all an activity made in departure from the normal business activity of the assessee. In fact, such deposit cannot be taken away from the normal business activity and also from usual course of trade of the assessee.

17. Merely because such deposit was made in a not freely tradeable

fund with a tenurial investment plan yielding high income and was shown as an investment in books of accounts of the assessee, are not the circumstances sufficient to conclude that the deposit was intended to be converted into long term or short term capital asset.

18. Circumstances sufficiently reveal that deposit in tenurial investment plan was merely to obviate possible losses as is the case of investments in equity, shares, securities and other derivatives etc. It cannot be denied that the assessee intended to increase its profitability by offsetting possible losses in its other type of investments. By no means can such a step by the assessee be construed as a bid to increase its capital freezing its volatility of liquidity. If the assessee, an investment company, would venture to enhance its capital by forclosing liquidity, then it will lose dynamics of its business and would become static earning only from interest or dividends received from its fixed and capitalised investments. Such an investment company then would lose the vibrance of its business. Such deposits are usually made by the investment companies like the assessee, as a strategy and pursuant to intelligent planning as stock in profitable trade, yielding fixed income when other derivatives may be in a situation of great flux giving no clear picture of high or low tides.

19. In short, the impugned deposit was clearly made in the usual course of its activity of trading in money and in the discharge of its normal business. Even though it was in the nature of tenurial investment, redemption of such investment during the same previous year of investment speaks volumes of the intention of the assessee that it had not intended to use such deposit as a capitalised investment.

20. Sequelly, booking this profit as a short term capital gain is clearly a strategic move of the assessee to blur vision of the revenue to show that such deposit was made in departure of its normal business and trading

activity of sale and purchase of equity shares, scrips etc. Non-holding of such deposit as an investment even for one year is clearly indicative of the normal business tendency of the assessee, a dealer in shares and scrips, to profitably liquidate investment for further booking at the earliest opportunity. Intention of nature of a transaction is to be gathered not only from the recording of an entry in the accounts where it even manipulatively may be shown as tenurial investment but also from the conduct which precedes or follows such a transaction. The pattern of investments made, behaviour of the assessee in conducting its business, nature of the transactions entered into in the usual course of its business, outcome of such transactions and of deposits made by the assessee, are important factors which were completely ignored by the appellate authorities. Outcome of this deposit is that the assessee had made profits from its investment and it was in the usual course of its business. The assessee had also not to wait for long to earn this income in the nature of dividend.

21. Viewing it from another angle, undoubtedly, the motive in purchase and sale of share, securities and of such deposits by the assessee is to earn profit. There cannot be intention or object of making such deposits to raise capital. The only purpose was to earn safe profits within a short span of time, even though by making investment in a tenurial dividend plan.

22. Merely because it is a single transaction of deposit ipso facto is not a ground to take this as an investment in the nature of raising capital. To constitute trade, it is not necessary that there should be a series of transactions of purchase and sale. In ***CIT Nagpur Versus Sutlej Cotton Mills Supply Agency Limited (100 ITR 276)***, the Hon'ble Apex Court had held that even a single transaction of purchase and sale even outside the assessee's line of business may constitute a venture in the nature of trade where neither repetition nor continuity of transactions is necessary.

23. In the present case, the assessee is engaged in the trade of sale and purchase of equity shares, securities and debentures etc. The transaction in dispute is no different from the others entered into by the assessee in the regular course of its business and in the usual discharge of its functions by its employees. Sequelly, if all the facts and circumstances of the case are taken into consideration, by no means such impugned deposit can be taken to be distinct or different from other transactions carried out by the assessee during the year under consideration. This deposit was clearly made by the assessee to earn profits on its deposit and thus, was in the nature of stock-in-trade and the revenue generated to the extent of Rs.1,24,70,700/- is to be assessed as business income.

24. It is important to note that this is not for the first time that such revenue income has been earned by short-circuiting the wait of tenurial investment but even earlier, the assessee had been undertaking such ventures. In the assessment year in question, the assessee had even sought to make adjustment for the brought forward unabsorbed short-term capital loss of the two previous years i.e. for a sum of Rs.1,93,776/- for the assessment year 2004-05 and for a sum of Rs.2,49,734/- of the assessment year 2005-06. It is clear that the assessee had been using the methodology of shifting its normal trading activity of some transactions into term investments and later had been getting the same redeemed before tenure and most of the times in the year of deposit itself and then had been showing it as short term capital gain or loss as the case may be without accounting for results of such transactions in the trading account as normal business or trading activity.

25. This maneuverability and manipulation used by the assessee as a consistent course, blinding the vision of the revenue is merely a bid to reduce its tax liability. It is neither 'tax planning' nor 'tax organization' nor 'tax management' but is clearly a manipulation to thwart the tax effect as also to thwart legal provisions for which actually, there is no escape for the

assessee.

26. Merely because deposits in mutual funds are not traded in the nature of sale and purchase of equity shares and such transactions are different in effect and consequences is no ground to treat those differently. Frequency of dealings in deposits of mutual funds with the strategy of firstly investing in tenurial plans and then getting redemption within the same year of deposit and at times resulting in huge profits while at other times in loss, has been usual business activity of the assessee. Such before term redemption, is done in the usual course of business by the assessee clearly to increase its actual cash inflow to tide over its commitments made in the market and at times to earn higher interest in other lucrative investment plans contemporaneously emerging in the market. In this case, in the name of consistency the assessee had tried to hoodwink the authorities. Rather previous conduct of the assessee reveals that the accounts had been manipulated by the assessee to treat the investment as a capital asset only as a camouflage and smoke screen. It is a case where intention as also principle of consistency sought to be used by the assessee in its favour rather goes against it as year after year the same manipulation strategy and maneuverability had been adopted to hoodwink the revenue.

27. In view of the discussion made earlier, by now, it is abundantly clear that the CIT(A) as also the ITAT were wrong in adjudicating the income on sale of Tata Mutual Funds (Dividend Plan) as income from 'short term capital gains' merely on the ground that the units of mutual funds were not freely tradable and thus, such investment was in non-tradeable commodity. In fact, in the present case, it has been amply proved that the business of the assessee is to make profits by virtue of investments in shares and securities etc. Merely because there is single transaction or that such investment was in not freely tradeable commodity, does not change the profit intent of the assessee who is in the business of investments only.

Therefore, the investment made by the assessee was rightly treated as stock-in-trade and revenue generated to the tune of Rs.1,24,70,700/- was correctly assessed as business income by the AO. Rightly, no adjustment for the balance forward on account of short term capital loss of assessment year 2004-05 to the tune of Rs.1,93,776/- and for the assessment year 2005-06 to the tune of Rs.2,49,934/-, had been allowed by him.

28. So far as ITA Nos.226 and 227 of 2012 are concerned, unlike case of ITA No.39 of 2012, activities of the assessee in these appeals are so frequent and regular in their operation and in the usual course of business activity of the assessees that no case for treating the impugned income as resulting from transactions labelled as 'tenurial investments', is made out.

29. Sequelly, the question of law posed in earlier part of this judgment i.e. para 7 is answered in favour of the revenue and against the assessee.

30. Consequently, all the three appeals filed by the revenue are allowed.

(Dr. Bharat Bhushan Parsoon)
Judge

(Rajive Bhalla)
Judge

April 11, 2014
'Yag Dutt'

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes