

Reassessment quashed as AO couldn't suddenly treat profit from share dealing as business income and not cap. Gains.

Summary – The High Court of Delhi in a recent case of Mohan Gupta (HUF), (the Assessee) held that where income from sale purchase of shares was treated as capital gain in earlier years, in absence of any new material, reassessment could not be initiated holding same as business income.

Facts

- The assessee-HUF filed its return of income under section 139(1), declaring income from shares as capital gain.
- The return was processed under section 143(1). Later on the revenue issued a notice to the assessee under section 148 for reopening of the assessment.
- The reason provided to the assessee was that the income from shares was to be treated as business income and there was an omission or failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and hence, it has escaped assessment for which notice under section 148 was issued.
- In one of the previous years, similar case arose. Where, the assessee concluded that the activity of sale and purchase of shares was not for investment purpose but in the nature of business activity. But the fact that such income was considered capital gain was considered insufficiently by Assessing Officer. The assessee appealed this order and Commissioner (Appeals) held that the income in this case was to be treated as capital gain.
- Despite the decision, revenue proceeded with the reopening of the assessment reasoning that an order under section 143(1) is only an intimation which does not involve an application of mind of Assessing Officer. Further, it was stated that given the nature and frequency of scrips traded by assessee, the Assessing Officer had reason to believe that income had escaped assessment.

Held

- Section 147 permits the reopening of an assessment, and the issuance of notices etc., if the 'Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year.....'.
- Though the Court will not judge the adequacy of the reasons provided by the Assessing Officer, the Court must assess whether the belief is based on relevant and specific information that could lead to such a belief.
- In the instant case, the reasons provided under section 148 are that 'by reason of omission or failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and by wrong treatment of income', certain income has escaped assessment. No details are provided as

regards what such information is, which engaged the attention of the Assessing Officer and was not disclosed by the assessee while filing returns. The reasons must indicate specifically what such objective material facts are on the basis of which a reopening is initiated under section 148. There is a vague reference in this case to 'material facts', which does not meet the standard under section 148. In fact, the reasons provided also state that '[a]s per the office note of the Assessing Officer for the assessment year 2007-08, the issue of treating of short-term capital gain income on sale of share is needed to be assessed again.' Therefore, this reassessment is not on the basis of new information or facts that have come to the fore now, but rather, a re-appreciation or review of the facts that were provided along with the original return filed by the assessee.

- In the instant case, the record does not show any tangible material that created the reason to believe that income had escaped. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier assessment year 2005-06, which amounts to an abuse of power and is impermissible. Equally, even the order of the Assessing Officer for the assessment year 2007-08, converting the short-term capital gain into business income, has been reversed by the Commissioner (Appeals) which was confirmed by Tribunal.
- In response, it is argued that since the return was processed under section 143(1) for the assessment year 2005-06, which involves a mere intimation, rather than an application of mind or true assessment of the return, a less stringent threshold must be taken in terms of 'reasons to believe' that income has escaped assessment or not.
- The writ petition is allowed and the impugned notices dated 26-3-2012 and 9-8-2012 are hereby set aside.