

## **HC directs ITAT to consider in detail issue of nature of income from sale of shares as business income or cap gains**

**Summary – The High Court of Madras in a recent case of Altius Securities Trading (P.) Ltd., (the Assessee) held that when specific case of assessee was that income arising from sale of shares could not be treated as income from business, in fairness to claim of assessee, Tribunal ought to have considered same in detail to arrive at a factual finding.**

### **Facts**

- The assessee was a trader in shares. The assessee was trading in two segments in stock exchange, viz., cash segment and Future and Options (F&O) segment. Admittedly, the assessee had two different portfolios one as investment and another as stock-in-trade. While profits from trading in cash market up to September 30, 2004, was offered to tax under the head 'Business', similar gains subsequent to that date was offered to tax under the head 'Short term capital gains'.
- The Assessing Officer viewed that on an average, the holding period of these shares ranged from 2 to 45 days or less.
- The assessee had also taken funding for trading in securities and had shown the profits made through the funding as capital gains. Taking the view that the transactions made in cash segment from 1-10-2004 to 31-3-2005, were all executed in the normal course of business and not as investments, assessment was sought to be made as business income.
- This was countered by the assessee that he had held the shares for earning dividend income and capital appreciation and he had also borrowed capital for the purpose of business.
- The Assessing Officer held that the transactions during the period 1-4-2004 to 30-9-2004, were treated by the assessee as stock-in-trade and offered the gain or loss under the head 'business'. However, after 1-10-2004, the assessee had shifted his stand treating the trading of shares and securities as by way of investment. Thus, the Assessing Officer rejected the assessee's stand to treat the transactions and the profits arising therefrom as stock-in-trade and business income.
- On appeal, the Commissioner (Appeals) found the reasoning of the Assessing Officer as incorrect factually and that contrary to the observation of the Assessing Officer that the shares were held between 2 and 45 days, the assessee had held many shares exceeding 45 days upto 12 months. The Commissioner (Appeals) also pointed out that borrowing of funds was for the purpose of F&O business and not for the purpose of investment. The shares purchased as investment had also been kept in the investment account and not in the stock-in-trade (inventory) account. Thus, on an analysis of facts, the Commissioner of Income Tax (Appeals) agreed with the assessee and allowed the appeal.
- On further appeal, the Tribunal held that a perusal of the assessment order, clearly brought out the nature of the transactions and the facts as brought out by the Assessing Officer remained undisputed.

- Thus holding, the Tribunal allowed the appeal filed by the Revenue.
- The assessee filed rectification petition before the Tribunal contending that the assessee had not admitted the facts as had been stated by the Assessing Officer to ultimately treat the income as business income.
- However, the Tribunal by the Third Member decision rejected the rectification petition.
- On appeal:

#### **Held**

- It cannot be agreed that on the sole ground of the order in the rectification petition not being challenged in the manner known to law, the order of the Tribunal would reach a finality. A reading of the order of the Tribunal clearly shows the perfunctory manner of the disposal of the appeal. This is more so in the context of the findings rendered by the Commissioner (Appeals) allowing the assessee's appeal on the findings of fact arrived at by the Commissioner (Appeals), which was a subject matter of appeal before the Tribunal at the instance of the Revenue.
- As rightly pointed out by the assessee that if the Tribunal decides that the findings of the Commissioner (Appeals) was without any material, nothing prevented the Tribunal from going into those facts and the findings to arrive at a finding based on the records. But all that the Tribunal observed that :
- The assessment order, clearly brought out the nature of transactions. These facts as brought out by the Assessing Officer remained undisputed.
- As far as the observation of the Tribunal is concerned, the only fact admitted by the assessee was that it had two different portfolios, being trading in shares and investments. The dispute raised by the assessee related to the transactions falling under both the heads. When the specific case of the assessee was that the income arising from the sale of shares could not be treated as income from business, in fairness to the claim of the assessee, the Tribunal ought to have considered the same in detail to arrive at a factual finding.
- As far as the present case is concerned, the Tribunal has not adjudicated on the issue in the light of the materials projected by the assessee in support of his case.
- The order passed by the Tribunal on the mistaken impression that the assessee had not raised any dispute on the facts found by the Assessing Officer, calls for interference by this Court.