

Gains arising on shares were capital gains when shares were continuously shown as investment in balance sheet

Summary – The Pune ITAT in a recent case of Suresh Babulal Shah (HUF), (the Assessee) held that where assessee had continuously shown shares as investment in balance sheet, it would be entitled to treat gains arising on purchase and sale of shares as capital gain

Facts

- The assessee was a HUF. It declared gain arising on purchase and sale of shares as short-term capital gain.
- The Assessing Officer found that shares were held for a short period. He, therefore, treated the income declared by the assessee under the head 'short-term capital gain' as 'business income'. He further noted that in view of the volume, frequency, continuity and regularity of the purchase and sale of transactions of shares, the assessee was not justified in treating the said gains as STCG. He, accordingly, concluded that impugned gain was systematic course of activity with set purpose and was in the nature of business income.
- The Commissioner (Appeals) affirmed the order of the Assessing Officer.
- In appeal, before the Tribunal, the assessee argued that various shares held by it were reflected in its balance sheet, under the head 'investment' and not as 'current asset'. The assessee further argued that the resultant short-term capital gain declared included gains on several transactions where the shares were subscribed in initial public offerings and sold after listing.

Held

- The assessee has declared gain arising on purchase and sale of shares to the tune of Rs. 13,59,669 as short-term capital gain assessable under the head capital gains. As per the scheme of the Act, the assessee is entitled to beneficial treatment in taxation on short-term capital gains and long-term capital gains on sale of shares and securities listed on a recognize stock exchange. Accordingly, the assessee has sought to avail the concessional tax treatment in respect of capital gains offered that arose to him. The revenue, on the other hand, has taken a view that the gain arising on impugned purchase and sale of shares is nothing but a business activity and therefore taxable under the head 'business income'. By doing so, the revenue has sought to forfeit the concessional tax treatment available to the assessee where income is chargeable under the head 'capital gains'.
- The controversy, in essence, is in a narrow compass, *i.e.*, whether the impugned transactions of purchase of shares and sale thereof tantamount to an investment activity or a trading activity. In order to address the aforesaid controversy, the facts as discernible on record has been noted. It is seen that the assessee has declared the purchase of shares and holding thereof at the end of the

year under the head 'investments' which connotes capital transaction unlike where these shares stock held as trading asset and is declared under the head 'current asset' in cases where the assessee intend to carry on a business activity. It is noticed that the assessee at the beginning of the year was barely holding few scrips under the head 'investments'. It is also borne out from the record that several transactions giving rise to gain are acquired by way of initial public offering which were re-sold after the same were listed in the stock exchange. It is noticed that the assessee was holding barely 16 scrips at the end of the financial year 2007-08 relevant to assessment year 2008-09. This kind of factual data does not support the case of the revenue that the assessee was indulging in any sort of systematic or organized business activity.

- Notably, the assessee has reportedly paid Securities Transaction Tax (STT) towards sale of impugned shares.
- With a view to dilute controversy continuously cropping up on the subject, the CBDT has unraveled the guidelines in this regard. The CBDT Circular (supra) clarifies that once a particular stand has been taken by the assessee to such purchases in a particular assessment year it shall remain applicable in subsequent assessment years also and the tax payers shall not be allowed to adopt divergent stand in different assessment years. Clearly, the CBDT Circular (supra) attempts to tone down the ongoing controversy on the issue in favour of the assessee. It is found on the fact that the action of the assessee is consistent with the aforesaid CBDT Circular. Consequently, gains arising on sale is required to be taxed under the head 'capital gains' only. The averments made on behalf of the assessee are that several purchases made in the earlier year and declared as capital investment in the balance sheet of the earlier year were also sold and gain arising therefrom formed part of the impugned capital gains arising in this year. There is no reason to impugne the declared intention of the assessee that the share were acquired as capital asset. In the aforesaid view of the matter, there is considerable merit in the arguments raised on behalf of the assessee. Hence, the assessee is entitled to treat the gains arising on purchase and sale of shares in the impugned assessment year as short-term capital gains as claimed. Accordingly, the action of the revenue on the issue requires to be reversed.