

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 975/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

Shri Atul A Shah, F-1001, Shanti Appt., Off Atul Towers, Mathurdas Road, Kandivali, Mumbai - 400067.	बनाम/ v.	Assistant Commissioner of Income Tax- 25 (3), Bandra Mumbai.
स्थायी लेखा सं./PAN : AACPS9190F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Rahul K. Hakani
Revenue by :	Shri Aarsi Prasad

सुनवाई की तारीख / **Date of Hearing** : 07-06-2016

घोषणा की तारीख / **Date of Pronouncement** : 17-08-2016

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 975/Mum/2013, is directed against appellate order dated 29th November, 2012 passed by learned Commissioner of Income Tax (Appeals)- 35, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2007-08, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 16th December, 2009 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) reads as under:-

“1. On facts and circumstances of the case, the learned CIT(A) has erred in treating a sum of Rs.5,51,677 being capital gain taxable @10% as business income. This should be treated as short term capital gains taxable @10%.”

3. The brief facts of the case are that the assessee is a partner in partnership firms from which the assessee derived income by way of share of profit, remuneration and interest income. The assessee has also declared capital gains on sale of shares and interest income etc.

4. During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the A.O. observed that the assessee has entered into transactions in shares and mutual funds and keeping in view the volumes, frequency, continuity and regularity of transactions in share and mutual funds, the assessee was asked by the AO to show cause as to why the short term/long term capital gains on shares and mutual funds shown should not be treated as assessee’s business income.

The assessee submitted that the assessee had disclosed income from securities transaction as short term and long term capital gains. In the earlier assessment year 2005-06 in scrutiny assessment u/s 143(3) read with Section 143(2) of the Act, it was accepted as capital gain . While for the assessment year 2006-07 the same was treated as business income. The assessee submitted that he has filed appeal before the ld. CIT(A) and submitted that the order of the AO for earlier year suffered from several infirmities against which elaborate submissions were made before the learned CIT(A) and order of the learned CIT(A) is awaited.

The A.O. observed that assessee has failed to submit specific explanation as to why income from shares be not treated as business income and keeping in view the volume, frequency, continuity and regularity of the share transactions, it can be inferred that these transactions made by the assessee with a profit motive and considering the facts that the assessment in assessee's own case for the immediately preceding assessment year i.e. assessment year 2006-07 under similar facts and circumstances of the case the entire profits on purchase and sale of shares were treated as income of the assessee under the head profit and gain from business and profession and hence the gains offered on short term capital gains of Rs. 5,51,677/- was treated as income of the assessee from business vide assessment order dated 16th December, 2009 passed by the AO u/s 143(3) of the Act.

5. Aggrieved by the assessment order dated 16.12.2009 passed by the A.O. u/s 143(3) of the Act, the assessee filed his first appeal before the ld. CIT(A).

6. Before the ld. CIT(A), the assessee submitted that the assessee is an individual deriving income from M/s Kind Metal Works as remuneration, interest and share of profit as partner. The assessee is also partner in other three firms. The assessee has received share of profit of Rs. 24,59,286/- which was disclosed as share of profit from firms being exempt from tax. The assessee is working partner in M/s King Metal Works and deriving remuneration of Rs. 4 lacs and interest on capital of Rs. 4,07,786/- also. The assessee submitted that surplus funds are invested in shares and mutual funds. The assessee submitted that majority of the time is devoted in the business and this is not the main activity being a working partner with M/s King Metal Works. The investment in shares was made mainly through the brokers or IPO and mainly in Mutual Funds. It was submitted that in the books of account these transaction were reflected as investment in shares

and not as stock-in-trade. No funds were borrowed for the purpose of investment in shares and no interest is paid. All the transactions were entered through the stock exchanges and the payments were through cheques. Thus, the income was shown as capital gains. Average period of holding of shares was 95 days with 70 transactions against 129 days of holding from 107 scripts during preceding year. It was submitted that the number of transactions were not large and investments were mainly held for long term period to earn dividend and good income. All the share dealings were done through recognized stock exchanges and were delivery based . The said investments are duly recorded in the books of accounts as 'Investment'. It was also submitted that in assessment years 2004-05 and 2005-06 the income was treated as investment income and charged to tax as capital gain in the scrutiny assessment framed by the Revenue, while in the assessment year 2006-07 the same was assessed as business income. Thus, the assessee prayed before the learned CIT(A) that the income be taxed as short term capital gains only instead of charging the same as income from business.

The ld. CIT(A) considered the submissions of the assessee and the stand of the A.O. and observed that the assessee had entered into voluminous transaction of purchase and sale of shares during the previous year. The assessee took the deliveries of shares on purchase and later sold the same. The number, volume and frequency of the transaction of purchase and sale of shares were huge and the objective is to earn profit and not to hold the shares for earning dividend or capital appreciation. The ld. CIT(A) observed that the volume of purchase and sale of the assessee during the previous year was substantially high and purchase and sale of shares was the main activity of the assessee. The transactions were continuous and regular and systematic. The ld. CIT(A) relied upon various decisions which are detailed in his order and came to the conclusion that the assessee is engaged in adventure in nature of trade on full-scale and it has shown purchase of shares as

investments and gains as short term capital gain with a view to avoid tax. The investments shown in the books of account are nothing but stock in trade. Purchase and sale of shares frequently in short period of time indicate that the assessee has a motive to earn profit in short period. Looking into the overall activity of the assessee in the share transaction, the ld. CIT(A) held that intention of the assessee is to gain profits and hence the decision of the A.O. was upheld by the learned CIT(A) vide appellate order dated 29.11.2012.

7. Aggrieved by the appellate order dated 29.11.2012 passed by the ld. CIT(A), the assessee filed appeal before the Tribunal.

8. The ld. Counsel for the assessee submitted that the assessee had made investments in shares which were purchased through recognized stock exchanges through brokers or IPO. The payments were made through cheque. The investments in shares are shown in the books of account as 'Investment' which are stated at cost. The assessee is a full time working partner in partnership firm and he does not have time to fully involve in the share trading business. The investments were made from the surplus own funds available with the assessee and no borrowings were made for this purpose and transactions were delivery based. In the assessment year 2005-06 the Revenue has accepted the transaction as capital gain and no additions were made by the AO, while for assessment year 2006-07 the AO brought the same to tax as income from business. In assessment years 2006-07 the ld. CIT(A) has accepted the purchase and sale of shares as short term capital gain vide order dated 19th August, 2009 which is placed in paper book page 16 to 24. The ld. Counsel submitted that there is no change in the factual matrix of the case in the instant previous year as compared to the earlier years. Principle of consistency has to be maintained and the short term capital gains offered for tax should be brought to tax as short term capital gains and not as income from business. The assessee also submitted a chart

vide paper book page 25 for assessment years 2005-06 ,2006-07 and 2007-08 wherein the average period of holding for share sold for a period of not more than one year was shown as 95 days with number of transactions being 70 for the instant previous year while for the assessment year 2005-06 it was only 70 days with number of transaction being 119 while the similar figure for assessment year 2006-07 being 129 days and 107 transaction. The assessee also submitted a chart vide paper book page 26 to 29 showing the statement of short term capital gains /loss on share transaction for the instant assessment year 2007-08 . The ld. Counsel relied upon the decision of Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit (2011) 336 ITR 287(Bom.).

9. The ld. D.R., on the other hand, relied upon the order of the authorities below and submitted that the assessee had indulged in voluminous share transactions regularly and frequently with the motive behind these transactions was to earn profit. It was submitted that the authorities below have rightly brought the gains arising from shares held for a period of not more than one year as business income instead of short term capital gains as claimed by the assessee.

10. We have considered the rival contentions and also perused the material available on record including case laws relied upon. We have observed that the assessee is a working partner in partnership firms from where he is deriving income from share from partnership firm(exempt), interest on capital and remuneration . We have observed that the assessee has purchased and sold the shares through recognized stock exchanges through brokers or IPO and the payments were made through cheque. The shares /Mutual Funds have been shown as investment in the books of account and valued at cost. There were no borrowings by the assessee and no interest was paid. The number of transactions has also come down in the impugned assessment

year as compared to the preceding assessment year. The average period of holding was 95 days and number of transactions were 70 , while for assessment year 2005-06 it was 70 days and 119 transaction while for assessment year 2006-07 , the average period of holding was 129 days and transactions were 107. In the preceding assessment year 2006-07, the learned CIT(A) has allowed the appeal of the assessee whereby the said gains were accepted as short term capital gains by the learned CIT(A) and the Revenue has accepted the orders of the learned CIT(A) as it was not brought to the notice of the Tribunal that Revenue has preferred further appeal with the Tribunal in this regard for assessment year 2006-07. The AO accepted the said gains as short term capital gains while framing assessment u/s 143(3) of the Act for the assessment year 2005-06. The factual matrix in the instant assessment year under appeal is similar to the preceding assessment years i.e. 2005-06 and 2006-07 and we do not find any reasons of deviating from the settled position in this year. Keeping in view of the above facts and circumstances of the case , we are of the considered opinion that principle of consistency has to be maintained and followed in this year as facts are almost similar to that of preceding years and hence we direct that the income earned by the assessee from purchase and sale of shares with respect to shares held for not more than one year be held as short term capital gains chargeable to tax under the head 'Capital Gains' and not as business income chargeable to tax under the head 'Profits and Gains from Business or Profession' as held by the authorities below . The reliance is placed upon the decision of Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit (2011) 336 ITR 287(Bom.) and decision of Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT reported in (1992) 193 ITR 321(SC).The assessee succeeds in this appeal as per our discussions and reasoning as set out above. We order accordingly

11. In the result, assessee's appeal in ITA No 975/Mum/2013 for the assessment year 2007-08 is allowed .

Order pronounced in the open court on 17th August , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 17-08-2016. को की गई ।

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 17-08-2016

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व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai