

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"RAJKOT BENCH", RAJKOT**

**BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER AND  
SHRI RAJPAL YADAV, JUDICIAL MEMBER**

**आयकर अपील सं./ ITA No.15/RJT/2013**

**अधीकरण वर्ष/Asstt. Year: 2008-09**

Shri Nemish Jaikishor Mehta  
J.K.Complex, Diwanpara  
Durlabhji Virani Road  
Rajkot.

ACIT, Cir.2  
Vs Rajkot.

PAN : ACTPM 7936 J

**अपीलाथा/ (Appellant)**

**अधीयथा/ (Respondent)**

Assessee by : Shri Kalpesh Doshi, AR  
Revenue by : Shri Pravin Verma, DR

सुनवाई का तारख/Date of Hearing : 01/11/2017

घोषणा का तारख /Date of Pronouncement: 03/11/2017

**आदेश/O R D E R**

**PER RAJPAL YADAV, JUDICIAL MEMBER:** Assessee is in appeal before the Tribunal against order of Id.CIT(A)-III, Rajkot dated 31.10.2012 passed for the Asstt.Year 2008-09.

2. Though the assessee has taken four grounds of appeal, but his grievances revolves around a single issue viz. the Id.CIT(A) has erred in treating the income disclosed by the assessee under the head "short term capital gain" as business income.

3. Brief facts of the case are that the assessee has filed his return of income on 30.9.2008 declaring total income at Rs.31,99,920/-. On scrutiny of the accounts, it revealed to the Assessing Officer that the assessee has shown short term capital gain of Rs.27,77,007/- as against income from share trading of Rs.3,93,503/-. It is pertinent to observe that the assessee was maintaining two sets of accounts viz. (a)

as an investor, and (b) as a trader, but both DEMAT accounts and treatment to the transactions were made separately in the accounts. Somehow the Id.AO was not satisfied with the declaration of short term capital gain. He treated the assessee as a trader. The Id.AO has analysed the details submitted by the assessee in tabular form on page no.7 to 9 of the assessment order. He treated the assessee as a trader and short term capital gain shown by the assessee at Rs.27,77,007/- was assessed as business income.

4. On appeal, the Id.CIT(A) has granted partial relief. It was pointed out before the Id.CIT(A) out of total short term capital gain of Rs.27,27,007/- a sum of Rs.12,67,121/- was an opening investment and remaining short term capital gain of RS.14,59,886/- was out of purchases during the year. In other words, the Id.CIT(A) has accepted the gain arisen to the assessee from the opening or from the investment of last year as short term capital gain, but the gain arisen to the assessee on the purchases made during the year was treated as a business income. In this way, the Id.CIT(A) has confirmed the assessment of Rs.14,59,886/- as income from business.

5. With the assistance of the Id.representative, we have gone through the record. The issue, whether gain from sale of shares is to be assessed as a business income or short term capital gain/long term capital gain, is a highly debatable issue. It always puzzled the adjudicator even after availability of large numbers of authoritative pronouncements by the Hon'ble Supreme Court/Hon'ble High Court. The reason for the puzzle is, one has to gather the intention of an assessee while he entered into the transaction. The expression "intention" as defined in Meriam Webster Dictionary means, what one intends to accomplish or attain, it implies little more than what one has in mind to do or bring out. It suggests clear formulation or deliberation. Thus, it is always difficult to enter into the recess of the mind of an

assessee to find out the operative forces exhibiting the intention for entering into the transaction. This would give rise a debate. Nevertheless, we have to look into the curious features of this case which will goad us on just conclusion.

6. Before we embark upon an inquiry on the facts of present case so as to find out, whether assessee is to be termed as involving in the trading of shares or to be treated as a simplicitor investors. We would like to refer certain broad principle culled out by ITAT Lucknow Bench in the case of Sarnath Infrastructure Pvt. Ltd. reported in 120 TTJ 216. These tests read as under:-

*“13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:*

*(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.*

*(2) Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.*

*(3) What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).*

*(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn*

*profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.*

*(5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.*

*(6) How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice versa.*

*7. It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.*

*8. The mere fact of credit of sale proceeds of shares ( or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.*

*9. One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?*

*10. It is permissible as per CBDT's Circular No. 4 of 2007 of 15<sup>th</sup> June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.*

*11. Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."*

7. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

- (a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.
- (b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.
- (c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.
- (d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.
- (e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.

- (f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.ö

8. In the light of the above, let us examine the facts of the present case. It emerges out from the record that the assessee maintained two separate accounts i.e. one for investment, and other for trading in shares. This fact has not been disputed by the Id.CIT(A). In the assessment year 2006-07, assessment was framed under section 143(3). The Id.AO has accepted the status of the assessee as an investor. Similarly, in the Asstt.Years 2007-08 and 2009-10, the Revenue did not disturb the status declared by the assessee and accepted returns under section 143(1) of the Act. In the earlier year and in subsequent year, the status of the assessee as investor was not disputed. The assessee has not used borrowed funds. All these shares were purchased by the assessee were on delivery basis. He has transacted in 16 scrips, though the transactions are large in number, but mere volume of transactions is not a criteria to doubt the treatment given by an assessee about its investment in the books. Therefore, considering all these facts, we allow the appeal of the assessee, and direct the Assessing Officer to treat the investment made by the assessee as an investor and the assess the income resulted to the assessee on sale of such investment as short term capital gain.

9. In the results, appeal of the assessee is allowed.

**Order pronounced in the Court on 3<sup>rd</sup> November, 2017 at Rajkot.**

**Sd/-  
(PRAMOD KUMAR)  
ACCOUNTANT MEMBER**

**Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER**

Rajkot; Dated 03/11/2017