

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER  
& SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 1072/Ahd/2014 & 130/Ahd/2016

(निर्धारण वर्ष / Assessment Year : 2010-11)

<b>Dr. Haresh Padmakant Dave</b> S-9, National Plaza, R.C.Dutt Road, Vadodara - 390007	<b>बनाम/ Vs.</b>	<b>ITO</b> Ward -2(2), Vadodara
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABNPD5702E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Kamlesh Bhatt, A.R.
प्रत्यर्थी की ओर से /Respondent by :	Shri S. K. Dev, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	10/10/2018
घोषणा की तारीख /Date of Pronouncement	01/11/2018

**आदेश/ORDER**

**PER PRADIP KUMAR KEDIA - AM:**

The assessee has filed two appeals for AY 2010-11. The issues involved are somewhat common and interconnected. Therefore, both the appeals have been heard together.

2. We shall first take up ITA No.1072/Ahd/2014 for adjudication.

3. The captioned appeal has been filed at the instance of the assessee against the order of the CIT(A) dated 06.12.2013 arising in the assessment order dated 11.02.2013 passed by the Assessing Officer (AO) u/s. 143(3) of the Income Tax Act, 1961; (the Act) concerning assessment year 2010-11.

4. The grounds of appeal raised by assessee reads as under:

*“1. In view of the facts and circumstances of the case, the Ld. CIT(A) ought to have directed the Ld. A.O. to allow the SET OFF of the STCG losses of Rs.39,27,238/- brought forward earlier year before changing the character of the STCG profit of the year under appeal and hence the appellant prays that the Ld.A.O. be directed to allow that brought forward loss and thereafter only the NET AMOUNT be shifted to the head Profits and Gains of Business and Profession.”*

5. When the matter was called for hearing, the learned AR for the assessee Mr. Kamlesh Bhatt submitted at the outset that solitary grievance is on account of re-alignment of income arising on sale of shares from capital gains to business income. The learned AR pointed out that the assessee during FY 2009-10 relevant to AY 2010-11 in question has reported short term capital gains of Rs.40,67,563/- from purchase and sale of shares. The aforesaid gain was reported under the head ‘capital gains’ by the assessee. However, the AO has held that purchase and sale activity of shares tantamounts to business activity as motive to earn regular proceed from trading can be deduced from such activities. The AO accordingly re-characterized the gains arising on sale of shares as business income of the assessee instead of capital gains reported by the assessee. The learned AR thereafter referred to the order of the

CIT(A) and submitted that the assessee could not get any relief from the first appellate authority either.

6. Delving further, the learned AR for the assessee submitted that the assessee has hardly executed transactions in 32 scrips during the FY 2010-11 which resulted in the aforesaid profits of Rs. 40,67,563/-. The learned AR submitted that the assessee was engaged in similar purchase and sale in the past also. In the immediately preceding FY 2008-09 (AY 2009-10), the engagement in such activity of similar nature gave rise to loss of Rs.39,27,238/- which was reported under the head 'short term capital loss' and thus carried out forward. The set off of aforesaid loss of Rs.39.27 Lakhs carried out forward to this assessment year (AY 2010-11) is sought to be denied by such action of the AO. The learned AR submitted that either capital gains of this year should be upheld as such or alternatively the loss arising in the preceding financial year should also be treated alike and loss resulting from purchase and sale of shares in AY 2009-10 should also be treated as business loss. The learned AR also referred to ledger account pertaining to share transactions to support its contentions that the gains arising on sale of shares have been rightly treated as capital gains by the assessee.

7. The learned DR, on the other hand, relied upon the orders of the AO and the CIT(A) and submitted that the assessee was not only engaged in frequent activity of purchase and sale of shares, the assessee was simultaneously also engaged in future and options. This apart, the volume, frequency and magnitude of purchase and sale would clearly suggests that the assessee was engaged in 'business activity'. It was thus contended that no interference with

the order of the CIT(A) is called for wherein such activities have been regarded as 'business activities'.

8. We have carefully considered the rival submissions. The essential controversy in the captioned appeal relates to characterization of income arising from delivery based purchase and sale transactions in shares. While it is the case of the assessee that the gain arising on sale of shares is chargeable under the head 'capital gains' in consonance with the earlier assessment years, the Revenue, on the other hand, seeks to hold that such activity of purchase and sale of shares give rise to business income. The issue is essentially factual in nature. On perusal of facts recorded in the orders of the authorities below, it is seen that the assessee has entered into purchase and sale activities in 32 scrips involving 398 number of transactions. Almost similar number of transactions (307 numbers involving 18 scrips) were carried out in the immediately preceding assessment year the loss from which was carried forward as 'short term capital loss'. The data for AY 2008-09 was also provided on behalf of the assessee which shows that the number of scrip is 30 and number of transactions is 346 in that year which has given rise to profits of Rs.4.79 Lakhs which is reported under the head 'capital gains'. Thus, for similar volume, frequency and magnitude of transactions, the assessee has suffered taxation under the head 'capital gains' in the assessment years 2008-09 & 2009-10. The Revenue in AY 2010-11 in question seeks to depart from such position and has attempted to hold such activity as business activity. We do not see much rationale in such action of the Revenue. In a similarly placed situation, the action of the assessee cannot be treated differently in two different assessment years. This will breach the golden rule of consistency in a similarly placed situation.

We also simultaneously notice from the tabulated statement forming part of the submissions of the assessee at page no.9 of the order of the CIT(A) which provides the combined tax effect over various assessment years. The tabulated statement is reproduced hereunder for the sake of ready reference:

A.Y.	Income if share Profit as STCG	Taxes Paid	Income if Share Profit is Business	Taxes Payable
2008-09	901510	219453	901510	219453
2009-10	487310	54036	NIL	NIL
2010-11	640802	79921	1035260	221015
2011-12	492650	34263	525505	40275
2012-13	799250	94606	227480	4890
TOTAL		482279		485633

A bare perusal of the tabulated statements spanning over five assessment years' shows that the action of the assessee cannot be regarded as detrimental to the interest of the Revenue. The assessee has demonstrated that by declaring the income under the head 'capital gains'; the tax liability has been incurred of similar amount which he would be otherwise asked to pay if the income is treated under the head 'business income'. Thus, when seen holistically the action of the assessee appears to resonate with the consistent position taken in past and in subsequent assessment years. While some circumstances do indicate the regularity in transactions and trapping of business, other overwhelming circumstances negate the same. Thus, benefit of doubt deserves to go to assessee. Therefore, the action of the Revenue to treat the gains arising on sale of shares (Rs.40.67 Lakhs) as business income cannot be approved as it denies the set off of loss of short term capital loss (Rs.39.27 Lakhs)

arose from the similarity of transactions in the preceding assessment year. Thus, we are disposed to hold that the action of the CIT(A) in confirming the order of the AO is misplaced. We accordingly set aside the order of the CIT(A) and direct the AO to treat the income arising from delivery based transactions in shares under the head 'capital gains' as claimed by the assessee. We may hasten to add that the findings in this year are purely factual and will not operate as res-judicata in the succeeding assessment year.

9. In the result, appeal of the assessee in ITA No.1072/Ahd/2014 is allowed.

10. We now advert to appeal of the assessee in ITA No.130/Ahd/2016 for AY 2010-11.

11. The captioned appeal arises from the order of the CIT(A) dated 13.10.2015 emanating from the rectification order passed by the AO under s.154 of the Act concerning AY 2010-11.

12. The assessee in the captioned appeal has challenged the action of the CIT(A) for denying the set off of short term capital losses of Rs.39,27,238/- brought forward from AY 2009-10 as discussed in the earlier appeal in preceding paragraphs in an appeal against the order passed by AO under s.154 of the Act.

13. Having regard to the observations made in ITA No.1072/Ahd/2014 (supra) wherein the action of the AO treating the capital gains as business income has been set aside, the grievance of the assessee for denial of set off of capital losses does not persist any more. The AO is directed to allow the set off of losses of the

preceding AY 2009-10 while computing the taxable income of AY 2010-11 in accordance with law.

14. Subject to aforesaid observations, appeal of the assessee is dismissed as infructuous.

15. In the combined result, ITA No.1072/Ahd/2014 is allowed and ITA No.130/Ahd/2016 is dismissed as infructuous.

<b>This Order pronounced in Open Court on 01/11/2018</b>
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Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER  
Ahmedabad: Dated 01/11/2018

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अद्योषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।