आयकर अपीलीय अधिकरण, 'आई' खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL,MUMBAI "I" BENCH

सर्वश्री **आई पी बंसल** , न्यायिक सदस्य **एवं** राजेन्द्र, लेखा सदस्य

Before S/Sh. I P Bansal,Judicial Member & Rajendra,Accountant Member

आयकर अपील सं/.ITA No.1429/Mum/2011,निर्धारण वर्ष/Assessment Year-2007-08

Addl.CIT-Circle-1 Vardaan Bldg. LowerGround Floor Wagle Indl. Estate, MIDC Thane-400 604.	Vs	Shri Avinash Atchut Kamat 7, Neelkamal, S.V. Road, Bhaskar Colony, Naupada,Thane (W) **PAN: AATPK 2797 B**
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by **:Shri Ravi Mulchandani**

राजस्व की ओर से/ **Revenue by** **:Shri Sacchidanand Dubey-DR**

सुनवाई की तारीख/ Date of Hearing : **28**-05-2015

घोषणा की तारीख / Date of Pronouncement : **28**-05-2015

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 20/09/2010 of the CIT(A)-II,Thane, the Assessing Officer(AO) has raised following Grounds of Appeal:

"1. On the facts of the case and in law, the Ld. CIT(A) has erred in allowing the assessee's claim of long term capital gain on sale of shares amounting to Rs. 63,45,847/-. The CIT(A) has not appreciated the fact that the assessee is dealer in shares and is engaged in the business of sale and purchase of shares.The Ld. CIT(A) has not appreciated the fact that the assessee has not maintained separate sets of books of accounts for assessee's claim of investment and sale / purchase of shares. Merely claiming that the dividend income has been offered for taxation for the earlier assessment years do not prove that the assessee has not earned profit from the share dealings.Further, the CIT(A) has also erred in allowing the claim of the assessee that due to sharp reduction in the prices of shares, which resulted in heavy losses to the assessee and the sale realization of such shares has been utilized for making payments to the creditors of the assessee. The CIT(A) has erred in holding that the intention of the assessee was not to earn profit is incorrect. Thus, the income earned from sale of shares is the business income and not the long term capital gain.

2. The Assessing Officer craves leave to add, amend alter or delete any ground of appeal."

Assessee,an individual, filed his return of income on 29/10/2007 declaring total loss of Rs.77.96 lacs.The AO completed the assessment on 22.10.200, u/s. 143(3) of the Act,determining income of assessee at Rs.(-)14.50 lacs.

2.Effective ground of appeal is about treating the income arising out of share transactions. During the assessment proceedings,the AO found that the assessee had shown income under the head Long Term Capital Gains(LTCG) on sale of shares, amounting to Rs.47.34 lacs, that he had claimed exemption about the shares sold. The AO was of the opinion that only business of the assessee was to trade in the shares and therefore income arising on sale of shares has to be treated as business income. Vide order sheet noting,dt.14.12.14,he asked the assessee as to why the LTCG should not be treated as business income. The assessee, vide his letter dt.21.12.2009, filed a detailed explanation in that regard. After considering the submission of the assessee,the AO held that the assessee was active in F&O segments of share trading, that the total value of transactions entered during the year under consideration was Rs.75.33 crores, that the shares which had been sold by the assessee to cover the loss in F&O segments had been pledged with the share broker, that on the strength of those shares the assessee was allowed margin trading in the F&O segments by the stock broker, that if the transactions leading to F&O segments were considered a business activity the shares on the basis of which the assessee was carrying out the business activities would have to be considered business assets, that most of the shares were sold after interval of twelve months.Finally,he held that the assessee was a trader in shares, that whatever income was arising in dealing in the shares had to be considered as business income.

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA). Before him,the assessee contended that the intention of the assessee in selling his long term share holdings was not to make profit but was to pay to the broker for the loss incurred by him in the F&O segments, that on 25/5/2006 the assessee had incurred loss of around Rs.72.00 lacs on a single day, that he had to sell his shares, held by him as long term investment, that the assessee was holding those shares to earn income by way of dividend, that the dividend income from the AY 2004-05 was increasing steadily,that the assessee had never treated the shares as his business assets,that in the earlier years the income arising out of LTCG had never been treated as business income by the AO,that the assessee was involved in two type of transactions,that he was an investor in the shares besides being a trader, that he was dealing in F&O segments as a trader, that he could maintain two separate portfolios. He referred to the judgment of Hon'ble Bombay High Court delivered in the case of Gopal Purohit.

After considering the submission of the assessee and assessment order the FAA held that the assessee had shown income from investment in shares and securities, that he was engaged in business of derivatives, that the income from F&O segments was offered for taxation under the head business income,that the income arising on LTCG was offered under the head capital gains, that for deciding the issue of investment / business of shares the intention of the assessee had to be looked into, that the assessee had suffered a huge loss on a single day, that he was forced to sell the shares that were held by him as investments, the intention of the assessee in holding the investment was to earn income by way of dividends, that the shares sold by the assessee during the year under consideration were acquired long back and in some cases even before 1998. Referring to the dividend warrants of some of the shares placed by the assessee on record the FAA observed that same pertained to the period of holding of earlier years i.e., FY 2002-03, that the assessee had been showing capital gains by selling his investments, that the department had been accepting the same, that the AO had not assessed the income arising out of share trading as business income, that there was no justification for taking a different view in absence of any evidence that the facts and circumstances for the year under appeal were different from the earlier years.Finally,he held that the assessee was holding the shares as investments and for personal use, possession and enjoyment, that those shares could not be treated as trading assets.

The FAA referred to the CBDT Cir. No.4/2003 dt.15/6/07 and cases of Janak S. Rangwala and Kunverji Kenia, Sunder Iyer delivered by the Mumbai Tribunal.Relying upon the order of the Hon'ble Bombay High Court in the case of Gopal Purohit,he allowed the appeal of the assessee.

4.During the course of hearing before us,Departmental Representative(DR)supported the order of the AO.Authorised Representative(AR)argued that the assessee was maintaining two portfolios,that he had to sell his investments to settle the account with the broker,that the assessee had never treated the shares as his business assets,that FAA had rightly allowed the appeal filed by the assesse.

5.We have perused the material before us. We have heard the rival submissions and perused the material before us.We find that the assessee had suffered a loss of Rs.80 lakhs during the year under appeal in share trading ,that out of it loss of Rs.72.11 lakhs occurred on single day,that the assessee had to pay the broker for the losses incurred to him in F & O segments,that he was compelled to sell the investments which were held by him for a very long period,that the intention of the assessee was to the hold the investments.Had there not been a sudden crash in the market,he would not have sold the shares which he was holding for last so many years.We find that there is increase in dividend income of the assessee - that from Rs.72,378/- in the year 2001-02 it has gone up to 2,18,361/-in the year 2006-07.We find that the FAA has given a categorical finding of fact that the shares sold by the assessee during the year under appeal were held by him for a much earlier period than as stated by the AO.There is no evidence on record that could prove that the finding of facts recorded by the FAA is incorrect.Here,we would like to reproduce the judgment of Gopal Purohit(336ITR 287)delivered by the Hon'ble Jurisdictional High Court,as it deals with the issue that has been raised before us.

"it was open to the assessee to maintain two separate portfolios, one relating to investment and another relating to business of dealing in shares, that a finding of fact had been arrived at by the Tribunal as regards the two distinct types of transactions,namely, those by way of investment and those for the purposes of business, and this warranted no interference.

(ii) That there should be uniformity in treatment and consistency when facts and circumstances for different years were identical particularly in the case of the same assessee.

(iii) That entries in the books of account alone are not conclusive in determining the nature of income."

Considering the above judgment and the facts and circumstances of the case,we are of the opinion that the FAA has rightly held that the income earned by the assessee on sale of shares has to be assessed under the head capital gains and not as business income.We do not find any infirmity in his order.Confirming his order we decide effective ground of appeal against the AO.

As a result,appeal filed by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 28th,May,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 28 मई,2015 को की गई ।

Sd/-	**Sd/-**
(आई पी बंसल/I. P. Bansal)	(राजेन्द्र / **RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 28.05.2015

व.नि.स *Jv.Sr.PS.*

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**