IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI
BEFORE SHRI. D.K. AGARWAL (JM) AND SHRI. N.K. BILLAIYA (AM)

ITA No.4184/MUM/2011
ASSESSMENT YEAR: 2006-07

Mr. Anil M Chhabria 301 , Grand Canyon 87 , Pali Hill , Bandra [West] Mumbai – 400050 PAN No.ACLPC3229J	**Vs.**	Asst. Commissioner of Income-tax, Circle 19(3), 3rd Floor , Piramal Chambers , Parel , Mumbai – 400 012.
(Appellant)		**(Respondent)**

Appellant by : Shri Arun Satne & Aarti Satne
Respondent by : Shri. T Roumuan Paite

Date of hearing: 21.3.2012 Date of pronouncement: 28.3.2012

O R D E R

PER N.K. BILLAIYA, A.M:

This appeal has been filed by the assessee on 20.05.2011 against the order of the learned CIT(A)-30, Mumbai dated 25.03.2011 in relation to assessment order under Section 143(3) of the Income Tax Act, 1961 for Assessment Year 2006-07.

2. This appeal is directed by raising 5 grounds of appeals . Ground Nos 1 and 5 are of general in nature and require no adjudication. By Ground No.2 the appellant has assailed the order of the ld CIT [A] for non – adjudication on the matter of the 'Status ' of the appellant and by grounds nos 3 & 4 , the appellant has questioned the additions on account of investments in shares as being treated as business profits.

3. Ground No. 2 deserves to be decided first because ' Status ' of the assessee is the starting point for the taxability or non – taxability of income under different heads of income under the Income Tax Act, 1961 .

4. Briefly stated, the facts of the case are that the appellant filed his return of income for the year under consideration on 1st February, 2007 declaring income of Rs. 33,00,380 /- consisting of Rent Rs.60000 /-, long term capital gains Rs.18,18,184 /- and short term capital gains Rs 33,76,145 /-, besides having band interest of Rs.92541 / - dividend income of Rs.452829 /- under the Residential Status as "Non – Resident".

5. The above said return of income was selected for scrutiny assessment and accordingly notices u/s 142 [1] and 143 [2] of the Act , were issued and served upon the assessee . During the course of the assessment proceedings the assessee was called upon to answer various queries raised by the assessing officer . The whole assessment order revolves around the taxability of share transactions as short term capital gains vis – a~ - vis business income, as the assessee has returned the gains under the head short term capital gains where as the assessing officer want to tax the income under the head ' business income' .

6. While the assessing officer has elaborately discussed the nature and the volume of transactions in shares done by the assessee during the year under consideration and has also discussed various decisions of the Hon'ble Supreme Court and High Courts, but in this whole exercise, the AO forgot to decide on the status of the assessee and in fact assessed the appellant as ' Resident' in stark contradiction to the status what the appellant has shown in his return of income , i.e., Non – Resident, and when on to complete the assessment by treating the short term capital gains as returned by the appellant to the tune of Rs.3376145.00 as business income and added Rs. 3191560.00 after giving allowance to bank charges and interest at Rs.184585.00 .

7. Aggrieved by this order of the AO , the assessee went in appeal before the CIT [A] for relief and along with other grounds of appeal , prayed that his status is that of a Non – Resident , and there fore he should be assessed as a Non – Resident , and there after the nature of his income / gains should tested as per the provisions of the Act .

8. But the Ld CIT [A] fell in to the same error as that of the ld AO and went on decide the appeal and confirmed the order the AO.

9. Once again aggrieved , the appellant is before us in this appeal .

10. At the very outset the counsel appearing for the appellant stressed that the CIT [A] should be directed to first decide on the issue of the 'status' of the appellant as that would decide the nature and taxability of his incomes and to substantiate his claim the ld AR drew our attention to page No. 1 of the paper book filed by him before us and

pointed out that in the computation of income under the head 'status' the appellant has returned : Individual / Non – Resident, and whereas he has been assessed under the status ' Individual / Resident '. The ld counsel for the appellant further pointed out that this issue was raised before the CIT [A] by taking a specific ground of appeal but the CIT [A] has not adjudicated on this issue and has confirmed the order of the AO .

11. We have gone through the orders of the lower authorities and also the computation of income filed by the appellant and also the grounds raised before the CIT [A] . Undoubtedly , The assessing officer has committed an error in taxing the appellant as a ' Resident ' when the assessee has filed the return of his income with the status ' Non – Resident '. The CIT [A] by confirming the order of the AO , without adjudicating on the grievance of the assessee in so far as his ' Residential Status ' is concerned , made his own order erroneous .

12. We therefore deem it fit to restore this issue back to the files of the Ld. CIT [A] – 30 Mumbai . Ld CIT [A] is directed to decide the issue of the 'Residential Status ' of the assessee first.

13. Since other grounds taken in this appeal are directly related with the adjudication on the ' Residential Status ' of the appellant , other grounds are also restored back to the files of the CIT [A]-30 , Mumbai for fresh adjudication , after giving due opportunity to the assessee .

14. In the result appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 28th day of March, 2012.

Sd/-	Sd/-
(D.K. AGARWAL)	**(N.K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date : 28.03.2012
At :Mumbai

Copy to :

1. The Appellant
2. The Respondent
3. The CIT(A), Mumbai concerned
4. The CIT, Mumbai City concerned
5. The DR "A" Bench, ITAT, Mumbai

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai