IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J ", MUMBAI

BEFORE SHRI R S SYAL, ACCOUNTANT MEMBER
AND SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.: 5545/Mum/2011
Assessment Year: 2008-09

The ACIT 18(1), Mumbai.	Vs.	Jaya Talakshi Chheda, 212 Jayant Villa, C S Rane Marg, Worli Naka, Mumbai- 400 013 **PAN AAJPB7882N**
(Appellant)		(Respondent)

Appellant by : Ms. R M.Madhavi (DR)
Respondent by : None

Date of hearing : 06.02.13
Date of Pronouncement : 27.02.13

O R D E R

Per Sanjay Garg, JM :

This appeal by the Revenue is directed against the order of the CIT(A) Mumbai dated 27.05.2011 pertaining to the assessment year 2008-2009. The sole grievance of the Revenue is that the CIT(A) ought not to have treated income of Rs.2,95,57,724/- as short term capital gain out of amount of Rs.3,24,55,202/- as against the income from business taken by the Assessing Officer.

2. The brief facts of the case are that during the course of assessment proceedings under section 143 (3) of the I.T. Act, the Assessing Officer noticed that the assessee, while computing the total income for the year under consideration, had claimed Short Term Capital Gains (STCG) of

Rs.3,24,55,202/- on purchase and sale of shares under section 111A of the Act. The assessee was asked to explain why those transactions should not be treated as trading in shares. The assessee's representative relying upon the order of CIT(A) in the case of the assessee pertaining to A.Y.2007-08 submitted that the income as STCG claimed by the assessee has been accepted for the earlier assessment year (A.Y.2007-08) and on the same basis the income for assessment year in question be also treated as STCG.

3. After considering the submission and the details furnished by the assessee, the Assessing Officer bifurcated the entire short term capital gain of Rs.3,24,55,202/- disclosed by the assessee into two categories. The first category, being transaction in shares held for a period less than 30 days resulting in a short term gain of Rs.28,97,477/- and the second category relating to balance capital gain of Rs.2,95,57,725/- for the transactions in shares held for period exceeding 30 days but less than one year. The Assessing Officer observed that the first category of transaction done in a period less than 30 days had to be treated as business income. The Assessing Officer further held that the rest of the gain i.e. Rs.3,24,55,202/- (-) Rs.28,97,477/- = Rs.2,95,57,725/- were related to shares held for more than 30 days. However, the Assessing Officer found that the income from these shares also was to be treated as business income as Department did not accept the decision of CIT(A) in the earlier year (2007-08) and had filed appeal before the ITAT.

4. The learned CIT(A) after considering the facts of the case observed that as regards the transactions done within a period of 30 days, those could be reasonably held as business transactions as the Assessing Officer had pointed out certain shares were purchased and sold in a day or two. The assessee made quick profit and that those transactions were not done for investment. There being no holding period, the intention was to make quick gain. There was frequency of transaction, intention to earn quick gain

and there was an organized trading activity in buying and selling of the scripts, hence the trading resulting in profit amounting to Rs.28,97,477/- was held as business activity by the learned CIT(A). The action of the Assessing Officer in this respect was confirmed.

5. As regards the balance short term capital gain of Rs.2,95,57,725/- learned CIT(A) found that such transactions were to be taken as short term gain for the reasons mentioned in the order under appeal as reproduced below:

"

a) Appellant has disclosed her investments in the balance-sheet as investment and not as stock in trade.
b) The entire STCG of Rs.2,95,57,725/- are out of purchase and sale of scripts with a holding period of more than a month. No businessman will take the risk of staying invested in shares unless there is an intention to gain from capital appreciation.
c) The jurisdictional ITAT's order in the case of Gopal Purohit (122 TTJ 433) which has similar facts, has been confirmed by Bombay High Court in ITA No.1121 of 2009 (228 CTR Bom 582)
d) All the transactions are delivery based transactions and have been duly routed through Demat Accounts.
e) It has been rightly argued that largely there is no organized business activity carried out by the appellant. No employees employed. No separate books of account maintained. The transactions are through normal savings bank account. There is no borrowal of funds.
f) There is no running account with stock broker or no differences of gain or loss have been settled.
g) The scrips have not been held as stock-in-trade and there is no opening stock or Closing Stock of scrips."

Aggrieved, the revenue is in appeal before us.

6. The learned DR has submitted that the learned CIT(A) has wrongly applied the ratio of the Hon'ble High Court of Bombay decision in the case of CIT Vs. Gopal Purohit 228 CTR 582 (Bom) as the assessee did not

maintain two kinds of portfolios as was the case with the assessee in the applied case.

7. We have considered the submissions of the learned DR and have also gone through the material on record. The Assessing Officer rejected the contention of the assessee on the ground that the revenue had already filed an appeal against the order of CIT(A) pertaining to his findings in relation to A.Y.2007-08. However, it has been brought to our knowledge that the appeal of the revenue has been dismissed by the learned Co-ordinate Bench of the ITAT vide order dated 27-11-2012 passed in ITA.No.6583/Mum/2010 pertaining to the A.Y.2007-08. The Tribunal has observed in the said case that the assessee had dealt the majority of shares for a very long time resulting into short term capital gain. It is possible for an investor to sell shares after holding for less than a year to reshuffle portfolio. The assessee had done share transactions only for a few days (69 days) in a year which showed that the assessee was not trading in shares which required full time engagement and a systematic and timely devotion. The assessee had taken delivery and paid STT on each transaction. There was no opening stock nor there any closing stock of scrips. Considering all these facts in totality, the learned Co-ordinate Bench of the ITAT upheld the findings of the CIT(A) pertaining to the case of the assessee for the A.Y.2007-08 to the effect that the assessee was an investor and not a trader.

8. Though principle of res judicata does not apply to income tax assessment proceedings as each year is to be treated as a separate year based on the facts of that relevant year only, but the principle of consistency requires that the view taken in one year should be followed in subsequent years, unless the facts or the legal position justify departure there from. The Assessing Officer in the case in hand had rejected the contention of the assesse for the reason that the department had filed appeal against the order of CIT(A) for the A.Y.2007-08. As observed above, the said appeal of the department has already been dismissed. Moreover, the learned CIT(A) in case in hand has already treated the income of Rs.28,97,477/- as business income for the transactions involving period of less than 30 days and the remaining as STCG out of the total claimed STCG

of Rs.3,24,55,202/-. The findings of the learned CIT(A) are well reasoned and we do not find any reason to depart there from.

9. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on this 27th day of February 2013.

Sd/-	**Sd/-**
(R.S.SYAL)	**(SANJAY GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, Dt : 27th February, 2013

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T. concerned Mumbai
4. CIT (A) concerned Mumbai
5. The DR, "J" - Bench, ITAT, Mumbai

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BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai