आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 6529/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2008–09)

Asstt. Commissioner of Income Tax
Circle–25(3), C–11, Pratyakshakar Bhavan
Bandra Kurla Complex, Bandra (E)
Mumbai 400 051
……………… अपीलार्थी / Appellant

बनाम v/s

Mr. Chetan K. Mehta
2–3, Kothari House
1st Floor, Oak Lane, Fort
Mumbai 400 001
……………… प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AAIPM2802J

राजस्व की ओर से / Revenue by : Mr. Sumit Kumar
निर्धारिती की ओर से / Assessee by : Mr. Pradeep Sagar

सुनवाई की तारीख / Date of Hearing – 19.06.2014	आदेश घोषणा की तारीख / Date of Order – 25.06.2014

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा / PER AMIT SHUKLA, J.M.

The present appeal has been preferred by the Revenue, challenging the impugned order dated 11th July 2011, passed by the learned Commissioner (Appeals)–XXXV, Mumbai, for the quantum of assessment passed under section 143(3) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2008–09. The grounds raised by the Revenue, read as under:–

> *"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O. to accept the claim of Short Term Capital Gain of Rs,2,47,89,694/- and long term capital gain of Rs.5,04,16,024/- on profit arriving from purchase & sale of shares instead of business income treated by the A.O. without appreciating the fact that the assessee is dealing in large volume of shares, most of the shares are bought and sold within short period, while some are not sold due to market conditions and their holding with the assessee remains beyond few days, and it will not change the nature of transactions and the assessee is very well engaged in the business of share trading, which denote that the motive of the assessee is to carry on business in shares to book profit rather than investment in shares. The case is covered by the decision of ITAT Mumbai in the case of Smt. Sadhana Nabera VIs ACIT (ITA No 2586/Mum/2009), Jayshree P. Shah vIs ACIT (ITA No. 3608/MUM/07) and the case of ACIT VIs V. Nagesh (ITA No 5410/Mum/2008)".*
>
> *2. On the facts and in the circumstances of the case, and in law, the Id. CIT(A) erred in directing the Assessing officer to allow deduction of Rs. 1,50,000/- under the head house property even though assessee has neither raised this ground during the assessment proceedings not filed a revised return."*

2. The learned Counsel for the assessee, at the outset, submitted that insofar as the ground no.1, is concerned, the same is squarely covered by the decision of the Tribunal in assessee's own case for the assessment year 2006–07, passed in ITA no.5662/Mum./2009.

3. <u>Facts in brief</u>:– The assessee is an individual having income from salary in the capacity of a director in C.M. Securities Pvt. Ltd., business income from consultancy fees and also trading in future and options. Besides this, the assessee has also shown income from the head

"capital gains" and *"interest income"*. Break–up of various heads of income shown by the assessee were as under:–

Salary		
Business income		*₹5,97,500*
Consultancy fee	*₹20,00,000*	
Profit from F&O transactions	*₹2,84,80,530*	
Profit from intraday transactions	*₹11,29,056*	
Interest on FDs	*₹1,04,537*	
	₹3,17,14,123	
Expenses claimed	*₹89,30,640*	*₹2,27,83,483*
Short term capital gain (STT paid)		*₹2,47,89,694*
Income from other sources		*₹13,28,275*

The appellant also admitted long term capital gain of ₹ 5,04,16,024 which was claimed as exempt."

4. The Assessing Officer observed that the assessee is mainly engaged in day–to–day activities in the company in which he was whole time director i.e., in C.M. Securities Pvt. Ltd. The assessee's entire income is derived from activities connected with sale and purchase and all shares and securities. The Assessing Officer noted the transactions of the shares shown under the head *"short term capital gain"* and *"long term capital gain"* in the following manner:–

No. of scrips	*75*
No. of transactions	*120*
Purchase amount	*₹34,64,73,161*
Sale amount	*₹37,71,88,117*
Profit / Gain	*₹7,56,29,607*
Expenses claimed	*₹89,30,640*
Net Profit / Gain	*₹2,47,89,694*

5. After analysing the above transactions, he came to the conclusion that profit on sale of such shares is to be assessed under the head *"business income"*. The reason being that the assessee has borrowed money to the tune of ₹ 39,93,017, part of which has been utilised for share transactions, the assessee has also claimed expenditure of ₹ 89,30,640, and claim of interest of ₹ 60,71,893, against F&O transaction. The assessee has been maintaining full office infrastructure for the purpose carrying of business out of share trading. He also found that the assessee has received dividend from share transactions into two categories where the shares have been delivered to the assessee and shares where no delivery was required to be taken. The first category has been shown as *"income from capital gain"* and the second category has been shown as *"business income"*. He has also analysed the period of holding on the number of shares brought in the following manner:–

No. of Shares	*Holding Period*	*Percentage of Total*
17,23,136	*Upto 1 week*	*47.66%*
11,24,636	*Upto 1 month*	*31.11%*
7,62,504	*Upto 6 months*	*21.09%*
5,098	*More than 6 months*	*0.14%*
36,15,374		

6. The main contention of the assessee before the Assessing Officer were as under:–

> *1. That the appellant is a whole time director of the Company and is involved in day to day affairs of the Company;*

2. That due to his active participation in day to day affairs of the Company, the profitability of the Company has improved considerably;

3. That neither there is large scale activity nor regularity of activity;

4. That the appellant did only 120 transactions when the stock exchange was open for transactions almost 250 days during the year;

5. That the appellant has applied his knowledge and there by made investment in shares of companies which were potentially sound companies;

6. That sales of shares was mainly of the nature of switch over transaction;

7. That shares involved in sale transactions income wherefrom is offered for tax under the head "Capital Gains" were given delivery out of Demat account;

8. That Purchase of shares was also done by getting credit for such shares in Demat account;

9. That the appellant has earned Rs. 9,96,887 by way dividend income;

10. That in respect of short term gain, sizable gain (111 % to 254% appreciation) was made by the appellant shares of only 5 companies."

7. The assessee's contention has been rejected by the Assessing Officer after detail discussion and relying upon the various case laws, which has been dealt by the Assessing Officer from Pages–7 to 17 of the assessment order.

8. Before the learned Commissioner (Appeals), the assessee's main contention has been that in the earlier assessment year 2006–07 and 2007–08, this issue has been decided in favour of the assessee by the learned Commissioner (Appeals) which has been confirmed by the Tribunal in the appeal filed by the Revenue. That apart, reliance was

also placed on the decision of the Hon'ble Jurisdictional High Court in CIT v/s Gopal Purohit, [2011] 228 CTR 582 (Bom.), besides other various Tribunal decisions. The learned Commissioner (Appeals), following the earlier years' precedence right from the assessment year 2005–06 to 2007–08, has decided this issue in favour of the assessee after applying the rule of consistency. Besides this, the learned Commissioner (Appeals) has also given detail reasons after discussing the various judicial decisions.

9. After hearing both the parties, we find that this issue had come up for consideration before the Tribunal in the assessment year 2006–07 and 2007–08. The learned counsel also brought to our notice that in the assessment year 2005–06, similar transactions shown under the head *"short term capital gain"* and *"long term capital gain"*, has been accepted by the Assessing Officer in the scrutiny proceedings under section 143(3) and besides this, in the subsequent assessment year 2009–10, the Assessing Officer again has accepted the similar transactions to be taxed under the head *"capital gains"* under section 143(3). In the assessment year 2006–07 and 2007–08, the learned Commissioner (Appeals) has also decided this issue in favour of the assessee which has been confirmed by the Tribunal. The relevant observations and the conclusion drawn by the Tribunal are as under:–

> *17. We have considered the rival submission. We have considered the rival submissions. The issue to be decided is as to whether the STCG on transaction of purchase and sale of shares undertaken by the assessee during the previous year is to be assessed under the head 'income from business' as claimed by the revenue or income under the head 'capital gain' as contended by the assessee. Before we deal with the facts of the case of the assessee, we will briefly narrate the principles applicable in deciding the above issue as laid down in several judicial pronouncements :-*

(a) Whether a transaction of sale and purchase of shares were trading transactions or whether they were in the nature of investments is mixed question of law and fact. CIT Vs. Holck Larsen, 60 ITR 67 (SC).

(b) It is possible for an assessee to be both an investor as well as a dealer in shares. Whether a particular holding is by way of investment or formed part of stock in trade is a matter which is within the knowledge of the assessee and it is for the assessee to produce evidence from his records as to whether he maintained any distinction between shares which were hold by him as investments and those hold as stock in trade. (CIT v/s Associated Industrial Development co. Ltd., 82 ITR 586 (SC).

(c) Treatment in the books by an assessee will not be conclusive. If the volume, frequency and regularity with which transactions are carried out indicate systematic and organized activity with profit motive, then it would be a case of business profits and not capital gain. CIT Vs. Motilal Hirabhai Spg. And Wvg. Co. Ltd., 113 ITR 173 (Guj); Raja Bahadur Viswshwara Singh Vs. CIT, 41 ITR 685 (SC).

(d) Purchase without an intention to resell where they are sold under changed circumstances would be capital gains. CIT v/s PKN, 60 ITR 65 (SC). Purchase with an intention to resell would render the gain profit on sale business profit depending on the circumstances of the case like nature and quantity of article purchased, nature of the operation involved. Saroj Kumar Mazumdar Vs. CIT, 37 ITR 242 (SC).

(e) No single fact has any decisive significance and the question must depend upon the collective effect of all the relevant materials brought on record. Janki Ram Bahadur Ram Vs. CIT, 57 ITR 21 (SC).

12. The above tests have again been reiterated by the CBDT in its Circular referred to by the AO in the order of assessment. Keeping in mind, the above broad principles, we shall now examine the case of the assessee. The assessee during the previous year had entered into transactions of purchase of shares of about 38 companies totaling to Rs.31,51,52,676 and all those shares were sold for a value of Rs.37,89,50,348. The above transactions were effected by actual delivery of shares at the time of purchase and sale. Besides such transactions, the *assessee had also entered into transactions of purchase and sale of shares where there was no actual delivery. The net profit after expenses on such transactions was Rs.40,77,711. Both the aforesaid transactions were in respect of transaction of purchase and sale of shares where the holding period was less than 12 months. The profit on transaction and sale of shares where there was no delivery was offered to tax by the assessee as speculative income under the head business income. The income from other transactions where there was actual delivery was claimed by the assessee to be STCG. Such transactions were about 142 in number during the previous year. The Number of shares dealt with by the Assessee was 30,79,124. The holding period was as follows:*

No. of Shares	Holding period	% of total
770317	Upto 1 week	25%
874619	Upto 1 month	28%
1275061	Upto 6 months	42%
159127	More than 6 months	5%

The factors which go in favour of the Assessee that the income in question is short term capital gain (STCG) are as follows:

1. The fact that in the earlier AY i.e., AY 05-06, on identical volume of transaction, the AO in Assessment u/s.143(3) of the Act, accepted the case of the Assessee that income from purchase and sale of shares is STCG and not business income. The facts as it prevailed in the earlier year were as follows:

	A.Y. 05–06	A.Y. 06–07
No. of scrips dealt with by the assessee	23	38
No. of days on which transactions carried out	92 days	96 days
Volume no. of shares	6,18,984	30,79,124
Purchase value	4,29,24,768	31,51,52,676
Sale value	4,73,44,028	37,89,50,348
Gain	44,19,260	6,37,97,673
No. of transactions	128	148

2. The Assessee in AY 05-06 had used borrowed funds to make investment in shares.

3. The Assessee carried out transaction of purchase and sale of shares without delivery in AY 05-06 also.

4. The volume and frequency of the transactions are substantially the same as it was in AY 05-06 except for the value, which has gone up substantially and which has been explained by the Assessee as owing to raise in the Sensex which were about 800 in number where the holding period was between minimum of 1 day to maximum of 6 months.

5. Purchase and sale of shares was not the only activity of the assessee.

6. The period of holding on an average was 24 days in AY 05-06 whereas in AY 06-07 it was 86 days.

7. The Assessee also invested shares of private limited companies and unlisted companies.

8. The Assessee did receive substantial dividend income on shares.

9. The Assessee held the shares as investment in its books of accounts and not as stock-in-trade. Factors which may go against the Assessee in accepting the plea that the income is question is STCG and the reply of the Assessee on the same are as follows:

> *1. The conduct of the assessee in showing income from delivery based transactions as STCG and non-delivery based transaction as business income only shows that but for actual delivery even income from those transactions would have been considered as speculative income and business income. The income from delivery based transactions are sought to be projected as STCG only because there was actual delivery and because they were shown as investments in the books of accounts of the assessee. The submission of the Assessee on this aspect is that on the same set of facts, the revenue in AY 05-06 accepted the plea of Assessee that gain on purchase and sale of shares is STCG though in that year also, the Assessee indulged in non-delivery based transactions.*

2. The holding period being very short it is reasonable to presume that the purchase was made with an intention to resell. The submission of the Assessee on this aspect is that the holding period is much longer than AY 05-06

3. The scale of activity is substantial. The submission of the Assessee is that the same is because of increase in sensex from 6000 points to 11000 points.

4. The transactions were continuous and regular besides being systematic. The submission of the Assessee is that there were o
nly 148 transactions carried out on 96 days during the previous year.

5. Borrowed funds had been used for purchase of shares. The submission of the Assessee has been that there is no bar to use borrowed funds to make investments. Besides the above, on the same set of facts, the revenue allowed the claim of the Assessee in AY 05-06.

6. Substantial time devoted by the assessee to the activity of purchase and sale. The Assessee did not devote time because the
knowledge which gained in the course of his service was used.

7. The shares sold and purchased are of listed companies. The Assessee also held shares of private limited companies and unlist
ed companies.

8. Composition of the dividend income is meager, which goes to show that the assessee never looked for returns from investments. As an investor one need not look only for returns in the form of dividend but also appreciation of capital.

13. In the light of the above circumstances prevailing in the case of the assessee, we are of the view that the conclusion of the CIT(A) that the income from sale of shares declared by the assessee as STCG has to be accepted is correct and calls for no interference.

14. In CIT Vs. Gopal Purohit 228 CTR 582 (bom), the question of law raised was regarding whether STCG declared by the Assessee *was to be assessed as business income or not. Question (b) considered by the Hon'ble Bombay High Court was as follows:*

> *"(b) Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that principle of consistency must be applied here as authorities did not treat the assessee as a share trader in preceding year, in spite of existence of similar transaction, which cannot in any way operate as resjudicata to preclude the authorities from holding such transactions as business activities in current year?"*

The Hon'ble Bombay High Court held as follows:

"3. In so far as Question (b) is concerned, the Tribunal has observed in paragraph 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares a s investment at the end of the year, in all the years. The revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position, that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question. Question (b), therefore, does not also raise any substantial question."

15. The above decision of the Hon'ble Bombay High Court is clearly applicable in this case. As we have already seen that the AO in AY 05-06 raised a specific query on the issue whether the STCG declared by the Assessee has to be assessed as business income and the AO after discussion accepted the plea of the Assessee and assessed income declared on purchase and sale of shares as giving raise to STCG. We have also seen that the facts and circumstances in the AY 05-06 are identical. Though the rule of res judicata is not applicable but the principle of consistency will definitely apply and on that basis the claim of the Assessee should be held to be proper. If at all the only factor which may go against the Assessee is the fact that the volume of shares transacted and their value is high in the present A.Y. On this aspect, we find that the CIT(A) had relied on the decision of the Hon'ble ITAT Mumbai Bench decision in the case of Janak

> *S.Rangwala Vs. ACIT 11 SOT 627 (Mum) wherein it has been held that magnitude of the transaction does not alter the nature of the transaction."*
>
> *16. For the reasons given above, we confirm the order of CIT(A) and dismiss the appeal by the Revenue."*

10. Thus, consistent with the view taken by the Tribunal in assessee's own case for the earlier year on similar set of facts and circumstances, which are also permeating through in this year, we hold that the income shown by the assessee from the sale of shares is to be taxed under the head *"short term capital gain"* and *"long term capital gain"*. Thus, ground no.1, raised by the Revenue stands dismissed.

11. In ground no.2, the Revenue is aggrieved by the direction of the learned Commissioner (Appeals) in allowing deduction of ₹ 1.50 lakhs under the head *"income from house property"*.

12. The assessee had acquired residential premises partly with the borrowed funds on which the assessee has paid interest of ₹ 15 lakhs. The assessee has claimed the entire amount of interest as deductible business expenditure in the return of income and no income was shown under the head *"income from house proeprty"*. At the time of the assessment, the assessee filed revised statement of computation of income claiming interest income of ₹ 1.50 lakhs allowable under section 24(b) and disallowed the claim of interest of ₹ 15 lakhs as business income. Thus, the claim of ₹ 15 lakhs was withdrawn and instead interest of ₹ 1.50 lakhs was claimed under section 24(b). The Assessing Officer has disallowed the claim mainly on the ground that this claim for deduction was not made in the original return of income and any revised claim can only be made by way of revised return of income in

view of the decision of the Hon'ble Supreme Court in Goetze India Ltd., [2006] 284 ITR 323 (SC).

13. Before the learned Commissioner (Appeals), it was brought to the notice of the learned Commissioner (Appeals) that in the earlier assessment year i.e., 2007–08, this issue has been decided in favour of the assessee after obtaining the remand report from the Assessing Officer. Apart from that, it was submitted that there was no new claim for deduction but wrong claim of deduction under section 36(1)(iii) was given up and correct claim under section 24(b), was made. It was further submitted that such a claim is not entertained at the stage of Assessing Officer, then the same can be done at the appellate stage in view of the decision of the Hon’ble Delhi High Court in CIT v/s Jai Parabolic Springs Ltd., [2008] 306 ITR 42 and the decision of Hon’ble Punjab & Haryana High Court in CIT v/s Ramco International, in ITA No.417 of 2008, judgment dated 8th December 2008, wherein the High Courts have duly considered the decision of the Hon'ble Supreme Court in Goetze India Ltd. (supra). The learned Commissioner (Appeals) allowed the assessee’s claim for deduction of ₹ 1.50 lakhs from the income from house property on the ground that firstly, similar issue was decided in the earlier year i.e., in the assessment year 2007–08 and, secondly all the necessary decisions for allowing such claim is available on the record and such a claim can be entertained at the appellate stage.

14. The learned Departmental Representative relied upon the order of the Assessing Officer and submitted that the claim can only be made by way of revised return of income and not otherwise and if such a claim cannot be entertained by the Assessing Officer, then the same cannot be mad in the appellate stage.

15. On the other hand, the learned Counsel for the assessee relied upon the order of the learned Commissioner (Appeals).

16. We have carefully considered the rival contentions, perused the relevant findings of the authorities below and the material available on record. First of all, it is noted that the assessee has made initial claim of deduction of interest of ₹ 15 lakhs on the borrowings which were utilised for acquiring residential premises as deductible business expenditure under section 36(1)(iii). Thereafter, the assessee filed revised statement of computation of income whereby the claim of ₹ 15 lakhs was given up and was disallowed by the assessee himself and instead interest claimed of ₹ 1.50 lakhs was made under section 24(b) which was the legally correct claim while computing the income from house property. Even if such a claim has been rejected by the Assessing Officer on the ground that the same should have been made by way of revised return of income, however, the same does not put any fetters on the powers of the appellate authorities to entertain such a legal claim if all the facts necessary for the adjudication are available on records. This has been clarified by the Hon'ble Supreme Court in the decision in Goetze India Ltd. (supra) itself. The Hon’ble Delhi High Court and Hon’ble Punjab and Haryana High Court have also clarified this issue as referred above. Apart from this, it is seen from the record that no new claim of interest has been made except for the fact that the right amount of interest has been claimed under the head *“interest”* and the amount of claim made in the earlier return of income. On these facts, it cannot be held that such a claim cannot be entertained as it is a trite law that it is the duty of the Assessing Officer to allow deductions as per the statute under the right provisions of the Act. If a wrong claim has been made then, it is the duty cast upon the Assessing

Officer to rectify. Thus, we do not find any reason to deviate from the findings of the learned Commissioner (Appeals). Ground no.2, is thus, dismissed.

17. परिणामतः राजस्व की अपील खारिज की जाती है ।

17. In the result, Revenue's appeal is dismissed.

आदेश की घोषणा खुले न्यायालय में दिनांकः 25th June 2014 की गई ।

Order pronounced in the open Court on 25th June 2014

Sd/-	**Sd/-**
डी. करुणाकर राव	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
D. KARUNAKARA RAO	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 25th June 2014

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

(1) निर्धारिती / The Assessee;
(2) राजस्व / The Revenue;
(3) आयकर आयुक्त(अपील)/ The CIT(A);
(4) आयकर आयुक्त / The CIT, Mumbai City concerned;
(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
(6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai