

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'E', NEW DELHI**

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER  
AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 5835/Del/2012  
AY: 2008-09**

DCIT, Circle 31(1) Room no.185 A C.R.bldg., I.P.Estate New Delhi	vs.	Mohan Gupta, HUF 502, Nirmal Tower 26, Barakhamba Road New Delhi
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PAN: AAGPG 9057 M

**(Appellant)**

**(Respondent)**

**Appellant by** : Shri Amrit Lal, Sr.D.R.  
**Respondent by** : Sh. Ved Jain, C.A.

**ORDER**

**PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER**

This is an appeal filed by the Revenue directed against the order dated 12.09.2012 of Ld.CIT(A)-XXVI, Delhi pertaining to the Assessment Year (hereinafter referred to as the A.Y.) 2008-09.

**2.** Facts in brief:- The assessee is engaged in the business of sale and purchase of shares and securities. He is also an investor in shares. The assessee maintains separate registers for stock in trade and investments. The issue before us is whether the Assessing Officer (hereinafter referred to as the AO) was right in assessing the income earned by the assessee under the head 'income from business and profession' and not under the head 'income from short term capital gains' as offered by the assessee.

**3.** The A.O. recorded that an amount of Rs.1,35,78,394/- pertains to gain accrued to the assessee on account of sale of IPO. The A.O. was of the

opinion that the assessee had in all the three years ended 31.3.2006, 31.3.2007 and 31.3.2008 had dealt with IPOs and the activity was shown as business activity for the year ended 31<sup>st</sup> March, 2006 and 31<sup>st</sup> March, 2007, and whereas in the year under consideration, this activity has been declared as investment activity. The Ld.CIT(A) had at para 5.1 held as follows.

*“5.1 Keeping in mind, the ratio of judicial pronouncement narrated above, I shall now examine the case of the appellant. In the case of the appellant, there is no dispute that the shares which were sold by the appellant and which gave rise to capital gain were held by the appellant as investments and not as stock in trade. The AO himself has specifically stated in para 4.1 of his order that the appellant is maintaining two separate registers i.e. stock register and investment register for various transactions done by him. The AO after stating the fact that the shares held as investments were recorded accordingly, has not brought on record the facts or circumstances which would show that the intention of the appellant was only to engage in the business of buying and selling shares. In this regard, he has not brought on record the volume and frequency of transactions carried out by the appellant. The appellant has filed a detailed chart depicting the transactions done by him. The same transpires that the purchases were made only through IPO’s and investment in one particular script was made just once. Also the sales were made mostly in one instance except in the case of the shares of Power Grid Corporation Limited which were purchased once and sold in three lots (i.e. as and when the adequate opportunity arose). The appellant dealt only in few scripts during the year under consideration, profit on which was claimed as short term capital gain. The composition of Short term Capital Gain was mainly to the investment in IPO. This indicates that the appellant was predominantly an investor for the shares on which profit has been booked as capital gain. The appellant was also doing transactions in other securities and the same was treated as business income by the appellant. It is important to mention here that an appellant can be a trader as well as an investor in the same security. In the present case the appellant clearly earmarked the difference in transactions done in the capacity of business activity and those*

*done as investment. It is further seen that the quantum (in monetary terms) of shares dealt with by the appellant was very high but the same as compared to the frequency of business activity done by it is very minimal. In the case of Janak Rangwalla vs. ACIT 2007 (11) SOT 627 (Mum), it was held that mere fact that volume of transactions carried out by an assessee was large cannot be a ground to conclude that an assessee was a trader in shares and not an investor. The intention of the assessee must be to hold shares as investments and the circumstances should not justify giving a different treatment.”*

**3.1.** He held that the investment activity of the assessee was distinct and separate from other business activities and hence the profit in question is assessable only under short term capital gain. He held that the assessee can be a trader as well as an investor in one single commodity and just because he has treated certain transactions in IPOs in earlier years, as business activity, it cannot be concluded the IPO activity during the year is also a business activity.

**3.2.** Aggrieved the Revenue is in appeal before us.

**4.** We have heard Shri Amrit Lal, Ld.Sr.D.R. on behalf of the Revenue and Shri Ved Jain, the Ld.Counsel for the assessee.

**5.** On a careful consideration of the facts and circumstances of the case, orders of lower authorities and case laws cited, we hold as follows.

**6.** We find that the intention of the assessee is to treat the amounts paid for IPOs as investments and not as stock in trade. Separate registers were maintained for investments as well as for stock in trade. The Ld.CIT(A) relied on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Neeraj Amidhar Surti 238 CTR 294 (Guj.) and came to a conclusion that despite borrowing, the gain on sale of shares can be capital gains and not business income. Moreover, the Tribunal in the assessee's own case for the A.Y. 2007-08 in ITA 1923/Del/2010 had allowed the appeal of the assessee

by concurring with the Ld.CIT(A) that the profit in question can be taxed only under the head 'income from capital gains' and not as 'income from business'. The Hon'ble Delhi High Court in the assessee's own case reported in 366 ITR 115 (Del) for the A.Y. 2005-06 vide judgement dated 28<sup>th</sup> January, 2014, at para 4 and 5 had held as follows.

*"4. The assessment order under Section 143(3) of the Act for the A.Y. 2007-08, from which the reassessment arose, after considering in detail the nature and frequency of the sale and purchase of shares by the assessee concluded that the activity was not for the purposes of investment but in the nature of a business activity, and thus, chargeable as such. The fact that such income was considered to be STGC in previous years was considered insufficient by the Assessing Officer as it is "a settled law that intimation under Section 143(1) are summary processing wherein there is no application of mind." The assessee appealed this order (Appeal No. 114/09-10). The CIT (Appeals) reversed the finding of the Assessing Officer and held that the income was to be treated at STCG and not as business income.*

*5. Despite this, the Revenue proceeded with the reopening of the assessment for the year 2005-06, based on the reasoning that an order under Section 143(1) - which was the case for the A.Y. 2005-06 - is only an intimation which does not involve an application of mind of the Assessing Officer. As new information had now come to light, given the nature and frequency of the scrips traded by the assessee, the A.O. had reasons to believe that income had escaped assessment."*

Further at para 9 it was held as follows.

*"9. In this case, the record does not show any tangible material that created the reason to believe that income had escaped. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier A.Y. 2005-06, which amounts to an abuse of power and is impermissible. Equally, even the order of the AO for the A.Y. 2007-08, converting the STCG into business income, has been reversed by the CIT(A) in Appeal no.114/09-10, which was confirmed by ITAT, Delhi in ITA 1923/Del/2010."*

7. Consistent with the view taken therein, we uphold the finding of the First Appellate Authority and dismiss this appeal of the Revenue.

8. In the result the appeal by the Revenue is dismissed.

Order pronounced in the Open Court on 11<sup>th</sup> May, 2016.

Sd/-

Sd/-  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

**(J.SUDHAKAR REDDY)**  
**ACCOUNTANT MEMBER**

Dated: the 11<sup>th</sup> May, 2016

*\*manga*

Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar