

IN THE INCOME TAX APPELLATE TRIBUNAL  
“E” Bench, Mumbai  
Before Shri B.R. Baskaran (AM)& Ramlal Negi (JM)

I.T.A. No. 2786/Mum/2012  
(Assessment Year 2008-09)

ACIT 13(3) Room No. 430 4 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	Shri Surendra S. Bajaj 4/43, Kapadia Chamber 51, Devji Ratansey Marg Mumbai-400 009. (Respondent)
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C.O. No. 140/Mum/2015  
(Assessment Year 2008-09)

Shri Surendra S. Bajaj 4/43, Kapadia Chamber 51, Devji Ratansey Marg Mumbai-400 009. (Appellant)	Vs.	ACIT 13(3) Room No. 430 4 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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PAN No.AAEPB3670R

Assessee by	Shri Reepal Tralshawala
Department by	Shri J. Saravanan
Date of Hearing	5.10.2016
Date of Pronouncement	5.10.2016

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the Revenue and cross objection filed by the assessee are directed against the order dated 2.12.2012 passed by learned CIT(A)-24, Mumbai and they relate to A.Y. 2008-09.

2. The Revenue is aggrieved by the decision of learned CIT(A) in cancelling the assessment of short term capital gain and long term capital gain earned on sale of shares as income from business.

3. The assessee has filed Cross objection contending that loss incurred on F&O transaction should have been set off by the Assessing Officer against business income assessed by him.

4. The assessee has made profit in purchase and sale of shares and declared the same as short term capital gains and long term capital gains. The Assessing Officer treated the assessee as trader in shares and accordingly assessed both types of capital gains as business income of the assessee.

5. Learned CIT(A), however held that the assessee should be considered as investor and accordingly directed the Assessing Officer to assess profit from sale of shares as capital gains. Aggrieved, the revenue has filed this appeal before us.

6. We have heard the parties and perused the record. Now, it is well settled proposition that a person can act as both trader as well as investor. With regard to long term capital gains, we noticed that the CBDT has come with the Circular No. 6/2016, wherein it is stated that long term capital gains declared by the assessee on sale of shares should not be disputed by the Assessing Officer. Accordingly, we are of the view that the long term capital gains declared by the assessee should be accepted by taking a view that the assessee has held those shares as investor. We also noticed that learned CIT(A) has taken an identical view in this matter and hence we do not find any infirmity in the order passed by him in respect of long term capital gains.

7. In respect of short term capital gains, we noticed that the Coordinate Bench of the Tribunal has considered an identical issue in assessee's own case in ITA No. 6234/Mum/2009 relating to A.Y. 2006-07 and the Tribunal, vide its order dated 28.10.2011 has taken the view that the assessee should be considered as trader and accordingly held the short term capital gain was rightly assessed as business income of the assessee. Though the learned AR submitted that the facts relating to the issue were different during the year

under consideration yet we are of the view that we should follow the view taken by the Tribunal in assessee's own case. Accordingly, we set aside the order passed by learned CIT(A) in respect of short term capital gain and uphold the order passed by the Assessing Officer in assessing the short term capital gain as business income of the assessee.

8. In the Cross Objection, the assessee has submitted that the loss incurred on F&O transactions should have been set off against business income of the assessee. Though the CO filed by the assessee is barred by limitation, yet we notice that the claim made by the assessee is a legal claim and hence we admit the CO by condoning the delay. We noticed that the above said claim of the assessee has not been considered by the Assessing Officer. Accordingly, we restore this issue to the file of the Assessing Officer with the direction to examine the said claim and take appropriate decision in accordance with law.

9. In the result, appeal filed by the Revenue is partly allowed and cross objection filed by the assessee is treated as allowed.

Order has been pronounced in the Court on 5.10.2016

Sd/-  
(RAMLAL NEGI)  
JUDICIAL MEMBER

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 5/10/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai