

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA
BEFORE SHRI N. V. VASUDEVAN, JM & DR. A.L.SAINI, AM**

**ITA No.130/Kol/2015
(A.Y: 2010-11)**

D.C.I.T, Circle – 33, Kolkata 10B, Middleton Row, 3 rd Floor, Kolkata – 700 071.	Vs.	Ashish Kumar Kataruka 10, Lord Sinha Road, Shakespeare Sarani, Kolkata – 700 071.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGFPK 6807 Q		
(REVENUE/DEPARTMENT)		(ASSESSEE)

Appellant/Assessee by : None (Sr. D.R)
Respondent by : Shri S. K. Tulsiyan, Advocate

सुनवाई की तारीख / **Date of Hearing** : **12/07/2017**
घोषणा की तारीख/**Date of Pronouncement**: **28/07/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, pertaining to Assessment Year 2010-11, is directed against an order passed by the Commissioner of Income Tax-(Appeals)-XIX, Kolkata, in appeal No.408/CIT(A)-XIX/Circle-33/Kol/12-13, dated 15.10.2014, which in turn arises out of an order passed by Assessing Officer u/s 143(3) of the I.T Act, 1961(hereinafter referred to as the 'Act'), dated 08.01.2013.

2. The brief facts of the case qua the assessee are that the return of income was filed by the assessee on 13.10.2010 disclosing a total income of Rs.84,68,942/-. The assessee's case was selected for scrutiny u/s. 143(2) of the Act and Assessing Officer has completed the assessment by showing the income of sale of investments under the

head of business income instead of under the head of capital gain, as claimed by the assessee. It was observed by the AO that the sale proceeds received from the sales of shares have been used for repurchase of shares/mutual funds again by the assessee, which clearly means that the assessee is using shares/mutual funds as a stock-in-trade and utilizing the sale proceeds including profit to buy more stock in trade i.e. shares/mutual fund. The assessee has sold shares of Rs.12,93,70,370/- and shown short term capital gain of Rs.80,44,406/- on it. Similarly, the assessee has sold shares of the value of Rs.1,46,49,452/- and on the same has shown long term capital gain of Rs.17,03,911/-. Therefore, the AO held that the huge volume of transactions of shares also shows that he is a trader not an investor. Therefore, the Ld. AO held that it is proved beyond doubt that the assessee is a trader in shares and mutual fund. Therefore his gain from share trading both short term and long term ought to be treated as business income. This way, the AO rejected the claim of the assessee to assess the profit on sale of shares and mutual funds under the head of short term capital gain and long term capital gain.

3. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the CIT(A), who allowed the appeal of the assessee.

The Id. CIT(A) held that AO has treated the transactions in shares to be that of business in nature rather than investments of the assessee. The Id CIT(A) observed that the same issue has come up before the I.T.A.T, Kolkata 'C' Bench in the assessee's own case for the A.Y 2008-09 in I.T.A No.1132/Kol/2011 wherein the Tribunal vide its order dated 06.02.2014 ultimately ruled in favour of the assessee and the appeal filed by the Revenue against the decision of the CIT(A) was dismissed. Therefore, the Ld. CIT(A) found that the same issue was involved in the A.Y. 2010-11, that is, the assessee's appeal under consideration. Therefore, the Ld. CIT(A) directed the AO to accept the return of income of the assessee in the nature of the investments rather than business income. The Ld. CIT(A) also observed that in assessee's own case in A.Y 2006-07, the AO has accepted the returned income of the assessee, with all the parameters remaining the same as in this year under consideration, without shifting the head of income from capital gains to that of business income. Therefore, based on the judgment of the jurisdictional I.T.A.T, Kolkata, the Ld. CIT(A) held that the income by way of sale of shares/mutual funds is to be treated under the head income from capital gain and the Ld. CIT(A) therefore, directed the AO to treat the assessee as an investor in shares rather than as a trader.

4. Not being satisfied with the order of CIT(A), the Revenue is in appeal before us and has taken the following grounds of appeal:

1. *In the facts and circumstances of the case, the Ld. CIT(A)-XIX, Kolkata has erred in treating the transaction in share as Long Term and Short Term capital gain reversing the assessment of such transaction as business income.*
2. *In the facts and circumstances of the case, the department craves leave to add, alter or amount or amend any ground or grounds before or at the time of hearing.*

5. The Id DR for the Revenue has stated before us, that looking into account the frequency of the transactions and the quantum of the transactions involved in the purchase and sale of shares/mutual fund, the capital gain should be assessable under the head Business Income rather than under the head capital gains. This way, the Id DR for the Revenue, has defended the order passed by the Assessing Officer.

6. On the other hand, the Ld. Counsel for the assessee has submitted that in the A.Y. 2006-07 in assessee's own case the AO has accepted the return of income of the assessee and treated the assessee as an investor in shares. Apart from this, the Hon'ble ITAT, Kolkata "C" Bench in the assessee's own case for the A.Y 2008-09 in I.T.A No.1132/Kol/2011 wherein the Tribunal held as follows:

“We have heard the rival contentions and perused the material available on record. There is no dispute that holding of assessee in shares and mutual funds were shown, all along as investment. It is also not disputed that assessee had been showing it so since last very many years. In none of the earlier years AO had disturbed the claim of assessee that surplus arising on sale of such shares was to be taxed under the head “capital gains”. AO thought it fit to shift his stand for the impugned assessment year only. Break-up of the capital gains claimed by assessee has been mentioned by the AO as Rs.83,36,337/- long-term and Rs.14,08,238/- short-term. It is clear from the above that about 85% of the holdings of shares, sold by assessee were of long-term in nature. In other words, the shares which were sold comprised in a major part, long-term holdings. Holding period of such shares exceeded was 1 to 4 years, as mentioned by the Assessing Officer himself at para 4.5 of his order. In our opinion, this will clearly imply that assessee was not indulging in day-to-day, share transactions. No doubt, it had shown a short-term capital gains of Rs.14,08,238/-, of which, 50% were out of sales made within first month of purchases. But considering the overall picture, we are of the opinion that the treatment given by the assessee cannot be faulted. Assessee had never shown the shares held by him as stock-in-trade. Just because assessee had indulged in trading of Future & Options which would not mean that he was also trading in shares as a business venture. Revenue has not been able to show that intention of assessee at the time of purchase of shares was only to earn profit as a business venture. Treatment given by assessee in respect of his holding of shares, in his books of accounts could not have been brushed aside. We are of the opinion that Id. CIT(Appeals) was justified in considering that the shift of head made by the AO was purely based on assumptions and presumptions. As noted by Id. CIT(A), CBDT had vide its Circular No.4 of 2007 clearly accepted the right of an assessee to have two portfolios, one for investment and other for trading. In these circumstances, we do not find any reason to interfere with the order of Id. CIT(A).”

7. Having heard the rival submissions and perused the materials available on record, we are of the view that assessee’s case under consideration is fully covered by the ITAT, Kolkata ‘C’ Bench, Kolkata in assessee’s own case in I.T.A No.1132/Kol/2011 for A.Y. 2008-09 dated 6th February 2014 wherein the Tribunal held that assessee had never shown the shares held by him as stock-in-trade. Just because assessee had indulged in trading of Future & Options, would not mean that he was also trading in shares as a business venture. Revenue has not been able to show that intention of assessee at the time of purchase of

shares was only to earn profit as a business venture. Treatment given by assessee in respect of his holding of shares, in his books of accounts could not have been brushed aside. Therefore, the assessee is an investor in shares and not a businessman in shares. Accordingly, we are of the view that order passed by the Ld. CIT(A) does not have any infirmity, therefore, we confirm the order passed by the Ld. CIT(A).

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

Order pronounced in the open court on this 28/07/2017.

Sd/-
(N. V.Vasudevan)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Dr. A. L. Saini)
लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक
Dated: 28/07/2017
[RS, SPS]

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

1. अपीलार्थी / The Assessee - Ashish Kumar Kataruka
2. प्रत्यर्थी / The Revenue / Department - DCIT, Circle – 33, Kolkata.
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. Guard File.

//True Copy//

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata