

आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JM AND SHRI N. K. PRADHAN, AM

आयकर अपील सं./I.T.A. No.5479/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2012-13)

Income Tax Officer 20(1)(5), Room No. 121, 1 st Floor, Piramal Chambers, Parel, Mumbai-400 012	बनाम/ Vs.	Shri Hiren M. Dand 2203, Springs, Islands City Entre, G. D. Ambedkar Marg, Near Wadala Telephone Exchange, Dadar (East), Mumbai-400 014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACPD 9760 A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

&

Cross Objection No.36/Mum/2018
(Arising out of ITA No. 5479/Mum/2016)

(निर्धारण वर्ष / Assessment Year: 2012-13)

Shri Hiren M. Dand Mumbai-400 014	बनाम/ Vs.	Income Tax Officer 20(1)(5), Mumbai-400 012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACPD 9760 A		
(Cross Obector)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Saurabh Deshpande
प्रत्यर्थी की ओर से/Respondent by	:	Shri Mehul Shah

सुनवाई की तारीख / Date of Hearing	:	09.05.2018
घोषणा की तारीख / Date of Pronouncement	:	01.06.2018

आदेश / ORDER

Per Saktijit Dey, J. M.:

The aforesaid appeal by the Department and the cross objection by the assessee are against the order dated 17.06.2016 of the Id. Commissioner of Income Tax (Appeals) – 32, Mumbai for the assessment year 2012-13.

2. The department is aggrieved with the decision of the Id. Commissioner of Income Tax (Appeals) in accepting assessee's claim that income derived from share transaction is to be assessed as 'short term capital gain' as against 'business income' as held by the Assessing Officer.

3. Briefly the facts are, the assessee an individual is stated to be an investor in shares and securities. For the assessment year under dispute, the assessee filed his return of income on 16.07.2012 declaring total income of Rs.9,94,117/-. During the assessment proceedings, the Assessing Officer noticing that the assessee has offered the income derived from share transaction amounting to Rs.46,61,208/- as short term capital gain, called upon the assessee to furnish the necessary details of the share transactions. After verifying the details submitted by the assessee, the Assessing Officer was of the view that the assessee has undertaken the activities in share transaction as a business. Hence, the income derived there from such activity should be assessed as business income. Accordingly, he issued a show cause notice to the assessee calling upon him to explain why the income from share transaction should not be assessed as business income. In response, the assessee filed its reply objecting to the proposed action of the Assessing Officer. It was submitted by the assessee that from the very inception, the assessee has consistently treated the share transaction as an investment activity and offered capital gain. Therefore, it cannot be considered as a business activity. The Assessing Officer, however, did not find merits in the

submission of the assessee and proceeded to assess the income derived from share transaction as business income, as against the assessee's claim of short term capital gain.

4. Being aggrieved with the aforesaid decision of the Assessing Officer, the assessee preferred an appeal before the Id. Commissioner of Income Tax (Appeals).

5. The Id. Commissioner of Income Tax (Appeals) after considering the submissions made by the assessee and applying his mind to the facts and materials brought on record, found that right from the inception, the assessee has undertaken the share transaction as an investment activity and offered the income derived there from as capital gain. He found that in the assessment year 2004-05, the income offered from share transaction under the head capital gain was treated as business income by the Assessing Officer. However, the Commissioner (Appeals) accepted the claim of the assessee which was not contested by the Department. He further found that in the assessment year 2008-09, the tribunal has accepted the claim of the assessee in offering the income derived from share transaction under the head capital gain. He found that in the assessment years 2006-07 and 2007-08 as well as in assessment year 2013-14, the Assessing Officer himself has accepted the claim of the assessee in offering the income derived from share transaction under the head capital gain. The Id. Commissioner of Income Tax (Appeals) having found that the facts in the impugned assessment year are materially identical, hence, applying the rule of

consistency and following the decision of the Tribunal he deleted the addition made by the Assessing Officer from the share transactions under the head 'business' and in the process accepted assessee's claim.

6. We have heard the parties and perused the materials on record. At the outset, the Id. Authorized Representative submitted that the issue in dispute is covered by the decision of the Tribunal in assessee's own case for assessment year 2008-09. In this context, he drew our attention to a copy of the order in ITA No. 4163/Mum/2012 dated 28.02.2014 which are placed at page 36 of the paper book. The Id. Authorized Representative submitted, the aforesaid decision of the Tribunal has also been upheld by the Hon'ble jurisdictional High Court in the Income Tax Appeal No. 1750 of 2014 dated 01.08.2017 while dismissing the department's appeal. Drawing an analogy between the factual position as involved in assessment year 2008-09 and in the impugned assessment year, the Id. Authorized Representative submitted, as against 10 scrips dealt with by the assessee in assessment year 2008-09, in the impugned assessment year the assessee has dealt with only 6 scrips. Therefore, he submitted, the facts being identical, the decision of the tribunal and the Hon'ble jurisdictional High Court will apply to the impugned assessment year as well. The Id. Departmental Representative fairly submitted that the issue has been decided in favour of the assessee in the earlier assessment year by the tribunal and the Hon'ble jurisdictional High Court. Considering the submissions made by the Id. Counsels appearing for both

the parties and perusing the material on record, we are of the opinion that the issue in dispute is covered by the decision of the Co-ordinate Bench in assessee's own case for assessment year 2008-09 which has also been upheld by the Hon'ble jurisdictional High Court in the order referred to above. In view of the aforesaid, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). The grounds raised are dismissed.

7. As regards the cross objection filed by the assessee, there is a delay of 07 days in filing the same. The assessee has not filed any application explaining the cause of delay and seeking condonation thereof. When, this was brought to the notice of the Learned Authorised Representative he submitted that the assessee does not want to press it. In view of the above the cross objection is dismissed without being admitted.

8. In the result, the department's appeal and assessee's cross objection are dismissed.

Order pronounced in the open court on 01.06.2018

Sd/-

(N. K. Pradhan)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.06.2018

व.नि.स./Roshani, Sr. PS

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / Judicial Member

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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