

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'F', NEW DELHI**

**BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER
AND SHRI MAHARISHI PRASHANT, ACCOUNTANT MEMBER**

ITA No. 3414/Del/2015

AY: 2010-11

Dy.CIT, Circle 1(1)(1) International Taxation Room No.409, E-2 Block 4 th Floor, Civic Centre Near Minto Road New Delhi	vs.	Smt. Asha Kumar Agarwal C/o Yogi Associates, C.A. E-335, East of Kailash New Delhi 110 065 PAN: ADCPA4605J
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(Appellant)

(Respondent)

Department by : Sh. Surender Pal, Sr. D.R.

Assessee by : Sh. R.S. Ahuja, C.A.

Date of Hearing : 31.10.2018

Date of Pronouncement: 02/11/2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by Revenue against order of Ld.CIT(Appeals)-42, New Delhi dated 09.03.2015 for A.Y 2010-11 on the following grounds of appeal:

“1. On the facts and in the circumstances of the case and law, whether Ld.CIT(A) has erred in deleting addition made by the voluminous shares trading as ‘business in nature’ and holding that in the light of Circular no.1827 dated 31.08.1989 or CBDT, the assessee’s activities of sale/purchase of shares can only be considered under the head ‘Capital Gain’, whereas considerations

dealt with in the Circular are totally different from the ones in the instant case.

2. The appellant craves to add, amend, modify or any ground(s) of appeal at the time or before the hearing of the appeal.”

2. Brief facts of the case are as under:

Assessee filed her return of income on 31/07/10 declaring total income of Rs.6,81,400/-. The case was selected for scrutiny and notices under section 143 (2) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) were issued along with detailed questionnaire. In response to statutory notices, representative of assessee appeared before Ld. AO and filed all necessary details/documents as called for.

2.1. It was observed by Ld.AO that assessee disclosed Income from House Property, Short Term Capital Gains and also Income from Other Sources. Ld. AO observed that assessee during the year under consideration, entered into frequent transaction of sale and purchase of shares. He thus drew a presumption of assessee being engaged in business of trading in securities.

2.2. Ld. AO also observed that during Assessment Year (A.Y.) 2008-09 similar view was taken by then Ld.A.O., which was reversed by Ld.CIT(A) therein. He thus on the basis of assessment order passed for A.Y. 2008-09, made addition in the hands of assessee under the head ‘Income from Business and Profession’.

2.3. Aggrieved by order of Ld. AO, assessee preferred appeal before Ld. CIT (A) who deleted addition made by Ld. AO.

3. Aggrieved by order of Ld. CIT (A) revenue is in appeal before us now.

4. Ld. Sr.DR submitted that assessee is a non-resident individual residing in Bahrain, and is pursuing her teaching profession over there. He submitted that assessee keeps visiting India and therefore an element of Permanent Establishment (P.E.) cannot be ruled out.

4.1. He placed reliance upon the order of Ld. AO and submitted that assessee frequently traded in securities and therefore income earned cannot be held as Capital Gains, instead it should be Income from Business and Profession.

4.2. On contrary Ld.Counsel submitted that assessee has been staying out of India since past 1983. She admittedly visited India during the year only for 43 days and no business connection could be established as per section 9 of the Act and DTAA between India and Bahrain. He submitted that assessee is liable to be taxed for business profit in Bahrain and not in India. He also submitted that in subsequent A.Ys being A.Y. 2011-12, and 2012-13, no adverse inference has been made in respect of income that has been declared by assessee as short term and long term capital gain, on purchase and sale of shares.

5. We have perused submissions advanced by both sides in light of records placed before us.

6. Assessee being an NRI has been investing in equity and mutual funds in India. Ld.CIT(A) has observed that there is no borrowed funds that has been used for this purpose and the gain/loss has been declared by assessee consistently as income under the head capital gains. This position has been accepted by revenue till A.Y. 2007-08, however only for A.Y. 2008-09 & 2009-10 Ld.A.O. treated capital gain declared by assessee as

income from business or profession. Again from A.Y. 2011-12 and 2012-13 assessee had declared income under the head "Capital Gains", which has been accepted by revenue authorities. We do not agree with reasoning of Ld.AO that since assessee travels to India there exist Permanent Establishment. Further it has been submitted by Ld.Counsel that order passed by Ld. CIT (A) for A.Y. 2008-09 and 2009-10 has not been appealed by revenue before this Tribunal, thereby accepted the long standing position taken by assessee.

6.1. It is also observed that there is no new facts that has been brought on record in order to deviate from the consistent view taken by the authorities for A.Y. 2008-09 and 2009-10 which stands accepted by Ld.A.O.

6.2. We are therefore inclined to uphold the observations of Ld. CIT (A).

7. Accordingly grounds raised by revenue stand dismissed.

8. In the result appeal filed by revenue stands dismissed.

Order pronounced in the open court on 02nd November, 2018.

Sd/-

**(MAHARISHI PRASHANT)
ACCOUNTANT MEMBER**

Sd/-

**(BEENA A PILLAI)
JUDICIAL MEMBER**

Dt. 02nd November, 2018

*GMV

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

	Date
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