

**IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.7917/Mum/2019
(Assessment Year: 2011-12)**

Sarah Faisal Hawa 24 Center Court Motalibai Street Agripada Mumbai-400 011	Vs.	ACIT-17(3) Room No.614, 6 th Floor Piramal Chambes Lalbaugn Parel Mumbai-400 012
PAN/GIR No.AAIPH0012P		
Appellant)	..	Respondent)

Assessee by	Shri Jitendra Singh, AR
Revenue by	Shri V.Vinod Kumar, DR
Date of Hearing	24/02/2020
Date of Pronouncement	04/03/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-33, Mumbai, dated 07/11/2019 and it pertains to Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal:

1. *The Ld. Commissioner of Income Tax (Appeals) -33, Mumbai [hereinafter referred to as the "Ld. CIT(A)"] erred in passing the order dated 7th November, 2019 upholding the assessment order passed by Ld. Assistant Commissioner of Income Tax - 17(3), Mumbai [hereinafter referred to as 'Ld. A.O.'] without appreciating the facts and circumstances of the case. Thus, the order dated 07.11.2019 passed by Ld. CIT (A) is bad in law and the same may be quashed.*

2. **Treating the Long Term Capital Gains declared by the Appellant as Business Income unjustified- Rs.95,09,761/-**

i. The Ld. CIT (A) erred in upholding the action of the Ld. A.O in treating the long term capital gain amounting to Rs.95,09,761/- as Business Income of the Appellant without appreciating the fact that the Appellant is an investor in shares and not a trader as alleged by the Ld. A.O. Hence, addition made by the Ld. A.O. amounting to Rs.95,09,761/- by treating the Long Term Capital Gains as Business Income of the Appellant is merely on conjecture and surmises and the same may be deleted.

ii. The Ld. CIT(A) failed to appreciate that the shares were held by the Appellant for more than a year. Hence, the sale consideration received by the Appellant were rightly treated as Long Term Capital Gain. Hence, treating the Long Term Capital Gain as Business Income of the Appellant is unjustified.

3. Treating the Short Term Capital Gains declared by the Appellant as Business Income unjustified - Rs.1,36,83,148/-

i. The Ld. CIT(A) erred in upholding the action of Ld. A.O. in treating the Short Term Capital Gains amounting to Rs. 1,36,83,148/- as Business Income of the Appellant without appreciating that the Appellant is an investor in shares and not trader as alleged by Ld, A.O. Hence, treating the Short Term Capital Gains as Business Income of the Appellant is without any basis.

ii. The Ld. CIT(A) failed to appreciate that the Appellant satisfies all the conditions enumerated in Circular No. 4 of 2007 dated 15.06.2007 to treat the Short Term Capital Gains as Business Income. Hence, treating the short term capital gains as business income and thereby making an addition of Rs.1,36,83,148/- is unjustified and the same may be deleted.

4. The Ld. Assessing Officer erred in levying interest under section 234A and 234B without appreciating the fact that the appellant denies his liability to the same.

5. The Appellant craves leave to add, alter, amend, delete, rescind or withdraw any of the grounds of appeal mentioned hereinabove.

3. The brief facts of the case are that the assessee is an individual, derives income from business, capital gains and income from other sources filed his return of income for AY 2012-13 on 30/09/2011, declaring total income of Rs.1,38,86,080/-. The case has been selected for scrutiny and during the course of assessment proceedings, the Ld. AO noticed that the assessee is involved in systematic activity of share trading and accordingly, called upon the assessee to explain as to why, income declared under the head short term capital gain, as well as long term capital gain from sale of

shares and securities shall not be assessed under the head income from business or profession. In response, the assessee submitted that he is an individual engaged in the activity of investments in shares for quite long period and income declared under the head capital gains towards profit derived from sale of shares has been assessed under the head capital gains in earlier assessment years and in subsequent assessment years. Therefore, without there being any change in material facts during the year under consideration, different view cannot be taken to assess surplus from purchases and sale of shares under the head income from business or profession. The Ld. AO after considering relevant submissions of the assessee and also taken note of various facts, including high frequency of transactions, as well as low period of holding, opined that the assessee is involved in systematic activity of share transactions, which is akin to an activity in the nature of business and accordingly, surplus derived from such activity is assessable under the head income from business or profession and accordingly, assessed short term capital gain, as well as long term capital gain derived from purchase and sale of shares under the head income from business or profession.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has reiterated its submission made before the Ld. AO and argued that when, income declared under the head short term capital gain, as well as long term capital gain towards profit derived from purchase and sale of shares has been accepted in past, no different view can be taken, unless there is changes in facts during the year under consideration. The assessee, further submitted that the Ld.

AO accepted the claim of capital gain right from AY 2005-06 to 2010-11 and also, in subsequent assessment years, however has taken different view without any change in facts for the year under consideration. The assessee, further submitted that the Ld AO was taken one isolated transaction of purchases and sales of shares of Accentia Technologies Limited on 26/05/2010 and Financial Technologies Limited on 26/07/2010, ignoring the fact that the average holding period of shares in case of long term capital gain is '543' days and in case of short term capital gain, it is '176' days. The Ld.CIT(A) after considering relevant submission of the assessee and also by taken note of various other facts , including frequency of transactions in certain scripts, came to the conclusion that the assessee is involved in systematic activity of share trading business, which is evident from the fact that he has made continuous and regular trading in shares of different companies and there was no intention to hold the shares for the purpose of earning dividend income. The Ld.CIT(A), further noted that insofar as, holding period is concerned, the same varies and some of the shares are found to have been sold on the date of purchases. It is, therefore, he opined that there is no error in the findings recorded by the Ld. AO to assess profit derived from purchases and sale of shares under the head income from business or profession. Aggrieved by the Ld.CIT(A) order, the assessee is in appeal before us.

5. The Ld. AR for the assessee, at the time of hearing submitted that this issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai 'F' bench in assessee own case for Asst.Year 2007-08 in ITA No.5884/Mum/10, where under identical set of facts, the Tribunal held that, the assessee is an investor in

shares and profit derived from sale of shares in assessable under the head capital gains. The Ld. AR, further submitted that the Ld. AO has reopened assessment of earlier years on the basis of findings of Asst.Year 2007-08 and those matters reached to the Tribunal and the Tribunal under similar set of facts has held that when, the Ld. AO was accepted the claim of the assessee for income declared under the head capital gains, in respect of profit derived from shares trading activity in the past and in subsequent assessment years, then there is no reason to take different view for the year under consideration. The Ld. AR, further submitted that the revenue has taken the issue before the Hon'ble Bombay High Court in Asst.Year 2007-08, where the Hon'ble High court by following the decision of its earlier order, in the case of CIT vs Gopal Purohit (2011) 336 ITR 287 has held that the respondent is being consistently held to be an investor by the revenue for the earlier and subsequent assessment year on similar facts and hence, there is no reason to take different view for the year under consideration, without there being any change in material facts. He, further submitted that for the year under consideration facts are *pari-materia* with facts considered by the Tribunal for earlier years and the average holding period for the year under consideration, in respect of long term capital gain is '543' days and it is 160 days for short term capital gain. Therefore, the Ld. AO, as well as the Ld.CIT(A) were incorrect in taking different view for the year under consideration.

6. The Ld. DR, on the other hand, strongly supporting order of the Ld. AO, as well as the Ld.CIT(A) submitted that the assessee is involved in systematic activity of share trading, which is evident from the fact that the Ld.CIT(A) has brought out clear facts to the effect

that he has made repetitive transactions in certain scripts for more than 10 to 12 times, which is akin to a trading activity. Hence, there is no error in the findings recorded by the Ld. AO, as well as the Ld.CIT(A), in coming to the conclusion that profit derived from share trading activity is assessable under the head income from business or profession.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. First and foremost, the issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai 'F' bench in assessee own case for Asst.Year 2007-08, where the Tribunal by following the decision of Hon'ble Bombay High Court in the case of CIT vs Gopal Purohit (supra) held that the assessee is an investor in share and any profit derived from purchase and sale of shares is assessable under the head capital gains depending upon the period of holding. We, further noted that a similar view has been taken by the ITAT, Mumbai, 'C' Bench for Asst.Year 2005-06 to Asst.Year 2008-09, where it has been held that when, the department is accepted the claim of income declared under the head long term capital gains/short term capital gains towards profit derived from share trading activity in the past and in subsequent assessment years, there is no reason to take different view for the year under consideration, without there being any change in facts. We, further noted that the CBDT has issued a circular No.04/2007, dated 13/06/2007, where it has been clarified that it is possible for a tax payer to hold two portfolios i.e one for investment portfolio and another one for trading portfolio. The income from share trading activity cannot be decided on one parameter to come to the conclusion that such income is assessable

under the head income from business or profession, but, it depends upon various facts, including frequency of transactions, volume of transactions, period of holding and capital employed for such activity. The Hon'ble Bombay High Court in the case of CIT vs Gopal Purohit (supra), which was further upheld by the Hon'ble Supreme Court has categorically held that it is possible for the assessee to maintain two portfolio's, i.e one for investments and one for trading. In this case, on perusal of facts available on record, there is no doubt of whatsoever with regard to, frequency, volume and period of holding in shares, because the average period of holding, in case of short term capital gains is '160' days and the average period of holding for long term capital gain is '543' days. The Ld. AO has never brought any records to indicate that the assessee has employed borrowed capital for share trading activity. It is also an undisputed fact that the assessee has treated shares purchases as an investments in his financial statements. All these facts goes to prove and undoubted fact that the assessee is an investor in shares for so many years and in the process, he has earned profit on purchases and sale of shares, which is assessable under the head income from capital gains. Further, the department itself has accepted income declared under the head capital gains in earlier and subsequent Asst.years. Unless, there is no change in facts, no different view can be taken for the year under consideration. Therefore, we are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were erred in assessed income derived from share trading activity under the head income from business or profession. Hence, we direct the Ld. AO to assess profit derived from purchase and sale of shares under the head short term capital gains and as well as long term capital gains, as declared by the assessee.

8. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 04/03/2020

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 04/03/2020
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai