

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 6381/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

Ruchit Bharat Patel 3-3A, 1 st Floor, 32-34, Churchgate House, Veer Nariman Rd, Fort, Mumbai- 400001.	बनाम/ Vs.	ACIT 12(1) 137, 1 st Floor, Aayakar Bhavan, Maharshi Karve Road New Marine Lines, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ANDPP9202F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Kumar Kale	
Revenue by:	Shri Akhtar H. Ansari (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 15/10/2020

घोषणा की तारीख /Date of Pronouncement: 17/12/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 18.07.2017 passed by the Commissioner of Income Tax (Appeals) -28, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2012-13.

2. The assessee has raised the following grounds: -

- “1. *On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in upholding the assessment of gain of Rs.66,50,725/- that arose on sale of shares as business income instead of short term capital gain (STCG) as declared by the appellant in his return of income. Your appellant, therefore, prays tat this gain be assessed as STCG.*



2. *Your appellant craves leave to alter, modify, amend or delete any of the above grounds of appeal, or to add one or more new ground(s) as may be necessary.”*

3. The brief facts of the case are that the assessee filed her return of income on 29.08.2012 declaring total income to the tune of Rs.1,23,36,996/-. Thereafter, the return was processed u/s 143(1) of the I. T. Act, 1961. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. In the year under consideration, the assessee was engaged in the business of investment and securities. The assessee derived income from capital gain and other sources during the assessment year. During the previous year, the assessee derived Short Term Capital Gain (STCG) amounting to Rs.66,50,725/- from dealing in shares & securities. The claim of the Short Term Capital Gain on sale & purchase of shares was scrutinized on the basis of various parameters emanated from CBDT's instruction no. 1827 dated 31.08.1989 and CBDT office memorandum dated 13.12.2005. Taking into account all the facts and circumstances, the Short Term Capital Gain was treated as business income and accordingly taxed. The assessee was not satisfied and filed an appeal before the CIT(A) who also affirmed the decision of the AO. Feeling aggrieved, the assessee filed the present appeal before us.

ISSUE NO.1

4. We have heard the arguments advanced by the Ld. Representative of the parties and perused the record. The only issue which has been raised by the assessee before us is in connection with the treatment of Short Term Capital Gain as business income. The Ld. Representative of the assessee



has argued that the status of the assessee has been treated as investor in the past i.e. assessment year w.e.f 2006-07 to 2011-12 and also in future for the A.Y. 2013-14 to 2017-18 except the year under assessment year 2012-13 (year under appeal), therefore, the claim of the assessee is not liable to be changed even on the basis of the principle of consistency and in this regard the Ld. Representative of the assessee has placed reliance upon the decision of the Hon'ble Bombay High Court in the case of **CIT Vs. Gopal Purohit (2011) 336 ITR 287 (Bom)**. It is also argued that the Hon'ble ITAT in the case of assessee's family members which is on similar facts and circumstances has treated the income from sale of shares as capital gain by virtue of order dated 11.05.2018 (ITA. No. 204 & 723/M/2014 and 4093, 4094, 4100 & 4887/M/2016). It is also argued that the claim of the family members of the assessee namely Hardik Bharat Patel has also made accepted by Hon'ble ITAT in ITA. No.4605/M/2016 titled as ACIT Vs. Hardik Bharat Patel. However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. On appraisal of the record available in the file, we find that the claim of the assessee has been treated as investor in the past i.e. assessment year w.e.f 2006-07 to 2011-12. Subsequently, the claim of the assessee has been accepted in the A.Y.2013-14 to 2017-18. It is only the assessment A.Y. 2012-13 in which the claim of the assessee has not been accepted and the income on the sale/purchase of shares has been treated as business income. However, there is no plausible reason has been given in the order of the AO under which circumstances the claim of the assessee has been declined and the income from the sale/purchase of the share has been treated as business income. The claim of the family members of the assessee in similar circumstances has been accepted



as short term capital gain in ITA. No.4605/M/2016 in which the following finding has been given in para no. 5, 5.1 & 5.2 which are reproduced as under:-

“5. We have heard rival submissions. We find that the ld. AO had treated the assessee as a trader in shares and not as an investor in shares by placing reliance on the orders passed by his predecessor for the A.Yrs. 2007-08 and 2008-09. We find that assessee has been consistently showing the purchase of shares under the head ‘investments’ from the inception and had been consistently reporting capital gains or capital loss as the case may be. We also find that the CBDT Circular No.6/2016 dated 29/02/2016 also states that where the assessee has consistently reported long term capital gains in the past and during the year under consideration, the same should not be disturbed by the revenue by treating it as business income. We hold that the said analogy would apply with equal force for short term capital gains also. We find that in respect of profits derived from futures and options, the assessee had declared the same under the head ‘business income’ which goes to prove the bonafide intention of the assessee of maintaining dual portfolios and offering to tax under the proper heads correctly.

5.1. We also find that this Tribunal for A.Yrs.2007-08 and 2008-09 in ITA Nos. 2274 & 8013/Mum/2011 dated 01/05/2013 had held that both short term capital gains and long term capital gains should be assessed as such and not to be treated as business income. In other words, this Tribunal had given a categorical finding for A.Yrs.2007-08 & 2008-09 that assessee is merely an investor in shares and hence, the gains derived there from should be assessed only under the head ‘capital gains’. The relevant operative portion of the said order as reproduced in the order of the ld. CIT(A) is as under:-

“Therefore, respectfully following the decision of the Tribunal and the Hon'ble High Court mentioned above, we hold that the learned CIT(A) was not justified in confirming the order of AO, who took the transaction as business transaction instead of treating the same as short term capital gain. Learned CIT(A) has confirmed the order of AO by observing that the transactions are frequent transactions, however, we are of the view that the holding period cannot be taken into consideration because under the Act itself, it has been provided that where the holding period of shares are more than one year then the long term capital gain will be applicable and where the holding period is less than one year, then the short term capital gain will be applicable, subject to the transaction are shown under the head investment portfolio. Therefore, whether the transaction are frequent or



holding period is less, they are shown under the head investment portfolio, therefore, the transaction which have been shown under the head investment portfolio and, hence, the short term capital gain or long term capital gain as the case may be, will be applicable. In view of these facts and circumstances, we allow the grounds of the assessee for both of the years and direct the AO to assess the profit under the head short term capital gain instead of under the head business profit.”

5.2. There is no dispute that the facts are identical in this year when compared to that in A.Yrs.2007-08 and 2008-09. We find that the ld. CIT(A) had merely followed the order of this Tribunal for earlier years while granting relief to the assessee and we also find that the Hon'ble Jurisdictional High Court in assessee's own case for A.Y.2008-09 after considering all the arguments of the revenue had upheld the order of this Tribunal for A.Y.2008-09 as referred supra and by dismissing the appeal of the revenue in ITA No.390/Mum/2016 dated 19/11/2018. Respectfully following the aforesaid orders, we do not find any infirmity in the order of the ld. CIT(A) in this regard. Accordingly, the grounds raised by the revenue for the A.Y.2010-11 is dismissed.”

5. The claim of the other family members of the assessee has also been accepted by Hon'ble ITAT in the order dated 28.12.2018 (ITA. No.204 & 723/M/2014 and 4093, 4094, 4095, 4100 & 4887/M/2016) in which the income from the sale/purchase has been treated as Short Term Capital Gain. Moreover, on the basis of the principle of consistency the nature of income is not liable to be changed unless there are plausible reasons to do so. Taking into account, all the facts and circumstances, we are of the view that the finding of the CIT(A) is not justifiable, hence, order to be set aside and we treated the income from the assessee from the sale purchase of share as Short Term Capital Gain. Accordingly, we decide this issue in favour of the assessee against the revenue.



ITA No. 3757/M/2018
A.Y.2013-14

6. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 17/12/2020

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 17/12/2020

Vijay Pal Singh/Sr. PS

Sd/-

(AMARJIT SINGH)

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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