

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"C" BENCH, AHMEDABAD**

*(Convened through Virtual Court)*

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND**  
**SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. Nos. 1513 & 1514/Ahd/2019  
(निर्धारण वर्ष / Assessment Years : 2007-08 & 2008-09)

<b>Swatiben Anilbhai Shah</b> C/o Ketan H. Shah, Advocate 512, Times Square-I, Opp. Ram Baug Bungalow, Thaltej Shilaj Road, Thaltej, Ahmedabad	<b>बनाम/</b> Vs.	<b>DCIT</b> Central Circle - 1(2), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ALHPS1798K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No. 1515/Ahd/2019  
(निर्धारण वर्ष / Assessment Year : 2007-08)

<b>Atul Hiralal Shah</b> 8, Amrashirish Bungalows, Opp. Shri Chimanbhai Patel Institute, Nr. Prahladnagar Garden, Prahladnagar, Ahmedabad	<b>बनाम/</b> Vs.	<b>DCIT</b> Central Circle - 1(2), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ALJPS4966M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Ketan H. Shah with Shri Aman K. Shah, A.Rs.
प्रत्यर्थी की ओर से / Respondent by :	Shri O. P. Sharma, CIT.DR & Shri L. P. Jain, Sr. D.R.

सुनवाई की तारीख / <b>Date of Hearing</b>	18/01/2021
घोषणा की तारीख / <b>Date of Pronouncement</b>	29/01/2021

**आदेश/ORDER**

**PER PRADIP KUMAR KEDIA - AM:**

The captioned appeals directed at the instance of different assessees & Revenue arise from the respective orders of the Commissioner of Income Tax (Appeals) ('CIT(A)') against different assessment years as tabulated below:

ITA Nos.	Name of assessee	AY	CIT(A)'s order dated	AO's order dated	AO's order under Section
1513/Ahd/19	Smt. Swatiben A. Shah	2007-08	08.08.19	29.12.17	143(3) r.w.s. 254 of the Income Tax Act, 1961 (in short 'the Act')
1514/Ahd/19	-Do-	2008-09	-Do-	-Do-	-Do-
1515/Ahd/17	Atul Hiralal Shah	2007-08	-Do-	-Do-	-Do-

2. We shall take up the captioned appeals for adjudication as follows:

**ITA No. 1513/Ahd/2019 AY 2007-08**

3. The grounds of appeal raised by the captioned assessee read hereunder:

- "1 *The Ld. CIT (A) has erred in facts and circumstances and in law in confirming the assessment order u/s. 143(3) r.w.s. 254.*
- 2 *The Ld. CIT (Appeals)-11, Ahmedabad has erred in confirming the treatment made by the Ld. A.O. in de novo assessment for the Gain on sale of shares as business income instead of Capital Gain. The same is prayed for treatment as Capital Gain.*

4. The assessee has also raised additional ground which reads as under:

*“Ld. Lower authority has erred on facts as well as law in not appreciating the facts that, in absence of any incriminating document found during the course of search on 07-02-2008, the whole proceeding under 153A is bad in law, illegal and liable to be quashed.”*

5. The prayer for admission of additional grounds noted above which are not set forth in memorandum of appeal are being admitted for adjudication in terms of Rule 11 of Income Tax (Appellate Tribunal) Rules, 1963 owing to the fact that objections raised in the additional ground are legal in nature and challenges the jurisdiction of the AO for making additions/disallowances and for such objections the relevant facts are stated to be emanating from existing records in the light of decision of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC)*.

6. Turning to the facts, a return of income was filed by the assessee on 07.11.2007 declaring a total income of Rs.1,41,20,990/-. After filing of return, a search & seizure action was conducted under s.132 of the Act in group cases of Atul Shah on 07.02.2008 including assessee. A notice under s.153A of the Act was issued to the assessee on 01.08.2008. In response to the aforesaid notice, the assessee filed another return of income under s.153A of the Act declaring total income at Rs.1,58,02,820/- which was revised to Rs.1,54,88,670/- thereafter. As per the returns filed under s.153A of the Act, the assessee *inter alia* declared income under the head 'capital gains' as short term capital gains of Rs.1,40,01,808/-. An order under s.153A r.w.s. 143(3) of the Act was passed on 05.05.2009 determining total income of Rs.1,56,36,030/- as against income returned at Rs.1,54,08,670/- wherein short term capital gains of Rs.1,40,01,808/- was treated as 'business income' by the

AO as against the claim of the assessee to be assessed as 'short term capital gain'. The controversy towards realignment of head from 'Capital Gains' to 'Income from Business/Profession' travelled up to the ITAT, Ahmedabad. The ITAT vide *ITA No. 57/Ahd/2010* order dated *19.05.2016* set aside the issue regarding the nature and character of gains arising to the assessee amounting to Rs.1,40,01,808/- for re-examination. The AO, in this second round of proceeding, once again called for the details of borrowed funds and details of transactions of purchase and sales of shares of Pyramid Siamira Theater Ltd. (PSTL) wherefrom the capital gain was mainly derived. The AO after calling for details, passed a very cryptic order yet again and essentially concluded that in the absence of utilization of own funds for purchase of shares and in the absence of separate de-mat account maintained for purchase and sale of shares in investment account *vis-à-vis* trading account, the gains arising on sale of shares are required to be treated as 'business income' and thus once again reinstated the position taken by AO in the first round of assessment proceedings.

7. Aggrieved by the change in the character of income and realignment of income reported under the head from 'Capital Gains' to 'Business Income', the assessee preferred appeal before the CIT(A). The CIT(A), however, confirmed the action of the AO and held that gains arising on sale of shares are liable to be treated as 'business income'.

8. Further aggrieved, the assessee preferred appeal before the Tribunal.

9. When the matter was called for hearing, the learned AR for the assessee submitted at the outset that the assessee maintains two

portfolios; (i) 'investment portfolio' where the shares acquired with the long term perspective are shown as capital investment (ii) trading portfolio where the assessee purchases shares with short term perspective and is solely driven by profit motive. The gains/loss arising on sale of shares held in investment portfolio are reported under the head 'capital gains' whereas profit and loss arising on sale of shares listed in trading portfolio are reported as 'business income/loss' of the assessee on a consistent basis. The learned AR for the assessee submitted that there are long line of judicial precedents which approves the dual manner of treatment of income as shown by the assessee under the respective heads. Prominent case laws on this score includes *CIT vs. Gopal Purohit 228 CTR 582 (Bom.)*. It was pointed out that CBDT Circular has also adopted the guidelines evolved by judicial precedents as can be seen in CBDT Circular no. 4 of 2007 dated 15.06.2007. It was next pointed out that utilization of borrowed funds on standalone basis cannot be determinative of the nature of income resulting from sale of shares acquired from participation of borrowed funds as held in plethora of judicial decisions. A reference in this regard was made to the decision of the Hon'ble Gujarat High Court in the case of *CIT vs. Neeraj Amidhar Sur [2011] 238 CTR 294 (Guj)*.

9.1 Adverting to the facts briefly, the learned counsel submitted that it is a matter of record that profit/gains of Rs.1,40,01,808/- in question arises from purchase and sale of shares of PSTL. The assessee has purchased 215802 shares of PSTL and sold 167000 shares giving rise to the impugned gains and remaining 48702 shares have remained in Investment Stock. The total number of transactions of purchase is only five and sale is barely seven. It was thus contended that frequency and repetition in the impugned scrip is *prima facie* absent justifying the intention of assessee to

purchase the shares as capital asset. It was strongly contended that the AO has sought to realign the head of income and shift the income declared under the head 'capital gains' to 'business income' only to deny the assessee of concessional tax treatment of 10% available to the assessee under s.111A of the Act and has sought to apply the regular rate of tax applicable to business income. It was insisted that the assessee has maintained separate ledger account for its capital investment transactions *vis-a-vis* trading transactions and therefore declared intention of the assessee of capital investment category ought not to have been displaced simply to seek higher rate of tax, more so, in the absence of any repetition, frequency or regularity etc.

9.2 The learned AR thereafter adverted to the additional grounds of legal nature raised under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 and contended that the return filed under S.153A of the Act owes its genesis to search action conducted in the group cases of assessee on 07.02.2008 and pursuant thereto a fresh return was called for by the AO under s.153A of the Act. In the assessment made on return filed under s.153A of the Act, it was incumbent upon the AO to refer to some incriminating document found in the course of search to disturb the position taken by the assessee, more so, on classification of asset. It was thus claimed that in the absence of any such reference, whole proceedings under s.153A of the Act itself is vitiated and rendered bad in law and hence liable to be quashed. It was asserted that action such as mere re-alignment of income from head to another has no impact on ultimate taxable income and thus cannot be done in special proceedings undertaken under S.153A of the Act owing to search which carries with it an avowed objective of assessment of unaccounted income which is not present.

10. The assessee filed yet another additional ground under Rule 11 of the ITAT Rule vide application dated 08.07.2020 which reads as under:

*“Ld. Lower authority has erred on facts as well as law in not appreciating the facts that, in absence of the approval u/s 153D, the whole proceedings is itself bad in law and void as held in Ranchi Bench ITAT as well as Gujarat High Court decision in the case of Sunrise Finlease reported in 89 Taxmann.com 1 and therefore, this assessment framed is bad in law and void and liable to be quashed.”*

11. The additional grounds were admitted for adjudication at the time of hearing having regard to the assertions made by the assessee that the additional grounds are legal in nature and seeks to challenge the jurisdictional aspect of the proceedings.

11.1 Adverting to the additional ground, the learned counsel for the assessee referred to the assessment order passed under s.143(3) r.w.s. 254 of the Act dated 20.12.2017 sought to be impugned in the present case and submitted that the AO has made no reference to the approval taken from the superior authority under s.153D of the Act, if any, and thus in the absence of statutory approval of the designated authority in search cases, the whole assessment passed in the second round of proceedings is bad in law. The learned AR for the assessee referred to the decision of the co-ordinate bench of the Tribunal in the case of *Anup Kumar Chatterjee vs. ACIT IT(SS)A Nos. 70-74/Ran/2019* order dated 19.12.2019 to support its aforesaid contention.

11.2 Joining the contention raised towards additional ground(supra) with reference to Section 153D of the Act, the learned DR pointed out that in the first round of the substantive assessment proceedings under s.143(3) r.w.s. 153A of the Act, the approval of designated authority under s. 153D of the Act was duly taken. However, in the

absence of any reference made in assessment order, it is not known whether the approval in the second round of proceedings coming into motion on account of the order of the ITAT has been taken or not. Notwithstanding, it was contended by the learned DR for Revenue that the absence of approval under s.153D of the Act would not vitiate the assessment order in second round under reference having regard to the fact that the assessment order under s.143(3) r.w.s. 254 of the Act is at the instance of ITAT which is a superior authority and the AO as well as the designated authority were dutifully governed by its command in a binding manner.

12. As noted in preceding paragraphs, the assessee has challenged the action of the AO on merits and also raised additional grounds of legal nature questioning the validity of the action of the AO in law.

13. We shall first address ourselves on merits of the issue involved.

13.1 The solitary issue for adjudication on merits is whether gains arising on sale of certain quantity of shares of a company, namely, Pyramid Siamira Theatre Ltd. (PSTL) by the assessee in the relevant assessment order is required to be taxed under the head 'capital gains' as offered by the assessee or is to be treated as 'business income' of the assessee. The issue involved is essentially factual in nature. As regards the justification on the claim of short term capital gain (STCG), it is the case of the assessee that the gains in question have arisen on sale of only one share i.e. PSTL. The assessee has purchased 215802 shares and sold 167000 shares during the year. The total number of transactions of purchase is barely 5 and that of corresponding sale is only 7. The principal argument on behalf of the Revenue in the first round of proceedings

is that transactions have been entered within a short period of less than one month and the assessee does not have sufficient own funds at its disposal and has employed borrowed funds from outsiders on which interest has been paid. It was further observed by the AO that the assessee has also dealt in other shares which are reported as share trading business by the assessee. In this background, the benefit of concessional rate of tax on STCG was denied to the assessee.

13.2 When the matter travelled to the ITAT, in the absence of proper facts available before the ITAT, the matter was set aside and remanded back to the file of AO for re-determination of the issue afresh after ascertaining the deployment of borrowed funds and the manner of maintenance of demat account etc. The co-ordinate bench *inter alia* observed that the order of the AO is cryptic without any proper verification of books of accounts. The AO merely deemed the borrowed funds to have been utilized for investment purposes. In para 11 of the order of the co-ordinate bench, it was observed that it was upon the assessee to demonstrate that his intention for earning investment income and share trading income are well differentiated and certainly the case of the assessee gets more strong if he is able to prove that no borrowed funds have been taken specifically for buying the shares when he intends to show as investment income. Thus, all the facts and circumstances of the case are required to be weighed cumulatively for proper determination of nature of income arising from sale of share.

13.3 The law has considerably evolved on the point and continuing. The Courts have laid down several tests for ascertaining the nature of transaction. The CBDT itself has also laid down parameters by way of circular no. 4 dated 15.06.2007. In the instant case, we note

few peculiar facts from the financial statements placed in the paper book. The assessee has claimed profits arising on sale of a solitary share (PSTL). The frequency of purchase and sale instances are quite few as noted above. The sale of the shares of part quantity has happened within a period of one month and thus claimed as STCG. A part utilization of borrowed capital, if any, in this peculiar background would not necessarily overwhelm the low frequency having regard to the decision of Hon'ble Gujarat High Court in the case of *Neeraj Amidhar Sur (supra)*. The cumulative effect of all factors need to be weighed and a mere involvement of borrowed funds in some instances would not *per se* denude the transactions of its character of capital assets. The issue is essentially factual and depends of peculiar facts of each case. In the absence of any straight jacket formula available despite plethora of judgments, the lack of regularity and isolated instances of capital transactions would vindicate the stand of assessee that income/loss from seven transactions have been rightly regarded as capital gains. As stated, the assessee has taken delivery of shares before sale. While maintenance of capital and trading transactions as a separate category in books can be insisted upon in practice to ascertain the underlying intentions, the maintenance of separate D-mat account separately is not necessarily in conformity with usage of share trade and thus cannot be insisted upon.

13.4 We thus find merit in the plea of assessee. Consequent claim of assessee deserves to be allowed on merits.

13.5 As the grievance of the assessee has been answered in favour of the assessee on merits, we are not inclined to address ourselves on additional grounds raised by the assessee at belated stage.

14. In the result, the appeal of the assessee is allowed.

**ITA No. 1514/Ahd/2019 AY 2008-09**

15. The grounds of appeal raised by captioned assessee read hereunder:

*“1 The Ld. CIT (A) has erred in facts and circumstances and in law in confirming the assessment order u/s. 143(3) r.w.s. 254.*

*2 The Ld. CIT (Appeals)-11, Ahmedabad has erred in confirming the treatment made by the Ld. A.O. in de novo assessment for the Gain on sale of shares as business income instead of Capital Gain. The same is prayed for treatment as Capital Gain.*

15.1 The assessee has also raised additional ground which reads as under:

*“Ld. Lower authority has erred on facts as well as law in not appreciating the facts that, in absence of any incriminating document found during the course of search on 07-02-2008, the whole proceeding under 153A is bad in law, illegal and liable to be quashed.”*

15.2 The assessee filed yet another additional ground under Rule 11 of the ITAT Rule vide application dated 08.07.2020 which reads as under:

*“Ld. Lower authority has erred on facts as well as law in not appreciating the facts that, in absence of the approval u/s 153D, the whole proceedings is itself bad in law and void as held in Ranchi Bench ITAT as well as Gujarat High Court decision in the case of Sunrise Finlease reported in 89 Taxmann.com 1 and therefore, this assessment framed is bad in law and void and liable to be quashed.”*

16. In the instant case, the issue involved is identical to the issue involved in ITA No. 1513/Ahd/2019 concerning AY 2007-08 (supra). The facts in brief are noted as follows. In the return filed by the assessee in pursuance of notice under s.153A of the Act, the assessee has declared short term capital gains of Rs.27,62,912/- chargeable at concessional rate of 10% under s.111A of the Act.

The aforesaid gains have been earned on purchase and sales of shares of Pyramid Simara Theater Ltd. (PSTL). The assessee had purchased 215802 shares out of which 167000 shares were sold in AY 2007-08 and remaining 48802 shares have been sold in FY concerning AY 2008-09 in question. The total number of transactions of sale during the year is stated to be six only. In parity of the reasons recorded for AY 2007-08 (supra), we find force in the plea of the assessee for allowability of gain on sales of shares under the head 'short term capital gains' as claimed. We accordingly reverse the action of the lower authorities in this regard.

17. We thus find merit in the plea of assessee. Consequent claim of assessee deserves to be allowed on merits.

18. As the grievance of the assessee has been answered in favour of the assessee on merits, we are not inclined to address ourselves on additional grounds raised by the assessee at belated stage.

19. In the result, the appeal of the assessee is allowed.

**ITA No. 1515/Ahd/2019 AY 2007-08 (in case of Shri Atul Hiralal Shah)**

20. The grounds of appeal raised by captioned assessee read hereunder:

- “1 *The Ld. CIT (A) has erred in facts and circumstances and in law in confirming the assessment order u/s. 143(3) r.w.s. 254.*
- 2 *The Ld. CIT (Appeals)-11, Ahmedabad has erred in confirming the treatment made by the Ld. A.O. in de novo assessment for the Gain on sale of shares as business income instead of*

*Capital Gain. The same is prayed for treatment as Capital Gain.*

21. The assessee filed additional ground under Rule 11 of the ITAT Rule vide application dated 08.07.2020 which reads as under:

*“Ld. Lower authority has erred on facts as well as law in not appreciating the facts that, in absence of the approval u/s 153D, the whole proceedings is itself bad in law and void as held in Ranchi Bench ITAT as well as Gujarat High Court decision in the case of Sunrise Finlease reported in 89 Taxmann.com 1 and therefore, this assessment framed is bad in law and void and liable to be quashed.”*

22. In the instant case, the issue involved is identical to the issue involved in ITA No. 1513/Ahd/2019 concerning AY 2007-08 (supra). The facts in brief are noted as follows. In the return filed by the assessee in pursuance of notice under s.153A of the Act, the assessee has declared short term capital gains of Rs.78,93,389/- chargeable at concessional rate of 10% under s.111A of the Act. The aforesaid gains have been earned on purchase and sales of shares of SGLPP. The assessee had purchased 4,09,355 shares on a single day i.e. on 10.04.2016 and another 1435 shares on 04.05.2006. The assessee has sold all the shares on various dated on 14 occasions and earned gains in question. The total number of transactions of purchase is thus only 2 and of sale is only 14. In parity of the reasons recorded for AY 2007-08 (supra), we find force in the plea of the assessee for allowability of gain on sales of shares under the head ‘short term capital gains’ as claimed. We accordingly reverse the action of the lower authorities in this regard.

23. We thus find merit in the plea of assessee. Consequent claim of assessee deserves to be allowed on merits.

24. As the grievance of the assessee has been answered in favour of the assessee on merits, we are not inclined to address ourselves on additional ground raised by the assessee at belated stage.

25. In the result, the appeal of the assessee is allowed.

26. In the combined result, all three appeals of assesseees are allowed.

**This Order pronounced on 29/01/2021**

Sd/-  
(RAJPAL YADAV)  
VICE PRESIDENT  
Ahmedabad: Dated 29/01/2021

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

*True Copy*

*S. K. SINHA*

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।