

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.5952/MUM/2019
(Assessment Year: 2008-09)**

Nalin V. Shah
2nd Floor, C Karim Court,
3rd Pasta Lane, C.J. Road,
Colaba, Mumbai - 400 005

ACIT 4(2)(1)
Vs. Aayakar Bhavan, M.K. Road,
Mumbai – 400 020

PAN No. AADPS1938G

(Assessee)

(Revenue)

Assessee by : Shri Satish Mody, A.R
Revenue by : Shri Tharian Oommen, D.R

Date of Hearing : 28/07/2021
Date of pronouncement : 29/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-9, Mumbai dated 04.09.2019, which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 15.12.2010 for A.Y 2008-09. The assessee has assailed the impugned order on the following grounds before us:

- “(1). On the facts and circumstances of the case, the Learned Commissioner of Income Tax has erred in holding that Short Term Capital Gain earned by your petitioner in respect of the purchase and sale of shares within 5 days should be treated as Business Income.

- (2) The Learned Commissioner of Income Tax has further erred in holding that an amount of Rs.24,94,457/- should be treated as Business Income and not Short Term Capital Gain on Shares.
- (3) The Id. Commissioner of Income Tax has further erred in overlooking the assessment order passed by the Assistant Commissioner of Income Tax 4(2), Mumbai for AY 2006 -07 in respect of the same point in case of your petitioner.
- (4) The Learned Commissioner of Income Tax has erred in ignoring the direction given in para 3(a) of the circular dated 29.02.2016.
- (5) The order appealed against is bad in law and is against the principle of natural justice.
- (6) The order appealed against is based on surmises and conjectures.
- (7) Your Petitioner resents the right to add, to delete and/or amend any of the foregoing grounds.”

2. Briefly stated, the assessee had e-filed his return of income for A.Y 2008-09 on 23.09.2008 declaring an income of Rs.75,73,090/-. The return of income was initially processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Original assessment was framed by the A.O vide his order passed u/s 143(3), dated 15.12.2010, wherein he had re-characterized the profit/surplus of Rs. 71,73,008/- that was earned by the assessee on sale of shares as his business income, as against that reflected by him as Short Term Capital Gain (STCG). On appeal, the CIT(A) vide his order dated 24.05.2014 upheld the view taken by the A.O. On further appeal the Tribunal vide its order passed in ITA No. 4916/Mum/2011, dated 30.06.2014 restored the matter to the file of the CIT(A) with a direction to re-adjudicate the issue qua treating of the income/surplus on sale of shares as business income vis-à-vis STCG after affording a reasonable opportunity of being heard to the assessee. The Tribunal while restoring the matter to the file of the CIT(A) had observed that both the lower authorities had in the course of their respective proceedings missed an important ingredient i.e the period of holding of the shares by the assessee and had directed that the said aspect be considered in the course of the set-aside proceedings.

4. In the course of the set-aside proceedings, the CIT(A) vide his order dated 04.09.2019 concluded that neither would it be fair and reasonable to treat the entire income earned by the assessee from purchase and sale of shares as his business income, nor would it be correct to treat the said income purely as STCG. Backed by his aforesaid observation, the CIT(A) was of the view that it would be reasonable to treat the income/surplus of Rs. 24,94,453/- that was earned by the assessee from sale of shares that were held by him for a period of not more than 5 days as his income for business, while for the remaining income/surplus of Rs. 46,79,155/- earned from the sale of shares that were held by him for a period of more than 5 days be assessed as STCG. On the basis of his aforesaid observation the appeal was partly allowed.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. It was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that it is the second round of appeal before the Tribunal. It was submitted by the Id. A.R that the CIT(A) had most arbitrarily compartmentalized the income earned by the assessee from share transactions into two parts, viz. (i). income earned from sale of shares that were held by the assessee for a period of not more than 5 days was treated by him as business income; and (ii). income earned from sale of shares that were held by the assessee for a period of more than 5 days was treated as STCG. It was submitted by the Id. A.R that as the aforesaid shares were purchased and held by the assessee as a capital asset, therefore, he had in his return of income rightly offered the income arising on the sale of the same under the head STCG. It was submitted by the Id. A.R that the aforesaid arbitrary classification of the income/surplus on sale of shares under the different heads of income by the CIT(A) was devoid and bereft of any logical basis or reasoning. It was submitted by the Id. A.R that the CIT(A) for classifying the income/surplus arising on the sale of the shares as business income or STCG had strictly gone by the period of

their holding which had resulted to unreasonable results. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that pursuant to the aforesaid basis adopted by the CIT(A) the income/surplus arising on sale of shares that were purchased by the assessee in a single lot had been subjected to tax under the different heads of income i.e business income and STCG. It was submitted by the Id. A.R that the period of holding of shares was though a material factor but not the only one for determining the head of income under which the income/surplus on sale of shares was to be brought to tax. Reiterating his aforesaid contention, it was submitted by the Id. A.R that as the shares in question were purchased and held by the assessee as a 'Capital asset', therefore, the income/surplus on the sale of the same was duly offered for tax under the head STCG. Further, in support of his contention that the assessee had rightly reflected the income from sale of shares as STCG reliance was placed by the Id. A.R on the CBDT Circular No. 6/2016, dated. 29.09.2016.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders passed by the lower authorities.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the CBDT Circular No. 6/2016, dated 29.09.2016 that has been relied upon by the Id. A.R. As observed by us hereinabove it is the second round of appeal before us. On a perusal of the order passed by the Tribunal while disposing off the assessee's appeal vide its order passed in ITA No. 916/Mum/2011, dated 30.06.2014, we find that the matter was restored to the file of the CIT(A) for deciding the same afresh in the backdrop of the facts therein involved. As noticed by us hereinabove, the Tribunal while restoring the matter to the file of the CIT(A) had observed that both the lower authorities had missed a material aspect that has a strong bearing on the adjudication of the issue under consideration i.e the period of holding of the shares by the assessee, and thus,

had directed that the said aspect be considered in the course of the set-aside proceedings.

8. As observed by us hereinabove, the CIT(A) in the course of the set-aside proceedings, had concluded, that it would be reasonable to treat the income/surplus of Rs. 24,94,453/- earned by the assessee from sale of shares that were held by him for a period of not more than 5 days as his business income, while for the remaining income/surplus of Rs. 46,79,155/- earned from sale of shares that were held for a period of more than 5 days be treated as STCG. In our considered view, the CIT(A) while complying with the directions of the Tribunal had in all fairness adopted the aforesaid period of holding of shares as a yardstick for bifurcating the income/surplus arising from the sale of shares and bringing the same to tax under the respective heads of income, viz. business income or STCG. However, we find substance in the claim of the Id. A.R that the period of holding of shares is though a material factor but not the only one for determining the head of income under which the income/surplus on sale of shares is to be brought to tax. As pointed out by the Id. A.R, and rightly so, adoption of the period of holding of shares as a standalone basis for classifying the income/surplus arising on their sale under the respective heads of income i.e business income or STCG had in stray instances resulted to incongruous results, and the income/surplus arising on sale of shares that were though purchased by the assessee in a single lot was assessed under different heads. Say, for instance, if out of a lot of 100 shares that were purchased by way of single transaction the assessee had sold 60 shares after holding the same for 5 days and 40 shares after holding for 6 days, then, on the aforesaid standalone basis adopted by the CIT(A) the income/surplus arising from the said respective transactions would be subjected to tax under the head business income and STCG, respectively. At this stage, we may herein observe that a vital test for deciding as to whether the income/surplus arising from the sale of shares is to be

assessed as business income or STCG is determining the intention which the assessee had at the time of purchase of the shares. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT (1959) 35 ITR 594 (SC). In its aforesaid order the Hon'ble Apex court had, inter alia, observed, that it is the intention of the assessee at the time of purchase of an asset that would be a determinative factor for concluding as to whether the income arising on the sale of the same is to be assessed as business income or under the head capital gain. Now, in the case before us, if the purchase of shares were made by the assessee with an intention to resell the same at a profit, then, the income arising therefrom would undeniably be liable to be assessed as his business income. On the contrary, if the shares were purchased by him with an intention to hold the same, then, the income arising on a subsequent sale of the same was to be brought to tax under the head 'capital gains'. Backed by our aforesaid observations, we are of the considered view that once the CIT(A) had held that the income/surplus arising from sale of certain shares was to be assessed as STCG, then, impliedly it can safely be inferred that the shares in question were purchased by the assessee with an intent to hold and enjoy them for some time as a capital asset. We, thus, in the backdrop of our aforesaid observations are of the considered view that now when the income/surplus arising from sale of certain shares (out of a lot purchased by the assessee in a single transaction) had undisputedly been subjected to tax as STCG, then, the income/surplus arising on sale of the remaining shares (out of the aforesaid lot), which though might have been sold by the assessee after holding for a shorter time period could not have been given a different treatment and summarily assessed as his business income. Our aforesaid view is all the more fortified by the fact that the department had accepted the order of the CIT(A) and had not assailed it any further in appeal before us. Further, as per the mandate of law, in case where a capital asset held by an assessee is thereafter converted or treated by him as stock-in-trade of a

business carried on by him, then, the income arising on a subsequent sale of the same as per sub-section (2) of Sec. 45 of the Act would be bifurcated into two parts, viz. (i) the fair market value of the capital asset on the date of such conversion or treatment by the assessee as stock-in-trade shall be deemed to be the full value of consideration received or accruing as a result of the transfer of the capital asset for the purposes of Sec. 48 of the Act; and (ii) the profit or gains arising on sale of such stock-in-trade shall thereafter be assessed as the business income of the assessee; both of which shall be chargeable to income-tax in the previous year in which such stock-in-trade is sold or otherwise transferred by the assessee. We, thus, on the basis of our aforesaid deliberations are of the considered view that if the income/surplus arising from the sale of shares (forming part of a lot purchased by the assessee) had undisputedly been subjected to tax as STCG, then, by way of an implication it can safely be inferred that the said entire lot of shares was purchased by the assessee with an intention to hold the same as a capital asset. Accordingly, backed by the aforesaid fact the income/surplus arising on the sale of the balance shares (forming part of the aforesaid lot) shall have to be given a similar treatment. However, in case the assessee is found to have converted or treated such shares as the stock-in-trade of the business carried on by him, then, the income/surplus arising on the sale of such shares shall be assessed in the manner provided in the provisions of sub-section (2) of Sec. 45 of the Act. Accordingly, in terms of our aforesaid observations, we herein modify the view taken by the CIT(A) and direct the A.O to give effect to our aforesaid observations and re-determine the re-characterization of the income/surplus arising on the sale of shares under consideration.

9. Before parting, we may herein observe that the support drawn by the Id. A.R from the CBDT Circular No. 6/2016, dated 29.02.2016 is absolutely misplaced and misconceived. On a perusal of the aforesaid circular, we find that

the same therein, inter alia, provides that where an assessee irrespective of the period of holding opts to treat the listed shares and securities as stock-in-trade, then, the income arising from the transfer of such shares/securities would be treated as his business income. Also, the same further contemplate that in respect of shares and securities held by an assessee for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as capital gain, the same shall not be put to dispute by the A.O. In fact, the CBDT in its aforesaid circular had observed that in all other cases, the nature of transaction (i.e whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the circulars issued by the CBDT., viz. Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007, dated June 15, 2007. We, thus, are of the considered view that the aforesaid Circular No. 6/2016, dated 29.02.2016 relied upon by the assessee would be of no avail in the backdrop of the facts involved in his case before us.

10. Resultantly, the appeal filed by the assessee is partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 29.09.2021.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;
Dated: 29.09.2021
PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai