

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'A' BENCH, KOLKATA**

**(Before Sri Rajpal Yadav, Vice President & Sri Manish Borad, Accountant Member)**

**I.T.A. No.: 161/Kol/2021  
Assessment Year: 2013-14**

**Sheetal Mohta.....Appellant  
[PAN: AIAPM 3784 D]**

**Vs.**

**ACIT, Circle-50, Kolkata.....Respondent**

**Appearances by:**

*Sh. Siddharth Agarwal, Adv., appeared on behalf of the Assessee.*

*Sh. Biswanath Das, Addl. CIT, appeared on behalf of the Revenue.*

Date of concluding the hearing : March 30<sup>th</sup>, 2022

Date of pronouncing the order : March 31<sup>st</sup>, 2022

**ORDER**

**Per Manish Borad, Accountant Member:**

This appeal filed by the assessee pertaining to the Assessment Year (in short "AY") 2013-14 is directed against the order of Id. Commissioner of Income-tax (Appeals)-15, Kolkata [in short Id. "CIT(A)"] dated 04.06.2018 vide Appeal No.348/CIT(A)-15/15-16/Cir-50/Kol which is arising out of the assessment order framed u/s 143(3) of the Income Tax Act, 1961 (in short the "Act") dated 28.04.2017 by ACIT, Circle-50, Kolkata.

2. The assessee is in appeal before the Tribunal raising the following grounds:

*"1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in confirming AO's action of treating gains made by the assessee to the tune of Rs.71,22,139/- as business income instead of short term capital gain.*

*2. For that the Ld. CIT(A) failed to appreciate that shares in question were held by the assessee as investments and accordingly reflected as "Investments" in the Final accounts.*

*3. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing."*

3. From perusal of the above grounds we find that the sole grievance of the assessee is that the ld. CIT(A) erred in confirming the action of the ld. Assessing Officer (in short ld. "AO") treating the gains from purchase and sale of shares as business income as against short term capital gain offered by the assessee in its return of income.

4. At the outset, ld. Counsel for the assessee submitted that the assessee is not in the business of purchase and sale of shares. It has not taken major loans for making investment in the equity shares. All the dealings in shares are on delivery basis. Further, he stated that the case of the assessee is squarely covered by the decision of the Calcutta High Court *Commissioner of Income-tax, Kolkata-III vs. Merlin Holding (P.) Ltd.* reported in [2015] 375 ITR 118 (Calcutta).

5. Per contra, ld. D/R vehemently argued supporting the orders of both the lower authorities.

6. We have heard rival contentions and perused the records placed before us. The issue raised by the assessee before us is that ld. CIT(A) erred in confirming the action of the ld. AO treating the short term capital gain from purchase and sale of shares as business income. On perusal of the paper book containing 22 pages we find that the assessee has filed the computation of income, financial statements, statement of capital gain and computation of income for preceding two assessment years and the subsequent assessment year. On going through the same, we notice that the assessee is consistently showing income from purchase and sale of shares as long term capital gain and short term capital gain computed as per the period of holding. Perusal of the balance sheet also shows that no major loans have been taken during the year and only an interest of Rs.6,929/- has been paid whereas the assessee has Rs.2,94,21,139.60/- in credit of her own capital which in itself is sufficient to cover the investment in shares and other transactions of purchase and sale of shares carried out during the year. Undoubtedly the transactions of purchase and sale of shares have been done consistently round the year but generally the shares have not

been sold on the same day, nor any futures & options transactions/intraday trading have been carried out. The assessee has purchased the shares, taken the delivery and sold them after holding them for few days which are in the range of 5 days to 115 days. Now, on these facts, whether the action of the Id. AO of treating the short term capital gain as business income was justified needs to be examined.

7. We find that the Hon'ble jurisdictional High Court in the case of *Merlin Holding (P.) Ltd. (supra)* has dealt with the very same issue and the finding given by the Hon'ble Court in para 6 is relevant to adjudicate the issue before us and the same reads as follows:

*"6. These are the facts and circumstances, which according to him, go to show that the assessee primarily was in the business of dealing in shares rather than in the business of investment. The frequency of transaction highlighted by Mr. Saraf is not decisive on either side. Frequency alone cannot show that the intention was not to make an investment. The legislature has not made any distinction on the basis of frequency of transaction. The benefit of short-term capital gain can be availed for any period of retention upto 12 months. Although a ceiling has been provided but there is no indication as regards the floor, which can be as little as one day. When that is the position in law and the investor has adduced proof to show that some transactions were intended to be business transaction, some transactions were intended to be by way of investment and some transactions were by way of speculation and the revenue has not been able to find fault from the evidence adduced then the mere fact that there were 1000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the Managing Director of the assessee is also a Managing Director of a firm of share brokers cannot have any decisive value. The question essentially is a question of fact. The CIT Appeal and the learned Tribunal have concurrently held against the views of the Assessing Officer. On the basis of the submissions made by the learned Advocate for the appellant, it is not possible to say that the views entertained by the CIT Appeal or the learned Tribunal were not a possible view. Therefore, the judgment cannot be said to be perverse."*

8. From perusal of the above finding of the Hon'ble High Court, we observe that frequency alone cannot show that the intention was to make any investment. Further, it has been held that the legislature has not made any distinction on the basis of frequency of transaction. Further, it is also judicially settled that frequency alone cannot be taken as the basis to deny the claim by the assessee of short term capital gain. Various other facts need to be examined which mainly include the source of investment made in the equity shares. If a person takes loan, pays interest thereon and uses the

borrowed funds for making investment in the equity shares on a regular basis then depending upon the facts and circumstances of the particular case it can be inferred that transactions carried out are in the nature of business.

9. We, therefore, under the given facts and circumstances of the case and in light of the ratio laid down by the Hon'ble High Court in the case of *Merlin Holding (P.) Ltd. (supra)* hold that the assessee deserves to succeed on the sole ground raised in the instant appeal firstly, because the investment made in the equity shares for purchase are not from borrowed funds and they are majorly from the assessee's own capital, secondly, that the assessee has taken the delivery of the shares and held them in her demat account and sold thereafter and thirdly, the assessee is consistently showing the income from long term capital gain and short term capital gain from sale of shares in the past and in subsequent years and not disputed by Revenue. We, therefore, set aside the finding of the Id. CIT(A) and hold that the gain of Rs.71,22,139/- should be taxed as a short term capital gain and not as a business income. Therefore, the grounds raised by the assessee in this appeal are allowed.

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

***Kolkata, the 31<sup>st</sup> March, 2022.***

Sd/-  
[Rajpal Yadav]  
**Vice President**

Sd/-  
[Manish Borad]  
**Accountant Member**

Dated: 31.03.2022

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

1. **Sheetal Mohta, C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suit 213, 2<sup>nd</sup> floor, Kolkata-700 069.**
2. **ACIT, Circle-50, Kolkata.**
3. CIT(A)-15, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata