

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.3923/M/2019**

**Assessment Year: 2016-17**

Smt. Anjali Aniruddha Malpani, 603, 6 <sup>th</sup> Floor, 6 <sup>th</sup> Floor, Jamuna Sagar, Shahid Bhagat Singh Road, Near Colaba Bus Station, Mumbai – 400 005 <b>PAN: AAHPM0693E</b>	Vs.	DCIT-Central Circle-3(2), Room No.1913, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.3930/M/2019**

**Assessment Year: 2016-17**

Shri Aniruddha Narayan. Malpani, 603, 6 <sup>th</sup> Floor, 6 <sup>th</sup> Floor, Jamuna Sagar, Shahid Bhagat Singh Road, Near Colaba Bus Station, Mumbai – 400 005 <b>PAN: AACPM9738M</b>	Vs.	DCIT-Central Circle-3(2), Room No.1913, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.4119/M/2019**

**Assessment Year: 2016-17**

Deputy Commissioner of Income Tax, Central Circle-3(2), Central Range-3, Room No.1913, Air India Building, Nariman Point,	Vs.	Smt. Anjali Aniruddha Malpani, 603, 6 <sup>th</sup> Floor, 6 <sup>th</sup> Floor, Jamuna Sagar Building, SBS Road, Colaba,
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Mumbai - 400021		Mumbai – 400 005 <b>PAN: AAHPM0693E</b>
(Appellant)		(Respondent)

**ITA No.4125/M/2019**  
**Assessment Year: 2016-17**

Deputy Commissioner of Income Tax, Central Circle-3(2), Central Range-3, Room No.1913, Air India Building, Nariman Point, Mumbai - 400021	Vs.	Shri Aniruddha Narayan Malpani, 603, 6 <sup>th</sup> Floor, 6 <sup>th</sup> Floor, Jamuna Sagar Building, SBS Road, Colaba, Mumbai – 400 005 <b>PAN: AACPM9738M</b>
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Hiro Rai, A.R. &  
Shri Dharan Gandhi, A.R.

Revenue by : Smt. Shailja Rai, D.R. &  
Shri Manoj Kumar Sinha, Sr. A.R.

Date of Hearing : 02 . 01 . 2023

Date of Pronouncement : 12 . 01 . 2023

**ORDER****Per : Kuldip Singh, Judicial Member:**

Aforesaid cross appeals filed by the appellant/assessee and Revenue bearing common question of law and facts are being disposed of by way of composite order in order to avoid repetition of discussion.

2. Appellants Smt. Anjali Aniruddha Malpani & Shri Aniruddha Narayan Malpani (hereinafter referred to as the assessee) and appellant DCIT, Mumbai (hereinafter referred to as the Revenue) by filing aforesaid cross appeals sought to set aside the impugned order dated 29.03.2019 passed by Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)], on the grounds inter-alia that:

### **Grounds of Assesseees**

#### **Grounds of ITA No.3923/M/2019**

*“aggrieved by the order of the Learned Commissioner of Income-tax Appeals-51 Mumbai, (Ld. CIT(A)) this appeal petition is being submitted on the following grounds, which it is prayed may be considered independently without prejudice to one another*

*1. In the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO in treating the short term capital gain of Rs. 3,20,70,115 as business income. The reasons given in this regard are patently erroneous and unjustified.*

*1.1. Without prejudice to the above, the Ld. CIT(A) has erred in relying upon certain judgments of the Courts without putting it to the assessee and which are in fact, not applicable to facts of the present case.*

*1.2. Without prejudice to the above, the Ld. CIT(A) has erred in not allowing deductions of various expenditure incurred like, portfolio management charges, STT and other expenses as deduction while computing the business income.*

*2. The Ld. CIT(A) erred in upholding the levy of interest us 2348 and 234C of the Act.*

*3. The Ld. CIT(A) erred in not setting aside the action of the Ld. AO in initiating penalty proceedings u/s 271(1)(c) of the Act.*

*4. The appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing”*

#### **Grounds of ITA No.3930/M/2019**

*“Being aggrieved by the order of the Leamed Commissioner of Income-tax Appeals-51, Mumbai, (Ld. CIT(A)) this appeal petition is being submitted on the following grounds, which it is prayed may be considered independently without prejudice to one another.*

*1. In the facts and the circumstances of the case and in law, the Ld, CIT(A) erred in upholding the action of the Ld AO in treating the short term capital gain of Rs. 6,23,76,203/- as business income. The reasons given in this regard are patently erroneous and unjustified.*

*1.1 Without prejudice to the above, the Ld. CIT(A) has erred in relying upon certain judgments of the Courts without putting it to the assessee and which are in fact, not applicable to facts of the present case.*

*1.2. Without prejudice to the above, the Ld. CIT(A) has erred in not allowing deductions of various expenditure incurred like, portfolio management charges, STT and other expenses as deduction while computing the business income.*

*2. The Ld. CIT(A) erred in upholding the levy of interest u/s 234B and 234C of the Act.*

*3. The Ld. CIT(A) erred in not setting aside the action of the Ld. AO in initiating penalty proceedings u/s 271(1)(c) of the Act*

*4. The appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing.”*

### **Grounds of Revenue**

#### **Grounds of ITA Nos.4119 & 4125/M/2019**

*“On the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in holding the gain from sales of shares and securities which were held for more than a year as Long term capital gain instead of business income by relying on the CBDT circular No 06/2016 dated 29.02.2016 even though the AO, in the assessment order, had clearly pointed out that the above circular is not applicable in assessee's case.”*

#### **ITA No.4119/M/2019 & 3923/M/2019**

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: assessee's return of income declaring income of Rs.5,41,13,750/- for the year under consideration was subjected to scrutiny. During the course of post search proceedings it was noticed that the assessee had short term capital gain (STCG) and long term capital gain (LTCG) to the tune of Rs.3,20,70,115/- and Rs.23,53,32,599/- respectively in A.Y. 2015-16. The Assessing Officer (AO) adverting to the guidelines

issued by Central Board of Direct Taxation (CBDT) vide office memorandum dated 13.12.2005 (F.No.149/287/2005-TPL) proceeded to examine whether the assessee is a trader or an investor in stocks so as to determine STCG & LTCG earned during the years under consideration. The AO by following the guidelines vide CBDT circular (supra) proceeded to hold that the income earned by the assessee on share transactions shall be considered as business income and accordingly held STCG & LTCG of Rs.3,20,70,115/- & Rs.23,53,32,599/- (Total Rs.26,74,02,714/-) respectively is considered as business income for the year under consideration and thereby framed the assessment under section 143(3) of the Income Tax Act, 1961 (for short 'the Act').

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) both the assessee as well as the Revenue have come up before the Tribunal by way of filing present cross appeals.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly, the assessee and her husband have hired the services of portfolio managers to whom a fee of Rs.3,70,07,549/- was paid during the years under consideration. It is also not in dispute that the assessee has claimed short term capital loss (STCL)

of (–) Rs.3,20,70,115/- and LTCG of Rs.23,53,32,599/- on share transactions. It is also not in dispute that the AO treated the assessee's claim of STCL of (–) Rs.3,20,70,115/- and LTCG of Rs.23,53,32,599/- on share transactions as taxable under the head "business income". It is also not in dispute that the Ld. CIT(A) has held assessee's surplus of Rs.23,53,32,599/- from transactions in shares with a holding period of more than one year as taxable under the head LTCG and has upheld the findings of the AO holding assessee's loss/deficit of (–) Rs.3,20,70,115/- from transaction in shares with a holding period of less than one year to be taxed under the head "business income". It is also not in dispute that the assessee has received dividend of Rs.99,32,392/- during the years under consideration.

7. In the backdrop of the aforesaid facts and circumstances of the case discussed in the preceding paras two questions arise for determination in the cross appeals filed by the Revenue as well as the assessee are:

(1) "That as to whether the Ld. CIT(A) has erred in directing the AO to treat the assessee's surplus of Rs.23,53,32,599/- from transactions in shares with a holding period of more than one year as taxable under the head LTCG as against taxing the same under the head "business income" as held by the AO?"

(2) "That as to whether Ld. CIT(A) has erred in upholding the order of the AO in treating the STCG of Rs.3,20,70,115/- as business income?"

8. The AO, in order to examine the scale of activities of the assessee qua sale and purchase of share transactions, examined the share transactions' data of the assessee from F.Y. 2010-11 to 2014-15, which is as under:

F.Y.	2010-11	2011-12	2012-13	2013-14	2014-15
Buy					
Quantity of shares	210822	336128	231778	435827	998113
Value of shares	38494865	70791730	52173815	71191048	350970789
Sell					
Quantity of shares	564303	422572	164100	453397	2494696
Value of shares	43425466	63837904	50549419	90314392	444815291

9. On the basis of aforesaid data the AO proceeded to hold that since there is a continuous increase in the share transactions in terms of quantity as well as value, the income of the assessee from these transactions is certainly the business income.

10. The Ld. D.R. for the Revenue while arguing on question No.1 framed in the preceding paras challenging the impugned order passed by the Ld. CIT(A) treating the gain from sales of shares and securities, held for more than a year as LTCG instead of business income contended inter-alia that from page 3 to 7 of the assessment order it is proved on record that the assessee has not entered into a solitary transactions rather there are substantial transactions in sale and purchase of shares in terms of quantity as well as value during the years under consideration which shows that it is a business kind of thing and as such it is required to be taxed as a business income; that assessee has also borrowed funds from spouse for the purpose of investment in shares and securities and that the Ld. CIT(A) has erred in relying upon CBDT circular No.06/2016 dated 29.02.2016 and relied upon the order passed by the AO.

11. However, on the other hand, the Ld. A.R. for the assessee to repel the arguments addressed by the Ld. D.R. for the Revenue qua question No.1 framed in the preceding paras that the assessee has made investment in all the listed shares qua which no doubt whatsoever has been raised by the AO rather continuously referred to the guidelines issued by the CBDT while deciding the issue in controversy; that the Ld. CIT(A) has thrashed the issue in detail in the light of the law applicable to the facts and circumstances of the case; that the assessee has brought on record the complete detail, available at page 30 of the paper book qua the LTCG as claimed for the years under consideration and relied upon the order passed by the Ld. CIT(A).

12. So far as the first contention raised by the Ld. D.R. challenging the findings returned by the Ld. CIT(A) that gain by the assessee from sale of shares and securities held for more than a year is LTCG and not business income is concerned, no doubt as pointed out by the Ld. D.R. for the Revenue there were voluminous transactions of sale and purchase of shares by the assessee and the assessee has been doing substantial transactions leading to the inference that all these transactions are business income but to our mind the Ld. CIT(A) has rightly held that the transaction of sale of shares of securities held for more than a year as LTCG instead of business income by relying upon CBDT circular No.06/2016 dated 29.02.2016. Because CBDT circular (supra) is categorical enough, giving option to the assessee to treat the income from the sale of listed shares and securities as income arising under the head LTCG. For ready perusal CBDT circular (supra) is extracted as under:

Circular No.6/2016

**Government of India  
Ministry of Finance  
Department of Revenue  
Central Board of Direct Taxes**

North Block, New Delhi, the 29<sup>th</sup> of February, 2016

**Sub: Issue of taxability of surplus on sale of shares and securities – Capital Gains or Business Income – Instructions in order to reduce litigation - reg.-**

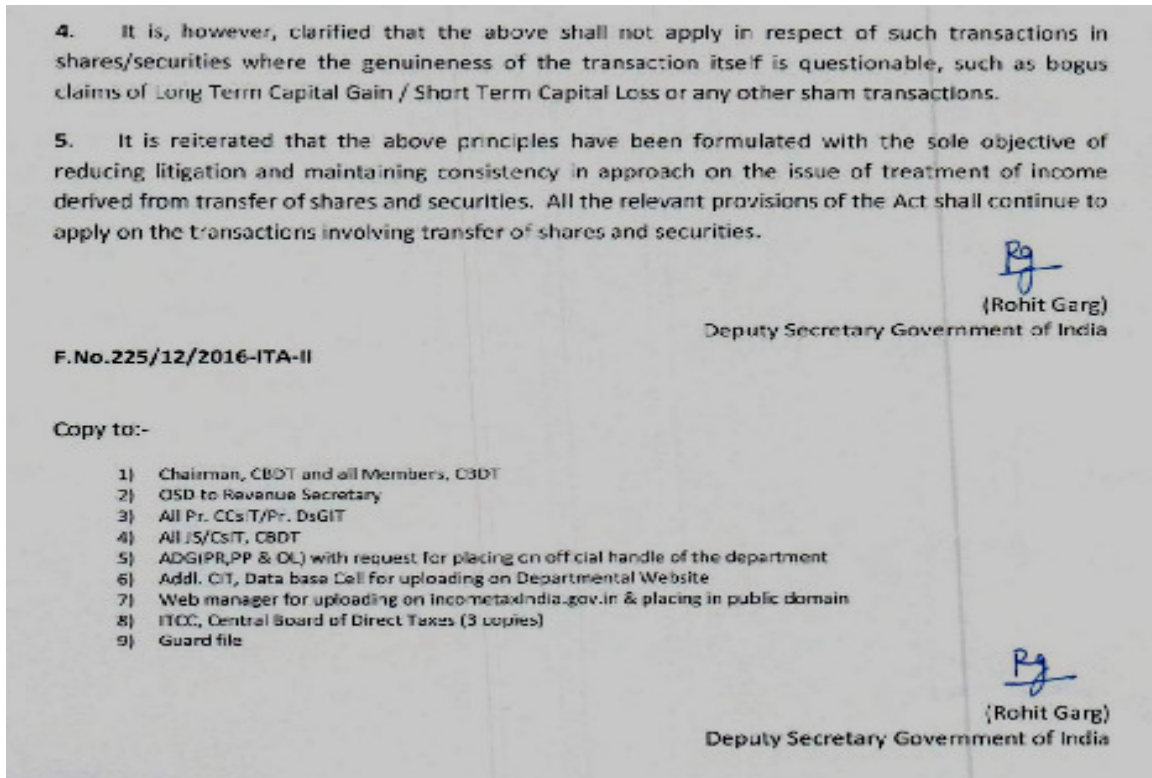
Sub-section (14) of Section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock in trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/ trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principle in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following-

- a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,
- b) In respect of listed shares and securities held 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 Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;
- c) 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 aforesaid Circulars issued by the CBDT.

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13. When undisputedly all the shares transacted by the assessee are listed shares and has been held for a period of more than 12 months immediately preceding the date of its transfer, as per circular (supra) assessee has the option to treat such profit as LTCG then the AO has no option except to allow the same. This issue was directly come up before the Hon'ble Bombay High Court in case of Pr. CIT vs. Hardik Bharat Patel (2019) 410 ITR 0202 (Bom.) and has been decided in favour of the assessee by returning following findings:

*“Capital Gains-Income from sale of listed shares-Assessee filed return of income-During assessment proceeding, AD treated profit arising on frequent and voluminous transactions initiated with borrowed funds in shares as business income When matter reached before ITAT, AO was directed to treat such profit as LTCG-Held, as per CBDT Circular No. 6 of 2016, assessee had an option to treat income from sale of listed shares and securities as income arising under head LTCG and same should be accepted by AD-However, stand once taken by assessee would not be subject to change and consistently income on sale of securities which were held as investment would continue to be taxed as LTCG or business income as opted by assessee-Said circular made no distinction whether investments made in shares were out of borrowed*

*funds or out of its own funds-Thus, distinction which was sought to be made by Revenue could not override stated CBDT Circular, which was binding upon it-Revenue's appeal dismissed.*

Held:

*Circular No. 6 of 2016 issued by CBDT clarified that with a view to reduce litigation and uncertainty in matter of taxability, as LTCG or business income, assessee had an option to treat income from sale of listed shares and securities as income arising under head 'LTCG', then same should be accepted by AO. However, stand once taken by assessee would not be subject to change and consistently income on sale of securities which were held as investment would continue to be taxed as LTCG or business income as opted by assessee. Said circular made no distinction whether investments made in shares were out of borrowed funds or out of its own funds. Thus, distinction which was sought to be made by Revenue could not override stated CBOT Circular, which was binding upon it."*

14. Similar view has again been taken by the Hon'ble Bombay High Court in case of Pr. CIT vs. Hiren M. Shah (2019) 413 ITR 0143 (Bom.) on the identical issue where the assessee had held shares for over more than 12 months before sale.

15. The Ld. D.R. for the Revenue while referring to para 7(v) of the assessment order contended that the assessee has borrowed funds from her husband as is evident from her bank account maintained with Kotak Mahindra Bank (A/c No.1311189729) which is extracted as under:

Date	Particular	Nature	Deposit (Rs.)	Withdrawal (Rs.)
22-11-2012	Dr. Aniruddha Malpani	Receipt	48,00,000	
	Geojit BNP Paribas Financial Services Ltd	Payment		70,18,168
	Geojit BNP Paribas Financial Services Ltd.	Payment		25,29,299
06-11-2013	Dr. Aniruddha Malpani	Receipt	20,00,000	

	Edelweiss Broking Ltd.	Payment		18,07,378
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16. Aforesaid contention raised by the Ld. D.R. for the Revenue is not sustainable in the eyes of law because as per para 3 of the assessment order the assessee Dr. Aniruddha Malpani is MD (Gynecology), Mumbai University and had training in IVF from UCSF, San Francisco and has been doing all the consultations and design the treatment plans. When the assessee herself is a professional having her own income any borrowing from spouse to spouse is not a loan sufficient to decline the relief otherwise available to the assessee.

17. Moreover, this issue has been decided by the Hon'ble Bombay High Court in case of Hardik Bharat Patel (supra) case by holding that the circular No.6/2016 (supra) makes no distinction whether investment made in the shares were out of the borrowed funds or out of its own funds and as such the definition sought to be made by the Revenue could not override stated CBDT circular which was binding on the Revenue.

18. Moreover the assessee and her husband, also assessee in the connected appeals, are reputed doctors being specialists in IVF treatment, running a clinic in the name and style of M/s. Malpani Fertility Clinic Pvt. Ltd. having turnover of Rs.7,00,00,000/- per annum and assessee is deriving remuneration from this clinic to the tune of Rs.1.4 crore per annum to 2.6 crore per annum, have hired portfolio managers, whom they have paid hefty fee of Rs.3,70,07,549/- to manage the affairs of their shares and security transactions, the Ld. CIT(A) has rightly treated the same as LTCG.

19. So we are of the considered view that once it is proved on record that entire transactions carried out by the assessee qua sale of shares and securities during the years under consideration, all listed shares, kept the same for more than 12 months and they are independent professionals and have hired portfolio management services to manage their shares and security transactions, their gains from sales of shares and securities are required to be treated as LTCG instead of business income, in view of the CBDT circular (supra). So we find no illegality or perversity in the findings returned by the Ld. CIT(A).

20. So far as second question as framed in the preceding para that as to whether Ld. CIT(A) has erred in upholding the order of the AO in treating the STCG of Rs.3,20,70,115/- as business income is concerned, the AO as well as the Ld. CIT(A) have returned concurrent finding that STCG claimed by the assessee are to be taxed under the head “business income” by relying upon the decision rendered by Hon’ble Gujarat High Court in case of Smt. Meenal Ramesh Chandra 165 ITR 507, Ratanlal J. Oswal 63 taxmann.com 57 by Hon’ble Bombay High Court and Gopal Purohit 336 ITR 287.

21. No doubt the assessee has entered into huge value and high frequency of transactions as explained in para 7.17 which is extracted for ready perusal as under:

F.Y.	2010-11	2011-12	2012-13	2013-14	2014-15
Buy					

Quantity of shares	2,10,822	3,36,128	2,31,778	4,35,827	9,98,113
Value of shares (Rs.)	3,84,94,865	7,07,91,730	5,21,73,815	7,11,91,048	35,09,70,789
Sell					
Quantity of shares	5,64,303	4,22,572	1,64,100	4,53,397	24,94,696-
Value of shares (Rs.)	4,34,25,466	6,38,37,904	5,05,49,419	9,03,14,392	44,48,15,291

22. The Ld. CIT(A) also observed that the ratio of dividend to the investment in shares in respect of various shares is also quite low as is evident from the chart given below:

A.Y.	Amt of Investment (Rs)	Dividend income(Rs )	Ratio of dividend to Inv.	Surplus (Rs)	Ratio of Surplus to Investment
2010-11	13,55,49,966	25,37,235	1.87	3,19,98,989	23.6
2011-12	16,61,42,513	31,84,748	1.9	35,02,118	2.1
2012-13	19,27,97,812	48,35,717	2.5	1,47,11,170	7.6
2013-14	21,56,85,126	57,61,468	2.67	1,22,35,118	5.67
2014-15	20,53,89,978	47,29,847	2.3	1,45,26,140	7.07
2015-16	40,14,11,200	62,53,051	1.55	31,34,18,367	78.07
2016-17	67,47,21,845	99,32,392	1.47	26,74,02,714	39.63

23. The Ld. CIT(A) further observed in para 7.21 that during the years under consideration the margin earned by the assessee on STCG varies from 4% to 14% which is comparable with normal trading activities detailed as under:

Assessment Year	Short term capital gain (Rs)	Sales Consideration(Rs)	Profit margin (%)
2010-2011	48,40,851	3,89,08,098	12.44
2011-2012	(3;20,70,115)	3,04,27,393	-4.99
2012-2013	16,34,970	2,05,68,281	7.95
2013-2014	(3,20,70,115)	76,17,668	-8.54
2014-2015	7,03,186	1,77,29,088	3.97
2015-2016	4,32,03,383	17,31,85,252	24.95
2016-2017	3,20,70,115	23,70,54,501	13.53

24. Challenging the aforesaid findings of the Ld. CIT(A) the Ld. A.R. for the assessee contended inter-alia that the ratio of turnover to stock in her case is mostly less than one which shows that the said transactions in shares are in the nature of investment that interest bearing borrowed funds have not been deployed for the said investment which shows that their transactions in shares are of the nature of investment.

25. Aforesaid contentions were also raised by the assessee before the Ld. CIT(A) which he has not accepted by returning following findings:

*“Though, this claim of the assessee is more or less found to be correct the surplus arising from the transactions in shares shown as STCG have to be taxed under the head 'Business Income one considers the other important parameters of huge volume & high frequency of the transactions, low dividend to investment ratio, low profit margin etc. as explained in paras 7.16 to 7.21 above.”*

26. Now the question arises for determination is:

“As to whether surplus arising from transactions in shares shown as STCG have to be taxed under the head “business income” only on account of huge volume and high quantity of transactions, low dividend to investment ratio and low profit margin etc.”?

27. Undisputedly as per findings returned by the AO in para 7(v) of the assessment order the assessee has not deployed any borrowed interest bearing funds for the purpose of investment. It is also proved from the findings returned by the Ld. CIT(A) at page 14 of the impugned order that average period of holding for the purpose of STCG is 183 days (6 months) as is evident from the table given below:

<b>FY 2015-16 (AY 2016-17)</b>			
<b>Particulars</b>	<b>Short term</b>	<b>Long term</b>	<b>Combined</b>
<i>Quantum of gain</i>	<i>Rs.3,20,70,115</i>	<i>Rs 23,53,32,599</i>	<i>Rs 26,74,02,714</i>
<i>No of scripts</i>	<i>19</i>	<i>17</i>	<i>36</i>
<i>No of transaction of sale</i>	<i>19</i>	<i>18</i>	<i>37</i>
<i>Average Period of Holding</i>	<i>183 Days (6months)</i>	<i>1089 days (3 year)</i>	<i>624 days (1 year and 9 months)</i>
<i>Dividend received</i>			<i>Rs 99,32,392</i>
<i>No of transaction where POH &lt; 1m</i>	<i>NIL</i>	<i>NA</i>	<i>NA</i>
<i>No of transaction where POH &lt; 2m</i>	<i>1</i>	<i>NA</i>	<i>NA</i>
<i>No of transaction where POH &gt; 2m</i>	<i>18</i>	<i>NA</i>	<i>NA</i>

28. Furthermore, there is not an iota of evidence on the file that the assessee is a trader in shares rather known doctors running their IVF clinics having hefty turnover of Rs.7,00,00,000/- per annum. It is also admitted fact on record that the assessee has hired portfolio management services to carry out their transactions of sale of shares at the hefty fees.

29. The Ld. A.R. for the assessee relied upon the decision rendered by Hon'ble Bombay High Court in case of Pr. CIT vs.

Amrita P. Talwar in ITA No.81 of 2017 with ITA No.84 of 2017, ITA No.90 of 2017 & ITA No.120 of 2017 order dated April 8, 2019 wherein identical issue as to whether income from transactions of shares held by the assessee for less than one year is to be treated as STCG or as business income. The Hon'ble Bombay High Court decided the issue in favour of the assessee by returning following findings:

*“5. We have heard the learned counsel for the parties and perused the documents on record. The Tribunal while giving full relief to the assessee noted the relevant facts such as the fact the assessee was a medical practitioner by profession, she had used interest free funds obtained from her father for purchasing shares. She had not made investment from any borrowed funds. She had shown the shares as investment in the balance sheet. In case of fall in the value of shares, the same is not claimed as a business loss. The profit and loss arising out of the intra day transactions was declared as speculation profit. In rest of the cases, the assessee had taken delivery of all the shares.”*

*6. The question whether the particular assessee is in the business of buying and selling shares or an investor, must necessarily depend on range of facts and circumstances. No single factor would decide the answer to the said question. In the present case, the Tribunal has taken into account all relevant facts. The significant factors as noted above are that the assessee was a professional, that no borrowed funds were used for purchase of shares, no interest inter alia was paid, the shares were shown in the balance sheet as investment and in all cases other than the intra day transactions, delivery of the shares was taken.*

*7. We do not find that the Tribunal has committed any error in holding that the assessee was not in the business of buying and selling shares. Mere fact that the frequency of buying and selling shares may be higher itself would not be a determined factor. In fact, the Tribunal noticed that the assessee had rarely indulged in repeat buying and selling the same script.”*

30. The Ld. A.R. for the assessee also relied upon the decision rendered by Hon'ble Karnataka High Court wherein it is held that investment through portfolio management services so as to derive maximum profits could not be termed as business of the assessee but would only with the case of more careful and prudent mode of

investment for earning higher returns and it would not amount to carrying on business of investment of any shares by the assessee by returning following findings:

*“Merely because of employment of Portfolio Management Service for investment in shares, the would become business income, High Court are of the opinion that the sad h been dealt with at length by the Delhi High Court in the case of Rada wherein, in similar facts, the question has been answered in favour of th the Revenue. Detailed reasons for the same have been given in the HIGH COURT concur. Even otherwise, it is admittedly not a case International (ra) engaged its own persons or had a separate business infrastructure to carry out its share transactions for the purpose of business. It is merely a case where the assessee has invested funds through the Portfolio Management Service.*

*(Para10)*

*In HIGH COURT opinion, investment through Portfolio Management Service, which may deal with the shares of the assessee so as to derive maximum profits cannot be termed as business of the assessee but would only be a case of a more careful and prudent mode of investment which has been done by the assessee. Funds which lie with the assessee can always be invested (for earning higher returns) in the shares either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that the assessee is carrying on the business of investment in shares Profits from such investment, either directly or professionally managed firm, would still remain as profits to be taxed as capital gains as the same will not change the nature of investment, which is in shares, and the law permits it to be taxed as capital gains and not as business income.*

*(para11)*

*HIGH COURT have also gone through the Circular of the CBDT dated 15.06.2007 and are of the opinion that the findings arrived of by the Tribunal are in conformity with the guidelines issued by the said Circular.*

*(Para 13)”*

31. In view of what has been discussed above, we are of the considered view that when the assessee has not deployed any borrowed interest bearing funds to make investment in the shares, held the shares and security for average more than 183 days and has hired the portfolio management services by paying the hefty fees

and that the assesseees are professional doctors having hefty turnover of Rs.7,00,00,000/- per annum from their clinic and there is no high frequency of transactions because average holding period of shares is more than 183 days and it is not the case of the Revenue that the assessee had ever claimed loss as a business loss, the Ld. CIT(A) has erred in confirming the finding returned by the AO that STCG of Rs.3,20,70,115/- is business income. So we hereby direct the AO to treat the surplus arising from the transactions in shares claimed as STCG instead of business income.

32. Findings returned by the Bench qua ITA No.4119/M/2019 and ITA No.3923/M/2019 in the cross appeals filed by the assesseees as well as the Revenue are mutatis mutandis applicable to ITA No.4125/M/2018 & ITA No.3930/M/2019 having identical facts and issues raised.

33. In view of what has been discussed in the aforesaid appeals filed by the Revenue bearing ITA No.4119/M/2019 & ITA No.4125/M/2019 are hereby dismissed and appeals filed by the assesseees bearing ITA No.3923/M/2019 & ITA No.3930/M/2019 are allowed.

**Order pronounced in the open court on 12.01.2023.**

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 12.01.2023.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

*//True Copy//*

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.