

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER &
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 420/Ahd/2020
(निर्धारण वर्ष / Assessment Years: 2016-17)

NamanJayeshbhai Shah 2750, Ajitnath Ni Khadki Shekh No Pado, Opp. Zaveri Vad, Ahmedabad- 380001	बनाम/ Vs.	The ACIT Circle-1(3), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : BHUPS4203H		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Tushar Hemani, Sr. Adv. & Shri Parimalsinh B. Parmar, A.R.
प्रत्यर्थी की ओर से/Respondentby:	Shri HishikesHementPatki Sr. DR

Date of Hearing	09/05/2024
Date of Pronouncement	07/06/2024

ORDER

PER SHRINARENDRA PRASAD SINHA, AM:

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-10, Ahmedabad, (in short ‘the CIT(A)’)dated 27.02.2020 for the Assessment Year 2016-17. The appeal is delayed by 84 days which was explained due to Covid pandemic. Hence the delay is condoned.

2. The brief facts of the case are that the assessee filed his return of income for A.Y. 2016-17 on 19.10.2016 showing total income of Rs.1,43,31,550/-. The assessment was completed on the income as per return but Short-Term Capital Gain (STCG) of Rs.1,37,46,867/- in respect of shares purchased through IPO was treated as business income by the A.O. Aggrieved with the order of Id. A.O., the assessee filed an appeal before Ld. CIT(A) who vide the impugned order has upheld the treatment as given by the A.O. The assessee is in appeal before us.

3. The assessee has raised the following Grounds of Appeal:

1. The learned CIT(A) has erred in law and on facts in confirming the action of AO of treating Short Term Capital Gain of Rs.1,37,46,867/- as business income of the assessee.

2. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

3. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.

4. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(1)(c) of the Act.

5. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

4. Shri Tushar Hemani, Ld. Senior Advocate appearing for the assessee submitted that the assessee had sold certain shares allotted in IPO process which had resulted into capital gain. This gain was disclosed as STCG in the return of income but the A.O. had treated the STCG as business income which was upheld by the Ld. CIT(A). He submitted that the shares were

held as ‘Investment’ by the assessee and not as ‘stock-in-trade’. Further all the transactions were delivery-based transactions. Though the assessee had also derived gain on certain “intra-day activity”, such gain was not shown as STCG. The Ld. A.R. pointed out that the assessee was consistently showing income derived on sale of shares as STCG which was accepted by the department in the earlier Assessment Years i.e. A.Ys. 2014-15 & 2015-16. Further that the case for A.Y. 2015-16 was selected for scrutiny wherein this issue was examined and the A.O. had accepted the STCG disclosed by the assessee in that year. According to the Ld. Senior Counsel, the revenue was not correct in changing the nature of income from STCG to business income in the current year. He submitted that following the principle of consistency, the gain on sale of shares as disclosed by the assessee should be treated as STCG and not business income. In this regard, he also placed reliance on the following decisions:

- (i) *DeepabenAmitbhai Shah Vs. DCIT 397 ITR 687 (Guj)*
- (ii) *Dhruv H. Patel Vs. DCIT 80 taxmann.com 390 (Mum)*

5. Shri Hishikes Hement Patki, Ld. Sr. D.R. appearing for the revenue submitted that the intention of the assessee was to apply in IPO, sale the shares allotted in IPO and maximize the profit which was an adventure in the nature of trade. He submitted that the principle of consistency cannot be applied as the transaction was clearly in the nature of business income and not STCG. He strongly supported the order of the A.O. the Ld. CIT(A).

6. We have carefully considered the facts of the case and the materials brought on record. The only dispute involved in this appeal is the nature of gain arising on sale of shares allotted to the assessee in IPO i.e. whether it is STCG or business income. It is found from the balance sheet of the assessee that the shares were disclosed as 'investment'. It is also found that the shares were allotted to the assessee in IPO and after allotment the shares were sold mostly within a period of one month. As the holding period of all the shares was less than 12 months, the gain arising on sale of these shares was disclosed as STCG by the assessee. In the preceding A.Y. 2015-16 also, the assessee had disclosed STCG of Rs.23,42,561/- on sale of such shares which was accepted by the Department in the order u/s 143(3) of the Act dated 28.11.2017. In the current year, however, the Department has taken a different view and treated this gain as business income.

7. The contention of the Revenue is that the intention of the assessee was to earn profit and not long-term appreciation or earning of dividend. It is precisely for the reason that there was no intention for long-term appreciation that the shares were sold within 12 months and gain was shown as STCG. The earning of profit is always the intention whether the gain is treated as business income or capital gain. When the Act provides for a mechanism for disclosure of Short-Term Capital Gain, where the holding period is less than 12 months; the Revenue cannot take a plea that the intention was not long-term appreciation or earning of dividend. It is the intention of the assessee that

matters. Though the principle of res judicata is not applicable to Income Tax proceedings, still the treatment given by the Department to similar gains in the preceding year has to be taken into consideration.

8. The CBDT vide Circular No. 6/2016 dated 29.02.2016 has stipulated that “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”. As a corollary to this guideline where the assessee has treated the holding of shares as investment and not stock-in-trade, the income derived from transfer of such shares has to be considered as capital gain, either long-term or short-term depending upon the period of holding. The CBDT has also directed in the said Circular that for listed shares and securities held for a period of more than 12 months, the stand once taken by the assessee in a particular year shall remain applicable in subsequent assessment years also. Therefore, the principle of consistency was acknowledged by the CBDT in this Circular. Further this Circular was issued with a view to reduce litigation and uncertainty. Therefore, the principle of consistency has to be followed in the case of shares held for less than 12 months as well. The assessee had shown the sale of shares held for less than 12 months as STCG in the past year which was accepted by the Department in the scrutiny assessment. As the facts were identical, the Revenue was not correct in changing its stand without any valid reason to treat the STCG disclosed by the

assessee as business income in the current year. Further, no reason has been given by the Department for changing its stand for the treatment of the gain arising from sale of shares. The principle of consistency has be applied in respect of listed shares and securities held for a period of less than 12 months as well so as to reduce litigation and uncertainty.

9. Hon'ble Gujarat High court has held in the case of *Deepaben Amitbhai Shah (supra)* that when the assessee had made investment in shares as investor, income arising to assessee on sale of those shares would be assessable as 'capital gains' and not as business profit. It was also held in the case of *Dhruv H. Patel (supra)* that the intention of the assessee to apply in shares to IPO was to get higher allotment of shares and there was no repetitive purchase and sale of the same script. Under the circumstances merely because assessee had used borrowed capital to apply for such shares, it cannot be a ground to treat the gain arising on sale of shares allotted through IPO as business income.

10. Following the ratio of the above decisions as well as the facts as discussed above, we are of the considered opinion that the Revenue was not correct in treating the gain arising on sale of shares allotted through IPO as business income. Following the principle of consistency, the same should be treated as STCG.

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

This Order pronounced on 07/06/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Ahmedabad; Dated 07/06/2024

Rajesh

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

Sd/-
(NARENDRA PRASAD SINHA)
ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad