

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No 4340/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2008-09)

Swati Rajeev Nadkarni 221, Gavtan Lane 2, S.V. Road, Opp. Andheri Post Office, Mumbai-400 058.	बनाम/ Vs.	Asst. Commissioner of Income Tax 11 (3), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAPN 3547M		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Vishwas V. Mehendale
प्रत्यर्थी की ओर से/Respondent by	:	Shri J. Saravanan

सुनवाई की तारीख / Date of Hearing	:	16/12/2015
घोषणा की तारीख / Date of Pronouncement	:	18/01/2016

आदेश / ORDER

PER RAJESH KUMAR, A. M.:

This appeal by the assessee is directed against the order dated 04-06-2012 of Commissioner of Income Tax (Appeals)-2, Mumbai (Hereinafter called as the CIT(A)) for assessment year 2008-09. The assessee has raised the following grounds of appeal:

1. *“On the facts and in the circumstances of the case and in law, Hon. CIT-A-2 erred in treating Appellant’s Income from Capital Gains as Business Income.*
2. *On the facts and in the circumstances of the case and in law, Hon. CIT-A-2 erred in misunderstanding and misinterpreting the facts of appellant’s case and thereby erred in holding that, the appellant’s Income from Capital Gains is Business Income.”*
3. The facts in brief are that the assessee a lady dental doctor engaged in the practice as dental doctor in partnership with her husband filed her return of income on 31.07.2008 declaring an income of Rs. 27,85,570/- comprising income from business and capital gain on sale of equity shares. The case of the assessee was selected for scrutiny and statutory notices u/s 143(2) and 142(1) of the Act were issued and served on the assessee.
4. During the course of scrutiny proceedings , the AO found that the assessee had huge income from short term capital gain of Rs. 25,52,383/- and long term gain of Rs. 1,01,948/- from shares from the sale of shares. The total sales of shares were Rs. 1,14,98,224/- and purchases were Rs. 91,41,284/- during the year. The AO framed the assessment order u/s 143(3) of the Act vide order dated 20.12.2010 by treating Rs. 26,54,331/- as income from business as against the STCG Rs.25,52,383/- and long term capital gain Rs.1,01,948/- by the assessee by holding

that the assessee was doing trading activity and not investments as the volume of transactions were very high.

5. At the outset, the ld AR for the assessee submitted before us that the case of the assessee was covered in her favour by the order of Tribunal in ITA No 5684/Mum/2011 AY 2008-09 in the case of the assessee's husband which was rendered under identical facts. The ld counsel further submitted that the facts of the assessee were similar to that of her husband case as both of them were engaged in practice under partnership and were doing full time practice of dentistry by simultaneously doing the investment in shares. The ld counsel submitted that the assessee had earned short term capital gain from one share namely Walchand amounting to Rs. 27,03,437/- which were sold on 7th August, 8th October, 13th November and 15th November,2007. Ultimately the ld. AR prayed that the appeal of the assessee be allowed in views of the decision of the coordinate bench (supra) in the case of assessee's husband. The Dr on the other hand relied on the orders of authorities below.

6. We have heard the rival submissions and perused the materials on records. We find that the assessee a dental doctor by profession was engaged in practice in partnership with her husband and were engaged in full time practice. From the

paper book page no. 8 we note that the assessee had made substantial gain from one share namely “Walchand” and had earned meager gain from others and incurred short term losses in most of the transactions. From the page no 6 we find that the assessee had borrowed from family members Rs. 18,04,000/- for the purpose of investment in shares. We find merit in the case of the assessee whose main and full time job is to do practice and not share trading. The assessee had made substantial gains from one share and if we look at the overall share transactions, we can very safely come to the conclusion that assessee was not a trader in shares. We also find that facts were similar in the case of her husband in ITA No 5684/Mum/2011 AY 2008-09 .The relevant para 5 of the said decision is extracted below:-

“After considering the overall facts and circumstances, we find that the assessee is not devoting his full time to the share transactions. The assessee is a dentist by his profession and is running a clinic with his wife. He has showed income from profession in his return of income. The assessee has gained a huge profit relating to one scrip only. He was tempted by the upward trend of the market in relation to the said scrip. The assessee has consistently been treated as an investor in earlier assessment years. Except the said one scrip of ‘Wall Chand’, the investment pattern of the assessee has remained the same. Only because the assessee has gained huge profits in one scrip that does not make the assessee a trader, especially when the assessee in the subsequent year did not make any transaction in shares and had

invested the money so earned in the FDRs. When the assessee had consistently been an investor, merely because in one year the assessee got a chance to make profits in relation to once scrip tempted by the growth in said scrip, that itself is not sufficient to hold the assessee a trader. The case laws relied upon by the assessee in the cases of “CIT vs. Ashok Wadia” (supra) and “CIT vs. Neeraj Amidhar Surti” (supra) are squarely applicable in the case of the assessee. We, therefore, do not find any justification on the part of the lower authorities in treating the assessee as a trader and assessing the income earned by the assessee on share transactions as business income. We, therefore, set aside the impugned order and direct the AO to assess the income earned by the assessee from share transactions as capital gains.”

7. The case of the assessee is fully covered by the decision of the co-ordinate bench and we, therefore, by following the same set aside the impugned order and direct the AO to assess the income earned from share transactions as capital gain.

In the result, the assessee’s appeal is allowed.

Order pronounced in the open court on 18th January, 2016.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / Judicial Member

Sd/-
(Rajesh Kumar)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :18.01.2016
Ps. Ashwini Gajakosh

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**