

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", MUMBAI**  
**BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER AND**  
**SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA No.4953/Mum/2014**

**(Assessment Year : 2010-11)**

The DCIT-4(2), Room No. 642, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s. Prashant J. Patel, 3,3A, 1 <sup>st</sup> Floor, Churchgate House, Veer Nariman Road, Fort, Mumbai-400001.  <b>PAN: AABPP2156M</b>
(Appellant)		(Respondent)

Revenue by : Shri Pradeep Kumar Singh  
(DR)

Assessee by : Shri V.G.Ginde (AR)

Date of hearing : 11.08.2016

Date of Pronouncement : 28.10.2016

**ORDER**

**PER PAWAN SINGH, JM:**

1. The present appeal u/s 253 of the Income tax Act (Act) is directed by the revenue against the order of CIT(A)-17, Mumbai dated 27.07.2014 (corrected vide corrigendum dt 08.08.2014), arising out of penalty order levied u/s 271(1)(c) of the Act dated 29.08.2013 in respect of Assessment Year (AY) 2010-11.
2. Brief facts of the case are that the assessee filed return of income on 13.10.2010 declaring total income of Rs. 3,83,87,463/-. The case was selected for scrutiny. The AO while making the assessment besides the other addition/disallowance treated the Short Term Capital Gain (STCG) on share of Rs. 33,56,796/- as a income from Business. Aggrieved by the order of AO, the assessee filed appeal before the Id. CIT(A). The Id. CIT(A) accepted the appeal of the assessee and accepted the income from STCG instead of business income. Thus, aggrieved by the order of the

ld. CIT(A) the Revenue has filed the present appeal before us. Raising the following grounds of appeal:

*1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the assessee as investor instead of trader even though the assessee has stated in more than 41 scrips and entered into more than 165 transactions in the year. The analysis of the holding period reflects that in more than 100 transactions the holding period is less than a month, in more than 60 transactions the holding period is less than 6 months."*

*2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon the earlier year's order in the assessee's own case whereas the facts of the case are not identical to the earlier years. In earlier year, income from investment activity was very negligible however in the present year income from investment is substantial."*

*3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified that theory of consistency is not applicable in this case because facts are very different from the earlier year i.e. 2006-07 and 2007-08. In those years income from investment was very less and transactions in Capital Gain were very less. In present year transaction in investment are very frequent and holding period of share is less than a month in majority."*

3. We have heard the ld. Authorised Representative (AR) of the assessee and Departmental Representative (DR) for the parties and perused the material available on record. The ld. DR for the Revenue argued that the CIT(A) wrongly treated the Business Income of the assessee as STCG. The ld. DR for Revenue argued that case of each year has to be examined on the basis of its facts. On the other hand, ld. AR of the assessee argued that his case is squarely covered in his favour. As in previous years as well as subsequent years the assessee was allowed STCG . The ld. AR of the assessee further argued that the CIT(A) on the basis of decision of ITAT in assessee's own case for Ay 2008-09 allowed the similar relief in his favour.
4. We have considered the rival contentions of the parties and gone through the records of the case. The AO while framing the assessment asked the assessee as to why the STCG be not related as income from business, the assessee replied the show cause notice issued by AO and contended therein that assessee is maintaining two separate portfolio that one for investment and other for trading, in the past department has assessed the assessee as investor and there is no change in the *modus operandi* of share transaction from year to year. The assessee has earned substantial dividend on investment, assessee has not utilized borrowed funds for

purchase of share. It was further contended that the frequency of transaction in case of assessee is not frequent, the assessee sold the share more in the month of April, May, August, September 2009 and January and February 2010. There is no regular sale transaction in other months. In the books of accounts regularly maintained by the assessee, the share forming part of trading portfolio are shown as stock-in-trade and those forms part of investment are shown as investment. The contention of the assessee was not accepted by AO and holding that assessee entered into 165 transactions and the analysis of the holding period reflects that in 100 transactions, the holding period is less than one month and in 16 transaction holding period is less than six month. Ld. CIT(A) while considering the contention of the assessee and relied upon the decision of ITAT in assessee's own case for AY 2008-09 in ITA No. 3546/Mum/2012 and ITA No. 6033/Mum/2012 for AY 2009-10 and allowed the appeal of the assessee.

5. We have further seen that the AO allowed the similar relief to the assessee for AY 2013-14, copy of which is placed on record along with computation of income showing the capital gain. In view of the above observation and the decisions of Co-ordinate Bench of ITAT, wherein the similar income was accepted as a STCG, thus, we do not find any illegality or infirmity in the order passed by ld. CIT(A).
6. In the result, appeal of the Revenue is dismissed.

Order pronounced in open court on 28<sup>th</sup> October, 2016

Sd/-

**(R.C.SHARMA)**

**ACCOUNTANT MEMBER**

Mumbai; Dated 28/10/2016

S.K.PS

Sd/-

**(PAWAN SINGH)**

**JUDICIAL MEMBER**

**Copy of the Order forwarded to :**

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

BY ORDER,

(Asstt.Registrar)  
ITAT, Mumbai