

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAMIT KOCHAR, AM

ITA No.1937/Mum/2013

(A.Y:2008-09)

Smt. Alpana M Motla, C/o. Roopkala, 89, M. K. Marg, Queens Chambers, Mumbai 400 020 PAN:AAHMP 7319P	Vs.	The Dy. Commissioner of Income Tax- 12(3), Mumbai
Appellant	..	Respondent
Appellant by	..	Shri K. Shivaram, AR
Respondent by	..	Shri A. K. Dhondial, Sr. DR
Date of hearing	..	19-10-2016
Date of pronouncement	..	19- 10- 2016

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of the CIT (Appeals)-24, Mumbai in appeal No.CIT(A)-24/DCIT-12(3)/IT-105/11-12 dated 03-12-2012. Assessment was framed by the DCIT-12(3), Mumbai for the assessment year 2008-09 vide his order dated 14-12-2010 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’).

2. The only issue in this appeal of the assessee is against the order of the CIT (A) in confirming the action of the AO in treating the excess arising out of sale of shares as business income instead of treating the same as short term capital gain as declared by the assessee.

3. Briefly stated facts are that the assessee is deriving income from futures and options i.e. derivatives from long term capital gain and short term capital gain from sale of shares, income from other sources and also profit from speculation business. During the course of assessment proceedings the AO required the assessee to explain as to why income from short term capital gain should not be treated as income from business. The assessee filed explanation before the AO but the AO noted that the assessee is engaged in systematic activities of sale and purchase of shares and the shares are sold within a period of one day to 200 days and hence, the same partakes the character of share trading. Hence, he treated the short term capital gain declared by the assessee amounting to Rs.50,35,193/- as business income. Aggrieved, the assessee preferred appeal

before the CIT (A) who also confirmed the action of the AO. Aggrieved, now the assessee is in second appeal before the Tribunal.

4. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the assessee is an investor in shares for last so many years and for and from assessment year 1999-2000 till assessment year 2013-14. Before us, the learned Counsel for the assessee explained that the assessee is also in the futures and option transactions and profit arising from the same is disclosed as business income. He explained that as regards to the transactions which are delivery based and kept in investment portfolio in assessee's books of account, is taken as short term or long term capital gain i.e. profit arising out of the same. The learned Counsel for the assessee explained that the assessee is mainly an investor since last several years and the Revenue all along has been accepting the same as short term capital gain or long term capital gain as declared by the assessee. The learned Counsel for the assessee filed copies of assessment orders passed u/s 143(3) of the Act for assessment year 1999-2000, 2004-05, 2006-07 and other assessment years to prove his point. In the rest of the years, assessments were not framed and the returns were processed u/s 143(1) or u/s 143 (1A) of the Act accepting the claim of the assessee. It was further explained that the assessee has earned dividend income on sizeable shares amounting to Rs.4,53,147/-, which would not have been possible unless the shares are held as investment for longer period. The assessee contended that profit motive is inherantly embedded in the transaction of purchase and sale of shares but, the assessee was holding the shares for future gains. The learned Counsel for the assessee also explained from the capital account of the assessee as on 31-03-2008 that there is capital of Rs.6,05,20,280/- which is more than Rsd.4,30,09,420/- and, therefore, it could easily be presumed that borrowed money was not utilized for the purpose of shares kept in investment. He further explained that the entire borrowed money was utilized only for the purpose of carrying on the business of futures and options.

5. After hearing both the sides, we find that the Revenue could not controvert the arguments of the assessee and the fact that the assessee is

consistently declaring holding of these shares as investment in her balance sheet and the Revenue is accepting the same as it is. Even, in the assessment framed u/s 143(3) of the Act, the Revenue is accepting the excess arising out of sale of shares, kept as investment, as long term or short term capital gain. For this year, the Revenue has not disputed the issue of long term capital gain. They have only changed the head of income of short term capital to the head of business income. In this case, we following the decision of the Hon'ble Bombay High Court in the case of CIT Vs Gopal Purohit (2011) 336 ITR 287 it was held as under that:-

“while dealing with the similar issue, that it was open to the assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business of dealing in shares. It was also held that there should be uniformity in treatment given to such transactions in shares and the rule of consistency should be followed when facts and circumstances for different years are identical, particularly in the case of same assessee.

Respectfully following the above decision of the Hon'ble Bombay High Court and the facts of the present case, we reverse the orders of the lower authorities and allow this issue of the assessee's appeal.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 19-10-2016.

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 19-10-2016
Lakshmikanta Deka/Sr.PS

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. //True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI

Sr. No.	Particulars	Date	Initials	Member Concerned
1	Dictation given on	19/10/16	LK Deka	JM
2	Draft placed before author	20/10/16/ 26/10/16		
3	Draft proposed/placed before The second Member			
4	Draft discussed/approved by Second member			
5	Approved Draft comes to the Sr.PS			
6	Kept for pronouncement on			
7	File sent to the Bench Clerk			
8	Date on which file goes to the Head Clerk			
9	Date of dispatch of Order			