

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI  
**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER  
AND SHRI RAVISH SOOD, JUDICIAL MEMBER**  
I.T.A. No.657/M/2012 (Assessment Year:2008-2009)

Mrs. Minal Deepak Mehta, Nanik Niwas, Flat No.42, Bldg No.2, 4 <sup>th</sup> Floor, 9/A Bhulabhai Desai Road, Mumbai – 400 026.	बनाम/ Vs.	ACIT 16(2), Mumbai.
स्थायी लेखा सं./PAN : AAEPM9931G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri C.N. Vaze, AR
प्रत्यर्थी की ओर से/ Respondent by :	Miss. Anupama Singh, DR

सुनवाई की तारीख / Date of Hearing : 07.09.2016  
घोषणा की तारीख /Date of Pronouncement : 23.09.2016

**आदेश / ORDER**

**PER D. KARUNAKARA RAO, AM:**

This appeal filed by the assessee on 1.2.2012 is against the order of the CIT (A)-27, Mumbai dated 17.10.2011 for the assessment year 2008-2009. In this appeal, assessee raised the following grounds which read as under:-

"1. On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in confirming the order of the AO to treat the Short Term Capital Gain of Rs. 38,48,344/- earned by the assessee on transfer of listed shares as income from business.

2. Without prejudice to the above, if at all the above income is treated as business income, the appellant be entitled to a deduction under section 88E of an amount equal to securities transaction tax paid by her in respect of these transactions."

2. Briefly stated relevant facts of the case are that the assessee declared short term capital gains of Rs. 38,48,344/- in the return of income. On finding the assessee is engaged in the share transaction activity, AO proposed to treat the same as business activity and proceeded to tax the same as 'business income'. Contents of para 9 of the assessment order are relevant in this regard. AO relied on various judgments in support of the said conclusions. Matter travelled to the first appellate authority.

3. During the proceedings before the first appellate authority, assessee could not improve its case despite various new submissions and arguments made before him.

After considering the submissions of the assessee, CIT (A) upheld the AO's decision. Aggrieved with the conclusions of the CIT (A), assessee is in further appeal before the Tribunal by raising the above mentioned grounds.

4. During the proceedings before us, Ld Counsel for the assessee submitted that the assessee was engaged in the similar activity in the past and offered the income of short term capital gains. Assessing Authorities accepted the claim of the assessee for the AYs 2006-07 and 2007-08 under the proceedings u/s 143(3) of the Act. Further, referring to the CBDT Circular No.6 of 2016, dated 29.2.2016, Ld Counsel for the assessee submitted that the accounting method with regard to these transactions in the books of account of the assessee decide the correct head of income. He also submitted that this proposition was upheld by the Tribunal in the case of M/s. R.R. Hosiery vs. ACIT in ITA No.5408/M/2013 (AY 2008-2009), dated 27.7.2016. In the said order (supra), the Tribunal discussed the issues relating to the repeated transactions; binding Circular No.6/16 issued by the CBDT; judgment of the Hon'ble Supreme Court in the case of Gopal Purohit. He also mentioned that the assessee shifted to the mutual funds, which reflected the intention of the assessee to embrace to investment activity undisputedly. In support of the same, Ld Counsel for the assessee read out the contents of para 7 of the said order of the Tribunal (supra). He also relied on another decision of the Tribunal in the case of Smt. Urmila S. Mehta vs. ACIT in ITA No. 9144/M/2010 (AY 2006-2007), dated 27.2.2013 for the proposition that when the facts are identical the rule of consistency is required to be honoured. For this proposition, he relied on the contents of para 12 of the said Tribunal's order (supra) dated 27.2.2013, wherein one of us (AM) is a party to the said order.

5. On the other hand, Ld DR relied on the orders of the AO and the CIT (A).

6. On hearing both the parties, we find, the assessee continuously engaged in the buying and selling of shares and reflected the same as investment activity and not as stock-in-trade. The claim of the assessee was accepted by the Revenue Authorities in the AYs 2006-07 and 2007-08. AO disturbed the claim of the assessee in the year under consideration and treated the same as a business activity and taxed the gains under the head 'income from profit and gains of business and profession'. We have perused the orders of the Revenue Authorities cited before us with reference to the Circular No.6/2016 of the Board. We have also perused the

order of the Tribunal in the case of M/s. R.R. Hosiery (supra) and find paras 6 and 7 of the said Tribunal's order are relevant in this regard. Considering the significance of the said paras for the sake of completeness of this order, we proceed to extract the same as under:-

"6. We have heard the rival contentions carefully and perused the material placed before us and also have gone through the orders of authorities below including the decision of the Apex Court relied upon by the assessee. We have also considered the CBDT Circular as relied upon by the assessee. We find that the assessee was doing the activities of investments in shares and securities and was trading in derivatives in future and option. Over the years, the assessee has been showing the gain / loss from sale of shares being investments which was accepted by the Revenue as is clear from the order passes u/s 143(3) for the assessment years 2005-06 and 2007-08 by the department in the earlier years even in the scrutiny proceedings as is clear from the copy of the assessment orders for the AYs 2005-06 and 2007-08, which are placed at pages 10 to 15 of the assessee's paper book. The assessee has been consistently showing closing and opening value of shares and securities at cost, under the head investment in shares as is clear from the copy of balance sheet filed in the paper book. The assessee was not using any borrowed funds for the purpose of investment in shares and own funds were being routed for purchase and sale of shares, as it is clear from the copy of balance sheet placed at page 4 of the paper book. During the year, the assessee earned LTCG of Rs. 5,14,30,041/- and also STCG of Rs. 2,57,89,650/- besides incurring short term capital loss on shares to the tune of Rs. 7,57,10,331/-. It is also clear from the copy of profit and loss account that shares at the beginning and at the closing of the year were never shown as stock in trade but it has been shown under the head 'investments' schedule-6 to the balance sheet. The relevant extract is given herein for the sake of better understanding.

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We also note that the assessee sold 25 scrips during the year out of which three were of long term, which were held for more than 12 months and 21 scrips were held for less than a year. In all there were 28 transactions of purchases and 43 transactions of sales in all. The average period of holding for long term securities was 768 days whereas the securities which yielded short term capital gain was 107 days and those yielded short term capital gains was 48 days. The assessee also filed the details of short term and long term capital gains right from the assessment year 2005-06 to AY 2011-2012 which reveals that the Revenue has consistently accepted the stand of the assessee barring the year under consideration. The details in respect of previous years are reproduced below for the sake of better understanding of the issue involved:

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After looking to the overall scenario of the assessee, we are of the considered view that the department cannot dictate the manner and method of treating the activity of assessee in shares as trading activity in one year while accepting the same as investment in shares in other years which were even scrutinized u/s 143(3), as it is clear from the above table. Moreover, the case of the assessee is fortified by the CBDT circular bearing number 6 of 2016 dated 29.2.2016 which is reproduced below for better understanding:-

**Circular No.6 of 2016, dated 29.2.2016:**

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

1. 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 (ie. 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.*

*4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain / Short Term Capital Loss or any other sham transactions. Er (Rohit Garg) Deputy Secretary Government of India*

*5. It is reiterated that the above principles have been formulated with the sale objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.*

*7. Taking into consideration the above circular and facts and circumstances of the case, we are of the considered view that the assessee was not carrying any trading activity into equity shares and securities and therefore, we are inclined to set aside the order of the Ld CIT (A) and direct the AO to treat the income from sale and purchase of shares as short term and long term capital gains."*

7. From the above, it is evident that irrespective of the holding period, if the assessee treated the shares as stock-in-trade, the income arising on such shares would be treated as business income. In reverse, if the assessee treated the shares as an investment, the same should not be brought under the head 'income from the business'. This principle mentioned in the CBDT Circular (supra) is appreciated by the Tribunal in the aforesaid judgment vide the contents of para 7 of the Tribunal's order in the case of M/s. R. R. Hosiery (supra). Further, we have also upheld the principle of consistency and the applicability of the Supreme Court judgment in the case of Gopal Purohit vide the Tribunal's order in the case of Smt. Urmila S. Mehta (supra). Contents of para 12 of the said Tribunal's order are relevant in this regard and the same are extracted as under:-

"12. We have heard the arguments of both the sides specially the arguments of the DR, asking for time so that comparisons could be made with regard to ascertaining the factual aspect of the case and to prove that he case did not fall within the parameters of the ratio laid down by the Gopal Purohit (supra). We, after detailed appreciation, cannot accept the submissions of the DR, because, the assessee had placed comprehensive details, as certified, in the paper book, before the revenue authorities. We are also aware, from going through the APB that identical facts had been accepted in the preceding year in her own case in the scrutiny proceedings, and identical position that of the assessee in the current year, has been accepted in scrutiny proceedings of the assessee's daughter and husband, ie Ms. Kaitki Mehta and Mr. Satish Mehta. As cited by the AR, and as extracted by us in the order, the decision of Gopal Purohit (supra), the Hon'ble Bombay High Court has insisted upon to follow a consistent view, which according to us, the assessee had done and which, the department has failed to demolish."

8. Considering the above, we are of the opinion, the order of the CIT (A) is required to be reversed. We order accordingly. Thus, the grounds raised by the assessee are allowed.

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

Order pronounced in the open court on 23<sup>rd</sup> September, 2016.

Sd/-

**(RAVISH SOOD)**

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.9.2016

व.नि.स./ OKK, Sr. PS

Sd/-

**(D. KARUNAKARA RAO)**

ACCOUNTANT MEMBER

**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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai