

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

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

ITA No.5897/Mum/2013

(A.Y:2010-11)

The Dy. Commissioner of Income Tax-25 (3), 308, C-11, Bandra-Kurla Complex, Bandra (East), Mumbai 400 51	Vs.	Shri Abhinay B. Kapoor, Badri Nath Ram Nath Kapoor, G-105, Nisarg Heaven CHS, Mahavir Nagar, Kandivali (W), Mumbai-400 067 PAN:AJYPK 9456B
Appellant	..	Respondent
Appellant by	..	Sri A. Ramachandran, Sr. DR
Respondent by	..	Ms. Aarti Sathe, AR
Date of hearing	..	19-10-2016
Date of pronouncement	..	19-10-2016

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of the CIT-(A)-35, Mumbai in appeal No.CIT(A)35/DCIT.25(3)/ITA.178/2012-13 dated 24th July, 2013. Assessment was framed by the DCIT-25(3), Mumbai for the assessment year 2010-11 vide his order dated 28-12-2010 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’).

2. The only issue in this appeal of the Revenue is against the order of the CIT (A), Mumbai in deleting the addition made by the AO on profit on purchase and sale of shares treating the same as business income.

3. Briefly stated facts are that the assessee is an individual earning income from salary, income from business and profession, profits and gains of speculation business, capital gains and income from other sources. The assessee is also engaged in trading of shares. During the course of assessment proceedings the AO required the assessee to explain as to why the income declared under the head short term capital gain i.e. profit arising out of sale and purchase of shares, be not treated as trading in shares and consequently business income amounting to Rs.44,59,731/-. The assessee before the AO claimed that the assessee has declared three types of income shown from purchase and sale of securities i.e. first is speculative profit, second is futures and options profit and the third i.e.

investment in shares shown as short term capital gain. It was explained by the assessee that during the relevant year, he was employed in full time employment with Pradip Metals Ltd. The learned Counsel for the assessee stated that the shares wherein the assessee's indulgence in purchase and sale and kept in investment in the balance sheet by taking delivery of the shares is only declared as short term capital gain or long term capital gain as the case may be. The learned Counsel for the assessee before the AO stated that in the past also the assessee is treated as investor and returns were processed u/s 143(1) of the Act for the assessment years 2008-09 and 2009-10, wherein the status of the assessee as investor was accepted by the Department. The AO brought out the details of the pattern of earning from share trading and noted the following facts:-

Sr. No.	Period of trading	No. of shares Purchased	No. of shares Sold	Net short term Capital gains / loss (Rs.)
1	01.04.2009 to 15.09.2009	330801	330801	4,76,846
2	16.09.2009 to 15.12.2009	266460	266460	15,44,255
3	16.12.2009 to 15.03.2010	158000	158000	3,04,811
4	16.03.2010 to 31.03.2010	110000	110000	21,38,819
				44,59,731

It is seen that the assessee had earned nearly 48% of his shares trading "income during the period 15.03.2009 to 31.03.2010 and in that period he had earned Rs.17,62,369/- from trading in one scrip of M/s. FCH in which he had purchased 60000shares @ Rs.165 per share on 29.03.2010 and sold 60000 shares @Rs.195/- per share on 31.03.2010. The assessee had held a majority of shares for a very short duration ranging from 1 day to one month. The assessee had held share for more than 6 months only in respect of one scrip namely M/s. NUTEK. He has also submitted that he had not taken physical delivery in any of the scrips."

Accordingly, the AO treated the profit arising out of purchase and sale of shares as income from business. Aggrieved, the assessee preferred appeal before the CIT (A) who, after considering the submissions of the assessee and considering the decision of the Hon'ble Bombay High Court in the case of CIT Vs Gopal Purohit (2011) 336 ITR 287 treated the assessee as investor and profit arising out of sale of shares was treated as short term capital gain by observing as under:-

"I have gone through the contentions of the A O and the submissions of the appellant. Facts have been examined in the light of the relevant

judicial decisions referred to by both the parties. With regard to the principle of res judicata I am in agreement with the A O that in the case of income tax proceedings the principle may not apply where facts merit a re-examination. In this case neither has scrutiny assessment been undertaken in the last two years in which the appellant started reflecting income from capital gains through share trading and in any case facts would need to be seen for the particular year.

Their lordships of Hon'ble Supreme Court in the Radhaswami Satsang v CIT (A) 193 ITR 521 have categorically held as under:

“..... Strictly speaking, resjudicata does not apply to income tax proceedings. Though each assessment year being a unit, what was decided in one year might not apply in the following year, where a fundamental aspect permeating through different assessment years has been found or a fact one way of the other and parties have allowed that position to be sustained by no challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

Coming to the facts of this year it is seen that the appellant has a purchase cost of Rs.5,27,58,652/- and a sale value of Rs.5,72,18,383 resulting in a net gain of Rs.44,59,731/-. The number of scrips held for a period of less than 7 days is 84 and the number of scrips held for more than 30 days is 100 out of a total scrip holding of 184. From this it can be seen that a major part of short term capital gains was earned by holding the shares for a period more than 30 days. The contention of the A.O. is not found backed by fact that majority of shares were held for than a month. The contention of the appellant that maximum profit has been trading of one of the scrip cannot be held against the appellant since even for investment purpose it for the appellant to invest in a manner so as to maximize his gain. It is seen that the appellant has shown the holdings as investment in his balance sheet. The appellant has not borrowed any funds for the investment in shares and has used his own funds generated through other source of income including salary to invest in dealing in shares.”

Aggrieved, the Revenue is in appeal before the Tribunal.

4. Now before us, there is no dispute that the assessee has invested his own funds for purchase and sale of shares. Admittedly, in the balance sheet as declared these shares are investment, but only disputed point remains even before us is that whether the assessee has taken physical delivery or not, because the AO has categorically recorded a finding that the assessee has not taken delivery in any of the scrips. The learned Counsel for the assessee before us now stated that this is contradictory statement of the AO and for this he stated that once that the assessee is holding shares for one day to one month and next, he says that the assessee has not taken physical delivery of any shares. She explained that the assessee has taken delivery of all

the shares in Client Pool Account of the Broker. She also explained that this Client Pool Account is a facility provided by the share brokers who held the shares on behalf of the client and the shares remain in the custody of the brokers as per instructions of the client. We are not convinced with the argument of the learned Counsel for the assessee for the reason that she has not filed any proof that delivery of these shares were taken in the Demat account because the assessee could not file statement of Demat account. In the absence of the same and in the interest of justice, whether the assessee has taken physical delivery of these shares and kept the same in the Demat Account, needs verification and hence, we remand the matter back to the file of the AO for limited purposes for verification of the same. Resultantly, Revenue's appeal stands allowed for statistical purposes.

5. In the result, the appeal of the Revenue is allowed for statistical purposes.

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	20/10/16	LK Deka	JM
2	Draft placed before author	21/10/16/ 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			