

THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" Bench, Mumbai  
Before Shri B.R. Baskaran (AM)

I.T.A. No. 261/Mum/2017  
(Assessment Year 2010-11)

Mr. Shailendra Nahar 201, H Panchavan Complex Laxman Mhatre Road Borivli (West) Mumbai-400 051.	Vs.	ITO 25(2)(3) C-10, 412 Bandra Kurla Complex, bandra East Mumbai-400 051.
(Appellant)		(Respondent)

PAN No.AAVPN1018L

Assessee by	Shri R.S. Khandelwal
Department by	Miss Bharti Singh
Date of Hearing	3.5.2017
Date of Pronouncement	3.5.2017

ORDER

The assessee has filed this appeal challenging the order dated 13-10-2016 passed by Ld CIT(A)-44, Mumbai for assessment year 2010-11, wherein he has confirmed the assessment of Short term capital gain arising on sale of shares as business income of the assessee.

2. The assessee is deriving income from brokerage & commission, rent, dividend, interest and capital gains. During the year under consideration, he declared short term capital gains as well as long term capital gains arising from sale of shares. The assessee has also held certain shares as stock in trade and has declared business income there from. The AO held that the short term capital gains declared by the assessee should be treated as business income of the assessee, since

- (a) The volume and quantity of trade were high.
- (b) holding period of shares was less

- (c) activities are carried on continuously and recurring in nature
- (d) income from share transactions is major livelihood and
- (e) the assessee has spent majority of time in share trading activity.

Accordingly he assessed the short term capital gains as business income of the assessee. The Ld CIT(A) also confirmed the same and hence the assessee has filed this appeal.

3. The Ld A.R submitted that the assessee has not used borrowed funds for investing in shares. He further submitted that the majority of shares have been held for a reasonable period. He submitted that the assessee has been classifying shares as "Stock in trade" and "Investments" at the time of making purchases itself. He submitted that a person can act both as trader and investor. At the year end, the shares have been valued at Cost only. He further submitted that the assessee has earned Short term capital gain of Rs.16.16 lakhs in one Scrip named M/s Gangotri Iron and those shares have been held for an average period of 7 months. He submitted that the aggregate amount of net Short term capital gains declared by the assessee was Rs.14.35 lakhs, meaning thereby the entire amount mainly represents gain realized on sale of M/s Gangotri Iron shares. He submitted that the in the assessment years 2006-07 and 2007-08, the short term capital gain declared by the assessee has been accepted by the AO u/s 143(3) assessments. In AY 2009-10, the same has been accepted u/s 143(1) of the Act. He further submitted that the long term capital gain declared by the assessee during the instant year has been accepted by the AO. He submitted that the AO had made identical addition in AY 2008-09 and the Tribunal has restored the matter back to the file of the AO with certain directions, viz., the repeated purchase and sale may indicate trading activity further the gains arising on sale of shares having holding period of less than 30 days was directed to be assessed as business income. However, in the instant

year, there is no repeated purchase and sale and the entire amount of STCG has been earned out of one scrip only and the net result of remaining scrips was loss.

4. On the contrary, the Ld D.R placed strong reliance on the order passed by Ld CIT(A).

5. I have heard rival contentions and perused the record. The nature of share transactions, i.e., whether an assessee has acted as an investor or trader, has to be judged on the basis of various criteria laid down by the Courts and the CBDT in its Circular. Out of those criteria, the intention of the assessee at the time of making purchase is one of the main criterias that need to be examined. I notice that the assessee has segregated the shares into trading shares and investment shares at the time of purchase itself. There is no repetition of purchases. The assessee has earned almost entire amount of from sale of shares of M/s Gangotri Iron, which has been held for an average period of 7 months. The assessee has used his own funds only for making investments and has accounted the same as Investment in the books of accounts. In AY 2006-07, 2007-08 and 2009-10, the short term capital gains declared by the assessee has been accepted. In 2008-09, though the AO has assessed the Short term capital gain as business income, I notice that the Tribunal has restored the same to the file of AO with certain directions as discussed above and the Ld A.R has submitted that the facts prevailing in the instant year is different. Under these set of facts, I am of the view that there is no reason to suspect the intention of the assessee and the nature of shares. Accordingly I set aside the order passed by Ld CIT(A) and direct the AO to assess the gains under the head Short term capital gains.

6. In the result, the appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 3.5.2017.

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 3/5/2017

Copy of the Order forwarded to :

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

//True Copy//

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BY ORDER,  
(Dy./Asstt. Registrar)  
ITAT, Mumbai