

आयकर अपीलीय अधिकरण, 'एक-सदस्य' न्यायपीठ, मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य, के समक्ष
Before Shri Joginder Singh, Judicial Member,**

**ITA No.7597/Mum/2014
Assessment Year: 2010-11**

Mr. Dilip Variya HUF, 602, Shri Aashirwad CHS, Shankar Lane, Opp. Shankar Mandir, Kandivali (W), Mumbai-400101	बनाम/ Vs.	Income Tax Officer-25(3)(2) Mumbai
निर्धारिती / Assessee		राजस्व / Revenue
P.A. No. AACHD1838F		

निर्धारिती की ओर से / Assessee by	Shri N.M. Porwal
राजस्व की ओर से / Revenue by	Shri Sumit Kumar-DR

सुनवाई की तारीख / Date of Hearing	07/09/2016
आदेश की तारीख / Date of Order:	08/09/2016

आदेश / O R D E R

The assessee is aggrieved by the impugned order dated 24/09/2014 of the Ld. First Appellate Authority, Mumbai.

The only ground raised in the present appeal pertains to long term/short term capital gain on profit on sale of shares.

2. During hearing, Shri N. M. Porwal, ld. counsel for the assessee, claimed that the impugned issue is covered by the decision of the Tribunal in the case of ACIT vs Dilip Variya (ITA No.1768/Mum/2010, etc.) order dated 15/05/2013 and also a decision from Hon'ble jurisdictional High Court (ITA No.1088 of 2011) order dated 09/01/2013 and CIT vs Dilip V.Variya (ITA No.2511 of 2013) order dated 12/07/2016 by further submitting that for Assessment year 2007-08, even the Ld. Commissioner of Income Tax (Appeal) vide order dated 26/02/2010 accepted the claim of the assessee.

2.1. On the other hand, the ld. DR, Shri Sumit Kumar, though defended the addition but did not controvert the factual matrix that the issue is covered by the decisions mentioned by the assessee.

2.2. I have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee declared income of Rs.18,604/- in its return filed on 30/07/2010. The assessment was completed by treating the income from business of trading in shares as business income instead of capital gains, computed by the assessee. The Ld. Commissioner of Income Tax (Appeal) made reference to CBDT Circular No.4 of 2007 dated 15/06/2007 and also a decision in the case of CIT vs Mandan Gopal

Radhyalal 73 ITR 62 and dismissed the appeal of the assessee. The assessee is in appeal before this Tribunal.

2.3. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, it is noted that this issue has been settled in the case of CIT vs Dilip V. Variya (ITA No.1088 of 2011) order dated 09/01/2013, wherein, on identical facts, the Hon'ble jurisdictional High Court dismissed the appeal of the Revenue affirming the decision of the Tribunal for Assessment year 2005-06. It is also noted that the Tribunal vide order dated 15/05/2013 in ITA No.1768, 1769/Mum/2010 (Assessment year 2006-07) and ITA No.1839/Mum/2009 (Assessment year 2005-06) held as under:-

“ ITA No.1768/Mum/2010 & ITA No.1769/Mum/2010 are appeals filed by the revenue. They are directed against two separate orders passed by Ld. CIT(A) -35, Mumbai dated 14/12/2009 in respect of assessment year 2006-07 in the case of the respective assesseees. ITA No.1839/Mum/2009 is an appeal filed by the assessee and it is directed against order passed by Ld. CIT(A)-XXV, Mumbai dated 16/1/2009 in respect of assessment year 2005-06. Grounds of appeal in ITA No.1768 & 1769/Mum/2010 are identical and read as under:

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O. to accept the claim of Long Term Capital Gain & Short Term Capital Gain on profit arriving from purchase & sale of shares instead of business income treated by the A.O. without appreciating the fact that the assessee is dealing in large volume of shares, most of the shares are bought and sold within short period, while some are not sold due to market conditions and their holding with assessee remains beyond few days, it will not change the nature of

transactions and the assessee is very well engaged in the business of share trading, which denote that the motive of the assessee is to carry on business in shares to book profit rather than investment in shares.

2. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O. be restored”.

2. Grounds of appeal in ITA No.1839/Mum/2009 read as under:

“ That each ground of appeal is an independent one and without prejudice to any other ground of appeal 1) a) The learned commissioner of Income Tax (Appeal) erred in treating the capital gain income as business income Rs. 22,44,557/- b) The learned commissioner of Income Tax (Appeal) failed to appreciate that appellant is a investor and not a trader as per letter dated 16/08/2007 submitted during the course of assessment.

c) The learned Commissioner of Income Tax (Appeal) failed to appreciate that appellant has shown shares investment under the head “INVESTMENT” since 25 years and assessed as capital gain.”

3. At the outset it was pointed out by the Ld. AR that assessee being individuals in the present case were assessed by the AO in respect of income earned by them on sale and purchase of shares under the head “business income” as against the claim of the assessee that the same is assessable under the head “capital gain”. In the case of Shri Dilip Variya the Tribunal vide its order dated 24/3/2010 had admitted the claim of the assessee that income arising to the assessee out of sale and purchase of shares was assessable under the head “capital gain” and the said order of the Tribunal was challenged by the revenue before Hon’ble Bombay High Court and the said appeal of the revenue has been decided by Hon’ble Bombay High Court vide its order dated 9/1/2013 in Income Tax Appeal No.1088 of 2011 and departmental appeal was dismissed with the following observation:

“This appeal by the revenue under section 260A of the Income Tax Act, 1961 challenges the order dated 24/3/2010 of the Income Tax Appellate Tribunal relating to assessment year 2005-06.

2) The revenue has formulated the following questions of law for consideration by this Court.

a) *Whether on the facts and circumstances of the case and in law, the Tribunal is right in law in upholding the order of CIT(A) whereby directing the A.O. to assess income from share investment activities as short term and long term capital gain instead of business income without appreciating that the assessee has substantial volume and huge number of share transactions and repeated transactions in single scrips, which denote that the motive of the assessee is to carry on business in shares rather than investment in shares to earn dividend?*

b) *Whether on the facts and circumstances of the case and in law, the Tribunal is in law in upholding the CIT(A)'s order that the assessee indulged in investment in shares without considering that the assessee has devoted most of his time in only one activity i.e. activity of earning profit through sales and purchase of shares, be it derivatives, intra day trading or purchase and sale within short period or long period?*

c) *Whether on the facts and circumstances of the case and in law the Tribunal in holding that the entire profits arising out purchase and sale of all shares assessed under the head "income from business and profession" by the AO be treated as investment and the benefit of indexation and exemptions on the share investments claimed as long terms investments be allowed?*

3) *The dispute in the present case is whether the income earned from the sale of shares is admissible as business income under the head capital gain. It is the case of the revenue that the Assessing officer taking into account the volume and turn over coupled with period of share holding and the value of transaction in shares concluded that the respondent assessee was carrying on share trading business. Thus, the income was liable to tax under the head profit and gains of business.*

4) *However, both the Commissioner of Income Tax (Appeals) as well as Tribunal have recorded a finding of fact that the respondent assessee was carrying business of investment in shares for last 30 years and for the last 25 years was assessed to tax under the head capital gains and not under the head of profit and gains of business by the revenue. The revenue never treated the shares as stock in trade of the respondent assessee. This finding that the respondent assessee is not carrying on business of shares trading is a concurrent finding of fact arrived at and both by the CIT (Appeals) and the Tribunal. The appellant revenue has not been able to show that this finding of fact is perverse. In the circumstances, no question of law arises.*

4) *In view of the above, the appeal is dismissed with no order as to costs".*

Ld. A.R has placed before us a copy of the aforementioned order of Bombay High Court and a copy was also given to Ld. DR. It was submitted that in all the past years the revenue had admitted the claim of the assessee and the stand was suddenly changed by the revenue in respect of A.Y 2005-06. In view of these facts, the Tribunal had admitted the claim of the assessee and the order of the Tribunal had been upheld by the Hon'ble Bombay High Court.

3.1 It was further submitted that in the case of Smt. Neena D. Variya also similar is the position and if the ratio of aforementioned decisions of Tribunal and Hon'ble Bombay High Court are applied to the facts, then the income has to be assessed under the head "capital gain" only as Smt. Neena D. Variya is also engaged in similar activity for the past so many years. He in this regard referred to the submissions of the assessee recorded by Ld. CIT(A) in the case of Smt. Neena Variya in respect of assessment year 2006-07 as under:

"(i) The appellant is assessed to income-tax since 25 years and the profit on shares has been shown as capital gain i.e. long term or short term in the past.

(ii) The number of transaction increased due to market trend.

(iii) The shares were shown as investment and not as stock-in-trade in the balance sheet. Moreover the investment was purely out of appellant's own funds and not out of borrowals.

(iv) The appellant relied on the CBDT Circular No.4/2007 dated 15.06.2007 wherein it is held that it is possible for a tax payer to have two portfolio i.e. investment portfolio and trading portfolio."

Thus it was pleaded by Ld. AR that the departmental appeals should be dismissed and ITA No.1839/Mum/2009 filed by the assessee should be allowed.

4. On the other hand, Ld. DR in respect of ITA No. 1768 & 1769/Mum/2010 has relied upon the orders passed by A.O and in respect of ITA No.1839/Mum/ 2010 she relied upon the order passed by Ld. CIT(A).

5. We have heard both the parties and their contentions have carefully been considered. In the case of Shri Dilip Variya the Tribunal after taking into consideration the fact that assessee is engaged in similar activity for the last 30 years and for the

last 25 years the assessee was assessed to tax under the head capital gain on similar activity. The revenue never treated the shares as stock-intrade in the hands of the assessee, therefore, the assessee was not carrying on the business of shares. These findings of the Tribunal have been upheld, therefore, the matter is squarely covered by the aforementioned decision of Hon'ble Bombay High Court rendered in the case of assessee itself, namely Shri Dilip V. Variya. Therefore, ITA No.1768/Mum/2010 is dismissed.

5.1 So far as it relates to appeal filed in the case of Smt. Neena D. Variya similar were the submissions of the assessee before Ld. CIT(A) in which it was stated that the assessee is assessed to income tax since last 25 years and the profit on shares has been shown as "capital gain". The increase in the transaction is only due to market trend. The shares were shown as investment and not as stock-in-trade in the balance sheet. The investment was purely out of assessee's own funds. These submissions of the assessee have not been controverted by the revenue. If the same is taken into account then the ratio of aforementioned decision of Hon'ble Bombay High Court will also be applicable to the case of Smt. Neena D.Variya. Therefore, applying the same ratio we hold this issue in favour of assessee and against the department and ITA No.1769/Mum/2010 is dismissed and ITA No.1839/Mum/2009 is allowed.

6. In the result, ITA No.1768 & 1769/Mum/2010 are dismissed and ITA No.1839/Mum/2009 is allowed."

2.4. In the aforesaid order, the Tribunal has made an elaborate discussion and dismissed the appeal of the Revenue and allowed that of the assessee. It is further noted that the order of the Tribunal has been affirmed by Hon'ble jurisdictional High Court. No contrary decision was brought to my notice by either side and more specifically the Revenue. Respectfully following the decision from Hon'ble jurisdictional High Court, the appeal of the assessee is allowed, more specifically when the assessee is carrying the business of

investment in shares for the last so many years and assessed under the head capital gains. The case of the assessee is further fortified by the fact that the Ld. Commissioner of Income Tax (Appeal) for Assessment year 2007-08, vide order dated 26/02/2010, identically decided the issue in favour of the assessee. The stand of the assessee is further fortified by the decision in the case of Gopal Purohit vs JCIT (29 SOT 117), which was affirmed by Hon'ble High Court. The decision in the case of Janak S. Rangabala vs ACIT 11 SOT 627, wherein, it was held that frequency and magnitude of transaction cannot be the criteria for determining the head of income. The ratio laid down in NEO Polypack (P.) Ltd. (2000) 245 ITR 492 (Del.) supports the case of the assessee. Considering the totality of facts and the judicial pronouncements discussed hereinabove, the appeal of the assessee is allowed.

Finally the appeal of the assessee is allowed.

This order was pronounced in the open in the presence of ld. representative from both sides at the conclusion of the hearing on 07/09/2016.

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 08/09/2016

Shekhar, P.S/निजी सचिव

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.

3. आयकर आयुक्त/ The CIT, Mumbai.
4. आयकर आयुक्त / CIT- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**