

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' E ' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI D MANMOHAN, VP & SHRI R K PANDA, AM

**ITA No. 2690/Mum/2010
(Asst Year 2006-07)**

Shantilal M Jain 92B Mittal Tower Nariman Point Mumbai 21	Vs	The Asst Commr of Income Tax Cir 12(3), Mumbai
(Appellant)		(Respondent)

PAN NO.AABPJ3286E

Assessee by Shri K Gopal & Satendra Pandey
Revenue by Shri S K Mahapatra

PER R K PANDA, AM

This appeal filed by the assessee is directed against the order dated 17.2.2010 of the CIT(A)-23, Mumbai relating to assessment year 2006-07.

2 Facts of the case, in brief, are that the assessee is mainly in the business of trading/investment in shares and securities and commission on sale of various products. The assessee filed his return of income declaring total income of Rs. 1,75,53,777/-, which was on account of salary, income from house property, business income, capital gain and income from other sources. During the course of assessment proceedings, the Assessing Officer noted that the assessee has disclosed income from Short Term Capital Gains (STCG) at Rs. 1,54,03,274/- and Long Term Capital Gains(LTCG) at Rs. 2,91,37,201/- . The Assessing Officer, from the Tax Audit Report, noted that the assessee is dealing in shares business in the form of buying and selling of shares and securities and

different other kind of share dealings. Therefore, he was of the opinion that the primary business of the assessee is dealing in shares. Therefore, he asked the assessee to explain as to why the income shown as STCG & LTCG should not be treated as business income being income from share trading activities and not income from capital gains.

2.1 The assessee submitted that the same cannot be treated as business income since the assessee is doing investment in shares and securities in recognized stock exchanges. The investments are acquired with the intention to hold for a longer period and not for trading. It was submitted that most of the investments are very old. The scrips traded in intraday without delivery and gain or loss from derivative transactions are treated as business income. It was submitted that this type of method of accounting is being consistently followed and accepted even in 143(3) assessments in earlier years. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He noted that the assessee is dealing in share trading and in the course of share trading business; the assessee has derived profit in different forms by virtue of shares only. The income from STCG is nothing but an off-shoot of prime share trading business and hence, this income cannot be differentiated from business income of share trading. The Assessing Officer noted that in order to constitute the share income as 'adventure in the nature of trade or business' the following important ingredients are necessary:

- a) Day-to-day business of the assessee and whether such other income is part of day-to-day business or income earned on the independent manner.*
- b) Continuous, organized and planned activity*
- c) Commodity in which assessee is dealing in with*

d) Profit earning motive

e) Pride of possession

f) Whether assessee intended to earn accretion on the capital investment or to earn profit thereon.

g) Series of transactions, repetitiveness nature of transactions, volume of transactions and quantum of transactions. Therefore, demarcation not possible”

2.2 Rejecting the various explanations given by the assessee and relying on a couple of decisions, the Assessing Officer treated the entire income from share trading activities, as ‘income from businesses’. Thus, he treated the STCG of Rs. 1,54,03,274/- as income under the head ‘business income’.

3 Before the CIT(A), it was submitted that the assessee is doing business of investment in shares and securities in recognized stock exchange since 1980 when the share certificates in physical form were issued by the companies. The investments were made with the intention of long term holding and earning dividend. Most of the investments were made in earlier years and substantial dividend has been earned. Such income has consistently been shown under the head ‘capital gain’. It was submitted that scrips traded intraday and settled compulsorily without delivery like due to non/bad delivery of shares or auction was carried out by the exchange. The income from such transactions is treated under the head ‘speculation business’. It was submitted that the assessee has accounted for in the books of account the said shares and securities which were held under the head ‘investments’ since their acquisition. This method of accounting has been consistently followed and assessed as such u/s 143(3) in the earlier years. The investments were valued at cost and the assessee has not taken any benefit of diminution in the value of shares and securities by way of

valuing the stock at cost or market value, whichever is lower since the shares & securities had not been held as stock in trade. The shares are not purchased for immediate sale and were purchased and kept for reasonably long period till the time the objective is achieved. The dividend income from such investments was offered for taxation in the return of income filed by the assessee. There has not been any change in these investments in the form of purchase and sales during the period from inception till today. It was submitted that the conduct and intention of the assessee clearly shows that assessee makes investment with intention to hold them as its investment and not with the intention to hold them as stock in trade to do business in them. The CBDT circular no.4/2007 dated 15th June 2007 was brought to the notice of the CIT(A). It was submitted that the assessee has only one portfolio comprising of securities which are to be treated as capital asset. Neither the assessee has any trading activity nor he has any trading portfolio comprising of stock in trade. Therefore, in view of the CBDT circular, the purchase and sale of shares by the assessee cannot be treated as income from business.

3.1 As regard the allegation of the Assessing Officer that the assessee has carried out investment in a very well planned, systematic and organized manner and repeated transactions, it was submitted that the volume of transactions does not change the nature of transaction. Relying on a couple of decisions, it was submitted that a person can be both an investor and a trader. The intention of the assessee at the time of purchase of shares is a predominant factor to decide the nature of transaction. The decision of the jurisdictional High Court in the case of CIT vs Gopal Purohit was also cited and it was submitted that the delivery based transactions in the present case should be treated as those in the nature

of investment transactions and the profit received there from should be treated either as “short term” or “long term” capital gain depending upon the period of holding.

4 However, the CIT(A) was not convinced with the arguments advanced before him. He referred to CBDT instruction no.1827 dated 31.8.1989 which has laid down certain tests to distinguish between the shares held as stock-in-trade and shares held as investment. He noted that the circumstances to be considered by the Assessing Officer in determining whether a person is a trader in stocks or an investor in stock as per the guidelines laid down by the CBDT are as under:

i) Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity.

ii) Whether the purchase is made solely with the intention of resale at a profit or for long term appreciation and/or for earning dividends and interest.

iii) Whether scale of activity is substantial

iv) Whether transactions were entered into continuously and regularly during the assessment year.

v) Whether purchases are made out of own funds or borrowings

vi) The stated objects in the Memorandum and Articles of Association in the case of a corporate assessee

vii) Typical holding period for securities bought and sold.

viii) Ratio of sales to purchases and holding

ix) The time devoted to the activity and the extent to which it is the means of livelihood.

x) The characterization of securities in the books of account and in balance sheet as stock in trade or investments.”

4.1 The CIT(A) noted from the various details furnished by the assessee that the assessee, in the instant case has indulged in purchase/sale of shares on a large scale. Purchase of shares of Rs. 1098 lacs and sale of shares of Rs. 1241 lacs during the year show that the assessee indulged in share transactions on a regular basis and on a substantially high scale. The assessee has traded in as many as 85 scrips in 188 transactions and in as many as 1631852 shares during the year with frequency and regularity. Only in 21 scrips there have been some opening balances. Rest of the scrips have all been purchased and sold during the year. The holding period in several shares has been merely a few days and in a few cases the purchase and sale has been on the same day and there is even one instance of forward sales. He further noted that simply because value of the investment is shown to be at cost, that *per se* would not change the real nature of the activity. Further, the principle of *res judicate* is not applicable to income tax proceedings. He further noted that there is frequency of transactions; therefore, the contention of the assessee that the assessee is an investor cannot be accepted.

4.2 As regards the contention of the assessee that delivery based transaction ought to be treated as investment; he noted that no details regarding delivery of shares have been filed before him. However, even apart from this, had delivery been the only criteria in deciding that all the delivery based transactions are by way of investment purpose, there would have been no situation wherein delivery based transaction can also form part of business activity. If it is taken in this way, it will result in an absurd situation wherein just because delivery is taken, it has to be that the dealing in shares must result in investment activity. Therefore, the surrounding facts and circumstances are also clearly against the assessee.

He noted that nothing has been placed on record to show how could the scrips be said to have been held for investment purpose alone, despite the fact that various factors such as quantum, periodicity, frequency and multiplicity of transactions and other surrounding circumstances point otherwise. Relying on a couple of decisions including the guidelines issued by the CBDT, he noted that the assessee indulged in purchase/sale of shares on regular basis on a substantially high scale. There is frequency and regularity in transactions and since the assessee has not been able to establish that the transactions were carried out by deploying own funds and not out of borrowed funds; therefore, merely treating the entries in the books as investment would not by itself be proof that the same were for investment. The volume, magnitude, frequencies, continuity, regularity, the ratio between purchase and sale clearly indicate trading activity. The period of holding in several instances has been extremely short. The assessee has not maintained separate bank accounts. In view of the above, he upheld the action of the Assessing Officer treating the income from STCG as business income.

5 Aggrieved with such order of the CIT(A), the assessee is in appeal here before us with the following grounds:

1. *i) On the facts and in the circumstances and in law, the Id CIT(A) has erred and was not justified in confirming the short term capital gain amounting to Rs. 1,54,03,274/- which was assessed as an income from business instead of income under the head capital gains;*
ii) The Id CIT(A) has totally ignored and has not taken into consideration relevant facts of the case and also the past assessments of the appellant wherein the same income has been consistently declared and assessed under the head income from capital gains.

iii) The Id CIT(A) has failed to appreciate that on the facts of the appellant's case the decision of the jurisdictional High Court in the case of CIT vs Gopal Purohit decided on 6th Jan 2010 is squarely applicable.

The appellant therefore, prays that treatment of short term capital gains under the head of business income instead of capital gains income deserves to be deleted.

2 On the facts and in the circumstances of the case and in law the appellant prays your honour to grant such other and/or consequential relief as your honour may deem fit and proper"

6 The Id counsel for the assessee reiterated the same submissions as made before the Assessing Officer and the CIT(A). Referring to page 1 of the paper book, he submitted that the assessee has shown STCG at Rs. 1,54,03,274/- and LTCG at Rs. 2,91,37,201. The Assessing Officer has accepted the LTCG but has treated the STCG as business income. Referring to page 2 of the paper book, he submitted that the assessee has received dividend income of Rs. 26,97,476/- which has been claimed as exempt u/s 10(34). Referring to page 4 of the paper book, he submitted that opening capital of the assessee is Rs.8,51,20,110/-.

6.1 Referring to pages 9 & 10, the Id counsel for the assessee drew the attention of the Bench to the balance sheet as on 31st Mar 2006 of the proprietary concern of the assessee Deepkala Collections Shop where the assessee's capital stands at Rs. 85,42,812/- only.

6.2 Referring to pages 22 to 27 of the paper book, he drew the attention of the Bench to LTCG derived by the assessee on account of dealing in various scrips. Referring to pages 41 to 67 of the paper book, he drew the attention of the Bench to the order passed by the Assessing Officer u/s 143(1) where the

Assessing Officer has accepted the STCG of Rs. 6,73,615/- for Assessment Year 2003-04. Referring to pages 68 to 89 of the paper book, he submitted that short term capital loss of Rs.55,38,840/- has been accepted by the Assessing Officer in the order passed u/s 143(3). Referring to pages 90 to 124, he submitted that STCG of Rs. 84,58,656.- has been accepted by the Assessing Officer in the order passed u/s 143(1). Referring to the copy of the order for Assessment Year 2007-08 and 2008-09, he submitted that the Assessing Officer in the order passed u/s 143(3) has accepted the STCG declared by the assessee, which is Rs. 69,38,985/- for Assessment Year 2008-09 and Rs. 33,31,449/- for Assessment Year 2007-08. He submitted that the assessee is maintaining separate bank accounts; one for investment purpose and other one for business purposes. It is not known as to from where the Assessing Officer obtained the information that the assessee has obtained borrowed funds. He submitted that no borrowed funds have been utilised for purchase and sale of shares and the assessee neither paid nor received any interest for the purpose of share trading.

6.3 Referring to pages 18 to 20 of the paper book, he drew the attention of the Bench to para 13 of the reply to the Assessing Officer where it was submitted that the assessee has given loan from his own capital or interest free loans taken from others ; therefore no interest has been charged on loans given.

6.4 On being questioned by the Bench to explain para 10 of the said reply wherein it was submitted that the assessee has taken secured loan from HDFC bank against the hypothecation of shares and securities, Id counsel for the

assessee submitted that the assessee has borrowed funds from the Bank against pledge of shares, which has been utilised for the proprietary ship business of Deepkala Collections and no part of the funds has gone to purchase or sale of shares.

6.5 Referring to the decision of the Tribunal in the case of Mr Nehal V Shah in ITA No.2733/Mum/2009 order dated 15.12.2010 for Assessment Year 2005-06 and the order of the Tribunal in the case of ACIT vs Naishadh V Vachharajani in ITA No.6429/Mum/209 order dated 25.2.2011 for Assessment Year 2006-07, he submitted that under identical circumstances, STCG on account of purchase and sale of shares has been accepted by the Tribunal. He submitted that the assessee's case is in a much stronger position; therefore, income from STCG declared by the assessee should be accepted and the order of the CIT(A) be set aside.

6.6 The Id DR, on the other hand supported the order of the CIT(A).

7 We have considered the rival submissions made by both the parties, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee, in the instant case is dealing in shares and securities apart from deriving income from salary, house property business income and income from other sources. There is also no dispute to the fact that LTCG declared by the assessee has been accepted by the Assessing Officer and the derivative income declared by the assessee has been accepted by the Assessing Officer as "business income". Therefore, the only dispute in the impugned appeal is regarding the treatment of STCG on account

of purchase and sale of shares, which has been held as 'business income' by the Assessing Officer and upheld by the CIT(A). It is the case of the revenue that due to volume, magnitude, frequency, continuity, regularity, the ratio between purchase and sale clearly indicate that income on account of purchase and sale of shares should be treated as income from business and not as income from STCG. According to the Id counsel for the assessee, since the income of STCG has been accepted by the Assessing Officer from Assessment Years 2003-04 to 2008-09 i.e preceding and subsequent years; therefore, following the Rule of consistency, this income from STCG should be accepted during the year in the light of the decision of the jurisdictional High Court in the case of Gopal Purohit (supra).

8 In the instant case, we find the assessment order was passed on 31.12.2008 for the Assessment Year 2006-07 wherein the Assessing Officer has treated the STCG as business income. Against this, the assessee filed an appeal before the CIT(A), who vide order dated 17.2.2010 upheld the action of the Assessing Officer. We find, the Assessing Officer in the order passed u/s 143(3) on 29.10.2009 for Assessment Year 2007-08 has accepted the STCG declared by the assessee. The above order of the Assessing Officer was after the order passed u/s 143(3) for the Assessment Year 2006-07 and before the order passed by the CIT(A) upholding the action of the Assessing Officer. However, we find, the Assessing Officer in the order passed u/s 143(3) dated 27.12.2010 for the Assessment Year 2008-09 has accepted the STCG of Rs. 69,39,985/- which is after the order passed by the CIT(A) on 17.2.2010. When the above aspect was confronted to the Id DR by the Bench during the course of hearing, the Id DR could not say anything. Thus, from the details furnished by the Id counsel for the

assessee, we find from Assessment Years 2003-04 to 2008-09, the Assessing Officer has consistently accepted the STCG shown by the assessee except for Assessment Year 2006-07 i.e. the impugned assessment year. Under these circumstances, we are of the considered opinion that Rule of consistency as propounded by the jurisdictional High Court in the case of Gopal Purohit (supra) will squarely be applicable to the facts of the present case.

9. In view of the above discussion, we are of the considered opinion that the income derived from the sale/purchase of share in the instant case has rightly been treated by the assessee as STCG. Therefore, we set aside the order of the CIT(A) and direct the Assessing Officer to accept the STCG as declared by the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed.

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

Order pronounced on the 27th, day of April 2011.

Sd/-

Sd/-

(D MANMOHAN) Vice President	(R K PANDA) Accountant Member
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Place: Mumbai : Dated:27th, April 2011
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai