

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"I" Bench, Mumbai**

**Before Shri D.K. Agarwal, Judicial Member  
and Shri B. Ramakotaiah, Accountant Member**

**ITA No. 2586/Mum/2009**  
(Assessment Year: 2005-06)

Smt. Sadhana Nabera  
First Floor, Jasu, Plot No. 60  
Vithal Nagar Society, JVPD Scheme  
Vile Parle (W), Mumbai  
PAN - AAFFN 5685 N

ACIT, Range 25(3)  
Vs. Mumbai

**Appellant**

**Respondent**

Appellant by: Shri Vijay Mehta/Shri A.K. Ghosh  
Respondent by: Shri Aurn C. Bharat

**ORDER**

**Per B. Ramakotaiah, A.M.**

This appeal by the assessee is against the order of the CIT(A)- XXVI, Mumbai dated 23.01.2009.

2. Assessee has raised the following two grounds: -

“1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the AO’s action of assessing short term capital gain under the head “Income from business or profession”.*

2. *On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred to hold that the provisions of Sec. 2(22)(e) are applicable to the transactions between the appellant and M/s. Adhunik Finance Pvt. Ltd.”*

3. In the course of argument the assessee has not pressed ground No. 2 and accordingly the same is treated as withdrawn. The only ground to be considered is whether the income earned by the assessee on sale of shares is to be treated as short term capital gain or income from business. The assessee is an individual and Director/shareholder of M/s. Hemkanak Merchantile Pvt. Ltd. and Adhunik Finance Pvt. Ltd. Her husband is also Director and shareholder in Emerging Capital Advsors Ltd., Simcorp Fund Ltd. and Adhunik Finance Ltd. and all these companies are engaged in the

business of share trading. For the assessment year under consideration the assessee had disclosed business and professional income Nil, short term capital gain before 01.10.2004 at Rs.45,659/- and short term capital gain after 01.10.2004 at Rs.79,74,441/- and income from other sources at Rs.60,691/-. She also claimed dividend income of Rs.2,24,307/- as exempt. On scrutiny of the details of short term capital gain disclosed the A.O. was of the opinion that the assessee has entered into voluminous transactions of purchase and sale of shares and out of these transactions some transaction in which delivery had not been taken, the assessee has treated as speculation loss and some of the transactions are treated as investments and losses were also claimed as set off against short term capital gain. The A.O. asked the assessee to explain why the income earned on transaction of shares should not be considered as business income. The A.O. has taken the nature of capital gains received for analysis and observed that the assessee has transacted total number of 2,12,281 shares involving Rs.1.87 crores as purchase cost and sold them for a consideration of Rs.2.69 crores thereby earning gains. It is also noticed that: (a) the assessee and her husband are Directors/substantial shareholders in companies which are engaged in share business and transacting in the Stock Exchange on regular basis; (b) there was transfer of funds between assessee's account and accounts in some of the concerns. Incidentally he also invoked the provisions of Section 2(22)(e) of deemed dividend, which were contested but were withdrawn in ground No. 2; (c) there were transactions of intraday trading and the assessee has purchased 21 scrips which are bought and sold on the same day incurring a net loss of Rs.4799/- and the assessee also had taken loans from banks by pledging shares purchased and (d) earning of dividend income is very small when compared to the gain earned on the share transactions. He was of the view that merely by classifying the shares as investment does not change the nature of asset. The assessee explained that she is a pure investor in stock market. There was not much frequency of transactions to treat them as business and relied on various case laws and legal principles to submit that the assessee is an investor. The A.O. analysed the legal principles and considered that the number, volume

and frequency of transactions of purchase and sale of shares in which there was actual delivery was taken and, therefore, short term capital gain declared by the assessee should be treated as business income. While doing so he also considered the Board Circulars and the questions to be examined to determine whether the assessee is an investor or a trader. He also relied on the decision of the ITAT Ahmedabad Bench in the case of DCIT vs. Deepa Shah 99 ITD 219 to hold that the assessee is doing transactions in the nature of business and accordingly he has arrived at the business profit at Rs.78,89,499/- and speculation loss was allowed to be carried forward. He determined the income of the assessee accordingly.

4. Before the learned CIT(A) the assessee submitted that the A.O. was wrong in considering the activity of investment in shares as there is no intention of holding the shares as stock-in-trade and it was a regular practice of showing share purchases as investment and whatever shares are sold the gains were accounted for as capital gains. It was further contended that the assessee has borrowed money and utilised in investment in shares and this is not prohibited and was duly approved by the Hon'ble Apex Court in the case of CIT vs. Rajendra Prasad Moody 115 ITR 519 and it was also contended that intraday transactions resulting in loss of Rs.7,499/- has no relevance and totally out of context for determining the capital gain on other shares. It was submitted that the intention of the assessee was always to hold the shares as investment but in few cases the shares purchased were sold of same day because of some wrong decision while making the investment. It will be a case of capital gain/loss and the A.O. was treating it as a speculation loss. The assessee also clarified that the Assessing Officer's finding that delivery of only 58637 shares were taken is not correct as assessee purchased 1 lakhs shares of TASC Pharma Ltd. out of which 61713 shares were received in the d-mat account of the assessee and the balance 38807 was received in the d-mat account of the concerned broker thereby taking delivery of all the shares. With reference to the dividend income being compared lower than the capital gain, it was submitted that there is no correlation between these two items and the dividend was received only when the concerned company declared the same and because of non-receipt

of dividend the activity of investment cannot be become a business activity. The assessee, further analysed the various case laws and countered the arguments of the A.O. and submitted that the assessee is an investor and cannot be considered as a trader.

5. After analysing the issues the CIT(A) has given the following findings in para 3.5 of his order: -

*“3.5 I have gone through the submissions in the light of the facts and find that there is no dispute that the appellant is dealing in shares in large magnitude as under: -*

*From 01.04.2004 to 30.09.2004 appellant purchased 44987 number of shares for Rs.30,58,864/- and sold the same of Rs.31,04,523/- thereby disclosing a profit of Rs.45,659/-. These scrips pertain to 26 companies. Further, from 01.10.2004 to 31.03.2005, appellant purchased 167384 number of shares for Rs.1,57,24,576/- and sold the same for Rs.2,38,66,845/- thereby disclosing a profit of Rs.79,74,441/-. These scripts pertain to 6 companies. In nutshell during the year appellant carried out transactions in 32 scripts involving 212281 number of shares amounting to Rs.2,69,71,368/- and short term capital gain is disclosed at Rs.80,20,100/-.”*

6. In para 3.6 the CIT(A) has analysed various case laws and in para 3.7 he has given further findings of facts which are as under: -

*“3.7. Appellant is undoubtedly dealing in large volume of shares. Most of the shares are brought and sold in few days. None of the shares shown in the Balance-sheet of the year ending 31.03.2004 were sold in F.Y. 2004-05 except 3000 shares of GSFC which again purchased on 29.03.2004 and sold on 01.04.2005 without taking the delivery. In the statement of shares traded from 01.04.2004 to 30.09.2004 it is further noted that except shares of ‘India Asia Fuse’ and ‘Kakatia Cement’ which were held for less than four months, all other shares were squared up (purchased and sold) on same day. Further gain/loss on such squared shares is claimed as Short Term Capital Gain instead of speculation loss/profit as no delivery was taken. Similar is the position about shares transacted after 01.10.2004 to 31.03.2005. Only few shares are not sold in few days. Only because some shares are kept in more than one year due to market condition will not change the nature of transaction. Appellant has taken loans from banks, financial institutions and private parties and related concern to the extent of Rs.2.84 crors (earlier year Rs.44.77 lacs as per Balance-sheet) to do share business and paid interest of Rs.1,82,805/- in the current year. The other facts which indicate that assessee was dealing in shares as trader is that she has pledged the shares to ICICI & HSBC for availment of loan and also*

borrowed 96000 shares from its associate companies for the purpose of mortgage for loan. She has borrowed money from individuals, financial institutions, bank and associates concern and paid interest to the extent of Rs.1,82,806/- on loan taken. No prudent person will incurred interest on loan for the purpose of investment but certainly for the purpose of business. The assessee was well acquainted with the activity of share market though her companies and family members and was using the full flashed infrastructure facilities of own related concerns. The shares shown in the Balance-sheet of F.Y. 2003-04 are not sold in the F.Y. 2004-05 but increased in the current year which shows that stock of investment is separately disclosed in the Balance-sheet and transaction of shares carried out in the year are purely business transactions and not related to the investment shown in earlier Balance-sheet. Moreover, the holding period of the shares transacted intraday and other shares are a few days which shows that intention was only to book profit and not to investment. All these facts prove beyond doubt that she was very well engaged in the adventure in the nature of trade. The Assessing Officer has discussed in detail in the assessment order relying upon various judgements that **manner, volume and period of holding of maximum shares** clearly show that the appellant is engaged in trading and not in investment. If something is accepted in earlier years u/s. 143(1) that will not amount to acceptance by the Department regarding holding of stock-in-trade or investment. The Assessing Officer had no occasion to apply his mind in earlier years as no scrutiny was done in the case. Appellant is engaged in large volume of transactions in shares and when A.O. scrutinized the case in the year under consideration and found that she is systematically engaged in trading of shares. The Assessing Officer rejected the book version of the appellant and held that the appellant is engaged in trading of shares on full scale. Recently **Vishakapattanam ITAT in Sridevi Steel and Cement Stores v/s ITO 106 ITD 326** in a case where in earlier year depreciation was allowed u/s. 143(1) even though same was claimed wrongly in the return and when assessment for subsequent assessment year was reopened and correct depreciation was allowed, the Hon'ble ITAT held that merely because in preceding year the claim was wrongly allowed more particularly when there was no discussion in the body of order to prove application of mind, it could not be said that it would bind the revenue in subsequent year and would amount to change of opinion. Moreover, year after year dealing in shares in large volume itself prove that the appellant is engaged in share business in full scale basis. She cannot treat profit as short term capital gain when shares are sold within one year and holding period in most of transactions is only one day and in some cases a few months. Recently **Hon'ble CBDT had issued circular No. 4/2007 dated 15.06.2007** after considering various judgements on the identical issue and concluded three aspects to determine whether any transaction is trading or investment.

- a) Magnitude of purchase and sale
- b) Period of holding
- c) Motive behind it”

7. On the basis of this factual finding and also analysing the case laws regarding adventure in the nature of trade in para 3.8 and 3.9 the CIT(A) held that the assessee is engaged in adventure in nature of trade on full scale and it has shown purchase of shares as investment and gains as short term capital with a view to avoid tax. Investment shown in the books of account is nothing but stock-in-trade. Accordingly he upheld the action of the A.O., hence the assessee is aggrieved.

8. The learned counsel drawing our attention to the paper book filed in which the details of assessee's investments and share transactions are furnished, submitted that the assessee has investment of Rs.1.70 lakhs at the end of F.Y. 2002-03 which has increased to Rs.17.68 lakhs by the end of the year under appeal and the assessee is a high net worth investor having capital of Rs.21.94 lakhs. It was further submitted that many of the shares were taken delivery and the principles established by the Hon'ble ITAT in the case of Gopal Purohit vs. JCIT 122 TTJ (Mum) 87 will apply to the facts of the case and further submitted that the order in the above case was upheld by the Hon'ble Bombay High Court in ITA No. 1211 of 2009. At our instance the learned counsel also placed copies of computation of total income, capital gain and statement of stock and capital gains from A.Y. 2001-02 onwards till A.Y. 2006-07. It was assessee's contention that the assessee is an investor and not a trader.

9. The learned D.R., however, relied on the orders of the A.O. and the CIT(A), which were very elaborate.

10. We have considered the rival submissions and perused the details furnished before us. The issue to be decided is whether the assessee's earning of Rs.78,89,499/- in purchase and sale of shares is to be treated as business income or short term capital gain. It is to be noted that the assessee has no long term capital gain in any of the years except in A.Y. 2002-03 as long term capital loss of an amount of Rs.59,937/- and a long term capital gain of Rs.8,41,749/- in A.Y. 2006-07. In all the years the assessee has short term capital gain as under: -

A.Y. 2001-20	Rs.17,468/-
A.Y. 2002-03	Rs.1,64,264/-
A.Y. 2003-04	Rs.1,07,969/-
A.Y. 2004-05	Rs.1,03,309/-
A.Y. 2005-06	Rs.79,78,440/-
A.Y. 2006-07	Rs.4,889/-

11. As can be seen from the above the assessee has an abnormal short term capital gain in this year as pointed out by the CIT(A). The assessee has transacted in number of scrips in the year and has earned substantial gains in the said transactions. The assessee has given an analysis of holding period as under: -

*Statement of Short Term Capital Gain/(Loss) for the period from 1/10/2004 to 31/3/2005*

<b>Name of Scrip</b>	<b>Quantity</b>	<b>Date of Purchases</b>	<b>Cost of acquisition</b>	<b>Date of Sale</b>	<b>Sale Value</b>	<b>Short Term Gain/(Loss)</b>	
<b>Gain on Shares held for the period from 1 day to 15 days</b>							
Crew BOS Products	576	38295	20,160	38301	30,660	10,500	<b>IPO</b>
Hiran orgo chem.	19834 various dates		700,436 Various dates		695,185	(5,251)	<b>5,249</b>
<b>Gain on Shares held for the period from 16 day to 30 days</b>							
Tricom	7000	38358	700,910	38383	579,530	(121,380)	
Hiran orgo chem.	2500	38371	90,500	38399	120,650	30,150	
Hiran orgo chem.	1834	38380	70,792	38399	88,509	17,716	<b>(73,514)</b>
<b>Gain on Shares held for the period from 31 day to 90 days</b>							
TASC Pharma Ltd.	34807	38266	3,976,700	38309	4,803,371	1,826,671	
TASC Pharma Ltd.	4000	38266	457,000	38338	704,880	247,880	
TASC Pharma Ltd.	15000	38266	1,713,750	38352	2,636,550	922,800	
Hiran orgo chem	50	38322	1,857	38359	1,742	(114)	
Hiran orgo chem	154	38322	5,718	38379	5,630	(89)	
Hiran orgo chem	96	38322	3,564	38393	4,394	829	
Hiran orgo chem	354	38342	12,294	38393	16,203	3,908	
Hiran orgo chem	781	38342	27,124	38399	37,691	10,567	
Hiran orgo chem	875	38345	28,884	38399	42,228	13,344	
Hiran orgo chem	1500	38348	52,035	38399	72,390	20,355	
Hiran orgo chem	510	38352	18,513	38399	24,613	6,100	
Hiran orgo chem	1866	38380	72,028	38422	101,193	29,166	<b>3,081,417</b>
<b>Gain on Shares held for the period from 91 day to 180 days</b>							
Micro Technology Ltd.	19450	38309	1,187,034	38391	2,089,586	902,553	
Sterling Tools Ltd.	10000	38274	1,306,527	38415	1,718,400	411,874	

TASC Pharma Ltd.	4700	38266	536,975	38396	929,613	392,638	
TASC Pharma Ltd.	41493	38266	4,740,575	38370	8,162,627	3,422,053	<b>5,129,053</b>
							<b>8,142,269</b>

*Less: Expenses incurred in connection with above*

<i>Bank Charges</i>						884	
<i>D-Mat Charges</i>						27,313	
<i>Brokerage, Service Tax on Brokerage Etc.</i>						17,097	
<i>Interest Expenses</i>						92,806	
<i>Securities Transaction Tax Paid</i>						<u>29,729</u>	1,67,829

*Net Short Term Capital Gain after 1/10/2004*

7,974,441

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12. Before analysing the facts of the case it is necessary to narrate the principles applicable in deciding the issue as laid down in several judicial pronouncements relied upon by both the A.O. and the CIT(A) and assessee. The A.O. has relied upon the principles that entries in the books of account are not determining factor to decide the real nature of transactions – Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT (SC) 227 ITR 172. If a receipt is trading receipt the fact that it is not shown in the account of the assessee does not prevent the A.O. in treating it as trading receipt – Chowringhee Sales Bureau P. Ltd. 87 ITR 548 (SC) & Punjab Distilling Industries Ltd. 35 ITR 523 (SC). Name of label given by a party to a particular amount is not conclusive - CIT vs. J.D. Italia 141 ITR 953 (AP). & CIT vs. Bazpur Co-op Sugar Factory Ltd. 172 ITR 330 (SC). The question whether it amount to business activity will depend on the peculiar facts of the case – G. Venkataswami Naidu & Co. vs. CIT 35 ITR 594. With reference to the business activity the A.O. held that the volume, frequency and regularity of share transactions done in organized manner indicate business activity – CIT VS. Motilal Hirabhai Spg. & Svg. Co. Ltd. 13 ITR 173 (Gju), Raja Bahadur Visheshwara Singh vs. CIT 41 ITR 685 (SC), Punjab Co-operative Bank Ltd. vs. CIT 8 ITR 635, etc.



13. It is held that whether a transaction of sale and purchase of shares were trading transactions or they were in the nature of investment is a mixed question of law and facts as held by the Hon'ble Supreme Court in the case of CIT vs. H. Holck Larsen 160 ITR 67. It is further held in the case of CIT vs. Associated Industrial Development Co. P. Ltd. 82 ITR 586 that it is possible that the assessee to be both an investor as well as dealer in shares. Whether a particular holding is by way of investment or form part of stock-in-trade is a matter within the knowledge of the assessee and it is for the assessee to produce evidence from the records as to whether he maintained any distinction between shares which are held as investment and those held as stock-in-trade. It is also held in the case of Motilal Hirabhai Spg. & Svg. Co. Ltd. 113 ITR 173 (Guj) and Raja Bahadur Visheshwara Sing 41 ITR 685 (SC) that treatment in the books by an assessee will not be conclusive and if the volume, frequency and regularity at which transactions are carried out indicate systematic and organised activity with profit motive then it becomes business profit not capital gain. In the case of CIT vs. PKN Co Ltd. 60 ITR 65 it was held that purchase with an intention to resale will also, under the changed circumstance, would be capital gains. It is also held in the case of Saroj Kumar Mazumdar vs. CIT 37 ITR 242 by the Hon'ble Supreme Court that purchase with an intention to resale in order to gain profit will be business profit depending on the circumstances of the case like nature quantity of purchase and nature operation involved. It was also held in the case of Janki Ram Bahadur Ram vs. CIT 57 ITR 21(SC) that no single fact has any decisive significance and the question must be answered depending on the collective effect of all relevant material brought on record.

14. Keeping in view the above principles, the facts in the present case of the assessee are examined. The assessee during the entire previous year had entered into transaction of purchases and sale of shares of about 32 companies totalling to Rs.1,87,83,440/- and these shares were sold for a value of Rs.2,69,71,368/-. The above transactions were effected by actual delivery of shares at the time of purchase and sale of shares except in the case of Hiran Orgo Chem, where there are 19 transactions of purchase and sale on the same day of various number of shares involving a total purchase

of Rs.7,00,457 and sale of Rs.6,95,224 with a loss of Rs.5,232/-. There were expenses incurred with reference to brokerage, interest, security transactions, bank charges , etc. totally to Rs.1,67,829/-. In all the transactions where capital gain shown during the year the holding period was less than even 6 months. Most of the gain earned by the assessee is in the shares held for a period 31 days to 90 days to an extent of Rs.30.81 lakhs and 90 day to 180 days, i.e. Rs.51.29 lakhs. In fact there were no shares which were held for more than 6 months period on which gains were earned. Thus the maximum holding period was from 1 day to a maximum of 180 days.

15. It is one of the arguments that the assessee is an investor and the investment has increased from Rs.1.70 lakhs in F.Y. 2002-03 to Rs.17.68 lakhs in the year under appeal and accordingly the assessee is an investor. An analysis of the investment schedule in various years indicate the investment in 201-02 was to the tune of Rs.2,55,315/- . Assessee furnished the following details: -

LIT OF INVESTMENT AS ON 31.03.2001

ALLOTTED	ADHUNIK FINANCE		2,300	23,000.00
GA47	ELECTRO KELV	14-Feb-01	1,000	19,128.24
GA48	ELECTRO KELV	21-Feb-01	500	8,250.00
GA52	ELECTRO KELV	20-Mar-01	500	3,950.00
GE61	NAT. ALUMINIU	23-Feb-01	1,000	60,528.55
GA055	PENTA GLON	28-Apr-00	100	1,810.00
	SARVODAYA LABS	1995-96	1,300	5,200.00
GN17	SONI CAPITAL	06-Dec-00	500	11,071.07
GA021	BEST MULYANKAN	04-Apr-00	2,000	83,922.26
GA38	TATIA FINANCE	09-Dec-99	3,000	33,239.32
	THIRUMALAI CHEM	1995-96		2,000.00
	XPRO INTERNATIONAL	1995-96		3,215.00
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				255,314.44
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16. Out of these, the investment in Adhunik Finance, Sarvodaya Labs, Soni Capital, Tatia Finance, Thirumalai Cehm, Xpro International have continued in the next year also whereas investments in Denim Organic and Vjilcdm to an extent of Rs.90 ,000 were shown afresh and added to the investment list in the next year (2002-03). Some of the shares were disposed off and were shown under short term capital gain. The assessee has

continued with the investment (in FY2003-04) in Adhunik Finance, Denim Organic, Sarvodaya Labs, Soni Capital, Tatia Finance and Thirumalai Chem and Xpro International. Some of the shares were also sold during the year as can be seen from the short term capital gain statement in the year under consideration. In the year 2004-05 relevant for this assessment year the assessee's portfolio of other shares is same except investment in Adani Exports Ltd. of 40240 shares valued at Rs.16,86 lakhs which in turn was sold in the next financial year to claim short term capital gain of Rs.8,41,747/-. If we exclude the investment in Adani Exports Ltd. in this year, in all the years assessee's investment are consistently in 5-6 scrips which are continued from A.Y. 2001-02 onwards whereas the purchases at the end of year were shown under the head investment but were immediately sold in the next year mostly offering short term capital gains, except Adani Exports Ltd. which yielded long term capital gain in A.Y. 2006-07. Therefore, what the assessee is showing as investment is only scrips in 5 6 companies of less than Rs.2 to 2.5 lakhs value in all the years which in fact are continued year after year. The purchases and sales of other shares in various years were for a period of less than 6 months in each year earning gains in short period. These facts were analysed correctly by the CIT(A). In earlier years also the assessee has nil or small long term capital gain which indicates that holding investments for a longer period is not the main intention except few scrips which are carried over without any transactions year after year. Accordingly to the extent of investment activity in shares one can see that the assessee has invested in some 5 to 6 companies scrips which have been carried over from year to year in which there are no frequent or large number of transactions and these investments in shares can be considered as assessee's proper "investments".

17. Purchase of shares during the year and selling them frequently in short period do indicate that the assessee has purchased the shares with a motive to earn profit in short period. An interesting aspect noticed from the details of short term capital gains statement filed in this regard ( page 73) is that the assessee has transacted in one share of Hiran Orgo Chem frequently. One argument which was raised before the CIT(A) explaining

daily transactions without delivery was that the assessee by mistake has made some investment and realising that the transactions were not gainful immediately sold for a loss on the same day. This argument is to be considered in the light of the transactions entered by the assessee in Hiran Orgo Chem's case. There are purchases and sales of shares on 06.12.2004 to 21.12.2004 on a daily basis and the maximum purchase in a day was of about 1910 shares and investment in a particular day was about Rs.67,472/-. If assessee has by mistake invested in that scrip on a particular day, it is not explained how only this scrip was transacted from 16.12.2004 to 21.12.2004 frequently 19 times. Not only that in the same period, the assessee also invested in the same scrip on various dates to earn profit of Rs.1,21,913/- on 10500 shares the cost of which was about Rs.3,63,000/- and sold for a gain. It shows that the explanation given for the day-to-day transactions is not correct and the assessee has invested frequently in the particular scrip from 01.12.2004 to 28.01.2005 and sold the shares from 16.12.2004 to 11.03.2005 regularly earning both loss as well as gains in the same scrip. Another scrip which was transacted in high volume was the TASC Pharma Ltd. In this case the assessee has purchased 1 lakh shares to an extent of Rs.1,14,25,000/- on 06.10.2004 and these shares were sold on 18.11.2004, 17.12.2004, 31.12.2004, 17.01.2005 and 18.01.2005 i.e. within a period of 3 months gaining an amount of Rs.68,62,041/- in this transactions. As can be seen these 2 scrips have given large amount of gain. In addition, there was gain of Rs.9,02,552/- on the scrips of Micro Technology purchased on 18.11.2004 and sold entirely on 08.02.2005. There is also gain of Rs.4,11,873/- on purchase of Sterling Tools Ltd. of 10000 shares and selling them entirely on 04.03.2005. Thus the assessee has earned most of the profits after 01.10.2004 to 31.03.2005 in only 5 scrips whereas there is loss of Rs.1,21,380/- in purchase of Tricom shares on 06.01.2005 and selling them on 31.01.2005. These indicate that the assessee has purchased the shares with an intention to make profit in the share market. This fact can also be compared with the gain shown from 01.04.2004 to 30.01.2005. In the first 6 months of the year the assessee has transacted in 25 scrips and gained Rs.45,659/- and the investment in those

shares is not much when compared to the large transactions as discussed above after 01.10.2004. Most of these shares were also purchased and sold immediately and there are no shares which are acquired prior to 01.04.2004 held after 31.01.2005. All these facts indicate that the intention of the assessee is to gain profits by dealing in short term period only. Not only the above, the AO also discussed about borrowing of funds, small amount of dividend when compared to the gain in sales and also the fact that assessee group companies are involved in share trading. In the light of the facts and circumstances considered above, we are of the view that the conclusion of the Revenue authorities that the income from sale of shares declared by the assessee during the year as short term gain is income from business activity is correct and calls for no interference.

18. Now we will deal with the specific decision relied upon by the learned counsel. i.e. decision of the Mumbai Bench of the ITAT in the case of Gopal Purohit 122 TTJ 97 where in respect of share transactions the ITAT accepted as investment and also on the principle of consistency in the matter of assessment. The Tribunal found that the said assessee has consistently been investing in shares and ratio of sales to investment was very less. In the above referred case there was long term capital gain of Rs.1.12 crores which was claimed exempt and long term capital gain taxable at 10% to the tune of Rs.60 lakhs in addition to profit from trading in shares taxable at 10% and short term capital gain at 10% of Rs.57.31 lakhs. In that case the assessee was investing for a long period and offering the long term capital gain which is more than short term capital gain and share holdings varied from one year to 5 years. No such facts exist in the present case. In fact there are no long term gains in assessee's case except in small amounts in A.Y. 2001-02 and in the later year only on one group which was discussed above which are from investments discussed above of few company shares. In view of the facts of the case, we are of the opinion that the decision in the case of Gopal Purohit, upheld by the Hon'ble Bombay High Court do not apply at all. Similarly the decision of the ITAT in the case of Janak S. Rangwalla vs. ACIT 11 SOT 627 (Mum) given in that set of facts is not applicable to the facts of the present case. For the reasons given above, we

concur with the findings of AO and CIT(A) and uphold the order of the CIT(A).

19. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 26<sup>th</sup> March 2010.

Sd/-  
**(D.K. Agarwal)**  
**Judicial Member**

Sd/-  
**(B. Ramakotaiah)**  
**Accountant Member**

Mumbai, Dated: 26<sup>th</sup> March 2010

Copy to:

*The Appellant*

1. *The Respondent*
2. *The CIT(A) – XXVI, Mumbai*
3. *The CIT– XXV, Mumbai City*
4. *The DR, “I” Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*  
*ITAT, Mumbai Benches, Mumbai*

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