

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एच', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI

सर्वश्री आर.सी.शर्मा, लेखा सदस्य एवं श्री विवेक वर्मा, न्यायिक सदस्य

BEFORE : SHRI R.C.SHARMA, AM

&

SHRI VIVEK VARMA, JM

आयकर अपील सं./ITA No.3469/Mum/2012

(निर्धारण वर्ष / Assessment Year :2008-09)

Hema Hiren Dand, C-25, Adinath Co-op, Hsg. Society Ltd., 79/B, Mazgaon Road, Mazgaon, Mumbai-400 010	Vs.	JCIT 17(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEBPD 0926 P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.4164/Mum/2012

(निर्धारण वर्ष / Assessment Year :2008-09)

JCIT 17(1), Mumbai	Vs.	Hema Hiren Dand, C-25, Adinath Co-op, Hsg. Society Ltd., 79/B, Mazgaon Road, Mazgaon, Mumbai-400 010
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEBPD 0926 P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri S.C.Tiwari

राजस्व की ओर से /Revenue by : Shri Love Kumar

सुनवाई की तारीख / Date of Hearing : 07/01/2015

घोषणा की तारीख/Date of Pronouncement : 18/02/2015

आदेश / O R D E R

PER R.C.SHARMA (A.M.) :

These are the cross appeals field by the assessee and Revenue against the order dated 26-3-2012, for the assessment year 2008-09, in the matter of order passed u/s.143(3) of the I.T.Act.

2. The solitary issue in both the appeals relates to taxing the capital gains as business income.

3. Rival contentions have been heard and record perused. The assessee filed return at income of Rs.1.25 crores. The AO observed that the assessee has offered income out of dealing in shares as short term capital gains or long term capital gains depending on the period of holding. The AO stated that assessee's principal source of income is from purchase and sale of shares. The assessee is involved in the share business activities for several years. After dealing with number of script which were 13 and considering the transactions of purchase and sales of shares as well as holding period, the AO concluded that assessee was engaged in trading of shares. Accordingly, both long term and short term capital gains offered by the assessee was treated as business income.

4. By the impugned order, CIT(A) allowed assessee's claim of long term capital gains and partly allowed the claim of assessee regarding short term capital gains and confirmed the balance of short term capital gains as business income, against which both assessee as well as Revenue are in appeals before us.

5. We have considered rival considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements cited at bar. From the record we found that assessee was consistently holding shares as investment. By observing that assessee has traded in shares, the AO did not accept assessee's contention regarding long term and short term capital gains, and held the same as business income. From the record we found that in the

assessment year 2004-05, the AO has treated the short term capital gains as business income. In an appeal filed before the CIT(A), the matter was decided in favour of assessee and in all the subsequent assessment years, the AO has treated capital gains offered by assessee as such. After appreciating the entire facts the CIT(A) principally agreed that assessee was an investor and not a trader. However, while analyzing the individual scripts, the CIT(A) observed that in case of some of the shares, the transactions were more. Accordingly, the CIT(A) treated part of the short term capital gains as business income. It was explained that, as a matter of fact, in screen based transactions, which is known as bolt, one may not be able to buy or sell a fixed amount of quantity owing to the limitations of system. Therefore, one may have to make piecemeal buying and selling. We had also analysed the investment made by the assessee in each scripts, its holding period, business transaction of sale, wherein we found that average period of holding was 2.84 months. Main script in which she earned maximum gain was held for almost 12 months. Assessee had not done any future or option contract nor done any transaction of speculation nature. The assessee has not borrowed any fund from outside party on interest but used her own money and family fund. Furthermore, there was no repetition of transaction meaning thereby the same shares were not purchased after selling.

6. The Hon'ble Supreme Court in the case of *CIT vs. Associated Industrial Development Co. (P.) Ltd.* [1971] 82 ITR 586 (SC) has observed as under:

"Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the

knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment.”

7. We have deliberated upon various case laws cited by the Id. Authorized Representative and Id. CIT DR and in the context of factual matrix of the case. We had also deliberated on the case laws referred to by lower authorities in their respective orders. The question as to whether the assessee has earned capital gain or business profits on the shares sold by him depend on the facts and circumstances of each case. Such decision is to be arrived at by taking into account the intention of the assessee while purchasing the shares, as to whether the same was acquired for holding as investment or for doing business therein. The treatment given by the assessee in its books of account is also one of the decisive factors to find out whether the shares were held as investment or stock in trade. If the shares are bought with the intention of earning capital gains thereon and also dividend income by keeping the same as investment, the gain arising there from is required to be treated as capital gains. On the other hand, if the shares are purchased with the intention to earn profit thereon and the same is treated as stock in trade in the books of account, the profit arising out of sale of such shares are liable to be treated as business income. Volume and frequency of transaction is also one of the guiding factors to find out whether the assessee is engaged in the business of purchase and sale of shares or making investment to have capital gains thereon. In the instant cases before us, we found that the assessee has invested in shares of Indian Companies since last 5-6

years, which is clear from the statement of shareholding of the assessee. Thus, the fact of the assessee investing in shares for the last several years is not in dispute. There is also no dispute to the fact that the assessee has treated the equity shares of Indian Companies as investment i.e. capital asset all along. The assessee has also taken the shares at cost of acquisition thus given a particular treatment to the shares held as investment, therefore, without bringing on record contrary material, the AO cannot change the intention and manner of investment being made by the assessee. Had the assessee valued the shares at cost or market price whichever is lower, the gain arising out of sale of shares could easily be treated as business income. Assessee had not valued the shares as stock but valued the same as investment. Thus, what was a capital asset will remain a capital asset unless a person holding the asset himself changes the nature by a specific action like conversion of capital asset into stock in trade. In the instant cases before us, the assessee has not treated the investment in equity shares of Indian Companies as stock in trade. In view of the decision of Hon'ble Supreme Court in the case of Ram Kumar Agarwal & Brothers, 205 ITR 251, the AO was not justified in treating the capital gain earned from sale of these shares, as business profits, which were entered by the assessee as investment in books of account. There is also no dispute to the well settled legal proposition that principle of res judicata do not strictly apply to the income tax proceedings, but at the very same time, it is well settled that principle of consistency under the same facts and circumstances is the fundamental of judicial principle, which cannot be brushed aside without proper

reasoning. In this regard, reliance can be placed on the decision in case of S.M.K. Shares and Stock Broking Private Limited, I.T.A. No. 799/Mum/09 order dated 24.11.2010. In this proposition, the decision of Hon'ble Supreme Court in the case of Gopal Purohit, 228 CTR 582, is very much relevant and important.

8. Merely because the assessee liquidates its investment within a short span of time, which had given better overall earning to the assessee, would not lead to the conclusion that the assessee had no intention to keep on the funds as investor in equity shares, but was actually intended to trade in shares.

9. Here, it is pertinent to mention the intention of Government for introducing the security transaction tax and exempt the long term capital gain earned from sale of shares and levying 10 % tax on short term capital gain and earned on sale of shares. It is noted that under the old provisions of the Income-tax Act, profits or gains arising to an investor from the transfer of securities were charged to tax either as long term capital gains or short term capital gains depending on the period of holding of the said securities; Short-term capital gains arising from transfer of securities were taxed at the applicable rates (normal rate) and Long-term capital gains were taxed @ 20%, after adjusting for inflation by indexing the cost of acquisition. For listed securities, the taxpayer had an option to pay tax on long-term capital gains @ 10% but without indexation. For Foreign Institutional Investors (FIIs), the long-term capital gains and short-term capital gains were taxed at the rate of 10% (without indexation) and 30% respectively. In case of a trader in securities,

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however, the gains were taxed as any other normal business income. Thus tax liability on the income from purchase & sale of shares as regards to the STCG & business income was at par. However, the issue of treatment of income from share transaction as capital gain or business income has in-fact arisen after the amendment brought with Finance Act - 2004 by insertion of provisions of section 111A and 10(38) as regards to levy of Transaction tax and exemption / concession on capital gain arising from securities entered in a recognized stock exchange. With a view to simplify the tax regime on securities transactions, a tax at the rate of 0.015 per cent. (see: change in rates on securities transactions, by Finance Acts, at appropriate head) is levied on the value of all the transactions of purchase of securities that take place in a recognized stock exchange in India. This tax is collected by the stock exchange from the purchaser of such securities and paid to the exchequer. The provisions relating to the securities transactions tax are contained in Chapter VII of the Finance (No.2) Bill, 2004, and came into effect from 01.10.2004. Further, clause (38) has been inserted in section 10 of the Income-tax Act, so as to provide exemption from long-term capital gains arising out of securities sold on the stock exchange. A new section 111A has also been inserted and section 115AD is amended, so as to provide that short-term capital gains arising from sale of such securities to an investor including FIIs shall be charged at the rate of ten per cent. These amendments apply to assessment year 2005-2006 and subsequent years. Through Finance Act, 2008, sections 111A and 115AD have further been amended whereby the rate of tax on such short-term capital gain

has been raised to fifteen percent. Thus, w.e.f. 01.10.2004; on the share transactions subjected to STT; concessional tax rate of 10% (which has been increased to 15% from AY 2009-10) are applicable in respect of STCG whereas no tax is chargeable in respect of LTCG. It is also noted that the CBDT vide its Circular no.4/2007, dated 15.06.2007 has also recognized possibility of two portfolios, i.e. one 'Investment portfolio' comprising of securities which are to be treated as capital assets and the other 'Trading portfolio' comprising of stock in trade which are to be treated as trading assets. In view of these facts, profit arose on shares in respect of delivery based transaction are liable to be taxed as capital gain and not as business income.

10. Analysis of balance sheet of assessee reflects of holding of shares as investment. In the case of Gopal Purohit, 228 CTR 528 (Bom), SLP was filed by the Department against the decision of Bombay High Court and the same was dismissed by Hon'ble Apex Court vide order dated 15.11.2010. In the speech by Hon'ble Finance Minister regarding Direct Tax Cases (Union Budget – 2004-05), especially clause 111, the intention of Government for introducing the security transaction tax and exempting the long term capital gain or from sale of share and levying 10% tax on short term capital gain or from sale of shares also supports the case of assessee. The idea behind introduction of security transaction tax is to end the litigation on the issue, whether the profit earned from delivery based sale of shares is capital gains for business profit.

11. Even the Hon'ble Apex Court in the case of K.P. Verghese vs TO, 131 ITR 597 (SC) observed as under:-

"The task of interpretation of a statutory enactment is not mechanical task. It is more than a mere reading of mathematical formulae because few word possesses the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provisions to be 'drafted with divine prescience and perfect clarity.' We can do better than repeat the famous words of judge Learned Hand when he said."

The above observations of Hon'ble Judges of the Apex Court was reiterated by Hon'ble Apex Court in the case of Kerala State Industrial Corporation, 259 ITR 51 (SC) holding as under:-

"That the Finance Minister's Speech can be relied upon to throw light on the object and purpose of the particular provisions introduction by the Finance Bill has been recognized by this Court in K.P. Verghese – vs ITO 1981), 131 ITR 597 (SC), at 609. Again in the case of R & B Falcon (A) Pvt. Ltd vs CIT (2008) 301 ITR 309 (SC), it was held that (Page 323):-

Rules of executive construction in a situation of this nature may also be applied. Where a representation is made by the makers of legislation at the time of introduction of Bill or construction thereupon is put by the executive upon its coming into force, the carries great weight."

The Hon'ble Delhi High Court in ARJ Security Printers, 264 ITR 276 and Neo Polypack Pvt Ltd. 245 ITR 492 (Del.) held that even when the doctrine of res judicata does not apply to income tax proceedings, where a issue has been decided consistently in earlier assessment years in particular manner, the same view should prevail in subsequent years unless there is a material change in facts, meaning thereby, there must be material change in the facts.

12. The Indore Bench of the Tribunal in the case of ACIT vs Om Prakash Suri (supra) held as under:-

"3. We have considered the submissions put forth by the learned Senior DR and also perused the material available on record. Brief facts are that in the past the assessee was engaged in road building contractor and was deriving income from contract

receipts as well as from sale of gitti and during the impugned year, ventured into investment in share market. The income arising from F&O transactions and daily trading in shares (without physical delivery) reflected as speculative business whereas the income on delivery based transactions of sale and purchase of shares, income was shown from capital gains. The learned AO considered the income which was based on purchase and sale of shares as business income on the grounds as narrated in the assessment order as well as at pages 3 and 4 of the appellate order. Broadly, the learned AO was of the view that the intention of the assessee since beginning was sale of shares as trading activities, as evident from audited profit and loss account by not showing the same as short term capital gain and also in Form 3CD the assessee has mentioned the nature of business as trading/dealing in shares/securities and mutual funds. The frequency of transactions was also considered, consequently he treated the amount of Rs.49,81,915/- as business income from share trading. However, before the learned Commissioner of Income Tax (Appeals) the basis of additions was explained as evident from para 3.1.1 onwards. The crux of claim of the assessee is that in the audited accounts, the sale of shares amounting to Rs. 9.43 crores in which delivery had been taken, STT was paid and the shares were sold after holding for a few days/few weeks. The mutual funds of Rs. 2.91 lacs were sold and were treated as income from short term capital gains. Before the learned Commissioner of Income Tax (Appeals) the assessee also filed a detailed note on the purchase process for delivery base shares, details of dividend received on the basis of relevant statements by placing reliance on the decision of the Mumbai Bench of the Tribunal in the case of JM Shares & Stock Brokers v. JCIT dated January, 2009. Briefly, the claim of the assessee before the learned Commissioner of Income Tax (Appeals) was that the delivery based transactions were made with an investment motive and as such the income therefrom was in the nature of short term capital gains whereas the income arose from F&O transactions and daily trading in shares were with the business motive which were showed as business income only which was mainly through stock broker, Arihant Capital Markets Limited, registered with NSC, NSE and BSE. It is also seen that in the impugned order the board circular no. 4/2007 dated 15.6.2007 wherein it was emphasized that it is possible for a tax payer to have two port folios i.e. an investment port folio comprising of securities which are to be treated as capital asset and trading port folio comprising stock in trade which are to be treated as trading asset, was considered. The Board further clarifies that no single principle would be decisive and the total proposition needs to be considered. The assessee has maintained only one port folio and claimed that to be an investment folio. Undisputedly, the period of holding is less than one year, consequently, there is no infirmity in holding that these transactions would be treated as short term capital gain on which the applicable tax is @ 10% only. In view of this uncontroverted fact, there is no merit in the appeal of the revenue and the same is dismissed.

Order pronounced in open Court on 4th August, 2010. <http://www.itatonline.org>

13. The aforesaid decision was affirmed by the Hon'ble Madhya Pradesh High Court reported in (2012) 19 ITJ 326 M.P. The Mumbai Bench of the Tribunal in the case of Shantilal M Jain vs ACIT vide order dated 27-04-2011 (ITA No. 269/Mum/2010) held that despite large volume of shares transactions, the Assessing Officer cannot ignore the rule of consistency to treat the gains on sale of shares as STCG. In that case, the assessee was engaged in the business of trading of investment in shares and securities offered Rs. 1.54 crores as short term capital gain and Rs. 2.91 crores from long term capital gain. The long term capital gain was accepted whereas short term capital gain was held to be business profit. Since in earlier assessment years the claim of the assessee was consistently accepted as short term capital gain, it was held that the rule of consistency as propounded by Hon'ble Bombay High Court in the case of Gopal Purohit (supra), it is fairly applicable and the income has to be treated as short term capital gain. Identically in the case of Nagindas P Seth (ITA No.961/Mum/2010) it was held that despite large number of transactions in shares, the profit can be assessed as capital gains under the facts of the case. The case of the assessee is further fortified by these decisions more specifically when the assessee was hold the shares in his books as investor, as well as tock-in-trade separately. The decision in the case of Janak S Ranawala, 11 SOT 627 (Mum.) further supports the case of the assessee. Likewise, the decision from Hon'ble Madras High Court in CIT vs N.S.S. Investment Pvt Ltd. 227 ITR 149 (Mad), CIT vs. Associated Industrial Development Company, 82 ITR 526 (SC) supports the case of the assessee. In the present appeal,

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we note that the assessee made investment in shares with intention to earn dividend income on appreciation of price of shares. Therefore, it cannot be said that the assessee was doing business. If the conclusion drawn in the impugned order, observations made from the assessment order, assertions made by respective counsel and the material available on record are kept in juxtaposition and analyzed, we find that the assessee had been consistently investing in shares and income arising from delivery based transaction of sale and purchase of shares was correctly shown as capital gains i.e. LTCG and STCG depending upon period of holding.

14. In view of the above discussion, we do not find any merit for treating the capital gains offered by the assessee as business income.

15. In the result, appeal of the assessee is allowed, whereas appeal of the Revenue is dismissed.

Order pronounced in the open court on this 18th Feb..2015.

Sd/-
(विवेक वर्मा)
(VIVEK VARMA)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(आर.सी.शर्मा)
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 18/02/2015

प्र.कु.मि/pkm, नि.स/ PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A) Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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