

**आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI**

श्री आय. पी. बंसल, न्यायिक सदस्य एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।  
**BEFORE SHRI I. P. BANSAL, JM AND SHRI SANJAY ARORA, AM**

आयकर अपील सं./I.T.A. No. 7516/Mum/2010  
(निर्धारण वर्ष / Assessment Year: 2007-08)

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|---|---------------------|---|
| Harsha L. Tahilramani<br>1003/1102, Vinayak Heights, argis Dutt<br>Road, Pali Hill, Bandra (W),<br>Mumbai-400 050 | <b>बनाम/</b><br>Vs. | Asst. CIT – Circle 19(1),<br>Mumbai                                 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAOPT 6988 Q   |                     |   |
| (अपीलार्थी /Appellant)  | :                   | (प्रत्यर्थी / Respondent)   |
| अपीलार्थी की ओर से / Appellant by   | :                   | Shri S. C. Tiwari,<br>Ms. Natasha Mangat &<br>Shri Suresh N. Otwani |
| प्रत्यर्थी की ओर से/Respondent by   | :                   | Shri Tushar Dhawal Singh  |
| सुनवाई की तारीख /<br>Date of Hearing  | :                   | 18.08.2014  |
| घोषणा की तारीख /<br>Date of Pronouncement   | :                   | 17.10.2014  |

**आदेश / ORDER**

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-30, Mumbai ('CIT(A)' for short) dated 30.08.2010, dismissing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2007-08 vide order dated 08.12.2009.

2. The sole issue arising per the instant appeal raised, per the assessee's only ground, reproduced as under, is the nature of the income arising to the assessee on the purchase and sale of shares, i.e., whether short-term capital gain (STCG), as offered by the assessee per its return of income, or 'business income', i.e., as assessed by the Revenue:

'1. That on the facts and in the circumstances of the appellant's case and in law learned CIT(A) has erred in upholding the assessment the sum of Rs.13,266,180/- as business income of instead of Short-term Capital gains as per the Return of income filed by the appellant.'

3. We shall begin by recounting the background facts of the case. The assessee, an individual, returned business loss (Rs.20.64 lacs) from trading in derivatives, besides STCG and long-term capital gain (LTCG) (claimed exempt) at Rs.132.66 lacs and Rs.139.43 lacs respectively. The magnitude of the transactions suggesting so; the purchase and sale of shares during the year (as revealed by the STCG statement furnished by the assessee), being at Rs.1344.52 lacs and Rs.1477.11 lacs respectively, the assessee was show caused by the Assessing Officer (A.O.) as to why the same, i.e., the purchase and sale of shares, be not treated as trading in shares and, accordingly, the gain arising be assessed as business income. The assessee explained that it was undertaking the said activity since 1998-99. The law provides for a holding period of one year (12 months) for a capital asset, where it is a share in a company or a unit of a mutual fund, to qualify as a long-term capital asset (LTCA). No minimum period, however, stands prescribed in respect of a short-term capital asset (STCA), so that the holding of even one day may be sufficient for an asset to be a STCA, and the gain on its transfer, resultantly, a STCG. What is relevant is the *intent* with which the shares (asset) was bought, i.e., whether for trading or for investment, therein. In the present case, the assessee had retained certain shares not for weeks or months, but for years. Accordingly, no adverse inference, where the shares had been held for a shorter period, may be drawn. That is, it was possible for an investor, as indeed a trader, to buy and sell shares on a daily basis, and the frequency itself would not be determinative. It relied on the assessment of such gains as STCG for

A.Y. 2005-06 by the first appellate authority, which had not been contested by the Revenue.

The A.O. proceeded to analyze the assessee's activity of purchase and sale of shares on the anvil of the CBDT Instruction No. 1827 dated 31.08.1989 and Circular No. 4 of 2007 dated 15.06.2007, being based on judgments by the hon'ble courts, further listing twenty seven (27) judgments, including nine (9) by the apex court in the matter. Surely, it is the *motive* which is the principal factor in determining whether a transaction is to be regarded as one of trade, constituting business or a part thereof, or as one of the transfer (by way of sale) of a capital asset. In the instant case, there are 1900 sale transactions during the year, of which in 570 the holding period have *less than a month*, while for another 756 it is *less than three months*. Further, the assessee had made sale transactions on most days, i.e., out of the 240 days available (on the trading platform or exchange) for trading during the year. As such, the transactions qualified to be trading transactions on the parameters of regularity, continuity, volume, frequency and holding period. The dividend income (Rs.12.77 lacs) was meager in relation to the quantum of holding, i.e., at an average of over Rs. 7.5 cr. The assessee also had borrowed capital, both at the beginning and the close of the year. The assessee was also undertaking derivative business, having in fact a huge turnover of Rs.295 crs. for the year. Considering all these facts, he concluded that the transactions of purchase and sale of shares are in fact trading transactions, relying on the decisions cited by him. Each of the several cases cited by the assessee before him were also considered and distinguished by the A.O. Further, the assessee had paid security transactions tax at Rs.3,37,137/- on the sale of shares, which was allowed by him as a business deduction (refer paras 8 to 14 of the assessment order).

In appeal, the Id. CIT(A) found considerable force in the arguments of the A.O. The decision by the Tribunal in the case of *Janak S. Rangwalla vs. ACIT* [2007] 11 SOT 627 (Mum), relied upon by the assessee, had been already distinguished by the A.O. As regards the decision in the case of *Gopal Purohit vs. JCIT* [2009] 29 SOT 117 (Mum), the same would not be of consequence, as the Revenue had in the instant case held a

consistent view since A.Y. 2005-06, i.e., of the assessee being a trader in shares. He noted that the A.O. had in fact relied upon as many as 27 decisions in support of his said findings (refer para 3 of the impugned order). The A.O.'s action in assessing the income arising on the purchase and sale of shares as business income, being confirmed by him thus, and for the same reasons as prevailed with the A.O., the assessee is in second appeal.

4.1 Before us, the Id. Authorized Representative (AR), the assessee's counsel, argued the matter at length. The assessee engages in both delivery-based and non-delivery based (derivative segment) trading in shares. The assessee has itself considered the non-delivery based transactions as 'business'. The Revenue, however, insists on even the delivery based transactions as being so, i.e., as business, even as it allows the assessee's claim toward shares held for 12 months or more as LTCG, thereby contradicting itself. The matter came up before the tribunal in the assessee's own case for an earlier year (A.Y. 2006-07), whereat the tribunal (in ITA No. 5931/Mum(H)/2009 dated 10.08.2011), noting that the credit facility had also been provided by the Portfolio Manager (PM), restored the matter back to the file of the A.O. to ascertain the true nature of the arrangement between the PM and the assessee (PB pgs. 89-102). True, it is the *intention* with which the shares are bought, i.e., whether for income, either as dividend or by way of capital appreciation over time, or for trading, by taking advantage of the market volatility, that is decisive of the matter. But, surely, the objective of profit maximization cannot take away the transaction/s from the realm of investment. Again, volume, frequency, regularity and period of holding are no doubt relevant indices. However, the same being relative cannot be regarded as conclusive. It is to be borne in mind that the share market fluctuates every hour, so that the indices have to be construed in light of the same. A particular volume of turnover, Rs.1 cr. (say), may be high for one but not for the other. Adverting to section 2(14) of the Act, defining 'capital asset', he would continue further, that the law also supports the assessee's case. Any asset of the business is only a capital asset, except where it is stock-in-trade thereof. Each share (scrip) is to be regarded

as a distinct commodity, and it is not permissible to treat different shares as either one investment or as a single item of stock-in-trade. There were no repetitive transactions. Even if it were to be regarded as in business, the assessee may be treated as in the business of investing, rather than in the business of trading, and which in fact had been entrusted to a PM, being an expert, who manages the assessee's funds. The average capital turnover ratio of 1.92 also supports the assessee's case.

When pointed out by the Bench that the assessee had repetitive transactions in the same scrip, i.e., a purchase transaction/s, subsequent to the sale/disposal thereof (refer para 11(iii) of the assessment order), he conceded thereto, stating that such transactions would only be marginal, not significantly impacting the assessment of the nature of transaction entered into, *which has to be made taking the totality of the facts and circumstances into account.*

4.2 The Id. Departmental Representative (DR), on the other hand, would submit that the assessee's arguments as made before us, obliterate the difference between a capital asset and a revenue asset, as stock-in-trade, of the business. The shares in the instant case are only the current assets or the stock-in-trade of the assessee's business of trading in shares. He placed reliance on the orders by the authorities below, contending them to be well considered, in consonance with the facts of the case and the law in the matter.

5. We have heard the parties, and perused the material on record.

5.1 Our first observation in the matter is that there is no dispute *qua* the primary facts; in fact, being only that as furnished by the assessee. There is, further, no difference *qua* the law in the matter, i.e., as to the respective understanding thereof, of the parties, so that it is the intention or the motive with which the asset is purchased that is determinative of whether the same is a current asset (i.e., held for its disposal in the ordinary or regular course of business) or a capital asset (i.e., deployed for the purpose of carrying on the same), and which (intent) is to be determined by taking the totality of the facts and circumstances into account (refer paras 3 & 4 supra).

The expression 'business' is well known in the income-tax law, being in fact defined u/s.2(13) thereof to include trade, commerce or manufacture or any adventure or concern in relation thereto. As observed by the apex court as far back as in *Narain Swadeshi Weaving Mills vs. Commissioner of Excess Profits Tax* [1954] 26 ITR 765 (SC), the word 'business' connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose. It goes on to explain that even a single and isolated transaction is conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transactions bears clear indicia of trade (pg. 773). The parties, we observe, to be also in agreement with the matter being a mixed question of law and fact. The principle/s of law being clear, the determination rests on the finding/s of fact, which is to be arrived at by taking the totality of the facts and circumstances into account. As explained, 'business' is a term of wide import, encompassing within it the different forms and shades of transactions, viz. trade, commerce, etc., which are again terms of considerable amplitude. The import or even the common parlance meaning of all these terms is not in dispute or in doubt. Reference in this context may be made *inter alia* to decisions in the case of *Bengal & Assam Investors Ltd. v. CIT* [1966] 59 ITR 547 (SC); *Khan Bahadur Ahmed Alladin & Sons v. CIT* [1968] 68 ITR 573 (SC); *P.M. Mohammed Meera Khan v. CIT* [1969] 73 ITR 735 (SC); *Dalmai Cement Ltd. v. CIT* [1976] 105 ITR 633 (SC), besides several by the high courts, as recently in *Institute of Chartered Accountants of India (ICAI) v. Director General of IT* [2012] 347 ITR 99 (Del), where the term has been elucidated by the hon'ble courts.

The assessee's activity of purchase and sale being regular and continuous, so that it is only in the nature of an organized and systematic activity for profit, would constitute business by definition. It was thus incumbent upon the assessee to show as to why, nevertheless and notwithstanding the same, the said activity could not be regarded as 'business' or 'trade'. The onus was heavy in view of the settled position of law, and the clear, admitted facts, giving rise to a clear inference of facts, with 30% of the transactions being of liquidation/sale within one month, and about 70% (1326 out of 1900) within three months of purchase (acquisition). It becomes all the more accentuated considering

that the said activity is being admittedly carried on since f.y. 1998-99, as also the simultaneous carrying on of non-delivery based trading in shares (derivative segment). The assessee, however, completely fails to discharge the said onus, so that we find the Revenue's stand of the assessee's activity of purchase and sale of shares as constituting business as well founded. Before us also the assessee has only presented another set of arguments, without disputing the primary facts - being in fact only as furnished by it, giving rise to the concomitant inference of the same being a continuous and regular activity of trading in shares, systematically undertaken, with a view to make profit, i.e., is nothing but a profit making scheme, which is essentially a finding of fact.

We may, however, if only for the sake of completeness of this order, consider and address each of the arguments raised by the Id. AR before us, so as to show that none of them operate to disturb the said finding, or at least to any material extent and, rather, refurbish and reinforce it further.

5.2 The assessee wonders as to why should she be not allowed her claim of the delivery-based transactions as being not trade, which stands admitted by her *qua* non-delivery based transactions? However, that precisely defines the controversy which is to be resolved (with reference to and on the basis of the facts), so that nothing turns on the said argument. If anything, it only raises a presumption of the assessee being well versed with the share market, devoting considerable time and resources toward the same, so that there is no reason why she would not extend it to the delivery-based segment (which is in fact the traditional, less sophisticated and, in fact, predate the derivative by decades) as well, or limit her engagement to only investment. It is no doubt open to the assessee to show, on facts, to be engaged only in investments, but we are only meeting the argument, having in fact observed the assessee's case as *de hors* any reference to facts.

5.3 The second argument is that the Revenue having acceded to the assessee being an investor, in-as-much as it allows her claim of LTCG, acts contradictorily when a capital asset is sold within the minimum holding period prescribed for the same to be a LTCA. That is, a capital asset would not, for being classified as such, depend on the time of its

sale, which determines its' holding period, but would be so since inception, i.e., acquisition. True. But then it is only for the assessee to establish her intention through her conduct, or explain why, despite the intention for retention, the shares were not so, and which we find as completely missing. Intent, being a state of mind, would find manifestation in conduct and, thus, can only be inferred there-from. *If not by conduct, how else, one may ask, would the same be inferred and, thus, determined?* Toward this, the argument, fact based, that the shares have been held by her for not weeks or months, but for years, so that the opening stock includes shares being held for years prior to the current year, *endorses the Revenue's and not the assessee's stand.* It firstly emphasizes the paramount significance of conduct, even as discussed earlier. Two, it clearly states of a marked difference characterizing the two behaviors, i.e., the investment behavior and the trading behavior, which reflects the trading sentiment or responses to trading impulses. There are in the present case not one or two or, given the volume, even a few, but scores, nay, over a hundred transactions where the shares are sold immediately or within days of purchase (PB pgs. 132-146). An investor, on the other hand, having entered the market with a long term horizon or perspective, seeking accretion to capital, would ordinarily be almost oblivious to the market volatility, giving, as it were, time for the investment to mature, without which no investment would normally bear fruit. There could be no doubt cases of a decision, sound at the relevant time (so that it could be shown to be so in terms of fundamentals), proves or turns bad (which would again be possible to be exhibited on the basis of the some vital statistics or information, or with reference to the subsequent, unanticipated events), so that an exit decision is made sooner or even much sooner. Such cases would not only be few, but also established on some objective basis/facts; investment decision making being informed and based on defined (investment) criterion. In the instant case, however, as afore-noted, sale within a short period is a norm rather than an exception. We observed that in many cases shares are sold within a week or even a day. In fact, the holding period is even negative in some cases, which only implies speculative trade, viz. Ansal Housing, Arih Found F, Deccan CHO Hold, Shivaani Sugar, Spanco Telesy. *The frequent intervention is not without purpose.*

The whole basis being to earn profit, i.e., in terms of return on capital employed, which is a function of time, a more frequent – implying a constant watch of the market and formulating a response in light of the market developments, allows the assessee to exit at a much lower margin. An exit also forecloses the exposure and, thus, risk. A short term positioning or strategy, thus, plays on market volatility with a view to generate positive return on the basis of the market sentiment or information for the time being. The holding period is rendered of no or little relevance in this scheme of things, which may also, being inherently riskier, entail losses. In other words, the investment and the trading behavior, which may overlap in some cases, are in general opposed to each other. The average margin on STCG, at 8.98% of turnover (i.e., Rs.132.66 lacs on Rs.1477.11 lacs) is, accordingly, much lower than the average yield of 44.38% (Rs.139.43 lacs/Rs.314.35 lacs) realized on LTCG. *That is, vary by a factor of 5.*

5.4 The assessee's third argument is that the indicia of volume, regularity, continuity, frequency, holding period, etc. being relative, do not amount by themselves amount to much, i.e., in understanding the nature of the transactions undertaken, whether as constituting trade/business or not. The argument, in one brush, sets aside the settled law in the matter, toward which case law is legion, with we having also referred to some decisions, noticeably by the apex court, besides several by the Revenue authorities, which have not been controverted in any manner, which we may cite (refer para 8 of the assessment order):

- a) *Ramnarain Sons (P.) Ltd. vs. CIT* [1961] 41 ITR 534 (SC);
- b) *Raja Bahadur Visheshwar Singh vs. CIT* [1961] 41 ITR 685 (SC);
- c) *Rajputana Textiles (Agencies) Ltd. vs. CIT* [1961] 42 ITR 743 (SC);
- d) *Dalhousie Investment Trust Co. Ltd. vs. CIT* [1968] 68 ITR 473 (SC);
- e) *New Era Agencies (Pvt.) Ltd. vs. CIT* [1968] 68 ITR 585 (SC);
- f) *Juggilal Kamlapat vs. CIT* [1970] 75 ITR 186 (SC);
- g) *Raja Bahadur Kamakhya Narain Singh vs. CIT* [1970] 77 ITR 253 (SC);
- h) *CIT vs. Associated Industrial Development Co. Pvt. Ltd.* [1971] 82 ITR 586 (\*);
- i) *CIT vs. Sulej Cotton Mills Supply Agency Ltd.* [1975] 100 ITR 706 (SC); and
- j) *CIT vs. H. Holck Larsen* [1986] 160 ITR 67 (SC) (\*)

The argument in fact runs counter to the judgments referred to by the Board in its Circular (No.4/2007 dated 15/6/2007, at pages 1-3 of the Compilation-I of case law furnished by the assessee), which the assessee itself seeks reliance on. The Board has, in our view, correctly enlisted the relevant principles to be considered in determining the issue, i.e., whether a particular share or security (asset) is the assessee's stock-in-trade or a capital asset, further cautioning that no one principle, but the totality of the facts and circumstances, including the assessee's explanation/s, are to be taken into account in arriving at the decision.

The argument is also without basis on facts. Regularity, frequency, continuity, etc. are in fact parameters that are amenable to mathematical treatment and, consequently, an accurate measurement and, thus, subject to an objective assessment. The assessee has transacted business on most of the 240 trading days available on the market, so that we wonder why she cannot be said to be regular or, rather, a regular, which in fact she would qualify for even on a much lower, say by  $\frac{1}{2}$  or  $\frac{1}{3}$ , trading days. The continuity is again admitted, with the assessee stating to be undertaking the same since 1988-89. The holding period is in fact a measure of frequency, so that the two indicate the same. Toward this, we had observed the shares to have been off loaded at very short intervals of time, which also reveal an engagement on a continuous basis. The whole premise of examining these indices, which have to be considered and applied together, is toward an assessment of the conduct, the devotion of time, effort and resources to the activity, so that where with a view to earn profit, would be business by definition, particularly where carried on in an organized and systematic manner. True, volume by itself is a relative measure, but then, as explained, the parameters are to be viewed together and not in isolation – the purport being to assess behavior. Two, volume is to be seen in relation to turnover (of capital), so that what is relevant is not the volume *per se*, but the capital turnover ratio; each person being limited by the capital available, with the investment and the trading behavior, as afore-stated, being marked by very different tendencies. There is another aspect to volume, i.e., the number of transactions. Toward this, it is the aggregate of the purchase and sale transactions, which are separate and distinct, representing in fact

opposite functions of a trade, which is to be considered. The A.O. observes the sale transactions during the year to be at 1900. The purchase transactions, reckoning them to be even at half that number, or even lesser, would make for aggregate transactions in the range of 2500. Even a fraction of this number would in our view make for a healthy volume, which of-course is to be considered along with the other parameters.

5.5 Next, the assessee argues that it should, if at all, be considered as in the business of investments, rather than in the business of trading. The said argument can be seriously considered only after the assessee is able to show, on facts, of not being a trader in shares in-as-much as it becomes otherwise hypothetical or academic. Raising of pleas, *de hors* and without reference to facts, is of little consequence. The law in the matter is also well settled. As explained by the apex court in *Bengal & Assam Investors Ltd.* (supra), if a company merely acquires and holds shares with the object of receiving dividend, it does not carry on business within section 10 (of the 1922 Act). In the facts of that said case, the apex court was deciding on whether dividend could be assessed as 'business income'. It found as not so unless the shares represent the stock-in-trade of the assessee's business and, further, that investment for income could not be considered as business. The head note of the decision runs thus:

'For a dividend on shares to be assessed under section 10 of the Indian Income-tax Act, 1922, the assessee, be it an individual or a company or any other entity, must carry on business in respect of shares, that is to say, the assessee must deal in those shares. An individual, who merely invests in shares for the purpose of earning dividend, does not carry on a business. The only way he can come under section 10 is by converting the shares into stock-in-trade, i.e., by carrying on the business of dealing in stocks and shares. If a company merely acquires and holds shares with the object of receiving dividends, it does not carry on business within section 10.

The mere fact that a company is incorporated to carry on investment does not show that it is carrying on business.'

The decision would apply equally under the extant law in-as-much as the apex court has clarified that investment *per se* cannot be considered as a business. Further still, how we wonder would it assist the assessee's case. Even accepting of being in the

business of investment, the 'investments' would then constitute the stock-in-trade thereof, which also enables an appreciation of the afore-stated decision.

5.6 The assessee has engaged the services of a PM. In our considered view, the cooption of or taking on board a PM, and availing its services, is at best a neutral fact – the service provider only acting for and on behalf of the assessee. The matter thus has to be considered in light of and on the basis of the primary facts. That is, the shares would warrant being considered as investments or as trading assets depending on whether they reveal an investment behavior or trading behavior, i.e., wear the badges of trade or a profit making scheme, rather than whether the assessee undertakes them herself or engages the services of the professional for the same. Realizing that share market, while offering a good potential for profit, being market driven, which may not be efficient at all times and is in any case not perfect, is inherently riskier, chooses to avail the services of an expert to manage her affairs for a consideration. The said fact is thus, to our mind, of no moment. *If anything, it only shows the seriousness of intent with which the assessee regards her resources, carrying it in an organized manner* (also refer para 5.9). Needless to add, the Revenue does not dispute the claim of PMS charges as business expense.

5.7 Next, the assessee argues that the shares, in-as-much as they are not the stock-in-trade of its business, are capital assets in terms of section 2(14) of the Act. The argument, if anything, is amusing to say the least. The stock-in-trade is only the stock of the trade, i.e., the good or commodity or chattel, etc. which is acquired for the purposes of the assessee's trade. The trade, assuming so, in the instant case, being of purchase and sale of shares, how we wonder are the shares not to be regarded as stock-in-trade, even if the shares of any company are to be treated as a separate item, which would only be of the stock-in-trade. Rather, in-as-much as the shares in a company or a particular scrip is sold to buy another, it only shows that they are treated by the assessee as one class of goods /commodity. That the first scrip may or may not be bought again, which we have found to be so in many cases, is, in this scheme of things, only incidental. Some examples of repetitive transactions are as: Ansal Housing & Construction; Arih Found F; Asian

Electronics Ltd.; Birla Corporation Ltd.; Deccan Cho Hold; ERA Construction; Everest Kanto CYL; Financial Tech; Fortune Info; Gayatri Projects; I.C.S.A India Ltd.; I.P.C.L. Ltd.; Infosys Technologies Ltd.; ITC Ltd.; Simbh Sugar; Karuturi.com, etc.

Continuing further, in the assessee's case, the shares are bought and sold regularly, across companies of different sizes, industries and sectors, so that these only represent the stock-in-trade of its business. Further, the assessee maintaining one set of books, the capital is shifted regularly, not only across different scrips, but also across different segments, i.e., delivery based and non-delivery based, so that the state of finances also reveals the two as constituting different forms of business of dealing in shares. Here it may be relevant to mention that the share-holding, which is at Rs.9.66 crs. at the beginning of the year, declines to Rs.5.69 crs. at its end, so that there is a reduction in or flight of capital by almost Rs.4 crs. The same, presumably and understandably, is in the derivative business.

A capital asset, on the other hand, is held either for the purposes of carrying on trade itself, in which case it is also a business asset, or for its' own sake, as for personal purposes. Financial security is a human need. Given the inflationary condition of the economy, one may invest in, *inter alia*, shares and securities, which, on account of the underlying economic activity, are a good hedge against inflation, also providing scope for appreciation. The growth hinges critically on the quality of the asset, and the period over which it is held. What capital gain attempts to capture is the accretion to capital. It is on account of this fact, i.e., being essentially the value of one's capital, since realized, that preferential treatment is accorded to capital gains under the tax statutes, as by way of indexation and lower (or nil) tax incidence. There is as such hardly any need to mark the assets to market, or at least frequently; the whole premise of growth or capital accretion, which, being only on account of an underlying economic activity, would require time to fructify. The difference between the shares held as capital assets and stock-in-trade is both critical and marked. We are, therefore, completely unable to, given the transactions, appreciate the assessee's stand of the stocks and shares as representing capital assets.

5.8 Be that as it may, it cannot be lost sight of that the assessee's holding of some shares is for years, so that she is also an investor. Why, the Revenue has itself allowed her claim of LTCG. Surely, it cannot be that only the shares which are held for 12 months or more are capital assets, which would amount to stipulating the said time limit for a share/security to be a capital asset. Further, if the assessee was only a trader, even the gain on shares held for one year or more, being only *qua* the stock-in-trade of her business, would qualify to be 'business income' - the holding period being of no or little relevance. The Revenue's stand is, to that extent, clearly contradictory and, thus, infirm. In fact, the assessee, by treating all its purchase (of shares) as of capital assets, so that its accounts do not reflect the true state of affairs, has only herself to blame, complicating matters. The assessee has reported LTCG on 21 scrips. We may here mention that going by investment theory, investment in shares is ideally spread over 8-12 scrips, choosing across sectors, in-as-much as it becomes unfeasible or impractical to track the company and industry fundamentals beyond the same, while achieving maximum risk diversification, so that the same represents an optimum portfolio size. Further, the investment strategy, even for the short-term, would consist of a lock-in period of 12-18 months, while the long-term would be for 3-5 years, extending to even longer in some cases, as for industries with long-term gestation period, viz. start-ups, infrastructure, etc. Even the portfolio report issued by the PM (PB pgs.190-194 – to which though reference was made during the hearing, so that the same cannot be taken as a part of the record), also enlists 10 scrips across five sectors, further showing 'growth' as the investment objective. The 'portfolio' size in the instant case, on the other hand, is many times over. The total number of scrip as per the stock flow statement (PB pgs.223-226) are 126, including 21 which find reflection in the LTCG report. The average profit percentage on 'trading' shares, as afore-noted, is in the range of 8% to 9%, and which cannot be regarded as 'growth'.

Coming back to our discussion, in our view, the investment in these shares, accepted as LTCAs, if also made at or around the same time as in the shares which stand sold, resulting in LTCG, or are sold along with, are liable to be considered as capital

assets. We say so as an investment pattern is discernable under such circumstances. We may though clarify that in doing so, we do not wish to, and are not laying down any general prescription for determining whether a particular scrip is a capital asset or stock-in-trade, but only that we consider it as appropriate in the facts and circumstances of the case. We say so as we are aware that no one prescription, even as cautioned by the apex court time and again, can hold. All that an assessee would have to, to meet such a criterion, do is to retain a few shares dealt in for being sold after a period of 12 months, arguing on that basis that the shares sold within a shorter period be also considered as capital assets. We tabulate the shares/scrips, 11 in number, which meet this criterion, as under:

**LTCG****STCG**

| <b>Scrip</b>             | <b>Qty.</b> | <b>Purchase Dt.</b>     | <b>Sale Dt.</b> |  | <b>Qty.</b> | <b>Purchase Dt.</b>  | <b>Sale Dt.</b> |
|--------------------------|-------------|-------------------------|-----------------|--|-------------|----------------------|-----------------|
| Amtek Auto Ltd.          | 2500        | 23.06.05                | 27.07.06        |  | 3000        | 28.11.05             | 27.07.06        |
| ANG Exports              | 1600        | Jan-Feb, 06             | Feb,07          |  | 3250        | Sep/Dec,05 & Jan, 03 | April-June, 06  |
| Dhampur Sugar Mills Ltd. | 1500        | Oct, 04 & Jan, 05       | June-July, 06   |  | 5000        | 29.08.05             | 10.07.06        |
| EPC Indus.               | 2175        | 05.09.05                | 05.09.06        |  | 17060       | Sep-Oct, 05          | July-Sep, 06    |
| I-Flex Solutions         | 1350        | 28.12.04                | 18.08.06        |  | 150         | 30.12.05             | 18.08.06        |
| Larsen & Toubro Ltd.     | 337         | 29.09.05                | 06.11.06        |  | 1795        | 28.02.05             | April, July, 06 |
| Rallis India Ltd.        | 1701        | 8.11.05                 | Nov, 06         |  | 4299        | Nov, 05 & Mar, 06    | Aug & Nov, 06   |
| State Bank of India      | 3500        | June, 03 & Feb-March,05 | 07.06.06        |  | 1000        | Oct-Nov,05           | 07.06.06        |
| Suven Pharma             | 13574       | Feb, 05                 | June,06         |  | 15000       | July – Aug,05        | June, 06        |
| Transgene Biotek         | 1900        | 07.01.05                | 29.06.06        |  | 1000        | 12.04.06             | 29.06.06        |
| Valiant Comm.            | 7500        | Oct, 05                 | Dec, 06         |  | 9500        | March, 06            | Dec, 06         |

We, accordingly, consider the said shares as capital assets, so that the gain arising on their sale during the year would give rise to, depending on the period of holding, STCG or LTCG. As regards the balance 10 shares, i.e., of the 21 on which LTCG stands reported for the year, no investment pattern is discerned for 3 (Helios, Simbh Sugar and Zenith Infot), i.e., with reference to the criteria listed, with there being a speculative trade in one (Shivani Sugar), while there are no sales within the short-term for the remaining 6.

Further still, a scrutiny of the transaction sheet for the year reveals some shares being held both at the beginning and the close of the year. The assessee in fact states, and

which remains undisputed by the Revenue, of having held some shares for years. Surely, each of the said scrips, where the shares acquired prior to the current year continue to be held at its close, would also without doubt qualify as capital assets. A detail of such shares, as we observe, is as under:

(Amt. in Rs. lacs)

| <b>Sr. No.</b> | <b>Particulars</b>        | <b>Stock as on 31.03.2006</b> |
|----------------|---------------------------|-------------------------------|
| 1              | Birla Corporation Ltd.    | 15.53                         |
| 2              | Cenlub Industries         | 18.54                         |
| 3              | Damania Airways           | 0.60                          |
| 4              | Dynavision NCD            | 0.02                          |
| 5              | Goodearth Org             | 0.05                          |
| 6              | Gujarat Alkalies & Chem   | 2.77                          |
| 7              | Hero Honda Motors Ltd.    | 35.09                         |
| 8              | Kesar Ent.                | 5.54                          |
| 9              | Lupin Laboratories Ltd.   | 30.83                         |
| 10             | Maneklal Harilal Mills    | 0.18                          |
| 11             | Morgan Stanley            | 23.09                         |
| 12             | Ras Propack Lamipack Ltd. | 0.13                          |
| 13             | Sristhti Videocorp        | 0.52                          |
| 14             | Suven Pharma              | 30.35                         |
| <b>Total</b>   |                           | <b>163.24</b>                 |

The assessee has worked out the capital ratio for the year at 1.92. The same is mistaken for two reasons. Firstly, the profit (or loss) element of the transaction (or turnover) would require being eliminated to yield a correct measure of the capital turnover ratio. Secondly, the assessee has computed the same for all the shares together, i.e., for those held as stock-in-trade as well as that as capital assets; it being now clear that the assessee while being a trader is also an investor. The value of the brought forward assets, which continue to be retained by it is, as we have found, at Rs.163.24 lacs. For those shares, being capital assets, that stand sold, in whole or in part, during the current year, we assume (for the limited purpose of working this ratio) that their sale is substituted by an equivalent investment, so that the value of the shares at the beginning of

the year, which is at Rs.252.37 lacs, continues unabated. The turnover of the capital assets is accordingly worked as under:

(Amount in Rs. lacs)

|    |             |   |
|----|-------------|---|
| a) | Turnover    | Rs.174.92 lacs (Rs.314.35 (sale) – Rs.139.43 (profit))        |
| b) | Investment  | Rs.415.61 lacs (Rs.163.24 + Rs.252.37)                        |
| c) | Ratio (a/b) | <b>0.421</b> (equivalent to a holding period of 28.51 months) |

The capital turnover ratio for stock-in-trade:

|    |   |               |                             |
|----|---|---------------|-----------------------------|
| a) | Turnover (other than capital assets, at cost) |               | 1344.51 (1477.11 – 132.66)  |
| b) | Average investment during the year            |               |                             |
| -  | Average investment (total)                    | 767.95        |                             |
| -  | Investment in capital asset                   | <u>415.61</u> | 352.34                      |
| c) | Ratio (a/b)                                   | <b>3.816</b>  | (equivalent to 3.14 months) |

It would be seen that the difference in the capital turnover ratio and, thus, the average holding period, between the two categories of assets, varies by a factor of *over 9 (nine)*.

#### Case law

5.9 Before parting with the order, we may also advert to the case law; the assessee having submitted two compilations thereof, listing 12 decisions. We have already, before proceeding to analyze the facts of the case, reviewed the law in the matter, to find neither any ambiguity therein nor in fact any dispute between the parties with regard thereto. The principles being, therefore, well laid down, the matters boils down to one of fact, with there being in fact no quarrel *qua* the primary facts as well (refer para 5.1). Accordingly, we do not see as to how the said case law, to which in fact no reference was made by the Id. AR during hearing (except the two decisions by the apex court referred to by the CBDT in its Circular No. 4/2007 dated 15.06.2007, marked as (\*), so that both the parties rely thereon), would assist the assessee's case.

In fact, the only decision by the apex court cited by the assessee, not also relied upon by the Revenue, is in the case of *Janki Ram Bahadur Ram v. CIT* [1965] 57 ITR 21 (SC). The apex court has therein clarified that the question whether the profit in a

transaction arises out of an adventure in the nature of trade is a mixed question of law and fact, which it observes to have been consistently held by it as so. Two, that the nature of the transaction must be determined on a consideration of all the facts and circumstances which are brought on record by the IT authorities – again, an aspect oft noted, as also in this Order. In the facts of that case, the assessee, a dealer in iron scrap and hardware, entered into an isolated transaction of purchase of a jute mill, which was sold later. The property was capable of and in fact let out before its sale, for which in fact no efforts were made by the assessee, being approached by a willing buyer. It was under these circumstances that it was held by the apex court that the transaction is not an adventure in the nature of trade. The assessee in the instant case is engaged in voluminous transactions on a regular basis; in fact, sourcing expertise at a cost for the purpose, *which rather indicates the extent to which the said exercise is sought to be carried in an organized and systematic manner*. The said decision, therefore, only assists the case of the Revenue. Each of the other decisions by the apex court, we may clarify, has also perused by us, only to find of the same having been rightly relied upon by the Revenue or assisting its' case. The issue, thus, even as observed earlier, arising is essentially the application of the principles as laid down by the hon'ble court, so that the matter is primarily factual, and has been decided by issuing definite findings of fact. The other decisions, as by the tribunal, submitted by the assessee would therefore be of little moment, even as none was in fact adverted to during hearing.

As regards the decision by the hon'ble jurisdictional high court in *CIT vs. Gopal Purohit* [2011] 336 ITR 287 (Bom), we find nothing therein that would support the assessee's case. The hon'ble court has affirmed that the principle of *res judicata* is not applicable to the proceedings under the Act, which is trite law, while stating that there should be uniformity in approach of the Revenue. The two injunctions have to be read in harmony, rather than in conflict, doing which would in fact render the decision as impracticable to follow. Further, if to the extent the issue involved is a legal issue, it is the correct legal position that is relevant, and not the view that any one or both the parties may take (refer: *CIT v. C. Parakh & Co. (India) Ltd.* [1956] 29 ITR 661 (SC); *Kedarnath*

*Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)). The Id. CIT(A) has in fact clarified that there is no inconsistency in the approach of the Revenue. We observe that the 'assessments' prior to A.Y. 2005-06 were made u/s. 143(1) (PB pg.227), so that there was in fact no assessment. The order by the first appellate authority for A.Y. 2005-06; the Revenue adopting the same view as for the subsequent years, or even the facts for that year, are not on record for us to be able to comment thereon. For A.Y. 2006-07, the tribunal has observed a difference in facts, i.e., from the preceding year, necessitating a restoration, so that the variation in facts across years is present. The said decision accordingly would be of little moment.

6. In view of the foregoing, in our clear view, the short term capital gain (STCG), as assessed, merits being confirmed, save on the 11 scrips listed at para 5.8 of this order. We decide accordingly.

7. In the result, the assessee's appeal is partly allowed.

परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

*Order pronounced in the open court on October 17, 2014*

Sd/-  
(I. P. Bansal)

न्यायिक सदस्य / Judicial Member

Sd/-  
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 17.10.2014

व.नि.स./Roshani, Sr. 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**