

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

श्री डी. मन्मोहन, उपाध्यक्ष एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, V. P. AND SHRI SANJAY ARORA, A. M.

आयकर अपील सं./I.T.A. No. 7334/Mum/2011
(निर्धारण वर्ष / Assessment Year: 2008-09)

Karan R. Bahl Saket, Plot No.84, MIDC, 15 th Road, Andheri (E), Mumbai-400 093	बनाम/ Vs.	ITO, Ward 20(1)(4), Piramal Chambers, 6 th floor, Lalbaug, Parel, Mumbai-400 012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AGPPB 9301 E		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से / Appellant by	:	Shri Biren Gabhawala
प्रत्यर्थी की ओर से/Respondent by	:	Shri Surinder Jit Singh
सुनवाई की तारीख / Date of Hearing	:	23.04.2013
घोषणा की तारीख / Date of Pronouncement	:	21.06.2013

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)-31, Mumbai (‘CIT(A)’ for short) dated 27.09.2011, 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.) 2008-09 vide order dated 23.12.2010.

2. The only issue arising in the instant appeal is the head of income under which the assessee's income, returned by him by way of Long Term Capital Gains (LTCG) in the sum of Rs.356.60 lacs, is to be assessed under the Act, the Revenue's stand being that the same is liable to be assessed as business income u/s. 28. The question assumes significance as while business income is subject to tax as regular income, LTCG is tax-exempt u/s.10 (38), and which (exemption) stands claimed by the assessee.

3.1 It would be relevant to delineate the facts and circumstances of the case as well as the respective cases of both the parties. The assessee-individual disclosed the following activities for the year, along with the operating results:

<i>Nature of share trading activities claimed</i>	<i>Income/profit earned</i>	<i>No. of shares traded</i>
<i>Futures and Options trading</i>	<i>(21510059)</i>	<i>36269502</i>
<i>Short-term profit on sale of shares</i>	<i>60128293</i>	<i>2145551</i>
<i>Speculation profit</i>	<i>(9343)</i>	<i>3644</i>
<i>Long-term capital gain on sale of share</i>	<i>35659784</i>	<i>272551</i>
<i>Total Shares Traded</i>		<i>38691248</i>

The net profit from the Future & Options (F&O) activities, as well as the profit on sale of shares (i.e., sold within a year of their purchase), thus, at Rs.373.36 lakhs, stood returned as business income and set off against the brought forward business loss, so that the final income offered under this head was at Nil. The assessee was, therefore, considered by the Assessing Officer (A.O.) as being clearly engaged in all types of share transactions, and on a systematic basis, and which in fact was for the past several years. The assessee, in fact, maintained separate books of accounts for this business, which stood duly audited, bearing all the transactions in shares as of one, composite business in share trading, which stood thus reported as part of the assessee's trade. The claim of some transactions, i.e., where the shares stood sold beyond a period of one year of acquisition, as in capital assets, was thus inconsistent therewith; the assessee adopting a different and ambivalent stand per its return of income. The difference between the business and the speculative

transactions was a function of delivery (in shares), so that the said segregation was based on whether the transaction is delivery or non delivery based. Further, the volume of the shares sold, the profit on which is stated to be by way of gain on transfer of long term capital assets, i.e., LTCG by definition, constitute only 0.7% of the total volume of the shares traded in. The dividend received by the assessee, again, claimed tax-exempt, is only Rs.15,60,450/-, which evidently was very low in relation to the capital employed. That is, clearly, the dividend earned, which arises only incidentally, is not the prime motive for the purchase of the shares, which is only to realize profit on their sale. In fact, the assessee has booked losses in as many as 66 (out of 100) scrips during the year, also profiling them as regards the various transaction types. The same clearly suggests the mindset of a businessman, so that seeking capital appreciation, which entails holding over a period, was not the prime motive, but of earning profit. As such, where realizing that he stands saddled with high priced stock, or one whose price movement is adverse for the time being, the assessee seeks to liquidate his position, booking losses. The volume, regularity, turnover, etc. of the transactions clearly does not lead to the inference of the transactions in shares as being in capital assets, and which cannot be so merely because the holding period in respect of some of them exceeds a year. In fact, the investment therein arises out of the same common pool of funds, so that according a separate treatment to them would be *de hors* the facts and circumstances of the case, which need to be looked at in their entirety. The A.O. accordingly treated the gain arising out of 272551 shares also as part of the assessee's business income. Reference was also made by him to the Board Circular 4/2007 dated 15.06.2007 issued by the CBDT, as well as several decisions by the apex court, also quoting there-from, viz.:

- 1) *Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT* [1997] 227 ITR 172 (SC);
- 2) *Chowringhee Sales Bureau P. Ltd.* [1973] 87 ITR 542 (SC);
- 3) *CIT vs. H. Holck Larsen* [1986] 160 ITR 67 (SC) and;
- 4) *Rajputana Vishveshwara Singh (Agencies) Ltd. vs. CIT* [1961] 41 ITR 685 (SC)

3.2 In appeal, the matter was again examined at length by the Id. CIT(A). The assessee had engaged in all forms of shares trading, returning income as under:

<i>i.</i>	<i>Business income</i>	<i>Rs.3,73,36,316.00</i>
<i>ii.</i>	<i>Short Term Capital Gains</i>	<i>Rs.Nil</i>
<i>iii.</i>	<i>Income from other sources (*)</i>	<i>Rs.22,969.00</i>
<i>iv.</i>	<i>LTCCG</i>	<i>Rs.3,56,59,784.00</i>

(*) wrongly stated as '27969' in the impugned order (pg. 6)

The transactions are being carried out through the same bank account, using the common funds, through the same D-Mat account and using the same infrastructure and, in fact, through the same broker. There is no classification or categorization of the shares as to being either a part of the trading stock or as capital assets. The claim of the shares sold after one year of their purchase as being capital assets is, therefore, untenable, and prompted merely to take benefit of the tax-exempt status of the gain arising therefrom. In fact, the shares being held in the same D-Mat account, with in fact some (six) scrips being common, i.e., sold both at less than as well as more than one year, it is not even possible to determine the holding period – the shares being homogenous, except by adopting a methodology or assumption, as 'first in first out' (FIFO). The marking of some shares, purchased together, as capital assets, as against the balance as stock-in-trade, merely because they stand sold subsequently, after a defined holding period (one year), is, thus, suspect. The income from the shares held for less than a year is admittedly being disclosed as business income. To say, therefore, that the income on the same or even other shares, where sold after over a year, would, the other facts and circumstances being the same, be of a different nature, i.e., as by way of realization of capital assets, was not justified. The turnover volume of the assessee's different share activities, i.e.,

- future and options (Rs.1348.19 crores),
- delivery based, at less than one year (Rs.30.18 crore),
- delivery based share trading (more than one year) (Rs.4.99 crores), and
- non-delivery based/speculative trading (Rs.0.15 crores),

which is to be viewed in holistic manner, thus, clearly shows it to be a composite business. Even for the preceding year, the income from share trading was held as business income. He, accordingly, confirmed the order of the AO on this aspect of assessment.

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

The assessee's case before the authorities below as well as before us is that the mere fact that he is trading in F&O, which yields profit or loss, as the case may be, without the actual purchase or sale of the shares, would not imply that he could not act as, and consequently be not entitled to, the benefits of an investor. And the gains on which have been, as in the past, disclosed as short or long term capital gains/loss, as the case may be. The Revenue, on the other hand, proceeds on the basis that there is nothing on record to show that the shares sold after one year of their holding were purchased, as claimed, with an intent of being held as or by way of an investment; being bought along with, and in the same manner, as the other shares traded in; the assessee admittedly being also actively engaged in share trading business. Further, the assessee had admittedly declared the income from the shares sold within a period of a year of their acquisition as business income.

Our first observation in the matter is that the primary facts are not in dispute, and both the assessing as well as the first appellate authority have arrived at their conclusions on the same set of basic facts, i.e., with regard to the various parameters in relation to the share transactions entered into during the year, viz. the number of scrips held, purchased and sold during the year. The question as to whether the assessee's share transactions are in 'capital assets', though of long term tenor, or of trading stock, is essentially one of fact, requiring an analysis of the relevant data, as well as the surrounding facts and circumstances of the case.

Proceedings with our examination of the objections, we firstly observe that trading in the shares, whether in the speculative or non speculative mode, is the assessee's principal occupation, perhaps the only occupation; the assessee's only other income being

by way of dividend apart from negligible income from other sources. Further, this obtains for a number of years now. *The assessee has classified the F & O transactions as well as the delivery based transactions in shares, except where sold beyond one year, as of business.* The only bone of contention between the assessee and the Revenue, or the area of dispute, is in respect of delivery based transactions, where the holding period exceeds one year; the assessee claiming it to be LTCG, exigible to tax exemption u/s.10(38). Though it cannot be denied that merely because the assessee is engaged in share business, he cannot be denied exemption u/s.10(38) where otherwise exigible, but then to suggest so, or to state of it as being the only reason for the denial of the claim thereunder, would be oversimplifying the Revenue's case, which is, as is to be, based on facts. The onus to establish that certain shares are being held by it as investments is only on the assessee, and particularly so in the instant case as, firstly, the assessee claims an exemption from tax of income on that basis and, secondly, for the reason that he is admittedly engaged in the share trading business, or at least in share transactions yielding business income (inasmuch as the F&O transactions do not involve actual sale and purchase of shares). In fact, to our mind, the difference between the two is notional as the contract entered into for the purpose, i.e., a F&O transaction, is also for the purchase and sale of shares. It is only the assessee, therefore, who needs to establish the basis of his considering some shares, though purchased in the regular course of its business of share trading, as not for acquisition of trading stock, but only as capital assets.

The difference between the two, it needs to be realized, is basic and qualitative. Though both are purchased with a view to earn profit, an investment is based on the economic strengths and the fundamentals of the company, having regard to the likely future developments, so that the scrip purchased would gain in value over time. In other words, the investment is essentially long term and strategic, involving retention for a period, over which only would the market price respond to its increased value as an economic asset. The other, i.e., the acquisition of a share as a stock-in-trade, on the other hand, essentially involves purchase of a scrip, the current market price of which is in the perception of the buyer lower than that warranted by its fair value, going by its

performance, or by the price behavior reflected in the past. As soon as, therefore, there is a correction in price, or any improvement in the market sentiment, the scrip is sold. On the other hand, an adverse price movement would suggest of a wrong decision, warranting its liquidation. Thus, while the former is a capital asset, the decision *qua* holding of which is ordinarily not affected by the price movement or the price obtaining for the time being, the other is a trading stock, which needs to be rotated. The other factor would be the price differential realized on sale. While an investor would normally look for higher gains, a trader would be satisfied with small gains inasmuch as he wishes to square his position and move on to the next earning opportunity. This, however, is only an indicator and, as afore-stated, the decision in the matter requires a consideration and holistic view taking all the factors into account.

In the instant case, all the shares have been bought by the assessee in the regular course of his business, employing common funds, depositing them in the same D-Mat account, and even through the same broker and infrastructure. New shares are purchased deploying funds realized on the sale of such shares. To contend, therefore, of some such shares as being capital assets on the premise that the same are sold beyond one year of their purchase, is, therefore, clearly untenable. The categorization as to whether the scrip acquired is as an investment or as a part of the assessee's trading stock is primarily one of intention with which the share is purchased/held and, accordingly, gets to be decided at the stage of or upon acquisition itself. That the scrip may eventually be sold, in whole or in part, within a period less than that envisaged earlier, or within a period less than a year, is, however, a different matter, as perceptions and, consequently, decisions, even *qua* capital acquisitions, may vary or change with time. This would, however, not make it any less an investment, where acquired as such in the first place, so that the gain or loss arising thus would be a short term capital gain or loss, as the case may be. In the instant case, there is no such classification done by the assessee, the onus of which is only on it, being required to demonstrate, i.e., in a cognizable manner, with reference to its accounts/records, that the share classified as a long term capital asset was indeed

bought/acquired as an investment. This is in view of, as aforesaid, the settled position of law, as clarified by the apex court per a number of decisions, viz. *CIT vs. H. Holck Larsen* (supra); *CIT vs. Sutej Cotton Mills Supply Agency Limited* [1975] 100 ITR 706 (SC); *CIT vs. Associated Industrial Development Co. Pvt. Ltd.*[1971] 82 ITR 586 (SC); *Dalhousie Investment Trust Co. Ltd. vs. CIT* [1968] 68 ITR 486 (SC); *G. Venkataswami Naidu & Co. vs. CIT* [1959] 35 ITR 594 (SC). On the contrary, the books of account of the assessee's business, point it to being one, composite business of trading in shares and, in fact, the only business carried on by the assessee. To contend or assert, or even state of some share as, in fact, representing investments for the purpose of returning income under the Act, would be of no moment. The income from the trading in shares has also been held and assessed as business income in the past. Under the circumstances, therefore, we have little hesitation in confirming the impugned order, holding the shares purchased, as well as being brought forward from an earlier year, for which the same have therefore been held as part of stock-in-trade, as only the trading stock of the assessee's business. We decide accordingly.

5. In the result, the assessee's appeal is dismissed.

परिणामतः निर्धारिती की अपील खारिज की जाती है ।

Order pronounced in the open court on 21st June, 2013

आदेश की घोषणा खुले न्यायालय में दिनांक: 21 जून, 2013 को की गई ।

Sd/-

Sd/-

(D. MANMOHAN)

(SANJAY ARORA)

उपाध्यक्ष / VICE PRESIDENT

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 21.06.2013

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**