

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1974 OF 2011

The Commissioner of IncomeTax-25. ...Appellant.

Vs.

Suresh R. Shah. ...Respondent.

Mr.N.A.Kazi for the Appellant.
Mr. V.S.Hadade for the Respondent.

**CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.**

DATE : 20th June, 2012

PC:

This appeal by the Revenue under Section 260A of the Income Tax Act (hereinafter referred to as the "said Act") is from the Order dated 10/11/2010 of the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) relates to Assessment Year 2006-07 (previous year ending 31/3/2006). Being aggrieved by the Order dated 10/11/2010, the appellant has formulated the following questions of law for consideration by this Court:

A) Whether on the facts and circumstances of the case and in law the ITAT was justified in upholding the order of CIT(A) Mumbai dated 17/9/2009 bearing No. CIT(A)-35/ACIT/25(2) ITA 4328/08-09 despite the

facts the Assessee has shown speculation loss and still accepted the claim of Assessee and directed A.O. to accept the claim of Assessee as short term capital gain and long term capital gain instead of share trading business income?

B) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding the claim of the Assessee that Assessee indulged in investment in shares without considering the facts and the investigation of the A.O. and the decision of the Hon'ble Supreme Court relied by the A.O. and the facts the Assessee himself has shown speculation loss Rs.13,483/- in share trading business?

2) The respondent is engaged in textile business. By an order dated 23/12/2008 passed under Section 143(3) of the said Act the Assessing officer took a view that the respondent was not an investor in shares but dealer in shares and therefore, rejected the claim of the respondent for being taxed under the head capital gains in respect of the income earned from purchase and sale of shares. This was inter alia on the basis that the respondent had also returned speculation loss of Rs. 13,483/-. Consequently by the above assessment order the total income assessed was Rs.1.92 crores as against the returned income of Rs. 36,213/-.

3) On appeal, the CIT (Appeals) by an order dated 17/9/2009 allowed the appeal of the respondent holding that the respondent was an investor in shares and therefore, income earned on purchases and sale of shares is investment and the same would have to be assessed as his income under the head capital gains and not as income from the head Profits and Gains from the business or profession.

4) Being aggrieved, the revenue/appellant preferred an appeal to the Tribunal. On 10/11/2010 the Tribunal after examining the evidence upheld the order of CIT(A) and concluded that the respondent was an investor in shares and entitled to be taxed under the head capital gains in respect of purchase and sale of shares. The Tribunal after examining the facts found that the respondent had not borrowed any funds for its investments and that the long terms gains were attributable to only shares of 4 companies and 3 of them were held for a period of about 5 to 12 years. So far as short terms capital gains were concerned the Tribunal held that about 93% of the short terms gain/loss was attributable to shares of six companies and in any case all the shares were held for periods ranging in excess of 1 month. With regard to the fact that the respondent had returned speculation loss in his return, the Tribunal followed the decision of this Court in the matter of CIT V/s. Gopal Purohit reported in 228 CTR (Bom.) 582 to hold that there is no bar for an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. Further this Court also held that the aforesaid finding is a pure finding of fact.

5) The appellate authorities have thus come to findings of fact

after examining the relevant material. The same is not perverse.

6) On the above concurrent findings of fact by CIT (Appeals) and the Tribunal, no substantial question of law arises for consideration by this Court.

7) The appeal is therefore, dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

(S. J. VAZIFDAR, J.)

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

**Before Shri N.V. Vasudevan, Judicial Member and
Shri J. Sudhakar Reddy, Accountant Member**

I.T.A. No. 6267/Mum/2009.
Assessment year : 2006-07.

Asstt. Commissioner of Income-tax,
25(2), Mumbai.

Vs. Shri Suresh R. Shah,
3rd Floor, Laxmi Palace,
R.C.Patel Road,
Off. Chandavarkar Road,
Borivali (W), Mumbai-92.
PAN AAGPS0752H

Appellant.

Respondent.

Appellant by : Shri Sandeep Goel.
Respondent by : Dr. P. Daniel.

ORDER

Per J. Sudhakar Reddy, A.M. :

This is an appeal filed by the Revenue directed against the order of the CIT(Appeals) -35, Mumbai dated 17-09-2009 for the assessment year 2006-07.

2. Facts of the case are brought out at para 2 page 1 of the CIT(Appeals)' order which are extracted below for ready reference.

“ The appellant is engaged in the textile business in the name and style of M/s Trend Creations. For the relevant assessment year, the appellant filed his return of income on 03.07.2006 admitting total income of Rs.36,213/- alongwith short term capital gain of Rs.1,71,08,298/-. The A.O. selected the case for scrutiny and completed the assessment u/s 143(3) determining the total income at Rs.1,92,00,510/-.

3. The AO assessed the income of the assessee under the head “Business income” after rejecting the claim of the assessee that the income earned from purchase and sale of shares, should be assessed under the head “Capital gains”. The AO summarized his findings at page 16 para 10 of his order which are extracted below for ready reference:

“Thus, to summarise, the assessee is undoubtedly dealing in large volume of shares. The frequency of purchase and sale is extremely high./ Number of transactions entered for 59 scrips dealt with in the year is more than Rupees fifteen crores. The holding period for most of the scrips ranges from a few days to few months. In certain cases, holding period is more than one month, however, the scrips have been repeatedly transacted into. It means that the assessee has repeatedly purchased and sold to earn quick profits. The dividend earned is only incidental and very less compared to the earning from and purchase of shares. The dividend earned by the assessee is Rs.4,22,483/-. It clearly shows that the intention of the assessee is not to earn capital gains, but to earn quick profits through his business. Therefore, he can not treat profits arising out of share transactions as capital gains. Thus in view of the discussion in the above paras I have no hesitation in stating that the assessee is engaged in only one activity i.e. activity of earning profit through sale and purchase of shares and not investment in shares leading to STCG and LTCG. I accordingly hold that the assessee has wrongly classified his income under income from Short Term Capital Gain and Long Term Capital Gain instead of business income. Therefore, the entire profit arising out of purchase and sale of shares shown as STCG and LTCG is

hereby assessed under the head “income from business and profession”. The trading account of this business is shown as below :

Particulars	Amount (Rs.)	Particulars	Amount(Rs.)
Closing stock	95,54,035	Sales	9,19,46,597
Purchases	8,19,50,699	Closing Stock	1,87,22,435
Gross Profit	1,91,64,298		
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	110669032		110669032

Aggrieved, the assessee carried the matter in appeal.

4. The first appellate authority considered the issue and allowed the claim of the assessee for the various reasons given at par 5.1 to 5.5 of his order.

Aggrieved, the Revenue is in appeal on the following grounds :

(i) On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) is right in holding that the assessee indulged in investment in shares not in share trading business without considering the facts brought on record by the A.O. that the volume and number of transactions in shares is very high.

(ii) On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) is right in holding that the assessee indulged in investment in shares without considering the fact that the assessee has devoted most of his time in share trading activity and has utilized little time for other activities.

5. The learned DR, Mr. Sandeep Goel, relied heavily on the order of the AO and submitted that the assessee claimed that he has received short term capital gains at Rs.1,71,72,085/- and long term capital gains of Rs.19,97,449/- and had

claimed exemption of both these amounts u/s 10(38) of the Act. He submitted that the assessee has shown speculation loss from share trading during the year amounting to Rs.13,484/- as well as dividend income of Rs.4,22,483/-. He pointed out that the assessee has divided his share transactions into two categories i.e. i) Delivery based transaction and b) Non delivery based transaction. He treated the income of the first category as income from capital gains and of the second category as speculation income. He pointed out that the AO has considered all the arguments of the assessee and , based on judgments of various Courts and Circulars of CBDT had come to a conclusion that the income in question is income from business and not income from capital gains. He pointed out that the assessee had opening stock of shares of Rs.95,54,035/- and that he has purchased shares worth Rs.8,34,41,699/- and has sold shares of Rs.9,19,46,597/- and that he had closing stock and shares valued at Rs.1,87,22,436/-. He submitted that the magnitude of purchase and sales independently is extremely high and that when both are taken together, the volume is Rs.17,71,97,432/-. The ratio of the purchase and sale, as per the DR is less than one. He submitted that the motive of the assessee is to earn profit and the figures also demonstrate that the holding period of scrips range from a few days to a few months. He relied on para 9.3 page 14 of the order of the AO and submitted that the assessee indulged in more than 100 transactions on the working days of the stock exchange during the year, which comes to an average of one transaction on every alternate day. On these facts and circumstances, the learned DR argued that the AO was right in holding that the income on the purchase and sale of shares should be assessed under the head “Business” and not under the head “Capital gains”.

6. The learned counsel for the assessee, Mr. P. Daniel, on the other hand, relied on the order of the first appellate authority. He specifically drew the

attention of the Bench to para 5.1 of the CIT(Appeals)' order. He placed reliance on the following decisions :

- i) Janak S. Rangwalla vs. ACIT (2007) 11 SOT 627 (Mum.)
- ii) CIT vs. Gopal Purohit 228 CTR (Bom) 582.
- iii) Gopal Purohit vs. JCIT (2009) 122 TTJ (Mum.) 87.

He submitted that this is a factual issue and the assessee was basically a textile consultant earning income in the form of commission on brokerage. He submitted that the assessee is also an investigator and he maintained his funds in FDs, shares in companies and PPFs. etc. He drew the attention of the Bench to the balance sheet filed by the assessee. He pointed out that the shares were held between 1 and 11 years and that these were long term investment and due to boom in the share market, the assessee encashed the investments. He pointed out that the assessee sold only four scrips during the year. He submitted that except for one scrip i.e. Karnataka bank Ltd., all the shares were held for a period between 5 to 12 years. He took this Bench to pages 5 and 6 of the CIT(Appeals)'s order and pointed out the factual errors committed by the AO in his order. For short term capital gains the learned counsel submitted that he had transacted only in seven shares. He pointed out that the assessee wanted to move his investments from one class of assets to another class of assets. He submitted a breakup of investment in real assets, equity shares as on 31-3-2005 as well as on 31-3-2006 and pointed out that as investment in shares was high, the assessee shifted those investments into other categories of investments. He pointed out that in the case of a trader, the margins would be 3% to 5% of the volume and whereas an investor looks for an income of 15% to 20%

annually on value of investment and not on the volume of transaction. He prayed for relief.

7. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, we hold as follows.

8. The issue whether an assessee can be considered as an investor or as a trader in shares, depends on the facts and circumstances of each case. It is well settled that an assessee can be held as an investor as well as a trader when he holds different class of assets. In this case the assessee is in textile business. It can be seen from the balance sheet that the assessee is not only investing in shares but has maintained funds and fixed deposits as well as PPF. Investments in shares are 75% of the total investments. The shares sold, the income of which was declared as long term capital gain, was held by the assessee for the period of 1 to 11 years and they consisted of four scrips. The shares of three companies were held for the period ranging from 5 to 12 years and only in the case of Karnatka Bank the period of holding was more than one year. As per the short term capital gain is concerned, transactions were done only in the case of 7 scrips and 93% of the short term capital gains arose from these scrips. On these facts at para 5.1 page 8 and 9 the learned CIT(Appeals) held as follows :

“5.1 I have considered the submissions of the representative and the stand taken by the AO. It is seen that the appellant is having his own textile business in the name and style of M/s Trend Creations. It is further seen from the balance sheet of the appellant that he had various investments in F.Ds., PPF and shares of companies and as per the balance sheet as on

31.03.2005, the investment in equities was heavier at 71% and the appellant decided to change the portfolio of investment so that there is fair distribution of assets in F.D., bank deposits, PPF & shares. As contended by the representative, as a prudent investor, the appellant distributed his investment in all modes of investment by selling a portion of the shares considering the favorable share market which does not mean that the appellant is a trader during this year. Further, as contended by the representative, the shares were shown as investment in the balance sheet in the earlier years and they were transferred in the name of the appellant as per the demat account produced before the A.O. and subsequently sold. Further, the appellant paid STT at the rate applicable to investment. A perusal of working of long term capital gain shows that the shares were held for a long period and in fact the appellant sold only 4 scrips during this year and except the shares of Karnataka Bank Limited, all the other shares were held for 5-12 years and therefore, there is no reason to assess the long term capital gain under the head business. Further it is seen from the short term capital gain working that 7 scrips were purchased in the earlier year and sold during the current year. The appellant has sold bonus shares of Subros Limited received in October, 2004 in the month of June, 2005 and the A.O. assessed the same under the head business. Further as contended by the representative, 93% of short term capital gain arose from sale of 7 scrips only as given in para 4.2 of this order above and major portion of the shares were held for more than one month and nearly 50% of the shares were held for more than 6 months. Further, the appellant has not taken any borrowed loan for the purpose of investing in shares. It is true that the appellant has claimed speculation loss from shares at Rs.13,484/- but the amount involved and transactions are very less. As held by the Hon'ble Hyderabad Tribunal in the case of Shah-La Investments and Financial Consultants Pvt. Ltd. vs. Dy. CIT (2 SOT 371, there is no bar for the same assessee to do business in shares and also hold some shares as investment. Thus, merely because the appellant claimed speculation loss of Rs.13,484- from shares, short term capital gain and long term capital gain admitted by the appellant cannot be assessed under the head business.”

8. These facts, as stated by the CIT(Appeals), are not disputed by the Revenue. In the light of the above facts, we apply the decision of the Hon'ble Bombay High Court in the case of CIT vs. Gopal Purohit (supra) and uphold the order of the first appellate authority.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 10th Nov. , 2010.

Sd/-
(N.V. Vasudevan)
Judicial Member.

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Mumbai,

Dated: 10th Nov., 2010.

Wakode

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, H-Bench

(True copy)

By Order

Asstt. Registrar,
ITAT, Mumbai Benches,
Mumbai.