

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'डी' मुंबई ।

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

BEFORE SHRI VIJAY PAL RAO, JM AND SHRI N.K. BILLAIYA, AM

आयकर अपील सं./I.T.A. No. 827/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Dr. Rahul Doctor, 62, Chitrakoot, Altamount Road, Mumbai-400 026		The ACIT, Range-16(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by: `		Shri Dharmesh Shah
प्रत्यर्थी की ओर से/Respondent by :		Shri Girija Dayal

सुनवाई की तारीख / **Date of Hearing** : **06.06.2013**

घोषणा की तारीख / **Date of Pronouncement** : **12.06.2013**

आदेश / ORDER

PER N.K. BILLAIYA, AM:

This appeal by the assessee is directed against the order of the Ld. CIT(A)-27, Mumbai dt.14.12.2011 pertaining to A.Y. 2010-11.

2. The assessee has raised four substantive grounds of appeal and one additional ground. Ground No. 1 & 2 relate to the treatment of Short term capital gain on sale of shares and securities under the head "Income from Business or Profession". Ground No. 3 & 4 are alternative plea and

so also the additional ground depending upon the outcome of the decision in ground Nos. 1 & 2.

3. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee shown salary income from RP securities Pvt. Ltd., income from profession, capital gains in shares and securities. During the year under consideration, the assessee has shown STCG of Rs. 83,15,790/-, LTCG of Rs. 38,88,313/- in addition to other income. The AO sought clarification from the assessee as to why the assessee's share transaction activities should not be treated as business activity instead of being an investment activity as claimed by the assessee.

3.1. The assessee submitted a detailed reply on 26.10.2010. It was contended that the assessee is a Doctor and is fully occupied in practicing his profession. As a result of his full time occupation, the assessee is hardly left with any time to monitor the movement in the share market. It was explained the deployment of funds in the shares is, therefore only with the objective of investments and not trading in shares. The assessee relied upon certain judicial decisions in support of his claim that he is an investor and not a trader. The reply of the assessee was considered by the AO but the AO did not agree with the submissions made by the assessee. The AO went on to discuss certain judicial decisions as discussed by him at para 3.1. of his order and was of the firm belief that the holding period clearly shown that the assessee was trading in shares as the average holding period was 42 days only. The AO finally concluded that income from STCG as shown by the assessee is to be taxed under the head "Income from Business or Profession" and accordingly treated the entire STCG of Rs. 83,15,790/- as income from business.

4. The assessee carried the matter before the Ld. CIT(A) and reiterated what has been stated before the AO. After considering the facts and the submissions, the Ld. CIT(A) observed that the assessee has carried out transaction in shares on 204 days out of 250 working days of Stock exchange. The Ld. CIT(A) also observed that the assessee has done repetitive transactions in the same scrips during the year and agreed with the findings of the AO that the assessee has carried out transaction in shares in a business like manner.

5. Aggrieved by this finding of Ld. CIT(A), the assessee is before us.

6. Before us, the Ld. Counsel for the submitted that the assessee is a full time Doctor and is engaged in his profession extensively. Therefore, he has no time to indulge in trading activities in the stock market. The Ld. Counsel for the assessee further submitted that in the past years also the assessee had shown purchase of shares as investment which has been accepted by the Revenue authorities. The Ld. Counsel strongly submitted that during the year under consideration, the total No. of purchase transactions were 109, No. of scrips whose shares are acquired were 133, No. of sale transactions were 343 and No. of scrips whose share are sold were 150. The Ld. Counsel for the assessee further submitted a chart showing that during the year under consideration, the assessee was out of Mumbai for 148 days to attend various medical conferences. It is the say of the Counsel that being a medical practitioner, the assessee cannot indulge in any business activity. The Ld. Counsel for the assessee also submitted a chart showing No. of days in which the transactions were carried out and submitted that the assessee has carried out the transaction of 141 days.

7. Per contra, the Ld. Departmental Representative relied upon the findings of the lower authorities.

8. We have considered the rival submissions and perused the orders of the lower authorities and the material evidence brought on record in the form of paper book. The dispute is regarding the nature of income from sale and purchase of shares by the assessee. The issue, whether the income from sale and purchase of shares in a particular case should be treated as capital gain or as business income has been a debatable issue and there are conflicting decisions of the Tribunal on this issue. Each case is, therefore, to be based on its own factual situation. In the present case, it is not in dispute that the assessee is a Doctor and is whole time engaged in his profession. 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. These observations by the Hon'ble Supreme Court in the case of CIT Vs Associated Industrial Development Co. (P) Ltd. 82 ITR 586 squarely apply on the facts of the present case. It is not in dispute that all the transactions under reference entered into by the assessee have been settled by actual delivery of shares and the money is actually paid and received in each and every case; whereas in case of a trader, ordinarily, the transactions are settled without actual delivery. The purchase and sale transactions are settled only by way of receipt/payment of net difference. This is not the case of the assessee as no such findings have been given by the AO.

8.1. The assessee has shown Long Term Capital gains during the year at Rs. 3888,313/- which has been accepted by the AO. If the AO was of the firm belief that the assessee is engaged in trading activities in the shares then it should not make any difference if the shares are held more than 12 months and less than 12 months. But here is a case where the AO has accepted that the assessee is an investor so far as Long term capital gains are concerned. The allegation that the assessee has done repetitive transactions cannot ipso-facto make the assessee a trader. It is an accepted fact and practice that in order to reduce the risk of loss of capital or income, the investor may try diversify the investment. Therefore, there may be a case of reshuffling portfolio by selling of some scrips and buying of some scrips to mitigate the scope of law of capital or income. Therefore, the reshuffling in a short period is not necessarily to be taken as an activity of trading when the intention was to reduce the risk of loss of capital. A perusal of the statement of accounts show that the assessee has no bank borrowings, the only borrowings are from family members and the income and expenditure account of the assessee does not reflect any claim of interest payment which means that the assessee has made investments not out of borrowed capital.

8.2. Considering the profession of the assessee, it cannot be said that the assessee was fully devoted to the stock market transaction. Considering the nature of profession and the facts in totality, in our considered view, the lower authorities have erred in treating the Short Term Capital gains as business income. We accordingly direct the AO to treat the STCG as declared by the assessee. On that note, we reverse the findings of the Ld. CIT(A). Ground No. 1 & 2 are accordingly allowed.

9. As we have allowed the appeal on ground No. 1 & 2, ground No. 3 & 4 and the additional ground raised by the assessee become otiose.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 12.6.2013

आदेश की धोषणा खुले न्यायालय में दिनांक: 12.6.2013 को की गई ।

Sd/-
(VIJAY PAL RAO)

Sd/-
(N.K. BILLAIYA)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 12/06/2013

व.नि.स./ RJ , 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai