

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G" : MUMBAI

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI R.K.PANDA, ACCOUNTANT MEMBER**

**ITA. No. 961/Mum/2010
Assessment year 2006-2007**

Nagindas P. Sheth (HUF) Mumbai – 400 022 PAN AAAHN3294F (Appellant)	ACIT 21 (3) vs. Mumbai - 51 (Respondent)
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**ITA. No. 1836/Mum/2010
Assessment year 2006-2007**

ACIT 21 (3) Mumbai - 51 (Appellant)	Nagindas P. Sheth (HUF) vs. Mumbai – 400 022 PAN AAAHN3294F (Respondent)
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For Assessee	: Shri Bhupendra Shah
For Revenue	: Shri A.K. Nayak

ORDER

PER D. MANMOHAN, V.P.

1. These cross-appeals are directed against the Order of the CIT(A)-XXXII, Mumbai and they pertain to assessment year 2006-2007.

2. Facts necessary for the disposal of the appeal are stated in brief. Assessee HUF earned income from business, capital gains and other sources and declared total income of Rs.45,57,970/-. During the course of assessment proceedings the Assessing Officer noticed that the assessee frequently transacted in purchase and sale of shares which would amount to trading activity. Since assessee has declared short term capital gains in respect of the shares sold within a span of 12 months, Assessing Officer issued a show-cause notice calling upon the assessee to explain as to why income thereon should

not be treated as business income arising out of trading in shares. In response thereto, it was explained that the assessee has treated them as investment in shares and merely because assessee made some profit out of bulk turnover on purchase and sale of shares they should not be taken as criterion to arrive at the nature of the transaction.

3. Assessing Officer however rejected the contention of the assessee. He observed that the assessee made 158 share transactions during the previous year under consideration and thus intention of the assessee was only to trade in shares to make profit. Any investor would be principally interested in holding the shares so as to earn dividend income whereas, the regularity and frequency of the transactions, in the instant case, shows that the assessee has no such intention. Further, an investor would normally open one or two demat accounts whereas, in the instant case, the assessee chose to go about in a much more professional manner by choosing several brokers, each one jointly and severally contributed to the kitty of the assessee in earning income from sale of shares. He thus concluded that the assessee was deeply involved in the share trading activity and the income on sale of shares on short term basis was treated as income from business.

4. Aggrieved, assessee contended before the CIT(A) that the Assessing Officer accepted in sec. 143 (3) proceedings that assessee purchased and sold shares in his capacity as investor and accordingly accepted the return of income for the assessment year 2005-2006. There was no reason for deviation from the assessment order for the assessment year 2005-2006 without pointing out any changed circumstances. Assessee was consistently treating the purchase of shares as investment. He thus contended that the income from sale of shares is assessable to tax under the head 'Capital gains'.

5. Learned CIT(A) partly accepted the contention of the assessee. In this regard, he observed that short term profit on sale of

shares held for more than 30 days works out to Rs.28,04,407/- whereas profit on sale of shares for less than 30 days works out to merely Rs.8,57,555/- and going by the circumstances only the shares held for less than 30 days should be treated as income from business. In this regard he observed as under :

4.1. *“From the analysis of the data it is clear that this is a case of an investor cum trader. The appellant is an investor who also at times tries his hand at trading in shares. It is a well known fact that the person who is a full time investor would be in a position to understand and take advantage of short term opportunities that are present in the market. The fact that a person can be both an investor as well as a trader is also recognised by the CBDT and the CBDT has stated that a tax payer can have both portfolios, an investment portfolio as well as trading portfolio. Various factors which makes the appellant an investor are that the appellant had made investments in unlisted shares, the shares were shown in balance sheet as investments and valued at cost, the appellant did not have any office and / or administrative set up, there are no fixed assets, the source of acquisition of shares was out of own funds and family funds, the ratio of investments to sale and purchases is very high and the fact that there was not a single instance where the appellant had squared off the transaction on the same day without taking delivery of shares.*

4.2. *While the factors listed above makes it clear that the appellant is mainly an investor the factors like lack of dividend income, turnover of shares in less than 30 days, etc., points to the fact that*

the appellant is also a trader. I therefore hold that the appellant is both an investor as well as trader. I direct the Assessing Officer to treat the surplus/loss on sale of shares held for less than 30 days as business income/loss and the to treat the surplus/loss on sale of shares held for more than 30 days as capital gains/loss.”

6. Aggrieved, assessee as well as Revenue are in appeal before us. The case of the Revenue is that even shares held for more than 30 days should be treated as ‘stock-in-trade’; whereas, the case of the assessee is that even shares sold within a span of 30 days from the date of purchase should be brought to tax under the head ‘short term capital gains’, since the pre-dominant intention of the assessee was to hold the shares as investment.

7. We have heard the learned Counsel, appearing on behalf of the assessee as well as learned DR in this regard and carefully perused the record. The issue as to whether profit arising out of purchase and sale of shares is assessable to tax under the head ‘capital gains’ or ‘business income’ is a vexed question depending on facts and circumstances of each case, based upon the principles set out by various judicial precedents. In the instant case, it is not in dispute that the assessee was holding the shares in its books as an investor. Learned CIT(A) observed that the assessee did not have any office or administration set up and the source of acquisition of shares was out of own funds and family funds. He further noticed that there was not a single instance where the assessee had squared-up transactions on the same day without taking delivery of the shares. Learned Counsel, appearing on behalf of the assessee, placed before us a copy of the Order of the Assessing Officer in respect of the assessment year 2007-2008 to submit that subsequent to the passing of the assessment order for the assessment year under consideration the Assessing Officer accepted the nature of transactions as

investment in the subsequent year in his order dated 20-10-2009. In otherwords, both for the earlier year and subsequent year Assessing Officer accepted, in the scrutiny assessment proceedings, that the assessee is an investor. Such being the case, merely because assessee transacted in 158 shares that should not be taken as a sole criterion to come to the conclusion that assessee is a trader in shares. It is not in dispute that in the books of accounts assessee has declared the shares as an investment and the finding of the learned CIT(A) that only own funds were utilised for purchase of shares was not contradicted by the learned DR. It was also highlighted by the learned CIT(A) that assessee had not indulged in any squaring-up of the transactions on the same day. On a conspectus of the matter, we are of the view that the transactions of purchase and sale of shares, in the instant case, deserves to be considered as investment and profit thereon has to be assessed to tax under the head 'capital gains'. We direct the Assessing Officer accordingly.

8. In the result, appeal filed by the assessee is allowed and appeal filed by the Revenue is dismissed.

Order pronounced accordingly in the open Court

Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-
(D.MANMOHAN)
VICE PRESIDENT

Mumbai, Date 05th April, 2011.

VBP/-

Copy

1. Nagindas P. Sheth (HUF), 5, Meghdoot, 283 Flank Road, Sion (East), Mumbai – 400 022 PAN AAAHN3294F
2. ACIT 21 (3), Bandra (East), Mumbai – 51.
3. CIT(A)-32, Mittal Court, 'B' Wing, R.Nos. 13 & 14, 3 rd Floor, Nariman Point, Mumbai – 21.
4. CIT, City-21, Mumbai.
5. DR 'G' Bench
6. Guard File

True Copy

By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI