

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

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

I.T.A. No. 6429/Mum/2009.  
Assessment year : 2006-07.

Asstt. Commissioner of Income-tax,  
25(3), Mumbai.

Appellant

**Vs.**

Naishadh V. Vachharajani,  
B-21, Harmony,  
Near Charkop Village,  
M.G. Road, Kandivali(West),  
Mumbai – 400067.  
PAN : AAWPV4880H.  
Respondent.

**AND**

C.O. No. 136/Mum/2010.  
(In ITA No. 6429/Mum/2009)  
Assessment Year : 2006-07.

Naishadh V. Vachhariajani,  
Mumbai.

Cross Objector.

**Vs.**

Asstt. Commissioner of  
Income-tax, 25(3), Mumbai.

Respondent.

Department by : Shri S.K. Mohanty.  
Assessee by : Shri Pramod Kumar Parida and  
Ms. Sanjukta Chowdhary.

**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 29-09-2009 on the following ground :

“ On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O. to accept the claim of Short Term Capital Gain and Long Term Capital Gain on profit arriving from purchase & sale of shares instead of business income treated by the A.O. without appreciating the fact that the assessee is dealing in large volume of shares, most of the shares are bought and sold within short period, while some are not sold due to market conditions and their holding with assessee remains beyond few days, it will not change the nature of transactions and the assessee is very well engaged in the business of share trading, which denote that the motive of the assessee is to carry on business in shares to book profit rather than investment in shares.”

2. The assessee is a marine consultant. He also has investment in shares. The assessee also has income from speculative profit and Future Option trading in shares. At para 4.1.2 and 4.1.3 the AO has brought out the following facts:

“4.1.2 In the return of income assessee has shown income under the following heads :

Income from other sources	10,83,896
Long term capital gain	29,84,026
Short term capital gain	13,48,030
Speculation Profit	1,10,469
F&O Trading	9,90,189
Income from Profession	2,36,261

This shown that all the receipts of assessee are arising out of transactions in shares and securities except bank interest and income from profession.

This gives rise to the question that whether the income arising out of some of the transactions in shares carried out by the assessee be classified as capital gains and the rest as business. In view of the regularity, volume, turnover, period of holding of the shares and value of the transactions in shares it is required to be examined whether short term capital gains & long term capital gains offered by assessee falls into the category of capital gains

or whether the same can be said to be part of business income of the assessee.

The assessee is an individual and is regularly trading in shares, derivatives, F & O transactions and also in speculation. Assessee is maintaining regular books of accounts for his purpose.

From the details of share transactions filed along with the return of income and also during the course of assessment the magnitude of delivery based transactions of sale and purchase done by the assessee is as under :-

#### Short term capital gains

	No of shares bought and sold	2,00,066
	Purchase amount	1,04,33,159
	Sales amount	1,17,81,189
	No. of transactions	222
	Gain	13,48,030
	Long term capital gains	
	No of shares bought and sold	9469
	Purchase amount	503397
	Sales amount	3487423
	No. of transactions	26
	Gain	2984062

4.1.3 In addition to this, as per the statement of trading in shares filed along with the return of income it is observed that assessee has speculated in various scrips thereby earning a speculative profit of Rs.1,10,469/-. The assessee has also traded in futures and options and earned a profit of 9,90,189/- and netted a brought forward speculation loss of Rs.5,29,282/-.”

Thereafter the AO by relying on number of case laws as well as after quoting Circular No. 4 of 2007 dated 15-06-2007 of the CBDT, held that the income arising from purchase and sale of shares is to be assessed as business income. Aggrieved, the assessee carried the matter in appeal. The first appellate authority

after considering the arguments of the assessee, held that the income in question is assessable under the head "Capital Gains". Aggrieved, the Revenue is in appeal.

3. The cross objection filed by the assessee is only to support the order of the first appellate authority.

4. We have heard Mr. S.K. Mohanty, learned DR on behalf of the Revenue and Mr. Pramod Kumar Parida, learned counsel for the assessee.

5. On a careful consideration of the facts and circumstances of the case, a perusal of the papers on record and the orders of the authorities below as well as the case laws cited, we hold as follows.

6. The assessee in this case has filed a paper book running into 47 pages. At page 10, the details of the shares which were sold and which gave rise to Long Term Capital gains, were listed out. A perusal of this list shows that in the case of Satyam Computers, the assessee held the shares from more than 12 years. In the case of Kitply Industries the shares were held from more than 10 years. In the case of Pidilite Industries and Radico Khaitan the shares were held for more than 13 years and 11 years. The shares of IFCI were also held for 11 years and 6 months. A perusal of the period holding, demonstrates that the assessee has acted as investor and has held these 12 scrips as an investor and not as a trader. Thus the income arising out of sale of these 12 scrips, in our humble opinion, is to be assessed only under the head "Long Term Capital Gains".

7. Coming to the sale of shares which resulted in Short Term Capital Gains, we do not find any intraday trading. In the case of SPIC shares the period of holding was more than 330 days. Similarly in many cases like Tata Tele, the period of holding was more than 200 days. Most of the shares, as pointed out by the

CIT(Appeals), were held for a period of 2 to 5 months. The assessee has offered the income from speculation and income from Futures and Options as business income. Keeping in view the facts of the case, we are of the considered opinion that the order of the CIT(Appeals) at para 5, which is extracted below, is to be upheld :

“5. Decision with reasoning:

5.1 I have considered the submissions of the representative and the stand taken by the A.O. As seen from the assessment order dated 31.10.2007 for A.Y. 2005-2006, the A.O. has accepted the claim of long term capital gain and short term capital loss in respect of shares which were taken delivery and sold through the demat account of the appellant. It is also seen that the appellant has shown speculation loss of Rs.5,29,282/- for A.Y. 2005-2006. Thus the A.O. did not assess the long term capital gain and short term capital gain under the head business for A.Y. 2005-2006. Merely because the appellant was having speculative business in shares, that does not mean that even the delivery based transactions of shares should be assessed under the head business. The Hon'ble Hyderabad Tribunal in the case of Shah-La Investments and Financial Consultants Pvt. Ltd. vs. Dy. CIT (2 SOT 371) held that there is no bar for the same assessee to do business in shares and hold some shares as investment. Further as contended by the representative, the appellant has no borrowed funds either as on 31.03.2005 or as on 31.03.2006 as per the balance sheet whereas the A.O. held in the Assessment order as [para 4.1.5] that the appellant borrowed loans for the purpose of doing share business which is totally incorrect. Further the appellant has brought to the notice of the A.O. by letter dated 15.10.2008 that the shares on which long term capital gain was offered were held for more than 3-5 years and the same are shown as investment in the balance sheet, but the A.O. held that only some shares were held for more than a month and other shares were held for a very short period. Even in respect of short term capital gain, the appellant had already submitted before the A.O. they were held for atleast 2-5 months and further submitted the details of demat account to prove this claim. But the A.O. merely held that the shares were held for very short period except very few shares which were held for more than a month. Thus, I find that the A.O. did not appreciate the facts of the case correctly. As seen from the details of long term capital gain working submitted by the appellant, some shares were held even for more than 12 years. For eg. The

appellant purchased shares of Satyam Computer in the year 1992 and the same were sold during this year after holding them for more than 12 years. Similarly, some other shares were held for more than 8 years and only shares of Mc.Dowell company were held for slightly more than a period of one year. All other shares were held for minimum of two years and maximum of 13 years. Thus, there is no reason to assess long term capital gain under the head business. Similarly for short term capital gain it is seen that most of the shares were held for more than a month and some shares were held even for more than 300 days like SPIC company shares. Most of the shares were held for more than 100 days while it is true that very few shares were held for less than 100 days. Thus, the finding of the A.O. is incorrect in as much as the remark that only few shares were held for more than one month. When the A.O. has accepted the balance sheet of the last year in which these shares were shown as investment, he cannot change the opening investment as stock-in-trade during this year, otherwise it would be contrary to the stand taken by the A.O. himself in the earlier year. Further it is seen that the appellant has paid STT in respect of share transactions as applicable to the investment.

5.2 Further the Hon'ble ITAT in the case of Gopal Purohit vs. JCIT (29 SOT 117) held as under in para 8.1

“In our view, the legislative change of this nature, whereby no change has been made in respect of nature and modus operandi of such share transactions, resulting into any advantage cannot be taken away by the Revenue Authorities in this manner and in these circumstances, we are of the view that, principle of consistency, though it is an exception to the principle res judicata must be applied here. It is further so because the payment of securities transaction tax is mandatory i.e. whether an assessee earns the profit or not or suffers a loss and by imposition of such tax, the Legislature has not given any benefit to individual(s) entering into these transactions. Thus, in our view, in the facts and circumstances of the case, on the basis of principle of consistency alone, the action of the Revenue Authorities is liable to be quashed.”.

5.3 Further, the Hon'ble Mumbai ITAT in the case of Janak S. Kangwala vs. ACIT (11 SOT 627) held as under on the principle of consistency and the issue of magnitude of transactions:

“ The mere volume of transaction transacted by the assessee would not alter the nature of transaction. It is an established principle that income is to be computed with regard to the transaction. The transaction in whole has to

be taken into consideration and the magnitude of the transaction does not alter the nature of transaction. Though the principle of res judicata does not apply to the income-tax proceedings as each year is an independent year of the assessment but in order to maintain consistency, it is a judicially accepted principle that same view should be adopted for the subsequent years, unless there is a material change in the facts. Their lordships of Hon'ble Supreme Court in the Radhasoami Satsang v CIT [1992] 193 ITR 321 have categorically held as under :

“.....Strictly speaking, resjudicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year, where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

The same view has been taken by the Hon'ble Delhi Court in CIT V. Neo Poly Pack (P) Ltd. [2000] 245 ITR 492.

In the facts of the present case, the assessee is holding the shares as investment from year to year. It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transaction of sale and purchase of shares in the preceding years have been held to be income from capital gains both on Long Term and Short Term basis. The purchase of shares is same as in the preceding years and the same merits to be accepted as Short Term Capital Gains. There is no basis for treating the assessee as a trader in shares, when his intention was to hold the shares in Indian companies as an investment and not as stock-in-trade. The mere magnitude of transaction does not change the nature of transaction, which are being assessed as income from Capital Gains in the past several years.”

5.4 When viewed in the light of the above jurisdictional Tribunal decisions and for the other reasons given above, I find that the claim of the appellant has to be accepted. Accordingly, the A.O. is directed to accept the claim of short term capital gain and long term capital gain. The A.O. shall withdraw rebate allowed u/s.88E of the I.T. Act by order u/s. 154 dated 03.02.2009 so far as it relates to capital gain.”

7. In the result, the appeal of the Revenue is dismissed.
8. As far as the cross objection is concerned, it has been filed just to support the order of the CIT(Appeals). Hence it require no separate adjudication. Accordingly, the cross objection is dismissed.
9. In the result, the appeal filed by the Revenueas well as the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 25<sup>th</sup> February , 2011.

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

Sd/-  
(J. Sudhakar Reddy)  
Accountant Member

Mumbai,  
Dated: 25<sup>th</sup> February, 2011.

Wakode

Copy to :

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

(True copy)

By Order

Asstt. Registrar,  
ITAT, Mumbai.