

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'D', MUMBAI

**BEFORE HON'BLE PRESIDENT SHRI G.E.VEERABHADRAPPA
AND SHRI D.K.AGARWAL (JM)**

**ITA No.4325/Mum/2010
(Assessment Year:2006-07)**

Assistant Commissioner of Income Tax 19(3), Room No.305, 3rd Floor, Piramal Chambers, Parel, Mumbai-400012.	V/s	Mrs.Rajpal Sethi, Jewel Arcade, 2 nd floor, Waterfield Road, Bandra (W), Mumbai-400050 PAN: ABDPS0231M
APPELLANT		RESPONDENT

Date of Hearing	:	5.1.2012
Date of Pronouncement	:	18.1.2012

Appellant by : Shri C.G.K.Nair
Respondent by : Dr.P.Daniel

ORDER

PER D.K.AGARWAL (JM)

This appeal preferred by the Revenue is directed against the order dated 15.3.2010 passed by the Id. CIT(A) for the assessment year 2006-07

2. Briefly stated facts of the case are that the assessee an individual derives income from house property, business income, long term and short term capital gain and other sources, filed return declaring

total income at Rs.86,78,840/-. During the course of assessment proceedings, the AO on the basis of the details filed by the assessee noticed that for the purpose of earning long term capital gain and short term capital gain, the assessee had entered into a large number of transactions of purchase and sale of shares of various companies. He further noted that the frequency of purchase and sale was very high and volume thereof was large. He further observed that in some cases, the period of holding was a few days only. He further noted that transactions where no delivery was taken, but were squared up on the same day the profit/loss was declared as business income, while in respect of shares of which delivery was taken the surplus/short fall was declared as short term capital gain/long term capital gain depending upon the period of holding of such shares. The AO on the basis of analysis and details observed that the assessee was not interested to wait for a long period of time for profits and had sold some shares even at a loss. He also noted that in earlier years too i.e. in assessment years 2003-04, 2004-05 & 2005-06 the trend was the same. He was accordingly of the view

that considering the number of script transacted, the amount involved, and number of transactions undertaken, it was clear that the assessee was not an investor but a trader and had entered into the share market for the purpose of earning quick profit only. Accordingly a show cause notice was issued by the Assessing Officer asking the assessee to explain as to why capital gain declared by him in the return of income filed be not treated as business income. In response the assessee filed a detailed reply before the AO vide his letter dated 21.11.2008 interalia stating therein, that his object was to act as a prudent investor and earn regular income by way of dividend which was evident from his return showing earning of dividend income in the year under assessment itself where he has earned dividend from around 600 companies amounting to Rs.5,13,734/-. The assessee further submitted that the bifurcation between long term and short term capital gain was done on the basis of period of holding of shares transacted. The assessee submitted that his intention was that of making of investment and not trading, and the same was highlighted by the fact that during the year he

had sold some shares which were held by him for more than 5-10 years and above also. The assessee further submitted that where ever delivery of the shares was not taken but transactions were squared up on the same day the resultant income/loss was declared as business income/business loss (speculation) only. The Assessing Officer however not being satisfied with the submissions filed and for the reasons mentioned in page 29 of the detailed assessment order, held that the assessee is a trader in shares and consequently he treated capital gain, both long term, as well as short term declared in the return of income filed as business income and taxed accordingly. In support of the conclusion that assessee was not an investor but a trader in shares, the Assessing Officer has also relied upon Instructions No. 1827 dated 31.8.1989 issued by CBDT as well latest CBDT Circular No. 4/2007 dated 15.5.2007, both these circulars he has reproduced in the order. In addition, he has relied upon various case laws of different courts including Hon'ble Apex Court/ High Courts and different benches of the Tribunal. The AO has set out 12 criteria in the assessment order on the basis of which according to

him, after analyzing the facts of the case, the assessee was held to be a trader and not an investor, thereby treating all the capital gains, long term capital gains and short term capital gains as business income. The AO accordingly held the capital gains (long term capital gains and short term capital gains) as business income and assessed the total income of the assessee at an income of Rs.1,18,64,040/- vide assessment order dated 23.12.2008 passed u/s 143(3) of the Income Tax Act, 1961 (in short the Act).

3. On appeal, the Id. CIT(A) after examining the chart showing the period of holding of shares both for earning long term and short term capital gain observed that the assessee's case stands squarely covered by the ratio of the decision of the Tribunal in the case of Gopal Purohit Vs. JCIT reported in (2009) 20 DTR (Mumbai)(Trib) 99 which has since been approved by the Hon'ble Bombay High Court and accordingly held that the appellant cannot be held to be a trader in shares with respect to delivery basis transaction. He, therefore, directed the AO to accept the appellant's claim of short term and long term capital gain on share transaction whether the delivery

has been taken or given and Security Transaction Tax has been paid. Other transactions involving non-delivery speculative transaction will be treated as forming part of speculation business and will be taxed as such and accordingly allowed the assessee's appeal.

4. Being aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us challenging in all the grounds the direction of the Id. CIT(A) to accept the short term capital gain and long term capital gain on share transactions where the delivery has been taken or given and Security Transaction Tax has been paid.

5. At the time of hearing, the Id. DR while relying on the order of the AO submits that the Id. CIT(A) was not justified in holding that the assessee is not a trader in shares with respect to delivery based transactions and in directing the AO to accept the appellant's claim of short term and long term capital gain on shares transaction where the delivery has been given or taken and Security Transaction Tax has been paid. He, therefore, submits that the order

passed by the Id. CIT(A) be reversed and that of the AO be restored.

6. On the other hand, at the outset, the Id. Counsel for the assessee submits that the assessee's case is squarely covered by the recent decision of the Tribunal in the case of assessee's father in ACIT V/s Shri Satpal Singh Sethi in ITA No.3650/Mum/2010 (AY:2006-07) dated 30.9.2011 wherein the Tribunal on the similar facts while upholding the order of the Id. CIT(A) accepted the assessee's stand. He also placed on record the copy of the said order of the Tribunal and also filed the copy of the assessment order for the assessment year 2004-05 in the case of assessee. He, therefore, submits that the order passed by the Id. CIT(A) be upheld.

7. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that there is no dispute that the Tribunal on the similar facts, in the case of assessee's father Shri Satpal Singh Sethi (supra), following the decision of the Hon'ble Bombay high Court in CIT V/s Darius Pandole (2011) 330 ITR 485 (Bom) and the decision in CIT V/s Gopal Purohit (2011) 336 ITR 287

(Bom) held that "...since in the earlier assessment years, the department has accepted the income from shares as falling under the head 'capital gains', in our considered opinion and respectfully following the above judgments, that the Id. CIT(A) was justified in upholding the assessee's stand."

8. Applying the ratio of the above decisions to the facts of the present case, we find that the AO in the case of assessee while making the assessment for the assessment year 2004-05 has accepted the short term capital gain and the long term capital gain on sale of shares vide order dated 22.12.2006 passed u/s 143(3) of the Act, therefore, we are of the view that the assessee's case is squarely covered in favour of the assessee by the decision of the Tribunal in the case of Shri Satpal Singh Sethi (supra). This being so and in the absence of any distinguishing features or contrary material brought on record by the Revenue, we respectfully following the consistent view of the Tribunal and the ratio of the decision of the Hon'ble Jurisdictional High Court in the aforementioned cases, hold that the Id. CIT(A) was fully justified in directing the AO to accept the appellant's claim of short term

capital gain and long term capital gain on share transactions, where the delivery has been taken or given and Security Transaction Tax has been paid. The grounds taken by the Revenue are therefore Rejected.

9. In the result, the Revenue's appeal stands dismissed.

Order pronounced in the open court on 18th Jan.,2012.

Sd

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(G.E.VEERABHADRAPPA)
PRESIDENT

(D.K.AGARWAL)
JUDICIAL MEMBER

Mumbai, Dated 18th January,2012.

SRL:

Copy to:

1. Appellant
2. Respondent
3. CIT Concerned
4. CIT(A) concerned
5. DR concerned Bench
6. Guard file.

BY ORDER

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ASSTT. REGISTRAR,
ITAT, MUMBAI