

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Ramlal Negi (JM)

I.T.A. No. 2046/Mum/2015
(Assessment Year 2010-11)

The ITO-33(2)(2) Room No. 406 C-13, Prataykshkar Bhawan, BKC Mumbai-400 051. (Appellant)	Vs.	Smt. Kalpana Khandelwal C-225, Bonanza Industrial Estate Ashok Nagar, Kandiwali (E), Mumbai-400 067. (Respondent)
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C.O. No. 214/Mum/2016
(Assessment Year 2010-11)

Smt. Kalpana Khandelwal C-225, Bonanza Industrial Estate Ashok Nagar, Kandiwali (E), Mumbai-400 067. (Appellant)	Vs.	The ITO-33(2)(2) Room No. 406 C-13, Prataykshkar Bhawan, BKC Mumbai-400 051. (Respondent)
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PAN No. AGRPK6518L

Assessee by	Shri Anant Pai
Department by	Shri Rajesh Kumar Yadav
Date of Hearing	11.5.2017
Date of Pronouncement	02.6.2017

ORDER

Per B.R. Baskaran (AM) :-

The appeal of the revenue and the cross objection of the assessee is directed against the order dated 19-01-2015 passed by Ld CIT(A)-45, Mumbai and it relates to the assessment year 2010-11. The revenue is aggrieved by the decision of Ld CIT(A) in holding that the gains arising on sale of shares is assessable as Capital gains only. The assessee has filed cross objection taking an alternative plea that if the decision of the AO is upheld, then the brought

forward losses arising on sale of shares should also be treated as business loss and set off be given.

2. We heard the parties and perused the record. The assessee is an individual and registered as sub-broker with SEBI. During the year under consideration, the assessee made gains on sale of shares and accordingly declared short term capital gains of Rs.84,57,551/- and long term capital gain of Rs.48,41,899/-. The AO did not accept the same as Capital gains and accordingly assessed both the incomes as business income of the assessee. The Ld CIT(A), however, reversed the decision of the AO and hence the revenue has filed this appeal.

3. The Ld D.R submitted that the assessee has been indulging in the activities of purchase and sale of shares as a trader. He submitted that the assessee's return of income has been accepted in the earlier years u/s 143(1) of the Act and hence the principles of consistency would not apply, as the AO has not applied his mind in the earlier years. He further submitted that more than 50% of the shares shown in Short term capital gains have been held for less than 30 days. The dividend declared by the assessee was also very minimal. The assessee has also borrowed funds for making investments. He submitted that the Hon'ble Kerala High Court has confirmed the assessment of Capital gains as business income under identical set of facts in the case of Equity Intelligence India (P) Ltd (2015)(376 ITR 321). Accordingly the Ld D.R submitted that the Ld CIT(A) was not justified in reversing the order of the AO.

4. The Ld A.R, on the contrary, submitted that the assessee has acted as an Investor only in these share transactions. He submitted that the assessee has declared capital gains in an identical manner in the earlier years and the same has been accepted in the past. He submitted that the CBDT has issued Circular

No.6/2016 dated 29-02-2016, wherein it is stated that the Long term capital gains declared by the assessee shall not be put to dispute by the AO. It was further stated that the stand so taken by the assessee should not be allowed to be changed. He submitted that the assessee has declared long term capital gains on sale of shares in the past also and during the year under consideration also. Accordingly he submitted that the Ld CIT(A) was justified in reversing the decision of the AO in respect of Long term capital gains.

5. In respect of Short term capital gains, the Ld A.R submitted that though the assessee had held more than 50% of shares for less than 30 days, the assessee has incurred loss of Rs.2.55 lakhs from those shares. He submitted that, out of short term capital gain of Rs.84.57 lakhs, the assessee has made a gain of Rs.74.77 lakhs in respect of shares held for more than 90 days. Accordingly he submitted that majority of shares have been held for more than 90 days and the assessee has sold only those shares, where the risk of loss was more. He submitted that the assessee had borrowed funds on a small scale only. He submitted that the Hon'ble Bombay High Court has held in the case of Gopal Purohit (ITA No.1121 of 2009 dated 06-01-2010) that a person can be both trader and investor. He submitted that the assessee has treated the shares as investment only in its books of account and there is no repetition of transactions also.

6. Having heard rival contentions, we are of the view that the decision taken by Ld CIT(A) does not call for any interference. We have noticed that the CBDT, in its circular, has advised the assessing officers not to disturb long term capital gains. In respect of short term capital gains, we notice that the major portion of gains (88.50%) was made in respect of shares held for more than 90 days. Though more than 50% of the volume of shares was held for less than 30 days, the assessee has actually incurred loss there from, meaning thereby, there is

merit in the contention of the assessee that the assessee was constrained to sell shares in order to minimise the loss. The assessee has also submitted that there is no repetitive transaction and further she has also earned considerable brokerage income. In the case of Gopal Purohit (supra), the Hon'ble Bombay High Court has held that a person can act both as trader and investor. In the instant case, the assessee is a share broker and there is no case of trading in shares. In the past also, the assessee has declared gains arising on sale of shares as Capital gains only.

7. It is a well settled proposition that the question as to whether a person has acted as a trader or as an investor in respect of share transactions, has to be decided on the basis of various factors listed out by the CBDT and Hon'ble Courts. One of the main criteria is the intention of the party at the time of purchase of shares. Hence each case has to be decided on the basis of facts available therein. The facts available in the case before Hon'ble Kerala High Court would have shown that the said assessee was acting as a trader. On the contrary, in the instant case, we notice that the assessee has all along treated the shares as her investments only. Further various factors discussed in the preceding paragraph also, in our view, supports the case of the assessee. Accordingly we are of the view that the decision taken by Ld CIT(A) on this issue does not call for any interference.

8. In the cross objection, the assessee has raised an alternative contention. The same requires adjudication only if the order passed by Ld CIT(A) is reversed by us. Since we have upheld the order passed by Ld CIT(A) on the impugned issue, the Cross objection filed by the assessee would become infructuous.

9. In the result, the appeal filed by the revenue and the cross objection filed by the assessee are dismissed.

Order has been pronounced in the Court on 2.6.2017.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 2/6/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai