

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member**

ITA No.1270/Hyd/2015
(Assessment Year: 2008-09)

Smt. Anju Gaggar Vs Asstt. Commissioner of
Hyderabad Income Tax, Circle 10(1)
PAN: ADJPG 5923 C Hyderabad
(Appellant) (Respondent)

For Assessee : Shri Mohd. Afzal
For Revenue : Smt. Suman Mali, DR

Date of Hearing: 20.12.2017
Date of Pronouncement: 21.03.2018

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2008-09. In this appeal, the assessee is aggrieved by the order of the learned CIT (A)-VI, Hyderabad, dated 25.08.2015 confirming the assessment order dated 29.03.2014.

2. Brief facts of the case are that the assessee, an individual, carrying on the business of trading in shares and deriving rental income, filed her return of income on 30.07.2008 declaring total income of Rs.4,34,76,040. The assessment was completed u/s 143(3) on 13.12.2010 by treating the income of Rs.4,34,76,040 earned from purchase and sale of shares as "business income" as against "Short Term Capital Gain" declared

by the assessee. The issue was carried up to the ITAT and the Tribunal had restored the matter to the file of the AO with a direction to re-examine the issue.

3. Consequently, the AO issued notices u/s 143(2) and 142(1) of the Act to the assessee asking the assessee to furnish full and complete facts and the details and evidence in the light of the directions of the Tribunal with respect to the frequency and volume of the transactions, extent of loans used for share transactions, entries in books at the time of purchase, period of holdings, practice followed in preceding and subsequent years, comparable cases, delivery based or otherwise etc., and to justify her claim for concessional rate of taxation u/s 111A of the Act. In reply thereto, the assessee submitted copies of the ledger a/c, bank statements, contract notes and De-mat statement for the financial year 2007-08 and a chart showing the details of shares purchased and sold along with their holding period. After considering the details, the AO observed that in A.Y 2006-07, the assessee had declared short term capital gain on sale of shares and in A.Ys 2007-08, 2009-10 and 2010-11, she had declared long term capital gain on sale of shares. He also observed that during the relevant financial year, the assessee had purchased majority of shares during that year itself and that the maximum period for which any shares were held by the assessee is 213 days (in the case of Aravind Chemicals) and minimum period is 3 days (in the case of Kilburn Chemicals). The AO also observed that the assessee has purchased the shares of certain companies on a daily basis and has also sold some shares on daily basis to earn maximum profit and therefore, such transactions reveal periodic

pattern in selecting the time of entry and exist in each scrip giving it a flavor of trading in shares. He examined the ledger a/c of the assessee to verify the recording of such transactions in the books of account of the assessee and noticed that the share account is recorded as “profit (loss) on sale of shares” which after various debits (losses) and credits (profits), records a net profit of Rs.4,34,79,816 in the shares account. He also observed from the books of account that the assessee has borrowed interest free loans from M/s. Inani Commodities & Finance Ltd amounting to Rs.1.90 crores as on 9.4.2007, which was in turn given to M/s. Inani Securities Ltd for purchase and sale of shares during the year and that the assessee has not only returned the loan amount on 20.11.2017 but also deposited Rs.3.80 crores with the said company as on 20.11.2007 and therefore, the assessee had a credit balance of Rs.1.80 crores with M/s. Inani Commodities and Finance Ltd which is shown in the balance sheet as loans and advances given earned a profit. The AO also noticed that the ITAT, in the case of Smt. Geeta Devi Gaggar (family member of the assessee), has held that such transactions cannot be considered as investments in shares; and that in the case of Smt. Sunitha Devi Gaggar (family member of the assessee) also, it was held that the transactions partake the character of business activities. Therefore, the AO treated the income from sale of shares as business income and taxed it accordingly. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO and the assessee is in second appeal before us.

4. The learned Counsel for the assessee reiterated the submissions made before the authorities below, while the learned DR, supported the orders of the AO and the CIT (A).

5. Having regard to the rival contentions and the material on record, we find that the assessee has been purchasing and selling the shares from the A.Y 2004-05 onwards and has been recording them as investment in her books of account and has been reporting capital gains on the sale of shares, either short term or long term as the circumstances warrant. According to the assessee, the assessee should be considered as an investor as she has been considered as investor in the earlier as well as subsequent years. Further, it was also submitted that the investments are valued at cost and not at cost on market value whichever is higher is required for valuation of the stock-in-trade as per Accounting Standard-13. It is also submitted that all the transactions of the purchase of shares are delivery based and that the frequency of the transaction cannot be the only basis for determining the nature of the transaction and that it has to be determined on the totality of the facts and circumstances of the case. Without prejudice to the above contentions, it was also submitted that only in the case of 11 transactions where the shares were purchased and sold on the same day, the assessee can be considered as a trader and not otherwise. The assessee had relied upon various decisions including the decision of the Hon'ble Bombay High Court in the case of CIT vs. Gopal Purohit reported in 336 ITR 287 and various other decisions of the Tribunal in support of her contention.

6. We find that though the assessee has been recording the shares as investments in its books of account and has been offering short term/long term capital gains on purchase and sale thereof in respective A.Ys, the assessment u/s 143(3) was done only in the years 2004-05 and 2010-11. For all other years, the assessments were completed u/s 143(1) of the Act. Therefore, it cannot be said that the revenue has been accepting the assessee to be an investor in all the earlier and subsequent A.Ys. Therefore, the principle of uniformity and consistency cannot strictly be applied in the case of the assessee for the relevant A.Y before us.

7. On the merits of the issue, we find that the AO has verified the transactions and has clearly brought out in his order that the assessee has been purchasing the shares of various companies during the relevant A.Y and has sold them within a short span of days and the average period of holding of shares is only 58 days. Even the assessee admitted that some of the shares are being purchased and sold on the very same day and without prejudice to her contention that they are investments, has accepted only such transactions can be considered as trading in shares. We find that in the case of Shri Gopal Purohit vs. Jt. CIT, reported in (2009) 122 TTJ 0087 (Mum-Trib.), the Coordinate Bench of the Tribunal at Mumbai had held that the assessee can have both the portfolios of investments as well as trading and the frequency of the transactions alone will not determine the nature of the transactions to be trading. This decision has been upheld by the Hon'ble Bombay High Court as well as the Hon'ble Supreme Court of India. In fact, the Tribunal in the assessee's own case had also referred the matter back to the AO with a

direction to consider the multiple parameters such as intention, profit motive, the turnover, volume, magnitude, frequency, source of funds-own or borrowed, day-trading delivery based or otherwise etc. for concluding whether the transactions were for investment or trading. The assessee had stated that all the shares are delivery based and that they have been valued at cost and not at cost or market price whichever is higher. The AO has considered all the transactions to be of trading only. The transactions of purchase and sale of shares during the relevant A.Y, within a short span of time by utilizing the borrowed but interest free fund, by the assessee should be considered as a trade. Therefore, in our opinion, the assessee can be considered as a trader only. All the decisions relied upon by the learned Counsel for the assessee are to be the effect that were the shares are held as investment, then the income from sale of such shares should be considered as capital gains only. The Coordinate Bench of the Tribunal in the case of Ms. Geeta Devi Gaggar vs. JCIT in ITA No.1380/Hyd/2010 and Smt. Sunita Devi Gaggar vs. ACIT in ITA No.910/Hyd/2011 have considered similar transactions and has confirmed the findings of the AO and the CIT (A) that the assessees therein were engaged in trading of shares. The relevant paragraph in the case of Ms. Geeta Devi Gaggar (ITA No.1380/Hyd/2010) is reproduced hereunder:

“7. We have considered the issue. Even though the department has accepted the assessee's incomes on the gains from the shares as short term capital gain in earlier year and also in later year, the facts in the impugned year do indicate that the transaction cannot be considered as investment in shares. The assessee has offered the entire income earned on short term capital gains to the extent of Rs.35,35,263/- under the head "Income from Capital Gain" and sub-head "Short-term Capital Gain". However, when pointed out about the

transactions of F & O, the assessee admitted that the amount of Rs.5,97,412/- can be considered as business, as there is no delivery of the shares. It was further pointed out that 24,900 shares of Cybermedia were purchased and sold on the same day. The learned Counsel also admitted to that extent that this was also can be treated as business. Hence, capital gain of Rs.3,75,107/- also has be treated as business income. Considering these facts, we are of the opinion that rest of the transactions also do come in trading transactions. There can not a situation where part of transaction can be treated as business and other as investment. As can be seen from the details, assessee has invested in the months of July starting from 14.07.2005 to 25.07.2005 in various shares and sold them immediately in the next 2-3 months. The period of holding has never exceeded 150 days. So, it cannot be considered that assessee's intention is to invest in shares as there is large turnover within a short period. Not only that the assessee has exited the shares of 'Indust Mete' on 01.09.2005 and again purchased some of shares on 05.09.2005 which have been sold immediately in the same month partly and later the balance. Not only in the above share, even in the case of 'MULTI-ARC IN' assessee has purchased large number of shares in the month of July,05 between 19th and 25th, and sold them by month of August and November '05 in a span of 130 days and again purchased large number of shares on 10.02.2006 to be sold again on 21.03.2006. As seen from the de-mat statement, except in the case of Saksoft Limited (200 shares) there is no closing balance in any of the shares purchased. These indicate that the intention is not to make investments for long periods. In these circumstances, we agree with the findings of the Assessing Officer and CIT(A) that assessee's transactions are in the nature of trade and accordingly, the orders of the authorities are upheld. Consequently, Assessee's grounds are rejected”.

8. Similarly, in the case of the assessee before us also, the relevant financial year is 1.4.2007 to 31.3.2008. Before 1.4.2007, the shares purchased by the assessee were of Aravind Chemicals i.e. on 23.3.2007 to 26.3.2007, GVK Power on 30.03.2007, Zee News on 30.03.2007, which were sold on 8.10.2007 to 25.10.2007, on 7.7.2007 and on 7.5.2007

respectively. Thus, the holding period of all the above shares is 213, 99 and 38 respectively. During the relevant financial year, there were repeated purchase of same scrip and sale thereof immediately, almost on daily basis to take advantage of the market fluctuations. Therefore, respectfully following the decisions of the Coordinate Benches in the cases of Geeta Devi Gaggar and Sunitha Devi Gaggar, both of whom are also family members of the assessee, we do not find any reason to interfere with the order of the CIT (A). In view of the same, the assessee's appeal is dismissed.

9. In the result, assessee's appeal is dismissed.

Order pronounced in the Open Court on 21st March, 2018.

Sd/-
(S.Rifaur Rahman)
Accountant Member

Sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 21st March 2018.

Vinodan/sps

Copy to:

- 1 Shri Mohd. Afzal, Advocate, 11-5-465, Sherson's Residency, Flat No.402, Criminal Court Road, Red Hills, Hyderabad 500004
- 2 The ACIT, Circle 10(1) IT Towers, Hyderabad
- 3 CIT (A)-VI Hyderabad
- 4 Pr. CIT – 6, Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order