

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

**Before: Shri Pramod Kumar, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 69 /Ahd/2020
Assessment Year 2012-13**

Shri Jitendra Manilal Malkan, 31, Goyagate Society, R.V. Desai Road, Pratapnagar, Vadodara-390001 PAN: ACZPM4387K (Appellant)	Vs	The ITO, Ward-3(1)(1), Vadodara (Respondent)
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**Assessee by: Shri Jitendra Malkan, A.R.
Revenue by: Shri S.S. Shukla, Sr. D.R.**

Date of hearing : 13-04-2022
Date of pronouncement : 31-05-2022

ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeal-3), Vadodara in Appeal No. CIT(A)-Vadodara-3/10869/2015-16 vide order dated 25/11/2019 passed for the assessment year 2012-13.

2. The assessee has raised following grounds of appeal:-

“Ground No. 1 :

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the A.O.'s action of disallowance of setoff under section 70 of the Income Tax Act, 1961 of share trading business loss against income from profession without giving the opportunities of being heard to justify the same as business loss. The appellant prays that the disallowance of set off on account of treating share trading as short term capital loss may please be deleted.

Ground No. 2 :

Without prejudice to Ground No. 1 and on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in considering the A.O.'s action of treating the share trading business loss of Rs. 12,96,828/- as Short Term Capital Loss. The appellant prays that the addition on account of the same may please be deleted.

The Appellant craves leave to add, alter, amend or delete any of the grounds as & when advised.”

3. The brief facts of the case are that the assessee is an advocate by profession and offers income for taxation mainly under the head income from profession. During the year and the consideration, the assessee had indulged in share trading activity and incurred loss of ₹ 12,96,828/- which has been set-off against his income from profession by treating the same as business loss. However, the Ld Assessing Officer treated the said loss as short-term capital loss on the ground that the shares were held as investment as the assessee was not in the business of purchase and sale of shares and disallowed the claim of set-off of said loss against income from profession. While disallowing the said loss, the AO allowed the assessee to carry forward the short term capital loss of ₹ 12, 96, 828/-.

4. The assessee filed appeal before CIT (Appeals), against the aforesaid addition. The assessee relied upon Circular no. 4/2007 issued by CBDT dated June 15, 2007, wherein the Board has directed the Department consider the sale of shares held for less than one year as business income. The assessee submitted that it is the first year of share trading and shareholding period is very short. He also contended that the transactions were very frequent. The assessee generated income from share trading business and also incurred certain expenses in relation to the same. Accordingly, in view of the above Circular, the assessee should be allowed the benefit of set off of short-term capital loss against professional income. The learned Ld. CIT(Appeals), however rejected the assessee's appeal on the ground that that as per the Circular quoted above, one of the conditions to treat the share transaction as business income was that "*the quantum of profit made from the sale was significantly higher than the dividend earned by the taxpayers then this indicates that the main purpose of the taxpayer is to earn profit*". However, in this case, no such details of shares transacted and dividend earned on the shares is provided by the assessee. Further in the instant case, the assessee has not earned any profit. Hence there is no question of fulfilling the above conditions. The learned CIT (Appeals) further observed that another condition as per the Circular is frequent transactions, substantial scale of activities and ratio of sale to purchase to indicate that the assessee was in the business of buying and selling of shares. Here, the assessee has not furnished any such details establishing the volume of such large-scale transaction in shares. Therefore, the main source of income of the assessee is from profession as advocate only and dealing in shares was only with a view of investment since it does not involve large-

scale activity. Accordingly, the CBDT Circular referred to above is not applicable in the instant facts. The CIT (Appeals), accordingly dismissed assessee's appeal and held that the claim of set-off of business loss of ₹ 12, 96, 828/- cannot be allowed against income from profession and held that AO was correct in treating the loss on sale of shares as short-term capital loss.

5. Before us, the assessee reiterated the submissions made before lower authorities and drew our attention to page 37 of paper book (summary of profit and loss in F&O transactions) and submitted that it is evident that he never intended to hold shares by way of investment. The assessee reiterated that the period of holding of each security is very short and the transactions are very frequent. The fact that the assessee has used his own funds for purchase of shares or has reflected shares as investment in the balance sheet cannot solely be a ground to treat loss on purchase and sale of shares as capital loss. In response, the learned DR drew our attention to para 4.2.2 of assessment order wherein the AO has observed that there assessee has reflected the shares as "investment" in the balance sheet. He further submitted that the assessee has taken delivery of shares which itself indicates that shares were primarily bought for investment purposes. The learned DR submitted that in the assessee's own books of accounts, shares have been reflected as "investment". Hence the assessee has himself treated purchase of shares as an investment. For this purpose, the assessee has employed his own capital which also indicates that the intent was to hold shares as investment. Further, in the tax audit report the assessee has not taken sale of shares as part of turnover. Therefore, the learned CIT (Appeals) was correct

in holding that loss in shares qualified as short-term capital loss and could not be set off against income from profession of the assessee.

6. We have heard the rival contentions and perused the material on record. We note that at page 38 – 39 of paper book, the assessee has given script -wise trading summary for FY 2011 – 12. On perusal of the same, it is observed that during the year the assessee had purchased 34 different scripts and out of which he had sold 32 scripts and did not sell only two scripts (Bombay Rayon fashion and Central Bank of India). Further, out of 32 scripts sold by the assessee during the year, 29 scripts were completely sold while three scripts were partly sold. From the assessee's conduct, it is evident that the shares were not purchased for purpose of holding them as investment and the fact that most of the shares were sold by the assessee during the first itself indicates that the assessee intended to purchase and sell shares as business activity and not to hold shares on long-term basis for earning capital gains or earning dividend income. The CBDT has also issued guidelines for assessing officers on tests for distinction between shares held as stock-in-trade and shares held as investment vide office memorandum, dated 13.12.2005 [F. No. 149/287/2005-TPL] and one of the criteria mentioned therein is whether, the purchase is made solely with the intention of resale at a profit or for long-term appreciation and/or for earning dividends and interest and also the typical holding period for securities bought and sold. We see that in instant facts, almost all the shares which the assessee purchased during the year were sold by him. As noted above, out of 34 stocks purchased during the year, the assessee sold 32 of those scripts, which is a clear indicator that the intention at the time of purchase of scripts was to sell them at a profit. On the issue that the assessee has employed his

own capital or reflected shares as investment, we note that in the case of **CIT v Naishad I. Parikh [2013] 39 taxmann.com 191 (Gujarat)**, the Gujarat High Court held that where assessee claimed share trading and future options losses and further, assessee had substantiated entire transactions by furnishing valid and statutorily accepted documents, **merely debiting directly these items in capital account instead of in profit and loss account and, not routing share trading account through audited account under section 44AB, could not be a ground to disregard legally acceptable claim of assessee.** In our considered view, therefore, the assessee has been able to substantiate that the shares were purchased for the purpose of trading and earning profit and not for purpose of holding them as investment to earn capital gains / dividend income. This is this is evident from the fact that during the first year itself, almost all of the scripts purchased by the assessee were sold by him. Respectfully following the decision of Gujarat High Court in the case of Naishad I. Parikh *supra*, we hold that the Learned CIT (A) has erred in facts and law in holding that the loss from sale of shares was short-term capital losses and hence not eligible for set off against income from profession of the assessee.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31-05-2022

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad : Dated 31/05/2022

आदेश क ितिलफ अ ेषत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order