

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH,  
KOLKATA**

Before: **Shri M.Balaganesh, Accountant Member** and  
**Shri S.S.Viswanethra Ravi, Judicial Member**

**ITA No. 2200/Kol/2014**  
A.Y 2011-12

**Income Tax Officer** ... Appellant  
**Ward 36(2), Kolkata**

Vs

**M/s. Sri Ram Commercial Co.** ... Respondent  
PAN:AAMFS 4086Q

Appearances by:  
Shri Sallong Yaden, Addl.CIT, Id.Sr.DR for the  
Shri Kalyan Acharya Bhaduri, Advocate, Id.AR for the assessee

Date of hearing : 30-01-2017  
Date of pronouncement : 13-04-2017

**O R D E R**

**Shri S.S. Viswanethra Ravi, JM :-**

This appeal by the Revenue is against the order dt: 24-09-2014 passed by the Commissioner of Income Tax (Appeals)-XX, Kolkata for the assessment year 2011-12.

2. In this appeal the Revenue has raised the following grounds of appeal:-

*1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that income arising out of share transactions has to be assessed under the head "capital gain" as against the income assessed under the head "Income from business or profession" .*

*2. On the facts and in the circumstances of the case, Ld. CIT(A) erred in restricting the disallowances u/s 14A of the IT. Act, 1961 to Rs. 18,09,239/- as against the disallowances of Rs. 24,95,563/-.*

*3. On the facts and in the circumstances of the case, Ld. CIT(A) is not correct in accepting the fresh computation violating Rule 46A and thereby, allowing the disallowable expenditure even below the expenditure disallowed by the assessee in its return of income.*

*4. On the facts and in the circumstances of the case, Ld. CIT(A) is erred in allowing claim of partners interest for Rs. 6,71,719/- u/s. 40(b) of the IT. Act, 1961 despite the fact that the assessee has no income under the head "Income from business or profession" .*

*5. The appellant craves the leave to make any addition, alteration, modification of grounds at the appellate stage.*

3. Ground no.1 raised by the Revenue challenging the order of CIT-A in holding the income arising from share transaction under the head capital gain as against the 'income from business or profession by the AO.

4. The AO found that the assessee treated the profit on sale of investments as capital gain. Further in the return, the assessee has shown an amount of Rs.98,77,541/- as profit on sale of investment and credited to profit and loss account and claimed the same amount as exempt without filling the relevant column to claim exemption. The AO also observed that the Assessee has substantial amount of borrowed fund.

5. In explanation to the notice u/s.142(1) of the Act stated vide reply dated 11-11-2013, that the Assessee firm is engaged in the business of investment, lending and borrowing during the year under assessment. Further the Assessee submitted copy of FD pledge documents dated 24.08.2009 vide letter dated 19.11.2013, on perusal of the said document the AO opined the assessee availed overdraft against TDR for the purpose of business and overdraft facility was sanctioned

against for the purpose of business and not for earning income other than business. The AO show-caused the assessee why income derived from investment should not be treated as business income. In response, the assessee submitted its reply vide its letter dated 22.01.2014 as under-

*"1. The assessee has made investment in shares & securities for long term purpose and has treated the same "investments" in its accounts and not as "Stock-in- Trade". Stock-in- Trade is normally held for a short term period.*

*2. Whether a transaction is a trading transaction has to be judged from the frequency of transactions. In case of trading, the transactions of sale and purchase are quite frequent and the holding period of the stock is very short. The assessee's holding period of shares sold during the year profit from which has been treated as "Long Term Capital Gain" has been more than three years in all cases. Such transaction can, by no stretch of argument, be treated as trading or business activity.*

*3. The treatment in accounts by the assessee is an important factor to determine the nature of transactions. The assessee has treated its holding of share as "investments" in its accounts. The average period of holding in most of the cases is more than a year. The assessee has derived the income as capital gain after holding the shares for a long period. The assessee has not done frequent transactions of sale & purchase in the same shares amounting to trading with a view to make trading profit.*

*4. The test whether the shares have been held by the assessee as "asset" or "stock-in-trade" is one of the main test to determine the nature of the transaction. If the assessee has held the shares as investment the income from sale thereof can not be treated as trading or business income.*

*5. From the statement of "Long Term Capital Gains" filed by the assessee it is evident that the shares have been sold after holding for more than three years. Such transactions cannot be treated as transactions in the nature of business or trading activity. The holding period of shares itself shows that the same have been held for long term purposes and not for trading purposes, the intention being to earn long term capital gains.*

*In its final submission dated 30.01.2014, the assessee has stated as under -*

*" you will kindly observe that the assessee's holding period of investment in each case of sale is more than 3 years. The assessee has not resorted to any kind of trading in shares, which involved frequent purchase and sale activity, as clarified in our submission dt. 22.01.2014. Further to its submission dated 22.01.2014, the assessee submits that it has earned dividend income from investment in shares held for long period of time. Even in case of "short term capital gains", the holding period of shares is more than 8 months. The assessee's accounts show that it has not treated it inventory of shares & securities as "Stock- in trade" but has treated the same consistently as "Investments"; in its accounts which clearly proves its intention of not resorting to trading in shares. The assessee's accounting treatment is conclusive proof of its intention to hold the shares as "Investments". There is no evidence of frequent sale and purchase of shares or trading in them."*

6. The AO found submission of the assessee not acceptable for the reasons as under:

*(a) The firm was constituted for business purposes only; not for investment purpose.*

*(b) Nature of fund utilized suggest business venture.*

*(c) Tax Audit Reports Form-3CB different columns suggest business activities.*

*(d) Return filed by the assessee in the prescribed ITR applicable for business income.*

*(e) Relevant columns of the return did not reveal any investment income of Rs.98,77,541/- as exempt.*

*(f) The assessee plea that it has shown investment, not stocks is misnomer. What has been shown under the investment head is "Stocks" only.*

*(g) Expenses claimed in the P/L A/c are all related to business expenses only which are claimed as per the Act while computing the business income.*

*(h) The assessee's supplementary deed again confirms the business of investing in shares and securities.*

*(i) Instead of showing share trading business and pay tax @ 30% [the assessee has changed the head of income as investment income. But, the fact is that all these are old stocks- in- trade and claimed exemption which has no other basis.*

*(j) The assessee failed to substantiate the formation of firm for the purposes of investments only as all the transactions were made in the Demat A/c of the partners of the firm since the Demat A/c cannot be opened in the name of the firm. So, all the partners can easily have investments income without the constitution of the firm. So, the very constitution of the assessee firm has no locus standi.*

*(k) The assessee failed to substantiate its claim of expenses in the form of Rent, Salary & ages, Any other benefit to employees in respect of which an expenditure has been incurred, workmen and staff welfare expense, Any other rate, tax duty or cess, Audit fee Other expenses, Interest, Depreciation in its P/L A/c to earn investment income (exempt income). These expenses are business expenses and are not admissible for computation of income under any other heads of the income including the investment income.*

*Hence, all the above facts suggest that the assessee's income from shares is a business activity. Hence, income from the sale of shares is a business income and not investment income and should be under the head business at the rate of 30%.*

7. The AO treated the income on account of profit on sale of investments of Rs.98,77,541/- as business income of the assessee and all the expenses claimed are allowed.

8. Aggrieved by such order of the AO, assessee challenged the same before the CIT-A and contended before him that the profit on sale of shares of company after holding more than 1 year is to be assessed as long term capital gain. The assessee also submitted that it has not resorted to trading in shares and securities involving in frequent transactions of purchase and sale of shares to assess the profit as business income. The assessee also submitted that it has been consistently trading by holding of shares as investment and income therefrom as investment in their accounts and as such urged to treat the income from investment as long term capital gain. Submissions of the assessee before the CIT-A are reproduced herein below:

*During the course of the assessment proceedings the Learned Assessing Officer raised two issues. First, he raised the issue that why investment income should not be treated as business income. After considering the submission of the assessee the Learned Assessing Officer observed - 'the Assessee's plea that it has been shown as investment, not stock, is misnomer". According to him what has been shown as investment is actually stock. He also held since all the transactions were made in Demat account of the partners of the Firm and not in the name of the firm, (which is statutory requirement,) so, all the partners can easily have the investment income without the constitution of Firm. So the Firm has no locus standi. On the basis of the aforesaid observation in the order he has treated the investment income as business income. In this regard the assessee submits that the various tests to be applied in this connection as held by the various High Courts and the Apex Court are -*

*(i) The accounting treatment and the methodology of keeping the books followed by the assessee.*

*(ii) The Intention of the assessee to hold the shares as "Investment" or as "Stock-In- Trade" with intent to earn Investment Income or trading profit.*

*(iii) The frequency of transactions of sale and purchase by the assessee and period of holding the Investment -*

*(iv) Whether there is a real, substantial, continuous and systematic or organized course of activity or conduct of business with the set purpose of profit.*

*Applying the aforesaid principles the assessee's case is as explained below :*

*(a) The assessee had during the year under consideration sold certain shares through Stock Exchange Broker after holding them for 3 to 5 years. Such transactions of sale of shares were subject to payment of Security Transaction Tax.*

*(b) As per the provision of section 2(29B) profit earned on sale of shares of companies sold after holding for more than a year is assessable as Long Term Capital Gain. The assessee submits that it has not resorted to any trading In*

*share & securities involving frequent transactions of purchase and sale, profit from which alone can be assessable as "Business Income". It has been the consistent accounting treatment of the assessee to hold the shares as investment and income therefrom as investment income.*

*(c) The assessee has done few transaction of sale of shares in the months of June 2010 and July 2010 during the whole year after holding such shares for more than 3 to 5 years Thus there has not been any continuous, regular and substantial number of transactions of buying and selling warranting these to be treated as business or trading activity. Moreover in the current year there has not been a single transaction of purchase.*

*(d) In the past In assessments completed u/s. 143(3) of the IT. Act, investment in shares is treated as 'Investments' In the accounts and profit on shares sold after holding them for longer period and specially for more than a year are assessable as Long Term Capital Gains and not otherwise. The intention and motive of the assessee was to hold the investment in shares for long term and not to do any business or trading in them.*

*(e) Since assessee s treatment in the account is as investment, technicalities mentioned by the Assessing Officer, should not come in between. The Assessing Officer's suggestion that to avoid tax, the Income has been shown as capital gain, is not correct since type of transaction suggests that income from sale of shares is capital gain and not business.*

*(f) It is also pertinent to mention that during the previous assessment year 2010 - 2011 the Learned C. I. T (A) under similar circumstances and for the present assessee has held that income from sale of shares is investment income and not business income. A copy of the said order is made Annexure "A".*

9. The CIT-A while considering the submissions of assessee found that there was a limited frequency of transactions of shares and there was sale of shares in the months of June'10 and July'10 for the whole year after holding such shares for more than 3-5 years. Accordingly, he directed the AO to treat the same as profit earned on account of sale of shares as capital gain on investment. Relevant finding of the CIT-A on this issue reproduced herein below:-

*6. I have perused the assessment order and considered the submission of the appellant. So far the first issue is concerned, the AO found that the major portion of the income pertained to income from investment and dividend. After analyzing the facts and discussing the various judgments of Hon'ble Courts, the AO found that the share transactions carried out by the appellant was not investment but trading in nature and thereby, the income derived there from was business income. However, the appellant submitted that there was sale of shares in the months of June 2010 and July 2010 during the whole year after holding such shares for more than 3 to 5 years and thus, there has not been any continuous, regular and substantial number of transactions of buying and selling warranting these to be treated as business or trading activity. After going through the facts/details, I find that there was a limited frequency of transactions of the shares, thereby, the intention of the appellant cannot be said to be carrying out trading activities. The facts clearly show that the shares were purchased to hold and nature of the same was investment.*

*Therefore, I find merit in the argument of the appellant, hence, the AO is directed to treat the same accordingly."*

10. Before us the Id.DR relied on the order of the AO.

11. On the other hand, the Id.AR of the assessee submits that the assessee is treating the profit earned on sale of shares as capital gain, The assessee also consistently maintained the holding of shares as investments in its accounts. He also submits that the appellant revenue accepted the treatment of holding of shares as investment and resultant gains as capital gains in the AYs 2009-10 and 2010-11 and also in A.Y 2012-13. The copies of assessment orders were also placed before us. The Id. AR of the assessee argued that the appellant revenue shall follow the rule consistently.

12. Heard rival submissions and perused the material available on record. The facts narrated above are not disputed. We find that the issue on hand is similar to the facts and circumstances ITA No's 1148 & 1437/Kol/09 & CO No.52/Kol/09 dt. 20-01-2016 (arising out of ITA No.1148/Kol/09 for the AY's 2005-06 & 2006-07) in the case of Lyons & Roses Pvt. Ltd and by deriving support from the decision of Hon'ble High Court of Calcutta held that the gains arising out of investment activities of the assessee had to be assessed only as capital gains and not business income and the relevant portion at Para 5.3.4.2 of which is reproduced herein below:

*5.3.4.2. We also find that the **Hon'ble Calcutta High Court in the case of CIT vs H K Financiers (P) Ltd reported in (2015) 61 taxmann.com 175 (Cal) for the Asst Year 2007-08** had held as below:-*

*3. The Assessing Officer has laid stress on motive. To begin with motive is something, which is locked in the mind of the person. No direct evidence as regards motive is possible. Motive can be inferred from the conduct of the person concerned but that is bound to remain an*

*inference, which may or may not be correct. We have today dictated a judgment in the case of CIT v. Merlin Holding (P.) Ltd [IT Appeal No. 101 of 2011, dated 12-5-2015] wherein the following views have been expressed by us:*

*"From the tenor of the submissions made by Mr. Saraf noted above, it appears that the case of the revenue is that in the facts of the case the finding that the income was earned from investment could not have been recorded. If that is the proposition then it is for the revenue to show that such a finding is not possible in law. That was not even suggested. What remains then is a question of appreciation of evidence, which has already been done. No fruitful purpose is likely to be served by remanding the matter. We do not find any issue, which has remained unattended.*

*For the aforesaid reasons, we hold that the judgment under challenge is not perverse."*

4. *The judgment in the case of Dalhousie Investment Trust Co. Ltd. v. CIT[ 1968] 68 ITR 486 (Se) referred by the Assessing Officer does not assist the revenue because in that on appreciation of facts it was found as follows:-*

*"On the facts, that the appellant dealt with the shares of McLeod and Co. and the allied companies as stock-in-trade, that they were in fact purchased even initially not as investments but for the purpose of sale at a profit and therefore the transactions amounted to an adventure in the nature of trade. The profit derived by the appellant from the sale of shares was therefore a revenue receipt and as such liable to income-tax."*

5. *The facts of the case are not shown to be similar with those in the case of Dalhousie Investment.*

6. *For the aforesaid reasons, we are of the opinion that the views expressed both by the CIT and the Tribunal for reasons expressed therein are a possible view. It is, therefore, not open to the revenue to contend that the view taken by the Tribunal is perverse. Question formulated at the time of admission of the appeal does not appear to have been correctly formulated. The question could only be, whether the views expressed upon appreciating the facts and circumstances of the case were perverse. The question is now formulated and is answered in the negative.*

*The appeal is thus dismissed."*

13. Respectfully following the above and in view of the fact that that during the previous assessment year 2010 - 2011 the appellant Revenue accepted the claim of the Assessee in treating the gain as capital and therefore, we hold that the income from sale of shares is capital gain and not business income. Thus, ground no-1 raised by the Revenue is dismissed.



14. Ground no.2 questioning the order of the CIT-A in restricting the same to Rs. 18,09,239/- disallowance u/s.14A of the Act.

15. The AO found that the assessee has earned dividend income of Rs.38,23,073/- on shares and mutual funds and the same was claimed exempt in computation of total income. Further, the assessee has claimed interest of Rs.22,309/- on overdraft interest and Rs.27,19,055/- on interest on others in its P/L Account towards interest on loan taken. During the course of assessment proceedings the assessee stated that the loans on which the interest was claimed has no relation with the investment of the assessee which has rendered dividend income. For not filing relevant records showing that the borrowed fund was not used to acquire investments for earning exempt income and disallowed Rs.5,86,112/- (Rs.24,95,563 – Rs.19,09,451) by applying Rule 8D(2)(i),(ii) and (iii) for the purpose of Sec.14A of the Act.

16. The assessee challenged the same before the CIT-A. The CIT-A found fault with the calculation made by the AO in disallowing the expenditure of Rs.22,35,497/- under Rule 8D(2)(ii). The CIT-A restricted the disallowance to Rs. 18,09,239/- on the ground that the AO also included the cost of investments, which were not yielding any tax free income. Relevant finding of the CIT-A on this issue is reproduced herein below:-

*The second issue relates to calculation of disallowance u/s. 14A of the I.T Act, The appellant objected the calculation of the AO and gave their calculation, which is as under:-*

- i) Expenditure directly relating to income which does not form part*

of total income Demat charges	2,741,364
ii) Interest Expenses (Nett)	
Less: Interest paid to Partner's Allowable in full U/s. 40(b)	<u>671,719</u> 2,069,645
iii) Investment as on 31.03.2010	59,125,166
Investment as on 31.03.2011	<u>35,005,533</u>
(Excluding Investment in Mutual Fund's Growth Plan where no dividend is receivable)	94,130,699
Average Investment	47,065,350
Total Asset as on 31.03.2010	84,048,920
Total Asset as on 31.03.2011	39,729,979
Average Asset	<u>123,778,899</u> 61,889,449
Interest disallowed = $\frac{20,69,645 \times 4,70,65,350}{=1,573,912}$	
0.5% of average value of Investments	6,18,89,449 <u>235,327</u>
Total disallowance U/s. 14A	1,809,239

*After going through the facts and circumstances of the case, I find merit in the calculation (supra) of the appellant as the AO also included the cost of investments which was not yielding any tax free income thereby, the AO is directed to restrict the disallowance to Rs.18,09,239/- only and the balance is directed to be deleted. "*

17. The Id.DR relied on the order of the AO. In reply, the Id.AR of the assessee referred to page 16 of the paper book.

18. Heard rival submissions and perused the material available on record. We find that the CIT-A directed the AO to disallow u/s. 14A to the tune of Rs.18,09,239/-, which is less than the amount disallowed by the assessee in R.O.I (Return of Income) in the sum of Rs.19,09,451/-. Hence, we hold that no fresh disallowance is to be made u/s. 14A in the facts of the case and disallowance made voluntarily by assessee is to be accepted. Hence, ground no. 2 raised by the revenue is partly allowed.

19. Ground no.3 is relating to accepting the fresh computation violating Rule 46A. The Id.DR was not able to point out filing of

any fresh evidences filed by assessee before the CIT-A. Hence, ground no. 3 is dismissed.

20. Ground no.4 is relating to questioning the allowance of claim of partners interest of Rs.6,71,719/- u/s. 40(b) of the Act. The Id.AR submits that the AO included the interest paid to partners and FDs for the purpose of disallowance U/Sec.14A of the Act. He argued that the amount has to be excluded and thereby ground no. 4 would become redundant. The Id.DR relied on the order of AO.

21. We find that the Id.AO had allowed deduction towards interest on partners current/capital account to the tune of Rs.6,71,719/- in the assessment. Hence, we do not find any merit in the ground no.4 raised by the revenue as it becomes redundant. Hence, ground no.4 is dismissed.

22. In the result, the appeal of the Revenue is dismissed.

ORDER PRONOUNCED IN OPEN COURT ON 13 /04/2017

Sd/-

**M.Balaganesh**  
**Accountant Member**

Sd/-

**S.S. Viswanethra Ravi**  
**Judicial Member**

Dated 13 -04-2017

Copy of the order forwarded to:-

- 1.. The Appellant: Income Tax Officer, Ward 36(2), Aaykar Bhawan, Poorva, 8<sup>th</sup> Floor, 110 Shanti Palli, Kolkata-700 107.
- 2 The Respondent: M/s. Sri Ram Commercial Co. 21 Strand Road,Kol-1.
- 3 The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar

\*\*PRADIP SPS