



ITA No.3742/Mum/2015  
Jignesh Madhukant Mehta  
Assessment Year 2010-11

**आयकर अपीलिय अधिकरण “जी” न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“G” BENCH, MUMBAI**

श्री डी.टी. गरासिया, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

**BEFORE SHRI D.T. GARASIA, JM AND  
SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. No. 3742/Mum/2015  
(निर्धारण वर्ष / Assessment Year: 2010-2011)

<b>Assistant Commissioner of Income Tax 30(1)</b> C-13, 5 <sup>th</sup> Floor Room No. 503 Pratyakshkar Bhavan BKC, Bandra (E) Mumbai 400 051	<b>बनाम/ Vs.</b>	<b>Jignesh Madhukant Mehta,</b> 53, Rustomjee Regency Adarsh Marve Road Malad(W) Mumbai 400 064
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>ACRPM-4513-H</b>		
( <input type="checkbox"/> पीलार्थी / <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Hemant Vora ,Ld. AR
<b>Revenue by</b>	:	Arun Kumar, Ld. DR

सुनवाई की तारीख / <b>Date of Hearing</b>	:	08/05/2017
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	12/05/2017



## आदेश / O R D E R

### Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeal by revenue for Assessment Year [AY] 2010-11 assails the order of Ld. Commissioner of Income Tax (Appeals)-41 [CIT(A)], Mumbai dated 13/03/2015 *qua* directing treatment of *business income* of Rs.2,62,28,530/- as *capital gain* despite having large number of share transactions. In Ground No. 2, the revenue has agitated deletion of disallowance u/s 14A of Rs.6,25,414/- by Ld. CIT(A).

2. Briefly stated, the assessee, being *resident individual*, was assessed u/s 143(3) at Rs.3,95,62,876/- as against returned income of Rs.3,54,94,358/- e-filed by assessee on 14/08/2010. The assessee earned *income from salary and trading in shares* and reflected an amount of Rs.2,62,28,530/- under the head *Short Term Capital Gains* against sale of certain scrips the holding period of which was more than 30 days. The gains from shares, the holding period of which was less than 30 days, were offered as *Business Income*. However, not convinced with the said classification made by the assessee and after appreciating the volume and quantity of shares traded by assessee, the Ld. AO concluded that the assessee was regularly engaged in share trading activity in business-like manner and hence the same was taxable as *Business Income* as against *Short Term Capital Gain* reflected by assessee. Another addition was related with Section 14A disallowance *read with rule 8D* for Rs.6,25,414/-. Since the assessee earned certain exempt incomes aggregating in all to Rs.18,44,132/-, the AO computed



the said disallowance as per Rule 8D which came to Rs.6,25,414/- which comprised of Rs.3,45,391/- u/r 8D(2)(i) & Rs.2,79,923/- u/r 8D(2)(iii).

3. The assessee assailed both the additions with success before Ld. CIT(A) vide impugned order dated 13/03/2015, who after considering the various submissions of the assessee concluded that the assessee was justified in reflecting the impugned transactions as *Short Term Capital Gain*. Similarly, the disallowance u/s 14A was deleted by noting that the assessee used own funds to make the said investment and hence no disallowance was warranted in the circumstances. Aggrieved, the revenue is in appeal before us.

4. The Ld. Departmental Representative asserted that the assessee entered into huge share transactions both in terms of volume and quantity and therefore, rightly assessed under *Business Head* as shares trading activity was carried out in a business-like manner only. The disallowance u/s 14A deleted by CIT(A) has been assailed on the ground that the assessee has not suffered disallowance for interest expenditure as wrongly observed by Ld. CIT(A) but for administrative expenses only, the quantum of which were as per the prescribed formula given in Rule 8D and hence justified.

5. Per *Contra* The Ld. Counsel for Assessee [AR] contended that the assessee was consistently bifurcating the said transaction in the same manner which was accepted by the revenue all throughout and hence, there was no reason to disturb the same. Further, as per settled judicial pronouncements, the assessee could maintain two separate portfolios- one for business and another for investment, which has been done by



the assessee. Further, no borrowed funds were used by the assessee to make the said investments and average holding period of the scrips was more than 72 days and the transactions were delivery based transactions which supports the action of the assessee in offering the income under the head *capital gains*.

6. The Ld. Departmental Representative asserted that the principle of *res judicata* was not applicable to Income Tax proceedings and hence, the assessee could not seek benefit of the same particularly when all the assessment in earlier years was summary assessment u/s 143(1).

7. We have heard the rival contentions and relevant material on record. We find that the classification of *income from share trading as 'business' or 'capital gains'* is dependent upon the facts and circumstances and there is only a thin line separating the two view point. The CBDT has so far following instructions / guidelines so as to bring clarity on the issue:

- (i) Instruction No. 1827 dated 31/08/1989
- (ii) Office Memorandum dated 13/12/2005
- (iii) Circular No. 4/2007 dated 15/06/2007
- (iv) Circular No. 6/2016 dated 29/02/2016

CBDT's office memorandum dated 13/12/2005 list following Circumstances to be considered by the Assessing Officers in determining whether a person is a trader or an investor in stocks:-

- (i) Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity;
- (ii) 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.
- (iii) Whether scale of activity is substantial;
- (iv) Whether transaction were entered into continuously and regularly during the assessment year.
- (v) Whether purchases are made out of own funds or borrowings;



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- (vi) *The stated objects in the Memorandum and Articles of Association in the case of corporate assessee;*
- (vii) *Typical holding period for securities bought and sold;*
- (viii) *Ratio of sales to purchase and holding.*
- (ix) *The time devoted to the activity and the extent to which it is the means of livelihood.*
- (x) *The characterization of securities in the books of account and balance sheet as stock-in-trade or investment.*
- (xi) *Whether the securities purchased or sold are listed or unlisted.*
- (xii) *Whether investment is in sister/related concerns or independent companies.*
- (xiii) *Whether transaction is by promoters of the company.*
- (xiv) *Total number of stock dealt in*
- (xv) *Whether money has been paid or received or whether these are only book entries".*

As per Circular No. 4/2007 it is possible for a taxpayer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. The above instructions have partially been modified with respect to listed securities in recent CBDT circular No. 6/2016 dated 29/02/2016 which lays down following factors to be considered for listed securities:-

- a) *Where the assessee itself, irrespective of the period of holding of the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,*
- b) *In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;*
- c) *In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.*

Further Apex Court in *CIT v. Associated Industrial Development Co. (P.) Ltd.* [1971] 82 ITR 586 (SC) has observed that:-

*"Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares*



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*and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment.”*

8. Applying the above principals upon the case in hand, we find that assessee has chosen to treat the shares held for more than 30 days under the head ‘investment’. The assessee has sufficient owned capital to make these investments. The dealings are primarily in listed securities and the assessee has undertaken delivery based transactions, albeit for shorter period of time, average holding period being 72 days. Although, we are conscious of the fact that the principal of *res judicata* do not apply to Income Tax proceedings, yet we are of the view that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical. Moreover, latest CBDT Circular No.6/2016 which is clarificatory in nature applies to listed securities and directs AO not to disturb the stand taken by assessee provided the same is applied consistently. Hence, we find that there cannot be any straight jacket formula to distinguish the same and further there cannot be any single decisive factor to determine the same but an overall view has to be taken keeping in mind peculiar facts and circumstances of the case.

9. At this juncture, it would be prudent to reproduce the relevant conclusion of Ld. CIT(A) in the impugned order:-

*“I have considered the submissions of the Appellant, impugned assessment order and the material available on record, The Appellant has reflected the shares as investment in the books of accounts. During the course of the appellate proceedings, the Appellant furnished the details of the Share transactions made during the year alongwith the copies of the purchase and sales bills, demat statements and bank statements. On perusal of the same, it appears that the appellant had duly recorded all the share transactions he had entered into. The Appellant had maintained two separate portfolios viz. investment portfolio and business portfolio. The appellant, on an average, has held scrips for around 72 days*



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*which also indicates that the shares were held for investment purposes. Had the intention been to earn business profits, the Appellant would have made an immediate turnaround so as to earn profits in short duration. The Appellant is investing and trading in the stock market based on his own knowledge and not with any professional help. The Appellant has held the stocks as on the last day of the year and which when subsequently sold were treated as long term capital gains by the AO. The Appellant has also earned dividend income of Rs.4.82 lacs, which in itself reflects that the shares were held for investment purposes.*

*Further, the Appellant is a director in Mesh Stock Brokers Pvt. Ltd. and also a partner in five other firms from where the Appellant earns major source of revenue. Had the Appellant engaged into the business of trading into the shares, the Appellant would have spent considerable time here also, which is not the case as stated by the Appellant.*

*Considering all the facts, the legal position and the judicial precedents relied upon by the Appellant, I am of the view that the Appellant has carried out trading in shares as well as earned capital gains income on sale of shares which were held as investment. Accordingly, the treatment of gains of Rs.2,62,28,530/- as business income is not justified and accordingly I direct the AO to treat the said gains of Rs.2,62,28,530/- as short term capital gains. This ground of appeal is allowed.”*

After weighing all the factors as cited above, we find ourselves in agreement with the view taken by CIT(A) and therefore, we are inclined to reject this ground of revenue's appeal and confirm the order of Ld. CIT(A) in this regard.

10. So far as disallowance u/s 14A is concerned, upon perusal of financial statement of the assessee, we find that the assessee has debited administrative expenditure of Rs.3,45,491/- which is the maximum disallowance which the assessee can suffer. However, Ld. AO has made disallowance of Rs.6,25,414/- towards the same which is not justified. Therefore, we delete disallowance of Rs.3,45,391/- made u/r 8D(2)(i) while confirm the addition of Rs.2,79,923/- made u/r 8D(2)(iii). This ground of revenue's appeal partly succeeds.



11. In nutshell, the revenue's appeal stands partly allowed.

*Order pronounced in the open court on 12<sup>th</sup> May, 2017.*

Sd/-

**(D.T. Garasia)**

न्यायिक सदस्य / **Judicial Member** लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 12.05.2017

Sr.PS:- *Thirumalesh*

Sd/-

**(Manoj Kumar Aggarwal)**

**आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.  
Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**