IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'G' : NEW DELHI)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 1565/Del/2011
Assessment Year: 2007-08

SECOND LEASING PRIVATE LIMITED, VS.	ACIT, CIRCLE-8(1)
FLAT NO. N, SAGAR APARTMENTS,	ROOM NO. 163,
6, TILAK MARG,	C.R. BUILDING,
NEW DELHI – 11 0001	I.P. ESTATE,
(PAN: AABCS6609R)	NEW DELHI – 110 002
(APPELLANT)	**(RESPONDENT)**

Assessee by : Sh. Ved Jain, Adv. &
Sh. Ashish Chadha, CA
Revenue by : Sh. K. Tiwari, Sr. DR.

ORDER

PER H.S. SIDHU, JM

The Assessee has filed this Appeal against the Order dated 16.01.2011 of the Ld. CIT(A)-XI, New Delhi relating to assessment year 2007-08 on the following grounds:-

1. On the facts and circumstances of the case, the order of the learned Commissioner of Income Tax (Appeals)-XI, New Delhi, is not correct in law and on facts.

2. On the facts and circumstances of the case, the learned CIT(Appeals), has erred both in law and on facts in treating the short term capital gain as business income of Rs. 2,79,79,723/- as long term capital loss as business income of Rs. 68,016.
3. On the facts and circumstances of the case, the learned CIT(Appeals), has erred both in law and facts in disallowance on account of travelling expenses of Rs. 1,22,222.
4. On the facts and circumstances of the case, the learned CIT(Appeals), has erred both in law and facts in disallowance on account of 14A of Rs. 6,95,204.
5. That the appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

2. The brief facts of the case are that the assessee filed its return of income on 30.10.2007 declaring the income of Rs. 2,39,32,188/-. The case was selected for scrutiny by issue of notice under Section 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred as the Act). During the year, the assessee has earned income by way of capital gain in respect of the investment sold by it. The AO called for the explanation regarding the income earned by the assessee by way of capital gain. The AO however was not satisfied with the reply of the assessee. The AO was of the view that the

volume and frequency of transactions were too high and accordingly such income is to be considered as business income as against capital gain declared by the assessee. Accordingly, he taxed the short term capital gain of Rs.2,79,79,723/- and long term capital loss of Rs. 68,016/- as business income. The AO also made disallowance of Rs.1,22,222/- on account of travelling expenses and Rs.5,42,500/- on account of business promotional expenses. In addition to above, the AO made a disallowance of Rs. 14,08,542/- by invoking the provisions of Section 14A of the Act and completed the assessment 2,59,37,436/- u/s. 143(3) of the Act vide order dated 30.11.2009. Against the assessment order of the AO, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 16.01.2011 deleted the disallowance of Rs. 5,42,500/- on account of business promotion expenses and reduced the disallowance on account of 14A to Rs. 6,95,204/-. Aggrieved with the order of the Ld. CIT(A), assessee is in appeal before the Tribunal.

3. Apropos Ground No. 1 & 5 are concerned, the same are general in nature and therefore, need not be adjudicated.

4. Apropos Ground No. 2 which is relating to confirming the short term capital gain of Rs. 2,79,79,723/- and long term capital loss of Rs. 68,016/- as business income. During the hearing, it was contended by the Ld. Counsel of the assessee that the AO has gone wrong in taxing the capital gain / loss as business income / loss. In this regard, the Ld. Counsel of the assessee invited our attention that

Assessee Company all along has been treating the investment in share as investment and income earned on such investment has been declared and accepted as capital gain. In this behalf, the Ld. Counsel of the assessee further invited our attention to the facts of the A.Y. 2005-06 and 2006-07 whereby the assessee company has declared income as capital gain and the same was accepted in the assessment order passed u/s. 143(3) of the Act. It was further contended that the facts of the present year are not different than the earlier years. On the issue of long term capital loss, the Ld. Counsel of the assessee invited our attention towards the details placed at Paper Book Page 29. It was further contended that investment in these shares were made in the Financial Year 2004-05 as is evident from the bought date and the same has been declared as investment in the books of account as is evident from the balance sheet. These shares have been sold during the year which has resulted into a loss of 68,015/- and accordingly such loss is to be treated as capital loss and not business loss. With regard to short term capital gain, the Ld. Counsel of the assessee draw our attention towards Paper Book Page 27 & 28 which gives details of the short term capital gain and losses. As per this statement, the assessee has made investment only in 9 shares. Out of these 9 shares, the assessee has made losses in 7 shares. The assessee has made gain only in 2 companies' share i.e. of DS Kulkarni Ltd. and Ruchira Papers Ltd. The assessee have made the investment in DS Kulkarni

Developers Ltd. when the rate of the shares was Rs. 110/-. The assessee has sold these shares when the rate went up to Rs. 258.70. Thus, it was an investment and prices of the shares have been gone up, the assessee thought it fit to realize the investment which resulted into short term capital gain. These shares have been treated as investment in the books of accounts and as such the assessee was right in computing capital gain on such shares. As regards the allegation made by the AO in the assessment order, it was contended that the AO from page 3 to page 10 of the order has just discussed the various case laws. Further, the AO has not been able to appreciate the facts of the case properly while giving the numbers of purchase and sale transactions. It was submitted that AO has gone wrong in saying that purchase transactions are 2,824 and sale transactions are more than 100. It was further clarified that when one places an order for purchase of shares on an exchange, the purchase comes from various sellers and for a single purchase order there are multiple sellers. This transaction is to be considered as one as purchase order by the assessee is one and executed at one time. Similarly, when the assessee sells shares, it is not necessary that the entire lot is purchased by one buyer. There can be different buyers on the exchange of different quantities and this will not mean that assessee has made multiple sale transactions. The Ld. Counsel of the assessee further invited our attention towards Paper Book and pointed that out transactions during the year of purchase are only 36

and the sales of 49. Out of these transactions, there is a gain in 3 transactions of purchases with the corresponding 4 transactions of sale. It was further submitted that it is a settled position of law that an assessee can have two portfolio, one of investment and another of trading. The assessee has not done any day trading. All transactions were delivery based and have been duly credited to the Demat account of the assessee. Theassessee has also received dividend on these investments as is evident from the computation of income whereby a dividend income Rs. 15,48,340/- has been received during the year. On this basis, it was submitted that the AO and the Ld. CIT(A) has gone wrong in ignoring these facts. The Ld. Counsel of the assessee also placed reliance on the Circular No. 6/2016 dated 29.02.2016 whereby it has been clarified by the CBDT that in respect of listed shares, where period of holding is more than 12 months and the assessee treats the same as capital gain, the same shall not be put to dispute by the AO. It was further contended that here is a case where even long term capital gain held for more than 12 months has been put to dispute and has been taxed under the business head. The Ld. Counsel of the assessee in support of his contention has placed the reliance on the following decisions:-

- CIT vs Avinash [2014] 362 ITR 441 (Del)
- Vesta Investments & Trading Co. (P) Ltd. vs. CIT (1999) 70 ITD 200 (Chd)
- CIT vs. Girish Mohan Ganeriwala (2003) ITR 417 (P&H).

4.1 On the contrary, the Ld. DR submitted that AO was justified in taxing the capital gain as business income. It was further submitted that principle of *res judicata* are not applicable to income tax proceedings. In support thereof, the Ld. DR placed reliance on the following case laws:-

- Manoj Kumar Samdaria Vs. CIT [2014] 45 Taxmann.com 394 (Delhi)
- CIT vs. GopalPurohit 336 ITR 287 (Bomb)
- Dalhousie Investment Trust Co. Ltd. Vs. CIT 66 ITR 486 (SC)

5. We have heard both the parties and perused the records, especially the impugned order as well as the case laws cited by both the parties. We find that the main issue is taxing of the income earned by the assessee on the sale of its investment. The AO has taxed the same as business income as against capital gain declared by the assessee. From the facts it is evident that assessee has been making investment in shares. In the past, the income arising on such investment has been accepted as capital gain. However, during the year the AO did not accept the same. It is an admitted fact that assessee has treated such transactions as investments in its books of accounts. This fact also gets supported from the fact that investment carried forward from earlier year was declared as such in the balance sheet of the preceding year. The AO has treated even such investment as business and taxed the same under the business head. The assessee following its earlier practice has also accounted

for purchase of shares during the year as investment. Some of these investments have been sold during the year which resulted into a short term capital gain. The AO has treated such short term capital gain as business income ignoring the accounting treatment. The basis for such change as alleged by the AO is the number of transactions. We have examined the details of the purchase and sale of shares during the year. On perusing the same, we find that the contention of the Ld. Counsel of the assessee to the effect that AO has wrongly worked out the number of sale and purchase transactions is correct. During the year, the total transactions of purchases are just 36 and that of the sales are 49. We find considerable cogency in the submission of the ld. Counsel of the assessee that the AO has gone wrong in treating one transaction of purchase as multiple transactions merely because such purchase came from different sellers on the exchange. From the assessee perspective, it was a single order and hence it cannot be considered to be multiple transactions. Similar is the case of the sales made by the assessee. We have also perused the details and find that there is no intra-day transactions. In view of these facts, we are of the view that the AO's finding that there were many transactions entered in a single day, is incorrect. The AO has also referred to the balance sheet of the statement of affairs as on 31.03.2006, however, the same has been quoted on page 12 of the assessment order. On going through this balance sheet, we note that the total available funds with

assessee as on 31.03.2006 was Rs. 3,48,19,641/- as against this, the investments were of Rs. 3,03,32,803/-. Thus, it cannot be said that there were no sufficient funds with the assessee. The AO has stated that the magnitude of the transactions was of Rs. 8 to 10 crore. In this regard, we note that the magnitude transaction at a given point of time was between 2 to 3 crore. The AO has simply added the value of all the transactions during the year which is not the correct way. The assessee company having released the gain on its investment is entitled to make further investments. All the transactions are delivery based and have been duly credited to the Demat account of the assessee. The AO has drawn adverse inference on the basis that the assessee company has borrowed funds and paid interest thereon. We are of the considered view that borrowed funds can one of the parameter to decide whether the transaction is in the nature of trade but that does not mean that all transactions wherever there is any borrowed funds will be in the nature of trade. The assessee is entitled to make investment out of its own funds and if need be to borrow for the purpose of investment. Borrowing for the purpose of investment is not uncommon. As rightly pointed out by the Ld. Counsel of the assessee that people do borrow funds for purchasing house and it cannot be said that such transaction is in the nature of trade. As stated above, we have looked into the availability of the total funds with the assessee company and the transaction entered into by the assessee company during the year and we are of

the view that these transactions are on account of investments. It may be relevant to point out that the assessee has also received dividend of Rs. 15,48,340/- during the year on such investments. Thus, the objective of making investments for realizing gain and dividend also get established. Considering these facts, the accounting treatment in the books of accounts of the assessee cannot be rejected. The books of accounts are essential evidences. The recording of transactions in the books is a primary evidence of the intention for which such investment or purchase has been made. There has to be material to reject such primary evidence. The same cannot be rejected merely because the AO has a different view. A transaction has to be seen from the perspective of the person who has entered into that transaction. As regards the various case laws relied upon by the Ld. DR, we have gone through each of these case laws. In the case of Manoj Kumar Samdaria Vs. CIT [2014] 45 Taxmann.com 394 (Delhi), the facts were that the assessee has given funds to a broker who traded the shares on behalf of the assessee on day to day basis and the dividend received was a meagre amount. Thus, this was a case where there was day to day trading by a broker on behalf of the assessee. Thus, this case law does not support the case of the revenue. As regards the reliance on the judgment of Bombay High Court in the case of CIT vs. Gopal Purohit 336 ITR 287 (Bomb) by the Ld. DR. we have gone through the same and we find that this judgment, in fact, support the case of

the assessee. In this judgment, the Hon'ble Bombay High Court has clearly held that delivery based transaction should be treated as those in the nature of investment and profit received there from should be treated as capital gain. In the present case, all the transactions are delivery based and hence by applying the above judgment, the income arising from such investment is to be treated as capital gain. As regards the judgment in the case of Dalhousie Investment Trust Co. Ltd. Vs. CIT 66 ITR 486 (SC) relied upon by the Ld. DR, the same will also not supports the case of the Revenue as this was a case where the assessee was making investment in the shares of a company M and its managed companies. Since it was a controlled transaction as contended by the assessee itself, it was held that the objective was to earn a profit on sale purchase and not with the object of investment. As against this, the judgment relied upon by the Ld. Counsel of the assessee are directly on the issue in the case of CIT vs. Avinash 362 ITR 441 (Delhi) the Delhi High Court has relied upon the Board Circular to hold that transaction is in the nature of investment. In the present case, not only the earlier circular support the case of the assessee but also the later on circular issued by the CBDT no. 6/2016 dated 29.02.2016 clearly supports the case of the assessee in respect of the long term capital gain. Further, the judgment in the case of Vesta Investment and Trading Co. Pvt. Ltd. vs. CIT 70 ITD 200 (Chd.) also support the case of the assessee wherein it has been held that although *res judicata* is not

applicable to income tax proceeding however, for the sake of consistency, the earlier view taken should not be disturbed unless there is a change in facts. In the present case, the assessee all along has been making investment and accounting for the same as investments. This stand has been accepted in the past and there is no reason to differ with the same in the current year. The accounting treatment given in the current year being the same as in the earlier years, the AO was not justified in altering the same. The aforesaid view has also been upheld by the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Girish Mohan Ganeriwala (2003) ITR 417 whereby it was held that profit from sale of shares is assessable as capital gain more so, when such profits were assessed as capital gain in earlier years.The issue whether the assessee is a trader or an investor is to be decided on the facts and circumstances of each of the case. When the assessee having made investment chooses to rely the same and obtain a higher price of it then what it originally acquired it, the enhanced price received is a realization of investment and hence the same is to be treated as capital gain.

5.1 In the background of the facts and circumstances of the case as explained above and respectfully following the precedents, as aforesaid, the AO is directed to treat the income as capital gain declared by the assessee as against business income. In the result, this ground of appeal raised by the Assessee stands allowed.

6. As regards ground No. 3 which is relating to disallowance of Rs.1,22,222/- on account of traveling expenses. The AO has disallowed the same treating the 50% of the total expenses as personal. The Ld. CIT(A) has confirmed the action of the AO. It was contended by the Ld. Counsel of the assessee that this disallowance is unsustainable in view of the fact that in this year fringe benefit tax was applicable and assessee has offered 20% of the expenditure under FBT. Once and FBT has been paid, then no disallowance can be made on account of personal expenditure. On the other hand, Ld. DR relied upon the order of the authorities below.

6.1 We have heard both the parties and perused the records especially the orders of the authorities below. On perusing the AO's order, we note that the assessee before the AO has taken the stand that it has paid fringe benefit tax at the rate of 20%. Now it is a settled position of law that no disallowance can be made once expenses are exigible to FBT. We note that this view is supported by the decision in the case of BG Shirke Construction Technology Pvt. Ltd. Vs. CIT (ITA No. 1430/PN/2010 (Pune) dated 17.07.2012 wherein, it has been held as under:-

> *"As the CBDT explaining the provisions regarding the FBT makes it clear that FBT is levied on the expenses incurred by the employer irrespective of whether the same are incurred for official or personal purposes. Once FBT is levied on such*

expense it follow that the same are treated as fringe benefits treated by the assessee as employwer to its employees and the same have to be properly allowed as expenses incurred wholly and exclusively for the purpose of business. Following the decision in the case of Hansraj Mathuradas (2012 (10) TMI 300 , ITAT, Mumbai direct the AO delete the disallowance. Issues decides in favour of assessee."

6.2 Respectfully following the aforesaid precedent, we direct the AO to delete the addition in dispute and this ground of appeal is accordingly allowed.

7. As regards Ground No. 4 which is relating to disallowance under Section 14A of the Act. The AO has made the disallowance of Rs. 14,08,542/- by applying Rule 8D. The Ld. CIT(A) has restricted the disallowance to Rs. 6,95,204/-. It has been stated by the Ld. CIT(A) that this figure has been admitted by the assessee before him in the written submission dated 5.01.2011. The Ld. CIT(A) accordingly has accepted that figure and has restricted the disallowance to Rs. 6,95,204/-. Since, this figure was accepted by the assessee itself before the Ld. CIT(A), we do not find any reason to interfere with the same. Accordingly, this ground is rejected.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 04-06-2018.

Sd/-	**Sd/-**
[N.K. BILLAIYA]	**(H.S. SIDHU)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 04-06-2018

SR BHATANGAR

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A), New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT

NEW DELHI.