

**आयकर अपीलिय अधिकरण, राजकोट न्यायपीठ, राजकोट ।
IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 340/Rjt/2011
(निर्धारण वर्ष / Assessment Year: 2007-08)

Pratish Manilal Modi (HUF), Near City House, Jundala, Porbandar.	बनाम/ Vs.	ACIT, Circle – 2, Jamnagar.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAEHM 2833 M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Written Submission
प्रत्यर्थी की ओर से/Respondent by :	Shri Praveen Verma, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	26/10/2018
घोषणा की तारीख /Date of Pronouncement	07/01/2019

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals)- Jamnagar, vides Appeal No.CIT(A)/Jam/158/09-10/121 dated. 20.07.2011 for the Assessment Year (A.Y.) 2007-08 with the following grounds:

- “1. That the ld CIT(A), Jamnagar erred and was not justified in coming to the conclusion that Rs.13,57,857/- is a business income, on transaction of purchase and sale of shares with thirty days, out of total short term gain of Rs.16,37,389/- declared by the appellant but held by assessing officer as business income, on the facts and circumstances of the case.

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2. *That the appellant carves leave to and/or to amend and/or to alter to and/or to substitute to all or any of the grounds of appeal up to the hearing of appeal.”*

2. The only issue raised by the assessee is that Ld. CIT(A) erred in treating the purchase/ sale of shares completed within 30 days as business income amounting to Rs. 13,57,857/-.

3. Briefly stated facts are that the assessee in the present case is a HUF and engaged in the business of trading in shares and securities under the name and style of M/s. Pratish Enterprises. The assessee during the year has shown following incomes:

Sr. No.	Particulars	Amount	Value of Transaction
1.	Trading profit from the trading of shares	2,57,828/-	2,91,52,332/-
2.	Short Term Capital Gain	16,37,389/-	4,61,54,825/-
3.	Dividend Income	94,686/-	Nil
4.	Long Term Capital Gain	498/-	Nil
5.	Interest Income	19,669/-	Nil

3.1 The AO during the assessment proceedings observed certain facts as detailed under:

- i. The assessee has been carrying on the investment in shares activity in a systematic manner.
- ii. The assessee has carried out sale purchase of shares in investment activity in 55 companies.
- iii. The time gap between the purchase and sale of shares is varying between few days to few months.

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In view of above, the AO after considering the magnitude of the transaction was of the view that the assessee is carrying out a trading activity which is wrongly being classified by the assessee as investment activity. Accordingly, the AO was of the view that the assessee should not have shown income under the head Short Term Capital Gain and Long-Term Capital Gain. Accordingly, an explanation was sought from the assessee vide letter dated 10.08.2009. The assessee in compliance to it vide letter dated 02.11.2009 and 15.11.2009 submitted as under:

- i. It has classified delivery based transaction under the head investment activity whereas non-delivery based transactions were classified as share trading activity.
- ii. The shares held as an investment were for the purpose of dividend income. As and when there was a better price available in respect of investment in shares, it uses to sell the shares in the market and accordingly, it was declaring Long Term & Short Term Capital Gain.

3.2 The assessee also submitted that the Revenue accepted the method adopted by it for showing the activity of sale purchase of shares in the earlier years.

3.3 The shares classified under the head investment were always valued at cost. Had the assessee been engaged in the trading activity of shares then it should have valued the investment in shares at market price or cost of acquisition whichever was lower. The basis adopting for the valuation of shares was duly accepted by the Revenue on a regular basis year after year.

3.4 Had the assessee been shown the investment activity in the nature of trading then it should have claimed deduction of the securities transaction tax paid by it as rebate u/s 88E of the Act.

3.5 The assessee alternatively submitted that if the AO wishes to treat the income from investment activity as trading in nature, then it should be allowed rebate u/s 88E of the Act.

However, the AO disagreed with the contention of the assessee by observing that the intention was to earn the profit from the sale purchase of shares which was carried out systematically. As such, the assessee has carried out substantial transactions for the purchase and sale of shares. Therefore the AO after considering the frequency and magnitude of transactions held that the assessee has carried out trading activity in the purchase and sale of shares. Accordingly, the AO held the Short Term and Long Term Capital Gain income as income under the head business and profession.

3.6 Aggrieved, the assessee preferred an appeal to Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that it had been allowed to maintain two portfolios one for share trading activities and another one for investment in shares activity as per the CBDT Circular No.4/2007 dated 15.06.2007.

3.7 As such, the assessee was maintaining two portfolios one for the shares where no delivery was taken, and accordingly, it was classified under the head business and the other one where delivery was taken of the shares, and accordingly it was classified under the Head Capital Gain. The assessee before the Ld. CIT(A) relied on various orders. However, the Ld. CIT(A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

“6. I have carefully considered the facts mentioned in the assessment order and the above submission of the appellant. Usually an assessee can both the dealer and investor in shares in view of CBDT Circular No.4/2007. But it is also clear that the same circular point out that there should be clear demarcation between two in the books of accounts and each case is to be - dealt on facts. As pointed out by the AO in the chart and also the chart submitted by the appellant during the course of appellate proceedings it is noticed that the time gap between purchase and sale of shares varies from one day to 371 days. Apart from magnitude and frequency, the holding of the shares is best indication to show the intention. The shares which have been held on very less period cannot be considered as held as investment. The hon'ble ITAT, Ahmedabad 'D' bench in the case of Sugamchand C. Shah vs. ACIT in 37 DTR (Ahd) (Trib) 345 has dealt with this issue at length. The hon'ble ITAT on, the basis of the facts wars M the view that assessee is neither fully acting as a trader nor as an investor; in the books all the purchases are shown as investment but frequency in several cases is very large and holding period in many cases is very small from 0 to a week or so; therefore, the hon'ble tribunal was of the view that criteria has to be fixed for determining as to when he is acting as trader and when as an investor. The hon'ble tribunal took the view that if shares are held for more than a month they should be treated as investment and profit: on sale should be charged as short-term capital gain, but when shares are held for less than a month, gain should be treated as profit from business. The same fact applies to the facts' of the case of appellant, Appellant is also having large frequency in several cases and holding period in many cases varied from 0 to 371 days. Applying as in the case of Sugamchand C. Shah discussed above, it is held that the shares which has been held for less than 30 days the profit earned should be taxed as income from business. In the statement given during the appellate proceedings it is found that the figure for profit on sale of shares which has been held less than 30 days comes to Rs.13,57,857, The AO is directed to treat this as income from bushels and rest of the profit on sale of shares is directed

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to be, treated as profit from short-term capital gains. As regarding the long-term capital gain shown by the assessee at Rs.498, AO is directed to treat the same as income from long-term capital gain and not income from business. This ground of appeal is partly allowed.”

Being aggrieved by the order of the Ld. CIT(A) assessee is in appeal before us.

4. The Ld. AR before us has filed written submission dated 23.10.2013 and 15.06.2007 which reads as under:

*“To:
The Honorable Members of
Income-Tax Appellate Tribunal,
Rajkot DB Bench,
Rajkot.*

Dated: 23-10-2013

*Hon’ble Sir, Ref: Shri Pratish Manilal Modi(HUF).
V/s
The ACIT Circle-2, Jamnagar,
PAN : AAEHM 2833 H
A. Y. 2007-08,
ITAT Appeal No. 340/RJT/2011
Date of hearing: 23-10-2013
Sub: Hearing Notes:*

Please refer to above. Above appeal has been fixed for hearing today on 23-10-2013 and undersigned have appeared before Your Honours.

Prior to date lastly hearing of above appeal was fixed for hearing on 11-07-2012. On that day hearing was taken place.

The point involved is only whether the transaction of purchase and sale of shares within thirty days is a business income or short term capital gain as claimed by the assessee?

*The Learned CIT(A) only relying on the judgment of in the matter of **ITAT Ahmedabad 'D' Bench judgment in the case of Sugamchand C. Shah vs. Assistant Commissioner of Income-Tax reported in (2010) 37 DTR (Ahd)(Trib) 345, has held that** transaction of purchase and sale of shares within thirty days are business income and not short term capita] gain.*

Detailed written submission has been submitted on that day and it was mainly contended as under:

- *ITAT Ahmedabad 'D' Bench judgment in the case of Sugamchand C. Shah vs. Assistant Commissioner of Income-Tax reported in (2010) 37 DTR (Ahd)(Trib) 345 is not applicable here as the facts of that case is different. In that case the assessee has not made any demarcation between the two types of dealing in shares. And under that circumstances based on the facts of that case, a criteria has been fixed that where the gain earned on a shares which are held for less then a month as profit from business.*
- *But here that is not a case at all as here the assessee has made the distinction between the investment in shares and trading in shares. Whenever the assessee is do the business in shares he never takes delivery of shares and sale the shares on the same day, and whenever he wants to purchase shares for investment purpose he takes the deliver of shares.*
- *Shares in the books of accounts at the end of the year always valued at cost and not at a cost or market value whichever is lower, because the assessee never takes the delivery of trading shares traded on same date hence there is no opening or closing stock of trading shares.*
- *There cannot be a sub-division of transaction relating to STCG. The transactions cannot be bifurcated on the basis of holding period of 30 days so as to classify a part of the gain as STCG and a part as business profit.*
- *The assessee had separate portfolios for investment and trading and in the books, the shares giving rise to the STCG had been treated as an "investment" and not as "stock-in-trade". The shares were valued at cost and not at lesser of market value.*
- *But the facts of the case is similar to Mumbai ITAT judgment in the matter of Gopal Purohit vs. Joint Commissioner of **Income-***

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Tax, reported in (2009) 122 TTJ (Mumbai) 87: (2009) 29 SOT 117: (2009) 20 DTR 99, and also confirmed by the Bombay High Court requested to please held that the appellant has earned total short term capital gain of Rs. 16,37,389 and long term capital gain of Rs. 498 and not as trading income as held by Honorable CIT(A) that transaction of purchase and sale of shares within thirty days are business income and not short term capital gain and confirmed the addition of Rs.13,57,857/- out of total addition made by the AO at Rs. 16,37,389/-.

At that time as one of the Honorable member of the Bench being also a member in above ITAT Ahmedabad "D" Bench judgment the case was adjourned and also directed to bring copy of Balance sheet and profit and loss account for the year under consideration.

Again above appeal fixed for hearing today on 23-10-2013 and as directed in earlier hearing I have submitted a copy of audited balance sheet and profit and loss account, and also submitted a copy of circular No. 4 of 2007. dated 15th June, 2007.

Case was argued. During the course of hearing the Honorable members, even though there being no dispute or adverse finding by the assessing officer regarding the separate treatment of shares trading (i.e. profit earned on purchase and sales of shares without delivery basis) and Short term Capital Gain (i.e. profit earned on purchase and sales of shares on delivery basis) have asked to produce the registers regarding both type of shares transactions and books of accounts. At that time I have asked the time for adjournment and to fixed the hearing on Monday dated 28-10-2013 as above details were with the assessee situated at Porbandar. But Honorable members insisted on to produce the same at that time and did not granted the adjournment and after some further arguments informed that the hearing is concluded and they will decide the matter considering written submission.

Above hearing note is prepared only for record purpose and it is hear by submitted in duplicate.

Sorry for the inconvenience caused.

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Thanking You,

Yours truly,
Girish Parikh
Advocate
Sent by Registered AD
Encl: Two copies of above hearing note.”

CIRCULAR NO. 4 OF 2007, DT. 15TH JUNE, 2007

Sub. : Distinction between shares held as stock-in-trade and shares held as investment - Tests for such a distinction

15/06/2007

SECTION

The Income-tax Act, 1961 makes a distinction between a capital asset and a trading asset.

2. *Capital asset is defined in section 2(14) of the Act. Long-term capital assets and gains are dealt with under section 2(29A) and section 2(29B). Short-term capital assets and gains are dealt with under section 42a) and section 2(42b).*
3. *Trading asset is dealt with under section 28 of the Act.*
4. *The Central Board of Direct Taxes (CBDT) through Instruction No. 1827 dated August 31, 1989 brought to the notice of the Assessing Officers that there is a distinction between shares held as investment (capital asset) and shares held as stock-in-trade (trading asset). In the light of a number of judicial decisions pronounced after the issue of the above instructions, it is proposed to update the above instructions for the information of assesses as well as for guidance of the assessing officers.*
5. *In the case of CIT vs. Associated Industrial Development Company (P) Ltd. 1972 CTR (SC) 239 : (1971 82 ITR 586 (SC), the Supreme Court observed that :*

"Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is matter which is within the knowledge of the assessee who holds the shares and it should, in norm; circumstances, be in a position to produce evidence from its records as to whether it has maintained a distinction between those shares which are its stock-in-trade and those which are held by way of investment."

6. *In the case of CIT vs. H. Holck Larsen (1986) 58 CTR (SC) 53 : (1986) 160 ITR 67 (SC), the Supreme Court observed :*

"The High Court, in our opinion, made a mistake in observing whether transactions of sale and purchase of shares were trading transactions or whether these were in the nature of investment was a question of law This was a mixed question of law and fact."

7. *The principles laid down by the Supreme Court in the above two cases afford adequate guidance to the assessing officers.*
8. *The Authority for Advance Rulings (AAR) in Fidelity Northstar Fund & Ors., In re (2007) 207 CTR (AAR) 297 : (2007) 288 ITR 641 (AAR), referring to the decisions of the Supreme Court in several cases, has culled out the following principles :-*

"(i) Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the nature of transaction;

(ii) the substantial nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish

a good guide to determine the nature of transactions;

(iii) ordinarily the purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the nature of trade/adventure in the nature of trade; but where the object of the investment in shares of a company is to derive income by way of dividend etc. then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not revenue receipt."

9. *Dealing with the above three principles, the AAR has observed in the case of Fidelity group as under:-*

"We shall revert to the aforementioned principles. The first principle requires us to ascertain whether the purchase of shares by a FII in exercise of the power in the memorandum of association/trust deed was as stock-in-trade as the mere existence of the power to purchase and sell shares will not by itself be decisive of the nature of transaction. We have to verify as to how the shares were valued/held in the books of account i.e. whether they were valued" as stock-in-trade at the end of the financial year for the purpose of arriving at business income or held as investment in capital assets. The second principle furnishes a guide for determining the nature of transaction by verifying whether there are substantial transactions, their magnitude, etc., maintenance of books of account and finding the ratio between purchases and sales. It will not be out of place to mention that regulation 18 of the SEBI Regulations enjoins upon every FII to keep and maintain books of account containing true and fair accounts relating to remittance of initial corpus of buying and selling and realizing capital gains on investments and accounts of remittance to India for investment in India and realizing capital gains on investment from such remittances. The third principle suggests that ordinarily purchases and sales of shares with the motive of realizing profit would lead to inference of trade/adventure in the

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nature of trade; where the object of the investment in shares of companies is to derive income by way of dividends etc., the transactions of purchases and sales of shares would yield capital gains and not business profits."

- 10.** *CBDT also wishes to emphasis that it is possible for a tax payer 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. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business income.*
- 11.** *Assessing Officers are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the assessee as investment (and therefore giving rise to capital gains) or as stock-in-trade (and therefore giving rise to business profits). The Assessing Officers are further advised that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the assessee as investment or stock-in-trade.*
- 12.** *These instructions shall supplement the earlier Instruction No. 1827 dated August 31, 1989.*

*[F. No. 149/287/2005-TPL]
(2007) 210 CTR (St) 29"*

5. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

6. We have heard the rival contentions and perused the materials available on record. At this juncture, we are inclined to refer to the

Circular issued by the CBDT vide No.6/2016 dated 29.02.2016. The relevant extract reads as under:

“In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following—

- (a) Where the assessee itself, irrespective of the period of holding 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.”*

6.1 As per the above circular, the case on hand falls under the clause ‘c’ and it is pertinent to take guidance from the CBDT Circular No. 4/2007 dated 15.06.2007. The relevant extract reads as under:

“1. The Income-tax Act, 1961 makes a distinction between a "capital asset" and a "trading asset".

2. Capital asset is defined in section 2(14) of the Act. Long-term capital assets and gains are dealt with under section 2(29A) and section 2(29B). Short-term capital assets and gains are dealt with under section 2(42A) and section 2(42B).

3. Trading asset is dealt with under section 28 of the Act.

4. The Central Board of Direct Taxes (CBDT) through Instruction No. 1827, dated August 31, 1989 had brought to the notice of the Assessing Officers that there is a distinction between shares held as investment (capital asset) and shares held as stock-in-trade (trading asset). In the light of a number of judicial decisions pronounced after the issue of the above instructions, it is proposed to update the above instructions for the information of assesseees as well as for guidance of the Assessing Officers.

5. In the case of Commissioner of Income-tax (Central), Calcutta v. Associated Industrial Development Co. (P.) Ltd. [1971] 82 ITR 586, the Supreme Court 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 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."

6. In the case of Commissioner of Income-tax, Bombay v. H. Holck Larsen [1986] 160 ITR 67, the Supreme Court observed :

"The High Court, in our opinion, made a mistake in observing whether transactions of sale and purchase of shares were trading transactions or whether these were in the nature of investment was a question of law. This was a mixed question of law and fact."

7. The principles laid down by the Supreme Court in the above two cases afford adequate guidance to the Assessing Officers."

6.2 On perusal of the above Circulars it is clear that the assessee can maintain two portfolios one for trading in the shares and the other one is for the investment in shares. The only requirement of the circular, both

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the activities of the assessee should be clearly demarcated in the books of accounts. As the assessee has not shown any activity from the trading of shares and there was also no closing stock shown in the financial statement. Therefore, we are of the view that the assessee is dealing only in the investment activity as evident from the classification shown by the assessee under the head investments. In this regard, we referred to the relevant portion of the balance sheet of the assessee which is placed on page 25 of the Paper Book and reproduced as under:

SHARES APPLICATION		
ADHUNIK METAL SHARE APPL.	94,500.00	
BIRLA POWER SOLU. SHARE APP.	94,500.00	
KEWAL KIRAN CLO. SHARE APP.	96,250.00	
ROHIT FERRO TECH SHARE APPL.	96000.00	
SHIVALIK GLOBLE SHARE APPL.	48,000.00	
	<hr/>	4,29,250.00
INVESTMENT		
N.S.C. ACCOUNT	30,000.00	
	<hr/>	30,000.00
SHARE INVESTMENT		
SHARE ACCOUNT	1,73,439.46	1,73,439.46
	<hr/>	

From the above balance sheet, it is clear that the assessee has demarcated its shares under the head investment. Therefore the Circular issued by the CBDT applies to the instant facts of the case. Therefore, keeping in view the provision of the Circular issued by the CBDT we are inclined to hold that the income from the investment of share on account of sale/ purchase should be liable to tax under the head capital gain.

6.3 We also note that the circulars issued by the CBDT which are beneficial to the assessee are binding on the Tribunal as held by the judgment of Hon'ble Supreme Court in the case of Keshavji Ravji & Co. Vs. CIT reported in 183 ITR 1 wherein it was observed as under :

The task of interpretation of the laws is the exclusive domain of the courts. However, - this is what Shri Ramachandran really has in mind - circulars beneficial to the assessee and which tone down the rigour of the law issued in exercise of the statutory power under section 119 of the Act or under corresponding provisions of the predecessor Act are binding on the authorities in the administration of the Act. The Tribunal, much less the High Court, is an authority under the Act. The circulars do not bind them. But the benefits of such circulars to the assessee have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. But that is not the same thing as saying that such circulars would either have a binding effect in the interpretation of the provision itself or that the Tribunal and the High Court are supposed to interpret the law in the light of the circular. There is, however, support of certain judicial observations for the view that such circulars constitute external aids to construction.

6.4 We also note that the Revenue has accepted the activity of investment in the shares in earlier years as well as subsequent years which was also not disturbed by the Revenue. Therefore, the principles of consistency need to be followed without any deviation when there is no change in the facts and circumstances of the case from the earlier years. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the case of Radhasaomi Satsang vs CIT reported in (1992) 193 ITR 321 (SC) where it was held as under:

“On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question

should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12."

6.5 We also note that the ITAT, Ahmedabad in the case of ACIT vs. Bhanuprasad T. Trivedi HUF in IT(SS)A No.460/Ahd/2010 pertaining to the A.Y. 2005-06 vide order dated 11.07.2016 has decided the issue in favor of the assessee by observing as under:

"10. The dispute is regarding the nature of income on sale and purchase of shares by the assessee. The issue, whether the income from sale and purchase of shares in a particular case should be treated as capital gain or as business income has been a debatable issue and there are conflicting decisions of the Tribunal on this issue. Each case is therefore, to be based on its own factual situation. In the balance sheet, the assessee has shown shares under the head 'investment'. These investment shares have been valued at cost. The Hon'ble Supreme Court in the case of CIT Associated Industrial Development Co Pvt. Ltd. 82 ITR 586, which decision has also been considered by the CBDT in its Circular No. 4/2007 dt. 15.6.2007, 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 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"

11. The CBDT has further thrown light on this controversial issue in its Circular No. 6/2016 dated 29.02.2016 and the same reads as under:-

*Sub: Issue of taxability of surplus on sale of shares and securities
- Capital Gains or Business Income -- Instructions in order to
reduce litigation - reg.-*

Sub-section (14) of Section 2 of the income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/ trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principle in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following-

a) Where the assessee itself, irrespective of the period of holding 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.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.

12. Considering the facts in hand, in the light of the aforementioned circular of the Board, in our considered opinion, the intention of the assessee at the time of the purchase of shares is paramount. If the assessee has clear intention of being an investor and showing the shares as investment, we do not find any reason to disturb the intention of the assessee. The assessee under consideration is investor and, therefore,

any gain arising out the transfer of shares should be treated as capital gains be it short term or long term.

13. In the light of the aforementioned discussion, we have no hesitation in upholding the findings of the First Appellate Authority. Ground No. 1 is accordingly dismissed.”

6.6 The Hon’ble High Court of Gujarat subsequently confirmed the view taken by the Tribunal in the above case reported in 87 taxmann.com 137 wherein it was held as under:

“4. The CIT (Appeals) and the Tribunal having applied such parameters on the facts of the case and having come to the conclusion that the assessee’s stand that the shares were held by way of investment and therefore the sale thereof should result in long term capital gain instead of business income, calls for no interference.”

6.7 We also note that the Revenue against the order of Hon’ble Gujarat High Court in the above case had filed a petition before the Hon’ble Supreme Court which was dismissed by the Hon’ble Supreme Court reported in 95 taxmann.com 19.

6.8 We also note that the case law relied on by the Ld. CIT(A) has not considered the CBDT Circular No.6/2016 dated 29.02.2016. Therefore we are reluctant to rely on the judgment relied upon by the Ld. CIT(A).

In view of above, we hold that the frequency, magnitude of the transaction in a systematic manner cannot be the criteria to hold that the assessee is engaged in a business activity of shares. Therefore, we are inclined to set aside the order of the Ld. CIT(A) and direct the AO to

treat the income from investment activity under the head capital gain. Hence, the ground of appeal of the assessee is allowed.

6.9 We also note that the case law relied on by the Ld. CIT(A) is not applicable to the present facts of the case. In that case, the assessee was unable to show any demarcation between shares held as stock-in-trade and investment. Therefore the income from the shares held for less than one month was treated as income from the business and profession. However, in case on hand, there is a clear demarcation by the assessee in its books of accounts. Therefore we are of the view that the principle laid down by the ITAT in the case of *Sugamchand C. Shah (supra)* is not applicable to the facts on hand.

6.10 We also refer to the balance sheet of the assessee as on 31.03.2007 as reproduced as under:

PROPERTIES AND ASSETS	SCH.	CURRENT YEAR 31.03.2007 RS.
FIXED ASSETS:		0.00
INVESTMENT:	'A'	12111866.59
CURRENT ASSETS:	'B'	
INVENTORIES:	(Taken, valued & cert. by proprietor)	
Stock in Trade		0.00
RECEIVABLES:		0.00

From the above balance sheet, it is clear that the assessee has clearly demarked the shares as investment and stock in trade.

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6.11 In view of the above we are inclined to reverse the order of authorities below. Thus, we set aside the order of the Id. CIT-A and direct the AO treat the income from the sale & purchase of shares under head capital gain. Thus the ground of appeal of the assessee is allowed.

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

This Order pronounced in Open Court on	07/01/2019
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sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 07/01/2019
Priti Yadav, Sr.PS

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)- Jamnagar.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, राजकोट/DR, ITAT, Rajkot
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot