

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI K.D. RANJAN

ITA No. 1648/Del/2010

Asstt. Yr: 2006-07

Narendra Gehlaut
296, Forest Lane,
Neb Sarai Sainik Farms,
New Delhi-110068.
PAN/GIR No. AAZPG9630K

Vs. JCIT Range-25,
New Delhi.

AND

ITA No. 2762/Del/2010

Asstt. Yr: 2006-07

JCIT Range-25,
New Delhi.

Vs. Narendra Gehlaut
296, Forest Lane,
Neb Sarai Sainik Farms,
New Delhi-110068.

(Appellant)

(Respondent)

Assessee by : Shri G.C. Srivastava Adv.
Revenue by : Mrs. Renu Jauhri CIT (DR)

ORDER

PER R.P. TOLANI, J.M :

These are two cross appeals, one by the assessee and the other by Revenue against CIT(A)'s order dated 4-2-2009, relating to A.Y. 2006-07.

Respective grounds are as under:

Assessee's appeal (ITA no. 1648/Del/10):

"1. The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in upholding the action of learned Assessing Officer in assessing short term capital gains

in respect of transactions in shares amounting to Rs. 7,61,56,446/- as income from business and applying the maximum marginal rate applicable to the assessee for the relevant assessment year instead of concessional rate of tax of 10% in terms of section 111A of the Income Tax Act, 1961.

2. The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in upholding the action of learned Assessing Officer in assessing short term capital loss in respect of transactions in commodities amounting to Rs. 2,95,16,035/- as loss from business allegedly on the ground that on the basis of nature, volume scale and frequency of transaction same is of business nature.”

Revenue’s appeal (ITA no. 2762/Del/10):

“On the facts and in the circumstances of the case the Id. CIT(A) ha erred in law and on facts in directing the AO to verify whether the interest paid amounting to Rs. 1,42,37,378/- is compensatory or penal in nature which is not in accordance with the provisions of Section 25(1) of the Act; the Id. CIT(A) should have given a categorical finding on this issue.”

2. Brief facts are: The assessee derives business income from hiring of earthmoving equipments. In addition to hiring income, from purchase and sale of shares, mutual funds, derivatives, futures. Regular books of accounts are maintained. During the course of assessment AO observed that assessee carries on shares and like activities by way of two types:

- (i) by way of actual delivery transaction; and
- (ii) by way of non-delivery.

2.1. For the assessment year in question the assessee filed its return, disclosing following types of income:

(a) Business income from hire charges	Rs. 2,17,06,111/-
(b) Income from short term capital gains:	

Short term capital gains in respect of sale & purchase of shares (delivery based): Rs. 7,61,56,446

Loss on a/c of commodity delivery basis:	(-) <u>Rs. 3,17,78,131</u>	Rs. 4,43,78,275
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Profit on futures – shares, index future and futures – commodities		Rs. 4,26,34,040
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Intraday transactions		Rs. 11,642
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2.2. Assessee accounted for these types of transactions separately and delivery based transactions are reflected as investments. Delivery based commodities and shares were held by way of investment and are sold on basis of delivery in the books of accounts.

2.3. Assessee accordingly offered the income by way of two distinct types of activities:

- (i) Delivery based – held by way of investment, reflected in the books of A/cs. The transactions were in volumes and only few scripts were traded.
- (ii) Non-delivery based, which were carried out by the assessee distinctly and separately, without delivery.

2.4. STT transaction tax was also paid by the assessee in respect of delivery based transaction of shares. AO, however, proposed that the short term capital gains earned by the assessee amounting to Rs. 7,61,56,446/-

should not be treated as short term capital gains but as profits and gains from business.

2.5. Assessee, in reply, contended that:

“(iii) The transactions in commodity and share scrip’s that are traded against actual delivery is accounted in the books of accounts as well as in the balance sheet as capital investment whereas the profit made on shares and commodity futures and index futures as well as intraday trading transactions that are traded without actually delivery is accounted as profit in the profit and loss account and also shown as part of business income in the returned computation so that ample distinction is exhibited between the two forms of portfolios not only in the books of account but also in the audited financial statement and tax audit report furnished along with the return of income. It will kindly be appreciated by your honour that in drawing its computation of income the assessee company has suo motu made a disallowance out of interest expenditure of Rs. 14237378/- incurred in relation to acquisition on such investment in securities made during the previous year and has also not claimed rebate u/s 88E of Rs. 20,66,571/- on capital gains both of which are otherwise available to assessee if these transactions are treated as stock in trade and treated as business.

(iv) That the average holding period of shares sold during the previous year by the assessee is 41 days meaning a month and a half which gives ample indication and evidence that the assessee does not trade in shares on regular or frequent basis to cash opportunities offered by fluctuating market prices but rather chooses to invest in bulk. Further it will kindly be appreciated by your honour that in all 98 transactions were undertaken by the assessee during the previous year which means mere 8 transactions per month which is very unlikely of a person dealing in shares. Also for the fact that during the previous year the assessee has maintained a small portfolio of 18 scrips indicated that the transactions in shares are not diversified either. In this connection we submit herewith a statement of average transactions.

- (v):
- (a) That on an average 4 scrips are transacted in a month.
 - (b) That there are no transaction in the month April, 2005 and February,2006.
 - (c) That on an average only 8 transactions are entered in a month.
- (vi) Further, the assessee relied on the following decision/ circular in support of its contention:-
- (a) The Delhi High Court in CIT V. Ess Jay Enterprises Private Limited (2008) 173 Tax 1.
 - (b) Circular No. 4/2007 issued by Central Board of direct Taxes (“CBDT”)
 - (c) Sarnath infrastructure (P) Ltd. V. Asstt. CIT (2008) in appeal no. 301/Luck/2006 dated 20.12.2007.
 - (d) Ramnarain Sons (Pr.) Ltd. Vs. Commissioner of Income-tax (41 ITR 534)
 - (e) Chandigarh bench of the ITAT in Vesta Investment and trading Co. (P) Ltd. Vs. Commissioner of Income-tax (70 ITD 200)
 - (f) Ramnarain Sons (P) Ltd. (supra) and Hon’ble Allahabad High Court in the case of Sohan Lal Gupta (supra)
 - (g) Karam Chand Thaper & Bros. (P) Ltd. V. CIT (82 ITR 899)
 - (h) Karnataka State Industrial Investment & Development Corpn. Ltd. Vs. Deputy Commissioner of Income-tax (59 ITD 643).
 - (i) M.V. Chandrashekhar V. Dy. CIT 91 ITD 543.
 - (j) Raja Bahadur Kamakhya Narain Singh Vs. Commissioner of Income-tax (77 ITR 253).

2.6. AO, however, held the delivery based transactions of shares and commodities as business income on following reasons:

- (i) There are no long term capital gains from transactions in shares and the assessee has not derived any income by way of dividends.
- (ii) The CBDT Circular referred to by the assessee was only in the nature of guidance while determining the facts of each case.
- (iii) The assessee's main line of business is not that of hiring of machinery and equipment as claimed, but the substantial part of his income was derived out of capital/ commodity market. Therefore, it would be reasonable to hold that the assessee's main line of business pertained to commodity markets.
- (iv) The total purchase of shares was to the tune of Rs. 1,85,49,37,656/- and the assessee's hire charges constituted a very small part of the share turn over. Reliance was placed by AO on Hon'ble Supreme Court judgment in the case of Janki Ram Bahadur Ram Vs. CIT (1965) 57 ITR 21.

2.7. The assessee's purchase/ sale of different scrips in different months were very frequent and amount to systematic activity of carrying on business of the shares. Reliance was placed on Hon'ble Supreme Court judgment in the case of CIT Vs. Sutlej Cotton Mills Supply Agency Ltd. (1975) 100 ITR 706. . This trend/ continuity and a certain pattern in the transactions by the assessee was indicative of a business of dealing in shares. Further reliance is placed on Hon'ble Gujarat High Court judgment in the case of Pari Mangaldas Girdhardas V. CIT (1977) CTR 647 (Guj); & Hon'ble Supreme Court judgment in the case of CIT Vs. H. Holck Larsen 160 ITR 67 (SC). On these observations, the amount of Rs. 7,61,56,446/- claimed by assessee as short term capital, was treated by the AO as profits and gains from business, liable to be taxed at the maximum marginal rate of 10%. The STT

paid was allowed as rebate as per the provisions of Sec. 88E. Based on these observations, the assessment was framed accordingly.

2.8. Aggrieved, assessee preferred first appeal before the Id. CIT(Appeals), who partly confirmed the observations of the AO by following observations:

- (i) The assessee purchased/ sold shares of companies and hundreds of transactions during the year.
- (ii) The assessee was an Engineer from IIT and drawing salary income from a company of Indiabulls group. The assessee had borrowed interest bearing funds from Indiabulls Financial Services Ltd. These borrowed funds have been raised indirectly by making late payments for purchase of shares. The initial payments were made by Indiabulls Financial Services Ltd. The use of borrowed funds indicated the assessee's intention to carry out the business in shares.
- (iii) The assessee not only carried out trading in equity in shares on delivery basis but also ventured into trading in Future Index, Future Stock, commodity futures and intra day trading on non-delivery basis.
- (iv) The assessee entered into various ventures for certain liquid acquisitions on regular basis.
- (v) The assessee has credited the earnings from shares/ future/ stock/index/commodity/ intra-day trading activities with his hire charges receipts in the P&L A/c of assessee's proprietary concern

which also indicated the assessee's intention to combine all the activities as business income.

- (vi) Circular no. 4 of 2007 issued by the CBDT refers to 2 Supreme Court judgments in the cases of CIT Vs. Associated Industrial Development Co. P. Ltd. 82 ITR 586; and Holck Larsen Vs. CIT 160 ITR 67. The Circular postulates 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. By taking into consideration all the principles enunciated in the Circular, the assessee's activities could have business activity.
- (vii) This is trite law that entries in books of accounts are not conclusive and the real nature of the transaction depends on the ascertainment of relevant facts. The assessee's frequent sales and purchases in shares ventures indicated that the assessee was carrying on activities of business. Reliance was placed on the Hon'ble Supreme Court judgments in the cases of Ramnarain Sons Pvt. Ltd. Vs. CIT 41 ITR 534; Oriental Investment Co. Ltd. Vs. CIT 32 ITR 664. The case law relied on by the assessee were distinguishable.

2.9. On these observations, the assessee's claim was dismissed, against which assessee is in appeal.

2.10. In the appeal, assessee raised an alternative contention that if the head of income is to be changed, in that case the amount of interest of Rs. 1,42,37,378/- paid to Indiabulls Financial Services Ltd. on borrowed funds should be allowed as allowable business expenditure. Ld. CIT(Appeals) restored the matter back to the file of AO with following observations:

“5.1. I have carefully considered the submission of the appellant. Since the AO has not accepted the appellant’s claim of the capital gains, therefore, this claim cannot be termed as additional claim of the appellant in view of the decision of Hon’ble Apex Court in the case of Goetze (India) Ltd. V. CIT 284 ITR 323 (2006). The business income has to be computed in accordance with the section 29 of the Act after allowing the deduction u/s 30 to 43D of the Act. The AO has changed the head of income, thus it is his duty to compute the income under proper head as per law. The case law relied on by the AO for not allowing the claim of interest is out of context. Since the AO has not verified the fact that whether this interest is compensatory or penal in nature, therefore, the AO is hereby directed to verify this fact and in case he is convinced/ satisfied that this interest expenditure is compensatory in nature, then the same has to be allowed while computing the business income. Therefore, this ground of appeal is allowed for statistical purpose.”

2.11. On the Id. CIT(Appeals) not deciding the issue and restoring back to the file of AO, the revenue is in appeal.

3. Learned counsel for the assessee contends that the assessee is an Engineer employed with Indiabulls Financial Services Ltd. and drawing salary therefrom. Since the assessee was owner of earth moving machinery and expert in this field, he derived business income from the hire of such machinery, which was a regular business activity of the assessee. Since the assessee wanted to augment his income by way of investment, it carried out the distinct and separate activities in the form of –

- (i) delivery based transactions of shares and commodities, exclusively engaged in by way of investment and not by trading activity.
- (ii) Non-delivery based transactions in shares and commodities, which are offered to income as speculative transactions.

3.1. The law and CBDT circular explicitly recognize as a matter of rule that an assessee is eligible to carry out the activities in shares and commodities by way of investment. There is no prohibition or bar of law against carrying out activities in the form of investment along with business activities in shares and commodities.

3.2. This is evident from the CBDT Circular no. 4 of 2007 dated 15-6-2007 that assessee can undertake both investment and trading activity in shares and commodities. CBDT circular is as under:

“CIRCULAR NO. 4/2007, DATED 15-6-2007

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.

8. The Authority for Advance Rulings (AAR) (288 ITR 641), 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 account, 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 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 emphasize that 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. 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.

3.3. The Board Circular makes it clear that :

- (i) There is a distinction between shares held by way of investment and shares held as stock in trade and assessee can engage in both type of activities.
- (ii) Hon'ble Supreme Court judgment in the case of Associated Industrial Development Co. P. Ltd. (supra) has held that assessee should be able to produce evidence as to whether he maintains any distinction between those shares which are stock in trade and which are held by way of investment.
- (iii) The reference to authority of Advance Ruling is in case of company who purchases or sells shares and FIIS. The assessee is neither a company nor FII but an individual. Even in case of companies and FIIS both activities can be undertaken.
- (iv) The CBDT has emphasized that a tax payer can maintain 2 portfolios i.e. (a) investment portfolios comprising of shares as

capital asset; and (b) portfolios comprising of stock in trade which are to be treated as trading assets.

- (v) It has been further emphasized that where the same assessee has both portfolios, assessee can earn income under both heads and they will be taxed under income tax accordingly.

3.4. The Circular clearly emphasizes that AO should not be governed by rigid concepts while dealing such cases. This was so because the Indian economy was opening to share investment and the assesseees were intended to be given choice of investment and trading by Govt.

3.5. The circular being very clear and justifying the accounting treatment given by the assessee, has been misconstrued to wrongly hold that assessee was undertaking business activity in respect of delivery and non-delivery transactions.

3.6. Ld. counsel contends that on an average assessee dealt on delivery share dealing in only limited number of companies i.e. selective 8 scrips. The assessee on an average undertook only 8 transactions in a month in these shares. It is common knowledge that the broker purchase small lots of shares depending on the market price. It does not mean that the assessee entered into that number of transactions individually. The broker was issued the instruction to buy/ sale given number of shares. It is up to the broker to acquire that target, the number of purchases cannot be treated as assessee's transaction. AO and ld. CIT(Appeals) instead of appreciating the facts that the assessee gave instruction to broker and the broker purchased various lots depending upon the feasibility, have erroneously held that the assessee has entered into number of transactions so as to emphasize the view that the assessee indulged in business adventure in delivery based shares. In the next

year the assessee carried out limited number of transactions. There is no bar that assessee cannot undertake investment activities in successive years.

3.7. Assessee had relied on the Hon'ble Delhi High court judgment in the case of CIT Vs. Ess Jay Enterprises (P) Ltd. (2008) 173 Taxman 1(Del.) to the following effect:

“6. We are of the view that the Tribunal has not committed any error in the opinion expressed by it. The assessee held the shares as an investment and there is nothing to show that the investment was converted into stock-in-trade of the business of the assessee. In fact, the business of the assessee appears to have been that of running a restaurant. It is true that one of the objects mentioned in the Memorandum of Association is with respect to buying and selling of shares but that was neither the business of the assessee nor is there any material on record to show that the assessee was regularly dealing in shares.

7. The Supreme Court in Raja Bahadur Kamakhya Narain Singh v. CIT (1970) 77 ITR 253, took the view that the treatment given to a transaction in the books of account is of importance. As noted above, the assessee had shown its shareholding in JPIL as an investment and not a stock-in-trade of business. As already noted, there is nothing to show that the shares were converted into stock-in-trade.

8. Under these circumstances, the Commissioner as well as the Tribunal were justified in holding that the claim of the assessee for capital gains was justified and that the Assessing Officer was not correct in taking the income of the assessee from the sale of shares as business income.”

3.8. Further reliance is placed on Hon'ble Bombay High court judgment in the case of CIT Vs. Gopal Purohit (2011) 336 ITR 287 (Bom.), holding as under:

“2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The

first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purpose of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received therefrom should be treated either as short-term or, as the case may be, long-term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.”

3.9. Similar issues have been decided by various Benches of the ITAT.

Reliance is placed on following:

- Vesta Investments & Trading Co. (P) Ltd. Vs. CIT (1999) 70 ITD 200 (Chd.);
- ACIT Vs. Smt. Kavita Devi Agarwal (2011) 48 SOT 191 (JP)
- Sarnath Infrastructure (P) Ltd. Vs. ACIT (2010) 124 ITD 71 (Luck.).

3.10. It is further pleaded that the investment portfolio can be maintained on the basis of borrowed funds. There is neither a bar in the law nor a condition prescribed by the Board Circular that assessee while maintaining an investment portfolio cannot do so by borrowing funds. The fact that the assessee treated these transactions as investment portfolio is further illustrated by the fact that it did not claim the interest on borrowed funds as expenditure while computing capital gains from investment portfolio. This is so because in case of short term capital gains, the interest on borrowed funds

is not allowable as a deduction. This is why an alternate claim was made when AO held to be business income. .

3.11. It is pleaded that the Hon'ble Supreme Court, various High Courts, ITAT and CBDT have held that an assessee can maintain two portfolios for share trading – one for trading and another for investment. In such cases, trading and investment in same company shares have been held to be allowable if in the books of accounts trading account as well as in investment a/c are duly maintained. The income earned on trading account is credited to the business income and the income earned from investment account is offered by way of capital gains. The stock in trade held by the assessee will be treated as stock in trade and in case of investment, nothing is reflected as stock in trade. However, as a corollary, the investment retained in the balance-sheet represents the value of shares as capital investment.

3.12. In assessee's case it clearly emerges from record that nothing was shown by the assessee as stock in trade in the books of accounts. The only portfolio maintained in respect of delivery based shares is on account of investment in shares, there is no stock in trade of shares. The assessee has carried out limited share trading activities in limited on which STT tax has been paid. Lower authorities held by stretching the logics and the facts.

3.13 Similarly, in respect of delivery based transactions of commodities also has been accounted by way of investment, which has been declared as short term capital loss. This loss in respect of delivery based commodities, has been wrongly held to be business loss by lower authorities.

4. Ld. DR, on the other hand, supported the order of lower authorities and contends that the assessee's income is from alleged investment is small business income on non delivery shares to a large extent which clearly

shows that the assessee's dominant purpose was to earn income by way of trading in shares and commodities

4.1. The fact that assessee borrowed initial purchase money from Indiabulls Financial Services Ltd. itself indicates that he did not have own funds and the interest bearing borrowings clearly indicates business motive in all transactions. The assessee's activities were not restricted only to the delivery based investment in commodities but simultaneously assessee indulged into trading and future stock commodity and intraday transactions. Therefore, all these facts, material, evidence and other observations made by lower authorities clearly indicate that the assessee was carrying out business activities in respect of shares and commodities. CBDT circular supports the stand of revenue. Orders of lower authorities are relied on.

5. We have heard rival contentions and gone through the relevant material available on record. As the facts emerge, regular books of account are maintained by the assessee in which the delivery based transactions in question are accounted on investment account. The delivery based transactions have been shown as investment in shares and commodity. Assessee claims to have undertaken 2 type of activities – (i) delivery based transactions; (ii) non-delivery based transactions. Books of accounts are accordingly maintained. The delivery based transactions are separately entered into books of accounts as capital investment and necessary entries about profits are accordingly made. No issue has been raised on the method of accounting adopted by the assessee.

5.1. The grievance of the revenue is to the effect that the frequency of transactions, the intention of the assessee constitute all the transactions i.e. delivery and non delivery to be business income.

5.2. The CBDT Circular no. 4 of 2007 has been referred to by both the parties. Revenue contends that the Board has set the AO free to decide the issue on the basis of the facts of each case. The assessee has no issue on this aspect but contends that Board Circular has referred to Hon'ble Supreme Court judgment in the case of Associated Industrial Development Co. P. Ltd. (supra), for the proposition that in normal circumstances, the assessee should 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

5.3. CBDT in para 10 of circular has emphasized that it is possible for a taxpayer to have two portfolios – (i) investment portfolio in which securities are to be treated as capital assets and profits as capital gains; and (ii) trading portfolio, comprising of stock-in-trade which are to be treated as trading assets and profits as business income. It has been further pleaded that assessee can have separate incomes under the two heads i.e. capital as well as business income. The circular was issued to encourage investment in capital markets due to liberal economy.

5.4. According to assessee the Circular emphasizes and advises the AO that no single specific principle should be applied, implying that the AO should appreciate all the facts in such manner. Assessee has maintained accounts by treating delivery based shares income as capital investment and capital income. Assessee has entered into the transaction with limited number of the companies i.e. 8 throughout the year. Besides the average number of transactions in one month on account of such share dealings is 8. This has been wrongly extrapolated by AO to more number of transactions adopting broker's purchases.

5.5. In the case of 2 portfolios, an eventuality may arise, like an assessee deals in the shares of Telco, some are credited to trading activity and some may be accounted for on capital investment. The law and CBDT circular permits that in such cases accounting entry will determine the nature of assessee's income. When the CBDT Circular and various case laws allow such type of eventuality, in our view the assessee has a stronger case. Looking at the accounting treatment, limited number of companies dealt in and limited number of transactions per month, in our considered view the assessee's claim of capital investment cannot be denied.

5.6. Coming to the revenue's objection that the assessee borrowed the funds from Indiabulls Financial Services Ltd., in our view, this cannot constitute a factor as in none of the case laws or CBDT circular it has been held that borrowings will not be allowed in investment transactions. In our view the investment in capital assets also can be carried out by way of borrowed funds. There being no bar notified by the law, judicial pronouncement or CBDT Circular, we are unable to accept this view.

5.7. Hon'ble Delhi High Court in the case of Ess Jay Enterprises (P) Ltd. (supra), was seized with similar controversy as in that case the shares were treated as investment and were not considered stock in trade or business. Though the assessee was running a restaurant and one of the business object of the assessee company was purchase and sale of shares. When a company having a restaurant with an object of selling and purchasing the shares by way of business can be eligible to hold the shares on investment account, we see no justification in holding the capital gains as business income when investment account is separately maintained. Our view is further supported by Hon'ble Bombay High Court judgment in the case of Gopal Purohit

(supra) and ITAT Chandigarh bench judgment in the case of Vesta Investments & Trading Co. (P) Ltd. (supra).

5.8. ITAT Delhi Bench 'B' vide judgment dated 30-9-2011 in the case of M/s Dynamic Consultants Pvt. Ltd. Vs. ACIT rendered in ITA no. 2694/Del/09, to which both of us (JM & AM) were party, has decided similar issue and held as under:

9. We have heard both the parties. The assessing officer has treated the purchase and sale of shares as continuous activity of the assessee. In the case before us, there is no dispute about the fact that the shares purchased were transferred to De-mat account. The Id. CIT (A) has held that where the period of holding is more than six months, the transaction will be in the nature of capital gains and where it is less than six months: it will be in the nature of business. Long term capital gain has been defined under section 2(29B) of the Act and means capital gain arising from transfer of a long time asset. Long term capital asset has been defined under section 2(29A) and means a capital asset which is not a short term capital asset. Section 2(42A) defines short term capital asset to mean a capital asset which is held by an assessee for not more than 36 months immediately preceding its date of transfer. However, in respect of shares the short term capital asset would mean that such shares are held by the assessee for not more than 12 months. The Id. CIT (A), however, treated the short term capital gains in relation to shares, which have been held by the assessee more than six months and the shares held for less than six months have been treated as business income. This, in our opinion, is not in accordance with the provisions of law. The assessee had treated the shares in its books of accounts as investments and not stock in trade. The assessee had received delivery of shares and have been deposited in De-mat account. Merely because the shares are sold within the short span of one to two months would not change the character of capital gains to the business income. The assessee has only 19 transactions during the year in respect of shares of 16 companies. Therefore, in our considered opinion, the Id. CIT (A) was not justified in treating

the shares held for less than six months as business assets. However, he has treated the shares held for more than one year as long term capital assets. In view of the above facts, in our considered opinion, the Id. CIT (A) is justified in treating the shares as long term capital gains which were held for more than one year. As regards the shares held for period less than six months, in our considered opinion, the view taken by the Id. CIT (A) is contrary to the provisions of law. Therefore, we are not in agreement with the views of the Id. CIT (A).

10. In the case of CIT Vs. Gulmohar Finance Ltd. (supra) where the assessee had shown the shares as investments in the balance sheet in the earlier years and no objection was taken to this position. Hon'ble Delhi High Court has upheld the order of the Tribunal holding that shares were held as investment. In the case of Ess Jay Enterprises P. Ltd. (supra) Hon'ble Delhi High Court has also held that the assessee having shown the shares as investment in the books of account and there was no material on record to show that the same were converted into stock in trade, Hon'ble Delhi High Court upheld the stand taken by the ITAT that the profits arising on sale of share was assessable as capital gains and not as business income. In the case before us the Id. AO has not brought any material on record to show that the shares were not held by the assessee as investment. Therefore, in our considered opinion, the profits arising on sale of shares held as investment will be assessable as capital gains depending upon the period of holding as long term or short term capital gain. Accordingly, we allow this ground of appeal in favour of assessee

5.9. This order has been upheld by Hon'ble Delhi High Court in appeal nos. 200 & 201/2012 by order dated 9-4-2012. Following the same analogy in present case, we hold that profits arising on sale of delivery based shares and commodities are to be held as investment and are to be assessed as short term capital gains.

5.10. In view of the foregoings, we are of the view that ground in respect of delivery based share transactions, investment and capital loss in respect of

commodity transactions on delivery basis both are to be held on account of short term capital gain income and short term capital loss respectively. Thus, the grounds of the assessee are allowed.

5.11. Since, we have held the income to be capital in nature, the direction of Id. CIT(Appeals) about verifying the payment of interest to Indiabulls Financial Services Ltd. becomes infructuous. Consequently, revenue's appeal is dismissed as rendered infructuous.

6. In the result, assessee's appeal is allowed and that of revenue is dismissed as infructuous.

Order pronounced in open court on 30-04-2012.

Sd/-
(K.D. RANJAN)
ACCOUNTANT MEMBER
Dated: 30-04-2012.

Sd/-
(R.P. TOLANI)
JUDICIAL MEMBER

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR