



ITA Nos.2584 & 2585/Mum/2016  
Nirpan Securities Pvt. Ltd.  
Assessment Years-2011-12 & 2012-13

**आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“B” BENCH, MUMBAI**

**माननीय श्री शक्तिजीत दे, न्यायिक सदस्य एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI SAKTIJIT DEY, JM AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. No.2584/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2012-13)

<b>Nirpan Securities Private Limited</b> 301-308, Bhagwati House Plot A/19, Veera Desai Road Andheri(W), Mumbai-400 058	<b>बनाम/</b> Vs.	<b>Deputy Commissioner of Income Tax 4(2)(1)</b> Aaykar Bhavan M.K.Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. <b>AAACN-1329-A</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

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आयकर अपील सं./I.T.A. No.2585/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2011-12)

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स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. <b>AAACN-1329-A</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Rajiv Khandelwal, Ld.AR
<b>Revenue by</b>	:	Asghar Zain V.P, Ld. DR

<b>सुनवाई की तारीख/ Date of Hearing</b>	:	27/09/2018
<b>घोषणा की तारीख / Date of Pronouncement</b>	:	05/12/2018



## आदेश / O R D E R

### Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years [AY] 2011-12 & 2012-13 contest separate orders of first appellate authority. Both the appeals are being disposed-off by way of this combined order for the sake of convenience & brevity. First we take up ITA No.2585/Mum/2016 for AY 2011-12 which assails the order of the Ld. Commissioner of Income-Tax (Appeals)-9 [CIT(A)], Mumbai, *Appeal No.CIT(A)-9/Cir.4/343/2013-14* dated 28/01/2016 by raising the following grounds of appeal:-

1. *Commissioner of I.T.(A) erred in confirming the treatment of Short Term Capital Gain earned by appellant as business income without appreciating arguments of appellant and ignoring fact that scripts in which capital gain is earned are acquired from IPO (Public issue) and assessee has not traded in same scripts.*
2. *Commissioner of I.T (A) erred in confirming the treatment of Short Term Capital Gain earned by appellant as business income by making reliance on holding period of shares allotted/acquired from IPO (Public issue) and assessee has not traded in same scripts.*
3. *The Appellant plead before Honorable ITAT to direct the Assessing Officer to:-*
  - (i) *To allow the claim of the appellant that income from sale of shares allotted in IPO be treated as the capital gain as returned and not to treat same as business income.*
  - (ii) *To allow appropriate relief on the ground of appeal raised before Hon'ble Tribunal.*
4. *The Appellant plead before Honorable ITAT to add, alter or amend any or all grounds of appeal before or at the time of hearing.*

The assessment for impugned AY was framed by *Ld. Assistant Commissioner of Income Tax, Circle-4(2), Mumbai [AO] u/s 143(3) of the Income Tax Act, 1961* on 10/02/2014 wherein the income of the assessee has been assessed at Rs.604.52 Lacs after certain



disallowances & adjustments as against returned income of Rs.594.49 Lacs e-filed by the assessee on 16/09/2011.

2.1 During impugned AY, the assessee being *resident corporate entity* was engaged in the business of *financial service sector and as Share Brokers, sub brokers*. As evident from the grounds of appeal, the sole subject matter of the appeal is determination of head under which gains earned by the assessee on sale of certain shares / securities would be assessable to tax.

2.2 During assessment proceedings, it was noted that the assessee earned *Short Term Capital Gains* of Rs.116.16 Lacs against sale of certain shares, the details of which has been extracted at *para-6.2* of the quantum assessment order. The assessee defended the same vide its letter dated 05/02/2014 wherein it *inter-alia* submitted that the shares were allotted in public issues and investments were out of own capital. However, Ld. AO noted that the assessee traded in 11 scrips / transactions during the year out of which the holding period of 10 transactions was less than five days. Placing reliance on several judicial pronouncements, Ld. AO came to a conclusion that the aforesaid income was assessable as *business income* instead of *Short Term Capital Gains* as offered by the assessee. The head of the income assumes importance in view of the fact that *Short Term Capital Gains* on sale of shares assessable under the head *capital gains* attracts concessional rate of tax as against the rate when the same are treated as *Business Income*.

3. Aggrieved, the assessee contested the same without any success before Ld. first appellate authority vide impugned order dated 28/01/2016



wherein Ld. CIT(A) came to conclusion that the assessee was engaged more as a trader rather than an investor in shares since the frequency of the transactions was high and the holding period of scrips was very less and therefore, Ld. AO was justified in treating the gains as *Business Income*. Aggrieved, the assessee is in further appeal before us.

4. The Ld. Authorized Representative for assessee [AR] contested the stand of lower authorities on the premise that the assessee acquired the scrips by way of *Initial Public Offers [IPO]* out of surplus funds and the same were held as investment and therefore the gains were rightly offered under the head *Capital Gains*. *Pe Contra*, Ld. DR drew our attention to the fact that the holding period of the scrip was very less and therefore, the stand of lower authorities was justified.

5.1 We have carefully heard the rival submissions and perused relevant material on record. The basic facts are not under dispute and the issue before us is in a very narrow compass i.e. whether the factual matrix justifies the gains to be assessed as *Capital Gains* or as a *Business Income*.

5.2 The perusal of holding period chart extracted by Ld. AO at *para-6.2* clearly reveal that the assessee has dealt in 11 scrips / transactions during the year out of which the holding period of 10 scrips / transactions is five or less than five days which indicate that the investments were made by the assessee as a trader only and not as an investor and the primary objective of the investments was to earn the gains in a *business-like* manner rather than to earn accretion to the same by way of dividend. The intention of the assessee gets manifested from the fact that the scrips have been sold within a very short span of time so as to reap the



benefits of listing gains only. This is further fortified by the fact that the assessee was engaged as *share broker* and as evident from *memorandum of association* as placed on record, dealing in shares was one of the main objectives of the assessee company. Hence, after due consideration, we find ourselves in agreement with the view taken by first appellate authority and we see no reason to interfere with the same. All the grounds as well as the appeal stand dismissed.

### **Assessee's Appeal ITA No. 2584/Mum/2016, AY 2012-13**

6. The assessee has raised the following grounds of appeal:-

1. *Commissioner of Income Tax (Appeals) erred in law and fact in confirming addition of Rs.26,90,759/- made in accordance with Rule 8D (2)(ii) though facts of interest cost was explained to assessing officer & same was on record.*
2. *Without prejudice to Ground No.1 Commissioner of Income Tax (Appeals) erred in law and fact in calculating disallowance under rule 8D (2)(ii) of Rs.26,90,759/- without appreciating the facts of the case & without recording reason for rejecting arguments of appellant on disallowance u/s 14A.*
3. *Commissioner of Income Tax (Appeals) erred in law and fact by confirming the disallowance u/s 14A read with Rule 8D(2)(ii) of Rs.26,90,759/- against dividend income of Rs.14,31,894/- received from Liquid Fund of Mutual Fund.*
4. *Commissioner of Income Tax (Appeals) erred in confirming disallowance of sundry balance written off amounting to Rs.11,40,522/- being refund receivable from SEBI*
5. *Commissioner of Income Tax (Appeals) erred in not considering the fact that the amount written-off was considered as income in AY 2004-05 as refund due from SEBI & is written off as same is not received after long period.*
6. *The Appellant plead before your honor to direct the Assessing Officer to: -*
  - i) *To delete the disallowance of Rs.26,90,759/- made u/s 14A read with rule 8D(2)(ii)*
  - ii) *To allow the claim of the appellant that disallowance u/s 14A read with rule 8D should be calculated by considering all facts stated in grounds of appeal & Rule should not be applied automatically.*
  - iii) *To Allow claim of sundry balance written off amounting to Rs.11,40,522/-*
  - iv) *To grant appropriate reliefs on all grounds raised herein the Appeal.*

As evident from grounds of appeal, the subject matter of appeal is disallowance u/s 14A and taxability of sundry balances written-off.



7.1 The assessee has been assessed u/s 143(3) on 19/02/2015 at Rs.671.56 Lacs under normal provisions after certain additions / disallowance as against returned income of Rs.577.44 Lacs *e-filed* by the assessee on 29/09/2012.

7.2 During assessment proceedings, it was noted that the assessee reflected exempt dividend income of Rs.14,31,895/- which called for disallowance u/s 14A. Against the same, the assessee had made *suo-moto* disallowance of Rs.1,43,190/- in the return of income. The assessee submitted that no expenditure was incurred to earn the exempt income. However, not convinced, Ld. AO, applying Rule 8D, worked out aggregate impugned disallowance of Rs.75.44 Lacs which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.26.90 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.48.53 Lacs. After adjusting the *suo-moto* disallowance of Rs.1.43 Lacs as offered by the assessee, the net disallowance worked out to Rs.74.01 Lacs which was added to the income of the assessee.

7.3 The second addition pertains to sundry balances written-off for Rs.11,40,522/- on account of refund receivable from *Securities & Exchange Board of India [SEBI]*. Explaining the same, the assessee submitted that an amount of Rs.17.61 Lacs was offered as income by the assessee as refund due from *SEBI* in AY 2005-06. However, only an amount of Rs.6.21 Lacs could be received by the assessee and therefore, the balance amount of Rs.11.40 Lacs, being non-recoverable, was written-off and claimed as deduction. However, in the absence of any evidence suggesting that *SEBI* has refused to recognize the assessee's claim, Ld. AO disallowed the same.



8. Aggrieved, the assessee agitated the same with partial success before first appellate authority vide impugned order dated 28/01/2016 wherein Ld. CIT(A), following its own decision in AY 2011-12, restricted the expense disallowance u/r 8D(2)(iii) to 5% of the exempt income but confirmed the interest disallowance u/r 8D(2)(ii). The addition of amounts written-off was confirmed by following Ld. AO's reasoning. Aggrieved, the assessee is in further appeal before us.

9. The Ld. Authorized representative for Assessee [AR], *Shri Rajiv Khandelwal*, submitted that in the absence of satisfaction as envisaged by the provisions of Section 14A, Rule 8 D could not be applied to the facts of the case. Without prejudice, it has been submitted that interest free funds in the shape of share capital and free reserves far exceeded the aggregate of stock-in-trade and investment made by the assessee and therefore interest disallowance was not justified. Finally, Ld. AR submitted that overall disallowance u/s 14A could not exceed the exempt income of Rs.14.31 Lacs earned by the assessee during impugned AY. The amounts written-off has been defended by submitting that the amount was already offered to tax in earlier years and since the same has become unrecoverable, deduction thereof is allowable to the assessee. Per *Contra*, Ld. DR supported the stand of lower authorities.

10.1 We have carefully considered the submissions and perused relevant material on record. Upon perusal of computation of income, it emerges that the assessee has offered *suo-moto* disallowance of Rs.1,43,190/- computed @10% of exempt income of Rs.14,31,895/- earned by the assessee during the impugned AY. It is undisputed position that the Tribunal in assessee's own case for AY 2009-10 as well



as first appellate authority in AY 2011-12 has restricted the same to 5% of exempt income, which has been accepted by the assessee. Relying upon the same, first appellate authority has restricted the expense disallowance to 5% of exempt income, which is fair under the circumstances and no further relief could be granted to the assessee on this account. The same is in line with estimation made in earlier years and therefore, the grounds of appeal, to that extent, stands dismissed.

10.2 So far as interest disallowance u/r 8D(2)(ii) is concerned, we find that the assessee has not offered any disallowance against the same and therefore, to contend that the Ld. AO failed to reject the workings made by assessee and record a proper satisfaction in that respect could not help the assessee in any manner. The same is devoid of any merits. However, we find substantial force in the argument of Ld. AR that the assessee had sufficient interest free funds in the shape of *Share Capital & Free Reserves* to make new investments including *stock in trade*. The perusal of financial statements as placed on record reveals that there is no change in *non-current investments* made by the assessee during impugned AY whereas *current investments and inventories* have been funded by way of reduction in overall *current assets*. Therefore, a presumption was to be drawn in assessee's favor that own funds were used to make the investments. Therefore, upon due consideration, we are inclined to delete the impugned interest disallowance u/r 8D(2)(ii). This ground of assessee's appeal stands allowed.

10.3 So far as the amounts *written-off* against refund receivable from *SEBI* is concerned, the assessee has placed on record the relevant documents for AY 2005-06 to support the submissions that the refund



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amount was offered to tax in that year. The working of the refund & other correspondences etc. made by the assessee with *SEBI* has also been placed on record. On factual matrix, we deem it fit to restore the matter back to the file of Ld. AO for re-adjudication of assessee's claim as per law after appreciating all these documentary evidences with a direction to the assessee to evidence the non-recovery of balance amount. The ground stand allowed for statistical purposes. The appeal stand partly allowed.

### **Conclusion**

11. The appeal for AY 2011-12 stands dismissed whereas the appeal for AY 2012-13 stands partly allowed in terms of our above order.

*Order pronounced in the open court on 05<sup>th</sup> December, 2018*

**Sd/-**

**(Saktijit Dey)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated :05/12/2018

Sr.PS:-Jaisy Varghese

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**



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Sr. No.	Details	Date	Initials	Designation
1	Draft dictation sheets are attached	Self-Typed on own Computer / Laptop by the Member		Sr.PS/PS
2	Draft dictated on	Not Applicable		Sr.PS/PS
3	Draft Placed before author	Not Applicable		Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on			Sr.PS/PS
8	File sent to the Bench Clerk			Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			