

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'C', New Delhi**

**Before : Shri H.S. Sidhu, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 5845/Del./2014
Assessment Year: 2010-11**

Rakesh Kumar Gupta, 267, Sukhdev Vihar, New Delhi. PAN – AEKPG6510R (Appellant)	vs.	Income-tax Officer, Ward 37(3), New Delhi (Respondent)
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Appellant by	Sh. KVS Gupta, Advocate
Respondent by	Sh. Arun Kumar Yadav, Sr. DR

Date of Hearing	14.09.2017
Date of Pronouncement	09.10.2017

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of Id. CIT(A)-XXVIII, New Delhi dated 21.08.2014 for the assessment year 2010-11 on the following grounds :

- 1) *The action of the Ld. CIT(A) in confirming the addition made by the Ld. Assessing Officer to the returned income of Rs.37,1 l,501/-as net business profit as per Para 3 of the Assessment Order as business against Short Term Capital Gains declared is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*
- 2) *The action of the Ld. CIT(A) in confirming the action of the Ld. Assessing Officer in not accepting Jobbing Losses as Business Loss/Short Term Capital Gains and treating it as speculation is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*

- 3) *The action of the Ld. CIT(A) in confirming the action of the Ld. Assessing Officer in not allowing loss from Jobbing in Share to be carried forward is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*
- 4) *The action of the Ld. CIT(A) in confirming the action of the Ld., AO in not allowing STT paid against Business Income of Shares is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*
- 5) *The action of the Ld. CIT(A) in confirming the action of the Ld. AO in not allowing set off of brought forward losses of Rs.45,60,675/- against the Short Term Capital Gains of sale of shares for current assessment year of Rs.32,96,534/- as claimed in the Income Tax Return is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*
- 6) *The action of the Ld. CIT(A)'s in confirming the action of the AO in not giving a finding regarding carry forward of losses of short term Capital Gains to be carried forward for subsequent years is illegal, arbitrary, unwarranted, uncalled for and against the facts and circumstances of the case.*
- 7) *The action of the Ld. CIT(A) in confirming the action of the AO in not accepting returned income is illegal, arbitrary, unwarranted and uncalled for and against the facts and circumstances of the case.*

2. The brief facts of the case are that the assessee is a lawyer by profession. During the year he derived income from profession and also earned income from short-term capital gain and income from other sources. In the assessment proceedings, the AO observed that the assessee has shown short-term capital gains of Rs.32,96,534/-. The AO asked for the details of the purchase and sales of shares. In response, the assessee filed a summary statement of shares issued by M/s. K.K. Securities Ltd. and M/s. Singhal Capital Services Ltd., through which the assessee made transactions of purchase and sale of shares. He further submitted the turnover of purchase and sales on the basis of turnover made by brokers on behalf of the assessee.

It included the turnover of sale which the broker had not paid to the assessee but had utilized the sale proceeds for purchase of other shares. The assessee did not file details of date-wise trading account summary. The Assessing Officer issued notices u/s. 133(6) to the above two brokers for filing the account summary on daily basis which is as under :

<u>Date</u>	<u>Name of the scrip</u>	<u>No. of share purchased</u>	<u>Value of shares purchased</u>	<u>No. of shares sold</u>	<u>Value of shares sold</u>
13.04.2009	Axis Bank			42206	1,96,86,904/-
23.06.2009	ICICI Bank	20000	1,39,47,765/-		
23.06.2009	R.Com	1000	2,86,810/-	1000	2,91,080/-
24.06.2009	ICICI Bank	3000	20,50,720/-		
24.06.2009	ICICI Bank	3000	20,39,010/-	3000	20,78,460/-
25.06.2009	ICICI Bank	5000	34,97,341/-	5000	34,92,100/-
26.06.2009	ICICI Bank			23000	1,70,81,769/-
30.06.2009	ICICI Bank	10000	73,96,435/-	10000	73,10,557/-
02.07.2009	ICICI Bank	13000	94,81,620/-	13000	95,48,009/-
03.07.2009	ICICI Bank	15000	1,10,96,750/-	15000	1,10,30,300/-
08.07.2009	ICICI Bank	3578	23,85,166/-	3578	23,42,660/-
08.07.2009	ICICI Bank	31422	2,07,21,341/-		
14.07.2009	ICICI Bank			20000	1,35,37,230/-
14.07.2009	ICICI Bank	5000	33,38,850/-	5000	33,49,150/-
14.07.2009	Axis Bank	9000	68,62,201/-		
15.07.2009	Axis Bank			8000	63,53,577/-
15.07.2009	ICICI Bank			11442	77,90,481/-
16.07.2009	ICICI Bank	20	14,310/-		
16.07.2009	Axis Bank			1000	7,86,030/-
28.07.2009	ICICI Bank	4960	36,71,322/-	4960	36,83,561/-
29.07.2009	ICICI Bank	9787	71,19,098/-	9787	71,56,041/-
30.07.2009	ICICI Bank	4438	33,35,485/-	4438	32,42,562/-
03.08.2009	ICICI Bank	5159	39,00,525/-	5159	39,34,018/-
04.08.2009	ICICI Bank	7591	58,10,688/-	7591	58,20,248/-
05.08.2009	ICICI Bank	400	3,08,000/-	400	3,08,200/-
05.08.2009	Axis Bank	2060	17,62,119/-	2060	17,53,915/-
06.08.2009	ICICI Bank	10366	81,62,220/-	10366	80,12,570/-
13.08.2009	ICICI Bank	2200	16,42,400/-	2200	16,50,350/-
13.08.2009	Great Offshore	741	3,97,738/-		
14.08.2009	ICICI Bank	8731	64,91,122/-	8731	65,14,783/-
17.08.2009	ICICI Bank	6091	43,72,834/-	6091	43,93,409/-
19.08.2009	ICICI Bank	3100	22,20,300/-	3100	22,08,800/-
25.08.2009	ICICI Bank	1400	10,57,000/-	1400	10,57,400/-
26.08.2009	ICICI Bank	3800	28,76,100/-	3800	28,97,943/-
27.08.2009	ICICI Bank	2300	17,24,600/-	2300	17,30,000/-
02.09.2009	ICICI Bank	6900	50,94,700/-	6900	50,86,150/-
04.09.2009	Great Offshore			741	4,06,378/-

09.09.2009	ICICI Bank	2600	20,55,300/-	2600	20,62,100/-
15.10.2009	ICICI Bank	2600	24,00,950/-	2600	24,27,190/-
16.10.2009	ICICI Bank	1000	9,60,920/-	1000	9,61,060/-
16.10.2009	Axis Bank	563	5,63,600/-	563	5,64,487/-
20.10.2009	ICICI Bank	5700	54,02,836/-	5700	53,87,982/-
20.10.2009	Tel Eighteen	16500	15,02,924/-		
21.10.2009	Tel Eighteen	1000	88,900/-		
21.10.2009	ICICI Bank	400	3,70,800/-	400	3,71,800/-
22.10.2009	ICICI Bank	6487	58,70,342/-	6487	58,35,782/-
22.10.2009	ICICI Bank	1213	10,90,275/-		
22.10.2009	Tel Eighteen	4000	3,49,000/-		
23.10.2009	ICICI Bank			1213	11,03,617/-
27.10.2009	ICICI Bank	10100	86,57,500/-	10100	86,85,960/-
30.10.2009	ICICI Bank	6000	47,20,500/-	6000	47,34,644/-
03.11.2009	ICICI Bank	1350	10,88,600/-	1350	10,83,986/-
04.11.2009	DLF Ltd.	1400	4,84,500/-	1400	4,86,100/-
06.11.2009	ICICI Bank	4027	34,21,483/-	4027	34,37,677/-
09.11.2009	ICICI Bank	3411	29,23,213/-	3411	29,32,160/-
10.11.2009	ICICI Bank	6900	62,09,600/-	6900	61,94,590/-
10.11.2009	Tel Eighteen			5000	3,92,714/-
11.11.2009	Tel Eighteen			4000	3,17,104/-
11.11.2009	ICICI Bank	1800	16,54,158/-	1800	16,30,200/-
12.11.2009	Tel Eighteen			12500	10,07,401/-
17.11.2009	ICICI Bank	1500	13,58,600/-	1500	13,56,000/-
19.11.2009	ICICI Bank	8050	71,70,800/-	8050	71,60,000/-
25.11.2009	ICICI Bank	4700	42,38,400/-	4700	42,40,964/-
26.11.2009	ICICI Bank	4500	39,40,400/-	4500	38,97,450/-
02.12.2009	ICICI Bank	600	5,46,000/-	600	5,47,200/-
02.12.2009	Great Offshore	18550	98,36,800/-		
03.12.2009	Great Offshore			9050	46,53,256/-
04.12.2009	Great Offshore			9500	48,78,186/-
05.01.2010	ICICI Bank	200	1,77,300/-	200	1,77,850/-
10.02.2010	ICICI Bank	200	1,61,900/-	200	1,61,500/-

3.2 The shares of Axis Bank sold on 13.04.2009 by the assessee were purchase by him in the last year as under:

Date	Name of the scrip	No. of share purchased	Value of shares purchased	No. of shares sold	Value of shares sold
27.01.2009	Axis Bank	21500	88,42,401/-		
29.01.2009	Axis Bank	8706	33,92,681/-		
30.01.2009	Axis Bank	2500	10,23,196/-		
02.02.2009	Axis Bank			3000	13,08,841/-
03.02.2009	Axis Bank	2500	10,83,143/-		
04.02.2009	Axis Bank	10000	41,65,755/-		

On the basis of above details, the AO issued show cause notice to the assessee to explain why the trading in shares should not be assessed under the head “income from business and profession” as income from speculation business

in respect of intraday transactions in shares and as income from business in respect of trading in shares on delivery basis, as the assessee has done trading in shares daily and in very high volumes. In response, the assessee submitted that he has invested in shares with intention of growth and investment on the advice of brokers. The Assessing Officer did not accept the reply submitted by the assessee observing as under :

"3.4. The reply of the assessee has been considered but the same is not tenable. Given the present situation of the assessee it can be seen that he is dealing in shares on continuous and aggressive manner. The frequency of trades and the time gap between buying and selling of various scrips does not show intention of the assessee for investment for appreciation but a cautious decision to earn higher profit from price movement of shares on regular basis. Further the account indicates a level of volume that would engage considerable time and attention of the assessee. Considering the magnitude and frequency of trade in shares it can be easily concluded that the motive of the assessee was never earning capital gain by investing in shares. The motive of the assessee was to earn higher profit from trading in shares. The fact is that the assessee is dealing in stocks and shares. In view of the above, the profit earned on share trading on delivery basis is treated as income from normal business and profit earned on share trading on jobbing basis is treated as income from speculation business and assessed under the head "Income from business or profession".

3.5 The assessee has declared net gain of Rs.19,05,581/- from share transactions on delivery basis and net loss of Rs.2, 13,0077- from share transactions on jobbing basis on transactions done through M/s K.K. Securities Ltd. He also declared net gain of Rs. 18,05,920/-from share transactions on delivery basis and net loss of Rs. 97,528/- from share transactions on jobbing basis on transactions done through M/s. Singhal Capital Services Ltd. Therefore, net normal business profit on delivery based trade is taken at Rs,37,1 1,501/- and net speculation business loss on jobbing transactions is taken at Rs.2,13,007/-. Since the assessee has filed his return of income belatedly on 20.03.2011, loss on speculation

business of Rs.2,13,007/- is not allowed to be carried forward to subsequent years.”

3. The Assessing Officer has further made adhoc disallowance of Rs.1,23,775/- and Rs.20,749/- on account of unvouched expenses debited to the profit and loss account and depreciation on vehicles respectively.

4. Aggrieved by the above additions, the assessee appealed before the first appellate authority. The assessee made detailed written submissions before the first appellate authority and the Id. CIT(A) after considering the order of the Assessing Officer and submissions of the assessee, confirmed the addition of Rs.37,11,501/- and did not allow the carry forward of losses. The Id. CIT(A) has partly allowed the addition of Rs.1,23,775/- and Rs.20,739/-. Aggrieved by the order of CIT(A) the assessee is in appeal before the ITAT on the issue of capital gain or business income and not allowing the carry forward losses.

5. The learned AR reiterated the submissions made before the Id. CIT(A) and submitted that the assessee is a lawyer and he cannot take any other business activity. The intention of the assessee was only to make investment and growth. Therefore, to say that the assessee was engaged in trading of shares is not correct, as all his trading in shares were on delivery basis and

jobbing too was in minimum quantity for a very limited transactions. The assessee has not taken any loan for investment in shares. The shares of Axis Bank were purchased in the previous year and it has been shown in the balance sheet under the head "investment" and the current year's purchase of shares which remained at the year end, has also been shown under the head "investment". The appellant has been dealing in shares all alone in the past. The surplus/losses have always been treated by the Income-tax Department under the head "capital gain". In the assessment year 2008-09, the Assessing Officer has accepted the contention of the assessee, which is on paper book page 55-56. He also relied on the circular No. 04/2007 issued by CBDT dated 15.06.2007. He further submitted that the assessee's transactions all alone have been with the sole intention of maximizing the investment growth and not to deal as businessman or speculator. In case of jobbing transactions, the AO has not given any finding that the speculative transactions constituted speculative business. He also relied on a number of decisions.

6. On the other hand, the Id. DR relied on the order of the lower authorities and submitted that the Id. CIT(A) has done reasoned order which does not require any interference. The assessee has done huge transactions in shares and has also done intraday transactions. It is clear from the finding of the

Assessing Officer on the tables noted at para No. 3 of the assessment order that the intention of the assessee was not to invest in shares, but to earn profit from sale of shares. The assessee has not received any dividend during the year.

7. After hearing both the parties and perusing the materials available on record and the orders of the authorities below, we find that during the year, the assessee has purchased and sold the shares of Rs 22 03 crores and odd and Rs.24.12 crores and odd respectively. Some of the shares of Axis Bank were purchased in the previous year, out of which some were sold and balance has been shown as on 31 03 2009. On examination of the tables reproduced above, we observe that the assessee has made purchase of shares 57 times and sale of shares 59 times. There are several instances when the assessee has purchased the shares and sold them either the same day or after a few days. In most of the cases, the assessee has done intraday transactions. From the balance sheet filed by the assessee for the impugned year placed at paper book page-33, we find that the shares held by the assessee are reflected as under :

Sl. No.	Name of the Company	Value as on 31.03.09	Value as on 31.03.10
1.	Abhishek Ind. (100)	1000	1000
2.	Bhageeratha Engg.(100)	1000	1000
3.	CCAP Ltd. (100)	1000	1000
4.	Shoppers Inv. & Finance Ltd.(100)	1000	1000
5.	Videocon International (8)	1000	1000

6.	Other Shares-Singhal Fincap	35243.30	35243.30
7.	Other shares – K.K. Securities	17162647.84	0

From the above part of the balance sheet, it is clear that there is no change in the shares of some companies, which remained as it is in F.Y. 31.03.2009 and 31.03.2010. In case of other shares – K.K. Securities, the assessee had value of shares at Rs.1,71,62,647/- as on 31.03.2009 but up to the impugned year, the assessee has sold all the shares. On perusal of the computation filed by the assessee and the capital account, the assessee has not received any dividend during the year. The assessee has received only dividend of Rs.350/- in F.Y. 31.03.2009. In view of the characteristics of share transactions undertaken by the assessee, we do not find any justification to discard the findings reached by the authorities below on this issue. In the present fact situation, the Hon'ble jurisdictional High Court in the case of Manoj Kumar Samdaria vs. Commissioner of Income Tax vide order dated 12.03.2014 has decided the issue as under :

“4. The Revenue is now in appeal before us against the aforesaid findings of learned CIT(A). The ld. DR while carrying us through the assessment order and findings of the ld. CIT(A) supported the order of the AO while relying upon the decision dated 2.11.2011 in the case of *Mafatlal Fabrics (P.) Ltd. v. Dy. CIT* [2012] [49 SOT 303 /17 taxmann.com 50](#) (Mum.) and decision dated 6th January, 2012 in the case of *Diligent Services (P.) Ltd. v. Asstt. CIT* [IT Appeal Nos.3299/Delhi/09 and 3318/Delhi/09]. On the other hand, the ld. AR on behalf of the assessee supported the order of the ld. CIT(A) while contending that their claim as an investor has been accepted in the preceding year. Inter alia, the ld. AR relied upon decision dated 6-1-2010 in *CIT v. Gopal Purohit* [2010] [188 Taxman 140](#) (Bom.), upholding decision of the Tribunal in *Gopal Purohit v. Jt. CIT* [2009] [29 SOT 117](#) (Mum).

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions relied upon by both the sides. The issue before us is as to whether the shares quoted in stock exchange and traded in by the assessee, which were classified as "investment" in their books of account, were their "investment" or their "stock-in-trade"? The AO treated short term capital gains of Rs. 65,45,321/-, on sale of such shares as business income while the Id. CIT(A) following the view taken in *M/s Gopal Purohit (supra)* accepted the claim of the assessee, reflecting the income under the head 'short term capital gains'. The assessee is in the business of exporting jewellery and handicrafts goods and is stated to be trading in shares for the preceding three or four years. The assessee claimed that in the earlier years their claim as an investor has been accepted by the AO in assessment completed u/s 143(1) of the Act while in the preceding AY2006-07, assessment was completed u/s 143(3) of the Act. However, there is nothing to suggest that the claim of the assessee as investor or trader in shares was examined by the AO nor any material has been placed before us that the AO raised any query on this aspect in the preceding assessment year. Even otherwise, no attempt was made by the Id. AR on behalf of the assessee before us to establish that facts and circumstances in the preceding years were similar to the facts and circumstances in the year under consideration. In these circumstances, reliance on decision of the AO in the preceding year is totally misplaced.

5.1 One of the relevant tests, in determining as to whether or not the shares/securities are a capital asset is whether it is in the nature of fixed asset or constitutes the stock-in-trade of the assessee's business. Fixed asset is what the owner turns to profit keeping the asset in his own possession, stock-in-trade is what he makes profit of by parting with it, and letting it change masters. Before proceeding further, we may have a look at the relevant provisions. Section 2(14) of the Act defines "*capital asset*" to mean property of any kind held by an assessee, whether or not connected with his business or profession. The definition of "*capital asset*" excludes "*stock in-trade*" held for the purpose of business. Section 2(22) of the Act defines "*dividend*" to include any distribution by a company of accumulated profits, whether capitalized or not. Section 2(42-A) of the Act defines "*short-term capital asset*" to mean a capital asset held by an assessee for not more than thirty six months immediately preceding the date of its transfer. However for share held in a company or any other security listed in a recognised stock exchange in India, this period is 12 months. Section 2(42-B) defines "*short term capital gain*" to mean capital gain arising from the transfer of a short term capital asset. Under Section 28(i) of the Act, the profits and gains of any business carried on by the assessee, at any time during the previous year, is chargeable to income tax under the head "*profits and gains of business or profession*". Under Section 45(1) of the Act any profits or gains, arising from the transfer of a capital asset effected in the previous year, is deemed to be income of the previous year in which the transfer took place. Section 111-A, inserted by Finance Act, 2004, relates to tax on short term capital gains in certain cases and, under sub-section (1) thereof, where the total income of an assessee includes any income chargeable under the head "*capital gains*", arising from the transfer of a short term capital asset being an equity share in a company and such transaction is chargeable to securities transaction tax, the tax payable by

the assessee shall be the aggregate of the amount of income tax calculated, on such short term capital gains, at the rate of fifteen per cent.

5.2. If the shares purchased by the assessee are held to be capital assets, short term capital gain on sale of such shares could fall within the ambit of Section 111A of the Act, and such capital gains would be subject to tax at a lower rate. If the shares are held by the assessee as stock in trade, profit on the sale of such shares would constitute business income, and be subject to tax at a higher rate. As mentioned above, Section 2(14) (i) of the Act defines a capital asset as not including stock in trade. If the assessee held the shares as "*stock in trade*", and not as investment, then such shares would stand excluded from the definition of "*short term capital asset*", and the profit earned on the sale of such shares would not be exigible to tax as "*short term capital gain*", but as "*profits and gains from business*".

5.3 In determining the issue as to whether, after acquiring the shares, the assessee dealt with it as an investor, or carried on business with it, treating it as its stock-in-trade or as a trading asset, what is relevant is that, if the case falls within the former category, receipts by way of sale of such shares will be capital receipts, but if it falls within the latter the receipts will be trading receipts, and profits therefrom business income. To determine as to whether sale of shares is to be assessed as business income or as income from capital gain, the most important test is whether the initial acquisition of the shares was with the intention of dealing in the shares or it was made as an investment. The intention of the assessee is best known to him and the dispute comes to the appellate authorities only when the Revenue authorities do not accept the claim of the assessee. The distinction whether the investment transaction is a mere realisation of the investment or an act done for making profits depends on the question whether the excess was an enhancement of the value by realising a security or a gain in an operation of profit making. If the transaction is in the ordinary line of the assessee's business there would hardly be any difficulty in concluding that it was a trading transaction but, where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. The surplus realised on the sale of shares, for instance, would be capital if the assessee is an ordinary investor realising his holding; but it would be revenue if he deals with them as a trader. The test often applied is, has the assessee made his shares and securities the stock-in-trade of a business?, as was observed in *Raja Bahadur Kamakhya Narain Singh v. CIT* [1970] [77 ITR 253](#) (SC). There is no material before us that shares and securities purchased in the year under consideration and classified as investment in books were actually intended to be held as long term investments. Profits realised by the sale of shares may be capital if the seller is an ordinary investor changing his securities, but it may be income if the seller of the shares is trading in shares, as held in *Raja Bahadur Visheshwara Singh v. CIT* [1961] [41 ITR 685](#) (SC). The substantial nature of the transactions, the magnitude of the shares purchased and sold and the ratio between the purchases and sales and the holdings, reveals the intention of the assessee as a trader in shares and not as an investor.. In the instant case, the assessee had opening investment of Rs. 1 crore in shares while shares worth Rs. 4.10 crore have been sold and shares of the value of Rs. 4.9 crore were purchased. The fact that few shares were held for only a day or two reflects the dominant or even sole intention to resell, which is a relevant factor and raises a strong presumption, but by itself is not conclusive proof, of trade. The intention to resell would, in conjunction with the conduct of the assessee and other

circumstances, point to the business character of the transactions. [*CIT v. Sutlej Cotton Mills Supply Agency Ltd.* [1975] [100 ITR 706](#) (SC) and *Venkataswami Naidu & Co. v. CIT* [1959] [35 ITR 594](#) (SC)]. Where a purchase is made with the intention of resale, it depends upon the conduct of the assessee and the circumstances of the case whether the venture is on capital account or in the nature of trade. A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale. Whether shares of a company held by a person constitute his capital or his stock-in-trade is not a pure question of law but essentially one of fact. [*CIT v. Ram Kumar Aggarwal & Bros.* [1994] [205 ITR 251](#)/[1993] [71 Taxman 510](#) (SC)]. The various authorities have laid down certain guidelines on the basis of which the intention of the assessee can be inferred. In the case of *Sarnath Infrastructure (P.) Ltd. v. Asstt. CIT* [2010] [124 ITD 71](#) (Luck.), the ITAT culled out various parameters, which may be applied to determine whether the transaction of purchase and sale of share is in the nature of trade or investment. The relevant observations of the ITAT read as under:

"The following principles can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:

- (1) What is the intention of the assessee at the time of purchase of the shares. This can be found out from the treatment it gives to such purchase in its books of account - whether it is treated as stock-in-trade or investment; whether shown in opening/closing stock or shown separately as investment or non-trading asset.
- (2) Whether assessee has borrowed money to purchase and paid interest thereon. Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.
- (3) What is the frequency of such purchases and disposal in that particular item? If purchases and sales are frequent, or there are substantial transactions in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).
- (4) Whether purchase and sale are for realizing profit or purchases are made for retention and appreciation in its value? Former will indicate intention of trade and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.
- (5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.
- (6) How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice versa.

- (7) It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept to the records or otherwise, between two types of holdings: if the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to revenue to prove that apparent is not real.
- (8) The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.
- (9) One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?
- (10) It is permissible as per CBDT's Circular No. 4 of 2007 of 15-6-2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.
- (11) Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen.

5.4 Even CBDT in Circular No.4/2007 dt.15.6.2007 has laid down the principles for holding as to when profits earned from transactions in share should be held as business or should be treated as investment. The relevant circular reads as under:

Circular No. 4/2007, dated June 15, 2007

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

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 the assesseees as well as for guidance of the Assessing Officers.

5. In the case of *CIT v. Associated Industrial Development Company (P) Ltd.* [1971] [82 ITR 586](#), the Supreme Court observed that (headnote) :

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 he should, in normal circumstances, be in a position to produce evidence

from his records as to whether he has maintained any distinction between those shares which are his stock-in-trade and those which are held by way of investment.

6. In the case of *CIT v. H. Holck Larsen* [1986] [160 ITR 67](#), the Supreme Court observed (page 87) :

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 is 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) [2007] [288 ITR 641](#), referring to the decisions of the Supreme Court in several cases, has culled out the following principles (page 651) :

- (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 (page 661) :

"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. The Central Board of Direct Taxes also wishes to emphasise 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. The 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]

5.5 We may point out that the Hon'ble Gujrat High Court in *CIT v. Rewashanker A. Kothari* [2006] [283 ITR 338](#) / [155 Taxman 214](#) laid down the following guidelines in order to determine whether profits arising on sale is business income:-

"The tests laid down by various decisions of the apex court indicate that, in each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction. Each case has to be determined on the total impression created on the mind of the court by all the facts and circumstances disclosed in a particular case. One of the principal tests is whether the transaction is related to the business normally carried on by an assessee. The nature of the commodity would also be a relevant factor. It is equally well settled that, merely because the original purchase was made with the intention to resell, if an enhanced price could be obtained, that by itself is not enough to infer that an assessee is carrying on business. However, though profit motive in entering into a transaction is not decisive, if the facts and circumstances indicate that the purchase of the asset was made solely and exclusively with an intention to resell the asset at a profit, it would be a strong factor for inferring that the transaction was in the nature of business.

In the case of *Pari Mangaldas Girdhardas v. CIT* [1977] CTR 647 (Guj), after analysing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

- (a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.
- (b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.
- (c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the

assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

- (d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.
- (e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorises such an activity.
- (f) The last but not the least, rather the most important test is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business.

5.6 In the instant case, the assessee has been habitually trading in quoted shares and the frequency of such purchases and disposal as also the fact that with the investment of 'Rs. 1 crore in shares, the assessee had turnover of over Rs. 4 crores, indicates nothing but intention of trade. It may be pointed out that the assessee earned only a meager amount of dividend of Rs. 21,952/- in the year under consideration. A trader in a commodity is basically motivated by profit in selling the commodity on each and every rise in value, which is apparent in the instant case. High frequency, high volume and regularity of transactions are therefore the basic features of a trading transaction. An investor on the other hand makes purchases with a view to earning income from the investments. He is not tempted to sell the commodity to earn quick profit on each and every rise in the value and holds the commodity for a longer period so as to have income as well as appreciation in value. The Id. CIT(A) pointed out that the assessee has not borrowed any funds for carrying the shares transactions. In our opinion, this is not the crucial factor to ascertain as to whether or not the assessee was an investor in shares or trader. Though the number of scrips is less than 25 as pointed out by the Id. CIT(A) but the period of holding and the ratio of turnover and stock reflects that the assessee had the predominant intention of trading in shares. As already stated, the true nature of transaction can be understood from the intention of the assessee at the time of purchase. Crucial factor is the period of holding which is very short in case of a trader, as is in the instant case, because a trader buys the commodity not for holding it in contrast to an investor who buys the commodity for holding it so as to earn some income from investment and have decent appreciation. In case of shares, income is in the form of annual dividend and therefore, an investor in shares will normally be holding shares for more than a year and any sale before one year has to be explained from the circumstances of the case. The profit motive is also relevant but this is also not conclusive because even an investor may earn profit by way of appreciation. As is apparent from the aforesaid facts, the transactions of purchase of shares, and thereafter selling it with in few days and most of the time within a month, with a view to earn profit, reflects motive of the assessee as a trader and not an investor. In the

instant case, purchases as well as turnover are continually increasing and the assessee has regularly dealt in purchase and sales of shares. Profit motive is also clearly evident in making the transaction. In *Gopal Purohit (supra)*, the assessee has been continually holding the shares as investment from year to year. This is not the situation in the instant case. In the case of *CIT v. Associated Industrial Development Co. (P.) Ltd.*, [1971] [82 ITR 586](#), the Hon'ble Supreme Court held as under:

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

5.7 In the case of *CIT v. H. Holck Larsen* [1986] [160 ITR 67/ 26 Taxman 305](#), the Hon'ble Supreme Court has held as under:

"In order to determine whether one was a dealer in shares or an investor, the real question was not whether the transaction of buying and selling the shares lacks the element of trading, but whether the later stages of the whole operation show that the first step - the purchase of the shares - was not taken as, or in the course of, a trading transaction. The totality of all the facts will have to be borne in mind and the correct legal principles applied to these. If all the relevant factors have been taken into consideration and there has been no misapplication of the principles of law, then the conclusion arrived at by the Tribunal cannot be interfered with because the inference is a question of law, if such an inference was a possible one, subject, however, that all the relevant factors have been duly weighed and considered by the Tribunal, the inference reached by the Tribunal should not be interfered with."

5.8 The Id. AR on behalf of the assessee relied on the decision in the case of *Gopal Purohit (supra)* where in it was held that income from all delivery based transactions has to be assessed as income under the head capital gains. We have carefully perused the order of the Tribunal in the case of *Gopal Purohit (supra)*, but we find that there is no universal finding in that case that all delivery based transactions have to be treated as investment. The Tribunal in case of *Gopal Purohit (supra)*, decided the issue, following the decision of Tribunal in case of *Sarnath Infrastructure (P.) Ltd (supra)* holding that facts in the case of *Sarnath Infrastructure (P.) Ltd. (supra)*, were identical. However, it is noted that in *Sarnath Infrastructure (P.) Ltd (supra)*, the shares sold out of investment account had been held for 23 years and Revenue could not show any shares sold which had been purchased during the year or in the immediately preceding year. Therefore, only in respect of such cases, the decision in case of *Gopal Purohit (supra)*, could be applied. The Hon'ble High Court of Bombay upheld the decision of the Tribunal in the case of *Gopal Purohit (supra)*, on the ground that there was no substantial question of law involved. Even before Hon'ble High Court, there was no question raised that all delivery based transactions have necessarily to be treated as investment activity. Thus, the decision of the Tribunal as well as the Hon'ble High court in case of *Gopal Purohit (supra)*, cannot be considered as a precedent for the proposition that all delivery based shares have to be treated as investment activity. The assessee can also be a trader in case of delivery based purchases and sales, which is a normal feature of any trading activity. Therefore, reliance placed by the Id. AR on the decision in the case of *Gopal Purohit (supra)* is totally misplaced.

6. In view of the foregoing, we are of the opinion that the character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item is indicative of the assessee's intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee can not be categorised as an investor, especially when the aforesaid facts speak otherwise and lead us to the conclusion that the assessee is indulging in activities of a trader in shares. As observed in *Sutlej Cotton Mills Supply Agency Ltd. (supra)*, it is a matter of first impression with the Court whether a particular transaction is in the nature of trade or not; it is not even the assessee's case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the nature of the business; purchase of shares by them was not for the purpose of earning dividend, but with the dominant intention of resale in order to earn profits; the profit made by the assessee is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition and continuity of the transactions, give them a flavour of "trade"; the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment, but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, we are of the opinion that the Id. CIT(A) was not justified in accepting the claim of the assessee as investor in shares. Accordingly, we vacate the findings of the Id. CIT(A) and restore the order of the AO. Therefore, ground no.1 in the appeal is allowed. For our aforesaid view, we are also supported by decisions in *Mafatlal Fabrics (P.) Ltd. (supra)* & *Diligent Services (P.) Ltd. (supra)*, relied upon by the Id. DR"

The SLP filed by the assessee bearing No. 20307 of 2014 against this decision stands dismissed by Hon'ble Supreme Court (2014) 52 taxmann.com 247.

Respectfully following the above decision of Hon'ble jurisdictional High Court, we are not inclined to interfere with the order of the Id. CIT(A) on this issue.

The case laws relied by the assessee are distinguishable and not applicable in the present fact situation of the case in hand.

8. Further the Assessing Officer has noted that there is net speculation loss on jobbing transactions of Rs.2,13,007/- which has not been allowed to the

assessee for carry forwarding in the next year because the assessee has filed the return on 20.03.2011 and the ld. CIT(A) has upheld the action of the Assessing Officer which, in our opinion, does not call for any interference. The return of income has been filed belatedly. Therefore, the loss cannot be carried forward as per provisions of the Income-tax Act. Therefore, the ground taken by the assessee for carry forward of the speculation loss is also dismissed.

9. In view of the above discussion, the appeal of the assessee is found to have no merits and is accordingly dismissed.

10. In the result, the appeal is dismissed

Order pronounced in the open court on 09.10.2017.

Sd/-

(H.S. Sidhu)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 09.10.2017

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Copy of order forwarded to:

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi