# आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।
# IN THE INCOME TAX APPELLATE TRIBUNAL
# "F" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

**BEFORE SHRI SAKTIJIT DEY, JM AND**
**SHRI MANOJ KUMAR AGGARWAL, AM**

आकरअपील सं./ I.T.A. No.2241/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2011-12)
&
आयकरअपील सं./ I.T.A. No.5803 Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2012-13)

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| **Shri Jayantilal B. Jain**<br>118, Caves Road<br>High Tech Inds. Centre<br>Cabes Road, Jogeshwari (E)<br>Mumbai-400 060. | **बनाम**/<br>Vs. | **DCIT-24(1)**<br>Pratyakshkar Bhavan<br>Bandra Kurla Complex<br>Mumbai-400 051. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAEPJ-8397-H** | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

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| अपीलार्थी की ओर से/ **Appellant by** | : | Ronak Doshi & Ayushi Modani-Ld.ARs |
| प्रत्यर्थीकीओरसे/**Respondent by** | : | Chaudhary Arun Kumar Singh-DR |

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| सुनवाईकीतारीख/ **Date of Hearing** | : | 16/05/2019 |
| घोषणाकीतारीख / **Date of Pronouncement** | : | 06/06/2019 |

## आदेश / O R D E R

**Per Manoj Kumar Aggarwal (Accountant Member):-**

1. Aforesaid appeals by assessee for Assessment Years [in short referred to as 'AY'] 2011-12 and 2012-13 contest separate orders of Ld. first

appellate authority. Since common issues are involved, we proceed to dispose-off the same by way of this common order for the sake of convenience & brevity.

**ITA No. 2241/Mum/2017, AY 2011-12**

2. Aggrieved by the order of Ld. Commissioner of Income-Tax (Appeals)-42, Mumbai, [in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-42/IT-402/14-15* dated 30/11/2016, the assessee is under appeal before us with following Grounds of appeal: -

***"GROUND I: TREATING SHORT-TERM CAPITAL GAINS AMOUNTING TO RS. 51,70,511 AS BUSINESS INCOME:***

*1. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the actions of Dy. Commissioner of Income Tax, Range 24(1), Mumbai ("the Ld. AO") in treating the short-term capital gains amounting to Rs.51,70 511 as business income on the alleged ground that the Appellant is engaged in the business of trading in shares by holding that the transactions carried out by the Appellant are voluminous and the period of holding is meagre.*

*2. He failed to appreciate and ought to have held that:*

*a. The Appellant had maintained two separate portfolios for shares, one as investment and the other for the purpose of trading;*

*b. In the earlier as well as future assessment years, the Ld. AO had consistently accepted the short-term capital gains arising on the sale of shares held as investment as shown by the Appellant.*

*3. The Appellant, therefore, prays that the Ld. AO be directed to treat the amount of Rs.51,70,511 as short-term capital gains and not as a business income.*

***GROUND II: DISALLOWANCE OF INTEREST EXPENSE U/S. 14A OF THE ACT R.W. RULE 8D OF THE INCOME-TAX RULES, 1962 ("THE RULES") AMOUNTING TO RS. 5,42,245:***

*1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the actions of the Ld. AO in disallowing interest expense amounting to Rs.5,42,245 on the alleged ground that the Appellant has not proved the nexus of funds utilised for making investments.*

*2. He failed to appreciate and ought to have held that:*

*i. For computing the disallowance u/s 14A of the Act, only expenditure 'in relation to' earning dividend income is to be considered;*

*ii. Rule 8D of the Rules cannot be automatically applied without considering the facts of the Appellant and without recording his dissatisfaction with respect to the Appellant's claim.*

*3. The Appellant prays that the aforesaid disallowance of Rs.5,42,245 be deleted or be appropriately reduced.*

***4. Without prejudice to the above,*** *the Appellant prays that the shares treated by the Ld.AO as held as stock-in-trade be excluded while computing the disallowance."*

3.1 Facts in brief are that the assessee being *resident individual* stated to be engaged in the business of readymade garments and trading in shares was assessed for impugned AY in scrutiny assessment u/s 143(3) on 26/03/2014 wherein the income of the assessee was determined at Rs.8.88 Lacs after certain adjustments / disallowances as against loss of Rs.56.41 Lacs filed by the assessee on 28/07/2011. The subject matter of present appeal before us is to determine the head under which *Short-Term Capital Gains* earned by the assessee on sale of shares would be assessable and disallowance of Rs.5.42 Lacs u/s 14A.

3.2 During assessment proceedings, it transpired that the assessee earned *Short-Term Capital Gain* on sale of shares for Rs.51.70 Lacs which was offered under the head *Capital Gains.* The said income, in the opinion of Ld. AO, was assessable as *Business Income* in view of the fact that the transactions were voluminous & period of holding was meager. The assessee defended the same by submitting that the said activity was assessable under the head *Capital Gains* only as assessed as well as accepted by revenue in earlier years, following the rule of consistency. However, the same could not convince Ld. AO, who treated the said income as *Business Income.* This would assume importance in view of the fact that income under the head *capital gains* would attract lower rate of tax as against *Business Income* which was to be taxed at regular rates of tax.

3.3 The second addition stem from the fact that the assessee earned exempt income aggregating to Rs.112.72 Lacs during impugned AY, which

called for disallowance u/s 14A. The Ld. AO, applying Rule 8D, computed aggregate disallowance of Rs.5.42 Lacs on account of indirect expenditure u/r 8D(2)(iii), being 0.5% of average investments.

4. Aggrieved, the assessee agitated the same without any success before Ld. first appellate authority vide impugned order dated 30/11/2016. The assessee agitated the stand of Ld. AO *qua* treatment of gains on shares by reiterating that similar claim has been accepted by the revenue in assessments framed u/s 143(3) for AYs 2007-08, 2008-09 & 2009-10. Even in AY 2013-14, income from shares was assessed as *Capital Gains.* Reliance was placed on certain judicial pronouncements and *CBDT* circulars issued on the subject from time to time to support the submissions. However, the same could not convince first appellate authority who observed that the assessee was involved in the activity of investments & finance as a business in his proprietary concern namely *M/s Rupam Investment & Finance* and the share transactions were allied to the activity of finance and investment. Further, the number of transactions was high, there was repetition of transactions and frequency of trading was also high. It was also held that the motive of investment was not to earn dividends but to earn the profit. In the aforesaid background, the ground was dismissed. Similarly, the disallowance u/s 14A as made by Ld. AO was confirmed. Aggrieved, the assessee is in further appeal before us.

5. The Ld. Authorized Representative for Assessee [AR], *Shri Ronak Doshi,* on the strength of documents placed in the *paper-book,* agitated both the additions. The Ld. DR, on the other hand, submitted that there was

no infirmity in the impugned order. Reliance has been placed on following judicial pronouncements: -

(i) *Ramilaben D.Jain V/s. ACIT [Hon'ble Bombay High Court 97 Taxmann.com 217]*
(ii) *Ratanlal J.Oswal V/s CIT [Hon'ble Bombay High Court 63 Taxmann.com 57]*
(iii) *Sanjeev Bajaj V/s CIT [Hon'ble HC of P&H, 82 Taxmann.com 80]*
(iv) *Equity Intelligence India P. Ltd. V/s ACIT [Hon'ble HC of Kerala, 61 Taxmann.com 256]*
(v) *CIT V/s Pooja Investment P. Ltd. [Hon'ble HC of P&H, 45 Taxmann.com 298]*

6.1 We have carefully heard the rival submissions and perused relevant material on record and deliberated on the judicial pronouncements as cited before us. The undisputed fact that emerges from the record are that the assessee has earned *Short-Term Capital Gains* of Rs.51.70 Lacs from certain share transactions during impugned AY. Al these transactions were delivery-based share transactions entered into by the assessee through stock exchanges. The assessee has also earned long-term capital gains on sale of shares during the year, which has been claimed to be exempted u/s 10(36) / 10(38) and the same has been accepted as such by the revenue. The perusal of summarized comparative chart of the transactions under dispute, as placed before us, reveal that the average holding period of the shares was 103 days with number of purchase / sales days to be 213 / 229 days.

6.2 It is settled law that there is no bar for the assessee to maintain two separate portfolios-one for investment and one for trading. For the said proposition, we draw support from the decision of Hon'ble Bombay High Court rendered in **CIT V/s Gopal Purohit [336 ITR 287]** which has been confirmed by Hon'ble Apex Court by way of dismissal of revenue's SLP on 15/11/2010. The perusal of assessee's personal *Balance Sheet* as placed

on record would reveal that majority of the investments have been funded out of assessee's own capital. The assessee has earned dividend income of Rs.34.45 Lacs during impugned AY. Another pertinent fact to be noted that the assessee has income from garment business to the tune of Rs.47.30 Lacs which would *prima-facie,* establish that share trading was not the only activity carried out by the assessee during impugned AY. Apart from this, the assessee was also carrying on the business of finance & investment in another proprietorship concern during impugned AY.

6.3 It has been submitted by Ld. AR that the assessee is a conventional investor in shares & securities and the gains / loss on shares was always offered under the head *Capital Gains* only and the same has always been accepted by the revenue in all the earlier years. In particular, similar treatment given by the assessee to such income in AYs 2007-08, 2008-09, 2009-10 was accepted by the revenue in assessments framed u/s 143(3) and the gains / losses were assessed under the head *Capital Gains* only. Similar claim has been accepted for AY 2010-11 u/s 143(1). Even in subsequent AYs 2013 14 to 2016-17, the assessment was framed u/s 143(3) wherein similar gains / losses were accepted under the head *Capital Gains* Only. The assessee's claim has been disturbed only for impugned AY as well as in AY 2012-13. The aforesaid facts remain uncontroverted before us.

6.4 Although we are conscious of the fact that principle of *res-judicata* do not apply to Income Tax proceedings, however, facts and circumstances being the same, the revenue is debarred from changing its stand and taking contrary view on identical set of facts and circumstance since there should

be finality to the issues. The Hon'ble Bombay High Court, in a recent decision of **PCIT Vs. Quest Investment Advisors Private Limited [ITA No. 280 of 2016 dated 28/06/2018]**, after considering judicial pronouncements of higher authorities, held as under:-

> *7. We note that the impugned order of the Tribunal records the fact that the Revenue Authorities have consistently over the years i.e. for the 10 years years prior to Assessment Years 2007-08 and 2008-09 and for 4 subsequent years, accepted the principle that all expenses which has been incurred are attributable entirely to earning professional income. Therefore, the Revenue allowed the expenses to determine professional income without any amount being allocated to earn capital gain. In the subject assessment year, the Assessing Officer has deviated from these principles without setting out any reasons to deviate from an accepted principle. Moreover, the impugned order of the Tribunal also records that the Revenue was not able to point out any distinguishing features in the present facts, which would warrant a different view in the subject assessment year from that taken in the earlier and subsequent assessment years. So far as the decision of Radhasoami Satsang (supra) is concerned, it is true that there are observations therein that restrict its applicability only to that decision and the Court has made it clear that the decision should not be taken as an authority for general applicability. 8. However, subsequently the Apex Court in* ***Bharat Sanchar Nigam Ltd. Vs. Union of India 282 ITR 273*** *has afte referring to the decision of Radhasoami Satsang (supra) has observed as under :*
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> > *"20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision of where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction."*
>
> *(emphasis supplied)*
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> *9. The principle accepted by the Revenue for 10 earlier years and 4 subsequent years to the Assessment Years 2007-08 and 2008-09 was that the entire expenditure is to be allowed against business income and no expenditure is to be allocated to capital gains. Once this principle was accepted and consistently applied and followed, the Revenue*

*was bound by it. Unless of course it wanted to change the practice without any change in law or change in facts therein, the basis for the change in practice should have been mentioned either in the assessment order or at least pointed out to the Tribunal when it passed the impugned order. None of this has happened. In fact, all have proceeded on the basis that there is no change in the principle which has been consistently applied for the earlier assessment years and also for the subsequent assessment years. Therefore, the view of the Tribunal in allowing the respondent's appeal on the principle of consistency cannot in the present facts be faulted with, as it is in accord with the Apex Court decision in Bharat Sanchar Nigam Ltd. (supra).*
*10. Accordingly, the question as proposed do not gives rise to any substantial question of law. Thus, not entertained.*

Therefore, following the aforesaid rule of consistency, we find force in submissions made by Ld. AR, in this regard.

6.5 Proceeding further, we find that the classification of income from share trading as *'business income' or 'capital gains'* would be dependent upon the facts and circumstances of a particular case and there is only a thin line separating the two view poin. The CBDT has so far issued following instructions / guidelines so as to bring clarity on the issue:

*(i) Instruction No. 1827 dated 31/08/1989*
*(ii) Office Memorandum dated 13/12/2005*
*(iii) Circular No. 4/2007 dated 15/06/2007*
*(iv) Circular No. 6/2016 dated 29/02/2016*

CBDT's office memorandum dated 13/12/2005 list following Circumstances to be considered by the Assessing Officers in determining whether a person is a trader or an investor in stocks: -

*(i) Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity;*
*(ii) Whether, the purchase is made solely with the intention of resale at a profit or for long-term appreciation and/or for earning dividends and interest.*
*(iii) Whether scale of activity is substantial;*
*(iv) Whether transaction were entered into continuously and regularly during the assessment year.*
*(v) Whether purchases are made out of own funds or borrowings;*

*(vi) The stated objects in the Memorandum and Articles of Association in the case of corporate assessee;*
*(vii) Typical holding period for securities bought and sold;*
*(viii) Ratio of sales to purchase and holding.*
*(ix) The time devoted to the activity and the extent to which it is the means of livelihood.*
*(x) The characterization of securities in the books of account and balance sheet as stock-in-trade or investment.*
*(xi) Whether the securities purchased or sold are listed or unlisted.*
*(xii) Whether investment is in sister/related concerns or independent companies.*
*(xiii) Whether transaction is by promoters of the company.*
*(xiv) Total number of stock dealt in*
*(xv) Whether money has been paid or received or whether these are only book entries".*

As per Circular No. 4/2007 it is possible for a taxpayer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated a capital asset and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. The above instructions have partially been modified with respect to listed securities in recent CBDT circular No. 6/2016 dated 29/02/2016 which lays down following factors to be considered for listed securities: -

*a) Where the assessee itself, irrespective of the period of holding of the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,*
*b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;*
*c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.*

Further Apex Court in **CIT v. Associated Industrial Development Co. (P.) Ltd. [1971] 82 ITR 586 (SC)** has observed that: -

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

Applying to the above principals upon the case in hand, we find that the share trading activity is not the only activity carried out by the assessee during the year. The majority of the investments has been funded out of own capital. The assessee has earned substantial dividend income during the year. The average holding period is more than 100 days. Further, the long-term gains earned on similar activity has been accepted by the revenue as *Capital Gains* only. Moreover, latest CBDT Circular No.6/2016, which is clarificatory in nature, applies to listed securities and directs AO not to disturb the stand taken by assessee provided the same is applied consistently. Hence, we find that there could not be any straight jacket formula to distinguish the same and further there cannot be any single decisive factor to determine the same but an overall view has to be taken keeping in mind peculiar facts and circumstances of the case. Accordingly, after weighing all the factors as cited above, we find ourselves in agreement with the submissions of Ld. AR and therefore, inclined to hold that the impugned gains were rightly offered as *Capital Gains.* By reversing the stand of lower authorities, we allow this ground of appeal. Our view is fortified by the cited decision of Hon'ble Bombay High Court rendered in **CIT V/s Gopal Purohit** which has subsequently been followed in recent decision titled as **Pr.CIT V/s Vikshit Engineering Ltd. [100 Taxmann.com 436 26/11/2018].**

6.6 The Ld. DR has placed reliance on the decision of Hon'ble Bombay High Court rendered in **Ramilaben D. Jain V/s ACIT [supra].** We find the same to be distinguishable on facts since in that case, the holding period of majority of share was within one week only. The case law of **Ratanlal J.Oswal V/s CIT [supra]** deals with a situation wherein the assessee made investments out of borrowed funds and the transactions were classified as Share Trading in the Tax Audit Report. In the case law of **Sanjeev Bajaj V/s CIT [supra],** the shares were held as stock-in-trade. In **Equity Intelligence India Pvt. Ltd. Vs. ACIT [supra],** the share trading activity was found to be carried in systematic manner and average holding period was found to be as low as 3 days. In the case law of **CIT V/s Pooja Investment Pvt. Ltd. [supra],** the assessee was engaged in the business of dealing in shares and securities and redeemed certain investments prematurely with a view to earn profit. Therefore, these decisions do not apply to the facts of the present case.

7. So far as the disallowance u/s 14A is concerned, Ld. AR has submitted that in terms of decision of **Delhi Tribunal (Special Bench) in ACIT Vs. Vireet Investment (P.) Ltd. [82 Taxmann.com 415],** only exempt income yielding investments were to be considered to arrive at the said disallowance. Concurring with the same, Ld. AO is directed to compute the disallowance by considering those investments which have yielded exempt income during the year. This ground as well as the appeal stand partly allowed.

**ITA No. 5803/Mum/2017, AY 2012-13**

8. In this year, the only point of assessee's grievance is that Short-Term Capital Loss suffered by assessee on share transactions, in similar manner, has been assessed as *Business Income* as against offered by the assessee under the head *Capital Gains.* The impugned order is on similar lines. The assessee has raised the following grounds of appeal: -

***GROUND NO. I: RECLASSIFYING SHORT TERM CAPITAL LOSS AS BUSINESS LOSS:***

1. *On the facts and circumstances of the case and in law, Hon'ble CIT(A) erred in confirming the actions of the Ld. AO by treating the short-term capital loss as business loss.*
2. *The Appellant prays that it be held that loss on account of short-term capital asset should not be reclassified as business loss."*

Facts being *pari-materia* the same, our observations, findings as well as conclusions as given in AY 2011-12, shall *mutatis mutandis* apply to his appeal also. Accordingly, Ld. AO is directed to treat the Short-Term Capital Loss under the head *Capital Gains.* The appeal stands allowed.

**Conclusion**

9. The appeal for AY 2011-12 stands partly allowed whereas the appeal for AY 2012-13 stand allowed.

*Order pronounced in the open court on 06th June, 2019.*

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| **Sd/-** | **Sd/-** |
| **(Saktijit Dey)** | **(Manoj Kumar Aggarwal)** |
| न्यायिक सदस्य / **Judicial Member** | लेखा सदस्य / **Accountant Member** |

मुंबई Mumbai; दिनांकDated : 06/06/2019
*Sr.PS:-Jaisy Varghese*

**आदेश की प्रतिलिपि  ग्रेषित/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.**