आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

श्री जी. एस. पन्नू, लेखा सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI G.S.PANNU, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.7116/M/11
(**निर्धारण वर्ष** / Assessment Year: 2007-08)

ACIT Cir. 6(1) R.No.506, 5th Floor, Aaykar Bhavan, M.K.Road, Mumbai - 400020	**बनाम**/ Vs.	M/s. Idea International Pvt. Ltd. 36/40, Mahalaxmi Bridge Arcade, Mahalaxmi, Worli, Mumbai - 400034
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCI1527J		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Haridas Bhatt
Department by:	Shri B.C.S.Naik

सुनवाई की तारीख / Date of Hearing: 21.07.2016
घोषणा की तारीख /Date of Pronouncement:28.10.2016
आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 18.07.2011 passed by the Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment year 2007-08.

3. The revenue has raised the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the profits on sale of shares as Short Term Capital Gains and not business income without appreciating fact that, addition on similar issue for the previous years has been confirmed by the Hon'ble ITAT.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to restrict the disallowance u/s.14A of Rs.21,87,516/- to Rs.1,00,000/- relying on the Judgement of Bombay High Court in the case of Godrej and Boyce Mfg. Ltd. without appreciating the fact that the judgment of Bombay High Court has not been accepted by the Revenue and SLP has been proposed.

3. The appellant prays that the order of CIT(A)on the above grounds be set aside and that of the Assessing Officer be restored."

2. The brief facts of the case are that the assessee filed the return of income disclosing total income to the tune of Rs.80,82,350/- on 10.09.2007. The return was processed u/s.143(1) of the Income Tax Act, 1961(in short "the Act"). Notice dated 18.09.2008 was issued and duly served upon the assessee. Subsequently notice u/s.142(1) of the Act along with questionnaire were issued on 21.05.2009 and 20.10.2009. The assessee is engaged together with its branch Idea International Pvt. Ltd. (Indore) and Raipur in trading of soya seeds, rape seeds, soya oil, soya doc and division Sanshu Foods is engaged in the business of manufacturing, distribution, representation and promotion of various products and commodities including foods.

During the year under consideration, the assessee derived income from business and capital gains. The assessee has shown Short Term Capital Gains to the tune of Rs.77,73,341/- which was treated by the Assessing Officer as income from business and the Assessing Officer also worked out the disallowance u/s.14A r.w.Rule 8D of the Act to the tune of Rs.21,87,516/- as expenditure to earn the exempt income, therefore, the assessee filed the appeal before the CIT(A), Mumbai, who allowed the said claim, therefore, the revenue has filed the present appeal before us.

ISSUE NO.1:-

3. Under this issue, the revenue has challenged the finding of the CIT(A) in holding the profit on sale of share as Short Term Capital Gain which should be treated as business income. The learned representative of the revenue has argued that the CIT(A) did not give any plausible explanation to hold this fact that why the transactions should be treated as Short Term Capital Gain, whereas the same is business income therefore the finding of the CIT(A) is wrong against law and fact and is liable to be set aside. It is argued that the detailed finding has been given by the Income Tax Appellate Tribunal in deciding the case of the assessee for the A.Y.2005-06 in ITA No.1453/Mum/2009 therefore, the CIT(A) has decided the matter of controversy wrongly and illegally which is not liable to be sustainable in the eyes of law. On the other hand the learned representative of the

assessee has refuted the said contentions. On appraisal of the file, it came into the notice that the assessee filed the return of income showing his income as Short Term Capital Gain. However, the Assessing Officer dealt the same as income from business by giving the detailed finding. In appeal the CIT(A) treated the business income as Short Term Capital Gain. The CIT(A) admitted this fact that the ITAT has held the income of the assessee from the sale of shares as business income in the A.Y.2005-06 and 2006-07. The CIT(A) did not give any detailed finding in this regard why the income from sale of share should be treated as income from short term capital gain. However, the learned Departmental representative has placed reliance upon the finding of ITAT in ITA No.1453/Mum/2009 in the assessee's own case for the A.Y.2005-06. The detailed finding has been given which is hereby reproduced below:-

> " We have heard the rival submissions, perused the orders of the lower authorities and the materials available on record. The moot point for our consideration is, whether or not, the assessee's intention was to hold the shares as its investment or the shares were held for earning profit by way of trading in shares. This is always a vexed question as one has to determine the intention of the assessee which is primarily within his own knowledge. No acid test has been laid down in any of the decisions as

a determining yardstick to decide the intention to earn dividend by way of keeping the same as investment or it was purely with an intention to earn profit by way of trading in shares. In the case of a company, the memorandum of association gives the object for which the company can carryout its business. Learned Counsel has referred to clause 3 of the ancillary object clause reproduced earlier. A bare perusal of the said clause would reveal that the investment in shares could be made by assessee only in such companies which had their objects altogether or in parts similar to those of assessee's company or carrying on any business capable of being conducted so as to directly or indirectly benefit the assessee-company. The assessee has not demonstrated that its alleged investments complied with this parameter. Therefore, this clause is of no assistance to assessee in its plea that its primary motive of buying shares was to keep them as investments in various companies particularly because the assessee had considerable investment in mutual funds also. On the contrary, this goes against the assessee as the investment pattern had been prescribed in the memorandum of association itself. Therefore, now we have to decide the issue keeping in view the actual state-of-affair as

prevailing in the relevant assessment year. Before analyzing this aspect, we may state certain principles governing this issue. Entries in books of account are not determining factor to decide the true nature of transaction – (1978) Sutlej Cotton Mills Ltd. Vs. CIT(A), 116 ITR 1 (SC). Whatever a particular activity is a business activity, depends on peculiar facts of the case - G.Venkataswami Naidu & Co. Vs. CIT, (1958) 35 ITR 594 (SC). Frequency and regularity of share transactions is organized manner indicate business activity [Raja Bahadur Visheshwara Singh Vs. CIT, 41 ITR 685(SC)]. CBDT in its Circular no.4 of 2007 dated 15th June 2007, has primarily laid down three criterias for deciding as to whether any transaction is trading or investment – (a) magnitude of purchase and sales; (b) period of holding and (c) motive behind it. It is also true, as held in several decisions, that though the frequency of transaction is an important indicator of intention but not the sole criteria for deciding the intention of the assessee because otherwise, as rightly pointed out by the learned Counsel, there is no requirement of short term capital gains. Having regard to these principles, if we examine the facts of the present case, we find that the assessee has not disclosed any long term capital gain. Further, the

frequency of transaction is to be judged by the fact that in most of the cases, the transactions of purchase and sale have been effected within 50 days in the case of shares and in the case of mutual fund, the period of holding in most of the cases is 100 to 150 days. Thus, the entire gamete of transactions, when considered together, clearly shows that the assessee had no intention to hold its shares and mutual funds as part of its investment portfolio. Rather the intention was to liquidate the shares as early as possible in order to earn profit. It is further pertinent to note that in the case of Uscal Fuel System and Unichem Laboratory Ltd., the assessee incurred losses when it sold its shares on 29th March 2005 and 30th March 2005. In the case of Uscal Fuel Systems, the assessee had purchased 3,000 shares on 1st February 2005, and on 29th March 2005, it had sold 95 shares and immediately thereafter on 30th March 2005, it sold 2905 shares. Had the intention been to invest in shares, there was no necessity to sell the shares at loss. Further, close scrutiny of purchase and sale pattern shows that in most of the cases shares have been purchased in the month of January and sold in the month of March. The whole action on the part of assessee clearly demonstrates its intention to trade in shares rather than to hold the shares

for long as investment. If the assessee had intention to hold the shares for long, it would not have liquidated its holdings in short span of period earning pretty profits. It is true that merely if a person liquidates its shares within a short span of time, it would not lead to the conclusion that he is trading in shares. But the intention in manifested from the facts and circumstances surrounding each case on the basis of which a rational conclusion is to be drawn. In the present case, we are constrained to hold that keeping in view the trend of transactions the inescapable conclusion is to be drawn. In the present case, we are constrained to hold that keeping in view the trend of transactions the inescapable conclusion is that assessee's primary intention was to earn profits from share dealing rather than keeping the shares as investment for the purpose of earning dividend particularly because as per the assessee's own calculation, the return from share holding in the form of dividend is 3.97%. Had the intention was to earn dividend, the assessee would have waited for dividend declaration and book closure date rather than liquidating the shares before that date. Thus, for the following reasons, we hold that assessee's primary intention was to trade in shares and mutual funds and not to keep the

> portfolio of shares as investment. Firstly, in view of ancillary object clause 3, assessee could make the investment in shares only in those companies which had their objects together or in part similar to those of assessee-company or carried on any business capable of being conducted so as directly or indirectly benefit the assessee-company. The assessee's alleged plea of investment does not meet this criteria. Secondly, frequency of transactions clearly demonstrates its intention to trade in shares and mutual funds and not to keep them as part of its investment portfolio. Thirdly, there was no intention to earn dividend because the shares were liquidated within three months. In view of the above, we dismiss this ground of appeal."

4. On appraisal of the above said finding, we are of the view that CIT(A) has given the finding without any basis and nature of transaction did not differentiate at all. The facts and circumstances of the case is quite similar to the A.Y.2005-06, therefore, in view of the said circumstances and by relying upon the order passed by the co-ordinate bench of Mumbai in ITA No.1453/Mum/2003 in the assessee's own case for the A.Y.2005-06, we are of the view that the CIT(A) has decided the matter of controversy wrongly and illegally which is not required to be sustainable in the eyes of law. Therefore,

we set aside the finding of the CIT(A) on this issue and direct the Assessing Officer to treat the income from shares as business income. Accordingly, this issue is decided in favour of the revenue against the assessee.

ISSUE NO.2:-

5. Under this issue the revenue has challenged to restrict the disallowance u/s.14A to the extent of Rs.1,00,000/- despite of Rs.21,87,516/-. Before going further it is necessary to advert the finding of the CIT(A) on record.

> "4.5 I have considered the submissions made by the appellant. On perusal of the facts and material on record along with the judicial pronouncements, it is now a well settle law in view of Bombay High Court's judgement in the case of Godrej & Boyce Ltd. that Rule 8D is not applicable for the years prior to A.Y.2008-09. Accordingly, the disallowance based upon the method prescribed in Rule 8D is not proper. Also, as already discussed above, the appellant has utilized the interest bearing borrowed funds solely for the purpose of its business and not for making any investments in shares. In so far as the judgement given by the jurisdictional Bombay High Court in the case of Godrej and Boyce is concerned, it is amply clear

that disallowance u/s.14A has to be made on a reasonable basis. On elucidation of the facts and the business of the appellant, it is seen that the main business of the appellant is to trade in soyabeen seeds, etc. Further, there is no evidence as to the incurring of any direct expenses in relation to the exempt income earned. However, one cannot deny the fact that since the appellant has earned substantial dividend in the current year, certain expenses are bound to be attributable to the said exempt income. One has to appreciate that the assessee cannot earn dividend without systematic investment. It requires substantial market research, day to day analysis of market trends and decisions with regard to acquisition, retention and sale of shares at the most appropriate time. It would therefore not be proper to say that dividend income can be earned by incurring no or nominal expenditure. In the interest of justice therefore, disallowance of an amount of Rs.1,00,000/- is considered sufficient u/s.14A and balance disallowance is deleted."

6. It is not in dispute that the present assessment year is the year of 2007-08 to which the strict rule of section 14A r.w.Rule 8D of the Act is not applicable. The assessee did not utilized the borrowed funds solely for the purpose of his business. Therefore, the disallowance

was assessed on reasonable basis u/s.14A of the Act. Considering the nature of business and each and every facts connected to the investment the CIT(A) has disallowed an amount of Rs.1,00,000/- which seems justifiable. In view of the said circumstances, we are of the view that there is not force in the contention of the revenue to assess the expenditure in view of the Section 14A read with Rule 8D of the Act. Therefore, this issue is decided in favour of the assessee against the revenue.

ISSUE NO.3:-

7. Issue no.3 is formal in nature therefore there is no need to adjudicate the same.

8. Accordingly, appeal of the revenue is hereby partly allowed.

Order pronounced in the open court on 28th October, 2016

Sd/- Sd/-

(G.S.PANNU) (AMARJIT SINGH)
लेखा सदस्य / ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER
मुंबई Mumbai; दिनांक Dated : 28th October, 2016

MP

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**