

IN THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Sandeep Gosain (JM)

I.T.A. No. 4814/Mum/2008
(Assessment Year 2005-06)

Goldstone Trading Co. Pvt. Ltd. B-502, Aster Tower Vasant Valley Complex-II Gen. A.K. Vaidya Marg Malad East Mumbai-400 097.	Vs.	Jt. CIT-15(3) Matru Mandir Mumbai 400 007.
(Appellant)		(Respondent)

PAN No. AACCG1763B

Assessee by	S/Shri R.S. Khandelwal Naeelkanth Kandelwal
Department by	Miss Anupama Singla
Date of Hearing	09.3.2017
Date of Pronouncement	26.4.2017

O R D E R

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 08-05-2008 passed by Ld CIT(A)-XV, Mumbai and it relates to the assessment year 2005-06. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the assessment of Short term Capital Gain as business income of the assessee.

2. The facts relating to the issue are discussed in brief. During the year under consideration, the assessee declared Short term capital gain on sale of shares of two companies, viz., (a) 5,40,350 partly paid shares of M/s Herring & Crankshaft Ltd and (b) 2,21,101 shares of India Bulls securities Ltd.

3. The AO noticed that the assessee has purchased partly paid shares of M/s Herring & Crankshaft Ltd at a price (Rs.32/- per share) higher than the market price quoted in the stock exchange (around Rs.22.50 per share). The shares have been purchased from M/s Maruti Securities and sold through M/s B Lodha Securities Ltd. The AO noticed both the share brokers have been termed as tainted brokers by SEBI.

4. The AO noticed that the shares of M/s India Bulls securities Ltd were purchased from M/s Kotak Securities, but they were held in a separate demat account. These shares were also sold through M/s B Lodha Securities Ltd, a tainted broker. The AO expressed the view that the investors will not normally open separate demat account for each security.

5. The AO further noticed that the assessee had availed loan of Rs.7.89 crores from Kotak Mahindra Investments Ltd for applying for the shares of M/s India Bulls Financial Services Ltd. Accordingly the AO inferred that the borrowings made by the assessee would indicate that the assessee is not an investor. Accordingly the AO rejected the claim of holding the shares as its investments and accordingly assessed the gain arising on sale of shares cited above as the business income of the assessee.

6. The Ld CIT(A) also confirmed the same and hence the assessee has filed this appeal before us.

7. The Ld A.R submitted that the assessee has shown the shares as its investment only, in its books of account. With regard to the high rate paid for purchase of partly paid Shares of M/s Herring & Crakshaft Ltd, the Ld A.R submitted that the assessee wanted to purchase bulk quantity of shares, but the volume traded in the stock exchange was very less. He submitted that any

online purchase of shares in huge quantities would immediately spike up the rate. Further huge quantity of shares was not available in online. Hence the assessee has chosen to purchase the shares in the off-market transaction through a broker, who could mobilize required quantity. Accordingly the Ld A.R submitted that it was a strategy adopted by the assessee and the same should not be a reason to reject the claim of investment in shares. He submitted that the AO has compared the rates prevailing in the market at the end, but did not consider the range in price quoted during the day. He submitted that the assessee has ultimately sold the shares at a profit only. With regard to the shares of M/s India Bulls Securities Ltd, the Ld A.R submitted that the shares purchased by the broker was kept in the pool account of M/s Kotak securities and ultimately sold through M/s B Lodha Securities Ltd. The Ld A.R submitted that the manner of holding shares should not have been given importance by the AO. With regard to the loan taken by the assessee, the Ld A.R submitted that the assessee had taken loan for the purpose of applying to the primary issue of M/s India Bulls Financial Services Ltd as per the scheme framed by M/s Kotak Mahindra Investments Ltd, wherein the assessee was required to give a fraction of amount only. Accordingly he submitted that the assessee has only availed the scheme of the finance company and it did not obtain any loan for making investments. With regard to the observation that the brokers were tainted, the Ld A.R submitted that both the brokers, referred above, were implicated only in the subsequent periods.

8. On the contrary, the Id D.R submitted that the character of an assessee as investor or trader has to be seen by considering various aspects in a holistic manner. He submitted that the assessee has held the shares for less than 70 days and it did not receive dividend at all. He submitted that the assessee has

indulged in obtaining loans for making investments. All these factors would go to show that the assessee was a trader only and not an investor.

9. We heard the parties and perused the record. It is well settled proposition that the question as to whether an assessee has acted as an investor or as trader would depend upon the surrounding circumstances and conduct of the assessee. The intention of the assessee at the time of purchase of shares is most relevant factor. We notice that the assessee has purchased shares of two companies only during the year under consideration. There is no dispute that the assessee's object clause enables the assessee to make investments. The tax authorities have taken an adverse view with regard to the fact that the assessee has purchased the shares in off-market transactions. But it is not the case of the tax authorities that the off-market transactions are not permitted by the SEBI. So long as the off-market transactions have not been banned by the SEBI, in our view, the same cannot be found fault with. In any case, we notice that the assessee has explained the reasons for purchasing the shares in off-market transaction, i.e., the bulk purchase of shares through online would spike the prices of the shares and further bulk quantity was not available on line. With regard to the higher price paid by the assessee in the case of M/s Herring & Crakshaft Ltd, the assessee has explained the reasons and has also stated that the price paid by it was nearer to the higher range. It was also submitted that the assessee has ultimately made the profit. With regard to the purchase of shares of M/s India Bulls securities Ltd, we notice that the AO has pointed out that the same has been held in a separate demat account. We agree with the submission of the Ld A.R, the manner of holding of shares may not be relevant to determine its character. With regard to the taking of loan for applying to the primary issue, the assessee has submitted that it has availed the scheme framed by the finance company and there was no other option available to the

assessee. In any case, the same is a separate transaction unconnected with the purchase of two shares referred above. With regard to the observation that the brokers from whom the assessee has purchased and sold the shares were tainted brokers, the assessee has pointed out that they were not declared as tainted when the transactions took place. We find merit in the submissions of the assessee with regard to various deficiencies pointed out by the tax authorities.

10. The Ld A.R submitted that the assessee has used its own funds for making investments in the two shares cited above. He also submitted that their sale proceeds were also utilized to make investment in the shares of M/s Netscape Software Ltd, which in turn was held as investment only. We also notice that the assessee has held the shares for about 70 days. It is a well settled proposition that a person can act both as a trader and as an investor. In the instant case, we notice that the assessee has intended to hold the shares of two companies cited above as an investor only at the time of their purchase for the reasons discussed above and hence we are unable to agree with the view taken by Ld CIT(A) on this issue. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess the gain arising on sale of shares under the head Capital Gains only.

11. In the result, the appeal of the assessee is allowed.

Order has been pronounced in the Court on 26.4.2017.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : /4/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai