

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

BEFORE SHRI R.C.SHARMA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 7280/MUM/2010
Assessment Year: 2007-08**

M/s. NVS Brokerage Pvt. Ltd., 1 & 1A, 3 rd Floor, Birla Mansion, 134, Nagindas Master Road, Mumbai- 400 023. PAN: AAACN9184H	Vs.	The ACIT-Circle 4 (2), Aayakar Bhavan, M.K.Road, Mumbai- 400 020.
(Appellant)		(Respondent)

&

**ITA No. 8295/MUM/2010
Assessment Year: 2007-08**

The ACIT, Cir. 4(2), Room No. 642, 6 th Floor, Aayakar Bhavan, M.K.Road, Mumbai- 400 020.	Vs.	M/s. NVS Brokerage Pvt. Ltd., 1 & 1A, 3 rd Floor, Birla Mansion, 134, Mangaldas Road, Mumbai- 400 023. PAN: AAACN9184H
(Appellant)		(Respondent)

Appellant by : Shri. Pramod Kumar Parida & Ms.
Sanjukta Chowdhury
Respondent by : Shri. B. Satyaramayana Rajo

Date of Hearing: 22/04/2016
Date of Pronouncement: 21/07/2016

ORDER

PER RAM LAL NEGI, JM

These cross appeals have been filed by the assessee and the revenue against order dated 20/09/2010 passed by the Ld. CIT(Appeals)-8, Mumbai, for the Asst. year 2007-08. Since both the

appeals pertain to the same assessee for the same assessment year, the same were clubbed and heard together for the sake of convenience.

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2. Brief facts of the case are that the assessee a private limited company engaged in the business of brokerage in shares & stocks, government and corporate Bonds, filed its return of income for the Asst. year 2007-08 on 23/11/2006 declaring total income of Rs. 1,21,28,972/- The AO *inter alia* making addition of Rs. 40,72,521/-, claimed by the assessee as short term capital gain, assessed the total income at Rs. 1,27,45,770/- u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act') treating the said amount as business income.

3. The impugned assessment order was challenged by the assessee before the Ld. CIT(A). The Ld. CIT(A) after hearing the assessee partly allowed the appeal, however, confirmed the finding of the A.O. regarding addition of Rs. 40,72,521/- treating the same as business income. Still aggrieved, the assessee has challenged the impugned order passed by the Ld. CIT(A) on the following grounds:-

“1. The Ld. Assessing Officer has erred in treating the Short Term Capital Gain of Rs. 40,72,521/- on the sale of shares earned by your petitioner as the Business Income.

2. The Ld. CIT(A) has erred in confirming the above amount of Rs. 40,72,521/- earned by the petitioner as Short Term Capital Gain on the sale of shares as “ Business Income”.

3. The Order appealed against is bad in law and is against the principle of natural justice.

4. The Order appealed against is based on surmises and conjectures.”

4. The Ld. Counsel for the assessee submitted that the Ld. CIT(A) has wrongly upheld the findings of the A.O. The appellant has been earning profits and incurring losses from speculation in shares but merely because the assessee is engaged in trading in shares does not mean that all the shares holding by the assessee are necessarily stock in trade. The assessee can hold other shares as investment. It is well settled principle of law that mere volume of transactions would not alter the nature of transaction unless the surrounding circumstances support the same. The assessee has recorded in the books of account to the effect that the shares in question were held as investment and not as stock-in-trade. The Ld. Counsel further submitted that mere intention to make gain does not convert shares purchased as capital asset into stock-in-trade nor does it convert the capital gain arising thereon into business income. All the investments have been made from the companies surplus funds. The company is debt free and has no borrowings. The Ld. counsel relied upon the decision rendered by the Mumbai Tribunal in Janak S. Rangwala Vs. ACIT (ITA No 1163/Mum/2004 dated 19.12.2006), decision rendered by the Hyderabad Tribunal in Shah Investments and Financial Consultants Pvt. Ltd. vs DCIT [2005]2 SOT 371(Hyd) and judgment delivered by the Hon'ble High Court of Madras in N.S.S. Investments vs P. Ltd. [2005] 277 ITR 149(Mad) to substantiate his contentions. The Ld. Counsel for the assessee relying on the judgments passed by the Hon'ble Supreme Court in Ashok Viniyoga Ltd. vs CIT 84 ITR 264(SC), Karam Chand Thakur & Bros.Pvt. Ltd.vs CIT 82 ITR 899 (SC), Madnani Development Corporation Pvt. Ltd. vs CIT 161 ITR 165 (SC) and other judgments passed by the High Courts, submitted that entries in the books of account are relevant to determine whether the asset is stock in trade or a capital asset.

5. On the Other hand the Ld. DR. submitted that since the findings of the A.O. is based on the law laid down by the Hon'ble Supreme Court, Hon'ble High Courts and various Tribunals, discussed in the assessment order, the Ld. CIT(A) has rightly upheld the findings of the AO and confirmed the addition. Therefore there is no merit in the assessee's appeal.

6. We have heard the rival contentions and perused the material placed on record including the decisions relied upon by the authorities in support of their contentions. The only grievance of the appellant/assessee is that the authorities below has wrongly treated the short term capital gain of Rs. 40,72,521/ as income from business. The Ld. CIT(A) as upheld the findings of the Ld. A.O. holding as under:-

“ I find that the issue whether the income arising from transaction in share in the instant case was Short Term Capital Gain as claimed by the assessee or business income as held by the Assessing Officer had been decided by my learned predecessor in the appellants own case for the immediately preceding year in which the action of Assessing Officer assessing the income as business income was found to be correct and confirmed. I find that the relevant facts during the current year remain identical to those in the immediately preceding year. The decision of my learned predecessor for the assessment year 2006-07, therefore squarely applies to the current year as well, following which I hold that the amount of Rs.40,72,521/- assessed as business income by the Assessing Officer is to be sustained which is confirmed. The appeal on this ground is, therefore not allowed.”

7. From the above observations, it is clear that the Ld. CIT(A) has upheld the findings of the AO following the decision of his predecessor passed in assessee's case for the assessment year 2006-07. Admittedly, the assessee has been earning profits or incurring losses from share transaction but, merely because an assessee is engaged in trading in shares does not mean that all the shares he is holding are necessarily stock-in-trade. The assessee can also hold other shares as investment. In *CIT vs. N.S.S. Investments P. Ltd. (supra)* the Hon'ble Madras High Court has held that a company can hold shares as stock in trade for the purpose of doing business of buying and selling of such shares, while at the same time it can also hold other shares as its capital. Where the finding was that the shares in question were never treated by the assessee as stock in trade, the profit on sale thereof was to be treated as capital gain. Hence, there is nothing in law which prohibits a trader in shares to invest in shares. The intention of the assessee is relevant to determine whether the trader is carrying on the business in shares or investments.

8. However, we notice that the AO has not verified and brought on records the facts necessary to determine whether the shares are stock in trade or the capital asset, in accordance with the general principles of law laid down by the Hon'ble Supreme Court in *New Era Agencies P. Ltd vs CIT(1968) 68 ITR 585 (SC)*. So, in our considered view the following facts are required to be verified in this case, whether the assessee had been maintaining two separate portfolios in respect of shares, one in respect of investment and other as stock in trade, whether shares were transferred from one portfolio to other during the relevant previous year and apart from the frequency of transactions the AO was required to ascertain the number of companies of which the shares were held as a capital asset.

9. The assessee has further alleged that since the incorporation of the company, it has been following the practice of treating all investments in

shares as investments whether long term or short term and making entries in the books of account and in all these years the assessee has shown long term and short term capital gain on the sale of shares and the department has accepted the same. Under these circumstances the AO is required to record the reason for rejecting the books of account being maintained consistently for a period of about ten years.

10. In view of the points discussed in the forgoing paras, we are of the considered opinion that further verification of the material facts, necessary to decide as to whether the amount in question is to be treated as short term gain as claimed by the assessee or the same is to be treated as business income of the assessee, is required. We, therefore, set aside this issue to the file of the AO with the direction to verify the aforesaid material facts and decide the issue afresh in accordance with the principles of law laid down by the Hon'ble Supreme Court in New Era Agencies P. Ltd.(supra) after giving opportunity of being heard to the assessee.

In the result, appeal filed by the assessee for the Asst. year 2007-08 is allowed for statistical purposes.

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1. The revenue has challenged the impugned order on following effective grounds of appeal:-

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs. 1,05,509/- made in respect of Transaction Charges without realizing the fact that these were composite charges alongwith transaction charges for professional and technical services rendered by the exchange to its members and the assessee has failed to deduct TDS thereon."

2. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 5,11,252/- made u/s 14A r. w. Rule 8D of the I.T. Act by Assessing Officer .”

3. “On the facts and in the circumstances of the case, the impugned order of the Ld. CIT(A) is contrary to law to be set aside and that of the Assessing Officer be restored.”

2. At the outset, the Ld. Counsel for the assessee submitted that the tax effect in this case is below Rs.10,00,000/- as the total disallowance made by the AO in respect of Transaction charges is Rs. 1,05,509/-. Hence, as per the CBDT Circular No. 21 of 2015, dated 10/12/2015, the present appeal is not maintainable.

3. The Ld. DR fairly admitted that the tax effect in department’s appeal is below Rs.10 Lakhs, We find that the issue raised in appeal does not fall under any of the exceptions specified in para 8 of the Circular. Since, it has been specifically clarified in the Circular aforesaid that the instruction will apply retrospectively to all the pending appeals; the present appeal filed by the revenue is not maintainable. We, therefore, dismiss the same *in limine*.

4. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court 21st July, 2016.

Sd/-
(R.C.SHARMA)

ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 21/07/2016

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

Pramila