

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI
BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND
SMT SUCHITRA KAMBLE, JUDICIAL MEMBER
I.T.A .No.-2442/DEL/2011
(ASSESSMENT YEAR-2007-08)**

ACIT Circle-10(1) New Delhi (APPELLANT)	vs	Decent Financial Services Pvt. Ltd. 84, Darya Ganj New Delhi AAACD2899P (RESPONDENT)
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Appellant by	Ms. Anima Baranwal, SR. DR
Respondent by	Sh. Ved Jain, ADV

Date of Hearing	15.03.2016
Date of Pronouncement	19.05.2016

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against the order dated 28/02/2011 passed by CIT(A)-XVII, New Delhi.

2. The grounds of appeal are as under:-

- “1. *On the facts and circumstances of the case and in law, the Ld.CIT(A) has erroneously held that income from Short Term Capital Gain at Rs.21,14,240/- and Long Term Capital Gain at Rs.50,42,972/- from shares to be taxed at special tax rate u/s 111(A) & 112 of the IT*

Act, 1961 and not to be considered as business income as assessed by the A.O.

2. *On the facts and circumstances of the case and in law, the Ld.CIT(A) has erroneously restricted the disallowance to 10% of the exempted income as against the disallowance of Rs.68,78,340/- made by the A.O.*
3. The assessee company is engaged in the business of activities in shares and securities during the year under consideration, as well as also earned dividend from these shares and securities. Out of total income of Rs.224.55 lakhs earned by the assessee, the income from Short Term Capital Gains was at Rs. 21,14,240/- and from Long Term Capital Gain at Rs.50,42,972/-. The assessee also declared dividend income of Rs.28,42,318/- and after deducting expenses of Rs.90,306/- an exemption of Rs.27,52,012/- was claimed u/s 10(38) of the Act. The assessee was asked to show cause as to why the Short Term and Long Term Capital Gain declared by the assessee shall not be assessed as business income. The assessee submitted its reply thereby stating that the assessee is not a share trader having any share shop, Membership of stock exchange, registration with SEBI or other association of share traders etc. It was further submitted that in commercial world nobody considered the assessee as a share trader, therefore, in natural way, all acquisition of shares securities and units will be capital assets of the assessee and that the benefit u/s 10(38) & 111(A) in case of capital gains or benefit of tax rebate u/s 88 E should be considered as options or privileges granted to the assessee by the legislature. Where transactions have suffered STT, the treatment given by the assessee to transactions as share trading activity or investment activity should be considered as final.
4. The Assessing Officer after taking into account the submissions of the assessee observed that although the assessee has mentioned purchase of shares as investments in its books of accounts but looking to the nature of transactions of shares, it was found that the assessee was doing frequent transactions for sale and purchase of shares which was evident from the

inventory of opening stock/closing stocks. The Assessing Officer has also taken into cognizance of Circular No. 4/2007 dated 15/06/2007 issued by CBDT and held that the assessee has declared Short Term Capital Gain on certain sale of shares even though its main business is trading of shares. The Assessing Officer also considered the instructions dated 31st August, 1989 issued by CBDT and held that though the portfolio manager is an agent of the investor and though he may carry on certain transactions in his own name such transactions are in his capacity as an agent of investor. Therefore, under general principals such transactions are the transactions of the investor carried out through an agent, the income from such transactions is liable to tax as the income of the investor and thus the Assessing Officer held the Short Term Capital Gain as well as Long Term Capital Gain earned on entire sale and purchase of shares i.e. Rs. 71,57,912/- as business income by rejecting the Special Tax treatment as per Section 111(A). The Assessing Officer further disallowed Rs.68,78,340/- u/s 14A of the Act by holding that the investment made being a conscious decision and having deployment of funds clearly beings into picture expenditure by way of cost of funds invested. Composite funds having cost needs to be spread so as to a portion appropriate cost of funds invested in the activity lending to carrying of exempt income. Rule 8 D is Procedural Rule, and, therefore, will have retrospective operation in so far as, all pending proceedings as on date of notification are concerned. Section 2 & 3 of Section 14A at the procedural provisions of the determining the disallowance of the expenditure in relation to income not found part of total income.

5. Being aggrieved the assessee carried the matter to the CIT(A) who has held that Long Term Capital Gains of Rs. 50,42,972/- was on the shares which have been held by the assessee for many years and there was no justification given by the Assessing Officer for treating the same as business income when for the last many years the same was treated as capital gain. Therefore, as per Circular No. 4/2007 dated 15/06/2007, the assessee's claim with regard to Long Term Capital Gain has to be accepted as the assessee was claiming the

same as long term capital gain consistently, since many years which was allowed by the Assessing Officer in previous years and thus, partly allowed the said ground. As regards to Ground No. 2 related to dividend income the CIT(A) relied on the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Company Limited 234 CTR 1 and held that it was the duty of the A.O to make the disallowance u/s 14A by adopting reasonable basis and thus restricted the disallowance to 10% of exempted income. Now the Assessee is in appeal.

6. The Ld. DR submitted that the transactions on its volume and on the basis of the trading in a single day were very much high and is rightly treated as business by the Assessing Officer. It was further submitted that no separate account was maintained by the assessee and the intention of the assessee was clearly for the trading activity and that there was no share purchased for Long Term Capital Gain or to earn dividend. The Ld. DR pointed out that from the Assessing Officer's order it was clear from the assessee's opening stock and closing stock was evident to show that the total number of shares purchased during the year was 514.44 lakh having total value of Rs. 2513.54 lakhs and number of shares sold during the year was 488.46 lakhs of Rs. 21,185.99 lakhs. The used volume itself indicated that the assessee was doing business activity and wrongly treated it as investments and had shown capital gain. The Ld. DR while supporting the order of Assessing Officer stated that Rule 8D is Procedural Rule and, therefore, will have retrospective operation. In so far as, all pending proceedings as on date of notification are concerned, the Ld. DR relied upon the case of CIT Vs. M/s DM Components Ltd. passed by Hon'ble Delhi High Court wherein the assessee has claimed the amounts were not business income but towards capital gain from sale of investment. The Hon'ble Jurisdictional High Court held that the short duration holding of the shares and the lack of clarity in the accounts books will hold the said amount not to be testified as Short Term Capital Gain and shall

be treated as business income, hence appeal of the Revenue was allowed therein.

7. In his rival submissions, the Ld. AR submitted that the assessee is having two portfolios and it's not a requirement under the law to have two separate bank accounts for conducting a business and making investments. The Assessing Officer admittedly stated that the Profit and Loss Account clearly shows that the assessee was having Short Term Capital Gain as well as business income so there was clear bifurcation of both the incomes. In-fact, for Short Term Capital Gain the assessee has not utilized any borrowed fund. The Ld. AR submitted that the judgment which was relied by the Ld. DR was in respect of transactions dealing with shares held only for three to four days. Thus, the applicability of the said judgment will not sustain in assessee's case because the entire transaction was during the year and there was nothing on record to show that it was a business of the assessee. The Ld. AR also referred to the CIT(A)'s order and submitted that the facts were appreciated properly by the CIT(A). The Ld. AR of the assessee also relied upon the CBDT Circular No. 6/2016 dated 29th February 2016 wherein the Board has instructed to the AO as under:-

“..a) Where the assessee itself, irrespective of the period of holding 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 the 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 issues by the CBDT.”

The assessee also relied upon the case of CIT Vs. Gopal Purohit (2011) 336 ITR 287 (Bombay) which was confirmed by the Hon'ble Supreme Court. In respect of Ground No. 2, the Ld. AR submitted that Rule 8D will not be applicable for the present Assessment Year 2007-08 as held in Jurisdictional High Court in the case of Maxopp Investment Ltd. vs. CIT reported at 347 ITR 272.

8. We have perused all the records and heard both the parties. The Ld. DR's contention that the circular dated February 2016 is not retrospective has to be looked into from the angle of the earlier circulars and the intention of that circular issued by the CBDT. The intention of the circular is clearly to reduce the litigation and maintain consistency. The submissions of the Ld. DR that the transaction was very much voluminous and, therefore, Assessing Officer by taking into the modus operandi of the assessee treated the same as business income but the Assessing Officer has not given the day to day transaction in its entire order and that for how much period the assessee was holding the shares and selling the same is missing in the assessment order. In-fact, in earlier assessment years, the Revenue allowed the Long Term Capital Gain to the assessee and thus the same was treated as capital gain during the earlier years by taking cognizance of circular dated 4/2007 dated 15/6/2007. The assessee has also shown Short Term Capital Gain in this particular year. The case law which was cited by the Ld. DR is not applicable to the facts of the present case because in that case the shares were held for only two to three days period but the assessee's situation in the present case is totally different. The CIT (A) has taken into cognizance of these factors and rightly treated the same as short term capital gain and in fact CIT(A) has taxed certain amount after examining

all the transactions related to share trading. The assessee's profit and loss account clearly states that the assessee was having two portfolios. Therefore, this ground of Revenue is dismissed.

8. As regards to Ground No. 2, it is clear that the Assessment Year involved in 2007-08 therefore Rule 8D is not applicable in this year as per the ratio laid down in the judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Company (supra). In our opinion, the CIT(A) has rightly taken into cognizance that the said judgment also held that where investment has been made and the income from the same was exempt from tax thus, the A.O is duty bound to make the disallowance u/s 14A by adopting a reasonable basis. The CIT(A) has rightly restricted the disallowance to the extent of 10% of exempted income. Thus, this ground of the Revenue is also does not survive.

9. In result, the appeal of the Revenue is dismissed.

The order is pronounced in the open court on 19th of May, 2016.

**Sd/-
(N. K. SAINI)
ACCOUNTANT MEMBER**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 19/05/2016

R. Naheed

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| 1. | Appellant | |
| 2. | Respondent | |
| 3. | CIT | |
| 4. | CIT(Appeals) | |
| 5. | DR: ITAT | ASSISTANT REGISTRAR
ITAT NEW DELHI |

		Date	
1.	Draft dictated on	15/03/2016	PS
2.	Draft placed before author	16/03/2016	PS

3.	Draft proposed & placed before the second member	.2016	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	19.05.2016	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	19.05.2016	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		