

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.6461/Mum/2012

(Assessment Year :2009-10)

ITA No.1582/Mum/2013

(Assessment Year: 2008-09)

ITA No.440/Mum/2015

(Assessment Year :2011-12)

ITA No.5449/Mum/2013

(Assessment Year:2010-11)

M/s. Sanat M. Dalal Securities Pvt. Ltd., Manek Mahal, 2 <sup>nd</sup> Floor 90, Veer Nariman Road Next to Ambassador Hotel Mumbai – 400 020	Vs.	ITO 4 (2)(2) R.No.647, Aayakar Bhavan M.K. Road, Mumbai – 400 020
<b>PAN/GIR No.AAFCS1400A</b>		
<b>Appellant)</b>	..	<b>Respondent)</b>

Assessee by	Shri Rajiv Khandelwal and Shri Neel Khandelwal
Revenue by	Shri Suman Kumar
<b>Date of Hearing</b>	<b>23/02/2018</b>
<b>Date of Pronouncement</b>	<b>20/03/2018</b>

**आदेश / O R D E R**

**PER R.C.SHARMA (A.M):**

These are the appeals filed by the assessee against the order of CIT(A)-8, Mumbai dated 26/09/2012, CIT(A)-9 dated 05/12/2014 CIT(A)-8, Mumbai dated 07/06/2011 and CIT(A)-8, Mumbai dated 04/07/2013 respectively for A.Y.2008-09 to 2011-12 in the matter of order passed u/s.143(3) of the IT Act.

2. Common grievance of assessee in all the years pertains to disallowance u/s.14A and speculation loss on share transaction.
3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in the business of Investment in shares and stock broking. It had filed Return of Income for A.Y.2009-10 on 25/09/2009 declaring a loss of Rs.29,15,946/-. The case was selected for scrutiny and AO has passed an order u/s.143(3) of the Income-Tax Act on 29/12/2011 converting the loss into income of Rs.78,61,230/-.
4. During the course of assessment, the AO made disallowance u/s.14A r.w. Rule 8D by observing that shares have been held by the assessee as investment. We found that assessee is engaged in the business of trading in shares and stock broking in the securities. Entire income earned on security transactions is offered to tax under the head "Business and Profession" and dividend income was an incidental income.
5. Learned AR relied on the decision of Delhi High Court in the case of Chem Invest Ltd., 378 ITR 33 and argued that disallowance should not exceed the exempt income earned by the assessee. Reliance was also placed on the decision of Gujarat High Court in the case of Cortech Energy Pvt. Ltd., Appeal No.239 of 2014.
6. We have considered rival contentions and carefully gone through the orders of the authorities below. Respectfully following the decision of the Delhi High Court in case of Chem Invest Ltd., (supra) and Joint Investment Pvt. Ltd., in ITA No.117/2015 order dated 25/0/2015. We

direct the AO to restrict the disallowance u/s.14A to the extent of exempt income so earned by the assessee. Recently this view has been affirmed by Hon'ble Supreme Court in the case of Maxopp Investment Ltd., vide order dated 12/02/2018. We direct accordingly.

7. In the A.Y.2009-10, AO has also disallowed deemed speculative loss and declined its set off against the income under the same head of income from business and profession.

8. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2002-03, 2003-04 and 2004-05, wherein exactly similar issue was dealt with by the Tribunal and held that entire income or loss arising to the assessee was attracted by Explanation to Section 73, therefore, entire transactions have to be treated as speculative in nature, therefore, to be set off against the profit arising out of similar transaction. The precise observation of the Tribunal was as under:-

*11. As discussed above, the assessee is engaged in the business of purchase and sale of shares. In the Balance Sheet, some of the transactions in shares have been shown under the head 'investment'. From this head, the AO inferred that the assessee is doing trading in shares as well as investment. For AY 2002-03, the AO held that whatever the shares on account of which the transactions are carried is less than 12 months they are on account of trading account and whatever the transactions are carried out in more than 12 months are on account of long term capital gain. Accordingly, the claim of the assessee was rejected that the Explanation to sec.73 is applicable. The AO, while rejecting the contention of the assessee has also observed in his order that the assessee has not converted the investments into stock. However, for AY 2003-04, the AO treated the investment account*

*separately and trading account separately and the loss not allowed to be set off. 2002-03 and following the order for AY 2002-03, the CIT(A) partly allowed the appeal of the assessee for AY 2003-04 and for AY 2004-05. Where the transactions carried out in less than 12 months were treated on business account and transactions carried out in more than 12 months were treated as long term capital gain. Accordingly, the AO was directed to re-compute the profit.*

*12 After analysing the facts of the case and written submissions and also the orders of the authorities below, we find that the assessee deserves to succeed in its appeal and Cross Objections. The decision of the Supreme Court in the case of Investment Ltd in 77 ITR 533(SC) is applicable on the facts of the present case. The Hon'ble Supreme Court has held that "just because the shares are shown as investments and just because the shares are valued at cost would not lead to a conclusion that profit/loss arising out of the sale of shares would be capital gains/loss. These two facts are not determining factors." It was further observed that the accounting entries made by the assessee in the books of account are not sufficient to ascertain the nature of transactions. The determining factor would be whether the assessee is in the business of dealing in shares/securities, the number of transactions the value of transactions etc. In that particular case though the transactions were not frequent but were of large value. Considering all these facts, the Hon'ble Supreme Court came to a conclusion that the loss suffered by the assessee was a revenue loss.*

*13. The facts in the present case are 'similar. In the Memorandum of Association, the main objects are to carry out the business i.e. to buy, sell, 'trade', 'exchange, deal, barter, swap, borrow, lend, assure, underwrite, Guarantee etc. Etc. From these facts, it is seen that the main objects of the assessee are of trading in shares. We have also gone through various case laws mentioned in the written submissions and found that directly or indirectly they support the case of the assessee.*

*13.1 The decision in the case of Sulej Cotton Mills Supply Agency Ltd in 100 ITR 706 also supports the case of the assessee. In that case the assessee purchased shares in a sister concern and after about, four years sold a portion of the stocks at a profit. The Tribunal held that the transaction was in the nature of a business adventure and that profits were liable to be taxed. While holding so various reasons were ascertained that; (i) the assessee was authorised under its Memorandum of Association to buy and sell shares (ii) the purchase was authorised by a specific resolution passed by the company (iii) the profit was included in the profit and loss account and not in any separate reserve account (iv) the purchase was made out of borrowed*

*funds on which the assessee paid interest (v) the sale proceed was not utilized for any pressing business necessity but was kept as liquid cash in a bank (vi) the assessee had, in the past, dealt in shares and the shares did not yield any dividend.*

*13.2 The Hon'ble High Court, however held that the transaction could not be treated as an adventure in the nature of trade; on the main reason that the dominant intention of the assessee in acquiring the shares was to boost the shares of a sister concern and, thus, render it assistance for setting it up as a good concern. On appeal, before the Hon'ble Supreme Court, the order of the Tribunal was restored.*

*14 . Similar view has been expressed in the case of Rani Ratnesh Kurnar in 123 ITR 3433 (All) and in the case of Hindustan Industrial Agencies P Ltd in 135 ITR 436(Bom) and in the case of Godavari Corpn Ltd in 156 ITR 835 (MP).*

*15. In the present case also the facts are similar to the facts before the Apex Court-in the case of Sulej Cotton Mills Supply Agency Ltd (supra) as the assessee was authorized under the Memorandum of Association to buy and sell shares. The profit was included in the profit and loss account and not in any separate reserve account. The purchase was made out of borrowed funds on which the assessee paid interest. The sale proceed was not utilized for further transactions of share trading. The assessee had, in the past, dealt in shares and the shares did not yield any substantial dividend. The transactions in shares have been done for more than ten crores wherein the dividend earned by the assessee is a meager amount about 1 lac which constitute 1% of the shares purchased either in share investment or other otherwise.*

*15.1 The view of the CIT(A) cannot be approved that the share dealing which are carried out in less than 12 months are of trading in nature and the transactions carried out in more than 12 months are on account of capital gain. The nature of the business has to be seen and according to that treatment has to be given. The nature of business is of frequent purchase and sale of shares, therefore, only one treatment has to be given either trading or investment.*

*15.2 On the facts of the present case, it is seen that the main business of the assessee is of purchase and sale of shares, therefore, in view of the facts and circumstances and in spite of the fact that the assessee is showing shares as investment in the balance sheet profit/loss arising out of these transactions are required to be assessed under the head profit and gain of business'. Since the assessee is a company, Explanation to sec. 73 will be applicable on the facts of the*

*resent case, therefore, the profit earned on share trading transaction alone deemed to be speculative in nature in view of the provisions of sec. 73 of the Act. Any profit has to be set off as against any loss on account of purchase and sales of shares. Accordingly, we direct the AO to allow the set off of loss against profit on account of purchase and sale of shares in all these three years.*

9. As the facts and circumstances during the A.Y.2008-09 and 2009-10 are same, respectfully following the order of Tribunal in assessee's own case, we do not find any justification in the order of the lower authorities for decline of claim of set off of loss against the income earned by the assessee on account of purchase and sale, in both the years under consideration.

10. In the A.Y.2010-11 and 2011-12, assessee has also aggrieved for disallowance of transaction charges.

11. Rival contentions have been heard and record perused. In the A.Y.2010-11, the assessee has debited Rs.2,46,639/ on account of Transaction charges on which it has not deducted TDS. During the assessment proceedings assessee was asked to show cause as to why the transaction charges paid should not be disallowed u/s. 40(a)(ia) and added to the total income. The assessee in his submission dated 19/12/2012 has stated that TDS statement & notice as when to pay was issued by the BSE only on February, 2012 but we have paid the TDS on 12.12.2011. AO did not agree with the contention and disallowed the same on the plea that non-deduction of tax at source.

12. By the impugned order, CIT(A) confirmed the disallowance so made by AO against which assessee is in further appeal before us.

13. We have considered rival contentions and carefully gone through the orders of the authorities below. The issue under consideration is squarely covered by the decision of Hon'ble Supreme Court in the case of Kotak Securities 383 ITR 1 wherein Hon'ble Supreme Court held that services available from Bombay Stock Exchange in respect of online trading system, for which transaction charges are paid by the members of BSE are common services that every member of Stock Exchange is necessarily required to avail of to carry out trading in securities in Stock Exchange. Such services do not amount to 'technical services' provided by Stock Exchange, not being services specifically sought for by user or consumer. Accordingly it was held that transaction charges paid by members of BSE are in the nature of payment made for facilities provided by Stock Exchange and no TDS on such payments would be deductible u/s.194J.

14. Respectfully following the decision of Hon'ble Supreme Court, we do not find any merit in the action of lower authorities for disallowing the transaction charges paid by invoking provisions of Section 40(a)(ia) in so far as no tax was deductible at source on such charges. Accordingly, we delete the disallowance of Rs.1,63,676/- in the A.Y/2011-12 and Rs.2,46,639/- in the A.Y.2010-11. We direct accordingly.

15. In the A.Y.2009-10, AO has also disallowed set off trading loss of Rs.23,77,040/- arising on account of delivery based transaction held as deemed speculation loss by virtue of Explanation to Section 73. Following

reasoning given in the A.Y.2008-09, we do not find any justification for the same and respectfully following the order of the Tribunal in assessee's own case as stated above, we direct the AO to allow set off. We direct accordingly.

16. Ground raised by assessee with regard to disallowance u/s.14A in the A.Y.2008-09, 2009-10, 2010-11 & 2011-12 are same as discussed hereinabove,. Following the reasoning given hereinabove at para 6, we direct the AO to restrict the disallowance to the extent of exempt dividend income earned by the assessee. We direct accordingly.

**17. In the result, appeals of assessee are allowed in part in terms indicated hereinabove.**

Order pronounced in the open court on this 20/03/2018

**Sd/-**  
**(RAM LAL NEGI)**  
JUDICIAL MEMBER

**Sd/-**  
**(R.C.SHARMA)**  
ACCOUNTANT MEMBER

Mumbai; Dated 20/03/2018

Karuna Sr.PS

**Copy of the Order forwarded to :**

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)  
ITAT, Mumbai