

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'बी', मुंबई।**

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं  
श्री राजेश कुमार, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and  
Shri Rajesh Kumar, Accountant Member**

**ITA No.145/Mum/2016  
Assessment Year: 2008-09**

ACIT-4(3)(2), Room No.649, Aayakar Bhavan M.K. Road, Mumbai-400020	<b>बनाम/</b> Vs.	Money Care Finance & Leasing Pvt. Ltd. 17, Gr. Floor, Sumernagar Bldg. No.01, Near Kora Kendra Flyover S.V. Road, Borivali West, Mumbai-400092
(राजस्व /Revenue)		(निर्धारिती /Assessee)
<b>PAN. No.AAACM3714C</b>		

राजस्व की ओर से / Revenue by	Shri Suman Kumar-DR
निर्धारिती की ओर से / Assessee by	Shri Sanjay N. Kapadia & Shri Navin Kumar Mishra-AR

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>24/01/2018</b>
<b>आदेश की तारीख /Date of Order:</b>	<b>24/01/2018</b>

**आदेश / ORDER**

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 05/10/2015 of the Ld. First Appellate Authority, Mumbai, treating profit on purchase and sale of shares to the extent of Rs.1,38,01,015/- as Long Term Capital Gain without considering that major income of the assessee is from share trading and the assessee carried out large transactions in shares on daily basis, therefore, the Ld. Assessing Officer correctly assessed the income under the head "Income from business".

2. During hearing, the ld. Counsel for the assessee, Shri Sanjay N. Kapadia along with Shri Navin Kumar Mishra, at the outset, claimed that the impugned issue is covered in favour of the assessee vide order dated 31/07/2015 (ITA No.3569/Mum/2010) in the case of assessee itself for Assessment Year 2006-07. This claim of the assessee was not controverted by the Ld. DR, Shri Suman Kumar, being matter of record.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order of the Tribunal dated 31/07/2015 for ready reference and analysis:-

*“The above titled appeal by the Revenue and the corresponding objections by the assessee have been directed against the order dated 22.02.2010 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2006-07.*

*2. The Revenue in its appeal has agitated the action of the Ld. CIT(A) in treating the income from sale and purchase of shares as long term capital gains instead of business income as has been assessed by the Assessing Officer (hereinafter referred to as the AO).*

*The brief facts of the case are that the assessee company has been engaged in the business of financial services and share investment. The assessee had ceased/closed its share business from A.Y. 2004-05 and it transferred all the shares held as stock in trade to the investment account. No transaction of sale and purchase of shares had been done during the year under consideration i.e. A.Y. 2006-07. The transactions during the year were only regarding the sale of shares which were purchased during the earlier years. The period of holding of shares was more than a year in respect of all the transactions and even more than 8 to 10 years in many cases. The shares had been disclosed as investments in the balance sheet. There were only 14 scripts out of which 8 had been held since 1996 and one since 2004 and one had been held since 2005. The assessee has also filed a copy of resolution dated 10.04.2004 on the file vide which it had been resolved that the assessee company had ceased in engaging itself in business of sale and purchase of shares and that the shares shown as stock in trade had been transferred to investment account. Considering the*

above facts, the Ld. CIT(A) has directed the AO to treat the income from the sale of above shares as long term capital gains.

3. We do not find any infirmity in the well reasoned order of the Ld. CIT(A) in this respect. The appeal of the Revenue is therefore dismissed.

4. Now coming to the cross objections filed by the assessee.

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5. The assessee has agitated the action of the Ld. CIT(A) in directing the AO to verify whether any deduction or loss had been claimed by the assessee during the previous years in respect of credit balance of Rs.25 lakh payable to M/s. M.J. International. The AO during the assessment proceedings added the amount of Rs.25 lakh under section 41(1) of the Act into the income of the assessee observing that the assessee had not furnished necessary evidences regarding the payment of the amount to the concerned party or the statement and confirmation of the auditor in this respect.

6. In appeal before the Ld. CIT(A), the assessee submitted that it had not claimed any deduction or loss in the previous year relating to the above said credit of Rs. 25 lakh. The Ld. CIT(A) therefore directed the AO to verify whether any deduction or loss had been claimed in any previous year and if it is found that deduction was claimed then the amount be added into the income of the assessee and in case no deduction was claimed then provisions of section 41(1) would not apply.

7. Before us, the Ld. A.R. of the assessee while relying upon the decision of the Hon'ble Supreme Court in the case of "CIT vs. Kesaria Tea Co. Ltd." 254 ITR 434 and further relying upon another decision of the Hon'ble Supreme Court in the case of "CIT vs. Sugali Sugar Works (P) Ltd." 236 ITR 518 has contended that mere unilateral transfer of entry in accounts would not enable the Department to apply section 41(1) of the I.T. Act. On the other hand, the Ld. D.R. has relied upon the findings of the Ld. CIT(A).

*8. We have considered the rival submissions. We find that it is an admitted fact on the file that the assessee has furnished confirmation from the party. However, the said confirmation has not been examined by the AO. Before the Ld. CIT(A), the assessee has contended that it has not claimed any deduction or loss in respect of the above stated credits from M/s. M.J. International. The Ld. CIT(A) directed the AO to verify the contention of the assessee in this respect. However, we find that the assessee has filed a confirmation from the party to show that the amount was still shown as a liability by the assessee and recoverable by the other party.*

*We therefore modify the order of the Ld. CIT(A) with the additional direction that the AO will verify as to whether the liability has been still existent or has ceased to exist in the light of the case laws cited by the assessee and the other relevant case laws as may be available in relation to the issue under consideration and also considering the evidences filed by the assessee in this respect and to decide the issue afresh in accordance with law. The AO will also verify the contention of the assessee that it had not claimed any deduction or loss in any of the previous year in respect of the amount in question and to decide the issue as per directions of the Ld. CIT(A) as stated above. Accordingly, cross objection of the assessee is partly allowed for statistical purposes.*

*9. In the result, appeal of the Revenue is dismissed and cross objection of the assessee is partly allowed for statistical purposes.”*

2.2. Considering the decision of the Tribunal for Assessment Year 2006-07, in the case of assessee itself, we find that the facts are identical and the funds, available with the assessee were utilized for purchasing the shares. In earlier years, the capital gains was treated as business income and on appeal the Tribunal for Assessment Year

2006-07, set aside the order dated 22/02/2010 directing the Assessing Officer to treat the gain as Long Term Capital Gain and not business income. So far as, Short Term Capital Gain was concerned, the order of the Ld. Commissioner of Income Tax (Appeal) was upheld to treat the same as business income. Following the order of the Tribunal for Assessment Year 2006-07, order dated 31/07/2015 and uncontroverted facts, we find no infirmity in the impugned order. It is upheld, resulting into dismissal of appeal of the Revenue.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 24/01/2018.

**Sd/-**

(Rajesh Kumar)

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 24/01/2018

*Shekhar, P.S./नि.स.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

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

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**