IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Shamim Yahya, Accountant Member
and Shri Amarjit Singh, Judicial Member

ITA No. 3053/Mum/2016
(Assessment Year: 2010-11)

A C I T - 3(1)(2) Room No. 607, 6th Floor Aayakar Bhavan Mumbai 400020	Vs.	M/s. Golden Life Financial Services Pvt. Ltd. *(formerly Lifeline Inusrance Distribution Co. Pvt. Ltd.)* 125-B, Mittal Court, Nariman Point Mumbai 400021 PAN – AAACL8998D
Appellant		**Respondent**

Appellant by: Shri Rajat Mittal
Respondent by: Ms. Krupa Gandhi

Date of Hearing: 19.02.2018
Date of Pronouncement: 02.05.2018

O R D E R

Per Shamim Yahya, AM

This appeal has been filed by the Revenue against the order of the CIT(A)-8, Mumbai dated 21.01.2016 and pertains to A.Y. 2010-11.

2. Revenue has raised the following grounds of appeal: -

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance u/s.14A r.w.r. 8D to Rs.4,69,605/- as against Rs.33,49,507/- made by the AO without appreciating that nothing in the provisions of Sec.14A has been provided that expenditure in relation to earning exempt income cannot exceed exempt income.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in treating ,the income of Rs.1,70,31,749/- arising from "the investment portfolio" as Short Term Capital Gain instead of Business Income, without appreciating that main characteristics of transactions namely quantum, frequency, borrowed funds, period of holding show that shares are traded as business transaction in terms of Board Circular No.4/2007.

3. The appellant prays that the order of CIT (A) on the above ground be set aside and that of Assessing Officer be restored."

3. Apropos ground No.1:

The brief facts of the issue are that the assessee is into the business of Financial Services and investments. The Appellant had filed its Return of Income for the Assessment Year 2010-11 declaring total income of Rs. 1,81,49,830/-. The return of income was processed under section 143(1) of the Act and notice under section 143(2) of the Act was issued. Thereafter, the case was transferred and a fresh notice under section 143(2) of the Act was issued on July 30, 2012 to the assessee. The AO in his assessment order under section 143(3) of the Act made certain additions/ disallowances to the total income declared by the assessee in the return of income. The Assessing Officer in his assessment order has stated that during the year consideration, the assessee earned dividend on investments amounting to ₹4,69,606/- which was exempt under section 10(34) of the Act. During the course of the assessment proceedings, the assessee suo-moto disallowed an amount of ₹4,69,605/-: the working of the same as under:

Sr.No.	Particulars	Amount (₹)
	Working of disallowance under section 14A r.w.r. 8D of the Rules	
1.	Investment as on March 31 , 2009	9,262,853
2.	Closing Investment as on March 31, 2010	70,378,102
3.	Average Investment	39,820,477
4.	Opening Total Assets as on March 31 , 2009	17,020,048
5.	Closing Total Assets as on March 31, 2010	74,111,802
6.	Average Total Assets	45,565,925
7.	Interest Paid	3,539,716
(i)	Actual expenditure incurred	-
(ii)	$\frac{\text{Interest Paid * Average Investment}}{\text{Average Total Assets}}$	3,093,390
(iii)	One-half percentage of Average Investment	199,102
	TOTAL DISALLOWANCE (i)+(ii)+(iii)	3,292,492
	TOTAL DIVIDEND INCOME	469,605
AMOUNT OF DISALLOWANCE UNDER SECTION 14A RESTRICTED TO ₹4,69,605/-		

The AO in his assessment order disallowed amounting to ₹ 33,49,507/- under section 14A of the Act read with rule 8D of the Income-tax Rules, 1962 by disallowing the proportionate interest amounting to ₹31,50,405/- and 0.5% of the average value of investments amounting to ₹1,99,102/-.

4. Upon assessee's appeal the learned CIT(A) upheld the contention of the assessee. He held that the disallowance under Section 14A cannot exceed the dividend earned. Against this order the Revenue is in appeal before us.

5. We have heard both the counsels and perused the record. We find that the issue stands covered in favour of the assessee by the following case law: -

i) Cheminvest Ltd. vs. CIT 281 CTR 447
ii) Hon'ble Bombay High Court in the case of Pr. CIT vs. Ballarpur Industries Ltd. in ITA No. 51 of 2016

6. In these decisions it was held that disallowance under Section 14A cannot exceed the dividend income earned. Accordingly in the background of aforesaid precedents we do not find any infirmity in the order of the learned CIT(A) on this issue. Accordingly we confirm the same.

7. Apropos ground No. 2:

The brief are that during the year under consideration, the assessee sold various shares and securities under both the portfolios. The income from "Investment Portfolio" was offered to tax under the head 'Capital Gains' and the Income from "Trading Portfolio" was offered, to tax under the head 'Income from Business' by the assessee. The assessee earned Short Term Capital Gains of ₹1,70,31,688/- and Long Term Capital Gains of ₹4,38,758/- in respect of the Investment portfolio and ₹52,20,406/- as business profit in respect of the Trading Portfolio (including other business profit) which have been offered to tax. The Assessing Officer during the course of assessment proceedings held that the assessee to be only in the business activity of share trading rather than an investor in shares and securities. The Assessing Officer observed that the assessee has shown

short term capital gain of ₹1,70,31,749/- on account of sales of shares and securities. The Assessing Officer observed that there were voluminous and regular purchase and sale transactions of shares which were in the nature of business transactions. On verifying the same, the Assessing Officer concluded that the assessee is not an investor in securities but has been engaged in the business activity of share trading. Therefore, the total income from short term sales i.e. ₹1,70,31,688/- was treated as business income of the assessee and computation with special rate was disallowed by the Assessing Officer.

8. The AO has inter alia observed as follows in para 6.12 of his order: -

> *"6.13 Huge borrowed funds have been used for the trading in shares shown as investment in shares. The shares categorized as investment have been purchased in the current year both in huge volume & with huge amount of money. Further the use of borrowed funds of Rs.9.12 crores from Chhatisgadh Investment Ltd., Rs. 2.04 crores obtained from Sarda Energy & Minerals Ltd. and Rs.39,79 crores obtained from M/s. J.M. Financial Services shows that the assessee is doing business of share holding."*

The AO has further noted that except giving captions to the investment portfolios the assessee has not given any cogent proof in support.

9. Upon assessee's appeal the learned CIT(A) deleted the addition by holding as under: -

> *"5.2.3 In the instant case, I find that the appellant has submitted explanation before the AO through various letter, particularly in its letter dt. 26.02.2013 wherein it was informed that shares and securities under the investment portfolio were classified as 'Investment' in the Audited Financial Statement and those in trading portfolio were classified as 'Stock in Trade' under 'inventories'. It has also been contended that the shares and securities in investment portfolios were purchased with the intention to earn capital appreciation. It is also asserted that Income from investment portfolio was offered to Capital Gains and that from trading portfolio was offered to tax as business income. The Appellant had further referred to CBDT Circular no. 4/2007 quoted above and hence not repeated.*
>
> *5.2.3 I find that in his remand report the AO has nowhere established that the copies of relevant board resolutions were asked for to support the claim of "intention" of investment by the appellant. The appellant could not have produced what was never asked for;*

Therefore, I find that the exception (c) to Rule 46A as mentioned above is applicable in the instant case.

5.2.4 I find that the copies of board resolutions dt. 02.07.2009, 02.10.2009, 02.01.2010, 02.04.2010, 04.07.2008, 04.10.2008 and 09.04.2009 furnished as additional evidence clearly show that the board has resolved to place the shares mentioned therein to be held in investment portfolio. I therefore deem it fit to allow the additional evidence as it goes to the root of the issue.

5.2.5 Coming to the merits of the case, it is not in dispute that the appellant has been maintaining an "Investment Portfolio" and a "Trading Portfolio" as is also evident from copies of the ledger accounts and Schedule 6 and 7 to the balance sheet. Further, it is seen that the investment has received a dividend of Rs. 4,69,605/- during the year. In fact, this is the amount that was subject of ground no. 1 above.

5.2.6 I find the decision of the Hon'ble ITAT Mumbai in Gopal Purohit vs JCIT, 29 SOT 117 (Mum) is applicable in the instant case. In that case, it was held that delivery based transactions should be treated as of nature of investment transactions. Similar view has been upheld by Hon'ble Bombay High Court in the same case in ITA 1121 of 2009 cited in 188 Taxman 140 (Bom)(2010).

5.2.7 The AO has not offered any cogent reason either in the assessment order or in the remand report as to why he is not accepting the separate Investment Portfolio and Trading Portfolio. He has rejected any explanation or evidence or components of audited accounts. His only reasons appear to be the volume and frequency of transactions in the investment portfolio and the lack of proof of intention that the impugned shares and securities were part of investment. In terms of a company, decisions/resolutions of the board of directors are reflections of intentions or views of the company. The AO has not shown why the above mentioned board resolution do not satisfy his need for seeing an evidence of the intention for investment.

5.2.8 In view of the above, the AO is directed to treat impugned amount of Rs.1,70,31,749/- as income from short term capital gain instead of business income. This ground of appeal is allowed."

Against the above order the Revenue is in appeal before us.

10. We have heard both the counsels and perused the record. We find that on this issue there is a decision of the Hon'ble Bombay High Court in the case of Gopal Purohit 188 Taxman 140 which the learned CIT(A) has purportedly applied and found that the said decision is applicable on the facts of the case. In this regard we may gainfully refer to the very first

paragraph of the said order of the Hon'ble Bombay High Court, which reads as under: -

> *"2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate port folios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received therefrom should be treated either as short term or, as the case may be, long term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law."*

11. Reading of the above makes it clear that the transaction in the aforesaid decision before the Hon'ble Bombay High Court were delivery based transaction. In the present case no where the assessee has claimed that these transactions are delivery based. Despite noting the said facts in the Hon'ble Bombay High Court decision, the learned CIT(A) has totally ignored the same. Only the aspect that assessee can maintain an investment and trading portfolio has been referred by the learned CIT(A) and the issue decided in favour of the assessee purportedly on the ground that the same is in accordance with Hon'ble Bombay High Court decision. In our considered opinion learned CIT(A) has totally erred in not examining the facts of the case in the entirety as to whether they were in accordance with the facts operating in the aforesaid decision of the Hon'ble Bombay High Court. Moreover learned CIT(A) has not given any finding as to whether the transaction in the present case are delivery based on not. Furthermore the observation of the AO that assessee has obtained huge amount of loan to make these investments has also not been considered by the learned CIT(A).

12. Accordingly in the background of aforesaid discussion and precedent we consider it appropriate to remit the issue the file of the learned CIT(A). Learned CIT(A)is directed to consider the issue afresh and give proper finding as to whether the issue can be said to be decided in favour of the assessee on the basis of the ratio emanating from the Hon'ble Bombay High Court decision in the case of Gopal Purohit (supra). Needless to add that assessee should be granted adequate opportunity of being heard.

13. In the result, this appeal by the Revenue stands partly allowed for statistical purposes.

Order pronounced in the open court on 2nd May, 2018.

Sd/-	Sd/-
(Amarjit Singh)	**(Shamim Yahya)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 2nd May, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -8, Mumbai*
4. *The CIT - 3, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.