

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: BENCH "B" : NEW DELHI**

**BEFORE SRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 5178/Del/2012
A.Y. 2008-09**

Dy.CIT Circle 10(1) New Delhi	vs.	M/s Divya Shakti Trading Services Ltd. (Now M/s Indiabulls Advisory Services Ltd.) F 60, 2 nd floor, Malhotra building Cannaught Place New Delhi PAN: AACCD4953E
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**ITA No. 5029/Del/2012
A.Y. 2008-09**

M/s Divya Shakti Trading Services Ltd. (Now M/s Indiabulls Advisory Services Ltd.) New Delhi PAN: AACCD4953E	vs.	Dy.CIT Circle 10(1) New Delhi
(Appellant)		(Respondent)

Assessee by	Sh. Gautam Jain, Sh. Piyush Kr. Kamal, Advs & Sh.Lalit Mohan, CA
Revenue by	Ms. Rachna Singh, CIT, D.R.
Date of Hearing	23.07.2018
Date of Pronouncement	23/08/2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present Cross Appeals have been filed by Revenue as well as Assessee against order dated 23/07/12 passed by Ld. CIT (A)-13, New Delhi for Assessment Year 2008-09 on the following grounds of appeal:

ITA No. 5178/Del/2012 (Revenue's appeal)

1. *Whether the Ld.CIT(A) under the facts and circumstances of the case and in law was justified in holding that profit of Rs.35,14,66,127/- earned by the assessee on sale of shares is short term capital gain and not business income.*
2. *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”*

ITA No. 5029/Del/2012 (Assessee's appeal)

1. *The Ld.CIT(A) has erred in law and on facts, in confirming the disallowance u/s 14A amounting to Rs.7,60,000/-, without giving due consideration to the facts and circumstances of the case.*
2. *The Ld.CIT(A) has erred in not considering the ground related to initiation of penalty proceedings u/s 271(1)(c) , as the assessee had neither concealed the particulars of income nor submitted any inaccurate particulars of income.*
3. *That the assessee craves for liberty to raise any other ground at the time of hearing of appeal.”*

2. Brief facts of the case are as under:

For the year under consideration assessee filed its return of income on 08/10/09. The same was processed under section 143 (1) of the Income Tax Act, 1961 (the Act) and was selected for scrutiny. Accordingly, notice under section 143 (2) of the Act along with notice under section 142(1) of the Act, with questionnaire, was served upon assessee. In response to statutory notices Representatives of assessee appeared before Ld.AO and discussed the case.

2.1. Ld.AO observed that during the year under consideration, assessee is stated to be engaged in the business of buying, selling

and dealing in securities of any kind, shares, debentures, debentures stock, properties, bonds, units, obligations and other securities. Ld.AO observed that assessee had declared income from business and profession to the tune of Rs.1,41,84,797/-, income from short term capital gains at Rs.35,14,66,127/-and income from dividend claimed to be exempt at Rs.16,300/-.

Ld. AO observed that assessee declared to have made investments in shares of 10 companies, the details of which are as under:

S.No.	Name of Company	No. of shares acquired	No. of shares sold
1.	Orchid Chemical & Pharmaceuticals Ltd.	5,40,230	5,40,230
2.	Nitco Ltd.	5,300	5,300
3.	Omaxe Ltd.	24,426	24,426
4.	DLF Ltd.	65,67,294	65,67,294
5.	Edelweiss Capital Ltd.	5,202	5,202
6.	BUR Energy Systems	5,838	5,838
7.	Reliance Power Ltd.	1,42,896	1,42,896
8.	Reliance Energy Ltd.	4,08,982	4,08,982
9.	Grabal Alok Impex Ltd.	19,00,000	19,00,000
10.	Prakash Industries Ltd.	12,50,000	NIL

It was observed that assessee had disclosed income from sale of investments under the head 'other income' and computed capital gain tax on it. During assessment proceedings, Ld. AO asked assessee to show cause, as to why, share transaction in such volume and frequency should not be treated as 'business income', instead of 'capital gains'. From reply filed in response

to show cause notice, Ld. AO recorded certain facts which are as under:

“From the reply filed by the assessee and issues involved, following facts emerges:

- (a) The assessee did not maintain separate books of accounts for the alleged investments and regular business, No separate bank account is maintained for diffracting the alleged investment made and for business activity. The assessee was utilizing the sales proceeds of the alleged investments for the purpose of business. Similarly the assessee was utilizing the funds of business for alleged purchase of investment/ shares. Merely, an assumption by the assessee that a particular purchase is investment is not sufficient. If it is allowed then every person shall opt for income trading of shares as capital gain income, only because tax on capital gain is either levied lesser rate or Nil rate.*
- (b) The turnover of these shares was to the tune of Rs.69,06,09,30,892/-.*
This in itself shows that it was trading activity.
- (c) The assessee was frequently trading in a particular scrip i.e. a particular share was frequently purchased and sold. If the intention of the assessee was to earn dividend then they would have held those shares for a longer period instead of selling and purchasing at short intervals.*

Ld. AO further observed as under:

In Asstt. Year 2007-08, the assessee itself treated its income as income from business and profession and considering this fact in mind the Assessing Officer accepted the plea of the assessee and the assessment was completed at the same figures without making any further additions as the department was taking the similar view in other cases on similar issue. Moreover, the assessee in his submission dated 16.09.2009 (submitted on 17.09.2009) clearly mentioned that the company is engaged in the business of buying, selling and dealing in securities of any kind, shares, debentures, debentures stocks, properties, bonds units, obligations and other securities. The audit report in 3CD annexed with the return also disclosed that nature of business was DEALING IN SHARES. The assessee company in his Profit and Loss Account has disclosed the income from operations and not from investments

and also claimed expenditure. Later the assessee after weaving thoughts and concocted a story for changing its income from Business to Capital gain just to avoid tax liability , it moved petition U/s 264 of the I.T. Act before the Ld. Commissioner of Income Tax, Delhi-IV, New Delhi on 19th March, 2010 by submitting that “During the relevant previous year the assessee company made transaction for purchase and sale of isolated scrip of GHCL. The income arising out of the above has been mistakenly treated as business income instead of capital gains by the assessee at the time of filing the return.”

2.2. On the basis of treatment of income by assessee in preceding Assessment Year, Ld.AO treated income earned by assessee from alleged investments as ‘business income’ for year under consideration. Ld.AO further computed disallowance under section 14 A read with Rule 8D, at Rs.7,60,000/-.

3. Aggrieved by additions made by Ld. AO, assessee preferred appeal before the Ld.CIT (A).

3.1. Ld.CIT(A) allowed plea of assessee regarding treatment of sale and purchase of shares tabulated hereinabove as ‘capital gains’, instead of ‘business income’, however, disallowance computed by Ld.AO under section 14 A was upheld.

4. Aggrieved by the order of Ld.CIT (A) assessee as well as Revenue are in appeal before us.

ITA No. 5178/Del/2012 (Revenue’s appeal)

5. Before us Ld. CIT-DR submitted that Revenue is aggrieved by impugned order passed by Ld.CIT (A) for following reasons:

- Ld.CIT (A) failed to address and rebut the arguments marshalled by Ld.AO;
- Ld.CIT (A) passed a non-speaking order, accepting submissions of assessee at face value.

5.1. She placed reliance upon decision dated 15.04.2010 of *Hon'ble Supreme Court* in the case of *ACIT vs M/s Shukla and Bros* in SLP(C) No.16466/09. Placing reliance upon order of Ld.AO, she submitted that intention of assessee was to earn profits from sale and purchase of shares. She submitted that though there was only 10 scrips, magnitude of transaction of sale and purchase was large with turnover of Rs.69,06,09,30,892/-. She submitted that only income generated by assessee shown in Profit and Loss account as 'income from operations', which has been referred to as profit from dealing in securities. She placed reliance upon Circular No. 4/2007 dated 15/06/07 issued by CBDT wherein a distinction between "capital asset" and a "trading asset" has been made out on the basis of the decision of *Hon'ble Supreme Court* in the case of *CIT vs. Associated Industrial Development Company Pvt. Ltd.* reported in 82 ITR 586, *CIT vs. H. Holck Larsen* reported in 26 Taxman 305 and *Authority for Advance Ruling (AAR)* in the case of *Fidelity North Star Fund*, reported in (2007) 158 Taxman 372. She submitted that, merely exercising power from Memorandum and Articles of Association to purchase and sell shares as investment will not by itself be decisive of the nature of transaction.

5.2. Ld. CIT-DR submitted that in Schedule 10 to audited accounts, revenue recognition has been categorised under 3 heads being:

- transaction in respect of dealing in securities which are recognised on the trade dates;

- dividend income on units of mutual funds is recognised on receipt basis and any gains/losses are recognised on the date of selling
- profit on sale of investments is recognised on traded date.

5.3. She submitted that assuming assessee has invested in these shares, it is not supported by audited accounts as there are no separate accounts maintained by assessee for purposes of investment in shares and shares held as stock- in-trade. Ld. CIT,DR submitted that method of valuation of investments as well as stock-in-trade has been separately shown in the Schedule 10, however, there is no segregation of 2 categories, as observed by Ld.AO.

5.4. She submitted that the frequency and the period during which assessee has purchased and sold shares of these 10 companies, clearly indicates intention that these were not ordinary purchases and sales made by assessee. Instead there was an object to derive income by way of profits. Emphasising upon the basic nature of share trading activity conducted by assessee, she submitted that income derived by assessee from such huge magnitude of sale and purchase of shares cannot be considered under the head “capital gains”.

6. On the contrary, Ld.Counsel submitted that, major part of capital gain was earned from transaction of IPO offered by DLF Ltd., and assessee held the shares for months before selling them. It was also submitted that delivery of shares from these 10 companies, was taken in depository account of assessee. Ld.Counsel submitted that assessee made these investments in few shares to take benefit of appreciation in the market, and,

therefore, it cannot be considered to be part of regular business activity. He submitted that assessee was incorporated on November, 2006. Placing reliance upon the audited accounts for Financial Year ending 31/03/07, he submitted that this was second-year of activity for assessee. He submitted that merely because predominant activity of assessee is buying and selling and dealing in securities of any kind etc, cannot stop assessee from purchasing shares for the sake of investment and sell them as and when a favourable price is received.

6.1. On a query being raised regarding details of opening investments made and sold during the year, as well as details of purchase and sale of securities at page 34-35 of paper book, Ld. Counsel submitted that these separately have been provided under: 13 and 14.

Placing reliance upon;

- *decision of Hon'ble Supreme Court in the case of Anil Jain vs. CIT reported in 294 ITR 435;*
- *decision of Hon'ble Delhi High Court in case of CIT vs. Vinay Mittal reported in 22 Taxmann.com 151;*
- *decision of Hon'ble Delhi High Court in the case of CIT vs. Rohit Anand reported in 327 ITR 445 ;*
- *decision of Hon'ble Delhi High Court in the case of CIT vs. Jubilate Securities Pvt. Ltd., reported in 333 ITR 445 ;*

he submitted that there was no restriction on assessee to hold 2 portfolios in so far as shares were concerned. He submitted that shares purchased and shown in investment portfolio when sold would result in capital gains.

7. In the rejoinder Ld. CIT DR submitted that the decisions referred to and relied upon by Ld. Counsel are factually distinguishable with present facts. She submitted that the decision of *Hon'ble Supreme Court* in case of *Anil Jain vs CIT (supra)*, are on a different facts. Further going through decision of *Hon'ble Delhi High Court* in the case of *CIT vs. Rohit Anand*, Ld. CIT DR submitted that assessee herein treated shares as investment in his books of accounts, and the intention was manifested by the treatment given to such investment as the investment was not rotated frequently and total number of transactions were very few. She further submitted that it was also a situation where the shares purchased were not sold and rather held for quite number of days. On going through decision of *Hon'ble Delhi High Court* in the case of *CIT vs. Jubilate Securities (supra)*, Ld. CIT-DR submitted that in the facts of this case assessee had two separate portfolios, one which was investments in shares and the other, which was treated as stock-in-trade. Ld. CIT-DR submitted that there are no such bifurcations in the case of assessee before us, as is evident from page 34 and 35 of paper book wherein certain scrips held as investment has also been included for the purposes of trading. She submitted that there is overlap of 3 scrips being DLF Ltd, Reliance Power Ltd, Reliance Energy Ltd, which are common in list of investments declared by assessee and also forms part of stock-in-trade. She submitted that it is not true when assessee before authorities below stated that shares shown as investment in balance sheet is as per Schedule VI of Companies Act 1956, and not as stock- in- trade.

8. We have perused the submissions advanced by both the sides in the light of records placed before us.

Whether a person dealing with shares has made investment or has treated them as stock-in-trade, has been the subject-matter of considerable debate. It is a matter of intention of assessee, which has to be gathered from the conduct and surrounding circumstances. Various parameter/criteria have been elucidated and explained, however a pragmatic and common sense approach needs to be adopted, to determine keeping in mind commercial considerations.

It is observed that assessee before us is stated to be engaged in the business of buying, selling and dealing in securities of any kind, shares, debentures, debentures stock, properties, bonds, units, obligations and other securities.

8.1. We have gone through balance sheet placed at page 23 along with Schedule, placed at Page 26 of paper book. On perusal of the same, it is observed that investment to the extent of Rs.304,000,000 has been reflected in balance sheet, and, schedule 4, being details of investment, shows fully paid up 1,250,000 shares of Prakash Industries Ltd. valued at Rs. 237,500,000/-and 3,500,000 optionally convertible equity warrants of Prakash Industries valued at Rs.35,00,000/-. It is observed that, in the list of investment reproduced hereinabove Prakash Industries shares has not been sold *vis-a-vis* remaining 9 scrips, which was sold and purchased in magnitudes in small intervals. It has been submitted by assessee that this was the only investment that was reflected as on 31/03/08. The transaction statement of the remaining 9 scrips placed at page

46-50 of paper book, show closing balance to be ‘nil’, as on 31/03/08. The statement also reveals that assessee in respect of these 9 scrips undertook intra-day transaction.

8.2. It is observed that these 9 scrips have not been held by assessee even for substantial period of time which has been alleged to be made for investment purposes.

Hon’ble Supreme Court in CIT v. Associated Industrial Development Co. (P.) Ltd. [1971] 82 ITR 586, observed that:

“Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment.”

8.3. We have also perused details at page 34 and 35 of paper book, with reference to point 13 and 14 therein. Ld.CIT DR placed reliance upon 3 scrips which are common to alleged list of investment, as well as shares held as stock- in- trade. Assessee has placed at page 45, details of investments and at pages 46-50 Transaction Statements as on 31/03/08. For the sake of convenience page 45 of the paper book is reproduced hereinbelow:

INVESTMENT MADE			INVESTMENT REALIZED			1
DATE	QUANTITY	AMOUNT	DATE	QUANTITY	AMOUNT	PROFIT
Reference to D-Mat Account						
ORCHID CHEMICALS & PHARMACEUTICALS LTD						
4-Apr-07	540,230	140,648,490				
			4-May-07	65,823	17,419,826	12
			7-May-07	196,743	52,186,185	13.
			9-May-07	3,252	844,102	14
			10-May-07	64,236	16,817,209	15
			11-May-07	210,176	54,886,381	16
						17

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	540,230	140,648,490		540,230	142,153,703	1,505,213	
NITCO LIMITED							
8-May-07	5,300	1,072,805					5
			30-May-07	5,300	1,058,740		6
	5,300	1,072,805		5,300	1,058,740	(14,065)	
OMAXE LIMITED							
2-Aug-07	24,426	7,572,060					7 *
			20-Sep-07	24,426	8,815,121		8
	24,426	7,572,060		24,426	8,815,121	1,243,061	
DLF LIMITED							
6-NOV-07	1,955,000	1,807,929,653					9
			27-Dec-07	1,496,000	1,505,153,326		10
			28-Dec-07	459,000	468,770,468		11
21-Jan-08	268,909	242,009,042					31
22-Jan-08	128,931	109,834,101					32
23-Jan-08	133,900	123,062,501					33
24-Jan-08	488,302	436,935,289					23
1-Feb-08	1,020,220	818,627,696					34
			4-Feb-08	1,220,262	1,055,092,170		36
			5-Feb-08	820,000	721,179,262		37
8-Feb-08	145,784	117,016,027					24
11-Feb-08	2,426,248	1,939,766,320					35
			13-Feb-08	200,504	162,921,702		38
			14-Feb-08	360,000	309,833,736		39
			15-Feb-08	1,000,000	851,751,609		25
			19-Feb-08	119,081	102,160,952		26
			21-Feb-08	101,493	84,604,988		27
			25-Feb-08	21,416	17,876,375		28
			26-Feb-08	400,000	333,664,167		29
			27-Feb-08	369,538	309,729,384		30
	6,567,294	5,595,180,629		6,567,294	5,922,738,140	327,557,511	
EDELWEISS CAPITAL LIMITED							
4-Dec-07	5,202	4,291,650					3
			14-Dec-07	5,202	7,765,870		4
	5,202	4,291,650		5,202	7,765,870	3,474,220	
BGR ENERGY SYSTEMS LIMITED							
26-Dec-07	5,838	2,802,240					1
			3-Jan-08	5,838	5,218,963		2
	5,838	2,802,240		5,838	5,218,963	2,416,723	
RELIANCE POWER LIMITED							
1-Feb-08	142,896	64,303,200					18
			13-Feb-08	142,896	49,857,585		19
	142,896	64,303,200		142,896	49,857,585	(14,445,615)	

8.4. From the above it is very clear that assessee has purchased and sold scrips multiple times, on various dates alleged to have been held as investment within small durations. The magnitude of purchases on each date has been very large in respect of all these shares. Thus in our considered opinion frequency and volume of purchase and sale of shares shows, intention of

assessee was to generate income through trade, rather than invest in them.

8.5. Further in *Smt.Prem Jain vs. ITO in ITA No. 2572/Del/2016* for Assessment Year 2011-12, this Tribunal with same combination, placing reliance upon decision of *Hon’ble Delhi High Court* in the case of *CIT vs D&M Components Ltd* reported in 364 *ITR 179* had observed as under:

“18. We find the Hon’ble Delhi High Court in the case of D & M Components Ltd. (supra) while deciding a somewhat identical issue has held that where there was short duration of holding of shares and lack of clarity in account books, sale and purchase of shares would lead to business income and not short term capital gains. The various other decisions relied by the ld. counsel for the assessee also supports his case that the profits in the instant case of purchase and sale of shares would amount to business income and not short term capital gain as held by the Assessing Officer. In this view of the matter, we set-aside the order of the ld. CIT(A) and direct the Assessing Officer to allow the claim of business income on account of profit on sale of such shares.”

8.6. Based upon the above factual observations, we do not agree with view of Ld. CIT (A) in considering income generated from sale of these shares as “capital gain” instead of “income from business”. We, therefore, set aside order of Ld. CIT (A) and uphold findings of Ld. AO.

8.7. Accordingly grounds raised by revenue in its appeal stands allowed.

9. In the result, appeal filed by revenue stands allowed.

10. ITA No. 5029/Del/2012

Ground No. 1

Only issue raised by assessee in the appeal is in respect of disallowance under section 14 A amounting to Rs.7,60,000/-.

10.1. Ld.Counsel submitted that assessee had exempt income of Rs.16,300/- for the year under consideration received on account of dividend. It is also submitted that these dividends have been received from investments in units of mutual funds. Ld.Counsel submitted that assessee did not incur any expenditure for earning said dividend because of which no disallowance was computed by assessee in its computation of income. He submitted that Assessing Officer computed disallowance by considering 0.5% of average value of investments, which is not justifiable on any count. He submitted that, considering the judicial precedents, disallowance under section 14 A, must be recomputed.

10.2. Ld. CIT DR was in agreement with the submissions of Ld.Counsel regarding a direction to Ld.AO to recompute disallowance under section 14 A having regard to decision of *Hon'ble Supreme Court* in the case of *Maxopp Investments Ltd. vs CIT* reported in (2018) 91 taxman.com 154.

11. We have perused the submissions advanced by both the sides in the light of records placed before us.

11.1. Admittedly, assessee has not computed any disallowance under section 14 A towards earning of exempt income. We therefore direct Ld.AO to recompute the disallowance under section 14 A (1) read with Rule 8D, on the basis of the decision

of Hon'ble Supreme Court in the case of *Maxopp investments Ltd vs CIT (supra)*.

11.2. Accordingly, this ground raised by assessee stands allowed for statistical purposes.

12. Ground No. 2 in assessee's appeal is in respect of initiation of penalty proceedings under section 271 (1) (c) of the Act. As this ground is premature at this stage, it does not require any adjudication.

13. In the result appeal filed by assessee stands allowed for statistical purposes.

14. In the result, appeal filed by revenue i.e. ITA 5178/Del/2012 stands allowed and appeal by assessee i.e. ITA 5029/Del/2012 stands allowed for statistical purposes.

Order pronounced in the Open Court on 23.08.2018.

Sd/-

(R.K.PANDA)
Accountant Member

Sd/-

(BEENA A PILLAI)
Judicial Member

Dated: 23rd August, 2018.

- Gmv

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By Order

Asst. Registrar
ITAT, Delhi Benches, New Delhi

ITA 5178/Del/2012 –DCIT vs. Divya Shakti Trading Services Ltd.
ITA 5029/Del/12 Divya Shakti Trading Services Ltd. (Now M/s Indiabulls Advisory Services Ltd.)
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S.No.	Details	Date
1.	Draft dictated on	31.07.18 & 02.08.18
2.	Final Draft placed before author	14.8.18
3.	Draft proposed & placed before the Second Member	
4.	Draft discussed/approved by Second Member	
5.	Approved Draft comes to the Sr. PS/PS	
6.	Kept for pronouncement	23.8.18
7.	Order uploaded on	
8.	File sent to Bench Clerk	
9.	Date on which the file goes to Head Clerk	
10.	Date on which file goes to A.R.	
11.	Date of Dispatch of order	