

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 621/MUM/2018  
Assessment Year: 2013-14**

Robust Marketing Services Pvt. Ltd., Flat No. 502, 5 <sup>th</sup> floor, Sterling Heritage, Plot No. 388, Sankara Mattam Road, Matunga (CR), Mumbai-400019. <b>PAN No. AABCR7635J</b> <b>Appellant</b>	Vs.	Assistant Commissioner of Income Tax, Range 8(1), Mumbai, Room No. 624, 6 <sup>th</sup> floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.  <b>Respondent</b>
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Assessee by	: Mr. H.P. Mahajani, AR
Revenue by	: Mr. D.G. Pansari, DR

Date of Hearing	: 17/07/2019
Date of pronouncement	: 29/07/2019

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax-14, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1<sup>st</sup> ground of appeal is general in nature. We turn to the 2<sup>nd</sup> & 3<sup>rd</sup> ground of appeal which deal with a common issue.

The 2<sup>nd</sup> ground of appeal

2. The Ld. CIT(A) erred in holding that Circular No. 6/2016 dated 29-02-2016 (issue of taxability of surplus on sale of shares & securities - Capital Gains or business income - Instructions in order to reduce litigation - reg) is not applicable to A.Y. 2013-14 as the same was not in force on first day of the assessment year concerned.

2.1 The Ld. CIT(A) failed to appreciate that circular no. 6/2016 dated 29-02-2016 is a benevolent circular issued with intention to reduce litigation on the subject & is binding on the departmental officers.

2.2 The Ld. CIT(A) ought to have held that circular no. 6/2016 dated 29-02-2016 was applicable to the facts of the present case & as held therein, it ought to have been held that the shares held by the appellant are held as stock-in-trade.

The 3<sup>rd</sup> ground of appeal

3. The Ld. CIT(A) erred in holding that the AO was justified in disallowing valuation loss of Rs.6,37,41,276/- arising on valuation of closing stock as on 31-03-2013 represented by equity shares of Deepak Fertiliser & Petrochemicals Corp. Ltd.

3.1 The Ld. CIT(A) ought to have held that the appellant was justified in valuing closing stock of shares on 31-03-2013 at lower of cost and market value and the resultant loss was allowable while computing business income of the appellant.

3.2 The Ld. CIT(A) erred in holding that the assessee has not done any business or trade or any other activity in shares and therefore it cannot be held that the assessee is dealing in shares.

3.3 The Ld. CIT(A) overlooked the fact that it is for the assessee (and not for the income tax officer) to decide as to which business the assessee wanted to carry on and therefore the AO erred in holding that assessee is not dealing in shares but holding the shares as investments.

3. Briefly stated, the facts are that the assessee filed its return of income for the assessment year (AY) 2013-14 on 30.09.2013 declaring total loss of Rs.10,09,11,625/-. Subsequently, it revised the return on 31.03.2015 declaring total loss at Rs.7,55,37,436/-. The nature of business of the assessee is market development of fertilizers, agro products and advisory services in investment activities. During the course of assessment proceedings, the Assessing Officer (AO) observed that the shares of M/s Deepak Fertilizers & Petrochemicals Corporation Ltd. (in short 'DFPCL') were shown as stock-in-trade. The market value of these shares as on 31.03.2013 was Rs.26,87,55,387/-. On the above shares, the assessee had booked "valuation loss" of Rs.6,37,41,276/- arising out of difference in the cost of acquisition being Rs.33,24,96,663/- and the market value being Rs.26,87,55,387/- as on 31.03.2013.

The AO observed that in the above case, the assessee had made investment in the shares of DFPCL first time in AY 2009-10. In light of the fact that an assessee's business was not exclusively trading in shares and investment of shares being done only in one script, the department in the assessment order passed for AY 2009-10 held the shares as investment and not stock-in-trade. The AO noted that the same was upheld by the CIT(A) and ITAT. Therefore, the AO made a disallowance

of Rs.6,37,41,276/- i.e. shares held are taken as investments made and loss claimed on account of treating the shares as stock.

4. In appeal, the Ld. CIT(A) examined the claim of the appellant that the Circular issued by CBDT on 29.02.2016 on “issue of taxability of surplus on sale of shares and securities” should be applied in the present case retrospectively. Referring to the judgment of the Hon’ble Madras High Court in the case of *CIT v. Prasad Production P. Ltd.* 179 ITR 147 (Mad), the Ld. CIT(A) noted that CBDT Circular in force on first day of assessment year is applicable. Also the Ld. CIT(A) has referred to the judgment of the Hon’ble Supreme Court in *J.K. Synthetics Ltd. v. CBDT* 83 ITR 335 (SC), wherein it is held that CBDT is not competent to give directions regarding the exercise of any judicial power by its subordinate authorities.

Further, the Ld. CIT(A) followed the order of his predecessor-in-office for AY 2009-10, AY 2011-12 and confirmed the disallowance of Rs.6,37,41,276/- made by the AO.

5. Before us, the Ld. counsel for the assessee relies on the CBDT Circular No. 6/2016 dated 29.02.2016 and Circular No. 725 dated 16.10.1995. Further reliance is placed by him on the decision in *Pr. CIT v. Ramniwas Ramjivan Kasat* (2017) 82 taxmann.com 458 (Guj), *DCIT v. Mahendra Kumar Bader* (2016) 48 ITR (Trib) 596 (Jaipur), *NEC HCL System Technologies Ltd. v. ACIT of ITAT Delhi* in ITA No. 5497/Del/2012 for AY 2008-09, *Commissioner of Central Excise v. M/s Mysore Electricals Industries Ltd.* by Supreme Court in Appeal (Civil) 4488 of 2005.

On the other hand, the Ld. DR submits that the issue is decided in favour of revenue by the order of the Tribunal in assessee's own case for AY 2009-10. Further, he supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. The CBDT Circular No. 6/2016 dated 29.02.2016 deals with issue of taxability of surplus on sale of shares and securities. Circular No. 725 dated 16.10.1995 deals with issue/approval of notifications u/s 10(23C)(iv) or section 35(1)(ii)(iii) after completion of assessment, rectification of mistake consequent thereto.

In *Ramniwas Ramjivan Kasat* (supra), the Hon'ble Gujarat High Court held that :

"7. Two things emerge from this circular. One is that the CBDT desires to obviate the difficulties of the assessee and simultaneously to reduce the litigation. In paragraph 3 of the circular, certain parameters have been laid down. Clause (b) thereof in particular provides that 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. In other words, the Revenue would not pursue this issue if the necessary ingredients are satisfied, only rider being the stand taken by the assessee in a particular year would be followed in the subsequent years also and the assessee would not be allowed to adopt a contrary stand such subsequent years."

In *Mysore Electrical Industries Ltd.* (supra), *NEC HCL System Technologies Ltd.* (supra), the import of CBDT Circular has been discussed.

In *Mahendra Kumar Bader* (supra), it is held that 'where assessee itself, irrespective of period of holding listed shares and securities, opts to treat them as stock-in-trade, income arising from transfer of such shares/securities shall be treated as its business income.'

The same issue arose before the ITAT 'D' Bench, Mumbai in assessee's own case for AY 2009-10 in ITA No. 2574/Mum/2013. The Tribunal *vide* order dated 24.11.2015 held :

"7. We have heard rival contentions on this issue. The fact remains that the assessee did not purchase shares of any other company during the year under consideration. The assessee has started purchasing shares of Deepak Fertilizers and Petrochemical Corporation Ltd only during the year under consideration. It has not purchased shares of that company either in the earlier year or in the succeeding year. It is also a fact that the assessee is engaged in the business of market development of fertilizers and agro products, in which the above said company is engaged. Hence, in our view, there is merit in the contention of the Ld DR that the assessee was motivated to purchase the shares of the above said company with the intention to hold the shares as a pride of possession. There is a possibility that the assessee might have been motivated by the business prospects of the above said company and hence, it has started accumulating the shares of the above said company. This is further fortified by the fact that the assessee did not sell any of the shares either during the year under consideration or in succeeding year, which is against the business principles of trading. If the assessee had intended to consider the shares as stock in trade, it would have indulged in repeated purchase and sale of shares. On the contrary, the assessee has proceeded to purchase shares continuously every month and also held it for a quiet a long time.

8. The assessee has relied upon the entries passed in the books of account and also the fact that the shares were purchased out of borrowed funds in order to support its contentions that it intended to purchase the shares as stock in trade. However, as held by Ld CIT(A), these two factors alone cannot be taken as determinative factors and accordingly the intention of the assessee should be gathered from the conduct of the party and surrounding circumstances. We also notice that the assessee had originally disallowed part of interest expenditure relating to the purchase of shares of M/s Deepak Fertilizers & Petrochemicals Ltd treating the same as investment, but retracted from the same only during the course of assessment proceedings. Hence, in our view, the conduct of the assessee and the factors surrounding the issue shows that the assessee had intended to purchase the shares of the above said company only to hold them as investments. Hence we are of the view that the tax authorities are justified in rejecting the claim of the assessee that it was held as stock in trade. Consequently, the tax authorities are justified in rejecting the claim of revaluation loss arising on account of fall in the price of shares.'

In view of the specific findings of the Tribunal in assessee's own case for AY 2009-10 and facts being similar to the impugned assessment year, CBDT Circular No. 6/2016 dated 29.02.2016, CBDT Circular No. 725 dated 16.10.1995 and the decision in *Ramniwas Ramjivan Kasat* (supra), *Mysore Electrical Industries Ltd.* (supra), *NEC HCL System Technologies Ltd.*, *Mahendra Kumar Bader* (supra) are distinguishable from the present case. It is well settled that general propositions do not decide concrete cases.

Facts being identical, we follow the order of the Co-ordinate Bench and dismiss the 2nd & 3rd ground of appeal.

7. The 4<sup>th</sup> ground of appeal

4. The Ld. CIT(A) erred in holding that the AO was justified in making a disallowance of Rs.18,11,573/- u/s 14A r.w. Rule 8D on account of expenses incurred for earning exempt income.

4.1 The Ld. CIT(A) failed to appreciate that as the shares were held by the appellant as stock-in-trade, disallowance u/s. 14A r.w. Rule 8D could not be made.

4.2 The Ld. CIT(A) overlooked the fact that income arising from the shares held as Stock-in-trade would be assessed as business income and therefore interest paid on funds borrowed for purchasing such shares is allowable while computing business income.

4.3 The Ld. CIT(A) failed to appreciate that disallowance of expenses u/s 14A r.w. Rule 8D is not applicable when shares are held as stock-in-trade.

8. During the course of assessment proceedings, in response to a query raised by the AO to furnish the details of exempt income and explain why the provisions of section 14A r.w. Rule 8D should not be invoked, the assessee filed a written submission stating that provisions in the above section do not apply with reference to shares held as stock-in-trade. However, the AO computed the disallowance u/s 14A at Rs.18,11,573/- which is confirmed by the Ld. CIT(A).

9. Before us, the Ld. counsel of the assessee relies on the order of the Tribunal in *M/s Nice Bombay Transport (P.) Ltd. v. ACIT* in ITA No. 1331/Del/2012 for AY 2008-09 ; and *PNB v. Additional CIT* (2019) 198 TTJ (Del) 325.

On the other hand, the Ld. DR submits that the issue is decided in favour of the assessee by the order of the Tribunal in assessee's own case for AY 2011-12.

10. We have heard the rival submissions and perused the relevant materials on record. The order of the Tribunal in *M/s Nice Bombay Transport (P.) Ltd.* (supra) and *Punjab National Bank* (supra) relied on by the Ld. counsel are distinguishable because of the judgment of the Hon'ble Supreme Court in the case of *Maxopp Investment Ltd. v. CIT* (2018) 402 ITR 640 (SC).

The same issue arose before the ITAT 'D' Bench, Mumbai in assessee's own case for AY 2011-12 in ITA No. 1238/Mum/2016. The Tribunal *vide* order dated 12.09.2018 held :

"5. We have carefully considered the rival contentions and perused relevant material on record. At the outset, we are of the considered opinion that for the purpose of computing disallowance u/s 14A, now it is immaterial whether the investments were held as investor or as stock-in-trade in the wake of recent decision of Hon'ble Apex Court rendered in *Maxopp Investment Ltd. Vs. CIT* [91 Taxmann.com 154] wherein the Hon'ble Court has upheld the above proposition. Therefore, the reliance on the aforesaid CBDT circular, in our opinion, could not help the assessee in any manner.

6. Proceeding further, upon perusal of financial statements as placed before us, we find that at year-end, the assessee's Share Capital was mere Rs.1 Lacs as against aggregate investments of Rs.34.76 Crores made by the assessee in Shares & Mutual Funds. The loans funds stood at Rs.56.25 crores whereas Accumulated Profit & Loss account was a negative figure of Rs.3.67 Crores. The above facts lead us to conclude that all investment were funded out of

the loan funds and therefore, disallowance u/s 14A was rightly applied to the case of the assessee. We have no hesitation in confirming the stand of lower authorities, in this regard.”

Facts being identical, we follow the above order of the Co-ordinate Bench, and dismiss the 4<sup>th</sup> ground of appeal.

11. In the result, the appeal is dismissed.

**Order pronounced in the open Court on 29/07/2019.**

Sd/-  
(RAVISH SOOD)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 29/07/2019

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**