

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H': NEW DELHI**

**BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI SUDHIR KUMAR, JUDICIAL MEMBER**

**ITA No.938/DEL/2024
(Assessment Year: 2004-05)**

ACIT, CIRCLE 17 (1)
Delhi.

vs.

Vireet Investments Pvt. Ltd.,
21D, Friends Colony West,
New Delhi – 110 065.

(PAN : AAACV2033M)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Manish Jain, CA
REVENUE BY : Ms. Sapna Bhatia, CIT DR

Date of Hearing : 04.09.2024
Date of Order : 06.11.2024

ORDER

PER S.RIFAUR RAHMAN,AM:

1. The appeal has been filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals), Delhi/National Faceless Appeal Centre (NFAC) ["Ld. CIT(A)", for short] dated 28.12.2023 for the Assessment Year 2004-05.
2. Brief facts of the case are, assessee filed its return of income for Assessment Year 2004-05 on 31.10.2004 declaring income of Rs.34,80,69,911/-. The same was processed under section 143 (1) of the

Income-tax Act, 1961 (for short 'the Act') on 28.12.2004. The case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued and served on the assessee. In response, ld. AR for the assessee attended from time to time and submitted relevant information as called for.

3. The assessee was incorporated on 03.10.1983 with the main objects, as per Memorandum of Association, to acquire and hold shares, stocks, debentures, debenture stocks, bonds, obligations and securities issued or guaranteed by any company constituted or carried on business in the Republic of India. After considering the submissions of the assessee, the Assessing Officer proceeded to make the following additions in the assessment completed u/s 143 (3) of the Act :-

S.No.	Addition	Amount	Pg. No. in CIT (Appeal) order
1	Capital Gain Income treated as Business Income (Long term capital gain and Short term capital gain)	Rs.36,79,65,338/-	67
	Long term Capital Gain on sale of HCL Group Shares held in capacity of promoter treated as business income	Rs.33,17,66,907/-	
	Long term Capital Gain others treated as business income	Rs. 2,24,90,871/-	
	Short term Capital Gain treated as business income	Rs. 16,14,264/-	
2.	Disallowance of Capital loss on transfer of shares of PDK Shenaj Hotels Pvt. Ltd	Rs. 40,60,000/-	73
3.	Disallowance of all Expenses debited to profit and loss account	Rs. 86,04,017/-	58
4.	Disallowance of Donation paid u/s 80G	Rs. 3,00,000/-	73

4. Aggrieved with the above order, assessee preferred an appeal before the Id. CIT (A) and Id. CIT (A) deleted the addition after considering the detailed submissions of the assessee.
5. Aggrieved with the above order, the revenue is in appeal before us raising following grounds of appeal, the same is reproduced below:
 1. *Whether, on the facts and circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.76,05,731/- out of Rs.86,04,017/- on account of expenses claimed by assessee against the Capital gains by considering the fact that some expenses were incurred with the acquisition and transfer of capital asset.*
 2. *Whether, on the facts and circumstances of the case and in law the Ld. CIT(A) has erred in allowing the taxation on income of Rs.36,79,65,338/- offered to tax by the assessee company as “capital gain” instead of “business income”.*
 3. *Whether, on the facts and circumstances of the case and in law the Id. CIT(A) has erred in allowing loss of Rs.40,60,000/- on sale of shares of PDK Shenaj Hotels Pvt. Ltd.*
6. We shall deal with the issues raised by the Revenue grounds-wise.
7. The relevant facts relating to ground no.1 are, the Assessing Officer disallowed administration expenses claimed by the assessee as not genuine and excessive. The relevant expenditure claimed by the assessee are as under:-

<i>Description</i>	<i>Amount</i>
<i>Salaries and other benefits</i>	<i>7,56,809</i>
<i>Entertainment</i>	<i>2,18,125.58</i>
<i>Professional charges (including management fees paid to M/s. Kotak Securities of Rs.36,67,416.97)</i>	<i>39,21,998.97</i>
<i>Vehicle running & maintenance</i>	<i>1,82,480.70</i>
<i>Donations</i>	<i>3,00,000</i>
<i>Loss on sale of assets</i>	<i>1,34,838.34</i>
<i>Security expenses</i>	<i>2,06,556</i>
<i>Travelling expenses</i>	<i>5,64,199</i>
<i>Membership fees</i>	<i>1,55,352</i>
<i>Hire charges</i>	<i>3,00,000</i>
<i>Telephone expenses</i>	<i>1,35,404.43</i>
<i>Others like printing, stationery, filing fees etc.</i>	<i>2,67,045.23</i>
<i>Financial charges</i>	<i>29,088.88</i>
<i>Auditors remuneration</i>	<i>35,648</i>
<i>Dep as per Income Tax Act</i>	<i>21,40,736</i>
<i>Sub Total</i>	<i>93,48,282.13</i>
<i>Filing fees disallowed</i>	<i>(58,000)</i>
<i>Disallowance u/s 14A</i>	<i>(2,51,427)</i>
<i>Loss on sale of assets</i>	<i>(1,34,838)</i>
<i>Donation</i>	<i>(3,00,000)</i>
<i>Sub Total</i>	<i>7,44,265</i>
<i>Total Expenses claimed</i>	<i>86,04,017.13</i>

The AO disallowed the above expenses for the reason that the above expenditures are not allowed to be claimed under the head Capital Gains u/s 48 of the Act.

8. Aggrieved with the above order, assessee preferred an appeal before the Id. CIT (A) and Id. CIT (A) after considering the detailed submissions of the assessee partly allowed the ground raised by the assessee by observing as under :-

“I have carefully considered the appellant submissions, judicial pronouncement quoted by the Appellant and Assessment Order. It is a fact on the record that the Ld. Assessing Officer has contended that various expenses like Salary, Administrative, Depreciation etc. shall not be permissible under the head Capital gain as per the provision of Section 48 of the Income Tax Act, 1961 and only following expenses are eligible to be deducted from the Income Tax Act, 1961 under the head capital gains:

- 1. Which are incurred wholly and exclusively in connection with the transfer of the Capital assets and*
- 2. The cost of acquisition of the asset and the cost of any improvement thereto.*

Further, the Ld. Assessing Officer has contended that in the present case, the expenses for which the assessee has claimed deduction from the income under the head capital gain did not fall in any of the above two categories. However, this claim of the assessee has no effect on the computation of income because Ld. AO has treated business income instead of Capital Gain. In this regard, the appellant has contended that out of the total expense claimed of Rs.86,04,017.13/- a sum of Rs.36,67,416/- had been paid to M/s Kotak Securities for managing the PMS and the balance expense of Rs.49,36,601.13/- majorly includes salary to administrative staff, auditor's remuneration, bank charges, vehicle running and maintenance, Travelling etc. The Appellant Company has further contended that these expenses are primarily incurred for day to day expenses and to comply with the various provisions of law. These expenses are to be incurred by every company whether it is in the business or not and these expenses are claimed by the appellant not only in this year but in the prior years and are accepted by the department.

Further, in the Assessment Order at page no.9, the Ld. AO has mentioned that with regard to claim of depreciation, the assessee has filed revised claim of depreciation as per Income Tax Act i.e. Rs.11,42,450/- instead of 21,40,736/-. Hence, the Ld. Assessing Officer has made the addition of Rs.9,98,286/- on account of disallowance of Depreciation in the total income of the assessee. Therefore, since the appellant company has admitted the said disallowance during the assessment proceeding, claiming again

during the appellate proceeding the same expense which was surrendered during the course of assessment proceeding that too without any specific and valid reason being adduced, is not allowed.

Further, the appellant has contended that there is nothing adverse in the assessment order that either the expenses are bogus, not genuine or excessive and from remarks of the Ld. AO in assessment order, it is very clear that these expenses are genuine and allowable expenses as these are allowed in the assessment order against business income.

Further, in support of its contention, the appellant company has relied upon below case:

The Hon'ble ITAT Pune in case of Deputy Commissioner of Income-tax vs Serum Institute of India Ltd. [2016] 72 taxmann.com 361 (Pune - Trib.), held as below:*

"Para 30. The ground No.8 raised by the assessee in its appeal is against the findings of Commissioner of Income-tax (Appeals) in not allowing PMS fees Rs.75,08,253/- either as cost of acquisition/improvement or as cost of transfer for computing capital gain. The ld. AR of the assessee submitted that similar disallowance was made by the Revenue in assessment year 2007-08. In first appeal the Commissioner of Income-tax (Appeals) upheld the findings of Assessing Office. The assessee carried the matter in appeal before the Tribunal in ITA NO.102/PN/2012 for assessment year 2007-08 decided on 10.04.2014. The Tribunal after considering the facts of the case and the decision of Co-ordinate Bench of the Tribunal in the case of KRA Holding & Trading (P.) Ltd. v. Dy. CIT [IT Appeal No. 703 (PN) of 2012, dated 19-9-2013] held that PMS fees paid by the assessee is an allowable deduction from the capital gains.

Para 32. Facts in the present assessment year being similar, the ground No. 8 raised by the assessee in its appeal is allowed accordingly."

The Hon'ble ITAT Mumbai in case of Nadir A. Modi vs JCIT, Tax 11(3), Mumbai [2017] 88 taxmann.com 868 (Mumbai - Trlb.), wherein held as below:

Para 7. However it is also argued that there are some contrary decision of the Tribunal such as Devendra Matial Kothari v. Dy. CIT [2011]13 taxmann.com 1511321To 173 (Mum.) and Pradeep Kumar Harlalka v. Asstt. CIT [2011] 14 taxmann.com 42147 SOT 204 (URO) and Homi K. Bhabha v. ITO [2011] 48 SOT 102114 taxmann.com 165 (Mum.). It is also argued that where two views are possible then the view in favour of the assessee is liable to be considered in accordance with law. However, on the other hand the learned departmental representative has placed reliance on the order passed by the CIT(A) in question. On appraisal of the above mentioned law it is not in dispute that the Tribunal has taken the two views to dealt the management fees paid for portfolio management scheme. It is also not in dispute that when two views are possible then one view which is favourable to the assessee is liable to be considered. Here it is necessary to rendered the finding of the case titled as Serum International Ltd.'s case (supra) and, the relevant para is hereby reproduced below:-

"6. On this aspect also, it was a common point between the parties that the said issue is covered in favour of the assessee by way of decision of the Tribunal in ITA No. 17/PN/2012 and others in the case of Serum Institute of India Ltd. dated 10.04.2014 (supra), wherein the relevant discussion is a under:-

"11.2 Grounds of appeal No.2 by the assessee reads as under:

"On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in refusing to treat 'PMS' fees paid of Rs.34,63,969/- as part of either of cost of acquisition/improvement or as 'Cost of transfer' for working income from Capital Gain."

11.2 In appeal the Ld. CIT(A) upheld the action of the AO by holding that the expenditure on account of 'PMS' fees is neither cost of acquisition of the shares in question nor cost of improvement there of nor incurred wholly and exclusively in connection with the transfer of assets and therefore the Assessing Officer is justified in rejecting the

claim of deduction of the fees of Rs.34,63,969/- while computing the capital gain.

12.1 Respectfully following the decision of the Tribunal in the case of KRA Holding and Trading Pvt. Ltd. (supra) we hold that the PMS fees paid by the assessee is an allowable deduction from the capital gains. Ground of appeal no.2 by the assessee is accordingly allowed.

Para 8 It is not in dispute that in connection with the present matter of controversy there are two views which have been taken by the Hon'ble Income Tax Appellate Tribunal. One is in favour of the assessee and the other is against the assessee. In view of the above mentioned case i.e. Serum International Ltd. (supra) the view which is in favour of the assessee is liable to be taken. The finding of the said case is based upon the finding of Hon'ble Supreme Court of India in case [CIT v. Vegetable Products Ltd. [1973] 88 ITR 192.(SC)]. In view of the said circumstances we set aside the finding of the CIT(A) on this issue and Assessing Officer is directed to allow the appropriate relief of the assessee in terms of the above said decisions in accordance with law. Accordingly, these issues are decided in favour of the assessee against the revenue.

In addition to above judgement, The Hon'ble ITAT Pune in case of KRA Holding & Trading (P.) Ltd. vs Deputy Commissioner of Income-tax, Range 11(1), Pune [2011] 11 taxman.com 250 (Pune), held as under :

"Para 41. The second issue relates to the allowability of the fee paid to the M/s, ENAM, the Portfolio manager. This issue is commonly raised in all three appeals of KRA Holding & Trading (P.) Ltd. i. e. ITA 500/PN/08 for AY 2004-05, 1320/P/2008 for AY 2005-06 and ITA 434/P/2009 for A Y 2006-07 and the same is adjudicated in favour of the assessee as discussed in the context of the adjudication of the recalled matter in the context of ITA 500.PN/08 for AY 2004-05. Considering the commonality of the facts, parties and the issue, we are of the opinion that the said issue stands covered by the said decision of the Tribunal and has to be decided in favour of the assessee. Accordingly, relevant grounds of the relevant appeals are allowed. "

The above judgement of Hon'ble ITAT Mumbai and ITAT Pune relied upon by the appellant, was carefully gone through and considered and it was found that ratio of the decisions that Expense paid by assessee was to be allowed as deduction while computing capital gains derived on sale of shares/securities and when two views are possible then one view which is favourable to the assessee is liable to be considered and said finding is based upon the finding of Hon'ble Supreme Court of India in case [CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 (Se)].

Therefore, after careful consideration of the above narrated facts, circumstances of the case, the submissions of the Appellant and respectfully following the ratio of various Judgement of Hon'ble ITAT Pune and ITAT, Mumbai the ground of the appellant company is partly allowed and expenses of Rs.76,05,731/- (86,04,017 - 9,98,286) is allowed and the expense of Rs.9,98,286/- is disallowed accordingly.”

9. Aggrieved against the above order, Revenue is in appeal before us.
10. At the time of hearing, ld. DR reiterated the findings of the Assessing Officer that various expenses like PMS, salary, administration, depreciation, etc. shall not be permissible under the head 'capital gain' as per the provisions of section 48 of the Act and only expenses which are eligible to be deducted under the head 'capital gain' are, which are incurred in connection with the transfer of capital assets, acquisition of cost and cost of improvement. Therefore, he relied on the findings of the Assessing Officer in this regard.
11. On the other hand, ld. AR for the assessee relied on detailed submissions made before the ld. CIT (A) and reasoned findings given by the ld. CIT(A).

12. Considered the rival submissions and material placed on record. We observed that the assessee has established its business and carries on the business of dealing in shares, stocks, debentures, etc. in the line of securities transactions. The assessee claimed expenditure of general administration and PMS towards maintenance of securities against the income declared under the head Capital Gains. The AO rejected the same with the observation that there is no provisions in the section 48 to claim such expenses. The Id CIT(A) by relying on the decision of ITAT Pune and Mumbai, allowed the claim of the assessee. After careful consideration of the facts on record, we observed that the assessee is dealing in the business of shares and securities, the monitoring of such securities, the assessee has to incur certain expenses on PMS. Therefore, this expenditure is directly relating to the securities transaction. The nature of transaction demands such expenditures, therefore, on the similar facts on record, the ITAT Pune has considered the same and allowed such expenses. After careful consideration of findings of Id CIT(A), he has decided the issue in favour of the assessee and he has also considered the conflicting decisions and came to conclusion based on the Hon'ble Supreme Court decision of Vegetable Products. The decision of Ld CIT(A) is reasonable findings on the issue of allowability of PMS expenses. Therefore, we are not inclined to disturb the same.

13. Coming to the issue of general administrative expenses, we observed that the assessee has incurred these expenditure on salaries, administration, depreciation etc,. We observed that the assessee has claimed these expenses in its Profit and Loss Account. In the income tax computation, it has computed the income under the head income from business as well as capital gain. The income tax provisions allows the assesseees to compute the income under different heads of income and the assessee is allowed to claim the expenses based on the relevant heads of income. In the given case, the assessee can claim the general expenses of running the business only under the head business income. Even there is no income declared under the head business income, the assessee is allowed to claim these expenses as business expenditure, if there is no business income, the assessee is allowed to carry forward the same in case the assessee does not have income under other heads of income other than loss under the head Capital Gains. Since the assessee has declared profit under the head Capital Gains, the assessee is allowed to adjust the same under section 71 of the Act. Hence, the above said expenses cannot be claimed under the head Capital Gains under section 48 of the Act. Therefore we are inclined to decide the issue of claim of administration expenses in favour of the revenue. Ultimately, the assessee may get the benefit of claim of these

expenses as business expenditure under the head business income. As such there is no impact for the same in this AY.

14. With regard to ground no.2, Assessing Officer treated the transaction entry with the assessee as business transaction and observed as under :-

- “1. As per the main object of Memorandum of Association, the assessee company was authorized to deal in sale / purchase of shares and other securities etc.*
- 2. The intention and the dominant motive of the assessee was to earn profit.*
- 3. Almost all the funds were deployed in shares/securities.*
- 4. The scale of activity is substantial.*
- 5. The sale-purchase of securities was conducted in a systematic, organized and continuous manner.*
- 6. Only the profit or loss arisen on sale purchase of shares of private limited companies can be treated as capital gain/loss.*

Above facts make it amply clear that the assessee is denying business income from sale-purchase of shares and securities. These facts are also covered by the guidelines dt. 18-5-2006 issued by the CBDT for looking into circumstances to determine whether a person is a trader in stocks or investor in stocks. Thus, the facts of the case are fully covered u/s 28 of the Income Tax Act, 1961. In view of the above discussion the profit from sale of shares and mutual funds is treated as business income instead of capital gain as declared by the assessee. The undersigned is also satisfied that the assessee by claiming business income of Rs.367,965,338/- [368782299 (assessed business income) - 816961 (declared business income)] as income from capital gains, has furnished inaccurate particulars of its income and for that penalty proceedings us 271(1)(c) of the Income Tax Act, 1961 have been initiated separately.”

15. Aggrieved with the above order, assessee preferred an appeal before the

Id. CIT (A) and before Id. CIT (A), assessee has submitted as under :-

“1. Principles laid down in the circular No. 04/2007 dt. 15th June, 2007 are satisfied to treat the income as Short term Capital gain. Following are the principles laid down in the circular -

2. The first principle laid down in the circular is as under :-

"Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the future of transaction,"

The appellant has held the shares as Investment and has not converted it into stock in trade at any time since purchase.

3. The second principle laid down in the circular is as under:-

"the substantial nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions,-"

4. The transactions of purchase and sale of shares and Mutual funds as stated above are not in substantial in nature and therefore evident it that the assessee is not involved in the trading of the shares and Mutual funds.

- Total No of purchase transactions of Mutual funds for the year are 137 i.e. less than 3 transaction per week*
- Total No of sale transactions of Mutual funds for the year are 177 i.e. less than 4 transaction per week*

- *Total No of purchase transactions of Shares for the year are 605 i.e. less than 2 transaction per day*
- *Total No of sale transactions of Shares for the year are 373 i.e. approx. 1 transaction per day*

5. *The third principle laid down in the circular is as under:-*

"ordinarily the purchase and sale of shares with the motive of earning profit would result in the transaction being in the nature of trade, 'but where the object of the investment in shares of a company is to derive income by way of dividend etc. than the profits accruing by change in such Investment (by sale of shares) will yield capital gain and not revenue receipt"

6. *As mentioned above the assessee motive of investment was to held the investment and earn dividend which is evident by the rate at which dividend is earned on the capital gain i.e. 25.20% and supported by various case laws as mentioned in detailed submission. Further the same is treated as investment in the books and accordingly the Short term capital gain should be treated as Short term capital gain only.*

7. *Further, the department has treated the sale of shares as capital gain only in assessments done for earlier year and for later years."*

16. After considering the above submissions, Id. CIT (A) allowed ground raised by the assessee with the following observations :-

"6.5 Further, with regard to finding of the Ld. Assessing Officer that only the profit/loss arisen on sale, purchase of shares of private limited companies can be treated as capital gain/loss, the appellant company has contended that with regard to Long Term Capital. Gain of Rs.3542.58 lakh, company has earned total long term capital gain of Rs.3542.58/- Lakhs which include Rs.3317.67/- Lakhs gains on sale of HCL Group of shares which are listed on recognized stock exchange and the appellant right from the day of purchase had held these shares as investments and not as stock in trade, in its balance sheets, in the support of this, appellant company has submitted Audited Balance Sheet along

with schedule. Further, the appellant company has contended that the issue whether the gain from sale of listed shares /securities is to be treated as capital gains or business income has now come to rest after the Hon'ble CBDT came up with the departmental circular No.6, dt. 29th February 2016, relevant provision are as under:

<i>3 (b)</i>	<i>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. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years</i>
--------------	---

Therefore, in view of the circular no.6, dt 29th February 2016 as discussed above, which squarely applies to facts of the Appellant Company, as explained in the above paragraphs hence the Gain shall be treated as Long term capital gain instead of business income.

Further, with regard to Short Term Capital Gain treated as business income, in this regard, the appellant company has relied upon CBDT Circular no.04/2007 dated 15-06-2007, the specific criteria/principle laid down in the said circular are as under:

The first principle laid down in the CBDT Circular is as under:

"Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the future of transactions.

The second principle laid down in the CBDT circular is as under:-

"the substantial nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions,-"

The third principle laid down in the CBDT circular is as under:-

"ordinarily the purchase and sale of shares with the motive of earning profit would result in the transaction being in the nature of trade, 'but where the object of the investment in shares of a company is to derive income by way of dividend etc. than the profits accruing by change in such Investment (by sale of shares) will yield capital gain and not revenue receipt"

Further, Para 10 of the above CBDT circular mentioned that "CBDT also wishes to emphasise that it is possible for a taxpayer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated .as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads, i.e., capital gains as well as business income."

In support of the above CBDT Circular no. 04/2007 dated 15.06.2007, the appellant company contended that the appellant has held the shares as investments as stock in trade. The appellant company has further contended that appellant earned dividend amounting to Rs.9,36,470.16 while capital Gain is Rs.37,15,20,048.10, this shows that dividend is 25.20% of Capital Gain which clearly confirms that the intention at the time of investments was to reap dividend & not to trade in the shares.

Further, the appellant company has relied upon various judgements, details of which are as below:

The Hon'ble Jurisdictional ITAT, New Delhi, in case of DCIT vs. Hero Investment Pvt. Ltd. ITAT DELHI dated 13/10/2023 [2023] 156 taxmann.com 15 (Delhi - Trib.)(13-10-2023) "where AO treated income from sale of shares and securities as business income, while assessee claimed it as exempt long term capital gains, however, Commissioner (Appeal) reclassified it as 'capital

gains' citing CBDT Circular No. 6 dated 29-02-2016. Considering shares as investments balance sheet and their long term holding period, "

In the case of CIT v. Gopal Purohit: Petition(s) for Special Leave to Appeal(Civil) ... /2010(CC 16802/2010) (From the judgement and order dated 06/01/2010 in ITA No.1121/2009 of the High Court of Bombay) "the assessee was engaged in the activity of sale and purchase of shares, Non-delivery based transactions were treated by the assessee as business activity and delivery based transactions were treated as an investment activity and, accordingly, the assessee claimed himself to be both a dealer as well as investor in shares....."

The SLP filed by the Revenue has also been dismissed by the Supreme Court, In the case of CIT v. Gopal Purohit: Petition(s) for Special Leave to Appeal(Civil) ... /2010(CC 16802/2010) (From the judgement and order dated 06/01/2010 in ITA No.1121/2009 of the High Court of Bombay).

The Hon'ble Jurisdictional ITAT,- New Delhi in case of Utkal investments Ltd vs DCIT vide ITA no. 25581DEL/2011, ITA no. 2894/DEL/2011 and ITA no.2662/DEL/2012 where in the jurisdictional Hon'ble Delhi ITAT not only accepted the gains as capital gains but also ruled that any investment shown as investment in books of accounts at the beginning of the year shall not be treated as business income even held for less than 30 days."

Further, apart from above judgements as relied by the Appellant Company, the Hon'ble Jurisdictional Delhi High Court in case of Commissioner of Income-tax-II vs M.G. Share & Stock (P.) Ltd. [2014] 52 taxmann.com 365 (Delhi), held as below:*

"Where assessee was having two clearly separate portfolios for shares i.e. investment and stock in trade, short-term gains on sale of shares related to investment could not be treated as business income,"

The above judgement of the Hon'ble' Delhi High' Court/Bombay High Court and the Hon'ble ITAT Delhi was carefully gone through and considered and it was found that ratio of the decisions

is that where the appellant company has held the share/mutual funds as Investment in the books of accounts and not as stock in trade which is important material facts and the same has never been disputed by the Ld. AO, then the Ld. AO cannot treat the same as business income of the appellant company.

Further, it is important to mention here that an application under rule 46A has been filed by the appellant furnishing the additional evidence to establish the fact that Directors of the appellant company were also the promotor of the HCL group whose shares were held as investment by the appellant company. Thereafter, as per the Para (f) at page no.16 of written submission dt. 08-12-2023 the appellant has contended that above mentioned additional evidence has become redundant now therefore the appellant withdraws the application under rule 46A and has requested to decide the issue as per the present position of law considering the CBDT circular binding on IT authority. In this connection, it is important to mention here that the above mentioned additional evidence adduced by the appellant company are no more crucial or, relevant now to decide the ground/legal issue in appeal after the issuance of Circular no. 6/2016 dated 29th February, 2016 and CBDT circular no.04/2007' dated 15.06.2007 where specific and unequivocal criteria has been laid down by CBDT to decide the issue in hand. Therefore, above contention of the appellant was carefully considered in the backdrop of the CBDT circular (supra), which is found to be tenable and acceptable.

Now, as per discussion in aforesaid paragraphs, with regard to Long Term Capital Gains, the appellant company has established the undisputed fact with evidence that share/mutual funds in question were held as investment and not held as stock in trade (The facts which has never been disputed by the Ld. AO) and Circular no. 6/2016 dated 29th February, 2016 with subject "Issue of taxability of surplus on sale of shares and securities - Capital Gains or Business Income - Instructions in order to reduce litigation" is squarely applicable on the fact and circumstances of the appellant company as per Para no. 3(b) "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".

Further with regard to Short Term Capital Gains, the appellant company has established that Circular 'no. 04/2007' dated 15.06.2007 is squarely applicable on the fact and circumstances of appellant company as the appellant company has fulfilled all the three conditions of the said circular and the appellant company has maintained separate portfolio for share/mutual funds held as Investment as mentioned in Para 10 of the Circular no. 04/2007 dated 15-06-2007.

Further, the other contention raised by the Ld. Assessing Officer in the Assessment Order dt. 22-12-2006 namely, even a single transaction may constitute trading income, adventure in the nature of trade is the 'intention' with which investment is made and company whose main object was to invest in the shares did not make any investment in the name of trade and on the other hand the non-trade investment has increased by Rs.41,77,92,286/- etc., has no more relevance now after the issuance of Circular no. 6/2016 dated 29th February, 2016 and Circular no. 04/2007 dated 15.06.2007.

Therefore, after the careful consideration of the above narrated facts, circumstances of the case, the submissions of the Appellant and respectfully following the ratio of various Judgements of Jurisdictional Delhi High Courts and Jurisdictional ITAT, New Delhi and following the Circular no.6/2016 dated 29th February, 2016 with regard to Long Term Capital Gain and Circular no.04/2007 dated 15th June, 2007 with regard to Short Term Capital Gain, the ground of appeal is allowed as the Ld. Assessing Officer has erroneously treated the Gain from share/mutual funds as Business Income amounting to Rs.36,79,65,338/- hence the Ld. Assessing Officer is being directed to treat the Gain from share/mutual funds as Capital Gain instead of Business Income.”

17. At the time of hearing, ld. DR for the Revenue vehemently argued and brought to our notice findings of the Assessing Officer and relied on the same.

18. On the other hand, ld. AR for the assessee relied on the detailed submissions made before ld. CIT (A) and relied on the order of ld. CIT(A).
19. Considered the rival submissions and material placed on record. We observed that the assessee has classified the investments made in the various shares including HCL shares for the purpose of investment only. The various circulars issued by the CBDT allows the assessee to choose the method of accounting relating to dealing in securities transactions either on the line of treating the same under the head business income or Capital Gain depending upon the treatment of various shares for the purpose of pure investment or not. Whatever the method adopted by the assessee, the same has to be followed consistently. The ld CIT(A) has considered the various circulars particularly Circular no 6/2016 dated 29.02.2016, which has settled the issues under consideration. Therefore we do not see any reason to disturb the findings of ld CIT(A). Therefore, we are inclined to dismiss the ground no.2 raised by the revenue.
20. With regard to ground no.3, the relevant facts are, during assessment proceedings, Assessing Officer observed that the assessee company has claimed a sum of Rs.40,60,000/- as loss on purchase and sale of shares of PDK Shenaz Hotels (P) Ltd. During the course of assessment proceedings, the assessee company vide questionnaire dt. 7.12.2006 was

asked to furnish the name and address of the person to whom shares of PDK Shehnaz Hotels (P) Ltd were sold. The assessee was also asked vide the same questionnaire to furnish the copies of bills of purchase and sale of the shares of the said company and also to justify the purchase and sale price of the shares of PDK Shehnaz Hotels (P) Ltd. The assessee was required to furnish the above detail on 15.12.2006. On 15.12.2006 an application of adjournment was received and the case was adjourned for 18-12-2006. On that date the assessee did not furnish the above requisite information. The case was further adjourned to 22-12-2006. On 22.12.2006, the assessee furnished the copy of letter of allotment dt 31.03.2003 of PDK Shenaz Hotels (P) Ltd. As per that letter of allotment the assessee company has been allotted 70000 shares of Rs.10/- each at a premium of Rs.90/- per share i.e. the assessee was allotted 70000 shares of PDK Shenaz Hotels (P) Ltd. @ Rs.100/- per share. The AO observed that the assessee company did not furnish any documentary evidence justifying the purchase price of Rs.100/- per share of a private limited company, As regards the sale bill in respect of the above shares, the assessee has furnished the copies of two agreements, both dated 11.12.2003 whereby the said 70000 shares of PDK Shenaz Hotels (P) Ltd were sold to one Mr Aditya Kanoi r/o 13/2 Bally Ganj Park Road, Kolkatta for a total consideration of Rs.2,940,000/- i.e. Rs.42/- per share.

The assessee company did not furnish any documentary evidence justifying the above sale price. The assessee also did not give any explanation as to why the shares, which were purchased just four and a half months earlier @ Rs.100/- per share were sold @ Rs.42/-per share. However, on perusal of the letter of allotment of shares of PDK Shenaz Hotels (P) Ltd and the copies of agreement of sale it has been noticed that Mr. Aditya Kanoi to whom shares were sold was none other than the director of PDK Shenaz Hotels (P) Ltd. The revelation of the fact that the shares of PDK Shenaz Hotels (P) Ltd were eventually purchased by the director of PDK Shenaz Hotels (P) Ltd has made it clear that the assessee company has been used as a via media /device for pouring in extra money to reap undue advantage in PDK Shenaz Hotels (P) Ltd and vice versa. Firstly, the shares were issued to the assessee company at a hefty premium of Rs.90/-per share which constitute the capital receipt in the hands of PDK Shenaz Hotels (P) Ltd. Thereafter, those shares were purchased by the director of PDK Shenaz Hotels (P) Ld. at a much lower price, which resulted in loss in the hands of the assessee company and introduction of unaccounted money (difference between the purchase and sale price) in the books of PK Shenaz Hotels (P) Ltd without suffering any tax. The assessee company too has used this device to reduce its tax liability. Under these circumstances and in the absence of any

justification from assessee company, the AO treated this loss of Rs.40,60,000/- as bogus.

21. Aggrieved with the above order, assessee preferred an appeal before the Id. CIT (A) and before Id. CIT (A), assessee has submitted as under :-

“2.1 As the assessee was interested in diversifying its operations into hospitality business, it purchased 70,000 shares at 100/- (Rs. 10 face value + Rs.90 premium) of M/s PDK Shenaz Hotels Pvt Ltd.

2.2 Assessee company was of the opinion to acquire 51 % shares of PDK Shenaj Hotels Pvt.Ltd. However, Board of PDK Shenaj Hotels Pvt Ltd back tracked from the commitment of allotment of 51 % shares.

2.3 Therefore, the assessee Company had to sell these shares in loss to come out from this peculiar circumstance as the assessee company was not interest in mere investment without control.”

22. After considering the above submissions, Id. CIT (A) deleted the addition by observing as under :-

“I have carefully considered the appellant submissions, judicial pronouncement quoted by the Appellant and Assessment order. It is a fact on the record that the Ld. Assessing Officer has treated loss on sale of share of PDK Shenaz Hotels (P) Ltd. as bogus loss in the absence of any justification from the assessee company. In this regard the appellant has taken the ground that the learned assessing officer has erred in disallowing loss of Rs.40,60,000/- on sale of shares of PDK Shenaj Hotels Pvt. Ltd.

Further, during the course of Assessment Proceeding vide questionnaire dt.15.12.2006, assessee was asked by the AO to furnish the copies of bills of purchase and sale of share of the said company and also to justify the purchase and sale price of PDK Shenaz Hotels (P) Ltd. In compliance to above queries, the

assessee furnished the copy of letter of allotment dt. 31-03-2003 of PDK Shenaz Hotels (P) Ltd. containing therein purchase price of unit share at RS.10/- each at premium of Rs.90/- per share i.e. the assessee was allotted/purchased the unit share at the price of Rs.100/- per share. In the same way assessee has furnished the copies of two sale agreement both dated 11-12-2003 containing the-Fein the sale price of the unit share of PDK Shenaz Hotels (P) Ltd., which was sold at price of Rs.42/- per share.

Furthermore, in the compliance of Assessing Officer's query with regard to name and address of person to whom the share of PDK Shenaz Hotels (P) Ltd. were sold, the assessee furnished the name of one Mr. Aditya Kanoi with address as R/o 13/2, Bally Ganj, Park Road, Kolkata. Further, the AO also asked the justification to for purchase and sale price of share of PDK Shenaz Hotels (P) Ltd. In this connection it is relevant to mention here that the purchase of share of PDK Shenaz Hotels (P) Ltd. was made in the previous year i.e. AY 2003-04, i.e. the year in which detailed Scrutiny Assessment was undertaken by the AO in AY 2003-04 and no adverse view was taken in the relevant year with regard to acquisition of the share of PDK Shenaz Hotels (P) Ltd at Rs.100/- per share. Therefore, on the basis of facts as emanating from the assessment order, it is established that the assessee has been able to discharge its primary onus cast upon it by furnishing the purchase and sale related documentary evidences containing therein the unit price at which the purchase and sale of share of PDK Shenaz Hotels (P) Ltd. was effected. Further, the assessee has also been able to discharge its primary onus by furnishing the name and full address of the person to whom the share at the price of Rs.42/- per share was sold. Therefore, in view of the fact that assessee has discharged its primary onus hence burden of proof shifted to the AO to establish it otherwise. The AO has not disputed the above facts submitted by the appellant and accepted the same by not being able to bring any contrary evidence/material on record.

Furthermore, the AO has no where disputed/doubted the credentials of the company M/s PDK Shenaz Hotels (P) Ltd whose shares have been transacted, no where the AO has been able to establish the following:

1. *That Net worth of company PDK Shenaz Hotels (P) Ltd in term of financial performance, market share, net worth etc is not commensurate to fetch the purchase price of Rs.100/- per unit share;*
2. *That the company is not in existence at given address therefore lack identity as well genuineness;*
3. *That the fundamentals of the company are not strong enough;*
4. *That no direct and circumstantial evidence of cash being routed back to Company PDK Shenaz Hotels (P) Ltd to make it enrich by so much amount as alleged by the Assessing Officer;*
5. *That the AO has ignored the fact that the transaction of purchase and sales was undertaken through banking channel and no cash was found deposited in the bank account.*
6. *That no verification u/s 133(6) of the Income Tax Act, 1961 was conducted of the concerned parties despite/the fact that details of identity and address was available. Further, no confession u/s 131 of the IT Act, 1961 was obtained or no adverse finding/outcome of any search or survey action is on record to bring any evidence with regard to the accommodation being made by the transacting parties, are brought on record;*
7. *That the AO has failed to demonstrate that despite poor fundamentals/low worth of the company the assesses has bought the share at the alleged high price;*
8. *That the AO has failed to establish that net worth of the company and business activity of the company is negligible, hence the share price commanded by company is unusually high and therefore the transaction comes into the category of sham transaction which is artificially structured one.*

Therefore, clearly the doubt raised by the Assessing Officer on purchase price of share of PDK Shenaz Hotels (P) Ltd is not being established by showing the company's performance in term of financial. net worth, its business being not real. Therefore, in absence of any adverse material finding of fact with regard to the above mentioned criteria or, without bringing any adverse

material on record, the price at which the shares were purchased and sold can not be doubted or held as unjustified.

Therefore, AO has not been able to bring any material evidence on record to establish that the said company's performance/worth is not commensurate to undertake the transaction of purchase and sale price at the price level on which it has been transacted in the instant case, hence the AO's holding of said transaction being bogus is not based upon any cogent evidence being brought on record and the same is based on conjecture and surmises, which is erroneous and not tenable in law.

Further, in this case, the Ld. Assessing Officer has contended that the assessee company did not furnish any documentary evidence justifying the purchase price of Rs.100/- per share of private limited company. In this regard, the appellant has contended that the company was interested in diversifying its operations into hospitality sector in future. The shares of PDK were purchased in the preceding previous year keeping in mind the said objective of the appellant to enter into hospitality business and it is important to note that the appellant as of now is a. successful hotelier having three hotels in its group. Further, the appellant company has contended that Ld. AO has verified the genuineness of purchase as the entire purchase consideration is paid through banking channel and same has been verified by Ld. AO and accepted during the assessment proceedings for AY 2003-04. Therefore, the appellant company has justified the purchase price of Rs.100/- per share.

Further, the Ld. Assessing Officer has contended that the assessee company did not furnish any documentary evidence justifying the sale price and assessee company also did not give any explanation as to why the share, which were purchased just four and half months earlier @ Rs 100/- per share were sold @ Rs.42/- per share. In this regard, the appellant company has contended that appellant since, wanted to pursue the objective to enter into hotel business, it purchased the share of PDK so as to achieve such objective. The shares of PDK were primarily purchased to have a controlling stake in the said company. The appellant at the time of making investment in the shares of PDK negotiated with the Board of the said Company for allotment of 51 % stake in the said company. Later on, the Board of PDK back tracked from its commitment and refused to allot balance shares to the appellant to

have total holding equivalent to 51 % in PDK. Since, the appellant was not interested in simply making an investment and taking a backseat as a mute spectator, it decided to take an exit from the said company. Further the appellant company has contended that the Assessee communicated to the PDK to buy back its Shares 'where PDK refused to do so which caused the assessee to sell these shares at Rs. 42 per share i.e. less than the purchase price and consequently a loss was incurred by the assessee on the its sale.

Further, the Ld. Assessing Officer has contended that the assessee company has used this device to reduce its liability and treated this loss of Rs.40,60,000/- as bogus in the absence of any justification from the assessee company. In this regard the appellant company has mentioned that Ld. AO has verified the genuineness of purchase as the entire purchase consideration is paid through Banking channel and same has been verified by Ld. AO and accepted during the assessment proceedings for AY 2003-04 and however, the year under appeal, the Ld. AO did not accept the purchase price of Rs.100 without any basis and further did not brought any material evidence to disallow the said loss.

In this case, after discussion of aforesaid narrated facts and circumstances of the case, the appellant company has been able to duly discharge its onus by furnishing all documents of sale and purchase, name and address of buyer, name and address of company whose share were transacted and justification that the appellant was interested in diversifying its operations into hospitality sector in future. and the shares of PDK were purchased in the preceding previous year keeping in mind the said objective of the appellant to enter into hospitality business and it is important to note that the appellant as of now is a successful hotelier having three hotels in its group. Further, the entire purchase consideration is paid through Banking channel and same has been verified by Ld. AO and accepted during the assessment proceedings for A Y 2003-04 and has also justified the reasons for distress sale.

Further, in the support of above finding, reliance is being placed on following judicial pronouncement:

The Hon'ble Supreme court in case of Principal Commissioner of Income-tax Renu Aggarwal [2023] 153 taxmann.com 579 (SC), held that "where AO disallowed exemption claimed by assessee under section 10(38) and made additions, alleging involvement in penny stock which were being misused for providing bogus accommodation of LTCG, however, there was lack of adverse comments from stock exchange and officials of company involved in these transactions and no material relating to assessee was found in investigation wing report, additions made by AO had rightly been deleted, "

*The Hon'ble HIGH COURT OF DELHI Principal Commissioner of Income Tax-12 vs Smt. Krishna Devi * [2021] 126 taxmann.com 80 (Delhi) held that "where assessee claimed exemption under section 10(38) on account of LTCG arose on sale of shares of a company, since there was no dispute that these shares were purchased by assessee online, payments were made through banking channel and shares were dematerialized and, further, sales were routed from demat account and, sale consideration was received through banking channels, impugned addition made by Assessing Officer under section 68 treating such LTCG as bogus was unjustified. "*

The Hon'ble Gujarat High Court in case of Principal Commissioner of Income-tax vs Genuine Finance P. Ltd. [2023] 152 taxmann.com 330 (Gujarat) held that "where assessee was continuously dealing in share trading of various company and entire transaction of purchase and sale of scrips was through Stock Exchanges, through authorized brokers and payments made to brokers were reflected in bank account, loss incurred in share transactions could not be disallowed."*

The broad and general ratio of above judgements of the Hon'ble Supreme Court and the High Court was carefully gone through and considered, and it can be safely deduced that where the appellant has established the fact with 'detail evidence related to transaction is furnished during the course of assessment proceeding and the Ld. AO has failed to bring any adverse material evidence to treat the transaction as bogus, the disallowance/addition can not be made.

Therefore, after careful consideration of the above narrated facts, circumstances of the case, the submissions of the Appellant and respectfully following the ratio of various Judgement of Hon'ble Supreme Court and High Courts, I find force in the contention of the appellant hence the ground of appeal is allowed and the addition of Rs.40,60,000/- on account of short term capital loss is accordingly deleted.”

23. Aggrieved, Revenue is in appeal before us and at the time of hearing, ld. DR for the Revenue relied on the findings of the Assessing Officer and expressed objections on the findings of the ld. CIT (A) and submitted that ld. CIT (A) merely relied on the submissions of the assessee without verifying proper documents and evidences.
24. On the other hand, ld. AR for the assessee submitted that assessee has sold these shares on distress. In this regard, ld. AR submitted various communications with PDK Shenaz Hotels Pvt. Ltd. from 07.04.2023 to 07.07.2023. He submitted that the issue under consideration is transacted with the intention to expand the business of the assessee in hotel and hospitality industry, however due to non allotment of shares to the assessee to the extent of 51% as per the earlier discussion with the management of PDK so that assessee could control the business of PDK Shenaz Hotels Pvt. Ltd.. Due to disagreement with the parties, the assessee had to exit from this project. Further, he submitted that even otherwise the Bench feels that the transaction requires more investigation, the assessee has no objection that the Hon'ble Bench may decide the

issue against the assessee and favourable to the revenue, as the assessee would like to settle the issue.

25. Considered the rival submissions and material placed on record. We observed that the assessee has entered into agreement with the management of PDK to investment in their company. He presumed or expected to invest to the extent of 51% of total shareholding. He invested in their shares @ Rs. 100 per share including share premium. However, as per the submissions made before us, it was claimed that the management of PDK has refused to allow him to invest to the extent of 51%. Due to the above disagreement, the assessee has to disinvest the same at much lower price of Rs. 40/- per share to one of the existing Director of the same PDK group. In support of the above submissions, the assessee has filed certain communications from 07.04.2023 to 07.07.2023. After considering the above communications, we are not able to understand, why the dispute has to be settled with in such short period of time and also to reduce the sale price from Rs. 100 to Rs. 40 per share. There is not substance to show why he has agreed to invest Rs. 100/- per share in first place and also to reduce the share price to sell the same shares to one of the directors of PDK and sell the shares at such huge loss. The whole transaction entered by the assessee does not display any prudence and the explanations offered to exit the project does not impress

us. Therefore, we are inclined to decide the issue under consideration in favour of the revenue. Accordingly, the ground no.3 raised by the revenue is allowed.

26. In the result, the appeal filed by the revenue is partly allowed.

Order pronounced in the open court on this 6th day of November, 2024.

**Sd/-
(SUDHIR KUMAR)
JUDICIAL MEMBER**

**sd/-
(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

**Dated: 06.11.2024
TS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals).
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**
