IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA Nos.5442/M/2008, 4475/M/2012, 3053/M/2011, 5303/M/011
Assessment Years: 2005-06, 2006-07, 2007-08, 2008-09

ACIT, Circle – 4(2), Room No.642, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	Shri Suresh K. Jajoo, 7/10, 1st Floor, Botawala Bldg., Near Horniman Circle, Fort, Mumbai – 400 001 **PAN: AAFPJ 0070J**
(Appellant)		(Respondent)

ITA Nos.5441/M/2008, 2469/M/2009, 4476/M/2012, 5302/M/2011
Assessment Years: 2005-06, 2006-07, 2008-09

ACIT, Circle – 4(2), Room No.642, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	Smt. Vimala S. Jajoo, 7/10, 1st Floor, Botawala Bldg., Near Horniman Circle, Fort, Mumbai – 400 001 **PAN: ADAPJ8747J**
(Appellant)		(Respondent)

ITA No.4366/M/2012
Assessment Year: 2005-06

Shri Suresh K. Jajoo, 7/10, 1st Floor, Botawala Bldg., Near Horniman Circle, Fort, Mumbai – 400 001 **PAN: AAFPJ 0070J**	Vs.	Commissioner of Income Tax (Appeals)-8, Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Dr. Santosh Mankoskar, A.R.
Revenue by : Shri Madhur Agarwal, D.R.

Date of Hearing : 26.11.2015
Date of Pronouncement : 22.01.2016

O R D E R

Per Bench:

The present is a bunch of appeals by two different but related assessees and cross appeals by the Revenue. Since the facts and issues involved in all these appeals are identical in nature, hence the same were heard together and are being disposed of by this common order.

2. First we take up the Revenue's appeal in relation to assessee Suresh K. Jajoo in ITA No.5442/M/2008 in relation to A.Y. 2005-06.

ITA No.5442/M/2008 for A.Y. 2005-06

3. The sole issue taken by the Revenue in this appeal is as to whether the income earned by the assessee from sale and purchase of shares is to be assessed as capital gains or business income. The assessee in the return of income claimed income from the share transactions as capital gains and set off of the same against the brought forward capital losses of earlier years. The Assessing Officer (hereinafter referred to as the AO), however, observed from the details of share transactions that the assessee had done numerous sale and purchase transactions in shares and further that interest bearing funds also were used for the said purpose. He observed that the motive of the assessee for purchase of shares was not investment but trading in shares. The period of holding in case of many scrips was very short and there were voluminous transactions. He therefore held that the assessee could not be treated as investor in shares but a trader. He accordingly assessed the short term capital gains and long term capital gains claimed by the assessee as business income of the assessee.

4. In appeal, the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] considering the treatment given by the assessee to the shares in the earlier assessment years observed that the assessee had

consistently been accepted as investor since A.Y. 1996-97 and that it was during the year under consideration that the assessee for the first time was treated as a trader. He further observed that the rate of tax for short term capital gains was 30% and it was only during the impugned year i.e. A.Y. 2005-06 the rate of tax on short term capital gains was redecued to 10%. He observed that the events of past years like carrying forward of loss to be set off were directly material and relevant to the facts of the present year and that the AO should not have disturbed the treatment given to the assessee as an investor only because the rate of tax in respect of short term capital gains had changed. He therefore held that since the assessee had consistently been treated by various AOs as an investor in past years and therefore to treat the assessee as trader for the year under consideration and denying the set off of carry forward loss was not correct and justifiable. He accordingly allowed the appeal of the assessee and directed the AO to treat the assessee as an investor. The relevant findings of the Ld. CIT(A) for the sake of convenience are reproduced as under:

> "13.6 Whether the past year is relevant or not has to be examined by looking into the events of past year. Vide letter dated 22.5.2008, the appellant has furnished copies of assessment order from A.Y.96-97 wherein in all the years income from investment activities in shares are assessed as capital gains as per Annexure 1 to the said letter Page 1 to 62.
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> **<u>In case of Suresh K. Jaioo</u>**
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> 1. **<u>A.Y.1996-97</u> -** Scrutiny assessment Order u/s. 143(3) passed by JCIT, Spl. Range-49 dated 24.12.98, accepts the assessee's position of being an investor in shares.
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> 2. **<u>A.Y.1997-98</u> -** Scrutiny assessment Order u/s. 143(3) passed by JCIT, Spl. Range-49 dated 31.1.2000, accepts the assessee's position of being an investor in shares.
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> 3. **<u>A.Y.1998-99</u> -** Scrutiny assessment Order u/s.143(3) passed by JCIT, Spl. Range-49 dated 29.3.2001, accepts the assessee's position of being an investor in shares.
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> 4. **<u>A.Y.99-2000</u> -** Scrutiny assessment Order u/s.143(3) passed by JCIT, Spl. Range-49 dated 27.7.2001, accepts the assessee's position of being an investor in shares.

5. **A.Y.2000-01** - The assessment order u/s. 143(3) was passed on 27.2.2004 and the appellant was held to be an investor in shares. Subsequently, the case was reopened and order u/s. 143(3) r.w.s. 147 was passed on 26.12.2007, ie. **the same date on which the order for A.Y.2005-06** have been passed by the ACIT-4(2), Mumbai. In the reassessment order also, the appellant has been held to be an investor in shares and not a trader in share. The order u/s. 143(3) r.w,s, 147 **dated 26.12.2007,** however contains finding of the A.O. that the long term capital gain declared by the appellant is a short term capital gain. But so far as the issue of assessee being trader or investor is concerned, the A.O. has not given any finding that the appellant is a trader but has accepted the position of the assessee that he is an investor.

6. **A.Y.2001-02 -** In the scrutiny assessment order u/s. 143(3) dated 27.2.2004 the A.O. holds the appellant as investor.

7. **A.Y.2002-03 -** Scrutiny assessment Order u/s. 143(3) r.w,s. 147 dated 16.9.2005 was passed by A.O., the assessee is treated to be an investor. The CIT-4, Mumbai sets aside the order of A.O. vide order u/s.263 dated 28.12.2005 and ITAT quashes the order of CIT by order dated 31.10.2006.

8. **A.Y.2003-04 -**Scrutiny assessment Order u/s.143(3) dated 16.9.2005 was passed by A.O. accepting the assessee's position that he is an investor. The CIT-4, Mumbai vide order u/s.263 dated 28.12.2005 held that assessee's transaction on sale of share were around 230 for total consideration of Rs.56.18 crores which may be treated as business transaction and not capital transaction.
The order u/s.143(3) r.w.s 263 dated 27.12.2006 by ACIT-4(2) held the assessee to be a trader and not an investor. The order u/s.263 of CIT4, Mumbai was quashed by ITAT vide order dated 28.9.2007.

9. **A.Y.2004-05 -** Order dated 19.12.2006 by ACIT-4(2), Mumbai accepting the position of A.O. that it is an investor and not a trader.

1.3.7 **In case of Vimla Jajoo**

1. **A.Y.1997-98, 1998-99, 99-2000 —**No findings of the A.O. The case was not examined as the return of income was merely processed u/s.143(1)(a).

2. **A.Y.2000-01 -**The assessment order u/s.143(3) was passed on 27.2.2004 and the appellant was held to be an investor in shares. Subsequently, the case was reopened and order u/s.143(3) r.w.s. 147 was passed on 26.12.2007, ie. **the same date on which the order for A.Y.2005-06** have been passed by the ACIT-4(2), Mumbai. In the reassessment order also, the appellant has been held to be an investor in shares and not a trader in share. The order u/s.143(3) r.w.s. 147 **dated 26.12.2007,** however contains finding of the A.O. that the long term capital gain declared by the appellant is a short term capital gain. But so far as the issue of assessee being trader or investor is concerned, the A.O. has not given

any finding that the appellant is a trader but has accepted the position of the assessee that he is an investor.

2. **A.Y.2001-02** — In the Order u/s.143(3) dated 27.2.2004, the assessee was held to be an investor in shares and long term capital gain declared as per revised return without (indexation) and short term capital loss on sale of shares as declared was assessed on such as per Para 26 of the order.

3. **A.Y.2002-03** —Processed u/s.143(1)(a)

4. **A.Y.2003-04** — In the order u/s.143(3) dated 26.8.2005, the short term capital gain of Rs.42,98,683/- was assessed as declared by the assessee and hence not treated as income from business or profession.
The order of the A.O. was set aside by CIT-4, Mumbai u/s.263 and the order of CIT was quashed by ITAT as mentioned above. Vide corrigendum dated 27.11.2006 it was clarified that in the ITAT order dated 31.10.2006, the assessment year should have been 2003-04 instead of A.Y.2002-03.

5. **A.Y.2004-05** — Order u/s.143(3) was passed vide order dated 19.12.2006 without going into the issue whether the assessee is an investor or trader and the A.O. accepted the short term capital gain and long term capital gain as disclosed by the assessee. Despite CIT-4, Mumbai's order u/s.263 dated 28.12.2005 for A.Y.2003-04, the A.O. vide order dated 19.12.2006 accepted the position of assessee being investor rather than trader.

1.3.8 It is obvious from the details as mentioned at Para 1.3.6 in case of Shri Suresh K. Jajoo and Para 1.3.7 in case of Smt. Vimla Jajoo that upto A.Y.2004-05, Shri Suresh K. Jajoo and Smt. Vimla Jajoo have been held to be an investor in share by all the Assessing Officers whenever they made scrutiny assessment order u/s.143(3). The CIT-4, Mumbai for A.Y.2002-03 and A.Y.2003-04 in case of Shri Suresh K. Jajoo and for A.Y.2003-04 in case of Vimla Jajoo did pass order u/s.263 setting aside the order of A.O. but as discussed above, those orders of A.O. were found to be not erroneous and the order of CIT-4 u/s.263 were quashed by the ITAT, Mumbai.

1.3.9 (1) As may be seen from Para 1.3.4. that Shri Suresh K. Jajoo has a **short term capital loss of Rs.130.69 Crores for A.Y.2001-02 and Smt. Vimla Jajoo has Rs.33.46 Crores short term capital loss for A.Y.2001-02,**

(ii) Upto A.Y.2004-05 the rate of tax for short term capital gain was 30% and during F.Y.2005-06, the rate of tax on short term capital gain was 30% upto 30.9.2004 and from 1.10.2004 the rate of tax on short term capital gain has been reduced to 10%.

(iii) In both the cases, Shri Suresh K. Jajoo and Vimla Jajoo, the treatment of A.O. of their short term capital gain as Income from

business has got two effects –

(i) the assessee is taxed at a higher rate and

(ii) the short term capital loss of A.Y.2001-02 which is being carried forward now cannot be set off against short term capital gain of A.Y.2005-06.

(iv) The loss which has taken place in A.Y.2001-02 was on account of similar nature of 534 transactions which were held to be short term capital gain has not been thus allowed to be set off against short term capital gain amounting to Rs.6.87 Crores as disclosed by the appellant for A.Y.2005-06 in course of exactly similar nature of transaction numbering 439. The amounts and number of transactions in case of Smt.Vimla Jajoo for A.Y.2001-02 is Rs.33.45 Crores for 58 transaction, and Rs.3.01 Crores for A.Y.2005-06 for 224 transaction.

(v) For A.Y.2000-01, scrutiny assessment order u/s.143(3) r.w.s. 147 was passed on 26.12.2007 by ACIT-4(2), Mumbai, the same Assessing Officer who has passed the order for A.Y.2005-06 in case of Shri Suresh K. Jajoo and Vimla Jajoo exactly on the same day, ie. 26.12.2006. Despite large number of transactions leading to short term and long term capital gain of the assessee's, the A.O. has held both Shri Suresh K. Jajoo and Vimla Jajoo as investor and not a trader.

(vi) When the events of past years like carrying forward of loss to be set off are directly material to the material facts of the present year, findings of the past years should not and cannot be ignored, as has been discussed lucidly in **Sampath Iyengar's Law of Income-tax, 10th Edition, Page 161** which is quoted as under:

"As *a general rule, the principle at res judicata is not applicable to decisions* of *tax authorities i.e. the tax authorities are not bound by earlier decisions and are accordingly entitled to depart from such decisions. The limitations of this general rule have been succinctly explained in Shah & Co (HA) v. CIT (1956) 30 ITR 61 624-25 (Born). In terms of this decision, while it is true that a tax authority is entitled to go back upon an earlier finding, such entitlement is hedged with clear limitations. If a given case falls into the parameters of these limitations, the tax authority would not be entitled to unsettle the earlier finding. Thus, in the following circumstances, a tax authority would not be entitled to unsettle the earlier finding:*

(i) Where the earlier finding was not arbitrary or perverse.

(ii) Where the earlier finding was arrived at after making due inquiries.

(iii) Where no fresh facts were placed before the authority giving the later decision, Sardar Kehar Singh v. CIT (1992) 195 ITR 769 (Raj); CIT v. Murugappa Chettair (S) (1992) 197 ITR 575 (Ker); Godavarl Devi Sehgal v. ITO (1992) 198 ITR 108 (A T) (Del).

(iv) Where the authority giving the earlier decision had taken into consideration all material evidence, CIT v. Kusum Bader (1990) 185 ITR 70 (Raj).

(v) Where unsettling the earlier decision leads to injustice to the assessee.

> *Without expressly stating that the above decision has been followed, the ratio of the above decision has percolated into a number of later decisions (CIT v. Velimalai Rubber Co. Ltd. (1990) 181 ITR 299 (ker); CIT v. Hindustan Motors Ltd. (1991) 192 ITR 619 (Cal)."*
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> (vii) The appellant has consistently been treated by various Assessing Officers as an investor in past years, therefore to treat the appellant as trader for only one year, ie. for assessment year 2005-06 and deny set off of carry forward loss is neither judicious nor correct as it leads to injustice to the assessee by denying set off of short term capital loss of A.Y. 2001-02
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> 1.3.10 The A.O. is therefore directed to treat the amount of Rs.6,87,44,080/- as short term capital gain."

5. The Revenue has, thus, come in appeal before us against the above findings of the Ld. CIT(A).

6. We have heard the rival contentions of the Ld. Representatives of both the parties and have also gone through the records. The Ld. A.R. of the assessee has submitted that the assessee is an individual and has been offering the income from sale and purchase of shares as capital gains even prior to 01.10.04. He has drawn our attention to assessment order passed under section 143(3) of the Act for the A.Y. 2001-02 wherein the claim of the assessee of short term capital loss and long term capital gain had been accepted and even the capital loss which could not be adjusted against the 'business income' and 'income from other sources' was allowed to be carried forward to the subsequent year. The Ld. A.R. has further brought our attention to assessment order passed under section 143(3) of the Act for the A.Y. 2003-04 wherein the AO had accepted long term capital loss and short term capital gain claimed by the assessee. The Ld. A.R. has further submitted that during the year under consideration 'security transaction tax' was introduced by way of Chapter-VII of Finance (2) Act, 2004 w.e.f. 01.10.2004. By the same Finance Act, Section 10(38), Section 111A and 88E were inserted bringing in a special scheme for taxation of trading and investing in respect of securities w.e.f. 01.10.2004. As per the said scheme, all the transactions of securities on stock exchange done

on or after 01.10.2004 would entitle securities transaction tax. All long term capital gains arising on such securities were made exempt under section 10(38) and short term capital gains arising on sale of securities on which security transaction tax had been paid were entitled to a concessional rate of tax at the rate of 10% under section 111A. The traders were also compensated for the additional security transaction tax paid by way of rebate under section 88E. The Ld. A.R. has submitted that merely because the scheme of taxation was amended/changed during the mid of the year under consideration, the AO therefore ventured into the share transaction activity of the assessee and treated the assessee as trader, whereas, in the earlier assessment years, where such benefit of concessional rate of tax was not available to the assessee, the assessee's claim of investor in shares had continuously and consistently been accepted. The Ld. A.R. has further brought our attention to the assessment order passed under section 143(3) of the Act for A.Y. 2009-10 i.e. subsequent year to the assessment year under consideration, wherein, the claim of the assessee of short term capital loss had been accepted by the AO. The Ld. A.R. has further brought our attention to the assessment order passed under section 143(3) of the Act for the A.Y. 2010-11, wherein the claim of the assessee of short term capital loss long term capital loss had again been accepted. Similarly, in the scrutiny assessment proceedings under section 143(3) of the Act for A.Y. 2011-12, the claim of the assessee of capital gains has again been accepted by the department. For the A.Y. 2012-13 also, the AO had accepted the claim of short term capital loss and long term capital gain of the assessee treating the assessee as an investor. The Ld. A.R. has further submitted that the assessee from the beginning had been treating itself as an investor irrespective of the rebate/concession, if any, given subsequently to the investors in shares and securities. The Ld. A.R. has further submitted that prior to the year under consideration, the assessee was treated as an investor and even in the subsequent years the assessee has been treated as an investor. He has further submitted that by treating the assessee as a trader for the year

under consideration, only because certain tax benefits in respect of capital gains have been provided in view of the amended provisions, the assessee has been denied the benefit of carried forward capital losses of earlier years. The Ld. A.R. has further submitted that the department is supposed to maintain consistency in its stand. By treating an assessee as investor in a year and a trader in another year and then again treating him as an investor in subsequent year would not only create uncertainty in the mind of the assessee but also disentitle him from the eligible claims. In the year in which the assessee would be treated as a trader, the assessee would lose the benefit of set off of capital loss of the earlier assessment year. Then by treating the assessee as an investor in subsequent assessment year, the assessee would be denied the benefit of claim of set off of loss from sale and purchase of shares as the same being treated as business income/loss of the assessee in earlier assessment year. He has submitted that though principle of resdjudicata is not applicable to the income tax proceedings, however, the department is not supposed to change its stand every year as per its convenience and putting the assessee to loss and disadvantage in either of the situations as discussed above. The Ld. A.R. has therefore submitted that the assessee was essentially an investor and was required to be treated so by the Revenue, while computing the income from sale and purchase of shares for the year under consideration.

7. The Ld. D.R., on the other hand, has drawn our attention to the observations made by the AO with regard to volume and frequency of transactions. He, therefore, has contended that the profits earned by the assessee from sale and purchase of shares were correctly taxed by the AO as business income.

8. We have considered the rival submissions. There is no dispute relating to the fact that the assessee in earlier years has been treated by the department as an investor. The assessee, as discussed above, has been continuously allowed the set off of short term capital loss and long term capital loss in the

earlier assessment years. The assessee had been dealing in two types of transactions in securities. The assessee had shown investments and had claimed capital gains relating to the shares. It is also a fact on the file that by the amendment brought by Finance Act, 2004, by insertion of provisions of section 111A and section 10(38), the levy of tax has been reduced to 10% on short term capital gains and long term capital gains have been made exempt. Under the old provisions of the Act, profits or gains arising to an investor from the transfer of securities were charged depending on the period of holding of the said securities. Short term capital gains were taxed at applicable rates (normal rates) and long term capital gains were taxed at the rate of 20% after adjusting for inflation by indexing the cost of acquisition. For listed securities, the tax payer had an option to pay tax on long term capital gains at the rate of 10% but without indexation. In case of trader in securities, however, the capital gains were taxed as any other normal business income. Thus, tax liability on the income for sale and purchase of shares as regards to short term capital gains and business income was at par. The issue of treatment of income from share transaction as short term capital gains or business income has in fact arisen after the amendment brought with Finance Act, 2004 w.e.f. 01.10.2004. It is an admitted fact on the file that prior to the amendment when the tax of short term capital gains, as discussed above, was at par with that of business income, the department has been consistently accepting the treatment of income by the assessee as capital gains. Merely because the rate of tax has been reduced in respect of short term capital gains and long term capital gains have been exempt during the year by way of an amendment to the provisions as discussed above, that itself, cannot be a ground for the AO to depart from its consistent stand of treating the assessee as an investor and thereby to charge the income earned by the assessee from share transactions as business income. As discussed above, at the time of purchase of shares even during the year but prior to 01.10.2004, the assessee was not guided or influenced by lower tax rate in case of short term capital gains as the rate for business income and short

term capital gains was at par. The assessee, however, was treating himself as an investor and keeping the shares as investments in his account irrespective of the probable tax implication as there were no such tax implications as discussed above. The intention of the assessee, while purchasing the share, is the important and guiding factor as to whether the same was purchased with an intention of investment or for trading. The facts of the case as discussed above, clearly reveal that the assessee had treated the shares as investments in his account. As discussed above, if during the mid of the relevant Financial Year, certain tax benefits have been given in respect of capital gains, that cannot, in any way, lead to an assumption or presumption that the intention of the assessee at the time of purchase of shares was that of a trader and not of an investor. The treatment of the investment in the account books of the assessee was also a relevant guiding factor. The AO has also not pointed out as to in what manner the activity of the assessee for the year under consideration had been changed from investor to that of a trader especially when the department had consistently been treating him as an investor. It is also pertinent to mention here that as discussed above, in subsequent assessment years the department has again accepted the assessee as an investor. It is for the first time that in this year under consideration i.e. A.Y. 2005-06 the assessee had been treated as a trader because of certain tax benefits granted to an investor in securities by way of amendment in the relevant provisions of the Income Tax Act and subsequently for the A.Ys 2006-07 to 2008-09, the assessee was treated as trader. However, the Ld. CIT(A) following the principle of consistency has held the assessee for the impugned assessment years i.e. A.Y. 2005-06 to A.Y. 2008-09 as investor. Though the principle of resjudicata is not applicable in income tax proceedings but the principle of consistency requires that the view taken in one year should be followed in subsequent years unless the facts or the legal position justify departure there from; reliance can be placed in this respect on the authorities of the Hon'ble Bombay High Court

in 'CIT vs. Darius Pandole' [(2011 330 ITR 485 (Bom.)] and in 'CIT vs. Gopal Purohit [(2011) 336 ITR 287 (Bom.).

9. In view of our above discussion of the matter, we are of the view that the assessee is to be treated as an investor for the A.Y. 2005-06 to A.Y. 2008-09 also. We hold accordingly. The AO, therefore, is directed to treat the income from sale and purchase of shares as short term capital gains and long term capital gains according to the period of holding as per the provisions of law for these assessment years also.

10. In view of our above discussion, the appeal of the Revenue is hereby dismissed.

ITA No.4366/M/2012 for A.Y. 2005-06 (Assessee's appeal)

11. The assessee, in this appeal, has agitated the action of the lower authorities in making the disallowance under section 14A as per the provisions of rule 8D of the Income Tax Rules. The appeal of the assessee is time barred by 1402 days. The assessee has moved an application for condonation of delay wherein it has been stated that the Ld. CIT(A) vide impugned order dated 18.06.08 had disposed this ground of disallowance under section 14A by giving directions to the AO to recalculate the disallowance as per CBDT Notification No. 45/2008 with respect to Rule 8D of the Income Tax Rules, 1962. As this ground was set aside, the assessee did not file an appeal to ITAT against the CIT(A)'s order. The Dept. is in appeal against the said CIT(A)'s order and the case was fixed before the F-Bench on 9.7.12. The AO while passing the order giving effect to CIT(A)'s order dated 15.12.08 applied Rule 8D and computed a disallowance of Rs.13,46,829/- u/s. 14A of the Act in addition to Rs.107,181/- disallowed in the assessment order u/s. 143(3) of the Act. Subsequently, the Honorable Bombay High Court in the case of "Godrej & Boyce Mfg. Co. Ltd." (328 ITR 81) rendered a decision on 12.8.10 wherein it was held that provisions of Rule 8D shall apply with effect from Assessment Year 2008-09, the assessee filed a request for rectification before the AO to

rectify the order giving effect to CIT(A) passed on 15.12.08 in view of the decision of Jurisdictional High court as he believed that this order giving effect to CIT(A)'s order could be rectified u/s. 154 of the Act. The AO however rejected the rectification by passing an order dated 11.5.12. It was at this stage that the assessee realized that he ought to have filed an appeal against the order of CIT (A) dated 18.6.2008. The assessee has also filed his affidavit in this respect in support of the above contentions. The Ld. A.R. of the assessee has further submitted that the application of the assessee for rectification order was rejected on 11.05.12 and the assessee immediately on 26.06.12 i.e. within the period of one month preferred the appeal against the original order of the Ld. CIT(A) realizing its mistake that the proper course was to file the appeal against the order of the Ld. CIT(A) and not the rectification application before the AO.

12. We have considered the above submissions of the Ld. A.R. We find that on the date of filing of the present appeal by the assessee the appeal of the Revenue was pending before this Tribunal. The assessee under the mistaken belief instead of pursuing his remedy by way of appeal before this Tribunal filed a rectification application before the AO pleading that the order be rectified in the light of the decision of the Hon'ble Bombay High Court passed in "Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT (supra). It has been held time and again that where under a mistaken but bonafide belief the assessee/applicant pursues a remedy before the improper forum and after realizing mistake he immediately files appeal before the right forum, then under such circumstances the period consumed in pursuing the remedy before the improper forum is required to be condoned. Further, we find that the assessee has relied upon the decision of the Jurisdictional High Court on this issue which, though, has come subsequently to the date of the impugned order of the Ld. CIT(A), however, the fact is that the appeal of the Revenue was pending on the date of filing of this appeal by the assessee before the Tribunal

and it is thus in the interest of justice that the appeal of the assessee be also heard while disposing of the appeal of the Revenue. Considering the above submissions of the Ld. A.R., the delay in filing the present appeal is hereby condoned. Now we proceed to hear the appeal on merits.

13. Admittedly, the AO has made disallowance under section 14A for the year under consideration by way of applying rule 8D of the Income Tax Rules. It may be observed that in the case of Godrej & Boyce Manufacturing Co. Ltd. (supra) the Hon'ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable but can be applied only if the assessee's method is not satisfactory. It has been further held that Rule 8D is not retrospective and applies from A.Y. 2008-09. For the years for which Rule 8D is not applicable and in the event of that the AO is not satisfied with the explanation/working given by the assessee, disallowance under section 14A has to be made on a reasonable basis. Almost similar view has been expressed by Hon'ble Delhi High Court in the case of 'Maxopp Investment Ltd. & Others' vs. CIT (247 ITR 162).

14. It may be further observed that it is not a case where no exempt income was received by the assessee despite making investments for earning exempt income. It is also not the case of the Revenue that the exempt income earned by the assessee was very less or not in proportion to the investments made by the assessee for this purpose. Under such circumstances the different co-ordinate benches of this Tribunal have observed that in such cases certain percentage of exempt income can constitute a reasonable estimate for making disallowance for the years earlier to assessment year 2008-09. The Hon'ble Bombay High Court in the case of CIT vs. 'Godrej Agrovet Ltd.' (ITA No.934/2011) decided on 08.01.13 has upheld the order of the Tribunal directing the AO to restrict the disallowance to the extent of 2% of the total exempt income earned by the assessee. Hence, considering the overall facts and circumstances of the case we restrict the disallowance u/s 14A in the case

of the assessee @ 5% of the tax exempt income earned by the assessee during the year. This appeal of the assessee is thus treated as allowed.

ITA Nos.4475/M/2012 (for A.Y. 2006-07) & 3053/M/2011 (for A.Y. 2007-08) (Revenue's appeals)

15. The sole issue raised by the Revenue in these appeals is relating to the treatment of income earned by the assessee from share transactions whether to be treated as business income or capital gains. In view of our findings given above while deciding the Revenue's appeal for A.Y. 2005-06, we decide this issue in favour of the assessee and against the Revenue. These appeals of the Revenue are therefore hereby dismissed.

ITA No.5303/M/2011 for A.Y. 2008-09 (Revenue's Appeal)

16. The Revenue in this appeal has raised two issues. The first issue is relating to the treatment of income earned by the assessee from share transactions whether to be treated as business income or capital gains. In view of our findings given above while deciding the Revenue's appeal for A.Y. 2005-06, we decide this issue in favour of the assessee and against the Revenue.

17. The second issue raised by the Revenue is in relation to the action of the Ld. CIT(A) in deleting the disallowance of Rs.7,56,556/- made by the AO under section 14A of the Act.

18. We find that the Ld. CIT(A) in the impugned order has observed that the AO had made the disallowance as per rule 8D without taking into consideration the fact that the assessee itself in its computation of income had added back certain expenses debited to profit & loss account and thus had never claimed the expenses amounting to Rs.35,48,740/- and Rs.24,368/-. Similarly, the securities transaction tax amounting to Rs.71,52,532/- had also been added back. Thus the only expenditure in respect of which the deduction

had been claimed by the assessee was Rs.5,23,637/-. The disallowance of Rs.7,56,556/- under section 14A thus was not justified as no addition can be made in respect of expenditure which has not been claimed as deduction. The Ld. CIT(A) accordingly deleted the addition of Rs.7,56,556/-. We find from the impugned order that the assessee himself had disallowed certain expenditure and further that disallowance can not be made more than the expenditure claimed. Considering the facts of the case and the impugned order, we do not find any infirmity in the order of the Ld. CIT(A) on this issue also. This ground of the appeal of the Revenue is therefore dismissed.

19. In the result, this appeal of the Revenue is also dismissed.

20. Now coming to the appeals in relation to the assessee Smt. Vimala S. Jajoo.

ITA No.2469/M/2009 for A.Y. 2005-06 (Revenue's appeal)

21. This appeal has been preferred by the Revenue against the order of the Ld. CIT(A) passed under section 154 of the Act. The issue raised in this appeal by the Revenue is as to whether the loss resulting from forfeiture of deposit is to be treated on revenue account or as capital in nature. The deposit of Rs.7,50,000/- given to Calcutta Stock Exchange in the year 2001 was written off by the assessee but the said claim was disallowed by the AO stating that the conditions of section 36(2) were not fulfilled. The assessee carried out the matter by way of appeal before the Ld. CIT(A).

22. However, the Ld. CIT(A) while deciding the appeal of the assessee vide order dated 18.06.08 failed to decide this issue under consideration. The assessee moved a rectification application under section 154 of the Act before the Ld. CIT(A) in this respect. The Ld. CIT(A) in the rectification application considered the issue and decided the same by observing as under:

> "3.2 The appellant submitted that the amount deposited to Calcutta Stock Exchange was forfeited/utilized for Settlement Guarantee Fund and Base Minimum

Capital towards the payment crisis during 2001 and despite repeated perusal, the Calcutta Stock Exchange stated that it has retained the sum of Rs.7,50,000/- as per the decision of the Committee of the Exchange taken at its meeting held on 12-03-2001 read with that of 11-07-2003.

3.3. The appellant submitted that the deposit was made in the course of business and the loss is incidental to the business. The appellant has deposited a sum of Rs.10,50,000/- as deposit with Calcutta Stock Exchange out of which Rs.7,50,000/- was towards Base Minimum Capital (BMC) and Settlement Guarantee Fund which was forfeited/ utilized towards payment crisis during 2001.

3.4 The deposit was made in the course of business for the purpose of business of the appellant and the forfeiture/ utilization of the sum towards payment crisis by Calcutta Stock Exchange has happened in the course of business and is incidental to the business. The sum of Rs.7,50,000/- is, therefore, allowable as business loss."

23. We do not find any infirmity in the well reasoned order of the Ld. CIT(A) that the expenditure was incurred by the assessee in the course of its business and that the loss was incidental to the business activity of the assessee. This appeal of the Revenue is therefore dismissed.

ITA Nos.5441/M/2008 (A.Y. 2005-06) & 4476/M/2012 (A.Y. 2006-07) Revenue's appeals)

24. The common issue raised in both the appeals is as to whether the income from share transactions is to be assessed as business income or capital gains. The facts and issues involved in these appeals are identical to that of the appeals in relation to Shri Suresh K. Jajoo. Even the Ld. CIT(A) has also discussed the case of the present assessee in the impugned order which has also been reproduced above while deciding the appeal of the assessee Shri Suresh K. Jajoo. Since the facts and circumstances in this case are identical to the case of Shri Suresh K. Jajoo, hence in view of our findings given above, these appeals of the Revenue are hereby dismissed.

ITA No.5302/M/2011 (for A.Y. 2008-09) (Revenue's appeal)

25. The Revenue in this appeal has raised two effective grounds of appeal. The first ground is as to whether the income earned by the assessee from sale and purchase of shares is to be assessed as capital gains or business income. Since the facts and circumstances are identical as in the case of Shri Suresh K.

Jajoo and in view of our findings given above, this ground of the Revenue's appeal is hereby dismissed.

26. The second issue raised in this appeal by the Revenue is that the Ld. CIT(A) has erred in deleting the disallowance made by the AO under section 14A amounting to Rs.19,30,794/-.

27. On perusal of the impugned order, we find that the Ld. CIT(A), in fact, has confirmed the disallowance of Rs.19,30,794/- made by the AO. The assessee admittedly has not preferred any appeal against the dismissal of this ground. The Revenue therefore is left with no grievance on this ground. This appeal by the Revenue is misconceived and is not maintainable and the same is accordingly dismissed. Accordingly, this appeal of the Revenue is also hereby dismissed.

28. In the result, all the appeals of the Revenue are hereby dismissed and the appeal of the assessee i.e. Shri Suresh K. Jajoo is hereby allowed.

Order pronounced in the open court on 22.01.2016.

Sd/- **(Ashwani Taneja)** **ACCOUNTANT MEMBER**	**Sd/-** **(Sanjay Garg)** **JUDICIAL MEMBER**

Mumbai, Dated: 22.01.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.