

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'H' BENCH
MUMBAI BENCHES, MUMBAI

BEFORE SHRI J SUDHAKAR REDDY, AM & SHRI VIJAY PAL RAO, JM

ITA No. 6497/Mum/2009
(Asst Year 2003-04)

&

ITA No.6603/Mum/2009
(Asst Year 2006-07)

Mr Hitesh Satishchandra Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76	Vs	The Jt Commr of Income Tax 21(3), Mumbai
(Appellant)		(Respondent)

PAN NO.AACPD8612R

ITA No. 148/Mum/2010
(Asst Year 2003-04)

&

ITA No. 812/Mum/2010
(Asst Year 2006-07)

The Jt Commr of Income Tax 21(3), Mumbai	Vs	Mr Hitesh Satishchandra Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76
(Appellant)		(Respondent)

ITA No. 3231/Mum/2009
(Asst Year 2004-05)

The Jt Commr of Income Tax 21(3), Mumbai	Vs	Mr Hitesh Satishchandra Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76
(Appellant)		(Respondent)

CO No. 239/Mum/2009

In

ITA No.3231/Mum/2009

Mr Hitesh Satishchandra Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76	Vs	The Jt Commr of Income Tax 21(3), Mumbai
(Cross Objector)		(Respondent)

**ITA No. 6495/Mum/2009
(Asst Year 2004-05)**

Smt Pratikshi D Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76	Vs	The Jt Commr of Income Tax 21(3), Mumbai
(Appellant)		(Respondent) PAN NO. AAEPD8993K

**ITA No. 150/Mum/2010
(Asst Year 2004-05)**

The Jt Commr of Income Tax 21(3), Mumbai	Vs	Smt Pratikshi D Doshi Etemia A/1602 Hiranandani Garden Main Street, Powai Mumbai 76
(Appellant)		(Respondent)

Assessee By Shri Vijay Mehta
Revenue By Shri Goli Srinivas Rao

PER VIJAY PAL RAO, JM

These are cross appeals by the assessee and the revenue except for the AY 2004-05 for which the assessee Shri Hitesh S Doshi has filed cross objection against the respective orders of the CIT(A) for the assessment years 2003-04, 04-05 and 06-07. The appeals in ITA No.6497/Mum/2009 and 150/Mum/2010 are also cross appeal by another assessee Smt Pratikshi D Doshi as well as revenue against the order dated 21.10.2009 for the AY 2004-05.

2 The first common issue arises in all the appeals and cross objection and assessee is whether in the facts and circumstances of the case the CIT(A) is justified in treating the surplus/loss of shares held for less than 30 days in respect of secondary market purchase and sales as business income/loss.

3 The solitary common issue arises in all the revenue appeal is as under:

“On the facts and in the circumstances of the case and in law, the Id CIT(A) has erred in treating the business income on account of trading in shares as short term capital gain by applying the share holding period for short term capital gain as more than 30 days but less than 1 year.”

4 Thus, the first issue raised in the assessee’s appeal as well as in the revenue’s appeal is connected and related to the assessment of income from sale and purchase of shares claimed by assessee as short term capital gain.

5 The brief facts regarding the issue are emerged as under:

5.1 The assesses are individual and engaged in the business of share trading and investments. The assessee Mr Hitesh S Doshi declared his income in the return of income filed for all the assessment years under consideration are as under:

For AY 2003-04:

i)	Business income	Rs. 42,71,139/-
ii)	Short Term Capital Gain	Rs. 51,59,160/-
iii)	Long Term Capital Gain (Loss)	Rs. 3,74,297/-

For AY 2004-05:

i)	Business income	Rs. 2,11,62,245/-
ii)	Short Term Capital Gain	Rs. 4,28,87,519/-
iii)	Long Term Capital Gain	Rs. 2,11,45,423/-

For AY 2006-07:

i)	Business income (loss)	Rs. 28,74,982/-
ii)	Short Term Capital Gain	Rs. 18,60,42,317/-
iii)	Long Term Capital Gain	Rs. 13,54,85,264/-

5.2 The assessee Mrs Pratiksha Doshi filed her return of income for AY 2004-05 and declared the income as under:

i)	Short Term Capital gain	Rs. 10,45,067/-
ii)	Short Term Capital Gain	Rs. 9,65,918/-
iii)	Other sources	Rs. 11,857/-

5.3 Apart from the income under the head “business and capital gains”, the assessee has also shown income from interest and dividend. The claim of the assessee regarding short term capital gain as well as long term capital gain was not accepted by the Assessing Officer and the same was treated as ‘business income’ by giving the following reasons:

i) The assessee is involved in systematic and regular course of share trading activity for which regular books are maintained. The scale of activity is frequent and huge. There is clear profit motive. Quantity purchased and sold are huge and repetitive.

ii) CBDT instruction no.1827 dated 31.8.1999 and supplementary instruction were applied.

iii) The expenses claimed against short term capital gain are such which are necessary for carrying out the business.

iv) The ratio of purchase to opening balance and sales to closing balance makes the assessee a trader in shares and not investor in shares. The ratio of turnover to closing stock is also an important indicator to look at the motive of the assessee.

5.4 The Assessing Officer, therefore, held that the assessee is engaged in the one activity only i.e. activity of earning profit through dealing in shares within a short period or long period. He accordingly treated the entire income as business income. For The AY 2004-05, the Assessing Officer also denied the deduction u/s 54F of the Act.

6 On appeal, the CIT(A) asked the assessee to file the statement of short term capital gains and long term capital gains. The assessee was also required

to bifurcate the short term capital gain into two parts namely; shares sold within 30 days of purchase and shares sold after 30 days of purchase. The assessee, accordingly filed the details of long term capital gain and short term capital gains and also details of bifurcated short term as per the period of holding less than 30 days and more than 30 days.

6.1 The CIT(A) in para nos 4.3.1 (a) & (b) held that as per CBDT's circular, the assessee can be an investor as well as trader and can have both portfolios. Various factors, which make the assessee an investor, are that; the assessee has made investment in listed shares and also in IPOs. The shares are shown in the balance sheet as investment and valued at cost. The assessee did not have any office and/or administrative set up and there are no commercial fixed assets. The source of acquisition are out of own funds and family funds. The ratio of investment to sale and purchase is very high and there is not a single instance where the assessee had squared off the transactions on the same date without taking delivery of the shares. These facts makes it clear that the assessee is mainly an investor but the factors like; turnover of shares in less than 30 days in respect of secondary market transactions points the assessee as a trader. He accordingly, held that the surplus/loss on sale of shares held for less than 30 days be treated as business income and from those shares held for more than 30 days as short term capital gain/loss. The Long term capital gain has been accepted as such.

7 The assessee as well as the revenue are in further appeal before us on the issue of short term capital gain or business income. However, there is no dispute

before us as regards long term capital gain accepted by the CIT(A) because the revenue has not challenged the findings of the CIT(A) on long term capital gain.

8 The Id AR of the assessee has submitted that;

i) The assessee started investment in shares every since 2000. All along these shares are treated as investment in the accounts maintained by the assessee.

ii) Section 2(14) defines the word “capital asset”. As per the definition, capital asset means, property of any kind held by an assessee whether or not connected with his business but does not include any stock in trade and certain other assets. Therefore, as per the definition of the phrase ‘capital asset’, shares held by the assessee and treated as investment in its accounts will be capital asset.

iii) Section 2(29A) defines the phrase ‘long term capital asset’ means – a capital asset which is not a short term capital asset.

iv) Section 2(42A) defines the phrase ‘short term capital asset’ means – a capital asset held by an assessee for not more than 36 months immediately preceding the date of its transfer but in respect of shares held in a company listed in a recognized stock exchange, the words 30 months are substituted for 12 months. Therefore, the statute itself recognizes the difference between short term & long term capital asset and also difference between capital asset being shares of a listed company and other capital asset.

v) Law relating to differential treatment to short term and long term capital gains came into effect with effect from the date on which Chapter VII of the Fin.N.(2) Act, 2004 come into force. This date is 1.10.2004 on which the levy of securities transaction tax came into effect. He has referred the speech of the Finance Minister on the Securities Transaction Tax.

vi) Once the assessee is called upon to pay the securities transaction tax based on the nature of transaction, it will be unfair to give a different treatment in respect of same transaction for levy of tax under different tax law. As per the intention of legislature, manifested by the speech of the minister, it is unfair not to honour his words and levy tax twice for same transaction. This contention is judicially accepted by the Tribunal in the case of Goptal Purohit reported in 29 SOT 117. There is no provision to refund the securities transaction tax, and having accepted such tax, the law makers cannot take a 'U-turn and ask the assessee to pay tax doubly.

vii) The intention of the assessee as investor is manifested by following :

a) Long holding period as per chart of investment

b) In spite of mani-fold increase in market value, the assessee preferred to hold the shares then to sell the shares. This clearly shows that assessee is an investor. This contention has been accepted by the Tribunal in the case of Nehal V Shah

8.1 The Id AR further submitted that the assessee has been consistently and continuously showing the income/loss from shares under the head 'capital gains". He has referred the details of various years regarding the income placed at page 86 of the paper book and submitted that except three years under

consideration for all other years the stand of the assessee has been accepted by the revenue. Therefore, the Id AR of the assessee has pleaded that the issue is covered by the decision of the Hon'ble jurisdictional High Court in the case of CIT vs Gopal Purohit reported in 228 CTR 582/188 Taxman 140.

8.2 The Id AR of the assessee has referred the decision of the Hon'ble Supreme Court in the case of Ramkumar Aggarwal & Bros reported in 205 ITR 251 and submitted that when the assessee has treated the shares as 'capital asset' all along; it is not permissible either for the assessee or for the Assessing Officer to treat the same as stock-in-trade. Once the intention of the assessee is clear from the record, the Assessing Officer cannot substitute the same. The assessee has given a particular treatment i.e investment of the shares; the Assessing Officer cannot change the nature of the asset. Thus, what was a capital asset will remain a capital asset unless the person holding the asset himself changes the nature by a specific action like conversion of capital asset into stock-in-trade.

8.3 He has further pointed out that many of the shares sold during the financial year, relevant to the assessment year under consideration, from which the long term/short term capital gains arose were purchased in earlier years and treated by the assessee as investment. Once the treatment of the shares as investment was accepted by the revenue in the earlier years then the Assessing Officer cannot be allowed, treating the same differently when the shares are sold. The shares are capital asset within the meaning of sec. 2(14) of the act, any gain or loss on transfer of the shares always taxed under the head 'capital gain'.

8.4 The Id AR vehemently contended that treatment given by the CIT(A) is contrary to the provisions of section 2(42A) of the Act. Under the provisions of the Act, short term capital asset means a capital asset held by an assessee for not more than 36 months/12 months depending upon the nature of the asset. When there is no concept of holding the shares less than 30 days to change the nature of asset and consequently, the income from sale of shares would be treated as business income and not capital gain. A capital asset is always a capital asset and cannot be treated differently at the time of sale. He referred to CBDT circular no. 4 of 2007 dated 15.3.2007 and submitted that CBDT has also emphasised that it is possible for a tax payer 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. Since the CBDT circular is binding on the Assessing Officer but not binding on the assessee; therefore, the guidelines of the CBDT circular so far as it is beneficial to the assessee has to be strictly followed by the revenue authorities.

8.5 The Assessing Officer observed that the activity of the assessee is continuously carried out since long in an organized and systematic way with the intention to make profits and subsequently treated the same as trading activity. The Id AR of the assessee has submitted that the investment is always be with the intention to make profit. No prudent person will ever invest if such investment is likely to result into loses. Therefore, the investment with an intention to make profits is a normal human tendency and cannot change the

nature of transaction of investment as a business. He further submitted that the nature of transaction is determined as per the intention on the date of acquiring the asset and not on the basis of subsequent event which lead the assessee to sell the asset. There may be several factors which an informed investor will consider before sale of any asset. Therefore, the sale within a short period or within a period of 30 days of acquisition will not change the nature of transaction on the date of acquisition. He has referred the decision of the Ahmedabad Bench of the Tribunal in the case of SAR Investment P Ltd vs DCIT reported in 40 SOT 566 (Ahd) and submitted that the Tribunal in the said case has held that *“whether the asset acquired is investment or stock in trade in the hands of the assessee depends upon the intention of the assessee at the time of the acquisition of the said asset i.e. whether it was intended to be acquired as investment or as a trading asset.”*

8.6 The Id AR then referred to pages 89 to 94 of the paper book and submitted that majority of the investment has been made by the assessee for the last 11 years only in top ten scrips. He has again pointed out that for the AY 2000-01, the assessee's investment was about 45% in the top ten scrips which has been gradually increased and for the AY 2003-04, it was 61% and subsequent years, the investment has been increased to 77% and 87%. For the AY 2010-11 it was more than 78%. Thus, the Id AR of the assessee has submitted that the intention of the assessee is always investment only in the selected scrips and more than 75% of the total investment is in the top ten scrips which shows that the intention of the assessee was not trading but only investment latterly. He has summarised his contention as under:

i) that the assessee recorded the investments in the books of account separately and consistently for every year and the assessee has proved his intention at the time of purchase of an investment;

ii) the assessee always valued the investment at cost and never valued at market price or realized value;

iii) the assessee admitted capital loss and never claimed as business loss out of sale of investment in shares which shows from the beginning and the assessee was treating the investment separately;

iii) the assessee consistently treating the investment separately in the last many years, which has been accepted by the revenue except for the year under consideration. Even in the subsequent year, the claim of the assessee has been accepted through u/s 143(1). The amount of investment is booked through number of scrips to avoid the risk because it is not advisable to invest huge amounts in few scrips. The assessee is using his own funds. The transactions of purchase and sale are Rs. 4.57% of the funds available and therefore, portfolio churning was not so high for a prudent investor. The long term capital gain has been accepted by the revenue; therefore, the revenue has accepted the status but being trader as well as investor. He has referred the following decisions:

- i) CIT vs Gopal Purohit 188 Taxman 140 (Bom)
- ii) Gopal Purohit vs JCIT 122 TTJ 87(Mum)
- iii) Janak S Rangwala (ITA No.1163/Mum/2004 dt 19.12.2006)
- iv) ACIT vs Sundar Iyer (ITA No.295/Mum/2001 dt 15.10.2002)
- v) ACIT vs Motilal Oswal (ITA No.3861/Mum/2001 dt 28.8.6)
- vi) Management Structure & Systems P Ltd vs ITO (ITA No.6966/Mum/2007dt 30.4.2010)
- vii) Walfort Financial Services Ltd vs ACIT (ITA No.847/Mum/209 dt 30.6.2010)
- viii) JM Share & Stock Brokers Ld vs JCIT (ITA No.28010/Mum/2000 dt 30.11.2007)

8.7 The Id DR has relied on the order of the Assessing Officer and submitted that the quantity of the shares and quantum of sales go to prove the intention of the assessee as trader. The transactions entered into for purchase and sale of shares show that the assessee is engaged in an organized activity of purchase and sale of shares with profit motive. He has further contended that in some instances, the assessee is selling shares on the next day of purchase and claiming the transaction as investment and short term capital gain whereas the nature of activity clearly shows that the assessee is engaged in continuous sale and purchase of some scrips in a single day. The assessee has also entered into the transactions which are accepted as speculative in nature. Therefore, from the volume of transactions, frequency of transaction and short period of holding of shares established that the assessee is engaged in the profit earning activity through dealing in shares in the organized way and therefore, the activity of purchase and sale is clearly trading in nature. He has relied on the decision of the Tribunal in the case of Smt Sadhana Nabera vs ACIT and submitted that the Tribunal, after considering the decision in the case of Gopal Purohit has laid down various principles.

8.8 He has referred some principles as held in the said decision that; the treatment in the books of an assessee is not conclusive and if the volume, frequency and regularity at which transactions are carried out indicate systematic and organized activity with profit motive then it becomes business profit not capital gain; purchase with intention to resale can constitute capital gains or business profit depending on circumstances like quantity of purchase and nature of activity; no single fact has any decisive significance and the

question must be answered depending on the collective effect of all relevant material brought on record.

8.9 He has further submitted that in the said case, the transaction of purchase and sale of share were only about 32 scrips. Since the holding period was only 6 months, the Tribunal has treated the transaction as business and not investment. He has referred the balance sheet of the assessee at page 22 of the paper book and submitted that the assessee has shown the loans of Rs. 118 lacs. Therefore, the assessee was using the borrowed funds for the purpose of purchase and sale of shares. The assessee was doing derivative transactions in shares. The motive of the assessee to purchase and sale is to earn profit in short period. He has relied on the order of the Tribunal in the case of M/s Synthetic Fibres Trading Co in ITA No.3022/Mum/2009 dated 29.9.2009; in the case of Smt Rekha Khandelwal in ITA No.785/Mum/2009 dated 17.3.2010 and in the case of Rakesh J Sanghvi in ITA No.4607/Mum/2008 dated 31.8.2010.

9 We have considered the rival contentions and perused the relevant records. The Assessing Officer took the ratio of purchase and sale to the opening and closing balance to support his view of treatment of the transaction including the transaction resulting long term capital gains as trading activity and consequently assessed income as business income. The CIT(A), though, admitted long term capital gains and the transaction of purchase and sale resulting long term capital gains as investment; however, he has bifurcated the transactions of sale and purchase resulting short term capital gains on the basis of holding period on the criteria of more than 30 days and less than 30 days. It is

pertinent to note that there is a criteria provided u/s 2(42A) which defines the shorter capital asset as capital asset held by an assessee for not more than 12 months in the case of shares and other securities. Section 2(42B) further defines the short term capital gain means capital gain arising from the transfer of short term capital asset. Thus, statute prescribed criteria for treating the capital asset either as long term capital asset or short term capital asset on the basis of the holding period but no such criteria of treating the short term capital asset and treating the asset has been prescribed under the statute. Even, there is no indication of holding period of 30 days find place either in the statute or in the circular/instructions as well as judicial pronouncements on the issue. Even otherwise, holding period is one of the various criteria and principles to determine the nature of the transaction i.e. trading or investment, no single formula or principle can be the determinative factor for deciding the nature of the transaction i.e. as 'trading transaction' or 'investment'. A bundle of criteria/factors/principles are to be taken into account in order to determine the nature of transaction.

10 The Hon'ble Supreme Court in the case of CIT vs Associated Industrial Development Co P Ltd reported in 82 ITR 586 as well as in the case of CIT vs H Holsck Larzen reportd in 160 ITR 67 has laid down various principles, which has been considered by the CBDT for issuing the circular no.4/2007 dated 15.6.2007. In short, the principles laid down in those cases for deciding the question of nature of the transaction as trading or investment, mainly/broadly are;- what is the intention of the assessee at the time of purchase of shares; whether the assessee has borrowed money to purchase and paid interest thereon; what is the frequency of such purchase and disposal in that particular item; whether the

purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value; how the value of items has been taken in the balance sheet. Thus, no single factor can be said to be decisive factor and no single principle can be laid down to determine the nature of the transaction i.e. trading activity or investment. Each case has to be decided based on the particular facts of the said case. Therefore, there cannot be any precedent in the matter of adjudication of the issue of nature of transaction with regard to purchase and sale of shares and securities. The issue can be determined only by taking into account all the relevant facts and principles as laid down by the Hon'ble Supreme Court and other High Courts. Thus, principles are taken as guidelines to be applied in the facts of each case and cannot be taken as strict jacket/formula. Therefore, the bifurcation of the short term capital gain and treating the transaction as investment in the cases where the holding period of more than 30 days and as business transaction in the case where the holding period is less than 30day, in our considered opinion, is not justified on the part of the CIT(A). Since there cannot be a single criteria for judging the transaction as capital asset or trading asset; the CIT(A) adopted only holding period as a sole criteria for bifurcating the transactions relating to the short term capital gain, which is neither proper and nor justified.

10.1 Moreover, when the assessee has treated the investment transaction in the books of account, which includes the long term capital gains as well as short term capital gains, then after accepting the long term capital gains, the transaction representing short term capital gains as claimed by the assessee can be neither treated as an investment or trading in nature. There cannot be a sub-division of transaction relating to short term capital gain. Hence, in our

considered opinion, in the case in hand, the CIT(A) has committed an error in bifurcating the transactions of purchase and sale of shares on the basis of holding period of 30 days and the income arising from the same claimed by the assessee as short term capital gain has been sub-divided as short term capital gains and business income.

11 Now, we will analysis the fact of the present case in the light of the principles laid down by the judicial pronouncements for determining the nature of the transaction of sale and purchase of shares.

Intention of the assessee at the time of purchase of shares:

12 Undisputedly, the assessee has treated the transaction as investment by recording in the books of account being investment and not as stock-in-trade. The assessee has shown investment in shares in the beginning and closing of the year only an investment and not as stock-in-trade. Further, the assessee has been maintaining separate portfolios for investment and trading transactions. It is now settled proposition of law that an assessee can have two separate portfolios one for investment and other for trading transactions and the income from these two portfolios is assessable under the different heads i.e. 'capital gain' and 'business'. The claim of the assessee is further strengthen by the fact that even prior to the differential tax effect w.e.f 1.10.2004, the assessee has been treating the investment separately and admitting capital gain as well as capital loss. This consistent treatment of the assessee has not been disputed rather has been accepted by the revenue prior to the Assessment Year under consideration. Thus, from the facts and materials on records, it is clearly

established that the intention of the assessee, at the time of acquiring the shares, which are claimed as investment was for investment and not for trading so far as representing the long term capital gains and short term capitals gains.

Own funds or borrowed funds used for purchase of shares and payment of interest:

13 As per the balance sheet of the assessee at page 22 of the paper book, for the Assessment Year 2003-04, the assessee is having its own funds of Rs. 3.71 crores and investment of Rs. 3.91 crores, which clearly shows that the assessee was having its own funds to the extent of 95% of the investment. Therefore, we do not find any substance in the contention of the Id DR that the assessee has used borrowed funds for the purpose of investment. The position is almost the same in the subsequent years. Moreover, the CIT(A) in para 4.3.1 (a) has recorded the finding that the source of acquisition are out of own funds and family funds.

Frequency of purchase and sale of shares:

13.1 As regards the frequency of purchase and sale of shares, the assessee has transacted all transactions of sales and purchases; through D-mat account in the electronic system of Stock Exchange. A single order placed by the purchaser may be completed by way of various small quantities of shares available for sale to meet out the demand of the purchaser. Therefore, a single order is not necessary be completed by a single transaction of the entire quantity of shares.

13.2 Similarly in the case of sale, the same may be divided as per the requirement of the purchaser and in this way; single transaction is reflected as number of transactions. For instance, the shares of Jindal Scrip purchased by the assessee on 3.6.2002, the order was for 10000 shares, which was completed by 4 different lots of shares of 4000, 2500, 2500 and 1000. Therefore, the said order of purchase of Jindhal scrips on 3.6.2002 has been reported as four transactions of purchases, which is otherwise one transaction. Thus, it appears that the numbers of transactions are taken as per the different lots available for execution of the one order and accordingly, it gives unrealistic figure of the number of transactions.

Motive of purchase and sale of share:

13.3 From the details of the short term capital gains, we find that the total short term capital gains arising from the shares sold within 30 days of purchase is Rs.15,19,938/- and a total amount of short term capital gains from the shares sold after 30 days but before one year is Rs. 37,76,143/-, which shows that the assessee's intention was to hold the shares for a longer period and to earn income of appreciation of the value of the shares and not earn the profit in the short period change in the price of the shares. Apart from the above, the assessee has been regularly earning dividend income. Profit motive is inherently embedded in the transaction of purchase and sale. The important aspect is the intention to earn profit from appreciation of value of capita asset or by way of transfer of trading asset.

Valuation of items in balance sheet:

14 Undisputedly, the assessee valued the shares under investment portfolio at cost and never valued the balance at the beginning as well as at the end of the year of market price or realization value.

15 In the case of Associated Industrial Development Co P Ltd reported in 82 ITR 586, the Hon'ble Supreme Court has observed as under:

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

15.1 In the case in hand, the assessee has treated the shares as investment in the books of account and values the same at cost in the balance sheet and not at the market value or realizable value. Therefore, when the assessee is maintaining the distinction between the shares, which are held as investment from the shares, which are held as stock-in-trade then, keeping in view of the other facts and applying the principles as discussed above, we have no hesitation to say that the assessee has been maintaining two separate distinct portfolios right from the beginning and the revenue has failed to brought out any material to show that any change in the practice of accounting method of the assessee as well as in the activity of the assessee in purchase and shares of sharers under two separate and distinct portfolio. It is an accepted fact and practice that in order to reduce the risk of loss of capital or income, the investor

may try to diversify the investment; therefore, there may be a case of reshuffling portfolios by selling of some scrips and buying of some other scrips to mitigate the scope of loss of capital or income. Therefore, the reshuffling in a short period is not necessary be taken as an activity of trading when the intention was to reduce the risk of loss of capital.

15.2 There are various decisions of the Tribunal on this point and each has been decided on the facts of each case. Some of the decisions are in favour of the assessee where some other cases are in favour of the revenue. In the latest decision of the Tribunal in the case of Shri Mahendra C Shah vs ACIT in ITA No.6289/Mum/208 dated 18 May 2011 has held in paras 14 to 21 as under:

“14 We have carefully considered the rival contentions. The question whether the surplus on the sale of shares is to be assessed as capital gains (short term or long term) as claimed by the assessee or as business income as claimed by the Assessing Officer is a question of fact to be decided according to the cumulative effect of several facts and circumstances of the case. The intention of the assessee, the nature of the commodity sold, whether the assessee has used his own funds or borrowed funds, the treatment given to the asset in the books of account, the consistent stand taken by the revenue authorities in respect of the sale proceeds of the asset in the earlier years, the frequency and volume of the transactions, the period of holding the shares, whether the assessee took or gave delivery of the shares, are all questions which have to be considered before a decision is taken as to whether the assessee held the shares as capital assets (investment) or as stock-in-trade. It is also recognized by the revenue that the same assessee can hold the shares in two different portfolios – one portfolio for stock-in-trade and another portfolio as investment. This position has been recognized by the CBDT in its Circular No: 665 dated 05.10.1992.

15 In the present case the commodity in question is shares which are generally traded. But that is not conclusive because it is common knowledge that shares are also held as investment particularly shares of blue chip companies which may yield consistent dividend and may also appreciate in value over a period of years, the appreciation being similar to the appreciation in the value of other investments such as fixed deposits with banks, real estate, gold and other precious metals, etc. It is a fact that in the present case the assessee has shown the shares as investment in his Balance Sheets. The relevant details are given in para 2.2(c) of the order of the CIT(A) for the assessment year 2006-07. The same is set out below: -

F.Y. ending on	No.of Companies	No. of shares	Value
31.03.2003	147	143323	98,22,424/-
31.03.2004	159	302243	1,69,96,403/-
31.03.2005	149	490237	3,24,59,391/-
31.03.2006	131	541377	3,32,72,973/-

One aspect which is thrown up by the above table is that though the investment value increased substantially from year to year, the number of companies whose shares were held by the assessee remained more or less constant and in fact as on 31.03.2006 it actually fell to 131 from the earlier high of 159. It appears to us that basically the number of shares of a particular company purchased by the assessee had increased which substantially contributed to the increase in the value of the investment. The above analysis prima facie shows that the assessee is basically an investor more than a share dealer. The stand of the assessee has been accepted by the revenue authorities in the assessment years 2001-02 and 2004-05 in assessment orders passed under section 143(3) of the Act. The assessment order for the assessment year 2001-02 is at page 34 – 35 of the paper book. It is seen therefrom that the Assessing Officer has accepted the short term capital loss and the long term capital gains shown by the assessee on sale of shares. The assessment order for the assessment year 2004-05 is at pages 61 & 62 of the paper book. In this year also the short term capital gains of Rs.13,94,013/- has been accepted by the Assessing Officer. There is also no dispute that the assessee has been declaring the cost of the shares as investment in his balance sheets in all the years.

16. For the assessment year 2005-06, the assessee has furnished the details of the sale of shares for two periods i.e. from 01.04.2004 to 30.09.2004 and from 01.10.2004 to 31.03.2005. It is seen that in respect of the first period the shares sold are those of Bharat Earth Movers Ltd., Balaji Telefilm Ltd., Century Textiles India Ltd., Cipla Ltd., Gail India Ltd., Pennar Aluminium Co.Ltd., Reliance Capital Ltd., Tata Steel Ltd. and Visual Software Ltd. The holding period in respect of these shares ranges from 533 days to 3981 days. The details of sale of shares in respect of the second period show shares of Avery India Ltd., Ballarpur Industries Ltd., Colgate Palmolive (India) Ltd., HDFC Bank Ltd., ICICI Bank Ltd., Larsen & Toubro Ltd., CEAT Ltd., Tata Steel, Voltas Ltd. The holding period ranges from 387 days to 9016 days. It is seen thus that the assessee has held the shares for quite a long period. For example, the shares of Greaves Cotton Ltd. were held for almost 27 years (9016 days). The shares of Avery India Ltd. were held for 7493 days. The shares of PCS Industries Ltd. were held for 5674 days. Many of the shares were held for 3000 to 4000 days (9 years to 12 years). Similar details have been filed for the assessment year 2006-07 also. For this year in respect of substantial number of sale of shares the holding period was more than one

month and in respect of shares which were held for less than a period of twelve months, the surplus was shown as short term capital gains. In respect of the surplus shown as long term capital gains, the period of holding in all the share transactions was several years. It is significant that the revenue has not filed any appeal against the finding of the CIT(A) that the long term capital gains declared by the assessee for the assessment year 2006-07 should be assessed as such and not under the head "business".

17. It is further seen that even in respect of the assessment year 2007-08 in which year an assessment was completed under section 143(3) of the Act by order dated 13.11.2009, the Assessing Officer has accepted the short term capital loss of Rs.69,43,821/- on sale of the shares and the same has not been considered as business.

18. It would thus appear that prima-facie there is enough evidence to show that the assessee is an investor in shares and therefore the surplus arising on the sale of shares should be assessed as short term or long term capital gains, depending on the period of holding and not as business income.

19. But then the contention of the department is that the assessee is also carrying on F & O transactions as speculation business in shares and that the investment in F & O transaction as per the balance sheet as on 31.03.2005 is Rs.1,03,01,657/- as against the investment in the shares of Rs.3,24,59,391/-. The point made is that almost 1/4th of the total investment of the assessee is in speculation and F & O business and with this kind of background it would be difficult to believe that the assessee can also be treated as investor in shares. We find it difficult to accept the contention because the circular issued by the CBDT referred to supra has itself recognized that a person can have two portfolios, one for investment and the other as stock-in-trade. The Hon'ble Bombay High Court has also accepted this position in its judgement in the case of CIT Vs. Gopal Purohit (34 DTR 52) delivered on 6th January, 2010. It is then pointed out that the assessee has borrowed from India Bulls for the purpose of buying shares and this is a strong indication that the assessee intended to do business in shares and not merely invest in them. The learned counsel for the assessee has drawn our attention to an order of the Pune Bench of the Tribunal in the case of S.Balan @ Shanmugam Balkrishnan Chettiar Vs. DCIT., (2009) 120 ITD 469, to submit that there is no thumb rule that a person cannot borrow money for the purpose of making investment. We have examined the position with reference to the order of the Pune Bench to which one of us (the Accountant Member) was party. In this case the assessee had borrowed monies for acquiring shares. The surplus on the sale of shares was declared under the head capital gains and for the purpose of computing the gains, the interest cost was also capitalized and reduced from the sale price. The interest has never been claimed as revenue deduction. On these facts it was held that there was no rule that interest cost cannot be capitalized and especially on the facts of the case of the assessee before the Pune Bench it was held that the right course would be to capitalize the interest cost and deduct the whole cost from the sale price while computing the capital gains. It was observed that the interest cost cannot be

segregated from the cost of acquisition and for this purpose reliance was placed on the judgement of the Delhi High Court in CIT Vs. Mithlesh Kumari (1973) 92 ITR 9 where it was held that interest paid by the assessee on monies borrowed for the purchase of an open plot of land would form part of the actual cost of the assessee for the purpose of determining the capital gains derived from the sale of the plot. This decision certainly lends support to the contention of the assessee before us. Even in the present case the department has no objection to the capitalization of the interest. The alternative submission of the assessee however was that in any case the balance in his capital account as on 31.03.2005 was Rs.4,19,60,788/- which is more than the investment in the shares as on that date which stood at Rs.3,24,59,391/- and therefore it can be presumed the borrowed monies were utilized only for the purpose of carrying on the F & O business. In fact this contention has been accepted by the CIT(A) in his order for the assessment year 2006-07. Reference may be made in this connection to para 2.3(i) of the order of the CIT(A) for the assessment year 2006-07. In that year the assessee had paid interest of Rs.15.73 lakhs and that was put as one of the points against the assessee's contention that he was an investor in the shares. The CIT(A) held that the assessee 's own capital was Rs.5.15 crores in that year out of which the investment of Rs.3.32 crores in shares could have come and thus it cannot be said that the assessee was depending totally on borrowed funds. In the light of this finding also it cannot be said that the fact that the assessee paid interest on borrowings should be held against him, particularly when there are other predominating features in the case which give clear impression that the assessee intended only to invest in shares and not hold them as stock-in-trade.

20. It thus appears to us that the CIT(A) took an incorrect view of the matter in the assessment year 2005-06 and that the CIT(A) who dealt with the appeal for the assessment year 2006-07 has taken the correct view of the matter and applied the appropriate principles correctly in holding that the assessee was an investor in shares.

21. For the above reasons, we allow the first ground taken by the assessee in his appeal. The grounds taken by the department in its appeal for the assessment year 2006-07 are rejected. “

15.3 In the above said case, the Tribunal observed that the investment value increased substantially from year to year. The number of companies whose shares were held by the assessee remained more or less constant, which prima facie show that the assessee is basically an investor more than a share dealer. In the case in hand also, the investment value has increased substantially from year to year but the number of companies remain almost the same. As we

have already discussed in the foregoing para that in the top ten scrips, the investment of the assessee has been increasing from year to year and goes upto 87% to the total investment from 45% in the assessment year 2000-01. The value of the investment also increased from Rs. 81,59,140/- in the year 2000-01 to Rs. 1,66,32,000/- in the Assessment Year 2006-07. Therefore, having regard to the facts and circumstances of the case and applying the various principles and guidelines laid down by the Hon'ble Supreme Court, the surplus of sale and purchase of the shares held by the assessee as investment in the books of account cannot be treated as business income. Even otherwise, when in the immediate preceding year right from Assessment Year 1999-00 to Assessment Year 2002-03 and subsequent year 2007-08, the claim of the assessee regarding capital gain and investment shown under the head 'investment' in the balance sheet has been accepted by the revenue and when there is no substantial change in the assessment year under consideration with respect to the treatment of the shares by the assessee and the pattern of the purchase and sale as well as availability of assessee's own funds then there should be unity in the treatment and consistency in the same fact and circumstances and the Assessing Officer cannot treat the same income under different character and had only because of change in the provision of Income Tax Act and allowed differential tax on the capital gain in comparison to business income. The department cannot be allowed to change treatment to be given to the surplus or loss of sales of the shares from short term capital gain to profit or gain of business or profession when there is consistency in fact and circumstances relating to the transaction. The principle of res judicata is not attracted since each assessment year is separate unit in itself; however, when the facts and circumstances are identical then uniformity in treatment and consistency has to be maintained.

15.4 Similar view was taken by the Tribunal in the case of Gopal Purohit reported in 29 SOT 117 which is in conformity with the decision of the Hon'ble Bombay High Court reported in 228 /CTR 582 wherein the Hon'ble High Court has observed in paras 2 & 3 as under:

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

3. Insofar as Question (b) is concerned, the Tribunal has observed in para 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The Revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The Revenue did not furnish any justification for adopting a divergent approach for the assessment year in question. Question (b), therefore, does not also raise any substantial question.

16 In view of the facts and circumstances of the case and decisions of the Tribunal as well as the jurisdictional High Court, we hold that the income arising from purchase and sale of share held by the assessee as investment cannot be treated as business income.

17 Next ground in the assessee's appeal for the Assessment Year 2006-07 as per the revised rounds of appeal is as under:

"The Id CIT(A) has erred in facts and in law in holding the loss from derivative transaction as speculative loss instead of business loss."

18 We have heard the Id AR and the Id DR and considered the relevant records. The Id AR of the assessee has submitted that the income from derivative has been treated by the CIT(A) as income from business w.e.f 25.1.2006 when the notification was issued for allowing transactions in the recognised stock exchange. Whereas, once the approval is granted in the relevant previous year, the same has to be taken as effective from the beginning of the relevant year. Thus, the Id AR of the assessee has submitted that the transaction in the derivative cannot be treated as speculative in nature for the Assessment Year 2006-07. The Id AR has pointed out that this issue is covered by the order of the Tribunal in the case of Prem Associates Advertising & Marketing in ITA No.6547/Mum/2009 dated 17.9.2010 as well as in the case of Nipra Financial Services P Ltd in ITA No.4605/M/2009 dated 30.9.2010.

18.1 The Id DR on the other hand, supported the orders of the authorities below.

19 We have considered the rival contentions and relevant material available on record. The Assessing Officer held that the derivative transaction prior to 25.1.2006 are speculative in nature and from 25.1.2006 to 31.3.2006 are as business income. The Assessing Officer's view is based on the notification issued by the CBDT on recognizing stock exchange w.e.f 25.1.2006 for carryout the derivative trading as per the provisions of sec. 43(5)(d). The CIT(A) upheld the action of the Assessing Officer by treating the derivative transaction as speculative in nature up to 25.1.2006 and thereafter, as business income.

20 As pointed out by the Id AR, we find this issue has been considered and decided by the Tribunal in the case of Prem Associates Advertising & Marketing (supra) wherein it has been held as under:

7. We find that it is undisputed position that the stock exchanges, on which the impugned transactions were carried out, were duly notified on 25th January 2006, and that in accordance with the views of the co-ordinate bench in the case of Anand Buildwel I (supra), as also with the views of Hon'ble Gujarat High Court in the case of Claris Life sciences (supra), once the approval is granted in the relevant previous year, and in the absence of anything indicated to the contrary, the approval has to be taken as effective from the beginning of the relevant year. The issue is thus covered, in favour of the line of reasoning adopted by the assessee, by decision of the coordinate bench in the case of Anand Brothers (supra) and by Hon'ble Gujarat High Court's judgment in the case of Claris Life sciences (supra). Respectfully following these decisions, we uphold the grievance of the assessee and hold that the derivate transactions, entered into by the assessee at the recognized stock exchanges even prior to the date of notification in the relevant previous year, are to be treated as covered by the exclusion clause set out in Section 43(5)(d). The assessee gets the relief accordingly.

20.1 Further, the Tribunal in the case of Nipra Financial Services P Ltd (supra again had an occasion to consider and adjudicate the same issue in paras 8 & 9, which are as under:

*"8. In the case of **G.K. Anand Bros. Buildwell (P.) Ltd vs. I.T.O. [2009] 34 SOT 439 (DELHI)** it has been held as follows for the Assessment Year 2006-07 with respect to speculative transactions the question whether the loss arising in future and option transaction carried out in a recognized stock exchange is to be treated as a business loss and not as loss in speculation business has been affirmative. Further it has been held as follows:*

"Section 43(5) defines 'speculative transaction' which means a transaction in which a contract for the purchase or sale of any commodity including stocks and shares is periodical or ultimately settled otherwise than by the actual delivery or the transfer of commodity or scrips. Proviso below section 43(5) carves out exceptions to section 43(5). As per clause (d) of the said proviso 'an eligible transaction in respect of trading in derivatives referred to in the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange shall not be deemed to be a speculative transaction'. Clause (d) in the proviso was inserted by the Finance Act, 2005 with effect from 1-4-2006. Therefore, if a transaction falls within clause (d) of the proviso, a transaction it will not be deemed to be a speculative transaction in respect of transaction pertaining to Assessment Year 2006-07. Under clause (d) of the proviso, a transaction is not a speculative transaction provided it is an eligible transaction within the meaning of clause (1) of the Explanation and it is carried on at the recognized stock exchange as explained in clause (ii) of the said Explanation below proviso to section 43(5)(d). The recognized stock exchange means a recognized stock exchange as notified by the Central Government for this purpose. Therefore, even if the notification is from 25.01.2006 as per clause (d) inserted, the same will apply to all the transaction in relation to the Assessment Year 2006-07 and onwards. Clause (d) does not mention that unless the recognized stock exchange is notified, the transaction will not be deemed to be a speculative transaction. The power to notify the stock exchange is granted under the statue and, hence, once the recognized stock exchange is notified, the same will apply in respect of all eligible transactions carried out in relation to the financial year relevant to the Assessment Year 2006-07 and onwards.

The notification dated 25.01.06 is by way of a subordinated legislation but cannot over ride the principal legislation enacted by the Parliament. It only clarifies but will not override unless statutorily so prescribed. Since there was no dispute to the fact that the transactions, in the instant case, in future and option segment were the eligible transactions carried out in a recognized stock exchange, loss in such transactions could not be deemed to be loss in the speculation business. Therefore, the loss-in-question was to be treated as a business loss and not as loss in speculative business. (para 5)"

9. Following the ratio of the decision reported in 34 sot 439 (Delhi) (supra) we confirm the order of the CIT(A) in deleting the addition of Rs.22,74,113/- on account of speculation loss and estimated expenses incurred for the same of Rs.15,99,813/-."

Therefore, respectfully following the earlier orders of the Tribunal, we decide the issue in favour of the assessee.

21 In the result, the appeals/cross objection filed by the assessee are allowed whereas the appeals filed by the revenue are dismissed.

Order pronounced on the 15th, day of June 2011.

Sd/-

Sd/-

(J SUDHAKAR REDDY) Accountant Member	(VIJAY PAL RAO) Judicial Member
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Place: Mumbai : Dated: June 2011
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai