

आयकर अपीलीय अधिकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य एवं/and श्री अब्राहाम पि. जर्ज, लेखा सदस्य)  
[Before Shri Mahavir Singh, JM & Shri Abraham P. George, AM]

**आयकर अपील संख्या / I.T.A No. 1180/Kol/2011**

**निर्धारण वर्ष / Assessment Year: 2008-09**

Income-tax Officer, Wd. 31(4), Kolkata Vs. Narain Prasad Dalmia  
(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)  
(PAN: AFSPD6333E)

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**C.O. No. 07/Kol/2012**

**In आयकर अपील संख्या / I.T.A No. 1180/Kol/2011**

**निर्धारण वर्ष / Assessment Year: 2008-09**

Narain Prasad Dalmia Vs. Income-tax Officer, Wd.31(4), Kolkata  
(Cross Objector) (Respondent)

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**आयकर अपील संख्या / I.T.A No. 1281/Kol/2010**

**निर्धारण वर्ष / Assessment Year: 2007-08**

Assistant Commissioner of Income-tax, Vs. Narain Prasad Dalmia  
Circle-31, Kolkata. (PAN: AFSPD6333E)  
(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)

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**आयकर अपील संख्या / I.T.A No. 1246/Kol/2010**

**निर्धारण वर्ष / Assessment Year: 2007-08**

Narain Prasad Dalmia Vs. Assistant Commissioner of Income-tax,  
(अपीलार्थी/Appellant) Circle-31, Kolkata. (प्रत्यर्थी/Respondent)

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**आयकर अपील संख्या / I.T.A No. 1217/Kol/2009**

**निर्धारण वर्ष / Assessment Year: 2006-07**

Assistant Commissioner of Income-tax, Vs. Narain Prasad Dalmia  
Circle-31, Kolkata. (PAN: AFSPD6333E)  
(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)

&

**आयकर अपील संख्या / I.T.A No. 1139/Kol/2009**

**निर्धारण वर्ष / Assessment Year: 2006-07**

Narain Prasad Dalmia  
AFSPD6333E)  
(अपीलार्थी/Appellant)

Vs. Addl. Commissioner of Income-tax,(PAN:  
Range-31, Kolkata.  
(प्रत्यर्थी/Respondent)

Date of hearing: 28.11.2013  
Date of pronouncement: 27.01.2014

For the Revenue: Shri R. P. Nag, Sr. DR  
For the Assessee: S/Shri R. N. Bajoria & A. K. Gupta

### आदेश/ORDER

#### Per Shri Mahavir Singh, JM:

The appeals being ITA No.1281/K/2010 by revenue and ITA No. 1246/Kol/2010 by assessee are arising out of order of CIT(A)-XIX, Kolkata in appeal No. 112/CIT(A)-XIX/ACIT, Circle-31/2009-10 dated 29.04.2010. Assessment was framed by ACIT, Circle-31, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2007-08 vide his order dated 31.12.2009. The appeals being ITA No.1217/Kol/2009 by revenue and ITA No.1139/Kol/2009 by assessee are arising out of order of CIT(A)-XIX, Kolkata in appeal No. 322/CIT(A)-XIX/Addl.CIT,Range-31, Kol/08-09 dated 08.05.2009. Assessment was framed by Addl. CIT, Range-31, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2006-07 vide his order dated 23.12.2008. ITA No. 1180/Kol/2011 by revenue and C.O. No. 07/Kol/2012 by assessee are arising out of order of CIT(A)-XIX, Kolkata in appeal No. 101/CIT(A)-XIX/ACIT,Cir-31/Kol/10-11 dated 24.06.2011. Assessment was framed by ACIT, Circle-31, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2008-09 vide his order dated 24.12.2010.

2. First we will take up ITA No. 1217/Kol/2009 and ITA No. 1139/Kol/2009. The first issue in this appeal of revenue is against the order of CIT(A) in treating the income disclosed from sale of shares as capital gains as against assessed by AO as business income. For this, revenue has raised following ground no.1:

*"1. The AO in his order u/s. 143(3), treated the profit as "Business Income" which the assessee disclosed as Short Term Capital Gain on the basis of facts and material available on record. The Ld. CIT(A) has allowed the appeal on this point. It appears that the Ld. CIT(A) has erred in both law as well as in fact on the basis of facts and material available on record."*

3. Briefly stated facts are that the assessee has declared a sum of Rs.1,17,50,160/- under the head capital gains on sale of investments i.e. the sale of shares. The assessee in his Profit & Loss Account has credited an amount of Rs.1,17,74,291/- under the head other incomes and the details of which are given in schedule 11 of the P&L Account. Out of these other incomes, the profit consists of sale of investment mainly which was declared by assessee as short term capital gain, the AO during the course of assessment proceedings was of the view that due to frequency of transactions in shares and the nature of transactions amounted to trading rather than investment. According to AO, the intention of the assessee is clear that the profit earning from selling of shares is the motive and according to him, this is business income. Even the frequency and timing of collection of shares, according to him, suggests that transactions are in the nature of adventure in the trade. Accordingly, he assessed the income as business under the head share trading. Aggrieved against the order of AO, assessee preferred appeal before CIT(A), who after considering evidences and submissions of the assessee decided the issue in favour of assessee by observing as under:

*“(5) I have considered the submission of the appellant and the reasoning given by the A.O. in the assessment order. I have also gone through the assessment record and judicial pronouncements relied upon by the A O and the appealait During the relevant previous year, the appellant had shown short term capital gain of Rs. 1,17,50,160/-. The A. O. has treated the capital gain, so computed by the appellant, as business income. The A.O. has arrived on this conclusion on the basis of frequency of the transactions, the appellant’s intention of earning profits on sale of shares, period of holding of shares, circular No.4 of 2007, decision of Authority of Advance Ruling reported in 288 ITR 641, other decisions of Supreme Court and the observation of the A.O. that the associated/related concerns of the appellant are in the business of share trading. For the aforesaid reasons, though, the A.O. has concluded that the transactions of sale purchase of shares entered into by the appellant, were business transactions, but he has not mentioned that under which conditions or situations, an assessee could claim that he has earned short term capital gain because the definition of short term capital asset u/s. 2(42A) of the Act and the rate of tax on short term capital gain as per section 111A of the Act are still very much part of the I.T. Act, 1 961. Thus, in my opinion, the claim of appellant with respect to short term capital gain could not be rejected outrightly for the inferences drawn by the A.O. On perusal of financial statements of the appellant for the relevant previous year, earlier years and the subsequent years, it was observed that the appellant has regularly made the investment in shares which were duly reflected in his balance sheet. During the relevant previous year there was no change in the character of transactions and in earlier years the income arising on sale of shares has been accepted by the A.O. as capital gain. Though the principle of res judicata is not applicable to the income tax proceedings, still there must be some reason or change in the facts to take a divergent view. On purchase of shares, the appellant has recorded them as investment in his financial statements and the delivery of the shares was taken in his demat account. There is no evidence that the investment was ever converted into stock in trade. On perusal of details of transactions it is observed that the capital gain of Rs.1,17,50,159/- was in 30 scrips. Out of this, gain ofRs.14,95,336/- was in 11 scrips which were acquired by the appellant in the Initial public Offer (IPO) and the gain of Rs.41,85,025/- was earned in three scrips namely Birla Corporation Ltd, Birla Eriction Optical Ltd and Gateway Distriparks Ltd., which were*

*purchased by the appellant during the Financial year 2004-05 and as on 31-03-2005, these shares were shown as investment in the balance-sheet. In my opinion, there is no reason to treat the shares accepted as “investment” in preceding year as “stock in trade” in the subsequent year. Further, the A.O. is not correct in his observations that the appellant’s intention was only to earn profit on sale of shares and not to earn the dividend. The financial statement of the appellant show that he has also earned the dividend of Rs.13,14,439/- during the relevant previous year.*

*(1) The Supreme Court in the case of C.I.T. vs. Madan Gopal Radheylal (73 ITR 652) held that there cannot be a presumption that every acquisition by a dealer in a particular commodity is an acquisition for the purpose of his business. In each case the intention is to be gathered from the facts of the case and from the conduct of the assessee acquiring the commodity and his dealings with the same. As per the ratio laid down in this decision of the Supreme Court, there cannot be presumption that where an assessee is a dealer in shares, every acquisition by the said dealer is for trading or business purposes. One should, therefore, gather the intention with reference to the assessee’s conduct and the manner in which shares are accounted and dealt with in the books of accounts of the assessee.*

*(5.2) The Supreme Court in the case C.I.T. vs. Associated Industrial Development Co. Ltd. (82 ITR 586) has observed that whether any part of the 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 and, therefore, he should be in a position to produce evidence from its record to establish the distinction between the shares held as stock in trade and by way of investment. In the appellant’s case, he was assessed to tax in respect of income derived on sale of investment shares all the past assessment years. The income computed by the appellant under the head capital gain was accepted by the A.O. It proves that the appellant was holding the shares for the purpose of investment.*

*(5.3) The A.O. has placed heavy reliance on circular No.4 of 2007 issued by the CBDT. However, para 10 of the circular supported appellant’s case which reads as under:*

*“CBDT also wishes to emphasize 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 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 gain as well as business income.”*

*Thus, even the Board has clarified that an assessee may have portfolio under the investment account and may have income under the head capital gains. In the case of CIT vs. Madan Gopal Radheylal, 73 ITR 652, the Hon’ble Supreme Court has observed “a trader may acquire a commodity in which he is dealing for his own purpose and hold it apart from stock in trade of his business. There is no presumption that every acquisition by a dealer in a particular commodity is an acquisition for the purpose of his business In each case the question is one of intention which is to be gathered from the facts and the conduct of the acquirer and his dealing with the commodity”. In the case of appellant he has invested his fund to acquire shares of various companies for investment purpose. The intention of the appellant is apparent from the financial statements and books of account. A number of shares were obtained through IPO and similarly there were shares which were carried forward from the investment Account of preceding years.*

*(5.4) The decision of the Authority for Advanced Ruling (AAR) in 288 ITR 641 also advances the appellant’s claim. In that case the applications were filed for advance*

*rulings by number of foreign institutional investors (FII) who had invested in shares and securities in large number of Indian companies. The investments were made after obtaining permissions from Reserve Bank of India under FEMA and it was in conformity with SEBI regulations. On scrutiny of applications filed by various applicants the Authority noted that non-resident entities from the jurisdiction where capital gains was exempt from taxes, claimed the gains from transaction of sale and purchase of securities on Indian Stock market as capital gains. While in respect of identical transactions some other institutions treated the income arising from such transaction as business profit. These entities further claimed that they did not have permanent establishment in India. Referring to the volume and frequency of transactions; systematic and organized activities carried out in shares, it was argued that these institutional investors were carrying on business of share dealing and trading and therefore income was assessable as business income. Since these entities did not have permanent establishment in India the business profits were claimed to be not liable to tax in India. The Authority then examined the facts relating to Investments made by these FIIs; AAR went through the Articles of Trust Deeds of these entities; considered the SEBI regulations and then held that from various transactions in securities in India carried out by the appellants it was seen that they were in the habit of keeping the holdings in various Indian companies from a few month to a few years which clearly indicated that the motive and intention of the applicants was to earn return in the form of capital gains rather than earn business profits. The AAR held that in the case of trading, the securities which were purchased and sold, would be termed in the books of the person acquiring it as stock in trade and not Investments. The intention of the foreign institution, as was evident at the time of purchase of securities, was a relevant factor and often the conclusive factor in determining whether the transaction was in the nature of trade or in the nature of investment. The authority then at Page 649 observed that the germane question in all these application was whether securities which were subject matter of purchase and sale by the applicants were held by them as of stock in trade so as to give rise to business income or investment in capital assets so as to yield capital gain. While deciding the germane question the authority considered the submissions of the applicants wherein it was argued that the use of the term investment in SEBI regulations or applications made was not determinative of nature of income arising from the transaction and it was to be determined on the basis of intention and circumstances. For the purpose of income tax, the term investment or investments was to be taken in the business sense of laying out money for profit: and nature of income had to be considered as per income tax statute and not in the context of FII regulation and not with reference to the terminology employed. It was contended that the applicants devoted their entire resources to the earning of income by way of trading in securities and it was so done after the study and research in a business like manner and merely because some securities were held by the applicants for relatively longer periods, the income from transactions in securities could not be considered as capital gains. The AR considered these submissions of the FIIs but ultimately held that the FIIs had made purchase and sale of securities of Indian companies as per SEBI regulation for investment purposes. AAR held that as per the scheme of the Govt. FIIs had acquired shares and securities as investments and not as stock in trade. The authority noted that the books of accounts of the applicants were not produced and examination of entries in books of account of the applicant was relevant in considering whether the securities were held as stock in trade or investments. The Authority particularly observed that they had no clue about the maintenance of the accounts of the applicant and if these were produced; then from the accounts Authority would have been in a position to ascertain whether the shares were entered in the books of account as stock in trade or capital assets. The Authority observed that under the principles of accounting stock in trade had to be valued at end of each year in the case of share trading, to arrive at profit of business whereas in the case of investments in capital assets, gains would be determined only on sale of such assets. In absence of books the AAR presumed that shares & securities were held as investments, as*



*per SEBI regulation and therefore the AAR held that profit arising to FIIs applicants from sale of securities in India could not be treated as business income.*

*(5.5) From careful reading of the decision of the AAR to which the A.O. referred, I find that the said decision advances the appellants case. In this judgment the AAR has referred to the historic background under which the capital markets in India were opened to institutional investors from abroad. Prior to 1992 the foreign entities were not allowed free access to Indian capital markets The FIIs brought in huge foreign capital and they acquired substantial holdings in the shares of Indian companies. The investments by the foreign institutional investors were several times more than the institutional investment by India companies. The volume of business undertaken by FIIs is several times than investments made by Indian companies and institutions. According to the AAR the question whether the acquisition of securities is for business purpose or by way of investment; can be decided with reference to the intention of the purchaser at the time of acquisition of security itself. For this purpose the authority held that the entries made in the books of the purchaser are relevant because in case of purchase of securities for business purposes; they are shown by way of stock in trade whereas in the case of investment; shares are disclosed in the accounts as investments. If in case of foreign institutional investors who regularly carried on the transactions of purchase and sale of shares at regular intervals and in large volume, the said activity is considered as Investment activity then by the same measure the same activity carried on by an Indian entity cannot be considered as business activity. In my opinion the judicial principle applicable to Foreign Institutional Investors are equally applicable to the Indian entities as well. In both cases the tax entities regularly carry on Investments transactions in Indian securities. There is regularity of transaction and the volumes are large in both the cases. In particular in the appellant's case the evidence on record established that clear distinction was always maintained between the trading stock, if any and investment. In the circumstances, applying the ratio laid by AAR in 228 ITR 641 I hold that the gains derived on transfer of investments was assessable as capital gains and not as business profit.*

*(5.6) I also find that the view taken by me in the present case is supported by the decision of the I.T.A.T., Kolkata in the case of DCIT, Central Circle-27, Kolkata vs. Reliance Trading Enterprises Ltd. in I.T.A. No.944 (KOL) of 2008 dated 03.10.2008. In this case the assessee company was a trader as well as an investor in shares. For the year under consideration the assessee has shown short term and long term capital gain aggregating to Rs.74,89,622/- being the profit on sale of investment shares. However, the A.O. had converted the income shown under the head capital gain to business income. In the first appeal, the claim of the assessee was allowed by the C.I.T.(A). On further appeal by the Revenue in the ITAT, Kolkata, the order of the C.I.T. (A) was upheld by the ITAT by observing as under:*

*“We have heard both the parties and perused the records as well as the documents contained in the Paper Book filed before us. There is no denying the fact that as per the accounts maintained the assessee had acted both as a trader as well as investor in shares as per the Memorandum and Articles of Association. Accounts were maintained for trading/business shares which are held as stock-in-trade and separately for investment shares which are held and shown in Balance Sheet under the head investment representing capital assets. The decision used to be taken by the assessee at the time of purchase itself based on different factors whether any share & security was to be held as investment or trading. When the shares are accounted for in the books as investment shares, the volume of transaction of such shares cannot alter its status from investment to trading. Profit on sale of such investment shares held as capital assets are assessable under the head capital gain. The period*

*of holding such assets cannot determine its status or change it from investment (capital) to trading (stock-in-trade). The audited a/cs. for the A.Y. 2004-05 and the earlier years placed in the Paper Book made it clear that every year the assessee had acquired shares for trading purpose and separately also for investment purpose with an intention to earn dividend income in addition to the prospect of making profit on sale of such investment shares at an appropriate opportune moment without making any hurry for sale ignoring dividend. The investment shares and securities purchased and held till their sale had dual purpose i.e. for earning dividend as an incidental income as well as to make profit on sale at appropriate time. The conclusions drawn by the A.O. by treating the investment shares as trading shares was based purely on assumptions and presumptions without bringing on record any material or evidence in support thereof. The A.O. did not reject the books of a/c. vis-a-vis the audited accounts u/s 145 of the I. T. Act before arriving at such a conclusion. The A.Os finding cannot, therefore, be accepted. In view of the above, we agree with the decision of the Ld. CIT(A) that the profit on sale of investment shares, securities and mutual fund is assessable under the head capital gain". We hold accordingly."*

*(5.7) The view is also supported by the decisions of I.T.A.T., Mumbai & Delhi Benches as well as decision of Madras High Court in the case of C.I.T. vs. Ramaamirtham (2008) 217 CTR 206. In the said decisions, on which the appellant has placed reliance, the assessees were all reputed stock brokers who regularly carried on broking and share dealing business but simultaneously held shares by way of investments. On transfer of investments the assessee earned capital gains which were assessed as business income. Considering differentiation maintained in the books of accounts between the trading stock and investment, the High Court and Tribunal Benches held that profit derived on transfer of investment was assessable as capital gain.*

*5.8) In the case of JCIT Vs. Dinesh Kumar Gupta reported in (2005)2 SOT 126 (Delhi), the assessee derived business income through his proprietary concern which dealt with motor parts and also did share business. He also derived income from buying and selling of shares in his individual capacity, which he declared as capital gain. The AO held that since those shares had been purchased with a profit motive, same were in nature of trade. In the first appeal, it was held by the CIT(A), that the assessee had rightly offered the profit on sale of investment under the head "capital gains". On further appeal to the ITAT by the revenue it was held by the ITAT Delhi Bench 'B' that – "it was incorrect to say that profit motive alone would distinguish a transaction of investment from a trading transaction because even in case of investment there may be motive that assessee should be able to sell investment at a premium. On facts, assessee having held those shares for certain length of time before selling the same and funds invested being entirely assessee's own funds, it was not possible to say that he carried on trading in shares as a continuous regular activity, therefore, order of Commissioner (Appeal) that income arising on sale of such shares was rightly offered by assessee as Capital Gains, was to be upheld. Having regard to the totality of facts of the present case I hold that the profit of Rs.1,17,50,160/- was assessable as Short Term Capital Gain and not as profit and gain of business. The AO is accordingly directed to assess the said income under the head Short Term Capital Gain and levy tax in accordance with Section 111A of the Act. The ground Nos. 2 to 5 are allowed."*

Aggrieved, revenue came in second appeal before tribunal.

4. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee has invested in the shares and the transactions carried out are exactly

similar to the transactions carried out in earlier years. In earlier years the revenue has accepted the income arising from sale of shares, declared by assessee in its books of account as investments, as income from capital gains. As per the copy of account of demat of assessee filed before the lower authorities and now the detailed filed before us, which suggests the analysis of frequency of transactions of purchase and sale of shares resulting in short term capital gains or the long term capital gains, as the case may be. During the year the assessee has earned dividend income to the extent of Rs.13,14,439/- on the holding of these shares. These shares are acquired in earlier years and assessee has enclosed summary of short term capital gain for ready reference of the bench, which is as under:

*“a) That short term capital gain of Rs.1,17,50,159/79 was in 30 scrips out of which Rs.14,95,336/56 was in the 11 shares acquired in the Initial Public issue of the Company and were even not purchased from the market.*

*b) That short term capital gain amounting to Rs.41,85,025/28 in following three shares was out of shares brought forward from last year which have been accepted as investment by the Department*

<i>Birla Corporation Ltd.</i>	<i>Rs. 7,601/-</i>
<i>Birla Ericition Optical Ltd.</i>	<i>Rs. 2,058/-</i>
<i>Gateway Distriparks Ltd.</i>	<i><u>Rs.41,75,366/28</u></i>
	<i>Rs.41,85,025/28”</i>

In the immediate preceding year, these shares were held by assessee as investment and revenue has accepted the same. In the facts of the present case the assessee was holding these shares as investment and the same was shown by the assessee in his books of account as investment in earlier years and this stand of the assessee was accepted by the Department and in that year the department has not disputed that these are investments. If the purchases of shares are accepted as investments, at the time of sale thereof, income arising on sale has to be accepted as capital gains and it cannot be assessed as business income merely for the reason that quantum is high or number of transaction are high. As regards to the principle of consistency, Hon’ble Supreme Court in the case of Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC) has held as under:

*“We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*

*On these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee- we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and*



*contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12 of the Income-tax Act of 1961.*

5. Further, in the similar circumstances, in the sister concern's case of the assessee namely, Shri Surya Kant Dalmia "A" Bench of Kolkata Benches in ITA No. 1140/Kol/2009 for AY 2006-07 vide order dated 21.05.2013, exactly on similar facts has held as under:

*"6. We have considered the rival submissions. At the outset, a perusal of the facts of the present case clearly shows that no borrowed funds had been used by the assessee for the purchase and sale of shares. Further, a perusal of the list of shares as also the details of the short-term capital gains clearly shows that the assessee is not regularly purchasing and selling shares in a systematic manner to be termed as 'business'. Substantial portion of the gains as disclosed by the assessee is admittedly from the sale of shares, which have been purchased from IPOs and public offers. It cannot be said that the assessee is regularly and systematically doing any business of purchase and sale of shares. Further, the fact that for the earlier and subsequent years, the Revenue has accepted the similar transactions in the hands of the assessee being taxed as short-term capital gains also goes in favour of the assessee especially in view of the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang referred to supra. In the above circumstances, we are of the view that the finding of the ld. CIT(Appeals) on this issue is on right footing and does not call for any interference."*

6. We find that this issue is squarely covered from the earlier years in assessee's own case wherein revenue has accepted the transactions from sale of shares and income arising from the transactions as capital gains. Hence, in view of the above facts and circumstances and legal position, we confirm the order of CIT(A). This issue of revenue's appeal is dismissed.

7. Now coming to the same issue of whether income from the share transactions is business income or capital gains, this issue is raised by revenue in ITA No. 1281/Kol/2010 for AY 2007-08 as under:

*"The assessee disclosed a profit of Rs.1,28,02,982/- derived by the assessee from sale and purchase of shares and credited the same in the profit of loss a/c. However in the computation sheet this profit was treated as "Short Term Capital Gain" and tax was calculated as per the prevalent rate applicable under this head. In the order u/s. 143(3) the head of income was changed and treated as business income on the basis of facts and material brought on record during the proceedings and also, inter alia, relying on CBDT circular No. 4 of 2007 and the decision of Authority for Advanced Ruling in 288 ITR 641 on this subject.*

*However the Ld. CIT(A)-XIX, Kolkata vide his order dated 29.04.10 has allowed the appeal on this point.*

*From the said order it appears that the Ld. CIT(A) has erred in both law and fact on the basis of facts and material available on record."*

8. Similarly, revenue has raised this issue in ITA No. 1180/K/2011 for AY 2008-09 as under:

*“That the Ld. CIT(A) erred in directing the AO to treat the profit from share transactions as capital gains instead of business income by failing to take cognizance of the magnitude and frequency of transactions, purchase to sell ratio, dividend to investment ratio and paying off interest on borrowed capital which was utilised for purchasing of shares.”*

9. In both the years, the facts and circumstances are exactly similar to what was in AY 2006-07, hence taking a consistent view, we following the same decision, confirm the order of CIT(A). This common issue of all the three appeals of revenue is dismissed.

10. The next issue in ITA No. 1217/K/2009 for AY 2006-07 is as regards to the order of CIT(A) in treating the interest income as income from business instead of treating the same as income from other sources as treated by the AO. For this revenue has raised following ground no.2:

*“The Ld. CIT(A) , in his order, allowed the appeal of treating the interest income disclosed by the assessee as “Income from Business” which the AO in his order u/s. 143(3) treated as Income from Other Sources. It appears that the Ld. CIT(A) has offered keeping the circumstances of the case in view as well as the materials available on record.”*

11. The AO during the course of assessment proceedings treated the interest income as income from other sources by stating that even though the assessee is disclosing interest under the head income from business, as disclosed by assessee in Schedule 11 of P&L Account under the head income from business or profession, it does not change the character of the income. Aggrieved assessee preferred appeal before CIT(A), who allowed the claim of the assessee vide para 7 of his appellate order as under:

*“7. I have considered the submission of appellant and perused the order framed by the AO. During the relevant previous year, the appellant has earned interest income of Rs.39,97,029/-. He has also paid interest of Rs.8,79,841/-. As per the AO the income earned by way interest is to be taxed u/s. 56 of the Act under the head “Income from other sources”, and not u/s. 28 of the Act as claimed by the appellant. On perusal of Profit & Loss A/c for the year ended on 31.03.2006, it was observed that besides the profit on sale of investment, the main source of income of the appellant was “Interest income”. In the immediately preceding year also i.e. A.Y.2005-06, the interest income was the main receipt of the appellant and he had credited the interest of Rs.50,46,193/- for the said year. For the year ended on 31-03-2005, the appellant had given the Loans and advances of Rs.6,94,84,922/- while as on 31-03-2006, the said amount was Rs . 7,00,43,619/-. During the course of appellate proceedings, the appellant has filed copies of assessment orders for A.Y.2003-04, 2004-05 & 2005-06. The assessments were completed u/s.143(3) of the I.T. Act by the ACIT, Central Circle-XXVIII, Kolkata. In all these years, the interest income was shown by the appellant as taxable u/s.28 of the I.T. Act as business income and accepted by the A.Os in the orders passed u/s.143(3) of the Act. It is seen that the*

assessment orders for A.Yrs. 2003-04, 2004-05 and 2005-06 were passed by the three different Assessing Officers and they had mentioned in the assessment orders that the assessee had earned income under the three heads viz. Income from business profession, Income from capital gain and Income from other sources. In all the years, the interest income earned by the appellant has been taxed u/s.28 of the I.T. Act. Besides the submission on merit, the appellant has relied on the assessment orders passed for the earlier years and it was contended by him that there was no change in the facts of case in the relevant year than the preceding years and hence it was not open to the A.O. to change the head of the income without differentiating the facts or bringing anything fresh on record. The Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT reported in 193 ITR 321 has held that:

*“We are aware of the fact that, strictly speaking res-judicata does not apply to Income Tax proceeding. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee. We do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contrary stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under section 11 and 12 of the Income-tax Act of 1961”.*

The Hon'ble Delhi High Court in the case of Director of Income-tax (Exemption) vs. Escorts Cardiac Diseases Hospital Society reported in 300 ITR 75, following the decision of Supreme Court in 193 ITR 321 (Supra) has held as follows:

*“Learned counsel for the Revenue submits that the principle of res judicata would not apply and that each assessment order has to be considered on its own merits. We are in agreement with this but when there is absolutely no change in facts, mere change of opinion will not entitle the Revenue to pick up and choose the assessment year in which an appeal should be filed. The principle of consistency, which was propounded by the Supreme Court in Radhasoami Satsang vs. CIT [1992] 193 ITR 321 has been followed by this Court in several cases. Since there is no change in the facts and circumstances from assessment year 1988-89 till 1997-1998, we are of the view that the Revenue must follow a consistent pattern and when it has granted the benefit of exemption under sections 10(22A) and 11 of the Act, it cannot be permitted to change its opinion merely on the whims and fancies of the Assessing Officer without any noticeable change in circumstances. Consequently, we are of the view that no substantial question of law arises.”*

(7.1) In the assessment order the A.O. has mentioned as under:

*“The fact that the assessee has been showing the income from interest under the head Income from business does not change the character of income. As per section 56 of the I.T. Act, the income is assessable as income from other sources. The assessee has failed to adduce any substantial evidence or argument in favour of treatment of income from interest under the head income from business.”*

*For the sake of better understanding and clarity it is necessary to reproduce the relevant portion of provisions of section 56 of the I.T. Act.*

*56(1) "Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head income from other sources, if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E"*

*(2) In particular, and without prejudice to the generality of the provisions of subsection (i), the following incomes, shall be chargeable to income-tax under the head income from other sources, namely:-*

*(id) income by way of interest on securities, if the income is not chargeable to income- tax under the head Profits and gains of business or profession."*

*It can be observed that the section 56 of the Act contain provisions about the residuary head, viz, F-income from other sources and it does not come into operation until the preceding heads A,B,C,D and E of section 14 are excluded. Wherein income appropriately fall under section 28 as business income, or any other specific head of income, no resort can be made to section 56 [S.G. Mercantile Corporation P. Ltd. vs. CIT, 83 ITR 700 (SC)]. The words if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E in section 56 refer to income and not a head of income. Section 56, therefore, deals with income which is not included under any of the preceding heads. Whether an income is included under any of the preceding heads would depend on what kind of income it was. Thus, it could be seen from the provisions of section 56 of the Act, that it is not the case that the interest income earned by an assessee is always be taxable u/s.56 of the Act. It could very well be taxed u/s.28 of the Act depending on the facts of the case. In my opinion, on perusal of the financial statements of the appellant for the relevant year as well as for earlier years it could be inferred that the appellant has carried out an organized activity to earn the interest income. The manner and the conduct of the appellant is similar to the activities carried out in the business of the money lending. The appellant has shown substantial amount of turnover in this activity and year after year, the appellant has earned a big amount of interest form such activity. The books of account maintained for the interest earning activities has been audited u/s.44AB of the Act. Moreover, the appellant has correctly relied on the assessments completed by the A.O for the earlier years wherein the interest income was accepted and assessed as business income. In view of above facts and the decisions of Hon'ble Supreme Court and High Court(Supra), it is held that the interest income earned by the appellant is taxable u/s.28 of the Act as Income from business. The ground nos. 6 and 7 are allowed."*

Aggrieved, revenue came in second appeal before tribunal.

12. We have heard rival submissions and gone through facts and circumstances of the case. We find that assessee is disclosing this interest income consistently as business income and assessment also completed u/s 143(3) of the Act accepting interest income as business income by the revenue for the AYs 2003-04, 2004-05 and 2005-06. Similar issue came in appeal before this ITAT in assessee's sister concern Shri Surya Kant Dalmia in ITA No.1216/K/2009 for AY 2006-07, wherein it is held as under:

*“9. We have considered the rival submissions. A perusal of the order of ld. CIT(Appeals) clearly shows that the ld. CIT(Appeals) has decided this issue on the basis of the stand taken by the Revenue in the earlier years. No reason has been shown by the Revenue or changing its stand for the year under appeal. It is also noticed that ld. CIT(Appeals) has applied the ratio on the decision of the Hon’ble Supreme Court in the case of Radhasoami Satsang referred to supra to hold that interest income is liable to be assessed only as business income for the relevant assessment year. In these circumstances, we are of the view that the finding of ld. CIT(Appeals) on this issue is on right footing and does not call for any interference.”*

In these facts and circumstances, we are of the considered view that the CIT(A) has rightly treated the interest income as business income and we confirm the same. This issue of revenue’s appeal is dismissed.

13. The next common issue in ITA No. 1139/K/2009 for AY 2006-07 and in ITA No.1246/K/2010 for AY 2007-08 is as regards to the order of CIT(A) confirming the disallowance made by AO regarding the expenses incurred for earning exempt income invoking the provisions of section 14A of the Act read with Rule 8D of I. T. Rules, 1962 (hereinafter referred to as the ‘Rules’). For this, assessee has raised following ground in ITA No. 1246/K/2010 for AY 2007-08:

*“For that on the facts and in the circumstances of the case the Ld. CIT(A)-XIX, Kolkata erred in confirming the disallowance of Rs.5,76,407 made by the Assessing Officer u/s. 14A of the I. T. Act, 1961 read with Rule 8D of the I. T. Rules.”*

Similar are the grounds in AY 2006-07 and facts are exactly identical.

14. We will take the issue from AY 2007-08. Briefly stated facts are that the assessee has earned exempted income i.e. dividend income of Rs.6,68,122/- and interest on PPF at Rs.3,04,877/-. The assessee claimed both the incomes as exempt. The AO noticed during the course of assessment proceedings that it has claimed expenditure qua this exempted income, hence applying the provisions of section 14A read with Rule 8D made a disallowance to the extent of Rs.5,76,407/-. Aggrieved assessee preferred appeal before CIT(A), who following the decision of Special Bench of ITAT, Mumbai in the case of Daga Capital Management Pvt. Ltd. in ITA No. 8057/Mum/2003 confirmed the addition. Aggrieved, now assessee is in appeal before us for both the years.

15. We find that this issue is squarely covered in favour of assessee and against revenue for both the years. We find that the relevant assessment year involved is 2006-07 and 2007-08 and Hon’ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT [2010]



328 ITR 81 (Bom.), wherein it is held that Rule 8D of the Rules as inserted by the I. T (Fifth Amendment) Rules, 2008 w.e.f. 24.3.2008 is prospective and not retrospective. The CIT(A) restricted the disallowance at 1% of the exempted income u/s. 14A of the Act by observing as under:

*“I find that the decision of Daga Capital has been reversed by Hon’ble Bombay High Court in their above mentioned order dtd. 12.08.2010. In this order Hon’ble Court has held that Rule 8D shall be applicable from assessment year 2008-09 onwards. Here, since the assessment year involved is 2007-08 therefore I hold that Rule 8D will not apply. However, in certain recent decisions Hon’ble ITAT Kolkata has held that out of the administrative expenses, expenses to the tune of 1% of the exempt income can be disallowed u/s. 14A. Following these decisions I hold that an amount of Rs.7,857/- shall be disallowable u/s. 14A.”*

The exempted income is to the extent of Rs.9,72,999/- in AY 2007-08 and Rs.15,90,683/- in AY 2006-07. We direct the AO to restrict the disallowance at 1% of the exempted income. This issue of assessee’s appeals is partly allowed as directed above.

16. The next common issue in ITA No. 1180/K/2011 of revenue and CO No. 7/Kol/2012 of assessee for AY 2008-09 is as regards to the order of CIT(A) restricting the disallowance made by AO by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules. For this, revenue has raised following ground No. 2:

*“That the Ld. CIT(A) erred in allowing relief of Rs.55,47,700/- u/s. 14A of the I. T. Act by not directing the AO to bifurcate and to consider the interest borrowed for the purposes of computing expenditure for earning of exempted income.”*

And assessee has raised following grounds:

*“1. For that the CIT(A) erred in confirming the disallowance of interest amounting to Rs.2,58,282/-. The CIT(A) failed to appreciate the fact that the appellant has advanced substantial amount as loans and advances in respect of which it derived substantial amount of interest income which was chargeable to tax and no disallowance of interest could be made under section 14A of the Act.*

*2. For that the CIT(A) erred in confirming disallowance of Rs.434745/- under Rule 8D(2)(iii) of the Income Tax Rules read with section 14A of the Act. The CIT(A) failed to appreciate the fact that the said disallowance was made on a percentage basis with reference to the value of investment held by the appellant and was not with relation to any expenditure incurred directly or indirectly in relation to earning of any income.*

*3. For that the CIT(A) failed to appreciate the fact that disallowance under section 14A of the Act can only be made of expenditure incurred by an assessee in relation to the income which does not form part of the total income under the Act and the disallowance as made in accordance with Rule 8D(2)(iii) of the Income Tax Rules is beyond and in excess of the provisions of Section 14A of the Act and as such is liable to be deleted.”*

17. Briefly stated facts are that the assessee claimed exempted income at Rs.32,41,335/-, from the following sources:

A.	Dividend	-	Rs.28,10,418/-
B.	Interest on PPF	-	Rs. 3,34,867/-
C.	Tax Free Bond	-	Rs. 96,050/-“

The AO noticed that the assessee has suo motu disallowed a sum of Rs.32,452/-, expenditure in relation to exempted income. The AO was of the view that in view of the provisions of section 14A of the Act relates to disallowance of expenditure incurred in relation to income not includible in total income are attracted in the assessee's case as a result of exempted income. He computed disallowance by invoking Rule 8D of the Rules. The first disallowance was made under Rule 8D(2) i.e. the expenditure directly related to exempted income at Rs.1,721/-. The second disallowance under Rule 8D(2)(ii) of the Rules at Rs.55,47,700/- i.e. interest expenditure. The third disallowance being average value of investment under Rule 8D(2)(iii) of the Rules at Rs.4,34,745/-. Thereby the aggregate disallowance was at Rs.55,84,166/-. Aggrieved, assessee preferred appeal before CIT(A), who restricted the disallowance at Rs.6,94,748/- by observing in para 4.3 as under:

*“(4.3) Thus, under Rule 8D(2)(i), any expenditure including interest, directly relating to the exempted income has to be disallowed. In the case of appellant, the A.O. has computed disallowance under Rule 8D(2)(i) at Rs.1,721/-. During the appellate proceedings it was submitted by the appellant that the disallowance made by the A.O. is without any basis and is arbitrary. However, I am not inclined to agree with the submission of the appellant, because he has not given any reason as to why disallowance of Rs.1,721/- computed by the A.O. was without basis. In view of above, I am of the opinion that the A.O. has rightly computed disallowance of Rs.1,721/- under rule 8D(2)(i) of the I. T. Rules. The A.O. has further computed the disallowance under Rule 8D(2)(ii) at Rs.55,47,700/-. As per the Profit & Loss Account, the total amount of interest payment was Rs.97,22,656/-. The average value of the investment was arrived by the A.O. at Rs.8,69,49,056/- and the average of total assets was calculated at Rs.15,23,83,094/-. By applying the formula as per Rule 8D(2)(ii), the A.O. has computed the disallowance at Rs.55,47,700/-. From the working of disallowance under rule 8D(2)(ii), it is observed that the A.O. has considered entire amount of interest payment of Rs.97,22,656/- being the amount of interest not attributable to any particular income. However, on the other hand, it was contended by the appellant that out of the total interest payment of Rs.97,22,656/-, the interest aggregating to Rs.92,69,529/- which was paid to Birla Global Finance Co. Ltd., DSP Merrill Lynch Capital Ltd. and J.M. Financial Products Pvt. Ltd. relates to loans taken for making application in IPOs and the shares of these IPOs were taken in his stock-in-trade. The part of the shares which were allotted in this IPOs were sold during the year under appeal and profit of Rs.87,42,284/- was earned by the appellant. The balance shares were carried forward to the Balance Sheet as stock-in-trade. In other words, the contention of the appellant was that the payment of interest amounting to Rs.92,69,529/- has direct nexus and is directly attributable to a particular income, i.e., business income. On careful consideration of the facts and in law, I find force in the submission of the appellant. On perusal of assessment records, it is observed that the appellant has filed a letter dt. 13/12/2010 before the A.O. wherein he submitted a*

*statement showing utilization of borrowed funds to substantiate his claim that funds were utilized in applying the shares in IPO which were in trading portfolio and part of them were sold during the year attracting tax at normal rate. The copy of said letter and the statement were also filed during the course of appellate proceedings. It is observed that the appellant had applied for shares of Jyothy Laboratories Ltd. in IPO and 8115 shares were allotted to him. After allotment, 4115 shares were sold by the appellant and 4000 shares were taken in stock-in-trade. The appellant earned profit of Rs.8,68,709/- as business profit. In the IPO of Mundra Port & Sez Ltd., 3727 shares were allotted out of which 2140 shares were sold leaving stock-in-trade of 1587 shares. The business profit earned by the appellant was Rs.11,00,953/-. In the case of Omaxe Ltd., 12562 shares were allotted and the entire shares were sold by the appellant. The profit earned was Rs.2,52,668/-. Similarly, 178191 shares of Power Grid India Corpn. Ltd. were issued out of which 103191 shares were sold by the appellant. The balance shares were taken in stock-in-trade. The business profit on these transactions was Rs.65,20,154/-. In the case of Reliance Power Ltd., 16358 shares were allotted to the appellant which were taken in stock-in-trade. In this manner, the appellant has earned business profit aggregating to Rs.87,42,484/- during the year under appeal. It is observed that for the purpose of making applications in the aforesaid IPOs, the appellant had taken loan from J.M. Financial Products Ltd., DSP Merrill Lynch Capital Ltd. and Birla Global Finance Co. Ltd. and interest was paid to them. From the details submitted by the appellant at the time of assessment proceedings as well as during appellate proceedings, it is apparent that the payment of interest aggregating to Rs.92,69,529/- to the above-mentioned three financial institutions is directly attributed to the appellant's business income. The provisions of Rule 8D(2)(ii) are very clear that the expenditure on account of payment of interest would be covered in the said Rule only if it is not directly attributable to any particular income or receipt. In the case of appellant, he is able to demonstrate that the payment of interest amounting to Rs.92,69,529/- is directly attributable to appellant's business income and hence same cannot be considered under Rule 8D(2)(ii) of the I.T. Rules. In view of above, the A.O. is directed to recompute the disallowance under Rule 8D(2)(ii) on the interest amounting to Rs.4,53,127/- i.e. (Rs.97,22,656—Rs.92,69,529). The disallowance under Rule 8D(2)(ii) would be worked out at Rs.2,58,282/-. The A.O. is directed to restrict the disallowance under Rule 8D(2)(ii) at Rs.2,58,282/-. Further, under Rule 8D(2)(iii), the A.O. has computed the disallowance at Rs.4,34,745/-. The appellant has contended that the A.O. was not justified in making the aforesaid disallowance because the disallowance under Rule 8D(2)(iii) is in the nature of cess/levy. However, I am not inclined to agree with the submission of the appellant and the A.O. has correctly computed the disallowance under Rule 8D(2)(iii) at Rs.4,34,745/-. The action of the A.O. in computing the aforesaid disallowance is upheld. In nut shell, the total disallowance u/s. 14A read with Rule 8D works out to Rs.6,94,748/-, i.e. (Rs.1,721 + Rs.2,58,282 + Rs.4,34,745). The A.O. is directed to restrict the disallowance u/s. 14A at Rs.6,94,748/-. The ground no. 1 is partly allowed.”*

Aggrieved, against restriction of addition at Rs. 6,94,748/-, revenue came in appeal before us and assessee filed cross objection.

18. We have heard rival contentions and gone through facts and circumstances of the case. First the issue of revenue's appeal is that the CIT(A) has wrongly deleted the disallowance made by AO under Rule 8D(2)(ii) of the Rules at Rs.55,47,700/-. Here the assessee before the lower authorities and even before us explained that out of the total interest payment of Rs.97,22,656/-, the interest aggregating to Rs. 92,69,529/- was paid to Brila Global Finance Co.

Ltd., DSP Merrill Lynch Capital Ltd. and J.M. Financial Products Pvt. Ltd. is relating to loans taken for IPOs shares, which were business transaction and taken in stocks. To prove this point the assessee explained that the shares which were allotted in these IPOs were sold during the year under appeal and profit arising out of the same at Rs.87,42,284/- was disclosed as business profit. The balance shares were carried forward to the Balance Sheet as stock-in-trade. We are in full agreement with the findings of CIT(A) that the payment of interest amounting to Rs.92,69,529/- has a direct nexus with business income and once this is the position, the CIT(A) has rightly deleted the addition. The CIT(A) has also consulted assessment records and found that assessee has submitted a statement showing utilisation of borrowed funds to substantiate his claim that funds were utilised for applying new shares in IPOs which were kept in trading portfolio and part of those were sold and earned profit, which was taxed at normal rates. Accordingly, we are of the view that the CIT(A) has rightly deleted the disallowance and we confirm the same. This issue of revenue's appeal is dismissed.

19. The issue raised in assessee's Cross Objection against confirmation of disallowance by CIT(A), as disallowed by AO by invoking rule 8D(2)(i), 8D(2)(ii) and 8D(2)(iii) of the Rules. Ld. Counsel for the assessee before us contended that this issue needs to be set aside as the AO or the CIT(A) could not go into the documents filed before them as is evident from orders. The assessee has established nexus of this expenditure with that of taxable income. This needs re-examination at the level of the AO. The Ld. Sr. DR has not objected to setting aside of this issue. Hence, we set aside this issue to the file of the AO for fresh adjudication. This ground of appeal of assessee is allowed for statistical purposes.

20. In the result, Appeals of revenue are dismissed and that of assessee is partly allowed and Cross Objection of assessee is allowed for statistical purposes.

21. Order is pronounced in the open court on 27.01.2014.

**Sd/-**  
**आब्राहाम पि. जर्ज**, लेखा सदस्य  
(Abraham P. George)  
Accountant Member

**Sd/-**  
**महावीर सिंह**, न्यायीक सदस्य  
(Mahavir Singh)  
Judicial Member

Dated : 27th January, 2013

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषित:- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – ITO, Ward-31(4), Kolkata./ACIT, Circle-31,  
Kolkata
2. प्रत्यर्थी/ Respondent – Shri Narain Prasad Dalmia2/3, Sarat Bose Road,  
Kolkata-700 020.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागीय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.