

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", KOLKATA  
[Before Hon'ble Shri M.Balaganesh, AM & Shri S.S.Viswanethra Ravi, JM]

ITA Nos.2799 & 2800/Kol/2013  
Assessment Years : 2006-07 & 2009-10

I.T.O., Ward-31(3),  
Kolkata

-versus-

Dilip B.Desai, HUF  
Kolkata  
(PAN:AABHD 7897 K)

(APPELLANT )

(RESPONDENT)

For the Appellant : Shri Nicholas Murmu, JCIT, Sr.DR  
For the Respondent : Shri Vijay Shah, FCA

Date of Hearing : 20.12.2016.

Date of Pronouncement : 27.01.2017.

**ORDER**

**Per Shri M.Balaganesh, AM**

These appeals of the revenue arise out of the orders of the Learned CIT(A)-XIX, Kolkata in Appeal Nos. 261 & 262/CIT(A)-XIX/ITO,Wd-31(3),Kol/11-12 dated 09.09.2013 for the Asst Years 2006-07 and 2009-10 respectively passed against the orders of assessment framed by the Learned AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. There is a delay of about 13 days in filing appeals by the revenue. The same has been explained in an affidavit filed before us. After considering the reasons given in the affidavit, we are satisfied that the delay in filing the appeals was due to reasonable and sufficient cause. Accordingly the delay in filing the appeals is condoned.

3. The only issue to be decided in these appeals of the revenue is as to whether the Id CITA is justified in treating the assessee as an investor of shares as against trader of shares treated by the Id AO in the facts and circumstances of the case.

4. The facts for the Asst Year 2006-07 are adjudicated herein and the decision rendered thereon would apply with equal force for Asst Year 2009-10 also as the facts

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are identical thereon except with variance in figures and number of scrips handled by the assessee.

5. The brief facts of this issue is that the assessee filed its return of income for Asst Year 2006-07 on 31.7.2006 declaring total income of Rs. 1,22,46,624/- and assessment was completed u/s 143(3) of the Act assessing the total income at Rs. 1,22,46,620/- by the Id AO. Later the Id CIT vide his order u/s 263 of the Act dated 25.3.2011 set aside the assessment framed by the Id AO with some directions. Accordingly, the Id AO pursuant to the Id CIT's order /s 263 of the Act framed the assessment u/s 143(3) / 263 of the Act on 22.12.2011. In the said assessment, the Id AO treated the short capital gains reported by the assessee as business income treating the assessee as a trader in shares. During the course of assessment proceedings, the assessee was directed by the Id AO to furnish the complete details of STCG with period of holdings of shares in days and other details to examine the genuineness of the nature of transactions. The Id AO observed that the same were duly filed by the assessee and were subjected to due examination. The Id AO observed that the assessee had reported short term capital gains (STCG) of Rs 1,21,54,384/- in the return of income and long term capital gains (LTCG) of Rs. 1,06,86,185/- and claimed exemption u/s 10(38) of the Act for Rs. 1,06,86,185/- in the return of income. The assessee derived dividend income of Rs. 2,33,98,095/- out of investments made in various shares and mutual funds. The main crux of the Id AO's observation of treating the assessee as a trader in shares as against the status of investor claimed by the assessee was that the assessee had dealt with more number of scrips and hence frequency of transactions were more which goes to prove that it had only dealt with trading in shares. Apart from this, he concluded that the holding period of shares were less than 4 months and hence the assessee never had any intention to stay on with the investment in shares and mutual funds with an intention to earn dividend income and was only interested in making short term business gains. He placed reliance on the CBDT Circular No. 4 of 2007 dated 15.6.2007 in this regard. The Id AO observed that the assessee had transacted in 44 numbers of companies which is substantially high from investors point of view. Similarly he observed that the assessee had

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transacted in 9 numbers of mutual fund schemes which is also again very high and does not give the impression of being an investor. The Id AO also observed that the assessee had earned total income amounting to Rs. 3,90,35,034/- out of which profit on sale of investment is Rs. 1,54,32,610/- and dividend income is RS. 2,33,98,095/- , thereby resulting more than 99.47% of the income from dividend and dealing in shares and securities and mutual funds. According to him, this clearly showed that the assessee's main activity is dealing in shares only and just to have benefit of lower taxation, he had intelligently shown the income under the head 'income from capital gains'. The Id AO also observed that the transactions are carried out regularly, quantities purchased and sold are very large and the assessee has contact, access to information and necessary qualification and competence to carry out the business of dealing in shares , securities and units of mutual funds. With regard to the arguments of the assessee that the transactions of these shares and mutual funds have been consistently been shown in the books of accounts under the head 'investments', the Id AO observed that the treatment in the books by 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 and not capital gain. He concluded by stating that the assessee has been doing this activity of shares and mutual funds continuously for years and the volume clearly reflects that he is trading in shares and securities and in no way be called as investor in shares and securities. The mere object is not to earn dividend income but to earn income by utilizing his expert knowledge of share market and then to earn profit. A normal man would not be doing frequently, such volumes without having expertise knowledge. Based on these observations, the Id AO concluded that the activity of investment in shares and mutual funds to be a trading activity and hence the resultant gain thereon would be taxable as business income of the assessee as against the claim of short term capital gains by the assessee. However, in respect of claim of exemption of Rs. 1,06,86,185/- u/s 10(38) of the Act towards LTCG, the Id AO accepted the claim of the assessee in the assessment.

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6. Before the Id CITA, the assessee reiterated the submissions made before the lower authorities and brought to the attention of the Id CITA, the factual error committed by the Id AO with regard to the holding period of shares. The assessee submitted that the holding period of shares was wrongly stated by the Id AO to be maximum in the range of 76 – 110 days, whereas factually the substantial volume of shares were held for the period 111 to 356 days which details were also very much available before the Id AO which was ignored by the Id AO. It was also stated that in majority of cases, the period of holding was substantially high and assessee had earned substantial amounts in the form of dividend to the tune of Rs. 2.33 crores. This goes to prove that the assessee had waited for the declaration of dividend before selling of the shares which a normal business trader would not do. The Id CITA observed that the treatment given in the books consistently over the years were under the head 'investments'. The Id CITA by placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs H Holck Larsen reported in (1986) 160 ITR 67 (SC) and Rajputana Textiles (Agencies) Ltd vs CIT reported in (1961) 41 ITR 743 (SC) accepted the contentions of the assessee and treated the assessee as an investor of shares. Aggrieved, the revenue is in appeal before us on the following grounds :-

*Ground NO.1:*

*"That. on the facts and in the circumstances of the case, and in law, the Ld, CIT (A) erred in directing to compute the income of the appellant under the head Income from Capital Gains instead of Business Income as determined by the Assessing Officer"*

*Ground. NO.2:*

*"That. on the facts and in the circumstances of the case, the Ld, CIT(A) erred in overlooking CBDT Instruction No.4/2007 dated 15.06.2007, ignoring various decisions of higher courts and also ignoring the frequency of trade, limited holding period and huge volume of transactions undertaken by the assessee"*

*Ground No.3:*

*"That. the appellant craves leave to submit additional grounds of appeal, if any, at or before the time of hearing and /or alter, modify, reframe any grounds of appeal at or before the time of hearing. "*

7. The Id DR reiterated the findings of the Id AO. In response to this, the Id AR argued the following :-

(a) The shares and mutual funds invested by the assessee were shown under the head 'Investments' in the books of accounts of the assessee regularly over the years. This has not been disputed by the revenue in the earlier years.

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(b) From the perusal of the balance sheets of earlier years and during the year under review, it could be seen that the assessee never had any borrowings.

(c) The assessee does not have any stock in trade with respect to securities and mutual funds in its books.

(d) The Id AO had accepted the exemption u/s 10(38) for long term capital gains claimed by the assessee and hence to that extent, he accepts to the fact that the assessee is an investor. But his finding in the assessment order go to prove that the assessee had only fully dealt with the shares and mutual funds only as a trader and not as an investor at all.

(e) Assessments for the Asst Years 2004-05 and 2005-06 were completed u/s 143(3) of the Act vide orders dated 27.12.2006 and 31.12.2007 respectively wherein the assessee's stand and status as an investor in shares together with the offer of capital gains has been accepted by the revenue.

(f) He argued that there was no any strange negative development that had happened in the years under appeal which would probably lead the Id AO to arrive at a conclusion that assessee had shifted from investor to a trader. Hence going by the principle of consistency, he stated that the assessee should be treated only as an investor in the years under appeal also.

(g) He fairly stated that the assessments for the Asst Years 2007-08 and 2008-09 were completed u/s 143(1) of the Act ,wherein the assessee's stand as investor and resultant capital gains were accepted by the revenue.

(h) He argued that the assessee had received dividend on shares and mutual funds to the tune of Rs. 2,33,98,095/- which is very substantial , which itself goes to prove that the assessee had invested in the shares and mutual funds with an intention to earn dividend income and not for the purpose of trading. He also drew the attention of the bench to the details of dividend received from each of the scrips and mutual funds by pointing to the relevant page of the paper book filed by the assessee.

He brought the attention of the bench to the factual error committed by the Id AO in wrongly mentioning the period of holding to 110 days as the maximum period of holding when factually large volumes of shares were held for as long as 356 days

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which is quite evident from the details of short term capital gains together with the holding period in days submitted before the Id AO. He argued that the Hon'ble Calcutta High Court in the case of CIT vs Merlin Holding P Ltd reported in (2015) 375 ITR 118 (Cal) for the Asst Years 2005-06 and 2006-07 had held that short term capital gains means shares held and sold within a period of 1 to 365 days. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs Gopal Purohit reported in (2011) 336 ITr 287 (Bom) in support of his arguments apart from relying on the co-ordinate bench decision of this tribunal in the case of ITO vs Lyons & Roses Pvt Ltd in ITA Nos. 1148 & 1437/Kol/2009 for Asst Years 2005-06 & 2006-07 dated 20.1.2016 in support of his arguments.

8. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee comprising of computation of total income and tax thereon (pages 1 to 3 of PB) ; statement of accounts as on 31.3.2006 along with relevant schedules (Pages 4 to 7 of PB) ; Order u/s 143(3) of the Act dated 6.11.2008 for AY 2006-07 (Pages 8 to 9 of PB) ; Order u/s 263 of the Act dated 25.3.2011 for AY 2006-07 (Pages 10 to 14 of PB) ; Relevant Extracts of Reply dated 19.1.2011 filed during proceedings u/s 263 of the act along with relevant annexures (Pages 15 to 19 of PB) and Relevant Extracts of Reply dated 24.1.2011 filed during proceedings u/s 263 of the Act (Pages 20 to 23 of PB). Apart from this, we have also gone through the Scrutiny assessment order u/s 143(3) of the Act together with computation of total income and Statement of Accounts of the assessee with schedules for the Asst Years 2004-05 and 2005-06. We find that all the arguments of the Id AR find lot of force in the facts of the instant case. We find that the shares before the date of its sale were held for a period ranging from 13 days to 356 days and to this extent the factual inaccuracy on the part of the Id AO on the holding period of shares is not appreciated. We find that the Id AO had treated the assessee as an investor to the extent of long term capital gains declared by the assessee and claim of exemption u/s 10(38) has also been granted by the assessee. It is never the case of the Id AO that the assessee was engaged in dual portfolio i.e one held for trading and other held for investments. According to the Id AO, the assessee was only trading in shares for

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which he had arrived at various justifications such as – *assessee has been doing this activity of shares and mutual funds continuously for years and the volume clearly reflects that he is trading in shares and securities and in no way be called as investor in shares and securities. The mere object is not to earn dividend income but to earn income by utilizing his expert knowledge of share market and then to earn profit. A normal man would not be doing frequently, such volumes without having expertise knowledge.* Hence it could be safely concluded that the Id AO never indicated that the assessee was having dual portfolio of shares and mutual funds.

8.1. We find that the Id AO having accepted the claim of exemption u/s 10(38) of the Act for long term capital gains of the assessee had conceded the claim of assessee to be an investor and the Id AO cannot take a different stand by treating the assessee as a trader in respect of short term capital gains alone.

8.2. We find that the assessee had earned dividend income to the tune of Rs. 2,33,98,095/- which is very substantial indicating the assessee's intention to always remain as an investor and not to exit the scrip with a short term profit motive.

8.3. We also find that the assessee had been consistently showing the amount invested in shares and mutual funds under the head 'investments' in its books of accounts and there are no borrowings in the balance sheet filed by the assessee for the earlier years. These facts are not controverted by the revenue before us. We find that the revenue had already accepted the assessee to be an investor in the earlier years even in the scrutiny assessments framed u/s 143(3) of the Act for the Asst Years 2004-05 and 2005-06. Though the principle of resjudicata is not applicable in income tax proceedings, the principle of consistency cannot be given a go-by in the absence of any changed circumstances. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Radhasaomi Satsang reported in 193 ITR 321 (SC). We find that the reliance placed on the various decisions by the Id AR are very well founded. For the sake of brevity, we would like to confine our discussions only on the order of co-ordinate bench of this tribunal which had dealt the other decisions

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also relied upon by the Id AR, wherein one of the member was also a party to that order, it was held that :-

*“5.3 We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee containing the scrutiny assessment orders of the assessee for the Asst years 2002-03, 2004-05, 2008-09 & 2010-11 ; statement of total income for the Asst Year 2010-11 ; audited financial statements for the years ended 31.3.2004 & 31.3.2005 ; details of profit on sale of investments ; details of investments and stock in trade for five years and compilation of various case laws on the impugned issue. We find that the assessee is engaged in investment activity and business activity for years together. We also find that the co-ordinate bench decision of this tribunal for the Asst Year 1992-93 in assessee's own case in ITA No. 2943/Cal/1996 dated 28.9.2001 had accepted the plea of the assessee that the gains arising out of investment activities of the assessee had to be assessed only as capital gains and not business income. It is also not in dispute that the revenue has been accepting the dual portfolio maintained by the assessee for years together which is quite evident from the scrutiny assessment orders passed by the Learned AO for the Asst Years 2002-03, 2004-05, 2008-09 and 2010-11, wherein the stand of the assessee reporting both capital gains and business income arising out of purchase and sale of shares have been accepted. Hence we find lot of force in the decision of the Hon'ble Apex Court relied on by the Learned AR in the case of Radhasoami Satsang (supra) on the principle of consistency. We are also in agreement with the arguments of the Learned AR that just because the assessee had made profits out of its investment activities, the same cannot be concluded that the assessee had carried on with an intention to do business. For that matter, every assessee would only try to make profits out of their activities be it investment or business. What is to be seen is whether the assessee intended to make only profits from dealing in shares or whether the shares were purchased with a view to earn dividend income which is also profit. The gains arising in the former case would be in the nature of trade and hence business income and the latter would be for the purpose of investment and hence resultant gain would be capital gains. In the instant case, the assessee had reported both dividend income and offered short term and long term capital gains on the investment activities and business income for trading activities.*

**5.3.1 Whether introduction of concessional rate of tax on short term capital gains and exemption of long term capital gains pursuant to introduction of securities transaction tax (STT) would change the character of the transaction**

*We find that the entire gamut of transactions are to be viewed in the context of dominant intention of the assessee whether to hold a particular scrip in investment portfolio or in trading portfolio. We find that the levy of securities transaction tax has been introduced in the statute with effect from 1<sup>st</sup> October 2004 relevant to Asst Year 2005-06, wherein if a sale of shares transaction is routed through a recognized stock exchange and securities transaction tax is suffered by the assessee, then the long term capital gains arising on such sale would be exempt u/s 10(38) of the Act. Similarly with effect from 1.4.2005, the short term capital gains, if subjected to levy of securities transaction tax, would be liable for concessional rate of tax as against the normal rate of tax @ 30%. We also find that the Learned AO had not brought any evidence on record that the assessee was trying to shift any of its trading assets from the trading portfolio of shares & units to the investment portfolio to take advantage of*

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*lower tax rates under the head capital gains and vice versa wherever losses were incurred on sale of investments. It is not in dispute that the assessee had not converted any of the shares under investment category into stock in trade.*

*5.3.1.1 As stated supra we find that certain shares under investment portfolio were held by the assessee from the year 1995 onwards. Just because if during the mid of the relevant financial year, certain tax benefits have been given in respect of capital gains, that cannot, in any way, lead to an assumption or presumption that the intention of the assessee at the time of purchase of shares was that of a trader and not of an investor. The treatment of the investment in the books of accounts of the assessee is also a relevant guiding factor. The issue of treatment of income from share transaction as short term capital gains or business income has in fact arisen after the amendment brought with Finance Act 2004 with effect from 1.10.2004. It is an admitted fact on record that prior to amendment when the tax on short term capital gains was at par with business income, the department has been consistently accepting the treatment of income by the assessee as capital gains. Merely because the rate of tax has been reduced in respect of short term capital gains and long term capital gains have been made exempt during the year by way of an amendment to the provisions, that itself, cannot be a ground for the Learned AO to depart from its consistent stand of treating the assessee as an investor and thereby to charge the income earned by the assessee from share transactions as business income. From the records, it is found that at the time of purchase and sales even during the period prior to 1.10.2004, the assessee was not guided or influenced by lower tax rate in case of short term capital gains as the rate for business income and short term capital gains was at par. The assessee, however, was treating himself as an investor and keeping the delivery based shares as investments in his account irrespective of the probable tax implication as there were no such tax implications as discussed above. Thus, the intention of the assessee, while purchasing the share, is the important and guiding factor as to whether the same was purchased with an intention of investment or trading.*

### 5.3.2 Dual portfolio - whether permitted

*We also find that nothing prohibits an assessee from holding dual portfolios i.e. (1) shares/units held for investment and (2) shares/units held for trading purposes. It is not in dispute that in the instant case, the assessee had maintained dual portfolios in its books of accounts and had reported capital gains and business income separately as per the consistent practice followed by the assessee over the years and accepted by the revenue in the earlier years. It is well settled that it is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment or stock in trade, then onus would shift to revenue to prove that apparent is not real. In the instant case, we find from the details in the paper book that the assessee had duly discharged its primary onus of demarcating the scripts held for investment and for trading and the resultant gains derived therefrom. Even the [CBDT Circular No. 4 of 2007 dated 15.6.2007](#) envisages the practice of assessee's maintaining dual portfolios. We also find that the decision was rendered by the Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit [\[2011\] 336 ITR 287/\[2010\] 188 Taxman 140](#) wherein the assessee had maintained dual portfolios and ultimately the court held that the resultant gains from investment activity would be*

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*assessable as capital gains and not business income. We also find that the valuation of investments has been done by the assessee at cost as could be evident from the accounting policies forming part of the audited financial statements.*

**5.3.2.1** *We also find that the CBDT in its [Instruction No. 1827 dated 31.8.1989](#) has laid down certain criteria to determine whether an activity of purchase and sale of shares is in the nature of trading activity or investment activity. One of the criteria laid down is the treatment given in the books is indicative of assessee's intention whether to hold the shares with a view to earn dividend and long term appreciation or with a view to carrying on as business.*

### **5.3.3 Intention of the assessee**

*We find the intention of the assessee to maintain two independent portfolios i.e. one for investment purposes and one for trading purposes from the very beginning is quite evident from the books of accounts wherein assessee had separate entries in its ledger accounts at the time of each transaction i.e. at the time of purchase itself. This practice has not been found fault by the revenue in the earlier assessment years even in scrutiny proceedings. The Hon'ble Madras High Court in the case of CIT v. S. Rammaamirthan [\[2008\] 217 CTR 206](#) while distinguishing trading and investment, observed that the intention of the assessee is relevant to determine whether an assessee is carrying on the business in shares or investments. The initial intention of the assessee in the instant case is proved beyond doubt from the manner of maintaining two separate portfolios i.e. (1) for investment purposes and (2) for trading purposes. The Learned AR argued that in respect of shares retained under 'investment category' the assessee had taken due delivery of shares on its purchase and given due delivery of shares on its sale. The Learned AR further informed that the assessee had also kept separate records to record the transactions of each category i.e delivery based and non- delivery based. It is settled law that a particular income is from business or from investment must be decided according to the general common sense view of those who deal with those matters in the particular circumstances. The most excruciating factor to be looked into at this juncture is the conduct of the assessee.*

### **5.3.4 Frequency of transactions**

*The next point to be addressed in this issue is whether the frequency of transactions would alone indicate the trading activity. In this regard, we find the co-ordinate bench of Mumbai Tribunal had an occasion to consider the same in the case of Janak S. Rangwalla v. Asstt. CIT [\[2007\] 11 SOT 627 \(Mum\)](#), wherein it was held that:*

*"It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transactions of sale and purchase of shares in the preceding years have been held to be income from capital gains both on long term and short term basis. The transaction in the year under consideration on account of sale and purchase of shares is same as in the preceding years and the same merits to be accepted as short term capital gains. There is no basis for treating the assessee as a trader in shares, when his intention to hold the shares in Indian companies as an investment and not as stock in trade. The mere magnitude of the transaction does not change the nature of transaction, which are being assessed as income from*

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*capital gains in the past several years. The Assessing officer is directed to set off the Long Term Capital Loss against the Short Term Capital Gain of the year under consideration. The grounds of appeal raised by the assessee are allowed."*

**5.3.4.1** We also find that the Hon'ble Calcutta High Court in the case of *CIT v. Merlin Holding (P.) Ltd.* [\[2015\] 375 ITR 118/\[2016\] 65 taxmann.com 37](#) for the Asst Years 2005- 06 and 2006-07 had held as below:—

*"The frequency of transactions in shares alone cannot show that the intention of the investor was not to make an investment. The Legislature has not made any distinction on the basis-of frequency of transactions. The benefit of short -term capital gains can be availed of for any period of retention of shares up to 12 months. Although a ceiling has been provided, there is no indication as regards the floor, which can be as little as one day. The question essentially is a question of fact.*

*The assessee was a certified non-banking financial concern. Its main activities were giving loans and taking loans and-investing in shares and securities. The Assessing Officer, for the assessment years 2005-06 and 2006-07, opined that the activity which, according to the assessee, was on investment account amounted to business activity and, therefore, he treated the short-term capital gains of Rs. 1,01,00,000 as business income. The Commissioner (Appeals) held that the refusal on the part of the Assessing Officer to accept the short-term capital gains was incorrect. This was confirmed by the Tribunal. On appeal :*

*Held, dismissing the appeal, that the assessee had adduced proof to show that some transactions were intended to be business transactions, some transactions were intended to be by way of investment and some transactions were by way of speculation. The Revenue had not been able to find fault from the evidence adduced. The mere fact that there were 1,000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the managing director of the assessee was also a managing director of a firm of share brokers could not have any decisive value. The Commissioner (Appeals) and the Tribunal had concurrently held against the views of the Assessing Officer. On the basis of the submissions made on behalf of the Revenue, it was not possible to say that the view entertained by the Commissioner (Appeals) or the Tribunal was not a possible view. Therefore, the decision of the Tribunal could not be said to be perverse. No fruitful purpose was likely to be served by remanding the matter."*

**5.3.4.2** We also find that the Hon'ble Calcutta High Court in the case of *CIT v. H K Financiers (P.) Ltd.* [\[2015\] 61 taxmann.com 175/234 Taxman 43 \(Cal\)](#) for the Asst Year 2007-08 had held as below:-

*'3. The Assessing Officer has laid stress on motive. To begin with motive is something, which is locked in the mind of the person. No direct evidence as regards motive is possible. Motive can be inferred from the conduct of the person concerned but that is bound to remain an inference, which may or may not be correct. We have today dictated a judgment in the case of *CIT v. Merlin Holding (P.) Ltd.* [IT Appeal No. 101 of 2011, dated 12-5- 2015] wherein the following views have been expressed by us:*

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*"From the tenor of the submissions made by Mr. Saraf noted above, it appears that the case of the revenue is that in the facts of the case the finding that the income was earned from investment could not have been recorded. If that is the proposition then it is for the revenue to show that such a finding is not possible in law. That was not even suggested. What remains then is a question of appreciation of evidence, which has already been done. No fruitful purpose is likely to be served by remanding the matter. We do not find any issue, which has remained unattended. For the aforesaid reasons, we hold that the judgment under challenge is not perverse."*

4. *The judgment in the case of Dalhousie Investment Trust Co. Ltd. v. CIT [1968] 68 ITR 486 (Sc) referred by the Assessing Officer does not assist the revenue because in that on appreciation of facts it was found as follows:—*

*"On the facts, that the appellant dealt with the shares of McLeod and Co. and the allied companies as stock-in-trade, that they were in fact purchased even initially not as investments but for the purpose of sale at a profit and therefore the transactions amounted to an adventure in the nature of trade. The profit derived by the appellant from the sale of shares was therefore a revenue receipt and as such liable to income-tax."*

5. *The facts of the case are not shown to be similar with those in the case of Dalhousie Investment.*

6. *For the aforesaid reasons, we are of the opinion that the views expressed both by the CIT and the Tribunal for reasons expressed therein are a possible view. It is, therefore, not open to the revenue to contend that the view taken by the Tribunal is perverse. Question formulated at the time of admission of the appeal does not appear to have been correctly formulated. The question could only be, whether the views expressed upon appreciating the facts and circumstances of the case were perverse. The question is now formulated and is answered in the negative.*

*The appeal is thus dismissed.'*

#### 5.3.5 Existence of borrowed funds

*The next point to be addressed in this issue is the existence of borrowed funds and payment of interest thereon by the assessee. The Learned CIT(A) had given a factual finding that no nexus has been brought on record between the borrowed funds and the investments made. The Learned CIT(A) found that for the Asst Year 2005-06, the assessee had made short term borrowings from its director for a period of seven months only in order to meet its working capital requirements and the said loan was also squared up during the year. Similarly in Asst Year 2006-07, the assessee had made borrowings of Rs. 3 crores and utilized the same for investment as well as for trading activity. The Learned CIT(A) also found that the assessee has got a share capital of Rs. 10,00,000/- and reserves and surplus as on 31.3.2005 at Rs. 1,73,98,009/- in addition to generation of own funds in the form of sale of shares held as investments. This goes to prove that the own funds along with borrowed funds have been utilised for both investment and trading activities of the assessee. He accordingly held that the finding of the Learned AO that borrowed funds were utilized for investments to be factually incorrect. This finding given by the Learned CIT(A) is not refuted by the Learned DR before us for both the asst years under appeal.*

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*We find that the Hon'ble Calcutta High Court in the case of Jt. CIT v. Bajranglal Chowdhury [2015] 58 taxmann.com 204/232 Taxman 246 had held as below:—*

1. *The appeal is directed against a judgment and order dated March 13, 2014, by which the learned Income-tax Appellate Tribunal dismissed an appeal preferred by the Revenue.*
2. *The Assessing Officer held that the transaction in shares undertaken by the assessee was in the nature of a business transaction and not investment. Aggrieved by the order of the Assessing Officer, an appeal was preferred by the assessee which was allowed by the Commissioner of Income-tax (Appeals) holding that the transaction was really in the nature of an investment. The appellate authority discussed reasons as to why was the transaction in the nature of an investment. The Revenue preferred an appeal. The learned Tribunal agreeing with the appellate authority dismissed the appeal. The Revenue has once again come up in appeal before us.*
3. *Mr. Saraf, learned advocate appearing for the Revenue, strenuously submitted that the finding of the learned Tribunal is perverse. The Tribunal ignored the fact that the shares allegedly purchased in July were not taken delivery of till December nor was any payment made when the purchase was allegedly made in the month of July. This submission of Mr. Saraf evidently is based on misreading of the evidence. It would appear from the assessment order that payment was made for the shares in the month of July itself through bill accommodation facility.*
4. *Mr. Saraf relied upon a judgment in the case of CIT v. Sutlej Cotton Mills Supply Agency Ltd. [1975] 100 ITR 706 (SC). He drew our attention to the following finding recorded by the apex court (page 713) :*  
*"The finding of the High Court that the clauses of the memorandum of association, viz., clauses 10, 12, 13, 28 and 29 do not authorise the company to acquire and sell shares as business has no relevance in view of the aforesaid resolution of the assessee and of the fact that it had been dealing in shares in a commercial spirit as is evident from its claim for loss in dealings in the shares of M/s. Titaghur Paper Mills Ltd. and devaluation of shares of M/s. Pilani Investment Corporation on the basis that they had fallen in value.*  
*Secondly, the Tribunal said that from 1947 to 1956, no dividend had been declared by the Rayon company and that the money which went into the purchase of these shares was borrowed by the assessee. In other words, the view of the Tribunal was, it was with borrowed funds that the assessee purchased the shares. It is no doubt true that there was no evidence to show that the money was specifically borrowed for the purpose of buying shares. But there was evidence before the Tribunal for its finding that the liabilities of the assessee exceeded its assets. The finding, therefore, that the shares were purchased with the borrowed funds on which the assessee was paying interest, was a finding supported by evidence. The reasoning of the Tribunal that it is most improbable that the assessee would be investing borrowed money on which interest would have to be paid in shares which yielded no dividend was correct. We cannot say that this was not a relevant circumstances for the Tribunal to take into consideration for coming to the conclusion that the transaction was an adventure in the nature of business."*
5. *It would appear from the aforesaid finding that the apex court was of the opinion that the view formed by the Tribunal was a possible view in the facts and circumstances of the case. The judgment is not, however, an authority for the proposition that since purchase was made by borrowed funds, it is bound to become a business transaction.*

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*The Tribunal in that case had taken a possible view. Therefore, the apex court did not interfere.*

6. *No other submission was made. We are of the opinion that the view taken by the learned Tribunal in this case is also based on evidence and is a possible view. There is, as such, no reason why the High Court should interfere.)*
7. *For the aforesaid reasons, we refuse to admit the appeal, which is, accordingly, dismissed.'*

### 5.3.6 Period of Holding of shares

*We find that one of the main arguments of the revenue seems to be the shorter duration for which the shares were held by the assessee. In this regard, we had gone through the entire details of profit on sale of investment scrip wise containing the date of purchase, number of shares purchased, purchase price, date of sale, sale price and resultant book profit or loss which forms part of the paper book filed by the assessee. We find from the said workings of profit on sale of investments, none of the scripts had been sold by the assessee within a period of 30 days as stated by the Learned DR, except Kotak Mahindra Mutual Fund Short Term Plan which was purchased in March 2004 and redeemed in April 2004. Other than this, all other scripts and mutual funds were held for a minimum period of two months from the date of purchase before its transfer. We also find that certain shares were held by the assessee from March 1995, October 1996, December 1998, May 2003, June 2003, July 2003, August 2003, September 2003, October 2003 etc onwards which were ultimately sold by the assessee in Asst Year 2005-06. Similarly in Asst Year 2006-07, from the workings of short term capital gains filed in the paper book, we find that only the part of the shares of DSP Merrill Lynch Ltd and Graphite India Ltd were sold within a month. Other than these two shares, the average period of 4 months has been maintained by the assessee from the date of purchase. We also find from the workings of long term capital gains for Asst year 2006-07, the shares were held for a period of 13 months. This shows that the assessee always intended these shares to be retained only under the investment category and it will be highly improper to state that these shares/units were held as stock in trade by the assessee.*

*We find that this aspect has been considered by the co-ordinate bench of this tribunal in the case of Dy. CIT v. Reliance Trading Enterprises Ltd. in ITA No. 944/Kol/2008 dated 3.1.2008 wherein it was held that :*

*"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 account 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 decisions used to be taken by the assessee at the time of purchase itself based on different factors whether any share and 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. Period of holding of such assets cannot determine*

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*its status or change it from investment (capital) to trading (stock in trade). The audited accounts for the Assessment Year 04-05 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 self 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 shares at appropriate time. The conclusions drawn by the Assessing Officer by treating the investment shares as trading shares was based purely on assumptions and presumptions without bringing any record any material or evidence in support thereof. The Assessing Officer did not reject the books of accounts vis a vis the audited accounts u/s 145 of the IT Act before arriving at such a conclusion. The Assessing Officer's finding cannot therefore be accepted."*

**5.3.7** *We find that the assessee had earned dividend income also which is quite reflective of the intention of investment and not for profit motive though an investor is not precluded from realizing its investment which may result into profit in favourable circumstances.*

**5.3.8** *We also find that the practice followed by the assessee by offering capital gains for investment activities and business income for trading activities in the earlier years have been consistently accepted by the revenue in section 143(3) proceedings for the Asst Years 2002-03 ; 2004-05 ; 2008-09 and 2010-11, copy of which orders are placed on record before us. The assessment years under appeal before us are Asst Years 2005-06 and 2006-07. We do not find any logical reason for the revenue to deviate from its consistent stand taken in the earlier years. It is also evident from the scrutiny assessment orders for Asst Years 2008-09 and 2010-11, the revenue had accepted the stand of the assessee having dual portfolio and offering income under capital gains and business income in subsequent years.*

**5.3.9** *We find that the Hon'ble Bombay High Court in the case of Gopal Purohit (supra) had considered the issue under consideration and held as under:—*

*'4.3. We have heard the rival submissions and perused the materials available on record including the paper book filed by the Learned AR before us. We find that the assessee has been engaging himself in the share transactions both as an investor and as well as trader. It is seen that the assessee had clearly bifurcated the investment and trading transactions including speculative share transactions in his books of accounts and it is also seen that the average period of holding of shares range from one month to more than one year and accordingly short term or long term capital gains are duly offered to tax by the assessee depending upon the period of holding the shares. It is also seen that the Learned AO had also accepted the stand of the assessee in the immediately succeeding assessment year as investment transactions under scrutiny proceedings vide 143(3) order dated 12.10.2009. We find that the frequency of transactions does not really matter and what is to be seen is the intention of the assessee whether he wants to penetrate into the capital market for the purpose of investment or for making speculative gains by doing day trading and dealing in futures and options. It is also seen that the Learned AO had clearly stated in his assessment order that the interest on*

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*borrowings were paid by the assessee only for trading in shares and this itself goes to prove that the assessee had clearly bifurcated his activities into two parts - one towards investment in shares out of own funds of the assessee and other towards trading in shares out of own and borrowed funds of the assessee. It is also seen that the assessee has been doing this activity consistently. It is also seen from the balance sheet filed by the assessee that the assessee had clearly classified the share transactions under the head Investments. This itself clearly proves the intention of the assessee that he is only interested in share market only as an investor and not otherwise.*

*We find that this issue has been elaborately dealt with by the Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit reported in [228 CTR 582 \(Bom.\)](#), wherein the questions raised before the Bombay High Court and decision rendered thereon are as below:—*

- (a) *Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in treating the income from sale of 7,59,003 shares for Rs.5,00,12,879/- as an income from short term capital gain and sale of 3,88,797 shares for Rs.6,65,02,340/- as long term capital gain as against the "Income from business" assessed by the A. O. ?*
- (b) *Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that principle of consistency must be applied here as authorities did not treat the assessee as a share trader in preceding year, in spite of existence of similar transaction, which cannot in any way operate as res judicata to preclude the authorities from holding such transactions as business activities in current year?*
- (c) *Whether, on the facts and circumstances of the case and in law., the Hon'ble ITAT was justified in holding that presentation in the books of account is the most crucial source of gathering intention of the assessee as regards to the nature of transaction without appreciating that the entries in the books of accounts alone are not conclusive proof to decide the income? 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 paragraph 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 port folios, 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 there from 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.*

*In so far as Question (b) is concerned, the Tribunal has observed in paragraph 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*

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*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.*

*In so far as Question (c) is concerned, again there cannot be any dispute about the basic proposition that entries in the books of account alone are not conclusive in determining the nature of income. The Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The finding of fact does not call for interference in an appeal under Section 260A. No substantial question of law is raised. The appeal is accordingly dismissed.'*

*It is pertinent to note that the decision of Bombay High Court was subjected to further appeal by the revenue before the Hon'ble Apex Court and the Special Leave Petition (SLP) was dismissed by the Supreme Court.*

**5.3.10** *We also find that there is no material brought in by the revenue to show that separate accounts of two portfolios are only a smokescreen and there is no real distinction between two types of holdings. This could have been done by showing that there is intermingling of shares and transactions and the distinction sought to be created between two types of portfolios is not real but only artificial and arbitrary. Therefore, in absence of any material to the contrary, and on appreciation of cumulative effect of several factors present as culled out above, we hold that the surplus is chargeable to capital gains only and assessee is not to be treated as trader in respect of sale and purchase of shares in investment portfolio. Accordingly, the ground no. 2 in ITA No. 1148/Kol/2009 for Asst Year 2005-06 and ground no. 1 in ITA No. 1437/Kol/2009 for Asst Year 2006-07 raised by the revenue are dismissed.*

8.4. Respectfully following the aforesaid judicial precedents and in the aforesaid facts and circumstances of the case, we hold that the Id CITA had rightly classified the assessee as an investor and treated the gains received on sale of shares and mutual funds as short term capital gains as against business income and granted relief to the assessee. Accordingly, the grounds raised by the revenue are dismissed.

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9. In the result, the appeals of the revenue are dismissed.

**Order pronounced in the court on 27.01.2017.**

Sd/-  
[S.S.Viswanethra Ravi]  
Judicial Member

Sd/-  
[M.Balaganesh]  
Accountant Member

Date: 27.01.2017.

R.G.(.P.S.)

Copy of the order forwarded to:

1. Dilip B.Desai, HUF, 1A, Devarati, 8- Dr.Rajendra Road, Kolkata-700020.
2. The I.T.O., Ward-31(3), Kolkata.
3. C.I.T.(A)-XIX, Kolkata,                      4. CIT-XI, Kolkata.
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches

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