

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

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.3785/Del./2017
Assessment Year:2013-14

M/s. Puran Associates Pvt. Ltd., 4 th Floor, Punjabi Bhawan, 10, Rouse Avenue, New Delhi	Vs.	ACIT, Circle-20(1), New Delhi
PAN:AAACP0458J		
(Appellant)		(Respondent)

Assessee by	Shri Chandan Aggarwal, CA Shri Akhil Mahajan, CA
Department by	Shri Sanjay Tripathi, Sr.DR

Date of hearing	05.03.2020
Date of pronouncement	29.05.2020

ORDER

PER O.P. KANT,A.M.:

This appeal by the assessee is directed against order dated 30/03/2017 passed by the Learned CIT(Appeals)-7, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2013-14 raising following grounds:

- That both the Ld. CIT(A) and Ld. AO erred similarly in law and in facts that income from Capital Gains as declared by the assessee was taken as income from business as follows:*

- a. *That the long-term capital gains on sale of fixed maturity plans of Rs.2,07,40,000/- where the assessee offered to tax at 20%, both the CIT(A) and AO failed to understand that the fixed maturity plans are not trading stock and hence cannot be taxed at 30%.*
 - b. *That both CIT(A) and AO failed to take into account the circulars No. 6 of 2015 dated 9 April 2015 on Capital Gains in respect of mutual fund under the fixed maturity plans;*
 - c. *That the Long Capital loss of Rs.55,64.762 should also been treated as capital loss entitled offset with the long-term income and that it cannot be treated as income from business.*
2. *That Both CIT(A) and AO has erred in notionally disallowing expenses u/s 14A read with Rule 8D of Rs.53,16,568 without appreciating that there is no further ground to disallow any further sum other than Rs.10,82,334 already disallowed by the assessee.*
 - a. *That the Ld. CIT(A) and AO failed to establish why the rule 8D should be invoked especially when the assessee himself has disallowed Rs.10,82,334 and which were the expenses that connection with tax free earnings.*
 3. *That both the CIT(A) and AO erred in disallowing in ad-hoc and arbitrary manner business expenses of Rs.15,48,318 incurred for genuine business activities.*
 4. *The Assessee prays to add, alter or modify any grounds of appeal which is necessary in the interest of justice.*

2. Briefly stated facts of the case are that the assessee company is engaged in the business of sale and purchase of the shares in mutual funds. For the year under consideration, the assessee filed return of income on 29/09/2013, declaring total income of ₹13,15,55,690/-. The return of income filed by the assessee was selected for scrutiny assessment and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. In the scrutiny assessment completed under section 143(3) of the Act on 14/01/2016, the Assessing Officer made certain additions/disallowances and assessed the

total income at ₹ 15,35,95,820/-. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who dismissed the appeal of the assessee. Aggrieved with the finding of the Ld. CIT(A), the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The ground No.1 of the appeal relates to treating capital gain of ₹ 1,51,75,238/- as business income.

3.1 The facts qua the issue in dispute are that the assessee claimed long-term capital gain of ₹ 1,51,75,238/- having details as under:

S.No.	Particulars	Amount (Rs.)
i.	Long term Capital Gain exempt u/s 10(38) I.T. Act, 1961	(-)55,64,762
ii.	Long term Capital Gain shown with indexation in the return but taken as business income without the benefit of Indexation which is not allowable while computing income under the head 'Business Income': Cost as shown: Rs.20,00,00,000/- Sale Value: Rs.22,07,40,000/-	2,07,40,000
	Total	1,51,75,238

3.2 According to the Assessing Officer in last several years, the Income Tax Department has been consistently holding the assessee's investment in shares and securities to be stock in trade (except for shares of the Dabur India Ltd.) and accordingly treating the gains from sale of the shares as business income. The Assessing Officer noted that Income Tax Appellate Tribunal (in short the 'Tribunal') in assessment year 2005-06 to 2007-08 has upheld the stand of the Department. The learned AO, therefore,

held the net capital gain shown by assessee of ₹ 1,51,75,238/-as business income.

3.3 Before the Ld. CIT(A), the assessee filed written submissions. The Ld. CIT(A) also following the finding of the Tribunal in ITA No.1118, 942 and 943/del/2010 dated 31/01/2012 upheld the finding of the Assessing Officer. The relevant finding of the Ld. CIT(A) is reproduced as under:

“4.2 I have carefully considered the assessment order and written submissions filed by the Ld. AR. The AO following the Departmental stand in the past several years treated the capital gains disclosed by the appellant as business income. The AO has also stated that the departmental stand is affirmed by the Hon’ble ITAT in their decisions in ITA No. 1118/942 & 943 dated 31.01.2012. In the said order, the findings of the Ld. CIT(Appeals) have been reversed and the order of the AO stands restored. The Hon’ble ITAT in the order has held as under:

“8. We are of the opinion that the character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item and that too since inception is indicative of the assessee’s intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee cannot be categorized as an investor, especially when the aforesaid facts speak otherwise and the ld. AR did not place any material, other than resolution dated 22.04.2005, before us while the auditor reports and facts for the years under consideration reflecting intention of the assessing, lead us to the conclusion that the assessee is continuing its activities as in earlier years of a trader in shares. As observed in Sutej Cotton Mills Supply Agency Ltd. (supra), it is a matter of first impression with the Court whether a particular transaction is in the nature of trade or not., it is not even the assessee’s case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the ordinary line of the assessee’s business; purchase of share by them was not for the purpose of earning dividend, but with the dominant intention of resale in order to earn profits; the profit made buy them is not of mere enhancement of value of the shares, but is a

profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition and continuity of the transactions, give them a flavor of “trade”, the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment, but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, including in Wallfort Financial Services Ltd. (supra) relied upon by the ld. DR, we are of the opinion that the ld. CIT(A) was not justified in accepting the claim of the assessee as investor in shares, especially when the nature of transactions in the years under consideration was similar to what the assessee had undertaken hitherto and turnover of the assessee continually increased in the years under consideration. Accordingly, we vacate the findings of the ld. CIT(A) and restore the order of the AO. Therefore, ground no. 1 in these appeals is allowed.”

3.4 Before us, the learned Counsel of the assessee filed a paper book, containing pages 1 to 125, and submitted that the Tribunal in subsequent years has held the activity of purchase and sale of the shares as investment activity and consequent profit has been held to be capital gain. He submitted that in view of the consistent finding of the Tribunal, the activity might be treated as investment activity.

3.5 The learned DR, on the other hand, relied on the order of the lower authorities.

3.6 We have heard rival submission of the parties on the issue in dispute. The issue in dispute of treating long-term capital gain shown by the assessee as business income has been raised in the case of the assessee for last so many years. The Tribunal in assessee's own case for assessment years 2005-06 to 2007-08 (ITA No.1118, 942 and 943/Del./2010 order dated 31/03/2012) held the activity of purchase and sale of the shares as business income. The relevant finding of the Tribunal is reproduced as under:

“8. We are of the opinion that the character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item and that too since inception is indicative of the assessee's intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee cannot be categorized as an investor, especially when the aforesaid facts speak otherwise and the ld. AR did not place any material, other than resolution dated 22.4.2005, before us while the auditor reports and facts for the years under consideration, reflecting intention of the assessee, lead us to the conclusion that the assessee is continuing its activities as in earlier years of a trader in shares. As observed in Sutej Cotton Mills Supply Agency Ltd. (supra), it is a matter of first impression with the Court whether a particular transaction is in the nature of trade or not. , it is not even the assessee's case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the ordinary line of 24 ITA nos.1118,942&943/Del./2010 the assessee's business; purchase of shares by them was not for the purpose of earning dividend, but with the dominant intention of resale in order to earn profits; the profit made by them is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition and continuity of the transactions, give them a flavour of "trade"; the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment, but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, including in Wallfort Financial Services Ltd.(supra) relied upon by the ld. DR, we are of the opinion that the ld. CIT(A) was not justified in accepting the claim of the assessee as investor in shares ,especially when the nature of transactions in the years under consideration was similar to what the assessee had undertaken hitherto and turnover of the assessee continually increased in the years under consideration. Accordingly, we vacate the findings of the ld. CIT(A) and restore the order of the AO. Therefore, ground no.1 in these appeals is allowed.”

3.7 Subsequently, the Tribunal in assessment year 2008-09, 2009-10 and 2011-12 (ITA No.3078/2011, 820/2013 and 5054/2015 in order dated 20/08/2018) analysis of various decisions and the circulars issued by the Central Board of the

Direct Taxes (CBDT) held the activity of purchase on sale of the shares as assessable under long-term capital gain and not business income. The detailed finding of the Tribunal is reproduced as under:

“14. We have heard the rival submission and also perused the relevant findings given in the impugned orders as well as matter referred to before us. The core issue before us is, whether the amount of Rs.15,41,96,869/- which has been classified as business income by the Assessing Officer which income has been offered to tax by the assessee under the head ‘capital gain’ is to be assessed as business income or capital gain. The Assessing Officer has summarized the following income shown under the head ‘Capital Gain’ as business income:

<i>Long Term Capital gain (Except Dabur India Ltd.)</i>	<i>Rs. 32,39,427</i>
<i>Long Term Capital Gain (without indexation)</i>	<i>Rs.10,13,29,232</i>
<i>Long Term Capital Gain (with indexation after removing Indexation)</i>	<i>Rs. 2,93,99,990</i>
<i>Short Term Capital Gain</i>	<i>Rs. 1,85,41,338</i>
<i>Short Term Capital Gain With PMS (Net)</i>	<i>Rs. 16,86,882</i>
<i>Total</i>	<i>Rs. 15,41,96,869/-</i>

The assessee company is a NBFC, which was also in the business of sale and purchase of shares and mutual fund. In so far as transactions in mutual funds are concerned, the same has been offered under the head ‘Profits and Gains of Business and Profession’. However, various shares which has been held under the investment portfolio on which assessee has been shown under the head Long-Term Capital Gain and Short-Term Capital Gain as per the details incorporated above. The income earned by the assessee from various sources was as under: -

<i>Particulars</i>	<i>Asset Type</i>	<i>Amount</i>
<i>Income from Business (A)</i>	<i>a)Trading in units of Mutual Funds; b) Income from Interest; c)Incentive and Miscellaneous Income</i>	<i>360,77,965</i>
<i>Income from Capital Gains (B)</i>	<i>Income from Capital Assets - Investment in EquitiesLTTCG11,48,78,740</i>	<i>13,51,06,960</i>

	(85%) STCG2,02,28,220 (15%)	
Income from other Sources (C)	Dividend earned from investment in equities	8,19,14,172

15. One of the main contentions of the Revenue which has been strongly harped by the Tribunal in the earlier years is that, assessee prior to 31st March, 2004 was holding shares as 'stock in trade', hence intention was to do business only and mere classification in books as investment by making entries is not decisive factor. It was on 01.04.2004 the shares were converted into investment portfolio and since A.Y. 2005-06; assessee has segregated the income under the head 'Capital Gains' and 'Business Income'. Apart from that, Assessing Officer has noted that magnitude of the transaction and the volume shows that assessee was into sale and purchase of share for the intention of business only and has also referred to the huge turnover and also highlighted various facts it has been discussed and incorporated in detail in the earlier part of the order. Now from the perusal of the schedule of investments especially investment made in the shares under the head 'Long-Term Capital Gain', we find that the major amount on amount of Long-Term Capital Gain is arising on account of sale of shares of Punjab Tractors Ltd. which is at Rs.10,13,29,232/-, out of total Long-Term Capital Gain of Rs. 15,41,96,869/-, which has been treated as business income by the Assessing Officer. Shares of Punjab Tractors were acquired in the years 2005 and 2006 and since the date of purchase it was shown under the head 'investment', because these shares were acquired by the assessee for having controlling stake/interest in the said company. Later on, these shares were sold to Mahindra & Mahindra as a part of takeover deal which is evident from sale purchase agreement dated 08.05.2007. Thereafter Mahindra & Mahindra has given a letter of offer for purchase of equity shares from public at large after the acquisition of the shares of Punjab Tractors from the assessee in accordance with SEBI rules. In so far as Long-Term Capital Gain shown on the sale of the Punjab Tractors Ltd., it cannot be disputed that it was never a part of stock-in-trade, prior to 1.4.2004, because, firstly, they were acquired much later to this date; and secondly, it was acquired for the purpose of acquiring controlling stake/interest. Hence such an acquisition cannot be held to be for trading purpose. The transfer of such shares on a takeover of Punjab Tractors Ltd. by Mahindra & Mahindra also goes to prove that this was an investment held by the assessee. Similarly, in the case of ABN Amro Bank they were always held as investment and since the stock was not a tradeable in the stock market, therefore it could have been held as stock for the purpose of trade. Thus, the shares of ABN Amro Bank can never be treated as acquired for trading purpose. Hence any gain arising from sale of these two shares has to be assessed as 'capital gain'.

16. Further, from the perusal of details shown under LTCG of other scrips also, we find that the same have been acquired in the years 2005, 2006 and 2007 and were treated as part of investment and the holding days of these shares are ranging from 372 days to 828 days. These shares were not converted from stock as on 01.04.2004, because they have been acquired in the later years and from the date of acquisition, always been kept as investment in the books and later on sold after more than a year on which gain has been shown under the head 'Long Term Capital Gain'. Nowhere it has been laid down that the assessee who is dealing in shares cannot maintain two separate portfolios, one for the trading purpose and other for the investment purpose and there is no provision that shares held in investment portfolio have to be treated as part of stock. The most paramount factor which needs to be examined in such cases is, whether the intention of the assessee while acquiring shares was for investment purpose or for trading in future for profit. However, we find that in the earlier years the Tribunal has taken a different view and held that even if the shares have been held under investment portfolio also, it can be taxed as business income. One of the core reasoning for arriving to this conclusion was that the assessee has been trading in shares and the audit report also suggest that the assessee is dealer in shares and prior to 31st March, 2004 assessee was a full-fledged trader of share. Thus, the intention of the assessee at the time of purchase became the decisive factor to hold that it was only for the business purpose. The conclusion of the Tribunal in this regard reads as under:

8. We are of the opinion that the character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item and that too since inception is indicative of the assessee's intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee cannot be categorized as an investor, especially when the aforesaid facts speak otherwise and the Id. AR did not place any material, other than resolution dated 22.4.2005, before us while the auditor reports and facts for the years under consideration reflecting intention of the assessee, lead us to the conclusion that the assessee is continuing its activities as in earlier years of a trader in shares. As observed in *Sutlej Cotton Mills Supply Agency Ltd'* (supra), it is a matter of first impression with the Court whether a particular transaction is in the nature of trade or not., it is not even the assessee's case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the ordinary line of the assessee's business; purchase of shares by them was not for the purpose of earning dividend, but with the

dominant intention of resale in order to earn profits; the profit made by them is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition and continuity of the transactions, give them a flavour of “trade”; the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment, but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, including in Wallfort Financial Services Ltd.(supra) relied upon by the Id. DR, we are of the opinion that the Id. CIT(A) was not justified in accepting the claim of the assessee as investor in shares especially when the nature of transactions in the years under consideration was similar to what the assessee had undertaken hither to and turnover of the assessee continually increased in the years under consideration. Accordingly, we vacate the findings of the Id. CIT (A) and restore the order of the AO. Therefore, ground no.1 in these appeals is allowed.”

If the aforesaid ratio and principle of the Tribunal is to be followed as it is, then as observed in the earlier part of the order, in so far as the transaction of shares of Punjab Tractors Ltd. and ABN Amro are concerned, right from day one it was acquired as a part of investment only and was classified as such in books right from the day of acquisition and it is not the case that these shares were earlier part of stock-in-trade which has been converted into investment after 01.04.2004. We have already held that the shares of Punjab Tractors Ltd. were acquired for controlling interest and ABN Amro shares are not tradeable in stock market and if one goes by the intention part, then these two scrips could never be held to be intended for trading purposes. Thus, the aforesaid decision will not be binding at least for these two scrips. For the other scrips also, if we see the volume of transaction and the period of holding, then we find that the transaction in the shares which was held for more than a year constitute 98.38%. For the sake of ready reference, the period of holding, volume of shares dealt, percentage of shares held in LTCG and other percentage of gain in shares are incorporated hereunder:-

<i>Period of Holding</i>	<i>More than 365 days</i>	<i>81 to 364 days</i>	<i>91 to 180 days</i>	<i>60 to 90 days</i>	<i>30 to 59 days</i>	<i>Less than 30 days</i>
<i>Quantity of shares</i>	1,33,65,009	53,003	1,01,571	43,971	78,813	67,802
<i>Percentage to Total</i>	97.48%	03.8%	0.74%	0.32%	0.57%	0.49%
<i>Quality Gain or loss</i>	1,19,85,50,369	86,05,051	20,57,841	21,45,605	22,70,962	19,21,580
<i>Percentage of Capital gain to</i>	98.34%	0.70%	0.16%	017%	0.18%	0.15%

Total
capital
gain

**inclusive of shares of Dabur India Ltd., Punjab Tractors Ltd. and ABN Amro Securities Pvt. Ltd.*

Total Capital	Rs.
Long Term Capital Gain claimed exempt u/s. 10(38)	1,06,78,21,147
Long Term Capital Gain on sale of shares of Punjab Tractors Ltd.	10,13,29,232
Long Term Capital Gain on sale of shares of ABN Amro Securities Pvt. Ltd.	2,93,99,990
Short Term Capital Gain	2,02,28,140
Total	1,21,87,78,509

17. Now, it has been well settled that if the shares which has been acquired and treated as investment from day one and held for more than a year, then sale of such shares has to be taxed under the head 'Long Term Capital Gain'. This has been clarified by the CBDT in its following two circulars: -

"Circular No.6/2016; dated 29/02/2016

Sub: Issue of taxability of surplus on sale of shares and securities — Capital Gains or Business Income — Instructions in order to reduce litigation - reg.-

Sub-section (14) of Section 2 of the Income-tax Act, 1961 (Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/ trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business

income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following-

a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income, b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years; c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain / Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities."

17.1 Later on CBDT again clarified in the following manner:-

F. No. 225/12/2016/ITA.II
Government of India
Ministry of Finance
Department of Revenue (CBDT)

North Block, New Delhi,
dated the 2nd of May, 2016

To
Principal Chief-Commissioners of Income-tax/
Principal Directors General of Income-tax

Subject: - Consistency in taxability of income/loss arising from transfer of unlisted shares under Income-tax Act, 1961-regd

Regarding characterization of income from transactions in listed shares and securities, Central Board of Direct Taxes ('CBDT') had issued a clarificatory Circular no. 6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head 'Capital Gain' unless the tax-payer itself treats these as its stock- in-trade and transfer thereof as its business income. It was further stated that in other situations, the issue was to be decided on the basis of existing Circulars issued by the CBDT on this subject.

2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.

3. It is, however, clarified that the above would not be necessarily applied in the situations where:

- i. the genuineness of transactions in unlisted shares itself is questionable; or*
- ii. the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or*
- iii. the transfer of unlisted shares is made along with the control and management of underlying business; and the Assessing Officer would take appropriate view in such situations.*

4. The above may be brought to the notice of all the necessary compliance.

17.2 Now this circular has been approved and upheld in many judgments including that of Hon'ble Gujarat High Court in the case of PCIT vs. Ramniwas Ramjivan Kasat, reported in 248 Taxman 484. (Guj). Following the above two circulars, the Tribunal in assessee's own case in the A.Y. 2011-12 has decided the issue in favour. Apart from that, there are many judgments now including that of Hon'ble Jurisdictional High Court rendered after the judgment of Tribunal order for the earlier years (supra), wherein it has been consistently held that if the shares have been held under the portfolio of

investment which is separate from the shares then same cannot be brought to tax under the head capital gain. Some of the judgments are as under: -

1. CIT vs. Gopal Purohit, 336 ITR 287 (Bom.)
[Also confirmed by Hon'ble Supreme Court]
2. CIT vs. Vinay Mittal, 208 taxman 106 (Del. HC)
3. ITO vs. Rohit Anand, (2009) 34 SOT 42 (Del.)
4. CIT vs. Amit Jain, 374 ITR 550 (Del.)
5. CIT vs. Sahara India Housing Corporation Ltd., ITA No.740/2009 (Del.)

18. In the light of the catena of decision Hon'ble Jurisdictional High Court and also some of the judgment affirmed by the Hon'ble Supreme Court and the facts as discussed above, the earlier years Tribunal order cannot be held to have any binding precedence and accordingly, we hold that in so far as transaction in sale of shares shown under the head 'Long Term Capital Gain' same cannot be taxed under the head business income especially in the light of the categorical clarification by the CBDT.

3.8 Further, the Tribunal in the assessee's own case for assessment year 2010-11 (ITA No. 701/2015 in order dated 02/01/2019) following the order of the Tribunal for assessment year 2008-09, 2009-10 in 2011-12 upheld the activity of the parties on sale of the shares assessable under the head capital gain. The relevant finding of the Tribunal reproduced as under:

"5. Thus, respectfully following the precedents of the earlier years and as a principle of consistency, we uphold the order of the CIT(A) that long term capital gain/capital loss cannot be treated as business income or loss and also long-term gain cannot be treated as business income. Accordingly, ground no. 1 raised by the Revenue stands dismissed."

3.9 Further, in assessment year 2012-13 i.e. immediately preceding assessment year, the Tribunal in ITA No.4711/Del/2016 in order dated 26/03/2018 held the activity of purchase on sale of the shares assessable under the head

capital gain. The relevant finding of the Tribunal is reproduced as under:

“6. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The assessee is Non Banking Financial Company and income from capital gains were investment made in equities are sold. The assessee treated long term capital gain from sale of equities held for more than 12 months exempt u/s 10(38) of the Act. The Assessing Officer treated it as business income, Now, the above issue is squarely covered in favour of the assessee by Circular No. 6 dated 29.02.2016 issued by CBDT. The above circulars peaks that if shares are held for more than 12 months, if assessee shows it as LTCG, same should be accepted.

7. In view of above facts we are of the opinion that when the assessee himself has treated the income arising from sale of securities held for more than 12 months as capital gains, there is no reason to dispute it by Assessing Officer.

8. In view of this ground No. 2 of the appeal of the assessee is allowed holding that long term gain from listed securities of Rs.25,13,359 is chargeable to tax under the head capital gain and not business income. Ground no. 2 of the appeal is allowed.”

2.10 In view of the consistent finding of the Tribunal since assessment year 2008-09, respectfully following the finding of the Tribunal for assessment year 2008-09 to 2012-13, we set aside the order of the lower authorities and hold the activity of purchase and sale of shares in question as investment activity to be assessed under the head capital gain.

3. The ground No.2 relates to disallowance of ₹ 53,16,568/- under section 14A read with rule 8D of Income Tax Rules, 1962. The assessee disclosed income of ₹ 28.3 crores and made disallowance of ₹ 10,82,334/-, under section 14A of the Act as under:

Calculation of Expenses U/s 14A			
(i)	Amount of expenditure directly relating to exempt Income		NIL
(ii)	Indirect Interest expenses Interest paid * Average Value of investment / Average value of Total assets		NIL
(iii)	0.5% of Average value of the investments.		6398902
	Closing Investments	1581876664	
	Opening Investments	977684303	
	Average Investments	1279780484	6398902
	Gross disallowance U/s 14A		
Less: Expenses on account of income on which no activity has done in the previous year			
<u>Total exempt Income</u>			
	Dividend received	283877168	
	Tax free interest	34946696	
		318023864	
	Less: Dividend recd from DIL	264896800	
	% of DIL dividend in exempted income	83%	5316568
	Disallowance U/s 14A		1082334

3.1 The action of the assessee of reducing ₹53,16,568/- claiming to be expenses on account of the income on which no activity was done in the previous year, was not accepted by the Assessing Officer and the explanation of the assessee that no expenses were incurred toward earning of dividend income shares of Dabur India Ltd, which was a strategic investment, was also rejected. The Assessing Officer, accordingly made the addition of ₹ 53,16,568/-.

3.2 The Ld. CIT(A) has also upheld the action of the Assessing Officer observing as under:

“5.3 It is evident from the above that the appellant has chosen to reduce a sum of Rs.53,16,568/- by excluding the dividend received from M/s. Dabur India Ltd. at Rs.26,48,96,800/- consulting 83% of the total dividend received and claimed as exempt income. Accordingly, 83% of the disallowance computed as per Rule 8D(2)(iii) i.e. 0.5% of average value of investment is excluded and a net disallowance of Rs.10,82,334/- is computed as against actual disallowance of Rs.63,98,902/-. The appellant company has computed the disallowance as per section 14A read with Rule 8D(2)(iii). However, it is not understood as to how the said

disallowance can be restricted to Rs.10,82,334/- on the plea that as 83% of the exempt income is received as dividend from Dabur India Ltd., the disallowance under rule 8D(2)(iii) is to be computed on a percentage basis. Rule 8D(2)(iii) is reproduced as under:

“(1) Where the Assessing Officer having regard to the accounts of the assessee of the previous year, is not satisfied with-

(a) The correctness of the claim of expenditure made by the assessee; or

(b) The claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:-

(i).....

(ii).....

(iii) an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, on the first day and the last day of the previous year.”

5.4 The computation made by the appellant company is as per Rule 8D(2)(iii) which does not provide for any percentage to be applied on the dividend income, to arrive at the disallowance. As the factum of exempt income claimed is not denied and computation is also as per the governing Rule i.e. Rule 8D(2)(iii), the disallowance has to be as per the letter of the Rule. In view therefore, the plea of the Ld. AR that since 83% of the dividend income is from Dabur India Ltd., the disallowance is to be worked out on percentage basis, is not in order. The Ld. AR's reliance on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Holcim India (P) Ltd. is misplaced as the appellant has dividend income of Rs.28.38 crores on the investments. It is not the case that no exempt income is earned, as was the case in the referred judgment. In view thereof, the computation of disallowance is to be as per Rule 8D(2)(iii) of the I.T. Rules which has been correctly worked by the AO at Rs.63,98,602/- and after reducing the disallowance computed by the appellant company at Rs.10,82,334/-, additional disallowance of Rs.53,16,568/- is made. As the computation is, as per section 14A of the Act read with Rule 8D(2)(iii) of the I.T. Rules, no interference is called for and the action of the AO is upheld. Disallowance of Rs.53,16,568/- is, accordingly, confirmed. This ground of appeal is ruled against the appellant.”

3.3 Before us, the Learned Counsel of the assessee referred to page 122 of the paper book containing details of dividend income earned from various shares/mutual funds etc. According to the details, dividend income of ₹ 26,53,52,190/-was earned from shares of 'Dabur India Ltd' and balance dividend was earned from investment in shares and mutual funds. The contention of the assessee that investment in the shares of 'Dabur India Ltd' has been made as promoter of the company and no expenditure was incurred for earning dividend income from said investment.

3.4 The learned Counsel further submitted that the Assessing Officer has not recorded any dissatisfaction on the claim of the assessee of expenses incurred toward earning of exempt income, and thus in absence of any such dissatisfaction recorded by the Assessing Officer, he is barred from making the disallowance.

3.5 The Ld DR, on the other hand, relied on the order of the lower authorities and submitted that once the assessee itself has followed the procedure laid down under section 14A read with rule 8D of Income Tax Rules for computing the disallowance, there was no requirement of recording express dissatisfaction in the assessment order.

3.6 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record.

3.7 The first contention of the assessee that no expenses were been disallowed corresponding to the strategic investment made in the shares of the Dabur India Ltd as promoter. In this regard, the Hon'ble Supreme Court in the case of Maxopp Investment Ltd Vs CIT in 402 ITR 640 has recently held that:

"34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant

purpose test, which is pressed into service by the assessee would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like **Maxopp Investment Limited** may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in **Walfort Share and Stock Brokers P Ltd.**, relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.

"The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A..

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The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14 A."

35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as

*investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of **Maxopp** Investment Limited as well as similar cases where shares were purchased by the assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.”*

3.8 In view of the above, that the contention of the assessee investment made for acquiring controlling interest in Dabur India Ltd should not be subject to disallowance under section 14A is rejected.

3.9 Regarding the second contention of the assessee that no dissatisfaction was recorded by the Assessing Officer on the claim of the assessee of expenses toward earning exempt income, we agree with the finding of the Ld. CIT(A), that when the assessee itself as computed the disallowance in terms of rule 8D and thereafter reducing the expenses corresponding to earning dividend income from shares of M/s Dabur India Ltd. was not justified. The Assessing Officer in para 4.3 to 4.5 of the assessment order has duly rejected the action of the assessee of reducing the expenses related to earning of the dividend income from the shares of M/s. Dabur India Ltd. Accordingly, we reject the contention of the assessee and upheld the finding of the Learned CIT(A) on the issue in dispute. The ground No. 2 of the appeal of the assessee is accordingly dismissed.

4. Third ground is regarding disallowance of ₹ 15,48,318/-out of business expenditure.

4.1 The brief facts qua the issue in dispute are that the Assessing Officer asked the assessee to provide details of business promotion expenses of ₹ 1,54,83,180/-, but the Authorised Representative of the assessee before the Assessing Officer admitted that certain expenses had not been incurred for

the business purpose and he was unable to offer any expenditure in respect thereof and the assessee offered 10% of the total expenditure of ₹ 15,48,318/- for disallowance.

4.2 The Ld. CIT(A) has also upheld the disallowance observing as under:

“6.2 The AO disallowed Rs.15,48,318/- @ 10% of Rs.1,54,83,180/- out of the business promotion expenses as it was noted during assessment proceedings that there were several expenses of expenditure which appeared to have not been incurred for business purposes. The Ld. AR admitted that it was not possible to filter out expenditure which may have been incurred for non-business purpose and accordingly offered 10% to the total expenditure claimed under business promotion expenses as disallowance. It is clear therefore, that the said disallowance was made on agreed basis and the appellant admitted that there was an element of non business expenditure claimed under this head. The appellant is now in appeal against the agreed addition. The Ld. AR has contended that the said expenditure is incurred for business purposes and allowable u/s 37(1). The Ld. AR has not furnished any details of the impugned expenditure or any justification for the same. The disallowance was made on agreed basis. This has not been controverted by the Ld. AR. The Hon'ble Punjab & Haryana High Court in the case of Banta Singh Kartar Singh Vs. CIT, 125 ITR 239 had observed “ An order based on an agreement cannot give rise to grievance and the same cannot be agitated in appeal”. The Hon'ble Kerala High Court in the decision in the case of CIT Vs. Vamadevan Bhanu, 330 ITR 559 held that assessee cannot against an assessment on agreed basis.

6.3 The appellant made a very general submission that the said disallowance is not called for as the expenditure is incurred for business purposes. Mere assertion, without adducing any material evidence and documentation does not establish that the impugned expenditure is allowable as a business expenditure. In the absence of any details pertaining to the impugned expenditure and also as it was on the agreed basis on admission by the Ld. AR that expenditure not wholly and exclusively for business purpose was not ruled out in the claim under the head business promotion, no interference is called for. The disallowance of Rs.15,48,318/- made by the AO, is confirmed. This ground of appeal is ruled against the appellant.”

4.3 Before us, the learned Counsel submitted that disallowance has been made on the ad-hoc basis, without identifying the

expenses towards non-business purpose and thus disallowance need to be deleted.

4.4 On the contrary, the Learned DR relied on the order of the lower authorities.

4.5 We have heard rival submission of the parties on the issue in dispute. It is undisputed that 10 percentile disallowance was agreed by the Authorized Representative of the assessee before the Assessing Officer and therefore the Assessing Officer did not identify the individual expenditure not related to the business purpose. In view of the admission of the Authorized Representative of the assessee for disallowance of 10% of the expenses as incurred for non-business purpose, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly uphold the same. The ground No.3 of the appeal of the assessee is accordingly dismissed.

4. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29th May, 2020.

**Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER**

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

Dated: 29th May, 2020.

RK/- (D.T.D.S)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi