आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

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

सर्वश्री आर.सी.शर्मा, लेखा सदस्य **एवं** डा.एस.टी.एम पवलन, न्यायिक सदस्य

BEFORE SHRI R.C.SHARMA, AM

&

DR.STM PAVALAN, JM

आयकर अपील सं./**ITA No.4857/Mum/2011**

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

Oceanic Marketing Agencies India Ltd., A-Z, Chambers, 30, Tamarind Lane, Fort, Mumbai	Vs.	DCIT,Cir 2(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACO 6877 C**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Mr. R.G.Tralshawala

राजस्व **की ओर से** /Revenue by : Mr. M.L.Perumal

सुनवाई की तारीख / **Date of Hearing : 5th March, 2014**

घोषणा की तारीख/**Date of Pronouncement : 9th May, 2014**

आदेश / O R D E R

PER R.C.SHARMA (A.M.) :

This is an appeal filed by the assessee against the order of CIT(A), dated 17-3-2011 for the assessment year 2007-08, in the matter of order passed under Section 143(3) of the I.T. Act, 1961. The basic grievance of the assessee relates to treatment of capital gains offered on sale of shares as 'business income'.

2. Rival contentions have been heard and record perused. Facts in brief are that during the course of assessment proceedings, the AO found that the total income of Rs.8,27,43,911/- returned by the assessee comprised short term capital gain on sale of shares amounting to Rs.8,26,93,311/-. The AO further found that long term capital loss on sale of shares shown was Rs.13,88,004/-. The details of short term capital gains filed showed that the gain has been worked in respect of transactions in shares of 29 different scrips, mainly those of M/s IFCI, India Bulls, Monnet Ispat, Sterling Biotech etc., while the long term capital gain related to purchase and sale of shares of M/s D-Link India and ESAB India. It was further found that in terms of number of transactions, there were 69 transactions of purchase and 114 transactions of sale. However, in terms of value, the total value of purchase was found to be Rs.48,60,60,899/- while the total value of sale both long term and short term shares was found at Rs.56,73,66,207/-. The assessee was asked to explain on what basis the profit on sale of shares of aforesaid magnitude has been claimed to be short term capital/long term capital gains/loss, as distinct from business income. In response, the assessee explained that assessee had surplus funds available and that these were invested in shares. It was further pointed out that these shares constituted investments and not stock-in-trade and that the transactions were delivery based and that the STT has been added back in the computation of income and that no rebate u/s.88E is claimed. The AO did not accept the explanation of the assessee on the various reasons which has been incorporated in the order of the CIT(A) at page 3 of his order. Accordingly, the AO held that the amount of Rs.8,26,93,311/- claimed to be short term capital gain u/s.111A is taxable as profits and gains of business. The AO also held that the long term capital loss of

Rs.13,88,004/- claimed to be exempt and resulting from sale of shares was normal business loss.

3. In appeal before the CIT(A), the assessee reiterated the submissions raised before the AO. The CIT(A) confirmed the action of the AO on the ground that the transactions in the assessee's case being voluminous, numerous, consistently spread over the year and having short holding periods. The precise observation of the CIT(A) is as under :-

> *"2.3 I have considered the assessment order and the submissions of the appellant. Looking to the nature of transactions relating to the share transactions, in question and the concept of business income as mentioned in the ITA, I agree with the Assessing Officer that the short term capital gain (STCG) and long term capital loss (LTCL) is to be treated as business income. In this respect, I find that CBDT has issued its Circular No.4, dtd. 15.6.2007 in which it has laid down exhaustive guidelines on which the character of share transactions is to be tested to determine whether or not they can be treated as business income. On. this, I find that the essence of the CBDT Circular is that the transactions have to be examined in their totality before coming to the finding in the matter. For' example, the CBDT Circular' refers to the volume of the transactions, their magnitude, the ratio' between purchase and sales, the intention and many other such factors. Pitted against these tests, I find that the transactions in the Appellant's case being voluminous, numerous, consistently spread over the year, and very significantly, having very short holding periods cannot be treated as source of capital gain income. In this respect, the Assessing Officer has clearly pointed out that the Appellant has undertaken 69 transactions of purchase and 114 transactions of sale. The volume of transactions has also been high in as much as total value of purchases was Rs.48,60,60,899/- and that of sale Rs.56,73,66,207/-. Further, I find that the average period of holding of shares also ranges from only a few days to few months. This would show the high volume, high magnitude and high frequency of transactions. Further, I find that the transactions were carried out consistently throughout the year. Most significantly, the holding period of the shares transacted are very low as low as even 1 to 20 days in many cases indicating very clearly that the Appellant did not want to stay invested in these shares. In this light, when the volume, magnitude, frequency and average period of holding are seen together, it is quite clear that the intention of the appellant is not to make investment for the purpose of earning of dividend or for capital appreciation but very clearly for deriving regular income. from*

the sales and purchases. Accordingly, I find that the appellant's intention was to earn profit in a systematic manner and this being so, the income from the transaction is to be treated as business income. In this respect, a recent decision of the Hon. ITAT, Mumbai in the case Wallfort Financial Services Ltd. Vs Add. CIT Range 4(2) 41 SOT 200 bears special mention. In this case, the share broker tried to pass off his trading transactions in shares after 1.10.2004 as investment in light of the possibility of availing lower tax rate. In this backdrop, in this case, after analyzing all facts, the Hon.ITAT has agreed with the assessment made holding the income as business income. In face of these overwhelming features, the Appellant's arguments are found to be out of place. As I find, the reference to trading activities with F & 0 and intra-day transactions is misplaced as these are governed by different principles. Further, the Appellant's argument on the earning of dividend, holding the shares as investment, the shares being delivery based are rendered immaterial in face of the foregoing signature features of the share transactions. The Appellant's case is further tilted towards business in that there was no other business being carried out. Further, the Appellant's intention to change the character of income also becomes clear from the fact that, as pointed out by the Assessing Officer, no STCG or L TCG was claimed prior to AY 2005-06, when section 111A came into effect In this respect, on account of the profile of the transactions indicating Appellant's intention to make profits, I agree with Assessing Officer's observations as given on pages 3 to 8 of the assessment order. Further, in view of the peculiar facts of the Appellant's case, I find the Appellant's case distinguishable from the cases relied upon by the Appellant. In this respect, it is to be noted that the judicial evolution in the matter makes it clear that each case has to be decided on its individual facts. In line with the foregoing, the action of the Assessing Officer is confirmed and the ground of appeal is dismissed."

4. Learned AR argued that all the transactions of purchase and sale entered into by it were made with an intention of investment. The assessee company was incorporated under the provisions of the Companies Act, 1956 in December, 1999 and main object of the company is to carry on the business of distribution, marketing, publicity, sales promotions, agency, transportation, buy, sell, stock, import, export and generally to deal and trade auto spares parts, components and accessories similar other item used in the light, medium and heavy vehicles. The assessee also submitted that the lower authorities have failed to appreciate that treatment of shares/securities by the assessee as 'investments' has been accepted by the department in the AY 2005-06 & 2006-07. Assessments for A.Y.2005-06 & 2006-07 were completed u/s.143(3), wherein similar gains/loss, short term/long term, declared under the head 'capital gains' were accepted by the AO. The assessee also submitted that it is settled position in law that where there are no changes in the material facts and circumstances, nature as well as modus operandi of such share transactions, the principle of consistency should be applied. For this purpose, reliance was placed on the following decisions :-

i) CIT Vs. Darius Pandole 330 ITR 485 (Bom)

ii) CIT Vs. Gopal Purohit, (2010) 188 Taxman 140 (Bom); and

iii) ACIT Vs. Naishadh Vs. Vachharajani (passed by Mumbai Bench of the Tribunal in ITA No.6429.Mum/2009 and CO No.136/Mum/2010, dated 25.02.2011

4.1 In regard to issue of short holding period as alleged by the AO, the learned AR submitted that breakup of the short term capital gains of Rs.8.27 crore, though in the tabular form, as under which prove that holding period is not so small as alleged by lower authorities :-

Rs. in crore

Period for which corresponding shares were held	Amount of gain(Rupees in Crore)
Upto 60 days	1.94
61 to 120 days	2.17
121 to 210 days	3.53
211 to 365 days	0.63
Total	8.27

4.2 With regard to volume, magnitude and frequency of transactions is concerned, learned AR submitted that by no stretch of imagination

69 transactions of purchase and 114 transactions of sale of shares with the purchase value of Rs.48.60 crore and sale value of Rs.56.74 can be regarded as such a large number of regular and frequent transactions in shares as could entitle the AO to conclude that they amounted to business of assessee. It was further argued by learned AR that the volume, magnitude and frequencies of the transactions are not much and not relevant for deciding the nature of the transaction. The intention of the acquisition is relevant. Reliance was placed on the decision of Delhi Bench 'F' of the Tribunal dated 29-1-2010 in the case of Sh. Nirmal Kumar Jain, Delhi where it has again be reiterated that the nature of the transaction cannot be decided on the basis of the volume, magnitude and frequencies of the transactions but on the basis of the intention of the acquirer. Attention in this regard was also invited to the following decisions wherein various benches of the Tribunal have consistently held that the scale/quantum of activity of purchase and sale of shares is not relevant/determinative factor for ascertaining the nature of gains: J.M.Share & Stock Brokers Limited v. JCIT, ITA No.2801/Mum/2000; ACIT V. Motilal Oswal, [2006] 8 SOT 771 (Mum); Janak S. Rangwalla v. ACIT, [2007] 11 SOT 627(Mum). It was further contended that out of the shares sold during the year under considering, some of the shares were acquired in the preceding financial year 2005-06, and accepted to be 'investment' in the assessment for that assessment year. The long term capital loss of Rs.13,69,004/- is on the sales of the shares/securities held and

declared as investments and accepted so in the preceding financial year 2005-06 under scrutiny assessment. He further contended that on the similar facts, the gain in the assessment year 2005-06 and in assessment year 2006-07 were returned as capital gains and assessed so. There is no reason to depart from the findings arrived at in the preceding assessment year. The uniformity in treatment is to be maintained. The treatment is to be consistent, for this purpose, reliance was placed on the decision of Director of Income Tax Vs. Lovely Bal Shiksha Parishad, 266 ITR 349(Del); CIT Vs. Girish Mohan Ganeriwala, 260 ITR 417(P&H); CIT Vs. Gopal Purohit, ITA No.1121 of 2009, dated 06.01.2010(Mum). It was further submitted by learned AR that while rejecting the assessee’s contention regarding capital gains on shares, the CIT(A) has argued that principles of 'estoppel' or "*res judicata*" do not apply to tax proceedings. There can be no quarrel with this basic proposition of law, but at the same time it is well settled that the Rule of consistency cannot he ignored in tax proceedings.

4.3 It was also contended by learned AR that assessee entered only delivery basis transactions, wherein shares so purchased were taken delivery for which proper accounting was made in Demat account. Similarly, on sale delivery was given. However, the account was not settled by difference, meaning thereby there was actual delivery both in case of purchase and sales of shares and securities.

5. On the other hand, learned DR submitted that the essence of the CBDT Circular is that the transactions have to be examined in their totality before coming to the finding in the matter. However, assessee's case being voluminous, numerous, having very short holding periods cannot be treated as source of capital gain income. The AO has clearly pointed out that the assessee has undertaken 69 transactions of purchase and 114 transactions of sale. The volume of transactions has also been high in as much as total value of purchases was Rs.48,60,60,899/- and that of sale Rs.56,73,66,207/-. Further, learned DR submitted that the average period of holding of shares also ranges from only a few days to few months. The assessee's intention was to earn profit and this being so, the income from the transaction is to be treated as business income. It was also submitted that assessee's intention to change the character of income also becomes clear from the fact that, as pointed out by the Assessing Officer, no STCG or LTCG was claimed prior to AY 2005-06, when section 111A came into effect In this respect, on account of the profile of the transactions indicating Appellant's intention to make profits, therefore, the CIT(A) has rightly confirmed the action of the AO and the appeal of the assessee has no merit, which deserves to be dismissed.

6. We have considered rival contentions, perused the record as well as orders of the authorities below. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as decisions cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the instant case. From the record, we found that assessee company was incorporated to carry on business on distribution, marketing and trading in automobiles. During the year under consideration, the assessee has income by way of interest, dividend and short term and long term capital gains on shares/securities. From the object clause, we found that assessee company was not incorporated to carry on business of dealing in shares. It has no power to carry on business on dealing in shares. The short term and long term capital gains/loss earned by the assessee was declared under the head 'capital gains' depending upon the period of holdings of the shares sold during the year. However, the AO assessed the net gain as 'business income'. It is settled law that for the purpose of assessability of profit derived from sale of shares, it is predominantly the intention of the assessee which is relevant. Such intention of the assessee is to be gathered from the facts and circumstance of each case. The issue whether shares/securities held by an assessee as 'investment' or as 'stock-in-trade' and whether the profit derived from sale of shares/securities is assessable as 'capital gains' or 'business income', depends upon the intention of the assessee which is to be ascertained predominantly from the objective of the assessee in acquiring the shares. Whether the objective was to acquire shares as an 'investment' and enjoyed income therefrom or to make profit by buying and selling shares in the short term. The manner in which such shares has been classified in the financial statements are also relevant factor. Whether distinction has been maintained between the investment portfolio and stock in trade or is also relevant. The period for which the shares have been held, frequency of transaction, how the shares have been acquired whether out of own funds or borrowed funds are also required to be examined in the light of intention of assessee in acquiring the shares. The Hon'ble Supreme Court in the case of **CIT Vs. Sutlej Cotton Mills Supply Agency Ltd., [1975] 100 ITR 706 (SC)**, observed that a capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment. The Hon'ble Supreme Court in the case of **Karam Chand Thapar & Bros. (P) Limited Vs. CIT, 82 ITR 899**, observed that the manner of disclosure in the balance sheet though not conclusive, is a relevant circumstance. It was held that where the shares were shown by the assessee as 'investment' in the balance sheet, while holding that the fact that the assessee was showing shares as 'investment' in its books as well as in its balance sheet, though by itself not a conclusive circumstance, was a relevant circumstance for drawing inference as to the nature of loss. The Hon'ble Delhi High Court in the case of **CIT Vs. ESS Jay Enterprises (P) Ltd. 173 Taxman 1 (Del.)** observed that conduct of the assessee is the determinative factor in judging whether shares were held on capital or trading account. Considering all these legal proposition and applying the same to the facts of the instant case, we found that the assessee has consistently shown investment in shares and the profit arising out of these investments were not only offered by the assessee as capital gains but was accepted by the department under scrutiny assessment in earlier assessment year i.e. A.Y. 2005-06 & 2006-07 as capital gains and not as business income. As the assessee was having surplus funds, the management of the assessee decided to invest available funds in various shares/securities to earn dividend income and also to earn appreciation in the capital value, rather than keeping the funds idle. A resolution was passed in the Board Meeting of assessee company wherein it was resolved that surplus funds to be held as part of investment portfolio. The shares so purchased held as investment and not as 'stock-in-trade' and assessee also earned substantial dividend income of Rs.41,98,958/- on such investment. Thus, the quantum of dividend income earned by assessee also supports its intention of investment in shares. Furthermore, in the audited financial statement of the assessee company, the entire investment portfolio was reported under the head 'investment' and not as 'stock-in-trade'. The assessee has recorded the script name of each investment. We had also verified the audited financial statement of the assessee, in Note 1(v) in Schedule 8- notes to accounts forming part of audited accounts, it was clearly stated that assessee has been valuing the investment at cost and not at cost or market price, whichever is lower. The sale proceeds of the shares have not been reflected as turnover, while rejecting the assessee's contention regarding capital gains on shares, the CIT(A) has argued that principles of 'estoppel' or "*res judicata*" do not apply to tax proceedings. There can be no quarrel with this basic proposition of law, but at the same time it is well settled that the Rule of consistency cannot he ignored in tax proceedings. This rule is an exception to the above rule, and has been well recognized in various judicial rulings cited below:

1. *Radhasoami Satsang vs. CIT /1991/ 193 ITR 321 (SC)*
2. *Sardar Kehar Singh CIT /1991/ 195 ITR 769 (Raj.)*
3. *CIT vs. Neo Poly Pack (P) Ltd.[2000/245 ITR 492 (Delhi)*
4. *CIT vs. Belpahar Refractrories Ltd., [1981/128/ITR 610(Ori)*
5. *M.A. Namazie Endowment vs. CIT /1988/174 ITR 58 (Mad)*
6. *CIT vs. Shree Nirmal Commercial Ltd./1994/213 ITR 361 (Bom)(FB)*
7. *Turaben Ramanbhai Patel & Anr. Vs. ITO [1995] 215 ITR 323 (Guj)*
8. *Dhansiram Agarwalla vs. CIT /1996/217 ITR 4 (Gau)*

In the context of the dispute whether the share transactions resulted in trading profit or capital gains, the rule of consistency has been applied in the following two decisions of the Mumbai Bench of the Tribunal *:*

.(Gopal Purohit vs.Jt. CIT/2009/20 DTR 99(Mumbai Trib.)
.Janak S. Rangwala vs. ACIT /2007] 11 SOT 627 (Mumbai)

Following the rule of consistency, the Tribunal in above cases, accepted the assessee's contention that assessee was investor in shares and not trader because in the earlier years, the Revenue had accepted that the assessee was investor. In Janak Rangawala’s case (Supra), the Tribunal quoted the following passage from the judgement in Radhasoami Satsang (Supra): ‘...... Strictly speaking, *res judicata* does not apply to income tax proceedings- Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

7. The profit derived from sale has been shown as 'profit on sale of investment' and offered in return of income as short term or long term capital gains depending on period of holding shares held in investment account as on 31-3-2006 and which were sold during the year and profit/loss thereon was offered under head of long term capital gain/loss, were value at cost only, and at cost or market price whichever is lower. Had the assessee valued such shares at cost or market price, whichever is lower, there would have been justification in the inference drawn by the AO to the effect that assessee was doing business in shares. All these facts substantiated the stand of the assessee with regard to holding of shares as investment with an intention to earn appreciation in value and also earn dividend income and not to earn profit by trading in shares/securities.

8. Hon'ble Supreme Court in the case of **CIT Vs. Associated Industrial Development Company (P) Ltd. 82 ITR 586(SC)**, has held as under :-

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

From the record, we found that being a prudent investor, the assessee purchased shares when prices were falling and sold shares when the scrip achieved its target or it had anticipated further erosion in value. The transactions of purchase and sale of shares were to nurse investment and to avoid erosion of capital, surplus arising from sale of shares is to be treated as capital receipt in such circumstances.

9. The frequency and magnitude of purchase and sale transactions, no doubt, play important role, but the same is not conclusive and other factors like main business/profession of assessee, intention while purchasing shares, holding the same as investment, funds used for such transaction i.e. borrowed funds at interest or own funds etc. are required to be seen for reaching to the conclusion regarding assessee being investor or trader in shares. In the case of **Bharat Kuverji Kenia Vs. Add.CIT, 130 TTJ 86 (Mum)**, the Mumbai Bench of the Tribunal observed that, "*There is no justification for treating the activity of purchase and sale of shares as 'business' merely on the reason of the' volume of transactions. As per well settled principles of law, the frequency of transactions cannot be per se decisive*."

10. Speaking on number of transactions in the case of **Mr. Nehal V. Shah vs, ACIT (ITA. No.2733/Mum/2009)**, the Mumbai Bench of the Tribunal held "that a single transaction would be split by the computers trading of the stock exchanges into many smaller transactions, but, that does not mean that assessee has carried so many transactions". In the case of Hitesh Satishchandra Doshi vs. J'Cl'I' (ITA No. 64971Mum/2009), the Tribunal held that the frequency of purchase and sale of shares, transactions through the electronic system of Stock Exchange split a single transaction into numerous transactions. This gives an unrealistic figure of the number of transactions."

11. In the case of **CIT Vs. Gopal Purohit [2010] 228 CTR 582**, an issue came up for consideration before the Hon'ble Bombay High Court, as to whether the transactions of purchase and sale of shares is assessable as business profits or as capital gains. The Hon'ble Jurisdictional High Court upheld the decision of the tribunal that the resultant gain is assessable as Capital gains instead of Business Income, inter alia, in view of the followings :

> i) the delivery based transactions have been shown as investments in the books;
> ii) the shares shown as investments were valued at cost;
> iii) nature of activities, modus operandi of share transactions, manner of keeping records and presentation of shares as investments is same in all the years and hence apparently there appears no reason as to why the claims made by the appellant should not be accepted;

The Hon'ble Bombay High Court also accepted tribunal's observations that the principle of res judicata is not attracted since each year is separate in itself, however, there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. Special Leave Petition filed by the Department against this order of Hon'ble Bombay High Court has also been dismissed by the Supreme Court vide order dated 15th November, 2010.

12. In case of **DCIT vs. SMK Shares & Stock Broking (ITA No. 799/Mum/2009)** the Hon'ble Mumbai tribunal held that "the fact that the AO accepted the appellant's claim in earlier years that it was an investor is material because though the principles of *res judicata* do not strictly apply to income tax proceedings it is well settled law that the principles of consistency should not be ignored. Uniformity in treatment and consistency under the same facts and circumstances is one of the fundamentals of the judicial principles which cannot be brushed aside without proper reason.

13. The CIT(A) has relied on the decision of **Wallfort Financial Services Ltd. Vs. ADCIT, 41 SOT 200** for coming to the conclusion that the profit earned on sale of shares was business income. In this case, it was held by Mumbai Bench of the Tribunal that where the assessee had dealt in more than 300 scripts during the year and the turnover was about Rs.3500 crores and the assessee had regularly dealt in purchase and sales of shares with high frequency and volume for repetitive purchase and sales in the same scripts, with no shares being held for more than 1 year, profit accruing on sale of shares was liable to be taxed as business income. However, the facts of the instant case are entirely distinguishable wherein total number of scripts was only 29 as against the number of scripts in case of decision relied by the CIT(A), which was more than 300. Further, turnover in the instant case was only of Rs.56.73 crores, whereas turnover in the case relied by the CIT(A) was more than Rs.3500 crores. Furthermore, in the instant case the assessee had also declared long term capital gain/loss which means these shares were held for more than 1 year, whereas in the case relied on by CIT(A) as discussed above, there was no share held for more than 1 year. As the facts of instant case are distinguishable from the facts of the case relied by the learned CIT(A), the same will not help the Revenue for coming to the conclusion that profit arising on sale of shares was liable to tax as business income.

14. The decision to dispose of investment at a short interval is being taken by the assessee keeping in view the eventuality of down trend in the market sentiments over a particular script. Merely because the assessee was able to realize better prices of its investment at a short interval, cannot be solitary yardstick for treating such action as an adventure in the nature of trade, giving rise to business profits, when all the surrounding circumstances, indicate otherwise. No where the AO has indicated any transaction of purchase of shares without taking delivery and making full payment of such investment. Even in the case of investment it is for the assessee to decide when to dispose them off so as to have a maximum return out of them. There is no theory that the shares held as investment should be disposed of only at the time of need or in emergency. The assessee had all the rights to dispose the investment to reap the maximum benefit when the prices of scripts are high so as to earn better gain. It is true that frequency and volume of transaction is one of a guiding factors to find out as to whether assessee deal in shares as trading asset or hold shares as investor, but certainly not a criteria. A prudent investor always keep a watch on the market trend and, therefore, not barred under law from liquidating his investment in shares. The law itself has recognized this fact by taxing these transactions under the head “Short Term Capital gains” being shares which are sold within 12 months of its acquisition. Under these circumstances, if the contention of the AO and CIT(A) is accepted, then it would be against the legislative intent itself.

15. If the conclusion drawn in the impugned order, observations made from the assessment order, assertions made by respective counsels, proposition of law laid down in various judicial pronouncements as discussed above, and the material available on record are kept in juxtaposition and analyzed, we find that the assessee had been consistently investing in shares and income arising from delivery based transaction of sale and purchase of shares had been shown as capital gains i.e. LTCG and STCG depending upon period of holding and same was accepted by department under scrutiny assessment proceedings. Analysis of balance sheet of assessee reflects holding of shares as investment. In the speech by Hon'ble Finance Minister regarding Direct Tax Cases (Union Budget – 2004-05), especially clause 111, the intention of Government for introducing the security transaction tax and exempting the long term capital gain from sale of share and levying 10% tax on short term capital gain from sale of shares also supports the case of assessee. The idea behind introduction of security transaction tax is to end the litigation on the issue, whether the profit earned from delivery based sale of shares is capital gains or business profit.

16. Here, it is pertinent to mention the intention of Government for introducing the security transaction tax and exempt the long term capital gain earned from sale of shares and levying 10 % tax on short term capital gain and earned on sale of shares. It is noted that under the old provisions of the Income-tax Act, profits or gains arising to an investor from the transfer of securities were charged to tax either as long term capital gains or short term capital gains depending on the period of holding of the said securities; Short-term capital gains arising from transfer of securities were taxed at the applicable rates (normal rate) and Long-term capital gains were taxed @ 20%, after adjusting for inflation by indexing the cost of acquisition. For listed securities, the taxpayer had an option to pay tax on long-term capital gains @ 10% but without indexation. For Foreign Institutional Investors (FIIs), the long-term capital gains and short-term capital gains were taxed at the rate of 10% (without indexation) and 30% respectively. In case of a trader in securities, however, the gains were taxed as any other normal business income. Thus tax liability on the income from purchase & sale of shares as regards to the STCG & business income was at par. However, the issue of treatment of income from share transaction as capital gain or business income has in-fact arisen after the amendment brought with Finance Act - 2004 by insertion of provisions of section 111A and 10(38) as regards to levy of Transaction tax and exemption / concession on capital gain arising from securities entered in a recognized stock exchange. With a view to simplify the tax regime on securities transactions, a tax at the rate of 0.015 per cent. (see: change in rates on securities transactions, by Finance Acts, at appropriate head) is levied on the value of all the transactions of purchase of securities that take place in a recognized stock exchange in India. This tax is collected by the stock exchange from the purchaser of such securities and paid to the exchequer. The provisions relating to the securities transactions tax are contained in Chapter VII of the Finance (No.2) Bill, 2004, and came into effect from 01.10.2004. Further, clause (38) has been inserted in section 10 of the Income-tax Act, so as to provide exemption from long-term capital gains arising out of securities sold on the stock exchange. A new section 111A has also been inserted and section I15AD is amended, so as to provide that short-term capital gains arising from sale of such securities to an investor including FIIs shall be charged at the rate of ten per cent. These amendments apply to assessment year 2005-2006 and subsequent years. Through Finance Act, 2008, sections 111A and 115AD have further been amended whereby the rate of tax on such short-term capital gain has been raised to fifteen percent. Thus, w.e.f. 01.10.2004; on the share transactions subjected to STT; concessional tax rate of

10% (which has been increased to 15% from AY 2009-10) are applicable in respect of STCG whereas no tax is chargeable in respect of LTCG.

17. Even the Hon'ble Apex Court in the case of K.P. Verghese vs ITO, 131 ITR 597 (SC) observed as under:-

> *"The task of interpretation of a statutory enactment is not mechanical task. It is more than a mere reading of mathematical formulae because few word possesses the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provisions to be 'drafted with divine prescience and perfect clarity.' We can do better than repeat the famous words of judge Learned Hand when he said.''*

The above observations of Hon'ble Judges of the Apex Court was reiterated by Hon'ble Apex Court in the case of **Kerala State Industrial Corporation, 259 ITR 51 (SC)** holding as under:-

> *''That the Finance Minister's Speech can be relied upon to throw light on the object and purpose of the particular provisions introduction by the Finance Bill has been recognized by this Court in K.P. Verghese – vs ITO 1981), 131 ITR 597 (SC), at 609. Again in the case of R & B Falcon (A) Pvt. Ltd vs CIT (2008) 301 ITR 309 (SC), it was held that (Page 323):-*
>
> *Rules of executive construction in a situation of this nature may also be applied. Where a representation is made by the makers of legislation at the time of introduction of Bill or construction thereupon is put by the executive upon its coming into force, the carries great weight.''*

18. The Hon'ble Delhi High Court in **ARJ Security Printers, 264 ITR 276 and Neo Pollypack Pvt Ltd. 245 ITR 492 (Del.)** held that even when the doctrine of *res judicata* does not apply to income tax proceedings, where a issue has been decided consistently in earlier assessment years in particular manner, the same view should prevail in subsequent years unless there is a material change in facts, meaning thereby, there must be material change in the facts. As mentioned earlier, the ld. CIT(A), identically for assessment year 2002-03 allowed the claim of the assessee and the same has been accepted by the Department.

19. The Mumbai Bench of the Tribunal in the case of **Shantilal M Jain vs ACIT vide order dated 27-04-2011 (ITA No. 269/Mum/2010)** held that despite large volume of shares transactions, the Assessing Officer cannot ignore the rule of consistency to treat the gains on sale of shares as STCG. In that case, the assessee was engaged in the business of trading of investment in shares and securities offered Rs. 1.54 crores as short term capital gain and Rs. 2.91 crores from long term capital gain. The long term capital gain was accepted whereas short term capital gain was held to be business profit. Since in earlier assessment years the claim of the assessee was consistently accepted as short term capital gain, it was held that the rule of consistency as propounded by Hon'ble Bombay High Court in the case of Gopal Purohit (supra), it is fairly applicable and the income has to be treated as short term capital gain. Identically in the case of Nagindas P Seth (ITA No.961/Mum/2010) it was held that despite large number of transactions in shares, the profit can be assessed as capital gains under the facts of the case. The case of the assessee is further fortified by these decisions more specifically when the assessee held the shares in his books as investor, no interest was paid on the funds and there was not a single instance where the assessee squared up the transactions on the same day without taking the delivery of shares. The decision in the case of **Janak S Ranawala, 11 SOT 627 (Mum.)** further supports the case of the assessee. Likewise, the decision from Hon'ble Madras High Court in **CIT vs N.S.S. Investment Pvt Ltd. 227 ITR 149 (Mad), CIT vs Associated Industrial Development Company, 82 ITR 526 (SC)** supports the case of the assessee. In the present appeal, we note that the assessee made investment in shares with intention to earn dividend income and appreciation in price of shares. Therefore, it cannot be said that the assessee was doing business. More specifically when, the assessee has utilised his own funds and depicted the transactions in shares under investment portfolio.

20. In view of the above discussion, we do not find any merit in the conclusion drawn by the lower authorities for treating the capital gain as business income. Accordingly the AO is directed to assess the same as capital gain.

20. **In the result, appeal filed by the assessee is allowed.**

परिणामतः निर्धारिती की अपील स्वीकृत की जाती है ।

Order pronounced in the open court on this 9th May,2014.

आदेश की घोषणा खुले न्यायालय में दिनांकः 9th May,2014 को की गई ।

Sd/-	**Sd/-**
(डा.एस.टी.एम पवलन**)**	**(**आर.सी.शर्मा**)**
(DR.S.T.M.PAVALAN)	**(R.C.SHARMA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	लेखा सदस्य **/ ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 09/05/2014

प्र.कु.मि/pkm, नि.स/ PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai