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

BEFORE SHRI I.P.BANSAL (J.M) & SHRI N.K.BILLAIYA (A.M)

ITA NO. 4864/MUM/2011(A.Y. 2007-08)

Storewell Credits & Capital Pvt. Ltd., Kejriewal House, 7, N. Gamadia Road, Mumbai - 26. PAN:AADCS 9571Q (Appellant)	Vs.	The ACIT, Range 5(3), 5^{TH} Floor, Aaykar Bhavan, MK Road, Mumbai - 20. (Respondent)

Appellant by	:	Shri S.V.Joshi
Respondent by	:	Shri V.Krishna Moorthy

Date of hearing	:	23/07/2012
Date of pronouncement	:	27/ 07/2012

ORDER

PER I.P.BANSAL, J.M

This is an appeal filed by the assessee. It is directed against the order dated 24/3/2011 of CIT(A)-9, Mumbai, for the assessment year 2007-08. The grounds of appeal raised by the assessee read as under:

> 1. The Learned Commissioner of Income Tax (Appeals)-9 Mumbai, erred in holding that the appellant was a dealer in shares and the profit / loss arising on sale of such shares was assessable to tax as 'Business Income' and not as 'Capital Gain' as contended by the appellant.
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> 2. The Learned CIT-(A)-9 Mumbai, in the facts and circumstances of the case ought to have held that the appellant held the shares in listed companies as 'Investments' and not as 'Stock-in Trade'.
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> 3. The Learned CIT-(A)-9 Mumbai, erred in following the order passed by his predecessor for A.Y. 2006-07 ignoring various ITAT decisions rendered after the order was passed by his predecessor.

3.1 The Learned CIT(A)-9 Mumbai ought to have followed various ITAT decisions cited before him which were pronounced after the appellate order was passed by his predecessor for A.Y. 2006-07.

4. The CIT-(A)-9 Mumbai after having held that the appellant was a dealer in shares ought to have held that the appellant was entitled to:

I) Deduction of Interest of Rs.2,95,467/-,
II) Deduction of Transaction Costs of Rs. 1,84,727/-.

5. The Learned CIT-(A)-9 Mumbai erred in holding that the Assessing Officer was justified in denying deduction of Rs.80,50,000/- claimed by the appellant u/s. 35AC in respect of contribution made to eligible project."

2. The AO treated the short term capital gain arising to the assessee out of sale and purchase of shares amounting to Rs. 68,15,802/- as business income against the claim of the assessee that the same should be considered to be short term capital gain. The action of AO has been confirmed by Ld. CIT(A). The assessee is aggrieved, hence, raised the aforementioned grounds of appeal.

3. It is the case of the assessee that the issue raised in the present appeal is covered in favour of the assessee by the decision of the Tribunal in the immediate preceding year i.e. for A.Y 2006-07. To demonstrate that the facts for the immediate preceding year as related to the impugned issue are similar Ld. A.R has referred to para 7, 8 & 9 of the assessment order, which is reproduced below:

"7. The facts, nature & extent of the transactions in this assessment year are the same as the facts, nature & extent of the transactions for the A.Y.2006-07. In view of this similarity, and on account of the same reasons as have been brought out in the order for the order has been confirmed by the CIT(A), the surplus so generated on account of the transactions in shares is treated as business income and the contentions / stands adopted by the assessee for treating the surplus arising from share transactions as Short term Capital Gain is rejected.

8. It may be mentioned here that the assessment order for the A.Y. 2006-07 was the subject matter of the appeal with the CIT(A) and the CIT(A) while adjudicating the appeal and the issues before him decided that the income ought to be taxed under the head Business Income and not under the head Short Term Capital Gain. This decision of the CIT(A) is after taking in consideration the appeal orders for the A.Y.2004-05 & 2005-06 which were decided in favour of the assessee.

9. Having done so various expenses claimed by the assessee will need to be examined. In the Asst. Order for the A.Y.2006-07, the A.O. has made various disallowances in the Assessment order under the following heads. Following the Assessment order for A.Y.2006-07, in this year also on account of the same reasons the following disallowances are being made".

4. The Ld. A.R also referred to para 2.5 of Ld. CIT(A)'s order, wherein he has recorded a finding that the facts of this year are similar to the facts of A.Y 2006-07. The relevant para 2.5 is reproduced as under:

"2.5 Since the nature of transaction and facts of the case in this year are similar to the facts of the Assessment Year 2006-07. Therefore relying on detailed aforesaid analyses of my predecessor CIT(A), I hold that the Assessing Officer was fully justified in taxing profits on sale of shares as business income instead of "Short term Capital Gain" claimed by the appellant. Thus, this ground of appeal is dismissed".

4.1 Ld. A.R further pleaded that for A.Y 2006-07 the order of CIT(A) was challenged before ITAT and it was decided by the Tribunal vide its order dated 21/3/2012 in ITA No.5286/M/09 and reference was made to the following observations:

"14. On hearing both sides, it is clear that the holding pattern by the assessee co. has to be taken into account. It is seen that the assessee co. has demonstrated that despite the fact, that there were substantial movement in some of the scrips (Praj), the average holding in all shares put together exceed 192 days i.e. more than six months. This itself establishes that the assessee co. has been holding on its purchases. The assessee co. further establishes the fact that in the current year the investments are more than 10 times the borrowings, which according to the AR borrowings, were effectively 0% against investment. The AR of the assessee co. very effectively pointed out that all purchase have been delivery based, which the DR could not controvert. The fact that the assessee co. in conducting its business from its residence

goes to prove that the observation of the AO and CIT(A) that the assessee has been conducting business in a continuous, organized and systematic manner does not seem to inspire confidence, because if the assessee co. is conducting its portfolio from residence, it cannot be organized and systematic and if the holding patter is between 192 days to 470 and closing stock holding, averages 1378 days cannot be called continuous.

15. Taking into account all the facts and going into the referred case laws, as placed before us, alongwith the case of Gopal Purohit, which has been upheld by the Hon'ble Bombay High Court, which squarely apply to the assessee's case in the present set of circumstances, we are of the considered view that the assessee co. is an investor and not a trader in shares."

Thus it was claimed by the Ld. A.R that addition has wrongly been made and sustained and the same should be deleted. He submitted that the issue raised in Ground No.1 to 2 is decided in favour of the assessee by considering the covered matter then other grounds need not to be decided as they will become infructuous in view of acceptance of main case of the assessee.

5. Ld. D.R on the other hand, relied upon the orders passed by A.O and CIT(A).

6. We have carefully considered the rival submissions in the light of the material placed before us. The AO as well as Ld. CIT(A) both have relied upon the case of the assessee for A.Y 2006-07. For A.Y. 2006-07 Ld. CIT(A) had confirmed the similar action of the AO referring to which for the impugned year also Ld. CIT(A) has dismissed this ground of the assessee. The order of Ld. CIT(A) for A.Y 2006-07 on this issue was considered by the Tribunal relevant portion of which has already been reproduced in the above part of this order. Therefore, the issue raised by the assessee is clearly covered by the aforementioned order and following the decision of the Co-ordinate Bench we hold that in the present set of circumstances, the assessee company is an investor and not trader in shares. Therefore, we

allow Ground No. 1to 3.1 of the assessee in the manner aforesaid. The other grounds, as stated by Ld. A.R have become infructuous in view of acceptance of the case of the assessee as mentioned in ground No.1 to 3.1.

7. In the result, the appeal filed by the assessee is allowed in the manner aforesaid.

Order pronounced in the open court on the 27th day of July, 2012

Sd/-	Sd/-
(N.K.BILLAIYA)	(I.P.BANSAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 27th July, 2012

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"E" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.