<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "बी" मुंबई</u>

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

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND B.R.BASKARAN (AM)

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.7267/Mum/2010

(निर्धारण वर्ष / Assessment Year :2007-08)

M/s Business Match Services (I) Pvt. 2,Nepture II, Smt.Nargis Dutta Road, Pali Hill, Bandra (W), Mumbai-400050	**<u>बनाम</u>**/ Vs.	Dy.Commissioner of Income Tax -9(1), Aayakar Bhavan, M.K.Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.8076/Mum/2011

(निर्धारण वर्ष / Assessment Year : 2008-09)

M/s Business Match Services (I) Pvt. 2,Nepture II, Smt.Nargis Dutta Road, Pali Hill, Bandra (W), Mumbai-400050	**<u>बनाम</u>**/ Vs.	Addl.Commissioner of Income Tax -9(1), Aayakar Bhavan, M.K.Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACB6129N

अपीलार्थी ओर से / Appellant by	Shri Vijay Mehta
प्रत्यर्थी की ओर से/Rspondent by	Shri Asgar Zain V P

सुनवाई की तारीख / Date of Hearing : 7.7.2015

घोषणा की तारीख /Date of Pronouncement: 19.8.2015

<u>आदेश / O R D E R</u>

PER B.R. BASKARAN (AM)

Both the appeals filed by the assessee are directed against the two separate orders dated 15.9.2010 and 5.9.2011 passed by Ld CIT(A)-19, Mumbai and they relate to the assessment years 2007-08 and 2008-09 respectively. Both the appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. In the assessment year 2007-08, the following issues are urged by the assessee:

a) Disallowance of Foreign Travelling expenses; and
b) Assessment of Short Term Capital Gains (STCG) as business income.

2.1 In the assessment year 2008-09, the following issues are urged by the assessee:

a) Assessment of Short Term Capital Gains (STCG) as business income; and
b) Disallowances made under section 14A of the Act.

3. Facts of the case are stated in brief. The assessee company is engaged in the business of providing consultancy services in the field of private placement of shares to foreign institutional investors, financial institutions. It is also engaged in the business of arranging finance and advising on insurance business. During the two years under consideration, the assessee also dealt in purchase and sale of shares. It declared a portion of profits arising on sale of shares as Short term Capital Gain (STCG) and the remaining portion was offered as its business income, i.e. the assessee has maintained separate portfolios for investment and trading assets. In both the years under consideration, the AO did not agree with the claim of STCG declared by the assessee and accordingly assessed the same as business income.

4. In assessment year 2007-08, the assessee had claimed foreign travelling expenses to the tune of Rs.11.84 lakhs. The AO took the view that this expenditure was not related to the existing business, but it has been incurred for exploring new business opportunity. Accordingly, the AO took the view that it is in the nature of capital expenditure or pre-operative

expenses. Though the assessee explained that it has incurred foreign travelling expenses for expansion of its business in foreign countries, the AO took the view that the assessee did not specify the purpose of expenditure. In view of the above, he disallowed the claim of foreign travel expenses.

5. In the assessment year 2008-09, the assessee had declared the dividend income of Rs.42.05 lakhs. The assessee has disallowed Rs.2.07 lakhs under section 14A of the Act. However, the AO proceeded to compute the disallowance u/s 14A of the Act as per the provisions of Rule 8D of the Income Tax Rules, 1962 and the same worked out to Rs.13.57 lakhs. The AO disallowed the above said amount u/s 14A of the Act.

6. In the appellate proceeding, the ld. CIT(A) confirmed the assessment of STCG as business income of the assessee. He also confirmed the disallowance of foreign travelling expenses accepting the order of AO that it is capital in nature. With regard to the disallowance made under section 14A of the Act in assessment year 2008-09, the ld. CIT(A) restored the matter to the file of the AO with a direction to re-work the disallowance in the light of discussion made by him. Aggrieved by the order of the ld. CIT(A), the assessee has filed these appeals before us.

7. We heard the parties and perused the record. The first issue relates to the assessment of Capital Gains as Business income. In the year relevant to the assessment year 2007-08, the assessee initially declared STCG of Rs.383.52 lakhs. However, later it reduced the STCG claim to Rs.371.45 lakhs and declared balance amount of Rs.12.07 lakhs as Business income. It is pertinent to note that the assessee has earned the entire amount of STCG in dealing with a single scrip viz., M/s Adani Enterprises Limited. The assessee has furnished the details of workings of

STCG at page 17 of the paper book. A perusal of the same would show that the assessee has held the shares of M/s Adani Enterprises Limited for an average period of 60 days. The assessee has purchased shares initially in several instalments and sold them subsequently in instalments, meaning thereby there are no successive repetition of purchase and sale of shares. There is an exception only to the extent of Rs.1.13 lakhs against the total purchases of Rs.588.01 lakhs. A perusal of Balance Sheet placed at page 5 of the paper book also shows that the assessee has used own funds and also interest free funds borrowed from the directors only for making investments, meaning thereby, no interest bearing funds have been borrowed for the purpose. The assessee has taken delivery of shares. In the books, it has treated the same as its investment.

8. We notice that the AO has considered all the shares together to take the view that the assessee has indulged in trading in shares. However, the fact remains that the assessee itself has offered gains arising on shares held as trading stock as its business income. The assessee has claimed the gains arising on sale of Adani Enterprises Limited only as Short term Capital gain with the claim that it has held the same as its investment. It is now well settled proposition that a person is entitled to maintain two separate portfolios, one for its investment and another one for its trading assets. For this proposition, one may gainfully refer to the Circular No.4/2007 dated 15-06-2007 issued by the CBDT and also the decision rendered by Hon'ble Bombay High Court in the case of Gopal Purohit (2010)(228 CTR 582). In the instant case, the assessing officer has not disproved the claim of the assessee that it has maintained two different portfolios as discussed above. Even though the Ld CIT(A) has observed that the question whether transactions were in the nature of trade or otherwise is largely dependent upon the facts of each case, yet we are of the view that the Ld CIT(A) has not properly appreciated the

facts prevailing in the instant case. In our view, the discussions made by us in the preceding paragraphs clearly show that the intention of the assessee at the time of purchase of shares of M/s Adani Enterprises Limited was to hold it as its investments. We notice that the assessing officer has not brought any material on record to show the contrary, which means that the AO has arrived at the adverse conclusion only on surmises. Accordingly, we are of the view that the gains arising on its sale should be assessed as Short term capital gains only. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the assessing officer to assess the gains arising on sale of shares of M/s Adani Enterprises Limited under the head "Income from Capital gains".

9. The next issue contested in AY 2007-08 relates to the disallowance of foreign travel expenses. We have noticed earlier that the tax authorities have taken the view that the foreign travel expenses have been incurred on exploring new business opportunities and hence it is capital in nature and/or in the nature of pre-operative expenses. There is no dispute with regard to the fact that the assessee is engaged in the business of providing consultancy services in private placement of shares with Foreign Institutional Investors, financial institutes and is also providing advice on strategic investments and insurance sector. Besides the above, it also helps in arranging finance. Now the submission of the assessee is that it has incurred foreign travel expenses to expand its operations in various other places. Mere expansion of existing business activities, under no circumstances, would fall under the category of "New business venture". It is not the case of the AO that the assessee has incurred the foreign travel expenses in connection with any activity, which is altogether new one and unconnected with the existing business activities. From the explanation furnished by the assessee, we notice that the travelling expenses have been incurred to increase the customer base in different

countries and also to identify new avenues in the existing business of providing financial consultancy services. It is a settled proposition that the expenditure incurred for expansion of the existing business activities is revenue in nature. It is also well settled that the expenditure need not produce revenue immediately, since it is usual that these expenditure may bear fruits in future. The assessee has also submitted that these expenses have not been incurred by the directors, but the representatives of the assessee company who hold high educational qualification, meaning thereby the element of personal expenditure is also ruled out. Hence, we are of the view that the tax authorities are not right in law in holding that the travelling expenses are capital/pre-operative in nature. Accordingly we set aside the order of Ld CIT(A) on this issue and direct the AO to allow the deduction towards foreign travel expenses.

10. Now, we shall take up the appeal filed for AY 2008-09. The first issue relates to the assessment of Short term capital gain arising on sale of shares as business income. As in last year, the assessee has maintained two separate portfolios, viz., one for share investment activity and another one for share trading activity. In the investment category, the assessee has dealt with only one share viz., M/s Balaji Telefilms Ltd. The various criteria discussed in the immediately preceding year with regard to the investment made in M/s Adani Enterprises Ltd are equally applicable to the investment made in M/s Balaji Telefilms Ltd, i.e., except one case of repetition of small magnitude, there is no repetition of purchase and sale. The assessee has accumulated the shares initially in instalments and later sold them in instalments. As in last year, no interest bearing funds have been used and average holding period is about 180 days. The assessee has held the same as its investment. The assessee has declared the gains under the head business in respect of shares held as trading asset. All these factors support the contention of the assessee that the shares of M/s

Balaji Telefilm Ltd were held as investment. Accordingly, we hold that the tax authorities are not justified in assessing the profit generated on sale of shares of M/s Balaji Telefilm Ltd as business income, that too, without bringing any other material on record. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to assess the same under the head "Short term Capital Gain".

11. The next issue contested in AY 2008-09 relates to the disallowance made u/s 14A of the Act. The assessee made a disallowance of Rs.2,07,022/- u/s 14A of the Act. However the AO computed the disallowance in terms of Rule 8D of the I.T rules at Rs.13,57,011/- and disallowed the same. Before the Ld CIT(A), the assessee submitted that the total administrative expenses incurred by it was Rs.19,11,754/-, out of which it has suo-motu disallowed a sum of Rs.8,20,901/-, meaning thereby the assessee has claimed about Rs.11.00 lakhs only as administrative expenses. It was further contended that the above said amount of Rs.11.00 lakhs was also incurred in connection with the regular business activities. In view of the above said submissions, the Ld CIT(A) set aside the matter of computation of disallowance to the file of the AO. The assessee is contesting the said decision by submitting that no disallowance is called for u/s 14A of the Act.

12. We heard the rival contentions on this issue and perused the record. The major expenses incurred by the assessee under the head "Administrative expenses" are as given below:-

Brokerage paid on sale of painting	2,02,000
Donation	5,00,000
Legal & Professional fee	7,50,562
Maintenance expenses	1,13,879
Travelling expenses	2,36,402

	18,02,843
	========

The assessee has disallowed donation expenses of Rs.5,00,000/- and maintenance expenses of Rs.1,13,879/- on its own while computing the total income. The brokerage of Rs.2,02,000/- paid on sale of painting is a direct expenditure incurred in connection with some other activity. It is submitted that the profit earned on sale of painting was offered to tax. The legal and professional fee was paid to Vatsala K towards advising for real estate deal with M/s K.V. Property ventures Pvt Ltd and hence it is also a direct expenditure. The travelling expenses were claimed to have been incurred in connection with the regular business activities only. Accordingly, if we exclude the above said expenditure, the remaining indirect expenses works out to Rs.1,08,911/- only, where as the assessee itself has disallowed a sum of Rs.2,07,022/- u/s 14A of the Act while computing the total income. Under these set of facts, in our view, the provisions of Rule 8D should not applied in the instant case, since the disallowance computed under Rule 8D works out to disproportionately higher figure of Rs.13,57,011/-. Hence, considering the facts discussed above, we are of the view that the disallowance of Rs.2,07,022/- made by the assessee does not call for any interference. In view of the above, we set aside the order of Ld CIT(A) on this issue and direct the AO to restrict the disallowance u/s 14A of the Act to the amount disallowed by the assessee.

13. In the result, both the appeals filed by the assessee are allowed.

Pronounced accordingly on 19th August, 2015.

घोषणा खुले न्यायालय में दिनांकः 19th August, 2015 को की गई ।

Sd sd

(जोगिन्दर सिंह/**JOGINDER SINGH**) (बी.आर. बास्करन,/ **B.R. BASKARAN**)
न्यायिक सदस्य / **Judicial Member** लेखा सदस्य/**Accountant Member**

मुंबई Mumbai: 19th August, 2015.

व.नि.स./ SRL , Sr. 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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

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