आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E" MUMBAI

सर्वश्री बी.आर.मित्तल, न्या.स / **एवं**

BEFORE SHRI B.R. MITTAL, JUDICIAL MEMBER /AND

श्री राजेन्द्र, ले.स.

SHRI RAJENDRA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 8047/Mum/2011

निर्धारण वर्ष /Assessment Year 2008-09

A.C.I.T. - Range 9(1), R.No. 223, Aayakar Bhavan, M.K. Road, MUMBAI – 20.	Vs.	M/s. East & West Securities Pvt. Ltd., 302/303, A.N. House, 3rd Floor, 34, TPS-III, 31st Road, Off Linking Road, Bandra (W), MUMBAI-400 050.

आयकर अपील सं. / ITA No. 7335/Mum/2011

निर्धारण वर्ष /Assessment Year 2008-09

M/s. East & West Securities Pvt. Ltd., 302/303, A.N. House, 3rd Floor, 34, TPS-III, 31st Road, Off Linking Road, Bandra (W), MUMBAI-400 050.	Vs.	A.C.I.T. - Range 9(1), R.No. 223, Aayakar Bhavan, M.K. Road, MUMBAI – 20.
PAN: AAACE 7577 R		

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

Revenue by	:	Shri Girija Dayal
Assessee by	:	Shri C.M. Gabhawala

सुनवाई की तारीख / Date of Hearing	: 25-03-2013
घोषणा की तारीख / Date of Pronouncement	: 03-04-2013

आदेश / O R D E R

PER RAJENDRA, A.M.

Assessee-company and the Assessing Officer (AO) have filed the cross-appeals against the order dt. 27-09-2011of CIT(A)-19, Mumbai:

GROUNDS OF APPEAL FILED BY THE AO

1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A)*

erred in holding that provisions of Section 43(5), clause (d) is applicable from 25-01-2006 being the date of notification of BSE & NSE as recognized stock exchange, ignoring the facts that the provisions of Section 43(5), clause (d) is inserted w.e.f. 01-04-2006.

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the Assessing Officer to set off of brought forward speculation loss for AY. 2002-03 against the income of the part period i.e., income from 01-04-2005 to 24-01-2006, holding that income from trading in derivatives through recognized stock exchange.*

3. *The appellant prays that the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.*

4. *The appellant craves for leave to amend or alter any grounds or add a new ground which may be necessary.*

GROUNDS OF APPEAL FILED BY THE ASSESSEE-COMPANY

1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in upholding the finding of the learned A.O. that the short term capital gains of Rs. 80,39,872/- earned on share transactions is taxable as business income.*

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that the case laws as cited by your appellant are distinguishable on facts and hence are not applicable.*

3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that your appellant is in the business of share trading and is not an investor relying heavily on volume and frequency of transactions and ignoring the various other favourable parameters cited in the submissions dated 04-06-2011.*

4. *Your appellant craves leave to add, alter or amend any of the above grounds of appeal on or before the date of hearing.*

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2. Assessee-company, engaged in the business of investment and trading of shares, filed its return of income on 27-09-2008 declaring total income at Rs. 38.38 Lakhs. Initially, the return was processed u/s.143(1) of the Income Tax Act,1961(Act). Later on, the case was selected for scrutiny and assessment was finalised by the Assessing Officer (AO) u/s. 143(3) of the Act on 20-12-2010 determining the total income of the assessee at Rs. 3.90 Crores.

Originally, AO had filed two Grounds of Appeal. Subsequently, he withdrew the first Ground. As a result, there is only one effective ground of appeal in the appeal filed by the AO and it pertains to set-off of brought forward speculation loss for 2002-03 against the income of the part period.

2.1. During the assessment proceedings, AO had disallowed set-off of part absorbed business loss of earlier year on the ground that it pertain to speculation loss of AY. 2001-02. Assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submissions of the assessee and the Assessment Order, he held that speculation loss computed prior to 01-04-2006 could be carried forward for eight years. Accordingly, he directed the AO to allow the claim of set-off verification of records.FAA referred to the order of the ITAT in assessee's own case for the AY. 2006-07 for allowing the appeal filed by the assessee.

2.2 Before us, Departmental Representative (DR) relied upon the order of the AO. Athorised Representative (AR) submitted that issue was covered in favour of the assessee by Tribunal's earlier order for the AY. 2006-07 (ITA No. 866/M/2010 dt. 25-02- 2011.

2.3 We have heard the rival submissions and perused the material put before us. We find that 'E' Bench of the Mumbai ITAT vide its order dt. 25-02-2011 (supra) has held as under:

"*13.In so far as the eligibility of the speculative losses to be carried forward under sub-sec. 4 of Section 73 reduced from 8 years to 4 years by amendment Finance Act, 2005 w.e.f. 01-04-2006 is concerned, we are of the view that speculative loss first computed in the year of 2001-02 were allowed to be carried forward up to 8 years as per the provisions existed at that relevant point of time. The restriction of 4 years is applicable only for the speculative losses which for the first time computed on or after 01-04-200, therefore once the speculative losses first determined is allowed to be carried forward to be 8 years the same cannot be disallowed from set off by virtue of subsequent amendment restricting the period of carried forward. We quote the provisions of section 73 as under:*

Losses in speculation business.

73.(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.
(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall subject to the other provisions of this Chapter, be carried forward to the following assessment year, and –
(i)It shall be off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and
(ii)If the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on
(iii)In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section(2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business.
(iv)No loss shall be carried forward under this section for more than (four) assessment years immediately succeeding the assessment year for which the loss was first computed.
[Explanation: where any part of the business of a company (other than a company whose gross total income consists mainly of income which is chargeable under the heads 'Interest on Securities', 'Income from house property', 'Capital Gains' and 'Income from other sources'), or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares].
14. From the plain reading of Sub-sec. 4 of Section 73, it is clear that the amendment is applicable only w.e.f. 01-04-2006 and therefore, it would not effect the setting off of the

already brought forward speculation losses. This issue is allowed in favour of the assessee and against the revenue. The order of the lower authorities are set aside.
The appeal of the assessee is allowed."

Respectfully following the same, we dismiss the Ground No.2 filed by the AO.

Appeal filed by the AO stands dismissed.

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3. The effective Ground of Appeal filed by the assessee-company relates to finding given by the AO in respect of share transactions carried out by the assessee-company during the assessment year under consideration. On perusal of the statement of computation of total income filed by the assessee-company, AO needed that assessee had shown Short Term Capital Gain(STCG) of Rs.80.39 lakhs, that during the relevant previous year the assessee carried out 65 transactions of purchase and sale of shares of which net STCG of Rs. 80,39,872/- was declared. After considering the submissions of the assessee, AO analysed the transaction carried out by the assessee-company for the purpose of determining the nature of transaction. He verified as whether there were substantial transactions, He held that ordinarily purchase and sale of shares with a motive of realising profit would lead to influence of trade/adventure in the nature of trade, that where the object of investment in shares of companies was to derive income by way of dividend the transactions of purchase and sale of share would lead to capital gains and not business profits, that the number of shares trades, number of transactions and volume of transactions was required to be taken into consideration for determining whether the transaction was in the nature of trade or investment, that frequency or number of similar transactions by the same person could also be the rule to determine whether the assessee was a trader or investor, that if realisation of the shares/securities occurred in succession over a period of time or there were several such realisations, a presumption arose that the assessee is dealing in such commodities, that when there was an organized effort to obtain profit, the same indicated the nature of activity as trade and not investment, that intention at the time of purchase was very crucial, relevant and often conclusive factor to know whether the resale was in the nature of an adventure in trade or not. As per AO, such analysis revealed that 70.7% of total transactions were carried out within a period of one month only, that during the relevant previous year, the assessee had carried out purchase and sale of shares of Rs. 6,91,69,411/- in terms of volume and 59 in terms of quantity of transactions, that only six transactions were of period of more than six months, that data clearly indicated the frequency of dealing in purchase and sale of transactions, that the assessee was a trader in shares and not an investor, that profit earned by it was required to be brought to tax as Business Income and not Capital Gains.

4. Assessee preferred an appeal before the First Appellate Authority (FAA). After considering the assessment order and the submissions of the assessee, FAA held that no single fact had any decisive significance and the question must depend upon the collective effect of all the relevant materials brought on record, that whether assessee was an investor or a trader depended on the facts of each case and hence rule of consistency did not apply, that it was also noted that borrowed funds had been used for purchase of shares, that a trader in a commodity was basically motivated by profit in selling the commodity on each and every rise in value, that he aimed to earn profit by generating volume by frequently turning over the stocks ,that high frequency, high volume and regularity of transactions were the basic features of a trading transaction, that an investor on the other hand would make purchases with a view to earning income from the investments, that he would not be tempted to sell the commodity to earn quick profit on each and every rise in the value and would hold the commodity for a longer period so as to have income as well as appreciation in value, that true nature of transaction could be understood from the intention of the assessee at the time of purchase, that various factors were needed to be considered in understanding the intention or the nature of transaction - frequency and volume of transactions; nature of entry in the books of accounts; the object clause in the Memorandum of Association authorising such transaction; circumstances such as organized efforts made to earn income as well as loans and borrowing which are normally associated with a business activity; profit motive-,that no single factor was conclusive and totality of the facts and circumstances had to be considered in arriving at a fair conclusion in the matter, that investment presupposed a time frame of holding of securities and frequent shuffling of the portfolio could indicate application of mind to book the profit, that if assessee would purchase shares during the year and sell them frequently in short spell it might indicate business motive unless evidences were adduced in support that same were actually undertaken for compelling reasons e.g. pressing needs for fund, a better option for reinvestment, that assessee was required to explain the reasons in respect of each of the transactions and a large frequency of transaction could be a pointer towards business motive. Further, where the transactions were squared up during the year and the funds were employed in new portfolios and the same pattern was followed year after year it could lead to inference that there was trading motive, that the appellant was engaged in the dealing in shares and has special expertise and knowledge in this area, that almost 70% of the transactions were concluded within one month of purchase of shares and 91% were concluded within 4 months of purchase, that the share transactions were carried out in all settlement periods and on almost all days when the stock exchange was functioning, that the appellant had not shown any stock in trade in the balance sheet, that it had shown investment of Rs. 13.94 Crores, that the borrowed funds were about Rs. 12.3 Crores (including loans of Rs. 82 lakhs from Directors and the share capital and the reserves were about 57 lakhs, that considering the volume and frequency of transactions and also the fact that there are sizeable borrowed funds, it has to held that the appellant was in the business of share trading and is not an investor. He upheld the order of the AO in treating the STCG gains as business income. As regard the cases relied on by the appellant he held that the question whether transactions were in the nature of trade or otherwise, was largely dependent on the facts of each case, that a particular decision had to be read in the context in which it is delivered, that no decision could be applied divorced from fact, that the facts being distinguishable, the case laws as cited by the appellant were not applicable. He further held that in the case of Harsha & Mehta (ITA No. 1859/ M/ 2009 dt. 16-07-2010) and Wallfort Financial Services Ltd., [41SOT 200 (Mum)] the facts were similar to appellant's case and thus drawing support from these decisions and primarily the facts of the case the conclusion of the AO that STCG is income from business was correct.

5. Before us, AR submitted that the investment in shares were reflected in the Balanced Sheet under the head 'investment' and not under the head 'Stock in Trade', that the value of the shares was shown at cost only, that assessee was not engaged in trading in shares, that assessee had invested only surplus fund not shares, that there was no intention of any adventure in the nature of trade, that the nature of income on transfer of shares had been accepted as Capital Gains in the past several years, that investment was made in fundamentally sound companies, that physical delivery of the shares was taken and the transactions were not of speculative nature, that no expenses were not claimed against the income from capital gains. He further relied upon the order of ITAT dt.18-06-2010 in the case of Shri Kinjal R. Maniar (ITA No. 2645/ M/2009 AY. 2005-06) and case of Shri Gopal Purohit (188 Taxman 140).DR submitted that the facts of the case for the year under consideration were totally different from the earlier AYs, that out of 65 transactions,45 were carried out in a period which was less than one year, that only six transactions were beyond the period of six month, that frequency of transactions, volume of the shares traded clearly proved that invention of the assessee at the time of purchase was not to invest in shares but to carry out business. He strongly relied upon the orders of the AO and the FAA.

6. We have heard the rival submission and perused the material on record. We are of the opinion that the question of treating the income from share trading in particular AY. has to be decided on the basis of the facts relevant for that particular AY only. Past history entries in the Books of A/cs. can be have limited role for deciding the issue of taxing a particular item of income under a head of income. It is the intention of the assessee and surrounding circumstances that are the deciding factors for taxing the income from share-trading under the head 'Business income' or Income from Capital Gains'. If the facts of the case under consideration are deliberated upon, it becomes clear that during the AY. under consideration, assessee was carrying out a systematic and organised business of share trading. Most of his transactions (about 70%) were over within a period of less than one month. Not only this, FAA has given a categorical finding that Rs. 12.3 Crores were borrowed by the assessee for business purposes. Assessee has also not contravened the finding given by the FAA that share transactions were taking place on almost all working days of stock exchange throughout all the settlement periods. In these circumstances, we are of the opinion that order passed by the AO and confirmed by the FAA for the AY under consideration does not suffer from any factual or legal infirmity. We are of the opinion that facts of the case under consideration and the cases relied upon by the AR are totally different. Considering the volume and frequency of the transactions and attending circumstances mentioned by the FAA at para No.4 of our order, we uphold his order. Effective Ground of Appeal filed by the assessee is decided against it.

As a result, Cross-Appeals filed by the AO and the assessee stand dismissed.

Order pronounced in the open court on 3rd April, 2013.
आदेश की घोषणा खुले न्यायालय में दिनांकः 3rd April,2013 को की गई ।

Sd/-	Sd/-
(बी.आर.मित्तल / **B.R. MITTAL**)	(राजेन्द्र / **RAJENDRA**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	लेखा सदस्य / **ACCOUNTANT MEMBER**

मुंबई/Mumbai, दिनांक/Date: 3rd April, 2013

TNMM

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

1. Appellant
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "E" Bench, ITAT, Mumbai
6. Guard File

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai