



**2018-TIOL-401-ITAT-KOL**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH 'A' KOLKATA**

**ITA Nos.848 to 850/Kol/2013  
Assessment Years: 2005-06 to 2007-08**

**RUGUVALIKA TRADING PVT LTD  
(SINCE MERGED WITH M M MURARKA  
SHARE & SECURITIES PVT LTD)  
PAN NO: AABCR5743B**

**Vs**

**DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-4, KOLKATA**

**ITA No.851/Kol/2013  
Assessment Year: 2008-09**

**M M MURARKA SHARE AND SECURITIES PVT LTD  
PAN NO: AABM7219F**

**Vs**

**DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-4, KOLKATA**

**M Balaganesh, AM & S S Viswanethra Ravi, JM**

**Date of Hearing: January 25, 2018  
Date of Decision: February 14, 2018**

**Appellant Rep by:** Shri J P Khaitan, Sr-Counsel & Shri Arvind Agarwal, Adv  
**Respondent Rep by:** Shri P K Srihari, CIT & Shri Sallong Yaden, Addl-CIT

**Income tax - Section 10(38) & [CBDT Circular No. 6/2016](#)**

**Keywords - Borrowed funds - Conversion of shares - Economic policy of company - Investment for earning dividend - Stock in trade - Sauda book - Draft trial balance.**

**The** Assessee company, engaged in the business of finance, trading and investment in shares since last several years, had disclosed profit on sale of shares as business income and profit on sale of investments as capital gains in its return of income. The shares purchased by Assessee from various parties, were sold after holding the same for a reasonable period, and thus the benefit derived thereon were declared by assessee as short term capital gains. This was done apart from the fact that the assessee had already reported more business income in respect of trading in shares and derivatives. Thus, the intention of assessee was to treat the subject mentioned scrips as investments right from the inception. In fact in A.Ys 2007-08 and 2008-09, the assessee had also earned long term capital gains on sale of certain shares held as investments and had claimed exemption for the same u/s 10(38), which was accepted by the AO in scrutiny assessments framed thereon. The AO had been disputing only the short term capital gains declared by assessee in all the four years. The distinctive feature in A.Y 2006-07 alone was that the assessee had converted certain shares from stock in trade into investments by passing an independent

board resolution by explaining the reasons for the said conversion to be in line with the economic policies of the country and the growth of the capital markets. In the meanwhile, a survey was conducted in the business premises of assessee, wherein the draft trial balance was found and the same was impounded by the survey team. In the said trial balance for the F.Y 2004-05, the accountant of the assessee had reported the entire gains arising from sale of shares as trading profits and had not bifurcated the shares into stock in trade and investments. The assessee pleaded that the said trial balance was only draft and the accountant of the assessee was not aware of the intentions of the management of the assessee company to treat certain shares as investments which were duly supported by board resolutions stating that the same were invested for earning dividend and to reap the benefits of capital appreciation. It was pleaded that the entire investment in shares held as stock in trade as well as investments, were made out of own funds and no borrowed funds were utilized for the same. The AO also mentioned in his assessment order that the assessee had maintained regular books of accounts which are computerized, which included transactions in respect of purchase and sale of shares, securities and units. He however placed complete reliance on the draft trial balance and sauda book which only reflected the combined purchase and sale of shares without any bifurcation into stock in trade and investments, and treated the short term capital gains as business income. On appeal, the CIT(A) upheld the action of AO.

**On appeal, the ITAT held that,**

**Whether resultant profit out of investments made in shares with a view to earn dividend income, has to be treated as capital gains, when the intention of investor is not solely to earn profit - YES: ITAT**

**Whether when the Department itself has accepted the status of Assessee as an investor during all previous AYs, it cannot take a divergent stand in absence of any contrary - YES: ITAT**

++ the entire allegations raised by the revenue such as frequency of transactions, volume of transactions, period of holding, intention of the assessee, conduct of the assessee, etc, for treating the gains as business income has been duly addressed by this tribunal in the case of ITO vs Lyons & Roses Pvt Ltd for A.Ys 2005-06 & 2006-07 wherein it was held that, just because the assessee had made profits out of its investment activities, it cannot be concluded that assessee had carried on with an intention to do business. For that matter, every assessee would only try to make profits out of their activities be it investment or business. What is to be seen is whether the assessee intended to make only profits from dealing in shares or whether the shares were purchased with a view to earn dividend income which is also profit. The gains arising in the former case would be in the nature of trade and hence business income and the latter would be for the purpose of investment and hence resultant gain would be capital gains;

++ in the present case, the assessee had maintained dual portfolio and had received dividend income of Rs 21,07,894, Rs 12,63,710/-, Rs 13,73,472/- and Rs 17,47,070/- for A.Ys 2005-06, 2006-07, 2007-08 and 2008-09 respectively. The assessee had declared long term capital gains for the Asst Years 2007-08 and 2008-09 in the sums of Rs 5,18,754/- and Rs 44,01,695/- which has been accepted by the revenue and this goes to prove that the AO had accepted the stand of the assessee to be an investor. Having done so, the revenue cannot take a different stand as far as the short term capital gains alone is concerned by not treating the assessee as an investor. It is not in dispute that the assessee had also reported business income from several transactions as tabulated hereinabove, in addition to reporting of short term capital gains for the asst years under dispute before this Tribunal. Moreover, the assessee had been consistently maintaining dual portfolio commencing from A.Y 2005-06 onwards and had reported short term capital gain and long term capital gains, as the case may be, depending upon the period of holding of shares, and the same has been accepted by the revenue in subsequent assessment years i.e Asst Years 2009-10, 2010-11, 2011-12 and 2013-14 under scrutiny assessment proceedings. The AO had even granted benefit of set off of brought forward short term capital loss of Asst Year 2009-10 to be set off with short term capital gain of Asst Year 2010-11. These actions of the revenue clearly prove that it had accepted the assessee to be an investor as well as trader in shares. There is absolutely no reason to take a divergent stand in A.Ys under dispute;

++ moreover, the revenue had placed heavy reliance on the impounded documents during survey. It would be pertinent to note that the impounded draft trial balance and sauda book was only for the A.Y 2005-06 wherein no bifurcation of trading and investment profits were made by the assessee. This has been properly explained by the assessee that the accountant of the assessee was not made aware of the top management decisions to treat 5 scrips that were purchased during the A.Y 2005-06 as investment purposes and that he had treated all profits on sale of shares as trading profits. Moreover, this sauda book and draft trial balance had been duly modified by rectifying the errors contained therein, and audited books of accounts with audited financial statements were presented before the AO at the time of scrutiny

proceedings. He also proceeded with the entire assessment by placing reliance on the said audited books of accounts and the audited financial statements as far as other transactions are concerned. Only in respect of share transactions, the AO had resorted to place reliance on the sauda book impounded during survey, which is not to be appreciated. Admittedly, the assessee had submitted the computerized and audited books of accounts before the AO which fact has been duly acknowledged by him in his order itself. Therefore, the treatment given by the assessee in respect of share transactions by separately offering business income and short term capital gains/long term capital gains does not warrant any disturbance.

**Case remanded**

**Cases followed:**

***ITO vs Lyons & Roses Pvt Ltd - [2016-TIOL-591-ITAT-KOL](#)***

***DCIT vs Lokenath Saraf Securities Pvt Ltd - [2016-TIOL-1823-ITAT-KOL](#)***

**ORDER**

**Per: M Balaganesh:**

1. These appeals of the assessee arise out of the independent orders of the Learned Commissioner of Income Tax (Appeals) –VI, Kolkata (in short the Id CITA) in Appeal Nos. 143 & 144/CIT(A)-VI/Circle-5/2010-11 dated 3.1.2013 for the Asst Years 2005-06, 2006-07; Appeal No. 142/CIT(A)-VI/Circle-5/2010-11 dated 4.1.2013 for the Asst Year 2007-08 and Appeal No. 222/CIT(A)-VI/Circle-5/2010-11 dated 7.1.2013 for the Asst Year 2008-09 against the separate orders passed by the Learned ACIT 2(3), Mumbai (in short the Id AO) u/s 143(3) of the Income Tax Act (hereinafter referred to as the 'Act') on 12.12.2007 for the Asst Year 2005-06; u/s 143(3) of the Act on 5.12.2008 for the Asst Year 2006-07; Learned ACIT, Circle-7, Kolkata (in short the Id AO) u/s 143(3) of the Act on 31.12.2009 for the Asst Year 2007-08, Learned DCIT, Circle-5, Kolkata (in short the Id AO) u/s 143(3) of the Act on 29.12.2010 for the Asst Year 2008-09. As identical issues are involved in all these appeals, they are taken up together and disposed off by this common order for the sake of convenience.

**2. Treatment of Short Term Capital Gains as Business Income**

**Grounds 1 to 3 of Asst Years 2005-06, 2006-07, 2007-08 & 2008-09**

The facts of Asst Year 2005-06 are taken up for adjudication and decision rendered thereon would apply with equal force for Asst Years 2006-07, 2007-08 and 2008-09 except with variance in figures and variance in name of the scrips. The brief facts of this issue is that the assessee is engaged in the business of finance, trading and investment in shares since last several years. The assessee disclosed profit on sale of shares as business income and profit on sale of investments as capital gains in the return of income. The claim of the assessee is that certain shares were purchased during the Asst Year 2005-06 pursuant to Board resolutions passed in that regard indicating the intention of the assessee company to treat those shares as Investments and meant to be held for a longer period of time. Accordingly, the assessee purchased the following shares and treated the same as investments in its books of accounts:-

- a) Ahmednagar Forging Ltd
- b) Mahindra Ugine Ltd
- c) Numeric Power System Ltd
- d) Vimta Laboratories Ltd
- e) Vardhaman Spinning Ltd

2.1. The assessee sold these shares after holding the same for a reasonable period and derived profits thereon on its sale, which were declared by the assessee as short term capital gains. This was done apart from the fact that the assessee had already reported more business income in respect of trading in shares and derivatives. In other words, commencing from Asst Year 2005-06 onwards, the assessee started to maintain dual portfolio i.e (i) shares held as stock in trade and (ii) shares held as investments. The income from shares held as stock in trade were offered as business income and profit from sale of shares held as investments were offered as short term capital gains/long term capital gains as the case may be.

2.2. The details of the various shares that were held as investments and that were subject matter of sale in various asst years under dispute before us are as under:-

	ASSESSMENT YEARS			
	2005-06	2006-07	2007-08	2008-09
STCG	12128212	122101953	46962641	82280276
No. of Scrips traded	5	47	11	47
Average Holding Period (No. of days)	164	95	177	58
Weighted average holding Period (No. of days)	83	82	131	50
LTCG	NIL	NIL	518754	4401695
No. of Scrips traded	NIL	NIL	4	4
Dividend received	2107894	1263710	1373472	1747070

2.3. The details of income from sale of shares offered by the assessee as business income for various asst years under dispute are as under:-

COMPARATIVE DATA FOR DERRIVATIVE AND SHARES TRANSACTIONS				
ASSESSMENT YEAR 2005-2006				
	NO. OF SCRIPTS	PURCHASE	SALE	PROFIT/LOSS
TRADING IN DERRIVATIVE	258	11492126547	11505223154	13096607
TRADING IN SHARES	151	897239672	903864219	6624547
TOTAL	407	12389366219	12409087373	19721154
ASSESSMENT YEAR 2006-2007				
	NO. OF SCRIPTS	PURCHASE	SALE	PROFIT/LOSS
TRADING IN SHARES	96	429787779	436015629	6227850
TRADING IN DERRIVATIVE	269	3227610507	3251889310	24278805
TOTAL	365	3657398286	3687904939	30506653
ASSESSMENT YEAR 2007-2008				
	NO. OF SCRIPTS	PURCHASE	SALE	PROFIT/LOSS
TRADING IN SHARES	65	467925911	472072994	4147083
TRADING IN DERRIVATIVE	194	2389104436	2385301313	-3803123
TOTAL	259	2857030347	2857374307	343960
ASSESSMENT YEAR 2008-2009				
	NO. OF SCRIPTS	PURCHASE	SALE	PROFIT/LOSS
TRADING IN SHARES AND DERRIVATIVE	290	4769565655	4787412780	17847125

2.4. The assessee had treated the profit on sale of shares of certain scrips held as investments as short term capital gains in the return of income. These shares were admittedly held as investments in its books of accounts. These shares were purchased during the year and held as investments pursuant to board resolutions explaining the purpose for the same as stated supra. This clearly indicates the intention of the assessee to treat the subject mentioned scrips as investments right from the inception i.e from the time of its purchase. The assessee had consistently maintained this stand from Asst Year 2005-06 onwards and had not shifted its stand in subsequent asst years also. Infact in Asst Years 2007-08 and 2008-09, the assessee had also earned long term capital gains on sale of certain shares held as investments and had claimed exemption for the same u/s 10(38) of the Act in the return of income, which has been accepted by the Id AO in the scrutiny assessments framed thereon. The Id AO is disputing only the short term capital gains declared by the assessee in all the 4 years under dispute before us.

2.5. The distinctive feature in Asst Year 2006-07 alone is that the assessee converted certain shares from stock in trade into investments by passing an independent board resolution on 1.4.2005 by explaining the reasons for the said conversion to be in line with the economic policies of the country and the growth of the capital markets. Accordingly, it was resolved that the shares held by the company as on 31.3.2005 should be converted into investments at the cost price on 1.4.2005 and profit/loss on sale of such shares

be treated as short term/long term capital gain as the case may be. Accordingly, necessary entries were passed in the books of the company for treating those shares as investments.

2.6. There was a survey conducted in the business premises of the assessee u/s 133A of the Act on 19.9.2006, wherein the draft trial balance was found and the same was impounded by the survey team. In the said trial balance for the year ended 31.3.2005, the accountant of the assessee had reported the entire gains arising from sale of shares as trading profits and had not bifurcated the shares into stock in trade and investments. The assessee pleaded that the said trial balance was only draft and the accountant of the assessee was not aware of the intentions of the management of the assessee company to treat certain shares (ie 5 scrips only) as investments which were duly supported by board resolutions stating that the same were invested for earning dividend and to reap the benefits of capital appreciation. It was pleaded that the entire investment in shares held as stock in trade as well as investments, were made out of own funds and no borrowed funds were utilized for the same. Moreover, it was pleaded that the accountant was not privy to the board resolutions passed as they are maintained only at the top management level. It was further pleaded that as on the date of survey, the return of income for the Asst Year 2005-06 had been already filed based on the audited books of accounts and financial statements, which need to be considered while framing the assessment and not the draft trial balance. It was pleaded that the said sauda book and draft trial balance were unaudited and later the same were duly audited and necessary rectification entries were passed in the books and final accounts prepared accordingly. The corrected final accounts duly audited were used for filing the return of income for the Asst Year 2005-06, which would take precedence over the unaudited draft trial balance containing various errors. The assessee further pleaded that the shares held as investments were reflected in the closing stock at cost and shares held as stock in trade lying in closing stock were valued at lower of cost or market price.

2.7. The Id AO also mentioned in his assessment order that the assessee had maintained regular books of accounts which are computerized, which included transactions in respect of purchase and sale of shares, securities and units. The Id AO observed that the assessee had produced computer print out of the books of accounts during the assessment proceedings, which included the transactions of shares and securities. The assessee had also furnished audit report in Form 3CB and as per records, it was confirmed that cash book/bank book, journal and ledgers are maintained in a computer system. The minutes book of Board meetings were also furnished before the Id AO. The Id AO had duly acknowledged the filing of these documents before him in the course of assessment proceedings.

2.8. The Id AO however placed complete reliance on the draft trial balance and sauda book which only reflected the combined purchase and sale of shares without any bifurcation into stock in trade and investments. The Id AO for justifying the treatment of short term capital gains as business income observed as under:-

*a) There are numerous transactions in shares, securities and units as will be obvious from perusal of the records. There are numerous sales transactions. Therefore, the regularity and frequency of dealings is proved.*

*b) The volume of transactions in terms of monetary value is substantial.*

*c) The portfolio of assessee is diverse, and by assessee's own admission consists of shares of many companies, as on 31.3.2005. The details are on record.*

*d) By assessee's own admission, sale proceeds are generally utilized for acquisition of shares/securities/units etc. Therefore, the sale proceeds are turned over in the same class of assets.*

*e) In general, sale of shares, securities and units was not necessitated by exceptional/extraordinary circumstances, or emergency or special personal purpose or family function or any other special circumstances.*

*f) In this year, there is a sudden spurt in the activity of purchase and sale of shares. The volume and frequency of share dealings has shown quantum jump in this year as compared to earlier years indicating that the assessee has treated the holdings in shares in this year as stock in trade instead of as investments.*

*g) The assessee maintains regular books of accounts, which are computerized. The accounts include transactions in respect of purchase and sale of shares, securities and units. The assessee had produced computer print out of the Books of accounts during the assessment proceedings, which included the transactions of shares and securities. The assessee has also*

*furnished Audit Report in Form No. 3CB and Form No. 3CD. As per records, it is confirmed that Cash Book/Bank Book, Journal and Ledger are maintained in a computer system.*

*h) The dividend income shown by assessee at Rs 21,07,894/- is a very miniscule portion of sales turnover of shares/securities/units called as investments i.e Rs 7,51,73,688/-.*

*i) The assessee has been purchasing and selling shares, securities and units for a long time.*

*j) Further, the assessee uses own time, effort, knowledge, skill and labour for the purpose of earning profit on sale of such investments.*

*k) As per Balance Sheet as on 31.03.2005, the assessee has holdings as under, totaling Rs 1,39,38,389/- which is a substantial high percentage w.r.t. the total assets.*

2.8.1. The Id AO observed from the above facts and circumstances that the following attributes of business can be inferred:

- Existence of a course of dealings, either actually continued or contemplated to be continued—not for sport or pleasure or pride of possession—but for profit.
- Existence of some real, substantial and systematic or organized course of activity or conduct with a set purpose.- Sale for profit, not for realization of investments.
- Existence of activity carried on continuously and systematically by a person by the application of his labour and skill with a view to earn income.
- Existence of real, substantial and systematically organized course of activity or conduct with a set purpose.

2.8.2. The Id AO observed that in view of above facts and circumstances, that he is satisfied that, on balance, there are stronger and weightier materials to assess income from sale of shares, securities and units is to be taxed under the head 'Profits & Gains of Business or Profession' than to assess under the head 'Capital Gains'. The Id AO observed that the trial balance found and impounded during the course of survey also reveals that the assessee was trading in shares and securities. The impounded trial balance very clearly reveals that the assessee has not shown any amount as investment nor has any part of profits been declared as "Profit on Sale of Investments". The entire profit has been declared as "Trading Profit on Shares and Units". He observed that he had perused the Minutes Book of the assessee. Though the Minutes Book reveal that the Board has authorized the assessee to make investments in certain shares on advice of the consultants, it nowhere reveals as to how that the Board has authorized the assessee to sell the said investments. Clearly the amount shown as investments in Balance Sheet and amounts shown as 'Profit on Sale of Investments' is nothing but an after thought. The nature of transactions also reveal that the amounts declared under the head 'Profits on sale of investments' is nothing but profit on trading in shares. Accordingly, he held that the amount of Rs 1,21,28,212/- for the Asst Year 2005-06 declared under the head 'Capital Gains' is to be treated as 'Business Income'. Similar treatment was given for Asst Years 2006-07, 2007-08 & 2008-09 also except with variance in figures.

3. Before the Id CITA, the assessee reiterated the same submissions before the Id CITA as was made before the Id AO and accordingly the Id CITA upheld the action of the Id AO.

4. Aggrieved, the assessee is in appeal before us on the following grounds:-

*1. Because that the Id. Commissioner of Income Tax (Appeals) was erred in law as well as in facts in confirming the addition made by the Ld. AO in treating the short-term capital gains income of Rs. 1.21 crores on sale of share investment, as business income, and his such conclusions are based on his surmises and guesses and are contrary to the facts and material on record and provisions of law.*

*2. Because that the Id. Commissioner of Income Tax(Appeals) were erred in law as well as in facts in applying the ration of various judgments of the Hon'ble Supreme Court, Hon'ble High Court and the Hon'ble Tribunal in coming to the conclusion in treating the short-term capital gain income as business income. His such reliance on the ratio of the various judgments as cited by him in his order are distinguishable on facts and are not applicable in the facts and circumstances of the appellant's case.*

*3. Because that the Id. Commissioner of Income Tax (Appeals) was erred in law as well as in facts in not accepting the contention of the appellant that the profit on sale of share investment was short-term capital gain income and the same was to be taxed at a special rate under the provision of section 111A of the I.T. Act, 1961.*

5. We have heard the rival submissions and perused the materials available on record including the paper books filed by the assessee for each of the years in appeal before us. The main reasons for the Id AO to treat the profit from shares in respect of 5 scrips as business income are as under:-

*a) Numerous transactions in shares*

*b) Frequency of transactions in shares*

*c) Sale proceeds of shares are utilized for acquisition of shares again*

*d) The volume of transactions had jumped high during this year when compared to earlier years.*

*e) Dividend income earned in the sum of Rs 21,07,894/- was very miniscule when compared to the total sales of shares done by the assessee.*

*f) Assessee did not maintain separate bank account for investment portfolio.g) No written documents were produced by the assessee to prove that a particular transaction was for investment or trading purposes.*

*h) The assessee is showing investments only to claim lower tax rate u/s 111A of the Act and exemption u/s 10(38) of the Act.*

*i) The assessee has started investment portfolio for the first time during the Asst Year 2005-06.*

*j) Treatment given in the books of accounts are not conclusive to prove the intention of the assessee whether to treat the particular scrip as investment or for trading purposes.*

*k) The assessee had purchased with an intention to resell at the earliest for profit.*

*l) The impounded trial balance and sauda book impounded during survey does not have any bifurcation of shares into investment or for trading for the Asst Year 2005-06 and the entire profit from shares have been reported thereon as trading profits.*

5.1. We find that-

a) The assessee had maintained dual portfolio in its books of accounts i.e both investment and trading portfolio. It had started investment portfolio during the Asst Year 2005-06 only for the first time.

b) The assessee had continued to maintain the trading portfolio and had not made any conversion of stock in trade into investment portfolio during the Asst Year 2005-06. On the contrary, the assessee had newly bought the shares of Ahmednagar Forging Ltd, Mahindra Ugine Ltd, Numeric Power System Ltd, Vimta Laboratories Ltd and Vardhaman Spinning Ltd during the Asst Year 2005-06 afresh and had treated the same as investments in its books of accounts. The same are duly supported by the Board resolutions passed at the Board Meetings held on various dates as could be evidenced from the Minutes of the said meetings. The Minutes of the Board Meetings clearly indicates the intention of the assessee to treat the purchase of 5 scrips as investments in its books of accounts and to treat the gains arising therefrom as short term or long term capital gain as the case may be. Hence it would be incorrect to state on the part of the revenue that no written documents were produced by the assessee, when minutes book were very much produced before the Id AO and had been duly examined by the Id AO, which fact is also acknowledged by him in his assessment order.

c) It is true that the provisions of section 111A of the Act have been introduced in the statute book with effect from 1.10.2014 and concessional rate of tax for STCG with effect from 1.4.2005, wherein, sale of shares routed through a recognized stock exchange had to suffer Securities Transaction Tax (STT) and if so suffered, the gains arising therefrom would be taxed at a lower rate if the gain is short term capital gain and would be exempt from tax if the gain is long term capital gain. Pursuant to introduction of STT, the entire capital market in the

country began to boom like anything and hence the assessee also had decided to involve more in capital market transactions, thereby increasing the volume and frequency of transactions. In fact it cannot be swept under the carpet, that the entire capital market had been booming from 1.10.2004 onwards due to introduction of STT and consequential other tax benefits provided in the statute. In fact the board resolutions to keep certain purchase of new shares as investments have been passed in the board meetings held much prior to 1.10.2004 itself. This itself proves as a clinching evidence to indicate the intention of the assessee.

d) The assessee had not claimed rebate u/s 88E of the Act on STT paid transactions of purchase and sale of shares held as investments. The investment portfolio has been shown in the balance sheet on cost basis, whereas the shares held as stock in trade were valued at lower of cost or market value as on 31st march. This also goes to prove clearly the intention of assessee in maintaining two separate portfolios i.e investment and trading.

e) There is nothing wrong for an assessee to purchase certain shares held as investments during the year and selling it within the year at a profitable moment by making huge gains. An investor would only look for capital appreciation and once the same is achieved with reasonable expectations, he would only try to quit and the said action of quitting from the market whether held for short term or long term cannot be questioned vis-a-vis the intention of the assessee. In fact the legislature had allowed the gains to be taxed as short term capital gains if the shares were sold within 1 to 365 days from the date of purchase. So even if it is held for a day and sold, the resultant gain would still be only short term capital gains if the shares were held as investments, as has been held by the Hon'ble Jurisdictional High Court in the case of *CIT v. Merlin Holding (P.) Ltd. reported in (2015) 375 ITR 118 (Cal)* = [2015-TIOL-1379-HC-KOL-IT](#) for the Asst Years 2005- 06 and 2006-07 had held as below:-

*4. Mr.Saraf, learned advocate, appearing for the appellant/revenue contended that there are more than one thousand transactions in the year which is not in consistence with the conduct of an investor. The dividend earned is restricted to less than Rs 2,50,000/- and the trading was for Rs 9 crores approximately. The Managing Director of the assessee is also a Managing Director of a company which deals in dealings of shares only as a share broker. There was also evidence to show that the assessee indulged in a speculative activities.*

*5. The income during the assessment year 2005-06 on account of shares was more than Rs 3 crores whereas the income from monies lent and advanced was slightly more than Rs 1,00,00,000/-.*

*6. These are the facts and circumstances, which according to him, go to show that the assessee primarily was in the business of dealing in shares rather than in the business of investment. The frequency of transaction highlighted by Mr Saraf is not decisive on either side. Frequency alone cannot show that the intention was not to make an investment. The Legislature has not made any distinction on the basis of frequency of transaction. The benefit of short-term capital gains can be availed of for any period of retention of shares up to 12 months. Although a ceiling has been provided but there is no indication as regards the floor, which can be as little as one day. When that is the position in law and the investor has adduced proof to show that some transactions were intended to be business transactionm some transactions were intended to be by way of investment and some transactions were by way of speculation and the revenue has not been able to find fault from the evidence adduced then the mere fact that there were 1000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the Managing Director of the assessee is also a Managing Director of a firm of share brokers cannot have any decisive value. The question essentially is a question of fact. The CIT Appeal and the learned Tribunal have concurrently held against the views of the Assessing Officer. On the basis of the submissions made by the learned Advocate for the appellant, it is not possible to say that the views entertained by the CIT Appeal or the learned Tribunal were not a possible view. Therefore, the judgment cannot be said to be perverse.*

5.2. We find that the entire allegations raised by the revenue such as frequency of transactions, volume of transactions, period of holding, intention of the assessee, conduct of the assessee, etc, for treating the gains as business income has been duly addressed by this tribunal in the case of *ITO vs Lyons & Roses Pvt*



Ltd for the Asst Years 2005-06 & 2006-07 in ITA Nos. 1148 & 1437/Kol/2009 dated 20.1.2016 reported in (2016) 67 taxmann.com 253 (Kol Trib) = [2016-TIOL-591-ITAT-KOL](#) wherein it was held:-

5.3 We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee containing the scrutiny assessment orders of the assessee for the Asst years 2002-03, 2004-05, 2008-09 & 2010-11; statement of total income for the Asst Year 2010-11; audited financial statements for the years ended 31.3.2004 & 31.3.2005; details of profit on sale of investments; details of investments and stock in trade for five years and compilation of various case laws on the impugned issue. We find that the assessee is engaged in investment activity and business activity for years together. We also find that the coordinate bench decision of this tribunal for the Asst Year 1992-93 in assessee's own case in ITA No. 2943/Cal/1996 dated 28.9.2001 had accepted the plea of the assessee that the gains arising out of investment activities of the assessee had to be assessed only as capital gains and not business income. It is also not in dispute that the revenue has been accepting the dual portfolio maintained by the assessee for years together which is quite evident from the scrutiny assessment orders passed by the Learned AO for the Asst Years 2002-03, 2004-05, 2008-09 and 2010-11, wherein the stand of the assessee reporting both capital gains and business income arising out of purchase and sale of shares have been accepted. Hence we find lot of force in the decision of the Hon'ble Apex Court relied on by the Learned AR in the case of Radhasoami Satsang (supra) on the principle of consistency. We are also in agreement with the arguments of the Learned AR that just because the assessee had made profits out of its investment activities, the same cannot be concluded that the assessee had carried on with an intention to do business. For that matter, every assessee would only try to make profits out of their activities be it investment or business. What is to be seen is whether the assessee intended to make only profits from dealing in shares or whether the shares were purchased with a view to earn dividend income which is also profit. The gains arising in the former case would be in the nature of trade and hence business income and the latter would be for the purpose of investment and hence resultant gain would be capital gains. In the instant case, the assessee had reported both dividend income and offered short term and long term capital gains on the investment activities and business income for trading activities.

### **5.3.1. ....**

#### **5.3.2 Dual portfolio - whether permitted**

We also find that nothing prohibits an assessee from holding dual portfolios i.e. (1) shares/units held for investment and (2) shares/units held for trading purposes. It is not in dispute that in the instant case, the assessee had maintained dual portfolios in its books of accounts and had reported capital gains and business income separately as per the consistent practice followed by the assessee over the years and accepted by the revenue in the earlier years. It is well settled that it is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment or stock in trade, then onus would shift to revenue to prove that apparent is not real. In the instant case, we find from the details in the paper book that the assessee had duly discharged its primary onus of demarcating the scripts held for investment and for trading and the resultant gains derived therefrom. Even the [CBDT Circular No. 4 of 2007](#) dated 15.6.2007 envisages the practice of assessee's maintaining dual portfolios. We also find that the decision was rendered by the Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit [2011] 336 ITR 287/[2010] 188 Taxman 140 = [2010-TIOL-129-HC-MUM-IT](#) wherein the assessee had maintained dual portfolios and ultimately the court held that the resultant gains from investment activity would be assessable as capital gains and not business income. We also find that the valuation of investments has been done by the assessee at cost as could be evident from the accounting policies forming part of the audited financial statements.

5.3.2.1 We also find that the [CBDT in its Instruction No. 1827](#) dated 31.8.1989 has laid down certain criteria to determine whether an activity of purchase and sale of shares is in the nature of trading activity or investment activity. One of the criteria laid down is the treatment given in the books is indicative of assessee's intention whether to hold the shares with a view to earn dividend and long term appreciation or with a view to carrying on as business.

### **5.3.3 Intention of the assessee**

We find the intention of the assessee to maintain two independent portfolios i.e. one for investment purposes and one for trading purposes from the very beginning is quite evident from the books of accounts wherein assessee had separate entries in its ledger accounts at the time of each transaction i.e. at the time of purchase itself. This practice has not been found fault by the revenue in the earlier assessment years even in scrutiny proceedings. The Hon'ble Madras High Court in the case of CIT v. S. Ramamirtham [2008] 217 CTR 206 while distinguishing trading and investment, observed that the intention of the assessee is relevant to determine whether an assessee is carrying on the business in shares or investments. The initial intention of the assessee in the instant case is proved beyond doubt from the manner of maintaining two separate portfolios i.e. (1) for investment purposes and (2) for trading purposes. The Learned AR argued that in respect of shares retained under 'investment category' the assessee had taken due delivery of shares on its purchase and given due delivery of shares on its sale. The Learned AR further informed that the assessee had also kept separate records to record the transactions of each category i.e delivery based and non-delivery based. It is settled law that a particular income is from business or from investment must be decided according to the general common sense view of those who deal with those matters in the particular circumstances. The most excruciating factor to be looked into at this juncture is the conduct of the assessee.

### **5.3.4 Frequency of transactions**

The next point to be addressed in this issue is whether the frequency of transactions would alone indicate the trading activity. In this regard, we find the co-ordinate bench of Mumbai Tribunal had an occasion to consider the same in the case of Janak S. Rangwalla v. Asstt. CIT [2007] 11 SOT 627 (Mum) = [2007-TIOL-32-ITAT-MUM](#), wherein it was held that:

*"It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transactions of sale and purchase of shares in the preceding years have been held to be income from capital gains both on long term and short term basis. The transaction in the year under consideration on account of sale and purchase of shares is same as in the preceding years and the same merits to be accepted as short term capital gains. There is no basis for treating the assessee as a trader in shares, when his intention to hold the shares in Indian companies as an investment and not as stock in trade. The mere magnitude of the transaction does not change the nature of transaction, which are being assessed as income from capital gains in the past several years. The Assessing officer is directed to set off the Long Term Capital Loss against the Short Term Capital Gain of the year under consideration. The grounds of appeal raised by the assessee are allowed."*

5.3.4.1 We also find that the Hon'ble Calcutta High Court in the case of CIT v. Merlin Holding (P.) Ltd. [2015] 375 ITR 118/[2016] 65 taxmann.com 37 = [2015-TIOL-1379-HC-KOL-IT](#) for the Asst Years 2005- 06 and 2006-07 had held as below:-

*"The frequency of transactions in shares alone cannot show that the intention of the investor was not to make an investment. The Legislature has not made any distinction on the basis-of frequency of transactions. The benefit of short -term capital gains can be availed of for any period of retention of shares up to 12 months. Although a ceiling has been provided, there is no indication as regards the floor, which can be as little as one day. The question essentially is a question of fact. The assessee was a certified non-banking financial concern. Its main activities were giving loans and taking loans and-investing in shares and securities. The Assessing Officer, for the assessment years 2005-06 and 2006-07, opined that the activity which, according to the assessee, was on investment account amounted to business activity and, therefore, he treated the short-term capital gains of Rs. 1,01,00,000 as business income. The Commissioner (Appeals) held that the refusal on the part of the Assessing Officer to accept the short-term capital gains was incorrect. This was confirmed by the Tribunal. On appeal:*

*Held, dismissing the appeal, that the assessee had adduced proof to show that some transactions were intended to be business transactions, some transactions were intended to be by way of investment and some transactions were by way of speculation. The Revenue had not been able to find fault from the evidence adduced. The mere fact that there were 1,000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the managing director of the assessee was also a managing director of a firm of share brokers could not have any decisive value. The Commissioner (Appeals) and the Tribunal had concurrently held against the views of the Assessing Officer. On the basis of the submissions made on behalf of the Revenue, it was not possible to say that the view entertained by the Commissioner (Appeals) or the Tribunal was not a possible view. Therefore, the decision of the Tribunal could not be said to be perverse. No fruitful purpose was likely to be served by remanding the matter."*

5.3.4.2 We also find that the Hon'ble Calcutta High Court in the case of CIT v. H K Financiers (P.) Ltd. [2015] 61 taxmann.com 175/234 Taxman 43 (Cal) = [2015-TIOL-1369-HC-KOL-IT](#) for the Asst Year 2007-08 had held as below:-

*'3. The Assessing Officer has laid stress on motive. To begin with motive is something, which is locked in the mind of the person. No direct evidence as regards motive is possible. Motive can be inferred from the conduct of the person concerned but that is bound to remain an inference, which may or may not be correct. We have today dictated a judgment in the case of CIT v. Merlin Holding (P.) Ltd. [IT Appeal No. 101 of 2011, dated 12-5-2015] = [2015-TIOL-1379-HC-KOL-IT](#) wherein the following views have been expressed by us:*

*"From the tenor of the submissions made by Mr. Saraf noted above, it appears that the case of the revenue is that in the facts of the case the finding that the income was earned from investment could not have been recorded. If that is the proposition then it is for the revenue to show that such a finding is not possible in law. That was not even suggested. What remains then is a question of appreciation of evidence, which has already been done. No fruitful purpose is likely to be served by remanding the matter. We do not find any issue, which has remained unattended. For the aforesaid reasons, we hold that the judgment under challenge is not perverse."*

4. The judgment in the case of Dalhousie Investment Trust Co. Ltd. v. CIT [1968] 68 ITR 486 (Sc) [2002-TIOL-706-SC-IT-LB](#) referred by the Assessing Officer does not assist the revenue because in that on appreciation of facts it was found as follows:-

*"On the facts, that the appellant dealt with the shares of McLeod and Co. and the allied companies as stock-in-trade, that they were in fact purchased even initially not as investments but for the purpose of sale at a profit and therefore the transactions amounted to an adventure in the nature of trade. The profit derived by the appellant from the sale of shares was therefore a revenue receipt and as such liable to income-tax."*

5. The facts of the case are not shown to be similar with those in the case of Dalhousie Investment. 6. For the aforesaid reasons, we are of the opinion that the views expressed both by the CIT and the Tribunal for reasons expressed therein are a possible view. It is, therefore, not open to the revenue to contend that the view taken by the Tribunal is perverse. Question formulated at the time of admission of the appeal does not appear to have been correctly formulated. The question could only be, whether the views expressed upon appreciating the facts and circumstances of the case were perverse. The question is now formulated and is answered in the negative.

*The appeal is thus dismissed.'*

### **5.3.5 Existence of borrowed funds**

The next point to be addressed in this issue is the existence of borrowed funds and payment of interest thereon by the assessee. The Learned CIT(A) had given a factual finding that no nexus has been brought on record between the borrowed funds and the investments made. The Learned CIT(A) found that for the Asst Year 2005-06, the assessee had made short term borrowings from its director for a period of seven months only in order to meet its working capital requirements and the said loan was also squared up during the year. Similarly in Asst Year 2006-07, the assessee had made borrowings of Rs. 3 crores and utilized the same for investment as well as for trading activity. The Learned CIT(A) also found that the assessee has got a share capital of Rs. 10,00,000/- and reserves and surplus as on 31.3.2005 at Rs. 1,73,98,009/- in addition to generation of own funds in the form of sale of shares held as investments. This goes to prove that the own funds along with borrowed funds have been utilised for both investment and trading activities of the assessee. He accordingly held that the finding of the Learned AO that borrowed funds were utilized for investments to be factually incorrect. This finding given by the Learned CIT(A) is not refuted by the Learned DR before us for both the asst years under appeal. We find that the Hon'ble Calcutta High Court in the case of *Jt. CIT v. Bajranglal Chowdhury* [2015] 58 taxmann.com 204/232 Taxman 246 had held as below:-

1. The appeal is directed against a judgment and order dated March 13, 2014, by which the learned Income-tax Appellate Tribunal dismissed an appeal preferred by the Revenue.

2. The Assessing Officer held that the transaction in shares undertaken by the assessee was in the nature of a business transaction and not investment. Aggrieved by the order of the Assessing Officer, an appeal was preferred by the assessee which was allowed by the Commissioner of Income-tax (Appeals) holding that the transaction was really in the nature of an investment. The appellate authority discussed reasons as to why was the transaction in the nature of an investment. The Revenue preferred an appeal. The learned Tribunal agreeing with the appellate authority dismissed the appeal. The Revenue has once again come up in appeal before us.

3. Mr. Saraf, learned advocate appearing for the Revenue, strenuously submitted that the finding of the learned Tribunal is perverse. The Tribunal ignored the fact that the shares allegedly purchased in July were not taken delivery of till December nor was any payment made when the purchase was allegedly made in the month of July. This submission of Mr. Saraf evidently is based on misreading of the evidence. It would appear from the assessment order that payment was made for the shares in the month of July itself through bill accommodation facility. 4. Mr. Saraf relied upon a judgment in the case of *CIT v. Sutlej Cotton Mills Supply Agency Ltd.* [1975] 100 ITR 706 (SC) = [2002-TIOL-1025-SC-IT-LB](#). He drew our attention to the following finding recorded by the apex court (page 713):

"The finding of the High Court that the clauses of the memorandum of association, viz., clauses 10, 12, 13, 28 and 29 do not authorise the company to acquire and sell shares as business has no relevance in view of the aforesaid resolution of the assessee and of the fact that it had been dealing in shares in a commercial spirit as is evident from its claim for loss in dealings in the shares of M/s. Titagur Paper Mills Ltd. and devaluation of shares of M/s. Pilani Investment Corporation on the basis that they had fallen in value.

Secondly, the Tribunal said that from 1947 to 1956, no dividend had been declared by the Rayon company and that the money which went into the purchase of these shares was borrowed by the assessee. In other words, the view of the Tribunal was, it was with borrowed funds that the assessee purchased the shares. It is no doubt true that there was no evidence to show that the money was specifically borrowed for the purpose of buying shares. But there was evidence before the Tribunal for its finding that the liabilities of the assessee exceeded its assets. The finding, therefore, that the shares were purchased with

*the borrowed funds on which the assessee was paying interest, was a finding supported by evidence. The reasoning of the Tribunal that it is most improbable that the assessee would be investing borrowed money on which interest would have to be paid in shares which yielded no dividend was correct. We cannot say that this was not a relevant circumstances for the Tribunal to take into consideration for coming to the conclusion that the transaction was an adventure in the nature of business."*

*5. It would appear from the aforesaid finding that the apex court was of the opinion that the view formed by the Tribunal was a possible view in the facts and circumstances of the case. The judgment is not, however, an authority for the proposition that since purchase was made by borrowed funds, it is bound to become a business transaction. The Tribunal in that case had taken a possible view. Therefore, the apex court did not interfere.*

*6. No other submission was made. We are of the opinion that the view taken by the learned Tribunal in this case is also based on evidence and is a possible view. There is, as such, no reason why the High Court should interfere.)*

*7. For the aforesaid reasons, we refuse to admit the appeal, which is, accordingly, dismissed.'*

### **5.3.6 Period of Holding of shares**

*We find that one of the main arguments of the revenue seems to be the shorter duration for which the shares were held by the assessee. In this regard, we had gone through the entire details of profit on sale of investment scrip wise containing the date of purchase, number of shares purchased, purchase price, date of sale, sale price and resultant book profit or loss which forms part of the paper book filed by the assessee. We find from the said workings of profit on sale of investments, none of the scripts had been sold by the assessee within a period of 30 days as stated by the Learned DR, except Kotak Mahindra Mutual Fund Short Term Plan which was purchased in March 2004 and redeemed in April 2004. Other than this, all other scripts and mutual funds were held for a minimum period of two months from the date of purchase before its transfer. We also find that certain shares were held by the assessee from March 1995, October 1996, December 1998, May 2003, June 2003, July 2003, August 2003, September 2003, October 2003 etc onwards which were ultimately sold by the assessee in Asst Year 2005-06. Similarly in Asst Year 2006-07, from the workings of short term capital gains filed in the paper book, we find that only the part of the shares of DSP Merrill Lynch Ltd and Graphite India Ltd were sold within a month. Other than these two shares, the average period of 4 months has been maintained by the assessee from the date of purchase. We also find from the workings of long term capital gains for Asst year 2006-07, the shares were held for a period of 13 months. This shows that the assessee always intended these shares to be retained only under the investment category and it will be highly improper to state that these shares/units were held as stock in trade by the assessee. We find that this aspect has been considered by the co-ordinate bench of this tribunal in the case of Dy. CIT v. Reliance Trading Enterprises Ltd. in ITA No. 944/Kol/2008 dated 3.1.2008 wherein it was held that:*

*"We have heard both the parties and perused the records as well as the documents contained in the paper book filed before us. There is no denying the fact that as per the account maintained the assessee had acted both as a trader as well as investor in shares as per the Memorandum and Articles of Association. Accounts were maintained for trading/business shares which are held as stock in trade and separately for investment shares which are held and shown in balance sheet under the head investment representing capital assets. The decisions used to be taken by the assessee at the time of purchase itself based on different factors whether any share and security was to be held as investment or trading. When the shares are accounted for in the books as investment shares, the volume of transaction of such shares cannot alter its status from investment to trading. Profit on sale of such investment shares held, as capital assets are assessable under the head capital gain. Period of holding of such assets cannot determine its status or change it from investment (capital) to trading (stock in trade). The*

*audited accounts for the Assessment Year 04-05 and the earlier years placed in the paper book made it clear that every year the assessee had acquired shares for trading purpose and separately also for investment purpose with an intention to earn dividend income in addition to the prospect of making profit on sale of such investment shares at an appropriate opportune moment without making any hurry for self ignoring dividend. The investment shares and securities purchased and held till their sale had dual purpose i.e. for earning dividend as an incidental income as well as to make profit on shares at appropriate time. The conclusions drawn by the Assessing Officer by treating the investment shares as trading shares was based purely on assumptions and presumptions without bringing any record any material or evidence in support thereof. The Assessing Officer did not reject the books of accounts vis a vis the audited accounts u/s 145 of the IT Act before arriving at such a conclusion. The Assessing Officer's finding cannot therefore be accepted."*

*5.3.7 We find that the assessee had earned dividend income also which is quite reflective of the intention of investment and not for profit motive though an investor is not precluded from realizing its investment which may result into profit in favourable circumstances.*

*5.3.8 We also find that the practice followed by the assessee by offering capital gains for investment activities and business income for trading activities in the earlier years have been consistently accepted by the revenue in section 143(3) proceedings for the Asst Years 2002-03; 2004-05; 2008-09 and 2010-11, copy of which orders are placed on record before us. The assessment years under appeal before us are Asst Years 2005-06 and 2006-07. We do not find any logical reason for the revenue to deviate from its consistent stand taken in the earlier years. It is also evident from the scrutiny assessment orders for Asst Years 2008-09 and 2010-11, the revenue had accepted the stand of the assessee having dual portfolio and offering income under capital gains and business income in subsequent years.*

*5.3.9 We find that the Hon'ble Bombay High Court in the case of Gopal Purohit (supra) had considered the issue under consideration and held as under:-*

*'4.3. We have heard the rival submissions and perused the materials available on record including the paper book filed by the Learned AR before us. We find that the assessee has been engaging himself in the share transactions both as an investor and as well as trader. It is seen that the assessee had clearly bifurcated the investment and trading transactions including speculative share transactions in his books of accounts and it is also seen that the average period of holding of shares range from one month to more than one year and accordingly short term or long term capital gains are duly offered to tax by the assessee depending upon the period of holding the shares. It is also seen that the Learned AO had also accepted the stand of the assessee in the immediately succeeding assessment year as investment transactions under scrutiny proceedings vide 143(3) order dated 12.10.2009. We find that the frequency of transactions does not really matter and what is to be seen is the intention of the assessee whether he wants to penetrate into the capital market for the purpose of investment or for making speculative gains by doing day trading and dealing in futures and options. It is also seen that the Learned AO had clearly stated in his assessment order that the interest on borrowings were paid by the assessee only for trading in shares and this itself goes to prove that the assessee had clearly bifurcated his activities into two parts-one towards investment in shares out of own funds of the assessee and other towards trading in shares out of own and borrowed funds of the assessee. It is also seen that the assessee has been doing this activity consistently. It is also seen from the balance sheet filed by the assessee that the assessee had clearly classified the share transactions under the head Investments. This itself clearly proves the intention of the assessee that he is only interested in share market only as an investor and not otherwise. We find that this issue has been elaborately dealt with by the Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit reported in 228 CTR 582 (Bom.) = [2010-TIOL-129-HC-MUM-IT](#), wherein the questions raised before the Bombay High Court and decision rendered thereon are as below:-*

(a) *Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in treating the income from sale of 7,59,003 shares for Rs.5,00,12,879/- as an income from short term capital gain and sale of 3,88,797 shares for Rs.6,65,02,340/- as long term capital gain as against the "Income from business" assessed by the A.O.?*

(b) *Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that principle of consistency must be applied here as authorities did not treat the assessee as a share trader in preceding year, in spite of existence of similar transaction, which cannot in any way operate as res judicata to preclude the authorities from holding such transactions as business activities in current year?*

(c) *Whether, on the facts and circumstances of the case and in law., the Hon'ble ITAT was justified in holding that presentation in the books of account is the most crucial source of gathering intention of the assessee as regards to the nature of transaction without appreciating that the entries in the books of accounts alone are not conclusive proof to decide the income? The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate port folios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received there from should be treated either as short term or, as the case may be, long term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.*

*In so far as Question (b) is concerned, the Tribunal has observed in paragraph 8.1. of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position, that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question. Question (b), therefore, does not also raise any substantial question.*

*In so far as Question (c) is concerned, again there cannot be any dispute about the basic proposition that entries in the books of account alone are not conclusive in determining the nature of income. The Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The finding of fact does not call for interference in an appeal under Section 260A. No substantial question of law is raised. The appeal is accordingly dismissed.'*

*It is pertinent to note that the decision of Bombay High Court was subjected to further appeal by the revenue before the Hon'ble Apex Court and the Special Leave Petition (SLP) was dismissed by the Supreme Court.*

*5.3.10 We also find that there is no material brought in by the revenue to show that separate accounts of two portfolios are only a smokescreen and there is no real distinction between two types of holdings. This could have been done by showing that there is intermingling of shares and transactions and the distinction sought to be created between two types of portfolios is not real but only artificial and arbitrary. Therefore, in absence of any material to the contrary, and on appreciation of cumulative effect of several factors present as culled out above, we hold that the surplus is chargeable to capital gains only and assessee is not to be treated as trader in respect of sale and purchase of shares in investment portfolio. Accordingly, the ground no. 2 in ITA No. 1148/Kol/2009 for Asst Year 2005-06 and ground no. 1 in ITA No. 1437/Kol/2009 for Asst Year 2006-07 raised by the revenue are dismissed.*

6. In the instant case, the assessee had maintained dual portfolio and had received dividend income of Rs 21,07,894, Rs 12,63,710/-, Rs 13,73,472/- and Rs 17,47,070/- for the Asst Years 2005-06, 2006-07, 2007-08 and 2008-09 respectively. The assessee had declared long term capital gains for the Asst Years 2007-08 and 2008-09 in the sums of Rs 5,18,754/- and Rs 44,01,695/- which has been accepted by the revenue and this goes to prove that the Id AO had accepted the stand of the assessee to be an investor. Having done so, the revenue cannot take a different stand as far as the short term capital gains alone is concerned by not treating the assessee as an investor. It is not in dispute that the assessee had also reported business income from several transactions as tabulated hereinabove, in addition to reporting of short term capital gains for the asst years under dispute before us. Moreover, we find that the assessee had been consistently maintaining dual portfolio commencing from Asst Year 2005-06 onwards and had reported short term capital gain and long term capital gains, as the case may be, depending upon the period of holding of shares, and the same has been accepted by the revenue in subsequent assessment years i.e Asst Years 2009-10, 2010-11, 2011-12 and 2013-14 under scrutiny assessment proceedings. The Id AO had even granted benefit of set off of brought forward short term capital loss of Asst Year 2009-10 to be set off with short term capital gain of Asst Year 2010-11. These actions of the revenue clearly prove that it had accepted the assessee to be an investor as well as trader in shares. There is absolutely no reason to take a divergent stand in the asst years under dispute before us for the revenue.

6.1. Moreover, the revenue had placed heavy reliance on the impounded documents during survey. It would be pertinent to note that the impounded draft trial balance and sauda book was only for the Asst Year 2005-06 wherein no bifurcation of trading and investment profits were made by the assessee. This has been properly explained by the assessee that the accountant of the assessee was not made aware of the top management decisions to treat 5 scrips that were purchased during the Asst year 2005- 06 as investment purposes and that he had treated all profits on sale of shares as trading profits. Moreover, this sauda book and draft trial balance had been duly modified by rectifying the errors contained therein, and audited books of accounts with audited financial statements were presented before the Id AO at the time of scrutiny proceedings for the Asst Year 2005-06. The Id AO had also proceeded with the entire assessment by placing reliance on the said audited books of accounts (computerized) and the audited financial statements as far as other transactions (i.e other than share transactions) are concerned. Only in respect of share transactions, the Id AO had resorted to place reliance on the sauda book impounded during survey, which in our considered opinion, is not to be appreciated. Admittedly, the assessee had submitted the computerized and audited books of accounts before the Id AO which fact has been duly acknowledged by the Id AO in his order itself. The most excruciating factor is that the very same impounded materials consisting of trial balance for the period ended 31.3.2006 contained the proper bifurcation of shares into trading and investment and trading profits and investment profits (profit on sale of investments) as a separate line item in the trial balance. This also goes to prove the intention of the assessee with regard to maintenance of dual portfolio.

6.2. The Id AR also placed reliance on the [CBDT Circular No. 6/2016](#) dated 29.2.2016, which would be applicable to the instant case. For the sake of convenience, the said circular is reproduced below:-

**SECTION 45, READ WITH SECTION 28(i),  
OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS,  
CHARGEABLE AS - ISSUE OF TAXABILITY OF SURPLUS ON SALE OF SHARES AND SECURITIES -  
CAPITAL GAINS OR BUSINESS INCOME - INSTRUCTIONS IN ORDER TO REDUCE LITIGATION**

**[CIRCULAR NO.6/2016](#)**



**[F.NO.225/12/2016-ITA-II], DATED 29-2-2016**

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.

We are in agreement with the arguments of the Id AR that though this circular speaks about business income and long term capital gains, the same analogy would be equally applicable for short term capital gains also, as at the end of the day, this circular also drives home the point that the assessee would be entitled to maintain dual portfolio and the treatment given in the books of accounts of the assessee and its consistent treatment in income tax returns would be a guiding factor for understanding the intention of the assessee. The assessee had not changed its stand from Asst Year 2005-06 onwards and had been maintaining consistently the same stand of having dual portfolio. In none of the cases of purchase and sale of shares, the genuineness is doubted by the revenue. We hold that the principles laid down by the CBDT in the aforesaid circular is squarely applicable to the facts of the instant case in as much as the Id AO had already accepted the assessee's stand of being an investor for Asst Years 2007-08 and 2008-09 by

accepting the long term capital gains reported by the assessee. The dispute was only with acceptance of short term capital gains and for that limited purpose alone, the revenue was trying to treat the assessee as trader in shares and not investor in shares. This divergent stand of the lower authorities is not appreciated.

6.3. We find that in respect of shares held as investments, the weighted average holding period of shares and dividends earned thereon are as under:-

<u>Asst Year</u>	<u>No. of Scrips</u> <u>Weighted average holding</u> <u>Period of shares</u>	<u>Dividend recd (Rs)</u>
2005-06	5	21,07,894
	83	
2006-07	47	12,63,709
	82	
2007-08	11	13,7,3472
	131	
2008-09	47	17,47,070
	50	

The above conduct clearly goes to prove that the assessee had purchased the shares that the assessee had invested in the aforesaid scrips with an intention to earn dividend and for holding for quite a long period of time and earn capital appreciation thereon. These are also supported by the Board Resolution passed by the assessee company to treat the purchase of certain scrips in each year as investments, much prior to the introduction of concessional rate of tax in the statute pursuant to levy of STT. We also find from the perusal of the audited financial statements, the assessee has got sufficient own funds at its disposal which were used for making investments and no part of the borrowed funds were used for making investments.

6.4. The one distinctive feature in Asst Year 2006-07 is that the shares held as stock in trade as on 31.3.2005 had been converted into investments by the assessee with effect from 1.4.2005 pursuant to the Board resolution passed on 1.4.2005 which is reproduced hereunder:-

#### **INVESTMENT IN SHARES**

*The Chairman stated that the Indian shares and securities market is looking up at this point of time because of the present Economic Policies of the Government followed by good monsoon of the previous year. He further stated that the present Government is giving adequate importance to the infrastructure growth and therefore the coming years can see momentum in infrastructure sectors. The industries that are into infrastructure development and its raw material will see a quantum jump in their performance as compared to their performances in the previous years. He further stated that all other sectors except a few are showing good results in their performance and Reserve Bank of India is also into making such policies which increases the business of all sectors and have already reduced the interest rates in various money lending avenues in order to facilitate more disposable liquidity in the hands of industrial houses. He further stated that Intuitions and Industrial Houses reduced accepting fixed deposit and banks reduced the interest on fixed deposit. This caused a situation where there is only a limited avenue of investment in the stock market as a whole. This formed a position that institution/ individuals have surplus amount in their hand to invest and as of now investing in stocks and shares seem to be only a viable avenue of investment for the reason stated above. This will facilitate an increased activity in the stock exchanges as compared to those of previous years. Further to this, Overseas Investment Institution (FII) have already foreseen the upmarket trend in the Indian Securities Market and have started in investing in Indian Securities by using various avenues to route their money to India for their Investment in securities. This is clearly visible in the Index of the stock exchanges in the reason past. As Our Company is investing in shares and securities from time to time and this is a good business opportunity and it is required to bag this opportunity and modify our principle of*

*business plan. So henceforth the company will treat purchase of shares as Investment and hold the shares purchased by the company for a period of 21 days or more at the least, before disposing of the same. unless and until there is a requirement of immediate sale of a particular scrip/shares depending upon the then prevailing market conditions or any other such reasons warrants the immediate sale of such shares. After some discussion, following resolution was passed-*

**"RESOLVED THAT** purchase of shares and securities by the Company w.e.f 01.04.2005 be and is hereby treated as Investments unless otherwise decided by the Board."

### **CONVERSION OF STOCK-IN-TRADE INTO INVESTMENT**

*The chairman stated that shares and securities held by the Company as on 31.03.2005 are treated as stocks in trade in the Books of Account of the Company. Now the Company has decided to sell the shares after holding the same for a reasonable period therefore all the shares treated as stock-in-trade as on 31.03.2005 should be converted into Investment at the cost price on 01.04.2005 and profit/loss on sale of such shares be treated as short term/long term capital gain as the case may be. After some discussion, following resolution was passed-*

**"RESOLVED THAT** shares and securities held by the Company as on 31 st March, 2005 be converted into Investment at the cost price on 01.04.2005 and Sri Dinesh Kumar Sharma be and is hereby directed to pass necessary entries in the books of account and to take all steps that may be necessary in connection therewith or incidental or ancillary thereto."

### **DISCUSSION OF GENERAL AFFAIRS**

*The Directors than discussed the general and financial affairs of the Company.***VOTE OF THANKS**

*There being no other business to transact, the meeting was terminated with a vote to the chair.*

The Id CITA had observed in para 8 that the assessee had reported sale of shares of Rs 50,57,71,236/- , purchase of shares of Rs 49,95,43,365/- and gross profit of Rs 62,27,851/- in share trading. Dividend received was Rs 12,63,709/-. The purchase price of cost of investments was Rs 65,60,57,332/- and sale price thereof was Rs 77,95,66,637/- leading to gross profit of Rs 12,35,09,105/-. The direct expenditure on investments claimed by the assessee was Rs 14,07,152/- only and thereby the assessee has shown short term capital gain of Rs 12,21,01,953/- on sale of Rs 77,95,66,637/-. The trading transactions disclosed by the assessee comprised of 96 scrips (trading in shares) and 269 scrips (trading in derivatives) for the Asst Year 2006-07. The profit derived from these trading transactions were duly offered to tax by the assessee as business income and accepted by the revenue. The assessee had after conversion of stock into investment as on 1.4.2005 had held those shares for a reasonable period of time and the weighted average period of holding of those shares was 82 days. This shows the intention of the assessee to hold those shares as investments to earn dividend and reap the benefits of capital appreciation and at the same time, exit at a profitable moment depending upon the market conditions. The conversion of shares from stock in trade into investment had also been addressed by the decision of this tribunal in the case of *DCIT vs Lokenath Saraf Securities Pvt Ltd in ITA No. 300/Kol/2011 for Asst Year 2006-07 dated 3.8.2016 reported in (2016) 73 taxmann.com 234 (Kol Trib) = [2016-TIOL-1823-ITAT-KOL](#)* wherein it was held as under:-

### **HELD**

*- It is found from records that the director of the assessee-company had been duly authorized to hold dual and separate portfolio. The fact of assessee holding dual portfolio was not disputed by the Assessing Officer. In fact, the Assessing Officer had accepted the long-term capital gains reported by the assessee from investment portfolio. Having done so, how can the Assessing Officer dispute the short-term capital gains reported by the assessee from the investment portfolio.- It is true that the shares held in investment category were sold in part or in full by the assessee and immediately the shares of the same companies were purchased in the trading portfolio. This action of the assessee could neither be faulted with nor any malign intention could be attributed towards the same. The assessee could repurchase the shares of the same company due to various reasons. The assessee has every right to exit at*

*the profitable moment from a particular scrip either in part or in full and due to sentimental reasons and the same could again be repurchased by an assessee. These actions cannot be questioned just because it results in an incidental tax loss to the revenue.- Moreover, even in business, the assessee would not deliberately indulge in a transaction to incur loss. Hence the allegation cast on the assessee is not appreciated. It is well settled that it is for the assessee to decide as to whether a particular scrip is to be retained under-investment portfolio or in trading portfolio and the revenue cannot step into the shoes of the assessee in that regard and decide what action should have been taken by a person in the given set of facts and circumstances. The assessee knows its interest best. It cannot be disputed that the assessee had also reported net profit from trading portfolio of trading in shares and securities to the tune of Rs. 3,38,44,526 in its return of income which cannot be ignored. The assessee has also reported short-term capital gains of Rs. 6,31,19,616 in its return of income. This is a telling instance of the intention of the assessee which is proved beyond doubt.- The assessee had provided detailed workings of profit derived from investments in respect of shares purchased and sold during the year for each scrip in investment portfolio. The assessee had also provided detailed workings of short-term capital gains from investment portfolio of each scrip clearly mentioning the period of holding of each scrip. [Para 5.4]- The assessee had purchased the scrips with a clear intention of holding it as investments only as the period of holding of these shares are also comparatively larger and the version of the Assessing Officer that the period of holding is too short gets defeated. The assessee had indeed the intention of earning dividends but had also parallelly chosen to exit from the certain investments in profitable situations without waiting for the dividends thereon. Thus, just because the assessee had made profits out of its investment activities, it cannot be concluded that the assessee had carried on with an intention to do business. For that matter, every assessee would only try to make profits out of their activities, be it investment or business. In the instant case, the assessee had reported both dividend income and offered short-term and long-term capital gains on the investment activities and business income for trading activities. [Para 5.5]*

*- The Assessing Officer had accepted the long-term capital gains reported by the assessee. The Assessing Officer had not disputed the assessee holding dual portfolio i.e. both trading as well as investment portfolio. The Assessing Officer also had stated in his order that the assessee has been consistently maintaining this dual portfolio in his books and assessed as such. The assessee also filed the copy of the audited financial statements together with the computation of total income for the years ended 31-3-2004 & 31-03- 2005 wherein the assessee had declared both business income as well as capital gains from dealing in shares and securities. It is found from the assessment order framed for the Assessment year 2005-06 under section 143(3) that the Assessing Officer had accepted the claim of short-term capital gains and long-term capital gains of the assessee. Hence the principles of consistency should be followed in the instant case. Though the principle of res judicata does not apply to income-tax proceedings, the principle of consistency cannot be given ago by. [Para 5.6]*

6.5. In view of our aforesaid findings and respectfully following the various judicial precedents relied upon hereinabove, the treatment given by the assessee in respect of share transactions by separately offering business income and short term capital gains/long term capital gains does not warrant any disturbance and deserves to be accepted. Accordingly, the Grounds 1 to 3 raised by the assessee for the Asst Years 2005-06, 2006-07, 2007-08 and 2008-09 are allowed.

7. The Ground No. 4 raised by the assessee for the Asst Year 2005-06 was stated to be not pressed by the Id AR at the time of hearing before us. The same is reckoned as a statement from the Bar and accordingly the Ground No. 4 for Asst Year 2005-06 is dismissed as not pressed.

## **8. Disallowance of Foreign Travel Expenses**

Ground No. 5 for Asst Year 2005-06 - Rs 10,29,557/-Ground No. 6 for Asst Year 2006-07 - Rs 3,37,705/- The Id AR stated before us that this ground has been dismissed by the Id CITA as not pressed by the assessee. He stated that the assessee had not given up this ground before the Id CITA at any point of time and had even filed detailed written submissions before the Id CITA with regard to this ground which are enclosed in page 204 of the Paper Book for Asst Year 2005-06 and in page 136 of the Paper Book for Asst Year 2006-07. On verification of the same, the facts stated by the Id AR are found to be correct and since the Id CITA had not erroneously stated this ground to be not pressed by the assessee, we deem it fit and appropriate, in the interest of justice and fair play, to restore this issue alone to the file of the Id CITA for

adjudication on merits afresh in accordance with law. Needless to mention that the assessee be given reasonable opportunity of being heard. The assessee is directed to appeal before the Id CITA in this regard on 14.3.2018 and not to take any adjournment except due to bona fide and exceptional circumstances. The Id CITA also is directed to dispose of this issue on or before 30.4.2018. Accordingly, the Ground No. 5 for Asst Year 2005-06 and Ground No. 6 for Asst Year 2006-07 are allowed for statistical purposes as per directions contained hereinabove.

## **9. Disallowance of Consultancy charges- Rs 84 lacs**

### **Ground Nos. 4 & 5 of Asst Year 2006-07**

The brief facts of this issue is that the Id AO observed that the assessee had claimed deduction u/s 40(a) (ia) of the Act to the tune of Rs 84,00,000/- towards consultancy fees paid to M/s Batliwala & Karani Securities India Pvt Ltd. This was claimed as deduction on remittance of TDS in Asst Year 2006-07 by the assessee. The assessee had suo moto disallowance of the said expenditure in Asst Year 2005-06 u/s 40(a) (ia) of the Act for non-deduction of tax at source. The assessee had made payment of Rs 6,00,000/- per month to its group concern M/s Batliwala & Karani Securities India Pvt Ltd pursuant to Memorandum of Understanding (MOU) dated 20.4.2004 wherein the assessee would receive the benefits of the research reports prepared by M/s Batliwala & Karani Securities India Pvt Ltd and its team with regard to various capital market transactions and dissemination of information of various companies which would inturn assist the assessee in making proper investment decisions in shares thereon. This payment of consultancy charges by the assessee was doubted by the assessee on the ground that the copy of research reports prepared by M/s Batliwala & Karani Securities India Pvt Ltd were not submitted by the assessee before the Id AO. Accordingly, the genuineness of the incurrence of this expenditure was doubted by the Id AO. The assessee replied that the said consultancy charges were duly subjected to levy of service tax at the rate of 8% every month and assessee had duly deducted the tax at source and made remittance of the TDS during Asst Year 2006-07 and submitted the copy of TDS certificate issued in this regard. The Id AO observed that at the time of survey, this was put to question by the survey team on the director of the company to furnish the research reports. The Director replied that he had not preserved those research reports. The Id AO observed that since the transactions had happened with a group company , the assessee had managed to reduce the taxable income by way of claiming this bogus consultancy charges without taking any services from the payee. This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us on the following ground:-

*4. Because that the Id. Commissioner of Income Tax(Appeals) was erred in law as well as in facts in confirming the disallowance of Rs. 84 lacs made by the Id. AO on account consultancy fees to Batlivala & Karani Securities India Pvt. Ltd. on the ground that the transaction of payment of commission is bogus and a colourable device to evade taxes. His such conclusions are based on his surmises and guesses and are contrary to the facts and material on record.*

*5. Because that the Id. Commissioner of Income Tax (Appeals) was erred in law as well as in facts in placing reliance on Hon'ble Supreme Court, Hon'ble High Court and Hon'ble Tribunal judgments in confirming the disallowance of Rs. 84 lacs on account of consultancy charges. His such reliance on the ratio of the various judgments as cited by him in his order are distinguishable on facts and are not applicable in the facts of the appellant's case.*

9.1. The Id AR drew our attention to the statement recorded u/s 133A of the Act from the director of the company on 19.9.2006 (i.e on the date of survey), wherein , the director in response to question numbers 8, 9 & 10 had replied as under:-

*Q.8. For A.Y. 2005-06 it is seen that you have claimed in P&L a/c consultancy charges amounting to Rs 85,80,000/- . Please give the details as to whom these charges are paid and also stated the nature of services rendered by them.A. 8. The consultancy charges are paid to M/s Batliwala & Karani Securities India Pvt Ltd. They have given advice regarding purchase of shares and sales of shares.Q. 9. Please state who from M/s Batliwala & Karani was giving advice, and who was receiving the advice at your end ? and whether the advice was in writing or oral.A. 9. There is a team of various persons who do market research of advice regarding share transactions. And I was receiving the advice in form of report i.e in writing.Q. 10. Please give the names of the advisors and produce the reports / reports received by you.*

*A. 10. I do not remember the names of advisors except one Rohit Bhatt. The reports are not with me anymore as we do not preserve these reports.*

9.2. The Id AR stated that the director of the assessee company had mentioned the name of Mr Rohit Bhatt who is from advisory team of Batliwala & Karani Securities India Pvt Ltd and the Id AO in order to verify the genuineness of transactions ought to cross verified from him or from Batliwala & Karani Securities India Pvt Ltd by using the legal process known to law. Without doing any such verification, when the other party had also shown this Rs 84 lacs as receipt of consultancy charges and more so the said payment of consultancy charges was subjected to service tax and deduction of tax at source, there is no reason to doubt the veracity of the said expenditure merely on the ground that the research reports were not submitted by the assessee. He argued that the principal activity of the assessee is to make investment in shares and it would receive various research reports running to several pages and hence the same could not be preserved. Once a decision is taken for purchase and sale of shares, those reports would be destroyed. Hence in this scenario, the only way is to understand the veracity of the transactions is by cross verifying the other side who had submitted those reports. He fairly agreed that let this matter be examined by the Id AO. We find that this request of the Id AR deserves to be considered in as much as the disallowance has been made only by way of suspicion by the Id AO. Accordingly, in the interest of justice and fair play, we deem it fit and appropriate to remand this issue to the file of the Id AO to decide the same by making necessary cross verifications from M/s Batliwala & Karani Securities India Pvt Ltd in the legal process known to law. Accordingly, the Grounds 4 & 5 raised by the assessee for the Asst Year 2006-07 are allowed for statistical purposes.

10. In the result, the appeal of the assessee in ITA No. 848/Kol/2013 for Asst Year 2005-06 is partly allowed for statistical purposes ITA No. 849/Kol/2013 for Asst Year 2006-07 is allowed for statistical purposes ITA No. 850/Kol/2013 for Asst Year 2007-08 is allowed ITA No. 851/Kol/2013 for Asst Year 2008-09 is allowed

(Order pronounced in the Court on 14.02.2018.)

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