IT : Where assessee filed his return wherein income from sale of shares was shown as short term capital gain, in view of fact that assessee did not furnish any evidence to show that shares were held for investment and, moreover, assessee apart from using his own funds for investment in shares, had also resorted to huge borrowings, Assessing officer was justified in holding that amount in question was liable to tax as business income

[2018] 93 taxmann.com 246 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'E'

Mahesh Chandra Agarwal

v.

Assistant Commissioner of Income-tax, Circle - 36 (1), New Delhi**

BHAVNESH SAINI, JUDICIAL MEMBER
AND L.P. SAHU, ACCOUNTANT MEMBER
IT APPEAL NO. 1064 (DELHI) OF 2010
[ASSESSMENT YEAR 2006-07]
OCTOBER 13, 2017

Section 28(i), read with Section 45 of the Income-tax Act, 1961 - Business income - Chargeable as (Share dealings) - Assessment year 2006-07 - During relevant year assessee filed his return wherein income from sale of shares was shown as short term capital gain - Assessing Officer took a view that assessee kept shares as stock-in-trade and, thus, income arising from sale of shares was liable to tax as business income - It was found from quantum of turnover and presence of component of intraday trading that purchase and sale of securities was usual trade or business of assessee - Further, assessee did not furnish any evidence to show that shares were held for investment or that he was having object to make investment in shares - It was also noted that assessee apart from using his own funds for investment in shares had also resorted to huge borrowings, thereby, confirming it to be business activity of assessee - Whether, on facts, impugned order passed by Assessing Officer was to be upheld - Held, yes [Paras 6 and 8][In favour of revenue]

FACTS

- The assessee was holding large number of securities. During relevant year, assessee filed his return wherein income from sale of shares was shown as short term capital gain.
- The Assessing Officer took a view that assessee kept the shares as stock-in-trade and thus income arising from sale of shares was liable to tax as business income.
- The Commissioner (Appeals) confirmed the order passed by the Assessing Officer.
- On second appeal:

HELD

- The Assessing Officer found that assessee has earned business income merely of Rs.

83,142. However, on sale and purchase of shares assessee has earned Rs. 65,55,066 with a transaction turnover of Rs. 17.79 crores. The assessee has also earned speculative profit amounting to Rs.1,29,025 on account of intraday transactions/speculative transactions, which was not disclosed in return, is evident that assessee is in business. Thus, from the quantum of turnover and presence of the component of intraday trading, it was found that purchase and sale of securities was the usual trade or business of the assessee. The assessee was therefore, found to be involved mainly in business activities. It was also found that assessee has earned dividend of Rs. 3,71,459 only which was very meagre and negligible in comparison to the total sales and forms only 5.7 per cent of total capital gains.

- Further there is not even a single share out of total share transaction which has been retained by the assessee for more than 12 months as the long term capital gain shown by assessee was *NIL*. Shares are sold at considerable profit. The net investment made by assessee in assessment year under appeal was Rs. 2,62,89,244 and the amount of advance taken for purchase of shares was shown at Rs. 2.36 crores and the transaction turnover runs into Rs. 17.79 crores. It is, therefore, evident that scale of business activities is substantial. The Assessing Officer also found that income of the assessee from sale of share was 95 per cent as against the total activities conducted by the assessee. The assessee also could not furnish complete details of share transactions before Assessing Officer, because it was finding difficult to furnish the actual details.
- The Assessing Officer also noted that in this case assessee has not filed any wealth tax return despite of the fact that he has shown investment in shares amounting to Rs. 2,62,89,244. Thus, the assessee is not treating the shares as investment in his books rather assessee was treating it as stock-in-trade. The Assessing Officer also found that assessee has no evidence on record which could prove that assessee has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment. The Assessing Officer also found that assessee has shown evidence of Rs. 30,59,007 due to 'K' Securities Ltd. Therefore, from this, it was concluded that some of the transactions were made through book entry of general entry. The assessee did not furnish any evidence to show that shares were held for investment or that he was having the object to make investment in shares. The Assessing Officer held that assessee kept shares as stock-in-trade. The findings of the fact recorded by the Assessing Officer in the assessment order have not been rebutted by the assessee through any evidence or material on record.
- It is, therefore, clear from the large number of transactions conducted by the assessee that purchase of shares was with an intention to make substantive profit on sales rather than to hold for long term to earn of dividend, interest or appreciation. The fact of assessee's intention in undertaking speculative transactions resulting in profit were also noticed on many such occasions. The assessee apart from using his own funds for investment in shares had also resorted to huge borrowing, thereby, confirming it to be the business activity of the assessee.
- The assessee's alleged investments were mostly short term and driven by market force and the business of sale and purchase was carried on by the assessee with an intention to make substantive profit rather than hold position by making long term investments. The sale and purchase of securities in this case is continuous and regular business activity of the assessee with an intention to earn profit on regular basis. The intention of the assessee in the facts and circumstances is very clear that

assessee purchased and sold the shares to earn business profits only. In preceding assessment year, admittedly, no assessment have been made by the department. Therefore, what treatment has been given by assessee in the return of income, whether investment or stock-in-trade would not be relevant. [Para 6]

- It is thus clear that shares were purchased with a view to sell them at a profit and in fact, those shares were sold within the same accounting year, the conduct of the assessee was not to hold them as investment and earn some interest but to trade in shares. It was clear from the frequency and nature of transactions in shares. In the absence of any material to show that assessee had made investments only, the authorities below were correct in concluding that gains were assessable as business income. [Para 8]
- In view of the above, it is held that the authorities below have rightly assessed the income from 'profits and gains of business as from shares' and accordingly, the appeal of the assessee stands dismissed. [Para 10]

CASE REVIEW

Dalhousie Investment Trust Co. Ltd. v. *CIT* [1968] 68 ITR 486 (SC) and *Vinod M. Shah* v. *Addl. CIT* [2010] 38 SOT 503 (Mum.) (para 8) *followed.*

Motheson Bosanquet Enterprises Ltd. v. *Dy CIT* [2009] 316 ITR 375 (Mad.) (para 9) *distinguished*.

CASES REFERRED TO

CIT (Central) v. *Associated Industrial Development Co. (P.) Ltd*. [1971] 82 ITR 586 (SC) (para 2.1), *CIT* v. *H. Holck Larsen* [1986] 26 Taxman 305/160 ITR 67 (SC) (para 2.1), *Fidelity Northstar Fund., Inre* [2007] 158 Taxman 372/288 ITR 641 (AAR) (para 2.1), *P.M. Mohammed Meerakhan* v. *CIT* [1969] 73 ITR 735 (SC) (para 2.1), *G. Venkataswami Naidu & Co*. v. *CIT* [1959] 35 ITR 594 (SC) (para 2.1), *Karam Chand Thapar and Brothers (P.) Ltd*. v. *CIT* (Central) [1971] 82 ITR 899 (SC) (para 2.1), *Asstt. CIT* v. *Kethan Kumar A. Shah* [2000] 108 Taxman 23/242 ITR 83 (Ker.) (para 2.1), *Dalhousie Investment Trust Co. Ltd*. v. *CIT* [1968] 68 ITR 486 (SC) (para 2.1), *ITO* v. *Rohit Anand* [2009] 34 SOT 42 (Delhi) (para 4), *Vinod M. Shah* v. *Addl. CIT* [2010] 38 SOT 503 (Mum.) (para 4) and *Motheson Bosanquet Enterprises Ltd*. v. *Dy CIT* [2009] 316 ITR 375 (Mad.) (para 7).

Amal Sinha, Adv. and **Ashok Kumar Jain**, CA *for the Appellant.* **Ms. Rakhi Vimal**, Sr. D.R. *for the Respondent.*

ORDER

Bhavnesh Saini, Judicial Member - This appeal by assessee has been directed against the order of the Ld. CIT(A)-XXVIII, New Delhi, dated 27th October, 2009 for A.Y. 2006-2007, challenging the order of Ld. CIT(A) in treating the short term capital gain of Rs.65,55,066 as business income.

1.1 Earlier, the appeal of assessee was dismissed in default, however, by allowing the M.A. the appeal was restored for deciding the same on merits.

2. Briefly, the facts of the case as noted in impugned order are that in this case, return of income for A.Y. 2006-07 declaring total income of Rs.73,94,138 was filed by assessee on 31.10.2006. During the year, assessee has shown income under the heads, business income, capital gains, income from other sources. From the perusal of details filed in respect of capital gains, it was found that the assessees is dealing in large number of securities. Thus, *prima facie* it was evident that the assessee is not an investor in securities but a trader in securities. The case was taken in full scrutiny with the approval of JCIT, Range-36 vide following noting *"In this case assessee has claimed STGC of Rs.71,81,117/- (as per revised computation filed by the assessee during the assessment proceedings it was shown as Rs.65,55,066/-) and in the balance sheet he has mentioned an investment of Rs.2,62,89,244/- in shares. In the liability side of the balance sheet assessee has shown an amount of Rs.2,36,00,000/- as advances which seems to be loan taken for investing in shares. This issue needs to be examined in detail."*

2.1 It was observed by the Assessing Officer that vide order sheet entry dated 15.10.2008, assessee was asked to *"show cause as to why share transactions on which STGC has been claimed should not be considered as business income."* The Authorised Representative of the assessee has submitted his submission dated 31.10.2008, which has been reproduced in the assessment order. In this connection, it is worthwhile to enumerate various factors as brought to notice by Circular No. 4 of 2007, dated 15th June 2007 which must be considered before arriving to a conclusion whether any transaction in securities is an ' investment' or is a 'business'. 'Distinction between shares held as stock-in-trade and shares held as investment - tests for such a distinction.

A. The Income Tax Act, 1961 makes a distinction between a capital asset and a trading asset.

B. Capital asset is defined in section 2(14) of the Act Long Term capital assets and gains are dealt with u/s 2(29A) and Section 2(29B). Short Term Capital Gains are dealt with u/s 2(42A) and Section 2(42B).

C. Trading asset is dealt with under section 28 of the Act.

D. The Central Board of Direct Taxes (CBDT) through Instruction No. 1827, dated August 31, 1989 had brought to the notice of the Assessing Officers that there is a distinction between shares held as investment (capital asset) and shares held as stock-in-trade (trading asset). In the light of a number of judicial decisions pronounced after the issue of the above instructions, it is proposed to update the above instructions for the information of assessee as well as for guidance of the Assessing Officers.

E. In the case of *CIT (Central)* v. *Associated Industrial Development Co. (P.) Ltd.* [1971] 82 ITR 586, the Supreme Court observed that:

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

F. In the case of *CIT* v. *H. Holck Larsen* [1986] 26 Taxman 305/160 ITR 67, the Supreme Court observed : The High Court in our opinion, made a mistake in observing whether transactions of sale and purchase of shares were trading transactions or whether these were in the nature of investment was a question of law. This was a mixed question of law and fact.

G. The principles laid down by the Supreme Court in the above two cases afford adequate guidance of the Assessing Officers.

H. The Authority for Advance Rulings *Fidelity Northstar Fund, In re*. [2007] 158 Taxman 372/288 ITR 641, referring to the decisions of the Supreme Court in several cases, has culled out the following principles :

(*i*) Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power of purchase and sell shares in the memorandum of association is not decisive of the nature of transaction.

(*ii*) The substantial nature of transactions, the manner of maintaining books of account, the magnitude of purchases and sales and the ratio between purchase and sales and the holding would furnish a good guide to determine the nature of transactions.

(*iii*) Ordinary the purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the nature of trade/adventure in the nature of trade; but the object of the investment in shares of a derive income by way of dividend etc., then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not reverse receipt.

I. Dealing with the above three principles, the AAR has observed in the case of *Fidelity Northstar Fund* (supra) group as under :

"We shall revert to the aforementioned principles. The first principle requires us to ascertain whether the purchase of shares by a Fll in exercise of the power in the memorandum of association/trust deed was as stock-in-trade as the mere existence of the power to purchase and sell shares will not by itself be decisive of the nature of transaction. We have to verify as to how the shares were valued/held in the books of account, i.e., whether they were valued as stock-in-trade at the end of the Financial Year for the purpose of arriving at business income or held as investment in capital assets. The second principle furnishes a guide for determining the nature of transaction by verifying whether there are substantial transactions, their magnitude, etc., maintenance of books of account and finding the ratio between purchases and sales. It will not be out of place to mention that regulation 18 of the SEBI Regulations enjoins upon very FII to keep and maintain books of account containing true and fair accounts relating to remittance of initial corpus of buying and selling capital gains on investments and accounts of remittance to India for investment in India and realizing capital gains on investment *from* such remittances. The third principle suggests that ordinary purchases and sales of shares with the motive of realizing profit would lead to inference of trade/adventure in the nature of trade; where the object of the investment in shares of companies is to derive income by way of dividends etc. the transactions of purchases and sales of shares would yield capital gains and not business profits."

J. CBDT also wishes to emphasize that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which to be treated as trading assets, where an assessee has two portfolios, the assessee may have income under both heads, *i.e.*, gains as well as business income.

K. Assessing Officers Officers are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the assessee as investment (and therefore giving rise to capital gains) or as stock-in-trade (and therefore giving rise to business profits). The Assessing Officers are further advised that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the assessee as investment or stock-in-trade.

Furthermore in *P.M. Mohammed Meerakhan* v. *CIT* [1969] 73 ITR 735 (SC), Hon'ble Supreme Court reiterated that it was not possible to evolve any single legal or formula which could be applied in determining whether a transaction was an adventure in the nature of trade or not. The answer to the question must necessarily depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of the transaction.

However, in *G. Venkataswami Naidu & Co.* v. *CIT* [1959] 35 ITR 594, Hon'ble Supreme Court has laid down following principles to these questions may furnish relevant data for determining the characteristic of any transaction:

(1) Was the purchase a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Affirmative answers to these questions may furnish relevant date for determining the character of the transaction.

(2) What is the nature of the commodity purchased and resold and what quantity was it purchased in very large? If the commodity purchased is generally the subject matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment.

(3) Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily reasonable?

(4) What were the incident associated with the purchase improve the quality and resale? Were they similar to the operations usually associated with trade or business?

(5) Are the transactions of purchase and sale repeated?

(6) In regard to the purchase of the commodity and its subsequent possession by the purchaser, does not element of pride of possession come into the picture ? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade.

(7) Was the purchase made with the intentions to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is not middle course and no half way house.

Thus, from the reading of the Instructions No. 1827, dated 31st August 1989, along with CBDT Circular No. 4 of 2007, read with various judicial pronouncements, following questions needs to be answered, before arriving at a conclusion that whether sale and purchase of securities is Investment or Business activity:

I. Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity.

II. Whether the purchase is made solely with the intention of resale at a profit or for long term appreciation and/or for earning dividends and interest.

III. Whether scale of activity is substantial.

IV. Whether transactions were entered into continuously and regularly during the assessment year.

V. Whether purchase are made out of own funds or out of borrowings.

VI. Average holdings period for securities bought and sold.

VII. Time devoted to the activity and extent to which it is the means of livelihood.

VIII. The characterization of securities in the books of the account and in balance sheet as stock in trade or as an investment.

IX. Total numbers of stocks dealt in.

X. Whether answering each question in respect of the assessee:

Now answering each question in respect of the assessee :

I. As per submission of at dated 30.08.2007, during the year under consideration assessee was working as a financial consultant with M/s Gujarat Heavy Chemical Ltd. in the same company assessee has worked as a Chief Manager (Finance) before his retirement. Net income earned from his business was merely Rs.83,142/-.

On the other hand, assessee has shown short capita gain from shares of Rs.65,55,066/- with a transaction turnover of Rs.17,79,98,405/- (as specified in Form No. 10DB submitted during assessment proceedings). Furthermore, assessee earned speculation profit amounting to Rs.1,29,025/- as disclosed by the Authorised Representative during the assessment proceedings which was not declared in the return, from intraday trading. Thus, from the quantum of turnover and presence of the component of intraday trading, it is *prima facie* evident that the purchase and sale of securities was his usual trade or business, in fact, it seems to be the main business of the assessee.

II. Now, answering to second question, the assessee has entered into transactions worth crores in respect of shares the relevant year. In fact, he has earned short term capital gain, to the tune of Rs.65,55,066/-. On total capital gains of Rs.65,55,066/-, assessee has earned dividend of Rs.3,71,459/-only. Thus, it is evident that the dividend earned is negligible in comparison to total sale and forms only 5.7% of total capital gains. Further, there is not even a single share out of the total share transactions which has been retained by the assessee for more than 12 months as the Long Term Capital Gain shown by the assessee is *Nil*. it will also be pertinent to note here that assessee has not invested in any of the mutual funds which are considered as instrument of investment. Thus, it is clear that purchase is made solely with the intention of resale at a profit and not for earning dividends, interest or long term appreciation.

III. In respect of third question, it is reasonable to mention that the net investment shown by the assessee as on 31.03.2006 was Rs.2,62,89,244/- and the amount of advances taken for purchase of shares was shown as Rs.2,36,00,000/- and the transaction turnover runs into crores (Rs.17,79,98,405/-). Thus, it is evident that the sale of activity is substantial. Moreover, it is incomparable to scale of his usual of business where the net profit earned by the assessee was just few thousands. The scale of activity can be better enumerated through this table:

Head of Income	*Income (Rs.)*	*% of Total Income*
Consultancy Business	83,142	1.21
Speculation business	1,29,025	1.87
Short term capital gain	65,55,066	95
Dividend (Exempt)	3,71,459	5.39
Interest & Miscellaneous	2,25,966	3.28
Total	68,97,112	100

Thus, it is clear from the scale of trading is substantial in comparison to other activities carried out during the year.

IV. In respect of fourth question, it is evident from the contract notes (assessee was asked to bring, which were test checked) that the transactions were entered into continuously and regularly during the assessment year. It is also worthwhile to mention that assessee was asked to furnish dates of sales/purchase of the securities traded during the year, but he took sufficient time to furnish the same in the required format for all the shares. It was *prima facie* evident from the bulkiness of contract notes that it was difficult to furnish accurate dates of sales/purchase along with quantity and value, as the transactions were huge and were entered into on regular basis. Only few copies of Contract Notes are taken and placed on records. The assessee has entered into around 62 different securities resulting into around 331 transactions (Including purchase and sale transactions). Moreover, the assessee has done speculative transactions resulting into net profit of Rs.1,29,025/-, Huge turnover of transactions (Rs.17,79,98,405) clearly reveals that the transactions are entered into continuously and regularly during the assessment year and there were repetitions in the transactions. For instance, a chart showing number of purchase and sale transactions in respect of single scrip, during the year under consideration is as follows :

Name of the Scrip	*No. of times purchased during the assessment year 2006-07*	*No. of times sold during the assessment year 2006-07*	*Total transactions during the assessment year 2006-07*
Bajaj Hindustan Ltd.,	28	25	53
CCL Products Ltd.,	6	10	16
GHCL Ltd.,	30	23	53
Titan Industries Ltd.,	20	20	40

This chart clearly shows that the transactions were entered into continuously and regularly during the assessment year.

V. Now coming to fifth question, it is worthwhile to point out that the balance sheet of the assessee clearly shows that assessee has taken advances of Rs. 2,36,00,000/-. As per the submissions of Authorised Representative dated 15.10.2008, these advances were taken from different parties for the purchase of shares. This proves it beyond doubt that the assessee, in addition to using his own funds has borrowed the money for transaction in securities, anticipating huge profits on the sale of shares, thereby clearly giving it a shape of business.

VI. In respect of sixth question, it would be significant to reaffirm that Authorised Representative could submit details of dates on which shares were sold and purchased in respect of all the shares with great difficulty.

Reason is clear, as the frequency of transactions is very high and same shares were sold and purchased and purchased on different dates, resulting in a very short period of holding and thereby making it difficult to different dates, resulting in a very short period of holding and thereby making it difficult to furnish requisite information. Other point which proves that the period of holding was short is that among several shares sold and purchased there was not even a single share in which period of holding was more than twelve month, as no long term capitals were claimed by the assessee. In otherwords, it can be said that the assessee was driven by only profit motive and there was no intention of holding the shares for long term appreciation. Apart from securities transactions on which the shares were not even held by the assessee, many of the shows that the assessee was driven by market forces, like any other prudent businessman and sold these units as and when he got the best opportunity.

VII. Now answering the seventh question, it is again clear from the magnitude of transactions that the assessee has devoted substantial time for dealing in shares. From his consultancy business assessee has earned a profit of Rs. 83,142/- which is abysmally low when compared to the profit earned from STCG. Presence of intra-day transactions show that the assessee was engaged in share trading activity on a daily basis. Thus, dealing in securities is the chief source of livelihood of the assessee, especially in light of the fact that the income from consultancy business is very low.

VIII. In respect of eighth question, it would be desirable to mention that even though, in the balance sheet the assessee has shown stock of Rs.2,62,89,244/- under the head investment but still it does not change the nature of transactions, as it is the substance that matters rather than form. Here, it is relevant to quote the following judgment.

In *Karam Chand Thapar and Brothers (P.) Ltd.* v. *CIT (Central)* [1971] 82 ITR 899, Hon'ble Supreme Court has held that the circumstances that the assessee had shown these shares as investment in its books as well as in the balance sheet was by itself not a conclusive circumstance, though it was relevant circumstances. Thus, even if the assessee had shown these transactions as investments, it does not make these transactions as investment. It is the intention of the assessee which has to be looked into rather than the treatment.

Furthermore, it is meaningful to quote the judgment of Hon'ble Kerala High Court in the case of *Asstt. CIT* v. *Kethan Kumar A. Shah* [2000] 108 Taxman 23/242 ITR 83 wherein it was held that the assessee must show the securities as his personal asset, in his wealth tax return, if the claims it as his personal asset or as an investment. In this case, assessee has not filed any wealth tax return, despite of the fact that his investments in shares as on 31.03.2006 amounted to Rs.2,62,89,244/-. Thus, the assessee is not treating the shares as an investment in his books rather; he is treating it as stock-in-trade.

Moreover, in his case it was noticed that in respect of some shares on which assessee has claimed short term capital gains, assessee has also revealed speculative gains. In other words, share transactions which were squared up, on same day were treated as speculative transactions (business) by the assessees by virtue of section 43(5), and if they were being held by the assessees even for two days or more he has treated them as short term capital gains (Investment). Therefore, one thing is very clear that assessee has not maintained any demarcation between stock held as investment and stock in trade. Alternatively, it can said that at the time of buying of shares assessee was not clear that whether he is going to treat that at the resulting gain as business profit or capital gain. Further, assessee has not maintained any separate books of account for the shares whose profit he is including in business gain. Therefore, it can be stated that assessee has no evidence on record which can prove that the assessee has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment. Therefore, assessee cannot take a plea that the profits on the shares held by him are in the nature of investment and not business.

IX. Now coming to the ninth question, as already stated the total number of stocks dealt in is around 62 (on the basis of detailed date wise submission on securities made by the assessee)/ Thus, it forms a huge chunk specially looking into the fact that all these stock were purchased and sold repetitively on different dates within a short duration.

X. As a final point, it was observed that in the balance sheet assessee shown advances of Rs.30,59,007/- due to Kotak Securities Limited as on 31.03.2006. Therefore, this it may conclude that some of the transactions are made through book entry or journal entry.

Finally, it is advisable to furnish the judgment of Hon'ble Supreme Court in the case of *Dalhousie Investment Trust Co. Ltd.* v. *CIT* [1968] 68 ITR 486. In this case the Hon'ble Supreme Court held that "the decision of the Department in the earlier years that the transactions were in the nature of change of investment was not binding in the proceedings for assessment during the subsequent years. Thus, even though the transactions were treated as investment in earlier years. It does not make the transaction as investment in every year. It has to be verified based on the facts and circumstances as arises in that year.

In lieu of all facts and circumstances as mentioned above, short term capital gain of Rs.65,55,066/- (as per revised computation filed by the assessee, he has shown capital gain of Rs.65,55,066/- instead of Rs.71,81,117/- declared in the return. (Evidence regarding same is placed on the record) is considered under the head "Profits and gains of business and profession". Thus, in the total an amount of Rs. 65,55,066/- is added to the head "Profits and gains of Business and profession" and income chargeable under the head "Capital Gain" is treated as NIL.

3. The assessee challenged the assessment order before Ld. CIT(A) and it was submitted that assessee has been working as a financial consultant with GHCL Ltd., which is engaged in the business of Soda Ash and Textile with its plants at Gujarat and Tamilnadu with Regional Office at Delhi, Mumbai, Kolkata and Chennai. GHCL is also having its business interest in Romania, U.K. and USA. The turnover of GHCL is in excess of Rs.1000 crores. The assessee being a financial consultant of GHCL has to look after their accounts and financial matters on day-to-day basis which includes supervision of accounts etc., Considering the nature of assignment with this company, assessee has to visit their various Offices located all over India. In consideration of the services rendered, he has been paid service charges by GHCL and the assessee has been showing the service charges as his income from business for the last many years which is the main source of income. Apart from the said business income, assessee has also been earning interest from Banks and bonds. It was during A.Y. 2004-2005 onwards, the assessee has started making investments in the shares. During the year under consideration, the assessee besides business income and income from other sources has also earned income from sale of his investments made in shares which have been shown as capital gain. The further submissions of the assessee and case law are reproduced in the appellate order in which the assessee highlighted that his intention was to earn dividend and assessee was not involved in any business activities. It was, therefore, prayed that assessee's claim in respect of short term capital gain may be accepted. The Ld. CIT(A), however, dismissed the appeal of assessee. His findings in paras 7 to 7.5 of the order are reproduced as under :

'7. Determination:

I have considered the facts of the case as well as the submissions made by the appellant. The *assessee prior to his retirement from M/s. Gujarat Heavy Electrical Ltd. was having a income of Rs. 83,142/- only per annum as pointed out by the Assessing Officer.*

The Assessing Officer further stated as under:

"On the other hand, assessee has shown short capital gain from shares of Rs.65,55,066/- with a transaction turnover of Rs.17,79,98,405/- (as specified in Form No. 10DB submitted during assessment proceedings). Furthermore, assessee earned speculation profit amounting to Rs.1,29,025/- as disclosed by the Authorised Representative during the assessment proceedings which was not declared in the return, from intraday trading. Thus, from the quantum of turnover and presence of the component of intraday trading, it is prima facie evident that the purchase and sale of securities was his usual trade or business. In fact, it seems to be the main business of the assessee"

7.1. It is clear from the various transactions undertaken by the assessee that the purchase of shares was with intent to make quick profits on escalation & sale rather than long term earning of dividend, interest or appreciation. The scale of activity is substantial & not commensurate to the pattern of investments as is sought to be projected by the appellant.

7.2. The sheer volume of the transactions in fact precluded the assessee from furnishing details of purchase & sale transactions in the ordinary course of business. The fact of assessee's intent in undertaking speculative transactions resulting in profit were also noticed on many such occasion.

7.3. It is also pertinent to note that the assessee apart from using his own funds for investment in shares has also resorted to huge borrowals thereby giving it a colour of a business activity.

7.4. The assessee's investments were mostly short term & driven by market forces and the business of sale and purchase was carried on by the assessee with an intent to make substantive profits rather than hold positions by making long term investments.

7.5. Therefore, I conclude that the Assessing Officer has rightly assessed the income from "Profits & Gains of business from shares" & therefore the appeal stands dismissed.

In the result, the appeal is dismissed.'

4. Learned Counsel for the Assessee, reiterated the submissions made before the authorities below and submitted that assessee has intention to earn dividend only. PB-5 is balance sheet to show assessee earned dividend of Rs.3,71,439 and advance was with Kotak Securities Ltd., for Rs.30,59,007 who was a debtor of the assessee. He has submitted that there is no bar in making investment out of borrowed funds also. The assessee made investments only. PB-38 is the details shows that shares were held more than one year and even some shares have not been sold. PB-40 is the list of investments made in mutual funds etc., PB-41 is details of interest free advances which were shown as "Property Advance". He has submitted that in earlier year the assessee has shown the same investment in shares but no assessment have been framed. He has, therefore, submitted that assessee did not conduct any business activities. He has relied upon the order of ITAT, Delhi Bench, in the case of *ITO* v. *Rohit Anand* [2009] 34 SOT 42 and decision of Mumbai Bench in the case of *Vinod M. Shah* v. *Addl. CIT* [2010] 38 SOT 503.

5. On the other hand, Ld. D.R. relied upon the orders of the authorities below and submitted that assessee was involved in huge transactions of purchase and sales and complete details have not been furnished before A.O. The assessee was also involved in inter-day transactions i.e., speculative transactions which shows that assessee is involved in business activities only. The assessee also used to borrow funds for business purposes only. Therefore, no interference is called for in the matter.

6. We have considered the rival contentions and perused the material on record. The A.O. has examined the issue in the light of Board's Circular referred to above providing guidelines as to whether the transaction of sale and purchase of shares is investment or business activity disclosing income on account of capital gain or business income and referred to certain decisions. The A.O. found that assessee has earned business income merely of Rs.83,142. However, on sale and purchase of shares assessee has earned Rs.65,55,066 with a transaction turnover of Rs. 17.79 crores. The assessee has also earned speculative profit amounting to Rs. 1,29,025 on account of intraday transactions/speculative transactions, which was not disclosed in return, is evident that assessee is in business. Thus, from the quantum of turnover and presence of the component of intraday trading, it was found that purchase and sale of securities was the usual trade or business of the assessee. The assessee was therefore, found to be involved mainly in business activities. It was also found that assessee has earned dividend of Rs.3,71,459 only which was very meagre and negligible in comparison to the total sales and forms only 5.7% of total capital gains. Further there is not even a single share out of total share transaction which has been retained by the assessee for more than 12 months as the long term capital gain shown by assessee was NIL. Shares are sold at considerable profit. The net investment made by assessee in assessment year under appeal was Rs.2,62,89,244 and the amount of advance taken for purchase of shares was shown at Rs.2.36 crores and the transaction turnover runs into Rs. 17.79 crores. It is, therefore, evident that scale of business activities is substantial. The A.O. also found that income of the assessee from sale of shares was 95% as against the total activities conducted by the assessee. The assessee also could not furnish complete details of share transactions before A.O. because it was finding difficult to furnish the actual details. The A.O. also noted that in this case assessee has not filed any wealth tax return despite of the fact that he has shown investment in shares amounting to Rs.2,62,89,244. Thus, the assessee is not treating the shares as investment in his books rather assessee was treating it as stock-in-trade. The A.O. also found that assessee has no evidence on record which could prove that assessee has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment. The A.O. also found that assessee has shown advance of Rs.30,59,007 due to Kotak Securities Ltd., Therefore, from this, it was concluded that some of the transactions were made through book entry or general entry. The assessee did not furnish any evidence to show shares were held for investment or that he was having the object to make investment in shares. The A.O. held that assessee kept shares as stock-in-trade. The findings of the fact recorded by the A.O. in the assessment order have not been rebutted by the assessee through any evidence or material on record. It is, therefore, clear from the large number of transactions conducted by the assessee that purchase of shares was with an intention to make substantive profit on sales rather than to hold for long term to earn of dividend, interest or appreciation. The fact of assessee's intention in undertaking speculative transactions resulting in profit were also noticed on many such occasions. The assessee apart from using his own funds for investment in shares has also resorted to huge borrowings, thereby, confirming it to be the business activity of the assessee. The assessee's alleged investments were mostly short term and driven by market force and the business of sale and purchase was carried on by the assessee with an intention to make substantive profit rather than hold position by making long term investments. The sale and purchase of securities in this case is continuous and regular business activity of the assessee with an intention to earn profit on regular basis. The intention of the assessee in the facts and circumstances is very clear that assessee purchased and sold the shares to earn business profits only. In preceding assessment year, admittedly, no assessment have been made by the department. Therefore, what treatment has been given by assessee in the return of income, whether investment or stock-in-trade would not be relevant. The Hon'ble Supreme Court in the case of *Dalhousie Investment Trust Co. Ltd.* (supra) held as under :

> *"The appellant company, whose principal activity was investment of its capital in shares and stocks, confined its activities mostly to the shares of McLeod and Co. and companies managed by McLeod and Co. It changed its investments by sale of its shares from time to time. During the previous years*

ending March 31 of 1953 to 1956, the appellant sold 6,900 shares of McLeod and Co. and other shares in the companies managed by McLeod and Co. some other companies. The objects specified in clause 2 of its memorandum of association was " to acquire, hold, sell and transfer shares . . ."; and the Appellate Tribunal held that the purchases and sales of those shares were in pursuit of that clause. The 6,900 shares of McLeod and Co. were purchased by the appellant during the years 1948 to 1952, at a time when their market price was continuously falling. In order to make those purchases the appellant had taken loans amounting to Rs.8 lakhs and the dividend declared on these shares was at a very low rate. The shares were sold during the previous year ending March 31, 1953, at a considerable profit. The appellant placed no evidence before the Tribunal as to the object behind the acquisitions of the shares of McLeod and Co. and companies managed by that company. The explanation sought to be given by the appellant that the shares of McLeod and Co. were held as investments and were sold simply because the control of that company went out of the hands of its directors was not proved. In years prior to the relevant assessment years the appellant's case that the acquisitions and sales of shares were in the nature of investments had been accepted by the department. The question was whether the profit made by the appellant from the sale of the 6,900 shares of McLeod and Co. in the previous year ending March 31, 1953, and shares in companies managed by McLeod and Co. and in other companies in the previous years ending March 31, 1954, March 31, 1955, and March 31, 1956, was income from business.

Held, 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.

Held also, that the decision of the department in the earlier years that the transactions were in the nature of change of investments was not binding in the proceedings for assessment during the subsequent years."

7. The Hon'ble Madras High Court in the case of *Matheson Bosanquet Enterprises Ltd.* [2009] 316 ITR 375 held as under:

"Held, dismissing the appeal, that in respect of the assessment year 1992- 93, the issue had become final to the effect that the income earned by the assessee-company on the sale of shares had been regarded as a business income. In the absence of any material to show that the assessee had changed its business, and that it was not dealing with shares, and that the shares were kept exclusively for the investment purpose, the Tribunal was correct in concluding that the gains were assessable as business income."

8. Considering the facts of the case in the light of above decisions, it is clear that shares were purchased with a view to sell them at a profit and in fact, those shares were sold within the same accounting year, the conduct of the assessee was not to hold them as investment and earn some interest but to trade in shares. It was clear from the frequency and nature of transactions in shares. In the absence of any material to show that assessee had made investments only, the authorities below were correct in concluding that gains were assessable as business income.

9. Learned Counsel for the Assessee, however, relied upon the decision in the case of *Rohit Anand* (*supra*), in which assessee had demonstrated that his intention was never to trade in shares. In the case of *Vinod N. Shah* (*supra*) it was found that on an average there was only 3-4 cases of purchase and sale of shares during a month. These decisions, therefore, would not support the case of the assessee.

10. In view of the above discussion, we are of the view that the authorities below have rightly assessed the income from "profits and gains of business as from shares" and accordingly, the appeal of the assessee stands dismissed.

11. In the result, appeal of the assessee is dismissed.

sunil

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*In favour of revenue.