

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI**

**BEFORE SHRI R. S. PADVEKAR (JM) AND
SHRI. B. RAMAKOTIAH (JM)**

ITA No.6966/Mum/2007

(Asstt. Year: 2004-05)

Management Structure & Systems Pvt. Ltd; ... Appellant
35-B, Jayant apartment, 3rd Floor,
Appasaheb Marathe Marg,
Prabhadevi, Mumbai 400025
PAN: AAACM5001G

V/s.

Income Tax Officer 6(3)(2) Respondent
Aayakar Bhavan,
Mumbai 400020

Appellant by: Shri. S. C. Tiwari
Respondent by: Shri. A. P. Singh, CIT (DR)

: ORDER :

Per: R S Padvekar, JM:

The assessee has filed this appeal challenging the impugned order of the Ld CIT(A)- I, Mumbai dated 15.2.2007 for the A.Y. 2004-05.

2. The assessee has taken the following Grounds :

“Ground No.1: Treating gains from sale of shares as ‘Income From Business’ instead on ‘Capital Gains’.

1. On the facts and circumstances of the case and in law, the leaned CIT(A) erred in upholding the action of the Income Tax Officer 63)(2) (“the AO”) of assessing the gains from sale of shares amounting to Rs.1,03,21,714/- as ‘Income From Business’ instead of long term capital gains of Rs. 96,11,474 and short term capital gains of Rs. 19,82,900/-

2. The Appellant prays that it be held that the gains on sale of shares be assessed under the head ‘Capital Gains’ as returned by the Appellant.

Ground No.2: Disallowance u/s. 14A of the Act.

1. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the AO of making disallowance u/s. 14A and thereby disallowing expenditure amounting to Rs. 84,113/- on the alleged ground that the said expenditure is incurred for earning tax-free dividend income.*

2. *He failed to appreciate and ought to have held that where no expenditure has been actually incurred, no estimation can be made to disallow expenditure for earning the exempt income.*

Ground No. 3:

The Appellant craves leave to add to, alter and/or amend all or any of the foregoing grounds of appeal.”

3. The first issue is treating the gains/profits from the sale of the shares of Rs.1,03,21,714/- as an income from business as against the Long Term Capital Gains of Rs. 96,11,474/- and Short Term Capital Gains of Rs. 19,82,900/- as declared by the assessee.

4. The facts which reveal from the record are as under.

The assessee company is engaged in the Management Consultancy, Investment Advisory and Equity Reserve Research Services and also dealing in the Investments. The assessee filed the return of Income, declaring total income of Rs.1,03,21,714. The assessee's case was selected for scrutiny and assessment was framed u/s. 143(3). The assessee had declared the capital gain of Rs. 103,21,714/- as under :-

i)	Long Term Capital Gain	Rs. 99,11,474
ii)	Short Term Capital Gain	Rs. 19,82,900
	Total:	Rs.1,03,21,714

The A.O was not in favour of accepting the computation of capital gains as declared by the assessee as in his opinion the assessee's activity in shares was a business activity. The A.O, therefore, issued Notice dt. 4.12.2006 asking the assessee to show cause to explain why the income from the investment from the shares should not be assessed as business income under the head of profits and gains of business, instead of assessing the same under the head capital gains. The assessee filed its reply resisting the action of the A.O. It was stated that the assessee is not trading in equity shares. It invests in shares and hold such shares as an investment and not as a stock-in-trade. The shares are held for the purpose of earning the dividend and for the purpose of investments in shares, the funds are never borrowed and if the funds are utilized of it's own . The assessee also contended as under :

“(a) In every single transaction the Company has paid for the purchase of shares and taken delivery and so also received consideration for sale of shares and given delivery.

(b) None of the transactions in shares have been undertaken in futures and options segment to indicate that the company is trading in shares.

(c) The quantum of shares purchased and sold is far too little to indicate that the company is engaged in any business of trading or dealing in shares.

(d) The infrequency of purchase/sale of shares undertaken by the company conclusively establishes that the company is engaged in the business of trading or dealing in shares.

(e) Out of the total capital gains of Rs.11594379/- made on transfer of shares, more than 82% of the capital gains have arisen consequent to holding shares for more than 12 months.

5. The assessee also relied on the decisions of the Hon'ble Supreme Court in following cases:

(i) G. Venkataswamy Naidu & Co., v/s. CIT, 35 ITR 594 (S.C)

(ii) Raja Bahadur Kamakshya Narain Singh v/s. C.I.T, 77 ITR 225

(iii) Bengal and Assam Investors Ltd. v/s. CIT, 59 ITR 547

5.1 The A.O did not agree with the explanation of the assessee that the activity of the investment in the shares is not in the nature of the business but purely it is an 'investment' and hence, the gains arising out of the sale of the shares/securities is taxable under the head capital gains. The A.O has noted that the main object of the company is a Management Consultancy and incidental object of the assessee company is to make investment. During the current year and as well as in preceding five years, the main activity of the assessee is trading in shares which has resulted in Short Term Capital Gain and Long Term Capital Gain, but in respect of the main activity, that is 'Management Consultancy', the contribution to the gross income is very small.

5.2 The A.O has further noted that the assessee was regularly dealing in the shares through out the year and hence, he was dealer in shares in respect of all sales. The assessee was regularly buying and selling the securities/shares and that shows that the profit motive was the main object for purchasing of the shares and merely, because assessee's as per method of accounting, trading transactions in the shares are shown as sale of investment, that would not make any difference.

5.3 In the opinion of the A.O, the shares are 'stock-in-trade' of the assessee and in accounts, merely because same has been shown as an investment, it will not change the

nature of the transaction. The A.O has further noted that the primary characteristics of an investment of an asset is the feeling of the security and secondary, aspect is capital accretion. Moreover, there should be incremental periodical income accruing on the investment. In the opinion of the A.O, all the fundamental characteristics for treating/holding the shares as an investment were lacking. The A.O also noted that only because the assessee had taken possession either physically or through depository, while purchase of the shares would not become investment leading to capital asset. Even if the shares are held for the longer period, that shows longevity of the stocks. The A.O has further noted that debiting and crediting an account open at the discretion of the assessee as share investment account would not change the character of real activity of purchase and sales of the shares. The A.O. also noted that merely showing the same as an investment and invoking the method of accounting by show it an investment, is mere camouflage of assessee's real interest in trading in shares. The A.O was of the view that the entire transactions in the shares were made with the profit motive. Deploying own surplus funds, in the securities which are likely to appreciate shows the assessee's business interest. The A.O accepted the proposition to some extent that deploying own surplus funds in securities in individual cases may have an element of investment or acquirement of capital asset. In the opinion of the A.O, holding a particular stock for more than 10 months till appreciation or sale after 12 months when it depreciation cannot be the sole criteria to decide the head of income. The intention at the time of investment had been outside head of income and as in the case of the assessee, the intention was earning of the profit only and hence, in view of the A.O held as it was business activity of the assessee to deal in shares/securities. The A.O also noted that some of the shares sold during the year are held for more than seven years and that shows the soundness of the financial position of the assessee and wise application of non-interest bearing own funds in selected stocks.

6. The another view of the A.O, which revealed from assessment order, presuming that assessee's activity was not fully a business activity or trading activity, but it was as adventure in the nature of trade. In respect of accepting the assessee's trade as an investment in preceding years, the A.O has noted that merely because the assessee's plea has been accepted earlier, that would not preclude the A.O from recording the finding different from that of an earlier year. The A.O. referred and relied on plethora of the decisions of the Hon'ble Supreme Court as well as of the different High Courts, as also referred to the Accounting Standards as prescribed by the Institute of Chartered Accountants of India (I.C.A.I) and finally held that the profit/gain earned from dealing in the shares is a business income and he, accordingly, taxed Rs.1,03,21,714/- as under the head "Profits & Gains of Business". The assessee carried the issue before the Ld CIT(A) but without success. As the Ld CIT(A) has confirmed the assessment order on this issue, the assessee is in appeal before us.

7. The Ld Counsel for the assessee, vehemently argued that the fact that 83% of total capital gains comprises the Long Term Gains, in respect of shares held for substantially long period and that shows that the company chooses to make Long Term Investment rather than trading in securities. It is argued that majority of the shares are held for more than five years and the single largest Long Term Capital Gains in the A.Y. 2004-05 was

in respect of the sale of shares in 'Infosys Technologies Ltd' (in short Infosys Ltd.) and the said shares were on an average held for more than 6 ½ years. It is argued that it was never the intention of the assessee to do the trading in the shares and securities. The assessee has never borrowed any money for making the investment in shares and it was only own money which was invested in the shares. The Ld Counsel also gave the example in respect of the shares of the Infosys which were sold in the previous year relevant to the A.Y. 2004-05 by submitting that except for 200 shares purchased in December 1996 and January 1997, every single share of Infosys Ltd which was sold, was the Bonus share received by the assessee. It is argued that the assessee declared the total dividend income of Rs. 7,86,427, which shows that the assessee's intention was to get returns on its investments. It is argued that all the transactions in respect of the shares made during the year have resulted in the delivery of the shares and there is no question or doubt to suspect any of the transaction as a speculative transaction. It is argued that in normal course of business deals in shares market, shares are used for derivative contract such as futures options, to protect themselves against such risk and in case of the assessee, it is a total absence of any derivative based transaction, which proves that assessee's activity of the investment does not constitute the business activity but is made as a long term investment of the capital in well managed profitable companies. It is argued that the Long Term Capital Gains of Rs. 19.11 lakhs was derived from the sale of the shares of 19 Companies, but so far as the 'Infosys Ltd.' is concerned, the capital gain attributable to the said shares is 78% of the total Long Term Capital Gain in which holding period is quite long one.

8. The Ld Counsel argued that the assessee company is not registered as a sub-broker or broker and even it has no Registration with the BSE or Ahmedabad Stock Exchange. The Ld Counsel referred to Page No. 222 of the Paper Book wherein the copies of the D-mat Account are filed and argued that it is clear from the D-mat Account that there is no repetition of any of the script by the assessee. The Ld Counsel also referred to page No. 25 and 26 of the Paper Book which is the copy of the working of the LTCG. The Ld Counsel argued that in the case of Unichem Laboratories, the shares were held for 62 to 64 months and in case of 'Infosys Ltd.', the shares were held from 62 months to 71 months. In respect of Rane Brake Linings Ltd., the shares were held for 89 months. He also referred to page 27 and 28 of P/B which is a summary of Short Term Capital Gain and argued that whenever the assessee found that in its interest, keeping the investment for the long time was not advisable, the said shares were disposed off within short span of time after considering the trend in capital market. The Ld Counsel also referred to CBDT Circular No. 4/2007 dt. 15.6.2007 (Page No.1) of Paper Book No. II and submitted that the CBDT has accepted that it is possible for the tax payer to have two portfolios, (i) in respect of the Investment Portfolios which is to be treated as a capital asset and (ii) Trading Portfolio comprising of stock-in-trade. The Ld Counsel further argued that as per the well settled principles, the intention of the assessee at the time of purchasing the securities/shares is decisive and at the same time if a investment is made with own funds which goes to straighten the case of the assessee. The Ld Counsel referred to page No. 23 of the Paper Book which is the copy of the profit & Loss Account as on 31.3.2004 and submitted that there is no opening or closing stock of shares/securities declared by the

assessee. It is also argued that there is no frequency of the buying and selling of the same script. The Ld Counsel relied on the following precedents :

- (1) CIT v/s. Associated Industrial Development Company Ltd., 82 ITR 586 (SC)
- (2) CIT v/s. H. Holsck Larzen, 160 ITR 67 (SC)
- (3) Fidelity Northstar Funds & Others, 288 ITR 641
- (4) Gopal Purohit v/s. Jt. CIT, 122 TTJ (Mum) 87
- (5) Savna Infrastructure King Pvt. Ltd., v/s. ACIT, 120 TTJ (Luck.) 216.

8. Per contra, the Ld. D.R. argued that there is no doubt in respect of the intention that he is doing the trading in the shares & securities. It is argued that merely because the securities are held for a longer period that cannot be decisive to conclude that the assessee is not in the trading of the securities. It is argued that there is no dispute about the proposition that the intention of the assessee at the time of purchasing the securities/shares is determinative, but that can be gathered only from the conduct of the assessee. It is argued that the assessee is have professional knowledge of the capital market and that cannot be neglected . The Ld Council referred to Page Nos. 27 to 29 which is the statement showing the short-term capital gain and argued that it is clear from the conduct of the assessee that even in many cases the shares are held for very short period. It is argued that merely because substantial amount of dividend is received by the assessee that per se is not the test to decide the intention of the assessee. The Ld. D.R., therefore, pleaded that the order of the CIT(A) may be confirmed. The Ld. D.R. relied on the following unreported decisions of the ITAT, Mumbai. In the case of Addl. CIT (S.R. 49), Mumbai V/s. Sri Motilal Oswal, ITA No. 3860, 3861, 3862, 3864/Mum/ 2001 dt. 31.8.2005.

9. We have given our anxious considerations to the rival submissions of the parties. We have also perused the record as well as the paper book containing the different documents filed by the assessee. We have also considered all the precedents and decisions relied on by both the Parties. The core controversy is in respect of the head under which the profit or gain on the sale of the shares/securities should be taxed. In the present case, it is not controverted that the assessee is not registered as a broker or sub-broker wither with the BSE or Ahmedabad Stock Exchange. It is claimed by the assessee that the assessee is engaged in the business of Management Consultancy, Investment Advisory and Equity Research Services and also investments in the Securities. Much water has been flown in laying down the principles that there is no fixed formula to determine whether the activity of the assessee who is the purchasing and selling the securities/shares can be treated as a Trading Activity or Investment Activity but by the judicial pronouncements certain guiding principles have been fixed . Admittedly in this case, in the past also, the assessee has never claimed that he was having any trading in the shares and securities but always claimed that he was making the investment and accordingly treating the gain on the sales of shares/securities, either as a Long Term Capital Gain or Short Term Capital Gain. This

fact has been stated by the A.O on the page No. 5 of the assessment order, giving the details in respect of the preceding five years. On the perusal of the Profit and Loss Account and Balance Sheet filed by the assessee, for the Year Ending 31.3.2004 as well as for the preceding years, it is seen that there is no opening or closing stock shown by the assessee but the shares and securities are shown under the head 'Long Term Investment and Current Investment'. So far as the present year is concerned, there is a force in the argument of the Ld Counsel that almost 83% of the Capital Gain declared by the assessee is from the Long Term Capital Gains (LTCS). Moreover, it also appears that the single largest Long Term Capital Gain in this year is from the sale of the shares of the Infosys Technology Ltd. As per the chart showing the computation of the Long Term Capital Gain (Page Nos. 25 and 26 of the Paper Book), it is seen that in respect of 19 scripts, some scripts are held for 89 months, 86 months, 67 months, 71 months etc., Moreover, in this case the transactions are completed by delivery of the shares and this fact has been nowhere controverted by the A.O as well as the CIT(A). From the reasons given by the AO in the assessment order, he has merely stated that delivery of the shares cannot be the decisive, but in our opinion, that is also not correct.

10. As per the CBDT Circular No. 4/2007 dt. 15.6.2007 (page No. 1 & 2 of the Paper Book) which is relied on by the Ld Counsel, the Board has accepted the principles laid down by the Hon'ble Supreme Court in the cases of CIT (Central), Calcutta v/s. Associated Industrial Development Co. (P.) Ltd., 82 ITR 586 as well as in CIT v/s. H Holsck Larzen, 160 ITR 67 (SC). In the above referred circular, the Board has issued certain guidelines to the A.O. The Board has accepted that the assessee can have two portfolios simultaneously- (1) an Investment Portfolio comprising of securities which are to be treated as a capital asset and (2) Trading portfolio comprising of stock and trade which are to be treated as trading asset.

11. The operative part of the Circular No. 4/2007 dt. 15.6.2007 which reads as under :

“4. 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 assessees as well as for guidance of the assessing officers.

5. In the case of Commissioner of Income Tax (Central), Calcutta Vs. Associated Industrial Development Company (P) Ltd (82 ITR 586), the Supreme Court observed that:

Whether a particular holding of shares is by way of investment or forms part 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.

6. *In the case of Commissioner of Income Tax, Bombay Vs. H. Holck Larsen (160 ITR 67), the Supreme Court observed :*

The High Court, in our opinion, made a mistake in observing whether transactions or whether these were in the nature of investment was a question of law. This was a mixed question of law and fact.

7. *The principles laid down by the Supreme Court in the above two cases afford adequate guidance to the assessing officers.*

8. *The Authority for Advance Rulings (AAR) (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 to 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 accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions;

(iii) ordinarily 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 where the object of the investment in shares of a company is to 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 revenue receipt.

10. *CBDT also wishes to emphasise 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 are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business income.*

11. *Assessing 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.”

12. We may also refer here the decision of the co-ordinate Bench in the case of Gopal Purohit (*supra*), in said case, the A.O examined the frequency of the transactions and also volume thereon. The A.O was of the opinion that as the frequency of the transaction carried out by the assessee was very high with large volume of shares and as for investments the funds were borrowed and utilized for the purpose of purchase of shares that partakes character of business activity. It was also found that in respect of the transactions where no delivery had taken, the same had been squared up on the same day and the profit and loss resulting there-from was shown as business income/loss. In respect of the delivery based transaction, it was found that the period of holding in most of the shares was very less few or days only. The A.O, therefore, treated the entire transactions of the sale and purchase of the shares as only one activity and treated the entire shares as the business income and declared to assessee as a capital gain. When the matter reached before the Tribunal by way of assessee's appeal, the in which after referring to the plethora of decisions, including the decisions of the Hon'ble Supreme Court in the case of Associated Industrial Development Co. Ltd. (*supra*) and H. Holsck Larzen (*supra*) has held that:

“8.2 Having stated so, on merits also, we find that in the case of Sarnath Infrastructure (P) Ltd. vs. Asstt. CIT (supra), the Tribunal has considered almost all the important judicial decisions laying down legal principles to determine the nature of transaction i.e. trading the transaction or investment, which have also been cited before us. The Tribunal has also considered the CBDT Circular No. 4 of 2007. The Tribunal has summarized these principles in para 13 of the said order. For the sake of ready reference, we reproduce the same as under :

“After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes :

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item) ? This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated as stock-in-trade or investment ? Whether shown in opening/closing stock or shown separately as investment or non-trading asset ?

(2) Whether assessee has borrowed money to purchase and paid interest thereon ? Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.

(3) What is the frequency of such purchases and disposal in that particular item ? If purchase and sale are frequent, or there are substantial transactions in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the

holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).

(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value ? Former will indicate intention of trade and later, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares ? A commercial motive is an essential ingredient of trade.

(5) How the value of items has been taken in the balance sheet ? If the item in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.

(6) How the company (assessee) is authorized in memorandum of association/articles of association ? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity ? And vice versa”.

Thereafter, the Tribunal analysed the facts of that case in the light of above principles and came to the conclusion that surplus earned by the assessee was chargeable to capital gains. The relevant findings in paras 14 and 15 are as under :

“When we examine the facts of the present case, we find that the assessee is dealing in shares both as a trader as well as investor. It has kept separate accounts for both types of dealings. Valuation of holdings has been done at cost (for investment portfolio). At least, there is no allegation or material to come to the conclusion that valuation of investment portfolio has been done on cost or net realizable value, whichever is low. The shares which are sold out of investment portfolio, this year, were purchased two to three years ago showing that assessee had intention, while purchasing them, to hold them. They were reflected in the balance sheet as investment. The assessee has enjoyed dividend income and declared the same in return of income. The frequency of such purchase or sale in this portfolio is not large enough to doubt that this portfolio is only a device to pay lesser taxes by parking some stock-in-trade in investment portfolio. We notice that in trading portfolio the assessee had purchased during the year shares worth Rs. 21,38,353 and same shares were sold for Rs. 23,89,805. There was neither opening stock nor closing stock. In investment portfolio, opening stock of shares was Rs. 19,22,203 and closing stock was Rs. 46,23,274 whereas sales out of investment portfolio were Rs. 31,80,423 It shows that turnover to stock ratio in investment portfolio is very low as compared to that in trading portfolio.

Further, there is no material to show that these shares in the investment portfolio were also traded in the same and like manner as those which were in stock-in-trade portfolio. The board of directors has passed resolutions for making

investment whereas memorandum of association has only authorized to carry out trade in shares. It clearly shows intention of the assessee to maintain a separate investment portfolio. All the sales out of this portfolio are identifiable to purchases made in this portfolio. In our considered view, the assessee has discharged its primary onus by showing that it is maintaining separate accounts for two portfolios and there is no intermingling. The onus now shifted on the Revenue to show that apparent is not real. There is no material brought in by the Revenue to show that separate accounts of two portfolios are only a smoke screen 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 on the basis of authorities described), 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. As result, this ground of the assessee is allowed.”

13. In the case of Associated Industrial Development Co. Ltd., (supra), the controversy was whether the assessee was the dealer in shares or it's activity of purchase and sale of the shares was in the nature of shares. Their Lordships have held as under :

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

14. The decision of the Tribunal in the case of Gopal Purohit (supra) has been affirmed by the Hon'ble High Court of Bombay in CIT V/S. Gopal Purohit-ITA No. 1121/09 Dt. 6/01/10 (unreported) and operative part of the judgment reads as under:

“ 3. 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.”

15. We have given our serious considerations to the different precedents relied on by the A.O in the assessment order, but in our opinion, the principles laid down in those decisions cannot be applied to the assessee's case to say that the activity of the assessee buying and selling of the shares amount to Trading Activity. It is well settled principle as has held in the case of H. Holsck Larzen (supra) that whether the activity of buying and selling of the shares is in the nature of trade and investment. It is a mixed question of law and fact. In this case, we have perused the Balance Sheet filed by the assessee and as per the books of account, the assessee has treated the entire investment in the shares as an investment only and not as a stock in trade. Another important aspect to be considered here is the assessee is not a share broker nor he is having a registration with any Stock Exchange. Moreover, some scripts are held for more than five years and it is not a case of the A.O that there were any derivative transactions by the assessee nor is it a case of the A.O that there were transactions without any delivery. In the present case, both the authorities have not disputed that the transactions are completed with the delivery. The intention of the assessee cannot be read from his mind but it reflects in its conduct, the way he treats the transactions. The assessee has not borrowed any money for investing in shares and used his own surplus funds and these facts have not been disputed by the A.O. The proposition has been accepted by the Board also in Circular No. 4/ 2007 that the assessee is entitled to maintain two portfolios. In the case of the assessee, in the preceding years, the assessee is consistently declaring the gain/profit on the sale of the shares under the head 'Capital Gain' either Long Term and Short Term and the same has been accepted by the A.O. It is true that the rule of *res judicata* is not applicable to the Income Tax Proceedings, but at the same time, it is also well settled principles that if there is no change in the facts, then, there should be consistency in the approach of the Revenue authorities while deciding the tax liability of the assessee.

16. Another aspect to be considered here is that the assessee has received the substantial dividend and that is also disclosed. After considering the totality of the facts, we are of the opinion that the transactions of sale and purchase of the shares by the assessee cannot be treated in the line of trading in the shares nor it can be treated as an adventure in the nature of the trade. For the reasons given herein-above, we hold that the entire income from the sale and purchase of the shares is to be assessed under the head 'capital gain ' as rightly declared by the assessee either Long Term Capital Gain (LTCG) or Short Term Capital gain (STCG) depending upon the period of holding. We, therefore, direct the A.O to accept the capital gains declared by the assessee from the sale of the shares and accordingly, set aside the order of the Ld CIT(A).

17. Ground no.2 is in respect of the disallowance made u/s 14(A) of the Act.

17.1 The ld counsel of the assessee submitted that considering the smallness of the amount of the disallowance and as per the instructions of the assessee he is not pressing the ground no.2.

18. As the ground no.2 has not pressed by the ld counsel; therefore, the same is dismissed as not pressed.

19. So far as the ground no.3 is concerned, it is general in nature and no specific adjudication is required.

20. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 30th April 2010.

Sd/-

(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Sd/-

(R. S. PADVEKAR)
JUDICIAL MEMBER

Mumbai, on the 30th day of April, 2010

Copy to:

1. Appellant
2. Respondent
3. CIT (A) - XXVI, Mumbai
4. The CIT concerned
5. The DR, "I" Bench, Mumbai
5. Guard File

True Copy

Mumbai

BY ORDER

Asst. Registrar, ITAT,