

**आयकर अपीलीय अधिकरण, मुंबई, "ई" न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**  
**श्री एच.एल. कार्वा, अध्यक्ष एवं पी.एम. जगताप, लेखा सदस्य के समक्ष।**  
**BEFORE SHRI H.L. KARWA, PRESIDENT, AND SHRI P.M.JAGTAP, AM**

आयकर अपील सं./I.T.A. No. 8393/Mum/2010  
(निर्धारण वर्ष/Assessment Year: 2007-08)

M/s. SMAA Trade Invest P. Ltd., C-1/23-Durian Estate Goregaon Mulund Link Road, Goregaon (East), Mumbai-400063	<b>बनाम/</b> Vs.	The Commissioner of Income-tax(Appeal)-20, Aayakar Bhavan, M.K.Road, Mumbai-400020
स्थायी लेखा सं./PAN : <b>AAECS5315H</b>		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

आयकर अपील सं./I.T.A. No. 7531/Mum/2012  
(निर्धारण वर्ष/Assessment Year: 2007-08)

M/s. SMAA Trade Invest P. Ltd., C-1/23-Durian Estate Goregaon Mulund Link Road, Goregaon (East), Mumbai-400063	<b>बनाम/</b> Vs.	The Income-tax Officer-9(3)(2), Aayakar Bhavan, M.K.Road, Mumbai-400020
स्थायी लेखा सं./PAN : <b>AAECS5315H</b>		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थी की ओर से / <b>Assessee by:</b>	Shri Vishwas Mehendale
राजस्व की ओर से/ <b>Revenue by :</b>	Shri Prakash L. Pathade

सुनवाई की तारीख /**Date of Hearing** : **17/07/2014**

घोषणा की तारीख /**Date of Pronouncement** : **30/07/2014**

आदेश / O R D E R

**PER P.M.JAGTAP, AM:**

This appeal filed by the assessee being ITA No.8393/Mum/2010 is quantum appeal and the same is being disposed off along with corresponding penalty appeal filed by the assessee being ITA No.7531/Mum/2012.

2. First we take up the quantum appeal filed by the assessee which is directed against the order of the ld. CIT(A)-20, Mumbai dated 04/10/2010.

3. In ground no.1, the assessee has challenged the action of the ld. CIT(A) in confirming the treatment given by the AO to the profit arising from sale of shares amounting to Rs.6,13,016/- as income from business instead of Short Term Capital Gain.

4. The assessee in the present case is a company which is engaged in the business of trading in shares and securities. It also claims to have made investment in shares. The return of income for the year under consideration was filed by it on 18/10/2007 declaring total income at Rs.3,07,980/-. In the said return, loss arising from trading in shares amounting to Rs.4,39,436/-was shown by the assessee under the head of profit and gains of business or profession while the profit claimed be arising from the sale of shares treated as investment was declared as Short Term Capital Gain, chargeable to tax at the concession rate of 10%.

5. During the course of assessment proceedings, its claim for Short Term Capital Gain was sought to be supported by the assessee by making the following submissions by a letter dated 25/11/2009:

*“1.As regards your query why short term capital gains on sale of shares of Rs.592,574/- should not be treated as income from business and taxed accordingly, we would like to submit as under:*

- a. We have submitted the complete details of short term capital gains showing script name, date of purchase date of sales, quantity, cost of purchase and sale value along with copy of sample contract notes vide our letter dated 10<sup>th</sup> November, 2009. As you honour would see from the details files that in all the*

*case the assessee company has taken delivery and there is a time gap between purchase and sales.*

- b. The assessee company maintains separate records for the share which has been purchased for trading purposes and the shares which has been purchased for investment purposes. The assessee company shows trading profit as business income and gain on sale of shares held for investments as capital gains.*
  - c. The assessee has not borrowed any funds from any financial institutions, bank or any other person for making the investments in shares which indicates that only the surplus funds has been invested in the shares to earn capital appreciation and dividend income hence the same cannot be termed as income from business.*
  - d. During the year under consideration, the assessee company has earned dividend income of Rs.994626/- which clearly indicate that the investment in shares has been made for earning capital appreciation and to earn dividend and not for trading purposes.*
  - e. In the Audited Balance Sheet the bifurcation of shares which has been purchased for trading has been shown as inventories in schedule-6 and shares which has been purposed for investment purposes has been shown as investments in Schedule-5 which clearly indicate the intention of the management.*
  - f. It may also be stated that investment in shares has been valued at cost but in case of inventory which has been valued at cost or market value whichever is low.*
  - g. The foremost principal which has been laid down by the Authority for Advance Ruling is whether 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 the company is to derive income by way of dividend etc. then the profits accruing by dealing such investments (by sale of shares) will yield capital gain and not revenue receipt from the Profit and Loss account it clearly indicate that the assessee company has earned dividend income of Rs.994926/- which clearly indicate that the investment in shares is for earning dividend and not for trading purposes.*
  - h. The assessee company follows the same principal for last so many years and the same has been assessed u/s143(3) for various years. Copy of the last assessment order has been filed.*
- 2. Without prejudice to the above attention of your goodself is invited to fact that by treating short term capital gains as income from business, there would not be any impact on the Tax liability and the tax payable would be the same as the assessee*

*has paid tax as per the provisions of section 115JA (MAT), working for the same is enclosed.*

3. *In view of the above stated facts your goodself is requested to treat the short term capital gains under the head capital gains only”.*

6. The above submission of the assessee was not found acceptable by the AO. He noted from the details of Short Term Capital Gain furnished by the assessee that majority of the shares were sold within short period and the frequency of transactions in shares was also very high. He therefore held that the intention of the assessee was clearly to trade in shares and it was not a case of investment made by the assessee in shares. Accordingly, the profit arising from the purchase and sale of shares declared by the assessee as Short Term Capital Gain was treated by the AO as business income of the assessee and the same was brought to tax under the head “profit and gains of business or profession”. On appeal, the Id. CIT(A), upheld the action of the AO on this issue after taking into consideration the volume and frequency of transactions in shares coupled with shorter duration of holding revised which, according to him, sufficiently displayed the intention of the assessee to trade in shares with profit motive.

7. We have heard the arguments of both the sides and also perused the relevant material on record. The Id. Counsel for the assessee has furnished before us the details of transactions in shares made by the assessee in the year under consideration as well as in the immediately preceding year i.e. A.Y. 2006-07 to show that the nature of transactions including their frequency, holding period etc was similar in both these years. He has invited our attention to the copy of Assessment Order passed by the AO for A.Y.2006-07 to

show that the claim of the assessee for Short Term Capital Gain amounting to 25,67,008/- on sale of shares in the identical facts and circumstances was accepted by the AO in the said assessment completed u/s 143(3). He has also invited our attention to the copy of Assessment Order passed by the AO u/s 143(3) for A.Y.2004-05 to show that the similar claim of the assessee for Short Term Capital Gain on sale of shares amounting to Rs.30,70,381/- was accepted by the AO in the identical facts and circumstances. A perusal of these two Assessment Orders passed by the AO u/s 143(3) of the Act for the A.Y. 2004-05 and 2006-07 clearly shows that the claim of the assessee for Short Term Capital Gain on sale of shares was accepted by the AO in the facts and circumstances, which are similar to the year under consideration i.e. A.Y. 2007-08 and this position is not disputed by the ld. DR at the time of hearing before us. In the case of **CIT v/s Gopal Purohit [2011] 336 ITR 287 (Bom)**, it was held by the Hon'ble Bombay High Court, while dealing with the similar issue, that it was open to the assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business of dealing in shares. It was also held that there should be uniformity in treatment given to such transactions in shares and the rule of consistency should be followed when facts and circumstances for different years are identical, particularly in the case of same assessee. In our opinion, the ratio of the decision of the Hon'ble Bombay High Court in the case of Gopal Purohit(supra) is squarely applicable in the facts and circumstances of the present case and respectfully following the same, we direct the Assessing Officer to accept the claim of the assessee for Short Term Capital Gain of

Rs.6,13,016/- on sale of shares. Ground no.1 of the assessee's appeal is accordingly allowed.

8. Ground no.2 raised by the assessee in this appeal relating to the disallowance of Rs.93,638/- made by the AO and confirmed by the ld. CIT(A) u/s-14A of the Act is not pressed by the ld. Counsel for the assessee at the time of hearing before us. The same is accordingly dismissed as not pressed.

9. In the result, the appeal of the assessee being ITA No.8393/Mum/2010 is partly allowed.

10. Now we take up the appeal of the assessee being ITA No. 7531/Mum/2012 which is directed against the order of the ld. CIT(A)-20, Mumbai dated 05/10/2012, whereby he confirmed the penalty of Rs.68,780/- imposed by the AO u/s 271(1)(c).

11. We have heard the arguments of both the sides and also perused the relevant material on record. As pointed by the ld. Counsel for the assessee from the relevant assessment order passed by the AO, even after making the corresponding addition in respect of which the impugned penalty is imposed, the total income of the assessee as computed as per the normal provisions of the Act was less than the book profit computed u/s 115JB and the assessee thus was finally assessed for the year under consideration on the basis of book profit as per the section 115JB of the Act. In the case of **CIT vs. Nalwa Sons Investment Ltd. [2010] 194 Taxman 387**, Hon'ble Delhi High Court had held that when assessment was made on income computed u/s 115JB and tax had been paid on income so computed, penalty u/s 271(1)(c) would not be imposed with reference

to addition that would have been made while making assessment under normal procedure. Respectfully following the said decision of the Hon'ble Delhi High Court in the case of **CIT vs. Nalwa Sons Investment Ltd (supra)**, we cancel the penalty imposed by the AO and confirmed by the CIT(A) and allow this appeal of the assessee.

12. In the result, appeal of the assessee being ITA No.8393/Mum/2010 is partly allowed while the appeal of the assessee being ITA No.7531/Mum/2012 is allowed.

Order pronounced in the open court on 30/07/2014

आदेश की घोषणा खुले न्यायालय में दिनांक 30/07/2014, को की गई ।

*Sd/-*  
(H.L.KARWA)

HON'BLE PRESIDENT

मुंबई Mumbai; दिनांक /Dated : 30<sup>th</sup> July, 2014.

*Sd/-*  
(P.M.JAGTAP)

ACCOUNTANT MEMBER

*Mekhar. P.S.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT- , Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai