IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI

BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER)
AND
SHRI D. KARUNAKARA RAO (ACCOUNTANT MEMBER)

ITA No. 7217/MUM/2014
Assessment Year: 2010-11

DCIT 5(2) R.No. 571, Aayakar Bhavan M.K. Road Mumbai- 400020	Vs.	Jai Vijay Resources P. Ltd. 12 Laxmi Vilas, 87 Nepeansea Road Mumbai- 400006
		PAN No. AABCJ4706C
(Appellant)		**(Respondent)**

Appellant by : Shri Alok Johri, CIT DR
Respondent By : Shri C.B. R Murthy, AR

Date of Hearing : 04/08/2016
Date of pronouncement : 12/08/2016

O R D ER

PER MAHAVIR SINGH, JM:

This appeal by the revenue is arising out of the order of CIT (A)-9, Mumbai in Appeal No. CIT (A)-9/DCIT-5(2)/205/2013-14 dated 02/09/2014. Assessment was completed by DCIT-5(2), Mumbai for the AY 2010-11 under section 143(3) of the Income Tax Act' 1961 (hereinafter 'the Act') vide his order dated 26/03/2013.

2. The only issue in this appeal of Revenue is against the order of CIT (A) in treating profit arising out of sale and purchase of shares as Short Term Capital Gain / Loss as declared by the assessee as against assessment made by AO as business income.

3. Brief facts of the case are that the assessee filed its return of income declaring Short Term Capital Gain of Rs. 11,11,17,274/- and the Assessing Officer assessed the same as business income. The AO just relied on assessment made in the case of Payash Securities Pvt. Ltd. (PSPL), for the AY 2009-10 and 2010-11. The relevant observations of the Assessing Officer read as under:

> ***6. <u>Treatment of Short Term Capital Gain / Loss as business income / loss</u>***
>
> *6.1 Assessee was asked vide order sheet entry dt. 21/01/2013 that why not investment held by the company may not be treated as business income in view of the precedent of the case for A.Y. 2009-10. In response of the same, AR of the assessee attended on 25/02/2013 and filed identical reply as filed in A.Y. 2009-10 and in A.Y. 2010-11 in case of Payash Securities Pvt. Ltd. The reply has been considered but found not acceptable in view of the stand taken by the Department in earlier years and for A.Y. 2010-11 in the case of Payash Securities Pvt. Ltd, which has been merged with the assessee company. Therefore income declared as capital gain is treated as business income because facts are similar as to previous year and current year with Payash Securities Pvt. Ltd.*

4. Aggrieved, assessee preferred appeal before CIT (A), who relying on the decision of PSPL in I.T. A No. 650/Mum/2013 for AY 2006-07 dated 19/04/2013, directed the Assessing Officer to treat the profit arising out of sales and purchase of shares as capital gain and not business income, the relevant Para 5.3 of CIT(A) reads as under:

> *"5.3 It is seen that facts of the appellant during the year under consideration are almost identical as in the case of M/s Payas Securities Pvt. Ltd., which is merged with the appellant. In fact the investment held by the erstwhile company (M/s Payas Securities) are taken over as investment by the appellant company. Under these circumstances sale of such old investments will also be taxable as capital gain in the hands of the appellant. It is noted that in the current year, the average holding period of shares which resulted in long term and short term capital gains in 1409 and 157 days respectively. Total number of transactions is 157 as compared to 182 in A.Y. 2006-07, where the Hon'ble I.T.A.T. held that the income is taxable as capital gains. Therefore, following the same principle it is held that the appellant has earned income in the capacity of investor of shares and not as a trader. Accordingly, the AO is directed to assess the income as capital gains and not business income."*

Aggrieved, Revenue is in appeal before the Tribunal.

5. At the outset Ld. Counsel stated that this issue is covered by the decision of this Tribunal in the case of PSPL for the AY 2006-07, 2009-10, 2010-11 and now PSPL got

merged with the assessee company with effect from 01/01/2016 vide Hon'ble Bombay High Court order dated 25/06/2010 approving the merger scheme, the copy of judgment of Hon'ble Bombay High Court is enclosed in assessee's Paper Book. We find that the assessee had filed complete details of capital gain arising out on sales and purchase of shares i. e. number of securities transaction, average holding period which reads as under:

PARTICULARS	A.Y. 2010-11		A.Y. 2010-11(PAYASH)		A.Y. 2006-07(PAYASH)	
	SHORT TERM	LONG TERM	SHORT TERM	LONG TERM	SHORT TERM	LONG TERM
CAPITAL GAIN	110,637,095	566,126	453,656,280	439,121,981/-	204,580,282	8,672,770
NO OF SCRIPS	7	1	47	25	62	3
NO OF TRANSACTION	32	2	98	25	178	4
AVG HOLDING	157	1409	115 Days	841 Days	138 DAYS	807 days

6. We noted that if the average holding period is calculated from all the transactions, it will be more than 157 in respect of sales and purchase of the shares transaction giving rise to Short Term Capital Gain, which indicates that there is no difference in the nature of transaction for the year under consideration from that of the earlier years in the case of PSPL. Further in this year also, Revenue has accepted the profit arising out of sales and purchase of shares giving rise to the Long Term Capital Gain. We also find that the assessee is treating the transaction as investment in its books of account and these are delivery base transaction as in earlier years. In view of the above facts and circumstances, we are of the view that CIT (A) has rightly treated the profit arising out of sales and purchase of shares as capital gain and we confirm the same.

7. In the result appeal of the Revenue is dismissed.

Order pronounced in the open court on 12th August, 2016.

Sd/- *Sd/-*

(D.KARUNAKARA RAO) (MAHAVIR SINGH)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai; Dated: 12/08/2016
AG (On Tour)/*LK Deka*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

		Date	Initial	
	Dictation pad attached with the Draft Order	-		
1.	Draft dictated on computer	04-08-16		Sr.PS
2.	Draft placed before author	04-08-16		Sr.PS
3.	Draft proposed & placed before the second member	-		JM
4.	Draft discussed/approved by Second Member.	-		AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS
6.	Kept for pronouncement on	12-08-16		Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			