आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ **ITA.No.1699/Ahd/2011**
निर्धारण वर्ष/ **Asstt. Year: 2007-2008**
AND
आयकर अपील सं./ **ITA.No.1918/Ahd/2013**
निर्धारण वर्ष/ **Asstt. Year: 2009-2010**

M/s.Mas Chemical Industries P.Ltd. C/o. Peass Industries P.Ltd. Maneklal Road Navsari PAN : AABCM 6329 A	Vs	ITO, Ward-2 Navsari.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Tushar Hemani
Revenue by :	Shri Dinesh Singh, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 20th and 24th June, 2016**
घोषणा की तारीख /**Date of Pronouncement: 26/07/2016**

आदेश/O R D E R

Present two appeals are directed at the instance of the assessee against orders of the ld.CIT(A), Valsad dated 26.3.2011 and 25.3.2013 passed in the Asstt.Year 2007-08 and 2009-10.

2. Though both these appeals were heard on different dates, but are being disposed of by this common order, because, in the appeal for the Asstt.Year 2009-10, the ld.CIT(A) has not passed any speaking order, rather relied upon the order of the CIT(A) passed in earlier years.

3. Sole controversy in both the appeals is whether the assessee is to be termed as involving in trading of shares or is to be treated as *simplicitor*

investor. In other words, gain on purchase and sales of shares is to be assessed as a short term capital gain/long term capital gain, as the case may be or business income.

4. Brief facts of the case in the Asstt.Year 2007-08 are that the assessee has filed its return of income on 30.10.2007 electronically and declared total income of Rs.33,28,990/- On scrutiny of the accounts, it revealed to the AO that the assessee has shown net profit at Rs.39,43,520/- in the computation of income. It has claimed dividend exemption under section 10(33) and also claimed long term capital gain exemption under section 10(38) of the Income Tax Act. The assessee has shown short term capital gain of Rs.33,28,991/- and paid taxes at the rate of 10%.

5. The facts in the Asstt.Year 2009-10 are that the assessee has filed return of income electronically on 26.9.2009 declaring total income at NIL. The assessee has claimed long term capital gain of Rs.27,83,688/- and short term capital gain of Rs.4,08,897/-. It has also shown long term capital loss of Rs.6,99,749/- and short capital loss of Rs.26,10,281/-. The ld.AO has treated the activity of the assessee as trading in shares and assessed business loss while assessing total income of the assessee.

6. With the assistance of the ld.representatives, I have gone through the record carefully. Before I embark upon an inquiry on the facts of the present case, so as to find out whether the assessee is to be termed as involved in trading in shares or to be treated as *simplicitor* investor, it would be imperative upon me to bear in mind certain basic broad principle culled out from various judgments of the Hon'ble High Courts as well as the orders of the ITAT to test such transactions. In this connection, I would like to refer the order of the Lucknow Bench of the ITAT in the case of Sarnath

Infrastructure Pvt. Ltd, 120 TTJ 216. The tests laid down in this case are as under:

> *"13. 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:*
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> *(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 stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.*
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> *(2) Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.*
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> *(3) What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, if 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).*
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> *(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, 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.*
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> *(5) How the value of the items has been taken in the balance sheet? If the items 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.*
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> *(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 verse.

7. It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.

8. The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.

9. One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?

10. It is permissible as per CBDT's Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.

11. Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."

7. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

"After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proposition to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.

8. In the light of the above, let me examine the facts of the present case. It was pointed out by the ld.counsel for the assessee that it had made investment in shares through portfolio management services, by which investment is made on behalf of the assessee. Various decisions pertaining to investment in shares, such as investment strategy, period of share holding, etc. are to be taken by the concerned PMS companies. During the course of hearing, the ld.counsel for the assessee drew my attention towards the order of the ITAT in the case of Udayan Finstock Pvt. Ltd. Vs. ACIT, ITA No.849/Ahd/2012. On the strength of this, it was contended that investment through PMS is not to be termed as business of the assessee. He further pointed that ITAT in the case of Uayan Finstock Pvt. Ltd. (supra) has relied upon the decision of the Hon'ble Delhi High Court in the case of Radials International Vs. ACIT, 367 ITR 1 and the decision of the Karnataka High Court in the case of CIT Vs. Kapur Investments P. Ltd. 61 taxmann.com 91. The ITAT had made reference to the para 10 of the Hon'ble Karnataka High Court decision, which reads as under:

> *"10. As regards the first question that merely because of employment of Portfolio Management Service for investment in shares, the same would become business income, we are of the opinion that the said issue has been dealt with at length by the Delhi High Court in the case of Radials International (supra), wherein, in similar facts, the question*

> *has been answered in favour of the assessee and against the Revenue. Detailed reasons for the same have been given in the said judgment with which we concur. Even otherwise, it is admittedly not a case where the assessee had engaged its own persons or had a separate business infrastructure to carry out its share transactions for the purpose of business. It is merely a case where the assessee has invested funds through the Portfolio Management Service.*
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> *11. In our opinion, investment through Portfolio Management Service, which may deal with the shares of the assessee so as to derive maximum profits cannot be termed as business of the assessee but would only be a case of a more careful and prudent mode of investment, which has been done by the assessee. Funds which lie with the assessee can always be invested (for earning higher returns) in the shares either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that the assessee is carrying on the business of investment in shares. Profits from such investment, either directly or through professionally managed firm, would still remain as profits to be taxed as capital gains as the same will not change the nature of investment, which is in shares, and the law permits it to be taxed as capital gains and not as business income."*

9. Apart from the above, it was also brought to my notice that the assessee has shown the shares as investment in the balance sheet since very inception. It does not have any employee and any business establishment. The investment in share is one of the main objects as mentioned in point no.22 of the Memorandum of Association. It does not have employee and activities are carried out by the PMS provider. The investment was being made in only listed securities. All investments have made in independent companies and no interest bearing funds were used by the assessee company. On due considerations of the above facts, in the light of the various decisions and tests propounded by the ITAT as well as by the Hon'ble Gujarat High Court, I am of the view that the assessee is to be treated as an investor and not a trader in the shares. I allow both the appeals and direct the AO to treat the assessee as

investor, and accordingly assess the income from purchase and sale of shares as long term capital gain/short term capital as the case may be.

10. In the result, appeals of the assessee are allowed.

Order pronounced in the Court on 26th July, 2016 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 26/07/2016