Kusum Gupta, New Delhi vs Department Of Income Tax

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI B.C.MEENA, ACCOUNTANT MEMBER

I.T.A .No.-1014/Del/2010
(ASSESSMENT YEAR-2007-08)

ACIT, Central Circle-15, Room No.-344, ARA Centre, E-2, Jhandewalan Extension, New Delhi. PAN-AEDPG4771M (APPELLANT)	vs	Smt. Kusum Gupta, H.No.-21/40, Shakti Nagar, Delhi-110007. (RESPONDENT)

I.T.A .No.-288/Del/2010
(ASSESSMENT YEAR-2007-08)

Smt. Kusum Gupta, H.No.-21/40, Shakti Nagar, Delhi-110007. (APPELLANT)	vs	DCIT, Central Circle-15, New Delhi. (RESPONDENT)

Appellant by Sh.D.K.Misra, CIT DR
Respondent by Sh. Salil Aggarwal, Adv. &
Sh. S.Gupta, Adv.

ORDER

PER DIVA SINGH, JM

These are cross-appeals filed by the Revenue and the assessee against the order dated 11.12.2009 of CIT(A)-II, New Delhi pertaining to 2007-08 assessment years on the following grounds:-

ITA No.-1014/Del/2010 "1. On the facts and in the circumstances of the case the Ld. CIT(A) has erred in holding and directing to treat the income of sale of shares as one from the long term capital gain and thereby allowing the exemption u/.s 10(38) of the Income Tax Act, 1961 amounting to Rs.70,77,375/-.

2. The order of the Ld. CIT(A) is erroneous and not tenable in law and on facts.

3. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of hearing of the appeal."

ITA No.-288/Del/2010 "1. That the learned Commissioner of Income Tax (Appeals) has erred in confirming the addition of Rs.3,00,000/- on account of boarding, lodging and clothing expenses of her son.

2. That the learned Commissioner of Income-Tax (Appeals) has erred in confirming the addition of Rs.3,50,000/- on account of foreign visit.

3. It is contended that the above ground of appeal are without prejudice to one another.

4. It is contended that the appellant craves leave to add, alter and/or amend the above ground of appeal and to raise any other ground of appeal at the time of hearing of the case."

2. The facts qua the departmental appeal as coming from the assessment order are that the assessee is stated to have shown income under the heads of house property, business, capital gain and other sources. She has also been doing business in the year under consideration in her name in shares and securities for which an audit report in Form no-3CD had been filed. As per Report, the assessee was having closing stock of shares of Rs.2,19,15,145/-; the purchases reported during the year were at Rs.60,64,573/-and gross profit from share business was reported at Rs.3,16,531/-. In addition to the normal business of purchases and sales of shares, income had also been shown by the assessee as per the AO from speculation business in shares. The P&L account as per the assessment order showed various expenses such as accounting charges, bank charges, DP charges, depreciation, salary, telephones expenses and vehicle expenses. The AO observed that the assessee was running a regular business of sale and purchase of securities as in the earlier years. Apart from the above business the assessee had also shown income of Rs.70,77,375/- from long term capital gain on account of sale of shares which was claimed as exempt u/s 10(38). It is pertinent to mention that assessee's residential and business premises were subjected to search and seizure operation u/s 132 of the Income Tax Act on 07.02.2007. A perusal of para 4 of the assessment order shows that the AO refers to the answers recorded to the questions put to the assessee on the basis of which in para 5, it was concluded by the AO that the assessee being a housewife did not know much about her business activities. He was of the view that the business in reality on a day-to-day basis was being performed by her husband Sh. Umesh Gupta who was assessed to tax in Central Circle-3. The AO was of the view that after a search on his business premises in 2003 when he was doing business and trade in metal and shares the business has been conducted in the name of his wife and he has been showing income from salary. A perusal of the order further shows that in para 6 the AO observed that this query was raised and the assessee's reply was that she has complete control of the business and its funds as the funds employed were her funds and it was of no consequence that the business is being conducted through somebody else. The reply of the assessee was considered by the AO to be evasive as the business according to the AO was being conducted by her husband and not by somebody else however he records that no adverse view is taken on this score. 2.1. The relevant facts qua the addition deleted by the CIT(A) are found discussed in para 7 of the assessment order. A perusal of the same from the AO shows that considering the claim of exemption on account of long term capital gain, the AO observed that the note given in the purchase and sale is that the aforesaid sale of shares was chargeable to Securities Transactions Tax (STT) and accordingly it was being claimed exempt from tax. The AO looking at the quantum and the magnitude of the sale record required the assessee to explain why this dealing in shares be not treated as part of his normal business. 2.2. In response thereto it was stated on behalf of the assessee that these facts had been explained in

2005-06 assessment year and the arguments remained the same subject to change of figures. The explanation of the assessee is extracted in page 4-5 of the assessment order which reads as under:-

> "The assessee Smt. Kusum Gupta has been dealing in shares and also making investment in shares. She has kept separate accounts with reference to shares held as investment and shares in respect of which she was trading. A reference in this regard may kindly be made to balance sheets furnished by her, which are already placed in records. A reference may kindly be made to the detail of investment as on 31.03.2004 at page 18 of first reply (copy enclosed for ready reference) wherein investment in shares of Toplight Commercials Ltd. has been depicted at rs.6,31,377/50. This investment is in respect of purchase of one lac shares the delivery of which was taken by the assessee in her D-Mat account placed at page 48 of third reply (copy enclosed for ready reference). It would be seen that delivery of 32,750 shares was taken on 18-07- 2003, delivery of 7,250 shares was taken on 05-08-2003 and delivery of 60,000 shares was taken on 05-08-2003. These 1,00,000/- shares were sold post October '2004 for Rs.2,97,82,130/- (excluding STT) and the delivery thereof was also handed over to D- Mat account. Copy placed at page no 49 and 50 of third reply (copy enclosed for ready for reference) The brokers notes for purchase of these shares and the sales thereof are also placed on records. A perusal of balance sheets of the assessee and the transactions in question would show that the assessee has been maintaining two portfolios i.e. investment portfolio and trading portfolio. The shares of Toplight Commercials Ltd. were purchased by the assessee as investment. A reference may kindly be made to balance sheet of 31-03-2004 and the details of investment appended thereto as annexure 'V' (Copy enclosed for ready reference).
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> It would thus be seen that the transactions in these shares of TopLight Commercials Ltd. were in the investment portfolio and not in the trading account and hence the gains in respect of the same have been treated as capital gains (Long Term) and accordingly depicted in the computation of income filed. "

2.3. The AO not convinced with the explanation offered on facts held as under :-

> "The above contention of the assessee does not carry any weight. The quantum, magnitude and the nature of shares show that these were transactions in normal course of business. There is no dispute with regard to the fact that the assessee has been engaged in the business of sale/purchase of shares for many years. The transaction shown under the head investment is not different but is very much similar and identical to the operations normally associated with her trade and business. Here it is pertinent to mention that the shares in question are such which are not normally transacted on stock exchange. The assessee herself is a director cum shareholder in a security company dealing in sale/purchase of shares in the name of M/s. Pee Aar Securities Ltd. This company is doing extensive security business in Delhi. It is abnormal that such a person has purchased shares through a broker in Calcutta when she herself was doing it for others in Delhi. Furthermore, no dividend

> has been paid by the above company whereas in an investment, dominant purpose is to earn dividend. This puts a question mark even on the genuineness of the above deal. Simply because the shares remained with the assessee for a period of more than 12 months in the case of long term capital gain, it can not become a case of investment. Though the assessee was a director in a security company in Delhi and was dealing extensively in shares yet the deals which have resulted in this windfall in the shape of long term capital gain this year as well as in the preceding year have been routed through a company situated in Calcutta and the shares dealt in are unfamiliar and uncommon. Therefore, surrounding circumstances which throws a light on the real scenario can not be ignored."

2.4. Accordingly considering the applicability in the case of G.Venkata Swami Naidu & Co. vs CIT (1959) 35 ITR 594 (SC) and Sardar Indra Singh & Sons Ltd. vs CIT (1953) 24 ITR 45 (SC), he was of the view that there was a methodical and systemic approach in the purchasing and selling of the shares which was the hallmark of any business activity. He further held that assessee was neither a promoter of the company nor was involved in the affairs of the company as the assessee did not even otherwise despite being a Director in the security company i.e PEE AAR Securities Ltd. operated by her and her family was aware. Accordingly he was of the view that seen from all angles the profit from sale/purchase of shares is only a part and parcel of the assessee's business of sale/purchase of shares and the exemption claimed was disallowed and the profit was treated as normal business of assessee resulting in the addition of Rs.70,77,375/-.

3. Aggrieved by this the assessee came in appeal before the First Appellate Authority on the following grounds :-

> "Ground No.2 is against the action of the AO in not allowing the exemption of Rs.70,77,375/- claimed u/s 10(38) of the Act and treating the same as income under the head 'business and profession' without appreciating that the appellant is maintaining two portfolios namely 'investment portfolio' and 'trading portfolio' and capital gain has been arising on shares sold from investment portfolio."

3.1. The facts appreciated by the CIT(A) are reproduced hereunder :-

> "3.1. The appellant has filed her Return of Income declaring total income of Rs.6,16,070/- on 17/10/2007. She has shown income under the head House Property, Income from Business, Income from Long Term Capital Gain and Income from other sources. The income shown under the head Long Term Capital Gain of Rs.70,77,375/- has been claimed as exempt u/S 10(38) OF THE Act and therefore Long Term Capital Gain has been shown to Nil. As mentioned by A.O. in this order, the appellant was doing business in her name in shares and securities and as appearing in the audited P&L Account, she was having closing stock of shares of Rs.2,19,15,145/- in this business. The purchases of shares shown during the year is of Rs.60,64,573/- and G.P. from this business is reported at Rs.3,16,531/-. The AO has further mentioned in the order that the appellant has shown income of

Rs.70,73,375/- from Long Term Capital Gain on account of sale of shares and has claimed exemption u/s 10(38) of the Act of identical amount. The capital gain is arising out of sale of25000 shares of OASASCIN. The details of same are as under:-

Name of No. of Date of Cost Date of No. of Sale price Profit/loss company shares purchase price sale shares OASASCIN 25000 8.1.05 168875 28.6.06 5000 1449250 2.7.06 5000 1449250 3.7.06 5400 1565190 4.7.06 9600 2782560 25000 168875 25000 7246250 7077375 3.1.1. As the assessee was running regular business in sale and purchase of shares and securities, AO asked the appellant to submit as to why the income on sale of these shares also not be treated as part of the normal business activity and therefore assessable under the head 'business' instead of capital gain. As mentioned by AO, specific reply was not filed by the appellant. Rather it was submitted that facts are exactly identical as they were for A.Y. 2005-06 wherein also this issue was involved and the same submission may be considered for this year also subject to change of figures."

3.2. The deficiency pointed out by the AO was summarized in para 3.1.2 by the CIT(A) in the following manner :-

"i). The fact that the appellant has been engaged in the business of sale and purchase of shares for many years. The transaction shown under the head investment is not different but is very much similar and identical looking to the quantum, magnitude and nature of shares to the operations normally associated with her trade and business.

ii). There was a methodical and systematic approach to earn profit by purchasing and selling the shares which is hallmark of any business activity.

iii). The shares in question are such which are not normally transacted on stock exchange.

iv). The assessee herself is a Director-cum-share holder in a security company dealing in sale purchase of shares in the name of M/s Pee Aar Securities Ltd. This company is doing extensive security business in Delhi. It is abnormal that such a person has purchased share through a broker in Calcutta when she herself was doing it for others.

v) No dividend has been paid by the above company whereas in an investment, dominant purpose is to earn dividend."

3.3. It is further seen that the assessee as per para 3.2 of the impugned order reiterated the arguments advanced before the AO. It was agitated by way of written submissions that the AO has disallowed the claim of the assessee basically on the following grounds :-

"a) The transaction under the head investment is not different but is identical to the operations with her trade and business.

b) The shares in question are such which are not normally transacted on stock exchange.

c) That she has purchased share through a broker in Calcutta when she herself was doing it for others.

d) Dominant purpose is to earn dividend."

3.4. It was also canvassed that all the propositions mentioned above are nothing but surmises and presumption of the AO on account of the following facts :-

"a) Since the transaction was on account of sale of shares held as investment it was bound to have similarity with the business of trading in shares and is not relevant at all.

b) Since the shares in question were such which were normally not transacted on stock exchange is all the more reason to hold the shares as investment.

c) It is prerogative of the assessee to buy shares from any stock exchange where she can get best or through any broker of her choice and nothing adverse could be drawn from the transaction. It is for the assessee to conduct her own business or manage her affairs in a way which is best suitable to her in the circumstances prevailing at the relevant time.

d) Investments in shares are held for earning capital gain over a period of tie and dividend, if any, earned during the period of holding is a benefit derived from such investment which is dependent upon the concerned company which declares the same and the investor does not have any control over it. It is for the investor to hold the investment or to sell the same to earn capital profit when he/she finds a suitable price for the investment."

3.5. It was further argued that there is no bar on the assessee to hold shares in different portfolios such as Investment Portfolio and Business Portfolio as all she had to do was to bifurcate the income earned under different portfolios for taxation purposes which she had done in the computation of income as well as in the Profit & Loss Account filed during the course of assessment proceedings. Attention was invited to Circular No.4/2007 dated 15.06.2007 which confirmed that it is possible for a tax payer to have two portfolios i.e an investment portfolios comprising of securities which are treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets and the assessee may have income under both the heads. It was also argued that the AO has not disputed the genuineness of the transaction and has also not controverted the declaration of the assessee regarding holding of such shares as investment in the previous preceding

year which was also assessed by him and he had also failed to bring on record any concrete material to justify that the profit earned by the assessee on sale of such investment was a business income. Copies of return for the assessment years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 & 2006-07 were produced so as to show that in the balance sheet the assessee is consistently showing investment separately and closing stock separately and the shares in which he had dealt as part of the business activity are different then the share which are kept as investment. It was further contended that on similar facts in 2005-06 assessment year, the action of the AO was not approved in the appellate proceedings. On the basis of these submissions it was argued that the claim deserves to be allowed. 3.6. Considering the arguments on facts the CIT(A) came to the following conclusions:-

> "3.3. I have considered the facts of the case. Submission of the appellant has also been gone through very carefully. I have myself examined the facts of the case very carefully. The appellant in her balance sheet for 31.3.06 has shown investment of Rs. 3,67,81,024/- whereas closing stock is of Rs.1,59,75,712/-. The closing stock is related to the traded shares whereas investment is related to house, balances with bank, bonds and various shares including the shares which were sold during the year on sale of which the capital gain has been claimed to be arising. The investment in the share of OASASCIN is Rs. 1,68,875/-as appearing in this balance sheet. This is stated to be the cost price of these shares respectively. In other words, the investment is shown at cost price and not at the market value and net realisable value.
>
> 3.3.1. Further it is not the first year when the appellant has shown separate investment in her balance sheet. The appellant has produced copy of her balance sheet for the last seven years in support of the fact that she is regularly showing investment shares separately and closing stock of traded shares separately. Based on the balance sheet of last seven years, the contention of the appellant is established that she is regularly maintaining two separate portfolios. 3.3.1.1. The profit and loss account of the appellant has been verified for this year and that of last seven years also. The inventory of closing stock has also been verified. It is seen that the appellant neither during this year nor even in earlier years had ever traded in those shares which are kept as investment. In other words the shares in which appellant had traded are totally different than the shares which are kept for investment. This also proves the intention of the appellant to keep these two portfolios totally separate without mixing and thereby creating any confusion.
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> 3.3.2. The AO is contradicting his own action as if it is his case that appellant is having only one portfolio of trading then he should have taken entire investment in shares as appearing in the balance sheet towards closing stock of shares at cost or market price which ever is less and worked out the profit of the trading business accordingly. This he has neither done in AY. 2006-07, the year in which the investment in OSASCIN was shown for the first time in b/s nor in this year or subsequent years. It is also seen that earlier the scrutiny assessment u/s 143(3) has been done for the assessment year 2002-03 and in this assessment also the

maintenance of two separate portfolios by the appellant has been accepted by the AO.

3.3.3. It is also seen that the frequency of purchase and sale of shares kept in investment portfolio is not very large. In other words normally they are being kept for a fairly long time. Thus basic objective appears to keep them as investment to earn profit on appreciation. I do not agree with the observation of the AO. that no dividend has been earned on these shares and therefore it cannot be said that objective of acquiring these shares is to keep them as investment. Now-a days, a person whether he is a trader in shares or not, does not acquire shares for earning dividend. It is acquired generally with the objective to earn profit on appreciation. Gone are the days when a person used to invest in shares for earning dividend.

3.3.4. The AO has also not disputed the genuineness of the transaction. Thus, there is no doubt about the genuineness of the transactions of sale of the shares.

3.7. The CIT(A) further in para 3.3.5 deliberated on the decisions relied upon by the AO and the CBDT circular and the facts of the assessee's case and thereafter in para 3.3.6 taking into consideration the decisions of the Bombay Bench of the Tribunal in the case of Gopal Purohit vs JCIT 25(3), Bombay [29 SOT 117 (2009)] and Sarnath Infrastructure (P) Ltd. vs ACIT [(2009) 120 TTJ 216]. Considering the principles considered in the said decision as summarized in para 13-15 of the same held that the assessee has successfully discharged all the tests which had been set out and the claim of the assessee that it was forming part of the investment portfolio was found to be factually correct by the CIT(A). 3.8. The principles summarized in the decision of Sarnath Infrastructure (P) Ltd. extracted in the impugned order read 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: (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 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. (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."

14. 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.

15. 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 account 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."

3.9. The reasoning summarized in the earlier part of this order (specific para 3.7) is extracted from the impugned order:-

> "3.3.7. If we examine the facts of the appellant in light of the principles as set by the above decision of Hon'ble ITAT Lucknow, it will be noticed that on all the principles, the appellant is successfully able to discharge all the tests which have been set and the claim of appellant that these share are forming part of investment portfolio, is found correct. Even the facts of the instant case are exactly identical to the facts of the Sarnath Infrastructure (P) Ltd.. In light of this decision of Hon'ble ITAT, it is very clear that action of AO can not be upheld in treating the long term capital gains so shown by the appellant as business income and thereby disallowing the claim of exemption u/s 10(38) of the Act.
>
> 3.3.8. However, during appellant proceedings, it was asked to the Ld. AR as to why part of the expenses debited in P&L account may not be disallowed as per provisions of section 14A of the Act as was done in my order for A.Y. 2005-06. No specific objection could be filed by the appellant. It is seen that in total expenditure debited in the P&L account is Rs.1,85,077/-. I, therefore, on estimated basis, attribute an expenditure Rs.75,000/- towards this income. Therefore, expenses to the extent of Rs.75,000/- are not allowable under the head business u/s 14A of the Act. Ground No.2 is decided accordingly."

4. Aggrieved by this the Revenue is in appeal before the Tribunal. Ld. CIT DR inviting attention to the assessment order contended that on a plain reading of the para 4 of the same, it was demonstrated that the assessee had no knowledge of her business which has been concluded in para 5 by the AO. Accordingly it was his contention that the CIT(A) has erred in granting relief. It was argued that the scrip in which investment was made by the assessee is admittedly a penny stock and the said stock by its very nature and functioning is mysterious. It was his argument that normally in the share market an investment is always made only in good stock and the good stock is identified in the market where it has sound fundamentals with a good target record of giving dividend over a period of time. The share in question it was argued is definitely not a stock in that category. The penny stock it was argued basically always exhibit a cyclic pattern where both the buyer and seller seek an advantage of an artificially created market situation to exploit and avoid taxation. The arguments accepted by the CIT(A) it was submitted had no relevance to the issue as the burden of proof in terms of the principles laid down in 158 ITR 826 (SC) has not been discharged by the assessee. It was submitted that investment per se is necessary for profit motive and there can be no other intention. The Ld. CIT DR laid specific emphasis on the answers given to Question No-2, Question no.-8 and Question no-11 recorded in para 4 of the AO and deliberated at length on the ignorance of the assessee in whose the name, the business was being run. Similarly Question No-13 and Question No-20 it was stated would also illustrate these aspects further and the discrepancies noted in the statements recorded it was argued are addressed in Question No-25. The ignorance evident it was argued was further compounded by the answers given to Question No-29 and 30 in

which the lady answers it was stated by the Ld. CIT DR that she only remembers her husband and children. Accordingly it was his vehement plea that the business is being run by the husband and not by the assessee. 4.1. Since the Ld. CIT DR has placed heavy emphasis on his arguments to the responses given to the Question, we reproduce para 4 of assessment order hereunder :-

"Q.2 What are you doing?

Ans. I am house wife.

Q.3. What is your husband doing?

Ans. I have no knowledge.

Q.8. Are you maintaining any bank account and any bank lockers? Ans. I have no bank account and locker.

Q.10. Have you any immovable property give complete details? Ans. I have immovable property but these details will be given by my husband Mr. Umesh Gupta.

Q.11. Have you any moveable property? Please give details. Ans. I do not know. My husband will reply for this question. Q.12. What is the relation with R.G>Group you have?

Ans. Mr. Rajesh Goyal is my sister's son. And I have no business relation in my knowledge.

Q.13. Please give the details of shares and DMAT account No. with depository. Ans. I have DMAT account in M/s Pee Aar Securities Ltd., AG-20, Shalimar Bagh, Delhi. But account No. will be told by my husband Mr. Umesh Gupta. Q.20. Are you director in any company? If yes please give details. Ans. I am Director in M/s Pee Aar Securities Ltd., A-6-20, Shalimar Bagh, Delhi and Shri Rajesh Projects & finances Ltd. And also in Aman VIhar (P) Ltd., Mayur Vihar, Phase-II.

Q.21. Please state the registered office of these companies and please state the name of the other directors?

Ans. Since I am not an active director, and I don't remember presently registered addresses & other name of directors. Previously the registered office of Rajesh Projects & Finances is at21/40, Shakti Nagar and not it is shifted to R.G. Complex, Sector-14, Rohini.

Q.25. Initially you have stated that you are a house wife and doing nothing and now you are saying that you are a partner and Director in the above noted concern?

Ans. Because I am not looking after any business activities that is why I stated that I am house wife.

Q.26. Do you hold shares of the companies in which you are directors if yes please give details?

Ans. Yes I am share holder in all the companies where I am director,. The number of shares reflected in my Income Tax return I do not remember the quantify of shares held by me.

Q.29. Do you hold shares in M/s Rajesh Project India Ltd.? Ans. At present I don't remember.

Q.30. Please stated which are the things you most remember? Ans. I mostly remember my husband and children.

Q.38. The shares held in above Co. and the shares held in companies whose you are director have not been found during the search seizure operation at your residence or premise. Please state where whose shares are kept? Ans. Some shares are in my DMAT account with M/s Pee Aar Securities Ltd. and the rest are sent for listing/D-mating to the company concerned."

4.2. Accordingly in the circumstances it was his submission that the AO is correct in not relying upon the evidence relied upon by the assessee. After carrying us through the assessment order it was his submission that he would be filing a write up on the legal principles relied upon by the department. In view of the position that after having made his submissions, Ld. CIT DR sought time to place his written submissions, it was proposed to adjourn the case. The Ld. CIT DR stated that since he has already made his arguments and only legal principles will be addressed as such the hearing need not be adjourned. However in the absence of written submission on which the department would want to file and rely it was indicated that the hearing should be adjourned. The Ld. AR responding to the query of the Bench also requested that he may be allowed to address the arguments of the Ld. CIT DR and also be allowed to argue his appeal and stated categorically that he would not be prejudiced by the department filing written submissions subsequently on case law as the assessee's case is fact specific on settled legal issues. Accordingly the Ld. AR advanced arguments on the departmental stand and also on the assessee's appeal to which the Ld. CIT DR also responded again stating that for legal pegal principles he would be filing his write-

up subsequently. Infact the hearing in the present case went back and forth few times on the dates of hearing. In the face of the peculiar approach of the Ld. CIT DR and the adamancy on the part of the Ld. AR to insist on being allowed to argue the proceedings were allowed to be continued.

5. On the next date of hearing Ld. CIT DR filed his synopsis after his oral arguments on both the issues addressed in the assessee's appeal and the department's appeal. It was re-emphasized that the assessee is not fully involved in her activity and the answers to the questions are avoided and despite

this fact it was urged the addition made has been deleted. It was his submission that since the assessee claims to be a broker then the need and the necessity to invest through a broker in Calcutta was a questionable act and he would be addressing case laws to assail the impugned order. The written submissions titled as "Synopsis" was filed by the Ld. CIT DR on the issues addressed in both the appeals. The same is reproduced hereunder:-

"Status for expenditure for household expenses:-

Budh Kishore (2005) 273 ITR 492 (PUNJ. & HAR.) SEPTEMBER 3, 2004 During the course of assessment proceedings for the assessment year 1994-95 the Assessing Officer observed that the assessee had not disclosed any withdrawals for household expenses and that the relevant columns in the net wealth statement had been left blank. Keeping in view the size of the family of the assessee and standard of living, he estimated the expenses of the family at Rs.10,000 per month totaling Rs.1,20,000 for the entire year. Since the assessee had not accounted for this amount, he treated the same as having been incurred out of undisclosed sources and thereby made an addition of Rs.1,20,000 to the income of the assessee. The assessee explained that the household expenses were being met by the wife of the assessee, who had withdrawn Rs.33,600 out of her capital account for that purpose. The Commissioner (Appeals)accepted this claim and deleted the addition. On further appeal the Tribunal upheld the estimate of the Assessing Officer determining the household expenses at Rs,1,20,000 as reasonable in view of the size of the assessee's family and his status. However, keeping in view the amount of Rs.1,20,000 as reasonable in view of the size of the assessee's family and his status. However, keeping in view the amount of Rs.33,600 withdrawn by the wife of the assessee. It restored the addition to the extent of Rs.86,400 (1,20,000-33,600). For the assessment year 1995096, the Assessing Officer made an addition of Rs.84,000 on similar grounds, which was upheld by the Tribunal. On appeal to the High Court:

Held dismissing the appeals, that the Tribunal had estimated the expenses at the rate of Rs.10,000 per month. Such a finding was essentially a question of fact. It was not open to the court while exercising the jurisdiction under section 260A of the Income Tax Act, 1961, to substitute its own estimate for the estimate of the Tribunal, unless it was shown that the estimate of the Tribunal was arbitrary, unreasonable or irrational. In the present appeal, no such case was made out especially in view of the fact that the assessee was not prepared to furnish any break-up of his household expenses. The reference to the cases of his relatives could not be considered as no details had been furnished about the size of their families, their household expenses and other particulars in respect thereof. Even the amounts of the household expenses in such cases had not been mentioned. No substantial question of law arose out of the order of the Tribunal.

Additions are made on low household expenses on the basis of status in DAS HARIYANI (2008) 166 TAXMAN 25 (JP.) (MAG.) AUGUST 27, 2007 & Trade or

investment:

Arguments taken by AR:

He has not challenged a single item of my written submission either on fact or in law like intermingling of shares. The AR has harped on issues like non borrowal of funds, maintenance of two portfolios, solitary transaction, valuation at cost etc. they have no relevance or of less relevance to the issue.

Borrowal of fund or own fund: See NarendraGehlaut ITA 1648/Del/2010 (PB-116 and 120 at para 3.10 and 5.6) held that this cannot be a factor to reckon.

Circumstantial evidence:

Like going to Calcutta Exchange while she trades for others at Delhi. can always be relied on by AO. There can be no direct evidences for certain dark deeds which are done under the cover of darkness (Deepak Dalela [2011] 128 ITD 225 (Jp.)) and in such cases AO can always rely on indirect evidences.

12.The word 'evidence' as used in See. 143(3) obviously cannot be confined to direct evidence. The word is comprehensive enough to cover circumstantial evidence also. Under the tax jurisprudence the connotation of the term 'evidence' in much wider. U/s 143(3) of the I.T. Act. 1961 it is used in a generic sense and not in the aborted sense so as to be either oral or documentary evidence, or both. While the "evidence" may recalled the oral and documentary evidence/as may be admissible under the Indian Evidence Act, the use of word 'material' which may not strictly be evidence admissible under the Indian Evidence Act, for the purpose of making an order of assessment. Court often taken judicial notice of certain facts which need not be proved, while administrative and quasi-judicial authorities can take "official notice" of wider varieties of facts which need not to proved before them. Thus, not only in respect of the relevancy but also in respect of proof the material which can be taken into consideration by the assessing officer and other authorities under the Act is far wider than the evidence which is strictly relevant and admissible under the Evidence Act.

It may be seen from sections 142 and 143 that A O. is not fettered by the technical rules of evidence and the like, and that he may not on material which may not strictly speaking, be accepted evidence in a court of law. All relevant circumstances which have bearing on the issue which are revealed in the course of assessment would be covered by the expression "material or evidence" on which A.O. could rely.

Burden of proof:

Misplaced burden vitiates a judgment.RangamalvsKuppuswamy 2011(2)(OJR)9(SC).The onus that this is not a trade is on assessee(G V Naidu case) since normal presumption is that assessee trades. Consistency rule/res judicata:

Assessee again and again harps on these despite clear direction of SC that each year is different and on such an issue this rule does not apply. Raja BahadurVisheshwar Singh y. Commissioner of Income-tax 41 ITR 685(SC)-3 judge bench dt 15.12.60

(iii) that the fact that the Appellate Tribunal had not treated the appellant as a dealer in shares for the assessment year 1941-42 and his profits from the purchase and sale of shares for that year had not been assessed to tax did not operate in any way as res judicata or preclude the Tribunal from holding that he was a dealer in shares for the years 1944-45 to 1948-49.

Raja BahadurKamakhyaNarain Singh vs (IT 77 ITR 2S3(SC) Since the present Tribunal had the advantage of examining the assessee's transactions during the whole of the period, i.e., right from 1938-39 to 1944-45, and thus have a more comprehensive picture of all the transactions, there would be no bar to its coming to a conclusion different from that arrived at in the earlier years, if the acts and conduct of the assessee taken as a whole throughout the period pointed to a different conclusion as both the Tribunal and the High Court have said. But the only new materials pointed out by the Tribunal from which a different conclusion could be arrived at were: (1) the sale of gold in 1944 and 1945, (2) the purchase of the said shares from its sale proceeds, and (3) the sale of Karanpura shares. CIT vs H. Holck Larsen 160 ITR 67(SC)

34. The question was again considered by this Court in Dalhousie Investment Trust Co. Ltd. v. CIT [1968] 68 ITR 486. There this Court on the facts came to the conclusion that the assessee dealt with the shares of Mcleod & Co. and the allied companies as stock-in-trade, and that these 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, and the profit derived by the appellant from the sale of shares was, therefore, revenue receipt and as such liable to income-tax. It was held 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. (2)2011- TIOL-179-ITAT-MUM Synthetic Fibres Trading Co., ... vs Department Of Income Tax on 14 January, 2011 Para 14. We have considered the rival submissions and also perused the relevant material on record. As regards the first contention raised by the learned counsel for the assessee relying on the Rule of Consistency that the assessee having treated as investor in shares in earlier years and the profit arising from sale of shares having been accepted as capital gains in the earlier years, there was no reason for the Revenue authorities to take a different stand in the year under consideration, we find it difficult to accept the same in view of the decision of Hon'ble Supreme Court in the case of New jehangirVakil Mills Ltd. vs.CIT 49 ITR 137. The Hon'ble Apex Court has held in the said judgment that the circumstances that in the earlier assessment year the assessee was treated as an investor would not stop the assessing authority from considering for the purpose of computation of profits for the succeeding year as to when the trading activities of the assessee began.

(3)Also we rely on the case of 18.General Talkies: ITA 4224/D/2010 (PB 128-

135) para 15.

Nature of the share/scrip:

I had put a question as to what is this scrip. What company? Where traded? Nothing has been told in response. So what is the way to see that these were valued at cost in the portfolio which has been emphasized in the assessee's case.

The fundamental rule in these type of cases is that party which asserts must lose if best evidences and details are not produced since such knowledge is within the knowledge of assessee who holds the shares.

Associated IndDevt Co P Ltd 82 ITR 586(SC) @ pg 590 Not a solitary transaction as told by AR but 4 transactions in the shares in quick succession.

In order to judge the transaction in question the relevant factors are:

(1) What was the intention to go for this share? What are the fundamentals of this company? What lured the assessee to go to Calcutta to buy this share? (2) Since the assessee is a trader and the transaction incidental to such trade, she should be more aware of what is called a penny stock?

(3) Whether she got any dividend and if yes, how much?

(4) Was it acquired as a matter of holding and sold when she got an opportunity to sell or it was bought to sell it at a profit at the earliest opportunity since it was not meant to be an investment for holding as it did not promise of dividend or company has any strong fundamental to survive in the visibly long run?

Cases cited by AR in the case of Kusum Gupta:

2.BMW Holding: This is a case where AO took the decision on the basis of volume of transaction and nothing more. It also relied on consistency. On both counts this is a per incuriam order (directly violates principles and guidelines of SC order)- apart from totally distinguishable on facts.

3.Global credit- ITA 1942/10- Delhi HC- A mere look at the judgment says that this is not at all our case. Here major income is dividend. Assessee holds for 3 years. It is not assessee's business to deal in scrips etc. completely quoted out of context.

4. Global credit- ITAT decision: same case and facts as in Sl. No.3. Moreover the shares that are sold during the year e.g Ballarpur was held for 3 years and assessee

had got 6.39 lakh dividend on them in earlier years. (PB-18)

5. Rohit Anand: Delhi HC: No question of law (Last para). No precedent.

There the assessee does not deal in shares but in jewellery business (PB-21). Investment not rotated frequently. It gets substantial dividend income from these shares(PB-22).(also distinguished in Ajay Srivastavav vs ACIT 6619& 5620/Del/2010 dt 22-2-12.

6. Gopal Purohit: HC: Does not answer any substantial question of law. Reliance on consistency is misplaced.(PB 24-25). Further there non delivery based transactions are offered by assessee as business income .Several judgments have distinguished this case. e.g. Para 10-Vinod K Nevatia 6556/Mum/2009 (PB 435).Also see para 18 of Smt. Harsha N. Mehta 2011] 43 SOT 332 (Mum.) See para 18. As regards the decision of the Tribunal in the case of Gopal Purohit (supra)which has since been upheld by the jurisdictional High Court and as relied on by the learned counsel for the assessee, we find the same is not applicable to the facts of the present case. In that case the Tribunal has given a finding that the assessee was consistently investing in shares and the ratio of sales to investment was very less. The assessee was investing for a long period and offering the long-term capital gain which is more than short-term capital gain and the shareholdings varied for longer period from one year to five years. However, no such facts exist in the present case. In fact in the case of the) assessee the holding of shares vary between one day to 200 days. Therefore, the decision in the case of Gopal Purohit (supra) is not applicable to the facts of the present case. Smt. Harsha N. Mehta 2011] 43 SOT 332 (Mum.)

7.Gopal Purohit:ITAT: Here no inter mingling of portfolios as in our case. In that case, Interest on loans taken in earlier years were allowed as business expenses. (para 8 and 8.1)(PB 32-33). Similar transactions were treated as capital gains in earlier years.(PB-32) In our case, these were taxed as business.(AY 05-06 etc.). Moreover consistency is never a criterion as held by apex court.

This case has also been distinguished by Delhi ITAT and others as a case unique to the facts of that case.(see supra)

8.Sarnath Infra- ITAT- fully distinguishable for its features discussed in PB 44- Para 14(11)and 15.

9.RohitAnand: ITAT- same as sl no.5. See para 9 of the order.

10. S K Finance:-ITAT- fully a different case. It is a PMS scheme and substantial dividend received. See para 5 (PB 50-51)

11.Jubilant Securities: 333 ITR 445 (Del)(PB- 54-56). This supports the stand of revenue. Here see PB-55 para 4(7). The switch from investment to trade fortifies the conduct as trader. The ITAT here relied on Guj HC decision in R A Kothari 283 ITR 338 which has not been differed from by Delhi HC.(para-6 of the order) In fact Delhi HC has approvingly quoted this decision at to the rules laid down in a subsequent judgment also in Vinay Mittal 22 taxmann.com 151(Del)etc.(see sl no 14 also in PB).If these criteria are considered assessee does not have a case at all.

12.Consolidated Finvest- ITA 6/11- Delhi HC- PB 57-61. No question of law arises. Here MOA did not speak of share trading. Shares were held for a very long period. Facts as per PB 60 (first 10 lines) shows that our case is quite different.

13. Dynamic consultants: ITA 200/2012- Delhi HC- PB 62-64:Here the assessee is a company. It also does not deal in shares like our case. There is no two separate portfolios here and these are normal investments(not penny stock as ours)

14. Vinay Mittal: Delhi HC: ITA 1172/2011: PB 65-77): In this case the assessee is a salaried person (Para 9). The other years transactions was not known in this case.(PB 77). The assessee has earned substantial dividend in previous years (PB 76).

15. R K & Sons -Delhi ITAT-ITA 174/2012:(PB 78-90): Here assessee deals in real estate. This is also not a case of a share trader nor two portfolios. (para 7 etc)

16. Dynamic consultants:ITA 2694/2009: ITAT Delhi(PB 91-100) see para 10 PB 97: Here share shave been converted from investment to stock and also comments at sl no 13 above.

17. Narendra Gehlaut: ITA 1648/2010:)(PB 101-123): Assessee is an Engineer. Does not deal in shares.(Para 3- PB 109). Borrowed funds cannot be a criterion to prove either way was my submission which AR has heavily relied on. See Para 3.10(PB 116). This is a case of single portfolio of investment. (Para 3.12 PB 117 & para 5.6). here they have also followed the case of Dynamic consultants supra.

18.General Talkies: ITA 4224/D/2010(Hon'ble JM was a member)PB 128-

135):Company is in business of film exhibitions. It was a case where assessee in order to set off accumulated business loss has shown the gain as business loss. Our case obviously is different. Rather in this case again the principle of consistency has not been approved in such type of cases as seen from para 15 of the order.

19. Chandra Global finance: (ITA 1145/D/2011) (Hon'ble AM was a member) PB 124-127) Looking at the substantial investment, period of holding and the nature of business of assessee (not share trading),the ITAT returned a finding that intention is for short term investment. Our case is different. Surendra Buildtech: ITA 141/2012: Del HC:

> Here the issue was filing documents from asst records to show that facts are incorrectly recorded by CIT{A). HC rejected the claim saying that this should have been filed before ITAT which is a final fact finding authority. Such a perverse finding can be challenged only if such material is before ITAT as the question can be decided on the basis of material before ITAT. This is a well settled law. It is not understood why and how this can help the assessee in shutting down revenue to bring facts before the ITAT, Rather it supports the cause of revenue that all material findings required and all contentions relevant to a case can and should be brought before

ITAT which is the last fact finding authority. ITAT can go to the whole gamut of the issue. See CIT vs CHETAN DAS LACHMAN DAS 2012-TIOL-628-HC-DEL-IT The assessee's case:

We have to keep in mind that this is a case of investment of penny stock and non descript stock which only business men like assessee could invest and this feature itself distinguishes from all other case.

In the case of CIT vs H Holck Larsen 26 Taxman 305/160 ITR 167(SC)@para 17-21 the court deciding on a case of share transactions observed as under. As can be seen the higher courts have not liked to interfere in many cases as what was important for courts to decide in a case which is a mixed question of law and fact. They have emphasised that the courts has to see what were the facts found by the Tribunal and whether all the facts have been fully considered by the Tribunal for the conclusions drawn and the second question is what are the legal principles applicable to the facts of these types of cases to determine whether the conduct was that of a dealer in shares or an investor in the shares and whether the inference drawn by the Tribunal could not be reasonably drawn at all.

Therefore, in the context of the controversy, it is necessary to examine that what were the facts found by the Tribunal and whether all the facts have been fully considered by the Tribunal for the conclusions drawn. And whether correct principles have been applied or not.

Thus each case is different. The factors in assessee's case that has to be taken into account are:

Whether in assessee's line of business:

If a transaction is in the assessee's ordinary line of business there can be no difficulty in holding that it is in the nature of trade. Commissioner of Income- tax v. Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706(SC)- 4 judge bench It is not a mere enhancement of value by realising a security but it is a gain made in an operation of business in carrying out a scheme for profit-making? " Commissioner of Income-tax v. Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706(SC) INTENTION AT THE TIME OF purchase/INVESTMENT;

In considering whether a transaction is or is not an adventure in the nature of trade, the problem must be approached in the light of the intention of the assessee having regard to the legal requirements which are associated with the concept of trade or business. RamNarain Sons (Pr.) Ltd. v. Commissioner of Income-tax 41 ITR 534(SC).

(Here intention of making profit is evident. From the features of trader badges of trade as discussed in H Holck Larsen 160 ITR 67(SC) the assessee satisfies most of

them to meet the legal requirement) True where the purchase of any article or of any capital investment, for instance, shares, is made without the intention to resell at a profit, a resale under changed circumstances would only be a realization of capital and would not stamp the transaction with a business character Commissioner of Income-tax v. P. K. N. Co. Ltd. [1966] 60 ITR 65 (SC).

(But here considering the nature of the scrip, the period of holding(just beyond a year),the cyclical swings in such scrip, it is but natural to hold that this is part of the scheme to make quick tax free profits, not common of an investment.) Intention to resell:

The intention to resell would, in conjunction with the conduct of the assessee and other circumstances, point to the business character of the transaction. Commissioner of Income-tax v. Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706(SC)- 4 judge bench-explaining ratio of G V Naidu case.

While Profit motive normally a guiding factor. not decisive per se

32. In the case of janki Ram Bahadur Ram v. CIT [1965] 57 ITR 21, (SC) this Court observed that the profit motive in entering a transaction was not decisive, for an accretion to capital did not become taxable income merely because an asset was acquired in the expectation that it might be sold at a profit. SC further observed that if a transaction was related to the business which was normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade might readily be inferred. H Holck Larsen 160 ITR 67(SC)-2 judge bench.

Intention of acquisition vs intention to resell:

Learned counsel also referred to the decision of this court in Ramnarain Sons (Pr.) Ltd. v. Commissioner of Income-tax [1961] 41 ITR 534 to urge that the principal consideration in determining whether income from sale of shares is revenue income or capital gain is to find out what was the purpose of purchase of those shares, and, if the purpose was investment, the fact that, in varying the investment, the sale of those shares resulted in a profit will not make that profit revenue income. The principle is perfectly correct. but is not applicable to the case before us on the finding mentioned by us above that even the initial purchase of these shares by the assessee was not for the purpose of investment for earning income from dividends, but was with a view to earn profit by resale of those shares. Dalhousie Investment Trust Co. Ltd vs CIT .1967] 66 ITR 473 (SC)- 3 judge bench If Repetitive: Then Business:

Neither repetition nor continuity of similar transactions is necessary to constitute a transaction an adventure in the nature of trade. If there is repetition and continuity, the assessee would be carrying on a business and the question whether the activity is

an adventure in the nature of trade can hardly arise. Commissioner of Income-tax v. Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706 (SC)-4 judge bench-dt 25.7.75.

(here it is not the first time that assessee dealt in such penny stock but having tasted success earlier has made it repetitive.) Relevant aspects of Conduct and Other circumstances: The real question is not whether the transaction of buying and selling the shares lacks the element of trading, but whether the later stages of the whole operation show that the first step-the purchase of the shares-was not taken as or in the course of, a trading transaction.. CIT vs H Holck Larsen 160 ITR 67(SC). What are such circumstances: few illustration:

Shortness of holding: Nature of sale: Whether any urgency for cash as a motive for sale:

What primarily influences our minds is the nature of the subject-matter of sale and the shortness of the time between purchase and sale of the shares coupled with the fact that the profit was anticipated or should have been anticipated and that there is no material on record to show that there was any urgency for the assessee to cash the shares so soon. AmirthamAmmal (V.) v. Commissioner of Income-tax 74 ITR 739(Mad). Also see Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706(SC) where the ITAT decision with this as a factor was endorsed by SC.

(here no urgency for assessee to sell just on completion of a year) Borrowal of funds:

Indicates as an added factor to show the intention to trade (Dalhousi investment 68 ITR 486) but the reverse that purchase was out of self generated funds is of no consequence as it is not an essential feature of a business to borrow. See V K Nevatia ITA 6556/Mum ITAT /2009 where in para 11 it held that it cannot be held in all circumstances if assessee has used his own funds for share activity it would lead only to inference of investment being the sale intention.

Speculation vs Non speculation:

Similarly speculative transactions indicate more to business but absence of the same cannot be a factor in favour of capital investment. (Here the transaction in such type of scrips border on speculation as they lack fundamental strength) Nature of shares is also important

52. Therefore, bearing the principles of the different cases which we have set out hereinbefore and considering the motive in the light of the transactions and the intention with which the shares were acquired, nature of the shares, the question has to be judged whether there has been trading in shares or in the words of Lord President Clyde, whether there was plunge in the waters of trade, in buying shares or acquisition of shares,-Balgownie Land Trust Ltd. v.

IRC 14 TO 684 at page 691. CIT vs H. HolckLarsen 160 ITR 67(SC). (here the nature of penny stock scrips have their own story) The book entry as investment is a good guide to hold it as capital receipt but neither it can be taken at its face value nor itself the factor is enough. It is true that in the account books they were never shown as such; but we have indicated how the evidence and the material in this case lead to the conclusion that the shares were infact purchased even initially not as investments, but for the purpose of sale at profits and that they were actually sold with the purpose of earning profits, so that the transaction amounted to an adventure in the nature of trade. Learned counsel also referred to the decision of this court in Ramnarain Sons(Pr.)Ltd. v. Commissioner of Income-tax 41 ITR 534(SC) to urge that the principle consideration in determining whether income from sale of shares is revenue income or capital gain is to find out what was the purpose of purchase of those shares, and, if the purpose was investment, the fact that, in varying the investment, the sale of those shares resulted in a profit will not make that profit revenue income. The principle is perfectly correct, but is not applicable to the case before us on the finding mentioned by us above that even the initial purchase of these shares by the assessee was not for the purpose of investment for earning income from dividends, but was with a view to earn profits by resale of those shares. Dalhousie Investment Trust Co. Ltd. v. CIT (1968) 68 ITR 486(SC)-a 3 judge bench at Pg 492-493:

> The conduct of the assessee is not to hold them as investment and earn some dividend income but to trade in shares. This is clear from the frequency and nature of transactions in such type of shares. e.g. in AY 05-06, she has dealt with similar penny stock of Top Light Commercial where shares worth 6.31 lakh was sold in little more than a year for Rs.2.97 cr. Notably SEBI has warned the investors that brokers like P Nahata and S jhunjhunwala have INDULGED IN CREATION OF ARTIFICIAL MARKET AND PRICE MANIPULATION THROUGH CROSS DEALS AND SYNCHRONIZED TRANSACTIONS IN SCRIP OF TOPLIGHT COMMERCIAL LTD and passed orders against these brokers.
>
> Merely because the assessee has shown these shares as investments in its books of account, it cannot be said that these shares were held on the investment account, whereas in fact the close perusal of the transactions clearly shows how the assessee has purchased and sold such shares. Rather we may rely on the apt observation of a 3- judge bench of SC that while the object of the sale as given by the assessee had, therefore, remained unproved, whereas the fact that the purchases of the shares were made at a time when they were not expected to give a good return as investment (prices were falling when bought) and were actually sold at a very good profit led to the reverse inference that the purchases and sales of these shares were an adventure in the nature of trade. Dalhousie Investment Trust Co. Ltd. [1968] 681TR 486 (SC).
>
> In Sutlej cotton Mills the SC endorsed the findings of ITAT which also considered the following as relevant factors.
>
> That the assessee did not make the sales on account of any pressing necessity to meet existing liabilities but had in fact kept a part of the sale proceeds as liquid cash in the United Commercial Bank Ltd.;

That there had recently grown a business practice of investing large sums of money in shares in new ventures with an eye on their appreciation for obtaining by sale substantial profits in future.

Note: Considering all the angles coupled with the factual finding of investment in penny scrip, that the assessee was a trader in shares, that the share was bought in a falling market to be sold in just above a year at huge margin indicating in reverse the profit motive for such investment, that two portfolios are not maintained strictly and there is intermingling, that in earlier years also it was treated as trading, that intention of sale not established and the circumstantial evidences like investing in Calcutta, the trade practice of dealing in such shares all point to predominantly to trading. "

6. The arguments recorded of the Ld. AR are based on the arguments advanced on the first date of hearing and also after the oral arguments of the Ld. CIT DR who as observed earlier filed his synopsis after advancing his arguments. The Ld. AR despite a query whether he has any objection to the said departmental stand did not seek any opportunity for going through the same as it was his stand that the case is fact specific and the judgements relied upon by the Revenue are on entirely different facts as would be evident on a bare perusal of the same and have no relevance to the issue. Infact it was his argument inviting attention to the impugned order that the genuineness has nowhere been doubted either by the AO as such nor by the department as such the arguments in the manner in which they have been advanced by the CIT DR were assailed as an attempt to create unnecessary suspicion which has no relevance for deciding the issue. It was emphasized that had the AO doubted he would have resorted to applying section 68 which he was duty bound to apply if the genuineness of the transaction was questioned by him which was not the case. The arguments questioning why a broker has invested through another broker in Calcutta Stock Exchange which leads to a doubt in the mind of the Ld. CIT DR it was stated has been addressed by the assessee in the written submissions reproduced in the impugned order itself and is addressed by the statement that there is no bar to purchase from any stock exchange in the country. The arguments of the Revenue based on suspicions and no evidence were assailed. It was questioned that where is the bar to such an action and what is wrong has not been addressed by the CIT DR. It was also his argument that to buy in a falling market is a prudent decision and to sell in a rising market is also a prudent decision and it does not lead to any reason justifying the upsetting of the impugned order. It was argued that the assessee has returned income of over six lakh and offered the same for tax and it was his stand that undue emphasis has been laid by the Revenue in trying to create unnecessary doubts so as to advancing unnecessary and irrelevant arguments for creating a prejudice in referring to the answers given recorded in para 4 of the assessment order. Ld. AR went through the answers to the questions again and stated that nothing negative turns on it. Infact referring to para 6 of the AO which he stated was selectively left out by the CIT DR it was pointed out that the AO himself records in

para 6 that the business was run by her husband and he also records that "no adverse view is being taken by him" on account of the responses. In these circumstances the attempt of the Revenue to build a case which even the AO has not found worth building was strongly assailed.

6.1. For ready-reference we reproduce para 6 of the assessment order referred to by the Ld. AR:-

"In this case it is none else but her husband who has started working in her name only. The bare and fair facts lead to the only conclusion that the business is being done in her name by the husband Shri Umesh Gupta. However no adverse view is taken on this score. Above analysis was done just to point out that it is not merely business done by a lady but business done by an intelligent group in the name of house wife with an intention well under stood."

6.2. Inviting attention to the questions read out by the Ld. CIT DR, it was his submission that the answer to the specific Question No-25 would show that she has claimed to be a house-wife and Question No-21 where she shows that she was not an active Director as such since she is not looking after the business actively which was accepted by the AO himself who records that no adverse view is being drawn in the circumstances since nothing turns on it the arguments of the Revenue it was submitted have no meaning. Referring to the facts it was submitted that the AO has concluded on facts that the business is run by her husband and the assessee also claims that she is not actively participating as such the arguments advanced by the Revenue in this line have no relevance in the present proceedings. It was his submission that nothing has been argued to assail the findings that the assessee has used her own funds and is maintaining two portfolios. Similarly the holding period has not been doubted or rebutted by the Revenue. The consistent disclosure by the assessee over the years in the factum of maintaining of two separate portfolios, it was argued has not been rebutted by the Revenue as admittedly no evidence to the contrary has been led. It was his argument that relying on principles randomly from different decisions have no relevance as without establishing that the facts are pari materia, the principles applied do not become applicable. It was reiterated that facts have not been rebutted. It was vehemently emphasized that the Revenue has not rebutted that the assessee has shown separate investment in her balance sheet based on the investment portfolio demonstrated by the balance sheets of the last 7 years on facts and contrary to this no evidence has been led and only arguments and theories based on suspicions have been canvassed which it was urged should be dismissed.

6.3. On the basis of these facts, it was his submission that as per the settled legal principles, the impugned order deserves to be upheld as the frequency of purchase and sale of shares is not very large and they have been held for a fairly long time and the basic objective stands demonstrated that it is to earn profit on appreciation. It was argued that the belief of the CIT DR that investment is made only to earn dividend is a fallacious belief as the investment is made for appreciation also which is a well accepted fact.

6.4. It was his argument that it was submitted that a speaking order was passed by the CIT(A) vide para 3.3 at pages 7 to 13 which deserves to be upheld. It was further clarified that the disallowance of expenditure u/s 14A made in para 3.8.8 on an estimate basis has not been challenged by assessee. Accordingly it was his contention relying upon the copy of Circular No-4/2007 dated 15.06.2007 placed at pages 68 to 70 of the paper book alongwith the details of the investment in shares from 31.03.2001 to 31.03.2007 placed at pages 79-97 of the paper book along with copy of assessment order for 2001-02 assessment year placed at page-71-76 of the paper book and 2002-03 at page 77-78 and the list filed before the AO placed at pages 48-65 that the facts have been correctly appreciated by the CIT(A) and no infirmity has been pointed out by the Revenue apart from advancing arguments based on suspicions de horse facts.

6.5. The detailed submissions filed before the CIT(A) at pages 98-103 which more or less sums up what was argued before the AO was also relied upon. It was submitted that the assessee would be relying upon the principles laid down in the various case-laws (copy of which has been placed in the paper book consisting of compilation of judgements). It was his submission that suspicion cannot replace evidences as has been held by various Courts. It was also his submission that the Ld. DR should lead evidence to oppose the finding instead of making arguments based on suspicions. Specific attention was invited to the decision in Gopal Purohit vs JCIT of Mumbai Bench 122 TTJ 122 (copy placed) at page 35 of the paper book which view it was submitted has been confirmed by the Bombay High Court in the case of CIT vs Gopal Purohit 188 Taxman 140 copy placed at page 23-28 of the paper book. It was argued that the price has been accepted by the department and the transaction has been accepted as a genuine transaction as such arguments based on suspicion deserves to be rejected.

6.6. Apart from placing reliance upon all the judgements placed in the compilation of case laws filed before the Bench, attention was specifically invited to DCIT vs R.K.Sons (HUF) in ITA No-174/Del/2012 (copy placed at page 78 to 90 of the paper book, specific page-89). It was also submitted that a very recent judgement of the Jurisdictional High Court rendered on 17.05.2012 in CIT vs Surendra Buildtech Pvt. Ltd. is also relied upon. Filing a copy of the said decision it was submitted that the impugned order is further fortified by the said decision. 6.7. CIT vs Global Credit Capital of Delhi High Court in ITA No.-1942/2010 (copy placed at page 10 to 11) was also relied upon in support of the impugned order. Similarly CIT vs Rohit Anand 327 ITR 445 (Del) [copy placed at page 21 to 22 of the paper book] and CIT vs M/s Jubilant Securities Pvt. Ltd. published in 333 ITR 445 (copy placed at pages 54-56 of the paper book) were also relied upon. Specific attention was invited to the observations in para 9 of the same at page 75 of the paper book in the case of CIT vs Vinay Mittal in ITA No-1172/Del/2012 (copy placed at pages 65-72 of the paper book) of the Jurisdictional High Court was also referred to so as to contend that they fully apply to the present case. It was argued that dividend is not necessarily the only consideration for investment as appreciation in value over time is also a relevant criteria while making an investment. Accordingly it was his submission that the departmental ground deserves to be dismissed and the impugned order be upheld. The following case laws filed in the computation of case laws were heavily relied upon by the assessee and it was stated that they fully support the case at hand:-

Sr. No.	Particulars	Page
1.	Copy of order in the case of ACIT vs M/s BMW Holding (P) Ltd. of Delhi	1-6

	Bench of ITAT in ITA No.1570/Del/2008.	
2.	Copy of order in the case of ACIT vs M/s BMW Holding (P.) Ltd. of Delhi Bench of ITAT in ITA No.-3187/Del/2010.	7-
3.	Copy of judgement in the case of CIT vs Global Credit Capital of Delhi High Court in ITA No.1942/2010.	10-1
4.	Copy of order in the case of DCIT vs Global Credit Capital Limited of Delhi Bench of ITAT in ITA No.2795/Del/2008.	12-2
5.	Copy of judgement in the case of CIT vs Rohit Ananad of Delhi High Court reported in 327 ITR 445	21-2
6.	Copy of judgement in the case of CIT vs Gopal Purohit of Bombay High Court reported in 188 Taxman 140	23-2
7.	Copy of order in the case of Gopal Purohit vs JCIT of Mumbai Bench of ITAT reported in 122 TTJ 87.	25-3
8.	Copy of order in the case of Sarnath Infrastructure (P) Ltd. vs ACIT of Lucknow Bench of ITAT reported in 313 ITR 13.	36-4
9.	Copy of order in the case of CIT vs Rohit Anand of Delhi Bench of ITAT reported in 127 TTJ 122.	46-4
10.	Copy of order in the case of S.K. Finance vs DCIT of Mumbai Bench of ITAT in ITA No.6190/Mum/2008.	50-5
11.	Copy of judgement in the case of CIT vs Jubilant Securities Pvt. Ltd. of Hon'ble Delhi High Court reported in 333 ITR 445.	54-5
12.	Copy of judgement in the case of CIT vs M/s Consolidated Finvest &	57-6

Holding Ltd. of Hon'ble Delhi High Court in ITA No.6/2011.

13. Copy of judgement in the case of CIT vs M/s Dynamic Consultants Pvt. 62-64 Ltd. of Hon'ble Delhi High Court in ITA No.200,201/Del/2012

14. Copy of judgement in the case of CIT vs M/s Vinay Mittal of Hon'ble 65-77 Delhi High Court in ITA No.-1172/Del/2012

15. Copy of order in the case of DCIT vs R.K. & Sons (HUF) of Delhi Bench 78-90 of ITAT in ITA No.174/Del/2012

16. Copy of order in the case of M/s Dynamic Consultants Pvt. Ltd. vs ACIT 91-100 of Delhi Bench of ITAT in ITA No.2694/Del/2009 and 3317/Del/2009

17. Copy of order in the case of Sh. Narendra Gehlaut vs JCIT of Delhi Bench 101-123 of ITAT in ITA No-1648/Del/2010 and 2762/Del/2010

18. Copy of order in the case of DCIT vs M/s Chandra Global Finance Ltd. of 124-127 Delhi Bench of ITAT in ITA No.1145/Del/2011

19. Copy of order in the case of M/s General talkies Ltd. vs ITO of Delhi 128-135 Bench of ITAT in ITA No.-4224/Del/2010.

7. We have heard the rival submissions and perused the material available on record. On a consideration of the same, we are of the view that in the peculiar facts and circumstances of the case

and considering the case law relied upon by the Revenue and the assessee and considered by the AO and the CIT(A), the departmental ground deserves to be dismissed. The arguments based on the suspicion of the Ld. CIT DR which have been orally canvassed and also by way of write-up filed subsequently it is seen stands fully addressed by the assessee in the impugned order itself. The same are found reproduced in the order and have been taken into consideration by the CIT(A) while passing his order. These arguments addressing the departmental suspicion are reproduced in page 4,5 & 6 of the impugned order and have also been extracted by us in paras 3.2 to 3.4 in the earlier part of this order. Similarly it is seen that the facts taken into consideration qua the issue arising out of sale of 25,000 shares of OASASCIN purchased on 08.01.2005 at the cost of Rs.1,68,875 and sold on specific different dates have not been disputed by the department as no evidence to the contrary has been relied upon. The number of shares, the date of purchase and dates of sale at the prices of specific number of shares as set out in the impugned order in para 3.1 at page 2 of the order extracted at page 6 of this order has not been shown to be incorrect by the Revenue. Considering the entire arguments advanced on behalf of the Revenue it is seen that none of these facts are disputed neither the dates are disputed nor the nos. of shares nor the price of sale or purchase. The department has also not attempted to upset the finding of the CIT(A) inasmuch as that the assessee was maintaining two separate portfolios one for Investment and one for business. Similarly the finding that there was no intermingling of shares in the two portfolios and that the two were separate and distinct has also not been shown to be incorrect on facts. The settled legal position permits the assessee to maintain two separate portfolios which admittedly has been done. This findings is found recorded in para 3.3 of the impugned order which has been extracted in page 8 & 9 of this order. Similarly the fact that this was not the first year when the assessee has shown separate investment in her balance sheet has been taken into consideration by the CIT(A) who has considered the copies of the balance sheet for the last 7 years which was found to support the facts that the assessee has regularly been maintaining two separate portfolios which finding is recorded in para 3.3.1 of the impugned order, nothing has been placed before us by the Revenue to upset this finding. It is also seen that the CIT(A) records that he has personally verified the position for the last 7 years from the P&L A/c of the assessee as well as the inventory of closing stock and then has come to a finding that neither during the year nor in the earlier years the assessee has ever traded in those shares which are kept as an investment. No attempt has been made by the Revenue to upset this finding as the line of argument adopted by the Ld. CIT DR is not supported by placing anything before us in order to canvass that a contrary view be taken. Thus it is seen that the finding that all along the assessee demonstrated that she had an intention to maintain two separate portfolios wherein there was no mixing up in the two portfolios remains unrebutted on record as nothing to the contrary has been placed by the Revenue before us. It is seen that none of these relevant facts have been assailed by the Revenue and only general arguments have been advanced. It is further seen that the finding that there is no intermingling of shares in the two portfolios has been verified by the CIT(A) after considering the balance sheets of the last 7 years and also the P&L A/c. Nothing has been placed before us by the Revenue in order to take a contrary view. In fact the CIT(A) takes into consideration the fact that the AO was himself contradicting his own action because if he was of the opinion that there was only one portfolio then he ought to have taken the entire investment in shares as appearing in the balance sheets towards the closing stock of shares at cost or market price whichever was less and worked out the profit of the trading business which the AO has not done. The finding is also recorded that the AO even in the immediately preceding year i.e 2006-07

assessment year when the investment in the said shares i.e OASASCIN was shown for the first time in the balance sheet as it was purchased admittedly on 08.01.2005 has accepted the position and thereby accepted the position of two separate portfolios. Similarly the factum of maintaining two separate portfolio was found to be correct even on a perusal of the position emanating from the 143(3) order of the AO in 2002-03 assessment year. These findings found recorded in para 3.3.2 have not been assailed by the Revenue. No evidence to the contrary upsetting these findings as incorrect finding has been placed before us. Similarly the holding period has also not been argued to be incorrect which is more than one and a half year or more. The reliance placed on the assumption of the AO that earning of the dividend is the only acceptable criteria for making an investment does not have any relevance as investments can be made with the objective to earn profit on appreciation also and we find no good reason to interfere with the said conclusion. The general arguments advanced on behalf of the Revenue that the attitude to purchase in a falling market and sell in a rising market is a ground to interfere with the finding to our minds may have relevance if the case of the Revenue is that the assessee is manipulating the market which admittedly is not the case of the department. The judgements and the case laws relied upon by the Ld. CIT DR, it is seen operate on entirely distinct and separate peculiar facts and circumstances, the arguments that the AO is not fettered by technical rules of evidence is a settled legal position and it is an accepted legal position that all relevant circumstances which appear on the issue and the material which may not strictly be evidence under the Indian Evidence Act can be taken into consideration by the AO to inquire probe and consider however in order to lead to the conclusion that material which is not an evidence to justify the addition has been that material which has the sanctity of a fact. As such the judgements relied upon in the context of the said proposition addressing the settled legal position and cannot be read out of context. The judgements relied upon in the context of the proposition that res judicata does not apply to income tax proceedings canvassing that a settled position can be changed are also distinguishable as in order to come to the said conclusion in each and every case facts have to be referred to for consideration of the Courts/Tribunals in order to justify interference and change from the settled position by demonstrating that facts as originally considered in some stray year may have not been correctly presented and a different conclusion is legally justified on facts. In the facts of the present case as observed no fact has been brought on record by the Revenue to justify that the past position of the last 7 years taken into consideration by the CIT(A) to show that the assessee was maintaining two separate portfolios one where shares were held in business portfolio and the other where separate portfolio reflecting shares held in the investment portfolio is not a correct fact. The mere argument that there is intermingling of shares in the two portfolios has to be demonstrated by facts and evidence which admittedly has not been attempted by the Revenue let alone done. Accordingly placing reliance on the judgements to take a contrary view where in the facts of those cases intermingling of the shares is an accepted fact is of no help to the Revenue as the basic fact to trigger the applicability of those principles is conspicuous by its absence. The very basic fact not having been established by the Revenue that there was intermingling of shares amongst other accepted facts as discussed earlier makes the attempt to rely on legal principles on different facts a wasted exercise. In the absence of any fact in contradistinction to the finding concluded in the impugned order, we find no good reason to deviate from the finding and conclusion arrived at the impugned order. Being satisfied by the reasoning and finding arrived at on the facts as they stand, the departmental ground is dismissed.

8. Coming to the assessee's appeal the relevant facts are found discussed in the assessment order at para 8 which read as under :-

> "8. During the year Shri Aman Gupta Son of the assessee was studying in a college in United Kingdom upto June 2006. The assessee was specifically asked to give details of her household expenses as well as expenses met on the education of her son in U.K. In response to this, the assessee has filed an evasive reply stating therein that she and her husband has withdrawn Rs.193000/- for household expenses including expenses on double trip to foreign countries by the family. It has also been stated that no amount was sent during the year to her son. This explanation of the assessee is incomplete. She has tried to evade the answer in respect of educational expenses of her son in a school in UK. Unless details of expenses and source of such expenses are furnished, the contention of the assess can not be accepted. In the A.Y. 2004-05, the assessee has stated that Rs.564000/- sent as fees to University of Sheffield. In addition to above, there were expenses on account of to and fro journey during the year. There were expenses on account of boarding and lodging, books, clothing etc. Taking all these facts into consideration, there is no other alternative but to estimate the expenses on the education of her child. In the preceding year, miscellaneous expenses on boarding lodging etc. has been estimated at Rs.1 lakh per month. Therefore total expenses on the education of her son come to Rs.3 lakhs plus Rs.564000. Thus expenses of Rs.864000/- has been incurred for which no explanation has been filed. As per detailed reasons given in the immediate preceding year due to non filing of any type of evidence in respect of source of these expenses or the type of income earned in UK, it is held that these expenses have been met by the assessee out of undisclosed sources of income. This will result in an addition of Rs.864000/-. Penalty proceedings under section 271(1)(c) of the I.T. Act are initiated separately for furnishing inaccurate particulars of income on this score."

8.1. Aggrieved the assessee went in appeal before CIT(A). The assessee as per record relied upon the written submissions filed in 2005-06 assessment year and also claimed that during the year no tuition fee was paid as Mr. Aman Gupta returned in 2006 and the tuition fee was paid for the entire session in 2005-06 financial year. In the circumstances it was argued the addition of Rs.5,64,000/- was not justified.

8.2. The CIT(A) considering the position of 2005-06 upheld the action of the AO by estimating the expenses @ Rs. 1 lac per month and accepted the alternate submissions of the assessee, thereby reducing the amount of Rs.5,64,000/-. The reasoning for the grant of the partial is extracted hereunder :-

> "It is a fact that appellant's son has been in U.K. during these years for the purpose of studies. Therefore the education fee has to be paid at least to the same extent as was paid in the immediate previous year which is Rs.5,64,000/- which is as per the submission of the appellant. In my opinion the estimation of expenditure of stay, lodging, clothing etc. @ Rs. One Lakh per month is also very fair looking to the

location which is UK. The claim of the appellant that her son has managed his expenses on his own could not be established by producing any evidence that her son was earning such income to sustain himself. No proof of employment or copy of bank account has been given either before me or before AO, which is very clearly mentioned in the order for AY 2004-05, to support that her son was earning sufficient money. As assessment proceedings are civil proceedings, therefore, we have to go by the principle of preponderance of probabilities. In the absence of any evidence produced by the appellant in support of her claim that her son has earned during his stay and study in U.K. to support himself, I uphold the addition made by the AO. This ground is therefore decided against eh e appellant."

9. Aggrieved by this addition of Rs. 3 lac the assessee is in appeal before the Tribunal. Mr. Aggarwal contended that nothing has been brought on record by the department to show why the son, Mr. Aman Gupta be supported by the assessee i.e the mother and not by the father who also had substantial earnings in his own right as he too is an income tax assessee. It was vehemently contended by him that nothing has been brought on record to show firstly that the expenditure of Rs. 1 lac was warranted on facts and secondly that the son was supported only by the mother and the father made no contribution. In the circumstances it was his submission the estimate made in an arbitrary manner deserves to be deleted. In the alternate it was his argument that it was excessive.

9.1. The Ld. CIT DR on the other hand submitted that the onus was on the assessee to show that Mr. Aman Gupta during his stay abroad had adequate funds at his disposal due to his own efforts. No such evidence it was submitted is available on record. It was also his submission that in support of the arguments that Mr. Aman Gupta was supported by the father, the position remained the same, as no evidence is available on record. It was further his stand that despite reaching the stage of the Tribunal no evidence of withdrawals available to the assessee's husband has been brought on record. It was his arguments that in order to establish that the estimate is excessive the onus is on the assessee to show that the expenditure of Mr. Aman Gupta was less than Rs. 1 lac. In the absence of any evidence to the contrary, the estimate arrived at by the CIT(A) it was his submission deserves to be upheld.

9.2. Ld. AR in reply contended that the department is very much aware that the father of the assessee has substantial earning and it is not correct to argue that Mr. Aman Gupta necessarily had to be supported by the mother only. It was also his arguments that since Mr. Aman Gupta admittedly as per record returned in June as per the assessment order itself. In the circumstances, it was his argument that the expenditure at best could have been included only for April and May and most definitely not for June 2006 when he returned to India.

10. We have heard the rival submissions and perused the material available on record. On a careful consideration of the same, we are of the view that in the peculiar facts and circumstances of the case the only relief available to the assessee can be the deletion of the expenditure estimated for the month of June 2006 when Mr. Aman Gupta admittedly returned to India. Nothing has been placed on record before us except oral arguments to demonstrate that Mr. Aman Gupta was also financed by his father. No arguments have been advanced requesting for the admission of evidence of

withdrawals available to the assessee's husband. In the absence of any relevant evidence the assessee being the best judge to know its affairs we find no good reason to deviate from the impugned order. Accordingly in the peculiar facts and circumstances of the case, we uphold the addition @ Rs. 1 lac per month for the month of April and May thereby sustaining the addition to the extent of Rs. 2 lac. In the result Ground No-1 of the assessee's appeal is partly allowed.

11. The facts qua the second ground agitated by the assessee are found discussed at page 9 of the assessment order which are reproduced hereunder for ready- reference:-

> "9. It has been stated by the assessee that a foreign visit was undertaken by the family during the year under consideration. In her reply it has been stated that the expenses have been met out of drawings shown under the head household expenses. In the same reply it has been stated that expenses for household have been Rs.293000/- met out of withdrawals by the assessee and her husband. These expenses are just sufficient to meet the household expenses. No details regarding expenses on foreign visits have been filed. The assessee has visited Dubai from 13.4.2006 to 19.4.2006 and she along with her daughter visited Singapore from 6.6.2006 to 11.6.2006. No details of expenses on ticket and hotel etc has been filed. Now there is no other alternative but to estimate these expenses on the basis of status of the family. The expenses are estimated for Dubai visit at approximately at Rs.1.5 lakhs and for Singapore visit of the family are estimated at Rs.2 lakhs. This will result in an addition of Rs.3.5 lakhs. Penalty proceedings under section 271(1)(c) for furnishing inaccurate particulars of income are initiated separately on this score."

11.1. In appeal before the First Appellate Authority it is seen that it was contended that the assessee visited Dubai for a period of 5 days only and to Singapore for a period of 5 days only. It was contended that before the AO it had been argued that the foreign visit had been made out of Rs.2,93,000/- available to the assessee as well as her husband from their withdrawals. The purpose of the visit was stated to be on account of tourism and of short tenure for which no record had been maintained. However the household drawing were stated to be sufficient for covering the tour expenses as such it was argued that there is no case for sustaining the addition.

11.2. The arguments advanced on behalf of the assessee were not accepted by the CIT(A) who sustained the addition holding as under:-

> "5.3. I have considered the facts of the case. The submissions of the appellant have also been gone through. The appellant herself has admitted that records of foreign visits are not maintained at all. Therefore, it is very difficult to accept the contention of the appellant that the expenses incurred for foreign travel could have been taken care of by household withdrawals of Rs.2,93,000/-. On the other hand, it is noticed that the appellant and her family is leading a very lavish life style and therefore, it is presumed that their visit will be through Executive class and stay will also be in good hotels. Therefore, the expenditure of Rs.3.5 lakh estimated by A.O. is quite reasonable which is for two persons. At the same time, the withdrawals are definitely

> not sufficient to take care of these expenses. As the appellant has not been able to explain any other source to meet these expenses either before A.O. or before undersigned, the action of A.O. of making addition of Rs.3.50 lakhs is upheld. This ground is, therefore, decided against the appellant."

12. Aggrieved by this the assessee is in appeal before us. The Ld. AR assailed the action of the department stating that nothing has been brought on record excepts surmises and conjectures based on suspicions that the assessee traveled Executive class and stayed at good hotels. It was his argument that when the assessee claimed that the house hold withdrawals of Rs.2,93,000/- were available they were sufficient to cover the foreign travel expenses then the onus was upon the Revenue to demonstrate that it was not so. It was argued that in the absence of information available on record placed by the department that the assessee traveled Executive class and stayed in expensive hotels, the addition based purely on suspicion and estimates deserves to be deleted and such actions it was submitted have been judicially frowned upon.

12.1. Ld. CIT DR on the other hand vehemently contended that the onus placed on the assessee has not been discharged. It was his argument that in the absence of any information placed on record by the assessee, the AO was left with to choice but to arrive at an estimate. It was his submission that even today the assessee does not care to place on record as to how she traveled and where she stayed and instead has chosen to argue on legal principles and the necessary facts known to the assessee are not placed on record. Addressing the arguments that she has not maintained any record it was his submission leads to only one conclusion that the same has to be estimated. In these circumstances the impugned order it was his submission deserves to be upheld.

12.2. We have heard the rival submissions and perused the material available on record. It is seen that the claim of the assessee that Rs.2,93,000/- was sufficient to cover the two foreign travels has not been accepted by the department. Before us it has been claimed that the said sum was over and above what was available to her husband as per his withdrawals. It is seen that this argument has been advanced but nothing has been placed on record to show the actual withdrawals available to her husband for the specific period. It is a matter of record that the foreign travel for tourism purposes has been done by the assessee to Dubai and Singapore for specific days. The information available in regard to the travel whether it was executive class or ordinary class and the nature of stay whether it was a Five Star Hotel or an ordinary bed and breakfast arrangement is an information which necessarily is known only to the assessee who has chosen to evade the same as the stand taken is that no records have been maintained. Nothing has been placed before us to show that the addition is excessive. Accordingly in the afore- mentioned peculiar facts and circumstances of the case in the absence of any material, fact or evidence, we have no alternative but to confirm the addition as necessary evidence in the knowledge of the assessee have not been made available to take a contrary view. Accordingly the Ground No.-2 of the assessee is rejected.

13. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is partly allowed.

The order is pronounced in the open court on 25th of October, 2013.

Sd/- Sd/-

(B.C.MEENA) (DIVA SINGH)

ACCOUNTANT MEMBER JUDICIAL MEMBER

Dated: 25/10/2013

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI