

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" DELHI]

887

BEFORE SHRI G. C. GUPTA, JM & SHRI K. D. RANJAN, AM

I. T. Appeal No. 863 (Del) of 2006.

Assessment year : 2001-02.

M/s. Multiplex Trading & Industrial Co. Ltd.,
11, Babar Lane, Bengali Market,
New Delhi-110 001.

The Income-tax Officer,
Ward : 5 (4),
NEW DELHI.

PAN / GIR No. AAACM 7597 F.

AND

I. T. Appeal No. 904 (Del) of 2006.

Assessment year : 2001-02.

The Income-tax Officer,
Ward : 5 (4),
NEW DELHI.

(Appellants)

M/s. Multiplex Trading & Industrial Co. Ltd.,
Vs. 11, Babar Lane, Bengali Market,
New Delhi-110 001.

(Respondents)

Assessee by : Shri Ved Jain, C. A.; &

Ms. Rano Jain, C. A.;

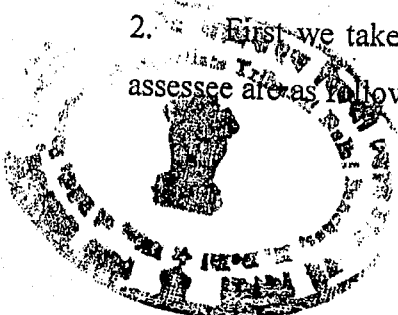
Department by : Shri B. K. Gupta, Sr. D. R.;

ORDER.

PER K. D. RANJAN, AM :

These cross appeals by the assessee and the Revenue for assessment year 2001-02 arise out of the order of the Id. Commissioner of Income Tax (Appeals)-VIII, New Delhi. These were heard together and are being disposed of, for the sake of convenience, by this common order.

2. First we take the appeal filed by the assessee. The grounds of appeal raised by the assessee are as follows :-



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“ 1. That on facts and circumstances of the case and in law, the Id. CIT (Appeals) erred in holding that the profit of Rs.48,65,115/- from the purchase and sale of shares was profit from speculation business;

2. That on facts and circumstances of the case and in law, the Id. CIT (Appeals) erred in not allowing the set off of the loss of Rs.48,38,623/-, held by him as business loss, against profit of Rs.48,65,115/- even though the said profit was held by him as profit from speculation business, inasmuch as there is no embargo in setting of the loss from business against profit from speculation business;

3. That on facts and circumstances of the case and in law, the Id. CIT (Appeals) erred in confirming the disallowance of the expenditure of Rs.83,30,111/- payable to Mahan Enterprise Ltd.;

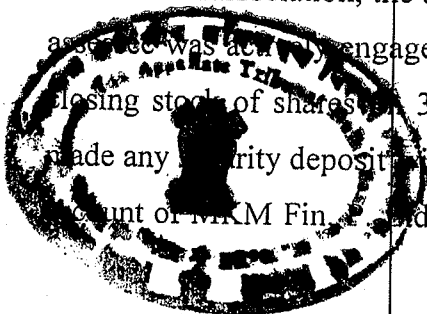
4. That the Id. CIT (Appeals) erred in not dealing with the ground No. 13 wherein was contended that on the facts and circumstances of the case and in law, the assessing officer erred in charging interest under sections 234-B and 234-C of the Act;

5. That the order passed by the CIT is bad in law and void ab-initio.”

3.1 The first grievance of the assessee is that the Id. CIT (Appeals) erred in holding that the profit of Rs.48,65,115/- from the purchase and sale of shares was profit from speculation business. The facts of the case stated in brief are that the assessee at the relevant time was engaged in multifarious activities like purchase and sale of shares, making investments in mutual funds, rendering services of management consultancy. During the year under consideration the assessee had shown a short term capital loss of Rs.48,38,623.88 and the dividend income of Rs.43,16,576.76. The assessing officer vide his letter dated 22/11/2002 asked the assessee to give details of dividend income and short term capital loss. The assessee vide letter dated 13/12/2002 explained that the dividend of Rs.43,16,546.70 was received on investments made in Sun F & C Value Fund. From the reply submitted by the assessee, the assessing officer noted that on 22.02.2001 the assessee had subscribed to 14,38,848.929 units of Sun F & C Value Fund under dividend reinvestment scheme @ Rs 13.39 per making total unit amounting to Rs. 2,00,00,000/-. The investment of Rs 2,00,00,000/- was made out of availing over draft facility from Indus Indbank Ltd. The assessee received dividend of Rs.43,16,546.70 on 22.02.2001 which was reinvested in 4,09,151.252 units of the said fund. The assessee got all the units redeemed on 23.02.2001 and received a cheque of Rs 1,94,77,922.88 on 26.02.2001. The assessee paid the bank Rs

3600/- as processing charges and Rs 26,578/- as interest. As a result of this investment and redemption thereof, the assessee suffered a loss of Rs 48,38,623.88 which has been shown in the books as short term capital loss and was accordingly claimed in profit and loss account. The assessing officer accepted short term capital loss of Rs.48,38,623.88 as declared by the assessee on the sale of investments of mutual funds.

3.2 As regards short term capital gains, the assessing officer noted that the assessee admitted short term capital gain of Rs.48,65,115/- on purchase and sale of shares. On a query it was explained that the assessee purchased shares of different companies worth Rs.1,10,86,056/- from MKM Fin. P. Ltd., the Stock Broker which were sold at Rs.1,59,71,171/-. In this process the assessee earned short term capital gains of Rs.48,65,115/-. The assessing officer made enquiries under section 133(6) from M/s. MKM Fin. P. Ltd. From the information supplied by the stock broker the assessing officer noted that the assessee had entered into as many as 200 transactions of purchase and sale during the period from 15/05/2000 to 23rd March, 2001. The assessing officer, therefore, asked the assessee to explain as to why the short term capital gain in shares should not be treated as speculative business income in view of provisions of Explanation to section 73 of the Act. The assessee vide letter dated 26/12/2003 explained that the main business of the assessee was purchase and sale of shares and, therefore, the assessee had rightly debited/credited the net result of a particular transaction of purchase/sale of shares in the profit and loss account. It was also submitted that the term "capital gain"/"capital loss" was used only to identify that the particular account represented purchase/sale of shares. No payments were made or received from the share broker on account of inter-se comfort. Accordingly, it was submitted that provisions of section 73 were not applicable because the assessee had earned a positive income from share dealing. However, the assessing officer noted that as per clause 6 [wrongly mentioned by AO as sub-clause (4)] of the main objects of Memorandum and Article of Association, the assessee was permitted to carry on business as share broker. The assessee was actually engaged in the business of purchase and sale of shares. There was no closing stock of shares on 31st March, 2001. He also noted that the assessee had neither made any security deposit with the broker nor made any payment for purchase of shares. The account of MKM Fin. P. Ltd. showed a credit balance of Rs.48,65,115/- which was pending

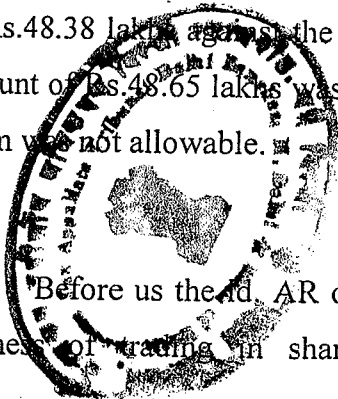


as on 31st March, 2001. The assessing officer, therefore, concluded that the purchase and sale of shares fell within the purview of provisions of Explanation to section 73 of the Act. He, therefore, assessed the income of Rs.48.65,115/- as income from speculation business. Accordingly, the short term capital loss of Rs.48,38,623.88 incurred on investments made in units Sun F & C Value Fund was held as not allowable against the speculative income.

4. Before the Id. CIT (Appeals) it was submitted by the assessee that Explanation to section 73 of the Act was not applicable to the facts of the assessee because it had earned positive income from such transactions. The Id. CIT (Appeals) on consideration of the facts and arguments made by the assessee observed that provisions of Explanation to section 73 were clearly applicable and there was nothing in that to say that it would not apply to the cases where income from shares was positive. He accordingly upheld the decision of the assessing officer that provisions of Explanation to section 73 of the Act were applicable.

5. As regards the loss of Rs.48.38 lakhs incurred on purchase and sale of units of mutual fund treated by the assessing officer as short term capital loss instead of business income, the Id. CIT (Appeals) noted that the assessing officer had given no reasons for treating it as short term capital loss except for stating on more than one occasions that the return of income of the assessee said so. The AO had solely relied on it and had not gone into the merits of the facts at all. Thus the Id. CIT (Appeals) was in agreement with the assessee that it was not the nomenclature in books of accounts which was crucial but the real nature of income/receipt/expenses. He also noted that the assessing officer had not commented on the issue even in the remand report. The Id. CIT (Appeals), therefore, concluded that the loss on sale of shares was to be treated as business loss. However coming to the issue relating to setting off of loss of Rs.48.38 lakhs against the income of Rs.48.65 lakhs, the Id. CIT (Appeals) observed that amount of Rs.48.65 lakhs was income from speculative business and, therefore, set off of the claim was not allowable.

6. Before us the Id. AR of the assessee submitted that the assessee was engaged in the business of trading in shares and commodities. The assessee company was not a

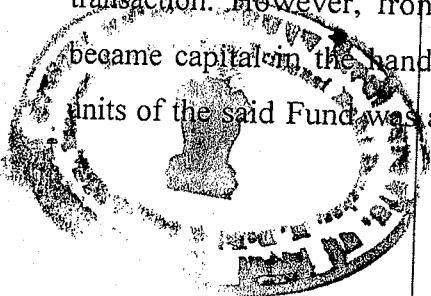


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manufacturing company. It was a service provider company and also engaged in the trading, sale/purchase of shares and mutual fund units and, therefore, the entire transactions of purchase and sales are to be treated on the same footing. The Ld CIT(A) had treated the purchase and sale of units as business activities and part of the activities of dealing in shares as speculative. Therefore, the Id. CIT (Appeals) was not justified in not allowing the set off of business loss from purchase/sale of units of mutual fund against the income earned from trading of shares.

7. On the other hand, the Id. Sr. DR submitted that the assessee is engaged in the business of consultancy. Referring to Memorandum of Association he submitted that the assessee was not authorised to deal in shares. He further submitted that the assessee has not taken the delivery of shares and, therefore, the income earned will be in the nature of speculative transactions. He placed reliance on the decision of Hon'ble Supreme Court in the case of Anil Jain v CIT & Another 294 ITR 435 (SC) for the proposition that solitary transaction of purchase and sale was not in the nature of business. Therefore, the loss incurred on purchase and sale of units of mutual fund was in the nature of capital loss and not as business loss; and as such could not be set off against speculative business.

8. We have heard both the parties and gone through the material available on records. The assessee is engaged in rendering Business & Management Consultancy and Marketing Services to its various clients against payment of professional fees. The assessee invested Rs 2,00,00,000/- in 14,38,848.929 units of Sun F & C fund. The dividend of Rs.43,16,546.70 received on 22.02.2001 was also reinvested in 4,09,151.252 units of the said fund as per the scheme of reinvestment plan. The investment of Rs 2,00,00,000/- in units of Sun F & C Fund and investment of dividend of Rs 43,16,546.70 in units of the said fund had taken place on the same day. The assessee sold 18, 48,000.181(14,38,848.929 +4,09,151.252) units on 23.02.2001 for Rs1,94,77,922.88. In fact no loss was suffered by the assessee in this transaction. However, from point view of taxation, the dividend of Rs 43,16,546.70 was became capital in the hands of the assessee. The total investment made by the assessee in units of the said Fund was at Rs 2,43,16,546.70 against which the assessee received net sale



consideration after meeting expenses at Rs1,94,77,922.88. This resulted in loss of Rs.48,38,623.88. The assessee as discussed above earned profits from share trading activities at Rs.48,65,115/-. Thus during the year under consideration the assessee had earned loss in trading in units of mutual funds and profits from trading in shares. The assessee had treated these two activities as two separate activities reflecting short term capital loss under trading in units of mutual fund and profits from trading in shares. As per clause 6 of Memorandum of Association, the assessee is permitted "to carry on business of share brokers, sub-brokers, underwriters, and sub-under-underwriters." There is no other clause in Memorandum of Association permitting the assessee to deal in shares and units of mutual funds as business activity. However the fact remains that the assessee was engaged in trading of shares during the year under consideration.

9.1 Now question arises as to whether the purchase and sale of units can be treated as business carried on by the assessee? The expression "business" is not defined under income Tax Act, 1961. As per the decision of Hon'ble Supreme Court in Mazagaon Dock Ltd. v. CIT [1958] 34 ITR 368, the word 'business' is one of wide import and in fiscal statutes it must be construed in a broad rather than a restricted sense. In bellow mentioned cases the Hon'ble Courts have discussed the circumstances under which a person could said to have carried out business activities:

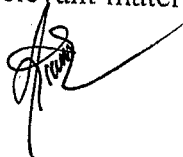
i. In Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 ITR 234 (SC) Hon'ble Apex court has held that there must be a course of dealings with continuity. The expression 'business', though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be course of dealings either actually contained or contemplated to be contained with a profit motive, and not for sport or pleasure. Whether a person carried on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transaction must ordinarily be entered into with a profit motive.



ii. In *P. Krishna Menon v. CIT* [1959] 35 ITR 48 (SC) has held that motive to produce income is not necessary. It is well-established that it is not the motive of the person doing an act which decides whether the act done by him is the carrying on of a business, profession or vocation. If any business, profession or vocation, in fact produces an income that is taxable as income from business, irrespective of the fact that business was not carried on with any motive of producing any income.

iii. Hon'ble Patna High Court in *Eclat Construction (P.) Ltd. v. CIT* [1988] 172 ITR 84 (Pat.) has held that the expression 'business' in ordinary parlance means any trading activity accompanied by regularity of transactions intended for the purpose of making profit. In general, a single transaction is not taken as business.

9.2 From above mentioned decisions it is clear that for considering a transaction as business there must be trading activities accompanied by regularity of transactions intended for the purpose of making profit. In the case before us the assessee purchased units of Sun F & C Value Fund with a motive of reinvestment the amount of dividend receivable into units of the said fund. Thus intension of assessee at time purchase of original units of Sun F & C Value Fund was to hold them as investments. The units were not purchased as stock in trade. It is immaterial that subsequently assessee thought to sell them at profit earned by way of tax free dividend income. The assessee had borrowed Rs 2,00,00,000/- from the bank for this purposes. The assessee itself had treated the investment of dividend income as capital investment for the purposes of determination of the short term capital loss. Hon'ble Calcutta High Court in the case of *Bikhamchand Bagri v. CIT* [1962] 44 ITR 746 (Cal) held that normally shares in joint stock companies acquired and held by a trader in shares are the stock-in-trade of his business. His business is to buy with a view to sell at a profit. Nonetheless the trader may, if he likes, acquire and hold the shares for investment and not for purposes of trade. But his intention to retain them and enjoy their dividends and not to circulate and part with them in course of business must be distinctly shown. The Court further observed that if the family treated the profits and losses arising from the sales of those shares as capital accretion or capital diminution and not as business profits or business losses arising from sales of stock-in-trade their conduct was relevant material to show that the shares were



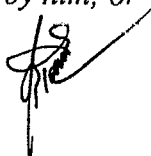
not stock-in-trade. Seen in the light of observations of Hon'ble Calcutta High Court the units were acquired by the assessee as investments and assessee had taken dividend income as further investment in units of the Fund for the purposes of computation of short term capital loss. The receipt of dividend and its reinvestment in units of the said Fund shows that the assessee held the units as investments and not as stock in trade and hence the loss suffered on sale such investments will be assessable as capital loss. Hence the assessing officer was justified in accepting the loss from units as short term capital loss. The purchase and sale of units do not fall in speculative transactions within the meaning of section 43(5) of the Act as the assessee had taken and given the actual delivery of units. The assessee itself in the profit and loss account treated the loss as short term capital loss. Therefore, the assessing officer was justified in treating the loss on purchase and sale of units as short term capital loss. We, therefore, set aside the order of CIT(A) holding that purchase and sale of units of mutual fund constituted business activity and restore the order of assessing officer.

9.3 Now we will decide the nature of transactions involved in purchase and sale of shares. The assessing officer has given a finding that the assessee had taken the deliveries of shares traded. The assessee had not given the copy of DEMAT account so as to prove the actual deliveries of the shares. In the absence of any such material to show the actual deliveries of the shares traded, the logical conclusion is that assessee was trading in shares without effecting actual deliveries of the shares. Section 43(5) of Income Tax Act, 1961 defines the term "*speculative transaction*" and at the relevant time it stood as under:-

"(5) "*speculative transaction*" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause—

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or



(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; or

(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange;"


shall not be deemed to be a speculative transaction;

The language employed in section 43(5) is plain and clear. A speculative transaction as contemplated by section 43(5) should fulfill four essential conditions namely (i) the contract should be for purchase or sale; (ii) the purchase or sale should be of any commodity, including stocks and shares; (iii) periodical or ultimate settlement of the contract; and (iv) settlement to be otherwise than by the actual delivery or transfer. The section covers only those transactions or contracts which are periodically or ultimately settled otherwise than by the actual delivery or transfer. The assessee's case does not fall under any of the exceptions contained in the proviso to section 43(5) of the Act. It has been held by Hon'ble Delhi High Court in the case of M.R. Dhawan v. CIT [1979] 119 ITR 412 (Delhi) that 'speculation' in common parlance connotes an intention to speculate, gamble, take a chance or risk. The Act however provides a very simple and objective test for determining whether a transaction is a speculative transaction or not. Under this definition, all that has to be found out is whether the contract was periodically or ultimately settled by actual delivery, transfer or otherwise. If the goods or commodities in respect of which the contracts were entered into were actually taken delivery of pursuant to the contract, it would not be a speculative transaction, even though the commodity or scrip may be a highly speculative one by its very nature and even though at the time when the contracts were entered into the parties might have had no idea of taking delivery at all. On the other hand, if the contract is settled otherwise than by actual delivery, then it will be a speculative transaction notwithstanding that the nature of the commodity was not one lending itself to possibilities of speculation or that the intention of the parties at the time of entering into the contract might have been to take actual delivery but this intention could not be effectuated for one reason or the other. On



examination of the facts of the case before us in the light of decision of Hon'ble Jurisdictional High Court of Delhi we find that the settlement of contracts in respect of shares traded during the period May 2000 to March 2001 has been made otherwise than by the actual delivery or transfer. Hence, the transactions of purchase and sale of shares are in nature speculative in nature within the meaning of section 43(5) of the Act.

9.4 There is another aspect of the matter. The assessee's main business consists of providing consultancy services to its clients. The receipts from consultancy business for the year under consideration as per profit and loss account are at Rs 2,12,01,307/-. As per the objects of Memorandum of Association the assessee is not permitted to trade in shares. The Memorandum of Association only authorizes it to engage in business of stock broker for which membership of a stock exchange is necessary. Admittedly the assessee is not in business of a stock broker. Though the memorandum of association does not authorize the assessee to carry on business of share trading but fact remains that the assessee was engaged in share trading activities. As many as 200 transactions of purchase and sale of shares of different companies were concluded in the year under consideration. Be it, as it may. We have to see the applicability of the Explanation to section 73 of the Act to the share trading activities carried on by the assessee. As per Explanation to Section 73, where any part of business of the company an assessee whose gross total income is not consisted mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of banking or the granting of loans and advances, consists of the purchase and sale of shares of other companies, such company shall, for the purposes of section 73, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. The provisions of Explanation to section 73 do not distinguish between the transaction of trading in shares on actual delivery or without delivery basis. Admittedly the assessee does not fall under any of the exceptions provided in the Explanation and hence, the purchase and sale of shares traded during the year under consideration is also in nature of speculation business within the meaning of proviso to section 73 of IT Act, 1961.



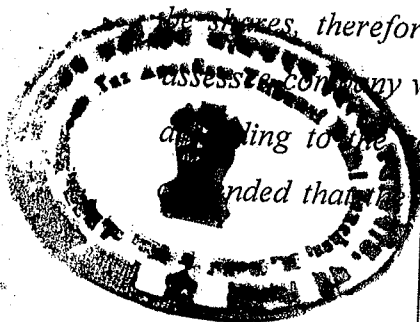
9.5 Another contention of Sh. Ved Jain, the AR of the assessee is that both the transactions i.e. trading in shares and units of mutual funds have to be treated on same footings. We are unable to accept this proposition of the Id AR of the assessee on the ground that units of mutual fund cannot be equated to shares of a company for the purposes of Explanation to section 73 of the Act. A Mutual Fund is not a company within the provisions of Companies Act. Therefore the units of mutual fund cannot be treated as shares. Hon'ble Supreme Court in the case of Apollo Tyres Ltd. v. Commissioner of Income-tax [2002] 122 Taxman 562 had an occasion to examine the question "*whether the business of buying and selling of units of Unit Trust of India by the assessee-company amounts to a speculation business or not, for the purpose of allowing set off as to the loss suffered by the company in such a business ?*" Hon'ble Supreme Court answering the question in negative held as under:

"8. The last point for our consideration is: whether buying and selling of units by the assessee company can be treated as a speculative business? For this purpose, the revenue argues that the units purchased by the assessee-company from the UTI are shares, therefore, as per Explanation to section 73 of the Act, the said business of purchasing and selling of shares will have to be treated as a business of speculation. The revenue in support of this argument relies on section 32(3) of the UTI Act which reads as follows:

"(3) Subject to the foregoing sub-sections, for the purposes of the Income-tax Act, 1961,—

- (a) any distribution of income received by a unit holder from the Trust shall be deemed to be his income by way of dividends; and*
- (b) the Trust shall be deemed to be a company."*

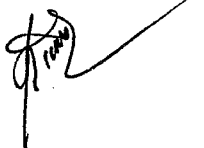
9. Relying on the above provision of the UTI Act, the revenue contends that if the UTI is a company and income from its units is dividend, then ipso facto the units will have to be treated as shares, therefore, the business of purchase and sale of units conducted by the assessee-company will have to be deemed to be a business in shares which business, according to the revenue, attracts Explanation to section 73. On this basis, it is contended that the business of purchase and sale of units by the assessee-company



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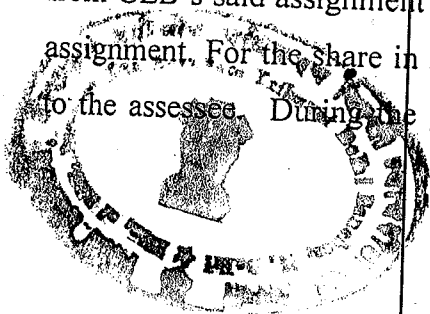
amounts to a business of speculation. Both the Tribunal and the High Court have considered this argument as also the effect of section 32(3) of the UTI Act and have come to the conclusion that the provision of the said Act is limited for the purpose of assessment of dividend income under the Act, and for deduction of tax at source. They have held that the legal fiction created by section 32(3) of the UTI Act cannot be carried any further. We have examined the provisions of the UTI Act and we are of the opinion that even though the said section creates a fiction to make the UTI as a deemed company and distribution of income received by the unit holder as a deemed dividend, by virtue of these deemed provisions, it cannot be said that it also makes the unit of the UTI a deemed share. In our opinion, a deeming provision of this nature, as found in section 32(3), should be applied for the purpose for which the said deeming provision is specifically enacted, which in the present case is confined only to deeming the UTI as a company and deeming the income from the units as a dividend. If as a matter of fact, the Legislature had contemplated making the unit as also a deemed share, then it would have stated so. In the absence of any such specific deeming in regard to the units as shares, it would be erroneous to extend the provisions of section 32(3) of the UTI Act to the units of UTI for the purpose of holding that the unit is a share. For these reasons, we are in agreement with the finding of the High Court on this point also."

From the decision of Hon'ble Supreme Court it is clear that units of mutual fund cannot be equated with shares of a company. Hence income from short term capital loss on purchase and sale of units of Sun F & C Value Fund cannot be treated as loss from speculation business. Further under section 73(1) of the Act, any loss computed in respect of a speculative business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business. Therefore the income from speculation business earned by the assessee cannot be set off against the short term capital loss from purchase and sale of units of the said Fund. Accordingly we do not find any infirmity in the order of CIT upholding the assessment order for not allowing the set off of income from speculation business against short term capital loss from units of Sun F & C Value Fund.

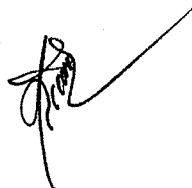


10. The next issue for consideration relates to confirming the disallowance of expenditure of Rs.83,30,111/- payable to Mahan Enterprises Ltd. The facts of the case relating to this ground of appeal as emerging from the material on record are that the assessee vide letter dated 9/08/1999 offered its services for the first time to Gujarat Electricity Board for rendering advice / assistance / consultancy / services for establishing settlement of claims of GEB with South Eastern Coal Fields Ltd. The assessee entered into an agreement with the Gujarat Electricity Board [GEB] for settlement of its quality claims with South Eastern Coalfields Ltd. [SECL] in respect of coal supplies received by GEB during the period 1993 to 1999 on success link service charges. The said assignment required the assessee to determine the extent to which there was a slippage in the quality of coal supplied by SECL during the relevant period; and on basis thereof to verify and compute claims of GEB; and to study the sampling procedure adopted by GEB and SECL with reference to the relevant ISS norms; and to study the contractual status of GEB qua SECL. This also required the assessee to formulate / advice strategies for achieving a settlement with SECL; and to prepare the relevant documents / charges etc. to enable negotiations with SECL and to obtain expert advice in support of GEB's case and to generally assist GEB in such negotiations. In consideration of rendering the said services GEB vide its work order offer dated December 22, 1999 agreed to pay service charges to the assessee @ 4% of the amounts of claims settled with SECL. Schedule B to the offer letter also provided incentive charges for early settlement of the claims.

11.1 The assessee in order to achieve the contractual obligations entered into a joint venture agreement with M/s. Mahan Enterprises Ltd. for the purpose of rendering services to M/s. Gujarat Electricity Board. Under the terms of agreement the assessee was to pay M/s. Mahan Enterprises Ltd subject to payment of expenses a sum equivalent to 2.8 per cent of the claim of amount settled between GEB and SECL to Mahan as Mahan's share in Revenues from GEB's said assignment excluding expenses, if any, incurred by Mahan on the said GEB assignment. For the share in revenues M/s Mahan Enterprises was required provide finance to the assessee. During the year under consideration the assessee received service charges



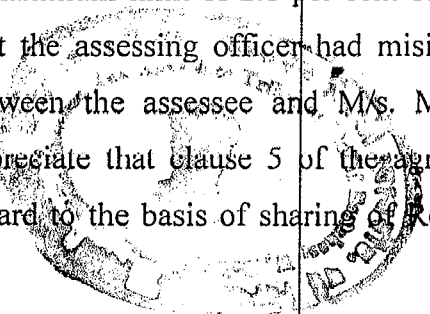
amounting to Rs.2,12,01,307/- from GEB. The assessee claimed expenses of Rs.2,95,31,418/- thereby making a loss of Rs.83,30,111/-. The expenses of Rs.2,95,31,418/- included the amount of Rs.1,48,40,915/- payable to M/s. Mahan Enterprises Ltd. The assessing officer from the terms of agreement noted that out of 8 per cent of the amount of claims settled between GEB and SECL, 2.8 per cent will go to Mahan Enterprises Ltd. and the balance service charges of 5.2 per cent of the settled claim amounts shall be retained by the assessee as its share of joint venture. Further para 6 of the joint venture provided that expenses / cost incurred by "Joint Venture Partner-I" i.e. the assessee shall be set off / reimbursed. After paying for the above out of the amount received from GEB if any further amount was still in surplus then cost/expenses incurred by "Joint Venture Partner-II" i.e. M/s. Mahan Enterprises Ltd. either directly or through Joint Venture Partner-I by way of financing the expenses shall be set off/reimbursed. The assessing officer further noted that after payment/disbursement of amount mentioned in para 6 of the Joint Venture Agreement if there was any amount in surplus the Joint Venture Partner II, M/s. Mahan Enterprises Ltd. was to be paid his share in joint venture revenue upto maximum extent of 2.8 per cent of the amount of claims settled between GEB and SECL. Accordingly, the assessing officer came to the conclusion that the clause 6 of agreement read with clause 5 clearly stipulated that all the actual expenses incurred were to be reimbursed first and if any surplus was left, it was to be paid to Joint Venture Partner II, i.e. M/s. Mahan Enterprises Ltd., subject to a maximum limit of 2.8 per cent of the service charges received from GEB. The assessing officer, therefore, required the assessee to explain as to why the loss in the work contract should not be disallowed. It was explained that M/s Mahan enterprises Ltd was entitled to receive a particular amount as per clause 5 of the agreement. Clause 6 of the agreement merely provided for modalities for disbursement of the so accrued/crystalised "share in revenue" payable to Mahan Enterprise Ltd. The assessing officer did not find the explanation offered by the assessee as acceptable. According to him the expenses incurred by the assessee in assessment year 2000-01 at Rs 69, 40,915/- and Rs 77,01,2003/- were to first set off as per clause 6 and balance remaining was to be shared between parties. As against the above the assessee had charged Rs 1,48, 40,915/- as per clause 5 of the agreement without taking into account the clause 6 of the agreement. The assessing officer disallowed the loss of Rs 83,30,111/-.



11.2 The assessing officer conducted inquiries from Mahan enterprises Ltd. It was found that assessee had not made payments of Rs 1,48,40,915/- to Mahan Enterprises Ltd. Mahan Enterprises Ltd had not disclosed the amount of Rs 1,48,40,915/- in its return of income for assessment year 2001-02. It was admitted by Mahan enterprises that the amount of Rs 1,48,40,915/- was due from the assessee and had received payment of Rs 1.07 crores out of funds arranged for the projects. Since payment of Rs 1,48,40,915/- was not paid to Mahan Enterprises Ltd, the amount payable was accepted on protective basis.

11.3 The assessing officer further noted that assessee had incurred expenditure Rs 64,73,413.92 in assessment year 2000-01 and Rs 70,57,790/- in assessment year 2001-02 on the project. The assessee debited 20% of such expenses to profit and loss account as deferred revenue expenditure amounting to Rs 27,06,241/-. It was explained that even though the expenditure was incurred in the current financial year, the revenue for the same was anticipated in subsequent years also. The assessing officer, therefore, proposed to treat the expenditure of Rs 70,57,790/- as pre paid expenses. The assessee explained that under the project completion method the expenses are accounted for during the life of the contract. The assessing officer for the reasons mentioned in the assessment order accepted the expenditure of Rs 70,57,790/- on protective basis.

12. Before the Id. CIT (Appeals) it was submitted that as per clause 5 of the agreement with M/s. Mahan Enterprises Ltd. for sharing of Revenue received from GEB, 2.8 per cent of the settled claims was to go to M/s. Mahan Enterprises Ltd. as its share of joint venture excluding expenses. Para 6 of the agreement spoke about disbursement of remuneration which included a clause thereby all expenses were to be reimbursed first and if any surplus was left, it was to be paid to the joint venture partner, M/s. Mahan Enterprises Ltd., subject to a maximum limit of 2.8 per cent of charges received from GEB. Therefore, it was pleaded that the assessing officer had misinterpreted clauses 5 and 6 of the agreement subsisting between the assessee and M/s. Mahan Enterprises Ltd. inasmuch as the AO failed to appreciate that clause 5 of the agreement governed the inter-se rights of the parties with regard to the basis of sharing of Revenue receipts from M/s. Gujarat Electricity Board and



clause 6 of the agreement merely provided the modalities for disbursement of so accrued share in revenue to the parties. It was also submitted that the assessing officer admitted the payability of expenses of Rs.1,48,40,915/- on the one hand, but accepted the same on protective basis although there is a provision for making protective assessment. The reason for the latter was that there might be a situation where it might be required to make a protective assessment, but in so far as the expenditure was concerned it was either allowable or disallowable. There could not be a situation calling for expenditure to be allowed on protective basis. The Id. CIT (Appeals) after considering the facts of the case and the arguments advanced by the Id. AR of the assessee observed that he was unable to agree with the arguments that the assessee was liable to make payment to M/s. Mahan Enterprises Ltd. as per clause 5 only. In reality, the two clauses 5 and 6 are required to be read together and, therefore, the interpretation given to the same by the AO in the assessment order was to be considered to be appropriate. This fact stood confirmed from examination of M/s. Mahan Enterprises Ltd. that the said sum of Rs.1,48,40,915/- claimed by the assessee as payable had not been shown by the other party as part of his receipts. Accordingly, the Id. CIT (Appeals) upheld the disallowance of Rs.83,30,111/- in principal subject to the direction to the assessing officer that arithmetical mistakes should be cured after due verification. As regards the contention of the assessee that the AO has held that expenses of Rs.1,48,40,915/- payable to Mahan Enterprises Ltd. were acceptable on protective basis, the Id. CIT (Appeals) observed that allowability of certain expenses was being judged on merits of the case and, therefore, making of such a statement did not really serve any purpose and the same was considered out of place. Similarly for allowance of expenditure of Rs 70,57,970/- on protective basis has not been approved by CIT(A). The Id. CIT (Appeals) accordingly confirmed the stand taken by the assessing officer.

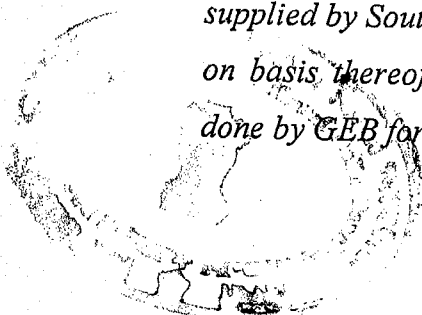
13. Before us, the Id. AR of the assessee submitted that the liability to pay the share of joint venture profit to M/s. Mahan Enterprises Ltd. has accrued at the rate of 2.8 per cent of the settled claim with SECL. Clause 6 of the Joint Venture agreement provided the modalities for disbursement of the right accrued under the joint venture agreement. It is clause 5 which creates right of sharing between the two parties and not clause 6 of the agreement. Therefore, the liability for payment of share of M/s. Mahan Enterprises Ltd. is to be determined as per



clause 5 of the agreement and accordingly, the assessee was liable to pay an amount of Rs.1,48,40,915/-. The assessee has, therefore, rightly claimed the payment of Rs.1,48,40,915/-. On the other hand, the Id. Sr. DR submitted that during the year only 24 per cent of the work has been completed. The assessee has computed the amount payable to M/s. Mahan Enterprises Ltd. relying on clause 5 of the agreement. The assessee has completely ignored the conditions stipulated in clause 6 (iii) according to which 2.8 per cent of the surplus amount of claims settled between GEB and SECL after meeting the expenses incurred by both the partners is to be paid. Therefore clause 5 and 6 are to be read jointly. Hence, the assessing officer has correctly arrived at the conclusion for disallowance of Rs.83,30,111/-.

14. We have heard both the parties and perused assessment order, order of CIT(A), terms of contract order carefully. The assessee vide letter dated 9/08/1999 offered its services for the first time to Gujarat Electricity Board for rendering advice / assistance / consultancy / services for establishing settlement of claims of GEB with South Eastern Coal Fields. On 31st August, 1999 the assessee offered the above services for charge of a fee equivalent to 10 per cent of the claim amount which was agreed and accepted by SECL. However, M/s. Gujarat Electricity Board vide letter dated 15/09/1999 informed the assessee about the decision of the Board for remuneration / service charges to be paid if the work was completed during the period of 90 days. Thereafter there were continued correspondences between the assessee and GEB about the service charges and period during which the claims were to be settled. Finally, GEB vide letter dated 22/12/1999 communicated the Board's decision containing terms and conditions in Schedule A and B. The assessee was asked confirm the acceptance of the order. Schedule A contained the terms and conditions for work order regarding GEB's claim on SECL pertaining to supply of coal during the period 1993-99 and the assessee based on records/data/information made available by GEB, shall:

"a) determine/verify the extent to which there was a slippage in quality of coal supplied by South Eastern Coalfields Ltd. (SECL) to GEB during the said periods and on basis thereof shall compute the claim amount /verify the computation of claim done by GEB for the said periods;



- b) study the sampling procedures/techniques adopted by GEB/CCO/PA during the period under reference and co-relate the same with the norms prescribed by ISS and the procedures followed during the joint sampling period;
- c) study the contractual position as it existed between GEB and SECL during the said two periods under reference;
- d) advise/suggest the strategies/mechanism which GEB should pursue to ensure settlement of its claims with SECL;
- e) prepare various documents /negotiation papers/ presentation formats/ data tabulation charts to enable negotiations with SECL;
- f) obtain expert advice on behalf of GEB and take services in this matter from eminent & appropriate professionals so as to strengthen the case of GEB; and
- g) generally shall assist GEB for negotiating settlement of claims for the said two periods of coal supply and shall follow up with SECL and the concerned functionaries/authorities controlling SECL for such negotiations/ settlement."

Clause 3 of Schedule A provided the payment schedule which reads as under:

"3. Payment:

- a) In consideration of your above referred services, you will be paid service charges equivalent to 4% of the claim amount settled by and between GEB and SECL in respect of quality slippage claims for the period beginning from 15.3.93 to 31.3.99 provided these claims get settled within the tenure of this contract.
- b) The claim shall be considered to have been settled only if the settlement offered by SECL is acceptable to GEB.
- c) If any tax, duty, or levies are applicable on the service charges, it has to borne by you and GEB shall make payments only after deducting the applicable taxes such as TDS etc.



- d) *The above service charges shall become payable only in case GEB and SECL agrees to a settlement of claims under reference within the tenure of this contract. However the actual payment will be released only after the receipt of credit notes for quality claims from SECL in favour of GEB.*
- e) *All costs for achieving the above scope of work and for rendering the services stipulated in the work order shall be borne by you directly and at no stage you shall demand any 'on account payment' from us towards the same or otherwise.*
- f) *You shall not transfer the authority to any other party to receive the payments directly from GEB HO, Baroda on your behalf through power of attorney, etc."*

Schedule B of the work order provided for payment of incentives in case the work order was executed early. 4 per cent of incentive charges were to be received in respect of claim amount settled if the claims were settled within a period of 30 days from the date of the order i.e. 22/12/1999. Incentive charges equivalent to 2 per cent of the claims amounts settled were receivable if the claims were settled between 30 to 60 days and no incentive charges were receivable if claims were settled after 60 days from the date of issue of the order i.e. 22/12/1999. There is nothing on record to suggest as to on what date the offer order dated 22.12.1999 was accepted by the assessee. From the terms and conditions enumerated in Schedule A & B, it is clear that work order was to be completed within the period of three months i.e. by 21st March, 2000 but the assessee as admitted in written submissions made before AO vide reply dated 12.12.2003 and also before CIT(A) submitted that it was not able to achieve any results for GEB until 20.02.2000. The assessee in reply dated 12.12.2003 also informed the AO that the services rendered by the assessee enabled GEB to arrive at a settlement in September 2000. As a consequence of this, lower slab of service charges were made applicable to the assessee and thereafter the service charges receivable by the assessee were reduced from 8% to 4% of the amount of the claims settled between GEB and SECL in respect of the period 1993-95; and were reduced from 8% to 3% in case of period 1995-99. Based on reduced slabs of services charges, GEB disbursed the service charges amounting to Rs.2,12,01,307/- between 9.2.2001 to 27.2.2001.

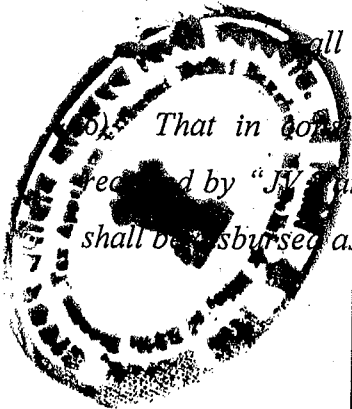


15. Though the terms and conditions of the work order were communicated to assessee vide letter dated 22.12.1999 for its acceptance but the assessee entered into joint venture agreement on 22.11.1999 on the basis of letter issued by GEB on 15.09.1999 and agreed to pay 2.8% out of 8% of the claims settled with SECL. The finally GEB agreed for lower slab of 4% for claims for period 1993-95. Mahan Enterprises Ltd was to provide finances to meet the cost of the project. Clause 5 of the Joint venture agreement provided sharing of revenue based on the letter dated 15.09.1999 whereas agreement was finally reached between GEB and the assessee in Sept. 2000 where in services charges have been reduced to 4%. Clauses 5 and 6 of Joint Venture Agreement are reproduced as under:

" 5). That the parties herein having assumed the gross service charges receivable from GEB at about 8 per cent of the amount of claims settled between GEB & SECL as per the provisions of the said letter dated 15/09/1999, have decided to share the revenues received from GEB amongst themselves, as per the following and subject to the provisions of clause 6 below :

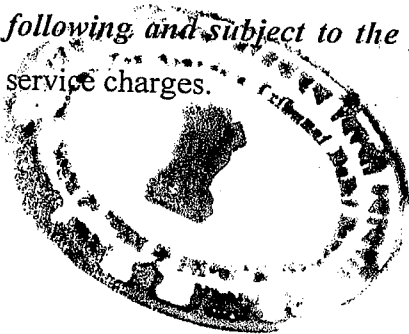
- i) 2.80 per cent of the settled claim amounts shall go to the account of "JV Partner - II" as its share of joint venture (excluding any expenses incurred by it either directly or through "JV Partner - I" on the subject assignment).*
- ii) The balance service charges [net of (i) above] received from GEB, i.e. upto 5.20 per cent of the settled claim amounts shall be retained by "JV Partner - I" as it's share of Joint Venture, which would include all costs / expenses of the subject assignment.*

5). That in consideration rendering the above services, the gross remuneration received by "JV Partner - I" (for and on behalf of both the parties herein) from GEB shall be reimbursed as per the following :



- i) Firstly, from the amounts received from GEB, all expenses / costs incurred by "JV Partner - I" towards undertaking the said assignment shall be off-set / reimbursed;
- ii) After paying for the above out of the amounts received from GEB, if any further amounts are still in surplus, then the costs / expenses incurred by "JV Partner - II" either directly or through "JV Partner - I" (by way of financing the expenses incurred by "JV Partner - I") shall be off-set / reimbursed;
- iii) After reimbursing the costs / expenses mentioned in para 6(i) & (ii) above out of the amounts received from GEB, if any further amounts are still in surplus, then the "JV Partner - II" shall be paid his share in Joint Venture Revenue upto a maximum extent of 2.80 per cent of the amount of claims settled between GEB & SECL;
- iv) After paying / disbursing the amounts mentioned in para 6(i) to (iii) above out of the amounts received from GEB, if any further amounts are still in surplus, then the same shall be retained and had by "JV Partner - I" as its share in the Joint Venture Revenue."

The opening sentence of clause 5 contains words "*That the parties herein having assumed the gross service charges receivable from GEB at about 8 per cent*" indicate the assumption of the gross service charges receivable from GEB at 8 per cent of the amount of claims settled between GEB & SECL. Therefore sharing of the revenue of joint venture in ratio of 2.8 : 5.2 was based on assumption of revenue to be received. When service charges have been reduced from 8% to 4% in Sept. 2000, the share of Mahan Enterprises Ltd. will be reduced in the same ratio. Thus the existence of assumption of revenue at 8% in the opening sentence of clause 5 clearly indicates that sharing of revenue between the parties was not absolute or final. It was dependent on the rates to be negotiated finally with GEB. It should be in the same proportion as 2.8 will be to 8. Clause 5 further contains words "*as per the following and subject to the provisions of clause 6 below:*" for the purpose of sharing of service charges.



The existences of these words clearly indicate that the sharing of revenue is subject not only to provisions of clause 6 but also to other following clauses. The provisions of clause 6 provide first deduction of expenses (i) incurred by the assessee; and from the balance the expenses (ii) incurred by Mahan Enterprises directly or through the assessee. From the balance surplus revenues, if any, 2.8% of claims settled will be paid to Mahan Enterprises Ltd. Further clause 7 provides that if for any reason whatsoever, in spite of best endeavours "JV Partner- I(the assessee), the subject assignment fails i.e. if the assignment does not lead to a settlement between GEB and SECL and / or if GEB does not make payment of the agreed service charges, then the amount invested by "J.V. Partner-II" (Mahan Enterprises), which cannot be reimbursed from the service charges received from GEB as per para 6 (ii) above, shall be written off by the said "JV Partner-II" as its individual losses from the joint venture. In such an event, "JV Partner-I" shall not be liable to make good the said losses, if any suffered by "JV Partner-II". Para 8 provides that in the event of GEB to make part payment of service charges prior to completion of the subject assignment then only the amount so invested by both sides on the assignment shall be disbursed to them as per para 6 (i) and 6 (ii) above and the balance amount (if any) so received from GEB shall be reserved for meeting further expenses / costs required to be incurred for completion of the assignment. From the joint reading of clauses 5, 6, 7 and 8 it is clear that "JV Partner-II" was not only to receive 2.8 per cent of the settled claim amounts but also has to suffer a loss in case the subject assignment failed and GEB did not pay any amount in respect of that particular assignment. Therefore, provisions of clause 5 cannot be read in isolation. The amount payable has to be determined with reference to conditions specified in clauses 5 to 8 of the agreement. However, as seen from the records and assessment order, the assessee has received service charges from GEB at Rs.2,12,01,307/- against which the assessee has treated an amount of Rs.1,48,40,915 payable to Mahan Enterprises Ltd as per provisions of clause 5 of the agreement. If for a moment the contention of assessee is accepted as correct it will render the other clauses of Joint Venture Agreement as redundant. Thus the amount of Rs.1,48,40,915/- determined payable to Mahan Enterprises Ltd by the assessee is not in accordance of provisions of the Joint Venture Agreement. Neither the assessing officer nor the Id. CIT (Appeals) have examined the terms and conditions of the Joint Venture Agreement vis a vis providing of finances by the "JV Partner -II" for the purpose joint venture. They have also failed to examine as to what was the ratio of sharing of Revenue



between them when service charges have been reduced to 4% for the claims settled with SECL pertaining to period 1993-95 and 3% for the period 1995-99 since we have held that sharing of revenue is not absolute when the sharing of revenue have been arrived at on assumption that they will receive 8% as service charges on claims settled between GEB and SECL. We, therefore, set aside this issue to the file of assessing officer with the directions to determine share of revenue payable in the light of provisions of clauses 5 to 8 of Joint Venture Agreement. The assessing officer will also keep in mind the services rendered by Mahan Enterprises Ltd by way of finances provided as per clauses 3 & 4 of the agreement to assessee for the purposes of Joint Venture project.

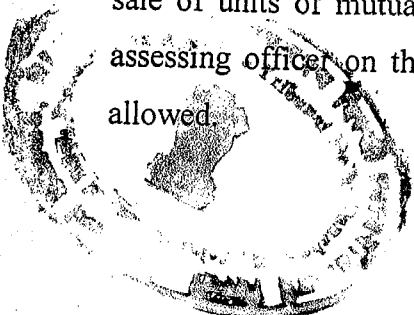
16. The last issue for consideration relates charging of Interest u/s 234A/234B of the Act Charging of Interest u/s 234A/234B of the Act is consequential to the additions made in view of decision of Hon'ble Supreme Court in the case of Anjum M.H. Ghaswala (252 ITR 1) and is dismissed as such.

I.T.A. No. 904 (Del) of 2006 [by the Revenue] :

17. The only ground of appeal raised by the Revenue, reads as follows :-

“ Whether, on the facts and in the circumstances of the case, the Id. CIT (Appeals) was justified in holding the loss on sale / purchase of mutual funds as business loss as against booked by the assessee in its books of accounts as short term capital loss without appreciating the fact that the assessee had claimed it as short term capital loss in schedule 12 attached with the return of income. ”

Since in Paragraph 9.2 We have held that loss on purchase and sale of units of mutual fund is short term capital loss and have reversed the findings of Ld CIT(A) holding that purchase and sale of units of mutual fund constituted business activity; and have restored the order of assessing officer on the issue, this ground of appeal raised by the Revenue is treated as allowed.



18. In the result the appeal filed by the assessee is partly allowed, for statistical papooes and the appeal filed by the Revenue is allowed.

Order pronounced in the open court on : 05-06-2009.

Cy [G. C. GUPTA]
JUDICIAL MEMBER

[K. D. RANJAN]
ACCOUNTANT MEMBER

Dated : 05-06-2009.

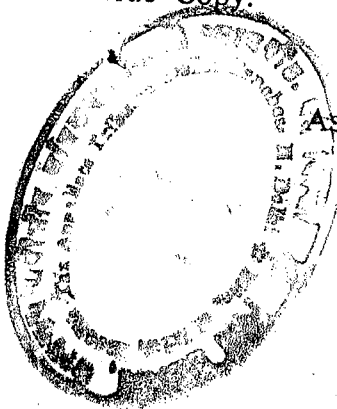
MEHTA

“ Copy of the order forwarded to :-

1. Appellant. *Reputed*
2. Respondent.
3. CIT,
4. CIT (Appeals),
5. DR, ITAT, NEW DELHI.

True Copy.

By Order.



सहायक पंजीकार
Assistant Registrar,
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal,
दिल्ली पाठ, नई दिल्ली
Delhi Benches, New Delhi