आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,E,मुंबई ।

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

Before Shri Mahavir Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.3217/Mum/2014
Assessment Year: 2010-11
&
ITA No.1411/Mum/2015
Assessment Year: 2011-12

ACIT 19(3), R.No.305, 3rd Floor, Pirmal Chanbers, Parel Mumbai-400012	**बनाम**/ Vs.	Shri Sachin R. Tendulkar, 19-A Perry Rd, Bandra (E) Mumbai-400050
(Revenue)		(Respondent)
		P.A. No.AAAPT4135B

Revenue by	Shri TA Khan (DR)
Respondent by	Shri Jitendra Jian (AR)
सुनवाई की तारीख/**Date of Hearing:**	**28/11/2016**
आदेश की तारीख /**Date of Order:**	**25 /01/2017**

आदेश / O R D E R

Per Ashwani Taneja:

These appeals pertain to same assessee for the two different years involving identical issues, therefore, these were heard together and being disposed of by this common order:

2. During the course of hearing, arguments were made by Shri Jitendra Jain, Authorised Representatives (AR) on behalf

of the Assessee and by Shri TA Khan, Departmental Representative (DR) on behalf of the Revenue.

3. First we shall take appeal for A.Y. 2010-11 filed by the Revenue against the order of Ld. CIT(A) dated 27.02.2014 passed against the assessment order of the AO u/s 143(3) dated 15.02.2013 for A.Y. 2010-11 on the following grounds:

> *1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in holding that the income on account of sale of shares and Mutual funds is Long Term Capital Gain or Short Term Capital Gain and not Business income."*
> *2. "On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in deleting the disallowance u/s 14A r. w. Rule 8D of Rs. 76,55,8411- by holding that the Assessing Officer (A.O.) has not recorded in the order as to how in regard to the accounts, the A.O. was satisfied with the correctness of the claim of the assessee in order to prove that the expenses*
> *3. "The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored."*
> *4. "The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

4. Ground No.1: In this ground, the Revenue is aggrieved with the action of Ld. CIT(A) in reversing the action of AO in treating the gain arising on sale of shares as 'business income' which was shown by the assessee as assessable under the head income from 'capital gains'.

5. The brief background and facts of the case as culled out from the orders of the lower authorities are that during the course of assessment proceedings it was noted by the AO that

the assessee had shown in its return of income long term capital gains and loss on sale of shares for Rs.85.56 lakhs and Rs.23.82 lakhs respectively. Further, short term capital gains of Rs.90.89 lacs and short term capital loss of Rs.7.78 lacs was also shown in the return filed by the assessee. It was noted by the AO that assessee has been disclosing capital gain from sale of shares every year in past and that purchase/sale of shares and units of mutual funds was managed by Portfolio Managers such as Kotak securities and DSP Merril Lynch (herein after called as PMS). It was noted by him that assessee had engaged the services of Portfolio Managers to carry out the transactions of the sale-purchase of shares for which huge amount of PMS charges of Rs.52 lacs were paid. According to the AO, it was not an ordinary thing for a normal investor. Further, he referred to the decision of Delhi Bench of ITAT in the case of M/s Radials International vs. ACIT and issued show cause notice to the assessee asking him to explain as to why profits on sale of shares/ unit should not be treated as 'business income' of the assessee as against the 'capital gains' as claimed by the assessee in the return of income.

6. In reply, the assessee submitted that major activity of the assessee was income from sports endorsements which has been shown under the head income from business. In addition to that assessee had made investment in shares from a long term point of view mainly to earn dividend and to maximize his wealth as a result of appreciation in value of shares. However keeping in view fluctuations in the stock market, the shares were sold time to time to minimize a risk of erosion in the

value of shares and to book the amount of gain accrued to the assessee. It was also explained that assessee was not a trader/dealer in shares and therefore, the income returned under the head 'income from capital gains' in the identical facts in the earlier years has been accepted as such by the AO, all along. He distinguished the decision of the Tribunal relied upon by the AO in the case of M/s Radial International on facts and placed reliance in his support on two decisions of Mumbai Bench of the Tribunal in the case of Mrs. Radha Birju Patel (ITA No.5382/Mum/2009) and Mrs. Nalini Navin Bhagwati (ITA No.53/Mum/2010) for the proposition that merely because the assessee availed services of the Portfolio Manager for better administration and maximization of his wealth held in the form of shares, it would not mean that the assessee was engaged in the business of sale-purchase of shares. It was also submitted on without prejudice basis that profit arising on sale of shares through PMS was merely to the extent of Rs.14,31,330/- and in case it was to be treated as income from business, the expenditure relating to profit earned on sale of shares i.e. Management Fee of Rs.18,33,258/- was eligible for deduction, and only net amount of profit/loss could be assessed as part of taxable income. If it is so done, there would arise a loss of Rs.4,01,928/- from the transactions entered done through PMS, and thus nothing would be taxable on this account.

7. But, the AO rejected all the submissions of the assessee as well as judgments relied upon by the assessee by mentioning that facts involved in these cases were not identical to the case

of the assessee. He also referred to the guidelines laid down by the CBDT in its Circular No.4/2007 dtd. 15.06.07 to determine whether the share transactions carried out by the Assessee fall under the head of 'business' or 'capital gains' and dismissed the assessee's contention that the activity of sale-purchase of shares carried out by him was as an investor, but constitutes adventure in the nature of trade. It was also observed that the manner of activity in the stock market, viz, large volume of purchase and sale of shares, multiplicity of transactions, regularity of the transaction from year to year, engagement of portfolio manager for systematic transaction of shares and earning from the sale of shares systematically, reinvesting for acquisition of shares on regular basis to make profit etc go to show the existence of intent on the part of the assessee to trade in stock as a business activity. Accordingly, AO assessed the income at Rs.1,35,76,244/- earned by the assessee out of sale and purchase of shares under the head 'profits and gains of business'. However, while assessing the income under the head ‘income from business’ the AO did not distinguish between the shares purchased and sold with the help of PMS or without it.

8. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) and made detailed submissions along with various evidences to justify its claim that the assessee had rightly disclosed gain arising on sale and purchase of shares as assessable under the head income from capital gains. Ld. CIT(A) considered the submissions of the assessee and also

analyzed various evidences in the light of observations made by the AO in the assessment order and also considered the judgments relied upon by both the sides. It was held by him that assessee had made investment in shares and the purchase and sale of shares was done as investor, therefore, resultant gain would be assessable under the head of capital gain as has always been accepted by the AO in all the preceding years. It was also held by him that the shares sold through PMS constituted only small portion of the total investment and in any case merely because assessee engaged Portfolio Manager, it would not mean that assessee carried out the activities would become of the nature of business. Being aggrieved, the Revenue filed an appeal before the Tribunal.

9. During the course of hearing before us, Ld. DR heavily relied upon the order of the AO. Per contra, Ld. Counsel of the assessee took us through various pages of the paper book in support of detailed findings given by the Ld. CIT(A) and also submitted that income from sale of shares has always been disclosed assessable under the head of capital gain, consistently by the assessee since last many years and accepted as such by the Revenue always. In some of the years, orders were passed u/s 143(3). It was in nutshell submitted by him that following facts and figures can be verified from the evidences brought on record by the assessee before the lower authorities as well as before the Tribunal:-

1. *Income from business and other sources is more than 97.5% of capital gains (Page No. 51)*
2. *The investment are made out of own funds earned by the Appellant from his regular business activity and not from*

borrowings (Page No. 31).

3. *The income from investments in shares / Mutual Funds has been assessed as Capital Gains in all the earlier years vide orders passed under section 143(3) and that there are no charge in the facts and circumstances of the case during the year under consideration.*
4. *The Appellant has disclosed the amounts invested under the category "Investment" and has not revalued the same in the books to adjust the reduction in market value, if any (Page No.36).*
5. *The investment in shares with PMS is 4.86% of the total investments (Page No. 54).*
6. *The dividend income is far in excess of the capital gains (Dividend income is 125 times the capital gains) (Page No. 52).*
7. *Investment in shares held under PMS is 7.6% of total investment under PMS (Page No. 55).*

Income under the head capital gain is 2.34% of gross total income (Page No.51)

10. It was also submitted by him that the view which has finally emerged on the basis of judgments of various courts with regard to PMS issue is that merely because shares were purchased and sold with the help of Portfolio Managers, it would not become business income if otherwise an assessee is an investor and always held the shares as part of investment. The gain arising on purchase and sale of shares would be assessable under the head income from capital gains. The reliance was placed by him on the following Judgments:

1. Nalin Pravin Shah (1575/Mum/2012)Mumbai
2. Nalini Navin Bhagwat (53/Mum/20 10) Mumbai
3. Radha Birju Patel (5382/Mum/2009) Mumbai
4. ARA Trading (13 Taxrnann.com 20) Pune
5. Apoorva Patni (54 SOT 9) Pune
6. KRA Trading (46 SOT 19) Pune
7. Janak S Rangwala (11 SOT 627) Mumbai

11. We have gone through the orders passed by the lower authorities and submissions made and evidences brought before us by both the sides as well as judgments relied upon by the AO, Ld. CIT(A) as well as Ld. Counsel of the assessee before us. It has been noted by us at the very outset that the Assessing Officer's main thrust was that income arising to the assessee from purchase on sale of shares would be assessable as business income because the assessee had availed the service of Portfolio Managers. Though, the assessee had pointed out to the AO on without prejudice basis that the gain arising on shares sold through Portfolio Manger was of a minor amount and substantial amount of gain was earned through shares sold without the help of Portfolio Manager, but despite that AO assessed the entire amount of gain as business income, comprising of gain earned on share sold with or without the service of Portfolio Managers. Thus, it is indicative of the fact that assessment order was passed by the AO without properly analyzing the fact and figures and disregarding the submissions of the assessee as well as past history of the assessee which has been accepted all along by the predecessors of the AO in all of the past years. Ld. CIT(A) made proper analysis of facts before deciding this issue and recorded detailed findings before holding that the gain earned by the assessee on sale and purchase of shares was assessable under the head income from capital gains. The relevant part of findings of Ld. CIT(A) is reproduced hereunder:

> *"I have duly considered the above submissions of the appellant. In para 8 of the order, the AO has mentioned that the profit on sale of shares shown by*

the appellant is Rs.1,44,85,693/- (Rs.85,56,188 + 83,11,319 - 23,81,814) which he has treated as income from business.

7.1. During the course of appellate proceedings, detailed break up of above profits has been furnished. The same being as follows:

As per income tax	Long term Capital gains			Short Term Capital Gains		Total Capital Gains		M.F.	
Particulars	Shares	M.F.	Deb /funds	Shares/ MF(STT)	M.F.	Shares	M.F.	Deb/ Funds	Total
PMS	9,913,151	2,629	9265237	6683623	902107	(3,229,528)	904,799	9,265,237	6,940,508
Direct Invest Ment	1,779,977	5039683	-.	2405326	91679801	4,185,303	3,359,882	-	7,545,185
Total	8,133,174	5042312	9265237	9088949	777631	955,775	4,264,681	9,265,237	14,485,693

7.2. Further, the analysis of short term capital gain furnished by the appellant is as follows:

Particulars	*PMS*	*Direct*	*Total*
Equity (STT paid)	*2270494*	*2405327*	*4675821*
Mutual funds (STT Paid)	*4413129*	*-*	*4413129*
Total	*6683623*	*2405327*	*9088950*

The holding period of shares under the PMS and declared under the head short term capital gain has also been furnished by the appellant as follows:

STCG Avg. p.o, Holding		
PMS	*1285897*	*123 Days*
ICICI-80063A	*984597*	*174 days*
Reliance Cap-100821	*2270494*	
POA		

Direct holding	*2405327*	*82 days*
Total	*6946315*	

7.3. The above analysis, therefore, would show:
(1)From the sale of shares held under the PMS for a period of more than 12 months, there is no profit. On the contrary, there is loss of Rs.99,13,151/-. The Long term capital gain under the PMS is recorded on sale of mutual funds and debentures/ funds only. Besides, the PMS, there is LTCG from direct investment made by the appellant to the extent of Rs.17,17,977/- and under the head of mutual fund, it is Rs.34,686/- only. Overall, there is a loss of Rs.81,33,174/- from shares held as long term capital assets. Similarly, there is profit of Rs.66,83,623/- only from shares held for less than one year and from the shares held as direct investment, there is short term capital gain of Rs.24,05,326/-. Overall short term capital gain is Rs.90,88,949/-. The appellant has also recorded loss of Rs.16,79,801/- on shares of mutual funds under 'Direct Investment', as short term capital loss.

(2) The average holding period of shares under the PMS is 123 days under the ICICI portfolio and 174 days in the Reliance portfolio, whereas, it is 82 days where shares have been held under the head 'Direct Investments'.
(3) Out of the total income of Rs.29.20 cr. declared by the appellant Rs. 19.78 cr. has been declared under the head 'business income' which is 67.66% of the total income whereas, income declared under the head' 'capital gains' is Rs.68,46,150/- which is 2.34% only, and income t Rs.8.76 cr. from 'Other Sources' constitutes 30% of the gross tot, income.
(4) The total of dividend and capital gain declared by the appellant Rs.6. 16 cr., out of which dividend income from investment in shares mutual fund is Rs.4.71 cr., which is 76.49% of the total income and capital gain from investment in shares in mutual funds is Rs.1.44 c which is 23.51% of the above income.

(5) On analysis of investment of the appellant, it is seen that out of the tote investment of Rs, 155.17 Cr., investment in PMS is Rs-21.73 Cr. LC 14.01% of the total investment.
(6) The appellant's major source of income during the year is from sport related activities including endorsements.
(7) The appellant is not a trader in shares and the overall investment pattern shows that the investment in shares is to earn dividend an income from shares as and when opportunity arises.

7.3.2 Upon due consideration of the submissions of the appellant, I find that the short term capital gain has been accounted in the two schemes operated under the PMS. In so far as the income under the head capital gains arising under PMS is concerned, the issue as to whether it is 'business' or 'capita Gains' was decided in favour of the Revenue in the case of M/s. Radial International, relied upon by the A.O., wherein ITAT, Delhi held that it is 'business' income. However, the Mumbai Bench of the ITAT in the case of M/s Salil Shah Family Trust (ITA No.2446/Mum/2012) has duly considered the decision of the ITAT Delhi Bench in the case of Radials International and held, as follows:

"The issue, whether the income from sale and purchase of shares in a particular case should be treated as capital gain or business, income has been a debatable issue and there are conflicting decisions of the Tribunal on this issue. Each case is, therefore, to be based on its own factual situation. It is possible for an investor to sell shares after holding for less than a year in order to reshuffle portfolio. In the present case, it is not in dispute that: the average holding period is 178 days. The 1TAT Pune Bench in the case of Apoorva Patni vs ACIT (supra) has held that "having regard to operating maximum of a discretionary portfolio management agreement, the relationship between the PMS provider and the assessee cannot be contempt as that of a mere agent as understood in the common parlance."

In this background, the finding of the Ld. CIT (A) that the PMS are nothing but agents working for and on behalf

of the assessee is not correct. All decisions regarding investments, its timings etc are made by the PMS provider and not by the assessor's investment. The contention of the revenue authorities that in the assessee inasmuch as it had no control on such decision making in a PMS arrangement because such decisions were taken by the PMS Provider.

In so far as other objections of the revenue authorities that there was volume and frequency of transactions were large so as to constitute business activity. We find that the assessee has engaged 4 PMS provider, has transacted in 7 shares and the total number of transaction is 110. In a stock Exchange, were more than 5000 shares are traded very day, the observations of the lower authorities do not carry much weight.....

It is also worth nothing that for the method of valuation of stock of shares reflected in the balance sheet, the admitted position is that the assessee has not adopted by a business concern. A business asset is valued at the cost or market price whichever is less but in the assessee's case, it is not so. The assessee has not adopted the prevalent method rather the investments have been shown at cost price only. ***The most important factor which has been ignored by the lower authorities is that there are no borrowed funds. The entire investments have come out of the corpus fund of the assessee.*** *Therefore, the claim of revenue authorities that the assessee has indulged in business activities in the guise of share investment does not hold any water.*

Considering the facts ant the submission and the judicial decisions considered hereinabove, in over considerate view, the decision of the Ld. CIT(A) solely based of Ld. CIT(A) we have not hesitation to hold that considering the nature of transaction through Portfolio Management Services Providers in the light of the judicial pronouncement discussed hereinabove, the transactions have resulted into capital gains, STCG and LTCG as returned by the assessee. Therefore, the A.O. is directed to accept the capital gains as returned by the assessee."

7.3.3 In yet another recent decision dtd 13.11.20 13 in

IT A No. 3159/ Mum/ 2012 in the case of Anusuya Suren Mirchandani, the ITAT held as follows:

"We have heard the rival submission and perused that material before us. We find that similar issue was decided by us in the case of Manan Nalin Shah (Supra). In that matter the only issue was as whether the profit arising to the assessee through the transaction carried out for purchase and sale of shares and mutual funds through PMS was to be assessed under the head business income or capital gains. After considering the decision delivered by the Pune Bench of the Tribunal in Ara Trading & Investment Put Ltd (Supra), it was held that in the PMS there was not assured guarantee against the loss or degeneration of capital. As per the SEBI guidelines, the portfolio manager was authorized to purchase and sale of shares on behalf of the client against undertake purchase/sale of securities, that they could make investment at their own discretions, that the investment made by the assessee through PMS was meant for maximization of wealth and not with a view to purchase/sale of shares, that department had not disputed the fact that portfolio managers had the sale and absolute discretions to make investment for and on behalf of the assessee, that assessee had no role to play with regard to making of investment, that the very nature of PMS was that the profit was to be assessed under the head capital gains. While passing the order, we have taken into consideration the order of the Delhi Tribunal referred above as well as the orders of the Pune Tribunal, considering the above, we are of the opinion that FAA was not Justified in holding that share transactions carried out by the assessee through PMS was taxable under the head business."

7.3.4 In view of the above two decisions of the Mumbai Benches of the ITAT, it is now clear that capital gains arising out of transactions under PMS are not falling under the "business" head and therefore cannot be taxed as business receipts.

7.3.5. When the capital gains under PMS are, excluded, the long term capital gain under 'Direct Investment' is Rs. 17.79 lac, on account of sale of shares and Rs.50.39 lac,

on account of sale of Mutual Funds and, Short Term Capital Gain under 'Direct Investment' is Rs.24.05 lac from sale of shares and Short Term Capital Loss under 'Direct Investment' is at Rs. 16.79 lac. Considering the overall investment pattern, and the gross total income of the appellant, the long term capital gain can under no circumstances be considered business income of the appellant. The short term capital gain under 'Direct Investment' is Rs.24.05 lac only and there is no evidence to show that the appellant has traded in shares to make profit. The criteria applied by the A.O., therefore, do not fit into the fact of the appellant's case. I, therefore, considering the facts discussed above and stated by the appellant vide letter dtd.24.02.2014, reproduced above, cancel the AO's order treating the Long Term and Short term capital gains declared by the appellant as 'business income'.

12. We have carefully examined all the factual findings recorded by the Ld. CIT(A). It is noted by us that major income of the assessee is income from sports endorsement and other shares. In addition to that assessee had made investment into shares. The entire investment has been made by the assessee out of its own funds. No amount of shares has been invested from any borrowing. Huge amount of dividend income has been earned by the assessee which is roughly 3.25 times of the amount of capital gain. The investment in shares with Portfolio Manager is merely to the extent of 4.8% of the total investments. The assessee has disclosed the amounts invested in the shares in the category of 'investments' right from beginning. The shares have never been revalued to bring them in line with the market value as would have otherwise been done in the case of stock-in-trade. The stock in trade is always disclosed at cost or market price which is lower. No such exercise has been done by the assessee in the case of shares

since these have been held under the head of 'investments'. It is also noted from the facts brought before us that in the case of short term capital gains average period of holding ranged between from 82 days to 123 days. It is not the case of the AO that shares have been purchased and sold on daily basis or without taking delivery and giving delivery. It is further noted by us that Ld. CIT(A) has rightly analysed the facts with proper reasoning to reach on the conclusion that conduct of the assessee and facts and circumstances of the case indicate that the assessee did not carry out the activity of making investment in shares as a systematic and organized activity of carrying out share trading or business.

13. In addition to the above, it is noted by us that though in the case of assessee before us, the shares have always been shown as part of investment in its Balance Sheet in all the past years consistently, but otherwise taxpayers have even been permitted to simultaneously carry out business of shares trading as well Investments into shares. The choice has been given to the taxpayers under the law that whether shares are to be kept by them as part of investment or stock-in-trade for the purpose of business. It is noted that Central Board of Direct Taxes by way of its circular No.4/7 dated 15-06-2007 clarified that an assessee can have two portfolios, i.e. one for investment purposes and the other for business purposes. The amount held in the investment portfolio would be assessable as income under the head 'Capital gains'. Relevant part of the circular is reproduced below:

> *"10. CBDT also wishes to emphasise that it is possible for a tax payer to have two portfolios, i.e., an*

investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading as-sets. Where an assessee has two portfolios, the assessee may have income under both heads i.e. capital gains as well as business income.

11. Assessing officers are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the assessee as investment (and therefore giving rise to capital gains) or as stock-in-trade (and therefore giving rise to business profits). The assessing officers are further advised 'that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the assessee as investment or stock-in-trade."

14. Our attention was also drawn on CBDT circular No.6 of 2016 dated 29-02-2016 wherein the Board gave further guidelines with regard to the treatment of profit as arising on sale / purchase of shares. It was *inter-alia* observed in the circular that the AO shall take into account the following guidelines in deciding whether the surplus generated from sale of listed shares or other securities would be treated as capital gains or business income :-

"a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer or such shares/securities would be treated as its business income,

b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding, the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. ***However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed***

to adopt a different/contrary stand in this regard in subsequent years;

c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT."

15. It was further observed in the circular as under:-

"5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer or shares and securities."

16. Thus, from the perusal of the above said circulars, i.e. circular No.4/2007 and circular No.6/2016, *inter-alia*, following points can be noted:-

(i) An assessee can have even two portfolios, i.e. investment and business;

(ii) The assessee has choice of deciding whether the shares are purchased in investment portfolio or business portfolio. Once a particular decision is taken by the assessee, then he is obliged to follow the same in all subsequent years; it would in turn mean that AO shall also be bound to follow consistent approach;

(iii) CBDT also wants reduction in litigation and maintaining the consistency by the Revenue as well as by the assessee in approach followed on the issue of treatment of income derived from sale of shares.

17. Thus, from the above, it is clear that the as per law initial choice was with the assessee that whether initial amount

invested in the shares was to be treated as part of 'investments' or 'stock-in-trade'. The assessee exercised its choice and kept the same as part of 'investments'. It is well settled law that a tax payer can very well plan it's affairs in such a manner so as to minimize the burden of tax so long as no *mala fide* or bogus practices are followed and tax planning is done by the assessee strictly within the framework of law.

18. We have analysed this issue from another perspective also. The income arising on account of sale -purchase of shares if assessed under the head of capital would of course be taxable at relatively lower rate of tax and is also exempt in some cases, as compared to the business income which is taxable at relatively higher rate of tax. But, if such income is assessable under the head income from business then the assessee would be entitled for claim of set of expenses incurred in the normal course of business to earn such income and the tax would be payable only on the amount of net profit. Therefore, while drafting the provisions the legislature did not make any water tight rule for determination of nature of income arising from purchase and sale of shares to be assessed under the head of capital gains or business income. It has been left upon the wisdom of the assessee and facts and circumstances of the case. Under these circumstances, if assessee has chosen a particular course after deciding all the pros and cons of both the options available to it and if the choice has been exercised in a *bonafide* manner, the Board has advised as discussed above that the AO does not have liberty under the law to

thrust his opinion upon the assessee, so long as the assessee follows his choice on consistent basis.

19. Turning back to the facts of the case before us, it is apparent that the assessee had adopted a particular course. He explicitly categorised the amount invested in shares as part of 'investments' and not as part of 'stock-in-trade'. In our considered opinion, AO's allegation that assessee did not make 'investment' into shares but carried it out as business activity merely relying upon factors like volume or frequency of transactions alone, was not in accordance with law and facts of this case.

20. Further, the AO had relied upon the judgment of Delhi Bench ITAT in the case of Radial International (supra) to hold that gain arising on sale of shares by availing services of Portfolio Manager shall amount to business income. In this regard it has been brought to our notice that the aforesaid decision has been reversed by the Hon'ble Delhi High Court in its order passed on 25th April 2014 reported in **367 ITR 1 (Delhi)** wherein it has been held by their lordships after considering entire scheme of PMS as well as provisions of law that categorization of the transactions whether giving rise to business income or income from capital gains would not necessarily be depending upon the fact that whether purchase and sale of shares are done with the help of Portfolio Manager or not. It was held that PMS agreement is mere agreement of agency and cannot be used to infer any intention to make profit. Similarly, in the case of **CIT v. Kapur Investments P. Ltd. 61 taxmann.com 91** Hon'ble Karnataka High Court had

adopted the similar view following the aforesaid judgments of Hon'ble Delhi High Court by *inter alia* observing as under:

> "In *our opinion, investment through Portfolio Management Service, which may deal with the shares of the assessee so as to derive maximum profits cannot be termed as business of the assessee but would only be a case of a more careful and prudent mode of investment, which has been done by the assessee. Funds which lie with the assessee can always be invested (for earning higher returns) in the shares either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that the assessee is carrying on the business of investment in shares. Profits from such investment, either directly or through professionally managed firm, would still remain as profits to be taxed as capital gains as the same will not change the nature of investment which is in shares, and the law permits it to be taxed as capital gains and not as business income"*

21. Thus, the reasoning given by the AO that the impugned income would be assessable under the head income from business merely because the assessee has availed the service of Portfolio Manager is not sustainable in view of the aforesaid judgments and facts of the case before us.

22. We have also analysed consistency part and noted that the assessee has right from beginning treated the amount held in shares as part of investment. In A.Y. 2005-06 the assessee kept the shares as part of investment and resultant gain was offered to tax as income assessable under the head income from capital gains. Few queries were raised by the AO in this regard. In response, proper replies were given by the assessee and thereafter AO accepted the same as income assessable under the head income of capital gain vide order passed u/s 143(3) dated 14-12-2007. Similarly in A.Y. 2006-07,

assessment order was passed u/s 143(3) vide order dated 26.12.2008 wherein gain arising on sale of purchase of shares was assessed under the head income from capital gains. Similarly in A.Y. 2007-08 also the assessment proceedings were done u/s 143(3) wherein quarries were raised by the AO which were replied by the assessee by filing detailed reply to justify its claim. After considering the same, the amount of gain arising from sale of purchase of shares was assessed as income from capital gains by the AO. Similarly, in A.Y. 2008-09 also assessment proceedings u/s 143(3) wherein AO accepted the claim by the assessee wherein income from shares was accepted as assessable under the head capital gains. It was further brought to our notice that even in the subsequent years i.e. A.Ys. 2012-13 and 2013-14 & 2014-15 also gain arising on sale and purchase of shares was shown under the head income from capital gain and has been accepted as such by the AO in the orders passed u/s 143(3) of the Act.

23. It was specifically brought to our notice that in A.Y. 2012-13, specific query was raised by the AO for treating the income arising on sale of shares through Portfolio Manager Service as business income. The assessee filed a detailed replied to the AO vide its letter dated 12th January 2015 wherein it was submitted that though the assessee had availed service of Portfolio Manager, but the assessee had made investment in shares and was not trader of shares. It was also submitted that in view of this fact, decision of Delhi Bench of the Tribunal in the case of Radial International (supra) was not

applicable. The AO considered the reply and accepted the claim of assessee in assessment order passed u/s 143(3) dated 13-01-2015. Similarly, queries were raised in A.Y. 2013-14 also but after considering reply by the assessee, the claim of the assessee was accepted in the assessment order passed by the AO u/s 143(3) dated 30th March, 2016.

24. Thus, in view of judgments of Hon'ble Supreme Court in the case of **Radha Swami Sat Sang, vs. CIT 293 ITR 321(SC)** and **CIT v. Excel Industries Ltd. 358 ITR 295(SC)**, upholding principal of consistency and in view of the aforesaid circular of **the CBDT** and in view of facts of this case as discussed above, claim of the assessee deserves to be upheld. Therefore, after taking into all the facts and circumstances of the case and in view of the detailed discussion made by us in earlier part of our order, we find that the detailed findings recorded by Ld. CIT(A) for upholding the claim of the assessee by treating the income arising from purchase and sale of shares as assessable under the head of 'capital gains' are well reasoned and do not require any interference from our side. Therefore, order passed by the Ld. CIT(A) on this issue is upheld and Ground No.1 raised by the Revenue is hereby dismissed.

25. Ground No.2: In this ground the Revenue is aggrieved that the action of Ld. CIT(A) in deleting the disallowance made by the AO u/s 14A read with Rule 8D for Rs.76,55,841/-.

26. The brief background as culled out from the orders of the lower authorities is that the AO observed that the assessee received exempt income in the nature of

dividend to the extent of Rs.68,02,975/-, however, no expenditure has been disallowed for earning of the said income. Therefore, the assessee was asked to explain as to why disallowance u/s14A should not be made. In response, the assessee vide its letter dt. 22.1.13 stated that all investments made by him were routed through specialized advisors appointed by him i.e. Kotak & DSP Merill Lynch for handling his investments and during the year he has paid Rs. 34,51,220/- on the said account, which is reflected in his 'capital account' and not debited to the P&L Account. It was further stated that out of the above amount of Rs.31.51 lacs, an amount of Rs.9,09,449/- was claimed against capital gains and balance amount of Rs.25,41,771/- has been disallowed voluntarily u/s 14A by not claiming it as an allowable expenditure. The assessee's assertion was that besides the above expenditure, he did not incur any other expenditure for handling his investments or earning exempt income. But, AO did not agree with the submissions of the assessee, and invoked section 14A read with Rule 8D and made disallowance of Rs. 26,55,841/ - as per the formula prescribed therein.

27. In appeal before the Ld. CIT(A), detailed submissions were made. It was *inter-alia* argued that assessee did not claim any expenditure relating to exempt income. Therefore, AO has wrongly made disallowance u/s 14A. Ld. CIT(A) considered the submissions of the assessee and deleted the disallowance after recording the detailed findings in his order.

28. During the course of hearing before us, Ld. DR vehemently supported the order of the AO. However, in response to our query that whether assessee had debited any expenses in the P & L account which could have disallowed by the AO, he was not able to show any thing and was not able to rebut the factual findings which were recorded in its appeal order by Ld. CIT(A) while deleting the disallowance.

29. Per contra, Ld. Counsel of the assessee vehemently supported the order of the Ld. CIT(A) and submitted that disallowance has rightly been deleted since it was contrary to law and facts in as much as no expenses were claimed in the P& L account much less any expense attributable to the earning of exempt income. Therefore, no disallowance was possible under the law. In addition to that, Ld. Counsel submitted a 'Brief Note' summarizing his arguments for agitating disallowance made u/s 14A; same is reproduced hereunder:

> ***"With respect to disallowance under section 14A,*** *the assessee submits that it has incurred net expenses of Rs.25.51 lacs in relation to investment activities which has been charged to capital account and therefore has not claimed any expenditure under the Act and therefore disallowance under section 14A is not warranted.*
>
> *16. It is submitted that the assessee maintains separate income and expenditure account for its business income. The surplus in the said account is Rs.19.61 crores (pg 32). The business income as per section 28-44 is arrived at Rs. 19.78 crores (pg 24) which has been accepted by the AO in his assessment order. Since the AO has accepted all the expenditure as allowable against business income and the assessee having not claimed any expenditure*

against exempt income, provisions of section 14A are not applicable.

17. In earlier years i.e. AY 2007-08 and 2008-09 there has been no disallowance on account of section 14A of the Act (pgs 59-78).

18.The share transaction charges and PMS management fees are debited to capital account (pg 33) and not claimed as expenditure except Rs. 9.09 lacs on proportionate basis against taxable capital gains (pg 24 and 26) which has been allowed in the assessment order.

19. Alternatively, the common expenses charged to Profit & Loss account, if any, is only to the extent of Rs. 22 lacs (pg 21 and 32) and the ratio of indirect cost to professional receipt is less than 1% and if the expenses not claimed on account of PMS fees and share transfer are considered then no disallowance is warranted. The assessee himself in the return of income disallowed Rs 12 lacs towards personal expenses (pg 50).

20. The AO has not recorded the satisfaction that accounts maintained and audited are not correct as stated above so as to invoke section 14A of the Act.

21. The Assessee relies upon the findings of CIT(A) at page 28 para 9 of his order and submissions made before the Ld. CIT(A)(pgs 16-22) on the issue of section 14A of the Act."

30. We have gone through the orders passed by the lower authorities and submissions made before us. Ld. CIT(A) considered the facts of the case in detail and deleted the disallowance by observing as under:

"I have, duly considered the above submission of the appellant and find that the appellant has incurred total expenditure of Rs.34,51,220/- which has been paid to Kotak/DSP for handling of his investments. The entire amount has not been debited to the P&L account, but to his capital account. The appellant has out of the said amount claimed Rs.9,09,449/- on proportionate basis being the expenditure related to

earning of capital gains. Thus, amount of Rs.25,41,771/- debited in the 'capital account' of the appellant is the direct expenditure relating to earning of the exempt income which has not been claimed by the appellant. As for the indirect expenses, the appellant's argument, which is without prejudice to its submission, is that the total amount of expenditure claimed in the P&L account is Rs.2,01,17,805/- out of which Rs. 1,78,45,499/- is directly relatable to 'business', on account of service tax and professional fees, donation, legal and professional expenses and depreciation on business assets and amount of Rs.22,72,306/- only is the common expenditure which has been charged to the P&L account. The appellant's contention, therefore, is that even if disallowance of any expenditure is warranted under the above section, the same cannot exceed the above amount of Rs.22,72,306/-. I have duly considered the submission of the appellant. As prescribed under Rule 8D, expenses of Rs.25,41,771/- directly related to earning of exempt income has not been claimed in the P&L Account, hence not applicable. Similarly, interest expenses being 'nil', the same will not be applicable. However, at the most and without prejudice to appellant's claim deemed expenses of Rs.22,72,306/- can be considered as per the formula prescribed therein, i.e. 0.5% average investments which is coming to Rs.67,46,392/-. However, the total direct expenses being Rs.22,72,306/-, it cannot exceed the said amount. As far as the direct expenses of Rs.9,09,449/taken by the appellant for disallowance & u/s 14A of the Act is concerned, the same is relating to earning of capital gains, hence, cannot be considered under the above section. In this regard appellant's contention that A.O. has invoked Rule 8D r/w Sec. 14A of the Act, without recording in the order as to how in regard to the accounts, he was not satisfied with the correctness of the claim of the appellant in respect of such expenditure in relation to income which does not form part of the total income under the

Act, as laid down in sub-section (2) of Section 14A of the Act, is found valid."

31. Thereafter, Ld. CIT(A) considered the decision of Pune Bench of Tribunal in the case of Kalyani Steels Ltd. in ITA No.1733/PN/2012 and held that AO had involved Rule 8D without complying with the requirement of section 14A(2) of the Act and also noted that since the assessee has not claimed any expenditure relating to the exempt income, therefore, no disallowance was liable to be made and therefore disallowance made by the AO was deleted. It is noted that while making disallowance, the AO omitted to consider the fact that the assessee is individual and not any corporate assessee. The assessee has maintained separate accounts with regard to its business income and expenses incurred in earning the business income. It is further brought to our notice that the expenses incurred with regard to the activity of making investment in shares have been debited to the capital account and have not been debited to P & L account. The P & L A/c prepared by the assessee is exclusively for the purpose of reflecting its transactions arising out of business activities i.e. comprising of business income and business expenses. Under these circumstances, there was heavy onus upon the shoulders of the AO to establish if any of the expenses debited in the P& L account did not pertain to its business activity but with any other activity say for earning income from capital gains. Unfortunately, no such exercise has been done by the AO before invoking the provisions of section 14A. It was all the more necessary in the light of the fact that expenses incurred

on PMS brokerage fee and other incidental expenses for making investment into shares have not been debited in the P & L account by the assessee. These facts have also not been disputed by the Ld. DR before us.

32. Under these circumstances, we find that the reasoning given by the Ld. CIT(A) for deleting the disallowance made by the AO is in accordance with law and facts of this case. No interference is called for by us, therefore his order is upheld and Ground no.2 is dismissed.

Now we shall take up appeal for A.Y. 2011-12 in ITA No. 1411/Mum/2015

33. It is noted that issues involved in this year are identical to the issues involved in A.Y. 2010-11. Ld. CIT(A) has followed his own order for A.Y. 2010-11 while allowing relief to the assessee.

34. During the course of hearing before us both the parties jointly stated that these issues as well as facts involving in this year also identical to the facts and issues involved in A.Y. 2010-11. It was also fairly submitted that there is no change in the legal position. We have already decide those issues in favour of assessee in our order for A.Y. 2010-11 and following the same, we decide issues involve in this year also in favour of the assessee and uphold the order of the Ld. CIT(A) and dismiss the appeal of the Revenue.

35. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 25th January, 2017.

Sd/-	Sd/-
(Mahavir Singh)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 25 /01/2017

*Patel, P.S.*नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**