

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri S. S. Godara, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 991/Ahd/2014
Assessment Year 2010-11**

Harsh S. Shah, C-54, Silver ARC, Nr. Ellisbridge Rly Crossing, Ahmedabad-380006 AFAPS3154G (Appellant)	Vs	The DCIT, Range-10, Ahmedabad (Respondent)
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**Revenue by: Shri Roop Chand, D.R.
Assessee by: Shri Nimish B. Shah, A.R.**

Date of hearing : 28-08-2017
Date of pronouncement : 22-09-2017

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2010-11, arises from order of the CIT(A)-XV, Ahmedabad dated 07-03-2014, in proceedings under section 143(3) of the Income Tax Act, 1961; in short the Act.

2. The assessee has raised the following grounds of appeal:-

“1. On the facts and circumstances of the case and in law the learned CIT(A) erred in holding that the gain earned by the appellant on share transactions of Rs 84,81,597/- was liable to be taxed under the head Business income as against Capital gain and consequentially the appellant was not entitled for the setoff of carried forward Short term capital loss of Rs 71,35,047/- from the said income.

2. On the facts and circumstances of the case and in law the learned CIT(A) erred in holding that use of Portfolio Management Service of HDFC for share transactions is to earn the business income.”

3. In this case, return of income declaring income of Rs. 24,77,375/- was filed on 26th July, 2010. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 27th July, 2011. The assessee was engaged in the activity of purchase and sale of land and trading of shares and securities. During the course of assessment proceedings, the assessing officer noticed that assessee's business income consists of Rs. 1,06,327/- as income from speculation and Rs. 6,16,1291/- as income from Frangipani art and further the assessee has earned income of Rs. 84,81,597/- from the sale and purchase of shares. The assessing officer observed that assessee had shown the same under the short term capital gain and set off the brought forward loss of Rs. 71,35,047/-. The assessing officer further observed that the income arose from share transactions should have been considered under the business held instead of capital gain. There were 2287 transactions undertaken by the assessee during the financial year relevant to the assessment year and the amount involved was Rs. 639162754/- on which the assessee had shown capital gain of Rs. 84,81,597/-. He further observed that assessee was carrying out business of purchase and sale of shares and mutual funds and the

turnover was exceeding more than 1 crore, the assessee has not filed tax audit report. The assessee was independently doing business of investments in shares and mutual funds by engaging services of PMS. He also observed that assessee has obtained loan of Rs. 4,46,08205 from relatives and the said loan was used for making investment in mutual funds and shares. He was of the view that the purchase and sale of shares and mutual funds was the major activity of the assessee looking to the above facts and circumstances. Therefore, the assessing officer has assessed the short term capital gain of Rs. 8481597/- as income from business out of share trading activity.

4. Aggrieved against the decision of the assessing officer, the assessee preferred appeal before the Id. CIT(A) who has sustained the addition made by the assessing officer by observing as under:-

“3.2 I have carefully considered the facts of the case and the submissions made by the appellant. In this regard, it is seen that Hon'ble jurisdictional Tribunal in the case of Dr Ajay Ranka (ITA No 3302/Ahd/2009) and Seema Ranka (ITA No 3301/And/2009) have held that transactions under the PMS Scheme are to be treated as business transactions. In these cited orders, Hon'ble Tribunal have followed their decision in ITA No 4517/Ahd/2007 wherein it was held that transactions under the PMS Scheme are to be treated as business transactions. Further, Hon'ble ITAT Delhi in the case of M/s. Radial International ITA No 1368/Delhi/2010 for A Y_2006-07 have held that PMS transactions are to be treated as business income. Similarly, Hon;ble ITAT, Hyderabad in the case of Anilkumar Jain ITA No 163 & 164/Hyd/2011 for A Y 2007-08 & Hon'ble ITAT, Indore in the case of Shri Anurag Vijay Vargaya ITA No 122/Ind/2010 for AY 2006-07 have concluded that PMS transactions are business transactions of the appellant and. income thereupon is a business income. The facts of the case present in the appeal have been compared with the facts of the case as available in the impugned decisions of Hon;ble Tribunals and it has been found that the same are more or less identical. Perusal of the decisions of the Hon'ble Tribunals indicate that all the Hon'ble Tribunals

*including Hobbles jurisdictional. Tribunal have held that PMS transactions are to be treated as business transactions of the assessee and profit or loss earned therein cannot be brought under the purview of income from capital gains. In respectful compliance to the decisions-of Hon'ble Tribunals including jurisdictional Tribunal, it is held that the Id A O has not erred in concluding that the PMS transactions are to be treated as an business activity. **Consequently the addition of Rs. 84,81,587/- made by the Id A O is confirmed and the ground of appeal No. 1 is dismissed.***

5. During the course of appellate proceedings before us, the Id. counsel has furnished the paper book containing written submission, statement of total income, balance sheet and judicial pronouncements etc. He contended that he Id. CIT(A) has erred in holding the purchase and sale of shares as business activity and treating the gain earned as business income in trading of share. On the other hand Id. departmental representative has supported the order of the Id. CIT(A).

6. We have heard both the sides and perused the material on record carefully. We noticed that the assessing officer has assessed the short term capital gain shown by the assessee as business income and held that assessee was not entitled for set off of brought forward loss on the ground that the transaction of purchase and sale of shares and securities were carried out through the portfolio management services (PMS). We observed from the balance sheet of the assessee that during the year under consideration the assessee has shown the purchase and sale of shares and securities as investment under the head HDFC Asset Management. We have

further verified from the paper book that in the preceding year also the same was shown as investment in the balance sheet of the assessee. We find that assessee has been consistently showing the shares as investment. The Id. counsel has also placed reliance on the following judicial pronouncements.

- (i) ACIT v. Sachin R. Tendulkar in ITA No. 3217/Mum/2014
- (ii) CIT v. Kapoor Investment Pvt. Ltd. (2015) 234 taxmann. 149(Karnatka)
- (iii) Udayan Finstock Pvt. Ltd. v ITAT D Bench Ahmedabad ITA No. 849/Ahd/2012
- (iv) ACIT v. Darshan Naranbhai Patel ITA No. 2374/Ahd/2012
- (v) Dr. Jaikumar Chmanlal Shah v DCIT (2016) 47 CCH 186/Ahd/Trib.

It is also observed that as per CBDT circular no. 4/7 dated 16-06-2007 the assessee can have two portfolio one for investment purposes and the other for business purposes. It is also noticed that the CBDT circular No. 6/2016 demonstrate that assessee has choice of deciding whether shares are purchased in investment portfolio or business portfolio. It was also brought to our notice that the decision of the Delhi bench ITAT in which it was held that gain on sale of shares through the services of portfolio management services will be the business income has been reversed by the honϕle Delhi High Court vide 367 ITR 1 on 25th April, 2014. We find that Honϕle Karnatka High Court in the case of CIT vs. Kapur Investment P. Ltd (2015) 234 Taxman 0149 held that profit from investment through portfolio management service either directly or through professionally managed firm, would still remain as profits to be taxed as capital

gains as same will not change nature of investment that is in shares, and law permits it to be taxed as capital gain and not as business income. We have also observed that the assessee has right from the beginning treated the amount held in shares as part of investment in the preceding assessment year. It was also brought to our notice that in the preceding assessment years 2005-06 to assessment year 2007-08 in the assessment made u/s. 143(3) the amount of gain arose from sale and purchase of shares was assessed under the head capital gain by the assessing officer. Similarly, it was also contended that in the subsequent years i.e. assessment year 2012-13 to 2014-15 gain arising on sale and purchase of shares was shown under the head income from capital gain and were accepted by the assessing officer in the assessment made u/s. 143(3) of the act. After considering the above facts and legal findings, we are of the view that the Id. CIT(A) was not justified in upholding the addition made by the assessing officer as business income. therefore, we allow the appeal of the assessee.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22-09-2017

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER
Ahmedabad : Dated 22/09/2017

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश कललम आषत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलअ अधकरण,
अहमदाबाद