आयकर अपीलीय अधिकरण, पुणे न्यायपीठ एक-सदस्य मामला पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1296 to 1300/PUN/2017
निर्धारण वर्ष / Assessment Years : 2008-09 to 2012-13

Income Tax Officer,
Ward 3(2), Pune .... अपीलार्थी/Appellant

Vs.

Smt. Roopa Jayant Gupta,
C/o Mrs. Mrinalini Kirloskar,
Lakaki Road, Model Colony,
Pune – 411016
PAN: AEHPB5246H .... प्रत्यर्थी / Respondent

Assessee by : Shri C.H. Naniwadekar
Revenue by : Shri Ajay Modi

सुनवाई की तारीख / **Date of Hearing : 18.06.2018**		घोषणा की तारीख / **Date of Pronouncement: 20.06.2018**

आदेश / ORDER

PER BENCH :

There are 5 appeals filed by the Revenue under consideration for the A.Yrs. 2008-09 to 2012-13. They are filed against the consolidated order of CIT(A)-3, Pune, dated 16-01-2017.

2. The issues raised in the grounds are identical and it relates to chargeability of gains earned on sale of securities under the head 'Capital Gains' or 'Business Income' when Port Folio Management Services are availed by the assessee in earning such gains. The CIT(A) passed a composite order for all the assessment years. We shall take up the appeal of the assessee for the A.Y. 2008-09 first for reference to

the facts and issues. Grounds raised by the assessee for this assessment year are extracted here as under :

> *"1. On the facts and circumstances of the case, the CIT(A) has erred in allowing the assessee's claim of Capital Gain Income as against the said income treated by the Assessing Officer as Business Income.*
>
> *2. On the facts and circumstances of the case, the CIT(A) has erred in not appreciating the AO findings, that the assessee had invested in shares/mutual fund/units through Kotak Securities, Bangalore, through a Port Folio Management Service in a very organized way with an intention to maximize the profit by resorting to frequent trading rather than to hold shares for a long duration."*

3. Briefly stated relevant facts of the case include that the assessee availed PMS - Kotak Securities Ltd. for augmenting the value of money and earned gains in the year under consideration. The said gains are offered as income under the head 'Business Income'. However, the Assessing Officer treated the same as 'Capital Gains' and denied the consequential benefits.

4. In the First Appellate proceedings, relying on series of decisions, CIT(A) allowed the appeal of assessee in all the five years as per discussion given in para 5.3 and its sub-paragraphs. Aggrieved with the said order of CIT(A), the Revenue is in appeal before us.

5. At the outset, the learned Departmental Representative for the Revenue heavily relied on the order of Assessing Officer. The learned Departmental Representative for the Revenue was critical of the decision of the CIT(A), who granted relief to the assessee.

6. Per contra, the Counsel for assessee brought our attention to the said paragraph 5.3 of CIT(A)'s order and submitted that the CIT(A) granted relief relying on the decisions of the Hon'ble Supreme Court in

the case of CIT Vs. PKN Co. Ltd. (1966) 60 ITR 65 (SC), Saroj Kumar Majumdar Vs. CIT (1965) 57 ITR 21 (SC) and the Hon'ble Bombay High Court in the case of CIT Vs. Gopal Purohit in ITA No.1121 of 2009, dated 06.01.2010. Further, the learned Counsel for assessee submitted the issue stands covered in favour of assessee by the order of Pune Bench of Tribunal in the case of Shri Apoorva Patni Vs. Addl.CIT in ITA No.239/PN/2011, relating to assessment year 2006-07, order dated 21.06.2012.

7. We have heard both the parties on the issue whether the gains earned by assessee in sale of shares and securities involving Port Folio Management Services under the head 'Business Income' and we also perused the order of Pune Bench of Tribunal in the case of Shri Apoorva Patni Vs. Addl.CIT (supra). For the sake of completeness, we proceed to extract the relevant paragraphs of the order of CIT(A) as well as from the order of Tribunal.

8. The relevant paragraphs of CIT(A) are as under:-

> *5. GROUND NOs. 1 to 4 :- The contention raised in these grounds revolve around single issue of treatment of capital gains as business income.*
>
> *5.1 OBSERVATION OF THE AO:- During the assessment proceedings the cases for A.Ys. 2008-09 to 2011-12 were reopened by the AO as it was observed that the assessee had transacted in shares & mutual funds through PMS with an intention to maximize profit by resorting to frequent trading rather than holding shares for a long duration. Notices u/s 148 were issued and served to the assessee by the Ld AO after recording reasons for reassessment. In response, the assessee requested to treat the returns filed originally for the respective assessment years as returns filed in response to the notices u/s 148 of the Act. The AO observed that the assessee had disclosed long term capital gain and short term capital gain for the respective assessment years on sale of mutual funds / shares / units. The assessee also claimed exempt income on transfer of equity shares / units. On perusal of the chart depicting transactions through Portfolio Management Providers*

(PMS) the AO observed that the assessee had transacted heavily in shares and mutual funds through PMS and assessee's intention was to maximize profits resorting to frequent trading rather than holding shares for a long duration. A show cause was issued in this regard and the submission made in response was not found acceptable by the AO. The AO after allowing 10% as expenses incurred to earn the gain treated the balance amount as income from business as against capital gains claimed by the assessee.

5.2 AR's SUBMISSION: During the appellate proceeding, the appellant in this connection submitted as below-

"TREATMENT OF CAPITAL GAINS AS BUSINESS INCOME

The Assessee is a single lady (divorcee) and has one daughter to look after. The assessee has income only from other sources and has not carried out any business of any nature whatsoever in the past. In fact, she is not conversant at all with any business requirements. Earlier also the assessee was a salaried person and has never been engaged in any sort of business at all in the past and present.

In order to maintain herself and her daughter she had certain funds which came from her family. In order to maximize the wealth and augment the resources, she invested certain funds with a Port Folio Management (PMS) as she was not at all aware or had any knowledge in investments.

The PMS Manager invested these funds in equity shares initially in the financial year 2008.09. In F.Y.08.09, the PMS manager tried to augment the wealth by making short term gains. However, since the assessee was not comfortable with this practice, later on i.e. from F.Y.10.11 onwards the shares were held for a considerable period of time as the assessee was interested in long term growth of her funds. From F.Y.10.11, the short-term dealings were reduced considerably.

It may be appreciated that most of the shares sold in F.Y. 2007-08 i.e. A.Y.2008-09 were held since 1981. It was in F.Y.2008-09 i.e. A.Y.2009-10, the assessee, for the first time, engaged the services of PMS Manager. It is worthwhile to note that in that year, the assessment was made u/s 143(3) and the Assessing Officer has accepted the income as Capital Gains. As held by Hon. Bombay High Court in Gopal Purohit's case (copy enclosed), there has to be consistency in these matters. Applying the ratio of the aforesaid decisions, the aforesaid income has to be treated under Capital Gains.

During the year, the assessee has shown long term capital gain of which is claimed as set off against and up to the amount of loss carried forward from earlier years. The assessee also shown the exempt capital gains from transfer of equity shares in a company. The assessee submitted chart with the return indicating that not all the shares are held for less than 1 year. As such, it cannot be said at all that the assessee is frequently dealing in shares. As regards mutual funds (long term), here again the mutual funds are held for more than one year and are not traded frequently. In fact, investment in mutual funds cannot be considered as trading because mutual fund units are

not quoted on the stock exchange and are thus not tradable at all. One has to redeem these units with respective fund only. Thus, this is a case of 'subscription and redemption' and not of a 'purchase and sale'. It is common knowledge that investment in mutual fund is made to park surplus funds and achieve a better return. In assessee's case the long term mutual funds are held for more than one year and short term mutual funds also are held for an average period of 6 months. In such a scenario, it cannot at all be said that the assessee is engaged in any sort of business activity in respect of shares and mutual funds.

In the past, also, whenever assessee has sold shares and mutual funds, the income was shown under the capital heads and no queries have been raised by the department, and the department has accepted the treatment given by the assessee.

We also enclose herewith year wise chart of the transactions entered in to by the assessee. From the same it can be observed that most of the transactions are in mutual funds and are by way of reinvestment in dividend reinvestment plans. Also, most of the transactions are in dividend yielding mutual funds thereby signifying the intention of the assessee to hold it as investments. In respect of transactions in shares there are hardly 8 to 10 scrips which are also held for more than 6 months in most cases.

Considering the background of the assessee, her intention of having regular income, volume of transactions etc. it cannot at all be said that the assessee has carried out the transactions with an intention to trade. On the other hand, the facts clearly indicate that the assessee has always acted as an investor.

We place reliance on following decisions.

1. *The Commissioner of Income Tax-25 Vs. Gopal Purohit-Income Tax Appeal N0.1121 of'2009*

2. *Shri Apoorva Patni Vs Addl. Commissioner of Income Tax-Appeal No.239/PN/11"*

5.3 DECISION:- I have perused the assessment order and the submission of the appellant as above carefully. It is seen that the AO treated the income from capital gains of Rs.91,733/- and Rs.2,56,280/- on account of long term capital gains and short term capital gains respectively as ***business income****, denying appellant's claim of the same as capital gains income. The AO found that the appellant had investment in shares/ units / mutual funds through Kotak Securities Ltd., Bangalore, a Port Folio Management Services (PMS). The chart relating to such investment revealed that the* ***appellant had transacted heavily in shares and mutual fund through PMS, which according to the AO, was made with an intention to maximize the profit by resorting to frequent trading rather than to whole shares for a long duration.*** *On query raise as to why the same should not be treated as business income, the appellant vide letter dated 01/03/2016 submitted that the appellant is a single lady (divorcee) and has one daughter and was a salaried person and never engaged any sort of business to bring up her daughter, in*

order to maximize the wealth, she invested certain funds with a PMS as she was ignorant in investments. The appellant also contended before the AO that the funds were invested by the PMS Manager in equity shares initially in the F.Y.2008-09 and in the said year it was tried by the PMS Manager to augment the wealth by making short term gains. However, as the assessee was not comfortable with such practice, from F.Y. 2010-11 onwards the shares were held for a considerable period of time as the assessee was interested in long term growth of her funds and from the said year the short-term dealings were reduce considerably. The appellant also contended before the AO that the port folio schemes are discretionary schemes and it is the port folio Manager alone who has absolute discretion to invest the client's money without any reference to or discretion from the investee. The appellant also contended that the issue relating to PMS activity whether capital gains or business income has been discussed in detail by the Pune Tribunal in the case of ARA Trading and Apporva Patni, thereby enclosing a copy of said order in the submission. The appellant contended that the order of the jurisdictional Tribunal binding upon the AO and the investment should be treated under the head income from capital gains. The AO did not accept the appellant contention inter-alia holding that the transaction was carried out in a professional manner by resorting to frequent trading and the assessee carried out the business of trading in shares in a systematic and organize manner by utilizing the services of PMS to act as an agent. The AO contended that the volume, frequency and regularity with which transaction were carried out by the assessee during all the years indicated that it was a systematic and organized activity with profit motive and therefore, the same should be treated as business income. It was also contended that most of the transaction effected during the years are short term in nature and therefore motive of purchasing the shares was profit booking by selling them at higher rates and not earning a dividend. The AO referred to the decision of the Supreme Court in the case of CIT Vs. PKN Co. Ltd. [1966] 60 ITR 65 (SC) wherein it was held that purchase without an intention to resell where they were sold under changed circumstances would be capital gains. The reference in the case of Saroj Kumar Majumdar Vs. CIT [1965] 57 ITR 21 (SC), in which it was said that purchase with an intention to resell would rendered the gain as business profit depending on the circumstances of the case like nature and quantity of article purchased, nature of the operation involved. The AO, accordingly, taxed the income of Rs.37,54,943/- from sale of shares as business income in detailed in para 8 of the assessment order.

(underline provided for emphasis)

5.3.1 The appellant, during assessment proceedings, in the submission dated 10/01/2017, the appellant more or less made identical submission. It was contended that most of the shares sold in F.Y. 2007-08 i.e. A.Y.2008-09 were held since 1981. It was in F.Y.2008-09 i.e. A.Y.2009-10, the assessee, for the first time, engaged the services of PMS Manager. It is worthwhile to note that in that year, the assessment was made u/s 143(3) and the Assessing Officer has accepted the income as Capital Gains. The appellant referred to the decision of Hon. Bombay High Court in the case of Commissioner of Income Tax-25, Mumbai Vs. Gopal Purohit, ITA No. 1121 of 2009 dated 06/01/2010, wherein it was

held that there has to be a consistency in these matters and submitted that on the ratio of the aforesaid decisions, the aforesaid income has to be treated under Capital Gains. It was further contended that, the assessee has shown long term capital gain which was claimed as set off against and up to the amount of loss carried forward from earlier years. The assessee also had shown the exempt capital gains from transfer of equity shares in a company. The assessee submitted chart with the return indicating that not all the shares are held for less than 1 year, and as such, it cannot be said that the assessee is frequently dealing in shares. As regards mutual funds (long term), it was contended that the mutual funds were held for more than one year and were not traded frequently. In fact, investment in mutual funds cannot be considered as trading because mutual fund units are not quoted on the stock exchange and are thus not tradable at all. One has to redeem these units with respective fund only. Thus, this is a case of 'subscription and redemption' and not of a 'purchase and sale'. It is common knowledge that investment in mutual fund is made to park surplus funds and achieve a better return. In assessee's case the long term mutual funds were held for more than one year and short term mutual funds also were held for an average period of 6 months. In such a scenario, it cannot be said that the assessee is engaged in any sort of business activity in respect of shares and mutual funds. The appellant, therefore, contended that the income disclosed by her cannot be treated as business income rather the same was rightly treated by the appellant as income from long term and short term capital gains. The appellant also furnished chart showing such transaction in shares.

5.3.2 *I find merit in the submission and contention of the appellant. I find that the AO without appreciating the facts relating to holding of shares / mutual funds by the appellant, as* ***the same were transacted through PMS Manager, had treated this profit from such sale of shares as business income of the appellant.*** *The facts that most of the shares sold in F.Y. 2007-08 since 1981 and also that due to constraints of the appellant being a single lady (divorcee) she had to employee a PMS Manager only from F.Y. 2008-09 onwards, were totally ignored by the AO. I also find that the criteria laid down in the case of* ***Shri Apporva Patni (supra) of the Hon'ble ITAT Pune****, and the case of* ***Goppal Purohit (supra) of the Bombay High Court, were not also taken into consideration*** *by the AO. The AO also summarily rejected the references of the cases cited before him by the appellant during assessment proceedings contending that the cases 'are completely different from the facts of the case laws submitted by the assessee in support her claim. Even, the AO did not bother to mention the citation made by the appellant'. It is also worthwhile to mention that no discussion as to the dates of purchase, sale, profit earn and holding of shares, though submitted by the appellant during assessment proceedings, was made in of the aforesaid assessment years. Merely because of certain constrains, shares were sold through PMS Manager, the same cannot be treated as business income, when a number of decisions had set the tests for considering such transactions whether business or capital gains income. I also find that the AO had treated the sale of units in mutual funds at the same parlance as the sale in equity shares, utterly disregarding the fact that the mutual fund units were not quoted on the stock exchange and*

> *hence could not be traded for earning business income. The appellant contention in this regard is required to be subscribed to. Considering all the aforesaid facts,* ***I am inclined to accept the appellant's contention and hold that the AO was not justified in taxing the sale of shares/ units in mutual funds as business income, denying the appellant's claim of the same as income from long term capital gains / short term capital gains. The additions made by the AO in this regard for all the aforesaid assessment years, as detailed in para 4 in the grounds of appeal are hereby deleted.*** *Grounds raised by the appellant from 1 to 4 for all the aforesaid assessment years in this regard are* ***allowed."***
>
> *(underline provided for emphasis)*

9. The relevant paragraphs of the Tribunal in the case of Shri Apoorva Patni Vs. Addl.CIT (supra) are as under:-

> *"9. We have carefully considered the rival submissions. Ostensibly, in the present case, the transactions in focus are the transactions in shares and securities carried out by the assessee through the PMS provider. Further, as it emerges from the record that in the present case, the portfolio management services engaged by the assessee were in the nature of Discretionary Portfolio Management services. The features of such a scheme have been adequately elaborated by the Commissioner of Income-tax (Appeals) in the impugned order and is also borne out of the copies of a few agreements with the PMS provider, which have been placed in the Paper Book at pages 137 to 183. The Commissioner of Income-tax (Appeals) has brought out the features of the Discretionary Portfolio Management services agreement wherein the PMS provider has got absolute independence in taking day-to-day decisions so far as investments in shares etc. are concerned. The PMS provider receives a lumpsum amount from the client and in a Discretionary Portfolio Management service arrangement, and the PMS provider makes the investments as per his own judgment reached on the basis of his own professional expertise and accordingly undertakes day-to-day decisions for purchase and sale of a particular scrip without recourse to the client. It is also evident that such decisions taken by the PMS provider are not client-specific, but is taken for a whole range of clients in his portfolio. No doubt, the PMS provider undertakes these transactions in the name of the assessee and the shares are also kept in dematerialized form in the Demat account of the assessee. So, however, all such activities are carried out in a fiduciary capacity. Having regard to the operating mechanics of a Discretionary Portfolio Management agreement, which is in question before us, the relationship between the PMS provider and the assessee cannot be contemplated as that of a mere agent as understood in the common parlance. All decisions regarding investments, its timings etc, are made by the PMS provider and not by the investor per se, though the resultant gain/loss is on account of the assessee investor. In the present case, we may also notice that at the time of engaging the PMS provider, the assessee mandated his Investment Objective which clearly indicates the intention of the assessee behind the parking of funds with the PMS provider. The Investment Objective mandated by the assessee and which forms part of the agreement with the PMS provider has been placed in the Paper Book at page 159 in the case of agreement with DSP Merrill Lynch Fund Managers Ltd. We are tempted to reproduce the same, which is as under,*

> *"The objective is to achieve reasonable returns over the long term by investing in a focused portfolio of 15-20 stocks with good growth prospects, across various sectors. We do not want exposure to any company in the Information Technology sector and specifically to Patni Computer Systems Limited and PCS Industries Limited."*

for the reason that the same gives away the dominant intention of the assessee of making investments with a view of "growth prospects". Clearly, it envisages that what the assessee was looking for by engaging the services of an expert, namely, the PMS provider, was appreciation and maximization of wealth and not merely encashing of profits with a view of a trader. In the case specific before us, we find that in this factual background, the plea of the Revenue that the arrangement of appointing a PMS provider to manage the investments was with an intention of a trade, cannot be accepted.

10. In any case, in so far as the very nature of Discretionary Portfolio Management scheme is concerned, the same has already been considered by our co-ordinate Bench in the case of ARA Trading and Investment P. Ltd. and KRA Holding and Trading P. Ltd (supra). According to the Tribunal, the scheme is for an activity of wealth maximization rather than a profit maximization and accordingly, it has been held that gain from such activity was liable to be considered as derived from an activity of investments and not trading. Therefore, on this aspect of the controversy, we find that the Commissioner of Income-tax (Appeals) made no mistake in following the order of the Tribunal in the case of ARA Trading and Investment P. Ltd. and KRA Holding and Trading P. Ltd (supra) and in holding that the assessee was indeed engaged in an investment activity while appointing the PMS provider with regard to the stated transactions.

11. In so far as other objections of the Assessing Officer that there was volume and frequency of transactions was large so as to constitute business activity, we find that the factual matrix has been appropriately analyzed by the Commissioner of Income-tax (Appeals) in para 4.20 of the impugned order, which is as under:

> *"So far as volume and frequency of transactions are concerned, it has been explained that actually the number of scrip traded was not very large being 62 across all the 3 PMSs, engaged during the year, which was not much considering that about 2000 companies' shares were actively traded in the stock exchanges. It was also clarified that the frequencies of transactions was not much. Sometimes several transactions may have to be made in the same scrip, which increases the frequency. It was emphasised that the total sales turnover in the investments made through PMS during the year was 19.06 crores involving 62 scrips, whereas, in the share trading business separately shown by the appellant, the sales turnover was 73.21 crores involving 76 scrips. This shows that in the share trading business activity, the turnover was almost 4 times higher even though the number of scrips were only marginally high. It was emphasized that in the trading activity even though the shares involved were proportionately much less as compared to the turnover, since the intention was to carry on business activity, the same was shown under the head Business income'. It also included speculative transaction and day trading,*

> *whereas no such transactions were entered into by the PMS. The appellant has also emphasized that i was prudent investment activity of the PMS to buy a target quantity of a particular scrip in small lots for averaging purpose; and it should not be treated as frequent and repetitive transactions. The appellant then goes on to cite the decision of the ITAT, Mumbai Bench in the case of Janak S. Rangwala, 11 SOT 627 in which it was observed that mere volume and magnitude of transaction will not alter the nature of transaction if the intention was to hld the shares as investment and not as stock in trade. Similar explanation has been given once again by the letter dt 14.6.2010 by the appellant in response to the AO's report."*

We have examined the position, in particular the analysis made out by the Commissioner of Income-tax (Appeals) in the extracted portion with reference to the statement and transactions which have been placed n the Paper Book filed before us. In our considered opinion, the inference drawn out by the Commissioner of Income-tax (Appeals) clearly establishes that the volume and frequency of transactions sought to be made out by the Assessing Officer with regard to the impugned activity stands on an entirely different footing and is quite distinct from the activity of trading in shares carried out by the assessee. In fact, it is notable that in the share trading business carried on by the assessee, he has carried out certain speculative and trading activities and that in the case of a PMS provider, such activities are prohibited in law. Having regard to the aforesaid discussion by the Commissioner of Income-tax (Appeals), which is borne out of the record, we, therefore, find no reasons to uphold the plea of the Assessing Officer on the basis of the volume and frequency of transactions.

12. The Assessing Officer has also pointed out that earning of dividends was not at all the motive of such transactions, because the shares have been sold just before the same became ex-dividend on the stock exchanges. In this regard, we find that the Commissioner of Income-tax (Appeals) has factually found the same to be contrary to material on record as per the discussion in para 4.15 of the order, which is as under:

> *"4.15 For the proposition that earning of dividend was not the motive, the AO has cited instances when the appellant has sold some shares just before the dates of the shares becoming ex-dividend or the stock exchanges. However, a perusal of the chart given in the assessment order showed that the information regarding date of declaration of dividend has not been given. For example, in the case of scrip of Amtek Auto, the sale was made on 19.9.2005 whereas the ex-dividend date was 22.12.2005; i.e. the sale was made more than 3 months before the shares became ex-dividend. It does not necessarily follow that the dividend was already declared in this case and still the appellant sold the same before the shares becoming ex-dividend. Similarly, in the case of ACC, two particular sale dates mentioned when the scrip was transacted by DSPML, were 24.3.2005 and 16.11.05, whereas the ex-dividend date has been mentioned as 29.3.2006. It cannot therefore be said that the appellant had knowingly sold the shares after declaration of the dividend before it became ex-dividend. Again in respect of shares of Jet Airways, the ex-dividend date has been mentioned as 14.9.2005 by the AO, and the date of sale has been mentioned as 17.10.2005 and 23.1.2006 in the case of two different PMS's. This instance points out to a wrong conclusion*

> *by the AO as here the shares have been sold after those have become ex-dividend. Coming to two more instances pointed out by the AO in this chart, shares of Nalco have been sold on 30.3.2006 which was after the ex-dividend date of 23.9.2005; and the sale of ONGC shares by DSPML was made on 30.12.2005, which also is after the ex-dividend date of 1.9.2005. It is, therefore, clear that the instances pointed out by the AO did not support this argument, except in the case of two or three instances, where the sale has been made just before the shares becoming ex-dividend; and there was a possibility that the dividend would have been declared and known to the PMS. However, such instances are few and far between; and it cannot lead to a conclusion of indulging in a business activity. Moreover, as has been explained elsewhere by the appellant, such day to day decisions regarding purchase and sale of particular scrips are not that of the appellant, but of the portfolio manager since the appellant's case was that of engagement of Discretionary Portfolio Management Services. It was explained that as per SEBI Regulations, there were two types of PMSs i.e. Discretionary and Non-discretionary. It was explained that in case of Discretionary PMS as availed by the appellant, he appellant did not have control on the day to day activities and did not give any directions, except for the broad guideline for not purchasing the shares of Patni Computers Systems Ltd. since it was promoted by the appellant and his family members. It was also explained during the appellate proceedings that in accordance with the Accounting Standard and CBDT Circular, dividend earning was not the only criterion and in any case substantial amount of dividend of Rs 16,31,796/- was also earned during the year in the investments through the PMS. Thus, this point is adequately explained."*

On this aspect also, we find no material to differ with the findings of the Commissioner of Income-tax (Appeals), which we hereby affirm.

13. Another aspect made out by the Assessing Officer was to the effect that by its very nature, sales and purchases carried out by the PMS provider was of short-term nature and, therefore, it was to be regarded as a business activity. Factually speaking, on this aspect the Commissioner of Income-tax (Appeals) has dealt with the same in para 4.17 of his order, which is as under:

> *"4.17 The AO also pointed out to some instances when shares of the same company have been repurchased sometimes after the sale. In this connection, it is explained that such instances were not much and there were reasons for churning of the investments by the Portfolio Manager at different instances during the year. It is relevant to notice that the appellant also pointed out that thre were many shares held for a long time, even upto 18 months, by the PMS, and substantial amount of long term capital gain of Rs 83,09,187/- was also shown. In fact, the AO has treated even this LTCG of Rs 83,09,187/- as Business income, which cannot be justified. On the other hand, depending on the market conditions, vis-a-vis the analysis of the fundamentals of particular scrip, decision may have to be taken to exit at a particular point of time, and to re-enter after a few months on change of fundamentals. This does not mean that it was in the nature of repeated trading activities in the same commodity; in which case there could be multiple repetitions within a few days; or even during the same day."*

> *14. In this context, we find that the Assessing Officer has treated even the gain on investments held for more than 12 months also as business income. Quite clearly as per the statement in respect of gains and investment in shares through PMS provider placed at page 73 of the Paper Book, the holding period goes upto even 18 months before the investment was liquidated. Be that as it may, the factor of period of holding cannot be ascribed to the assessee, inasmuch as it has no control on such decision making in a Discretionary PMS arrangement, because such decisions are taken by the PMS provider as we have observed earlier. In any case, in so far as the present case is concerned, the Investment Objective of the assessee mandated to the PMS provider was to achieve growth prospects and the actuality of transactions carried out by the PMS provider in order to achieve the stated Investment objective of the assessee cannot be made a basis to charge the assessee of having a different objective. Considering the aforesaid matters, we, therefore, are of the view that the objections made out by the Assessing Officer have been adequately addressed by the Commissioner of Income-tax (Appeals) in coming to his findings that* ***the investments carried out by the assessee through the PMS provider do not result in a gain assessable as business income.***
>
> *(underline provided for emphasis)*
>
> *15. In view of the aforesaid discussion, and having regard to the reasonings extended by the Commissioner of Income-tax (Appeals) with which we hereby affirm, we find that the grievance of the Revenue in this appeal is misdirected and accordingly the conclusion arrived at by the Commissioner of Income-tax (Appeals) on this aspect is hereby affirmed. Thus, on this Ground, Revenue fails."*

10. On facts, it is undisputed that the assessee has been consistently employing the services of PMS – Kotak Securities Ltd. for augmenting the value of securities and the same are shown under the head 'Capital Gains'. The pattern of investment is one and the same in this year also. The Assessing Officer disturbed the assessee's claim by treating the said income as taxable under the head 'Profits and Gains from Business or Profession'. On similar facts, relying on the Pune Bench decision in the case of Shri Apoorva Patni Vs. Addl.CIT (supra), the CIT(A) granted relief to the assessee by holding that when the income earned by the assessee out of investments in securities using specialized professional services of PMS – Kotak Securities Ltd., such income becomes taxable under the head 'Capital Gains' and the same should not be construed as 'Business Income'. The contents of para 5.3.2 of the order of CIT(A) is

relevant in this regard. For the purpose of completeness, we already extracted the relevant paragraphs from the decision of Pune Bench in the case of Shri Apoorva Patni Vs. Addl.CIT (supra). Further, it is not the case of Revenue that there is a difference on facts which matters for taking a different decision by us and also for holding that the said decision in the case of Shri Apoorva Patni Vs. Addl.CIT (supra) is in-applicable to the facts of present appeals. From this point of view, the issue raised in the present appeals is identical to the issue before the Tribunal in the case of Shri Apoorva Patni Vs. Addl.CIT (supra). Therefore, the grounds raised by the Revenue in all the five years are dismissed.

11. In the result, all the 5 appeals of Revenue are dismissed.

Order pronounced on this 20th day of June, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 20th June, 2018
GCVSR

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-3, Pune
4. The Pr CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "SMC" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,स

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune