

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND  
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.2228/M/2012  
Assessment Year: 2007-08**

M/s. Urudavan Investment and Trading Pvt. Ltd., 209-210 2 <sup>nd</sup> Floor, Arcadia Bldg., 195, Nariman Point, Mumbai – 400 021 <b>PAN: AAACU 1353M</b>	Vs.	The Commissioner of Income Tax-2, Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

**ITA No.6441/M/2014  
Assessment Year: 2007-08**

DCIT-2(3), R.No.552, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020	Vs.	M/s. Urudavan Investment and Trading Pvt. Ltd., 209-210, Arcadia Bldg., 195, Nariman Point, Mumbai – 400 021 <b>PAN: AAACU 1353M</b>
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Vijay Mehta, A.R.  
Revenue by : Shri G.M. Doss, D.R.

Date of Hearing : 12.08.2015  
Date of Pronouncement : 16.12.2015

**ORDER**

**Per Sanjay Garg, Judicial Member:**

The above captioned are two appeals relevant to the same assessment year. One has been filed by the assessee agitating the order of the Commissioner of Income Tax [hereinafter referred to as the CIT] dated 20.03.2012 passed under section 263 of the Act. The other one is the appeal of the Revenue against the order of the Ld. CIT(Appeals) dated 11.07.2014

wherein the Revenue has agitated the action of the Ld. CIT(A) in deleting the additions made under section 143(3) r.w.s. 263 of the Act.

2. The Ld. Representatives of the parties have submitted that since the issue is small, hence the appeal of the Revenue may be heard first. So first we take up the appeal of the Revenue i.e. ITA No.6441/M/2014.

### **ITA No.6441/M/2014**

3. The Revenue in this appeal has agitated the deletion of the disallowance of Rs.88,44,792/- made by the Assessing Officer (hereinafter referred to as the AO) on account of proportionate expenditure attributable to capital gains.

The brief facts of the case are that the assessee filed its return for the assessment year under consideration on 29.10.07 declaring total income at Rs.5,29,77,133/-. Assessment under section 143(3) was completed on 21.05.09 assessing the total income at Rs.5,46,22,860/-. The said assessment order was set aside by the Ld. CIT vide order dated 21.03.12 passed under section 263 of the Act and directed the AO to make a fresh assessment in respect of the following two issues.

The assessee has shown short term capital gain of Rs.37,52,677/- from transactions where shares were sold within 15 days. The issue is set aside to examine sale of shares within a short span of 15 days was made with the intention of booking quick profits and as such was to be taxed as income from business and profession.

b. The professional fees paid to PHF International should have been allocated proportionately towards trading income and capital gains and hence to examine the proportionate allocation of such expense.”

4. In the set aside proceedings, on the issue of capital gains, the AO accepted the contention of the assessee and did not make any addition. However, on the issue of professional fees, the AO noted that the assessee had debited a sum of Rs.2,01,01,800/- on account of professional fees paid to M/s. PFH Entertainment Ltd. for providing advisory services in the field of investment. He further noted that the assessee's income consisted of profit on income from trading and speculation amounting to Rs.2,94,53,170/- and short

term capital gain of Rs.2,30,97,562/-. He asked the assessee to explain as to why professional expenses should not be proportionately allocated between business income and income from investments and the expenses relating to investments be not disallowed. The assessee submitted before the AO that the professional fees paid to M/s. PFH Entertainment Ltd. for advisory services in the area of Future and Options (F&O) on the basis of research conducted for various industries and as such, it was related to the business activities of the assessee. The AO, however, did not agree with the explanation given by the assessee and held that the professional fees was paid for both business and investment income. He, therefore, apportioned the fees between the F&O segment and short term capital gain and attributed the sum of Rs.88,44,792/- to the capital gains and disallowed the same. Being aggrieved by the order of the AO, the assessee preferred appeal before the Ld. CIT(A).

5. The Ld. CIT(A), after hearing the Ld. Representatives of the parties, deleted the additions made by the AO observing that the assessee had furnished the documentary evidence such as certificate along with the copy of invoice from M/s. PFH Entertainment Ltd. stating that the said party had recommended the timing of purchase and sale in F&O segment. Even during the original assessment proceedings, the authorized person from M/s. PFH Entertainment Ltd. had also appeared before the AO and his statement in this respect was also recorded. The Ld. CIT(A), after appreciation of the evidences on the file, held that the advisory services were given by the M/s. PFH Entertainment Ltd. relating to the business activity of the assessee. The relevant findings of the Ld. CIT(A) for the sake of convenience are reproduced as under:

“6.3 I have considered the above submissions of the appellant as well as the facts of the case. The AO has, while passing the impugned order observed that the appellant had debited a sum of Rs.2,01,01,800/- on account of professional fees paid to PFH Entertainment Ltd for providing advisory services in the field of investments. Such professional fees were related to share transactions, advisory services for stocks, restructuring of portfolio, demat charges and

stamp charges etc. Therefore he concluded that the professional fees were both for the business of trading in shares and investment segment. Accordingly, 44% of the professional service fees at Rs.88,44,792/- were disallowed from the business income and held to be attributable to capital gains. As against this decision of the AO, it may be seen that the appellant has furnished a certificate along with the copy of invoice from PFH Entertainment Ltd stating that the said party had recommended the timing of purchase and sale of a) Maharashtra Seamless Ltd, b) Sterlite Industries Ltd and c) IPCL Ltd. Accordingly, the appellant, by trading in these shares made profit of Rs.10,75,57,943/- in F&O segment. The details of these transactions are as under:

Particulars	Amount (Rs.)
d) Maharashtra Seamless Ltd.	6,28,59,954.00
e) Sterlite Industries Ltd.	2,01,94,973.00
f) IPCL Ltd.	2,45,03,016.00
Total	10,75,57,943.60

6.4 The AO has, in spite of a confirmation from PFH Entertainment Ltd made his own conclusion and divided the fees for professional services between trading/business income and capital gains income, without conducting any independent enquiries and without controverting the certificate given by PFH Entertainment Ltd. The AO has only relied upon the MOU between the appellant and PFH Entertainment Ltd, while making disallowance of Rs.88,44,792/- in respect of the claim of professional fees against business income. The AO has not at all commented about the certificate given by the PFH Entertainment Ltd, the relevant part of which is as under:

"Nature of services provided - the invoice raised on UITPL is enclosed herewith. We have provided timely advisory services in the area of investment i.e. purchase or sale of shares in Future or Options segment on the basis of research conducted for various industries. This report mainly contains the investment strategy which is recommended by us after vetting the view of various experts belonging to diversified industries. Specifically, we had recommended the timing of purchase and sale of following scripts wherein UITPL has made exorbitant profits viz Maharashtra Seamless, Sterlite, JPCL."

6.5 The above certificate given by PFH Entertainment Ltd has not been proved by the AO either to be false or devoid of the merits. It may also be noted that during the course of original assessment proceedings, the Authorised person from PFH Entertainment Ltd had also appeared before the AO and his statement was also recorded. Accordingly, the expenditure of professional fees of Rs.2,01,01,800/- was allowed to the appellant as business expenditure. Further, PHF Entertainment Ltd has treated the fees of Rs.2,01,01,800/- as their business income and paid taxes accordingly for AY 2007-08. The nexus of the fees of Rs.2,01,01,800/- with the business income of the appellant can be seen from the invoice raised by PFH Entertainment Ltd alongwith the detailed note as well as the actual purchase and sales made by the appellant in the above said three scripts.

6.6 An assessee is entitled to carry out his business as is expedient for him to do.

The revenue cannot step into the shoes of the businessman and on its own decide as to what expenditure incurred is relatable to which part of the income on the basis of assumptions and surmises, unless the same is established by the revenue beyond doubt. It is the businessman's concern how to run the business. This view is supported by a number of decisions some of them being Walchand & Co. Pvt. Ltd, 65 ITR 381 (SC), Dhawan Investment & Trading Co. Ltd, 100 Taxman 562 (Cal) etc.

6.7 The AO has cited the Supreme Court judgement in the case of Sumati Dayal (supra), which cannot be said to be applicable to the present case of the appellant. In that case Hon'ble Supreme Court laid down the principle of 'preponderance of probabilities'. This decision, instead of favouring the case of the revenue, rather favours the case of the appellant, where by virtue of the principle of 'preponderance of probabilities', it can very well be said that the professional fees were paid by the appellant for the trading in F & O segment of three scripts namely, Maharashtra Seamless Ltd, Sterlite Industries Ltd and IPCL Ltd, whereby the appellant made a huge profit of Rs.10,75,57,943/- and thus by virtue of the preponderance of probabilities, the professional fees of Rs.2,01,01,800/- must have been paid by the appellant for the advisory received in respect of the three scripts.

6.8 In the circumstances therefore, the decision of the AO does not appear to be justified. The AO is directed to delete the disallowance of Rs.88,44,792/- from the business income."

6. We do not find any infirmity in the above factual finding given by the Ld. CIT(A) which is based on the appreciation of the evidences on the file. There is no merit in the appeal of the Revenue and the same is accordingly dismissed.

7. Now coming to the appeal of the assessee i.e. ITA No.2228/M/2012.

### **ITA No.2228/M/2012**

8. The assessee has agitated against the revision of the assessment order under section 263 of the Act. However, we find that the additions made by the AO during the fresh assessment proceedings in compliance of the order of Ld. CIT under section 263, have already been deleted by the Ld. CIT(A) which order has been upheld by us in view of the above discussion while deciding the appeal of the Revenue.

Hence, the issue of revision of the assessment order under section 263 is rendered academic at this stage. We do not think it proper at this stage to deliberate upon the merits of the action of the Ld. CIT in invoking the

provisions of section 263 of the Act at this stage. The appeal of the assessee has, thus, become infructuous and is disposed of accordingly.

9. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is also treated as dismissed for statistical purposes.

**Order pronounced in the open court on 16.12.2015.**

**Sd/-**  
**(D. Karunakara Rao)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(Sanjay Garg)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 16.12.2015.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.