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

BEFORE SHRI G.S. PANNU (VP) AND SHRI RAM LAL NEGI (JM)

ITA No. 2998/MUM/2011
Assessment Year: 2005-06

Shyam Sunder Duggal, HUF, Flat No. 21B, Grande Parade Bldg., August Kranti Marg, Kemps Corner, Mumbai - 400036 PAN: AABHD8522M	**Vs.**	The ACIT, Cir, 16(1), Matru Mandir, Grant Road (West), Mumbai - 400007
(Appellant)		**(Respondent)**

Assessee by : Shri Bhupendra L. Kenia (AR)

Revenue by : Shri V. Justin &
Suhas Kulkarni (DR)

Date of Hearing: 30/11/2018
Date of Pronouncement: 22/02/2019

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against order dated 15.02.2011 passed by the Ld. Commissioner of Income Tax (Appeals)-25, Mumbai, for the assessment year 2005-06, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the act').

2. Brief facts of the case are that the assessee having income from capital gains and other sources of income, filed its return of income for the assessment year under consideration declaring the total income of Rs. 19,52,790/-. Since, the assessee had claimed Advisory Management fees of Rs. 7,77,744/- paid to Portfolio Management services, the AO asked to explain as to why the claim

should not be rejected. After hearing the assessee AO rejected the claim of the assessee and determined the total income of the assessee at Rs. 27,30,530/-. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee dismissed the appeal and confirmed the disallowance made by the AO. Against the said findings of the Ld. CIT (A) the assessee is in appeal before the Tribunal.

3. The assessee has preferred present appeal before the Tribunal on the following effective ground:-

> *"On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) was not justified in confirming the disallowance of Rs. 7,77,000/- being Advisory fees paid to Portfolio Managers as deduction claimed against Short Term Capital gains on shares for the above said Asst. Year."*

4. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has wrongly confirmed the disallowance made by the AO on account of payment of Rs. 7,77,744/- made towards Portfolio Management fees. The Ld. counsel further contended that the assessee paid fees to Portfolio Management M/s Kotak Security Ltd. for rendering services for purchasing shares at the lowest price and selling the same at the best possible price. As a result of which the assessee earned short term capital gains of Rs. 26,66,586/-. Therefore, it was an expenditure wholly and exclusively incurred for earning the short term capital gain. The Ld. counsel relied on the judgment of the Hon'ble Delhi High Court in the case of *M/s Plash Food Private Ltd. 198 Taxation 220 (Delhi)* in which the Hon'ble High Court upheld the decision of the Tribunal vide which the Tribunal had allowed the similar claim of the assessee. The Ld. counsel further relied on the following decisions of the Tribunal to substantiate the claim of the assessee:

1. *DCIT- Circle-11, Pune vs. KRA Holding and Trading Pvt. Ltd., Pune and KRA Holding and Trading Pvt. Ltd vs. DCIT, ITA No. 356 and 240/PN/2011, A.Y. 2007-08.*
2. *Serum Institute of India Ltd. vs. ACIT, Pune ITA No. 1576/PN/2012, A.Y. 2007-08.*
3. *RDA Holding and Trading Pvt. Ltd. vs. ACIT Pune, ITA No. 2166/PN/2013.*

5. On the other hand, the Ld. Departmental Representative (DR) relying on the concurrent findings of the authorities below, submitted that under the head capital gain such expenses are not allowable because the same do not pertinent to cost of acquisition of a particular capital asset and the fee paid for PMS relates to managing of funds and commissions and all types of services. Hence, it cannot be said that the expense relates to cost of acquisition of capital asset. The Ld. DR relied on the following decisions of the Tribunal to counter the claim of the assessee.

1. *Shri Homi K Bhabha vs. ITO, Mumbai, ITA No. 3287/Mum/2009 A.Y. 2006-07.*
2. *Capt. Avinash Chandra Batra vs. DCIT-Mumbai (2016) 68 taxman.com 366 (Mumbai Tribunal).*
3. *Devendra Moti Lal Kothari vs. DCIT 132 ITD 173 (Mum) 2011.*

6. We have heard the rival submissions and also gone through the entire material available on record including the cases relied upon by the parties in the light of their contentions. The only grievance of the assessee is that the Ld.CIT (A) has wrongly confirmed the addition of Rs. 7,77,000/- made by the AO by making disallowance of fees paid to Portfolio Managers. As is clear from the record that the assessee paid Rs. 7,77,744/- to PMS providers and claimed the said amount on the ground that the said expenses is allowable expenditure u/s 48 of the Act. But, the AO rejected the contentions of the assessee holding that the management fees paid to Portfolio Managers cannot be treated as the expenditure incurred wholly and exclusively in connection with the transfer of

capital assets. The contention of the assessee is that since the assessee is not an expert in buying the selling of shares, appointed M/s Kotak Securities Ltd. for purchase and sale of shares and the amount was paid towards management fees. The Ld. counsel further argued that the claim of the assessee is in accordance with the principles laid down by the Hon'ble Delhi High Court in the case of *CIT vs. Plash Food Pvt. Ltd.* (supra). In the said case, the assessee had claimed deduction of brokerage stamp duty and other expenses incurred in connection with the transfer of shares u/s 48 of the Act. The AO restricted the expenditure to 5% of the sale consideration. In the first appeal, the CIT (A) gave partial relief to the assessee and on further appeal, the ITAT allowed the total expenditure claimed by the assessee. The revenue challenged the order of the ITAT before the Hon'ble High Court. The Hon'ble High Court dismissed the appeal of the revenue holding that no substantial question of law arises for consideration.

7. In the case of *DCIT-Pune vs. KRA Holdings and Trading Pvt. Ltd*. (supra), the Pune Bench of the Tribunal has allowed the claim of the portfolio management fees as an allowable expenditure. Discussing the decision of the Mumbai Bench in the case of *Homi K. Bhabha vs. ITO*, (supra), the Pune Bench has allowed the appeal of the assessee by following the principle of law laid down by the Hon'ble Supreme Court in the case of *CIT vs. Vegetable Products 88 ITR 192* (SC) that when two views are possible on the same issue, the view which is favourable to the assessee should be followed.

8. Similarly, in the case of *Serum Institute of India vs. ACIT* (supra), the Pune Bench of the Tribunal following the decision rendered in *KRA Holding and Trading Pvt. Ltd*. held that PMS fee paid by the assessee is an allowable deduction from the capital gains.

9. On the other hand, the coordinate Bench in the case of *Shri Homi K. Bhabha vs. ITO* (supra) has decided the identical issue against the assessee. Similarly, in the case of *Devendra Moti Lal Kothari vs. DCIT* (supra) the coordinate Bench has upheld the order passed by the Ld. CIT (A), whereby the Ld.CIT (A) had confirmed the disallowance made on account of deduction claimed by the assessee towards fees for PMS while computing long term capital gain and short term capital gain holding that the same does not come within the ambit of cost of acquisition of shares in question. In the case of *Capt. Avinash Chandra Batra vs. DCIT* (supra), the Tribunal has held that the assessee is not entitled to claim deduction of the amount paid towards portfolio management service fees to various Portfolio Managers while computing capital gain arising from sale of shares.

10. Hence we notice that the Pune Bench of the Tribunal in the cases of *DCIT vs. KRA Holdings, RDA Holdings and Trading Pvt. Ltd. vs. ACIT* and *Serum Institute of India Ltd. vs. ACIT* (supra) have decided the similar issue in favour of the assessee by following the principle of law laid down by the Hon'ble Supreme Court in the case of *CIT vs. Vegetable Products 88 ITR 192 (SC)* in the case of *Serum Institute of India vs. ACIT* the Pune Bench has decided this issue in favour of the assessee holding as under:-

> *"13. We have carefully considered the rival submissions and also the precedent in the assessee's own case by way of the order of the Tribunal dated 25.07.2012 (supra). In the said case, the Tribunal considered the allowablity of expenditure incurred by way of payment of fees of ENAM Asset Management Company Pvt. Ltd. in terms of the investment agreement dated 01.01.2005, which is precisely the issue before us also. The Tribunal referred to its earlier decision in the assessee's own case for assessment year 2004-05 vide order dated 31st May, 2011 (supra) and noticed that the issue has been decided in favour of the assessee. Thereafter, the Tribunal*

noted that against the decision of the Tribunal dated 31st May, 2011 (supra), Revenue preferred an appeal before the Hon'ble Supreme Court only on the ITA No. 1617/PN/2012 issue treatment of income from the sale of shares as capital gain or business income and that the Revenue had not preferred any appeal against the order of the Tribunal allowing the claim of deduction of expenditure by way of Portfolio Management Fee representing payments to ENAM Asset Management Company Pvt. Ltd. while computing the income under the head 'Capital Gains'. After noticing the aforesaid the Tribunal concluded as under in para 11 of its order dated 25.07.2012:-

"11. The decision of the Mumbai Bench of the Tribunal in the case of Homi K. Bhabha vs. ITO was brought to our notice by the learned DR wherein it was held that Portfolio Management Scheme fees is not deductible against capital gains. The decision of the Pune Bench of the Tribunal in the case of KRA Holding & Trading was not followed by the Mumbai Bench in the above cited decision. The Mumbai Bench following other decision of the coordinate Benches of the Tribunal declined to follow the decision in the case of KRA Holding & Trading (supra). It is the settled proposition of law that when two view are possible on the same issue the view which is favorable to the assesse has to be followed. [CIT vs. Vegetable Products 88 ITR 192 (SC)]. Further, in the instant case the Tribunal in assessee's own case has already taken a view in favour of the assessee. Since, the AO & CIT (A) have followed the order for earlier year in the case of the assessee. And since the order of CIT (A) for earlier year has been reversed by the Tribunal, therefore, unless and until the decision of the Tribunal is reversed by a higher court, the same in our opinion should be followed. In this view of the matter, we respectfully following the order of the Tribunal in assessee's own case for A.Y.

2004-05 allow the claim of the Portfolio Management fees as an allowable expenditure. The ground raised by the assessee is accordingly allowed."

11. In view of the fact that the ITAT, Pune Benches have decided the similar issue in favour of the assessee by following the principle of law laid down by the Hon'ble Supreme Court in the case of *CIT vs. Vegetable Products* (supra), we respectfully following the same principle, allow the sole ground of the appeal of the assessee and hold the Portfolio Management Fees claimed by the assessee as an allowable expenditure.

In the result, appeal filed by the assessee for assessment year 2005-2006 is allowed.

Order pronounced in the open court on 22nd February, 2019.

Sd/-	*Sd/-*
(G.S. PANNU)	(RAM LAL NEGI)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 22/02/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

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