IN THE ITAT PUNE BENCH 'B'

Apoorva Patni

v.

Additional Commissioner of Income-tax, Range-2, Pune*

I.C. SUDHIR, JUDICIAL MEMBER

AND G.S. PANNU, ACCOUNTANT MEMBER

IT APPEAL NOS. 192, 193, 239 & 273 TO 276 (PN) OF 2011

[ASSESSMENT YEAR 2006-07]

JUNE 21, 2012

ORDER

G. S. Pannu, Accountant Member - The captioned proceedings relate to four assessees belonging to the same family and since the issue involved is common, all the appeals were heard together and are being disposed off by way of a consolidated order for the sake of convenience and brevity.

2. We shall first take up departmental appeal in the case of Shri Apoorva A Patni vide ITA No 276/PN/11 as the lead case. This appeal by the Revenue is directed against the order dated 28.12.2010 passed by the Commissioner of Income-tax (Appeals)-II, Pune, which in turn has arisen from the order dated 22.12.2008 of the Assessing Officer passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') for the assessment year 2006-07.

3. In this appeal, the substantive dispute raised by the Revenue is directed against the decision of the Commissioner of Income-tax (Appeals) in holding that the activity of transacting in shares/mutual funds by engaging a Portfolio Management Services (in short 'the PMS") was an investment activity so as to assess the resultant gains under the head 'capital gains' and not as 'business income', as contended by the Assessing Officer.

4. Briefly the facts giving rise to the aforesaid dispute as also the reasoning advanced by the Assessing Officer can be summarized as follows. The assessee an individual filed her return of income for the assessment year 2006-07 declaring a total income of Rs 13,95,40,653/- under various heads of income, viz. income from house property, business income, capital gains and income from other sources. The income declared under the head capital gains included short term as well as long term capital gain on investments made through the PMS providers. Besides, the assessee has also declared capital gains, both long term and short term, from direct dealing in mutual funds, investments also. Apart from the aforesaid dealings in shares and securities, the assessee also had a portfolio wherein income from share and securities transactions was declared

as business income. In this factual background, the Assessing Officer treated the short term as well as long term capital gain earned through the investments made through PMS providers amounting to Rs 3,86,38,849/- (as detailed in para 10 of the assessment order) as income which was liable to be assessed as 'business income' and not under the head 'Capital gains'. The income from such activity declared by the assessee as capital gains was reworked for being assessed under the head 'business income' by allowing deduction for certain expenses amounting to Rs 22,48,024/- and accordingly income was computed at Rs 3,63,90,825/- which has since been assessed as business income. The Commissioner of Income-tax (Appeals) has, however, upheld the contentions of the assessee that the gain from investments made through the PMS provider was assessable under the head capital gains and against such stand of the Commissioner of Income-tax (Appeals), Revenue is in appeal before us.

5. The Assessing Officer has made elaborate discussion on the aspect as to why the gain on investments made through PMS provider could not be assessed under the head 'capital gains' and his conclusions can be found in para 9 of the assessment order. As per the Assessing Officer, the PMS provider is vested with a lumpsum amount for effecting purchase and sale of shares so as to make profits thereon and that such activity is carried out by the PMS provider as an agent on behalf of his client which, in the present case, is the assessee. As per the Revenue, in this manner the conduct of trading in shares by PMS provider is to be seen as one which has been done on behalf of the assessee. It is also pointed out that all the purchases and sales are effected in the name of the assessee, inasmuch as the delivery of the shares are received and given out of the Demat account maintained in the name of the assessee. With regard to the instant case, the Assessing Officer noticed that the PMS provider has conducted purchase and sale and thereafter repurchased the same scrips for sales again and, therefore, it was an activity involving trading in shares and not as an investor; that all the transactions carried out through the PMS provider were short term in nature with the motive of selling the shares at higher rates and booking profits thereon; that even the fee charged by the PMS provider is a percentage of daily asset value of holding in the account of the client which shows that the arrangement is with an intention to carry out business; that PMS provider carries out an organized and systematic activity of transacting in shares on behalf of the assessee which is akin to a business activity. That the PMS provider does not guarantee any return which shows that the risks associated with the trading are to be borne by the assessee which is akin to a business or trading activity. In the instant case, the Assessing Officer pointed out that the total number of scrips transacted by PMS provider was 62 which shows a high volume of transactions. As per the Assessing Officer, having regard to the facts and circumstances of the present case, the assessee could be said to have been engaged in the purchase and sale of shares in an organized and systematic manner and such activity constituted business and therefore, according to him, the instant gain earned on investments made through the PMS provider was assessable as business income.

6. In appeal before the Commissioner of Income-tax (Appeals), the assessee assailed the order of the Assessing Officer in law and on facts. As per the assessee, the Assessing Officer failed to appreciate a clear-cut distinction maintained by the assessee with regard to its activities of share dealing which were segregated into business and investment activities. That intention and conduct of the assessee, as reflected through the books of account, could not be ignored to hold that the investment carried out through PMS provider was a business activity. As per the assessee, the Assessing Officer erred in wrongly appreciating the role of the PMS provider. In

particular, the assessee pointed out that he was having his share trading business whose income was separately disclosed as business income as distinct from investment activity carried out through PMS provider. It was explained before the Commissioner of Income-tax (Appeals) that the assessee had carried out the entire activity of making investment through the PMS provider out of own funds and there were no borrowings and that the assessee was also making investments directly in mutual funds to get the benefits of dividend income and appreciation in capital. As a policy for investment of funds, the assessee adopted the approach of diversification and for that reason it appointed the PMS providers and accordingly parked funds with the objective of making investments. In particular, the assessee explained the nature and character of services offered by PMS provider and statutory provisions governing the role of a PMS provider. With regard to the volume and frequency of share transactions pointed out by the Assessing Officer, the assessee explained that the activity in shares which has been declared as trading activity in comparison would show that there was much lower activity in the PMS investments. It was also explained that in the instant case, the PMS scheme under which the assessee invested was a Discretionary Portfolio Management scheme wherein the assessee did not dictate to the PMS provider as to which shares and securities were to be transacted and, on the contrary, only broad policy was given out by the assessee. The Commissioner of Income-tax (Appeals) has elaborately elucidated the rival stands taken by the Assessing Officer as well as by the assessee and we find that a remand report was also called for from the Assessing Officer. The Commissioner of Income-tax (Appeals) after considering the submissions and the claims of the Assessing Officer has made two-fold findings. Firstly, on the basis of the general principles for deciding whether the transactions are in the nature of investments or trading investments, he has concluded that in the instant case, the transactions bear the nature of investments and the gain thereof is liable to be assessed as capital gains. Secondly, as per the Commissioner of Income-tax (Appeals), the investment activities through PMS provider are on account of a Discretionary Portfolio Management Service agreement. Considering this aspect also, he has concluded that such transactions in shares through the PMS provider was to be viewed as an investment activity resulting in assessability of gain under the head 'capital gains' and not as 'business income'. In coming to the latter conclusion, the Commissioner of Income-tax (Appeals) has referred to and relied upon the decision of the Pune Bench of the Tribunal in the case of *ARA Trading & Investment (P.) Ltd.* v. *Dy. CIT* [2011] 47 SOT 172/13 taxmann.com 20 and *KRA Holding & Trading (P.) Ltd.* v. *Dy. CIT* [2011] 46 SOT 19/11 taxmann.com 250 (Pune). Accordingly, the action of the Assessing Officer was not upheld by the Commissioner of Income-tax (Appeals) and instead, the gain on investments made through the PMS provider has been directed to be assessed under the head capital gains.

7. Against the aforesaid twin findings of the Commissioner of Income-tax (Appeals), the Revenue is in appeal before us. Before us, the learned Departmental Representative, appearing for the Revenue, pointed out that the Assessing Officer was justified in holding that the transactions carried out through the PMS provider were to result in business income, inasmuch as the transaction in shares was carried out by the PMS provider in an organized and systematic manner so as to be viewed as a business activity. In particular, it has been pointed out that the transaction in shares though carried out through the agency of a PMS provider were high in volume, frequency and in an organized manner and, therefore, the same constituted business activity. Apart from making aforesaid submissions, the learned Departmental Representative relied upon the reasoning extended by the Assessing Officer in support of the case of the

Revenue which have already been noticed by us in para 5 above and are, therefore, not being repeated for the sake of brevity.

8. On the other hand, the learned representative for the respondent-assessee, at the time of hearing, exhaustively referred to the discussion made by the Commissioner of Income-tax (Appeals) in the impugned order on each and every point made out by the Assessing Officer and supported the conclusions of the Commissioner of Income-tax (Appeals). The learned Counsel briefly pointed out that even at the time of appointing the PMS provider the assessee had spelt out the 'Investment Objective' which was contained in the Discretionary Portfolio Management Services agreement with the respective PMS providers. In this context, a reference was made to agreement with DSP Marrill Lynch Fund Managers Ltd. copy of which has been placed in the Paper Book at pages 137 to 171 to point out that the Investment Objective set out by the assessee was to achieve a reasonable return over a long term by investing in a focused portfolio of 15-20 stocks with good growth prospects, across various sectors and further that being erstwhile promoter of Patni Computer Systems and PSS Industries Ltd., he had specifically advised the PMS provider that no transactions should be carried out in such companies. It was emphasized that all along the intention of the assessee to carry out investments through the PMS provider was for long term growth and capital appreciation and that since the assessee opted for Discretionary Portfolio Management services from the PMS provider, the actual decision to invest in particular shares, their frequency etc., were all matters of discretion of the PMS provider and the assessee had no role to play in such decision making, except giving a broad investment objective. Secondly even with regard to the level of frequency and the volumes, the learned Counsel pointed out to pages 75 to 79 of the Paper Book wherein is placed the details of the number of scrips dealt with in the investment activity and the trading activity respectively. According to the learned Counsel, the aforesaid comparison shows that the level of activity, frequency and volumes was much higher n the case of trading activity which has been declared as business income and the same could not be said about the activity of investment carried out through the PMS provider. Further-more, it is also pointed out that the assessee has reflected the aforesaid activity as an investment activity and all such investments have been valued at cost, which shows that the same has not been treated as a stock-in-trade of the business. The learned Counsel emphasized that the intention to act as an investor also stands reaffirmed by a subsequent year development, wherein the capital loss suffered on such activity has not been claimed as a set off against the share trading income offered for assessment as business income. For this aspect, reference has been made to the observations of the Commissioner of Income-tax (Appeals) contained in para 4.1.3 of the impugned order. Therefore, the learned Counsel submitted that the Commissioner of Income-tax (Appeals) has fairly differed with the observations of the Assessing Officer that the volume and frequency of the transactions in this case was not of the manner to be regarded as a business activity. Even with regard to the role of the PMS provider, the learned Counsel vehemently pointed out that the nature of the relationship with the PMS provider in the instant case has been adequately and properly dealt with by the Commissioner of Income-tax (Appeals) and following the decision of the jurisdictional Bench of the Tribunal in the case of *ARA Trading & Investments (P.) Ltd.* (*supra*) and *KRA Holding & Trading (P.) Ltd.* (*supra*), the issue has been appropriately dealt with. Apart therefrom, the learned Counsel also pointed out that the Mumbai Bench of the Tribunal in a similar decision in the case of *ITO* v. *Radha Birju Patel* [2011] 46 SOT 23/11 taxmann.com 293 (URO) has observed that the investments through the PMS provider is intended for maximization of wealthy

and not for encashing of profits as a business activity. In this manner, the learned Counsel for the assessee sought to defend the order of the Commissioner of Income-tax (Appeals).

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 lump-sum 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 & Investments (P.) Ltd.* (*supra*) and *KRA Holding & 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 & Investments (P.) Ltd.* (*supra*) and *KRA Holding & 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 hold 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 on 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 there 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.

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.

16. The only other Ground raised by the Revenue in this appeal is with regard to the addition of Rs 16,800/- under head 'income from house property' made by the Assessing Officer, which has since been deleted by the Commissioner of Income-tax (Appeals). In this regard, the facts are that with respect to a property at 1, Amrutnagar, New Delhi, the assessee had declared its annual value at NIL by applying provisions of section 23(1)(c) of the Act on the ground that such property remained vacant during the year under consideration while it was let out in the earlier years till May, 2002 and again in the subsequent period from May 2007 it was let out. The Assessing Officer disagreed with the assessee on application of section 23(1)(c) of the Act on the ground that there was no material to show that any effort was made by the assessee to let out the property during the financial year 2005-05 relevant to the assessment year under consideration. Accordingly, the annual value of the property was adopted on the basis of fair rent of Rs 20,000/- per month and after allowing statutory deduction of 30% under section 24 of the Act, income chargeable under the head house property was computed at Rs 1,68,000/-. The Commissioner of Income-tax (Appeals) has since upheld the invoking of section 23(1)(c) of the Act by the assessee, following the decisions of the Mumbai Bench of the Tribunal in the case of *Premsudha Exports (P) Ltd* v. *Asstt. CIT* [2008] 110 ITD 158 and of the Pune Bench in the case of Shri Vijay M. Athavale and accordingly, the addition has been deleted.

17. Before us, the leaned Departmental Representative submitted that the Commissioner of Income-tax (Appeals) has not properly appreciated the factual position in the present case, which did not justify invoking of section 23(1)(c) of the Act because there was no effort made to let out the property during the year and, therefore, it cannot be said that the property remained vacant for non-availability of a tenant or for any other justified reasons.

18. On the other hand, the learned Representative of the respondent-assessee has relied upon the reasoning advanced by the Commissioner of Income-tax (Appeals) in deleting the addition in support of his stand.

19. We have considered the rival submissions. Sub-section (1) of section 23 prescribes the manner in which annual value of any property is to be ascertained for the purpose of section 22 of the Act. Clause (a) prescribes that the annual value of any property shall be the sum for which it can be let out from year to year. Clause (b) applies in a case where the property or any part of the property is let and the actual rent received or receivable is in excess of the sum referred to in clause (a), then the amount so received or receivable shall be taken to be the annual value of the property. Clause (c) prescribes that where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), then the annual value of the property shall be the amount so received or receivable. The controversy before us is with regard to clause (c) in terms of which it is contended by the assessee that the impugned property was let out in the past and was vacant during the year and owing to such vacancy, the actual rent received was NIL and, therefore, the same be assessed as annual value for the purpose of section 22 of the Act. For that matter, the Commissioner of Income-tax (Appeals) has also relied upon the decision of the Tribunal in the case of *Premsudha Exports (P.) Ltd.* (*supra*) and *Shri Vijay M. Athavale* (*supra*) in accepting the position canvassed by the assessee. In the aforesaid decisions, it was held that the expression "property is let" in section 23(1)(c) does not mean that the property should have been actually let for any time in the

relevant previous year, but it would be sufficient that the property was "intended to be let out" and that it was not meant for self-occupation and under these circumstances, invoking of section 23(1)(c) of the Act shall be justified. On the aforesaid proposition laid down by our co-ordinate Bench, there is no quarrel. So, however, in the present case before allowing the benefit of section 23(1)(c) to the assessee, it is for the assessee to establish that the property was intended to be let and it remained vacant in the absence of it being occupied by a tenant. In fact, the Assessing Officer has made a finding to the effect that no effort has been made by the assessee to let out the property during the year under consideration and there is no controversion to the aforesaid finding of the Assessing Officer. Therefore, factually in the present case it cannot be made out that the property was "intended to be let out" as observed by the Tribunal in the aforesaid precedents and, therefore, in our view, the Commissioner of Income-tax (Appeals) has erred in applying the aforesaid decisions in deleting the addition made by the Assessing Officer. Therefore, we set aside the order of the Commissioner of Income-tax (Appeals) and restore that of the Assessing Officer with regard to the impugned addition. Accordingly, the Revenue succeeds on this Ground.

20. In the result, the appeal of the Revenue, vide ITA No 276/PN/11, is partly allowed.

21. In ITA No 275/PN/11 filed by the Revenue in the case of Shri Arihant G Patni, both the issues raised are same as in the case of Shri Apoorva Patni, vide ITA No 276/PN/11.

22. The facts and submissions of rival sides being similar in this appeal, our decision given in the case of Shri Apoorva Patni, vide ITA No 276/PN/11 will apply mutatis mutandis to this appeal also. On the parity of reasoning, therefore, ITA No. 275/PN/11 is partly allowed.

23. In the other two appeals filed by the Revenue in ITA Nos 273/PN/11 and 274/PN/11 in the cases of Smt Shruti Patni and Ruchi A Patni respectively, the issue raised is against the decision of the Commissioner of Income-tax (Appeals) in holding that the activity of transacting in shares/mutual funds by engaging a PMS provider was an investment activity so as to assess the resultant gains under the head 'capital gains' and not as 'business income'. The facts and submissions of rival sides being similar in these appeals, our decision given in the case of Shri Apoorva Patni, vide ITA No 276/PN/11 will apply mutatis mutandis to this appeal also. On the parity of reasoning, therefore, both these appeals are dismissed.

24. Resultantly, Revenue's appeals, vide ITA Nos 276/PN/11 & 275/PN/11 are partly allowed, while ITA Nos 273/PN/11 & 274/PN/11 are dismissed.

25. We shall now take up the appeals filed by the individual assessees.

ITA No 239/PN/11 - Shri Apoorva A Patni

26. In this appeal, the first grievance of the assessee is with regard to a disallowance of Rs 3,85,666/- under section 14A of the Act, which has been sustained by the Commissioner of Income-tax (Appeals) in respect of exempted dividend income. In brief the facts are that the Assessing Officer found that the assessee had earned dividend income which was exempt and, therefore, expenditure in relation to earning of such income was disallowable under section 14A

of the Act. The Assessing Officer noticed that such dividend income was earned from both portfolios, i.e. share trading business portfolio as also on investments made through PMS provider, which was declared as capital gain in the return. The Assessing Officer attributed Rs 3,85,666/- as expenditure in relation to the dividend earned on account of share trading business and Rs 5,45,824/- was stated to be expenditure attributable to dividend income on shares dealt with as PMS activity. The Commissioner of Income-tax (Appeals) has deleted the addition of Rs 5,45,824/- and has retained the balance of Rs 3,85,666/- under section 14A of the Act against which the assessee is in appeal before us.

27. Before us, the learned Counsel for the assessee submitted that the impugned disallowance was in relation to a dividend income earned in the course of business activity and, therefore, the provisions of section 14A of the Act are not applicable and in support thereof, has relied upon the judgment o the Hon'ble Karnataka High Court in the case of *CCI Ltd* v. *Jt. CIT* [2012] 206 Taxman 563/20 taxmann.com 196.

28. On the other hand, the learned Departmental Representative has relied on the orders of the lower authorities in support of the case of the Revenue.

29. We have carefully considered the rival submissions. In the case of *CCI Ltd.* (*supra*), the assessee was, inter alia, a dealer in shares and securities and had earned dividend income on shares of certain companies. The Assessing Officer found that the assessee had raised interest bearing loans to part-finance the shares and it had also incurred brokerage for arranging such loans. The Assessing Officer held that such expenditure was directly attributable to the earning of dividend income and invoked section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962, to disallow the expenditure The Hon'ble High court was seized of the following question in the above background:

"Whether the provisions of section 14A of the Act are applicable to the expenses incurred by the assessee in the course of its business merely because the assessee is also having dividend income when there was no material brought to show that the assessee had incurred expenditure for earning dividend income which is exempted from taxation?"

Following discussion in the order of the Hon'ble High Court is worthy of notice:

"5. When no expenditure is incurred by the assessee in earning the dividend income, no notional expenditure could be deducted from the said income. It is not the case of the assessee retaining any shares so as to have the benefit of dividend. 63% of the shares, which were purchased, are sold and the income derived therefrom is offered to tax as business income. The remaining 37% of the shares are retained. It has remained unsold with the assessee. It is those unsold shares have yielded dividend, for which, the assessee has not incurred any expenditure at all. Though the dividend income is exempted from payment of tax, if any expenditure is incurred in earning the said income, the said expenditure also cannot be deducted. But in this case, when the assessee has not retained shares with the intention of earning dividend income and the dividend income is incidental to his business of sale of shares, which remained unsold by the assessee it cannot be said that the expenditure incurred in acquiring the shares has to be apportioned to the extent of dividend income and that should be disallowed from deductions. In that view of the matter, the

approach of the authorities is not in conformity with the statutory provisions contained under the Act. Therefore, the impugned orders are not sustainable and require to be set aside. Accordingly, we pass the following:

ORDER

(*i*) Appeal is allowed.

(*ii*) Impugned orders are hereby set aside.

(*iii*) The substantial question of law is answered in favour of the assessee and against the revenue."

In view of the aforesaid judgment, it is clear that where no expenditure is canvassed to have been incurred by the assessee in earning dividend income, no notional expenditure can be deducted by invoking section 14A of the Act. Further as per the Hon'ble High Court, in a case when assessee has not retained shares with the intention of earning dividend income and dividend income is incidental to the business of sale of shares, it cannot be said that the expenditure incurred in acquiring the shares has to be apportioned to the extent of dividend income so as to be disallowed. Following the aforesaid judgment, we set aside the order of the Commissioner of Income-tax (Appeals) and direct the Assessing Officer to allow appropriate relief to the assessee on this count. Thus, on this Ground the assessee succeeds.

30. The last Ground in this appeal is with regard to the closure of share trading business. The assessee claimed that during the year under consideration, he had closed the share trading business as on 31.3.2006 and the entire stock in trade of the shares was transferred to his capital account. The shares were transferred at cost. The Assessing Officer in para 12 of the assessment order did not accept the claim of the assessee of closure of the business of share trading in his proprietary concern. The Assessing Officer further noticed that the assessee had valued the stock at cost while transferring the shares into the capital account and, therefore, there was no effect on the income for the year under consideration. At the same time, the Assessing Officer observed that in future when the shares are sold, the resultant gain would be taxable as income from business and not as capital gains. Against the aforesaid observation of the Assessing Officer the assessee felt aggrieved and raised the issue in appeal before the Commissioner of Income-tax (Appeals). As per the Commissioner of Income-tax (Appeals), since the observation of the Assessing Officer had no implication in respect of the current year's assessment of income, no adjudication was called for on this issue. Not being satisfied with the aforesaid stand of the Commissioner of Income-tax (Appeals), assessee is in further appeal before us.

31. Before us, the learned Counsel for the assessee fairly conceded that the stand of the Assessing Officer had no implication for the assessment of current year's income. In this background of the matter, in our view, the dispute sought to be raised by the assessee has not affected the determination of the taxable income for the year under consideration and as such, the adjudication of such dispute is only academic in nature. Therefore, Commissioner of Income-tax (Appeals) made no error in refraining to adjudicate on this controversy. The action of the Commissioner of Income-tax (Appeals) is hereby affirmed. So however, the assessee shall be

within his right to raise this issue in the year in which it effects the actual determination of the total income, if so advised in law. In the result, we dismiss the Ground raised by the assessee as premature subject to our above observations.

32. In the result, the appeal of the assessee is partly allowed.

33. Now coming to ITA No 192/PN/11 filed in the case of Shri Arihant Patni, both the Grounds No. (1) & (2) raised are similar to those dealt by us in the case of Shri Apporva A Patni. In relation to Ground No. (1) involving disallowance under section 14A, we have held above that no disallowance under section 14A is called for and in that view of the matter, the said Ground has been decided in favour of the assessee. On the parity of reasoning, we hold so and thus the assessee succeeds on Ground No. 1.

34. Similarly in respect of Ground No. (2) relating to closure of share trading business of the assessee, we have affirmed the finding of the Commissioner of Income-tax (Appeals) that since the observation of the Assessing Officer had no implication in respect of the current year's assessment of income, no adjudication was called for on the said issue. On the parity of reasoning, we hold that the Commissioner of Income-tax (Appeals) made no error in refraining to adjudicate on this controversy. Accordingly, the assessee fails on this Ground.

35. In the result, the appeal of the assessee is partly allowed.

36. Now coming to ITA No 193/PN/11 filed in the case of Shri Arihant Patni, both the Grounds No. (1) & (2) raised are similar to those dealt by us in the case of Shri Apporva A Patni. In relation to Ground No.(1) involving disallowance under section 14A, we have held above that no disallowance under section 14A is called for and in that view of the matter, the said Ground has been decided in favour of the assessee. On the parity of reasoning, we hold so and thus the assessee succeeds on Ground No. 1.

37. Similarly in respect of Ground No. (2) relating to closure of share trading business of the assessee, we have affirmed the finding of the Commissioner of Income-tax (Appeals) that since the observation of the Assessing Officer had no implication in respect of the current year's assessment of income, no adjudication was called for on the said issue. On the parity of reasoning, we hold that the Commissioner of Income-tax (Appeals) made no error in refraining to adjudicate on this controversy. Accordingly, the assessee fails on this Ground.

38. In the result, the appeal of the assessee is partly allowed.