IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI I. C. SUDHIR, JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER

S. No	ITA No	Asstt.year
1.	500/PN/08	2004-05
2.	1320/PN/08	2005-06
3.	434/PN/09	2006-07

KRA Holding & Trading P. Ltd. .. Appellant
12 Boat Club Road,
Riverside Estate, Pune
PAN AAACK7301F

Vs.

Dy. Commissioner of Income-tax .. Respondent
Range 11(1), Pune

AND

S. No	ITA No	Asstt.year
4.	499/PN/08	2004-05
5.	1321/PN/08	2002-03
6.	1322/PN/08	2005-06
7.	806/PN/09	2006-07

ARA Trading & Investments P. Ltd. .. Appellant
12 Boat Club Road,
Riverside Estate, Pune
PAN AABCA5138R

Vs.

Dy. Commissioner of Income-tax .. Respondent
Range 11(1), Pune

Appellants by : Shri M P Mahajani & R.D. Onkar
Respondent by : Shri A. S. Singh CIT-DR

ORDER

Per Bench:

There are seven (7) appeals under consideration involving two group assessees, namely, M/s **KRA** Holding & Trading P. Ltd. (AYs 2004-05, 2005-06 & 2006-07) and M/s **ARA** Trading & Investment (P) Ltd (AYs 2002-03, 2004-05, 05-06 & 06-07). During the proceedings before us, at the outset, Ld Counsel mentioned that these two assessees got amalgamated with RDA Holding & Trading Ltd vide judgment No 1323 of 2008 and in this regard, the assessee's counsel filed a copy of the judgment of the Hon'ble High Court evidencing such amalgamation,. Further Ld Counsel mentioned that there is delay of 40 days in filing appeal in the case of ARA Trading & Investments P, Ltd. in ITA No

1322/P/08. In this regard, the Counsel mentioned that the assessee filed appeal on 20.10.2008 as against due date 10.9.2008 and the delay is not without any reason. In this regard, the Counsel mentioned that the concerned employees as well as consultants were busy with the Scheme of Amalgamation and the proceedings before the Hon'ble High Court. In this regard, the Counsel filed an Affidavit of Shri Vasant A Potbhare, who is key person in filing of the said appeal. On examining the facts detailed in the said Affidavit, which are not controverted by the revenue with evidences and after hearing the ld. DR, we find that the delay is required to be **condoned**.

2. Assessee's counsel filed the following table providing the bird's view of the appeals and the issues pending for adjudication before us are tabulated as under:

ITA No/A.Y	**Two Issues raised in grounds**		**Remarks**
	1st Issue: Business income/ Capital Gains	**2nd Issue: Allowability of fee paid to Enam, the AMC**	
2	3	4	5
1. KRA Holding and Trading P Ltd			
500/PN/08 2004-05	Already adjudicated in the 1st round of the proceedings before ITAT.	Order of Tribunal is recalled only for adjudicating this issue.	In the first round, ITAT passed an order dt 31.8.09. The other issue relating to fee paid to asset management company vide ground-5, was omitted from adjudication. The said order was recalled vide MA No 11, 12/PN/ dt 23. 4.2010 for this purpose. Gr 5 relating to Fee paid to ENAM is required to be adjudicated here.
1320/PN/08 2005-06	Present	Present	Both issues are to be adjudicated. However, the 1st issue stands **covered** by order of the ITAT dated 31.8.09. Thus, only Ground 4 relating to Fee paid to ENAM is required **to be** adjudicated here.
434/P/08 2006-07	Present	Present	-do-
2. ARA Trading & Investment P Ltd			
1321/PN/08 2002-03	Present	No	We find the lone issue is **covered** by the order of the Tribunal dt 31.8.09 by ITA Nos 499 & 500/PN/08.
499/PN/08 2004-05	Present	Present	1st issue was already adjudicated vide ITA Nos 499 & 500/PN/08 dt 31.8.09 in the first round. Thus the 2nd issue at Ground 4 relating to Fee paid to ENAM is required **to be** adjudicated here.
1322/PN/08 2005-06	Present	No	1st issue was already adjudicated vide ITA Nos 499 & 500/PN/08 dt 31.8.09 in the first round. Hence it is a covered issue.

806/PN/08 2006-07	Present	No	1st issue was already adjudicated vide ITA Nos 499 & 500/PN/08 dt 31.8.09 in the first round. Hence it is a covered issue.

3. The above table reflects that a **couple of issues** are involved in all the grounds of the appeals involving two assessees, (i) relating to whether the income earned on sale of shares is to be assessed under the head profits and gains of business or profession' or under the head capital gains' and (ii) allowability of the fee paid to the Asset Management Company.

4. Regarding the **first issue**, the parties mentioned that it was the subject matter of the appeal for adjudication before this Tribunal in the first round of the proceedings in the assessee's own case in connection with appeals ITA Nos 499 & 500/PN/08 and the Tribunal held that the securities in question being the investments, the sale proceeds of the same are assessable under the head 'capital gains' and consequently, the Tribunal upheld the assessee's decision of taxing the same under the head capital gains. In this regard, the Counsel referred to para 27 of this order 0f the Tribunal. The said paragraph reads as under:

> *"27. To conclude, the circumstances and the plethora of precedents unmistakably points out that the assessee was not directly involved in the trading activity. Therefore its holding was nothing but an investment. What is decisive is the conduct and the intention of an investor which has been established in the present appeal that the appellant had simply acted in the fashion to maximize the value of its wealth holding, in the shape of shares.* ***Such an activity cannot be held a profit making activity of a business concern but safely it cane held as a profit seeking activity of an investor****. Resultantly our view goes* ***in favour of the assessee****, thus the grounds are allowed."*

5. On mentioning that the said ground relating to the chargeability of the earning on sale of the shares under the 'capital gains is already adjudicated, Ld counsel mentioned that the said order of the Tribunal had to be recalled as it failed to adjudicate other ground relating to the allowability of the claim of deduction relating to the fee paid to the asset management company debited to the P& L account. Therefore, the Tribunal recalled the said orders ie ITA Nos 499 & 500/PN/08 for limited purpose of adjudication of the ground 2 relating to the said fee issue. Thus, the Ld Counsel mentioned that the first issue relating to the chargeability **(Head of Income)** of the earning on sale of the shares under the 'capital gains is already adjudicated and by this adjudication, relevant grounds of the other appeals mentioned the table above stand covered in favour of both the assessee's appeals. In view of the homology of facts, Ld DR respectfully relied on the orders of the AO. Further, nothing contrary was brought to our notice to support that the said decision of the Tribunal is anyway reversed or interfered with by the Higher judicial authorities. Thus, the said order of the Tribunal holds

relevant as on date to the identical issues raised in the appeals under consideration.

6. Consequently, so far as the appeals by M/s **KRA** Holding & Trading P. Ltd is concerned, the grounds 1 to 3 of ITA No **1320** for A.Y 2005-06 and the ground Nos 1 to 3 of ITA No **434**/PN/09 for AY 2006-07 relating to the issue of 'head of income', stand covered and accordingly, adjudicated in favour of the assessee. Accordingly, the said grounds are **allowed** in favour of the assessee.

7. Further, so far as the appeals by M/s **ARA** Trading & Investments P Ltd is concerned, the ground Nos 1 to 4 of ITA No **1321 & 1322**/PN/08 & **806**/PN/09 are also covered in favour of the assessee. Accordingly, the relevant grounds of all these appeals are **allowed** in favour of the assessee.

8. Now we proceed to take up the second issue relating to the fee paid to Asset Management Company in the succeeding paragraphs.

Allowability of the fee paid to M/s ENAM, Portfolio Manager

9. As evident from the above referred chart, the only issue that is required to be adjudicated by us in appeals (ITA Nos 500/PN/08, 1320/PN/08, 434/PN/09 of KRA Holding & Trading P.Ltd., and 499/PN/08 of ARA Trading & Investments P Ltd), relate to the issue of allowability of the fee paid to the Asset Management Company. In the process, we pick up the recalled appeals with ITA No 499/P/08 in the case of ARA Trading & Investments P Ltd and ITA No 500/PN/08 in the case of KRA Holding & Trading P. Ltd for the purpose of extraction of the facts. The findings of the Tribunal if any in these appeals would be applicable to rest of the appeals, under consideration, wherever this issue is raised by the assessee. Paragraphs 5 of the impugned order in the case of **KRA Holding & Investment P. Ltd** for the assessment year 2004-05 is relevant for facts and discussions.

10. Otherwise, the AO dealt with this issue of payment of fee to ENAM Asset Management P. Ltd (in short 'ENAM') in his order. Relevant **KRA Holding & Investment P. Ltd** for the assessment year 2004-05 are that the assessee debited a sum of Rs 69,22,396/-, which includes termination fee (**TF**) of Rs 59,15,574/- and annual maintenance fee (MF) of Rs 10,06,823/-. After hearing the assessee and considering his submissions, the AO found that **TF** has to be disallowed. Accordingly, he made an addition of Rs 59,15,574/-. While disallowing the claim, the case of the AO is that the said payment constitutes '***profit sharing fee'*** paid to ENAM and the same is not authorized or borne out

of either by any agreement between the assessee and the Enam or the SEBI (Portfolio Managers) Rules & Regulations, 1993. As per the AO, vide sub-clause (c), clause 7, a termination fee of upto 5% will be payable and the same calculaled on the net asset value (NAV) of the portfolio on the date of ***termination of the agreement period.*** As per the AO, the agreement was never terminated as it is renewed from time to time. Further, the AO relied on clause 14(3) of the Chapter 3 of SEBI (Portfolio Managers) Rues & Regulations, 1993 for the proposition that the Portfolio Manager shall charge on agreed fee from the client for rendering portfolio management service and shall **not on a return sharing basis**. Thus, there is express prohibition against the assessee. The relevant Clause reads as under:

> *"The portfolio manager shall charge on agreed fee from the client for rendering portfolio management services without guaranteeing or assuring, either directly or indirectly any return and such fee shall be independent of the return of the client and* ***shall not be on a return sharing basis****."*

11. The AO while disallowing the claim, relied essentially on the above clause 14(3) which is against the assessee's claim and held that the assessee paid the said amount of Rs 59,15,574/- in the name of **TF**/Performance fee by calculating the fee on return sharing basis, which is against the said clause 14(3). As per the AO, the above payment to Enam constitutes the transfer of gains of the assessee to the tune of 38% of the total gains, i.e. Rs 59,15,574/1,56,76,802. The concluding para of the AO reads as follows:

> *"It is therefore clear that payment of Rs 59,15,574/- as termination fees which is computed on profit sharing basis is neither specifically provided in the agreement nor is as per SEBI rules and regulations. The same is therefore disallowed. Further no mention of fees paid is made in the return as gains on sale of shares are net of such fees paid is made in the return as gains on sale of shares are net of such fees and computation of such gains is not enclosed with the return."*

12. Aggrieved with the above addition, the assessee filed an appeal before the CIT(A) and made various submissions which are reproduced in para 5.1 and 5.2.1 of the impugned order. By these submissions, the assessee submitted that the said expenditure was incurred in connection with the **acquisition of shares**. Therefore, the expenditure is **required to be capitalized** as done by the assessee in the books of account. As per the assessee, this expenditure is part of the **cost of acquisition** of shares. As there is a **direct and proximate nexus** between the fees paid to ENAM and the process of acquisition of the securities and the sale of securities. As per the assessee, termination **of agreement** and termination **of period of agreement** are distinctive activities, so the amount in question is payable on termination of the period and not the termination of the agreement and relied on Clause 2 of the agreement relating to the fee. Regarding basis of termination fee computation, the same is payable at the rate of 5% of the NAV of the portfolio of the client and mentioned that NAV

is **defined** in the said agreement. Expanding on the issue of the basis of 5%, the assessee argued that the basis is **scientific** and **consistently** followed by the assessee over the years. The actual payment in fact is within the limits provided under the agreement. Further, he argued that as of now, there is no issue about whether the said income is taxable under the head 'profits and gains from the business or profession; or under the head 'capital gains' since the said issue is already decided by the Tribunal vide order dated 31.8.2009 in favour of the assessee, i.e. the said profit constitutes capital gains taxable under the head capital gains as the securities in question constitutes capital assets/investment. Considering the fact that there is **no dispute about genuineness** of the payment, the said payment to ENAM is incurred only for acquisition of the shares/securities, as per the assessee, the said payment constitutes **cost of acquisition and sale of securities**.

13. Without prejudice, the assessee argued that part of the fee is attributable to act of selling of securities and, therefore, part of the fees can be said to be expenditure incurred wholly and exclusively **in connection with the transfer**. Further, he argued that fee is paid wholly and exclusively for acquiring and selling securities during the year under review. Therefore, the fees so paid **should be loaded** on the shares/securities purchased and sold during the year in the value proportion. In respect of the shares purchased during the year, the fees loaded would be cost of acquisition and in respect of shares sold during the year,the fees loaded would represent expenditure incurred wholly and exclusively in connection with the transfer. Further the assessee filed another letter dt 1.10.2007 explaining the reason for payment to ENAM and the nature of the same and the mode of calculation of the payment. The details are mentioned in para 5.2.1 of the impugned order. The summary of the same is as under:

> *"In summation, the following facts emerge from the above submissions:*
> *A) the fees are paid wholly and exclusively for earning the income offered to tax under the head capital gains.*
> *B) the fees paid have a direct, proximate and one to one nexus with earning of capital gains and*
> *C) the Company has already undertaken a contractual obligation to divert its profits to the extent of profit sharing fees to the portfolio manager and has accepted to receive the sale consideration/profits net of such fees."*

On hearing the appeal of the assessee and after considering the submission, the CIT(A) is of the view that the assessee's submission are not acceptable and accordingly dismissed the relevant grounds of the assessee.

BEFORE THE TRIBUNAL

14. Aggrieved with the above order of the CIT(A), the assessee filed the present appeal with the ground 2 (ground 1 was already adjudicated by the

Bench in the first round of the proceedings and this is the second round of the proceedings consequent to the **recalled order on the ground of the failure of the Tribunal in adjudicating the ground 2** completely) and made various submission before us. Some of the crucial arguments are narrated as under: (i) Ld Counsel referred to the provisions of section 48 of the I.T Act and mentioned that the said section allows **deduction of any expenditure** incurred wholly and exclusively in connection with the transfer and the instant expenditure being the outflow to the assessee, should be loaded to the cost of the investments. In this regard, the assessee relied on Gujarat High Court judgment in the case of Rajkot Dist. Gopalak Co-op. Milk Producers' Union Ltd. v. CIT 204 ITR 590, for the proposition that what is taxable in the hands of the assessee is the actual income that reached the assessee and therefore, the fee paid to M/s Enam has to be deducted from the capital gains earned by the assessee. Ld Counsel reminded that the taxing of the said profits on sale of the securities under the head of 'capital gains' has reached finality. Therefore the fee incurred by the assessee should be given deduction u/s 48 of the Act. Relevant para of the said decision is reproduced as under:

> *"What is taxable is the real income, it is that **income which reaches the assessee that has to be regarded as the real income**. Payment to be made as a result of statutory or contractual obligation, even though it may be related to the profits, may be in the nature of an obligation as a result o which profits to that extent is diverted by an overriding title. Thus, in such a case, what is required to be considered is the true nature of the obligation and the payment to be made to discharge the same."*

15. Further, the Counsel relied on the jurisdictional High Court decision in the case of CIT v Shakuntala kantilal 190 ITR 56 (Bom) for explaining the provisions of sec. 48 of the Act and for the proposition that when the genuineness and certainty and necessity of the payments is beyond doubt and if it is only the case of absence of the enabling provisions in section 48 of the Act, "such type of payments are deductible in **two ways**, one by taking full value of consideration ie net of such payments or deducting the same as expenditure incurred wholly and exclusively in connection with the transfer. As per Hon'ble High court opined that t*he "Legislature, while using the expression '**full value of consideration**', **has contemplated both additions as well as deductions from the apparent value**. What it means is the **real and effective consideration**.* The effective consideration is the after allowing the deductible expenditure. Further, as per the His Lordship, "*so far as clause (i) of section 48 is concerned, we find that the expression used by the Legislature in its wisdom, is **wider** than the expression "**for the transfer**". The expression used is "the expenditure incurred wholly and exclusively in connection with such transfer". The expression "**in connection** with such transfer" is, in our view, certainly **wider** than the expression **"for** the transfer". Here again, we are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an*

expenditure covered by this clause". Eventually, Hon'ble High Court allowed the legal fee genuinely and necessarily incurred by the assessee in connection with the transfer of the transfer of the capital asset, as deduction in the computation of capital gains. In other words, the Hon'ble High Court came to the conclusion that the expression 'in connection with' used in 48(i) of the Act should be read as 'for the transfer' of the capital asset with wider implications and inclusions.

16. Thus, the assessee submitted before the first appellate authority that the fee paid was correctly claimed as deduction the commutation of capital gains. On hearing the above, the CIT(A) perused the order of the AO and extracted the same in his order, as seen from para 5.3 of the impugned order and held that the AO has rightly disallowed the sum of Rs 59,15,574/- and also for other reasons that the said payment was paid in violation of the SEBI Regulations, i.e. Clause 14(3) of the SEBI (Portfolio Managers) Rules & Regulations, 1993.

17**. Arguments of the Revenue:** *Per contra*, Ld DR for the revenue argued vehemently and some of his arguments are as follows. (i) the expenditure is question is directly unconnected to the securities in question and there is the same cannot be loaded to the cost of the acquisition; (ii) securities is a plural word, where as the capital gains is calculated considering each capital asset on stand alone basis and for this there is need for identification of the asset specific expenditure be is for arriving at cost of acquisition or for transfer specific expenditure. Relying on the decision of the Tribunal in the case of Davendra **Kothari** (136 TTJ 188), DR argued stating that the PM fee is not allowable.

18. During the **rebuttal** time, Ld Counsel for the assessee took on the said decision of the Tribunal of Mumbai bench and mentioned that the said decision is distinguishable on facts. As per the assessee's counsel, the said decision was delivered on the facts and the circumstances of that case, where the assessee claimed the deduction which was calculated based on the global turn over reported by the Portfolio Manager and where such turnover also includes the dividend income, the basis is unscientific and unspecific etc. Further, the Ld Counsel mentioned that the assessee in that case filed to discharge the onus of establishing the nexus that the fee paid to the Portfolio Manager is incurred wholly and exclusively in connection with the transfer of the assets. Whereas, in the instant case, as Sri Mahajani, the assessee not only demonstrated the direct nexus of the impugned expenditure to the acquisition and sale/transfer of the securities successfully but also the fee in question is strictly on the NAV of the securities and not on the dividends or other miscellaneous income. Regarding the basis of calculations, Ld Counsel mentioned that the clause 14(3) has

undergone change by virtue of the amendments by the SEBI and ***'profit sharing basis'*** is the SEBI approved basis now. Further on the issue of agreed rate of 5% on the NAV of securities, Ld Counsel argued stating that the basis is totally and exclusively capital-value-oriented, consistently followed by the assessee and it constitutes acceptable basis in view of the judgment of the Apex court in the case of Bharat Earth Movers Ltd (supra). Finally, the counsel mentioned that the if the claimed deduction is not allowed u/s 48 of the Act, the same is not allowed by the revenue under any other provisions of the Act and it constitutes an unfair act on part of the revenue. More so, when the expenditure of fee paid to Portfolio Manager in question is genuine and an allowable claim, the claim must be allowed under the provisions of section 48 of the Act. Thus, the assessee's counsel argued for reversing the order of the CIT(A).

19. We heard the parties and perused the orders of the revenue. Allowability of the fee paid to the M/s Enam, the portfolio manager for purchase and sale of the securities under section 48 of the Act is the issue for adjudication before us. The stands of the parties on this issue are as follows.

As per the Revenue, while the AO made disallowance for couple of reasons: (i) the payment is **not as per the agreement**, as the agreement was never terminated in reality; (ii) the payment was **not authorized** by the SEBI Regulations, 1993, CIT(A) authority confirmed the said disallowance also for another reasons that the **said payment attracts provisions of the Explanation** to sub-section (1) of section 37 of the IT Act. The said fee is not allowable in view of the decision of the Tribunal of Mumbai Bench in the case of Davendra **Kothari** (136 TTJ 188) where the Tribunal held that when the assessee failed to demonstrate the nexus of the said expenditure with the purchase and sale transactions of the said capital assets ie securities, the fee paid to the portfolio managers is not an allowable expenditure u/s 48 of the Act.

20. *Per contra,* the case of the assessee is that the said decision of the Mumbai Bench Tribunal is distinguishable on facts relating to discharge of onus relating to nexus issue and also in matters of global turnover based claim of fee including the miscellaneous receipts such as dividends and interest. As per the assessee, there are other decisions to support the claim of the assessee. Further, assessee's stand is that revenue authorities have listed three reasons cumulatively for denial of deduction ie **not as per the agreement**; (ii) **not authorized** by the SEBI Regulations, 1993 and therefore it attracts the **provisions of the Explanation** to sub-section (1) of section 37 ie infringements of the law, and the said reasons do not stand the test of legal scrutiny as the IT authorities misinterpreted the facts. In this regard, the facts are that the fee paid to assessee as per the agreement ie at the expiry of the

agreement period and expiry of the agreement is different from the **expiry the agreement**. In the earlier case, the agreement does not expire and only the period expires. **Secondly,** regarding the allegation of SEBI Regulations, assessee's stand is that the said **clause 14(3) has been amended** to include the payment of fee on **'profits sharing basis'** too**.** Therefore, there is not infringement of the said clause and consequently, the invoking by the CIT(A) of the provisions of Explanation to section 37(1) of the Act does not arise.

21. In the context of the above rival positions, we proceed to examine the scope of the provisions of section 48 of the Act, amended SEBI regulations in matters relating to fee payable to Portfolio managers, the matters relating to the distinguishing of the decisions cited by the revenue etc.

A. Scope of the Provisions of section 48 of the Act:

22. Section 48 provides for the method of computation of capital gains. The relevant provisions read as follows:

> *"The income chargeable under the head "Capital gains" shall be computed by deducting from the **full value of the consideration received or accruing** as a result of the transfer of the capital asset the following amounts, namely:*
> *(i) expenditure incurred wholly and exclusively **in connection** with such transfer,*
> *(ii) the cost of acquisition of the capital asset and the cost of any improvement thereto."*

Hon'ble Jurisdictional High Court has an occasion to explain the above provisions of section 48 of the Act in the case of CIT v **Shakuntala Kantilal** 190 ITR 56 (Bom) explained the same and held that the deductibility of certain expenditure must considered favorably to the assessee as the provisions of clause (i) and (ii) are **wider**. As the Hon'ble High Court, "such type of payments are deductible in two ways, one by taking full value of consideration ie **net** of such payments or deducting the same as expenditure incurred wholly and exclusively in connection with the transfer." In other words, so long as the expenditure in question is genuine and are incurred in connection with the transfer of the securities, the expenditure is allowable from the '*full value of the consideration received or accruing',* itself. Meaning thereby, the impugned expenditure is reduced from the *'gross value of the consideration received or accruing,* and the 'net *value of the consideration received or accruing'* will be further reduced by the expenditure mentioned in clauses (i) and (ii) of section 48 of the Act. The second way of dealing with the said genuine expenditure relates to the one specified in clause (i) and clause (ii). The assessee must be given benefit of the deduction as the same is incurred wholly and exclusively for the transfer of the securities. For the sake completeness of this order, relevant para 5 & 6 are reproduced as follows:

"5. It must be stated in fairness to Dr Balasubramanian for the Revenue that he did not dispute the ***fact of payment*** *or even the* ***necessity of making*** *such a payment. His contention is that the language in which section 48 is couched does* ***not contemplate deduction*** *of such an amount. Reference in this regard was made to section 48 of the Act to show that the payment herein could be neither be termed as expenditure incurred wholly and exclusively for the transfer or the cost of acquisition or of any improvement thereto……..*

6. In order to appreciate DR …… submission, it is desireable to refer to the provisions of section 48 which read as under:

……

The section (section 48) broadly contemplates three amounts for the purpose of computing income chargeable under the head "Capital gains". The ***first*** *is the* ***full value*** *of the consideration for which the capital asset has been transferred. The* ***second*** *is the expenditure incurred wholly and exclusively* ***in connection*** *with such* ***transfer*** *and the* ***third*** *and the last is the* ***cost of acquisition*** *of the capital asset including the cost of any improvement thereto. We have already referred to the facts of the case in detail earlier. It cannot be disputed that unless the assessee had settled the dispute with Radia and Sons (P) Ltd., the sale transaction with M/s Cosmos Co-op Housing Society Ltd. under the agreement dated March 30,1967,* ***would not, rather could not, have materialized****. If this transaction had not materialized there would perhaps have been* ***no question of capital gains****. The sale would then have taken place at the rate of Rs 29 per sq. yard as against Rs 51 per sq. yard. One way of looking at the problem could be to say that the full value of the consideration in this case was not the apparent consideration, i.e. Rs 2,58,672/-, but Rs 2,23,168/- (i. e 2,58,672 minus Rs 35,501). The Legislature, while using the expression* ***'full value of consideration'****, in our view,* ***has contemplated both additions as well as deductions from the apparent value****. What it means is the* ***real and effective consideration****.*

That apart, so far as clause (i) of section 48 is concerned, we find that the expression used by the Legislature in its wisdom is ***wider*** *than the expression "****for the transfer****". The expression used is "the expenditure incurred wholly and exclusively in connection with such transfer". The expression "****in connection with such transfer****" is, in our view, certainly* ***wider than the expression "for the transfer****". Here again, we are of the view that any amount* ***the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause.*** *In conclusion, it is respectfully submitted that the* ***fees paid have been correctly claimed as deduction in the computation of capital gains****……"*

23. The scope of section 48 as per the binding judgment of the Hon'ble High court is that the claim of *bona fide* or genuine expenditure should be allowable in favour of the assessee so long as the incurring of the expenditure is a matter of fact and the necessity of making such a payment is the imminent and the requirement for the transfer the transfer of the asset. It is now binding on our part to take the view that the expressions '*in connection with'* has wider meanings than the expression '*for the transfer'*. The Revenue's contention is that the language in which section 48 does **not contemplate deduction** of such an amount was overruled and allowed the deduction of the fee incurred by the

assessee for removal of the encumbrances, which is necessary for transfer of the asset in that case.

24. We have also perused some of the other citations relied upon by the parties to draw the boundary lines for the kind of expenditure which fall within the scope of the allowable expenditure u/s 48 of the act in computation of the capital gains. We find that all these citations invariably followed the jurisdictional high court judgment in the case of Santhilal Kantilal (supra).

A. Calcutta High Court held in the case of Gopeenath Paul and sons & Anr (278 ITR 240) that "*when assets of the assessee GNP, earlier carrying n business in the name of GSM could not be sold as going concern under orders of Court without meeting the liabilities of GSM towards the Bank, payments for meeting such liabilities of GSM towards bank was expenditure incurred wholly and exclusively in connection with the transfer, hence deductible u/s 48(i) of the Act.*"

B. AAR held in the case of Compagnie Financiere Hamon, In Re (310 ITR 1), that the '*professional fee paid to the lawyers distinctly related to and integrally connected with the transfer of shares is admissible for deduction u/s 48(i) of the Act' AAR held that the what is attributable to the final act of transfer of shares is admissible for deduction provided the intimate connection between the expenditure and the act of transferring shares is established.*

C. In the case of Bradford Trading co P Ltd, the Madras High court held that the "*amount paid by the assessee to a third party to settle the pre existing claims against the transfer of the assets as also litigation expenses constituted expenditure incurred wholly and exclusively for transfer of capital asset and was deductible in computation of capital gains; the amount reimbursed by vendee to the assessee towards such claim constituted part of sale consideration but deductible while computing capital gains".*

D. Bombay High Court in the case of Abrar Alvi (247 ITR 312) held that the amount paid by the assessee to his son to resolve the property dispute was an allowable expenditure in computing the capital gains. Same High court in the case of Miss Piroja C Patel (242 ITR 582) held that the compensation paid by the assessee to the hutment dwellers is an allowable expenditure in computing the capital gains.

E. In the case of Motilal Kothari vis DCIT (136 TTJ 188), the Mumbai Tribunal held that the payment of fee to the PMS to discharge his contractual liability did not amount to diversion of income by overriding title. It is a case of application of income. In this case, the assessee claimed expenditure of the fee paid to PMS on his global turn over and assessee failed to discharge onus in establishing the nexus of the expenditure with the asset's transfer. Tribunal did not refer to the explanation given by the binding jurisdictional High Court on the provisions of section 48 of the Act.

25. From the above, it is invariably learnt that the scope of the provisions of section 48 are explained by the jurisdictional High Court and it is binding on us as they remain undisturbed as informed to us. The citation at E above did not have benefit of the said explaining of the provisions of section 48 of the Act. For allowing the claim of deduction in the computation of the capital gains, the expenditure has to be distinctly and intricately linked to the asset and its transfer and the Onus is on the assessee to demonstrate the said linkage between the expenditure and the asset's transfer. It is evident and binding that the expenditure if undisputedly, necessarily and genuinely spent for the asset's transfer within the scope of the provisions of section 48 of the Act, the claim cannot be disallowed for want of the express provisions in section 48 of the Act.

26. Wholly and Exclusively: In this regard, it is a settled law that the expression *'wholly and exclusively'* is explained for the purpose of the identical expressions used in section 37 of the Act. In the case of Sasoon j David & Co P Ltd v CIT 118 ITR 261(SC), Hon'ble Supreme Court explained the twin adverbs stating that the first adverb, '**wholly'** refers to the **quantum** of the expenditure, the sum of money spent and the second adverb '**exclusively'** has reference to the '**purpose'** behind the expenditure and 'not the motive or object' of expenditure.

27. After explain the scope of section 48 of the Act, we shall now proceed to examine the facts of the case in general and the applicability of the provisions of section 48 in particular.

28. We have already detailed the facts of the impugned payments in the preceding paragraphs. To sum up the same, the undisputed facts are: (i) the assessee made the payment of fee to M/s Enam, the Asset Management Company and the genuineness of the said payment is undisputed; (ii) the

revenue authorities have also not disputed the requirement or **necessity** of the said payments; (iii) quantitatively speaking in view of the adverbial expression, '***wholly'*** *used in section 48(i) of the Act*, we find that the payment of fee @ 5% only restricted to the NAV of the securities and not only the global turn over including the other income; (iv) regarding the purpose of payment in view of the adverbial expression, '***exclusively*** *used in section 48(i) of the Act*, we find that the same is intended only **twin purpose** of the **acquisition** of the securities and also for **sale** of the same; (v) the NAV is defined in Para 1(d) as the *'net asset value of the securities of the client'* and the assessee calculated the impugned fee is linked to the securities value only and not includes other income such interest or dividend etc; (v) considering the contents of the para 7.01(c), "termination fee upto 5% will be payable on the net asset value (NAV) of the Portfolio of the client as on the date of termination of the agreement **period** and not the agreement itself and therefore payment is period specific; (vi) it is a fact that the clause 14(3) was amended subsequently and therefore, the action of the revenue is based on the inapplicable or pre-amended facts. The details are detailed belows.

Clause 14(3) of SEBI (Portfolio Managers) Rules & Regulations 1993:

29. Revenue is of the *bona fide* belief or opinion that the clause 3(a) prohibits the payment of fee on the basis of 'returns sharing basis' as they relied on the original clause 14(3) of SEBI (Portfolio Managers) Rules & Regulations 1993 which governs the portfolio manager which bans the payment of fee to the portfolio manager. In this regard, Ld Counsel filed a Gazette copy showing the **amended** clause 3 vide SEBI (Portfolio Managers) (Amendment) Rules, 2002 which provides for **return based fee** also. The said clause originally came into force with effect from 7.1.1993, a date of publication in the official Gazette, whereby the SEBI provided for the fee relating to the portfolio managers vide para 3(a) which has come into effect w.e.f. 11.10.2002. The Securities & Exchange Board of India (Portfolio Managers) Regulations, 1993 provide that the discretionary portfolio manager is obliged to individually and independently manage the funds of each client in accordance with the needs of the client. These Regulations, 1993 provide that **fee to be charged** may be a fixed amount or a **return based fee** or a combination of both. We have extracted the amended clause 14(3) and the same is as follows.

> *"(3)(a) : The portfolio manager shall charge an agreed fee from the clients for rendering portfolio management services without guaranteeing or assuring, either directly or indirectly, any return and the fee so charged may be a fixed fee or a* ***return based fee*** *or a combination of both."*

Thus, in our opinion, the amended provisions allows the payment of fee to AMC on 'return based fee' and therefore, all the three reasons of the revenue for denying the claim of deduction in favour of the assessee, as discussed in the above paragraphs of this order, require to be **rejected** and in favour of the assessee.

Capital gains vs Deductions

30. We have discussed in the preceding paragraphs that the profits earned by the assessee is chargeable to tax under the head 'capital gains'. It is so ordered by this Tribunal vide the order dt 31.8.2009 in connection with appeals ITA No 499/PN/08 in the case of ARA Trading & Investments P Ltd. and ITA No 500/PN/08 in the case of KRA Holding & Trading P. Ltd. Relevant para 27 of the said order was already extracted in the preceding paragraphs. In the light of the above undisturbed proposition, our attention is restricted to the limited issue of if the impugned fee paid to the M/s Enam is allowable u/s 48 of the Act or not.

Loading of the expenditure to the cost of the shares, distinguishing of the Tribunal's order in the case of Devendra Kothari (supra):

31. Ld DR for the Revenue relied on the above decision of the Tribunal and mentioned that the order of the CIT(A) does not call for any interference despite the fact that the order is not considered the above citations. In this regard, Ld Counsel filed at our request a brief note on the issue of loading and other ancillary issues and the relevant portions are imported for this order and the same are as under:

> *"The method of accounting followed by the company in respect of fees paid is to **proportionately load** these types of fees as part of the **purchase cost** of the securities during the given period. Automatically these fees are taken into account for computing capital gains or the carrying cost of unsold investments.*
>
> *There is a **direct and proximate nexus** between the fees paid and the process of **acquisition and sale of the securities** which is a **causative factor** for making capital gains and that the fees are paid wholly and exclusively for earning the income offered to tax under the head **capital** gains.*
>
> *Reliance is placed on the decision in the case of CIT v. SHAKUNTALA KANTILAL [1991] 58 Taxman 106/190 ITR 56 (Bom.) where it was held that **amount paid for removing an encumbrance** was allowable u/s 48(i). In coming to this view the Court observed that without this payment the sale could not have been materialized and hence there would have been no question of the capital gains being brought to tax. In the present case the capital gains have arisen as a result of the **efforts of the PM** for which the fees have been paid.*
>
> *A Mumbai Bench of the Tribunal in the case of DAVENDRA **KOTHARI** (136 TTJ 188) has confirmed disallowance of PMS fees while computing capital gains.*

In that case fees were paid based on value of the assets. The Honourable Bench has observed at Para 7 of the said order that the CIT(A) found that the,-
quantification of fees: *was based only on either the* ***market value*** *of the asset or the* ***net value*** *of the assets of the assessee as held either at the* ***beginning*** *or at the* ***end*** *of each quarter.*
At Para 8 of the Order, the Honourable Bench has observed that the CIT(A) held that the assessee was paying the fees as aforesaid to portfolio managesr ***even on the interest/dividend received*** *on the investments and therefore the CIT(A) came to hold that it could* ***not be said that there was nexus*** *between the PMS fees paid and purchase and sale of investments.*
The Honourable Mumbai Tribunal has laid stress on the said findings of the CITA.

Present case of the appellant is clearly distinguishable in the light of the fact that return based fees is also payable in respect of ***profits earned on sale of investments*** *and therefore the PMS fees has* ***a direct nexus*** *with the purchase and sale of investments during the year and fees is* ***not paid on interest and dividend*** *received by the appellant.*

It is respectfully submitted that the ***said decision is not applicable*** *as it turns on its own facts apart from being patently wrong.*

The ***assessee in that KOTARI'S case had failed to demonstrate the nexus*** *between the fees paid and the activity of purchase and sale*

The ***assessee could not explain how the fees paid on such explicit basis*** *could be considered differently so as to constitute cost of either acquisition or as expenditure in connection with transfer.*

The ***assessee could not demonstrate how allocation of fees had been made****. It could not furnish details of how or the basis on which allocation of said fees was possible*

Further ***fees had to be paid even when no purchase or sale took place***

The ***CIT(A) had held that it was not possible to break up the fees*** *so as to hold that the same was relatable to purchase or sale of shares.*

Further, ***fees were paid even on interest accrued and dividend*** *received*

The Tribunal held that the basis on which fees were paid is such that there was no relationship with either purchase or sale. In view of this it held that there was no nexus with purchase or sale.

It is respectfully submitted that the Honorable Tribunal ought to have independently determined whether ***the fees were paid for an activity which had a direct nexus*** *with the purchase or sale of the shares instead of allowing itself to be persuaded merely by the difficulty in allocating such fees to purchases by a directly conceivable basis*

In the present case before You Honours the ***annual termination fee is to be determined with reference to the NAV*** *of the portfolio which has been defined to been the market value of the Securities as on the relevant date.* ***No fees were paid on interest accrued and dividend*** *received. It is further submitted that the* ***Act does not define the expressions 'cost of acquisition' or 'cost of improvement' referred to in section 48****. These expressions thus have to be given their natural commercial meaning as men of trade and commerce would unmistakably understand. Investments in securities are valued at cost by the appellant.*

In view of the direct nexus between the fees and the role of the PM established by us ***it is not difficult to appreciate that such fees form part of the cost of acquisition of the portfolio***

The SC in the case of ***BHARAT EARTH MOVERS*** *(245 ITR 428)(SC) in the context of allowability of provision for leave encashment referred to the following passage from its decision in the case of Calcutta co. Ltd vs. CIT (1959) 37 ITR 1 (SC) wherein it was held that merely because there is some difficulty in the estimation of the liability would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.*

In the present case merely because some ***mathematical exercise*** *is involved in loading such fees to* ***individual*** *transactions of purchase would not mean that such fees do not form part of cost of acquisition or have nexus therewith*

Accounting Standard 13 (Accounting for Investments) issued by ICAI provides that ***cost of an investment includes acquisition charges such as brokerage, fees and duties****. The method of accounting followed by the company in respect of fees paid is to proportionately load these fees on the securities handled by the Portfolio Manager during the year [i.e. opening portfolio plus investments made during the year]. Automatically these fees are taken into account for computing capital gains or the carrying cost of unsold investments.*

The Supreme Court in the case of UP State Industrial Development Corporation (225 ITR 703) was dealing with the case of an ***underwriter of shares*** *who had to subscribe to shares in the event of under subscription by the public. The issue before the SC was whether in respect of such devolved shares whether the underwriting commission received from the client, should be treated as an item of income or an item that would go to reduce the cost of acquisition of such devolved shares. The Supreme Court, applying the well accepted proposition that for the purposes of ascertaining profits and gains ordinary principles of commercial accounting should be applied so long as they are not in conflict with any express provision of the Act upheld the contention of the assessee which it found to be in consonance with the general principles of accountancy governing underwriting contracts*

In the present case since the Department is not contending that the accounting practice followed by the company is contrary to general principles of accountancy governing PM contracts the above ratio would squarely apply. As a matter of fact the lower authorities have not disputed the correctness of the method of allocation of PMS fees or found it contrary to accounting practice

The Hon'ble Pune Tribunal in case of S.Balan (308 ITR 151 (T PUNE) held that ***interest paid on monies borrowed for acquisition of shares*** *would form part of cost of acquisition.*

Undoubtedly loading interest on individual transaction of purchase would necessarily involve an exercise of allocation which did not deter the Pune Tribunal from upholding the claim. The Hon'ble Pune Tribunal observed that Interest having nexus with the cost of acquisition has to be taken into account for the purpose of computation of capital gains prescribed u/s 48 (ii). The Hon'ble Bench inter alia referred to the decision of the Hon'ble Delhi High Court in the case of Mithilesh Kumari reported in 92 ITR 7 and the observation of Their Lordships that-

it will not make any difference whether the interest was paid on the date of purchase or whether it is paid subsequently to exclude the interest amount from the actual cost would lead to anomalous results

In the case of CHALLAPALLI SUGARS LTD (98 ITR 167) the SC held that interest ***paid on borrowed money for purchasing plant and machinery*** *before commencement of production would form the part of actual cost for the purpose of depreciation allowance. It held so following the accepted accountancy rule for determining the cost of fixed assets.*

In this case preoperative interest would have to be allocated to the cost of individual fixed assets acquired during construction period of a new company (this was before the block of assets concept was introduced) and yet the Court held so.

By the same logic expenses incurred in relation to the ***portfolio should be allowed to be capitalized in terms of AS 13***

It will be appreciated from the submissions made above that this is not so in the present case where a live nexus has been clearly established and on that basis even the accounts have been maintained; ***investments have been accounted for inclusive of proportionate fees*** *and said fees are also loaded to unsold investments as at the year end*

It is respectfully submitted that in the present case assessee has demonstrated how ***there is a nexus between the fees and the role of the PM directly affecting purchases and hence cost of acquisition****."*

32. From the above, it is evident that the unlike in the transactions involving acquisition and sale of the land buildings, the loading of the expenses ie fee paid to the AMC is done in accordance with the AS-13 ie **cost of an investment includes acquisition charges such as brokerage, fees and duties**. Further, once the liability to incur is certain the quantification does not bar the assessee from claiming the expenditure. The claim of the assessee must be allowed once the basis of quantification is scientific and reasonable. The method of accounting followed by the company consistently in respect of fees paid is to proportionately load these fees on the securities handled by Portfolio Manager during the year.

FINDINGS OF THE TRIBUNAL

33. Thus, the issue for adjudication relates **if the payment of fee paid to the portfolio manager ie Enam for the twin purposes of (i) purchase of investments/securities and (ii) sale of the same is an allowable deduction u/s 48 of the Act** or not. The same has to be decided in the context of settlement of the disputes relating to correct head of income. In other words, the issue relating to 'head of income' for taxing the gains on sale of the said **investments/securities** has been decided by the Tribunal in the first round of the appeals and the Tribunal held that the portfolio investment is **not** the business activity but it is an investment activity & relevant gains are taxable under the head 'capital gains' as accounted by the assessee. It is so held in the

own case of the assessee vide 499 & 500/p/2008 and the same affirmed by a decision of the Tribunal-Mumbai Bench vide I.T.A No. 5382 Mum/2009 dated 30th November, 2010 in the case of Radha Birju Patel. Thus, it is the settled position at the level of the Tribunal that the Portfolio management activity is an **investment activity** and neither the business activity nor the activity amounting to '*an adventure in the nature of trade'*. Therefore, the securities in question are held to be the investments by the Tribunal in the first round and **consequently**, when such securities are transferred by way of sale, the resultant gains have to be dealt with as per the provisions of section 48 of the Act.

34. The provisions of section 48 of the Act have already been analysed in the preceding paragraphs in the light of the explaining by the jurisdictional high court in the case of Shantilal Kantilal (supra). It is a settled issue now at the level of the jurisdictional High Court in the case of Shantilal Kantilal (supra) that the rightful expenditure incurred in connection with the transfer of the capital asset/securities should be allowed notwithstanding the inadequacy of the express provisions of section 48 of the Act. It is also binding on us to interpret the said provisions of section 48 that the same are read down by the Hon'ble High Court in that case and the same remains undisturbed till date. Consequently, the expenditure which is distinctly and directly connected to the transfer, which is interpreted to be of wider meaning and connotation, are required to be allowed. We also interpreted in the preceding paragraphs that the expression 'wholly and exclusively in connection with such transfer' as wider in scope and in our opinion, it is no so narrow to not to accommodate the 'portfolio fee', which is paid undisputedly and obviously for acquisition and sale of the securities/unit if any. Therefore, we are of opinion that the impugned expenditure is (i) directly connected to the asset and its transfer, (ii) it is genuinely incurred as accepted by the revenue; (iii) it is a *bona fide* payments made as per the norms of the 'arm's length principle' since the M/s Enam and the assessee are unrelated; (iv) necessity of incurring of expenditure is imminent and it is in the normal course of the investment activity; and (v) read down provisions of section 48 of the Act in view of the said ratio in the case of Shantilal Kantilal (supra) accommodate the claim of such expenditure legally.

35. Further, the decision of the Tribunal in the case of Devendra Kothari (supra), which was heavily relied upon by the Ld DR for the revenue unfortunately did not refer to the said '*read down'* interpretation in the cited judgment of the jurisdictional High Court in the case of the Shantilal Kantilal (supra). In any case, we find the said order of the Tribunal is distinguishable on fact in general and the discharging of the **onus** of the assessee in demonstrating the **direct linkage** of the expenditure to the shares as well as the claim of fee

on the entire turnover on global basis ie not restricted to investments only. As such, it is a settled issue that the expression 'in connection with such transfer' enjoys much wider meaning and therefore, the fee paid to the portfolio manager in our opinion has to be construed to have been expended for the purposes of acquisition and transfer of the investment of the securities. Consequently, adjudication of the issue of allowability of the said expenditure under clauses (i) or (ii) of section 48 of the Act is merely an academic exercise. Therefore, considering the fact there is no such specific issue raised before us in the grounds, we refrain from entering into that zone in this order. It is also relevant to mentioned that the on facts, the expenditure is for the **twin purpose of acquisition and sale of the securities** and hence, it cannot be held the whole of the impugned expenditure is spent for transfer of asset or it should be loaded to the cost of the securities.

36. **Non-allocability of the Expenditure**: It is an agreed position between the parties the payment of the Portfolio management fee was paid to M/s Enam and others and the same is in accordance with the contents of the bilateral agreement. The services rendered by M/s Enam are also undoubted. The twin services relating to the said portfolio management include (i) acquisition of securities for the assessee-client and (ii) sale of the said securities for the assessee-client. The payment of fee is undisputedly unspecific to the individual shares/securities. In fact, the revenue takes an argument before us that to become the part of the cost of the acquisition of the asset, the expenditure ie fee paid the Enam, has to be asset-specific or share-specific per the provisions of section 48 of the Act. In our opinion, the same is absurd given the facts of the case where the portfolio investment attracts the provisions of section 48 of the Act and the asset involved is not land or building and in fact the assets involved are the securities/shares/mutual funds etc. In matters of transactions involving securities/shares/mutual funds etc, expenditure/fee paid to portfolio manager is never each share specific and in fact they are paid on volume based. Therefore, the revenue's argument has to be rejected on the ground of impracticability or non-existent in this line of investment activity alone. Considering the genuineness and essentiality of the payment of fee to the Portfolio manager ie ENAM and undisputedly for the predominantly for the said twin purposes of acquisition and sale of the securities, the claim has to be allowed. Further, it is an admitted fact that the bifurcation of expenditure is not possible in the given facts of the case and the payment is for **composite services**, wholly and exclusively in connection with transfer of the transfer of the securities.

The expenditure is undisputedly for the twin purposes of acquisition of the securities and the sales of the same. The expenditure is arrived at on profits sharing basis, which is now allowable basis by the SEBI. The expenditure is

composite one as it is for the both the purposes. There is no bifurcation either by the assessee or by the revenue. In our opinion, there is no requirement of bifurcation of the expenditure ie a segment to form part of the cost of acquisition and other segment relating to transfer of securities to reduce the profits as it is not the case of the revenue that it shall make some difference from the tax point of view. Therefore, we resist from entering into that controversy.

37. Next, we proceed to explain the expression 'such transfer' used in section 48 of the Act. The expression 'transfer is defined section 2(47) of the act and it is an inclusive one. However, there is no explanation as to from which point the concept of 'transfer' begins. Does it start from the point of acquisition of the asset/share? Thus, in our opinion, the expression 'transfer' involves various sub-components and the first sub-component must of purchase and possession of the impugned securities. Unless the assessee is in possession of the asset, he cannot transfer the same. Therefore, the expression 'expenditure incurred wholly and exclusively in connection with '*such transfer'* read with '*as a result of the transfer of the capital asset'* mentioned in section 48 and 48(i) of the Act must necessarily encompasses the transfer involved in the stage of acquisition of the securities till the stage of transfer involved in the step of sale of the impugned securities. Such an interpretation of sec 48 of the Act is the necessity here to avoid the likely absurdity.

38. In the peculiar circumstances of the present case, in our considered opinion the claim of the must not be rejected for want of the express provisions in section 48 of the Act and such an interpretation goes with the spirit of the judgment of the Jurisdictional high court in the case of M/s Shakunthala Kantilal (supra). Further, as per the principles of accounting ie AS-13, as discussed above, the expenditure of this kind is allowed to be loaded to the cost of acquisition of the securities. Therefore, in principle, the claim of the assessee is allowable under the provisions of section 48 of the Act. Hon'ble Supreme Court in the case of UP State Industrial Development Corporation (225 ITR 703) was dealing with the issue of loading of an underwriter commission to the cost of shares, held that the general principles of accounting have to be observed. Regarding the objections of the revenue regarding the quantification of the claims of expenditure, in our opinion, the judgments of the Supreme Court in the cases of Bharat Earth Movers Ltd (supra) and the Culcutta Co Ltd (supra) helps the assessee and therefore, the claim of the assessee is allowable. Accordingly, relevant ground relating to the second issue of the recalled appeals has to be **allowed** in favour of the assessee.

39. In the result, the appeals vide ITAs 499 & 500/P/2008 are **allowed**.

Other Appeals

1. 1320/PN/08 2005-06
2. 434/PN/09 2006-07

(By KRA Holding & Trading P Ltd)

&

3. 1321/PN/08 2002-03
4. 1322/PN/08 2005-06
5. 806/PN/09 2006-07

(By ARA Trading & Investments P Ltd)

40. We have tabulated the issues raised in the grounds raised by the two assessees namely KRA Holding & Trading P Ltd and ARA Trading & Investments P Ltd in the appeals mentioned above. As summed up in the said table, there are only two issues in all the grounds of the said appeals and they are: (i) whether the portfolio activity amounts to the business activity or the investment activity and proper head of income for taxing the earning of this activity; and (ii) allowability of the 'Fee paid by the assessee to the Portfolio Manager ie M/s Enam, the AMC u/s 48 of the Act. As detailed above, the 1st issue has been adjudicated by the Tribunal vide the appeal ITAs 499 & 500/P/2008 in favour of the assessees. This issue is common in all the other appeals under consideration here. Considering the commonality of the facts, parties and the issue, we of the opinion that the said issue stands covered by the said decision of the Tribunal and the same is decided in favour of the assessees. Accordingly, relevant grounds are **allowed**.

41. The second issue relates to the allowability of the fee paid to the M/s Enam, the Portfolio manager. This issue is commonly raised in all three appeals of KRA Holding & Trading P Ltd ie ITA 500/PN/08 for AY 2004-05, 1320/p/2008 for AY 2005-06 and ITA 434/P/2009 for AY 2006-07 and the same is adjudicated in favour of the assessee as discussed in the context of the adjudication of the recalled matter in the context of ITA 500/PN/08 for AY 2004-05. Considering the commonality of the facts, parties and the issue, we of the opinion that the said issue stands covered by the said decision of the Tribunal and has to be decided in favour of the assessees. Accordingly, relevant grounds of the relevant appeals are **allowed**.

So far as the ARA Trading & Investments P Ltd is concerned, the this is specific to ITA 499/PN/08 for AY 2004-05 and the same was already decided in favour of the assessee as per the preceding paragraphs of this order.

42. In the result, the appeals vide ITA **500**/PN/08 for AY 2004-05, **1320**/P/ 2008 for AY 2005-06 and ITA **434**/P/2009 for AY 2006-07 filed by M/s KRA Holding & Trading P Ltd are **allowed**.

43. In the result, the appeals vide ITA **1321**/PN/08 for 2002-03, **499**/PN/08 for 2004-05, **1322**/PN/08 for 2005-06 and **806**/PN/08 for 2006-07 filed by ARA Holding &Trading P Ltd are **allowed**.

Order pronounced in the open court on 31st May 2011.

Sd/- Sd/-

(I C SUDHIR) **(D. KARUNAKARA RAO)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Pune,
dated the 31st May, 2011

JMR*

Copy of the order is forwarded to :

1. Assessee.
2. DCIT, Range-11(1), Pune.
3. CIT (A), Pune.
4. CIT concerned,
5. D.R. ITAT 'A' Bench, Pune.
6. Guard File

By order

Assistant Registrar
I.T.A.T Pune