

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHE (H), MUMBAI.**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No. 7320/Mum/2019
Assessment Year: 2013-14**

Kismet Exports & Investments Pvt. Ltd. C-1/5, Sarathi C.H.S. Ltd. Santacruz (W), Mumbai 400054. [PAN:AACCK2895C] (Appellant)	Vs.	DCIT, 12 (3) (1), Mumbai. (Respondent)
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Appellant by	Sh. Prakash Jotwani, Adv. & Bhupendra Fafadia, CA
Respondent by	Sh. Vinay Sinha, CIT. DR.

Date of Hearing	02.08.2022
Date of Pronouncement	27.10.2022

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal was filed by the assessee against the order of the Id. Commissioner of Income Tax(Appeals)-21,Mumbai, [in brevity the CIT(A)] bearing appeal No. CIT(A)-21/DCIT-12(3)(1)/IT-469/2017-18, date of order 22.08.2019, the order passed u/s 250(6) of the Income Tax Act 1961, [in brevity

the Act] for A.Y.2013-14. The impugned order was originated from the order passed by the Dy. Commissioner of Income Tax,12(3)(2), Mumbai(in brevity the AO),order passed u/s 143(3)of the Act date of order 30.03.2016. The assessee took the following grounds which are reproduced here as under: -

“Ground No. 1 - “Business Income” or “Capital Gains”:

- 1) The learned CIT(A) erred in adjudicating on this ground based on findings which are completely irrelevant to the ground itself.*
- 2) The learned CIT(A) erred in relying on vague and incorrect figures which are in no way related to the ground.*
- 3) The learned CIT(A) failed to consider the crux of the issue which was whether income from sale of shares and units was to be treated as income from capital gain or income from business which is covered by earlier years’ orders for Asst. Years 2008-09, 2009-10 and 2010-11 wherein the Hon’ble ITAT has accepted the income is chargeable under the head Capital Gains.*
- 4) The learned CIT(A) failed to adjudicate on the main issue in question, i.e., whether the income of Rs.9,73,045/- should be income from capital gain or income from business.*

Ground No. 2 - Deduction of Rs.5,00,000/- u/s 37 (1):

- 1) Without prejudice to ground no. 1, the learned CIT(A) erred in confirming the at hoc allowance of only Rs.5,00,000/-*

as against actual expenses of Rs.76.94,648/-against income from business.

2) *The CIT(A) erred in restricting the allowance on a pro rata basis without any valid explanation.*

3) *The CIT(A) failed to consider that Section 37(1) does not provide for proportionate allowance of business expenses. The main condition to be satisfied is that the expenses must be wholly in relation to the business only, which condition is satisfied by the appellant company.*

4) *The CIT(A) erred in disallowing the claim of expenses on the basis that no*

evidence was provided during appellate proceedings to validate the same, when in fact there was no specific reference made by the learned CIT(A) to provide any proof of these expenses.

Ground No. 3 - Deduction of Rs.6,63,064/- u/s 57(iii):

1) *The learned CIT(A) erred in confirming disallowance u/s 57(iii) of Rs.6,63,064/-.*

2) *The learned CIT(A) failed to consider that the claim of deduction of Rs.36,68,051/- was restricted to 21.35%, being an amount proportionate to the percentage of interest income earned from total revenue during the year, i.e., Rs.53,36,565/- (21% of Rs.2,61,96,06/-).*

3) *The learned CIT(A) failed to consider that the interest expenditure being claimed against interest income was accrued interest paid to vendors from whom Non-Cumulative Debentures were purchased. The same was claimed in the profit and loss account as a deduction against the interest income earned from the said debentures.*

4) *Without prejudice, the learned CIT(A) erred in making a finding that no TDS was deducted in respect to these interest payments, when in fact there was no requirement to do so, since it should be allowed as a deduction in the year in which Interest income is earned from such Debentures and the interest paid was only in the nature of a reimbursement to the vendors.*

Ground No. 4 - Disallowance of Rs. 15,34,68,000/- u/s 40(a)(ia):

1) *The learned CIT(A) erred in confirming disallowance of Rs. 15,34,68,000/-u/s 40(a)(ia) for non-deduction of TDS u/s 195 on payment made to non resident shareholder on account of buy back of shares.*

2) *The learned CIT(A) failed to take into consideration that the appellant company bought back shares from a non-resident shareholder who was a resident of Singapore and as per the Double Taxation Avoidance Agreement (DTAA) between India & Singapore, Article 13 specifically provides that Capital*

Gains arising to a resident of Singapore are subject to tax in Singapore and not in India.

3) The learned CIT(A) erred in confirming the disallowance on the ground that during appellate proceedings the appellant had not particularly furnished documentary evidence showing that he was a resident of Singapore, when in fact there was no specific query raised in this regard during the appellate proceedings.

4) The learned CIT(A) failed to consider that in A.Y. 2011-12 & A.Y. 2012-13 also, buy back of shares had taken place and was duly accepted and no addition was made in this regard.

5) The learned CIT(A) erred in confirming this disallowance on the false and baseless assumption that the entire buy back of shares was devised to evade taxes. The learned CIT(A) has shown nothing on record which proves the contention of tax evasion.

6) The learned CIT(A) erred in disregarding the fact that section 115QA was introduced vide Finance Act, 2013, effective only from A.Y. 2014-15. The fact that Section 115QA was not applicable to the appellant company cannot be ruled out on a false surmise that the buyback of shares was devised for tax evasion.

The Appellant Company craves leave to add, alter or amend the Grounds of Appeal at or before the hearing of the appeal.”

Brief facts of the case

2. Brief fact of the case is that the assessee was assessed u/s 143(3) of the Act and the addition was made in related to Rs.9,73,045/- on account of capital gain which was claimed by the assessee. But the AO had treated this income as a business income of the assessee. The set off loss on the capital gain was not adjusted with the said income. The amount was added back as business income of assessee.

2.1. Ground No. 2 was not pressed by the Id. Counsel.

2.2. In Ground No.3, the assessee earned a revenue of Rs. 2,61,96,086/-, out of which interest income was 53,36,565/- which is worked @21% of total revenue of the year. Accordingly, assessee claimed proportionate deduction @21.35% on total expenses amount to Rs. 1,71,80,568/- which is worked out amount to Rs. 36,68,051/- u/s 57(iii). As per appellate authority, appellant voluntarily disallowed expenses U/s 14A amount to Rs 30,04,987/-. As per the assessee the claim is restricted to 663,064 effectively. But, as per observation of the Id. CIT(A) there is no deduction of TDS on payment of interest amount to Rs. 613,789/- which is liable to be disallowed U/s 40(a)(ia) of the Act. The prayer of the assessee is that

the expenses should be restricted to @ 21.35% of Rs. 663,064/- which is calculated to Rs. 141,564/-.

2.3. In the next issue, the assessee bought back shares from non-residential shareholder, Mr. Dileep Raghu Nath, who was a resident of Singapore, and as per the double taxation avoidance agreement (DTAA) between India and Singapore, Article 13 specifically provides that capital gains arising to a resident of Singapore are subject to tax in Singapore and not in India. Ld. AO rejected the claim of assessee. The addition was made for non-deduction of TDS against payment made to non-resident shareholders on account of buy back of shares by contravening section 195 read with section 40(a)(ia) of the Act and added back Rs. 15,34,68,000/- with the total income of the assessee. The assessee filed an appeal before the Id. CIT(A). The Id. CIT(A) upheld the order of the AO.

2.4. As per the assessee, a different fact was ascertained by the Id. CIT(A) in question of TDS on payment to non-resident in disregarding the fact. A new fact was illuminated by the CIT(A) related section 115QA which was introduced vide Finance Act, 2013 effective only from A.Y. 2014-15. As per the assessee the fact that section 115QA was not applicable to the appellant company cannot be ruled out and false summarize that the buyback of shares was devised for tax evasion.

2.5. Being aggrieved assessee filed an appeal before us.

Adjudication of Ground No-1 of the Assessee

3. The Id. Counsel for the assessee vehemently argued and filed a written submission which is kept in the record. The Id. Counsel first point out the order of the Id. CIT(A) in para no. 6 which is reproduced as below:

“6. Decision:

I have considered the facts of the case and submissions made by the assessee. It is seen from the facts available on record that the assessee is a private limited company and engaged in the business of shares and securities etc. The assessee filed return of income on 30.09.2014 declaring total loss of Rs 6,08,30,359/-. The case was selected for scrutiny under CASS. During the course of assessment proceedings, the A.O. observed that the assessee has shown loss of Rs 1,93,86,608/- from business other than loss from speculative business and specified business in ITR whereas the assessee has shown Rs 39,79,700/- of income from other sources and no business loss as mentioned in ITR is reflected in the Computation of income. After elucidation of the facts and consideration of the submission filed by the assessee, the A.O. completed the scrutiny assessment proceedings u/s 143(3) of the Act on

30.11.2016 by disallowing business loss of Rs 19386608/- claimed by the assessee in ROI. Aggrieved by the disallowance, the appellant filed appeal against the said disallowance.

During the course of appellate proceedings, the appellant filed copies of ITR, computation of income, financial statements and ledger accounts of current year losses. The appellant stated that though the income computed by stands at Rs 3979678/- being income from other sources while uploading the Return of Income on the IT website, the system has of its own accord calculated current years expenses as Business loss and adjusted the same against current year gains and the appellant has paid adequate taxes by way of TDS and Advance taxes. It is seen from profit and loss account that the assessee has claimed Rs 21291616/- of total administrative expenses and the assessee claimed the said loss is attributable to income of dividend income. I am not in agreement with' the submissions of the assessee for the reason that the assessee is aware of reporting the business loss in return of income but failed to revise the return of income. If the expenses are attributable to earning exempt income, it should not have been claimed in the profit and loss account or if claimed, it should have been disallowed in return of income. If the expenses incurred for earning exempt income are treated as business loss during the year and set off against income of a subsequent year, the appellant does not pay

any tax on positive income reported in the said subsequent year. Thus, the appellant's reasons that it paid due taxes during current year does not hold much water.

The appellant has not placed any new material on record during the course of appellate proceedings and the AO has rejected the submissions lucidly in the assessment order. A non-genuine business loss, if reported in return of income wrongly for the purpose of carrying forward to future years should be revised or intimate to the department as and when the assessee comes to know of the discrepancy. A wrong claim without supported by documentary evidences could not be treated as genuine when the AO identifies it during scrutiny proceedings. There is no evidence brought on record and mentioned in the submissions to prove that the appellant has attempted to revise the return AO. The assessee should always be true and fair while filing return of income and is not expected to take undue advantage of taxation by making plea of systemic error of adjustment of carry forward business loss for setting off against income of succeeding years in the ROI before the AO when the case is selected for scrutiny. The assessee has neither filed revised return of income nor brought the discrepancy to the notice of the AO or CPC. The assessee has a huge brought forward business loss from AY 2006-07 onwards to be set off against income of future years. However, the assessee has not

submitted whether it faced the same discrepancy while filing return of income in any earlier years. Considering the totality of facts and submissions filed by the assessee, it is decided that the AO has a clear and unambiguous finding that the appellant would have got the benefit of carrying forward business loss of Rs 1,93,86,608/- to subsequent years under the head business and profession (non-speculative) and disallowance of business loss of Rs.2,16,26,458/- is confirmed. Therefore, this ground of appeal is therefore dismissed.”

3.1 The Id. Counsel mention that the observation of the Id. CIT(A) is irrelevant. The counsel relied that the loss on capital gain was brought forwarded from earlier years. The issue was covered by the order of Coordinate Bench bearing ITA 8699 & 8870/Mum/2011 dated of order 14.01.2015. The relevant para 3.4 is extracted below:

“3.4 Against above order assessee is in appeal before us. We have heard both the counsel and perused the records. Lt. Counsel of the assessee submitted that this tribunal in assessee’s own case in ITA No. 8870/Mum/2011 and 8699/Mum/2011 for assessment year 2008-09 has decided the same issue in favour of the assessee vide order dated 14.01.2015. Furthermore Ld. Counsel of the assessee submitted that assessee is engaging into the investment activity through PMS (portfolio management services). Ld. Counsel submitted

that in such cases Hon'ble High Courts have decided that investment activity engaged through PMS transactions cannot be treated as trading activity. For this proposition Ld. Counsel placed reliance upon Hon'ble Delhi High Court decision in ITA 485/2012 in the case of Radials International vs. ACIT vide order dated 25.04.2014. Per contra Ld. DR relied orders of the authorities below. He further submitted that it is also not clear from the order, of the A.O that assessee is engaging into the investment activity through portfolio management services.”

3.2. The ld. CIT(A) DR only relied on the order of the revenue authorities and no contrary finding was able to produce before us.

3.3. We heard the rival submissions and relied on the documents available in the record. The carry over loss is a nature of capital gain loss which the assessee can adjust with the capital gain profit of this year. The AO erred to treat the income from capital gain as a business income. The Coordinate Bench is already covered the issue for A.Y. 2008-09 to 2010-11. We find no infirmity in the claim of the assessee the income amount of Rs.9,73,045/- as capital gain and eligible to adjust this gain with a capital gain loss.

3.4. Accordingly, the Ground No. 1 of the assessee is allowed.

Adjudication of Ground No-3 of the Assessee

4. Considering the Ground no-3, the assessee claimed proportionate deduction @21.35% on total expenses amount to Rs. 1,71,80,568/- which is worked out amount to Rs. 36,68,051/- u/s 57(iii). As per appellate authority, the appellant voluntarily disallowed expenses U/s 14A amount to Rs 30,04,987/-. So, the claim of the assessee is to restrict the deduction amount to Rs.663,064 (Rs 36,68,051— Rs. 30,04,987/-) effectively. The Id. CIT(A) disallowed the assessee's claim in the ground that the assessee had not deducted TDS amount to Rs 613,789/- on payment of interest which is contravening the Section 40(a)(ia) of the Act. The appellant during the hearing unable to bring to details calculation related claim of Section 57(iii) in respect income from other sources. The Id. CIT. Dr only relied on order of the revenue authorities. In our opinion the claim of deduction U/s 57(iii) should be allowed amount of Rs.49,275/-(Rs. 663,064/- - Rs. 613,789/-)

4.1. Accordingly Ground no-3 is partly allowed.

Adjudication of Ground No-4 of the Assessee

5. In **Ground No-4**, the Id. Counsel for the assessee vehemently argued and first pointed out in the order, the AO for relevant para 6.13 which is extracted as below:

“6.13. Therefore, the amount payable by the assessee company would be taxable in India and assessee company is required to withhold tax on the proposed remittance of the proceeds. The assessee has not brought anything on record to show that withholding tax has been deducted on payment made to Non-Resident Indian. In view of the failure on the part of the assessee to deduct withholding tax, an amount of Rs.15,34,68,000/- paid to Shri Dileep Nath is taxed in the hands of the assessee company as per the provisions of section 40a(i) rws 195 of the I.T.Act and added to the total income of the assessee. Penalty proceedings u/s.271(1)(c) are initiated for furnishing inaccurate particulars of income.”

5.1 He further argued that the assessee company has accumulated profit from earlier year i.e. F.Y. 2006-07 as on 31.03.2007 an amount of Rs.52,05,02,707/- and it was grown to Rs.80,05,02,707/- as on 31.03.2010. When there was buy back 1250 shares for Rs.19,98,75,000/- during the F.Y. 2010-11. Again, there was buy back of 324 shares during the F.Y. 2011-12. The assessee bought back 840 shares from Mr. Dileep Raghu Nath who is a non-resident of India and paid amount of Rs.15,34,68,000/-. The capital gain was earned by Mr. Dileep Raghu Nath amount of Rs.15,15,81,802/- and claimed as exempted vide Article-1 of the Protocol dated

29.06.2005 read with Article 13 of DTAA dated 24.01.1994 with Singapore. The tax on the ground will be paid in Singapore. There is no such provision to deduction of tax on this amount as per the DTAA. The demand of the AO is wrong, and assessee is not liable to pay deduct tax u/s 195 of the Act in India. So, there is no violation of section 40(a) (ia). He further argued that the ld. CIT(A) without considering the fact had taken a different view that the assessee is violated the provision of section 115QA of the Act. He further argued that section 115QA was introduced in statute by Finance Act, 2013 with effect from 1-6-2013, payment made by assessee on account of purchase of its own shares prior to 1-6-2013 could not be termed as dividend as per provisions of section 115QA. Ld. Counsel relied on the order of the ITAT Bangalore Bench 'B' in the case of Fidelity Business Services India (P.) Ltd.v. ACIT, Circle 3 (1) (1), Bangalore[2017] **80 taxmann.com 230** (Bangalore - Trib.). So, the addition is liable to be deleted. The CIT(A) did not consider the factual position which was raised by the AO and took different view in the order which is bad in law.

5.2. The ld. DR vehemently argued and relied on the order of the revenue authorities. No other contrary view was placed by the revenue.

5.3. We heard the rival submissions and relied on the documents available in the records and respectfully considered the judgments submitted by the assessee. The assessee bought back the shares by paying amount of Rs.15,34,68,000/-. As per the AO which is liable to be taxed by violation of section 195 of the Act. The Id. CIT(A) took different view and upheld the addition for violation of section 115QA. The CIT(A)'s divergent view is related to application of section 115 QA. Since section 115QA was introduced in statute by Finance Act, 2013 with effect from 1-6-2013, payment made by assessee on account of purchase of its own shares prior to 1-6-2013 could not be termed as dividend as per provisions of section 115QA. The fact that section 115QA was not applicable to appellant company as the payment is related to FY 12-13. The order of CIT(A) is ruled out for wrong ascertaining fact against the assessee. However, Mr Dileep Raghu Nath is aNRI and a resident of Singapore and accordingly the provision of DTAA article 13, applied to him. As per the provisions of Indo Singapore DTAA jurisdiction for taxing the capital gains arising in the hands of Mr. Dileep Raghu Nath is in Singapore and not in India. Therefore, the application of section 195 is not applicable for assessee-company. Accordingly, the addition for violation of section 40(a)(ia) read with section 195 amount of Rs. 15,34,68,000/- is quashed.

5.6. Accordingly, the Ground No-4 is allowed.

6. Therefore, Ground No-1&4-6 of the assessee are allowed. Ground No-2 of the assessee is not pressed. Ground no-3 of the assessee is partly allowed.

7. In the result, the appeal of the assessee **ITA No. 7320/Mum/2019** is partly allowed.

Order pronounced in the open court on 27.10.2022

Sd/-
(PRAMOD KUMAR)
Vice President

Sd/-
(ANIKESH BANERJEE)
Judicial Member

AKV

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

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By Order