

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 2284/MUM/2024
(Assessment Year: 2012-13)**

**Assistant Commissioner of Income Tax
Ward 4(3)(1), Mumbai**
Aayakar Bhavan, M.K.Road,
Churchgate, Mumbai – 400020
Maharashtra

..... **Appellant**

**Kismet Exports and Investments
Pvt. Ltd.**

Vs

C-1/5, Sarathi CHS, Khira Nagar,
S.V.Road, Santacruz (West)
Mumbai, Maharashtra
[PAN: AACCK2895C]

..... **Respondent**

Appearance

For the Appellant/Department : Shri P. D. Chougule
For the Respondent/Assessee : Shri Bhupendra Shah

Date

Conclusion of hearing : 14.08.2024
Pronouncement of order : 29.10.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 29/02/2024, passed by the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the **CIT(A)**'] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 19/03/2015, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the **Act**'].
2. The Revenue has raised following grounds of appeal:
 - "1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that profit

arising on sale and purchase of shares during the relevant previous year is to be assessed under the head "Capital Gain" and not under the head "Business Income" without having any discussion in its order on nature of transactions, frequency, period of holding and volume of such transactions during relevant previous year".

3. The relevant facts in brief are that the Assessee, a company engaged, inter alia, in making investments in shares, securities and other financial instruments under Portfolio Management Scheme (PMS), filed return of income for the Assessment Year 2012-13 on 26/09/2012 declaring total income INR.2,74,63,110/-. The income as per the Profit and Loss Account of the Assessee for the relevant previous year included the (a) F&O Profits : INR.3,53,33,704/-, (b) Short Term Capital Gains: INR.3,66,79,892/-, (c) Long Term Capital Gains: INR.5,83,699/- and (d) Income from other sources - interest: INR.49,21,543/-. The case of the Assessee was selected for regular scrutiny, the Assessing Officer completed the assessment under Section 143(3) of the Act vide Assessment Order, dated 19/03/2015, at assessed income of INR.6,81,77,530/- under normal provisions of the Act after making addition/disallowance. The Assessing Officer also treated the Short/Long Term Capital Gains offered to tax by Assessee as a business income.
4. Being aggrieved, the Assessee carried the issue in appeal before CIT(A) and submitted that during the year under consideration the Assessee-Company has declared Short Term Capital Gain of INR.2,61,93,491/- and Long Term Capital Gain of INR.1,21,59,331/- (without indexation under Section 112 of the Act) being income arising from sale of shares/mutual funds which are held under different Portfolio Management Schemes

(PMS). The Assessing Officer has treated the entire Short/Long Term Capital Gain as Business Gain. No purchases or sales were made by the Assessee directly and all the transactions have been carried out by its Portfolio Managers namely M/s. Kotak Securities Ltd. and India Infoline Ltd. (IIFL), based on the sentiments and movement of stock market as per their own discretion. Thus, the Assessee did not have any control over the buying/selling of shares and it is left to the choice of the Portfolio Managers. The aforesaid submissions found favour with the CIT(A), as the CIT(A) accepted the claim of the Assessee and treated income of INR.1,21,59,331/- and INR.2,61,93,491/- as Long Term Capital Gain and Short Term Capital Gain, respectively. The relevant extract of the decision of the CIT(A) reads as under:

"5. The Hon'ble ITAT, in the appellant's own case decided the issue in favour of the appellant for the Asst Years 2008-09, 2009-10, 2010-11 & 2011-12. The ITAT held that the investment activity through PMS agreement doesn't give rise to business activity of making profit and hence the investment activity cannot be held to be business activity and the gains/loss on account of share transactions are to be assessed under the head of capital gains. In view of the findings of the Hon'ble Tribunal in the appellant's own case for earlier years, the grounds 1 & 2 raised by the appellant are allowed and the AD is directed to consider the amounts as capital gains. In view of the adjudication of grounds 1 & 2 in favour of the appellant as capital gains, the expenses of Rs. 16,93,733/- cannot be allowed. The ground no.3 is accordingly dismissed."

5. Being agreed, the Revenue has preferred the present appeal before the Tribunal.
6. We have heard both sides and perused the material on record. We find that the CIT(A) has granted relief to the Assessee by following the decision of the Tribunal in the case of the

Assessee for the 2008-09 (ITA No.8699 & 8870/Mum/2011, common order dated 14/01/2015), 2009-10 & 2010-2011 (ITA No.1766 & 1598/Mum/2013 and ITA No.5043 & 5610/Mum/2014, common order dated 03/05/2017) and 2011-12 (ITA No.3255/Mum/2017, order dated 08/02/2019). The Learned Authorised Representative for the Assessee has placed on record the copy of the aforesaid orders passed by the Tribunal.

- 6.1. We note that while deciding identical issue in favour of the Assessee in appeal preferred by the Assessee for the immediately preceding Assessment Year 2011-2012, the Mumbai Bench of the Tribunal has held as under:

"5. We have heard rival submissions. We find that the Id. AR pointed out that this issue has already been settled in favour of the Assessee in its own case for the A.Y.2009-10 by this Tribunal in ITANo.1766 & 1598/Mum/2013 and for A.Y.2010-11 in ITA No.5043 & 5610/Mum/2014.

3.4 Against above order assessee is in appeal before us. We have heard both the counsel and perused the records. Ld. 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.

3.5 *Upon careful consideration we find that this tribunal in assessee's own case has decided similar issue in earlier year as mentioned above in favour of the assessee by holding as under:*

"The revenue through its grounds of appeal has agitated the action of the CIT(A) in treating the profit of Rs.49,87,5149/- earned on redemption of mutual funds as Long Term Capital Gains(LTCG) as against business income treated by the AO. The contention of the revenue is that since the assessee is primarily an investment company, so the income earned should be treated as business income. We find that this issue has been dealt by the Ld. CIT(A) in Para 4 of his order. The Ld. CIT(A) after detailed discussion of the matter has observed that the assessee company had earned long term capital gains on redemption of mutual funds held for more than 1 year. It had been consistently showing the same as investments and assessed as such for the last couple of years. There was nothing on the record that the assessee had traded in the said mutual units. Following the principle of consistency and in the absence of any evidence that the assessee had acted as a trader in the redemption of mutual funds, he held the assessee as investor and directed the Assessing Officer to treat the same as LTCG. We are unable to agree with the contention of the revenue that since the assessee is primarily an investment company, so the income earned should be treated as business income. Law has been now settled on the point through various judicial decisions that even a company having business in trading in shares or securities can also maintain a separate investment portfolio. We therefore do not find any reason to interfere with the well reason order of the CIT(4) on this issue. The appeal of the revenue, thus having no merit is therefore dismissed."

"The assessee before ux has submitted that the transactions were carried out through investment manage. It was submitted by the assessee company that 13,000 shares of the Kotak

Securities Lid were directed to be purchased to the investment manage, however, mistakenly 25000 shares were purchased by it. It was immediately directed to restrict the purchases to 13000 shares and rest of the 12000 shares were sold on the same day by incurring loss. The assessee did not carry out any other share transaction during the year. This was the singly transaction done by the assessee during the year. The shares of other companies purchased were held as investment. In view of the above explanation given by the assessee, in our view, the action of the lower authorities in treating the said loss resulting from single transaction of sale of shares for which the assessee has given the plausible explanation, cannot be held to be justified. This issue is accordingly decided in favour of the assessee and it is directed that the said loss to be treated as short term capital loss"

- 3.6 *Furthermore we also note that Hon'ble Delhi High Court in the case of Radials International (supra) has held as under "head notes only":*

"Business income or capital gains Sale of shares under Portfolio Management Scheme-Assessee-firm earned gain on sale of equity shares under the Portfolio Management Schemes (PMS) and treated gains realized on sale of shares as business income. Assessee in its reply to 40 stated that the shares were depicted as investments and not "stock-in- trade in the accounts of the assessee and hence, the gains resulting from their sale were to be considered capital gains. AO noted that motive of transactions was the earning of profit and not a dividend and holding period was ranging from a few days to a few months, therefore, the gain from sale of shares was business income. CIT(A) confirmed the views of AO. Tribunal upheld the order of CIT(A) on the ground that intention of assessee wax to maximize the profit at the time of deposit of amount in PMS. Assessee contended that the PMS agreement, by its terms alone or by the fact of agency being handed over to the portfolio manager, could not be the basis for inferring an intention to profit or that the transactions were in the nature of trade. Of the total of 1248 transactions that had taken place in the relevant period, revenue submitted that there were on average, about 4-5 transactions daily,

only 8 of which entailed a holding period of longer than 365 days. Thus, the order of the Tribunal must be upheld. Held: The PMS Agreement was a mere agreement of agency and could not be used to infer any intention to make profit. The intention of assessee must be inferred from conduct of assessee, circumstances of transactions and not just from seeming motive at the time of depositing the money. Since large volume of shares purchased were reflected from holding period, intended towards the end of investment, gain arising from sale of shares must be treated as capital gains, and not as business income."

3.7 A reading of above case laws makes it clear that similar issue was decided in favour of the assessee by the tribunal in assessee's own case. Furthermore in the order of Ld. CIT-A it is noted that assessee is engaged into the activity of investment through PMS. In such situation the ratio from Hon'ble Delhi High Court cited above applies to the facts of the case. Thus in earlier year similar transactions were treated by the ITAT as transactions of investment giving rise to capital gains/loss. Furthermore Hon'ble Delhi High Court has held that investment activity through PM agreement doesn't give rise to business activity of making profit. Hence we hold that assessee's investment activity cannot be held to be business activity. Accordingly the gain/loss on account of share transactions are to be assessed under the head of capital gains. Accordingly, we set aside orders of authorities below, and decide the issue in favour of assessee."

5.1. Respectfully following the said decision of this Tribunal in assessee's own case for the earlier two assessment years (supra), we allow the Ground No.1 of the assessee."

6.2. It is admitted position that there is no change in the facts and circumstances of the case during the relevant previous year. There is nothing on record to persuade us to depart from the view taken by the Co-ordinate Bench of the Tribunal in the case of the Assessee for the preceding four Assessment Years. Accordingly, respectively following the above decisions of the

Tribunal we declined to interfere with the order passed by the CIT(A) and the same is confirmed. Accordingly Ground No.1 preferred by the Revenue is dismissed.

In result, the appeal is preferred by the Revenue is dismissed.

Order pronounced on 29.10.2024.

Sd/-
(Shri Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 29.10.2024
MP, LDC

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai