

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

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

**ITA No. 5520/MUM/2024
Assessment Year: 2012-13**

Deputy Commissioner of Income
Tax-4(3)(1)
649 Aayakar Bhavan M K Road
Mumbai-400020

Appellant

Vs.

Kismet Exports and
Investments Pvt Ltd.
C-1/5, Sarathi CHS, Khira
Nagar, S.V.Road, Santacruz
(West), Mumbai-400054
PAN NO. AACCK 2895 C
Respondent

Assessee by : Mr. Bupendra Shah
Revenue by : Mr. Hemanshu Joshi, Sr. DR

Date of Hearing : 27/03/2025
Date of pronouncement : 24/04/2025

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 02.08.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2012-13, raising following grounds:

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) is correct in deciding the appeal of the assessee relying on the decision of the Ld.CIT(A) vide order dated 29.02.2024 in



assessee's own case for the assessment year AY 2012-13, even though the department has not accepted the said order of the Ld.CIT(A) and filed further appeal before the Hon'ble ITAT, Mumbai

2. Whether on the facts and circumstances of the case and in law the Ld.CIT(A) erred in allowing the appeal of the assessee even though there is no loss to be set off against the income of the assessee for the AY 2012-13

3. The appellant craves leave to amend or alter any ground or add new ground which may be necessary.”

2. We have heard rival submissions of the parties and perused the relevant materials on record. The ground No. 1 of the appeal has been raised by the Revenue only for the reason that department has not accepted the order of the Tribunal and further appeal was filed. In our opinion, the department is at liberty to contest the issue to higher appellate forum, the Tribunal is bound to follow a binding precedent on the issue in dispute unless order of Tribunal (supra) is reversed by the higher appellate authorities. The issue in dispute in the case was regarding set off loss which was allowed by the Tribunal. We note that before the Ld. CIT(A) the assessee pleaded for issuing direction to the assessing officer for allowing setoff of unabsorbed business loss of Rs. 2,35,20,032/- and deduction of income from other sources of Rs. 49,21,543/- while computing business from income and profession. The the Ld. CIT(A) vide impugned order has decided as under:

“The Appellant submits that the learned AO be directed to allow the setoff of unabsorbed business loss of Rs.2,35,20,032/- as assessed



and the learned AO be directed to deduct income from other sources of Rs.49,21,543/- while computing income from business & profession.

Grounds of Appeal No. 3: The Learned AO has charged interest u/s. 234B of Rs.2,10,12,842/-. The Appellant submits that the Learned AO be directed to re-calculate the interest chargeable u/s. 234B. The Appellant submits that while calculating interest u/s. 234B the AO has not calculated the interest u/s. 234B on assessed tax as defined vide explanation 1 to section 234B. The Appellant submits the learned AO be directed to calculate interest u/s 234B.....

4. It is seen that while passing the order giving effect to the order of ITAT, the AO has merely adopted the income as appearing in the assessment order passed on 19.03.2015 wherein the gross total income and total book profit were shown at Rs. 9,16,97,564/- and Rs. 8,24,66,366/-, however the AO did not consider the issues of brought forward of business losses to be set off against such income. The appellant stated that its petition u/s 154 filed against the said order is still pending.

4.1 It is further to note that the NFAC had passed an appeal order in the appellant's case for the very same assessment year 2012-13 wherein clear directions were given to the AO to re-compute the income of the appellant. The said order was passed vide DIN & Order No: ITBA/NFAC/S/250/2023-24/1061739732(1), dated 29/02/2024. The operative portion of the appellate order is reproduced as under:

5. CONCLUSION. The Assessment Order, ground of appeal, statement of facts, submissions of the appellant made on different dates and the AR's argument through video conference held on 28.12.2023 and further submissions filed by the appellant post video conference have been perused. The appellant



filed its return of income for AY 2012-13 on 26.09.2012 declaring total income of Rs. 2,74,63,110/- under normal provisions and Rs. 7,87,27,987/- u/s. 115JB of the IT Act and the same was taken up for scrutiny. During the course of assessment proceedings, the AO was of the opinion that the appellant's activities are in the nature of a trader rather than an investor for the income in respect of the capital gains. Hence the AO treated the amount of Rs. 1,21,59,331/- shown as Long Term Capital Gains and Rs. 2,61,93,491/- shown as Short Term Capital Gains, as business income and made addition as income from business or profession. The appellant raised grounds 1 & 2 stating that the income should be treated under the head Capital Gains only. In this connection, it is noticed that 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 AO 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.

5.1 The ground no 4 deals with disallowance made u/s 14A. It is seen that the AO disallowed Rs 7,08,228/- in addition to the already made disallowance by the appellant of Rs. 36,13,969/-, and the total disallowance as per the assessment order was Rs.



43,22,197/- . During the course of appeal proceedings, through the additional/modified ground, appellant submitted that the disallowance u/s. 14A be restricted to exempt income of Rs. 5,83,699/- considering the judicial pronouncements wherein it was held that the amendment to section 14A is applicable prospectively from AY 2022-23 and onwards. As this ground is fresh and has not raised before the Assessing Officer, no adjudication is made at this end. However, duly relying on the judicial pronouncements, the disallowance u/s 14A is restricted to Rs. 41,97,668/- (Rs. 36,13,969/- already disallowed by the appellant itself + 5,83,199/-). Hence, the disallowance u/s. 14A is restricted to Rs. 41,97,668/- and the ground raised is partly allowed.

5.1.1 The appellant raised additional ground w.r.to computation of book profit u/s. 115JB and 14A disallowance cannot be added to the book profit. The appellant relied upon the Hon'ble supreme court judgment in the case of PCIT V Atria Power Corp Ltd (2002) 142 taxmann.com 413(SC) and stated that book profit be computed without Sec 14A disallowance. Duly relying upon the judicial pronouncements in this regard, the AO is directed to exclude sec 14A disallowance while computing book profit. Thus, this ground raised by the appellant is allowed.

5.2 The ground 5 pertains to addition of Rs. 4,11,804/- being disallowance of 50% of motor car expenses. The same was disallowed by the AO as the appellant could not produce log books in respect of the cars usage. The appellant stated that the same was used for Directors. In the absence any further specific submissions filed by the appellant during appeal proceedings also, the addition/disallowance made is hereby confirmed and the ground is dismissed.



5.3 With regard to the ground no.6 viz., disallowance of 50% of payment of Rs. 22,83,216/- made to AMBFS private Limited, the AO held that the payment appears excessive and not justified thus 50% of the amount so paid i.e. Rs. 11,41,608/- was disallowed by him. The appellant argued that the fee paid to the above firm was on account of rendering services relating to company law, income tax matters and other allied functions since the appellant does not have any staff of its own and further stated that the entity was not a related party to the appellant. The appellant stated that it had filed details of services rendered by the said firm to the appellant and TDS was also made from the payment made to the said AMBFS. Considering the submissions of the appellant, the said expenses are allowed to the extent TDS is done. Thus the ground raised by the appellant is allowed subject to verification.

5.4 The appellant further filed an additional ground of appeal that the AO failed to reduce interest income from total business income and also while calculating business income he deducted F&O income instead of LTCG/STCG while assessing capital gain as business income. Thus it was requested by the appellant to assess the correct income subject to appellate decision. As some of the grounds of appeal are decided in favour of the appellant during the present appeal proceedings as discussed in the earlier paragraphs, the AO is directed to adopt correct income under each head and assess the total income after proper verification. Thus, this ground is allowed subject to verification.

6. In result, the appeal is partly allowed.."

4.2 The above appellate order is passed subsequent to the impugned order against which the present appeal is filed by the appellant.



Further the appellant stated that its petition u/s. 154 is pending before the AO. Therefore, considering the facts and circumstances of the case, the AO is directed to scrupulously follow the directions given in the above referred appellate order and re-compute the income of the appellant. Further the AO is directed to set off of brought forwarded unabsorbed business loss in accordance with law. With these directions, the grounds 1 & 2 are allowed subject to verification.”

3. We find that Ld. CIT(A) has directed the assessing officer to allow the brought forward unobserved business losses in accordance with law. In our opinion there is no infirmity in the order of the Ld. CIT(A) on the issue and dispute. Further, during the course of hearing before us Ld. DR was directed to verify from the assessing officer whether he had already given effect to the order of the Ld. CIT(A) or not. The Ld. DR was provided 7 days time for filing a reply from the assessing officer but no such reply has been filed and therefore, in the facts and circumstances, we feel it appropriate to direct the assessing officer to comply with the direction of the Ld. CIT(A) as reproduced above, if already not complied till date. The grounds of the appeal of the Revenue are accordingly dismissed.

4. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 24/04/2025.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER



Mumbai;

Dated: 24/04/2025

Disha Raut, Stenographer

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)

ITAT, Mumbai