IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

M.P. No. 337/Bang/2018
(In ITA No.202/Bang/2018)
(AY. 2015-16)
(Appeal by Assessee)
&
(ITA No. 693/Bang/2018)
(AY. 2015-16)
(Appeal By Revenue)

Joint Commissioner of Income-Tax,
Special Range-3,
Bangalore ..Revenue / Petitioner

Vs.

M/s. Flipkart India Private Limited,
Essae Vaishnavi Summit,
No.6/B, 7th Main, 80 Feet Road, 3rd Block,
Koramangala Industrial Layout,
Bangalore – 560034,
[PAN: AABCF8078M]

..Assessee / Respondent

Appellant by	:	Shri Ch. Sundar Rao, CIT
Respondent by	:	Shri Percy Pardiwala, Sr. Advocate

Date of hearing	:	12-04-2019
Date of Pronouncement	:	24-04-2019

O R D E R

Per N.V.VASUDEVAN, Vice-President:

This is a Miscellaneous Application (M.A.) filed by the Assessee u/s.254(2) of the Income Tax Act, 1961 (Act) praying for an

order recalling its order dated 25.04.2018 and rectifying order adjudicating the grievance projected by the revenue in this Miscellaneous Petition.

2. The Assessee is a company. During the relevant previous year it was engaged in the business of wholesale trader/distributor of books, mobiles, computers and related accessories. It filed a return of income for AY 2015-16 declaring loss of Rs.796,34,36,863/-.

3. The AO noticed that the Assessee was a wholesale dealer and acquired goods from various persons and was immediately selling the goods to retail sellers like M/S.WS Retail Services Pvt.Ltd. and others, who subsequently would sell those goods as sellers on internet platform under the name 'Flipkart.Com'. The AO further noticed that the Assessee has been purchasing goods at say Rs.100/- and selling them to the retailers at Rs.80/-. The purchases during the relevant previous year was Rs.10335,73,05,882/- and sales was Rs.9351,75,05,319/-. After excluding closing stock of unsold goods, the purchase and sales figure were as follows:

Purchases	Rs.10335,73,05,882
Less: Stock Unsold	Rs. 741,83,06,836
	Rs. 9593,89,99,046
Less: Sale value	Rs. 9351,75,05,319
Gross Loss	Rs. 242,14,93,727

4. The loss in terms of percentage was 2.52% of the cost of purchase value. The AO was of the view that the action of the Assessee in selling goods at less than cost price was not a normal business practice. In the order of assessment, the AO concluded that the Assessee followed predatory pricing in order to create marketing intangibles and brand. According to him the enhanced valuations at which venture capitalists invest in the Assessee is based on intangibles generated by Assessee. Hence, selling at a price below prices is not an irrational economic behaviour. It is a clearly thought strategy to establish a monopoly in market by brand building by generating consumer goodwill. This strategy naturally leads to generation of intangible assets and enduring benefit. Having come to a conclusion that the Assessee created intangible assets, the AO thereafter embarked upon method of valuation of intangibles. For the above purpose there was a need to find out average gross margin on cost for other wholesalers in the market. The AO took the database for wholesalers dealing in consumer and electronic goods. The search process yielded an average gross profit margin of 16.95%. This was compared with Assessee's profit margin of (-2.52%). The AO thereafter arrived at the value of intangible on the basis that had the assessee not followed a predatory of Rs.9593,89,99,046) i.e. Rs. 11220,06,59,384. Assessee's real sales was Rs. 9351,75,053 The reduction in sales due to following assessee's strategy of selling at a price lower than Cost, the difference of Rs. 1868,31,54,065 between the price at which the assessee is selling and the price the normal wholesaler would have sold is the

value of expenses incurred by assessee towards cost of marketing intangibles in the year. Accordingly a sum of Rs.1868,31,54,065/- was treated as expenditure incurred by the Assessee for creating intangibles and it was further held that the expenditure so incurred was capital expenditure and had to be disallowed and added to the total income. The AO however treated the value of expenditure for creating intangibles as capital asset and allowed depreciation at 25%. *depreciation on intangibles is allowed 25 % of RS.1868,31,54,065/- which is a sum of Rs.467,07,88,516/-. The difference between* ***Rs. 1868,31,54,065 - Rs. 467,07,88,516) Rs. 1401,23,65,549*** was proposed to be added to the total income of the Assessee. *Further a similar capitalization was made in A.Y 2012-13, A.Y 2013 -14 and AY 20 1415 and it was held that the assessee was eligible for depreciation on these capital asset in those AYs also and accordingly by a process of reverse working the sum to be disallowed was worked out by the AO as follows:*

A.Y:2012-13- Rs. 8,18,81,560

A.Y:2013-l4 - Rs. 45,14,69,521

A.Y:2014-15- Rs. 143,22,15,931

After allowing the above deduction for AN 2012-13, 2013-14 and 2014-15 the addition to be made was worked out as under:

	1401,23,65,549
Less: Amortisation of A.Y: 2012-13	8,18,81,560
Less: Amortisation of A.Y: 2013-14	45,14,69,521
Less : Amortisation of AY 2014-15	143,22,15,931
Balance Addition	**1204,67,98,537**

A sum of Rs.1204,67,98,537/- was added to the total income of the Assessee. On appeal by the Assessee, the CIT(A) not only confirmed the action of the AO but in exercise of his powers of enhancement held that the Assessee was not entitled to depreciation on the capitalized value of intangible.

5. On appeal by the Assessee, this Tribunal held that the starting point for computing income from business is the profit or loss as per the profit and loss account of the Assessee, which cannot be disregarded unless certain provisions (Section 145(3)) of the IT Act are invoked. Since the AO has not invoked such provisions, the AO is not empowered to go beyond the book results. It was held that it is settled law that "where a trader transfers his goods to another trader at a price less than the market price and the transaction is a bonafide one, the taxing authority cannot take into account the market price of those goods, ignoring the real price fetched to ascertain the profit from the transaction" and "income which has accrued or arisen can only be subject matter of total income and not income which could have been earned but not earned". It was held that "the AO was not right in

proceeding to ignore the books results of the Assessee and resorting to a process of estimating total income of the Assessee in the manner in which he did, what can be taxed is only income that accrues or arises as laid down in Sec.5 of the Act. Nothing beyond Sec.5 of the Act can be brought to tax". It was held that there is no provision to disregard the loss declared by the Assessee and also there is no provision by which the Revenue can ignore the sale price declared by an Assessee and proceed to enhance the sale price without any material before him to show that the Assessee has in fact realized higher sale price. In fact, whenever, the Legislature intended to tax income not earned, they have made a provision to this effect. It was held that there was no expenditure which was incurred by the Assessee and one cannot proceed on the basis of a presumption that profit forgone is expenditure incurred and further that expenditure incurred was for acquiring intangible assets like brand, goodwill etc. It was also held the valuation of intangibles is academic since it rejected the basic position adopted by the Revenue and held that the Assessing Officer should accept the loss declared by the Assessee. The Tribunal concluded that the action of the Revenue in disregarding the books results cannot be sustained and the further conclusion that the action of the Revenue in presuming that the Assessee had incurred expenditure for creating intangible assets/brand or goodwill is without any basis. Accordingly, the loss declared by the Assessee in the return of income should be accepted by the AO and the action of disallowing the expenses in without any basis.

6. In this MA the following are the averments by the revenue:

2. The Taxpayer failed to invite the attention of Hon'ble tribunal that the goods were purchased and sold to WS Retail Pvt Ltd (Retail arm of the Taxpayer) at less than the cost with a condition to sell the same only through the Web portal Flipkart.com. This would amount to controlled transaction in order to attract customers and create intangible asset in the form of goodwill/brand value of its web portal Flipkart.com.

3. The factual aspect that the goods supplied by the Taxpayer to WS Retail are supplied to the customers placing orders in the Flipkart web portal at the price commanded by the Taxpayer was not placed before the Hon'ble ITAT by the Taxpayer. Hence the loss incurred in the form of supply of goods to WS Retail at less than the cost of purchase and sale of the same to Flipkart customers was only with an intention of acquiring the intangible asset in the form of goodwill/brand value and the same was correctly held as capital in nature by the AO. The findings of the Hon'ble tribunal contrary to the above was due to suppression of material fact in the form of an agreement by the Taxpayer.

4. This Hon'ble tribunal has recorded a finding that the transaction between Taxpayer and the retailer, WS Retail was independent transaction. However the supply agreement and license and service agreement between the parties prohibits / controls the WS Retail either to purchase / procure goods from any person other than the Taxpayer and also to sell the said goods other than to the customers placing orders in the Flipkart portal. Above factual position was not placed before this Hon'ble tribunal. The above aspect would lead to only analogy that entire transaction is an colorable device to claim the cost of intangible asset as business loss.

5. This Hon'ble tribunal has accepted the case of the Taxpayer that there is no acquisition of intangible asset as the same is not recognized in the books of accounts. However, the License and Service agreement entered into by the Taxpayer with WS Retail heavily emphasize on the intangible assets in the form of brand name, license of technology, domain name etc.

It is submitted that the factual aspect of the Taxpayer and WS Retail having agreed to payment of consideration under the license and service agreement, the quantum of payment has been agreed to be determined on intervals on an annual basis to be mutually agreed on a future date was not

placed by the Taxpayer before this Hon'ble Tribunal. The above agreements would clearly demonstrate beyond doubt that WS Retail is fully controlled by the Taxpayer and creating intangible assets under the guise of supplying the goods to WS retail at less than the cost of purchase. Hence the reduced price is nothing but the cost of the intangible assets as the same has been rightly held as capital by the AO.

It is submitted that if the transaction between the Taxpayer and WS retail is supplier and retailer simpliciter, the Taxpayer would not have IPRs in the products supplied to WS Retail. Even in the common business parlance the supplier cannot claim any IPRs in the products supplied. The reflection of the above condition in the agreement agreed between the Taxpayer and the WS Retail would indicate some hidden transaction which requires to be examined by this Hon'ble Tribunal by lifting the corporate veil. The said exercise to be undertaken by the Hon'ble tribunal and also considerations of the other aspects stated in the previous paragraphs could not be requested or attention of the Hon'ble tribunal be invited in view of the suppression of the above facts by the Taxpayer and also lack of sufficient opportunity to the revenue".

7. In short the contention of the revenue is that the entire conclusion of the Tribunal is based on the fact that M/S.WS retail Services Pvt. Ltd., to whom the products are sold by the Assessee after its purchase is based on the fact that the transaction between the Assessee and M/S.WS Retail Services Pvt.Ltd. was an uncontrolled transaction whereas the fact is that there was an agreement between Assessee and M/S.WS Retail Services Pvt.Ltd. and the terms of the said agreement provide that M/S.WS Retail Pvt.Ltd., shall sell the products sold by the Assessee to it only through the web portal "Filpkart.com". Therefore the transaction between Assessee and M/S.WS Retail Services Pvt.Ltd., cannot be said to be an uncontrolled transaction. The further contention is that the Assessee failed to invite the attention of such agreement before the Tribunal. The further

contention of the revenue is that because the transaction between the Assessee and M/S.WS Services Retail was not in the nature of uncontrolled transaction, the profits forgone by the Assessee was only with an intention of acquiring intangible asset in the form of goodwill/brand value and the same was correctly held to be capital expenditure by the revenue authorities. The further allegation is that there was suppression of the aforesaid agreement which has influenced the findings of the Tribunal. The further allegation is that there was a supply agreement and license and service agreement between parties (which parties is not spelt out in the MA) which prohibits/controls W/S.Retail Services Pvt.Ltd., from either purchasing or procuring goods from any other person other than the Assessee and also to sell the goods other than to the customers placing orders in the "Flipkart" portal. The further allegation in the MA is that the above Agreements were not placed by the Assessee before the Tribunal.

8. The further averment in the M.A. is that existence of the above agreements, indicate some hidden transaction, which requires examination by the Tribunal by lifting the corporate veil. The further allegation in the MA is that the revenue could not bring the above facts to the knowledge of the Tribunal at the time of hearing of appeals because of suppression of the above facts by the Assessee. The ultimate prayer in the MA is that the order of the Tribunal should be recalled and a rectification order passed adjudicating the above grounds.

9. The learned DR reiterated the stand of the revenue as contained in the MA. He filed before us copies of two Agreements both dated 31.12.2011. The first Agreement is an Agreement between the Assessee and M/S.W.S.Retail Services Private Limited, which is described as "Supply Agreement" and the second Agreement between the same parties described as "License Agreement". He also filed a copy of the return of income filed for AY 2011-12 by M/S.W.S.Retail Services Private Limited, wherein the shareholding pattern of M/S.W.S.Retail Services Private Limited, is given and the same contains the name of Sachin Bansal and Binny Bansal, who are also promoters of the Assessee. The Bench raised a query as to what is the relevance of these documents when they were not the basis of assessment by the AO or the CIT(A) nor was it the case of the Revenue before the Tribunal that the transaction between the Assessee and W.S.Retail Services Private Limited was a controlled transaction. It was also pointed out that a reading of Paragraph-2 and Paragraph 6 of the MA would show that the Agreements and document now sought to be filed before the Tribunal was neither the basis of assessment by the AO or the CIT(A). The allegation in the MA is that the Assessee ought to have pointed out the existence of these documents. It was also pointed out that even in the MA there is no inference drawn that these documents would show that the order of the Tribunal or the conclusions reached therein were erroneous. On the other hand, the allegation in the MA is that there is a possibility of some hidden

transaction which requires to be examined by the Tribunal by lifting the corporate veil. How an MA could be filed on the basis of a possibility of some hidden transaction emanating by lifting the corporate veil. To these queries the learned DR could not given any reply but reiterated the stand of the revenue as contained in the MA.

10. The learned counsel for the Assessee on the other hand pointed out that there existed no brand or intellectual property (IPR) owned by the Assessee during the previous year relevant to AY 2014-15 which was the AY which was decided by the Tribunal. He drew attention to the fact that the Assessee had already transferred whatever brand/IPR it owned to M/s.Flipkart Internet Pvt.Ltd. and these facts were noticed both by the CIT(A) as well as by the Tribunal in its order vide Paragraph-14 & 15 of the Tribunl's order. He submitted that there is no mistake in the order of the Tribunal much less a mistake apparent on the face of the record and hence the MA deserves to be dismissed.

11. We have given a careful consideration to the rival submissions. As we have already pointed out the learned DR was unable to explain the relevance of the documents now sought to be filed before us for deciding the issue that was for consideration before the AO. As we have already mentioned these documents were neither the basis of assessment or the basis of conclusions by the CIT(A) for its conclusions on the addition that was in challenge before the Tribunal. These documents were never sought to be relied upon by the learned

DR when the appeal was heard nor was there any allegation of any hidden transaction requiring examination by the Tribunal after lifting the corporate veil. These documents could not have been relied upon by the learned DR when the appeal was argued for the reason that these documents were not the basis on which the assessment and the addition challenged before the Tribunal were made by the AO and confirmed and enhanced by the CIT(A). Even in the allegation in the MA is that the Assessee has failed to place the documents now sought to be filed before Tribunal by the Revenue. The conclusions drawn by the Tribunal which have been extracted in Paragraph-5 of this order, will hold good and these documents will have no impact on the conclusions drawn by the Tribunal. Therefore, there exists no relevancy of these documents now sought to be filed with regard to the issue that was decided by the Tribunal. The revenue cannot seek to raise a totally new basis of assessment in an MA and on a possibility of existence of a hidden transaction after lifting corporate veil. It cannot therefore be said that there was mistake apparent from the record which calls for rectification u/s.254(2) of the Act.

12. The power of the Tribunal u/s. 254(2) of the Act is only to rectify mistakes apparent on the face of the record. The Tribunal does not have power to review its own orders. Power of review is not an inherent power but must be conferred by law either specifically or by necessary implication. Courts have consistently held that review proceedings imply those proceedings where a party, as of right, can

apply for reconsideration of the matter already decided upon after a fresh hearing on the merits of the controversy between the parties and that such a remedy is available only if provided by the statute. The law on powers of Tribunal is well settled and is governed by the ratio laid down by the Hon'ble Supreme Court, on scope of powers u/s.154 of the Act, which is akin to Sec.254(2) of the Act, in ITO Vs Volkart Brothers [(1971) 82 ITR 50 (SC)], as follows:

> *"…….. an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record"*

13. The present MA filed by the Revenue is devoid of any merit and is liable to be dismissed as without any basis and virtually seeking a review of the order of the Tribunal on a possible hidden transaction which requires examination after lifting the corporate veil when there those were neither the basis of assessment by the AO or CIT(A) or the Tribunal.

14. In the result, the MA is dismissed.

Pronounced in the open court on this 24th day of April, 2019

Sd/-	Sd/-
(JASON P. BOAZ)	(N.V. VASUDEVAN)
ACCOUNTANT MEMBER	VICE PRESIDENT

Bangalore,
Dated, the 24th April, 2019.

TNMM

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore