IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC - B" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT

ITA Nos.686 and 687/Bang/2022
Assessment Years : 2013-14, 2014-15

Mr. Sohanraj Khimraj Kothari, Prop: M/s. K S Kothari, Sanghvi Complex, New Javali Saal, Hubli – 580 020. **PAN : ACZPK 8499 E**	Vs.	JCIT, Range - 3, Hubli.
APPELLANT		RESPONDENT

Assessee by	:	Shri Vinay K. Kulkarni, CA
Revenue by	:	Shri. Ganesh R. Ghale, Standing Counsel

Date of hearing	:	21.11.2022
Date of Pronouncement	:	23.11.2022

O R D E R

ITA No.686/Bang/2022 is an appeal by the assessee against the order dated 08.06.2022 of NFAC, Delhi, relating to Assessment Year 2013-14. ITA no.687/Bang/2022 is also an appeal by the assessee against the order dated 08.06.2022 of NFAC, Delhi, relating to Assessment Year 2014-15.

2. ITA No.686/Bang/2022: The first issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in making the addition of Rs.1,61,960/- on account of unexplained cash credit under section 68 of the Act.

3. The assessee is an individual. He carries on the business of wholesale dealing in textiles. In the books of accounts of the assessee, the following outstanding credit balance were found:

Sl. No.	Name	Balance as	Balance as per	Difference
1.	Gini Silk	88941		88941
2.	PARASRAM JAIKISHAN	73019		73019
			Total	**1,61,960**

4. In the Order of Assessment, it has been mentioned by the AO that despite opportunities given to the assessee for filing confirmation of the creditors, the assessee did not file any confirmation and therefore the AO made an addition of a sum of Rs.1,61,960/- under section 68 of the Act. The CIT(A) confirmed the order of the AO.

5. Before the CIT(A), the assessee specifically pointed out as follows:

> *"However I wish to bring to your kind notice that above addition is made by the A.O merely because of non availability of balance confirmation statement from above referred creditors. But the A.O has not considered the corroborative evidences like payments made to above referred creditors by way of cheques etc.* ***Party confirmations received from above referred parties are furnished to you vide our letter dated 19/03/2018.*** *We had furnished the Xerox copies of few bills and bank statement of SBI to support the purchases and payments vide our letter dated16/11/2018. Their GST numbers may be treated as their identity proof."*

6. The NFAC, however, observed that no documentary evidence was submitted by the assessee on ITBA portal to substantiate the claim with regard to filing the confirmation of the creditors and therefore the NFAC confirmed the order of the AO.

7. Before us, learned Counsel for the assessee submitted that the appeal was filed in physical form and the assessee made a written

submission dated 18.09.2019 and 19.03.2018. Along with the written submission, the assessee had filed the confirmation of the 2 creditors and those confirmations are available at pages 41 and 42 of the assessee's Paper Book. The only error was that it was filed in physical form and was not uploaded in the ITBA portal in soft form and the confirmation filed in physical form was not taken cognizance by the NFAC.

8. I am of the view that in the light of the availability of confirmation filed in physical form before the First Appellate Authority, the issue with regard to the aforesaid addition should be remanded to the AO for consideration afresh in the light of the confirmation already filed before the First Appellate Authority in physical form. Accordingly, this issue is set aside to the AO for confirmation denovo.

9. The second issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in disallowing the claim of the assessee for deduction of a sum of Rs.1,33,351/- on account of bad debts written off. In this regard, there is no dispute that the assessee had written off the same in question as bad debts in the books of accounts. The only reason assigned by both the Revenue authorities is that the assessee did not show as to what efforts the assessee made to recover the debts before writing off as bad debt. On this issue, the law is now well settled and the Hon'ble Supreme Court in the case of TRF Ltd., in Civil Appeal Nos.5292 to 5294 of 2003 vide judgment dated 09.12.2010, has laid down the principle as follows:

> *"After 1.4.1989, for allowing deduction for the amount of any had debt or part thereof under section 36(1)(vii) of the Act, it is not necessary for assessee to establish that the debt, in fact has*

become irrecoverable; it enough if bad debt is written off as irrecoverable in the hooks of accounts of assessee."

10. The CBDT, on the basis of the aforesaid decision of the Hon'ble Supreme Court, issued Circular No.12/2016 dated 30.05.2016 and in para 4 of the said Circular, the CBDT has clearly laid down that deduction should be allowed if a debt is written off as irrecoverable in the books of accounts of the assessee in the relevant previous year. In the light of the aforesaid decision of the Hon'ble Supreme Court and CBDT Circular, I am of the view that the disallowance of deduction on account of bad debt written off is unsustainable and the same is directed to be allowed as deduction.

11. The third issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in disallowing a sum of Rs.1,33,000/- by invoking the provisions of section 40(a)(ia) of the Act. In so far as the aforesaid disallowance is concerned, it is noticed that the AO noticed from the ledger account of sales promotion expenses that a sum of Rs.1,33,000/- was paid to hotels as per the following details:

Date	Name of the payee	Amount
06/09/2012	Naveen Hotel	Rs.20,000/-
17/09/2012	Naveen Hotel	Rs.80,000/-
13/02/2013	The Grand	Rs.33,000/-
Total		**Rs.1,33,000/-**

12. According to the AO, since the assessee did not deduct tax at source on the payments made to the hotels, the same claimed by the assessee cannot be allowed as deduction. It is pertinent to mention that the AO has not mentioned as to what is the nature of the aforesaid expenses and how it falls within the parameters of payments specified in section 40(a)(ia) of the Act. The First Appellate Authority also confirmed the order of the AO. I am of the view that in the light of the admitted position that the sum in question was the payment made to hotels for consumption of food, there is no requirement of complying with the requirements of section 40(a)(ia) of the Act, especially when the AO has not spelt out as to what is the nature of payment and as to how the payment falls within the ambit of payments referred to under section 40(a)(ia) of the Act. Hence, the addition made in this regard is directed to be deleted.

13. The fourth issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in making the disallowance of Rs.66,000/- being expenses incurred by the assessee in procuring gift item to the customers. In this regard, it is the AO who did not allow the claim of the assessee for deduction of the aforesaid sum for the reason that supporting bills and vouchers evidencing purchase of gift items were not given by the assessee. The NFAC, however, observed that no documentary evidence was submitted by the assessee on ITBA portal to substantiate the claim with regard to filing the confirmation of the creditors and therefore the NFAC confirmed the order of the AO. Before us, learned Counsel for the assessee submitted that the appeal was filed in physical form and the assessee made a return submission dated 18.09.2019 and 19.03.2018. Copy of the Bill is placed at page 43 of Assessee's paper book. The only error was that it

was filed in physical form and was not uploaded in the ITBA portal and the confirmation filed in physical form was not taken cognizance by the NFAC. I am of the view that in the light of the availability of bill in physical form before the First Appellate Authority, the issue with regard to the aforesaid addition should be remanded to the AO for consideration afresh in the light of the bill already filed before the First Appellate Authority in physical form. Accordingly, this issue is set aside to the AO.

14. The fifth issue that arises for consideration is as to whether the Revenue authorities were justified in adding a sum of Rs.6,31,961/- which was the total income of KAS Kothari, HUF, for Assessment Year 2013-14 to the total income of the assessee. On this issue, the parties agreed that in Assessment Year 2011-12, similar issue arose for consideration in assessee's own case for Assessment Year 2011-12 and this Tribunal in ITA No.201/Bang/2017 set aside the issue to the AO for consideration afresh with the following observations:

> *"5. Ground No.3 is in respect of addition of HUF income in the hands of assessee. 5.1. Ld.AR submitted that assessee carries on proprietary business and also has similar business in status of S.Kothari HUF. Ld.AO computed profits earned by HUF in the hands of assessee holding it to be one and the same business. Ld.AR submitted that, HUF is also carrying on same business as Trader in textiles at Mumbai. Ld.AO made addition to the extent of profit earned by HUF in the hands of assessee as both are managed by assessee.*
>
> *5.2. Ld.DR on the other hand submitted that both proprietary as well as HUF concerns have common address at Hubli and assessee created an impression that HUF is carrying out its activities from Mumbai. He placed reliance upon observation by Ld.AO in respect of total debt balance appearing in HUF account as well as the proprietary concern managed by assessee being the*

same. He submitted that Ld.AO therefore rightly held it to be same business carried out by assessee. We have perused submissions advanced by both sides in the light of the records placed before us.

5.3. Revenue alleges that assessee has created HUF concern to reduce tax liability in the hands of assessee. There is nothing on record to establish that what is the separate business carried out by assessee in the name of HUF though may be having common address. Assessee somehow misrepresented it by saying that the HUF concern is carrying out its business from Mumbai which is factually incorrect.

5.4. For clubbing, there has to be common management, interglacing or interlocking of funds. Ld.AO has not given proper finding in respect of these, before clubbing the income of HUF in the hands of assessee. We therefore set aside the issue to Ld.AO for verifying the same. Assessee should file all relevant detais to prove contrary. In the event there are sufficient materials to establish that both are independent business, though working having common address. Ld.AO shall give proper opportunity to assessee as per law.

Accordingly, this ground raised by assessee is allowed for statistical purposes."

15. I am of the view that an identical order in the present Assessment Year would be just and sufficient. Accordingly, this issue is set aside to the AO for consideration denovo in the lines indicated by the Tribunal in the order for Assessment Year 2011-12 in assessee's own case.

16. The sixth and last issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in disallowing commission paid of Rs.2,30,700/-. In this regard, it is seen that the AO disallowed the commission for the following reasons:

"11. It is noticed form the Profit Loss account that the assessee has given sales commission of Rs. 6,49,132/- to four persons. The

assessee was asked to 'furnish the ledger Accounts of the sales commissions. From the observation of the ledger accounts, it is noticed that the assessee has paid the sales commission at different rate for same type of work, details of which is as under:

Sl. No.	*Payee*	*Amount*	*@ rate*
1.	*Rajendra Jain*	*Rs.2,41,600/-*	*1@*
2.	*Sanjay Jain*	*Rs.1,19,800/-*	*1@*
3.	*Poonamchand Prajapat*	*Rs.1,01,432/-*	*0.5%*
4.	*Suresh Kumar Prajapat*	*Rs.86,300/-*	*0.5%*

The persons at Sl. No. 3 and 4 are employees of the assessee to whom sales commission was paid at the rate of 0.5% and the persons at sl. No. 1 and 2 were commission agents to whom sales commission was paid at the rate of 1%. The assessee was asked why for the same nature of work, paid at different rates. The AR could not produce any evidence/valid reason for paying sales commission at different rates. Also he could not explain the circumstances under which he was compelled to pay commission at higher rates. In absence of proper explanation, I held that the sales commission paid to the payees at SI No. 1. & 2 are excessive and should have been given at the rate of 0.5% instead of at the 1%. Therefore, I disallow the excessive 0.5% the sales commission paid to the payees at Sl No. l & 2 which comes to Rs. 2,30,700/- and added it to the income of the assessee."

17. The First Appellate Authority confirmed the order of the AO. After considering the rival submissions, I am of the view that the payment in question has not been made to any related party. The law is well settled that in the matter of making business decisions, it is the prerogative of the businessman as to how he should conduct his business affairs. The AO cannot sit in the armchair of the businessman and decide as to what should be paid as commission and to whom. The Courts have

upheld that the AO cannot sit in the chair of businessman and dictate as to how the business is transacted. In this regard, reliance is placed on:

- Hero Cycles (P) Limited (Appeal 514 of 2008) dated November 5, 2015 (SC);
- S.A. Builders Limited (2007) (158 Taxman 74) dated December 14, 2006 (SC);

In the light of the aforesaid legal position, I am of the view that the disallowance of the commission expenses cannot be sustained and the same is directed to be deleted.

18. In the result, ITA No.686/Bang/2022 is partly allowed.

19. <u>ITA No.687/Bang/2022 :</u> In this appeal, there are only two grounds which needs to be adjudicated and the first issue is adding KAS Kothari, HUF's income for Assessment Year 2014-15 to the income of the assessee. On this issue, while deciding an identical issue in Assessment Year 2013-14, I am already remanded the issue to the AO for fresh consideration. Following the said order, the issue in this Assessment Year is also set aside to the AO for consideration denovo on the lines indicated in the order for Assessment Year 2013-14.

20. The next issue that arises for consideration is the disallowance of commission expenses of Rs.1,28,018/-. This disallowance was made for identical reasons as was given by the AO for Assessment Year 2013-14. While deciding the identical issue for Assessment Year 2013-14, I have already held that the AO cannot sit in judgment over business decisions taken by the assessee in the matter of payments of commission. For the reasons given while deciding the said ground, I am of the view that the disallowance made by the Revenue authorities cannot be sustained and the same is directed to be deleted.

21. In the result, ITA No.687/Bang/2022 is partly allowed.

22. In the result, both the appeals are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore,
Dated: 23.11.2022.
/NS/*

Copy to:

1.	Appellants	2.	Respondent
3.	CIT	4.	CIT(A)
5.	DR	6.	Guard file

By order

Assistant Registrar,
ITAT, Bangalore.