

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**

**BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA No.1358/AHD/2016**

**(निर्धारणवर्ष / Assessment Years: (2011-12)**

**(Virtual Court Hearing)**

M/s. Kaneria Granito Ltd., 605-A, Tirupari Plaza, Behind Govt. Multi Storied Building, Nanpura, Surat-395001.	<b>Vs.</b>	The DCIT, Circle-1 (Old Jurisdiction), DCIT, Circle-1(1)(2), Surat (New Jurisdiction),
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADCK0182H</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

Assessee by : Shri Rasesh Shah, CA

Revenue by : Shri S. T. Bidari, CIT(DR)

**सुनवाईकीतारीख/ Date of Hearing : 23/03/2021**

**घोषणाकीतारीख/Date of Pronouncement: 11/05/2021**

**आदेश / O R D E R**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the assessee, pertaining to the Assessment Year (AY) 2011-12, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-1, Surat [in short “the ld. CIT(A)”] in Appeal No. CAS-I/206/2014-15, dated 22.03.2016, which in turn arises out of an order passed by Assessing Officer (in short “the AO) under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as the “Act”], dated 31.03.2014.

2. The grievances raised by the assessee are as follows:

*“1. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in not adjudicating the ground of making addition of Rs.12,10,00,000/- u/s 68 of the I.T. Act, on account of unexplained share application money.*

*2. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of assessing officer in making ad hoc disallowance of Rs.80,97,725/- being 10% of various expenses.*

*3. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in not granting setoff of unabsorbed depreciation loss and carried forward business loss of previous years from the assessed income of the assessee.*

*4. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in not granting setoff of current year business loss as returned from the assessed income of the assessee.*

*5. It is therefore prayed addition made by Assessing Officer and confirmed by learned Commissioner of Income-tax (Appeals) may please be deleted.*

*6. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”*

3. Now, we shall take Ground No.1 raised by the assessee which relates to addition of Rs.12,10,00,000/- made by assessing officer under section 68 of the Act, on account of unexplained share application money, which was not adjudicated by the Id.CIT(A).

4. Shri Rasesh Shah, Learned Counsel for the assessee begins by pointing out that Assessing Officer has made addition under section 68 of the Act at Rs.12,10,00,000/- in the body of the assessment order but did not take the said addition in the computation of total income and did not create the demand. However, later on, the assessing officer has rectified the mistake by passing order under section 154 of the Act. On appeal, Id CIT(A) dismissed the ground raised by the assessee and advised the assessee to file appeal against order under section 154 of the Act. The assessee has not filed an appeal against the rectification under section 154 of the Act. Therefore, Learned Counsel prayed the Bench that a suitable instruction may be given to the Id CIT(A) to adjudicate this issue.

5. On the other hand, Shri S. T. Bidari, Ld. CIT(DR) for the Revenue submits that since the issue of addition does not arise from the assessment order, therefore Ld. CIT(A) has not adjudicated the said issue. Therefore, the right approach which can be suggested to the assessee is to file an appeal against the order under section 154 of the Act before the Ld. CIT(A).

6. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that Assessing Officer has discussed the addition under section 68 in his assessment order *vide* para 7 of the assessment order at page no.6, and made addition under section 68 to the tune of Rs.12,10,00,000/-. However, the Assessing Officer did not bring this said addition of Rs.12,10,00,000/- in the computation of total income and consequently did not create the demand. However, later on the Assessing Officer has rectified his assessment order under section 154 of the Act, *vide* order under section 154 of the Act, which is placed at assessee's paper book page no.10, which is reproduced below:

*"The assessee company filed its e-return of income on 14.04.2012 showing total loss at (-) Rs.5,42,33,736/-. The assessment U/s 143(3) of the I.T. Act was completed on 31.03.2014. While finalizing the assessment U/s 143(3) of the Act, the following additions were made:-*

- (i) Unexplained cash credit U/s 68 of the Act : Rs. 12,10,00,000/-*
- (ii) Out of business Expenses : Rs. 80,97,725/-*

*2. On perusal of the case records and assessment folder, it is seen that the following errors have been crept in to the computation of income which is forming part of the assessment order while arriving at the assessed total income of the assessee company. It is seen that the addition of Rs.12,10,00,000/- made U/s 68 of the I.T. was remained to be added back in the computation of income. On account of the above error in the computation of income, the total income of the company was assessed at Rs.4,61,36,009/- instead of assessing the total income at Rs.7,48,63,991/- which has resulted into underassessment of income by Rs.2,87,27,982/-.*

*3. However, it is clear from the assessment records that the additions were made after elaborate discussion in the body of the assessment order and the disallowance on each head is clearly specified in the body of the assessment order at the end of the last paragraph after discussion in respect of each issue which was the subject matter of disallowance. Hence there is no ambiguity in respect of the amount of disallowance in the body of the assessment order, rather it is only a clerical mistake/omission occurred in the computation of income in taking the correct amount of disallowance or omission in taking the addition amount for computing the correct total income of the assessee company.*

*4. The above mistakes being apparent from records are hereby rectified U/s 154 of the I.T. Act.*

5. Subject to the above remarks, the total income of the assessee is re-computed as under:

Sr. No.	Particulars	Amount (Rs.)	Amount (Rs.)
	Total Income as per income U/s 143(3) of the I.T. Act.		(-) 4,61,36,009
Add:	Disallowances/ Additions		
1.	Unexplained cash credit U/s68		12,10,00,000
	Total Income		12,10,00,000

6. Assessed u/s 154 of the I.T. Act, 1961. Give credit for prepaid taxes, if any, after due verification. Charge applicable interest u/s 234/234B/234C of the Act. Issue demand notice & challan accordingly. Pass necessary Plus memo in ITD in respect of difference in demand as well as in manual D & Cr as applicable.”

7. We note that order under section 154 of the Act is appealable order, however, the assessee did not file the appeal before the Id CIT(A) against the rectification order under section 154 of the Act. The assessee filed the appeal before the Id CIT(A) against the order passed by the assessing officer under section 143(3) of the Act dated 31.03.2014 which has been dismissed by the Id CIT(A), observing as follows:

“9.Due, consideration is given to the submission filed by the appellant. Admittedly, the Id AO has made a detailed discussion in respect of share application money of Rs.12,10,00,000/- in paras 3 to 7 of the assessment order but no addition has been made in the computation of income and no demand has been raised in the assessment order passed u/s 143(3) of the Act dtd 31.03.2014 against which appeal has been filed which is under consideration. Any ground can be raised against the orders specified in Sec 249A of the Act which provides for two appeals against orders passed u/s 143 (3) & 154 of the Act. Before filing appeal or raising ground of appeal it is a pre-condition that assessee should be aggrieved against the order. This is the sine qua non for raising any ground of appeal or filing of appeal. Since no tax liability has been fastened against assessee nor any demand has been raised in respect of Share application money of Rs.12,10,00,000/-, there is no occasion for the assessee to be "aggrieved". During the appellate proceedings, the AR of the assessee has filed copy of order passed u/s 154 of the Act dtd 09.04.2014 by which the AO has made addition of Rs.12,10,00,000/- towards Share Application Money. As discussed earlier order passed u/s 154 of the Act is a separate order for which assessee need to file appeal separately. In view of these facts, I am of considered view that ground No. 1 raised in the appeal is not maintainable, hence, dismissed being infructuous.

Before parting, it may be clarified that appellant is free to file separate appeal against the order passed u/s 154 of the Act dtd. 09.04.2014 whereby

*addition of Rs.12,10,00,000/- have been made. Without prejudice, I am of the considered view that assessee deserves full sympathetic consideration with regard to condonation of delay in filing appeal against order passed u/s 154 of the Act. In view of the above discussion, ground of appeal no. 1 is hereby dismissed.”*

8. Having gone through the above order of Id CIT(A), we noticed that Id CIT(A) has rightly pointed out that “order passed under section 154 of the Act is a separate order for which assessee need to file appeal separately”, but the assessee has failed to do so. The Id CIT(A) has also stated that “*assessee deserves full sympathetic consideration with regard to condonation of delay in filing appeal against order passed u/s 154 of the Act.*”.

Taking into account the factual position narrated above and to meet the end of justice, we remit this issue back to the file of the Ld. CIT(A) for *de novo* adjudication. We direct the assessee to file an appeal before the Ld. CIT(A) against the order under section 154 of the Income Tax Act, dated 09.04.2014 within one month from the date of receipt of this order. Since, in this case there was mistake on the part of the Assessing Officer, as he did not bring the addition made by him in the computation of taxes and did not create the demand, and that is why, assessee’s issue has not been adjudicated. The assessee should not suffer because of the mistake made by the Assessing Officer. Hence, assessee deserves that delay in filing appeal against the order under section 154 should be condoned.

Therefore, we direct the Ld. CIT(A) to condone the entire delay in filing the appeal against the order under section 154 of the Act dated 09.04.2014 and adjudicate the appeal of the assessee on merits. Therefore, ground No.1 raised by the assessee is allowed in above terms.

9. Ground No.2 raised by the assessee relates to disallowance of Rs.80,97,725/- being 10% of various expenses.

10. Brief facts *qua* the issue are that during the assessment year under consideration the assessee has debited various expenses in the profit and loss account, such as Telephone Expenses, Office Expenses, Selling Expenses, Commission etc., aggregating to Rs.8,09,77,259/-. During the course of assessment proceedings, the assessee was asked to furnish the details of the above expenses claimed along with supporting proof and evidences to prove that the said expenses are wholly and exclusively incurred for the purpose of business. In response, the assessee has furnished copy of the ledger account of above expenses. The assessing officer was of the view that assessee has failed to prove that said expenditure has been incurred wholly and exclusively for the purpose of the business. Therefore, an amount of Rs.80,97,725/- being 10% of the above mentioned expenses of Rs.8,09,77,259/- was disallowed and added to the total income of the assessee.

11. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

12. We have heard both the parties and perused the material available on record. Learned Counsel for the assessee relied on the submission made before the authorities below. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that Assessing Officer has passed the order under section 143(3) of the Act. The assessing officer on the basis of his observation reproduced at para no. 9 [ vide Page No.7 to 8 of assessment order ] made ad hoc addition of Rs.80,97,725/- @ 10% of Rs.8,09,77,259/-, without appreciating the sales/turnover of the assessee and without considering the fact that all these expenditures were incurred wholly and exclusively for the purpose of carrying on the business of the assessee company and the quantum of expenses were most reasonable as compared to the volume of the business

of the assessee company during current year and previous year. He also failed to appreciate the fact that in many cases the expenses were required to be incurred by cash compulsorily [ within threshold limit under section 40A(3)] and that does not mean that the expenses incurred were either bogus or not genuine. The Ld Counsel submits before us that all expenditure is relating to business purpose only and there is no personal element involved in it. The assessee is having turnover of Rs.130,22,00,000/-, therefore ld Counsel states that considering the volume of business activity, the expenses incurred by assessee is most reasonable and hence, the same are required to be allowed on the basis of commercial expediency.

13. We note that the ld AO could have ventured into estimation only after rejecting the books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, AO has not passed any order u/s 144 of the Act. The AO thus without rejecting the books of account of the assessee has gone for estimation on suspicion and conjectures that the assessee may be inflating its expenses. While scrutinizing the expenditure if the expenses claimed are not having any nexus to the business of the assessee or if there is deficiency in the vouchers or there is no bills supporting the incurrence of an expenditure, at the most expenses to the extent that are not supported by the vouchers can be held to be non-genuine and can be disallowed by AO; and item-wise the AO could have disallowed the expenditure rather than going for *ad hoc* disallowance of percentage basis of the expenses claimed by the assessee which action of the AO is arbitrary in nature and cannot be sustained. For that we rely on the judgment of the Hon`ble Delhi High Court in the case of National Industrial Corp. Ltd, 258 ITR 575 (Del-HC) wherein it was held as follows:

*“26. Regarding the sale promotion expenses, according to the assessee-company it spent Rs. 23,75,170 on giving major gift items. The AO held that keeping in view the nature of the business of the assessee-company and the reasonableness of such expenditure he deemed it fit to disallow 50 per cent of the expenditure on gift items as detailed in the table being of a non-business nature and thus disallowable as per*

*provisions of s. 37(1) of the IT Act and initiated penalty proceedings under s. 271(1)(c) of the Act separately on this issue.*

*27. The CIT(A) mentioned about the disallowance of sale promotion expenses of Rs. 11,83,585 and allowed Rs. 10 lakhs, which according to her was related to business and a part of Rs. 1,83,585 was confirmed as used in personal gifts and personal expenditure.*

*28. The Tribunal has observed that the CIT(A) has allowed bulk of the relief by observing that the expenditure was related to business expenditure. The CIT(A) has sustained the disallowance which accounts for about 5 per cent of the total claim. The Tribunal observed that "In our opinion, the disallowance of Rs. 75,000 under this head will meet the end of justice. Thus, we confirm the disallowance to the extent of Rs. 75,000 under this head and delete the balance amount".*

*29. It may be pertinent to mention that Mr. Gupta argued that there was no material on record to show that any part of the said expenditure was not for the sale promotion and the Tribunal was, therefore, in error in law in sustaining the disallowance of Rs. 75,000 without any basis. He submitted that the order of the Tribunal regarding sale promotion expenses is based on no material and that is how this becomes a substantial question of law.*

*30. We have carefully examined the judgment of the Tribunal and there is no material on record to show that any part of the sale promotion expenditure was incurred for non-business purposes. The Tribunal has not given any basis whatsoever while confirming the disallowance to the extent of Rs. 75,000. All that the Tribunal observed was that the disallowance of Rs. 75,000 under this head will meet the ends of justice. The approach of the Tribunal in dealing with this aspect of the matter was erroneous and cannot be sustained. We set aside this part of the order. On the basis of our aforesaid findings, the appeal is accordingly allowed and disposed of. In the facts and circumstances of this case we direct the parties to bear their own costs."*

14. We note that there is no material on record to show that any part of these expenses was incurred for non-business purposes. We note that assessee's books of accounts are audited by Chartered Accountant. The reports of the auditors could be said to be "material" on which reliance could be placed by the Income Tax authorities. The Income Tax authorities not only to accept the auditors' report, but also to draw the proper inference from the same. Here in assessee's case, the AO has not passed any order u/s 144 of the Act. The AO thus without rejecting the books of account of the assessee has gone for estimation on suspicion and conjectures that the assessee may be inflating its expenses. It may be pertinent to mention here that there was no



material on record to show that any part of these expenditures were not for the purpose of business. Therefore, we delete the *ad hoc* addition of Rs. 80,97,725/-.

15. Ground No. 3 and 4 relates to set off of unabsorbed depreciation loss and carried forward business loss of previous years from the assessed income of the assessee.

16. We note that this issue is consequential in nature. If the assessee is entitled to claim set -off of unabsorbed depreciation loss and carried forward business loss of previous years, he should be allowed such benefit in accordance with law. The assessee submitted before us copy of return of income wherein he claimed carry forward business loss, vide paper book page No. 13, which is given below:

**Details of Losses to be carried forward to future years**

Sl. No	Assessment Year	Date of Filing (YYYY/MM/DD)	House property loss	Loss from business other than loss from speculative business	Loss from speculative businesses	Loss from specified business	Short-term capital loss	Long-term Capital loss	Other sources loss from owning race horses
i.	2003-04	2003-08-31	0	318846			0	0	
ii.	2004-05	2004-08-30	0	17752			0	0	
iii.	2005-06	2005-10-31	0	42327			0	0	
iv.	2006-07	2006-07-17	0	57602				0	
v.	2007-08	2007-10-31	0	1382371			0	0	0
vi.	2008-09	2008-10-31	0	23832966			0	0	0
vii.	2009-10	2010-03-31	0	949280			0	0	0
viii.	2010-11	2011-03-31	0	104539204			0	0	0
ix.	Total of earlier year losses		0	15318435	0		0	0	0
x.	Adjustment of above losses in Schedule		0		0		0	0	0

	BFLA (see instruction)								
xi.	2011-12 (Current year losses)		0	5423373	0		0	0	0
xii.	Total loss Carried Forward to future years		0	20741808	0		0	0	0

17. The assessee also submitted before us a chart showing the details of unabsorbed business losses, which is given below:

**Chart showing details of unabsorbed business losses to be set off/carried forward**

<b>Assessment Year</b>	<b>(Rs.)</b>
2003-04	3,18,846
2004-05	1,77,526
2005-06	4,23,270
2006-07	5,76,024
2007-08	1,38,23,714
2008-09	2,38,32,966
2009-10	94,92,803
2010-11	10,45,39,204
<b>(i) Total carried forward losses</b>	<b>15,31,84,353</b>
2011-12	5,42,33,736
<b>(ii) Current year unabsorbed losses</b>	<b>5,42,33,736</b>
<b>(i) + (ii) Total business loss to be set off/carried forward in A.Y.2011-12</b>	<b>20,74,18,089</b>

18. Based on the material before us, as noted above, assessee is entitled to claim set-off of unabsorbed depreciation and carry forward of business loss. Therefore, we direct the assessing officer to examine the return of income of the assessee and the charts, noted above, and after due verification, allow the

claim of assessee in accordance with law. Therefore, statistical purposes the ground Nos. 3 and 4 are treated to be allowed.

19. In the result, the appeal of the assessee is allowed partly for statistical purposes, to the extent indicated above.

Order is pronounced on 11/05/2021 by placing result on Notice Board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

सूरात /Surat

दिनांक/ Date: 11/05/2021

SAMANTA

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat