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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER

ITA No.2192/Bang/2019
Assessment Year :2008-09

The Income Tax Officer, Ward - 1, Shivamogga	Vs.	Shri. H. Omkarappa, (HUF), #3, A Block, APMC Yard, Sagar Road, Shivamogga. **PAN : AABHH 1124 B**
APPELLANT		**RESPONDENT**

Assessee by	:	Shri. Shri. S. Ramasubramanyam, CA
Revenue by	:	Shri. Sankar Ganesh K, JCIT(DR)(ITAT), Bengaluru.

Date of hearing	:	10.03.2022
Date of Pronouncement	:	16.03.2022

O R D E R

Per N. V. Vasudevan, Vice President :

This is an appeal by the Revenue against order dated 29.07.2019 of CIT(A)-2, Panaji, relating to Assessment Year 2008-09.

2. The assessee is a HUF carrying on the business of trading in arecanut under the name and style of M/s. N.R. Halagappa & Sons at APMC Yard, Shimoga. A survey u/s 133A was conducted in the business premises of the assessee on 29.09.2010. During the course of survey, certain entries in the books of account were noticed involving transactions of receipt of demand drafts and withdrawal of cash. The explanation furnished by the assessee was not satisfactory to the learned assessing officer and therefore, the same was added to the total income. In addition to the above, the learned assessing officer

made disallowance u/s 40(a)(ia) of the Income Tax Act 1961 (Act). The assessment order u/s. 143(3) of the Act was passed on 31.12.2010.

3. Aggrieved by the aforesaid order, the Respondent filed an appeal before the CIT(A), Davangere and vide order dated 21.4.2015, the CIT(A) allowed the appeal partly. The department filed an appeal against the above order of the CIT(A) before Income Tax Appellate Tribunal. The Tribunal set aside the issues to the files of the assessing officer for deciding the issues afresh.

4. In remand proceedings, the AO passed an assessment order u/s. 143(3) r.w.s 254 of the Act on 28.12.2017 confirming the disallowances made in the assessment order dated 31.12.2010 on the same grounds. The assessee filed an appeal before the CIT(A) against the above said order dated 28.12.2017. The learned Commissioner of Income-Tax (Appeals) allowed the appeal partly. The Department has filed this appeal against the relief allowed by the CIT(A). The grounds of appeal raised by the Revenue reads as follows:

1. *The order of the learned CIT(A) is opposed to law and facts of the case.*
2. *In Para No. 5.3 of the CIT(A) had stated that addition U/s. 68 of the Act had to be sustained and in para 5.4 CIT(A) had stated that the claim of the appellant that transaction cannot be added U/s. 68 is not justified. Hence the CIT(A) ought to have confirmed the addition made by the AO.*
3. *The Ld. CIT(A) erred in directing the AO to add only 8% of the unexplained credit to the income of the assessee in contravention of his conclusion in para 5.3 and 5.4 of his order.*
4. *The direction of the Ld CIT(A) is opposed to law because the assessee has not produced any evidence to show that the credit of Rs. 2,23,48,550/- were generated out of sales.*
5. *Gross profit at 8% on unexplained credit of Rs. 2,23,48,550/- is not justifiable and the addition made as per the provisions of Sec. 68 to be sustained in this case.*

6. *The CIT(A) has erred in deleting the disallowances made u/s 40(a)(ia) of the I.T.Act, 1961 by not considering the fact that both TDS deduction as well as remittance to the government account has been made only after the end of the relevant financial year.*

7. *The CIT(A) has erred in not adjudicating on the disallowance u/s 40(a)(ia) as per the plain language of the statute.*

8. *For these and other grounds that may be urged upon, the order of the CIT(A) may be reversed and that assessment order to be restored.*

5. As far as ground Nos.2 to 5 are concerned, the facts are that during the survey proceedings u/s. 133A of the Act conducted on 21.09.2010 in the case of the assessee, the bank statement of the Respondent was found where the deposit of Demand Drafts (DD) and cash withdrawals on various dated were found. The details of the deposits of DDs and cash withdrawals are given below;

Sl No.	Date	Total Value of DD's Received	Cash withdrawn
1	11.04.2007	15,00,000	15,00,000
2	13.04.2007	1,49,400	1,49,400
3	16.04.2007	10,00,000	10,00,000
4	24.10.2007	59,79,128	45,00,000
5	06.11.2007	48,99,888	29,06,150
6	07.11.2007	24,91,250	10,00,000
7	19.11.2007	39,60,862	10,20,000
8	27.11.2007	45,15,132	25,00,000
9	15.12.2007	12,00,000	12,00,000
10	17.12.2007	38,00,000	20,00,000
11	26.12.2007	26,40,000	6,40,000
12	31.12.2007	1,87,000	1,87,000
13	28.01.2008	9,96,000	9,96,000
14	05.02.2008	11,21,703	6,00,000
15	05.02.2008	21,50,000	21,50,000
	TOTAL	3,65,90,363	2,23,48,550

6. The AO proposed to consider the total value of the Demand Drafts of this kind to the extent of Rs.3,65,90,363/- as cash credit u/s. 68 of I.T. Act. The assessee explained that it carries on the business of arecanut trading in Shimoga. Traders from North India come to purchase arecanut which may be settled in cash. However, on safety consideration, they carry open Demand Drafts instead of cash. The assessee further submitted that due to the issues with respect to variety, quality or quantity, the customers may purchase from other sellers in the APMC Yard. Some sellers may insist on cash payment and such cash transactions are not disallowed u/s. 40A(3) of the Act by virtue of rule 6DD as the payment is made for purchasing the agricultural produce and purchasing from APMC Yard. The regular customers request the assessee to accept the DDs endorsed in its favour and pay cash to them. However, for maintaining the good relationship with the customers, the assessee encashes the DDs after they are endorsed in their favour. Therefore, the deposit of Demand Drafts and withdrawals are appearing in the bank statement of the assessee. Since the transactions are not in the nature of any business, the same has not been entered in books of account.

7. It was also submitted that the total deposit of demand drafts was Rs.3,65,90,363 and cash withdrawals was Rs.2,23,48,550/-. The difference of Rs.1,42,41,813/- was explained as amount received from the same customers towards the balance due from them for sales made earlier. The AO accepted the explanation of the assessee with regard to a sum of Rs.1,42,41,813/- on the ground that the above sum was recorded in the books of account against the credits appearing in the ledger accounts of the debtors. The remaining sum of Rs.2,23,48,550/- was also received from same parties but the AO refused to accept the explanation of assessee and added a sum of Rs.2,23,48,550/- u/s. 68 of the Act.

8. Before CIT(A), assessee challenged the addition u/s. 68 of the Act on the following grounds:

(i) Though the explanation offered by the respondent may not have been found satisfactory, the assessing officer taking into account the attendant circumstances like the fact that he himself has accepted that nearly Rs. 1.42 crore as received from the customers and the above sum of Rs. 1.42 crore is a part of the DDs found credited in the bank account, he should have held that the balance sum of Rs. 2.23 crore is also received from the customers.

(ii) The DDs are not found credited in the books of account and hence, section 68 is not applicable.

9. An alternate submission was made before the CIT(A) that the difference of Rs.1,42,41,813/- was explained as receipt for debtors for earlier sales. The learned assessing officer accepted the explanation of the assessee on the ground that the above sum was credited to the accounts of the debtors. It is not the case of the assessing officer that the sum of Rs.1,42,81,813/- was received from some other persons. Therefore, the sum of Rs. 2,23,48,550/- also has to be treated as sales as it is received from regular customers. It was further submitted that the deposit of Demand Drafts to the extent of Rs.2,23,48,550/- has to be treated as sales and only net profit has to be made as addition.

10. The CIT(A) accepted the alternate plea of the assessee and restricted the addition made by the AO to 8% of Rs.2,23,48,550/-. The following were the relevant observations of CIT(A):

> *"I find force in the argument of the appellant and it is not the case of the assessing officer that the parties from whom the sum of Rs.1.42 crore and 2.23 crore received are different. Once it is established that the transaction of Rs. 2.23 crore is entered into with the same customers, it can be concluded that these transactions are also towards sales. Hence, the treatment of such DD deposits as sales has to be accepted. The appellant also submitted that the AO has not brought any material on record to prove that the assesse has any other source of income other than business income and agricultural income therefore, it has to be presumed that the unaccounted deposits have to be treated as turnover and gross profit to be added. He relied on the decision of Hon'ble Supreme Court in Kale Khan Mohammed Hani 50 ITR 1 wherein it was held that if the*

assessee declares undisclosed income as income from business which is the only source of income, the assessing officer cannot dispute unless he brings some material on record. In the present case, the appellant's only source of income is business and the appellant declared the above sum of Rs.2.23 crore as turnover. The assessing officer has not brought any record to prove that the sum of Rs.2.23 crore is earned from some other source. Respectfully following the decision of Hon'ble Supreme Court, I hold that the DD deposits of Rs. 2.23 crone as sales. Hence, the AO is directed to add the gross profit at 8% of the sales of Rs. 2.23 crore as income of the appellant. It is also seen from the order of the CIT(A) in the original proceedings that the gross profit at 8% of the sales was added and the same has been adopted in this appeal."

11. Aggrieved by the order of the CIT(A), the Revenue has raised ground Nos.2 to 5 before the Tribunal. The learned DR submitted that the CIT(A) categorically held that the assessee had not established the identity and creditworthiness of the creditors and no record was brought on record to prove the genuineness of the transactions. Hence the addition u/s 68 had to be sustained. Further in para 5.4 of the order the CIT(A) negated the contention of the assessee and held that the addition u/s 68 is correct. However, the CIT(A) without stopping there went on further and accepted the claim of the assessee that the persons who submitted DDs for the amount of 1.42 Crores and the persons who submitted DDs for Rs. 2.23 Crores are same and held that it can be presumed that the amount 9f Rs. 2.23 Crores also from trade and directed the AO to estimate GP at the rate of 8%. He submitted that the CIT(A) erred in his conclusions for the following reasons:

a. The CIT (A) had given categorical findings in para 5.3 and Para 5.4. Hence the subsequent discussions and findings are irrelevant.

b. The CIT (A)failed to appreciate for the amount of Rs. 1.42 the Assessee submitted necessary documents before AO which was verified him and accepted. Whereas for the amount of Rs. 2.23 Crore the assessee had not submitted any documents to prove that these are trade receipts. It is categorically stated by the CIT (A) himself in para 5.3. In such a circumstance treating this amount as trade receipts solely based on assumption is wrong.

c. The CIT (A) as observed by the Hon'ble ITAT in its order again had not referred to any material to come to such conclusion. ***This is in violation of the direction of the Hon'ble ITAT.***

12. Hence the order of the CIT(A) should be set aside and the order of the Assessing Officer needs to be confirmed.

13. The learned Counsel for assessee reiterated submissions made before the CIT(A) and relied on the order of the CIT(A).

14. We have carefully considered the rivals submissions. The nature of the transaction as explained by the assessee was pertaining to exchange of D.Ds for cash to the DD holders who have approached the assessee for encashment of the D.D, since they were in need of cash. These DD holders in fact have endorsed these D.Ds in Assessee's favour by affixing their authenticated signature. The D.D so received from these parties bear the names of the DD holders, date of issue, name of the banker and the branch etc., These D.Ds are capable of verification.

15. The assessee explained that the name, address and PAN of the person from whom D.Ds have been received and the complete details of the D.Ds, are available with the assessee's Banker M/ s. Shimoga Arecanut Mandy Merchants Co-op Bank and therefore, the relevant information is also available with the Banker. However, M / s. Shimoga Arecanut Mandy Merchants Co-op Bank, expressed their inability to provide the information requested.

16. While answering to the question No.6 of the sworn statement recorded during the course of survey conducted at the business premises of the assessee on 21.09.2010, it was stated that the assessee does not entertain encashment of open Demand Drafts in their books from regular buyers and that buyers from

North India approach the assessee with open Demand Drafts as they cannot carry huge cash for their purchase of areca in the market. It was also stated that the assessee has facilitated some customers to encash their open demand drafts through the assessee's account as the buyer were unable to get the requisite quantity of areca or variety of areca from the assessee's concerns, so as to enable them to purchase areca from the local market. The whole process/transaction involving exchanging D.Ds for cash from regular buyers from North India so as to enable them to buy, areca from the open market. We are concerned with Assessment Year 2008-09 when core banking facilities were not available. Existence of such practice cannot be neglected altogether. The pattern of deposit of DD and withdrawal of cash immediately lands credence to the plea of the assessee. The assessee would have been beneficiary of only commission but has accepted 8% profit treating the value of DDs as sales. The approach adopted by the CIT(A) in the given facts and circumstances of the case is proper and calls for no interference. Hence, ground Nos.2 to 5 are dismissed.

17. As far as ground Nos.6 and 7 are concerned, the facts are that the assessee incurred expenditure towards commission and interest. The details of the expenses and date of deduction of tax at source are available in the assessment order. The date of remittance of TDS is 07.06.2008 and 11.06.2008 respectively. The AO disallowed the above sum u/s. 40(a)(ia) of the Act on the ground that the tax has not been deducted at source u/s. 194H and 194A of the Act respectively. The assessee submitted that the TDS amount was remitted within the due date for filing the return of income and therefore, section 40(a)(ia) as amended by Finance Act, 2010 is applicable and the expenditure is eligible for deduction for assessment year 2008-09. It was also submitted that it’s a settled proposition that the amended section 40(a)(ia) by Finance Act 2010 which provides the benefit of deduction to the assessee if the TDS has been remitted within the due date specified u/s. 139(1) of the Act for the respective year is

applicable retrospectively from AY 2005-06 as held in the case of CIT v. Calcutta Export Co. 404 ITR 654(SC).

18. The AO held that the date of remittance is not in dispute. However, the tax at source was not deducted during the financial year 2007-08 relevant to assessment year 2008-09 therefore, the expenditure is not eligible for deduction. In doing to, the AO relied on the 1st proviso to section 40(a)(ia) of the Act. On appeal by the assessee, CIT(A) deleted the addition made by the AO.

19. The learned DR submitted that the assessee had paid commission amounting to Rs. 35.12 Lakhs and the assessee is liable to deduct tax at source as per section 194H and paid interest of Rs. 56.95 lakhs and liable to deduct tax at source as per section 194A. However the assessee had not deducted tax before the end of the Financial Year ending on 31.03.2008 relevant to AY 2008-09. To sum up both deduction and deposit of tax was done during AY 2009-10. The assessee claims that as the tax was deposited to account of the Government before filing of RoI the expenditure is deductible. However, such a concession is available to assessee had the assessee deducted tax during AY 2008-09 and deposited in the next AY i.e. AY 2009-10. However, as the assessee have not deducted tax during AY 2008-09 the assessee cannot take advantage of this proviso to section 40(a)(ia) which was inserted from 1.4.2010. The relevant proviso is reproduced below:

> *" Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:"*

20. It was submitted that without appreciating the intention and meaning of the law the CIT(A) looked into the practicality of giving effect had it been held

that the amount is taxable in AY 2009-10 (para 6.5). Such an approach would embolden the assessee not to comply with the law of the land and the deterrence effect envisaged in the act will be watered down. Hence, the order of the CIT (A) should be set aside and the order of the Assessing Officer needs to be confirmed.

21. The learned Counsel for the assessee submitted that the first proviso is not relevant for the present appeal. The first proviso speaks about the situations where the deduction is allowable for the subsequent year. The respondent's case is not covered by the first proviso. In the present appeal, though the deduction is made in subsequent year, the TDS remittance is made on 07.06.2008 and 11.06.2008 which is before the due date specified u/s. 139(1) of the Act. The respondent submits that the main portion of section 40(a)(ia) as amended by the Finance Act 2010 itself is applicable and not the proviso. The main portion itself states that the disallowance will be made only if the tax is deducted at source has not been remitted on or before the due date specified u/s. 139(1) of the Act. As held by Hon'ble Supreme Court in CIT v. Calcutta Export Co. 404 ITR 654 and Hon'ble Karnataka High Court in CIT v. Sri Scorpio Engineering P. Ltd 388 ITR 266 the amendment made in Finance Act 2010 is clarificatory and it is applicable from AY 2005-06. There is no dispute that the TDS amount has been remitted on 07.06.2008 and 11.06.2008 which is prior to the due date for filing the return of income 31.10.2008 for AY 2008-09. Therefore, disallowance cannot be made for the current year.

22. Section 40(a)(ia), as amended by the Finance Act, 2010, with effect from April 1, 2010, and now reads as under :

> *"40(a)(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a res ident, or amounts payable to a contractor or sub-contractor, being resident, for*

carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduc tion, has not been paid on or before the due date specified in sub-sec tion (1) of section 139 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in com puting the income of the previous year in which such tax has been paid."

23. The above amendment to the law has been held to be retrospective and applicable from the date section 40(a)(ia) was inserted in the Act.

24. It is no doubt true that the assessee had deducted tax at source on the payment of commission and interest on 07.06.2008 and 11.06.2008 respectively which is in the subsequent year. To fall within the provisions of the main section, tax ought to have been deducted at source within the relevant previous year. If it is not so deducted, the proviso operates and the deduction can be claimed only in the subsequent year in which tax is deducted and paid. The case of the assessee is therefore not covered by the main section and proviso is applicable. However, we find that the present appeal is for assessment year 2008-09 and 13 years have passed. Therefore, making disallowance for assessment year 2008-09 and allowing the deduction for assessment year 2009-10 is an unnecessary exercise. The rate of tax remains same for assessment years 2008-09 and 2009-10. In view of the above, the disallowance for assessment year 2008-09 will be a revenue neutral exercise. In this regard, Hon'ble Punjab and Haryana High Court in CIT v. Glaxo Smithkline Consumer Health Care Ltd 383 ITR 290 has held that in a situation where the addition is tax neutral, the addition should not be made. The relevant portion of the judgment is reproduced below:

"11. Viewed from another angle, the case here relates to the assessment years 2000-01 and 2001-02 where the allowability of the expenditure is

not in dispute but the issue is whether it had to be allowed in one year as revenue expenditure or by way of depreciation under Explanation 1 to section 32 of the Act by spreading it over the years. At present, the number of years that have gone by from the initial year has been about more than thirteen years. Learned counsel for the Revenue has not been able to demonstrate that there had been any change in the rate of taxation during these years. Thus, even if the substantial portion of the expenditure had been capitalised and depreciation allowed under Explanation 1 to section 32 of the Act, at the prevalent rate admissible under the Act and the Income-tax Rules, 1962, the entire amount would have been allowed as deduction on account of depreciation by now and the case would be revenue neutral. Therefore, in such circumstances as well, we do not find any justification in interfering with the order of the Tribunal".

25. In view of the above, we confirm the order of the CIT(A) and dismiss ground Nos.6 and 7 raised by the Revenue.

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

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

Sd/-	Sd/-
(B. R. BASKARAN)	**(N. V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore.
Dated: 17.03.2022.
/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.