IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 1364/Mum./2021	**ITA No. 1365/Mum./2021**
(Assessment Year : 2010–11)	(Assessment Year : 2011–12)

Dy. Commissioner of Income Tax
Circle–4(3)(1), Mumbai ……. Appellant

v/s

M/s. S. Kumars Nationwide Ltd.
B–2, Marathon Next Gen Innova
Off G.K. Marg, Lower Parel (West)
Mumbai 400 013 PAN – AAACS0767K ……. Respondent

Assessee by : None
Revenue by : Shri Tejinder Pal Singh Anand

Date of Hearing – 30/05/2022	Date of Order – 06/07/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the Revenue against the separate impugned orders dated 18/02/2021 and 21/01/2021, passed under section 250 of the Income Tax Act, 1961 ('*the Act*') by the learned Commissioner of Income Tax (Appeals)–58, Mumbai, ['learned CIT(A)'], for the assessment years 2010–11 and 2011–12, respectively.

2. When these appeals were called for hearing neither any one appeared on behalf of the assessee nor was any application seeking

adjournment filed. From the perusal of record, we notice that even during the previous hearings there was no representation on behalf of the assessee. Considering the issues involved, which proceed to hear these appeals ex parte qua the assessee, after hearing the learned Departmental Representative (*'learned DR'*) and on the basis of material available on record.

3. Since, the identical issues are involved, therefore, both the appeals are taken up together and disposed off by this common order for the sake of convenience. Further, the appeal of the Revenue for the assessment year 2010-11 was taken up as the lead case and the decision rendered therein would apply with equal force in appeal for assessment year 2011-12, except with variance in figures.

4. In its appeal for the assessment year 2010–11, the Revenue has raised following grounds:

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT (A) is correct in restricting the rate of guarantee commission to 0.5% as against 1.04% adopted by the TPO without giving any rationale and without discussing the facts of the case and deciding the issue on the merits of the case without considering that guarantee commission was for performance guarantee?"*
>
> *[Tax effect: Rs. 8,31,096 /-]*
>
> *2. "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT (A) has erred in restricting the disallowance to 10 percent of the expenses incurred on motor car without appreciating the facts that the assessee has failed to justify this expense as motor expenses during the assessment proceedings."*
>
> *[Tax effect: Rs. 2,66,716/-]*

3a) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in restricting the disallowance to 10 percent of the expenses incurred on overseas travelling as other expenses without appreciating the facts that the assessee has failed to justify these expenses to have been incurred wholly and exclusively for the purpose of business in terms of sec 37 of the Income Tax Act, 1961. b) "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT (A) has erred in restricting the disallowance to 10 percent of the expenses incurred on overseas travelling without appreciating the fact that no documentary evidence was produced at the time of assessment proceedings.

[Tax effect: Rs. 2,06,90,276/-]
[Total Tax effect: Rs. 2,17,88,088/-]

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

5. The issue arising in ground No. 1 raised in Revenue's appeal is pertaining to transfer pricing adjustment in respect of guarantee commission.

6. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a company in which the public are substantially interested and is engaged in the business of manufacturing and selling man-made fabrics, ready-made garments, home furnishing, which are manufactured/processed at its units located at Devas, Bangalore and Mumbai. For assessment year 2010–11, the assessee e-filed its return of income on 25/08/2011 declaring total income of Rs. Nil. During assessment year 2010–11, assessee entered into following international transactions with its associated enterprises, which are reported in Form No. 3 CEB:

Sl. No.	*Nature of transaction*	*Amount in Rs.*
1.	*Investment and capital contribution*	*219,36,72,054*
2.	*Purchase of goods*	*36,80,000*
3.	*Sale of goods*	*33,69,000*

7. Pursuant to reference by the Assessing Officer, during the transfer pricing assessment proceedings, the Transfer Pricing Officer ('*TPO'*), inter-alia, upon perusal of schedule to balance sheet observed that assessee has given corporate guarantees to the lenders of Reid and Taylor India Ltd, Brand House Retails Ltd and on behalf of subsidiary companies for an amount of Rs. 65936.42 lakh. Accordingly, the assessee was asked to submit the details regarding the guarantees issued to various banks on behalf of its associated enterprises. In reply, assessee provided the details to the TPO. As per assessee's submission, guarantees amounting to Rs. 45.28 crores pertained to the associated enterprises, namely, SKNL international. The assessee further submitted that these guarantees are not reflected in Form No. 3 CEB, as it is contingent in nature. The TPO vide order dated 17/01/2014 passed under section 92CA(3) of the Act treated the provision of guarantee as an international transaction under section 92B of the Act. The TPO applied Comparable Uncontrolled Price ('*CUP'*) method for benchmarking the transactions of provision of corporate guarantee. The TPO held that the guarantee, in present case, is basically in nature of performance guarantee which clearly assures the licensor of the brand that all amounts due and payable in respect of

guaranteed obligations will be borne by the assessee on behalf of the associated enterprise. Further, the TPO after collecting the information u/s 133(6) of the Act regarding performance guarantee, arrived at arm's length composition for performance guarantee @1.04% per annum. Accordingly, the TPO, inter-alia, made an upward adjustment in respect of guarantee of Rs. 45.28 crore at Rs. 47,09,120.

8. In appeal, learned CIT(A), vide impugned order dated 18/02/2021, held that providing guarantee is an international transaction and guarantee commission has to be charged on such transaction. The learned CIT(A) by following the decision of Hon'ble jurisdictional High Court in CIT vs. Everest Kento Cylinders Ltd., [2015] 378 ITR 57 (Bom.), directed computation of guarantee commission at 0.5%. Being aggrieved, the Revenue is in appeal before us.

9. During the course of hearing, learned DR vehemently relied upon the order passed by the TPO.

10. We have considered the submissions and perused the material available on record. In the present appeal, the Revenue is aggrieved against reduction in the rate of guarantee commission to 0.5% as against 1.04% adopted by the TPO. We find that Hon'ble jurisdictional High Court in Everest Kento Cylinders Ltd. (supra) upheld charging of guarantee commission at the rate of 0.5%. As, the learned CIT(A) has followed the binding precedent of Hon'ble jurisdictional High Court, we find no infirmity

in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 1 raised in Revenue's appeal is dismissed.

11. The issue arising in ground No. 2 raised in Revenue's appeal is pertaining to restricting the disallowance of motor car expenses.

12. The brief facts of the case pertaining to this issue, as emanating from record, are: During the course of assessment proceedings, from the perusal of particulars of payment made to persons specified under section 40A(2)(b) of the Act, furnished in Annexure–6 to Form No. 3CD, it was observed that Director of the company has been paid motor car expenses of Rs. 19,61,728. The assessee was asked to show cause as to why this payment should not be treated as excessive under section 40A(2)(b) of the Act. In reply, assessee submitted that the motor car expenses have been paid to the Director as per the terms and conditions agreed between the parties at the time of employment as Vice-Chairman and Managing Director of the company. The assessee further submitted that as per the minutes of meeting of remuneration committee of the company as well as resolution dated 20/10/2008, it was provided that other perquisites will be reimbursed on actual basis. The Assessing Officer vide order dated 21/04/2014, passed under section 143(3) r.w.s. 144C of the Act did not agree with the submissions made by the assessee and disallowed 50% of Rs. 19,61,728 paid to the Director on account of motor car expenses and, accordingly, made an addition of Rs. 9,80,864 under section 40A(2)(b) of the Act, by treating the same to be excessive.

13. In appeal before the learned CIT(A), the assessee reiterated its submissions made before the Assessing Officer. The assessee further submitted that these expenses were incurred wholly and exclusively for the purpose of the business. The learned CIT(A) vide impugned order dated 18/02/2021, granting partial relief to the assessee directed the Assessing Officer to restrict the disallowance to 10% of the expenses incurred on motor car. Being aggrieved, Revenue is in appeal before us.

14. During the course of hearing, learned DR vehemently relied upon the order passed by the Assessing Officer.

15. We have considered the submissions and perused the material available on record. In the present case, as per the assessee motor car expenses were paid to the Director as per the terms and conditions agreed at the time of employment. Before the Assessing Officer, the assessee also referred to the extracts from minutes of meeting of remuneration committee of the company as well as resolution passed on 20/10/2008, which provided that other perquisites will be reimbursed on actual basis. In the present case, the Revenue has not denied any of the aforesaid contentions. The Assessing Officer disallowed 50% of the motor car expenses paid to the Director only on the basis that the said Director has spent considerable time abroad on account of foreign travel and therefore expenditure to the extent of Rs. 19,61,728 is not justifiable. Accordingly, the Assessing Officer on estimated basis made disallowance

of 50% of the aforesaid amount. Before the learned CIT(A) also, the assessee could not produced complete details with respect to motor car expenses. As a result, the learned CIT(A) directed the Assessing Officer to restrict the disallowance to 10% for want of evidence. Thus, it is evident that in the present case, the dispute is only regarding the quantum of expenditure which can be allowable to the assessee, as the Revenue has accepted that being Director some amount of motor car expenses would have been incurred wholly and exclusively for the purpose of business. Thus, in view of the above we find no infirmity in the impugned order passed by the learned CIT(A) restricting the disallowance to 10% of the motor car expenses. Accordingly, ground No. 2 raised in Revenue's appeal is dismissed.

16. The issue arising on ground No. 3 raised in Revenue's appeal is pertaining to restricting the disallowance of overseas travelling expenses.

17. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the course of assessment proceedings, assessee submitted statement of conference on sales promotion expenses for the period under consideration, wherein Corporate Division, Mumbai, the overseas travelling expenses are shown at Rs. 6,92,38,346 and overseas expenses at Rs. 8,29,40,795. The assessee was asked to furnish the justification for each and every trip with full evidence of correspondence/emails with foreign clients and complete supporting evidences of the expenditure incurred. In reply, assessee submitted the

statement of travelling and overseas expenses. It was further submitted that the said expenditure was incurred by the Director / Senior Executives / Consultants of corporate division for business development and for exploring new market. It was also submitted that the said expenditure include cost of overseas air tickets, foreign exchange for day-to-day purpose, total expenses and overseas credit card expenses of corporate division. The Assessing Officer vide order passed under section 143(3) r.w.s. 144C of the Act did not agree with the submissions made by the assessee and accordingly, disallowed 50% of the expenses incurred on overseas travelling and overseas expenses amounting to Rs. 7,60,89,571.

18. In appeal, learned CIT(A) vide impugned order restricted the disallowance to 10% of the expenses incurred. Being aggrieved, the Revenue is in appeal before us.

19. During the course of hearing, learned DR vehemently relied upon the order passed by the Assessing Officer.

20. We have heard the submissions and perused the material available on record. It is evident from the record that the assessee submitted details regarding overseas travelling and overseas expenses during the assessment proceedings. The Assessing Officer on estimated basis disallowed 50% of the expenditure incurred on overseas travelling on the basis that assessee has failed to furnish the justification for each and every trip with full supporting evidence. Learned CIT(A) directed the

Assessing Officer to restrict the disallowance to 10% on the basis that only small percentage can be attributed to personal purpose. Thus, it is evident that in the present case, the dispute is only regarding the quantum of expenditure which can be allowable to the assessee, as the Revenue has accepted that some amount of foreign travel expenses would have been incurred wholly and exclusively for the purpose of business. Thus, in view of the above we find no infirmity in the impugned order passed by the learned CIT(A) restricting the disallowance to 10% of the foreign travel expenses incurred. Accordingly, ground No. 3 raised in Revenue's appeal is dismissed.

21. As stated earlier, similar issues are raised in Revenue's appeal for assessment year 2011–12, except with variance in figures, therefore, the decision rendered hereinabove for assessment year 2010–11 shall apply *mutatis mutandis* to assessment year 2011–12 and accordingly, all the grounds raised in Revenue's appeal for assessment year 2011–12 are also dismissed.

22. In the result, both the appeals by the Revenue are dismissed.

Order pronounced in the open court on 06/07/2022

Sd/	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 06/07/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai