IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'F': NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No.2516/DEL/2018
[Assessment Year: 2014-15]

Wieden+Kennedy India Private Limited, 314 DLF South Court, Saket, Delhi-110017	Vs	Deputy Commissioner of Income Tax, Circle-27(2), New Delhi-110002
PAN-AAACW7243C		
Assessee		Revenue

Assessee by	Sh. Salil Kapoor, Adv. & Sh. Tarun Channa, Adv.
Revenue by	Sh. Ajay Kumar Arora, Sr. DR

Date of Hearing	**03.01.2023**
Date of Pronouncement	**06.01.2023**

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of ld. CIT (Appeals)-9, New Delhi, dated 30.01.2018 for the Assessment Year 2014-15.

2. The grounds of appeal reads as under:-

"Based on the facts and circumstances of the case and in law, the Appellant, respectfully craves leave to prefer an appeal under section 253 of the Act against the order dated January 30, 2018, passed by the CIT(A) under Section 250 of the Act on the following grounds

1. General

That on the facts and circumstances of the case and in law, the order passed by the Ld. Assessing Officer (hereinafter referred as AO) and confirmed by the Ld. CIT(A) is bad in law in as much

as the Hon'ble CIT(A) has failed to appreciate the facts and the law laid down in his regard.

2. Disallowance of business expenditure

a. *That on the facts and circumstances of the case and in law, the Ld.CIT(A) has grossly erred in upholding the disallowance of loss incurred to the extent of Rs.41,17,498 made by the Ld. AO, on account of illegal siphoning of funds by the Finance Director by holding that there was no nexus between the loss incurred vis-à-vis the business operations carried on by the Appellant.*

b. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has grossly erred in not following the CBDT circular No. 35-D (XLVII-20) of 1965 F. No. 10/48/65-IT(Al), dated 24-11-1965, and the decision of Hon'ble Supreme Court in the case of Badridas Daga vs. CIT (1958) 34 IT 10 (SC), wherein it has been confirmed that loss by embezzlement and misappropriation of funds by employees must be held to be arising out of carrying on of business and to be incidental to such business and accordingly, loss thereof is an allowable deduction. To this extent the CIT(A) has violated the doctrine of binding principle applicable to him.*

c. *That on the facts and circumstances of the case and in law, the reliance placed by Ld. CIT(A) on the decision of CIT vs Pukhraj Wati Bubber (2008) 296 IT 290 (P&H High Court) is misplaced.*

d. *That on the facts and circumstances of the case, the Ld. CIT(A) has grossly erred in making incorrect factual reference that the breakup of the loss incurred by the Appellant had not been submitted without considering that the breakup of loss was duly submitted before him vide submission dated November 7, 2017.*

e. *That on the facts and circumstances of the case, the Ld. CIT(A) has grossly erred in suo moto assuming that appellant had already recovered the amount equivalent to the loss incurred by withholding the dues of Mr. V Balasubramanian without even requiring the Appellant to submit details of amount withheld and appearing in the signed financial statements of the Appellant.*

3. That without prejudice, the directions given by CIT(A) for taking necessary remedial action in respect of Assessment Year 2012-13 and 2013-14 are illegal, bad in law and without jurisdiction and against the principle of natural justice.

4.That without prejudice, CIT(A) has no jurisdiction to issue directions in respect of Assessment Year 2012-13 and 2013 without giving an notice/opportunity to the assessee. Hence, the said directions are illegal, bad in law, without jurisdiction and against the principle of natural justice.

3. Brief facts of the case are that in the assessment order, the AO noted that the assessee was a subsidiary of WK Inc. and was engaged in providing advertising services to clients in India. During the course of assessment, he noted that the Finance director of the company Mr. V. Balasubramanina misused his position in the company by illegally siphoning funds of the company amounting to Rs.1,34,85,555/-. The assessee was asked vide note sheet dated 22.11.2016 why the expenditure incurred by the way of illegal siphoning of funds of the company by Mr. V. Balasubramanian amounting of Rs. 1,34,85,555/- was disallowed. The assessee submitted its reply dated 29.11.2016 that loss due to fraud/defection of money entrusted to employee is allowable as business expenditure. The AO noted that the assessee did not initiate any recovery proceedings against Mr. V. Balasubramanian in any court of law. He held that the reply of the assessee is not tenable, and hence the above expenditure incurred by the company in the above fraud is not abusiness expenditure. Hence, the total amount of Rs.1,34,85,555/- was disallowed and added back to the income of assessee.

4. Before the Ld. CIT(A), the assessee made submission which was considered by the Ld. CIT(A). The Ld. CIT(A) granted part relief by observing as under:-

> *" In its submission, the appellant has not demonstrated conclusively as to whether the nexus between the said loss on account of embezzlement by its Director, (Finance) vis-à-vis business operation was existing. Also, the said loss pertains to the expenditure already claimed in the past in its books of account. It is not the case of the appellant that the said loss arising out of embezzlement is from its accumulated profit which has already been subjected to tax. In nutshell the loss so claimed is basically expenses booked in the past and current previous year.*
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> *5.5 One of the important facts ascertained from the submission of the appellant is that after detection of the alleged embezzlement, the appellant company by passing a special resolution has, removed the said director (Finance) Mr. V. Balasubramaniam from the company and withheld his all dues as recovery measure. It is also noted that the alleged loss of Rs. 13485555/- pertains to the period January 1, 2012 to March 31, 2014 (FY 2011-12, FY 2012-13 and FY 2013-14 corresponding to AY 2012-13, AY 2013-14 and AY 2014-15 respectively). Though detailed breakup of said embezzlement amount has not been submitted, the amount pertaining to current previous year (AY 2014-15) is reported to be Rs.4117498/-.*
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> *5.6 In the due deference to the judicial pronouncements of the Hon'ble Supreme Court in the case of Badri Das Daga (supra) and other cases, even if it is accepted in principle that the said loss on account of embezzlement amounting to Rs. 13485555/- caused by siphoning of the fund by the said Mr. V. Balasubramaniam, Director (finance) of the appellant is an allowable/admissible expenditure, the claim can be allowed only to the extent it has not been recovered. Since, the appellant has already recovered the amount of loss on account of embezzlement by withholding the dues of Mr. V. Balasubramaniam, the attributable expenditure booked in the relevant previous years requires to be disallowed. In the current previous year (AY 2014-15) the attributable amount out of*

embezzled loss is Rs.4117498/- only and the balance relates to AY 2012-13 and 2013-14 details of which is not available either in the submission of the appellant or in the impugned order. Therefore, the addition for the current previous year may be limited to Rs. 41, 17,498/- only and as a result, appellant gets relief of Rs. 9368057/- (Rs. 13485555- Rs.4117498). However, Ld. AO is directed to take necessary remedial action in past cases (AY 2012-13 and 2013-14) after affording opportunity to the appellant.

The addition of Rs.4117498 out of total addition of Rs.13485555/- is sustained. Accordingly, the appellant gets part relief on this ground of appeal."

5. Against this order, the assessee is in appeal before us.

6. We have heard both the parties and perused the records. The ld. Counsel for the assessee submitted that the Ld. CIT(A) is totally wrong when he says that the details were filed. He said that the details were dully submitted and the embezzlement by the concerned director was in inflation of expenditure account in different years and only Rs.4117498/- pertains to current Assessment year. We note that the ld. CIT(A) has clearly written that the break up were not given but the ld. Counsel for the assessee submitted the same was given. Furthermore, the Ld. CIT(A) submitted that in principle, the ld. CIT(A) has accepted that the said loss is allowable but he has not allowed the same for want of details. He further submitted that the Ld. CIT(A) has erred in directing the AO to take necessary remedial action for past assessment years.

7. Per Contra, the Ld. DR relied upon the orders of the authorities below.

8. We note in this case, the said embezzlement by the Director has been attributed to inflation of the expenditure by the said director over a period of few years. The assessee has clearly said that he has not made any debit of expenditure as embezzlement loss. It was only note in the account explaining loss from which the Revenue authorities have come to the conclusion that the assessee has debited embezzlement loss. In this the ld. Counsel of the assessee has further submitted that the Ld. CIT(A) has erred in stating that the assessee has recovered the embezzlement loss of Rs.4117498/- for the current year from the dues of such employees/director. He submitted a sheet of ledger account by reference to which he claimed that a very meagre amount of Rs.6,37,936/- has been collected and hence, the Ld. CIT(A) is wrong in holding that Rs.4117498/- has been recovered. In our considered opinion, on the facts and circumstances of the case, this issue needs to be remitted back to the file of the AO. The AO is directed to factually verify the recovery and allow the balance of loss.

9. As regards of the Ld. CIT(A) direction to the AO to take necessary remedial action for AY 2012-13 to 2013-14, we note that the assessee has submitted two case laws from ITAT , wherein it has been expounded that the Ld. CIT(A) cannot go beyond the assessment year which is under consideration before him. In this regard, the case laws referred are in ITA No.565//Kol/2013, AY 2007-08 vide order dated 10.11.2017 and ITA(SS) No.88/Ind/2013 AY 2009-10 vide order dated 04.06.2019. No contrary decision was shown to us by the Ld. DR. Hence, following these

case laws, we hold that the Ld. CIT(A) has erred in passing the direction to take remedial action to AO for other years.

10. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 06th January, 2023.

Sd/-	**Sd/-**
[N.K.CHOUDHRY]	**[SHAMIM YAHYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Delhi; Dated: 06.01.2023.

Shekhar,

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi