IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " C "

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.327/Bang/2017 (Assessment Year : 2009-10)		
Smt. P. G. Sunandamma, Propx. Five Star Liquor Shop, P.B. Road, Davangere. PAN AIVPP 0384M	Vs.	Income Tax Officer, Ward-2, Davangere.
Appellant		Respondent.

Appellant By : Shri V. Srinivasan, Advocate. Respondent By : Ms. H.L. Soumya Achar, Addl. CIT (D.R)

Date of Hearing : 12.04.2017.
Date of Pronouncement : 02.06.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.16.12.2016 of the Commissioner of Income Tax (Appeals), Gulbarga for the Assessment Years 2009-10.

2. The assessee has raised the following grounds :

1. The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned CIT[A] is not justified in sustaining the addition of Rs.2,86,806/- being the income of the business belonging to the joint family of which the appellant is the member, as income of the appellant separately in as much as, the Excise license stood in her name following a consensus among the members of the family under the facts and in the circumstances of the appellant's case.

2.1 The learned CIT[A] to have taken into account the position under Hindu Law that the property can be in the name of any one of the members of the family and therefore, the income is liable for assessment in the hands of the family of which the appellant is a member and the addition made requires to be deleted.

2.2 The learned CIT[A] ought to have appreciated that the decisions of the Hon'ble Supreme Court in the cases of BIHARILAL JAISWAL reported in 217 ITR 746 [SC] and RANGILA RAM reported in 254 ITR 230 [SC] have no application to the facts of the appellant's case as the benefit of the license was not transferred to any person in violation of the state excise laws and therefore, the ratio of the aforesaid judgements have no application to the facts of the appellant's case and consequently, the income of the HUF that has been assessed in the hands of the appellant requires to be vacated.

3. The learned CIT[A] is not justified in sustaining the GP addition of Rs.3,89,729/- under the facts and in the circumstances of the appellant's case.

4. The learned CIT [A] is not justified in upholding the addition of Rs.66,960/- made in respect of the difference between the sales shown in the VAT return, which was erroneous and the sales shown in the regular books, which is correct which could not be reconciled under the facts and in the circumstances of the appellant's case as income of the appellant

4.1 Without prejudice to the above, the learned CIT[A] is not justified in treating the entire difference as income and he ought to have taxed only the net profit embedded in the difference in sales as income.

5. The learned CIT[A] ought to have telescoped the addition made towards inflation in purchases, difference in the sales with the GP addition and should have made a single addition by telescoping all these into one.

6. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies herself liable to be charged to interest u/s 234-B and 234-D of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

7. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. Ground Nos. 2, 2.1 & 2.2 are regarding assessment of income in the hand of assessee-individual instead of HUF. The assessee is an individual and

proprietrix of M/s. Five Star Liquor Shop. The assessee's husband Late Shri P.G. Govindaswamy was earlier the proprietor of this business during his life time. Late Shri P.G. Govindaswamy also running retail outlet M/s. Pisale Wines at Davangere which was considered and treated as business of HUF comprising of himself, his wife (the assessee) and 4 sons as members of HUF. After the demise of her husband, the assessee was filing returns of income in two status as a *de facto* Karta of HUF of which the assessee continue to be a member in respect of income of M/s. Pisale Wines and secondly as an individual being proprietrix of M/s. Five Star Liquor Shop. The assessee filed two returns of income, one in the status of HUF and the other in the status of individual for the assessment year 2009-10. Subsequently, the Assessing Officer noticed that the income from liquor business standing in the name of M/s. Pisale Wines admitted in the hand of HUF should have been shown as individual income of the assessee. Accordingly, in view of the decision of Hon'ble Supreme Court in the case of **Biharilal Jaiswal Vs. CIT** 217 ITR 746 (SC) as well as in the case of **CIT Vs. Rangila Ram & Others** 254 ITR 230 (SC), the Assessing Officer held that the income arising from the liquor trading offered in the hands of HUF requires to be clubbed in the hand of individual and accordingly assessed. The assessee

challenged the action of the Assessing Officer before the CIT (Appeals) but could not succeed.

5. Before the Tribunal, the learned Authorised Representative of the assessee has reiterated its contention as raised before the authorities below. The submissions of the assessee has been reproduced by the Assessing Officer in para 5.1 as under :

5.1

2 In the afore said notice your Honour has called upon me to show cause as to why the income belonging to my Hindu Undivided Family of which I am the defacto karftha or representing member of the family in the shape of proprietor of the business carried on under the name and style of M/s Pisale Wine Stores, should not be clubbed with my separate income assessable in MY INDIVIDUAL STATUS by relying upon the decision of the Apex Court in the case of Biharilal Jaiswal report in 217 ITR 746 and CIT Vs. Rangeela Ram reported in 254 ITR 230 and in this connection, I beg to submit for your Honour's kind consideration and the ratio of these two decision and the latest decision on this subject of the Hon'ble Karnataka High Court in the case of CIT V. SB Pannalkar & Co., reported in 61 DTR 296, which is enclosed herewith, far from supporting your case supports my claim that the income which arose to me as the defacto kartha or as a member representing the HUF of the business carried on by the joint family in my name should not be assessed in my hands as my separate property but as the income of my joint family. To appreciate my contentions in this regard, the relevant facts require to be stated once again in addition to what I have submitted in detail by my letter dated: 11-11-2011, which is resting with your Honour.

3 I am widow of late Sri PG Govindaswamy, who was a kartha of a Hindu Joint Family of which myself and my sons are the other co-parceners. My husband during his lifetime was assessed to tax in two statuses. The business carried under the name and style of M/s Pisale Wine Stores is the joint family business. After his demise, by mutual consent to avoid disputes and to facilitate hassle free transfer from one member of the family to another member of the same family the license came to be transferred in my name and I held it for and on behalf of and for the benefit of the joint family as among us, since it is joint family property and I could not be the exclusive owner of the privilege of the license granted to my late husband Sri PG Govindaswamy, who himself was the kartha of the family. My husband dies on 26-04-1994. The business of M/s Pisale Wine Stores was kept undivided among the co-parceners and it was agreed that the license should be transferred in my name as a matter of convenience to facilitate easy transfer without any hassles. The income from this business beneficially belonged to the joint family and not to me separately as my separate property to be assessed in my hands.

4 Coming to the 2 decision relied upon by your Honour and the latest decision of the Hon'ble Karnataka High Court in the case of SB Pannalkar & Co., though not cited by your Honour, it is submitted that they were in connection with the transfer of the license under Excise Law. The Excise Law prohibits any transfer without the consent of the Government and the Transferring such license to a firm constituted to carry on the business is in violation of the provisions of the Excise Law and such a firm so formed is not entitled to the benefits of registration under the Income-tax Act as the firm then would be one formed in violation of the law and it is illegal. The illegal firm could not be granted the registration. In our case, there has been a transfer from one member of the joint family of Sri PG Govindaswamy, my husband to my name and as between me and my sons, who are the other co-parceners of the joint family. This business of the family was not divided and it continued to be the business of our joint family and I am accountable under Law and infact the HUF is the beneficial owner and I am only a nominee. Infact under the tenets of the Hindu Law, it is the property of the family and not my own. It is submitted that there was no partition allotting the said business to me exclusively to consider that the license held by me as my separate property to be enjoyed in severality and I also did not lay any such claim and therefore, the business as well as the license held in my name belongs to the family and it is the family property accordingly, notwithstanding the license stood in my name, the income from the business is assessable in the hands joint family. Unlike the case of a firm where registration could not be granted if the firms is formed in violation of the law, there is no such prohibition under the Income-tax Act for the joint family to hold a Excise License in the name of any one of the members to carry on the business for the benefit of the family. Therefore, the joint family, which is an assessable entity of which I am the member, carries on the business beneficially in my name and the income is assessable in the hands of the joint family and not in my hands. These provisions are not applicable in the case of transfer of license from one member of the HUF to another member of the HUF. I also rely on the ratio of the decision of the Hon'ble Supreme Court in the case of CHARANDAS HARIDAS Vs. CIT reported in 39 ITR 202. In that view of the matter I request your Honour to refrain from clubbing such income and I hereby object your Honour's proposal for making the assessment of the joint family's income in my Individual hands.

Thus the learned Authorised Representative has submitted that in view of the decision of Hon'ble jurisdictional High Court in the case of **CIT & Another Vs. S. B. Pannalkar & Co.** 61 DTR 296 the income offered in the hand of HUF cannot be assessed in the hand of the individual-assessee. He has further contended that the Hon'ble jurisdictional High Court after considering the decision of Hon'ble Supreme Court in the case of **Biharilal Jaiswal Vs. CIT** (supra) as well as

in the case of **CIT Vs. Rangilaram and others** (supra) has held that the above decisions are not applicable to the facts of the said case.

6. On the other hand, the learned Departmental Representative has submitted that the assessee has offered the income as a Karta of HUF however the assessee cannot be a Karta of HUF. Therefore the income from the business of retail trading in liquor has to be assessed in the individual hand of the assessee. He has relied upon the orders of the authorities below.

7. Having considered the rival submissions as well as the relevant material on record, it is noted that the assessee was allocated these licenses by the Excise Department by virtue of the law of succession on demise of her husband. The other family members of the assessee gave the consent for transfers of the licenses from the name of the deceased husband to the name of the assessee. It is also undisputed fact that during his lifetime **Shri P. V. Govindaswamy** was assessed to tax in two statuses i.e. individual being proprietor as well as HUF being Karta of HUF. Thus on the death of the husband of assessee, the assessee acquired these licenses as a successor and legal heir of **Sri P.V. Govindaswamy**. The status of **P.V. Govindaswamy** was not disputed being Karta of HUF then there is no impediment in succession of the assessee as a Karta of HUF. The authorities below are relied upon the decisions of Hon'ble

Supreme Court in the case of **Biharilal Jaiswal Vs. CIT** (supra) as well as **CIT Vs. Rangila Ram & Others** (supra) wherein the Hon'ble Supreme Court has held that a license issued in the name of individual cannot be transferred to a partnership firm and therefore the income from business of liquor has to be assessed in the hand of the individual who is license holder. In the case on hand there is no transfer of the license by the holder but the license in the name of the late husband of the assessee was transferred in the name of the assessee by the authorities because of the law of succession and it was not the transfer by the holder itself. The Hon'ble jurisdictional High Court in the case of **CIT Vs. S B Pannalkar and Co**. (supra) having considered and understood the decisions of Hon'ble Supreme Court in the case of **Biharilal Jaiswal Vs. CIT** (supra) as well as in the case of **CIT Vs. Rangila Ram & Others** (supra) has observed and held in paras 8 & 13 as under :

" **8.** Therefore, ultimately it is the intention of the parties as gathered from the facts of the case which would determine the eligibility for deduction. No person can carry on liquor business without a licence or permission. Such licence granted is not transferable. Even if transferable, it would be subject to conditions. A partnership firm to carry on business needs a licence or permission from the authority under the Excise Act. If an individual transfers the said licence to a partnership firm, it has to be in accordance with law. Otherwise the transfer would be contrary to section 23 of the Indian Contract Act, and is void. However, if a partnership firm chooses to obtain a licence in the name of one of its partner and the licence granted to such partner is treated as the partnership asset expressly in the partnership deed even before acquiring such licence and the partnership firm pays the fee for obtaining such licence, the said licence granted is a partnership asset and is not the personal property of such partner. No transfer is involved in such a transaction. It is not a case of a person who has obtained a liquor licence is inducted into a partnership as a partner, who brings in the said licence as his capital contribution and makes available the licence to the partnership firm to carry on liquor business and thus circumvent the law prohibiting transfer of such licence. Thus the

partnership should acquire the licence to carry on liquor business in a manner known to law to be eligible for deductions under the heading business expenditure under section 37 of the Income-tax Act, 1961."
9..
10…..
11…..
12….
" **13.** Therefore, it is clear that there is no intention on behalf of these partners to contravene the law. It is not camouflaged to contravene the law. Therefore the appellate authority as well as the Tribunal were justified in holding that the aforesaid judgments of the Apex Court has no application to the facts of this case. It is a case of genuine partnership carrying on business in liquor after obtaining licence in the name of one of the partners, treating the said licence as partnership asset. No transfer is involved."

8. Similarly in the case on hand when no transfer of license by the holder of the licensee is involved then the decisions of Hon'ble Supreme Court as relied upon by the authorities below are not applicable in the case of the assessee. In view of the above discussion, the orders of the authorities below qua this issue are set aside and the claim of the assessee is allowed to the extent that the income offered in the hand of the HUF cannot be assessed in the hand of the individual-assessee.

9. Ground No.3 is regarding Gross Profit (GP) addition. The Assessing Officer noted that the assessee has declared very low GP in comparison to the GP worked out at 17.11% on the data made available by **M/s. Karnatka State Beverages Corporation Limited** (KSBCL). The assessee challenged the action of the Assessing Officer before the CIT (Appeals). The CIT (Appeals) granted part relief and directed the Assessing Officer to adopt GP at 14%.

10. Before the Tribunal, the learned Authorised Representative has submitted that when the assessee itself has shown GP at 11.43% then making addition by taking an estimate of GP at 14% is not justified. He further submitted that the authorities below have not brought on record any specific reason for not accepting the GP shown by the assessee and contended that the CIT (Appeals) is not justified in directing the Assessing Officer to adopt GP at 14% & GP at 11.43% be retained.

11. On the other hand, the learned Departmental Representative has submitted that the Assessing Officer has considered the data made available by the KSBCL and therefore the rate adopted by the CIT (Appeals) is justified.

12. Having considered the rival submissions as well as the relevant material on record, it is noted that for the year under consideration the assessee has offered the income which is equal to GP at 11.43%. Accordingly when the assessee itself has shown GP at 11.43% then making addition by taking an estimate of GP at 14% is not justified as there is no significant difference. Even otherwise, the authorities below have not brought on record any specific reason for not accepting the GP shown by the assessee. The only reason by the Assessing Officer is the direction obtained from ACIT under Section 144A of the Act regarding assessment to be made in the hand of the assessee-individual.

These directions are based on the data made available by KSBCL and therefore there is always a scope of tolerance range of fluctuation of GP of individual cases and if the assessee's GP is falling within the reasonable range of fluctuation of GP then no addition can be made by taking GP on estimate basis. Hence the GP addition made by the authorities below is deleted.

13. Ground No.4 is regarding addition made on account of difference between the sales shown in VAT return and regular books of accounts.

14. I have heard the learned Authorised Representative as well as learned Departmental Representative and considered the material on record. The Assessing Officer has made the addition of Rs.66,950 on account of difference of sales shown in the VAT Return and books of accounts. The learned Authorised Representative of the assessee has submitted that the sales shown in the VAT Return was erroneous whereas the sales shown in the books of accounts is correct figure and therefore no addition is called for. Alternatively, he has submitted that the entire difference cannot be treated as income and only GP addition of differential amount of sales can be added as income of the assessee.

15. On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

16. Having considered the rival submissions as well as the relevant material on record, it is noted that the difference of sales as per the VAT Return and books of accounts has not been disputed by the assessee therefore the sales shown in the VAT Return cannot be ignored. However the entire sale cannot be treated as income of the assessee and therefore only GP addition of such excess sale as per the VAT Return has to be added as income of the assessee. The Assessing Officer is directed to make the addition by taking the GP as declared by the assessee.

17. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on 2nd June, 2017.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

Bangalore,
Dt. 02.06.2017.

*Reddy gp