

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

1. ITA No. 839/Bang/2016
2. ITA No. 840/Bang/2016
Assessment year : 1998-99

1. Shri. Basavaraj I. Kamatagi (HUF),
C/o Gangavathi Silk Palace,
Dajiban Peth,
Hubli – 580 028.
PAN : AABHB 0871 P

2. Shri. N. R. Gangavathi (HUF),
C/o Gangavathi Silk Palace,
Dajiban Peth,
Hubli – 580 028.
PAN : AAAHG 8411 P

... APPELLANT

Vs.

The Income Tax Officer,
Ward-3(2),
CR Building, Navanagar,
Hubli – 580 025.

... RESPONDENT

Assessee by : Shri. S. V. Ravishankar, Advocate
Revenue by : Shri. Pardeep Kumar, Addl. CIT

Date of hearing : 23.11.2017
Date of Pronouncement : 22.12.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

These appeals are preferred by the assessee against the respective orders of CIT(A) on common grounds. Except the difference in quantum, the grounds raised in these appeals are

identical. Therefore, we prefer to extract the grounds raised in ITA No.839/Bang/2016 as under:

- “1. The order of the CIT (A) in so far as they are against the appellant are opposed to law, equity, and weight of evidence, probabilities, facts and circumstances of the case.
2. The appellant denies to be assessed at Rs. 12,48,710/- as against the declared total income of Rs. 1,27,080/- on the facts and circumstances of the case.
3. The learned CIT (A) is not justified in confirming the addition of Rs. 11,21,625/- under section 68 of the Act on the facts and circumstances of the case.
4. The learned CIT(A) was not justified in confirming the finding of the AU that the nomenclature as per the declaration differed from the sale invoice and hence the said sale of Gold, Silver and Diamonds different from the one found in the declaration made on the facts and circumstances of the case.
5. The learned CIT(A) was not justified in relying on the observations made in the earlier appellate orders to arrive at a finding that the declaration stood unproved and hence the Gold, Silver and Diamonds sold was not out of the declaration made.
6. The learned CIT(A) was not justified on facts in not considering the Gold, Silver and Diamonds on hand with the appellant as per the declaration, to be the same Gold, Silver and Diamonds sold on the facts and circumstances of the case.
7. Without prejudice to the right to seek waiver with the Hon'ble Chief Commissioner of Income Tax/Director General of Income Tax, the Appellant FIUF denies itself liable to be charged to interest under section 234B of the Act which under the facts and circumstances of the case deserves to be cancelled. The calculation of interest under section 234B is not in accordance with law as the rate, amount and method for calculating interest is not discernible from the order of assessment.
8. The appellant craves leave to add, alter, modify, delete or substitute any or all of the grounds and to file a paper book at the time of hearing the appeal.
9. In view of the above and other grounds that may be taken at the time of the hearing the appeal, the appellant prays that the appeal be allowed in the interest of justice and equity.”

2. Though various grounds are raised but they all relate to the addition under section 68 of the Act. The facts in brief borne out from the record are that the return of income for 1998-99 filed by the assessee was selected for scrutiny and during the course of assessment proceedings, it was noticed by the AO that assessee has maintained the capital account with an amount of Rs.11,21,625/- in the case of Basavaraj I Kamatagi (HUF), as received from sale of gold, silver and diamonds which were declared by the assessee under VDIS 1997. After due verification and the enquiries with the assessee and the parties to whom the

jewellery were allegedly sold, the AO came to the conclusion that sales were not genuine and accordingly an amount of Rs.6,63,278, being profits from sale of the said jewellery, was brought to tax as income within the meaning of Section 68 of the Act. Later on, having noted that the order of the AO is erroneous and prejudicial to the interest of the Revenue, the CIT set aside the assessment under section 263 of the Act and directed the AO to tax the entire sale proceeds. Accordingly, the effect was given by the AO. The order of the AO was challenged before the CIT(A) but the assessee did not find favour with him. Consequently, the matter was brought to the Tribunal and the Tribunal has also confirmed the addition. Thereafter, assessee preferred an appeal before the Hon'ble High Court of Karnataka and the Hon'ble High Court, following the judgment in the case of Smt. Kailashi Devi G Agarwal Vs. ITO in ITA No.186/2004, set aside the order of the Tribunal and restored the matter to the AO for passing fresh order in the light of the observations made in the body of the order in the case of Smt. Kailashi Devi G Agarwal (supra). Consequently, in compliance with the directions of the Hon'ble High Court, the AO has issued the notice and asked the assessee to produce bank statements/bills of purchase and sale of gold, silver, etc., and any other documentary evidences in support of his contention that the goods sold are the same which were declared in the application filed under VDIS Scheme, 1997. In response to said notice, the assessee filed the written submissions along with some evidences which were considered and examined by the AO and he came to the conclusion that what is sold under the sale transaction claimed by the assessee in the regular return and what is declared under the VDIS 1997 are not the same goods. The AO further examined the details furnished by the assessee and after taking cognizance of the statements of the assessee made in response to show cause notices issued under section 263 of the Act, held that the jewellery sold were not the same which were declared under the VDIS scheme. He accordingly treated the entire sale proceeds as unexplained cash credit and made the addition of Rs.11,21,625/- in the case of Shri. Basavaraj I Kamatagi, HUF and Rs.11,08,610/- in the case of Shri. N. R. Gangavati, HUF. Since the reasons for making the addition in both the cases are same, we prefer to extract the observation of the AO in the case of Shri. Basavaraj I Kamatagi, HUF, as under:

“7.0 The explanation and the copies of the evidences furnished by the assessee have been thoroughly verified in the light of the observations made by the

Hon'ble High Court of Karnataka, Circuit Bench, Dharwad to see what is sold under the sale transaction claimed by the assessee in the regular return filed pertains to the gold jewelry, silver articles and diamond which are as declared in the application filed under the VDIS Scheme 1997. On refification it is noticed that what is declared in the application filed under the VDIS scheme 1997 and what is claimed by the assessee in the regular return of income filed by the assessee is as under:

Sl. No.	What is declared in the application filed under VDIS-1997		What is claimed by the assessee in regular Return of Income as sale transaction	
	Items	Net Weight in Grams	Items	Net Weight in Grams
1	Gold Jewellery:		GOLD BULLION	1161.250
2	Bangles-121160.150			
3	Patali-4	121350		
4	Chapal Har-2	101.200		
5	Tode-2 pairs	81.350		
5	Vanki-2	256.450		
6	Bajuband-2	254.250		
7	Chhairs-6 pcs	181.350		
8	Padak sara-1	70.500		
9	Gold diamond items=Necklace-1, Bangles-2, Tops-2 pairs, Hangings-2 and Rings-3.	178.570		
	TOTAL	1401.100		
	Silver Articles:			
1	Tat-18	38.710 Kg.	SILVER BULLION	34.900 Kg.
2	Tambige-9			
3	Vati-36			
4	Glass-18			
5	Trey-4			
6	Samai-4			
7	Dinner Set-1			
8	Jug set-1			
1.	Diamonds: Stones-291 stones	20.35 Cts.	Cut and polished diamonds-291 pcs	20.35 Cts.

8.0 From the above table it can be observed that what is sold under the sale transaction claimed by the assessee in the regular return filed and what is

declared in the application filed under the VDIS Scheme 1997 are not the same goods. The Hon'ble High Court has held that the material fact has not been considered by the Assessing Authority or the first appellate authority or the Appellate Tribunal. As the authorities have not given a finding on the material fact, a finding has to be given now by the Assessing Authority, as to the said material fact as to whether the assessee is able to prove that the subject matter of the goods which are sold as per the sale transactions declared under the regular returns filed for the assessment year 1998-99 is in respect of the same goods which were subject matter of application filed under the VDIS Scheme 1997 and accepted by the revenue, as per the observations made in the High Court Order.

9.0 It can be seen that as against gold ornaments and silver articles the assessee has sold gold bullion and silver bullion, which does not amount to same goods. In the VDIS declaration the assessee had not declared any bullions of gold and silver, but the assessee had declared gold ornaments and silver articles. In view of the same it is held that the assessee could not prove the material fact that what is sold under the sale transaction claimed by the assessee in the regular return filed and what is declared in the application filed under the VDIS Scheme 1997. With regard to diamonds the assessee had declared the same in the VDIS application as Diamonds-291 stones and diamonds studded with Gold jewellery items (Gold diamond items=Necklace-1, Bangles-2, Tops-2 pairs, Hangings-2 and Rings-3). However, the sale bill shows that cut and polished diamonds of 291 stones are sold. Further the VDIS declaration does not say that they were cut and polished. Further, the bill is not containing the sale in respect of the diamonds studded with gold ornaments (Gold diamond items=Necklace-1, Bangles-2, Tops-2 pairs, Hangings-2 and Rings-3). Thus, the diamonds sold are not the same diamonds which were declared and accepted under VDIS-97.

10.0 During the course of original assessment proceedings the assessee voluntarily came forward and offered the amounts credited in his capital account as profit on sale of gold, diamond and silver as his additional income under the head income from other source. He had stated that though the transactions are genuine, to avoid litigation and to buy peace he voluntarily offer the amount for tax and requested not to charge any interest and initiate any penalty proceedings. However during the course of giving effect to the order of the Commissioner of Income Tax, Hubli U/s 263 of the Act, the assessee has filed a letter on 12/11/2003 in which it is stated that:-

*“.....If you pass fresh order as directed in order u/s 263, it will lead to fresh dispute and I will be constrained to go back to my original return as stated above. The sworn statement was given as accepted by the department with the sole motive of buying peace with the department. There was no unexplained cash credit. If the department rakes up the issue afresh, **I will also be free to withdraw the sworn statement and also take different stand convenient to me. In that case assets declared under VDIS are to be treated as not disposed off and are held by***

me.....”

As the assessee has agitated against the additions made as per order u/s 263 of the Act, that means as per assessee's own words the assets declared under VDIS are to be treated as not disposed off and they are still held by him. If the VDIS-1997 declared assets were really disposed off, what is the reason behind assessee's making above statement? The above statement of the assessee gives scope for doubt that those VDIS declared assets are still there and what is disposed of is something else. Under the circumstances it is difficult to believe that the material fact that what is sold under the sale transaction claimed by the assessee in the regular return filed and what is declared in the application filed under the VDIS Scheme 1997 are one and the same.

11.0 Apart from the copies of VDIS Certificate, valuation reports and sale bill copies, the assessee is not able to prove what is sold under the sale transaction claimed by the assessee in the regular return filed pertains to the gold jewelry and diamond which as declared in the application filed under the VDIS Scheme 1997. Under the circumstances discussed above I hold that the assessee is not able to prove that the subject matter of transaction declared in the regular returns is the same goods which is declared under the application filed under scheme 1997 and accepted by the revenue. The cash credits credited by the assessee in his capital account is not relating to sale of jewellery items declared under VDIS. Therefore, it is clear that the assessee is bound to pay tax on the sale transactions, as what is sold is not the property which is the subject matter of application under the Scheme 1997. Therefore, the entire sale proceeds are treated as unexplained cash credits and have been brought to tax U/s.68 of the Act as income of the assessee.”

3. Aggrieved, assessee preferred an appeal before the CIT(A) but assessee did not find favour with him. Now the assessee is before the Tribunal and during the course of hearing, the learned counsel for the Assessee has contended that it has filed the relevant evidences with regard to conversion of gold jewellery into bullion along with the sale bills of the bullion but it was not accepted by the Revenue. The learned counsel for the assessee further contended that the conversion from gold jewellery to bullion was done at the instance of jewellers as they were not ready to purchase the jewellery. He also contended that since the assessee has sold the same gold, silver and diamond which were declared in the application filed under the VDIS scheme, the sale proceeds introduced as capital should be accepted. He placed reliance upon the orders of the Tribunal in the case of Sri Jayantilal J Jain Vs. ITO in ITA No.42/Bang/2016 and Shri Shyam B. Habib Vs. ITO in ITA No.81/Bang/2016 in support of his contentions that under the similar circumstances, the

sale proceed declared by the assessee was accepted by the Tribunal.

4. The learned DR on the other hand emphatically disputed the contentions of the assessee with the submission that the Hon'ble High Court has remanded the matter to the AO with a direction to examine as to whether the goods declared in the application filed under VDIS Scheme 1997 was sold and sale proceeds was introduced as a capital. Pursuant to the directions, the AO has examined the details of jewellery declared in VDIS Scheme and the goods sold as per the jewellery declared.

The learned DR invited our attention as a sample in the case of Shri. Basavaraj I Kamatagi (HUF) that the gold jewellery was of 1401.100 grams but the weight of gold bullion sold was at 1161.250 grams meaning thereby the jewellery declared though it may converted into bullion according to assessee was not the same as contended by the assessee. Similarly, the silver articles declared under the VDIS Scheme were of 38.710 Kgs. but the silver bullion sold was 34.900 Kgs. Therefore, it cannot be said that the silver articles declared under VDIS Scheme was sold in the form of bullion after its conversion. Again in the case of diamond also, the declared diamond stones were 291 in numbers whereas the sold diamonds were cut and polished diamonds of 291 pieces.

5. The learned DR further invited our attention that under the category of gold jewellery, certain gold jewellery i.e., Necklace, Bangles, Tops, Hangings and Rings were studded with diamonds but no sale in this regard was claimed to have been effected. Since the declared jewellery do not tally with the sold goods, the claim of the assessee that he has sold the declared jewellery cannot be accepted. The learned DR further contended that similar is the position in the case of Shri. N. R. Gangavathi (HUF). In this case also, the quantity of jewellery declared do not match to the quantity of gold bullion, silver bullion and diamond sold. It was further contended that whatever judgment he has relied upon in that case, the quantity of declared jewellery and the sold goods were the same. Therefore, the reliance laid down in this case would not apply in the present case. The learned DR further invited our attention that in the original assessment, the assessee has agreed to the addition in respect to the sale proceeds introduced in the form of capital in the books of account but later on he

disputed the additions. Therefore, no interference is called for in the order of the lower authorities.

6. Having carefully examined the orders of authorities below and the judgments referred to by the parties in the light of rival submissions, we find that in first round of appeal, the matter has gone upto the High Court and the Hon'ble High Court accordingly remanded the matter back to the AO with the direction to examine as to whether the items sold were the same as declared in the application filed under VDIS Scheme 1997. The relevant observation of the Hon'ble High Court is extracted hereunder for the sake of reference:

“10. It is clear from the perusal of the material on record that having regard to the peculiar facts and circumstances of the case and the above said material on record and the contentions of the respective parties, the fact that the assessee had filed an application claiming benefit under the Scheme 1997 declaring gold jewellery and diamond which was valued at Rs.3,51,213/-, which has been accepted by the revenue by issuing a certificate on 27.12.1997, cannot be disputed. It is also clear from the perusal of the material on record that the assessee has effected sale transactions in respect of gold jewellery and and diamond as claimed in the regular returns filed, is not in dispute. However the real question that was required to be decided by the first appellate authority and the assessing authority was as to whether the subject matter of the sale transaction is in respect of the goods that were subject matter of declaration filed under the Scheme 1997, which declaration has been admittedly accepted by the revenue. If the assessee is able to prove that what is sold under the sale transaction claimed by the assessee in the regular return filed pertains to the gold jewellery and diamond which was declared in the application filed under Scheme 1997, the contention of the assessee that what is sold under the sale transaction and declared under the regular returns is the gold jewellery and diamond that was subject matter of application filed under the Scheme 1997 and cannot be taxed under section 68 has to be accepted. However, if the assessee is not able to prove that the subject matter of transaction declared in the regular returns is the same goods which is declared under the application filed under Scheme 1997 and accepted by the revenue, then it is clear that the assessee is bound to pay tax on the sale transactions, as what is sold is not the property which is the subject matter of application under the Scheme 1997. This proposition cannot be disputed by the Counsel for the parties. When the finding given by the assessing authority, which is confirmed by the first appellate authority and the Tribunal in appeal is considered, it is clear that there is no specific finding on this material fact, which would decide the contention of the assessee or the revenue.

Depending upon the finding that may be given by the assessing authority, the assessee is bound to pay under Section 68, if the assessee has not been able to prove that the goods that are sold under the transaction declared under the regular returns are the goods which were declared and accepted under the application filed under the scheme 1997. If the assessee is able to prove that the goods that the goods sold under the transaction declared in the regular returns are the goods which were declared in the application filed under the Scheme 1997 and accepted by the revenue, then the question of taxing the transaction declared in the regular return under Section 68 would not rise and tax has to be imposed under Section 68 of the Income-tax Act, 1961. Since this material fact has not been considered by the assessing authority or the first appellate authority or the appellate tribunal, it is clear that the finding given by the Income-tax Appellate Tribunal confirming the order of the first appellate authority, who inturn had confirmed the order of the assessing authority imposing tax under Section 68 cannot be sustained and the same are liable to be set aside. As the authorities have not given a finding on the material fact, a finding has to be given now by the assessing authority, as to the above said material fact as to whether the assessee is able to prove that the subject matter of the goods which are sold as per the sale transactions declared under the regular returns filed for the assessment years 1998-99 is in respect of the same goods which were subject matter of application filed under the Scheme 1997 and accepted by the revenue, as per the observations made in the body of this order. Accordingly, we answer the substantial questions of law raised for our determination and pass the following:

ORDER

The appeal is allowed. The order passed by the Income-tax Appellate Tribunal, Bangalore Bench 'C' in ITA.No.605/Bangalore/ for assessment year 1998-99 confirming the order passed by the Commissioner of Income-tax, Hubli dated 27.03.2003 who inturn had confirmed the order passed by the Assessing Officer, Ward-1(3), Hubli dated 30.03.2001 is set aside and the matter is remitted to the Income-tax Officer, Ward-I(3), Hubli, for passing fresh orders in the light of the observations made in the body of the order."

7. Pursuant to the directions of the Hon'ble High Court, the AO has made necessary enquiries. Having noted the discrepancies in the jewellery declared under VDIS Scheme and sold, the AO came to the conclusion that the jewellery sold are not the same which were declared under VDIS as there was difference in quantities. From a careful perusal of the chart, we find that gold jewellery declared in the case of Shri. Basavaraj I Kamatagi (HUF)

was at 1401.100 grams whereas the gold bullion sold was at 1161.250 grams. Short fall in the quantity of the jewellery was not explained by the assessee either before the lower authorities or before us. Under the heading gold jewellery, gold diamond items were shown as Necklace, Bangles, Tops, Hangings, Rings at 178.570 grams. Once these jewelleryes were converted into gold bullion, there may be availability of diamond stones for which no explanation was furnished as to whether they were sold or not. Similar is the position of silver articles. The silver articles were declared at 39.710 Kgs, whereas silver bullion sold were at 34.900 Kgs. There was no explanation from the assessee as to why there was a difference in weight of silver articles and silver bullion and whether the entire silver articles declared were sold. Similar is the position in the case of diamonds. The declared diamonds were 291 stones whereas the diamonds sold were cut and polished diamonds of 291 pieces.

8. Similar is the position in the case of Shri. N. R. Gangavathi (HUF) where the net weight of gold jewellery declared is 1396.800 grams whereas the gold bullion sold was at 1157.700 grams. The declared silver articles were at 36.100 Kgs, whereas silver bullion sold was 32.500 Kgs. Similarly, the diamonds declared were 297 stones but the sold diamonds were cut and polished diamonds of 297 pieces. The discrepancies in the weight of gold and silver jewelleryes declared in the return and sold were not explained by the assessee. If the assessee has sold the entire gold and silver jewellery declared under VDIS, then why there was a difference in weight of jewellery and bullions? We have also carefully examined the orders of lower authorities and we find that in all these cases, the jewellery was given to one person i.e., to Shree Balaji Refinery and the bullion was sold to M/s. Shree Mahalaxmi Jewellers. From the details of the bills, we find in the case of Basavaraj I. Kamatagi, HUF that the gold and silver jewellery were given for conversion into bullion to Shree Balaji Refinery and the gold bullion was sold on 28.01.98 and silver bullion on 18.01.98. Since the gold jewellery and silver jewellery were sold in the form of bullion on 28.01.98 and 18.01.98, where as the need to get it converted into bullion? The assessee has not made out the case that gold and silver jewellery were not saleable in the open market and the jewellers have forced them to get it converted into bullion before purchase. The assessee could not furnish the valid reasons for the conversion of jewellery into bullion. If in any case the jewelleryes

are to be converted into bullion, how the weight of jewellery gets substantially reduced. All these questions remained unanswered during the course of hearing. We cannot ignore the facts that in the original assessment proceedings, assessee has agreed for the additions proposed by the AO on account of profit and sale of jewellery. But when the assessment order was revised under section 263 by the CIT in consequential order, assessee retracted from the earlier statement and tried to justify the sale of declared jewellery.

9. We have also carefully examined the orders referred to by the assessee and we find that in all these cases, the quantity of the declared goods and the sold goods remained the same. Since the declared goods tallied with the sold goods, the Tribunal has considered that the goods declared were sold. But in the instant case, whatever quantity was declared under VDIS Scheme was not sold later on. Therefore, we are of the view that order of the Tribunal would not render any assistance to the assessee. Keeping in view the totality of the fact and circumstances of the case, we are of the considered opinion that assessee could not establish that the goods declared under the VDIS Scheme 1997 were sold as claimed by the assessee. Therefore, we find no infirmity in the order of the CIT(A) who has rightly confirmed the addition.

10. In the result, appeals of the assessee are dismissed.

Pronounced in the open court on 22nd December, 2017.

Sd/-
(JASON P BOAZ)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.

Dated: 22nd December, 2017.

/NS/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. Guard file

By order

Sr. Private Secretary,
ITAT, Bangalore.