

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2212/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2011-12)

M/s H.K. Commercial Pvt. Ltd. 11, Esplanade East, Kolkata – 700 069.	Vs.	ITO, Ward-8(4), Kolkata Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAACH 6884 Q		
(Assessee)	..	(Respondent)

Assessee by : Shri Ravi Tulsian, FCA

Respondent by : Shri Robin Chowdhury, Addl. CIT, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 19/11/2018

घोषणाकीतारीख/Date of Pronouncement : 16/01/2019

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the assessee, pertaining to Assessment Year 2011-12, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-2, Kolkata in Appeal No.96/CIT(A)-2/16-17 dated 25.10.2016 which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) dated 13/03/2014 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The grievances raised by the assessee are as follows:

"1. That, on the facts and in the circumstances of the case, the Ld. C.I.T.(A) has erred in having endorsed the action of the A.O. on all the points agitated before him without considering the detailed explanation of the assessee in proper perspective and thereby passing a non-speaking order and hence such order is bad in law.

2 (a). That, on the facts and in the circumstances of the case, the Ld. C.I.T.(A) erred in upholding the disallowance of expenses of Rs.2,269/- u/s 14A r.w.r. 8D of the Rules without considering that loan taken during the year cannot be a source of purchase of dividend

earning shares of Chambal Fertilizers & Chemicals Ltd. in past years and hence no interest expenditure is attributable to such exempt income.

(b) That, the Ld. C.LT(A) further erred in upholding the disallowance of Rs. 2,269/- without appreciating that the A.O. took 0.5% of the average of total investment as per Rule 8D(2)(iii) in spite of the settled position in law that disallowance u/s.14 r.w.r. 8D(2)(iii) can be made only in relation to those investments which gave rise to dividend in the relevant assessment year.

3. That, on the facts and in the circumstances of the case and in law, the A.O. erred in making addition of alleged undisclosed income of Rs.66,40,284/- on account of Credit Notes received from ITC Ltd. and the Ld. C.I.T.(A) simultaneously went wrong in upholding the same without appreciating the facts and detailed explanation of the assessee with supporting evidences in proper perspective.

4. That, similarly, the Ld. C.I.T.(A) erred in having upheld the addition of Rs.4,96,987/- made in the garb of undisclosed income on the alleged ground of short declaration of "Assistance on rebates and discount" received from ITC Ltd. without appreciating the facts and detailed explanation of the assessee with supporting evidences in proper perspective.

5) That, as the order of Ld. C.I.T.(A) on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your assessee be given such relief(s) as prayed for.

6) That the assessee craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds."

3. Ground No.1 and 2 were not pressed by the Id counsel therefore, these grounds do not require adjudication.

4. Ground No.3 raised by the assessee relates to addition of undisclosed income of Rs.66,40,284/- on account of credit notes received from M/s ITC Ltd. and Ground No.4 relates to addition of Rs.4,96,987/- made by assessing officer on account of alleged short declaration of "assistance on rebates and discount" received from M/s ITC Ltd. Above noted Ground No.3 and Ground No.4 are interlinked and common therefore, we adjudicate them together as under.

5. The brief facts qua the issue are that during the course of scrutiny proceedings, the assessee has submitted that he is the stockiest of M/s ITC Ltd and deals in cigarettes, tobacco and consumer goods of ITC brand. The assessee, during the course of business receives rebates and discount from ITC Ltd. In order to verify the transactions with ITC during the F.Y 2010-11, confirmation u/s 133(6) had been brought from ITC Ltd. on 16.07.2013, the Xerox copy of which

was handed over to the assessee. In this confirmation, M/s ITC Ltd. stated vide the ledger account copy of M/s H.K. Commercial Pvt. Ltd. as appeared in their books that they have given credit notes to assessee aggregating to Rs.2,10,48,821/-. On analysis of the ledger of credit notes it was found that the credit notes were given in the following twelve narrations/heads:

1. Assistance on account of Sale Promotion
2. Assistance on account of Rebate & Discount
3. Assistance on account of damage & destroy
4. Assistance on account of onward freight
5. Credits towards stock supply to ITC
6. Assistance on account of display
7. Assistance on account of Brand Board Maintenance
8. Assistance on account of products stacking unit
9. Assistance on account of transport charges
10. Assistance on account of trade incentive
11. Assistance on account of bank charges
12. Award to customers

M/s ITC Ltd. was again requested to clarify categorically whether the above assistance / credit notes under the above twelve heads were given to the assessee on actual basis, as incentive/discount under the above heads. In response, the ITC Ltd. clarified to the credit notes given in the assessee's favour in the following manner which is reproduced below:

“ITC deals with its customers on a principal to principal basis. At times the customers request for financial assistance towards expenditure incurred by them during the course of their business of distribution of ITCs products. Such requests are evaluated by the company and if found justifiable and in the interest of the ITCs business, credits are given to the customer.”

In this respect supporting evidences were also attached with the said reply. Except in the case of assistance on account of “Brand Board Maintenance” aggregating to Rs.1,11,59,932/- (as per point no.7 above) which accompanies the supporting bills and vouchers submitted by the assessee to M/s ITC Ltd. and on the account head “credit towards stock supply to M/s. ITC Ltd” aggregating to Rs.12,71,384/- (as per point No.5 above) which accompanies “bills of sales” raised in the name of M/s ITC Ltd., and on account head “assistance on account of damage & destroy” aggregating to Rs.6,67,267/-. (point no.3 above) in no other Nine (9) heads as

stated above there is any supporting evidence annexed with the claims made by the assessee to M/s ITC Ltd. except the duly filled up format prescribed by M/s ITC Ltd. It is also observed from the annexures to the reply of M/s ITC Ltd. that it did not sanction/approve its whole claims, but they did finally sanction the amount of claims made on account of those 12 different heads as per the entitlement fixed by M/s ITC Ltd. itself as per their own evaluation with respect to the justifiability & the interest of its business. It also establishes that in the real term, it is not reimbursement but these credit notes are actually income credited in its favour under different heads of assistance, excluding the amount under account head, “assistance on Brand Board Maintenance” amounting to Rs.1,11,59,932/-, under the account head, “credit towards stock supply to M/s ITC Ltd” amounting to Rs.12,71,384/- and under the account head,” assistance on account of damage & destroy” amounting to Rs.6,67,267/-. The assessee did not account for these credit notes in its Profit and Loss account by taking the plea that it did not bear any income element in favour of its business. It is to be noted here also that the assessee itself have taken the credit notes on account of “assistance on account of rebates and discounts” amounting to Rs.8,13,967/- and credited in its Profit and Loss account by deducting it from the gross amount of purchase during the said financial year.

6. It was noted by the AO that out of the total credit notes received by the assessee from M/s ITC Ltd, the assessee has passed on the benefit to its customers/clients amounting to Rs.1,11,59,932/- on account of assistance on “ Brand Board Maintenance” incurred actually Rs.12,71,384/- on account head, “credit towards stock supply to M/s ITC Ltd.” and Rs.6,67,267/- on account head “damage and destroy”. But for the rest of the amount of credit notes aggregating to Rs.66,40,284/- (i.e. Rs.2,10,48,822/- minus Rs.1,11,59,932/- i.e. on account of “Brand board maintenance” as per point-7 minus Rs.13,09,955/- on account of “rebate and discount” as per Point-2 and Rs.12,71,384/- on account of “credit towards stock supply to M/s ITC Ltd” as per Point-5 and Rs.6,67,267/- on account of “damage & destroy” as per point no.3), the assessee has contended that this

should be passed through balance sheet and not through the Profit and Loss account but the assessee itself have accounted for the amount of assistance on account of “rebate and discount” as point-2 by deducting the same from gross purchases to arrive at the net purchase figure as arrived and reflected in Profit and Loss account. It is clear contradiction on its part and hence assessee`s contention that these credit notes have no element of income is not acceptable hence rejected. The AO further noted that other than assistance for “Brand Board Maintenance” which can be considered as the reimbursement in true sense (i.e. the incentive in this head provided by ITC is factually passed on to its dealers and customers) and also in account head “Credits towards supply to M/s ITC Ltd.” aggregating to Rs.12,71,384/- in no other nine heads there is any proof of evidence received from ITC vide the reply dated 23/08/2013, that it is reimbursement of expenses. On the other hand, on the analysis of the above quoted portion of the statement of M/s ITC Ltd, it can be understood that according to their business exigencies i.e. for their interest of business, M/s ITC Ltd. gave assistance to the assessee depending on the volume of their business made through the assessee. But from audited accounts and the details filed by the assessee it was not understood how did the assessee account for this amount of credit given by M/s ITC Ltd. through credit notes. Accordingly, the assessee was requested to show the reflection of this credit notes in its books of account and also the assessee were requested to produce the books of account with respect to each and every claim during that year under the above heads towards ITC and in which account head(s) the assessee has credited the same i.e. the assessee has shown it in the Profit and Loss account or in the balance sheet vide the order sheet noting dated 08/08/2013.

In response, the assessee has stated that this recitals (sales bills/claim bills) though mentioned also as bills of sale but in fact it denotes the claims lodged on M/s ITC Ltd. in respect of in various scheme, replacement of state cigarettes or other products to off set / deplete the stock which have been already distributed to retail outlets. The AO noted that the assessee has not been able to substantiate this contention either by regular / day to day books of account including stock register

maintained in this regard under this particular head of credit notes received from the M/s ITC Ltd. or the claims made to M/s ITC Ltd. under this head. So, AO noted that this depletion of stock or set right of the stock is no way related to the claims made to M/s ITC Ltd. on monthly basis. Therefore, AO made following additions:

(1). Undisclosed income of Rs.4,96,987/- on account of assistance on rebates and discounts received from M/s ITC Ltd.

(2). Undisclosed income aggregating to Rs.66,40,284/- on account of assistance on received from M/s ITC Ltd on above discussed 9 heads of account.

7. Aggrieved by the addition made by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the order made by the Assessing Officer observing the following:

"I have considered the submissions of the authorized representative of the assessee as well as the assessment order framed in the light of the materials available on record before the Assessing Officer during the assessment proceedings. The Assessing Officer has already discussed the issue in details while passing the order. The assessee has not been able to explain the issue with books of account neither during the assessment nor appellate proceeding. The goods which were moved out from the stock were not properly recorded in the register. The free gift sample were not explained with books of account. The normal sale were recorded on daily basis but gift and sample were not properly recorded. No name of delivery man is written in the stock register which is otherwise maintained on daily basis. Keeping in view of the above, the order of the Assessing Officer is upheld and this ground of appeal is dismissed."

8. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us. The Id Counsel for the assessee reiterated the submissions made before the authorities below. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

9. We have given a careful consideration to the rival submissions and perused the material available on record, we note that the assessee being one such distributor of ITC Ltd's products, purchases the products from ITC Ltd. (specimen copy of

purchase bill enclosed at pages 17 to 21 of the paper book) and stacks them in its godown for the purpose of distribution of the products to the hawkers and retailers. From the godowns, the salesmen of the assessee company take the products for distribution to shops/outlets/retailers where the products are sold to the ultimate consumers. However, in case of cigarettes and tobacco products, the products are supplied/sold to hawkers also which again are sold by the hawkers to other shops/vendors in the streets for sale to ultimate consumers. While supplying/selling ITC's products to both hawkers and retailers, the assessee retains the margin between purchase price of the products from ITC's Ltd. and the price at which it supplies to hawkers/retailers as its income, which is duly credited in its profit and loss account. The assessee while distributing ITC's products incurs various expenditures like paying retailers for putting up flakes/sign boards featuring ITC's name. on account of destruction of damaged/expired products purchased by the assessee for distribution, for paying retailers for reserving shelves/counters for exclusive display of ITC's products in the retail outlets. We note that the assessee also incurs expenditure for remunerating the retailers for displaying ITC Ltd's cigarettes in an attractive and exclusive manner in separate units created for this purpose, on account of remunerating the transporters for transporting ITC's products from ITC's godowns to that of the assessee's godown when required, on account of giving incentive to depot salesmen for achieving the specified sales target, for paying salary to supervisors, deliverymen, depot salesmen who are engaged in the distribution process etc.

10. We note that assessee also incurs expenses on account of bank charges while paying ITC Ltd through RTGS, while purchasing products from ITC Ltd for distribution. All the above expenditures being incurred by the assessee while distributing ITC's products are claimed by the assessee from ITC Ltd. through ITC's prescribed claim format and the same are credited by ITC Ltd to the assessee in the form of assistance through credit notes post evaluation of the assessee's claims. Further ITC Ltd, in order to maximize and boost up its sales, comes up with various incentive schemes at regular intervals. The incentive

schemes require the distributors to provide free samples of ITC's cigarette packets, other products as gifts, and also sometimes provide cash discount to the hawkers/retailers as incentive for promoting and selling ITC Ltd's products on priority than that of its competitor companies by putting up flakes/sign boards featuring ITC's name, reserving shelves/counters for exclusive display of ITC's products at their outlets, displaying cigarette packets in attractive manner. Therefore, the assessee also incurs expenditure for providing free samples as gifts, discounts to various retailers pursuant to declaration of schemes by ITC Ltd, from time to time. Such schemes are usually communicated to the assessee by ITC Ltd either via email or text messages over cell phone etc. Now while providing free samples/discount to retailers/hawkers the assessee's stock gets depleted resulting in the assessee incurring expenses. The said depletion of the assessee's stock and expenses being incurred by the assessee to that extent is set right by ITC Ltd by reimbursing the assessee through credit notes, once expenses are claimed by the assessee through ITC's prescribed claim formats. Herein it is pertinent to mention that when the assessee while continuing its business of distributing ITC's products incurs expenditures on behalf of ITC Ltd. like transportation charges (for transporting ITC's products from ITC's godowns to that of the assessee's godown when ITC's vehicles are not available for transportation) or freight expenses (wherein salary is paid to supervisors, deliverymen, depot salesmen who are engaged in the distribution process etc). It sells its stock of goods to meet the expenses and later claims reimbursement of the expenses incurred by it on account of depletion of its stock from ITC Ltd., through ITC's prescribed claim format.

11. We note that all the claims made by the assessee to ITC Ltd, is later on made good by ITC Ltd. by providing assistance to the assessee through credit notes, post evaluation of the assessee's claims. However, it is pertinent to mention that while the assessee gives out its stock as free samples/gifts and provides cash discount as per scheme, it sells its stock to make payment of transportation charges or freight expenses as per ITC's direction verbally communicated by ITC's sales officials. There is no agreement for the same and it is admitted by ITC Ltd. itself through its

reply dated 23/08/2013 (copy enclosed at pages 31 to 80 of the paper book). We note that all the above assistances received by the assessee from ITC Ltd. have been duly accounted for by the assessee by including the same in its Profit and Loss account. Apart from assistance given to the assessee by ITC Ltd. pursuant to claims made by the assessee during the relevant assessment year, the ITC Ltd. also provided credits to the assessee during the relevant Assessment Year in the form of awards or performance incentive for efficient distribution of its products which has been duly offered to tax by the assessee. The total amount of assistance thus provided by ITC Ltd. to the assessee during the relevant assessment year was Rs.2,10,48,822/-, post evaluation of the total claim of Rs. 2,28,09,349/- made by the assessee (evidencing the same ledger copy of claim account which is enclosed at page 109 of the paper book and ITC's confirmation of payment of assistance amounting to Rs. 2,10,48,822/-).

12. We note that assessing officer, before reaching his conclusion of addition Rs. 66,40,284/- and Rs. 4,96,987/- to the assessee's total income, issued a notice u/s 133(6) of the Income Tax Act, 1961 to ITC Ltd. In response to which, ITC Ltd. had given two confirmations dated 16.07.2013 and 23.08.2013 (copies enclosed at pages 31 to 80 and 81 to 107 of the paper book). From the first confirmation received by the Ld. AO from ITC Ltd. on 16.07.2013, it was confirmed by ITC Ltd. that during the relevant Assessment Year, it had provided credit notes to the assessee worth Rs.2,10,48,822/- and in support of its reply, enclosed the assessee's ledger account as it existed in ITC's books during the relevant Assessment Year. On perusal of ITC's reply and the assessee's ledger copy in ITC's books, the Ld. AO came across twelve heads/narrations under which ITC Ltd. had issued the credits to the assessee during the relevant Assessment Year, which are given below for ready reference:

Sl No.	PARTICULARS OF ASSISTANCE	AMOUNT (IN Rs.)
1.	Assistance on account of Rebate & Discount	13,09,955
2.	Assistance on account of Sale Promotion	1,68,856
3.	Assistance on account of Brand Board Maintenance	1,11,59,932
4.	Assistance on account of damage & destroy	6,67,267
5	Credits towards stock supply to ITC	12,71,384
6	Assistance on account of onward freight	23,72,308

7	Assistance on account of display	11,07,018
8	Assistance on account of products stacking unit	28,70,600
9	Assistance on account of transport charges	61,444
10	Assistance on account of trade incentive	5,758
11	Assistance on account of bank charges	1,800
12	Award to customers	52,500
	Total	2,10,48,822

We note that on receipt of the above reply from ITC Ltd., the Ld. AO sought further clarification from ITC Ltd. as to whether the aforementioned credits/assistance given by ITC Ltd to the assessee were in the nature of reimbursement or incentive/discount under the above 12 heads. In response to the ld. AO's queries, further the ITC Ltd, vide reply dated 23/08/2013 (enclosed at pages 31 to 80 of the paper book) stated the following in its reply:

"ITC deals with its customers on a principal to principal basis. At times, the customer's request for financial assistance towards expenditure incurred by them during the course of their business of distribution of ITC's products. Such requests are evaluated by the company and if found justifiable and in the interest of the ITCs business, credits are given to the customer."

Along with the above reply dated 23/08/2013, ITC Ltd had enclosed specimen copies of various claim formats through which the assessee raised its claim on ITC Ltd during the relevant Assessment Year, and specimen copies of credit notes through which ITC Ltd provided assistance to the assessee towards its claim of expenditure incurred. We note that the ld. AO based on the confirmation of ITC Ltd. dated 23/08/2013 held that supporting evidences for assistance on account of 'Brand Board Maintenance' amounting to Rs.1,11,59,932/-, on account of 'Credit towards Stock Supply' amounting to Rs.12,71,384/- and on account of 'damage & destroy' amounting to Rs.6,67,267/- were enclosed by ITC Ltd along with its confirmation dated 23/08/2013 and hence treated these three assistance provided by ITC Ltd. as reimbursements, without adding the same to the assessee's total income. We note that assessee, being ITC's distributor, provided discount, free samples as gifts to retailers/hawkers for promoting ITC's sales pursuant to schemes brought out by ITC in this regard. Further, on ITC's direction it generated claim bills/bills of sales for accounting/recording of the samples moving out of its stock

as free gifts though ITC's provided software in this regard and later claimed assistance for depletion of the stock from ITC through claim formats. However, the contention of the AO that in the absence of any agreement between the assessee and ITC Ltd, the generation of sales bills as per ITC's direction through ITC's provided software and later claiming assistance from ITC through claim formats only without submitting the sales bills generated to ITC cannot be further substantiated by the assessee through documentary evidence, is not acceptable. Therefore, when ITC Ltd has allowed assistance of Rs.2,10,48,822/- to the assessee and the assessee has included the same in its income there remains no ground for the Ld. AO to add back part of the assistances of Rs.66,40,284/- and Rs.4,96,987/-, out of Rs.2,10,48,822/- to the assessee's total income as alleged undisclosed income of the assessee. The Id AO failed to bring any tangible material on record to show that assessee has not incurred these assistances/rebates/reimbursements of Rs.66,40,284/- and Rs.4,96,987/-, for the purpose of the business. Considering the nature of business, as narrated above, these assistances/reimbursement of expenses bound to happen. We note that considering the nature of business and kind of businessmen involved that is, retailers/hawkers for promoting ITC's sales pursuant to schemes brought out by ITC in this regard, the additions made by assessing officer of Rs.66,40,284/- and Rs.4,96,987/- needs to be deleted and accordingly we delete these additions.

13. In the result, the appeal filed by the assessee is allowed.

Order is pronounced in the open court on 16.01.2019.

Sd/-
(S. S. GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date:16 /01/2019

(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Assessee- M/s H.K. Commercial Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent- ITO, Ward-8(4), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT,
Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.