

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3311/MUM/2014
Assessment Year: 2009-10**

Amazon Foods & Beverages Pvt. Ltd., 82, Indage House, Dr. A.B. Road, Worli, Mumbai - 400018 PAN: AAELA6965F	Vs.	The Asst. Commissioner of Income Tax- 5(1), 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Dharan Gandhi (AR)

Revenue by : Shri Michael Jerald (DR)

Date of Hearing: 25/09/2020
Date of Pronouncement: 06/11/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 17.02.2014 passed by the Commissioner of Income Tax (Appeals)-9 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10. whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act (for short the 'Act').

2. Brief facts of the case are that the assessee company engaged in the business of Hotel and Restaurant, filed its return of income for the assessment year under consideration declaring nil income. Since the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act, 1961. In response thereof, the authorized representative (AR) of the assessee appeared and furnished some of the details. Since the assessee did not file the complete details called for despite several opportunities given for this purpose, AO passed assessment order u/s 143 (3) of the Act on the basis of material

available on record and determined the total income of the assessee at Rs. 1,30,18,510/- after making various additions. The assessee challenged the assessment order before the CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal of the assessee. Still aggrieved, the assessee is in appeal before this Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“1. Addition of Rs. 13,018,510/- on account of Unexplained Cash Credit u/s 68 of the Act.

a) The Commissioner of Income-tax (Appeals) [CIT(A)] has erred in confirming addition to the extent of Rs. 13,018,510/- on account of Unexplained Cash Credit u/s 68 of the Act made by the Assessing Officer (AO).

b) The appellant respectfully submits that it has established the identity director Mr. Cyrus Nallaseth (lender), genuineness of transaction and credit worthiness of lender by providing the bank statements, PAN and a copy of the tax return. Therefore, section 68 of the Act is not applicable.

c) The appellant therefore, humbly prays that the addition of Rs. 13,018,510/- be deleted, in the interest of justice.

2. Ground No. 2- Disallowances of loss by theft amounting to Rs. 136,549/-

The CIT (A) has erred in upholding the disallowance of loss by theft amounting to Rs. 136,549/- only on the alleged ground that no police complaint or insurance claim was filed.

3. Ground No. 3- Disallowance of Rs. 650,048/- on account of vehicle expenses, Rs. 4,753,120/- on account of salary expenses and Rs. 6,814,695/- on account of purchase expenses.

The CIT (A) has erred in confirming disallowance of vehicle expenses, salary and purchase expenses on an arbitrary ad hoc basis.”

4. During pendency of this appeal, the assessee raised additional grounds without prejudice to the grounds raised in the appeal. The additional grounds raised by the assessee are as under:

1. *Without prejudice to the other grounds, the Ld. AO has erred in not setting off the unabsorbed depreciation and brought forward business loss against the income assessed u/s 68 of the Act.*
2. *Without prejudice to the other grounds, the Ld. AO ought to set off brought forward business loss first in preference to the unabsorbed depreciation.”*

5. Vide Ground No. 1. (a) (b) and (c), the assessee has challenged the action of the Ld. CIT (A) in confirming the addition to the extent of Rs. 1,30,18,510/- on account of unexplained cash credit made by the AO u/s 68 of the Act. The Ld. counsel for the assessee submitted that the assessee had taken loan amounting to Rs. 1,30,18,510/- from Shri Cyrus Nallaseth, one of the Directors. The Ld. counsel further contended that the authorities below have wrongly held that the assessee has failed to establish the genuineness of the transaction and creditworthiness of the creditor by furnishing documentary evidence. The Ld. counsel invited our attention to page 95 of the paper book (PB), which is the copy of IT return filed by Sh. Cyrus Nallaseth for the AY 2009-10, page No. 96 to 110 of the PB, which is the copy of statement of bank account page No. 111 of the PB, which is the copy of PAN Card, page No. 113 of the PB, which is the confirmation of accounts for the period of 1st April 2008 to 31st March 2009, loan confirmation submitted by Shri Cyrus Nallaseth, page No. 116 of the PB to establish the genuineness of the transaction. The Ld. counsel further pointed out that during the appellate proceedings, the assessee filed an application under rule 46A for admission of additional evidence on the ground that in August 2009, there was changed in management of the company and since certain records remained in possession of old management, those documents could not be submitted during assessment proceedings. Accordingly, the Ld. CIT (A) obtained report from AO and on the basis of the said report, additional evidence were taken into consideration while deciding the appeal. The Ld. counsel further invited our attention to page 75 to 79 of the paper book, which is the copy of report submitted by the AO wherein the Dy. Commissioner of Income Tax has

admitted that the assessee has taken loan of Rs. 1,22,34,110/- from Director Mr. Cyrus Nallaseth and that he has furnished the documents called for by u/s 133(6) of the Act. In view of the aforesaid facts, the Ld. counsel for the assessee submitted that the findings of the Ld. CIT (A) are contrary to the evidence on record. Hence, the same is liable to be set aside.

6. On the other hand, the Ld. Departmental Representative (DR) submitted that since the issue requires verification by the AO, this issue may be sent to the file of AO for verification and determination.

7. We have heard the rival submissions of the parties and perused the material on record. We notice that during the appellate proceedings, the Ld. CIT (A) called for a report on the additional evidence furnished by the assessee. As pointed out by the Ld. counsel, the DCIT –Tax-5 (Mumbai) in its report dated 26.11.2012 has mentioned that as per the ledger account and the bank statements, the assessee had taken loan of Rs. 1,22,34,110/- from Director Shri Cyrus Nallaseth. Further, he has also furnished the copy of return of income for the AY 2009-10, balance sheet for the AY 2009-10, loan confirmation documents, copy of bank statements, reflecting transaction during the period 01.04.2008 to 31.03.2009 and copy of bank statement reflecting the said transaction during the relevant period. However, the DCIT has asked for rejection of assessee's contention on the ground that Mr. Cyrus Nallaseth has stated that balance sheet for the AY 2009-10 is not relevant in the present case. We do not find any substance in the observation of the AO, as there is no evidence on record to show that Shri Cyrus Nallaseth was asked by the AO to furnish the relevant balance sheet. Since, the AO has admitted in the remand report that Shri Cyrus Nallaseth had advanced loan to the assessee amounting to Rs. 1,22,34,110/-, there is no justification in making addition of Rs. 1,30,18,510/- on account of unexplained cash credit u/s 68 of the Act. Hence, in our considered view, the assessee has established the genuineness of the transaction by discharging the burden of proving identity and creditworthiness of the lender. We therefore, allow this ground of

the appeal of the assessee and set aside the findings of the Ld. CIT(A). Accordingly, we direct the AO to delete the addition.

8. So far as ground No.2 of the appeal is concerned, the Ld. counsel submitted that the assessee does not want to press this ground of appeal. Hence, we dismiss Ground No. 2 of the appeal as not pressed.

9. Vide Ground No. 3 the assessee has challenged the action of the Ld. CIT (A) in confirming disallowance of vehicle expenses, salary expenses and purchase expenses on the ground that the AO had made these disallowances on *ad-hoc* basis, which is not permissible under the law. The Ld. counsel for the assessee submitted before us that the Ld. CIT (A) has wrongly confirmed the disallowance made by the AO on *ad-hoc* basis. The Ld. counsel further submitted that the assessee was carrying on its business from 19 outlets and maximum details were furnished on sample basis during assessment proceedings. The assessee adduced additional evidences during the appellate proceedings, which were verified by the AO during remand proceedings. Further, placing reliance on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Walchand & Company Pvt. Ltd.* 65 ITR 0381, the Ld. counsel submitted that since the action of the Ld. CIT (A) is contrary to the ratio laid down by the Hon'ble Supreme Court in the said case, the impugned order is liable to be set aside.

10. On the other hand, the Ld. DR supporting the order passed by the Ld. CIT(A) submitted that, since the assessee has failed to produce the documentary evidence to the satisfaction of the AO/CIT(A), the Ld. CIT(A) has rightly confirmed 20% disallowance made by the AO out of the total expenses claimed in respect of vehicle expenses and purchases and restricted the disallowance to 20% under the head salary. Therefore, there is no merit in the contention of the assessee.

11. We have heard the rival submissions of the parties and perused the material on record. We notice that during appellate proceedings, the assessee filed an application for admission of additional evidence on the ground that due to change in management it could not produce some of the documents

during assessment proceedings. Further, as contended by the assessee since the assessee was carrying on its business from 19 outlets, the vouchers were produced on sample basis. We notice that the In the case of *CIT vs. Walchand & Company Pvt. Ltd* (supra) the Hon'ble Supreme Court upheld the findings of the High Court whereby the High court had set aside the order of the Tribunal confirming similar disallowance, holding as under:-

“4. In para 2 of their order the Tribunal correctly set out the principle applicable to claims for deduction of expenditure incurred in payment of remuneration to its employees by the assessee. But for partially rejecting the claim for allowance of the amount paid, no reasons were recorded. If the Tribunal was satisfied that the expenditure was laid out or expended wholly and exclusively for the purpose of the business of the assessee there was no reason why the full amount expended should not have been allowed. It is open to the Tribunal to come to a conclusion either that the alleged payment is not real or that it is not incurred by the assessee in the character of a trader or that it is not laid out wholly and exclusively for the purpose of the business of the assessee and to disallow it. But it is not the function of the Tribunal to determine the remuneration which in their view should be paid to an employee of the assessee. When a claim for allowance under s. 10 (2) (xv) of the IT Act is made, the IT authorities have to decide whether the expenditure claimed as an allowance was incurred voluntarily and on grounds of commercial expediency . In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Revenue. The ITO was of the view that there was no adequate increase in the earnings of the assessee, for the increase in remuneration was not reflected in the increase in profits of the assessee and that it appeared that, as compared to the previous years, the business profits disclosed by the assessee had fallen by Rs. 2 lakhs and, therefore the increase in expenditure could not be justified as laid out wholly and necessarily for the purposes of the business. But an employer in fixing the remuneration of his employees is entitled to consider the extent of his business, the

nature of the duties to be performed, and the special aptitude of the employee, future prospects of extension of the business and a host of other related circumstances. The rule that increased remuneration can only be justified if there be corresponding increase in the profits of the employer is, in our judgment, erroneous.”

12. As pointed out by the Ld counsel, Ld. CIT(A) has confirmed/restricted the disallowances in question *inter alia* on the ground that the assessee has shown more business loss as compared to the earlier year. We further notice that the authorities below have not given any cogent reason for making/confirming disallowance in question. Hence, respectfully following the ratio laid down by the Hon’ble Supreme Court in the case discussed above, we hold that the *ad-hoc* disallowance made/sustained on the ground of increase of business loss is not sustainable. Hence, we delete the additions made on account of vehicle expenses, salary expenses and purchase expenses.

13. The assessee has challenged the action of AO in not setting off the unabsorbed depreciation and brought forward business loss against the income assessed u/s 68 of the Act by raising additional grounds. Without prejudice, the assessee has contended that the AO ought to have set off brought forward business loss first in preference to the unabsorbed depreciation.

14. Since, we have decided ground No. 1 in favour of the assessee, the additional grounds raised by the assessee have become infructuous.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed.

Order pronounced on 6th November, 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 06/11/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai