

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND  
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.369/Bang/2019
Assessment year : 2012-13

The Dy. Commissioner of Income-tax, Circle-3(1)(1), Bengaluru.	Vs.	M/s Flipkart Online Services Pvt. Ltd., No.447/C, 1 <sup>st</sup> A Cross, 12 <sup>th</sup> Main, 4 <sup>th</sup> Block, Koramangala, Bengaluru-560 025. PAN – AABCF 3146 L
APPELLANT		RESPONDENT

Assessee by	:	None
Revenue by	:	Shri Muzaffar Hussain, CIT(DR)

Date of hearing	:	10.02.2022
Date of Pronouncement	:	14.02.2022

**ORDER**

*Per Padmavathy S, Accountant Member*

This appeal by the Revenue is directed against the order of the CIT(A)-3, Bengaluru dated 14/12/2018 passed u/s 250 of the Income-tax Act (the Act) for the assessment year 2012-13.

2. The Revenue raised the following grounds before us.

“1. *The order of the learned CIT(A) is opposed to law and facts of the case.*

2. *On the facts and in the circumstances of the case the learned CIT(A) erred in placing reliance on the order of the Tribunal which has recorded a finding that the loss claimed by the Assessee cannot be disallowed, as the same was not claimed as an expenditure. However the assessee has accepted/admitted that the goods were sold at lower than the cost price order to attract customers to purchase goods through e-commerce which would be in the nature of acquiring/creating intangible asset in the form of goodwill/Brand value so as to reap benefits in the later years and the loss is capital in nature.*

3. *The factual aspect that Assessee as a wholesaler supplied majority of the total goods sold on portal Flipkart to its only retail arm WS Retail Pvt. Ltd as mentioned in the order as well as is bound to have an effect on the judgment of the Tribunal on which reliance has been placed once the matter is highlighted before the Tribunal.*

4. *The order of the Hon'ble ITAT in ITA No.202/Vang/2019 dated 25.04.2018 on identical issues has suffered several mistakes apparent from record and MP has been filed which is pending adjudication.*

5. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reserved that of the Assessing Officer may be restored.*

6. *The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”*

### **The brief facts of the case**

3. The assessee is a company engaged in the business of wholesale distribution of books, mobiles, media, computers, gaming consoles and other related accessories. The assessee company filed its e-return of

income for the asst. year 2012-13 on 30/09/2012 declaring a loss of Rs.1,12,88,65,061/-. The case was selected for scrutiny u/s 143(2) and the order passed by the AO dated 30/03/2015 making various additions as given below thereby assessing the loss at Rs.78,65,94,969/-

- i) Addition of capital expenditure in the form of intangibles – Rs.29,08,28,372
- ii) Disallowance of depreciation claimed on assets sold as part of slump sale – Rs.3,99,89,130/-
- ii) Disallowance u/s 40a(i) Rs. 1,14,52,590

4. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A) against the disallowances made by the AO.

5. The CIT(A) partially allowed the appeal where he

(i) Deleted the addition on account of alleged capital expenditure in favour of the assessee following the order of the ITAT in the assessee's own case for the asst. year 2015-16 on the basis that the identical facts are considered and decided in favour of the assessee.

(ii) Upheld the disallowances made by the AO where the rest of the grounds raised by the assessee before CIT(A) are held against the assessee.

6. Now, the Revenue is before us against the order of the CIT(A) deleting the addition on account of capital expenditure in the form of intangibles. The assessee has not filed any cross appeal against the order passed by the CIT(A) confirming the disallowances made by the AO. Hence the only issue for our consideration here is that **whether the CIT(A) is justified in deleting the addition made by the AO on account of capital expenditure in the form of intangibles**

7. The assessee was a wholesale dealer and acquired goods from various persons and was immediately selling the goods to retail seelers like M/s.Retail Services Pvt Ltd., and others who subsequently would sell those goods as sellers on internet platform in the name “Flipkart.Com”. The AO during the course of assessment noticed that the assessee had been selling the goods at a price less than the purchase price which in AO’s view was not the normal business practice. The AO concluded that the assessee followed predatory pricing in order to create marketing intangibles and brand. Having come to the conclusion that the assessee is doing this entire transaction to create intangible assets, the AO went on to calculate the valuation of such intangible. The AO took the database for the wholesalers dealing in consumer and electronic goods which yielded a result that the average gross profit margin ought to be @ 19.90% whereas the assessee is making -11.99% . Applying this % on the presumption if the assessee had not followed the predatory pricing the AO arrived at the sale price. The difference between the actual sale price and the

presumptive sale price was considered as the expenditure incurred for creating the intangible asset. The AO however treated this expenditure as capital in nature and allowed depreciation at 25%. The amount thus computed was Rs. 58,00,32,899. The AO arrived at the final disallowance taking into consideration of the fact that the entire business of the assessee was transferred to M/s. Flipkart India Pvt Ltd in a slump sale and hence restricted the disallowance to the difference between the purchase price (Rs.242,48,68,773) and selling price (Rs.213,40,40,401) i.e. Rs.29,08,28,372

8. The CIT (A) deleted this addition made by the AO stating that

*“The submissions of the appellant have been duly considered. A perusal of the order of ITAT in the case of Flipkart India Ltd for AY 2015-16 and order of the CIT(A) for AY 2012-13 shows that on identical facts the issue was decided in favour of the appellant. Considering the binding effect of the decision of ITAT on identical facts grounds of appeal 3 is allowed”*

9. During the course of hearing, the Ld.DR submitted that the revenue has filed a Miscellaneous Petition (MP) before the Tribunal against the order relied by the CIT (A) and hence prayed that the decision of the Hon’ble Tribunal on the MP may be considered while adjudicating the current appeal.

10. None was present on behalf of the assessee.

11. We heard Id.DR and perused the material on record. We noticed that the coordinate bench of the Tribunal in the case of Flipkart India Private Ltd for AY 2015-16 (ITA No.202/Bang/2018) on the identical issue under consideration here held that the action of the Revenue cannot be sustained, as the Revenue has disregarded the book results and has presumed that the assessee had incurred expenditure in creating intangibles assets/brand or goodwill is without any basis. The Tribunal held that the loss declared by the assessee in the return of income should be accepted by the AO and action of disallowing the expenses is without any basis.

12. We also noticed that the revenue has filed a MP against the said order on the grounds that

- (i) That the assess had failed to invite the attention of the Hon'ble Tribunal to the agreements entered into between the assessee and M/s.WS Retail Services Limited and by virtue of this agreement the transaction between the assessee and M/s.WS Retail Service Pvt Ltd cannot be said to be an uncontrolled transaction
- (ii) That there was suppression of the aforesaid agreement which has influenced the findings of the Tribunal

- (iii) That the existence of the above agreements indicate some hidden transactions which requires examination by the Tribunal by lifting the corporate veil
- (iv) That the order of the Tribunal should be recalled and a rectification order passed adjudicating the above grounds

13. The Tribunal while deciding on this M.P No.202/Bang/2018 held as under:-

*“11. We have given a careful consideration to the rival submissions. As we have already pointed out the learned DR was unable to explain the relevance of the documents now sought to be filed before us for deciding the issue that was for consideration before the AO. As we have already mentioned these documents were neither the basis of assessment or the basis of conclusions by the CIT(A) for its conclusions on the addition that was in challenge before the Tribunal. These documents were never sought to be relied upon by the learned DR when the appeal was heard nor was there any allegation of any hidden transaction requiring examination by the Tribunal after lifting the corporate veil. These documents could not have been relied upon by the learned DR when the appeal was argued for the reason that these documents were not the basis on which the assessment and the addition challenged before the Tribunal were made by the AO and confirmed and enhanced by the CIT(A). Even in the allegation in the MA is that the Assessee has failed to place the documents now sought to be filed before Tribunal by the Revenue. The conclusions drawn by the Tribunal which have been extracted in Paragraph-5 of this order, will hold good and these documents will have no impact on the conclusions drawn by the Tribunal. Therefore, there exists no relevancy of these documents now sought to be filed with regard to the issue that was decided by the Tribunal. The revenue cannot seek to raise a totally new basis of assessment in an MA and on a possibility of existence of a hidden transaction after lifting corporate veil. It cannot therefore be said that there was mistake apparent from the record which calls for rectification u/s.254(2) of the Act.*

*12. The power of the Tribunal u/s. 254(2) of the Act is only to rectify mistakes apparent on the face of the record. The Tribunal does not have power to review its own orders. Power of review is not an inherent power but must be conferred by law either specifically or by necessary implication. Courts have consistently held that review proceedings imply those proceedings where a party, as of right, can apply for reconsideration of the matter already decided upon after a fresh hearing on the merits of the controversy between the parties and that such a remedy is available only if provided by the statute. The law on powers of Tribunal is well settled and is governed by the ratio laid down by the Hon'ble Supreme Court, on scope of powers u/s.154 of the Act, which is akin to Sec.254(2) of the Act, in ITO Vs Volkart Brothers [(1971) 82 ITR 50 (SC)], as follows:*

*".....an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record"*

*13. The present MA filed by the Revenue is devoid of any merit and is liable to be dismissed as without any basis and virtually seeking a review of the order of the Tribunal on a possible hidden transaction which requires examination after lifting the corporate veil when there those were neither the basis of assessment by the AO or CIT(A) or the Tribunal.*

*14. In the result, the MA is dismissed."*

14. The main ground raised by the revenue is that the MP filed by the revenue against the order of the Tribunal in assessee's own case referred above is pending adjudication and that the judgment on the MP would have an impact in the current appeal. We have considered

the fact that the Tribunal has dismissed that MP stating that the MP filed by the revenue is devoid of merits and is liable to dismissed.

15. Therefore, respectfully following the binding decision of the coordinate bench of the Tribunal in assessee's own case for the asst. year 2015-16 (Supra), we uphold the order of the CIT(A) in deleting the addition on account of capital expenditure in the form of intangibles. The appeal of the Revenue is dismissed.

16. In the result, the appeal of the Revenue is dismissed.

Order pronounced in court on 14<sup>th</sup> February, 2022

Sd/-  
**(GEORGE GEORGE K)**  
Judicial Member

Bangalore,  
Dated, 14<sup>th</sup> February, 2022

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

Sd/-  
**( PADMAVATHY S)**  
Accountant Member

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation  
.....
2. Date on which the typed draft is placed  
before the dictating Member .....
3. Date on which the approved draft comes to Sr.P.S  
.....
4. Date on which the fair order is placed  
before the dictating Member .....
5. Date on which the fair order comes back to the Sr.  
P.S. ....
6. Date of uploading the order on  
website.....
7. If not uploaded, furnish the reason for doing so  
.....
8. Date on which the file goes to the Bench Clerk  
.....
9. Date on which order goes for Xerox &  
endorsement.....
10. Date on which the file goes to the Head Clerk  
.....
11. The date on which the file goes to the Assistant  
Registrar for signature on the order  
.....
12. The date on which the file goes to dispatch section  
for dispatch of the Tribunal Order  
.....
13. Date of Despatch of Order.  
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