

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI

Before Shri G.S. Pannu, Hon'ble President
and
Shri Anubhav Sharma, Judicial Member

ITA No. 6646/Del/2018
(Assessment Year: 2014-15)

DCIT,
Circle-18(1),
New Delhi

(Appellant)

Vs. NCR Business Park Pvt. Ltd,
3, Shivji Marg, Westend Greens
Rangpuri, Delhi
PAN: AACCK7819E
(Respondent)

ITA No. 6595/Del/2018
(Assessment Year: 2014-15)

NCR Business Park Pvt. Ltd,
3, Shivji Marg, Westend
Greens Rangpuri, Delhi
PAN: AACCK7819E
(Appellant)

Vs. DCIT,
Circle-18(1),
New Delhi

(Respondent)

Assessee by : Shri Kapil Goel, Adv

Revenue by: Ms. Garima Sharma, Sr. DR

Date of Hearing 26/05/2022

Date of pronouncement 15/06/2022

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The appeals have been preferred by the Assessee and the revenue against the order dated 17.08.2018 of Ld Commissioner of Income Tax (Appeals)-6, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal

No. 10755/2016-17 arising out of an appeal before it against the order dated 30.12.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the Ld Deputy Commissioner of Income Tax, Circle-18(1), New Delhi (hereinafter referred as the Ld. AO).

2. The facts in brief are that the return of income declaring NIL income was filed on 30.09.2014. Loss for the current year was claimed at Rs.39,07,343/-. The case was selected for scrutiny through CASS and notice u/s 143(2) dated 17.09.2015 was issued. The assessee stated its business as of providing infrastructure services. During the assessment proceedings, it was observed that the assessee had received Rs.590/- as share capital on conversion of fully convertible debentures (FCDs) into equity shares and had also received share premium amounting to Rs.6,72,03,810/-, the ledger account of which was furnished.

3. The Id AO had called for explanation in regard to addition in share capital and share premium, identity and creditworthiness of the share holders, valuation report. However, being unsatisfied the Id AO observed that the Assessee has failed to discharge its onus of proving the identity and creditworthiness of the investors and genuineness of the transaction. Hence, the amount of share capital and share premium totaling to Rs. 6,72,04,400/- was added to the income of the Assessee as unexplained credit u/s 68 of the Act. Further, the Id AO observed from the copy of Memorandum of Association it was observed that he main object for which he company had been incorporated was to carry on the business of builders and colonizers. However, from the details of revenue as appearing in the financial Statement, it was seen that he assessee had not carried out any business activities during the year and had earned income from other sources only. Vide order sheet entry dated 26.10.2016 the assessee was asked to show cause as to why his claim of business expenses may not be disallowed. In response it was submitted that the expenses claimed were indirect expenses to safeguard the interest of the company. The reply was not acceptable to Id AO who held that any

claim on deduction has to be judged by its admissibility with respect a particular head of income under which he deduction would be admissible. It was further held that in absence of any business activity, which is an admitted fact, he claim of business expenses cannot be allowed. The Id AO referred to the provisions of section 2(13) and section 14 and observed that that there was no activity on which income had been earned from income under the head "Profit and gains of business or profession". Hence, expenditure claimed by the assessee, except bank charges and audit fee, amounting to Rs.41,61/481/-, were held to be inadmissible and were disallowed.

4. However, in appeal the Id CIT(A) had set aside the addition made u/s 68 f the Act by finding as under:-

"6.1.3. I have considered the assessment order, the submissions of the appellant and also the remand report called for in tire matter. As has been submitted by the appellant, the principal amount was received by the company and was shown in the books of account, which is evidenced by the financial statements in past years. From details submitted it is seen that the said amounts were received from financial year 2007-08 onwards and are duly reflected in the Balance Sheets of the respective years. Hence, it can be said that the amount which was credited in the books of accounts against which the debentures were issued and which was converted into share capital during the year under consideration was capital received in the past years and not in the current year. From the details submitted it is apparent that the said amounts was received in financial year 2007-08. During the year under consideration, the appellant company has converted debentures and issued equity shares. Effectively, the money has not been received and credited during the previous year but the amount which was already received in the past years has been converted into equity shares. In the background of these facts, provision of section 68 are not applicable for the simple reason that the said provision, inter alia, stipulates that amount credited during the previous year has to be brought to tax fee the conditions are not satisfied.

6.1.4 In view of the above whereby it is an admitted fact that the amount on account of which the equity shares were issued is not found to have been credited during the previous year, the AO is not justified in making the addition. The AO, in the remand report, has indirectly referred to the fact that conversion of Fully Convertible Debentures into equity has taken place. It is also to be noted that in the audited financial statements for

the year ended 31.03.2013, under long term borrowings, debentures are shown to be Nil whereas the said amount for the year ended 31.03.2014 was Rs. 6,72,04,400/-.

6.1.5 In view of the discussion above and in view of the facts of the case, the addition made is "deleted. Grounds of appeal nos. 1 and 2 are allowed. The AO may, however, take necessary action, to invoke the provision of section 68 in the relevant previous year(s) in which the amounts have actually been received as per provision of Income Tax Act, if deemed fit."

5. However, it is sustained the disallowance of business expenses by following observation in para 6.2.2 as under:-

"6.2.2 I have considered the assessment order and the submissions of the appellant. Admittedly, there was no business activity during the year under consideration and if there was no business activity the question of allowing business expenses does not arise as has been held by the AO. It is also seen that capital work in progress has been shown at Note 9B but there is nothing on record to show that the business was established and ready to commence. In view of this the disallowance made by the AO is upheld. Ground of appeal no. 3 is dismissed."

6. Now the revenue is in appeal vide ITA No. 6646/Del/2018 raising following grounds of appeal :-

"1. The Id CIT(A) has erred in deleting the addition of Rs. 6,72,04,400/- on account of unexplained share capital and share premium which was entered in to books of accounts during FY 2013-14 relevant to Assessment Year 2014-15, by holding that the said amount was received and credited during the previous year and provisions of section 68 are not applicable."

7. The Assessee is in appeal vide ITA No. 6595/Del/2018 raising following grounds of appeal as under:-

"Ground No. 1

That on the facts and circumstances of the case, the assessment order partially confirmed by the Ld. CIT(A) under section 250 of the Income-tax Act is bad in law.

Ground No. 2

The Ld. CIT (Appeals) has erred in suggesting the Ld. AO to invoke the provisions of section 68 of the Act for the AY 2008-09 without appreciating the fact that source of funds received in earlier year also stands proved.

Ground No. 3

That the Ld. CIT (A) has erred in confirming the disallowance of business expenditure of Rs. 41.61.481 /- for the reason that no business activities were carried out during the relevant previous year."

8. Heard and perused the records.

9. On behalf of the revenue the Id DR submitted that the Id CIT(A) has fallen an error in not considering the remand report in correct perspective while holding that provision of section 68 of the Act are not applicable. It was submitted that the Assessee has merely adopted a method of introducing unaccounted money by changing description of non existing liability in the form convertible debentures. At the same time the Id DR supported the findings of the Id CIT(A) in regard to sustaining the disallowances of expenditure on the ground that Assessee was not having any business activity in the relevant year.

10. On the other hand on behalf of the Assessee it was submitted that the Id CIT(A) has rightly relied upon the provision of law with regard fact that if no cash is credited in the relevant Assessment Year provision of section 68 cannot be invoked. However, supporting the grounds raised in its appeal it was submitted that leaving opportunity with the Id AO to invoke provision of section 68 in relevant previous years is not justified when otherwise it is established that in the previous year also the money was received in the form of fully convertible debentures as per relevant provision of FEMA and Companies Act. He relied upon the judgments of Hon'ble Madras High Court in case of VR Global Pvt. Ltd Vs. ITO in IT Appeal No. 246/2017 dated 06.08.2018 to contend that Hon'ble High Court has held that cash credit towards share capital was of book adjustment, so additions u/s 68 of the Act cannot be made. It was further submitted in regard to grounds challenging the sustenance of disallowance of expenditure by the Id

CIT(A), the Id AR submitted in the Assessment Year 2012-13 no such disallowances was made while in those years also there was no business activity.

11. Appreciating the matter on record in regard to ground No. 1 in the revenue appeal and ground No. 2 of the Assessee's appeal there appears to be no error in the findings of the Id CIT(A) as admittedly no credit entry of cash has been made in the relevant Assessment Year. Admittedly during the relevant year no cash was actually infused in the fund flow of company. There was mere dressing of accounts. As for the purpose of invoking Section 68 of the Act, Hon'ble Madras High Court in the case of **VR Global Energy Pvt. Ltd. ITO, 407 ITR 145 (Madras)** has held that where the assessee allotted shares to a company in settlement of pre-existing liability of assessee to the said company by way of adjustment and since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credit u/s 68 of the Act. It was held that since the cash credits towards share capital were only by way of book adjustment and not actual receipts, therefore, the same could not be treated as receipt towards share subscription money. Since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credits u/s 68 of the IT Act. The Revenue challenged this decision of the Hon'ble Madras High Court before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the SLP filed by the Revenue reported in 268 taxmann.com 392. The same has also been relied by Co-ordinate Bench at Delhi in ITO Vs Zexus Air Services Pvt. Ltd. (ITAT Delhi) ITA No.2608/Del/2018; Date of ; Order : 23/04/2021. Thus there is no error in the finding of Ld CIT(A) and no substance in the Ground no 1 raised by the revenue. At the same time as no conclusive direction is given for any action against the present assessee under any other provision of Act there is also no substance in ground no 2 raised by the Assessee. Both grounds are dismissed.

12. In regard to ground No. 1 and 3 of the Assessee's appeal it can be observed from the matter on record that during the relevant Assessment Year the Assessee has claimed following expenditure as reflected in the audited final accounts for the period under consideration and placed on record at page No. 38 of the paper book.

*"NCR Business Park Private Limited
(formerly known as Kay Kay Buildtech Private Limited)
Noted to financial statements for the year ended 31 March 2014
(All amounts in Indian Rupees)*

16.	<i>Other Income</i>	<i>For the year ended 31 March 2014</i>	<i>For the year ended 31 March 2013</i>
	<i>interest on income tax refund</i>		
	<i>interest on income tax refund</i>		6440
	<i>Profit on redemption of mutual fund units</i>	22,236	252958
	<i>interest on fixed deposits</i>	672351	672651
	<i>Liabilities no longer required written back</i>		66085
		694887	997884
17	<i>Other Expenses</i>		
	<i>Loss on permanent diminution of investments</i>		330,000
	<i>Market research</i>	520226	495507
	<i>Electricity charges</i>	1633324	5620
	<i>Prevailing and conveyance charges</i>	47134	6674
	<i>Rates and taxes</i>	59479	11500
	<i>Legal and professional</i>	1510531	778386
	<i>Auditors' remuneration (as auditors (excluding service tax))</i>	500000	150000
	<i>Advance written off</i>	220600	
	<i>Insurance</i>		9210
	<i>Site Expenses</i>	89105	241890
	<i>Bank charges</i>	26986	13834
	<i>Miscellaneous expenses</i>	81082	22287
		4688467	2064907

13. This bench is of considered view that there are two kinds of provisions under the Act, one in respect of what is allowable and other in respect of what is not allowable, i.e., they override the provisions. The overriding provisions should first be applied and then only one can decide the allowability of expenditure. If any

expenditure is not allowable due to any provisions, then that expenditure is not allowable. These are specific and general provisions which do not allow the expenditures. Expenditure means a cost relating to the operations of an accounting period or to the revenue earned during the period or the benefits of which do not extend beyond the period. While determining whether a particular expenditure is deductible or not, the first requirement must be to enquire whether the deduction is expressly prohibited under any other provision of the Income tax Act. If it is not so prohibited, then alone the allowability may be considered under Sec. 37(1). As such Sec. 40 and 40A provides for nondeductible expenses or payments and under Sec. 43B certain deductions are to be allowed only on actual payment. So there cannot be as such no allowance or disallowance of expenditures, beyond these provisions.

13.1 When expenditure means a cost relating to the operations of an accounting period then it encompasses not only active operations but even dormant operations which may not be generating any revenue or income. So disallowance on basis of lack of business activity or non reporting income under PGBP cannot be sole ground of disallowing expenditure.

14. Coordinate Bench at Delhi vide order dated 24.09.2021, in ITA.No.404/Del./2020 titled **Dhanyata Enterprises Private Limited V The DCIT, Circle-7(2), New Delhi** dealt with a similar controversy where referring to the decision of Hon'ble Delhi High Court in the case of **CIT vs., Integrated Technologies Ltd., in ITA.No.530/2011** Dated 16.12.2011, Ld. Counsel of Assessee in that case, had submitted that the Hon'ble jurisdictional High Court has upheld the order of the Tribunal wherein the Tribunal under similar circumstances has allowed the claim of depreciation on plant and machinery on the footing that they were ready for use in the business once it got revived and that amounted to passive use of the assets, which would meet the requirements of Section 32 of the I.T. Act, 1961. Further referring to the decision of **Mumbai Bench of the Tribunal in the case of Sai Fragrance & Flavours (P.) Ltd.,**

169 ITD 235 (Mumbai.Tribu.), he had submitted that under identical circumstances the Tribunal has allowed the claim of various expenses incurred by the assessee to keep the corporate status and the expenses were allowed as deduction under section 37(1) of the I.T. Act, 1961. The Coordinate Bench sustaining the contentions had held;

"8. I have considered the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the A.O. in the instant case disallowed expenses of 12 ITA.No.404/Del./2020 Dhanyata Enterprises Private Limited, Delhi. Rs.9,94,872/- on the ground that assessee has not carried out any business activity and no business income has been declared and the assessee failed to produce the complete books of account, bills and vouchers etc. I find the Ld. CIT(A) upheld the action of the A.O, the reasons of which have already been reproduced in the preceding paragraph. It is the submission of the Learned Counsel for the Assessee that it has not stopped its business and is maintaining an office and there is simply lull in the business activity. It is also his submission that due to less number of students the assessee thought it prudent not to admit any student for this year to minimize its expenses. According to him, merely because there is no business income during the year and when the assessee otherwise has maintained its corporate identity and has kept everything ready for reviving the coaching/teaching activities at right time, the Revenue Authorities should not have disallowed the expenditure merely on the ground that there is no business activity carried-out during the year or no business income has been shown during the year."

15. Rajasthan High Court in CIT vs. Udaipur Mineral Development Syndicate AL Ltd [2004] 269 ITR 0263 upheld deduction of power charges and engine hire charges though no business in the was carried on during the year. Further ITAT Amritsar Bench in ITA No. 1394/Kol/2010, **Shingar Lamps Ltd V. Additional Commissioner of Income Tax Special Range, Jalanadhar** [2006] -(150)-

TAXMAN -- 0017, has held that the expenses were allowable which are essential for maintenance of the company even if no business was carried on. Thus it appears that Ld Tax Authorities below have fallen in error in disallowing the expenses on the ground of lack of business activities alone.

15.1 However, there is no matter on record to suggest that the expenses were examined on the basis of actual expenditure corroborated by evidence. Therefore the issue in regard to the disallowance of expenses is restored to the files of the Id AO with a direction to evaluate the genuineness of the expenses on actual expenditure basis and then pass fresh assessment order. Accordingly, ground No. 1 and 3 of Assessee's appeal stands allowed in favour of the Assessee.

16. Since the ground no 1 raised in appeal of the revenue is dismissed and ground no 1 and 3 raised in the appeal of the Assessee are allowed with a direction, the appeal of the revenue is dismissed and of the Assessee is allowed for statistical purposes.

Order pronounced in the open court on 15/06/2022.

Sd/-

(G.S. Pannu)
Hon'ble President

Sd/-

(Anubhav Sharma)
Judicial Member

Dated: 15/06/2022
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	03/06/2022
Date on which the typed draft is placed before the dictating member	06.06.2022
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	