IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI. LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No. 97/Bang/2022
Assessment Year : 2015-16

M/s. Khoday India Ltd., 7th Mile, Brewery House, Kanakapura Road, Bangalore – 560 062. PAN: AAACK6734C	**Vs.**	The Income-tax Officer, Ward 4 (1)(2), Bangalore.
APPELLANT		**RESPONDENT**

Assessee by	**:**	Shri V. Sridhar, CA
Revenue by	**:**	Shri Ramesh B.R., Addl. CIT (DR)

Date of Hearing	**:**	09-06-2022
Date of Pronouncement	**:**	30-06-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by the assessee against order dated 09/12/2021 passed by the Ld.CIT(A)-11, Bangalore for assessment year 2015-16 on following grounds of appeal:

> *"1. The order of the learned Commissioner of Income-tax (Appeals), Bengaluru-11, Bengaluru in ITA No.CIT(A)-11/BNG/Tr.10036/2018-19 (DIN: ITBA /APL /M/ 250 /2021-22/ 1037634908(1) dated:09.12.2021 is opposed to law, weight of evidence, probabilities and facts and circumstances of the case.*
> *2. The learned Commissioner of Income-tax (Appeals) erred in confirming the order of the Assessing Officer passed u/s.154 of the Income tax Act, 1961 dated:14.02.2018.*
> *3. The learned Commissioner of Income-tax (Appeals) erred in not directing the Assessing Officer to set off the entire*

business loss of Rs.24,64,35,094/- out of the income assessed u/s.68 amounting to Rs.29,72,80,000/-.

4. The learned Commissioner of Income-tax (Appeals) erred in not noticing that the AO has entertained the application of the appellant and gave partial relief by setting off the current year's business loss of Rs.18,02,79,362/- against the income brought to tax u/s.68 amounting to Rs.29,72,80,000/-.

5. The learned Commissioner of Income-tax (Appeals) erred in not noticing that when the AO has entertained the application and decided the application on merits, it is not open to him to sit in judgement to decide whether it is a debatable issue or not.

6. The learned Commissioner of Income-tax (Appeals) failed to appreciate that there is no concept of "partial application of mind". It should be either application of mind and non-application of mind altogether.

7. The learned Commissioner of Income-tax (Appeals) erred in holding that the rectification sought for by the appellant is on debatable issue on which two different opinions are possible, even when the AO had entertained the application and disposed of the application on merits on both the counts viz. set of business loss and unabsorbed depreciation.

8. The learned Commissioner of Income-tax (Appeals) erred in confirming the interpretation placed by the AO on the provisions of section 115BBE(2).

9. The learned Commissioner of Income-tax (Appeals) erred in not noticing that the AO has failed to appreciate that she has arrived at the business loss under the head "profits and gains of business/profession" and ascertained the income under the head "Income from other sources". When both the incomes have been determined under two heads, it is incumbent upon her to set off the business loss under the head "Other sources" as provided under section 71 of the Income tax Act.

10. The learned Commissioner of Income tax (Appeals) has entertained a belief that what was claimed for set off against the income assessed u/s 68 was unabsorbed depreciation of the earlier years, although the fact of the matter was that it was current year's depreciation and, therefore, part of the business loss of the current year itself.

11. The learned Commissioner of Income-tax (Appeals) failed to look into the circular of the CBDT in No.11 of 2019 dated 19.06.2019 wherein CBDT has clarified that the amendments made to the provisions of section 115BBE (2) is applicable only from the assessment year 2017-18 and did not apply to the assessment year in question.

12. The learned Commissioner of Income-tax (Appeals) erred in not discussing the judgements relied upon by the appellant in its written submission during the course of hearing in the case of Vijaya Hospitality & Resorts Ltd vs. Commissioner of Income-tax & Ors. (2019) 419 ITR 322 of the Kerala High Court and in the case of Principal Commissioner of Income-tax Vs. Aacharan Enterprises Pvt. Ltd. (2020) 273 Taxman, of the Rajasthan High Court .

13. The appellant craves leave to add, delete, amend or modify any or all grounds at the time of hearing of the appeal.

14. The appellant prays, that this Hon'ble Income Tax Appellate Tribunal may be pleased to set aside the order of the Commissioner of Income-tax (Appeals), and direct the AO to set off business loss, including unabsorbed depreciation, against income from other sources taxed u/s.68 and grant consequential relief and such other relief as the Hon'ble Income Tax Appellate Tribunal deems fit in the interests of justice."

2. **Brief facts of the case are as under**:

2.1 The assessee is a company, and filed its return of income on 30/09/2015 declaring total income to be, 'NIL' during the year under consideration, after claiming loss of ₹ 29,28,61,058/-. The case was selected for scrutiny and notices under section 142 (1) of the Act, was issued to the assessee. In response to the statutory notices, representative of assessee appeared before the Ld.AO and filed requisite details as called for.

2.2 The Ld.AO observed that, the assessee is in the business of manufacturing Indian made foreign liquor and is also engaged in property development. The Ld.AO observed that, the assessee claimed expenditure of ₹6,44,39,242/- towards legal and professional charges. In order to verify the expenditure, the Ld.AO called upon the assessee to furnish details in respect of the same.

2.3 From the details filed by the assessee, the Ld.AO noticed that, sum of ₹12,80,000/- was paid to Shri.Aditya Sondhi, Advocate

and ₹ 1,00,00,000/- to Shri Sukumar Advocate, towards reduction in share capital case before the SEBI and High Court.

2.4 The Ld.AO was of the opinion that, the said amount paid to respective advocates, were capital in nature, and therefore, were to be disallowed under section 37 of the Act. The assessee filed various submissions in support of its claim which was rejected by Ld.AO. The Ld.AO disallowed ₹ 1,12,80,000/- under section 37 of the Act.

2.5 Further, from the details furnished, the Ld.AO observed that assessee debited ₹ 68,26,316/- towards sales promotion expenditure. The Ld.AO, following the decision of this *Tribunal*, restricted the disallowance to 25% of the said expenditure, and added back ₹ 17,606,579/- as disallowed under section 37 of the Act.

2.6 The Ld.AO also made disallowance of expenditure under section 14A, read with rule 8D (2) (i) to (iii) amounting to ₹ 3,34,39,385/-.

2.7 The Ld.AO further noted that during the year assessee had received an advance from L. K. Trust of ₹ 40 course. The assessee was called upon to furnish confirmation of unsecured loans availed by its directors. On perusal of the statement of accounts, the Ld.AO noted that the directors have taken over liabilities of the assessee towards L. K. Trust. The Ld.AO noted that, in the balance sheet of the assessee, the liability against the trust was shown to be ₹ 43 crores, but in the confirmation of loan filed by the assessee, it was noted that, the directors have taken over loan to the extent of ₹ 73.30 crore. The assessee was accordingly asked to explain the nature of liability in the hands of the company that

has been added during the year, and the nature of liability in the name of LK Trust as on 31/03/2014.

2.8 The assessee submitted that, the advance given by L.K.Trust has been taken over by the directors. The Ld.AO proposed to add ₹ 40 crores as unexplained, by invoking provisions of section 68 of the Act. The Ld.AR in response to the notice, submitted that, L.K.Trust is a private family trust, and has a credit worth to provide such advances to the assessee. The assessee submitted the financial services L.K.Trust to the Ld.AO. Ld.AO thereafter verified the financials of L.K.Trust to conclude that, it had liquid asset only to the extent of ₹ 21,30,26,474/- and bank statements evidenced deposits received from L.K.Trust only to an extent of ₹ 10,2720,000/-. The balance amount of ₹ 29,72,80,000/- shown as advance received during the year from L.K.Trust was therefore, brought to tax as unexplained credit under section 68 of the Act, as the assessee failed to grow satisfactorily the genuineness of the credit and the creditworthiness of L.K.Trust to advance the amount.

2.9 The Ld.AO thus assessed the loss of ₹ 24,64,35,094/- in the hands of the assessee, from its business income and ₹ 29,72,80,000/- was added under the head income from other sources as unexplained credit under section 68 of the Act.

2.10 The assessee thereafter, made application under section 154 of the Act vide application dated 24/01/2018. It was submitted that, without prejudice to the disallowance made by the Ld.AO, business loss has to be set off against the income brought to tax under the head income from other sources. The assessee submitted that, separate appeal has been filed before the

Ld.CIT(A), against the order passed under section 143 (3). The Ld.AO vide order dated 14/02/2018, partially accepted the contentions of the assessee, and set of the current year business loss to the extent of ₹ 18, 02, 79, 362/-.

2.11 Assessee once again approached the Ld.AO vide application dated 23/02/2018, requesting the set off of the entire business loss assessed. The Ld.AO, vide letter dated 26/02/2018 stated that, the rectification or application of the assessee has been disposed of on 21/02/2018.

2.12. Aggrieved by the approach of the Ld.AR filed appeal before the Ld. CIT(A).

3. The Ld. CIT(A) observed and held as under:

> *"4.4 A perusal of the same shows that the provisions of Section 115BBE(2) prohibiting 'deduction in respect of any expenditure or allowance' existed at that point of time. So the argument of the appellant that the same is applicable w.e.f. AY 2017-18 is not correct. The said amendment is in relation of 'set off of any loss' only and as such not relevant here. Anyhow, in rectification the most important aspect which needs to be looked into is whether the amendment proposed to be made would fall within the scope of Section 154 or not. Scope of rectification is limited to correcting error of fact or error of law on the basis of material available on records. In the appeal under consideration, if the appellant wants to dispute the meaning of words 'expenditure or allowance' as in Section 115BBE(2), then the same would be beyond the scope of Section 154 of the Act. If on an issue two different opinions are possible, the same cannot be subject of rectification. So on the basis of material available on records it cannot be said that there was a mistake apparent from record."*

4. Aggrieved by the above order of the Ld. CIT(A), the assessee is in appeal before this *Tribunal*.

5. The Ld.AR submitted that, the revenue authorities has not taken into account the statutory provision, and the computation is not in consonance with the provisions of the Act. He submitted

that, the Ld.AO in the order dated, 21/02/2018 partially rectified the mistake, however, did not consider the fact that, the prohibition to deduct any expenditure while computing income under section 115BBE (1) (b) was introduced with effect from 01/04/2017, which is relevant to A.Y. 2017-18. He submitted that, the year under consideration was to AY 2015-16.

6. He submitted that, section 115BBE (2) refers to the deduction of expenditure or elements to be allowed in computing income referred to in clause (a) of subsection (1), and no expenditure relevance was allowed against the income declared in the return of income under section 68. He submitted that, the assessee had sought a set of laws from one head against the income from other head, which cannot be denied to the assessee for the year under consideration. The Ld.AR also drew support from the CBDT Circular No. 11 of 2019, wherein applicability of the amendment to section 115BBE is clearly explained.

7. On the contrary the Ld.DR relied on the orders passed by authorities below.

8. We have perused the submissions advanced by both sides in light of records placed before us.

9. The assessee raised the issues regarding the manner in which, the income has been computed by the Ld.AO in the original assessment order. It is an admitted fact that, the disallowances made has been challenged by the assessee separately before the Ld.CIT(A), against the order passed under section 143 (3) of the Act.

We have perused the relevant amendment brought into section 115BBE of the Act that categorically is applicable with effect from assessment year 2016-17.

10. Undisputedly, the provisions of section 115BBE as existed prior to the amendment, do not provide that losses shall not be allowed to be set off against the income referred in section 115BBE (1) of the Act. A bare perusal of the provision itself, makes it clear that, the amendment is not retrospectively applicable, which is also fortified by the *Circular No.11 of 2019* by CBDT relied by the Ld.AR. The Ld.AR in the paperbook relied on the decision of *Hon'ble Kerala High Court* in case of *Vijaya Hospitality & Resort's Pvt.Ltd. vs CIT* and others reported in *(2020) 269 taxman 513* wherein, similar issue for assessment year 2013-14 was under consideration before the *Hon'ble Court*. The *Hon'ble Court* after going through various arguments and the decisions relied by both sides, came to a conclusion by observing as under:

> ***"14.*** *Based on the rival contentions, on analyzing the factual situation, it is evident that the assessment pertains to the period from 1st April 2013 to 31st March 2014. It is not in dispute that the addition of Rs.56,24,264/- made in the assessment is undisclosed income coming within the purview of section 68, it being a sum found credited in the books of the assessee with respect to which the explanation offered was not found to be satisfactory by the Assessing Officer. Since section 115BBE was introduced with effect from 01.04.2013, it cannot be disputed that no deduction in respect of any expenditure or allowance can be allowed with respect to the said amount. But question is whether set off of any loss shall be allowed against the said undisclosed income. In order to decide the question it is crucial to decide the nature of such income. Contention for the revenue is that, it will not fall within any of the category of income under the classifications contained in section 14. In other words, such income cannot be treated as "profits and gains of business" or it cannot be considered as "income from other sources". As the provisions of law which stood applicable for the relevant year of assessment, there is a specific bar with respect to allowing any deductions from such income, by virtue of section 115BBE, as it stood unamended. The amendment declining set off was introduced only with effect from 1.4.2017. Therefore, question whether set off permissible*

under section 72(2) read with section 32(2) of the Act would apply with respect to the said income, assumes importance. There again, the crucial aspect relevant for consideration is the nature of the said income. In one of the oldest cases decided by the Honourable Supreme Court, A.Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807 it is held that, "there is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income Tax Officer is entitled to draw an inference that the receipts are of an assessable nature". Following the said observations in Lakhmichand Baijnath (supra) the Honourable Supreme Court observes that, "when an amount is credited in the business books, it is not an unreasonable inference to draw that it is a receipt from business". Even though Standing Counsel contended that the said observations of the apex court cannot be treated as a precedent of binding nature, mainly because it is made with respect to the provisions contained in the erstwhile Income Tax Act of 1922, we are not persuaded to accept the same. It is basically on an identical circumstance that the apex court had found that the income credited in the business book with respect to which the assessee fails to prove satisfactorily the source and the nature of receipt of the amount, it shall be deemed to be of receipt from business. The decisions of the High Court of Madras in Chensing Ventures (supra) as well as the decision of the High Court of Gujarat in Shilpa Dyeing & Printing Mills (supra) are to the effect that income of such nature from undisclosed source need to be treated as income from other sources. Therefore, we are of the opinion that the undisclosed income assessed under section 68 need not be treated as an income falling totally outside the ambit of the classifications contained in section 14 of the Act. Even assuming for the sake of argument that, it will not fall within the classifications contained in section 14, it is evident that, as on the date of the assessment such income was included under a special classification by virtue of section 115BBE. It is pertinent to note that, 115BBE had prohibited allowance of deductions alone, as it stood unamended as on the relevant date of the assessment. The explanatory notes to the provisions of the Finance Act, 2016 enumerates the reasons for introduction of the further amendment barring the set off, with effect from 1.4.2017. It is stated that,—

> *"Currently, there is uncertainty on the issue of set-off of losses against income referred to in section 115BBE of the Income Tax Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in section 115BBE. However, the current language of section 115BBE of the Income-Tax Act does not convey the desired intention and as a result the matter is litigated. In order to avoid unnecessary litigation, the provision of the sub-section (2) of section 115BBE of the Income Tax Act has been amended as to expressly provide that no set off any loss shall be allowable in respect of income under the section 68 or section 69 or section 69A or section 69C or section 69D."*

The intention of the legislature in introducing the amendment, as stated in the explanatory note, is to avoid unnecessary litigation and to expressly provide that no set off of any loss shall be allowable in respect of income under section 68. Therefore, it has to be held that, as on the relevant date of the assessment, there was no bar existed with respect to allowing set off against the carried forward unabsorbed depreciation on fixed assets, with respect to income under section 68. Therefore, we are of the view that, Tribunal had committed an illegality in coming to the conclusion that the deemed income will not fall even under the head of income from other sources and therefore the deductions and set off applicable to income under other heads will not be attracted in the case of deemed income covered under the provisions of section 68. Accordingly we answer the question of law under clause (F) in favour of the Assessee and as against the Revenue. In view of the decision of the said question of law, other questions framed are not of consequence and become irrelevant."

11. Respectfully following the above view, we hold that, set-off of business loss is available to the assessee, against the income under the head 'income from other sources', wherein, addition under section 68 is made.

Accordingly all the Grounds raised by assessee stands allowed.

In the result appeal filed by assessee stands allowed.

Order pronounced in open court on 30th June, 2022.

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 30th June, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore