

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "H" BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
SHRI M BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.8446/Del/2019
[Assessment Year : 2015-16]**

Knauf India Pvt.Ltd., (Earlier known as USG Boral Building Products (India) Pvt.Ltd.), S-217, Ground Floor, Panchsheel Park, South Delhi, New Delhi-110017. PAN-AABCL1984A	vs	ITO, Ward-27(2), New Delhi.
APPELLANT		RESPONDENT
Appellant by	S/Shri S.K.Agarwal, CA, Gopal Agarwal, CA & Shubham Gupta, CA	
Respondent by	Shri Gurpreet Shah Singh, Sr. DR	
Date of Hearing	06.06.2023	
Date of Pronouncement	14.07.2023	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2015-16 is directed against the order of Ld. CIT(A)-16, New Delhi dated 13.08.2019.

2. The assessee has raised following grounds of appeal:-

1. *“That on the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the additions/ disallowances made by Learned AO aggregating to INR 136,61,037. in the assessment order dated 19 December 2017, without providing any justified and reasonable basis.*

Ad-hoc disallowance (estimated at 10% of various expenses incurred)

2. *On the facts, and in the circumstances of the case, and in law, the Learned CIT(A) both on facts and in law has erred in upholding the action of the Learned AO of making an ad-hoc disallowance of various*

revenue expenses to the extent of INR 92,56,638, being 10% of the revenue expenses incurred by the Appellant, wholly and exclusively for the purpose of carrying out its business, allowable under section 37 of the Act.

- 2.1. On the facts, and in the circumstances of the case, and in law, the Learned CIT(A) has erred in upholding the additions of ad hoc disallowance of expenses by disregarding the documentary evidences filed by the Appellant during the course of assessment proceedings.*
- 2.2. On the facts, and in the circumstances of the case, and in law, the Learned CIT(A) has erred in confirming the addition amounting to INR 92,56,638, without considering the submission made by Appellant and without appreciating the fact that the same were incurred during the course of business.*
- 2.3. On the facts, and in the circumstances of the case, and in law, the Learned CIT(A) has grossly erred in confirming the action of the Learned AO, which is based on mere surmises and conjecture and has been made ignoring the audited books of accounts which is unsustainable and bad in law.*

Disallowance of reversal of cenvat credit

- 3. On the facts and circumstances of the case and in law, the Learned CIT(A) has erred in upholding the addition made by Learned AO on account of reversal of actual cenvat credit on input amounting to INR 12,64,648 on the premise that the same is in the nature of penal interest.*
 - 3.1. On the facts, and circumstances of the case, and in law, the Learned CIT(A) has erred in giving direction to the Learned AO for verification of the nature of cenvat credit reversed by the appellant, there by setting aside the assessment order on this issue, without concluding the matter, which is beyond the power of Learned CIT(A).*

Disallowance of foreign exchange fluctuation loss

4. *On the facts, and circumstances of the case, and in law, the Learned CIT(A) has erred in upholding the addition/ disallowance made by Learned AO, treating the entire foreign exchange fluctuation loss amounting to INR 31, 39, 751 as unrealized/notional in nature, on the premise that the same represents marked to market losses on foreign exchange derivatives, being contingent in nature and hence, not allowable under section 37 of the Act.*

4.1. On the facts, and circumstances of the case, and in law, the Learned CIT(A) has erred in giving direction to the AO for verification of the nature of foreign exchange loss incurred by the Appellant in the light of principles enunciated by the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Private Limited (312 ITR 254) (2009), there by setting aside the assessment order on this issue, without concluding the matter, which is beyond the power of Learned CIT(A).

5. *The appellant craves for leave to amend, vary, omit or substitute the aforesaid grounds of appeal or add any further ground of appeal(s) at any time before or at the time of hearing of the appeal.”*

3. Facts giving rise to the present appeal are that in this case, the assessee is a company which was incorporated under the Companies Act on 06.07.2006 and is engaged in the business of manufacturing of gypsum boards, metal studs, plaster and other accessories. The return of income declaring income of Rs.1,07,200/- after setting off current business income of Rs.89,21,724/- with brought forward business losses was filed by the assessee on 30.11.2015. The case of the assessee was selected for scrutiny assessment under CASS. Accordingly, a notice u/s 143(2) of the Income Tax Act, 1961 (“the Act”) was issued and duly served upon the assessee. In response to the statutory notice, Ld.AR for the assessee attended the assessment proceedings and filed the details

as called for by the assessing authority. The Assessing Officer (“AO”) during the course of assessment proceedings, noticed that the assessee had claimed certain expenses amounting to Rs.9,25,66,376/-. However, as per the AO, the assessee could not furnish the supporting bills for large number of items and claimed that they were reimbursements made to their overseas sister concerns for proportionate expenses incurred on behalf of the assessee company. Therefore, the assessing authority considering the material available on record in its wisdom, disallowed 10% of such expenses and made addition of Rs.92,56,638/-. Further, the AO noticed that in the P& L Account, under Finance Costs (Note 23), a sum of Rs.12,83,577/- on account of interest on delayed payment of statutory dues is recorded. After giving opportunity to the assessee, the AO made addition of Rs.12,64,648/- on this account. Further, the AO disallowing the claim related to foreign exchange fluctuation loss made addition of Rs.31,39,751/-. However, after setting off the brought forward loss, the assessing authority assessed the income of the assessee at Rs.1,07,200/-.

4. Aggrieved against this, the assessee had preferred the appeal before Ld.CIT(A), who after considering the submissions, partly allowed the appeal of the assessee. Thereby, the issue regarding disallowance of the foreign exchange fluctuation loss was set aside to the AO and adhoc disallowance made of Rs.92,56,638/- on account of the expenses, was sustained. Further, in respect of issue regarding addition of Rs.12,64,658/- was also restored to the AO for verification and decisions afresh.

5. Aggrieved against the order of Ld.CIT(A), the assessee has preferred the present appeal before the Tribunal.

6. **Ground Nos.1 & 5** raised by the assessee are general in nature, needs no separate adjudication.
7. **Ground Nos. 2 to 2.3** raised by the assessee are against the confirming of adhoc disallowance made by the AO @ 10% of total expenses. During the course of assessment proceedings, the assessee also filed an application seeking admission of additional evidences under Rule 29 & 31 of the Income Tax (Appellate Tribunal) Rules, 1963. Ld. Counsel for the assessee reiterated the submissions.
8. Apropos to Grounds of appeal, Ld. Sr. DR for the Revenue opposed these submissions and submitted that the application of the assessee deserves to be dismissed on account of the fact that he could have filed these evidences before the assessing authority.
9. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that the assessee in application has stated as under:-

“The Appellant craves leave for admission of copy of voucher/ bills/ invoices referred by the Hon'ble Commissioner of Income-tax (Appeals) in the order dated 13 August 2019 and forming part as Annexure 'A' of the aforesaid order, as additional evidence on record under Rule 29 and 31 of the ITAT Rules (enclosed as - Additional evidence paperbook - Volume I and II). It is humbly submitted that the above bills/ vouchers/ invoices are in addition to the bills/ vouchers/ invoices already produced before the Ld. Assessing Officer and Hon'ble CIT(A) on sample basis.

The Appellant humbly submits that the above-mentioned additional evidence could not be furnished before the lower authorities earlier as the said documents were not readily available with the Appellant and only after

putting lot of efforts in retrieving these old documents the Appellant was able to find the same.

In view of the above, the Appellant submits that for effective disposal of the appeal, it is respectfully prayed that the aforesaid documents may kindly be admitted as additional evidence by exercising the discretion conferred on this Hon'ble Tribunal under Rule 29 of the ITAT Rules and taking into consideration while adjudicating the appeal.

Further, it is humbly submitted that the Hon'ble jurisdictional bench of the ITAT in the case of UOP LLC vs Additional Director of Income-tax, International Tax: (2007) 108 ITD 186 (Del) had laid down inter- alia the following principles as regards admissibility of additional evidence:

- Evidence which is not only helpful but also relevant to decide the issue shall be adduced by the Appellate Tribunal.*
- Where evidence proposed to be filed was not available with the party seeking to rely on the additional evidence at the time of relevant proceedings despite exercising due diligence, the same should be admitted.*
- Further, the additional evidence should be admitted, where it is established that notwithstanding exercise of due diligence, the evidence was not in the knowledge of the party seeking to rely on the additional evidence or could not after exercise of due diligence be produced by such party at the time of relevant proceedings.*

Our Prayer:

The Appellant requests your Honours to kindly admit the above additional evidences. Since these crucial evidences which goes to the root of the matter are now available with the Appellant and are germane to dispense justice by your Honours to the Appellant, it is prayed that these documents be admitted as evidence by your Honours so that natural justice is meted out to the Appellant. The Appellant trusts that the request shall merit sympathetic consideration and be acceded to.

In case your Honours require any further clarifications/ information, we shall be pleased to provide the same.”

10. It is not in dispute that the impugned addition has been made on the basis that the assessee failed to furnish the supporting evidences. Considering the fact that these evidences goes to the root of the issue, therefore, we allow the application of the assessee and admit these evidences. Upon admission of the additional evidences, parties have agreed that the issue may be restored to the file of the AO for fresh adjudication. The impugned order is hereby set aside and the AO would verify the correctness of the claim of the assessee and decide the issue afresh after giving adequate opportunity of hearing to the assessee. Thus, Ground Nos. 2 & 2.3 raised by the assessee are allowed for statistical purposes.

11. Apropos to **Ground Nos. 3 & 4** of the assessee, the contention of the assessee is that the Ld.CIT(A) is not empowered by law for setting aside the issue to file of the AO for fresh adjudication.

12. On the other hand, Ld. Sr. DR relied upon the decision of the authority below.

13. We have heard the rival contentions and perused the material available on record. We find merit into the contention of Ld.AR that the Ld.CIT(A) exceeded the jurisdiction by setting aside the issue to the file of AO. For the sake of clarity, the relevant contents of the impugned order are extracted herein below:-

Discussion & Decision

“The facts of the case, the submission of the AR and the finding of the AO were examined at length.

The AR of the appellant contended that interest on late payment of TDS as well as write off of Cenavt credit was disallowed by the AO. The AR further contended that interest on late payment of TDS of Rs 18,929/- was disallowed. In this regard the AR stated as under:

The Appellant submitted that interest on late payment of TDS amounting to INR 18,929 has already been disallowed by the Appellant in the COI of the subject AY.

The AO is directed to examine the veracity of the claim of the appellant and allow it if found to be correct.

Regarding the disallowance of the cenvat credit, the AR of the appellant submitted that the cenvat credit was not in the nature of a penalty and had been wrongly reflected under interest on delayed payment of statutory dues' heads. The submission of the AR is as under:

With respect to reversal of cenvat credit amounting to INR 12,64,648, the Appellant duly submitted that the said amount is in the nature of actual cenvat credit reversal and is not in the nature of penalty or interest and the same is not disallowable under the provisions of the Act. Further, the Appellant submitted that the said amount has been inadvertently debited by the Appellant under the head interest on delayed payment of statutory dues".

It is noted that the disallowance has been made as the amount was categorized under the head 'interest on delayed payment of statutory dues which falls within the ambit of Explanation to section 37 of the Income Tax Act. However, the appellant has contended that this amount is in the nature of actual cenvat credit reversal and not an expense incurred on account of infraction of the law. The AO is directed to ascertain the correctness of the claim of the appellant and allow it after due verification if found to be correct and in tandem with the provisions of the statute.

Result

Grounds of Appeal 8 and 9 are allowed for statistical purposes."

14. From the above, it is clear that the issues have been restored to the file of AO. The powers of Ld.CIT(A) is embodied in section 251 of the Act, same is reproduced herein below for the sake of clarity:-

Powers of the [Joint Commissioner (Appeals) or the] Commissioner (Appeals).

251. (1) "In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

[(1A) In disposing of an appeal, the Joint Commissioner (Appeals) shall have the following powers—

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.]

(2) The [Joint Commissioner (Appeals) or the] Commissioner (Appeals) [,as the case may be,] shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.—In disposing of an appeal, the [Joint Commissioner (Appeals) or the] Commissioner (Appeals), may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [Joint Commissioner (Appeals) or the] Commissioner (Appeals) [, as the case may be,] by the appellant.”

14.1. It is clear from plain reading of the above provision of law that Ld.CIT(A) in case of appeal against an order of assessment, he may confirm, reduce or annul the assessment. However, in the present case, the Ld.CIT(A) has set aside the issues for fresh adjudication after making verification. This act of Ld. CIT(A) in our considered view is in excess of powers conferred on him. The Ld. CIT(A) ought to have verified himself or should have sought a Remand Report from AO in this regard. Therefore, considering the totality of facts, we hereby modify the order of Ld.CIT(A). The AO is hereby, directed to delete the addition in respect of disallowance of exchange fluctuation loss. As the issue is squarely covered by the judgement of Hon'ble Supreme Court rendered in the case of *CIT vs. Woodward Governor India Private Limited* (supra), Ground Nos. 4 to 4.1 raised by the assessee are allowed for statistical purposes.

15. In respect of Ground Nos. 3 to 3.1 after considering the totality of the facts, we deem it proper to remit this issue to the file of AO for verification of correctness of the claim of the assessee that the amount in question is actual reversal of cenvat credit, if found correct, same may be deleted. Ground Nos.3 to 3.1 raised by the assessee are allowed for statistical purposes.

16. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 14th July, 2023.

Sd/-

**(M BALAGANESH)
ACCOUNTANT MEMBER**

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI