

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

ITA NO. 53/MUM/2017

:

A.Y : 2008-09

DCIT - 8(1)(1),
Mumbai. (Appellant)

Vs. M/s. Reliance Utilities Pvt. Ltd.
(in which Relogistics Infrastructure
Ltd. has merged)
5th floor, Maker Chambers IV,
222, Nariman Point,
Mumbai 400 021.
PAN : AABCN2528G (Respondent)

Assessee by : Shri Vijay Mehta

Revenue by : Dr. Rajeev Harit

Date of Hearing : 24/06/2019

Date of Pronouncement : 30/08/2019

ORDER

PER G.S. PANNU, VICE PRESIDENT

The captioned appeal by the Revenue is directed against the order of CIT(A)-14, Mumbai dated 19-10-2016, which in turn has arisen out of order dated 29-03-2016 passed by the Assessing Officer under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, the Revenue has raised the following Grounds of appeal :-

“(i) *The Ld. CIT(A) has erred on facts and in law in deleting the addition unexplained cash credits of Rs. 1851,91,30,000/-without properly appreciating*

the factual and legal matrix as clearly brought out by the Assessing Officer in the assessment order.

- (ii) The Ld. CIT(A) has erred on facts and in law in deleting the addition made u/s.68 of the Income Tax Act, 1961 holding that the power of the AO to lift the corporate veil is not in question without appreciating the fact that on lifting the corporate veil it is clear that Biometrix has been created as a mere camouflage or shell or sham company deliberately created by the persons exercising control over the same for the purpose of avoiding liability.*
 - (iii) The Ld. CIT(A) has erred on facts and in law in deleting the addition made u/s. 68 of the Income Tax Act, 1961 holding that Non submission of most crucial documents like Loan account of Biometrix and OCBC account of Biometrix is not necessary without appreciating that It clearly confirms the doubts raised by the AO regarding the nature and, genuineness of the transaction and thereby clearly attract the provisions of section 68 of the Act.*
 - (iv) The Ld. CIT(A) has erred on facts and in law, completely ignoring the fact that Biometrix is ultimately subsidiary of one of the Reliance group company. He has just taken a view that it's an independent company and following the laws of Singapore. However he has completely disregard the fact that it's an arrangement within Reliance group companies and Biometrix is just a conduit.*
 - (v) The Ld. CIT(A) has erred on facts and in law, completely ignoring the fact regarding the valuation of the CCPS. Biometrix has sold CCPS of all the 4 Indian companies, including that of Assesses's, to much lower price than the market value as shown by the Biometrix to ICICI bank in the last submission before selling of these CCPS.*
 - (vi) The Ld. CIT(A) has erred on facts and in law, completely ignoring the fact that flaws in monitoring the terms of loan by ICICI bank by just saying that it is not making any impact with respect to section 68 of the Act. He has completely disregarded the fact that by doing so the nature and genuineness of the transaction has become, not only doubtful, but proved to be non genuine.*
- 2. The Ld. CIT(A)'s order is contrary to law and on facts and deserves to be set aside.*

3. *The appellant craves leave to amend or alter any ground or add a new ground that may be necessary.*
4. *The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO restored.”*

3. It was a common point between the parties that the facts and circumstances of this appeal are identical to those considered by our co-ordinate Bench for the very same assessment year in the cases of Reliance Utilities Pvt. Ltd. (ITA No.223/Mum/2016) & Reliance Ports and Terminal Ltd. (ITA No.224/Mum/2016). So however, in order to impart completeness to the order, the following discussion is relevant.

4. Briefly put, the relevant facts are that the assessee is engaged in the business of infrastructure development. It filed its return of income for assessment year 2008-09 on 30.09.2008 declaring a total income of Rs.66,03,263/-. In the course of assessment, the Assessing Officer noted that assessee had credited a sum of Rs.1851,91,30,000/- as subscription received from M/s. Biometrix Marketing Private Limited, Singapore (in short 'BMPL') towards 185191300 Compulsory Convertible Preference Shares of Rs.10/- each at a premium of Rs.20/- each, aggregating to Rs.100/- each. BMPL was a non-resident investor and it was noticed that said concern had also similarly invested in other group concerns, namely, M/s. Reliance Gas Transportation Infrastructure Pvt. Ltd., M/s. Reliance Ports and Terminals Ltd. and M/s. Reliance Utilities Pvt. Ltd. The Assessing Officer treated the sum of Rs.1851,91,30,000/- as unexplained cash credit under Section 68 of the Act, as according to him, the nature and genuineness of the transaction of investment

by BMPL in Preference Shares issued by the assessee was not established. This stand of the Assessing Officer was consistent with the stand of the assessing authority in other group concerns referred above. It is in this background, it was a common point between the parties that the facts and circumstances of the dispute in the instant case are similar to those in the case of M/s. Reliance Utilities Pvt. Ltd. (supra) and M/s. Reliance Ports and Terminals Ltd. (supra).

5. It is also notable that the CIT(A) has also considered the matter in the impugned order in the similar manner as in the case of other two group concerns. For the sake of brevity and avoiding repetition, the operative part of the CIT(A) order is reproduced hereunder:

“8.31 As noted above, identical issue is involved in the other group companies of Reliance in this connection the Ld counsel has submitted the appellate orders in appeal No CIT(A)-8/IT-115/15-16 dated 30/10/2015 in the case of Reliance Utilities Pvt Ltd A.Y 2008-09 and appeal no CIT(A)-8/IT-118/15-16 dated 30/10/2015 in the case of M/s Reliance Ports & Terminals Ltd A.Y 2008-09 wherein the Id CIT(A) on an identical issue has deleted the addition made u/s 68 of the I T Act '61. Ld CIT(A) has discussed the issues in details and finally observed that

" 5.37 Section 68 of the Act obligates an assessee to show evidence both of any sum credited in the books of the said assessee. It on the nature and source needs no elaboration that through a catena of decisions the Courts have laid down the following three fundamental tests which have to be established to discharge the burden under section 68 of the Act:

*Identity of the creditor
Creditworthiness of the creditor, and
Genuineness of the transaction.*

*.....
.....
.....*

5.39 In view of the discussions in the above paras and the plethora of judicial pronouncements, I find that in the facts and circumstances of the instant case, identity of creditors namely Biometrix, the nature of the amount as well as the source of the source, namely ICICI Bank have been established.

5.40 For the reasons elaborated above, it is clear that the Appellants have proved the nature of the transaction which originated invested by Biometrix in the Appellant as CCPS. The nature of the transaction is a loan as a loan from ICICI Bank which was becoming an investment. As regards the source, Biometrix has invested this fund into the Appellant and other group companies as CCPS and Biometrix had borrowed the said fund from ICICI Bank, Singapore and ICICI Bank, Singapore has lend the money as per the terms and conditions of the Facility Agreement. The twin requirements viz., nature and source as envisaged in section 68 of the Act stands fulfilled and therefore the order of assessment making additions on account of this transaction needs to be set aside.

8.32 The facts of this case is identical to that of other cases of Reliance group as discussed above. The A.O during the appellate proceeding also submitted that the facts in these cases are identical to the case of Reliance Utilities Ltd. Considering the aforesaid detailed discussion in earlier paragraphs as above, the identity of the creditors M/s Biometrix and nature, source and genuineness of the transaction is established and therefore I direct that the addition made by invoking Section 68 of the Act be deleted. Ground no 3 and 4 are allowed.”

6. We have carefully considered the rival submissions and perused the material on record. As conceded by both the sides, the facts are exactly identical as in the appeal of Reliance Ports & Terminals Ltd. in ITA No.223/M/2016 for the assessment year 2008-09, wherein this Bench has held as under:-

“28. Now the transaction under question is an investment of Rs. 700 crores by Biometrix into the assessee Company in the form of Compulsory Convertible Preference Shares ("CCPS"). We are of the view that the assessee has shown

the relevant materials on records for the AO to get satisfied on the nature, source and genuineness of the investment transaction. In our view it remains undisputed that it is Biometrix which had invested into the assessee in the form of CCPS. Admittedly assessee has placed on record the complete sequence of transaction including the transfer of funds from the bank account of Biometrix into the bank account of assessee and the corresponding allotment of CCPS by the assessee and finally furnishing and filing the statutory declarations and forms both with the Reserve Bank of India ("RBI") and the Registrar of Companies ("ROC"). The Revenue has not disputed this position at any point in time including before the Tribunal. These all documents relating to Biometrix, the borrower or the beneficiary of the loan and ICICI Bank, Singapore, the lender of the loan and all these documents were part of the AO's files, copies of which were applied by the assessee and again furnished. The essence of the matter is that ICICI Bank, Singapore had sanctioned a loan of USD 1.7 Billion to Biometrix for it to invest inter-alia into the assessee in the form of CCPS. We find that the AO conceded that "Investigation conducted by the Investigation Wing", as follows:

"So, as per the report of DDIT(Inv), Unit 11(1), Mumbai M/s Biometrix Marketing Pte. Ltd. (Biometrix) based in Singapore had made investments to the tune of Rs. 6530 crores in the form of Compulsorily Convertible Preference Shares (CCPS) in the following four Reliance Group Companies. (page 703 of the paper book) (emphasis supplied)

S.No	Name of the Company	No. Of CCPS	Amount of CCPS
1.	M/s Reliance Ports & Terminals Ltd	8,50,00,000	850,00,00,000
2.	M/s Reliance Utilities Ltd	7,00,00,000	700,00,00,000
3.	M/s Reliance Gas Transportation Infrastructure Pvt Ltd.	31,28,44,149	31,28,44,14,900
4.	M/ s Relogistics Infrastructure Ltd	18,51,91,300	18,51,91,30,000

29. We also find that the DDIT(Inv)-Unit 11(1), Mumbai conducted enquiries in this case and vide his report dated 10.07.2012 he has given the following findings:

"The investment in shares (CCPS) in India, through FDI route was not out of equity capital of M/s Biometrix Marketing P Ltd., but was out of loan of USD 1700 million from ICICI Bank, Singapore, which was secured with options agreement to sell the shares to M/s. Ekansha, a group company of M/s. Reliance Industries Limited (RIL)." (page 702 of the paper book) (emphasis supplied)

We find that ICICI Bank Singapore has disbursed a loan of USD 1.7 billion to Biometrix. As per information received from FT&TR division, the IRAS has provided swift messages showing that loan proceeds have been remitted to the Overseas Chinese Banking Corporation, Singapore, SG Bank account No. 662001767301 of Biometrix. The date wise details of the disbursement are as under: (page 711 of the paper book)

As per the financial statements of Biometrix for the period ending September 2008 shows secured term loan of USD 1,70,00,00,000 has been obtained to finance the purchase of Company's Long term investment. (page 712 of the paper book) The remand report also details out facts as under:-

"4(A)(vii) The ICICI Bank secured the loan by (i) creating exclusive charge over all cash flows and assets excluding the CCPS and CCDs invested in from the proceeds of the loan; (ii) Non disposal undertaking on the shareholding of the borrower company in a form and manner acceptable to IC/CI Bank and (iii) assignment of Put Option with respect of sale/transfer of CCPS/CCDs. " (page 170 of the paper book) (emphasis supplied)

We have also raised a query as to whether Biometrix had repaid the loan to ICICI Bank even though this question may not be relevant to decide the fate of the proceedings under section 68 of the Act. The Revenue conceded the fact that these loans have been repaid and this stands also proved independently through the findings rendered at various stages. Even the report of DDIT(Inv)-Unit 11(1), Mumbai records the following findings:

"17 (ii) Subsequently, the CCPS held by Biometrix were purchased by three companies of the Mukesh Ambani group. The principal amount of loan from

ICICI Bank was also repaid out of remittances from Mukesh Ambani group." (page 705 of the paper book) (emphasis supplied)

We find that Complete financial flow commencing from ICICI Bank finding its way ultimately to the assessee as CCPS investment and this is proved by the swift messages issued by ICICI Bank, Singapore to the bankers of Biometrix and the swift messages issued by the bankers of Biometrix to the bankers of the assessee are already forming part of the AO's record, copies of which were duly obtained. The assessee even during the hearing placed on record a financial chart to demonstrate the sequence commencing from the date of utilization request by Biometrix till its ultimate credit into the assessee's bank account.

.....

The swift messages covering the entire transaction have been placed on record. It is made clear that all the swift messages are forming part of this Appellate order & the details of which can be found in pages 76 to 81.-

30. To sum up the whole issue in the present appeal by Revenue, is about the source, nature and genuineness of the transaction to determine whether the addition made by the AO under section 68 of the Act is sustainable. Admittedly, in this case, is no dispute that the assessee issued Compulsory Convertible Preference Shares (CCPS) and the same was subscribed by Biometrix Marketing Private limited, Singapore (Biometrix). It is also not in dispute that for making this investment Biometrix borrowed the money from ICICI Bank, Singapore. All the documents relating to Biometrix were procured by the AO from Inland Revenue Authority of Singapore and ICICI Bank. At every stage, the conclusions reached by the Revenue and CIT(A) are based on these materials on record. We are now required to re-appreciate the very same materials on record. The authenticity of these materials on record is not in dispute before us. No new materials were relied upon either by the Revenue or by the assessee before us. The assessee argued before us and filed detailed submissions and brought out various aspects of the case based on the very same materials on record which stands undisputed during the entire proceedings viz.,

- a) That Biometrix invested in the CCPS issued by the assessee;*
- b) That Biometrix borrowed from ICICI bank, Singapore;*

- c) That Biometrix secured the loan given by ICICI Bank, Singapore by assigning the investment agreement and put and call option agreement entered into with the investee companies and option obligors respectively;*
- d) That Biometrix has repaid the loan to ICICI Bank out of remittance from Mukesh Ambani group;*
- e) That the transaction in question can never be construed as bogus transaction;*
- f) That complete financial flow commencing from ICICI Bank finding its way to the assessee disclose the nature source and genuineness of the transaction;*
- g) That contemporaneous transactional documents also disclose the nature source and genuineness of the transaction;*
- h) That Biometrix genuinely existed in Singapore and was not a shell/ conduit company;*
- i) That Biometrix maintained adequate debt cover ratio and fulfilled the various covenants under the Facility Agreement; and*
- j) That the assessee made all the filings with the relevant regulators viz., Registrar of Companies and Reserve Bank of India.*

31. With this, we proceed to deal with the grounds of appeal raised by the Revenue. We will deal with the second and fourth ground of appeal first. The Revenue's ground is that Biometrix is a shell/conduit company. The Id. DR argued before us that Biometrix was incorporated just few months before this investment transaction and was liquidated in 2011 and therefore Biometrix is a shell entity. The Id. Counsel for the assessee argued that Biometrix was a tax resident of Singapore and to ascertain whether an entity is a shell/ conduit company in Singapore, the various tests laid down in India Singapore DTAA is the only relevant factor and that all the positive and negative tests laid down therein is fulfilled by Biometrix during every year of its existence. The Revenue has not contested this position. The CIT (A) has upheld that Biometrix is not a shell/ conduit company. We concur with the finding of the CIT(A) though we are of the considered view, that that this issue is not at all relevant for the purpose of section 68 of the Act in the facts and circumstances of the case, since it is abundantly clear from the materials on record that Biometrix was to be an SPV. Next, we will deal with the fifth and sixth ground of appeal by the Revenue. It concerns as to how Biometrix sold the CCPS at lower than the market value disclosed by them to ICICI Bank. The CIT(A) has dealt with these and observed that the debt-cover ratio at all times was more than that

prescribed in the Facility Agreement based on the higher of two different valuation reports furnished using different methods of valuation and that the loan has been repaid by Biometrix to ICICI Bank and hence these issues are not relevant for the purpose of section 68 of the Act. We are unable to fathom as to how these events that relate to periods post the investment are relevant for ascertaining the source nature and genuineness of the investment transaction under section 68 of the Act and hence concur with the finding of the CIT(A)."

7. In view of the above, taking a consistent view, we confirm the order CIT(A) in this appeal also, and the appeal of Revenue is dismissed.

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

Order pronounced in the open court on 30th August, 2019.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 30th August, 2019

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "C" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai