

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 3667/Del/2017
(Assessment Year: 2012-13)

DCIT, Circle-3(2), Room No. 380B, CR Building, IP Estate, New Delhi	Vs.	Azalea Infrastructure Pvt. Ltd, 296, Forest Lane, Neb Sarai, Sainik Farms, New Delhi PAN: AAICA8733B
(Appellant)		(Respondent)

Revenue by :	Shri Sanjay Goel, CIT DR
Assessee by:	Shri Gautam Jain and Shri Lalit Mohan, CA
Date of Hearing	15/01/2021
Date of pronouncement	28/01/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by The Deputy Commissioner of Income Tax, Circle – 3 (2), New Delhi (the learned AO) against order of the Id CIT (A)-I, New Delhi (the learned CIT – A) dated 16.03.207 for the Assessment Year 2012-13.
2. The only issue in this appeal is that the assessee company has claimed short-term capital loss of ₹ 1,087,500,000/– originated from India bulls infrastructure Ltd on forfeiture of share warrants which was disallowed by the learned assessing officer but was allowed by the learned CIT – A mainly relying on the decision of the honourable Delhi High Court in case of CIT V Ratan Chand Bagri 329 ITR 356 (Delhi) and honourable Supreme Court in case of Grace Collis 248 ITR 323 (SC) and of the honourable Karnataka High Court in case of Deputy Commissioner of Income Tax versus BPL Sanyo Finance Ltd 312 ITR

63. Therefore, the learned assessing officer is aggrieved and has raised the following grounds of appeal:-

- “1. On the facts and in circumstances of the case, Ld. CIT(A) has erred in law on facts in allowing Short term Capital Loss of Rs. 108,75,00,000/- ignoring the surrounding circumstances as under:*

 - i. The assessee company paid Rs. 108,75,00,000/- which originated from M/s Indiabulls 1 Infrastructure Ltd itself, as upfront amount as part payment against 15 Cr, warrants of Indiabulls Power Ltd (Now Ratan India Power Ltd)*
 - ii. The assessee company alongwith three other investors chose not to exercise the option to make full payment for purchase of warrants on 30.11.2010 even though the option was available upto the 29th May 2012.*
 - iii. The flow of fund clearly reveal that entire scheme of allotment of share warrant is a subterfuge to create loss, in group companies for ulterior purpose without incurring any cost.*
 - iv. The perusal of the audited accounts reveal that the assessee company is a paper company without any activity.*
 - v. Entire exercise was pre-meditated and movement of fund through banking channel do not prove the genuineness of transaction.*
 - vi. As per the factual matrix, the assessee company is actually a conduit for transfer of the amount to credit the amount as capital receipt in the books of India bulls Power Ltd (Now Ratan India Power Ltd).*
3. Brief facts of the case shows that that assessee is a company incorporated on 7 October 2010. The business of the company has been stated to be purchasing, selling, developing, constructing, hiring, or otherwise acquire and deal in all real estate. During the year, the assessee company had no business activity nor in the immediately preceding year, which is evident from the profit and loss account and noted by the learned assessing officer. On this facts, assessee has filed return of income on 26/9/2012 declaring loss of ₹ 1087529690/-. The case of the assessee was picked up for scrutiny and it was found by the assessing officer that assessee company has shown business loss of ₹ 29,690/- and short-term capital loss of ₹ 1,087,500,000. The above loss is claimed by the assessee stating that assessee has paid ₹ 1,087,500,000 as upfront amount

for part payment against the 15 crore warrants of Indiabulls Power Ltd having equal number of equity shares of the face value of Rs 2/- each. In addition, during the year ended on 31st of March 2012 the company has conveyed the unwillingness to the Indiabulls power limited to exercise the warrants. Consequently the upfront amount of ₹ 1,087,500,000 paid by the company towards part payment against the said warrants was forfeited and the same was charged to the statement of profit and loss account as loss on share warrants. Thus, the above capital loss was claimed.

4. Facts were explained by the assessee that during the financial year 2000 – 11 Indiabulls Power Ltd proposed assessee 15 crore share warrant which upon conversion would have entitled the assessee to acquire an equal number of equity shares of the company of the face value of ₹ 10 each at the conversion price of ₹ 29 per share. As per the terms of the offer, the assessee was required to pay ₹ 7.25 per warrant (25% of conversion price of ₹ 29/-) amounting to ₹ 108.75 crores as upfront at the time of allotment of shares warrant and the balance was payable at the time of exercise of option i.e. within 18 months from the date of allotment. Considering the market price of share at the time of grant of option and estimating the future profit, the assessee accepted the proposal and paid the upfront money to the company on 30 November 2010. However, in the year under consideration considering the market conditions and to safeguard its future interest, the assessee opted not to make further payment and accordingly conveyed its unwillingness to Indiabulls Power Ltd as per letter dated 18/11/2011. Consequently, Indiabulls Power Ltd forfeited the amount paid by the assessee and it has been claimed under the head capital gain as short-term capital loss. Assessee submitted in the form of resolution passed in the board meeting of India bulls power Ltd. The copy of the resolution passed in the board meeting of the assessee company for making investment in the warrants was also submitted. The learned assessing officer questioned the above loss and found that the assessee company has been incorporated only on 7/10/2010 and its shareholding pattern shows that it's hundred percent equity is

owned by Valerian real estate private limited and its nominees holding 10,000 equity shares of face value of ₹ 10 each amounting to ₹ 1 lakh. Thus, the company is a wholly owned subsidiary of that company. During the course of assessment proceedings assessee submitted the balance sheet and profit and loss account of the holding company, which funded the aforesaid amount of ₹ 108.75 crores to the assessee. The AO noted that the sum has also been received by the holding company of the assessee through a long-term the loan liability from another company. He noted that the holding company has only substance in its balance sheet of long-term liability of ₹ 108.75 crores, which is invested in the assessee company borrowed from another group company, and the investment in Assessee Company as loans and advances is shown at Rs 108.75 crores. Thus, these are the only two items of substance in the books of the holding company. Therefore, the learned assessing officer noted that even the holding company has arranged funds for making investment in the subsidiary company as a loan from another party. The learned assessing officer further examined the bank statement of one company Chloris properties Ltd which shows that the amount of ₹ 304.50 crores have been received in the bank account of that company from India infrastructure Ltd on 29/11/2010. On the same date, it transferred the above sum of ₹ 304.50 crores in the name of four different companies. Out of them one of the company is holding company of the assessee wherein a sum of ₹ 108.75 crores was transferred. That holding company transferred the above sum to the assessee company, which was invested in Indiabulls Power Ltd. The learned assessing officer further examined the resolution of the board of directors passed on 30 November 2010 of India Bulls power Ltd which shows that the above investment is made by the companies which are promoted by the promoters of the India Bulls Power Ltd. Based on this the Indiabulls Power Ltd, 42 crore number of warrants in the name of four different private limited companies amounting to ₹ 304.50 crores received by it at the rate of ₹ 7.25 per warrant. The AO held that in fact what has actually been done by the Indiabulls Power Ltd is purchase of share

warrants through its own companies and then forfeiting it by creating the reserve and surplus in Indiabulls s Power Ltd of ₹ 304.50 crores. Therefore, he held that Assessee Company is a conduit for transfer of the amount to the credit in the books of Indiabulls Power Ltd as a capital receipt. Accordingly, he held that it is a colourable device created to camouflage the credit of the amount to Indiabulls Power Ltd as a capital receipt to avoid the application of Section 68 of the income tax act 1961. The assessee company along with its holding company acted as an operator and conduit to the transaction to provide ultimate benefit to Indiabulls Power Ltd was shown this amount of ₹ 304.50 crores as a capital receipt and thus avoids taxation on this sum. Therefore, he disallowed the above sum as a short-term capital loss claimed by the assessee and assessed the total income of the assessee at a business loss earned by the assessee of ₹ 29,690/- in the return of income. Consequently the assessment order u/s 143 (3) of the income tax act 1961 was passed on 20th of March 2015.

5. Aggrieved assessee preferred an appeal before the learned CIT – A who after considering the submission of the assessee and the reasons given by the learned assessing officer, considering the share price of India bulls power Ltd at the time of further payment of 75% of the face value of the warrants, the scheme of merger and amalgamation approved by the honourable Delhi High Court on 25 November 2011 wherein the appellant had to pay ₹ 3 26,00,000 on or before 27/11/2011, he directed the learned assessing officer to allow the assessee the claim of short-term capital loss of ₹ 108.75 crores. The learned CIT – A also held that that the contention of the learned assessing officer that the transaction is not genuine is not tenable as these transaction was affected through banking channels and all companies are being assessed to tax and filing the return of income regularly under income tax act as well as the companies act. They are separate legal entities and complying with the provisions of the income tax as well as the company law. He thereafter following the decision of the honourable Delhi High Court in case of CIT versus Chand rattan Bagri (supra) and of honourable Karnataka High Court in case of BPL Sanyo Finance Ltd

(supra) allowed the claim of the assessee. Therefore, the revenue is in appeal before us.

6. The learned departmental representative vehemently supported the order of the learned assessing officer and submitted that the assessee has entered into as a conduit in the scheme of converting a tax free income/capital receipt in the hands of the Indiabulls Power Ltd without paying any taxes and assessee being a dummy company booked a capital loss of ₹ 108.75 crores. He further referred that the four companies were promoted by the promoters of the India Bulls group for conversion of ₹ 304 crores in India Bulls Power limited where the assessee is one of the conduit. He further referred the order of the learned assessing officer where the full facts are given how the money was converted as a free reserve in the hands of India Bulls Power Ltd of ₹ 304.50 crores by transferring the money from India Bulls infrastructure Ltd through another company and then transferring money in the four different entities of the same group who failed willingly to subscribe to the shares of India Bulls Power limited and incurred collectively a joint loss of ₹ 304.50 crores which resulted into reserve and surplus in the hands of Indiabulls Power Ltd. He further submitted that it is the perfect scheme of transferring unaccounted money and beneficial ownership from one group company to another group company by avoiding income tax. He therefore submitted that the learned assessing officer has correctly analyzed the provisions in the facts of the case for disallowing the short-term capital loss.
7. The learned authorised representative submitted that the issue is squarely covered in favour of the assessee by the decision of honourable Delhi High Court in case of Sri Chand Ratan Bagri 329 ITR 356, the decision of the coordinate bench in case of CIT versus Pavitra Commercial Limited ITA number 782/D/2015 dated 14/10/2015, 108 taxmann.com 455 principal Commissioner of income tax versus Kanyalala M Sheth , 312 ITR 63 DCIT versus BPL Sanyo finance Ltd and Dynamic Foundations Private Limited versus CIT 232 taxmann 501. He further stated that the issue is also squarely

covered by the several decisions of the coordinate benches. It was further stated that there is no tax evasion in this case as suggested by the learned assessing officer, as the aforesaid loss has not been set-off against any income of the assessee in subsequent years. For this proposition, he submitted the copy of the return of income for assessment year 2013 – 14 to 2019 – 20 and stated that now the issue is only academic as far as the assessee is concerned. He further referred to the written submission placed before the learned CIT – A which is part of the paper book submitted by him at page number 81 – 89 and 92 – 93 of the paper book. He also referred to the page number 111 and 114 of the paper book stating the share price of M/s Indiabulls Power Ltd for the month of October 2010 – may 2012 to show that it was not beneficial for the assessee to invest further in that particular company and therefore it was beneficial for the assessee to surrender and allowed to be forfeited the above sum of ₹ 108.75 crores. He therefore supported the order of the learned CIT – A.

8. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the various judicial precedents cited by the learned CIT – A and relied upon by the learned authorised representative as well as the judicial precedents relied upon by the learned assessing officer for making the above addition. The facts clearly shows that on October 20, 2010, India Bulls Power Ltd pursuant to the provisions of Section 192A of the Companies Act, 1956 made a preferential allotment of 42 crore as fully convertible warrants to 4 different companies which are the entities promoted by the promoters of Indiabulls real estate Ltd , which upon conversion would entitle them to acquire an equivalent number of equity shares of the company of the face value of ₹ 10 each to conversion price of ₹ 29 per equity shares. Consequent to that 15 crore warrants of the India bulls Power Ltd convertible into 15 crore equity shares of the India Bulls Power Ltd of face value of ₹ 10 each at the option of the warrant holder, assessee company, was allotted. The warrants were issued and allotted to the assessee on payment of 25% of the

warrant price that is Rs 108.75 crores. Thus, a balance amount of ₹ 326.25 crores was further payable by the assessee company for the full value of the warrant. Subsequently, as per the order of the Honourable High Court on 17/10/2011 u/s 391 – 394 of The Companies Act 1956 along with three other companies, one of them being the India bulls infrastructure and Power Ltd which invested in a company where from the money is routed for investment in India bulls Power Ltd, sanction was granted by the Honourable High Court. The scheme was so framed by the companies that the warrant issued by India Bulls Power limited would be converted into partly paid shares of the company and the holder was liable to pay 1% of the balance amount within two days from the effective date of scheme i.e. by 27/11/11. Naturally, the promoters of India Bulls group promote all the companies who applied for the warrant of the assessee. Therefore, at the time of framing of the scheme, it was within their knowledge that the companies who have applied for warrant, has initially for payment of 25% of the warrant price has borrowed money from its holding company, which in turn borrowed from another company and that another company also borrowed fund from India bulls infrastructure and Power Ltd which is one of the company involved in the scheme. Therefore, it is apparent that the whole scheme was created for transferring a sum of ₹ 304.50 crores in the name of India bulls Power Ltd by transferring it from another company without any tax consequence. The assessee is one of the layers used by the Indiabulls group for doing this. However as the case of the assessee is concerned it has incurred that loss on forfeiture of the share warrant to the extent of 25% amounting to ₹ 108.75 crores which was never claimed by the assessee or set off against any other income. Therefore, the appellant company was created only for the reason of transferring money from the group concern to the assessee company and subsequently to another group company, booking loss in the assessee company. The assessee company is used as one of the layer for the above transaction. Therefore, the remedy for the whole transaction does not lie under The Income Tax Act but under some other law. The ground [1]

stated by the learned assessing officer clearly shows the scheme of the things wherein a sum of ₹ 108.75 crores or originated from Indiabulls infrastructure and Power Ltd against issue of 15 crore warrants of Indiabulls Power Ltd, all group companies, forfeiting a sum of ₹ 304.50 crores by transferring through layers of conduit companies, clearly shows the scheme of things. During the course of hearing, on looking at the strange set of facts, the information was called from the assessee with respect to the corporate restructuring and business justification for layering of the funds. Assessee merely submitted that the issue is squarely covered in favour of the assessee by several decisions and once again relying on the decision of the learned CIT – A. As far as the scheme of things goes, it is evident for everybody. Nothing is further required to be mentioned that who is the beneficiary and who is the conduit. Further, it is not the assessee who is to be taxed in its hands, as the real beneficiary is India bulls Power Ltd, which further went into restructuring and scheme of amalgamations.

9. So far as the issue for taxation in the hands of the assessee is squarely covered in favour of the assessee by the decision of honourable Delhi High Court in 329 ITR 356 in case of CIT versus Chand Ratan Bagri, wherein the addition was made in the hands of the assessee on protective basis and the addition was made on substantive basis in the hands of the company who forfeited the shares. In paragraph number 2 there was also an allegation of tax evasion tactic prohibited by law employed by the assessee. It is also the allegation in the impugned case. In paragraph number 12 – 14 clearly clinches the issue in favour of the assessee. The honourable High Court held that the issue as to whether the forfeiture of the convertible warrant amount to a transfer within the meaning of Section 2 (47) of the said act has now been made clear by the Supreme Court in the case of Grace Collis (supra) as also by the Karnataka High Court in BPLSanyo finance Ltd (supra) and the honourable High Court also followed the same. In paragraph number 14 the honourable High Court held that forfeiture of the convertible warrant has resulted in extinguishment of the right of the assessee to obtain a share in the issuer company.

10. In view of this, the ground number 1 of the appeal raised by the learned assessing officer, and so appeal, is dismissed.

Order pronounced in the open court on 28/01/2021.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 28/01/2021
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi