

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND AMARJIT SINGH, JM

ITA No. 2668/Mum/2018
(Assessment Year: 2013-14)

DCIT-4(2)(2) Room No.640, 6 th Floor Aaykar Bhawan, M.K.Road Mumbai-400 020	Vs.	M/s. GBTL Ltd. (formerly known as M/s. Grasim Bhiwani Textiles Ltd.) 409, Cotton Exchange Building Kalbadevi Road, Mumbai-400 002
PAN/GIR No. AACCG9347F		
(Appellant)	:	(Respondent)

Appellant by	:	Shri T.S.Khalsa-DR
Respondent by	:	Dr. K.Shivaram-AR

Date of Hearing	:	03/03/2021
Date of Pronouncement	:	28/05/2021

ORDER

Per Shamim Yahya, A. M.:

This appeal by the revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-9, Mumbai ('Id.CIT(A) for short) dated 02.02.2018 and pertains to the assessment year (A.Y.) 2013-14.

2. The grounds of appeal read as under:

1. "On the facts and the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of salary provisions u/s. 43B(f) of the I.T. Act, 1961 amounting to Rs.30,02,616/- without appreciating the fact that provision for leave salary only an estimate and was not actual paid, thus making it a contingent liability."

2. "On the facts and the circumstances of the case and in law, the learned CIT(A) erred in treated the grant of Rs.2,27,74,314/- received from holding company as capital receipt as the same was not used for creating any capital asset but was used to pay salary to the director."

3. "On the facts and the circumstances of the case and in law, the learned CIT(A) erred in relying on the case law in the case of CIT vs. Deutsche Post Bank Home Finance Ltd. [2012] 209 Taxman 313 (Delhi) as the case law applies to money received from holding company to recoup losses and not applicable to money received for paying salary of directors in contravention of the company act, 2013."

4. "On the facts and the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of loss on forward contracts of Rs.74,306/-without appreciating the facts that no benefit of adjustment of income or gain on account of mark to market losses or gain will be given as per the CBDT instruction No.3/2010."

3. Apropos ground No.1

Brief facts on the issue are that provision for leave salary was disallowed by the Assessing Officer by holding that the leave salary is contingent in nature. The Assessing Officer observed that the leave salary may or may not be encashed by the employees in future date as some of the employees may actually take leave. Hence he made the disallowance of the provision under section 43B(f).

4. Upon assessee's appeal Ld.CIT(A) deleted the addition by relying upon a decision of the ITAT on similar issue in case of the assessee's group concern. We may gainfully refer to the order of the Ld.CIT(A) as under:-

"6.6 I find that the Mumbai ITAT in the case of the appellant's group company Aditya Birla Nuvo Ltd. v ACIT [2015] 68 SOT 403 (Mumbai - Trib.) has held that leave salary is not attracted by Section 43B(f) of the Act. The Hon'ble ITAT held as follows:

"15.7 We have carefully perused the orders of the lower authorities and the claim of the assessee vis-a-vis Sec.43B(f). A perusal of Sec. 43B(f) shows that the Explanation to Sec. 43B referring to the amendment of the word any sum payable is applicable only for clause (a) of Sec.43B which means that it is not applicable for clause (f).Hon'ble Andhra Pradesh High Court in the case of Sriakollu Shubbarao & Co.173 ITR 708 has held that in order to apply the provisions of Sec. 43B not only be the liability to pay the tax or duty be incurred in the accounting year but also should be statutorily payable in the accounting year. In our considered opinion, the provision for leave salary is not a statutory liability but only a contractual liability which is payable only if the employees resigns or retired from the services. We also find that the Hon'ble Calcutta High Court in the case of Excide Industries Ltd. (supra) has struck down Sec. 43B(f) being arbitrary, unconscionable and de hors the Apex Court decision in the case of Bharat Earth Movers 245 ITR 428. It is relevant to state that the Tribunal in the case of CIT v. Universal Medicare in ITA No. 6191/M/08, has followed the decision of the Supreme Court in the case of Bharat Earth Movers and directed the AO to allow the amounts so claimed. Respectfully following the afore discussed decisions, we direct the AO to allow the claim of provisions for leave salary. Ground No. 6 is accordingly allowed."

6.7 I find that the Hon'ble ITAT Mumbai has held that leave encashment is not a statutory liability but a contractual liability and hence does not attract Section 43B. Further, as per Explanation 2 to Section 43B, the leave

encashment must be both due and payable to be disallowed under Section 43B. Thus, following the ITAT decision in Aditya Birla Nuvo Ltd. v ACIT (supra), this ground of appeal is decided in favour of the appellant and the disallowance of leave salary of Rs 30.02.616/- is deleted.

5. Against the above order revenue is in appeal before us.

6. Having heard both the parties and perused the record, we find that the issue is duly covered in favour of the assessee by the decision of ITAT referred by the Ld.CIT(A) as above. No contrary decision was brought to our notice. Hence, we are uphold order of Ld.CIT(A).

7. Apropos ground No. 2 and 3

Brief facts on this issue are that the assessee company was required to make payment to its Directors. Due to the constraints of provisions of Companies Act with regard to managerial remuneration it could not pay more than Rs. 48 lakhs. Hence, it received a grant of Rs 2,27,74,314/- from its holding company M/s Grasim Industries Ltd. It had adjusted the remuneration paid Rs. 2.76 crores against it. It only claimed the balance Rs. 48 lakhs remuneration paid by debit to the P&L account. However in computation of income it reduced the entire remuneration from its income without offering the grant as income. During the course of assessment proceedings, the Id Assessing Officer asked the assessee as to why not the grant should be treated as a revenue receipt in these circumstances. The assessee replied that it was a capital grant and was a voluntary given to it to comply with managerial remuneration provision as per Schedule XIII of the Companies Act. Hence it was not in the nature of trading receipt. Further, the capital grant was not claimed as expenditure in the hands of the holding company. Hence the assessee justified utilisation of said grant as its expenditure from its total income chargeable to tax and at the same time treating the grant as exempt. The assessee also submitted that it had inadvertently claimed an exemption for Rs 1,87,74,314/- in its return of income although the grant received was Rs 2,27,74,314/-. The Id Assessing Officer was of the view that Schedule XIII of the Companies Act did not mandate that the grant was to be treated as a capital receipt. The Id Assessing Officer observed that the grant was not a loan/advance. Therefore, the grant was nothing but a benefit to be taxed under

Section 56 of the Act. The Id Assessing Officer was of the view that in the circumstances the grant was income from other sources and hence he added the grant to the total income of the assessee.

8. Upon assesses appeal Ld.CIT(A), further brought on record, the factual details on this issue as under:-

“8.2 In this case, the assessee paid an amount of Rs.2.76 Crores to Mr Thomas Varghese, Director of the appellant company. As per Companies Act, 1956, the maximum remuneration payable by companies with inadequate profits is Rs.48 Lakhs. Hence, the assessee received a grant of the balance money of Rs. 2,27,74,314/- from its holding company. The entire grant was paid to Mr. Thomas Varghese, Director of the appellant company.

8.3 In the profit and loss, the appellant debited entire salary paid to Mr. Varghese of Rs.2.76 Crores and credited grant received of Rs.2.27 crores. In other wards, the appellant claimed net deduction of Rs.48 Lakhs being Director fees paid to Mr.Thomas Varghese. In the return of income, the appellant claimed deduction for the entire Director’s remuneration of Rs.2.76 crores, but excluded the capital grant received.

9. Ld.CIT(A) found that the it may be noted that this grant is a form of donation. Learned CIT(A) further observed that however, the holding company M/s. Grasim Industries Ltd has not claimed deduction for the grant in its income tax return. This observation was made despite noting that the grant was claimed as exempt and its utilisation was claimed by the assessee as its deduction from taxable income.

10. Ld.CIT(A) referred to following decisions:-

- i. Hon’ble Supreme court in Siemens Public Communication Network (P.) Ltd. Vs. CIT[2017] 390 ITR 1 (SC)
- ii. Hon’ble Delhi High Court in CIT v Deutsche Post Bank Home Finance Ltd. [2012] 209 Taxman 313 (Delhi)

11. Referring to the above decision Ld.CIT(A) deleted the disallowances holding as under:-

“8.9 Thus, Courts have held that if the grant from holding company was to recoup losses and safeguard their interest in the subsidiary, it ought to be taxed as a capital receipt. In the present case, although the appellant company is not making a loss, the grant was used to meet the operational expenses of the appellant company. The grant was towards ensuring that business is continued and to ensure survival of business. Thus, the grant was to safeguard the holding company's interest in the appellant company.

As per Schedule XIII of the .Companies Act 1956, the appellant could pay a maximum remuneration of Rs 48 lakhs to its Director. Hence, the appellant was prevented from making further payment to the Director and had to get funds from its holding company. Merely since the grant is credited to the Profit & Loss account does not make it a revenue receipt. The grant was not claimed as a deduction in the hands of the donor i.e. M/s. Grasim Industries Ltd. In view of the above, even though the Director's fees were claimed as a deduction, the grant ought to be treated as a capital receipt. Further, I am not in agreement with the findings of the id Assessing Officer that the grant is a benefit taxable under Section 56 of the Act. This is just a bald statement and the Assessing Officer has not specified under which limb of Section 56 this grant is taxable.

8.10 One more aspect of this issue has been brought to my notice that the capital grant received from the holding company was Rs 2,27,74,314/-. However, the amount of deduction claimed in the return of income was erroneously Rs 1,87,74,314/-, Hence, the Id Assessing Officer only disallowed grant of Rs 1,87,74,314/-. In the grounds of appeal, the appellant has mentioned that the Profit and Loss of the appellant has been credited by a grant of Rs 2,27,74,314/-. It is argued that merely because the appellant made a typing mistake in its return of income, it cannot be penalized for its wrong doing. The right amount of tax as per law ought to be collected. In view of the above, the appellant ought to be entitled to relief of Rs 2,27,74,314/- ie the entire capital grant credited to the Profit and Loss account. Thus, Ground No 3 of the appeal is allowed. The appellant is entitled to relief of Rs 2,27,74,314/ subject to further verification by AO, of claims being made by the appellant as referred to above.”

12. Against the above order, revenue is in appeal before us.

13. We have heard both the parties and perused the record.

14. Ld. Departmental Representative submitted that while assessee has treated the amount received from its holding company as a tax-free grant and at the same time treated the utilisation out of it as an expenditure in its computation of income. Learned Departmental Representative submitted that this is totally contradictory and unsustainable proposition and learned CIT(A) has completely erred in his order. He further submitted that the case laws referred by learned CIT(A) are not at all applicable on the facts of the case. He submitted that in the case laws referred by learned CIT(A), the holding company was giving amount to its subsidiary companies i.e. the assessee's who were loss making companies. Hence, the amount was received for the survival of the companies and recovery of loss. He submitted that in the present case assessee has made a profit of Rs.12.77 crores and hence facts are different.

15. Learned Counsel of the assessee submitted that the amount was received from the holding company to pay director remuneration as the assessee was not in a position to pay in excess of Rs. 48 lakhs as per the provisions of the Companies Act. He further submitted that the Assessing Officer has treated the same as income taxable under section 56 without specifying any section. That section 56 of the Act as it stood for assessment year did not contain any provision to tax capital grant. That section 56 was amended by the Finance Act w.e.f. April, 2017. It inserted sub-section 56(2) thereby widening the scope of income from other sources from A.Y. 2013-14 and the law as it stood during the year the same was not within the ambit of section 56. Furthermore, he placed reliance upon the Hon'ble Supreme Court decision in the case of CIT Vs. Maharashtra Sugarless (160 ITR 920) for the proposition that it is a duty cast on the ITO to apply the relevant provisions of the Act for the purpose of determining the true figure of the assessee as taxable income and the consequential tax liability. Without prejudice to the above submission learned Counsel of the assessee's reliance on the following case laws as under :-

- CIT Vs. Mahalaxmi Sugar Mills Co. Ltd. (160 ITR 920)(Supreme Court)
- Siemens Public Communication Network (P) Ltd. Vs. CIT (390 ITR) (Supreme Court)
- CIT Vs. Deutsche Post Bank Home Finance Ltd. (24 taxamnn.com 341) (Delhi High Court)
- PCIT Vs. Sate Fisheries Development Corporation Ltd. (94 taxmann.com 466) (Calcutta High Court)

16. Furthermore learned Counsel of the assessee in his written submission submitted that without prejudice to the above, there is no contravention of the Companies Act. That neither the assessee company nor the holding company has claimed the said payment as allowable deduction in profit and loss account. That the holding company has given the grant to meet the capital loss, hence, cannot be assessed as income from other sources. He reiterated that this is capital grant and cannot be taxed. He further relied on following case laws :-

- Cadell Weaving Mill Co. (P) Ltd. Vs. CIT (249 ITR 265)(Bom HC)
- CIT Vs. D.P. Sandu Bros. Chembur (P) Ltd. (273 ITR1(SC)
- CIT Vs. Smt. T.P. Sidhwa (133 ITR 840)(Bom HC)

17. In rejoinder learned Departmental Representative submitted that even if the particular receipt is not considered under section 56(2) the same would not take away the generality of the provisions of section 56(1), which states that income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income tax under the head income from other sources, if it is not chargeable to income tax under any of the heads specified in section 14 items A to E. He further submitted that section 56(2) only prescribes in particulars of incomes, which shall be chargeable to income tax under the income from other source. Hence he pleaded that the addition of receipt of Rs. 2,27,74,314/- from holding company is to be upheld.

18. We have carefully considered the submissions and perused records. As per the undisputed fact in this case assessee company has paid remuneration to its director As per the provisions of the Companies Act, assessee company could pay only Rs. 48 lakhs. The remuneration payable was Rs. 2.76 crores. So assessee received fund from the holding company to pay the balance i.e. Rs. 2.27 crores. The assessee accounted for the amount so received as grant and debited the remuneration paid against the said grant. Only the balance i.e. income of the remuneration paid over grant received was claimed in the profit and loss account. Thus the debit to profit and loss account was only Rs. 48 lakhs remuneration paid. However in computation of income it reduced the directors remuneration paid out of the grant as its deduction from profit. Thus it has deducted Rs. 2.27 crores remuneration paid out of grant from total income without offering the equivalent grant as income. Thus without taking credit of the sum received the company deducted the payment out of it from its income.

19. We find that the aforesaid conduct is unsustainable. The contention of the assessee is that the said sum was received from holding company to enable it to pay directors remuneration beyond the limits prescribed by the Companies Act. Hence, the same is not an income but a capital grant. This argument is acceptable to the extent the expenditure out of the said is not treated as deduction from profits/income. The assessee has done so and hence the

amount received cannot be treated as non-taxable income as at the same time the expenditure out of it is claimed as an expenditure/deduction. As referred above, the case laws referred by the learned counsel of the assessee are not at all applicable on the facts of the case. In those cases the amounts were received by the assessee company which were incurring heavy losses to recoup the losses and for the survival. In the present case, the situation is not at all like that. Moreover, in none of those cases the assessee had made such an effort to reduce the utilisation of grant in its computation of income. Further learned counsel of the assessee has claimed that neither the assessee company nor the holding company has shown the same amount as expenditure in profit and loss account. This is absolutely irrelevant claim made in the written submission by the learned counsel of the assessee. In the assessee company's computation of income the amount paid has been claimed as deduction. So it is admittedly claimed as a deduction. The claim that assessee has not debited in the profit and loss account is on the cusp of a misleading statement. Another submission of the learned counsel of the assessee is that section 56(2) is not applicable to the current assessment year in this economy. Firstly we note that as discussed above, it is not the issue of taxability or the chargeable of the receipt in isolation. But the claim of deduction for utilisation of the so-called exempt grant which has to be considered alongwith. This is the actual subject matter of debate over here. Hence this claim of the learned counsel of the assessee that assessing officer has quoted wrong section is not at all sustainable. Moreover, it is settled law that quoting a wrong section is not fatal. Furthermore assessing officer has not specifically invoked section 56(2). The dubious method adopted by the assessee of claiming the utilisation of grant as deduction from taxable income without offering the corresponding grant as income cannot be brushed aside on the claim that it is not debited to profit and loss account. As in substance the assessee is claiming the utilisation of grant as deduction in the computation of income.

20. In this view of the matter in our considered opinion CIT(A) has completely erred in this regard. The amount received from the holding company cannot be allowed to be treated as exempt if the utilisation out of it is

allowed as deduction from the total income chargeable to tax. The assessee cannot treat the grant as its not taxable income and at the same time claim utilisation out of it as a deduction from total income. Hence, we are of the considered opinion that the sum of Rs. 2.27 crores has been rightly brought to tax in as much as its utilisation as remuneration has been claimed and allowed as deduction. The effect of this addition/disallowance is assessee's dubious act of not having claimed the expenditure/utilisation of grant ostensibly though profit and loss account but claiming it though deduction in computation of income surreptitiously is nullified. Hence, we set aside the orders of learned CIT(A) and allow the Revenue's appeal on aforesaid reasoning.

21. Apropos ground No.4

In this case, the appellant entered into export sale transportations for sale of yarn/fabrics/textiles. As per the contracts, it was to receive a sum in US dollars on a future date. In order to safeguard itself against the value of the dollar, the appellant entered into forward contracts with HDFC Bank. Under this contract, the appellant secured the rupees it was to receive against the dollar. In some cases, the forward contract was outstanding at the year end. In such cases, the contract was benchmarked against the prevailing dollar rates as on 31st March to arrive at the mark to market profit/loss. As a result, the appellant claimed mark to market loss of Rs 74,306/-. The Id Assessing Officer asked the appellant to justify why such loss was claimed. The appellant contended that the loss was AS-11 and Section 209(3) of the Companies Act. The appellant also relied on the Hon'ble Supreme Court judgment in the case of Woodward Governor India P Ltd (312 ITR 254) in support of its claim. The Id Assessing Officer was of the view that the decision of Woodward Governor India P Ltd [supra] was in the context of sundry creditors/debtors and was not relevant. The Id Assessing Officer distinguished forward contracts from future contracts and held that forwards are OTC in nature, customized, less liquid, without margin and settlement happens at the end. The Assessing Officer relied on the case of Alembic Chemical Works v CIT (266 ITR 47) (Guj) which held that a liability is said to be incurred only when Dispute between the parties is settled. The Id Assessing Officer relied upon the Madras High Court

decision of Indian Overseas Bank Ltd v CIT (246 ITR 206) (Mad) in which it was held that notional foreign exchange loss could not be allowed and it was to be allowed only on settlement. In view of the above, the Id Assessing Officer disallowed the mark to market loss of Rs 74,306/-.

22. Upon assessee's appeal Ld.CIT(A) referred to several case laws and distinguished the decision referred by the assessing officer. He concluded as under:-

9.9 In view of all the above factors, I am of the view that the forward contract market to market loss is an allowable deduction. The loss was incurred for the purpose of business and revenue in nature as the forward contracts were purchased in connection with the appellant's export obligation. Thus, Ground NO.4 of the appeal is allowed and the disallowance made by the Id. Assessing Officer is hereby deleted. The appellant is entitled to relief of Rs.74,306/-.

23. As regards the above Revenue is in appeal before us.

24. We have heard both the parties and perused the records.

25. Learned Departmental Representative relied upon the Assessing Officer's order.

26. Learned Counsel of the assessee submitted that the issue is covered in favour of the assessee. Learned counsel referred to the decision of Hon'ble jurisdictional High Court in the case of CIT v. D. Chetan & Co. [2017] 390 ITR 36 (Bom HC), where it was held that Forward contracts for purpose of hedging in course of normal business activities of import and export done to cover up losses on account of differences in foreign exchange valuations would not be speculative activity, but business activity. That in the Jurisdictional Tribunal decision in the case of S. Vinodkumar Diamonds (P.) Ltd. v. Dty CIT [2020] 118 taxmann.com 317 (Mum Trib.), it was held that when Forward contract in foreign exchange was incidental to carrying on business of export and was done to cover up losses on account difference in foreign exchange valuation, same would not be speculative activity but a business activity. He further relied upon the decision of the jurisdictional Tribunal in the case of Foods and Inns Ltd. v. ACIT 159 ITD 1007, where it was held that where assessee engaged in

manufacture and export of processed food products, in order to safeguard itself against fluctuations in exchange rates of foreign currency, entered into foreign exchange forward contracts with banks against confirmed export order, hedging loss suffered by assessee in respect of said forward contracts was to be allowed as business loss.

27. Upon careful consideration we find ourselves in agreement with the contention that the issue is duly covered in favour of the assessee by the case laws referred above. Hence, we uphold the order of learned CIT(A).

28. In the result, Revenue's appeal is partly allowed.

Order pronounced in the open court on 28.5.2021.

Sd/-
(Amarjit Singh)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 28.05.2021

Thirumalesh, Sr. PS/PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai