

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

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.3003/Mum./2016**  
**(Assessment Year : 2010-11)**

Asstt. Commissioner of Income Tax  
Circle-21(3), Mumbai

..... Appellant

v/s

Smt. Kalpana Shripal Morakhia  
161, Starcity Entertainment  
2<sup>nd</sup> Floor, Manmala Tank Road  
Mahim (West), Mumbai 400 016  
PAN – AFQPM9762E

.....Respondent

Assessee by : Shri Hiro Rai  
Revenue by : Shri Sandeep Raj

Date of Hearing – 04/01/2023

Date of Order – 03/04/2023

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the Revenue challenging the impugned order dated 17/02/2016, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-33, Mumbai, [*learned CIT(A)*], for the assessment year 2010-11.

2. In its appeal, the Revenue has raised the following grounds:-

*"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in:*

1. *On the facts and circumstances of the case and law, the Ld. CIT(A) has erred in directing the Assessing Officer to allow the short term capital loss of Rs.23,44,27,385/- on the sale of shares of I. Dream Production Pvt. Ltd. without appreciating the action of the Assessing Officer.*

2. *The appellant prays that the order of Ld.CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

3. *The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary."*

3. The only grievance of the Revenue, in the present appeal, is against the allowance of Short term capital loss on the sale of shares of M/s I Dream Production Pvt. Ltd.

4. We have considered the rival submissions and perused the material available on record. The brief facts of the case are that the assessee is an individual and for the year under consideration, the assessee filed her return of income on 07/07/2010 declaring a total income of Rs.1,43,63,702. During the assessment proceedings, it was observed that the assessee has withdrawn Rs.26.50 crores deposited in the Capital Gains Deposit Scheme under section 54F of the Act in Union Bank of India, Mumbai, and Dena Bank, Mumbai. However, the commensurate tax was not paid before the end of the relevant financial year. It was further observed that the assessee had incurred huge short-term capital loss in dealing in shares of M/s I Dream Production Pvt. Ltd. in which the assessee has held nearly 99.99% of shares except one share held by her mother-in-law. It was also observed that the assessee was allotted 23,45,000 preferential shares of M/s I Dream Production Pvt. Ltd., during the year under consideration, at a price of Rs.100 per share (i.e. face value of Rs.10 and premium of Rs.90 per share). Immediately after the allotment of preferential shares, the assessee expressed her desire to sell all the shares

held by her of the aforesaid company. Subsequently, on 04/03/2010, the assessee sold all the shares to 2 persons, namely, Shri Sharad Baggonkar and Shri Ashish Bhatnagar, who were associated with the group companies controlled by the assessee or her husband for a long. All the shares (i.e. initial shareholding of 49,999 and preferential shares 23,45,000) were sold by the assessee at Rs.0.21 per share, incurring a short-term loss of Rs.23,44,27,385 on the preferential shares and long-term loss of Rs.6,72,341 of the shares bought in the earlier years. During the assessment proceedings, on being called to explain the subscription of shares of M/s I Dream Production Pvt. Ltd. at a huge premium despite the fact that the company's net worth was negative, the assessee submitted that since she held almost 99.99% of shares, it was her obligation to infuse funds so as to revive the net worth of the company and so that the company has adequate liquidity to meet its liabilities of creditors including Bank. Accordingly, the assessee withdrew Rs.26.50 crores from the Capital Gains Deposit Scheme and infused capital of Rs.23.45 crores by way of subscribing additional capital so that liabilities of the company can be discharged and the same can be sold out. However, the Assessing Officer ("AO") did not agree with the submissions of the assessee and vide order dated 04/03/2013 passed under section 143(3) of the Act held that the company which has a huge negative net worth, cannot command a premium for its shares, much less a premium of Rs.90 per share. The AO further held that there was no commercial justification to invest in shares of a loss-making company, that too at a high premium when the assessee was fully aware that the value per share was a huge negative. The AO also held that the company is distinct from its shareholder, even if the shareholder is beneficially

holding 100% of the equity capital of the company. Further, in a company, a shareholder cannot decide the number of shares and the price at which shares have to be issued, which is the prerogative of the board of directors of the company. Thus it is the case of the Revenue that the assessee had manipulated her accounts and the losses so generated were nothing but a colourable device for lowering of the tax burden, which tantamount to tax evasion. Accordingly, the AO assessed the total income of the assessee at Rs.24,87,91,087, after ignoring the short-term capital loss of Rs.24,88,84,703 on sale of shares of M/s I Dream Production Pvt. Ltd.

5. The learned CIT(A) agreed with the submissions of the assessee and vide impugned order allowed the appeal filed by the assessee, by observing as under:-

*"15. I have carefully considered the submissions made by the appellant and the enclosures along with it. I have also gone through the findings made by the AO in his order. My observations are as under-*

*16. The AO has primarily rejected the claim of the appellant regarding short term capital gain as he found investment in the shares of M/s I. Dream Production Pvt. Ltd. at a premium of Rs. 90 per share i.e., @ Rs. 100 per share, a colourable device to save the tax knowing fully well that the net worth of the said company was highly negative. At the same time, the AO has admitted that there is no infringement of the provisions of the I.T. Act. However, I find that the AO has not analysed the reasons for infusing such huge capital in a company where the appellant is holding 99.99% of the hares and she knew fully well that once the capital is introduced in such a loss making company, there is no possibility of recovery of the said capital in future. In this regard, I agree with the appellant that "the capital gain tax liability alleged to have been evaded comes to about Rs. 5.2 crores (ie. 20% of about Rs. 26 crore). It may kindly be appreciated that no person would be out of pocket by Rs. 23.5 crore just to save tax of Rs. 5.2 crore."*

*17. In this case, it is observed that the appellant was holding 99.99% shares of M/s I.Dream Production Pvt. Ltd., which is a private limited company. The said company had incurred huge losses and as on 31-3-2009, had huge liabilities, including Rs. 16.24 crores payable to the banks. It is apparent from the balance sheet that the net worth of the company had turned substantially negative. Under this circumstances, I donot agree with the AO that there is no responsibility of the appellant towards the company in general and the lending banks in particular. The appellant cannot be treated as a mere shareholder in the light of the fact that she was holding 99.99% share of the company. The company's liability may be limited but the appellant being promotor holding all most all shares of the company cannot shed her responsibilities particularly*

when such huge burden of bank loans exist. In this regard, it can be seen from the balance sheet of the company that entire bank loans of Rs. 16.24 crore was serviced (repaid) due to infusion of capital and the total current liability reduced from Rs. 20.35 crore as on 31.03.2009 to Rs. 60.82 lac as on 31.03.2010. The net worth of the company turned into positive at the end of the relevant financial year. In the above scenario, I agree with the appellant That there was a commercial justification for the appellant for introduction of fund with company, notwithstanding its huge negative worth. In the course of such infusion of capital in the company, if the appellant has incurred loss, the same cannot be termed as colourable device to save taxes.

18. It is further observed from the assessment orders of the company for AYS 2009-10 and 2010-11 that the company was regularly assessed to tax and huge losses incurred in these years were duly accepted in the scrutiny assessments by the respective AOs. Therefore, there is no merit in the findings of the AO that there were manipulations in the accounts of the said company. It is highlighted by the appellant that her claims made in the preceding 3 years have been regularly accepted in the scrutiny assessments made in her own case.

19. Now coming to the applicability of the decision of Supreme Court decision in the case *Mc Dowell & Co. Ltd. vs. Commercial Tax officer (1985) 154 ITR 148(SC)* to the facts of the instant case, I find that the observation of the AO that artificial loss in capital gain was created by the appellant was not correct. It is actual loss suffered by the appellant while subscribing to the shares of the company. In this regard, the appellant has relied upon a no. of judgments which touches on the core issue of this case. Para 215 of the Hon'ble Supreme Court decision in the case of *Vodafone International Holding BV vs UOI (341 ITR 1) (SC)* is worth reproducing here.

*"Revenue cannot tax a subject without a statute to support and in the course we also acknowledge that every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury. The Revenue's stand that the ratio laid down in McDowell is contrary to what has been laid down in Azadi Bachao Andolan, in our view, is unsustainable and, therefore, calls for no reconsideration by a larger Bench."*

20. In this connection, I find ratios of other judgments relied upon by the appellant equally relevant here and applicable to the facts of the instant case viz., *CIT v Oberoi Hotels P Ltd. 334 ITR 293 (Cal)*, *Asst. CIT v Biraj Investment P Ltd. 210 Taxman 418 (Guj)*, *Bhoruka Engineering Industries Ltd. v DCIT 356 ITR 25 (Kar)*, *DCIT v Mahendra M Mehta 89 TTJ 1 (Mum-Trib)*, *ADIT v Maersk Line UK Ltd. 149 TTJ 537 (Kol-Trib)*, *CIT vs Walfort Share & Stock Brokers P Ltd. 326 ITR 1 (SC)*, *Union of India v Azadi Bachao Andolan 263 ITR 706 (SC)*, *CIT vs Special Prints Ltd. 356 ITR 404, DIT (International Taxation) vs Maersk Line UK Ltd. 270 CTR 545 (Cal.)*.

21. Considering totality of the facts and circumstances of the case, I donot find any justification in the action of the AO in disallowing short term capital loss of Rs. 23.44 crore on the sale of shares of I.Dream Production Pvt. Ltd. The AO is directed to allow the same. Hence, grounds of appeal no. 1 to 6 are allowed."

Being aggrieved, the Revenue is in appeal before us.

6. From the record it is evident that M/s I Dream Production Pvt. Ltd. is a private limited company and all the shares therein are held by the assessee, except one which was held by her mother-in-law. From the financials of the

aforesaid company, it is evident that the current liabilities including bank overdraft was Rs.20.35 crores as on 31/03/2009. As per the assessee, since she held 99.99% shares of the aforesaid company, it was her obligation to honour the commitments to the business world. If these were not honoured, as per the assessee, there would be a tremendous loss and major dent in the business standing, the reputation of the assessee, and the entire group as a whole. Further, as per the assessee, the assessee had already decided to exit the said business but prior to the same, the loans, particularly the bank overdraft, have to be discharged. Accordingly, the assessee decided to introduce the funds in the aforesaid company by way of subscribing to the additional share capital, out of which the liabilities were cleared. Accordingly, the assessee withdrew Rs.26.50 crores from the Capital Gains Deposit Scheme and invested in the aforesaid company by way of subscribing to the preferential shares. It is undisputed that as on 31/03/2010 the current liabilities of the company, including bank overdraft, which stood at Rs.20.35 crores as on 31/03/2009, were reduced to Rs.60.82 lakhs. Even if AO's own findings are accepted that the value of shares was increased from (-) Rs. 1858 as on 01/04/2009 to (-) Rs. 0.48 as on 31/03/2010, the benefits of funds, infused by the assessee, to the financial position of the company are clearly evident.

7. As noted above, the allegation of the Revenue is that the assessee by investing a huge amount in a loss-making entity and thereafter selling the shares at a meagre amount has tried to take advantage of her position in the aforesaid company to reduce her tax liability and thus the entire transaction is

a colourable device. In this regard, it is pertinent to note that M/s I Dream Production Pvt. Ltd. is a private limited company, wherein 49,999 equity shares out of 50,000 shares were held by the assessee. Further, the husband of the assessee is the main director on the board and the aforesaid company was regularly assessed to tax and was a genuine company. The aforesaid facts, as recorded in the order of the lower authorities, have not been disputed by the Revenue. Further, it cannot be denied that it is only due to the fact that M/s I Dream Production Pvt. Ltd. was a loss-making entity, the assessee was required to infuse the funds to pay off the debts incurred by the company, being the promoter holding 99.99% shares of the company. At the same time, we cannot be oblivious to the fact that the Revenue has not disputed the sale price of the shares and the identity of the purchasers is also not in doubt. Therefore, when all the parties to the transaction are genuine and the intention of the assessee in subscribing to the preferential shares of the company is also supported by the benefits derived by the company, the mere fact that the shares were sold at loss does not result in treating the entire transaction as colourable. In this regard, the following findings of the Hon'ble Gujarat High Court in ACIT vs Biraj Investment Pvt. Ltd., (2012) 210 Taxman 418 (Guj.), become relevant:-

*"17. We are not inclined to accept the Revenue's contention that this was a colourable device and that the entire arrangement was a paper arrangement. Firstly, there is no provision in the Act which would prevent the assessee from selling loss making shares. Simply because such shares were sold during the previous year when the assessee had also sold some shares at profit by itself would not mean that this is a case of colourable device or that there is a case of tax avoidance. Further, there is no restriction that such sale or transaction cannot be effected with a group company. As long as the Revenue could not doubt the sale price of the shares, it would not be open for the Revenue to contend that the assessee had shown loss which it did not really suffer. In the present case, it is not even the case of the Revenue that shares were sold at a price lower than the market rate. If that be so, the question of inflating the loss by transferring the shares to group company would not arise."*

8. Insofar as the decision of the Hon'ble Karnataka High Court in CIT vs Wipro Ltd [2014] 50 taxmann.com 421 and SMC bench of the Tribunal in DCIT vs Leading Line Merchant Traders Private Limited, [2015] 155 ITD 614 (Delhi-Trib.) relied upon by the learned Departmental Representative, during the hearing, we find that the same are factually distinguishable, as the aforesaid facts as noted above in the present case were not the basis of share transaction in those decisions.

9. Accordingly, we find no infirmity in the impugned order passed by the learned CIT(A). As a result, the grounds raised by the Revenue are dismissed.

10. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 03/04/2023

**Sd/-**  
**OM PRAKASH KANT**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 03/04/2023**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai