

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

**BEFORE SHRI B. R. BASKARAN, AM &
SHRI N. K. CHOUDHRY, JM**

आयकरअपीलसं./ I.T.A. No. 1916/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2011-12)

DCIT, Cen. Cir. 3(1), R. No. 1923, 19 th floor, Air India Building, Nariman Point, Mumbai-400 021.	बनाम/ Vs.	M/s Amrit Sales Promotion Pvt. Ltd., 20, Floor 10, 3 Navjivan Comm. Prem. Co-operative Soc., Dr. D. B. Marg, Lamington Road, Mumbai-400 008
स्थायीलेखासं./जीआइआरसं./PAN No. AACCA3220D		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Appellant by	:	Smt. Shailja Rai, Ld. DR
Respondent by	:	Shri Karan Jain, Ld. AR
Date of Hearing	:	01.05.2023
Date of Pronouncement	:	31.05.2023

आदेश / O R D E R

Per N. K. Choudhry, Judicial Member:

The Revenue Department/Appellant herein has preferred this appeal against the order dated 30.05.2022 impugned herein, passed by Ld. Commissioner of Income Tax (Appeal)-51, Mumbai {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act') for AY 2011-12.

2. In the instant case, the Assessee has declared total loss of Rs.1,14,58,226/- and book profit of Rs.34,459/- u/s. 115JB of the Act by filing its return of income on 14.09.2011 which was scrutinized and resulted into passing an assessment order dated 31st Oct 2013 u/s 143(3) of the Act, whereby the income of the Assessee was assessed at Rs. 1,01,20,842/-. Subsequently, a search and seizure action u/s. 132 of the Act was conducted on 21.08.2017 in the case of Shri Vinay Maloo, and his Group of Companies and its directors, in pursuant to which notice dated 06.12.2019 u/s 153C of the Act was issued to the Assessee. In response, the Assessee declared the total loss at Rs. 1,14,58,226/- by filing its return of income on 14th Dec. 2019.

2.1 On the basis of search and seizure operations conducted in the case of Shri Vinay Maloo and his group entities on 21st Aug 2017, some incriminating details pertaining to the Assessee were found and accordingly, assessment proceedings u/s 153C of the Act have been initiated. The AO observed that Assessee had issued Optionally Full Convertible Debentures (OFCDs) amounting to Rs. 89,11,00,000/- during the FY 2001-02 and 2002-03 to two companies namely M/s Burlington Finance Ltd. and M/s Authentic Finance Ltd. These OFCDs were subsequently

transferred to Himachal Futuristic Communications Ltd. (HFCL) Trade Investment Ltd., which later on merged with HFCL in March 2003. The said HFCL surrendered the conversion option and transferred the OFCDs to loans and advances bearing interest of 12% during A.Y. 2010-11 as the Assessee was not in position to pay the redemption value of the OFCDs. HFCL during the year under reference that is A.Y. 2011-12 assigned this loan to another concern naming M/s Sai Dwarka Finman Pvt. Ltd. (SDFPL) for a consideration of Rs. 6.0 crores. The Assessee paid an amount of Rs. 1.5 crore to M/s Sai Dwarka Finman Pvt. Ltd., who thereafter assigned the balance loan to another concern naming M/s Authentic Finance Pvt. Ltd.(AFPL) to whom the Assessee paid entire quantum of loan which was approximately Rs.117 crores in FY 2013-14 i.e. within the span of 2 years. The AO therefore doubted the transaction mainly on the following reasons:

“That HFCL being a public listed company sold a debt worth Rs. 119.60 crore to a non-deposit company viz. SDPL or consideration of Rs. 6 crore only even when the Assessee company has sufficient balance in books to repay at any rate more than 6 crores. No prudent businessman will undertake this transaction and there is no commercial rationale. It is not the fact that HFCL got any extra amount of this transaction. To a common person these transactions are bereft of economic logic. This proves that the above transaction is a sham transaction.”

“ That there is no plausible reason why HFCL could have initiated to settle a loan amount with ASPL at price higher than of Rs. 6 crores, whereas the Assessee ultimately repaid the entire quantum approximately 117 crores in next 2 years to M/s Authentic Finance Ltd. Further on perusal of assignment agreement on 12th July 2012 entered into between M/s Authentic Finance Ltd., M/s Sai Dwarka Finman Pvt. Ltd. and the Assessee wherein the receivable of AFPL from one Digital Cyber Highway Ltd. was assigned to Dwarka (SDFPL) and receivable to SDFPL from the Assessee company was assigned to Authentic Finance Ltd. . On perusal of this agreement, it is clear that the amount payable by the Assessee company to SDFPL is in the nature of loan. Also M/s Authentic Finance Pvt. Ltd. is related to group companies of Shri Vinay Maloo, one of the directors is Shri Panna Lal Maloo, therefore the amount received by the Assessee through OFCDs was repaid and was settled with its own related companies. It is ironical that a company whose debt was considered unrecoverable by a listed company paid the complete sum of Rs. 117.5615 crores in FY 2013-14 within a span of 2 years. This fact also implies that the transaction between M/s HFCL and SDFPL is sham and bogus.”

2.2 The AO by issued a notice dated 20th Dec 2019 u/s 133(6) of the Act to M/s SDFPL asked to provide certain details with regard to its genuineness, creditworthiness and identity. However in response to the said notice, no reply was received by the AO till the date of passing of the assessment order, therefore it was construed by the AO that the genuineness, creditworthiness and identity of M/s SDFPL could not be established. The Assessee has also failed to produce any person of SDFPL before the AO. In the aforesaid

circumstances, the AO by reproducing the provisions of section 68 of the Act and mentioning the following facts:-

9.8) Assessee in its reply to the notice has merely narrated the books of accounts and did not produce any business rationale.

9.9) In the instant case a sum of Rs119.60 crore is credited in to the books of account of the Assessee i.e. M/s ASPPL. The explanation offered by the Assessee about the nature and source is clearly not satisfying by any yardstick as neither the transaction is genuine nor is the party genuine. The creditworthiness of the M/s SDFPL is negligible as can be seen in the ITR produced above. The onus is on the Assessee to prove the genuineness, identity and creditworthiness.

9.10) Further as per section "nature" of the transactions has also to be explained. In the instant case the entry in to books of account of M/s ASPPL is inexplicable and beyond any commercial logic. An OFCD has been converted in to loan and sold to non descript party at negligible price.

Ultimately, held that in view of the above series of transactions, it is clear that Assessee has availed loan from 'SDFPL' which is unexplained and the Assessee failed to prove its genuineness, creditworthiness and identity. In light of the above facts, the explanation provided by the Assessee regarding "nature" and "source" of credit entry in its books of account of Rs 119,06,15,000/- is not satisfactory, therefore same should be added to the total income of the Assessee as unexplained credits in the books of account of Assessee u/s 68 of the Act.

3. The Assessee being aggrieved with the assessment order and making of the addition by the AO preferred first appeal before Ld. Commissioner and challenged the applicability of the provisions of section 68 r.w.s 153C of the Act and the addition on merit as well.

4. The Ld. Commissioner though dismissed the claim of the Assessee qua challenging the proceedings u/s 153C of the Act, however accepted the claim of the Assessee qua non-applicability of the provisions of section 68 as applied by the AO in making the addition. The Ld. Commissioner further not only thoroughly considered the factual aspect, but also analyzed the dictums laid down by the Hon'ble Apex Court, High Courts and the Tribunal before coming to the conclusion in deleting the addition made u/s 68 of the Act. The revenue department being aggrieved is in appeal before us.

5. Heard the parties and perused the material available on record. Provisions of section 68 of the Act clearly prescribes where any sum is found to be credited in the books of Assessee maintained for any previous year and the Assessee offers no explanation about the nature and source thereof. Further the explanation offered by the Assessee is not in the opinion of the AO satisfactory, then only the sum credited

may be charged to income tax as the income of the Assessee of that previous year, but not otherwise.

In this instant case, it is not the case of the department that the amount was credited in the books of the Assessee during the previous year which is relevant for the assessment year under consideration. It is an admitted fact that the Assessee had issued OFCDs during the FY 2001-02 and 2002-03 to two companies namely M/s Burlington Finance Ltd and Authentic Finance Ltd, which were subsequently, sold and transferred to HFCL Trade Investment Ltd. which also later on merged with HFCL in March 2003. The said HFCL company though exercised the redemption options as per the terms and conditions set out in the issue letter of the OFCDs, however the Assessee failed to redeem the said OFCD due to liquidity constraints , therefore in view of the understanding between the HFCL and the Assessee, the HFCL surrendered the conversion options and transferred the OFCDs to loans and advances bearing interest @ 12% per annum and subsequently on 21st March 2011 entered into an agreement with M/s SDFPL and recorded the debt in its books of accounts at Rs. 59,72,15,000/- and transferred the said debt for a consideration of Rs. 6 crores to M/s SDFPL who consequently become the creditor of the Assessee. The aforesaid fact goes

to show that this transaction was not recorded or introduced newly during the year under consideration. In fact, this was a Journal Entry and therefore, ousted the parameters of section 68 of the Act. The Journal Entry transferring the existing credit from one party to another as a case of fresh credit entry cannot be held as tenable as rightly observed by the Ld. Commissioner. We also in agreement with the Ld. Commissioner that mere General Entry which does not involve the actual receipt of funds would not fall within the ambit of section 68 of the Act and it is undisputed fact that Assessee has not received any fresh funds during the year under consideration from SDFPL and the credit entry appearing in the name of SDFPL was earlier in the name of HFCL which subsequently transferred in the name of SDFPL through a General Entry as per the agreement for which the Assessee was bound to adhere and implement. Therefore, the general entry referred to above, per say would not meet the requirement of section 68 of the Act.

The AO doubted the transaction on the ground that HFCL Company transferred the debt at a lower price at Rs. 6 crores and therefore, it is a sham transaction. In fact, there is nothing on record to suggest that Assessee has directly or indirectly received any benefit out of the said transaction held between the HFCL and SDFPL. It is a settled law that

mere suspicion cannot take place for the purpose of passing an order, in fact there must be something more suspicion in support of an assessment. The Hon'ble Apex Court in the case of **CIT vs. P. Mohankala Civil Appeal no. 2540 of 2007 dated 15.05.2007**, has clearly laid down *“that there has to be credited amount in the books of account of the Assessee and such credit has to be sum during the previous year and the Assessee offers no explanation.* In the instant case, it is a fact that neither the parties have received any cash nor paid any cash and there was no real credit of cash in the cash book, therefore the amount in question as unexplained could not arise, hence the on this count also, the provisions of section 68 is not applicable.

5.1 With regard to the claim of Ld. DR that is an undisputed fact that in the case of Tarun Goyal vs. ACIT in ITA No. 4636 and 4637/Del/2012 decided on 18.10.2013 as noted by the hon'ble Tribunal that Mr. Tarun Goyal has accepted that he was running a racket of providing accommodation entries by floating numerous companies. M/s SDFPL belongs to the group companies of Mr. Tarun Goyal and therefore, AO has rightly doubted the transactions entered into by the Assessee, HFCL and SDFPL. We are not convinced by the said claim of the Ld. DR as the transactions entered into between the Assessee and HFCL does not

pertain to the previous financial year i.e. 2010-11 relevant to assessment year under consideration, but in fact pertains to the original transactions of OFCDs took place in Ay 2002-03 and 2003-04. In FY 2010-11, the HFCL tried to redeem OFCDs, however on unsuccessful, entered into an agreement with M/s SDFPL and therefore only on the basis of statement of Mr. Tarun Goyal, the transactions under consideration cannot be held as bogus and sham until and unless the same substantiated with peculiar facts and circumstances and cogent evidence, which in the instant case that AO failed to bring on record. According to Article 265 of the Constitution of India, it is the mandate of law "no tax can be imposed or collected other than by the authority of law." In the same sense legitimate tax can be recovered from the respective person only, but not from the person who is not at all liable. In the instant case may be, SDFPL has got the benefit and therefore would have been taxed accordingly, but the Assessee cannot be held liable.

5.2 In view of above consideration and analyzations , we do not find any infirmity, perversity and/or illegality in the decision of the Ld. Commissioner in deletion of addition under consideration, hence the impugned order do not requires any interference.

6. In the result, the appeal filed by the Revenue is dismissed.

Orders pronounced in the open court on 31stMay, 2023.

Sd/-
(B. R. Baskaran)
Accountant Member

Sd/-
(N. K. Choudhry)
Judicial Member

Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
4. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai