

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'C' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.3309/Del/2018, A.Y. 2012-13

DCIT, Circle-10(1), New Delhi	Vs.	Gloxinia Infrastructure P. ltd. 296, Forest Lane, Neb Sarai, Sainik Farms, New Delhi-110068
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. Manoj Kumar, CA
Revenue by	Mr. Waseem Arshad, CIT (DR)

Date of hearing:	12.07.2023
Date of Pronouncement:	20.07.2023

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been preferred by the Revenue against the order dated 27.02.2018 passed by the Commissioner of Income Tax (Appeals)-42, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 136/17-18/ CIT (A)-42 arising out of an appeal before it against the order dated 27.02.2015 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the CIT, Circle-10(1), New Delhi (hereinafter referred as the Ld. AO).

2. The facts in brief are the assessee company is engaged in the business of development of the infrastructure and to undertake infrastructure projects and to purchase, sale develop construct, hire or otherwise acquire and deal in

all real or personal estate/ properties. As per computation of income, the assessee company has shown business loss of Rs. 18,254/- and short term capital loss of Rs. 43,50,00,000/- in regard to which the Id. AO observed that during the previous period ended 31.03.2011, the company had paid Rs. 43,50,00,000/- as upfront amount for part payment against 6,00,00,000/- warrants of Indiabulls Power Ltd. (IPL) which, if exercised, would have entitled the company to an equal number of equity shares of IPL fully paid up of the face value of Rs. 2/- each, anytime after November 30, 2010 but not later than May 29, 2012, in accordance with the terms of issue of such warrants. The Ld. AO examined the same as a short term capital loss for which the assessee submitted para no. 3.1 reproduced as below ;

“3.1 On being asked to explain the short term capital loss, the assessee vide its letter dated 16.10.2014 made following submission :-

*During the F.Y. 2010-11, Indiabulls Power Ltd. proposed to allot 6,00,00,000/- share warrant to the assessee, which upon conversion, would have entitled the assessee to acquire an equal No. of equity shares of the company of **face value of Rs.10/- each at the conversion price of Rs.29/- per share**. As a term of the offer, the assessee was required to pay Rs.7.25/- per warrant (25% of conversion price of Rs.29/-) amounting to Rs.43.50 crores as upfront at the time of allotment of share warrant and the balance was payable at the time of exercise of option i.e. within eighteen 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 November 30, 2010. Copy of the bank statement, reflecting the payment of warrant money paid and the copy of share warrant certificate is attached herewith as per annexure.*

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. vide letter

dated 18.11.2011. Consequently, the amount paid by the assessee was forfeited by IPL and same has been claimed under the head "Capital gain" as short term capital loss"

3. Ld. AO was not satisfied and considered it to be a sham exercise wherein the upfront money of Rs. 43,50,00,000/- was allowed to be forfeited to the IPL. Ld. AO found that on 29.11.2010 *M/s. Mugwort Real Estate Pvt. Ltd.* borrowed the amount and transferred this amount of Rs. 43,50,00,000/- to the assessee company which was utilized by the assessee company for making the investment in the convertible warrants of IPL. Ld. AO observed that after this investment no activity was carried out by both the companies for earning any income for moving towards stated object. Ld. AO was not satisfied with the pre-mature decision of the assessee company to not exercise its rights and suffering the loss. Ld. AO considered the transactions to be colored in nature to pass on the amount in question to *Indiabulls Power Ltd.* in disguise of the convertible warrants. Ld. AO examined the chronology of events of incorporation of the company borrowing the amount and investment for the aforesaid conclusion.

3.1 Ld. CIT(A) however, deleted the addition primarily for consideration that on 17.10.2012 reconstructing scheme of *Rattan India Power Ltd* (RIPL), which was earlier known as *M/s. Indiabulls Power Ltd. (now.)* was ordered by Hon'ble High Court and as per the terms of the scheme warrants issued by RIPL would be converted into partly paid shares of the company and the holder was liable to pay 1% of the balance amounts within 2 days from the effective date of scheme dated 27.11.2011. Ld. CIT(A) appreciated that if the assessee had to continue its right in the warrants it was required to pay additional amount of the Rs. 1.3 crore immediately. Ld. CIT(A) accepted the plea of the assessee that the market share price was Rs. 8.57 for fully paid of shares, therefore the appellant company was not in position to

sell the partly paid shares even after paying 1.30 crores. Thus, he did not sustain the findings of AO that the assessee could have earned Rs. 12,85,50,000/- by first converting shares into partly paid shares after paying sum of Rs. 1.30 crores and thereafter selling the same at the rate of Rs. 8.57 per share.

4. The Revenue is in appeal raising following grounds :-

“1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in ignoring the fact that Assessee itself has given its consent to the scheme of merger and amalgamation of five companies and later on took the excuse of scheme for surrendering Rs.43.50 crores to M/s India bulls Power Ltd.?.

2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in allowing the assessee to use colorable device to transfer the money amongst its associate/group concern by way of surrender of the partly paid up warrants and claiming the corresponding loss?

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.43,50,00,000/- ignoring the finding of the assessing officer that the share transaction with Indiabulls Power Limited (Now Rattan India Pvt Ltd) was a sham transaction and a colorable device to pass on the amount to Indiabulls Power Limited?

4. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.”

5. Heard and perused the record.

6. Ld. DR submitted that AO had given a thorough examination of the sequence of events and how artificial capital loss was created in the hands of assessee with unjust enrichment of IPL. It was submitted that Ld. CIT(A) failed to appreciate the factual findings. Ld. DR submitted that there is a

difference between forfeiture of shares and surrender. It was submitted that surrender of warrants cannot be considered to give rise to capital loss.

6.1 On the other hand, Ld. AR brought to the notice of the Bench the fact that Ld. AO had observed in para 7.1 of the assessment order that apart from the present company three other companies M/s. Azalea Infrastructure Pvt. Ltd., Jarul Infrastructure Pvt. Ltd. & Alona Infrastructure Pvt. Ltd. had invested in the same manner and suffered the losses. Relying order dated 08.01.2021 in case of *M/s. Alona Infrastructure Pvt. Ltd., ITA No. 1278/Del/2016* and the order dated 23.06.2022 in the case of *M/s Jarul Infrastructure Pvt. Ltd. ITA No. 3514/Del/2019* he submitted that the issue has been examined and the appeals of Revenue stood dismissed.

6.2 He pointed out that in the case of *M/s. Jarul Infrastructure Pvt. Ltd.* the Bench has also taken into consideration the order dated 28.01.2021 in the case of *Azalea Infrastructure Pvt. Ltd.*

7. Giving thoughtful consideration to the matter on record, the Bench is of considered view that there appears to be no force in the contention of Ld. DR that as far as the Act is concerned there is a difference between forfeiture of warrants and the surrender. The Bench is of considered view that in both the cases the effect is transfer of an interest within a meaning of Section 2(47) of the Act. This issue has been examined in the case of *M/s. Azalea Infrastructure Pvt. Ltd. (supra)* which has been relied in the case of *M/s. Jarul Infrastructure Pvt. Ltd. (supra)* and it will be relevant to reproduce para 18 as follows ;

“18. Thus, the crux of the issue for taxation in the hands of the assessee in this case is whether the forfeiture of the convertible warrant amount to a transfer within the meaning of section 2(47). The ITAT in the case of M/s Azalea Infrastructure Pvt. Ltd. (supra) has answered this by concluding as under:-

“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.”

8. Further, on merits it can be appreciated that in **M/s. Jarul Infrastructure Pvt. Ltd. (supra)**, the Co-ordinate Bench, on which one of us had considered the issue had made following relevant findings in para no.16;

“16. We have carefully considered the submissions and perused the records. We find that in this case assessee company has suffered short-term capital loss which arose out of forfeiture of share warrant money. It is not the case of the assessing officer that the legal claim of short-term capital loss arising out of forfeiture of share warrant money is not legally sustainable. Rather assessing officer in the beginning has questioned the wisdom of assessee is investing. For this he has referred to the share price movement of the investing company. Despite noting that prices were touching Rs.28, he found Rs.29 investment a wrong decision. His inference in this regard is not correct as the price movement by no stretch of imagination point out that investment was in a bogus or penny stock company. Further, it is settled law that Assessing Officer cannot sit in the shoes of businessman and decides the prudence of business decision. Thereafter

Assessing Officer has wondered why instead of getting the share warrants forfeited assessee did not sell these shares. It was informed that as per the agreement there was no clause of selling the shares. As subsequent movement in prices have duly corroborated that the share prices fell and the assessee's decision not to pay the balance amount was not at all unjustified. The prime emphasis of the assessing officer at the end is that the exercise was meant to bring capital receipt in the hands of Indiabulls Power Pvt. Ltd. and thwart examination from the perspective of section 68. This line of reasoning is wholly unsustainable. Firstly assessing officer is not at all seized with the assessment of Indiabulls Power Pvt. Ltd. as to how the capital receipt in his hand is to be examined from the perspective of section 68. Moreover, even if assessee had contributed the balance amount that would still be a capital contribution. Moreover, even for exempt capital receipt, there is no law that such credits are outside purview of section 68. Hence, Assessing Officer's surmise also is without any basis whatsoever. Moreover, the amendment in section 68 providing for examination of source of source for share application money, share capital, and share premium, or any such amount was brought in by Finance Act, 2012 w.e.f. 01.04.2013 is not applicable in this case."

9. Further, it can be appreciated from the order of Id. CIT(A) that he has prudently examined the issue from the point of fact that due to reconstructing scheme of RIPL on 17.10.2011 there was substantial change in the circumstances and there was considerable drop in the share prices after the order dated 17.10.2011. On 18.11.2011 letter conveying unwillingness to exercise share warrant of IPL was communicated. It appears that the Ld. AO had examined the transactions not with intention to consider the business prudence of investment or exit and suffering the loss but has gone into the trail of transaction to show as if assessee and other companies were conduit for passing the amount to beneficiary Indiabulls Power Ltd. through same transactions. The principles of Section 68 of the Act were brought in action by Id. AO instead of examine the business prudence of investment and exit as appreciated by Id. CIT(A).

10. Consequent to the aforesaid discussion, the Bench finds no substance in the ground raised. **The appeal of Revenue is dismissed.**

Order pronounced in the open court on 20th July, 2023.

**Sd/-
(N.K.BILLAIYA)
ACCOUNTANT MEMBER**

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Dated :20/07/2023

Binita, Sr. PS

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

Assistant Registrar,
ITAT, Delhi