आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

आयकर अपील सं**./ITA No.3056/AHD/2015**

निर्धारण वर्ष/Asstt. Year: 2012-2013

I.T.O, Ward-2(1)(3), Ahmedabad.	Vs.	Ideal Data Electronic Application Ltd., Swastik Chamber, 42-Navjeevan Press Road, Ashram Road, Ahmedabad380014. **PAN: AAACI3657A**

(Applicant)		(Respondent)

Revenue by	:	Shri Sudhendu Das, CIT.DR
Assessee by	:	Shri Bandish Soparkar, with Shri Parin Shah, ARs

सुनवाई की तारीख**/Date of Hearing : 11/01/2024**
घोषणा की तारीख **/Date of Pronouncement: 09/04/2024**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)- Ahmedabad-2, arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-2013.

2. The only issue raised by the revenue is that the learned CIT-A erred in deleting the addition made by the AO for ₹ 11,23,64,705.00 under the provisions of section 41(1) read with section 28(iv) of the Act.

3. The necessary facts are that assessee in the present case, a limited company, is engaged in the activity of software development. The assessee in the financial year 2001-02 has received a sum of Rs. 11,23,64,705 from the company namely M/s Marwar Hotels Pvt. Ltd. The assessee has classified such receipt of money as non-sundry creditors since the financial year 2003-04. As per the assessee, such advance was received against the project to be carried out but the same has not seen the light of the day. As such neither the project was carried out nor the amount was returned to the party due to financial constraints. Accordingly, the assessee treated such amount as non-current sundry creditors. The assessee also submitted that the other party has classified such advances to the assessee in its books of accounts as capital work in progress which was written off in the year 2006-07 but as per the assessee the party has not waived off its right for the recovery of the amount from the assessee. As such, the assessee has made part payment of ₹ 1 lakh dated 10 November 2014 which evidences that the liability on the part of the assessee has not ceased to exist and therefore the question of applying the provisions of section 41(1) of the Act does not arise.

4. However, the AO found that neither the project was carried out by the assessee, nor the amount was returned to the party. Likewise, the amount has been written off in the books of the party though it may be capital loss in the hands of the party but for the assessee, such advance of money represents the business advance and therefore the same should be subject to the provisions of section 41(1) of the Act. As per the AO, the part payment of ₹ 1 lakh is nothing but an afterthought. It is because such payment was made by the party once the question was raised during the assessment proceedings about such advances.

According to the AO, such amount has ceased to exist and therefore the same should be subject to the provisions of section 41(1) of the Act. The AO in support of his view has referred to various judgements which are detailed below:

CIT vs. A.V.M. Ltd [1985] 21 taxman 232 (Madras)

CIT vs. T.V Sundaram Iyengar & Sons Ltd [1996] 222 ITR 344 (SC)

Solid Containers Ltd vs. DCIT [2009] 308 ITR 417 (Bombay)

4.1 In addition to the above, the AO also found that the amount of money received by the assessee from the party was invested in acquiring the shares of the group company of M/s Marwar Hotels. Later, the assessee sold such shares to the group company of M/s Marwar Hotels at a loss. Thus, the assessee has returned the money almost in entirety to the party.

4.2 In view of the above, the AO treated the sum of ₹ 11,23,64,705.00 as the income of the assessee under the provisions of section 41(1) read with section 28(iv) of the Act and added the same to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the ld. CIT-A who deleted the addition made by the AO by observing as under:

> *2.9. Having considered the facts of the case, it is noticed that in the books of the appellant, the advances received from M / s Marwar Hotels Limited were shown as non current liability in the balance sheet. These advances were undisputedly received for carrying out the project for M / s Marwar Hotels Limited but the same could not be materíalised due to non feasibility after receipt of the advance. It is also undisputed that the appellant has not claimed any expenditure / deduction in the profits / income of the preceding years and the AO has not brought anything on record showing that it had derived any benefit by way of cash or in kind due to cessation / remission of liabilities. On making the inquiries by the AO, U / s 133(6) with MHL, the dues have been confirmed by MHL and it had retained its right to recover the dues from the appellant. M / s Marwar Hotels Limited in the reply to the notice U / s 133(6) of the I. T. Act has nowhere stated that it has relinquished its right of recovery of advances from the appellant. In fact the appellant has paid a sum of Rs.1,00,000/- against the dues on 10/11/2014 to M/s. Marwar Hotels Limited and the same has been accepted by M/s. Marwar Hotels Limited and adjusted against the dues. Merely, M/s. Marwar Hotels Limited has written off these debts in A. Y. 2007-08, would not give rise to taxability of the entire dues in the hands of the appellant in the year under consideration l.e. A. Y. 2012- 13 treating them as cessation / remission. Even M/s. Marwar Hotels Limited has although credited the written off amounts to P & L Account, but the same was added back to the income in the computation of income of A. Y. 2007-08. Thus, MHL has not claimed any deduction on account of written off of the dues in A. Y. 2007-08. This fact is verifiable from the copy of computation of income and P & L Account of M/s. Marwar Hotels Limited for A. Y. 2007-08.*

Further, no incidence has taken place in the year under consideration which could give the rise to the taxability of the dues of the income under consideration in the hands of appellant. If the logic of the AO is even considered theoretically, but not accepting then also, the dues could have been taxed in the year of written off by M/s. Marwar Hotels Limited i.e. A. Y. 2007-08, but for no reasons in the year under consideration i.e. A. Y. 2012-13 which is what the section 41(1) states. It states in clear terms that the benefit in respect of such trading liability by way of cessation shall be deemed to be profits chargeable to income tax as the income of that previous year only. Thus, both the conditions stipulated in the provisions of section 41(1) for taxing the same in the hands of the appellant do not get fulfilled. The finding of the AO for taking an adverse view that M/s. Marwar Hotels Limited has written off the said advance as non recoverable in its books of accounts, means that liability has ceased to exist and appellant has received benefit of an equal amount could not mean that the liability was ceased to exist for the reason
Ideal notice issued by AO u / s 133(6), it was clearly stated that they have not given up the legal claim to recover the advance from the appellant. Further, the repayment of Rs.1,00,000/- by the appellant to the MHL was duly acknowledged by MHL. Further, the appellant's intention to repay such dues was reflected by showing them as non current liability in the balance sheet and no benefit has been achieved out of such advance. The treatment given in the books of account of the M / s Marwar Hotels Limited has no relevance until the appellant has shown such liability as payable in its books of accounts. Thus, when M / s Marwar Hotels Limited has itself acknowledged the right to receive the advance, then there is no event of cessation of liability in this case. On the facts and material available on record, there was no event taken place during the year under consideration which discharged the appellant from its liability to pay the creditor, which means that the appellant has not been benefited in any way during the year under consideration.

2.10. Even the appellant has incurred loss under the head of capital gains on its transactions of sale of shares in the absence of any capital gains, it has not availed any set off of such loss. Thus, there is nothing on record to show that any taxes have been evaded on account of such capital losses.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

2.12 In view of the above discussion it is apparent that the cessation of the laibilites cannot be held in the year under consideration more particularly when M/s.Marwar Hotels Limited had not waived their right to realize the dues from the appellant. On the contrary through the Ideal Data Electronic Application Limited confirmation letter submitted to the AO, the liability of the appellant to M/s. Marwar Hotels Limited still stands. Moreover there is nothing on record to say that the appellant has derived any benefit in respect of such trading liability by way of remission or cessation thereof. Thus on this ground also, no disallowance was called for. Therefore, on the facts and submission of the appellant and also following the judgments of jurisdictional High Courts and other authorities as discussed above, the addition made U / s 41(1) of the I.T. Act by the A.O is not warranted, and hence, the same is deleted.

2.13. Further, the provisions of section 28 (iv) of 1. T. Act is also not applicable for the reason that the same comes into picture only when someone derives any benefit, whether convertible into money or not arising from the business. Since in appellant's case, the advances received from appellant were shown as payable in the balance sheet, and no benefit there-from has been derived by the appellant and hence, the provisions does not have any application over the same. The AO's reliance in the judgment of T. V. Sundaram lyengar is not significant as there is difference from the facts of the case, for the reason that in the quoted case, the appellant during the year under consideration had credited such income in the form of deposits from customers to the P&L Account meaning thereby that the lawful event for cessation liability had taken place during the year under consideration but no such event has taken place in appellant's case. In the cited case, although such income was offered in P & L Account, but the same was excluded from the computation of income but nothing sort of that has taken place in the case of appellant. Since there was a specific event during the year i.e. writing back such amount in P & L Account which relieved the appellant from acknowledging the said liability in future, the same was treated as income of the appellant by the Apex Court. But, in the appellant's case no such action of writing off such liability in the P & L Account for the year under consideration has taken place. On the contrary, the appellant as well as M/s. Marwar Hotels Limited has acknowledged the fact that the appellant was liable to pay such amount and was not relieved of such liability. In the case of appellant, no such event has taken place

during the year which relieved it from payment of such liability. Hence, the decision of Hon'ble Apex Court in the case of CIT Vs. T. V. Sundaram (supra) is not applicable on the facts of the case.

2.14. Even the provisions of section 28(iv) are not applicable on the facts of the present case in view of the decision of Hon'ble ITAT, Ahmedabad in the case of Anurag Chemicts Pvt. Ltd. (supra) as discussed in preceding para. The facts of the case of Anurag Chemicals Pvt. Ltd. are similar to the facts of the appellant's case. It is also worth here to mention that the case laws relied upon by the AO are on different facts, hence, the same are of no relevance to the facts of the case.

2.15. In view of the above discussion, it is apparent that the aforesaid liability was continuingly admitted by the appellant in the balance sheet and that the appellant has not obtained any benefit either by of remission or cessation of liability, thus no addition u/s. 41(1) of the I.T. Act is warranted in the case of the appellant. Even otherwise also, on the basis of written off the amount by M/s. Marwar Hotels Limited in its books of account in A. Y. 2007-08, but no deduction claimed in the total income for the year under consideration, the same cannot be added as income of the appellant for the year under consideration. There is no event taken place in the year under consideration. Therefore, the addition made by the AO is found not correct, and thus, same is deleted.

6. Being aggrieved by the order of the ld. CIT-A, the Revenue is in appeal before us.

7. The learned DR before us reiterated the findings contained in the assessment order and relied on the same.

8. On the other hand, the ld. AR before us filed a paper book running from pages 1 to 76 and other details running into from A to G, along with the case law compilation and contended that the impugned liability has not ceased to exist in the books of accounts which is also evident from the payment of ₹ 1 lakh made by the assessee. Therefore, the question of treating such liability as income under the provisions of section 41(1) of the Act cannot be addressed.

8.1 Without prejudice to the above, the ld. AR further submitted that the AO himself has given the finding that amount received by the assessee has returned to the party by acquiring the shares which is a colourable device. As per the ld. AR, if the version of the AO is believed, then it becomes evident that the assessee was not the beneficiary of the impugned transaction and therefore on this count as well the addition cannot be made. The ld. AR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessee has received an advance of ₹ 11,23,64,705.00 against the project but the same has not seen light of the day and at the same time, the amount received by the assessee was not returned to the party. Thus, the issue arises whether the assessee has used colourable device in the transaction of the impugned projects against which the advance of ₹ 11,23,64,705 has been shown. Before we deal with the issue as discussed above, it is pertinent to note that as per the AO the advances received by the assessee from the party have been returned almost in entirety to the same group. To this effect, the relevant finding of the AO is extracted below:

> *3.8 Another interesting feature of the assessee's transaction is that the assessee has made investment of Rs.9,28,78,500/- in the shares of group companies of Marwar Hotels Ltd. in the F.Y. 2001-02 relevant to A.Y. 2002-03. Again in the F.Y. 2002-03 relevant to A.Y. 2003-04 the assessee further invested an amount of Rs. 1,61,19,105/- in the shares of group companies of Marwar Hotels Ltd. During the F.Y. 2005-06 relevant to A.Y. 2006-07 the assessee stated to have incurred a loss of Rs.(-)10,32,06,696/- on sale of its shares of 10623050. The assessee has not given any working of loss of Rs. (-) 10,32,06,696/- incurred on sale of shares in the statement of income for A.Y. 2006-07. The assessee is claiming such c/f. capital loss from year to year. The assessee again in the A.Y. 2009-10 shown a long term capital loss of Rs. (-) 54,46,623/- from sale of shares of group companies of Marwar Hotels Ltd. aggregating the total loss of Rs. (-) 10,86,53,319/-. Again during the P.Y. relevant to A.Y. 2010-11 the assessee sold another lot of shares resulting into loss of Rs. (-) 2,38,87,943/-. In this way, the assessee has repaid more or less the same amount of Rs. 11,23,64,705/- received from Marwar Hotels Ltd. (as trade advance for certain project Lun of chares of group companies of Marwar Hotels Ltd.*

9.1 From the above finding of the AO, it is transpired that even we assume that the assessee has adopted a colourable device for the transaction discussed above, but the question arises whether the assessee is the beneficiary of such a transaction. The answer stands in negative. It is because whatever amount received by the assessee as advance has gone back to the same party. In other words, the assessee did not enjoy the money that it has received as advance. Therefore, the assessee cannot be alleged to have derived any benefit out of such transaction as admitted by the AO himself in the assessment order. At this juncture, it is equally important to note that as per the AO the assessee on the sale of shares of the group company of the party has incurred losses but there is

no discussion in the body of the assessment order whether such loss was admitted by the revenue. Accordingly, we stay away from this issue as the same does not arise from the order of the AO. Thus, we hold that even the colourable device adopted by the assessee in the transactions discussed above, the assessee at the most can be alleged in such transaction is one of the conduits and not the party who allegedly derived benefit. Hence, no addition can be made in the hands of the assessee on the reasoning of colourable device as alleged by the AO.

9.2 Moving further, the next controversy arises whether the assessee is subject to the addition of such an advance in the manner provided under section 41(1) of the Act. In this regard, we note that the AO himself in his has order has recorded that the assessee has made investment in the shares of M/s Marwar Group which is a capital transaction in the hands of the assessee. Accordingly, we are of the view that such a transaction cannot be made subject to the addition under section 41(1) of the Act. Hence, the ground of appeal of the Revenue is hereby dismissed.

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

Order pronounced in the Court on 09/04/2024 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 09/04/2024

Manish