आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री संजय गर्ग, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI SANJAY GARG, JM

आयकर अपील सं./I.T.A. No. 3596/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2008-09)

Panna S. Khatau Laxmi Building, 6, S. V. Marg, Mumbai-400 001	**बनाम**/ Vs.	ITO-2(3)(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADPK 4246 R		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Paresh Shaparia
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Jeetendra Kumar

सुनवाई की तारीख / **Date of Hearing**	:	06.04.2015
घोषणा की तारीख / **Date of Pronouncement**	:	03.07.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-6, Mumbai ('CIT(A)' for short) dated 30.03.2012, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 18.11.2010.

2. The principal issue, agitated per Ground I, arising in the instant appeal, is the maintainability or otherwise in law of the addition in the sum of Rs.28,09,953/-,

representing the net increase in the assessee's capital during the year on account of write back as well as write off of some old credits and debits appearing in her accounts.

3. The brief facts of the case are that the assessee's accounts, on verification of her return for the year, were observed to reflect a net increase of Rs.28,09,953/-, being the difference between the amount of sundry creditors written back and of sundry debtors written off, at Rs.30,42,500/- and Rs.2,32,547/- respectively, to her capital account. The assessee claimed the same to be unsecured loans, received some 15 years ago, furnishing their break up as under:

Sr. No.	Name	Amount (Rs.)
1	Diseto Tools Company	6,06,000
2	Balkishan & Son	1,95,000
3	Vinod Corporation	80,000
4	Manisha Trading Company	1,00,000
5	Desai Corporation	1,00,000
6	Kinner Textile	95,000
7	Samir Trading Company	1,00,000
8	Shantilal Lalchand & Sons	1,71,500
9	V. Navbheram & Company	1,95,000
10	N Vasantrai & Company	1,00,000
11	Dhanji Shivaji Bhanushali	1,50,000
12	Dhanji Bhaga Patel	2,50,000
13	Pravin Shivaji Furia (HUF)	1,50,000
14	Onida Enterprises	1,75,000
15	Manji Ladha Patel	1,25,000
16	Harilal Kuvarji Gala	1,50,000
17	Bombay Textile	3,00,000
	Total	30,42,500

The assessee being unable to substantiate her claim, furnishing no more than the names of the parties, nor even not the reason for the write back, the same was treated as income from other sources, i.e., under the residuary head of income. In appeal, it was pleaded that the parties being not traceable, confirmations from them could not be obtained. In view of the ld. CIT(A), upon considering the Assessing Officer's (A.O.) report and the assessee's comments thereon, the ratio of the decision in the case of *CIT v.*

T.V. Sundram Iyengar [1996] 222 ITR 344 (SC) was squarely applicable. The amounts were clearly not loans. No interest was ever paid on the amounts, which were consistently shown in accounts as 'amounts payable'. The amount being credited to the capital account for the current year clearly represented a receipt for that year, attracting section 56(2)(vi), as none of the excepted payers, as listed at clauses (a) to (g) thereof, were applicable. The addition being confirmed thus, the assessee is in second appeal.

4. Before us, the assessee's principal contention was that neither section 41(1) nor, consequently, section 59(1) would apply. The impugned sums had not been claimed or allowed in the assessment for any preceding year, and neither did she have any trading relations with the creditors. The question of the application of these provisions, therefore, did not arise. There is as such also no scope for the application of the decision in the case of *T.V. Sundram Iyengar* (supra). Similarly, the amounts having been received years ago; rather, about 15 years ago, section 56(2)(vi) also could not be invoked.

The Revenue's stand, on the other hand, is that the amounts have not been shown to be received on capital account, i.e., in the first instance. Further, the credit to the assessee's capital account being during the current year, the impugned sum can only be considered as having been received during that year. The provision of section 56(2) shall, therefore, apply. Reliance stands placed by it on the decision in the cases of *CIT vs. P. Mohanakala* [2007] 291 ITR 278 (SC) and *Major Metals Ltd. vs. Union of India* (in WP No. 397 of 2011 dated 22.02.2012, since reported at [2013] 359 ITR 450 (Bom)).

5. We have heard the parties, and perused the material on record, giving our careful consideration to the matter. We are, for the reasons that follow, of the considered opinion that the impugned sum is liable to be considered as the assessee's income for the current year.

Income – Concept & Scope

5.1 Income, inclusively defined u/s. 2(24) of the Act, is a term of widest amplitude, which would include any sum in the nature of income, i.e., which corresponds with and

answers the common notion of the said term (also refer para 5.4). Case law in the matter is legion (refer: *CIT vs. G. R. Karthikeyan* [1993] 201 ITR 886 (SC); *Emil Webber vs. CIT* [1993] 200 ITR 483 (SC) (also refer para 7). True, capital receipts are excepted. The reason is, again, simple. Income, by definition, is always conceived in terms of accretion to capital. When, therefore, what is received stands established as capital, there is no question of it being considered as accretion thereto and, hence, as income. *However, here again there are exceptions, which are essentially rules of evidence, coming into play where the receipt or the credit is not established as a capital receipt*. Accordingly, section 68 deems any credit, nature and source of which is not satisfactorily explained, as income for the year of such credit. The same does not violate the principle or breach the scope of the term 'income', but mandates a statutory presumption of it representing the assessee's income, where its nature and source is not satisfactorily explained, even where the credit is to the account of another, or not on revenue account; the receipt being itself an evidence of income. Where, therefore, the genuineness of a 'loan' or 'gift', both forms of capital transfers, is not satisfactorily proved, the same is liable to deemed as income, the second aspect of which relates to the year for which it is to be brought to tax. The Revenue is, in such a case, under no obligation to locate the exact source of credit (*A. Govindarajulu Mudaliar vs. CIT* [1958] 34 ITR 807 (SC); *CIT vs. M. Ganapathi Mudaliar* [1964] 53 ITR 623 (SC); *CIT vs. Devi Prasad Vishwanath* [1969] 72 ITR 194 (SC)).

In *A. Govindarajulu Mudaliar vs. CIT* [1958] 34 ITR 807 (SC), it was explained by the apex court that whether the receipt is to be treated as income or not must depend very largely on the facts and circumstances of the case. Further, where an assessee fails to prove satisfactorily the source and nature of an amount credited in its accounts, the A.O. was entitled to draw an inference that the receipt is of an assessable nature. In *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC), the hon'ble apex court, after referring to its earlier decisions in *Sreelekha Banerjee vs. CIT* [1963] 49 ITR 112 (SC); *Parimisetti Seetharamamma vs. CIT* [1965] 57 ITR 532 (SC); *CIT vs. Durga Prasad More* [1971] 82

ITR 540 (SC); and *CIT vs. Orissa Corporation P. Ltd.* [1986] 159 ITR 78 (SC), held as under:

> 'In all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within the exemption provided by the Act lies upon the assessee. *But in view of section 68 of the Income-tax Act, 1961*, where any sum is found credited in the books of the assessee for any previous year it may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut the said evidence, it can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably (see pp. 804H. 805A – C).)'
>
> [emphasis, ours]

The decision in the case of *Orissa Corporation P. Ltd.* (supra) was also referred to by the hon'ble jurisdictional high court in *Major Metals Ltd.* (supra) (at pgs. 447 - 478) to emphasize that the doubtful nature of the transaction and the manner in which the sums were found credited in the books of account maintained by the assessee are to be duly taken into consideration by the Revenue authorities. Reference was also made by it to the decision in the case of *Vijay Kumar Talwar vs. CIT* [2011] 330 ITR 1 (SC) (at pg. 478 of the reports) to reiterate the same principle, i.e., that in the absence of a satisfactory explanation, as where the assessee does not produce any evidence about the nature and source of the credit rebutting the presumption of section 68, the same would hold, attracting charge to income tax. In *P. Mohanakala* (supra), to which again reference stands made by the hon'ble court (at pg. 447 of the reports), the apex court clarified that the expression 'the assessee offers no explanation' occurring in section 68 means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by it. Further, the satisfaction, or as the case may be, non-satisfaction of the A.O. is required to be formed objectively with reference to the material available on record, signifying an application of mind, which is the *sine qua non*

forming the opinion. *In our clear view, this is the case of no explanation being offered by the assessee*.

Vide sections 56(2)(v) to (vii), provisions recently introduced, provide for receipt without consideration from an unrelated party, except otherwise than in any specified condition, is statutorily presumed to bear the character of income. The same is the second exception to the rule of a capital receipt being not considered as income under the Act and, in that sense, is again a rule of evidence, i.e., as s. 68, etc. The provision/s is harsh on genuine transfers, legislated in view of the propagation and proliferation of 'gifts' from unrelated parties. *The same, however, is without prejudice to the generality of section 56(1)*. It would, therefore, be of little consequence even if section 56(2)(vi), the specific provision covering the period under reference, i.e., f.y. 2007-08, is considered as inapplicable in the facts of the case. In fact, section 56(2)(viib), inserted by Finance Act, 2012, duly incorporated in section 2(24) defining income, provides for treating the share premium in excess of the fair market value of the share as income. The apex court in *T.V. Sundram Iyengar* (supra) opined in favour of the write back of trade advances as income, *de hors* the provision of section 56(2), applying the concept of income, consistent with section 2(24), in the facts of the case. The efflux of time, coupled with the write back, so that it was no longer payable, it opined, was sufficient to signify a qualitative change in the nature of the sum as one of receipt of business. The finding of it representing a trade surplus (and, therefore, assessable u/s.28), in view of the trading relationship between the parties, is, though relevant, secondary, in the larger context of the ratio/import of the decision. It may not be of much import in-as-much as it would only alter or impact the head of income under which the income stands to be assessed. The issue before us is not *qua* the head of income under which the impugned sum would stand to be assessed; it not being even the Revenue's case that the same is business income, assessing it as 'income from other sources' u/s. 56, but as to the nature of the receipt, i.e., if it at all is, or represents, the assessee's income.

5.2 During hearing, the ld. counsel was specifically questioned by the Bench that even assuming, without admitting though, the sums under reference to be, as contended, received by way of unsecured loans, i.e., in the absence of confirmations to that effect, how would it assist the assessee's case in-as-much as these are admittedly no longer loans, i.e., do not represent the assessee's liability as at the year-end, that being the rationale or the *raison de'tre* for their write back as equity. Unless and until, therefore, the assessee shows them to be 'gifts', transmitting the property in the impugned sums to the assessee, establishing genuineness thereof, section 68 would apply. In fact, that these are not gifts is patent from the fact that the remitters (donors) are not traceable. In *Major Metals Ltd.* (supra), the hon'ble court found the conversion of the loans into share application money, including the extent of premium at which the shares were allotted, i.e., at Rs.990/- per share of a face value of Rs.10/-, as a valid basis for enquiry by the Settlement Commission into the genuineness of the loan/share application money.

Continuing further, section 68 would hold even if the impugned sums represent, as contended by the Revenue, the assessee's liabilities, assumed in the past, on whatever count. The same no longer representing a liability, there is admittedly a qualitative change therein – its nature transforming from a liability (for goods, services, whatever - which could itself vary over different persons, and remains unspecified) to the assessee's own money, as signified by the credit to her capital account, which is a fresh credit/s during the year. Both sections 68 and 56(2)(vi) would apply. *Qua* the latter, the sum of money may have been received earlier, but there is a constructive receipt during the year in-as-much as it is received on own account, while the earlier 'receipt' was that by way of incurring a liability for value received (in kind) or even if in the form of money, only for being paid back and, as such, not without consideration. The second receipt, however, is without consideration. Section 68 shall also, as afore-referred, apply in-as-much as there is fresh credit/s in the assessee's books in the form of credit/s to the capital account. In our view, the particular section is not of much significance considering the amount to be no longer a liability, but accretion the capital during the year, so that even section 56(1)

shall hold, quite in the same vein as the hon'ble apex court found the write back to be assessable u/s.28 as business income in the case of *T.V. Sundram Iyengar* (supra).

5.3 The non-application of section 41(1), or as the case may be, section 59(1), which would apply only where the Revenue has discharged the onus of showing the impugned sums to have been allowed deduction in the assessment for any earlier year, is absent in the instant case. This, however, would be of little moment.

Conclusion

5.4 We, for the reasons afore-stated, confirm the assessment of the impugned sum as income, which would, in the absence of the establishment of the cause of remission or cessation of liability, fall to be assessed under Chapter IV-F under the head 'income from other sources' u/s. 56. We have, while discussing the taxability, also made abundant reference to section 68. The assessee's own accounts reflect the impugned sums as 'amounts payable', from year to year, for the past several years. Her stand of the sum/s as representing a liability was accepted. She now states, through the write back of the same, to be no longer so, without any explanation. It is nobody's case that these were not actual, but fictitious liabilities. Again, there has admittedly been no transaction in these accounts for the last 15 years or so. The amount stands credited in the books to her capital account. The same is a credit, separate and distinct from that made earlier, i.e., on the receipt of money or, as the case may be, incurring of the liability in relation to the payable/s. The ingredients of section 68 are satisfied. One may argue that the Revenue has not invoked the said provision. That, to our mind, is of little consequence. As long as the assessing authority has a requisite power for a particular act, invocation of a wrong section is not material (refer: *L. Hazari Mal Kuthiala vs. ITO* [1961] 41 ITR 12 (SC)). In fact, as we have seen, it is even not a case of wrong section in-as-much as the other sections are equally applicable. The purview of the Tribunal is to decide the matters in accordance with the law. It is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matte (refer: *CIT v. C. Parakh & Co. (India) Ltd*.

(1956) 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* (1971) 82 ITR 363 (SC)). Again, we are not advocating that the credit should be construed as income only on the basis of the rules of evidence, i.e., *de hors* the common notion of income. When an amount, which is stated, claimed and accepted as a payable, is no longer so, the assessee gains to that extent. There is nothing unreal or notional about this gain. It can show that, even so, the same is not chargeable as income or no tax liability is attracted in-as-much as the benefit is not in the nature of income. The assessee offers no such explanation. What is admitted though is that there has been remission/cessation of liability in-as-much as these are no longer payable. Why? No reason is advanced. It is under these circumstances that the law permits the A.O. to draw an adverse inference of it as representing the assessee's income. As regards the year, there can again be little doubt in the matter. The impugned credit/s, which we have found as a fresh credit/s, is during the current year. The liability was accepted as genuine for and up to the immediately preceding year, while it is no longer payable as at the year-end. The taxable event, in terms of gain, thus, has taken place during the year, even if one considers the passing of the journal entry, recording so, on a particular (single) date in the books, to be a matter of convenience only. It is for these reasons that we find the impugned credit as corresponding and answering to the concept of income under section 2(24) and, further, as standing to fall to be assessed u/ss. 56(1) and 56(2), finding strong support in the decision in the case of *T.V. Sundram Iyengar* (supra).

6. The subject matter of Ground II is an addition in the sum of Rs.3,03,424/-, being the write back, as stated, of earlier year expenses, to the assessee's capital account for the year. The amount being not offered as income per the return, the same was brought to tax as income from other sources u/s. 56(1), in view of the non-substantiation of her stand by the assessee. In the appellate proceedings, it was again reiterated that the write back was on account of erroneous entries made by the appellant in her books for the earlier years, and the impugned entry was only by way of a rectification entry, not leading to any income, much less chargeable to tax. The matter was subject to a remand report by the

A.O., who endorsed his earlier view, stating the assessee to be entitled to an income in the impugned sum towards godown rent, *qua* which there was no dispute. The ld. CIT(A) confirmed the addition in view of the assessee having failed to clarify her claim with reference to the entries passed in her accounts. Aggrieved, the assessee's is in appeal.

7. We have heard the parties, and perused the material on record.

We are clearly unable to appreciate the Revenue's stance. The assessee clearly states of neither owning any godown nor of, consequently, any godown rent being payable to her by Khatau Makanji Spg. and Wvg. Co. Ltd. (KMSWL) or any other, which was in fact payable by the said company to a third party. The payment (Rs.1,51,712/-) was, however, made on its behalf by one, Kedar Kiran Investment Pvt. Ltd. KMSWL, however, instead of crediting the latter in its accounts, credited the assessee's account on account of rent. The assessee, as it stated, responded by debiting KMSWL while crediting the payer-company, even as no entry was required to be passed in her books. Again, as explained during hearing, instead of passing a reversal entry, by mistake the same entry was repeated, resulting in a fictitious credit of Rs.3,03,424/- (Rs.1,51,712/- x 2) in her accounts. It is this that was sought to be neutralized by the write back thereof in its accounts to the capital account. True, all that was therefore required for the assessee was to show that it had passed the relevant wrong entries in its accounts for the earlier years, resulting in a debit to her capital account at Rs.3.03 lacs, which stood reversed by the write back of a fictitious credit. Again, clearly, the explanation of the impugned sum as representing a write back of earlier year's expenses is not a correct statement.

So, however, and nevertheless, the impugned entry would not result in income accruing to the assessee in-as-much as no net accretion to the capital has been shown, the onus for which is on the Revenue. No taxable event has taken place in the current year, as well as, as it appears, in the past. A reversal of a wrong entry, having no income or expense implication, cannot, by any stretch of imagination, result in income. Book entries do not create income but merely recognize it. In fact, even the Act does not define

'income' conclusively, but only in terms in which it ordinarily manifests itself. The Revenue has wholly failed to discharge the onus on it to show that any income has either arisen or stood received by the assessee during the year, which could only be by showing that the credit written back, stated to be fictitious by the assessee, was actually not so but represented an actual liability of the assessee, so that she has actually gained to that extent. There is also no case of the assessee owning a godown and being entitled to rent in its respect or for ground-rent *qua* the same, for the current or even an earlier year. It is for these reasons that we stated at the beginning of our discussion of our finding no appeal or merit in the Revenue's case. We decide accordingly, directing the deletion of the impugned sum.

8. In the result, the assessee's appeal is partly allowed.
परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on July 03, 2015

Sd/-	Sd/-
(Sanjay Garg)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 03.07.2015
व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

//True copy// **आदेशानुसार/** BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**