IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 4566/MUM/2013
Assessment Year: 2001-02

ACIT-2(3)(2), Jt. CIT-(OSD)-2(3)(1), Room No. 552, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	Safari Mercantile Pvt. Ltd., Now Vahanvati Conlt. Pvt. Ltd. 2, Cressent Chambers, Tamarind Lane, Fort Mumbai-400023
		PAN No. AAACS6043C
Appellant		**Respondent**

Revenue by : Shri R. Manjunatha Swamy, CIT-DR
Assessee by: Dr. K. Shivaram, Senior Advocate

Date of Hearing : 28/09/2020
Date of pronouncement : 07/10/2020

ORDER

PER N.K. PRADHAN, A.M

This is an appeal filed by the Revenue. The relevant assessment year is 2001-02. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-6, Mumbai and arises out of the assessment completed u/s 254of the Income Tax Act 1961, (The 'Act').

2. The grounds of appeal filed by the Revenue read as under: -

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)has erred in relying on the finding of the predecessor with regard to transfer of 3,50,000/- shares and quoting it in para-5.2 of the order without appreciating the detailed discussion made by the AO in the order giving effect to the order of the Hon'ble tribunal.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred granting relief to the assessee with regard to transfer of 3,50,000/- shares overlooking the fact that definition of transfer in section 2(47) is an inclusive definition and the AO had correctly formed an opinion regarding transfer of shares after detailed enquiries.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in granting relief to the assessee with regard to transfer of 1,50,000/- shares relying on the fact that the group companies had disclosed sale consideration and offered for taxation without appreciating the fact that the assessee company is also liable for payment of taxes on such transfer as it amounts to sale and resale.
4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in granting relief to the assessee with regard to transfer of 1,50,000/- shares overlooking the fact that the AO had correctly formed an opinion transfer of shares after detailed enquires.
5. For, these and other grounds that may be urged at the time of hearing, the decision of the Ld. CIT(A) may be set aside and that of the AO restored.

3. Briefly stated, the facts of the case are that the assessee (now merged with Vahanvati Consultant Pvt. Ltd.) is an investment company belonging to the Global Telesystems Ltd. (GTL). In this case, the regular assessment was completed by the AO u/s 143(3) on 30.03.2004 determining the total income at Rs.240,84,19,450/- as against the gross total income of Rs.74,18,37,910/-

shown by the assessee. The business of the assessee during the year under consideration was investment in stocks and shares. The assessee had 31,34,000 of GTL shares as on 31.03.2000 as opening balance. During the year the assessee had sold its 5,94,100 shares on which capital gains was offered to tax. Further, during the year, the Classic Credit Ltd. (CCL) had requested the assessee *vide* letter dated 19.10.2000 to advance 5,00,000 shares as a loan. CCL had stated that it would return on 04.11.2000. However, the same was not returned to the assessee. It is seen that Leesha Investment Pvt. Ltd. (LIPL) had 2,62,500/- of GTL shares as on 31.03.2000 as opening balance. Also Global Credit Corporation Pvt. Ltd. (GCCPL) had 3,08,780 of GTL shares as on 31.03.2000 as opening balance. On 01.12.2000, LIPL sold their 75,000 shares of GTL and GCCPL sold their 75,000 shares of GTL @ Rs.1000/- per share (75,000 shares each company) through NH Securities Ltd. resulting in sale consideration of Rs.15 crores (Rs.7.5 crores each company). On the same date i.e. 01.12.2000 the assessee wrote a letter to CCL and requested to adjust delivery of 1,50,000 shares against the loan shares 5,00,000. On 15.03.2001, LIPL and on 20.03.2001 GCCPL delivered 1,50,000 shares of GTL to assessee. It is found that the assessee received its part loan i.e. 1,50,000 shares through adjustment against sale of shares. However, balance outstanding loan of 3,50,000 shares was not returned by CCL despite several request of the assessee. During the original assessment proceedings, the AO treated whole transaction of 5,00,000 shares of GTL as Long Term Capital Gains (LTCG). In respect of 1,50,000 shares, the AO held that it was sold by the assessee and computed capital gains at Rs.12,07,50,000/- and shares of 3,50,000 never received by the assessee and thus treated the same as sale consideration and

computed capital gains at Rs.35,23,75,000/-. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) accepted the contention of the assessee and deleted the addition of Rs.35,23,75,000/- in respect of 3,50,000 shares ; in respect of 1,50,000 shares, the Ld. CIT(A) confirmed the addition made by the AO treating the same as a sale consideration. Against the order of the Ld. CIT(A), the assessee filed an appeal before the Tribunal on the issue of 1,50,000 shares whereas the Revenue filed an appeal on deletion of 3,50,000 shares. Before the Tribunal, the assessee filed an additional evidence in the form of confirmation letter dated 20.04.2004 from CCL. The Tribunal *vide* order dated 30.06.2009 held as under :

> "30. At the time of hearing before us, the assessee has moved an application U/R 29 of the ITAT Rules, 1963 seeking admission of the additional evidence in the form of letter dtd. 20.04.2004 issued by CCL confirming the transactions involving giving of 5 lacs shares by the assessee company of GTL on loan and adjustment of 1,50,000 shares out of the same against sale made by two group companies. As stated in the said application, the assessee company was neither informed by the A.O. about the non-service of summons on CCL nor was it specifically called upon by him to file the latest confirmation from the said party. It is submitted that no opportunity thus was given by the A.O. to the assessee in this regard to file the confirmation of CCL before completing the assessment and despite this factual position, the confirmation letter obtained by the assessee company from CCL and produced before the id. CIT (A) in the form of additional evidence has not been considered by him while deciding this issue. Keeping in view these submissions made by the assessee, we are of the view that the additional evidence filed by the assessee in the form of confirmation letter issued by CCL which is vital to decide the issue under consideration can appropriately be admitted. The Id. D.R. has not raised any material objection in this

regard. He, however, has contended that if the additional evidence is admitted by the Tribunal, an opportunity may be given to A.O. to examine/verify the same. We find merit in this contention of the Id. D. R. Moreover, as submitted by the Id. Counsel for the assessee, 1,50,000 shares adjusted by CCL against sale of shares by two group companies as per request made by the assessee company have been subsequently received back by the assessee company from the said two group companies. The observation of the Id. CIT(A) that the said shares no longer remained with the assessee company may not be correct since the assessee company, as claimed by the Id. Counsel for the assessee still holds these 1,50,000 shares. He has also pointed out from the copies of relevant assessment orders that the capital gain arising from sale of these 1,50,000 shares has already been offered and taxed in the hands of the said two group companies. If it is so, the addition of the same amount on account of capital gain arising from the same 1,50,000 shares as made in the hands of the assessee company would amount to double addition which is not permissible. In our opinion, all these factual aspects of the matter also require verification and since the same has not been done either by the A.O. or by the Id. CIT (A), it would be fair and proper and in the interest of justice to restore this issue to the file of A.O. for further examination. Accordingly, we set aside the impugned order of Id. CIT(A) on this issue and restore the matter to the file of A.O. for deciding the same afresh after taking into consideration the additional evidence filed by the assessee and after verifying the submissions made on behalf of the assessee as narrated above. Needless to observe that the A.O. shall afford proper and sufficient opportunity to the assessee of being heard. The appeal of the Revenue on Ground No. 2 and the appeal of the assessee are accordingly treated as allowed for statistical purposes."

In the order u/s 143(3) r.w.s. 254 of the Act dated 24.12.2010, the AO restricted the addition of Rs.47,31,25,000/- in the following manner :

		Amount (Rs.)	
	Total Income as per order dated 11.03.2005		77,94,93,430/-
Add:	Long Term Capital Gains on sale of 500000 shares of GTL lent to Classic	47,31,25,000/-	
Less:	Long Term Capital Gains upheld by CIT(A)	12,07,50,000/-	35,23,75,000/-
	Revised Total income		**113,18,68,430/-**

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that vide order dated 01.03.2013, the Ld. CIT(A) observed that (i) the AO's action in his order u/s 254 dated 24.10.2012 to restore the addition made in the original assessment order is based on contradictions in his findings at para 10 where he says that Classic could not be traced and at para 11, the AO mentions that it is difficult to accept that there were no transfer from the assessee to Classic and further not examining the additional evidence admitted by the ITAT, (ii) the CIT(A) *vide* order dated 10.12.2004 has decided that the identity of Classic is established and further held with respect to 3,50,000 shares that there is no evidence on record to show that the debt is created in favour of the assessee or right to receive payment has been acquired by the assessee and taxing capital gain on notional income is not permissible under the law and that the computation of capital gain with respect to 3,50,000 shares are not valid, (iii) so far as the balance of 1,50,000 shares are concerned, the two group companies sold those shares to Classic and payments of Rs.15 crores were received not by the assessee but by the two group companies and the said amount has been considered for computation of income of two group companies, (iv) there is evidence of return of 1,50,000 shares through the two group companies and in view of the fact that the amount of Rs.15 crores on transfer of 1,50,000 shares has already

been included in the income of the group company and double addition in the hands of the assessee is not valid and (v) information was received from the Investigation Department Unit-IX(1) that the assessee received Rs. 75 crores in settlement of 5,94,000 equity shares of Global Trading System Ltd. in August 2000, as mentioned in the assessment order u/s 143(3) dated 30.03.2004 and the assessee declared total income of Rs.74.18 crores in the return of income filed on 31.10.2001.

With the above observations, the Ld. CIT(A) found that there is no information that any amount has been received by the assessee with respect to 5,00,000 shares and therefore, the action of the AO to treat the loan transaction as sales transactions is not valid.

5. Before us, the Ld. Departmental Representative (DR) submits that the assessee has failed to file before the AO the copies of delivery instructions for giving the said 5,00,000 shares. Further, it is mentioned by him that the assessee failed to explain before the AO why the shares belonging to it, purportedly lent to Classic were to be adjusted against the sale of shares made by GCC and Leesha. Also it is stated by the Ld. DR that the assessee failed to file copies of demat account of GCL and Leesha before the AO. Thus it is stated by him that the order passed by the Ld. CIT(A) be set aside and the one passed by the AO be restored.

6. On the other hand, the Ld. counsel for the assessee submits that in the second round of assessment, the assessee had filed before the AO the details as per letter dated 28.06.2010 along with copies of broker notes (N.H. Securities) and Demat Statement. Relying on those documents, it is stated by

him that (i) the assessee had advanced 5,00,000 shares of GTL by way of loan *vide* letter dated 19.10.2000, (ii) shares sold by GCC and Leesha have been shown as income in their respective assessment, which has been accepted and therefore, assessing the capital gain in the hands of the assessee and in the hands of the other two concerns will lead to double taxation, (iii) 1,50,000 shares are with the assessee ; hence, cannot be assessed as capital gains, (iv) remaining 3,50,000 shares which were lent to CCL were never received back, nor any consideration was received.

Relying on the decision in the case of *CIT v. Mrs. Hemal Raju Shete* (2016) 239 Taxman 176 (Bom) (HC), it is argued that capital gain can be assessed only if consideration is received and in the present case, as the assessee has not received any consideration, capital gains cannot be assessed. Also reliance is placed by him on the decision in *CIT v. Texspin Engg. & Mfg. Works* (2003) 263 ITR 345 (Bom) (HC) and *CIT v. Reliance Communication Infrastructure Ltd.* (2012) 254 CTR 251 (Bom) (HC).

Thus stating that the details as called for by the AO were furnished during the course of assessment proceedings, the Ld. counsel submits that the order passed by the CIT(A) be affirmed.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As mentioned earlier, the assessee had advanced 5,00,000 shares of GTL by way of loan *vide* letter dated 19.10.2000. We find that 1,50,000 shares are with the assessee and hence cannot be assessed as capital gains ; remaining

3,50,000 shares which were lent to CCL were never received back, nor any consideration was received.

A perusal of the documents clearly indicates that CCL vide letter dated 19.10.2000 requested the assessee to advance 5,00,000 shares as loan. On 01.12.2000, the assessee wrote a letter to CCL, requesting to adjust delivery of 1,50,000 shares against the loan shares 5,00,000. The assessee filed a copy of the confirmation letter dated 20.04.2004 from CCL before the AO. Also the assessee filed before the AO letter dated 28.06.2010 along with copies of broker notes (N.H. Securities) and Demat statement. Also it is found that for remaining 3,50,000 shares, the assessee filed before the AO subsequent year balance sheet wherein 3,50,000 shares are reflected in the 'Investment Schedule'.

In *Reliance Communication Infrastructure Ltd*. (supra), the Hon'ble Bombay High Court has held that where there was no transfer of shares but only a pledge of shares for purposes of obtaining a loan and revenue has not disputed the fact of return of loan and also receipt of pledged shares creditor, no capital gain could be charged.

In *Mrs. Hemal Raju Shete* (supra), it is held by the Hon'ble Bombay High Court that only income that was actually received or accrued to the assessee, upon sale of shares had to be taxed and not any contingent deferred income. In that case, the respondent-assessee filed her return of income for the assessment year 2006-07 declaring total income of Rs.11.68 lakhs. The respondent-assessee had also shown long term capital gain of Rs.42.39 lakhs arising out of the sale of 75,000 shares of a company Unisol to RKHS in terms

of agreement dated 25-1-2006. The Assessing Officer on perusal of above agreement was of the view that under the agreement, the respondent-assessee as well as other co-owners of Unisol were to receive in aggregate a sum of Rs.20 crores and proceeded to tax entire amount of Rs.20 crores in the subject assessment year in the hands of all co-owners of shares.This resulted in the respondent-assessee being taxed on her share of capital gains at Rs.4.48 crores after availing exemption under section 54EC. In the result the Assessing Officer by order dated 30-12- 2008 assessed the respondent to an income of Rs.4.60 crores. On appeal, the Commissioner (Appeals) deleted the addition of Rs.4.48 crores made by the Assessing Officer on the ground that it is notional. On further appeal, the Tribunal upheld the findings of the Commissioner (Appeals) *inter alia* holding that as there is no certainty of receiving any amount as deferred consideration, the bringing to tax the maximum amount of Rs. 20 crores provided as a cap on the consideration in the agreement dated 25-1- 2006 is not tenable. Tribunal further held that what amount has to be brought to tax is the amount which has been received and/or accrued to the respondent-assessee and not any notional or hypothetical income as the revenue is seeking to tax the respondent-assessee in the subject assessment year 2006-07. On appeal by the Revenue, Their Lordships held as under:

> "8. In the present case, from the reading of the above clauses of the agreement the deferred consideration is payable over a period of four years i.e. 2006-07, 2007-08, 2008-09 and 2009-10. Further the formula prescribed in the agreement itself makes it clear that the deferred consideration to be received by the respondent-assessee in the four years would be dependent upon the profits made by M/s. Unisol in each of the years. Thus in case M/s. Unisol does not make net profit in terms of the formula

for the year under consideration for payment of deferred consideration then no amount would be payable to the respondent-assessee as deferred consideration. The consideration of Rs.20 crores is not an assured consideration to be received by the Shete family. It is only the maximum that could be received. Therefore it is not a case where any consideration out of Rs.20 crores or part thereof (after reducing Rs.2.70 crores) has been received or has accrued to the respondent- assessee As observed by the Apex Court in Morvi Industries Ltd. v. CIT [1971] 82 ITR 835. 'The income can be said to accrue when it becomes due.... The moment the income accrues, the assessee gets vested right to claim that amount, even though not immediately.' In fact the application of formula in the agreement dated 25th January, 2006 itself makes the amount which is receivable as deferred consideration contingent upon the profits of M/s.Unisol and not an ascertained amount. Thus in the subject assessment year no right to claim any particular amount gets vested in the hands of the respondent-assessee. Therefore, entire amount of Rs.20 crores which is sought to be taxed by the Assessing Officer is not the amount which has accrued to the respondent-assessee. The test of accrual is whether there is a right to receive the amount though later and such right is legally enforceable. In fact as observed by the Supreme Court in E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27 'It is clear therefore that income may accrue to an assesee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro …. …. ….'. In this case all the co-owners of the shares of M/s. Unisol have no right in the subject assessment year to receive Rs.20 crores but that is the maximum which could be received by them. This amount which could be received as deferred consideration is dependent/contingent upon certain uncertain events, therefore, it cannot be said to have accrued to the respondent-assessee. The Tribunal in the impugned order has correctly held that what has to be taxed is the amount received or accrued and not any notional or

hypothetical income. As observed by the Apex Court in CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 'Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which liability to tax is attracted, viz., the accrual of its income or its receipt; but the substance of the matter is income, if income does not result, there cannot be a tax, even though in book-keeping an entry is made about a hypothetical income, which does not materialize.' In this case Rs.20 crores cap in the agreement is not income in the subject assessment year. It has been observed by the Apex Court in the case of K.P. Varghese v. ITO [1981] 131 ITR 597/7 Taxman 13 that one has to read capital gain provision along with computation provision and the starting point of the computation is 'the full value of the consideration received or accruing'. In this case the amount of Rs.20 crores is neither received nor it has accrued to the respondent-assessee during the subject assessment year. We are informed that for the subsequent assessment year (save Assessment Year 2007-08 for which there is no deferred consideration on application of formula), the Assessee has offered to tax the amounts which have been received on the application of formula provided in the agreement dated 25th January, 2006 pertaining to the transfer of shares."

In view of the above factual scenario and position of law, we affirm the order of the Ld. CIT(A).

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

Order pronounced through notice board under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 07/10/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai