

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "F" BENCH: NEW DELHI**

**BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

**ITA No.8218/Del/2019
Assessment Year : 2015-16**

WGF Financial Services Pvt.Ltd., A-48, FF, Sec-2, Noida, Uttar Pradesh-201301. PAN-AAACW0228P	Vs	ACIT, Central Circle-27(2), New Delhi.
APPELLANT		RESPONDENT
Appellant by	Sh.Vinod Bindal, Adv.	
Respondent by	Smt. Sushma Singh, CIT DR	
Date of Hearing	09.02.2021	
Date of Pronouncement	10.02.2021	

ORDER

PER N.K.BILLAIYA, A.M:

This appeal by the assessee preferred against the order of CIT(A)-9, New Delhi dated 30.08.2019 pertaining to Assessment Year 2015-16.

2. The grievance of the assessee leads to the following additions confirmed by the CIT(A):-

- (i) Addition of Rs.27,38,96,372/- as the taxable long term capital gain;
- (ii) Addition of Rs.27,76,90,000/- on the amount returned;

(iii) Addition of Rs.28,60,000/- towards the amount spent on various legal matters.

3. Representatives of both the sides was heard at length. Case records carefully perused and with the assistance of the Ld. Counsel, we have carefully considered the documentary evidences brought on record in the form of Paper Books in the light of Rule 18(6) of the ITAT Rules.

4. The appellant under consideration was engaged in the business of financing and investing and it also trades in shares and commodities though not on regular basis. The business of financing and investing included lending/advancing money standing guarantor. Return of income was electronically filed on 29.09.2015 and the same was revised electronically on 29.03.2017. The originally declared loss of Rs.43.61 Lakhs was revised to a loss of Rs.27.43 crores.

5. The return was selected for scrutiny assessment under CASS and accordingly, statutory notices were issued and served upon the assessee.

6. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that in the original return of income, the assessee has declared capital gains which was subsequently withdrawn in the revised return of income. The assessee was asked to explain its action. The assessee replied as under:-

4.1. *“The assessee has mortgaged its plots of land of Village Chhatapur, New Delhi in the year 2009 with Indiabulls Financial Services Ltd. (IBFSL) as Guarantor to secure the loans given by IBFSL to the assessee’s associated concerns. Since the borrowers could not repay the loan, the mortgaged property through the assessee and recovered the loan.*

The surplus of Rs.27,45,97,098/- on sale of said mortgaged property over its cost was erroneously declared as taxable receipt and the original return of income vide acknowledgement no.830056811290915 filed on 29.09.2015 and adjusted against the business loss suffered during the year.

However, the surplus on sale of the plots of land mortgaged to the lender is not at all taxable in the hands of the assessee to receiver the debts of the loanees where the same consideration was taken to recover the loan by the lender and no money was received by the assessee for its benefit or use in view of the judgement of Kerala High Court in the case of CIT vs Thressiamma Abraham (1997) 227 ITR 802 and Addl. CIT Spl. Range-26, New Delhi vs Glad Investments (P) Ltd. (2006) ITD 227 (Delhi).”

7. The reply of the assessee did not find any favour of the Assessing Officer who was of the firm belief that the assessee was the owner of the land title and freely possessed the land at the time of sale and the land was sold in the market and the sale consideration has been received by the assessee in its bank accounts and, therefore, the sale consideration confirms the receipt of the assessee. The Assessing Officer was of the opinion that since the plot of land was sold in the open market, it does not mean to foreclosure or action of the property by the lender under distress. According to the Assessing Officer, the assessee was free to apply the capital gains/sale consideration for any purpose.

8. The Assessing Officer firmly believed that the key differentiating factor in diversion of income is that income in that source is charged with an over-riding title which diverts the income. Referring to various judicial decisions, the Assessing Officer finally came into the conclusion that the amount of long term capital gain is earned by the assessee and accordingly, made the addition of Rs.27,38,96,372/- which was confirmed by the First Appellate Authority.

9. There is no dispute that the lenders were making pressure on the assessee to honor its guarantee taken by it for the repayment of loan by the borrower. Since the borrower defaulted in repaying the loan taken from Indiabulls Financial Services Ltd. (in short “IBFSL”), the assessee was asked to sell the mortgaged property.

10. Defending the order of the lower authorities, the Ld. DR drew our attention to the Sale Deed dated 13.04.2015 and pointed out that under Clauses (i) & (k), it has been clearly mentioned that the vendor is the sole lawful and absolute owner and in peaceful physical possession of the entire land and the vendor further stated that the said land is free from all encumbrances, mortgaged charges etc. It is the say of the Ld.DR that since the Sale Deed itself mentioned that there was no mortgage, therefore, it cannot be said that the sale was forced sale.

11. But, we find that under Clause (j) of the same Deed, it has been specially mentioned that the vendor had created first charge/equitable mortgage on the said entire land in favour of the IBFSL by Mortgage Deed dated 06.03.2012 and the Mortgage Deed was registered with the

Office of Registrar of Companies of Delhi and Haryana and the said land had been redeemed in favour of the vendor on 10.04.2015.

12. Further, we find that as per the payment schedule mentioned in the said Deed at page 7, we find that Rs.3 crores was received upto 09.04.2015 and on payment of Rs.3 crores to IBFSL, the mortgage was released on 10.04.2015. We further find that on 10.04.2015, Rs1.5 Crores were received and on 11.04.2015, Rs.1.44 crores were received.

13. We have carefully perused the decision relied by the assessee and the Ld. DR. It is true that the decisions relied upon by the Ld. DR have been duly considered by the Tribunal of Delhi Bench in the case of *Addl.CIT vs Glad Investments Pvt. Ltd.* (supra). In both the cases relied upon by the assessee, the assessee acted as guarantor and since the borrower could not repay the money, the lender sold the mortgaged/pledged property and sale consideration was received by the lender and adjusted against satisfaction of debt. A perusal of the judicial decisions shows that there is a big difference between the decisions relied upon by the ld. counsel for the assessee and the facts of the case in hand. In all the decisions relied upon by the assessee, the mortgaged property was sold directly by the lender who received

the sale consideration, whereas in the case of the assessee, sale deeds were executed by the assessee and the sale consideration was received by the assessee and thereafter, the assessee paid the consideration to the lender to discharge its liabilities.

14. After carefully perusing the decisions relied upon by the assessee, in our considered opinion, the factors to be considered for deciding as to whether the surplus of sale of mortgaged property is taxable or not and whether it was a forced sale of mortgaged property to pay to the lender or the sale was at free will and whether any benefit actually accrued/received by the assessee.

15. A careful consideration of the facts on record show that the appellant company received the entire sale consideration and it cannot be said that it was a forced sale due to the pressure mounted by IBFSL. It may be possible that the plot of lands were sold under the vigil and direction of IBFSL but the fact remains that the entire sale consideration was realized by the appellant and thereafter the sale consideration was taken by IBFSL in discharge of its loan.

16. It may be possible that the buyer desired the transfer of title from the owner to avoid any litigation with the owner in future and therefore, IBFSL, after receiving Rs. 3 crores, released the mortgage in favour of the assessee, thus, facilitating the assessee to sell the land with clear title. We are of the view that the income did accrue to the assessee and it cannot be said that the assessee sold the said plots of land involuntarily as forced sale. Considering the facts of the case relating to sale of mortgaged property, we do not find any force in the claim of the assessee. Ground No. 1 is accordingly, dismissed.

17. Facts relating to the grievance related to Ground No.2 show that the assessee had given guarantees to the lender on behalf of the borrowers as giving guarantee is one of the business objects of the assessee and for which guarantee commission is charged. Seven borrower companies had taken loans from IBFSL and IBFSL required the guarantor to secure its loan. Accordingly, the Commitment Agreement was made on 18.11.2009 which is placed at pages 127 to 131 of the Paper Book wherein the appellant company inter-alia with other three companies became guarantors by mortgaging their respective plots of land in favour of IBFSL. The borrower companies agreed to pay Rs.20 crores as commission in lieu of the guarantee and if the guarantee is

invoked by the lender, then the borrowers were to pay additional Rs.20 crores as damages for the hardship the assessee would bear. Subsequently, the borrower companies committed defaults and the assessee company (guarantor) had to repay the loan amounts. Since the borrower companies owned shares of listed companies which were placed with IBFSL as securities, the borrower companies informed the assessee that once the outstanding liability repaid to IBFSL and as and when the shares held as security are released by IBFSL, the shares of the amount equal to the amount paid by the assessee as guarantor would be given to the assessee. Since the shares were sold by the lender company to recover its debts, therefore, borrower companies could not get their shares back and could not transfer the shares to the assessee.

18. Subsequently, a Memorandum of settlement dated 16.03.2015 was entered as per which an amount of Rs.36.50 crores was accepted as full and final settlement against Rs.64,26,92,000/- recoverable from Carissa Investment Private Ltd. (in short "CIPL") by the assessee. This settlement Deed is placed at pages 465 to 468 of the Paper Book and accordingly, the assessee wrote off the balance loan amount aggregating to Rs.27,76,92,000/-.

19. The Assessing Officer was of the firm belief that the appellant has not fulfilled the conditions of section 36(2) of the Act as the assessee has not received any guarantee commission from CIPL.

20. CIPL has paid donation of Rs.10 crores and earned Revenue of Rs.15 crores, therefore, it cannot be said that CIPL was not financially sound to repay the loan taken from the assessee. The Assessing Officer went on to make addition of Rs.27,76,90,000/- which was subsequently confirmed by the First Appellate Authority.

21. As mentioned elsewhere, the assessee is engaged in the business of financing which included lending, advancing money, standing guarantor etc. and in its ordinary course of business, the assessee gave guarantee to the borrowings made by CIPL. As per the Agreement, CIPL was supposed to transfer shares held by it in the listed companies after repayment of its loan from IBFSL. Since IBFSL sold the shares held by it as security, CIPL was not in a position to transfer the shares to the assessee. CIPL was in debt to the assessee to the tune of Rs.64.26 crores and since CIPL defaulted in its obligation, the assessee had to settle the quarrel by way of Memorandum Deed dated 16.03.2015 and could recover only Rs.36.50 crores. The assessee was left with no choice but to write off the balance Rs.27,76,92,000/-.

22. In our considered view, the entire transaction cannot be considered as the colorable device as the same was never entered with any intent to defraud the Revenue. We find that all the transactions were undertaken with third parties through bank accounts or registered Mortgage Deeds etc. in the regular course of business and were duly recorded in the books of accounts. Nothing could be managed as the transactions were spread over a period of five years.

23. Due to mayhem in the stock market in the year 2008, the stocks of the listed companies nose-dived and the borrowers suffered huge losses, nothing was recoverable from them and there was no point in filing legal suit. It is true that no guarantee commission has been received by the assessee from CIPL but CIPL was not in a position to make any payment to the assessee. It is true that CIPL made certain donations but that cannot be considered against the assessee as the assessee could not be held responsible for the business module of CIPL. The assessee could recover only Rs.36.50 crores out of Rs.64.26 crores, the balance written off may not fulfill the condition of section 36(2) of the Act but definitely a business loss suffered by the assessee in carrying out its ordinary course of business. Considering the facts of the case in totality, the write off of Rs.27,76,92,000/- is definitely a business loss and deserve to be allowed. We accordingly direct the

Assessing Officer to delete the addition of Rs.27,76,92,000/-, Ground No.2 is accordingly allowed.

24. Facts relating to Ground No.3 show that the assessee has claimed Rs.35.80 Lakhs as payment made for legal professional charges, the details of said payment is as under:-

- a) *Rs.30,000/- paid to Mr. Arush Khanna*
- b) *Rs.27,50,000/- paid to M/s PKA Advocates*
- c) *Rs.5,50,000/- paid to Mr. Kapil Sibal*
- d) *Rs. 2,50,000/- paid to Mr. Shyam Divan*

25. On perusal of the bill show that some of the payments do not relate to the professional services received by the assessee but other members of the group companies. Since no bifurcation has been provided by the assessee, it is very difficult to decide how much of the charges paid pertain to the professional services received by the assessee company. The CIT(A) found that 75% of the expenses must have been incurred on other group companies and accordingly, sustained the addition of Rs.28.60 lakhs.

26. Before us also, the Counsel was not in a position to furnish the details. For the lack of evidences, we decline to interfere with the findings of the CIT(A), Ground No.3 of the assessee is dismissed.

27. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 10.03.2021.

Sd/-

**(KULDIP SINGH)
JUDICIAL MEMBER**

sd/-

**(N.K.BILLAIYA)
ACCOUNTANT MEMBER**

Dated:- 10.03.2021

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**

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