IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH MUMBAI

BEFORE: SHRI MAHAVIR SINGH, VICE PRESIDENT
&

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.559/Mum/2017
(**Assessment Year :2012-13**)

M/s. Crescent Payments Pvt. Ltd., 306, 3rd Floor, Sigma IT Park Rabale, Navi Mumbai Maharashtra- 400 701	Vs.	Dy. Commissioner of Income Tax, Circle-6(1)(1) Mumbai
PAN/GIR No. AAICA5293L		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Faran Khan
Revenue by	Ms. Shreekala Pardeshi
Date of Hearing	**16/06/2021**
Date of Pronouncement	**30/08/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.559/Mum/2017 for A.Y.2012-13 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-12, Mumbai in appeal No.CIT(A)-12/ACIT-6(2)(2)/217/15-16 dated 03/11/2016 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/03/2015 by the ld. Dy. Commissioner of Income Tax, Circle 6(1)(1), Mumbai (hereinafter referred to as ld. AO).

2. The only issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in upholding the action of the ld. AO in treating the money received by the assessee for issue of shares but the shares could not be issued due to contravention of FEMA guidelines and accordingly, treated as gift by the assessee company, in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. The assessee company was registered originally in the name of M/s. Alertpay Solutions Pvt. Ltd., on 20/04/2010. Later the name of the company was changed to M/s Crescent Payments Pvt. Ltd., w.e.f. 29/01/2014. The assessee company is engaged in the business of Information Technology Enabled Services (ITES). The return of income for the A.Y.2012-13 was filed by the assessee electronically on 29/09/2010 declaring loss of Rs.65,86,782/- under normal provisions of the Act and book profit of Rs.64,69,719/- u/s.115JB of the Act. During the course of scrutiny proceedings, the ld. AO observed that as per the information available in Note-3 to balance sheet – "reserves and surplus", an amount of Rs.3,46,33,388/- was shown as monies received as remittance from M/s. Alertpay, Canada without any instruction and hence, treated as gift received. The ld. AO sought to examine the veracity of the said receipt and sought explanation from the assessee company as to why the said receipt of gift be not treated as income of the assessee. A show-cause letter was also sent by the ld. AO to the assessee asking various details connected with the receipt of monies from M/s. Alertpay, Canada and its utilisation thereon. The ld. AO finally show-caused the assessee also to explain as to why the said receipt of amount credited to reserves and surplus be not treated as income of the assessee company in terms of Section 28(iv) r.w.s. 2(24)(ix) of the Act.

3.1. In response thereto, the assessee explained that M/s. Alertpay Solutions Pvt. Ltd., (i.e. assessee company) was formed on 20/04/2010 by two brothers i.e. Mr. Yusuf Patel and Mr. Zoheb Patel. Their elder brother Mr. Feroz Patel, resident of Canada, is successfully running a company in Canada by the name of M/s. Alertpay Inc. Canada and also assisted them by sending the capital requirement from Canadian company towards issue of shares in favour of Canadian company but the Indian promoters missed the deadline of complaince with the requirements on issue of shares within the period of six months as provided under Foreign Exchange Management Act (FEMA). Later, the assessee company approached FEMA consultant for solution and was advised that under the given circumstances, Reserve Bank of India (RBI) will ask the Indian company to send back the money received by it or alternatively the said receipt could be treated as gift by Canadian company to Indian company in case the remitter intends to let the money be in Indian company without being repatriated back, which was agreed by Mr. Feroz Patel. It was further pointed out by the assessee company that there was no business connection between Alertpay Inc, Canada and the assessee company. It was also stated that the money received was used for purchasing the capital assets and was never used for any revenue purposes by the assessee company. Accordingly, the assessee objected to invocation of provisions of Section 28(iv) r.w.s 2(24)(ix) of the Act in the instant case. The assessee also dealt with the case laws sought to be relied upon by the ld. AO by stating that they are factually distinguishable.

3.2. The ld. AO however, did not heed to the contentions of the assessee and observed that assessee's contention that it has no business relations with Alertpay Inc. Canada is not correct, since Alertpay Canada

is a holding company of the assessee company. The ld. AO further observed that the utilisation of funds either for capital or for revenue purposes will not change the character of the receipt, as long as the said money is not received in the shape of share capital. The ld. AO also observed that the assessee itself admitted that in order to circumvent regulations of one statute i.e. FEMA, it has treated the receipt of amount as gift. With these observations, the ld. AO sought to treat the receipt of amount of Rs.3,46,33,388/- as taxable income in the hands of the assessee.

4. The ld. CIT(A) upheld the action of the ld. AO by observing as under:-

> *6.2 I have carefully perused the assessment order and the submission of the appellant. It is seen that the main argument of the appellant is that it is this receipt is gift. The appellant claimed that Shri Feroz Patel, elder brother of Yusuf Patel & Zoheb Patel introduced his share capital but the appellant could not issue shares within 6 months from the date receipt of share application money which is as per requirements of FEMA hence without taking of RBI order to repatriate back the money it was treated as gift from Feroz Patel specially because he was ready to relinquish his right on shares of the appellant company by treating it as non repatriable.*
>
> *Further, it is seen from the schedule 3 of the balance sheet that the auditor noted that 'company received remittances from Alertpay Canada without any instruction hence treated as gift'. The appellant has also put forth the same argument at the time of assessment proceedings. Now the appellant has submitted that the elder brother brought his share capital and the appellant has failed to issue share and elder brother has relinquished his right. This appears to be the new story to bring on record that the amount is received so as to claim it as a capital receipt. At the time of receiving such payment the appellant itself stated that the appellant received remittances from Alterpay Canada without any instruction then it is strange as to why the appellant stated that it was share capital from his brother. If the so called amount is received from brother then why it is very strange as to why the amount is remitted from the Alterpay, Canada.*
>
> *The appellant during the appellate proceedings has not submitted any evidence to show that it was indeed a gift such as gift deed. If the gift is received from a company of Canada then the Memorandum or Article of Association of the company can prove that the company can give the gift. But instead a new theory is put forth by the appellant that Shri Feroz Patel introduced his share capital and the appellant has not issued shares within six months. ... In view of*

this fact, this amount received from the Alterpay Inc. Canada cannot be treated as gift. Further, the appellant has not established with evidence that the remittance was from Shri Feroz Patel, was against the share application money and therefore cannot be held as capital receipt on account of share capital or forfeiture of such shares. The appellant relied on various case laws which are found to be distinguishable from the instant case. The Hon'ble Supreme Court in the case of G S Homes & Hotels P Ltd has given the ruling on the facts of that case that the share capital from various shareholders ought not to be treated as business income. But, in the instant case the amount claimed as received as gift from the Alterpay Inc. Subsequently, the appellant's claim that it was share capital from Shri Feroz Patel without any evidence is not acceptable. Secondly, the appellant has relied on the decision of Hon'ble Mumbai ITAT in the case of Graviss Hospitality Ltd. On perusal of the said decision, it is seen that it was with respect to the forfeited share application money but this is not the case here, in this case the appellant's original claim is of gift and not the forfeiture of share application money of Shri Feroz Patel.

In my opinion, the appellant, first proved that its claim made in the return that it was a gift. But, in the instant case the appellant first stated that it was remittance from the Alterpay Inc Canada without any instruction and subsequently claimed that it was share application from Shri Feroz Patel and he relinquished its right. Hence/ it is not possible to understand as to actually what happened. Who made the remittance and for what purpose. If the shares were allotted to Shri Feroz Patel then for what reason the amount was remitted through the Alterpay Inc. Canada and as to why the appellant has not made such an argument before AO. Therefore, in absence of correct facts, I find force in the addition of the AO. Hence, the addition made by the AO is confirmed.
Therefore, ground Nos. 1 & 2 of the appeal is dismissed."

5. We find at the outset, that the receipt of monies by the assessee company originally was only towards share capital and for the purpose of allotment of shares to the Canadian Company. This intention of the assessee company was not doubted by the revenue at any point in time. It is a fact that the assessee company failed to comply with the FEMA regulations by not allotting shares within 6 months from the date of receipt of money towards share capital. Pursuant to this failure, as advised by the FEMA consultant, the assessee had two choices – (i) to refund the monies back to the Canadian Company or (ii) to treat the receipt as gift provided the Canadian Company agrees to the same. The assessee company chose the mixture of both first and the second option.

Accordingly, the assessee company made a request through email dated 7.9.2011 to Alertpay, Quebec making a request to refund Rs 75,00,000/- equivalent to 156000 Canadian Dollars and required the opinion of Alertpay, Quebec upon the balance monies which cannot be returned as the same was already utilised for purchase and development of business premises. Hence the remaining sum of Rs 3,46,33,388/- was allowed to be treated as gift received by the assessee company from the Canadian Company, pursuant to Board Resolution dated 21.9.2011 passed from the side of Alertpay, Quebec . In the said Board Resolution dated 21.9.2011, there is a specific direction from Alertpay Quebec to assessee company to treat the remaining sums of 773000 Canadian Dollars equivalent to Rs 3,46,33,388/- as gift. Accordingly, the assessee company vide its Board Resolution dated 23.9.2011 had sought to treat the receipt of 773000 Canadian Dollars equivalent to Rs 3,46,33,388/- as gift in its books of accounts by directly crediting the same to 'Reserves and Surplus'. We find that the ld AR also placed on record the Memorandum of Association (MOA) of Alertpay Quebec to prove the fact that the Alertpay Quebec is entitled to pay gift.

5.1. We find that the ld AO had stated that the assessee company had received this gift from its Holding Company. In this regard, it was specifically clarified by the ld AR that at the time of receipt of monies, Alertpay Quebec was not the holding company of the assessee company. We further find from the perusal of the Board Resolution dated 21.9.2011 of Alertpay Quebec, that the Canadian Company would send fresh money transfer of 153000 Canadian Dollars to the assessee company for purchasing the shares of the assessee company. Obviously this event happened after the receipt of original gift amount of Rs 3,46,33,388/-. Only pursuant to this acquisition of shares by investing 153000 Canadian

Dollars, the assessee company became the subsidiary company of Alertpay Quebec and not before that. Hence it could be safely concluded that at the time of receipt of monies originally in the sum of Rs 3,46,33,388/- , which was treated as gift by the assessee company for reasons stated hereinabove, Alertpay Quebec was not the Holding Company of assessee company. Hence we hold that the observation made by the ld AO in this regard is factually incorrect.

5.2. Hence in this factual matrix, we have to examine the applicability of provisions of section 28(iv) read with section 2(24)(ix) of the Act. Incidentally the applicability of provisions of section 56 of the Act should also be examined as it was vehemently argued by the ld DR. At the outset, we find that originally the monies were received from Mr Feroz Patel, staying in Canada, as his share of capital in the assessee company. It is not in dispute that Mr Feroz Patel is the brother of Mr Yusuf Patel and Mr Zoheb Patel (promoters of the assessee company). Since shares could not be issued to Mr Feroz Patel by the assessee company within the prescribed time as mandated under FEMA regulations, with the consent of Mr Feroz Patel, the monies originally received was sought to be treated as gift in the sum of Rs 3,46,33,388/-. Thereafter, Mr Feroz Patel made further remittance through Alertpay Inc. Canada, for the purpose of holding shares in the assessee company, pursuant to which, Alertpay Inc. Canada became the holding company of the assessee company. Hence it could be safely concluded that there was no malafide intention on the part of Mr Feroz Patel to manipulate the character of receipt as in any case, Mr Feroz Patel could have given direct gift to his brothers , which would be exempt from tax in their hands under the Act. Thereafter Mr Yusuf Patel and Mr Zoheb Patel could have reinvested the same towards share capital in the assessee company. We find that the lower

authorities had taken advantage of the fact that the assessee had admitted violating FEMA regulations and thereby the receipt of monies constitute income of the assessee. We hold that merely because there was violation of FEMA regulations by not allotting shares within 6 months from the date of receipt of monies towards share capital, it cannot automatically become the income of the assessee company. There is no such mandate provided in the law to treat the said receipt as income in these circumstances. With regard to applicability of provisions of section 56 of the Act, we find that section 56(1) of the Act speaks about "income of every kind which is not to be excluded from the total income under this Act shall be chargeable to tax under the head 'income from other sources'". Hence the nature of receipt should at first place be income chargeable to tax within the meaning of section 2(24) of the Act. If the said receipt is not at all chargeable to tax under any of the heads specified in section 14 Chapter IV A to IV E of the Act, then the said receipt cannot be chargeable to tax in terms of section 56(1) of the Act. In the instant case, the amounts have been received by the assessee company which is not covered by the provisions of section 56(2)(vii) of the Act. We find that the provisions of section 56(2)(viia) of the Act applies only to receipt of shares by a firm or company without consideration or for inadequate consideration. In the instant case, the assessee company had only received monies. Hence the said provisions are also not applicable in the instant case. We find that the provisions of section 56(2)(viib) of the Act are applicable only for consideration for issue of shares received by a company from any person who is a resident. Admittedly, the monies have been received in the instant case by the assessee company from a non-resident. Hence the provisions of section 56(2)(viib) of the Act are also not applicable in the instant case. With regard to applicability of provisions of section 28(iv) of the Act,

admittedly, the monies were not received by the assessee company in the ordinary course of its business. For the applicability of provisions of section 28(iv) of the Act, the following conditions should be satisfied :-

(i) the assessee company should have carried on any business during the previous year;

(ii) There should be a benefit arising to the assessee company;

(iii) Such benefit must be one arising from the business carried on by the assessee company ; and

(iv) Such benefit, if any, must be revenue in character i.e must be of income in nature.

5.2.1. We find that the aforesaid conditions are not satisfied in the instant case. We further find that the *Hon'ble Gujarat High Court in the case of Chetnaben B Seth reported in 203 ITR 24(Guj)* had held that amount received by an assessee partner of a firm towards valuation of Goodwill and assets of a firm at the time of retirement from the firm does not attract the provisions of section 28(iv) of the Act, since the same cannot be perquisite arising from the business and that even otherwise it would not partake the character of income. Hence the provisions of section 28(iv) of the Act cannot be made applicable to the facts of the instant case. Moreover, we also find that the *Hon'ble Supreme Court in the case of G.S.Homes & Hotels (P) Ltd vs DCIT reported in 242 Taxman 58 (SC)* had categorically held that the amount received on account of share capital ought not to be treated as business income. It is not in dispute that the amounts originally received by the assessee company from the non-resident was only for issuance of share capital. Since the same was not implemented by the assessee company within the prescribed time, the assessee company as instructed by the concerned remitter from

abroad, had chosen to treat the said receipt as gift and accordingly had directly credited the same to 'reserves and surplus' in the balance sheet.

5.3. We also find that the *Hon'ble Jurisdictional High Court in the case of Nerka Chemicals (P) Ltd vs Union of India reported in 371 ITR 280 (Bom)* , which has been vehemently relied by the ld AR at the time of hearing, had observed as under:-

FACTS

- *The assessee was a wholly owned subsidiary of DHPL and all the shares of DHPL were held by Shroff group.*
- *For purpose of restructuring the group organization, certain equity shares in companies UPL and UEL transferred to assessee by Shroff group without any monetary consideration. The assessee treated said transaction as gift and same being capital receipt claimed to be not taxable.*
- *The Assessing Officer taxed under the head 'Income from other sources', a sum representing the market value of shares of UPL and UEL in hands of assessee holding that said transaction was transfer and not by way of gift and thereafter, he sought to tax same under section 25(iv).*
- *The assessee filed an appeal before Commissioner (Appeals) against the said assessment order.*
- *In the meantime, the Assessing Officer served a notice of demand.*
- *The assessee filed appeal against the said assessment order.*
- *The Commissioner (Appeals) after hearing the assessee disposed of the stay application and directed the assessee to pay 25 per cent of the demand in four equal monthly instalments and directed for the stay on the recovery of the balance amount.*
- *On writ, the assessee prayed to set aside the order of Commissioner (Appeals).*

HELD

- *The Assessing Officer in the assessment order held that the transfer agreement is purely in the nature of 'transfer' as it does not mention the word 'gift'. He rejected the contention that the transfer of the shares was by way of gift as the agreement is titled as 'Transfer Agreement'. He observed that if it had been a gift 'it would have been a gift deed'. [Para 5]*
- *The assessee has more than just a strong prima facie case in this regard. The title given to a document is not determinative of its true character. The purport of the document must be ascertained on a consideration of the contents thereof. The respondents do not deny that no consideration in the terms of money or moneys worth was paid by the assessee to the transferors. [Para 6]*
- *The Assessing Officer further observed that the consideration for transferring the shares was basically for creation of a better business environment by way of*

maximizing focus in various business areas and to align the group companies' organizational activities undertaken with growth aspirations. This per se was a 'consideration' and the transaction could not be termed as a 'gift'. The transaction was a kind of 'window dressing' for avoidance of capital gains tax at a future date for the reason that as and when the assessee sells these shares, the transaction will not be taxable as the shares are of listed companies. [Para 7]

- *Here again, there is no cogent explanation as to what exactly the consideration was and assuming that there was any consideration, whether it is the transferor or the transferee who is liable to be taxed in respect thereof. [Para 8]*
- *It is conceded that no monetary consideration flowed to the assessee. The AO therefore, came to the conclusion that the transaction is liable to be taxed under section 56(1). Without prejudice to the above, the AO held that in any event, the transaction is liable to be taxed under section 28(iv).*
- *There are serious issues to be considered in this regard. The shares that were transferred belonged to the Shroff group. These shares have been transferred to the assessee, which also belongs to the Shroff group. Prima facie at least therefore, the control and influence qua such shares remains with the Shroff group. Prima facie again, assuming it is a benefit for the assessee, it is not a benefit from the assessee's business. Consolidation of shares in a single entity by a group is not unknown. [Para 10]*
- *The above only indicates that there are serious issues to be tried which is one of the relevant factors while considering an application for stay. There are other two factors of crucial importance, one legal and the other practical, to grant the stay albeit on certain conditions. [Para 11]*
- *The the assessee case is supported by an order of the Tribunal in the case of D.P. World (P.) Ltd. v. Dy. CIT [2013] 140 ITD 694/[2012] 26 taxmann.com 163 (Mum. - Trib.). The transaction involved a transfer of the shares which entitled the holder of the shares to the said flats. The Tribunal had held that simply because both the donor and the donee happened to belong to the same group cannot ipso facto establish that they have any business dealings and it is a case of a valid gift which is to be treated as capital receipt in the hands of the assessee, in the absence of any specific provision taxing a Gift as a deemed business income, provisions of section 28(iv) cannot be applied on the facts of the case. In view of the judgment of the Tribunal, the assessee has more than just a strong prima facie case for a stay.*
- *Prior to the transfer of the said shares the assessee held 1.59 per cent and 1.44 per cent of the equity shares of UPL & UEL respectively. After the transfer the assessee holds 21.35 per cent and 47.88 percent of the equity shares in UPL & UEL. A refusal to grant a stay would in all probability entail a sale of the said shares to meet the demand. Upon a sale of the shares, the Shroff group would loose a substantial benefit of such a large shareholding in both the companies. The Shroff group always held the shares. They transferred the shares to the assessee only for administrative convenience. If the assessee succeeds, ultimately the damage caused by the sale of the shares would be irreversible. They would loose the benefit of a large shareholding in both the listed companies permanently and irreversibly. Thus, if the stay is not granted, the assessee will suffer irreparable harm and injury. On the other hand, the conditions upon which we the stay will be granted will protect the revenue. The balance of convenience is also therefore, in favour of the assessee. [Para 14]*

- *Balance of convenience and the question of irreparable injury are relevant factors while considering an application for stay even in proceedings under the Income-tax Act. [Para 15]*
- *This would be by restraining the assessee from parting with possession of, selling, disposing of or in any manner whatsoever encumbering its shareholdings in UPL & UEL to an extent of Rs. 1000.00 crores pending the appeal before the Commissioner (Appeals) and with deposit Rs. 10.00 crores. [Para 16]*

5.4. In view of our aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the receipt of monies in the sum of Rs 3,46,33,388/- cannot be taxed as income in the hands of the assessee company. Accordingly, the grounds raised by the assessee in this regard are allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced on 30/ 08 /2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 30/08 /2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai