IN THE INCOME TAX APPELLATE TRIBUNAL
"A'' BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.408/Bang/2020
Assessment Year : 2011-12

M/s. Archana Traders Pvt. Ltd. Cottage No.4, Bangalore Palace Vasanthnagar, Bangalore 560 052 **PAN NO : AACCA3590N**	**Vs.**	Income Tax Officer Ward-1(1)(4) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Siddesh Gaddi, A.R.
Respondent by	**:**	Shri Vikas Suryavansh, D.R.

Date of Hearing	**:**	22.04.2021
Date of Pronouncement	**:**	30.06.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 4.2.2020 passed by Ld. CIT(A)-1 Bengaluru and it relates to the assessment year 2011-12. The assessee is aggrieved by the decision of Ld. CIT(A) in confirming the addition made by the A.O. u/s 28(iv) of the Act.

2. At the time of hearing, the assessee did not press the ground relating to validity of reopening of assessment u/s 148 of the Act. Accordingly, the said ground is dismissed as not pressed.

3. The facts relating to the issue are stated in brief. The assessee is a Private Limited Company and is engaged in the business of trading in refined salt. The return filed by the assessee for the year under consideration was processed u/s 143(1) of the Act. Subsequently, the A.O. re-opened the assessment by issuing notice u/s 148 of the Act. The AO. had received information from Enforcement Directorate, New Delhi that one of the directors of the assessee company named Shri Naveen P. Patil had informed that a sum of Rs.3.00 crores given by him to the assessee company had been forfeited by the assessee company. Shri Naveen P. Patil had claimed set off of above said Rs.3.00 crores against his income declared under the head "Income from other sources". Accordingly, the A.O. has taken the view that the amount of Rs.3 crores forfeited by the assessee represents income of the assessee and the same has not been declared in the return of income. Hence, the A.O. has reopened the assessment.

4. Before the AO, the assessee submitted that Mr. Naveen P. Patil is one of the shareholders and Directors of the assessee company who had initially advanced a loan of Rs.3.77 crores to it in the financial year 2006-07. Since the assessee company could not repay the above said loan, it was agreed that the assessee company would sell its property located at Narain Manzil, Barakhamba Road, New Delhi for a consideration of Rs.9 crores. In this regard, an agreement for sale was executed on 29.8.2008, as per which Shri Naveen P Patil shall pay the balance amount of sale consideration and complete the sale transaction by the end of December, 2008. However, Mr. Naveen P. Patil failed to pay balance sale consideration and hence the assessee has forfeited the advance amount of Rs.3 crores, as per the terms of Agreement for sale. The assessee submitted before A.O. that the amount of Rs.3 crores forfeited by it is a capital receipt in its hand

and the same is not taxable. The assessee also submitted that, as per provisions of section 51 of the Act, the amount of Rs.3 crores would go to reduce the cost of property. The assessee placed its reliance on the decision rendered by Hon'ble Supreme Court in the case of Travancore Rubber Ltd.

5. The A.O., however, took the view that the assessee has given colour of a property transaction for the forfeited amount of Rs.3 crores. Accordingly, he took the view that the agreement for sale entered between the assessee and Shri Naveen P. Patil is an afterthought. The observations made by the AO are extracted below:-

> *"5.3 The assessee company forfeited an amount of Rs. 3 cr given by Sh Navin P Patil as loan. It thus got benefitted by forfeiting this amount. The assessee has tried to later colour the loan transaction as an advance for a property. Sh Navin P Patil is one of the Directors in the assessee company and is controlling and managing its affairs. The assessee co. tried to adjust the loan amount against advance for sale of a property. The fact that Sh Navin P Patil did not launch any legal proceedings to claim the amount so forfeited as advance for property shows that the amount was in the nature of loan only. The assessee company never intended to sell the property which it showed as being sold to Sh Navin P Patil. It was only an afterthought to treat the loan given as advance for property. The agreement to sell entered by the assessee co. is a step in this direction. Thus, section 51 of the Income tax Act 1961 would not be applicable to this case."*

He also observed that Shri Naveen P. Patil has claimed the amount forfeited by the assessee as a revenue loss. He also noticed that the agreement for sale stated that Shri Naveen P. Patil had invested a sum of Rs.3.72 crores in respect of projects undertaken by the

assessee company, out of which Rs.3.00 crore has been forfeited. The assessee has also shown the above said amount as unsecured loans only in its books of accounts. Accordingly, the AO took the view that the above said forfeited amount is a benefit accrued to the assessee and same would fall within the purview of sec.28(iv) of the Act. Accordingly he held that the impugned amount of Rs.3 crores is assessable as income of the assessee u/s 28(iv) of the Act. In this regard, the A.O. placed his reliance on the decision rendered by Hon'ble Madras High Court in the case of CIT Vs. Ramaniyam Homes Pvt. Ltd. (2016) 68 Taxmann.com 289. Accordingly, he assessed the above amount u/s 28(iv) of the Act.

6. The Ld. CIT(A) observed that neither the assessee nor Shri Naveen P. Patil had furnished the details of project for which Shri Naveen P. Patil had given the sum of Rs.3.77 crores to the assessee company. He further noticed that, as per the agreement to sale dated 29.8.2008, Shri Naveen P. Patil shall complete his part of the contract on or before 31.12.2009, i.e. Shri Naveen P. Patil shall pay balance value of purchase's consideration to the assessee by 31.12.2009. The Ld. CIT(A) further noticed that the assessee has leased out the property, which is sought to be sold to Shri Naveen P. Patil, in February, 2010 i.e. before the amount was forfeited by the assessee company the property has been leased out. Accordingly, the Ld. CIT(A) concurred with the view of the A.O. that the sale agreement is a colourable device adopted by the assessee in order to avoid taxation of forfeited amount of Rs.3 crores.

7. The assessee contended before Ld. CIT(A) that the amount forfeited by it cannot be treated as a benefit within the meaning of section 28(iv) of the Act. In this regard, the assessee placed its reliance on the decision rendered by Hon'ble Bombay High Court in

the case of Mahindra & Mahindra Ltd. 261 ITR 501, wherein it was held that the provisions of section 28(iv) of the Act would not have application to any transaction involving money. The above contention of the assessee was rejected by Ld. CIT(A) by following the decision rendered by Hon'ble Madras High Court in the case of CIT Vs. Ramaniyam Homes Pvt. Ltd. (supra). In the above said case, the Hon'ble Madras High Court had expressed the view that waiver of a portion of the loan would certainly tantamount to the value of benefit within the meaning of section 28(iv) of the Act. Accordingly, the Ld. CIT(A) upheld the addition made by the A.O.

8. The ld. A.R. submitted that the tax authorities have assessed that the above said amount of Rs.3 crores forfeited by the assessee as a benefit u/s 28(iv) of the Act. He submitted that Hon'ble Bombay High Court has held that the provisions of section 28(iv) of the Act would not have application to any transaction involving money. Though the Ld. CIT(A) has refused to follow the decision rendered by Hon'ble Bombay High Court and followed the decision rendered by Hon'ble Madras High Court in the case of Ramaniyam Homes Pvt. Ltd. (supra), yet it is pertinent to note that the decision rendered by Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra) has since been upheld by Hon'ble Supreme Court in the case of CIT Vs. Mahindra & Mahindra Ltd. (2018) 404 ITR 1. Accordingly, the Ld. A.R. submitted that the decision rendered by Hon'ble Madras High Court in the case of Ramaniyam Homes Pvt. Ltd. (supra) is no more a good law. The Ld. A.R. further submitted that though the assessee had received the loan from Naveen P. Patil in the financial year 2006-07, the same was converted into an advance money received by the assessee for sale of its property, by virtue of agreement for sale entered between parties. Since the buyer of property Shri Naveen P. Patil could not purchase the property by

paying the remaining amount, the amount of Rs.3 crores was forfeited by the assessee in terms of agreement for sale. He further submitted that there is no reason to suspect the agreement for sale entered between the parties. He further submitted that the treatment given by Shri Naveen P. Patil in his return of income would not determine the nature of transaction in the hands of the assessee. Accordingly, he submitted that the amount of Rs.3 crores forfeited by the assessee would go to reduce the cost of property as per provisions of section 51 of the Act. Accordingly, he submitted that the addition made by the tax authorities should be deleted.

9. The Ld. D.R., on the contrary, supported the order passed by Ld. CIT(A). He further invited our attention to the clause 11 of the agreement for sale dated 29.8.2008. The said clause provided a right to the purchaser to recover advance money paid, if the vendor fails to comply with all or any of the conditions of the agreement. He submitted that the buyer Shri Naveen P. Patil did not take any step to recover the advance money as per this clause.

10. In the rejoinder, the Ld. A.R. submitted that there is no failure on the part of the assessee (Vendor) to comply with any of the clauses of the agreement and hence clause 11 of the agreement would not be applicable to the present case. On the contrary, as per clause 12 of the agreement, the assessee was having right to forfeit the advance money received, if the purchaser fails to pay the balance sale consideration.

11. We heard the rival contentions and perused the record. We have noticed earlier that the tax authorities have assessed the impugned amount of Rs. 3 crores u/s 28(iv) of the Act. The above said section states that the value of any benefit or perquisite, whether

convertible into money or not, arising from business or exercise of profession is assessable as business income. The Hon'ble Bombay High Court has held in the case of Mahindra & Mahindra Ltd. (supra) that the provisions of section 28(iv) of the Act would not have application to any transaction involving money. However, the Hon'ble Madras High Court has taken a contrary view in the case of Ramaniyam Homes Pvt. Ltd. (supra). This controversy has been set at rest by Hon'ble Supreme Court in the case of Mahindra & Mahindra Ltd. (2018) 404 ITR 1, wherein, the Hon'ble Supreme Court has observed as under:

> *"13. On a plain reading of section 28(iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form other than in the shape of money. In the present case, it is a matter of record that the amount of Rs.57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of mokey, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs.57,74,064/- can be taxed under the provisions of Section 28(iv) of the I.T. Act."*

12. It can be noticed that the Hon'ble Supreme Court was dealing with a case of waiver of loan by the creditor and it has been held that the provisions of section 28(iv) of the Act is not applicable. In the present case, Rs.3 crores represented advance money forfeited by the assessee and the same also represents cash received on forfeiture of advance money. In this view of the matter, the provisions of section 28(iv) of the Act is not applicable to the facts of the present case.

13. We notice that the tax authorities have taken the view that the agreement for sale entered by the assessee with Naveen P. Patil is a colourable device. However, we notice that the assessing officer has

not brought any material on record in support of this view. In our view, the only fact that has induced the tax authorities to tax this amount in the hands of the assessee is that Shri Naveen P. Patil has treated the forfeited amount of Rs. 3 crores as his loss and set off the same against his income. Accordingly, the AO has taken the view that the impugned amount of Rs.3.00 crores is liable to be taxed in the hands of the assessee. It is always not necessary that the nature of payment and nature of receipt should be the same. For example, if a car dealer sells a car, the sale proceeds are revenue receipts in his hand, while it may be a capital asset in the hands of the buyer of car. If the said buyer, in turn, sells the very same car subsequently, the sale consideration is a capital receipt in his hands. Hence the nature of payment and nature of receipt would depend upon the facts prevailing in the case of payer and receiver.

14. In the present case, there is no dispute with regard to the fact that the assessee has received money from Naveen P. Patil initially in the financial year 2006-07. As per the recital in the Agreement for sale, the above said amount was given as investment in the projects taken up by the assessee. We notice that the Ld CIT(A) has given much importance to the recital so made in the Agreement for sale by observing that neither the assessee nor Naveen P Patil has given the details of project. In fact, the parties have only stated the purpose of given money by Shri Naveen P Patil to the assessee in FY 2006-07. The said facts are not relevant to the issue on hand. The issue on hand is related to the property transaction subsequently entered by the parties, i.e., subsequently, the above said loan amount was converted into advance money in the property transaction, whereby a property belonging to the assessee was agreed to be purchased by Shri Naveen P. Patil for a sum of Rs.9.00 crores. Thus the issue is related to the property transaction and not the earlier loan transaction.

15. As per the Agreement for sale, Shri Naveen P Patil has to pay the balance amount of sale consideration and complete the sale transaction. Since Shri Naveen P. Patil failed to pay the balance amount of sale consideration, the amount of Rs. 3 crores has been forfeited by the assessee as per the terms of agreement for sale. Hence, the forfeited amount related to property transaction only. Merely for the reason that the amount received as loan in an earlier year was converted into advance payment for purchase of property, there is no reason to disbelieve the property transaction as a colourable device. No material has been brought to substantiate the above said view of the tax authorities, meaning thereby, they have entertained this view only on surmises and conjectures. Since the amount of Rs.3 crores forfeited by the assessee is on account of sale of property, we agree with the submissions of the assessee that the provisions of section 51 of the Act shall be applicable and the above said amount would go to reduce the cost of property.

16. In view of the foregoing discussions, we are of the view that the impugned amount of Rs.3 crores is not taxable in the hands of the assessee u/s 28(iv) of the Act. Accordingly, we set aside the order passed by Ld. CIT(A) on this issue and direct the A.O. to delete the impugned addition.

17. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30th June, 2021

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 30th June, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.