

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1233/Kol/2013
Assessment Years:2006-07

DCIT, Circle-8, Aayakar Bhawan, 5 th Floor, P-7, Chowringhee Square, Kolkata-69	<u>बनाम</u> / V/s.	M/s Celica Developers Pvt. Ltd., 24, Park Street, Kolkata-16 [PAN No.AABCC 3820 C]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sallong Yaden, Addl-CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Ravi Tulsiyan, FCA
सुनवाई की तारीख/Date of Hearing	03-08-2016
घोषणा की तारीख/Date of Pronouncement	24-08-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is against the order of Commissioner of Income Tax (Appeals)-Central I, Kolkata dated 19.02.2013. Assessment was framed by DCIT, CC-VI, Kolkata u/s 263/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.12.2011 for assessment year 2006-07. Only ground raised by the Revenue per its appeal is as under:-

"1. That on the facts and circumstances of the case and in aw, the Ld. CIT(A) has erred in deleting the addition of Rs.99,89,510/- to the Short Term Capital Gain arising from the transfer of shares of M/s Magma Leasing Ltd. at the book value without having regard to the fact that the transactions of transfer of the shares were not genuine and a device to avoid taxes.

2. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in giving relief to the assessee company by deleting the addition made on account of transfer of shares at book value without having considered that transaction of listed shares at the price lower than the quoted price was not legally permissible.*

3. *That the appellant reserves the right to amend, alter or add to any ground of appeal before or at the time of hearing of the appeal.”*

Shri Ravi Tulsian, Ld. Authorized Representative appeared on behalf of assessee and Shri Sallong Yaden, Ld. Departmental Representative appeared on behalf of Revenue

2. Single issue raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by Assessing Officer for ₹99,89,510/- on account of bogus transactions and to evade tax liability.

3. Briefly stated facts are that assessee in the present case is a Private Limited Company and for the year under consideration has filed its return income showing income from business of house property and capital gain for an amount of ₹82,22,167/-. Thereafter the case was selected for scrutiny subsequently notices u/s. 143(2) and 142(1) of the Act were issued. The assessee has shown 2.65 lacs shares of Magma Leasing Ltd. (MLL for short) as on 01.04.2005 and its value was shown at ₹72,87,500/-. These shares of MLL were listed on the Stock Exchange of the country. The assessee, during the year, has transferred 2,25,700 shares at book value though the value of the Stock Exchange was too much high. The AO observed the difference between the book value and market value of the share at ₹44.03 per share, therefore the total income from capital gain from the sale of 2,25,700 share of MLL comes to ₹99,98,510/- but assessee has shown no income in its hand. Accordingly, AO treated the difference amount of ₹99,98,510/- as Short Term Capital Gains (STCG for short) and added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A) where the assessee in support its sale of share submitted the bills disclosing the details and price of the

shares at which these were sold and considering the same, Ld. CIT(A) deleted the addition made by AO by observing as under:-

"5. I have perused the relevant orders. I have also considered the submissions made on behalf of the appellant and the judicial decisions relied upon. I find that the appellant had 2,65,000 shares of Magma Leasing Ltd valued at Rs.72,87,500/- the book value being Rs.27.50 per share. During the year, the appellant sold 2,25,700 shares to 16 parties @ Rs.27.50 per share. The appellant revalued residuary 39,300 shares @ Rs.71.50 per share and transferred the equivalent credit of Rs.17,41,097/- to the Revaluation Reserve Account. This prompted the AO to hold that the sale price should be taken at Rs.71.50 per share in respect of sale of 2,25,700 shares. However, I find that the action of the AO is arbitrary and without any basis as there is no material or evidence on record to show that the shares were actually sold @ Rs.71.50 per share. The AO has brought no incriminating material- on record to show that the appellant received by way of sale consideration anything more than what has been declared by it in its return. I find merit in the argument that there is no provision in the Income Tax Act which authorizes the AO to increase the declared sale consideration by the fair market value of the transferred asset. In fact, there is no provision in the Income Tax Act which prohibits sale of shares at a price less than the market value. The AO can increase the value of the sale consideration only when there is positive material on record to establish that the consideration for the transfer of the capital asset has been understated by an assessee; or, in other words, the full value of the consideration in respect of the transfer has been shown at a lesser figure than that actually received by the assessee. But then, the burden of proving such understatement or concealment shall lie on the revenue. The onus is on the AO to bring positive material on record to show that the sale consideration has been understated and that the assessee has actually received more than what has been declared by him. But, in the present case, there is no material on record to show that the shares were transferred by the appellant at a higher rate than what has been declared in the return. The AO has merely adopted a hypothetical figure to estimate the sale consideration. In the case of K P Vargheese 131 ITR 597, the Hon'ble Supreme Court has held that it was for the revenue to establish that the sale consideration was understated by the assessee; and, in case there is no supporting material on record, the AO has no authority to substitute the fair market value of the transferred capital asset for the sale consideration. In the case of Shri Ramalinga Choodambikai Mills Ltd. 28 ITR 952, it was held by the Hon'ble High Court of Madras that if there was no evidence to show that either the sales were sham transactions or the market prices were paid by the purchasers; then the mere fact that the goods were sold at a concessional rate to benefit the purchasers at the expense of the company would not entitle the Income Tax Department to assess the difference between the market price and the price paid by the purchasers as profits or the company. In view of the above, I am of the considered opinion that in absence of any material on record to show that higher price was actually paid to the

appellant by the purchasers, the AO had no legal sanction or authority to increase the sale consideration as he has done in his assessment order. The computation of short-term capital gains as done by the AO is not in accordance with the provisions of law; and, the same is directed to be deleted. The grounds raised by the appellant are allowed.”

Being aggrieved by this order of Ld CIT(A) Revenue is in appeal before us.

5. Before us Ld. submitted that as per the Security Exchange Board of India's regulation, assessee cannot sale its share at a price less than exchange price, therefore, assessee must have received some consideration over and above the book value which has not been disclosed in it returned income and he vehemently relied on the order of Assessing Officer.

On the other hand, Ld. before us submitted paper book which comprises pages from 1 to 51 and stated that there is no provision from the SEBI for selling the share at a price less than the Exchange price and he relied on the order of Ld. CIT(A) and requested the Bench to uphold the same.

6. We have heard the rival contentions and perused the materials available on record. From the foregoing discussion, we find that assessee has sold its listed share at a book value but AO rejected its book value of the share and took the sale consideration at a price which was prevailing at the relevant time in the Stock Exchange. However, Ld. CIT(A) has deleted the addition made by AO. Now the present issue before us arises so as to whether the difference between the book value and the market value amounts to the STCG. In the similar facts and circumstances of the present case in hand, various courts have decided this issue in favour of assessee and relevant case laws cited below:-

a) K.P. Varghese vs. ITO & Anr. (2981) 24 CTR 358 (SC), wherein the head-note:-

Capital gains—Applicability of s. 52(2)—Understatement of consideration—If, the Revenue seeks to bring a case within sub-s. (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15 per cent of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him—There are two distinct conditions which have to be satisfied before sub-s. (2) can be invoked by the Revenue

and the burden of showing that these two conditions are satisfied rests on the Revenue—Sub-s. (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration

b) Sri Ramalinga Choodambikai Mills Ltd. v. CIT (1955) 28 ITR 952 (Mad), wherein the head-note

Income—Accrual—Assessee-company engaged in the business of manufacture and sale of yarn—Goods sold by company to directors at concessional price—Finding by the ITO that the sales were not bona fide and were effected to benefit the purchasers at the expense of company—Not justified—Difference between market price and price paid by director cannot be assessed as company's income in the absence of evidence to show that sales were sham transactions or that the market prices were in fact paid by purchasers—Mere fact that goods were sold at concessional rate would not entitle the ITO to assess the same as profits of the company

Respectfully following the precedent as mentioned above we find no reason to interfere with the order of Ld. CIT(A) accordingly we uphold the same. This ground of Revenue's appeal is dismissed.

7. In the result, Revenue's appeal stands dismissed.

Order pronounced in open court on 24/08/2016

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member

*Dkp

Sd/-
(Waseem Ahmed)
Accountant Member

दिनांक:- 24/08/2016 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Circle-8, Aayakar Bhawan 5th Floor, P-7, Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Celica Developers Pvt. Ltd., 24, Park Street, Kolkata-16
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, कोलकाता