IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E': NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER,

ITA No. 6295/Del /2013
Assessment Year: 2009-10

The I.T.O Ward – 6(1) New Delhi	Vs.	M/s Mahajan Industries P. Ltd E-1, NDSE- Part II New Delhi PAN : AAACM 0878 R
[Appellant]		[Respondent]

Final Date of Final Hearing : 10.03.2016
Date of Pronouncement : 18.03.2016

Appellant by : Shri Rajesh Kumar Bhoot, CIT- DR

Respondent by : Shri C.S. Aggarwal, Sr. Adv
Shri Ravi Mall, Adv
Shri Brijesh Luthra, FCA

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal filed by the Revenue is directed against the order of the CIT(A)-IX, New Delhi, dated 30/09/2013 for A.Y 2009-10.

2. The Revenue has raised the following grounds of appeal:

1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in holding that the income earned on sale of property is taxable under the head income from Capital Gains and not as Business Income completely ignoring the intention of the assessee which was not to hold the property as investment as discussed in detail in the assessment order?

2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in allowing the claim of Long Term Capital Loss of Rs. 13,10,06,344/- by selling the Shares of Rs. 7.90 cr to a related person at Rs. 79 lakhs by completely ignoring the fact that it was 'Colourable Transaction' to reduce the tax burden of Long Term Capital Gain, claimed in the same assessment year, as establish by the A.O. in the assessment order and held by the Hon'ble supreme Court in plethora of judicial pronouncements that 'Colourable transaction' cannot be allowed as Tax Planning?

3. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,26,06,025/- made on account of Bad Debt without appreciating the fact that the above amount was a loan which was never offered for tax in any earlier assessment year?

4. That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.

5. That the grounds of appeal are without prejudice to each other."

3. Briefly stated, the facts of this case as emanating from the first appellate order are that the appellant company was engaged in the business of trading in shares. The return of income for the A.Y. 2009-10 was filed on 30.09.2009 declaring an income of Rs.90,19,86,967/-. The assessee has filed revised return on 30.03.2011 declaring income of Rs.77,28,37,094/-. The same was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and statutory notice u/s 143(2) dated was issued and served. The assessment was completed u/s 143(3) vide order dated 30.12.2011 by the AO at the income of Rs.110,48,92,459/- making the various additions as below:

(i)	Profit on sale of property at Curzon Road	Rs.1,11,28,77,
(ii)	Bad debt written off	Rs. 2,25,00,00
(iii	U/s 14A	Rs. 33,18,235/
(iv)	Profit on sale of property at	Rs. 18,50,000/
(v)	STT	Rs. 7,173/-

Besides, above additions/disallowances, the AO also disallowed LTC loss of Rs. 13,10,06,344/-.

3.1 The fact in brief as noted from the order under appeal and also from various detailed submissions made by the appellant, are that appellant filed its original return of income on 30.9.2009, declaring a total income of Rs.90,19,86,967/-,which was subsequently revised on 30.3.2011 to Rs.77,28,37,094/-. The main reason for revising the return was that in the original return the appellant had omitted to take the benefit of indexation on sale of some of the shares, which it had all along held as investments. The A.O has noted the difference & reasons for revising the return of its income. In any case, there is no dispute on this fact about revision of the return of income and the AO has taken into cognizance the revised return while passing his order and appellant has disputed the facts only on the merits of the issue.

3.2 Aggrieved, the assessee carried the matter before the first appellate authority and appeal of the assessee was allowed on all the three issues as raised by the Revenue in the grounds reproduced hereinabove.

4. Now, the aggrieved Revenue is before the Tribunal in this second appeal challenging the grant of relief to the assessee by the ld. CIT(A).

Ground No. 1

5. We have heard the arguments of both the sides and carefully perused the relevant material placed on record before us. The ld. DR has drawn our attention towards assessment order page 6 and submitted that the assessee company had entered into an agreement for development of a multi storey project at the property situated at 27, Curzon Road, New Delhi [hereinafter referred to as 'the property']. The ld. DR further pointed out that the assessee tried to develop the property by entering into various agreements one after the other viz:

i) agreement with legal heir Dr. Raghu Nath
ii) Tata Housing in 1988,
iii) Ansal Properties & Inds. Ltd [APIL] in 1995
iv) Verka Investments in 1995

and so on. Therefore, the intention of the assessee can be clearly inferred from its conduct. The ld. DR further drew our attention towards relevant operative part of the assessment order and submitted that during the search and seizure operation u/s 132 of the Act conducted at the office of the assessee company on 29.8.2000 and consequent assessment order passed u/s 158BC of the Income-tax Act, 1961 ['the Act' for short] on

27.09.2002, it was noted that the assessee was engaged in the business of real estate and wanted to develop the said property in a 'A' class ultra-modern centrally air conditioned building. The ld. DR further pointed out that the assessee invested in the property as a part of its business and not for the purpose of its investment in business. Therefore, the consideration which has accrued to the assessee against sale of 25% development rights in the said property is liable to be assessed under the head "property and gains of business or profession". The ld. DR also pointed out the relevant clause in the agreement 4.4.1995 with Verka Investment and contended that as the assessee had already transferred 40% of the development rights in the above mentioned property to M/s APIL through out of court settlement and therefore, impliedly it is clear that the assessee invested in the property as a part of its business and not for the purpose of investment.

5.1 The ld. DR further drew our attention towards assessee's paper book I at page 282 and submitted that as per the assessment order dated 27.9.2002 passed u/s 158BC of the Act for the block period of 1.4.1990 to 29.8.2000, the assessee's total undisclosed income under the head "profits and gains of business

and profession" was assessed at Rs. 31 crores and as per the relevant para 2 of the assessment order, the same was accrued to the assessee out of agreement transferred of 25% development rights to M/s MIPL. Therefore, the same cannot be treated as long term capital gain [LTCG] from the same property.

5.2 The ld. DR also drew our attention towards pages 295 and 296 of the assessee's paper book and submitted that as per first appellate order of the ld. CIT(A) passed against the said assessment order dated 29.8.2000, it is clear that the said addition of Rs. 31 crores stand confirmed by the ld. CIT(A).

5.3 The ld. DR took us through page 13 of the assessment order for A.Y 2009-10 at para IV.14 and submitted that after considering all the submissions, documents and evidence, the AO rightly concluded that the real character of the transaction and intention of the assessee company was in purchasing and selling the properties. Therefore, income arising out of the said property has to be assessed as income from business and profession. The ld. DR pointed out that the conclusion recorded by the ld. CIT(A) in this regard at page 20 of the impugned first appellate order are not sustainable. The ld. DR also contended

that the ld. CIT(A) entertained the documents at the appellate stage without any legal basis and reason and granted to the assessee on the basis of same which is not a proper approach as required u/r 46A of the Income-tax Rules, 1962.

5.4 The ld. DR also submitted that the assessee acquired 100% rights in the property in the year 1987 and sale agreement was registered in favour of the assessee by the legal heirs of Dr. Raghunath on 30.1.1987. The ld. DR also drew our attention towards assessee's paper book page 244 and submitted that in the assessment order for A.Y 1988-89 passed u/s 143(3) of the Act, short term capital gain of Rs. 4,17,60,000/- was assessed. The ld. DR further submitted that during the appellate proceedings before the ld. CIT(A) against the said assessment order, the assessee in its written submissions filed before the first appellate authority, it was submitted that the AO has erred grossly in omitting to consider the fact that the assessee company had entered into construction contract on 25.6.1987 with THDCL for construction of multi storey blocks in the course of carrying on its real estate business and selling/leasing the build-up places in its share. The ld. DR vehemently pointed out that the assessee cannot take a different stand for the year under consideration for

the same property without any logical cause or reasoning. The ld. DR also pointed out that the assessee is taking its stand on convenience and choice which are being changed time and again and it is not clear till date whether the assessee treated he amount in its books of accounts as stock in trade or investment at the time of original agreement with the legal heirs of original allottee, Dr. Raghunath. The ld. DR further drew our attention towards relevant para 8(i) at running page 12 [assessee's Paper Book I, page 160] of agreement dated 19.5.1980 between the legal heirs of Dr. Raghunath and the assessee and submitted that from the very beginning the assessee company had definite plan to construct a multi storied building on the said property. Therefore, when the business of the assessee company is dealing in property, then it cannot be accepted that the assessee treated the property as an investment since beginning.

5.5 The ld. CIT(A) lastly referring to para 12(g) and 13(a) assessee's paper book page 160 at running page 20 of the agreement,, contented that it is clear that the property was originally purchased with an object of constructing multi-storey building thereon which was the main business activity of the assessee company. Therefore, the same cannot be treated as an

investment in property and income arising from the sale of the said property was righty assessed as income from the business and profession by the AO. The ld. DR placing reliance on the decision of the Hon'ble High Court of Delhi in the case of CIT Vs. Central News Agency Pvt. Ltd. Reported at 373 ITR 399 [Del] submitted that the test to determine whether profits from sale are assessable as business income has to be decided on various counts but it is the main parameter that whether the transaction undertaken by the assessee which accrued income to the assessee is adventure in the nature of trade. The ld. DR strongly supported the conclusion of the AO and contended that the ld. CIT(A) granted relief to the assessee by considering the irrelevant facts and circumstances of the case and on the wrong premise and therefore the impugned order on this issue may be set aside by restoring that of the AO.

6. Replying to the above, the ld. Sr. counsel for the assessee submitted that the grounds of the Revenue are not in accordance with the provisions of section 253(2) of the Act as the same has been framed in the form of a question. However, the ld. Sr. Counsel further submitted that the grounds of appeal as per Form No. 36 of the Revenue may be decided as per its letter and spirit.

The ld. Sr. Counsel further pointed out that admittedly and undisputedly the property was sold in F.Y. 2008-09 relevant to A.Y 2009-10. The AO issued notice on 26.12.2011 u/s 142(1) of the Act alongwith notice u/s 143(3) of the Act seeking relevant information.

6.1 The ld. AR further took us through para 7.1 at page 20 of the first appellate order and vehemently contended that the assessment order does not suggest that at any stage of assessment the assessee was informed or required about this issue i.e. taxing the income on sale of property a business income as against long term capital gain as declared by the assessee. Therefore, the assessee was asked to submit relevant information during the assessment proceedings. The ld. AR further pointed out that additional evidence consisting of Board Resolution, etc passed by the assessee company which depicts the intention of the assessee to give treatment to the advance given against the said property and shifting of the registered office etc, could not be furnished before the AO due to the reason that the AO, at any stage of assessment proceedings did not inform his intention and did not issue any show cause notice enquiring about the issue of business income Vs. long term capital gain as declared by the

assessee. Therefore, the assessee was prevented by the said sufficient reason filing the relevant evidence before the AO which was submitted during the first appellate proceedings.

6.2 The ld. Sr. counsel further drew our attention towards para 6.9 at pages 18 and 19 of the first appellate order and submitted that the AO himself in the Wealth Tax proceedings u/s 17/16(3) of the W.T. Act for A.Y 2005-06 to A.Y 2008-09 held that the said land pertaining to the said property did not represent stock in trade and was capital asset and not liable to W.T. Act.

6.3 The ld. AR further drew our attention towards pages 349 to 350 of assessee's Paper Book – II and submitted that before the ld. CIT(A), the assessee in its supplementary written submissions dated 4.5.2012 explicitly mentioned that when the execution of the documents for transfer of the said property from Dr. Raghunath/ his legal heirs to the assessee company became certain, then the assessee company passed resolution to transfer the advance given against the purchase of the said property standing in the books of accounts under the head 'current asset to fixed asset' with the object to construct a building on the said land to be used as registered/corporate office of the assessee.

6.4 The ld. AR further pointed out that the said property was also recognised as fixed assets in the books of account of the assessee and since then the said property was always disclosed under the head “fixed assets” continuously in all the subsequent years. The ld. AR reiterated its written submissions dated 4.5.2012 made before the first appellate authority and submitted that during the period 1987 till date of sale of subject property during the relevant F.Y, the assessee treated the same as fixed assets and thus entered into a collaboration agreement with certain developers to construct commercial building thereon in lieu of retaining specific area in the constructed/developed building. The ld. Sr. counsel also pointed out that the agreements with various collaborators, as noted by the AO in the assessment order para IV entered into from time to time were never executed and accordingly the same were cancelled because the required terms and condition for execution of said agreements, construction on the said property were not satisfied by the said collaborators. The ld. AR further pointed out that the main object of the assessee company, in entering into various agreements with collaborators, was only to ensure availability of a modernized office space for the assessee and because the

various agreements with collaborators could not see the light of completion due to reasons beyond the control of the assessee. Therefore, the assessee company also paid penalty to developers as compensation in lieu of cancellation of agreement which again goes to show the bonafide intention of the assessee and supports this fact that the assessee, since the very beginning treated the said property as investment and shown the same as fixed assets in its books of account. The ld. Sr. counsel also pointed out that as per the proposition laid down by the Hon'ble High Court in the case of CIT Vs. Central News Agency [supra] as relied on by ld. CIT-DR, the third test, which is frequently applied as to how the assessee dealt with the subject matter of transaction during the time the asset was with the assessee. The ld. Counsel also pointed out that before any conclusion an enquiry is required as to whether the property had been treated as stock in trade or shown in the books of account and balance sheet as investment/fixed assets, and out-come of the said enquiry is relevant to decide the issue. The ld. Sr. Counsel vehemently contended that if the said enquiry was made by the AO on the documentary evidence such as balance sheet, profit and loss account and books of account of the assessee, then certainly the

outcome would be that the assessee treated the said property as an investment since it was acquired and the same was shown as fixed assets in the books of account of the assessee.

6.5 The ld. AR also drew our attention towards book on the Act written by Chaturvedi and Pittisaria [Edition 2014] at page 2237 to support this contention that it is the paramount test to decide the issue of business income against long term capital gain that how the assessee dealt with the subject matter of transaction during the period when the asset was with the assessee.

6.6 The ld. Sr. counsel drew our attention towards the proposition laid down by the Hon'ble Supreme Court in the case of Raja Bahadur Kamakya Vs. CIT reported at 77 ITR 253 [SC] and submitted that where a person is selling his investment realised on enhanced price excess over his price is not profit assessable to tax under the head of business income. The ld. AR also contended that in this judgment, their Lordships held that if the transaction is in ordinary line of assessee's business, there would be hardly any difficulty in concluding that it was trading transaction but where it is not, facts must be assessed to discover whether it was in the nature of trade. The ld. AR

further contended that surplus realised on the sale of property/shares shown as fixed assets/investment would bring either long term capital gain or short term capital gain. He also contended that such an investment, though motivated possibility of enhancing value does not render investment a transaction in the nature of trade or adventure. The ld. AR also placed reliance on the decision of the Hon'ble Supreme Court in the case of Karamchand Thapar Vs. CIT reported at 82 ITR 899 [SC] and submitted that the manner of disclosure in the balance sheet though not conclusive but it is very relevant circumstances for determining that whether the said property was kept as stock in trade or as in investment/fixed asset in the books of account of the assessee.

6.7 The ld. AR further drew our attention towards pages 355 to 364 of the assessee's paper book – II i.e. written submission dated 4.5.2012 and submitted that even the contentions of all the developers/collaborators agreement entered into by the assessee with various collaborators shows the intention of the assessee to develop a modernized well equipped and air conditioned office space for the assessee company which cannot be held adventure in the nature of trade.

6.8 Lastly, the ld. AR placed his reliance on the recent decision of the Hon'ble High Court of Delhi in the case of Shanti Banerjee [deceased] by the legal heirs Vs. DCIT passed on 17.11.2015 in ITA No. 299/2003 and submitted that as per paras 4 to 9 of this order, the present issue is covered in favour of the assessee by this decision as there was no material on record from which it could be said that the assessee ever had the intention to exploit the said property as commercial venture.

6.9 The ld. Senior Counsel parted with his argument with the final submission that merely because developers/collaborators agreement were entered into by the assessee with various parties does not show that the assessee had intention to exploit the said property as a venture of commerce or trade because if the collaboration agreement could not follow, then, multiple number of collaboration agreement do not show that there was working with the intention to do business of sale and purchase of property especially when the said property was treated as investment/fixed assets in the books of accounts of the assessee since its acquisition and the AO also treated the same as investment in the W.T. assessment proceedings for A.Ys 2004-05 to 2008-09.

7. We have heard the arguments of both the sides and carefully perused the relevant material placed on record before us. On careful consideration of the above noted submissions and contentions of both the sides, at the outset, from the relevant operative part of the assessment order on the issue, we observe that the AO enlisted in chronological order date wise and party wise details right from 8.2.1933 to 28.4.2008 wherein all the relevant events have been mentioned in a tabular form. This tabular details show that the assessee company on 5.5.1980 entered into agreement with legal heir of Dr Raghunath and after passing through the various collaborations agreements with TATA, AIPL, VERKA etc, the said property on 20.9.2005 made in the name of the assessee company and on 15.12.2005 it was converted into freehold property from leasehold. On 28.4.2008, agreements between the assessee and the VERKA was cancelled lifting riders on the title of the assessee and finally on 28.4.2008 the assessee sold the said property for a consideration of Rs. 200 crores which gave birth to the issue of business income as held by the AO, v/s long term capital gain as claimed by the assessee and allowed by the ld. CIT(A) by passing the impugned order. In the next para, the AO also tabulated the cost of acquisition and

improvement on the said property and calculated the cumulative value of the property and Rs. 88,71,22,952/- at the end of financial year 2008-09 i.e. at the time of sale of property and the same is not disputed by the assessee.

7.1 Further, the AO noted that it is not a case that the assessee company has not brought a property in one outright purchase. The AO further observed that the assessee had to incur cost of getting the same vacated and settling other issue relating to the property, which have been mentioned in agreements dated 19.5.1980 and supplementary agreements dated 4.6.1980, 20.8.1984 and 21.9.1986. But this analogy is not acceptable as there is no provision in the Act for treating the onego purchase of property and its sale at one parameter and for treating the property which was acquired by the assessee by vacating the same from the occupant tenants or trespassers etc and by settling other issues. The main point to be enquired and examined for determination of nature of income is that how the assessee treated the property in its books of accounts during the period when the property was with the assessee.

7.2 It is also relevant to consider the contention of the ld. DR that as per the nature of the business of the assessee company as noted by the AO in para III of assessment order it is clear that as per memorandum and articles of association inter alia clause (3) the main business object of the assessee is dealing in sale and purchase of property income arose therefrom has to be treated as business income. The ld. Sr. Counsel has pointed out that as per letter of the assessee submitted to the AO on 21.11.2011 the assessee was mainly dealing in the sale and purchases of shares and even if it is presumed, not accepted, that in the memorandum and articles of association one more object of sale and purchase of property is mentioned, then also if as per provisions of the Act the assessee can have two portfolios for shares and securities viz. Stock in trade and investment then it is also sovereign right of the assessee to have two portfolios regarding immovable properties in the form of stock in trade as well as investment in fixed assets. We are not in agreement with the analogy applied by the AO that there is mention of business and sale and purchase of property etc in clause 31 of the Memorandum and Articles of Association thus income on sales of said property has to be treated as business income. We may point

out that as per paras II.1 to II.6 it is amply clear that in paras II.6 the AO has noted that the company has declared results from sale and purchase of shares for F.Y. 2006-07 to 2009-10 which shows that the main business activity of the assessee is purchase and sale of shares. We are of the opinion that the objects mentioned in the memorandum and articles of association do not determine the nature of income the main object of the assessee may change from time to time as per feasibility of business activities. The main parameter for determination of nature of income is that how the assessee treated the property or investments in its books of account and financial statements during the period when the property/investment was with the assessee. Thus, the said basis of conclusion of the AO is not tenable and we dismiss the same.

7.3 Further, from para IV.14 of assessment order it is also clear that the AO noted correct and relevant proposition applicable to the issue in hand but in subsequent para IV.15 and IV.16 he directly jumped to the conclusion without any adjudication on the explanation and documentary evidence submitted by the assessee, that the income from sale of property is assessable and taxable under the head of Income from business and profession instead of long term capital gain [LTCG] as claimed by the

assessee. This is not a right and correct approach for drawing a meaningful and justified sustainable conclusion by a quasi judicial authority.

7.4 At the same time, when we analyse threadbare the impugned first appellate order, then we note that the ld. CIT(A) in paras from 6.7 to 7.1 dealt with the admissibility of additional evidence filed by the assessee u/r 46A of the Income-tax Rules, 1962 [for short, 'the Rules']. The said relevant paras shows that the ld. CIT(A) called for remand report from the AO regarding admissibility and merits of the proposed additional evidence and on receipt of remand report the assessee was also allowed to submit its rejoinder to the remand report. The ld. DR could not controvert these contentions of the para 6.7 of the impugned first appellate order wherein the ld. CIT(A) has noted that the AO has not objected to admission of additional evidence except by contending that the assessee has given sufficient time during assessment proceedings. At this juncture, it is relevant to consider the contention of the ld. Sr. Counsel that he AO did not show his intention to treat the long term capital gains as business income hence on this controversy that the assessee was not allowed to place his explanation supporting this stand by relevant

documentary evidence and therefore these were not submitted during the assessment proceedings. The ld. Sr. Counsel further pointed out that thus the assessee was prevented by said sufficient reasons in furnishing relevant evidence during assessment proceedings. Therefore, the same was placed u/r 6A of the Rules.

7.5 From the relevant operative part of the assessment order we observe that the AO posed several queries to the assessee but he never show caused the assessee asking that why income accrued from sale of said property be not treated as business income hence this is a sufficient cause which prevented the assessee in filing the relevant documents and evidence which was submitted before the ld. CIT(A) as additional evidence. We are of the opinion that the ld. CIT(A) rightly admitted the same by properly following the provisions of Rule 46A and this objection of the ld. DR in this regard being bereft of merits is dismissed.

8. Next point comes for adjudication is that the ld. CIT(A) in para 6.9 noted that in view of the admitted findings of the AO in the proceedings under Wealth Tax Act for A.Y 2005-06 to A.Y 2008-09 the AO held that the land in question was not stock in

trade. In these proceedings, the AO held that the land /property in question was not in stock in trade and in the Wealth Tax proceedings the AO explicitly held that the said property [27 Curzon Road] was not stock in trade but was a mere invest of assessee in the property and the same was held as an investment. This conclusion of the AO in Wealth Tax proceedings have not been controverted by the ld. DR and thus we are in agreement with the conclusion of the ld. CIT(A) in this regard that the AO himself in the Wealth tax proceedings held that the said property did not represent stock in trade but was capital asset and thus liable to Wealth tax Act.

8.1 Obviously, capital assets includes investment in fixed assets and thus the stand of the assessee is found correct that the AO in the Wealth Tax proceedings treated the said property as capital asset/investment in fixed assets and not as stock in trade of the assessee.

8.2 Further, next for adjudication is that the ld. CIT(A) vide order dated 9.5.2003 has upheld the conclusion of the AO in assessment order dated 27.9.2002 for the block period from 1.4.1990 to 29.8.2000 u/s 158BC of the Act wherein addition of

Rs. 31 crores has been confirmed by the ld. CIT(A) by observing that the amount in question was not really in the nature of advance of but the appellant had derived the right to receive the amount in the course of its business. In this regard, the ld. Sr. Counsel pointed out that the principle of res judicata does not apply to tax proceedings. He further contended that the said order of the ld. CIT(A) dated 9.5.2003 [supra] has been discussed by ITAT 'D' Bench order dated 10.10.2004 passed in IT(SS)A Nos. 321 & 322/Del/2013 hence this demolished conclusion of the AO cannot be taken as supportive of the finding of the AO in the present case.

8.3 From further consideration of the impugned order the ld. CIT(A) we note that on merits the first appellate authority granted relief to the assessee with the following findings and conclusion:

> "7.2 *Examining the merits of the case, it is observed that the AO's main reason t treat the transactions of sale of the property i.e 27, Curzon Road, New Delhi appears to be impression the AO had that the appellant was trying to explore the possibility of having the property developed by various developers i.e. APIL TATA & VERKA. Such actions on the part of the appellant have been considered as*

business activities. The AO has referred also to clause 31 of the memorandum & articles of the company to draw such inferences. Reference has also been made to the report in form 3 CD of the Act to arrive at the conclusion by the AO that appellant is engaged in the business of dealing in land & building.

7.3 As against this, the claim of the appellant is that it has never done any business of sale/purchase of land or building. Referring to certain case laws in its submissions, it has been pointed out that business is a continuous & systematic activities carried out on routine manner on a regular basis. It has also submitted that agreements to develop the properties pertaining to APIL and Verka were not entered by the appellant on its own but were imposed upon the appellant by the ongoing disputes between the legal heirs of Dr. Raghunath and APIL. It is argued that the agreement with Verka came into existence because APIL assigned/sold its development rights to Verka and appellant had to by force of law get into such arrangements. Since, the APIL had sold the development rights to Verka, the appellant also entered into a Joint Development Agreement ("JDA"), with Verka on 4th April, 1995, whereby both the parties mutually agreed to develop the subject property jointly. As per the aforesaid JDA, the appellant agreed to admit the Verka as a co-promoter for development of appellant's share of subject property and was allowed to retain 25% of the developed structure. In accordance with the aforesaid JDA, the Verka

also deposited a sum of Rs.29 crores (approx.) with the appellant. The only time such an attempt was made by the appellant was in AY 1988-89 with TATA. Such action was held to be giving rise to' 'capital gains' by the department in the relevant A.Y. Finally nothing was held taxable due to subsequent event of cancellation of the agreement with TATA. It has thus been submitted when the transaction of development in respect of this property in AY 1988-89 was held to be giving rise to capital gains, it can by no stretch of imagination, be treated as business income when the same property is sold 20 years after that event. It has further been submitted that the appellant has always disclosed this asset under the head fixed assets in its audited Balance Sheets. Such Balance Sheets have been a part of the records of the department in the respective years. It has also been submitted that intention of the appellant was crystal clear when in 1983 itself appellant passed resolutions to transfer the advances to fixed assets. Further after the property was purchased in 1987, it was declared fixed assets and since then have been continuously been shown as fixed assets. Regarding clause 31 in the memorandum & articles of association, it has been explained with the help of case laws that such a clause reflects an overall authority in which assessee can engage on its incorporation. The actual business carried on has to be decided on the actual available facts as per records. It is further explained by the appellant that subsequent act of the AO (during WT proceedings) of

treating the property as capital asset and not stock in trade further and completely fortifies the claim of the appellant that this property was a capital assets as defined in section 2(14) of the Act and was not held as taxable as stock in trade held for more than 10 years under the W.T Act. It has been submitted that there cannot be two treatments to the same item, one under the Income Tax Act and second under the W.T. Act. It is observed that through out the assessment order although the AO had been building up a case of treating the gain as business income, at no stage during the assessment proceeding, the AO appeared to have raised a Specific query about his intention to treat the amount as business income. There is no pointed query in this regard.

7.4 It can be seen that there is no dispute on the legal preposition that even a single transaction can be treated as an adventure in the nature of trade and profit arising there from can be taxed as business income. However, the most important factor that the courts have applied to determine the character of the transaction is the intention of the taxpayer. It is also observed that intention of the taxpayer cannot be easily interpreted for known but can be gathered from the surrounding circumstances. The most important evidence in this regard is the treatment in the books of accounts. It is seen that the appellant has treated this property as its fixed assets in its audited Balance Sheets since the beginning. There is no challenge to this

treatment for over 25 years. The AO's view that by making further payment to the developers to settle their claims on development rights tantamount to business is erroneous. In any case, every time the appellant has made such payments, the same have been added to the cost of fixed assets only. There is no challenge to this fact as well. Therefore, judgments of Hon'ble High Court of Delhi in CIT Vs DCM Ltd (2010) 320 ITR 307 clearly covers the issue in favour of appellant. It is held that

"That the flat had been held as a capital asset. The Tribunal had held that the decision to sell the property was necessitated to improve the cash flow of the assessee. The decision of the Commissioner (Appeals) holding that the income from the sale of the 10th floor in the same building in the year 1991-92 was capital gains had been accepted by the Revenue. Therefore the Tribunal was right in holding that the profit earned by the assessee on sale of portion of the property was assessable under the head "Capital gains" and not under the head "Income from business

7.5 Regarding the observation of AO that appellant has got into development agreements with APIL, Verka and TATA, it can be seen that such agreements are based on existing dispute between legal heirs of Dr. Raghunath & APIL. It was APIL who assigned its right in favour of Verka wherein appellant had to agree as confirming party. Thus AO's findings that appellant got into these development

agreements to carry on the business as a developer or dealer of land are not supported by any fact. The development agreement with TATA goes against the findings of AO as on this agreement the AO held the asset as capital asset in A.Y. 1988-89 and prepared to treat income as Capital Gain. For the same asset, the treatment was capital gains in AY 88-89 and "business profit" during this year. Such differential treatment raises a debatable issue and interpretation should go in favour of the appellant.

7.6 The clause in memorandum & articles, referred by AO can be seen in view of the decision of Hon'ble SC in the case of CIT Vs P K N Co. Ltd (1966) 60 ITR 65 (SC). Wherein it is held that

"The incidental sale of uneconomical or inconvenient plots of land could not convert what was *essentially an investment into a business transaction in real estate. Existence of power in the memorandum of association to sell or turn into account, dispose of or deal with the properties and rights of all kinds had no decisive bearing on the question whether the profits arising there, from were capital accretion or revenue. The profits arising from the sale of the properties were not taxable income.*

The question whether in purchasing and selling' land the taxpayer enters upon a business activity has to be determined in the light of the facts and circumstances. The purpose or the object for which it is incorporated where the taxpayer is a company may have some bearing, but is not decisive, nor is the circumstance that a single plot of land was acquired and was thereafter sold as a whole or in plots decisive. Profit motive in entering into a transaction is also not decisive"

7.6 In the W.T. assessment orders for AY 2005-06 to AY 2008-09 it is accepted that the property does not represent stock in trade. This is contrary to AO's own , findings in the assessment order under appeal where AO is treating the property as stock in trade. Although, principle of resjudicata is not always applicable to income tax proceedings, the glaring facts cannot be ignored. In the absence of any facts, -seating that the appellant has converted 'Capital Asset' to 'stock in trade' during the relevant A.Y., it has to be held that the same fact continues even in A.Y. 2009-10.

In view of the discussion in the aforesaid part of the order on this issue, the income earned by the appellant on sale of 27, Curzon Road, New Delhi is taxable under the head income from capital gains & not as business. There is no dispute on the Sale price and cost, the only dispute was with regard to head of income under which it is taxable which is held to be taxable under the head "Capital gains".

Accordingly, appellant would be entitled to the benefit of cost inflation index on the cost incurred by it on purchase of the property as per law. In the facts and circumstances of the case and as per law, this ground of appeal is allowed and AO is directed to treat the income as Capital Gain".

8.4 The ld. Sr. Counsel pointed out that regarding clause No. 31 in the Memorandum and Articles of Association of the assessee, such a clause reflects and creates an overall authority in which assessee can engage on its incorporation but the actual business activity carried on has to be decided on actual available facts as per records. In this regard, the conclusion of the ld. CIT(A) as noted in para 7.3 and 7.4 is that there is no dispute that a single transaction can be treated as an adventure in the nature of trade and profit arising therefrom can be taxed as business income and this proposition is well accepted. Further, the ld. CIT(A) noted that the most important factor that the courts have applied to determine the character of transaction is the intention of the tax payer which cannot be gathered or interpreted for known but the same can be gathered from the surrounding circumstances. In our opinion also, the most important relevant factor is the treatment given by the assessee at the time of acquisition of property during the time when property was with the assessee and at the time of sale of property which can be gathered only on evaluation

of financial statements, balance sheet and supporting documentary evidence. In the present case, neither the AO nor the ld. DR could demolish the contention of the ld. Sr. counsel that the assessee entered into an agreement to purchase the said property i.e. land with a semi construction building therein for a total consideration of Rs. 75 lakhs with an object to build building on the said property to be used as a registered /corporate office of the assessee. Accordingly, the assessee reflected the subject property as fixed asset in the books of account and continued to show the same as fixed asset in its annual accounts till it was sold till F.Y. 2008-09. The ld. Sr. Counsel strenuously pointed out that when the AO himself in the Wealth Tax proceedings held the said property is not stock in trade and the same is investment and fixed capital then it is not open for the AO to take a different view on the same property without any change in the facts and circumstances of the case. In the present case, the AO has not brought out and facts or allegation on record and without discussion and adjudicating the explanation of the assessee the AO proceeded to treat the income as business income instead of long term capital gain as claimed by the assessee.

9. Per contra, the ld. CIT(A) after properly analyzing the relevant submissions the facts and evidence of the assessee concluded that the AO himself held in the Wealth Tax proceedings that the said property is an investment and capital asset of the assessee also shown the same as fixed asset since its acquisition till date of sale hence in totality of the facts and circumstances of the case it cannot be held that the property was acquired as stock in trade kept as stock in trade thus the income accrued therefrom, is business income.

9.1 At this stage it would be profitable to consider the dicta laid down by the Hon'ble Jurisdictional High Court of Delhi in the case of Shanti Banerjee Vs. DCIT [supra] wherein speaking for the Hon'ble Jurisdictional High Court, their Lordships held that there was no change in the character of the said plot from the year of its allotment till the year flats were constructed thereon and there was no material on record from which it could be said that the assessee ever had the intention to exploit the plot as commercial venture. Their Lordships considering the facts of that case held that merely because six flat had been constructed and out of four were sold to friend it would not show that it was an adventure in the nature of trade". In this decision, their Lordships after considering all the relevant propositions of

Hon'ble Supreme Court and Hon'ble High Courts almost settled the issue. The relevant operative para, being words of wisdom and light house in our path of dispensing justice, are being *respectfully reproduced below:*

> *"10. The principal question to be decided is whether in the facts and circumstances of the case, it may be said that having sold two flats that fell to her share pursuant to the collaboration agreement with the Builder, the Assessee had undertaken an 'adventure' in the nature of trade warranting the receipt to be treated as business income.*
>
> *11. The issue, it appears, is no longer res integra. In G. Venkataswami Naidu and Co. v. CIT [1959] 35 ITR 594, the Supreme Court observed that while a single "plunge" in the waters of trade may be enough, a mere purchase of property "if that is all that is involved in the plunge may fall short of anything in the nature of trade". It was emphasised that what might be in the nature of trade would depend on the facts and circumstances of a particular case.*
>
> *12.The expression 'adventure in the nature of trade' was again considered by the Supreme Court in Raja Bahadur Kamakhya Narain Singh v CIT [1970] 77 ITR 253. It was observed that if a transaction was in the ordinary line of the assessee's business, there would be no difficulty in concluding that it was a trading*

transaction. But where it was not, the facts had to be carefully assessed to determine if it was in the nature of trade.

13. On more or less similar facts, this Court held in favour of the Assessee in Commissioner of Income Tax v R.V. Gupta [2002]261 (Del). In that case the Assessee was a senior IAS officer and was allotted a plot of land admeasuring 664 sq. m by the Delhi Development Authority (DDA) in a group housing society in New Delhi. The Assessee constructed six flats on the said plot and for meeting cost of construction he and his brother entered into agreement to sell with friends in respect of four of them and retained the remaining two for their own use. The question was whether the transaction was an adventure in the nature of trade and therefore the profits accruing therefrom were to be taxed under the head "income from business or profession." This Court was of the view that there was no change in the character of the said plot from the year of its allotment till the year the flats were constructed thereon. There was no material on record from which it could be said that the assessee ever had the intention to exploit the plot as a commercial venture. Merely because six flats had been constructed out of which four were sold to friends it would not show that it was 'an adventure in the nature of trade'.

14. The facts of the present case are no different. Merely, because the Assessee sold two plots that fell to her share pursuant to collaboration agreement in respect of the property owned by her since 1956, it would not render the transaction as an 'adventure in the nature of trade' leading to the resultant

receipt as business income in her hand. Further the Assessee offered the long term capital gains arising out from the same flats to tax and filed her return on that basis.

15. Consequently, the question is answered in the negative i.e. in favour of the Assessee and against the Revenue. The impugned order dated 20th March, 2003 of the ITAT and the corresponding orders of the CIT (A) and the AO hereby set aside. The appeal is allowed but in the circumstances with no order as to costs."

9.2 Furthermore, from the recent decision of the Hon'ble Jurisdictional High Court of Delhi, as relied on by the ld. Sr. Counsel dated 21.12.2015 in ITA No. 11/2004 in the case of Rajdulari Bhasin Vs. CIT we also observe that their Lordships after referring to the decision in the case of Shanti Banerjee Vs. DCIT [supra] and other relevant decision on the subject reiterated the said proposition as was rendered in the case of Shanti Banerjee [supra] after considering the facts of that case held that where the construction and sale of the flats do not change the character of the asset and there was no material to show that the assessee ever had the intention to exploit the plot as a commercial venture, the transaction cannot be characterised as an adventure in the nature of trade" leading to the resultant receipts as business income in her hand. The relevant operative paras 17 and 18

of this order is being reproduced below for the sake of completeness in our findings:

> *"The Court finds that merely because the Assessee approached the builder for constructing the flats on the portion apart from the already constructed portion, would not make the transaction an 'adventure in the nature of trade.' All that the Assessee had received from the sale of the flats was a residential flat of the value of Rs. 5,32,855 and Rs. 4 lakhs in cash as a result of the agreement entered into with the builder. As explained by this Court in Shanti Banerjee (deceased) by LRs (supra), after considering the decision in G. Venkataswami Naidu & Co. v. CIT (1959) 35 ITR 594, Raja Bahadur Kamakhya Narain Singh v. CIT (1970) 77 ITR 253 and CIT v. R.V. Gupta (2002) 258 ITR 261, where the construction and sale of the flats do not change the character of the asset and there was no material to show that the Assessee ever had the intention to exploit the plot as a commercial venture, the transaction cannot be characterized as 'an adventure in the nature of trade' leading to the resultant receipt as business income in her hand. The fact that the Assessee got a flat on the rear second floor apart from the original constructed portion on the ground floor made no difference to the nature of the transaction. The AO, the CIT (A) and the ITAT have proceeded on an erroneous legal premise that the agreement entered into by the Assessee with the builder and the consequent sale of the flats by the builder on behalf of the Assessee was an adventure in the nature of the trade.*

18. Accordingly, the question framed is answered in the negative i.e. in favour of the Assessee and against the Revenue."

9.3 In the light of the proposition when we evaluate the impugned first appellate order of the ld. CIT(A), as reproduced above, then we note that the assessee since the beginning i.e. from the date of acquisition of property till it was sold in F.Y. 2008-09 shown the property as investment in fixed assets in the audited books of account and financial statement submitted before the AO alongwith returns of income there is no challenge by the AO about the treatment. Merely because the assessee making further payments to the developers to settle the claims on development rights tantamount to business cannot be held a logical and correct a this is not only a relevant fact and surrounding circumstance to determine the main character of the transaction. We may point out that the other assessee has to make some payments to meet the liability of performance of conduct arising out of relevant contracts and agreements pertaining to fixed assets but it does not make the transaction as business transaction or 'adventure in the nature of trade'. It may be a corroborative or surrounding fact being important element to determination of real character of transaction but not a sole basis to conclude against the assessee.

9.4 The AO also observed that the assessee has got into development agreements with the TAT, AIPL and VERKA. We note that the root cause of those agreements was existing dispute between the legal heirs original owner of Dr. Raghunath and the developers and the assessee was under compelling situation to agree with these agreements as confirming party to save and protect its rights in the said property but this also do not tag the transaction as 'adventure in the nature of trade'. The ld. DR could not assist us as to why the AO gave different treatment in the wealth tax proceedings treating the same as capital asset except by stating that the principle of res judicata does not apply to the tax proceedings and we also agree to this settled and well accepted proposition. But there is rule of consistency which says that the revenue authorities are not allowed to take a different view point on the similar facts and circumstances of the case unless there are reasonable causes substantiated by radical, material and important notable change in the facts and circumstances of the case or there is some change or amendment in the provisions of the Act which could really empower and enable the revenue authorities to take a different view from the earlier view but he AO has not brought out any such material or cause to establish the changed stand wherein he treated the same property as stock in trade to tax the income accrued

therefrom as business income instead of income from long term capital gain as claimed by the assessee. The ld. DR could not controvert the observation of the ld. CIT(A) that for the same asset, the AO treated the gains as capital gain for A.Y 1988-89 and as 'business income' for A.Y 2009-10 and such differential treatment raised a debatable issue which should go in favour of the assessee.

9.5 In the case of CIT Vs. PKN Co. Ltd reported as [1966] 60 ITR 65 [SC] as relied by the ld. CIT(A) to support his conclusion regarding main business activity of the assessee, it was held that the purpose or object for which it incorporated, where the tax payer is a company, may have some bearing, but not decisive, nor is the circumstance that the single plot of land was acquired and was thereafter sold as whole or in plots decisive and profit motive in entering into transaction is also not decisive. In the case in hand, the assessee is claiming to be in the main business of sale and purchase of shares and the AO has noted in para II.6 of the assessment order that the financial results of the assessee from A.Y 2006-07 to 2009-10 shows the income from sale and purchase of shares then one instance of sale of a property which was acquired approximately 30 years back kept as investment in fixed assets in the audited accounts of the assessee and after sorting out various disputes between the legal heirs of the original owner Dr.

Raghunath and various developers i.e. TATA, AIPL & VERKA the assessee could be able to get the complete right in the said property on 28.4.2008 when the agreement between VERKA and the assessee was cancelled and 25% rights of VERKA and 40% right of AIPL were acquired by the assessee. It is pertinent to note that the assessee could get the property muted in its name on 20.9.2005. It is also relevant to note that neither the AO nor the ld. DR could demonstrate us that on such point of time the assessee changed the character of the property by putting the same from investment in fixed assets to stock in trade, which could empower the AO to tax the income accrued on sale of such property as business income instead of long term capital gain validly dismissing the claim of the assessee. Thus, we are also in agreement with the conclusion of the ld. CIT(A) that in the absence of any facts indicating that the assessee has converted capital asset' into 'stock in trade during the relevant A.Y [or during some any other earlier financial period] it has to be held that same fact continue to A.Y 2009-10. It is relevant to note that the AO has not raised any objection and has not disputed the sale price and cost [including indexation] and only dispute for our consideration was with regard to head of income under which it is taxable. On the basis of foregoing discussion, we are inclined to hold that in the totality of the facts and

circumstances of the case as noted and observed above, the treatment given by the assessee to the property from its acquisition to sale i.e. during the period when the property was within the assessee it is amply clear that the assessee shown the said property as investment in capital asset and the AO could not establish that it was ever held as stock in trade or one point of time during the period of acquisition it was converted from capital asset to stock in trade. In this situation, we decline to accept and approve the conclusion of the AO to treat the income from sale of said property as business income.

10. Per contra, we are of the considered opinion that the finding and conclusion of the ld. CIT(A) in the impugned first appellate order are quite justified, correct and sustainable and we are unable to see any perversity, ambiguity or any other valid reason to interfere with the same and thus we uphold and confirm the same. Consequently ground No. 1 of the Revenue being devoid of merits is dismissed.

Ground No. 2

11. Apropos Ground No. 2 of the Revenue, the ld. DR has drawn our attention towards pages 16 to 18 of the assessment order and contended that in the year 1998 the assessee purchased redeemable preference shares of M/s Pan Foods Pvt. Ltd [PFL]

and M/s Kayam Foods [P] Ltd [KFL] and invested a sum of Rs. 7.90 crores. The ld. DR further submitted that after 11 years in A.Y 2009-10 the assessee sold these shares @ 10% of face value for Rs. 79 lakhs as against face value of 7.90 crores. The ld. DR vehemently contended that the assessee advanced interest free loan to Mr. Lalit Jain [the purchaser of the said hares] in the form of financial support to book long term capital loss [LTCL] with an intention to reduce tax liability arising from long term capital gain [LTCG] as claimed by the assessee which accrued to it from sale of said property at 27 Curzon Road. The ld. DR vehemently argued that he ld. CIT(A) granted relief to the assessee without any basis therefore the impugned order on this issue may be set aside by restoring that of the AO. However, the ld. DR fairly accepted that the AO did not make any enquiry, from the two allotter companies i.e M/s PFL & KFL regarding redemption of said shares as to whether the shares were redeemed and if redeemed, then who was the ultimate beneficiary either the allottee assessee company or the buyer Shri Lalit Jain. The ld. DR also took us through para V-17 of assessment order and contended that admittedly the assessee had given interest free loans to Shri Lalit Jain, his wife Smt Neelam

Jain and M/s Tina Organics Pvt. Ltd a company run by Shri Lalit Jain. The ld. DR also pointed out that the assessee shown receipt of Rs. 79 lakhs from Shri Lalit Jain as sale consideration without actually giving him delivery of shares and without transferring the same in the name of buyer Shri Lalit Jain. The ld. DR strenuously contended that the assessee had used this sham transaction as colourable device to reduce its taxable income for the year under consideration arising from sale of property. The ld. DR strongly supporting the action of the AO contended that considering the fact that no delivery of shares sold was given during the year and shares were never transferred in the name of the buyer Shri Lalit Jain and the fact that the shares was repurchased by the assessee company in the next financial year the AO was quite justified and correct in dismissing the claim of LTCL of the assessee.

11.1. The ld. DR also drew our attention to the relevant paras 8.10 to 8.12 of the impugned first appellate order and submitted that the ld. CIT(A) granted relief to the assessee without any reasonable cause and thus the same is not sustainable and thus the same may be dismissed by restoring that of the AO.

12 Per contra, the ld. Senior counsel for the assessee contended that from the assessee's paper book page 439 it is apparent that the shares were transferred in the name of Shri Lalit Jain during the F.Y. 2008-09 on 29.03.2010. The ld. Sr. counsel also took us through relevant paras 8.10 to 8.12 of the impugned first appellate order and contended that the conclusion of the ld. CIT(A) are based on proper appreciation of facts and relevant circumstances which is quite justified and sustainable. The ld. AR also pointed out that section 73 of the Act is not applicable to the present case as there was no speculative transaction by the assessee as the shares was physically handed over to the purchaser Shri Lalit Jain and the same were also transferred in the name of Shri Lalit Jain immediately after the sale by the assessee.

12.1 Placing reliance on the decision of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan, the ld. AR submitted that he assessee has a right to enforce tax planning which cannot be allege as conscious and malafide tax evasion act of the assessee.

12.2 The ld. AR also pointed out that the assessee in March 1998 [A.Y 1998-99] invested a sum of Rs. 7.90 crore and after holding the same for more than 10 years the same were sold to Shri Lalit Jain for Rs. 79 lakhs on 24.3.2009 and the same were transferred in the name of the buyer on 29.3.2009 and henceforth the buyer Shri Lalit Jain became the absolute owner of the said shares.

12.3 The ld. AR further submitted that after claiming indexation, the assessee rightly claimed LTCL of Rs. 13,10,06,344/- which is allowable and the ld. CIT(A) was quite justified in allowing the same.

12.4 The ld. AR further contended that such shares were held by the assessee for more than ten years and during the instant year [F.Y. 2008-09] the assessee approached one of its debtors Shri Lalit Jain, also a friend of Shri Rakesh Mahajan [the director of the assessee company] and he accepted the offer of the assessee company and purchased such shares. The ld. AR also pointed out that after the sale by the assessee the shares were physically delivered to Shri Lalit Jain and the same were duly registered and transferred in the name of Shri Lalit Jain on 29.3.2009. The ld.

AR vehemently contended that the AO proceeded to make disallowance by recording perverse findings and only on the basis of statements of Shri Lalit Jain recorded on 26.12.2011 which had been retracted by him.

12.5 The ld. AR further contended that the ld. CIT(A), in para 8.6 has properly considered the submissions of the assessee and also the allegations of the AO has been properly rebutted by the assessee and the first appellate authority has also considered the same while granting relief to the assessee. The ld. Senior Counsel also contended that the assessee received sale consideration in respect of sale of shares by two account payee cheques totalling Rs. 79 lakhs and advancing of loans and repayment of different and detached transaction with the aforesaid impugned transaction of sale of shares. On the allegation of the AO regarding repurchase or buy back of these shares, the ld. Sr. Counsel strongly supporting the first appellate order submitted that the assessee submitted copies of accounts, balance sheets to substantiate that till date of hearing of the appeal the shares were not repurchased buy the assessee from Shri Lalit Jain then how the genuine and real transaction can be alleged as sham transaction or colourable device to reduce tax liability.

12.6 Lastly, the ld. Sr counsel pointed out that the AO never enquired about the status in the register/roll of shareholders maintained by the allotter PFL and KFL and the name of the registered share holder of the said shares after redemption from the said allotter companies and in this situation baseless conclusion of the AO was rightly demolished by the ld. CIT(A) on the basis of logical observation and findings as noted in para 8.7 to 8.11 of the impugned first appellate order.

13. On careful consideration of the above noted rival submissions of both the sides from the assessment order we note that he AO disallowed claim of the assessee regarding LTCL on the ground that complete details of transaction of sale of shares with Shri Lalit Jain were not furnished and no delivery of shares were give to the buyer Shri Lalit Jain and the so called sold shared were not transferred in the name of the buyer Shri Lalit Jain and the same were repurchased by the assessee company in the next financial Year. Hence, the AO held that the sale of shares transaction is not genuine transaction and has been used as colourable device to reduce tax liability.

3.1 Per contra, from the operative paras 8.6 to 8.11 of order of the ld. CIT(A), we observe that the ld. CIT(A) granted relief to the assessee after considering all the facts and circumstances and relevant material and explanation placed by the assessee on the allegation of the AO that the assessee has treated the amount received against recovery of amount earlier given as advance to Shri Lalit Jain during F.Y. 2000-01 and 2001-02 towards sale consideration of shares the ld. CIT(A) noted that as per the statement of account of Shri Lalit Jain, the total amount of said loan was Rs. 36.50 lakhs and most of the advance were repaid during F.Y. 2007-08 ending on March 2008 and only debit balance of Rs. 9 lakhs was outstanding on 31.3.2008 against Shri Lalit Jain. The ld. CIT(A) also noted that the buyer Shri Lalit Jain paid sale consideration of Rs. 79 lakhs to the assessee through two separate cheques totalling Rs. 79 lakhs. The transaction of advance was expected much earlier i.e. before 7-8 years upto F.Y. 2007-08 and the transaction of sale of shares was independently undertaken in F.Y. 2008-09 and these two are separate transactions and there is no linkage between these transactions which are purely separate and independent. We are of the view that merely because some amount of Rs. 9 lakhs of

advance was due in the beginning of financial period the transaction of sale of shares cannot be alleged as colourable device by wrongly observing that the seller assessee advanced interest free loans to the assessee enabling him to buy shares. In view of the above, we are of the opinion that the findings of the AO are baseless that the assessee had treated the amount received as consideration from the sale of shares against recovery of amount earlier given as advance during F.Y. 2000-01 and 2001-02 and the same was rightly rejected by the ld. CIT(A) and we concur with his conclusion.

13.2 The ld. CIT(A) also considered the allegation of the AO regarding that the shares were not transferred in the name of Shri Lalit Jain. The ld. CIT(A) further considered the details and copies of share certificates which were duly endorsed and transferred in favour of the buyer which establish the factum of the transfer of the said shares in the name of the buyer Shri Lalit Jain. Even in the retracted statement of Shri Lalit Jain recorded on 26.12.2011 deponent admitted that he obtained physical delivery of shares which again the support the conclusion of the ld. CIT(A) that the allegation of the AO regarding the non transfer of shares in the name of the buyer is not supported by a

strong evidence against the assessee. We are also in agreement with the conclusion of the ld. CIT(A) that the shares were sold on 24.3.2008 and Board of Directors passed resolution on 15.3.2008 approving the sale of shares as the action taken by the company can be ratified by the company subsequently and thus in our opinion no adverse inference can be drawn against the assessee on this fact and the transaction of sale of shares was undertaken without approval of the Board of directors.

13.3 On the observation of the AO regarding delivery of the share was never given to the buyer Shri Lalit Jain we are of the opinion that the ld. CIT(A) rightly observed that even in the retracted statements recorded on 26.12.2011 Shri Lalit Jain admitted that he had taken physical delivery of shares then finding of the AO in this regard cannot be held to be correct and the same is also not sustainable especially in the view that the shares were transferred in the name of the buyer on 29.3.2011 i.e. only within five (5) days from the date of transaction.

13.4 So far as the allegation that Shri Lalit Jain in his statement recorded on 26.12.2011 had admitted that he had resold the shares to the appellant company but he retracted his statements

on the next day i.e. 27.12.2011 and undisputedly the AO received the same letter on 29.12.2011. To support the contention of this letter, Shri Lalit Jain also filed copes of accounts and balance sheet to substantiate that the statement recorded on 26.12.2011 was factually incorrect as there was no repurchase of these shares by the assessee in the next financial year.

13.5 We also observe that the AO has discarded this letter without any cogent or justified reason merely by observing that the statement on oath cannot be discarded by filing a simple letter which is not a proper approach for a quasi judicial authority. The AO can very well discard the retraction letter but for that the AO is duty bound to bring on record some substantial evidence or allegation that the buyer Shri Lalit Jain resold the shares to the assessee during the next financial period and to demolish details as per balance sheet and the statements of account filed by Shri Lalit Jain alongwith the said letter dated 27.12.2011 supporting the fact that he never resold these shares to the assessee.

13.6 In view of the above noted observations we are in agreement with the conclusion of the ld. CIT(A) that the transaction of sale of shares had actually taken place with Shri Lalit Jain and he actually paid consideration of Rs. 79 lakhs through two account payee cheques. It is also very clear that after purchase of these shares, that the shares were actually transferred in the name of the buyer Shri Lalit Jain on 29.3.2009 and also that the shares were physically received by the buyer immediately after such sale and that reason to make investments including distinctive number of shares had been admitted by the buyer Shri Lalit Jain in his statement. On the basis of foregoing discussion, we are of the considered view that the assessee could very well substantiate the fats indicating the genuineness of the transaction by submitting all relevant facts and documents showing that the assessee actually sold these shares against consideration of Rs. 79 lakhs and the same was paid by the buyer through two account payee cheques and shares were physically handed over to the buyer and the same were transferred in the name of the buyer on 29.3.2011.

13.7 Per contra, the AO failed to demonstrate and establish that the assessee had given financial support in the form of interest free loans to Shri Lalit Jain for the purchase of shares to the effect the paper or sham transaction with an intention to reduce tax liability. Furthermore, the allegation of the AO, that the assessee repurchased these shares in the next financial period, has no legs to stand in the absence of any further enquiry from the allotter companies viz PFL and KFL regarding status of share holders pertinent to these shares by the AO and the fact was also fairly accepted by the ld. DR during arguments. Hence above noted allegations levelled against the assessee, by the AO, were rightly demolished by the ld. CIT(A) and his conclusion in this regard is valid and sustainable. We are unable to see any valid reason to interfere with the conclusion of the ld. CIT(A) in this regard on this issue and thus we uphold the same. Accordingly, Ground No. 2 of the revenue being devoid of merits is dismissed.

Ground No. 3

13.8 Apropos Ground No. 3, the ld. Ld. CIT-DR pointed out that the AO at pages 26 to 29 of the assessment order elaborately considered the issue and after considering the written

submissions of the assessee rightly held that the claim of the assessee for deduction as bad debts is not accepted as the debt has not been generated as part of the money lending activity as the assessee company is not in the business of money lending. The ld. DR pointed that it is not the case of the inter corporate deposit [ICD] which qualifies for deduction u/s 36(1)(vii) of the Act and the ld. CIT(A) also allowed the claim of the assessee by treating the same as inter corporate deposit which is a wrong conclusion.

13.9 The ld. DR vehemently disputed the conclusion of the ld. CIT(A) in para 9.6 page 35 of the impugned order and submitted that the loss accrued to the assessee due to assignment of debit outstanding from M/s VHEL was capital loss which has arisen from interest bearing inter corporate loan and the same is capital loss which cannot be treated as bad debts.

13.10 The ld. DR lastly contended that the ld. CIT(A) allowed the claim of deduction on bad debts to the assessee u/s 36(1)(vii) of the Act and there is a rider under the provision of clause (i) of section 36(2) of the Act because the money was not lent in the ordinary course of money lending business.

13.11. Per contra, the ld. Sr. Counsel for the assessee submitted that the assessee filed its detailed reply dated 19.10.2011 and 14.12.2011 and categorically explained that M/s VHEL Industries Ltd borrowed money by way of short term advance/loans/bill discount and agreed to pay a sum of Rs. 3 crores. The ld. AR further explained that during the year under assessment, the assessee company had assigned its debts of Rs. 3 crores recoverable from M/s VHEL Industries Ltd to Hanuman Construction Corporation Ltd for a sum of Rs. 75 lakhs thus suffering a loss of Rs. 2.26 crores which the assessee had rightly claimed as deduction u/s 36(1)(vii) of the Act. The ld. Sr. Counsel pointed out that w.e.f 1.4.1989, in order to obtain a deduction in relation to bad debts it is not necessary for the assessee to establish that the debts, in fact, has become irrecoverable and it is enough if the bad debt is written off as irrecoverable in the accounts of the assessee to substantiate the claim of bad debts. Further, placing reliance on the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT Vs. Tulip Star Hotels Ltd reported as 57 DTR 210 [Del], the ld. AR submitted that the loan advanced by the assessee to VHEL Industries Ltd was part of inter corporate deposit [ICD] and it could clearly be

treated as bad debt which qualifies for deduction u/s 36(1)(vii) of the Act and the embargo put by clause (i) of sub-section (2) of section 36 of the Act could not have come in the way of assessee in view of the finding that the money was lent in the ordinary course of business of the assessee.

13.12 Lastly, the ld. AR placed reliance on the decision of the ITAT, Hyderabad 'Á' Bench in the case of ITW Signod I Ltd Vs. DCIT reported as 110 TTJ 170 [Hyd. Trib] wherein it has been held as under:

> *"It is also not uncommon that at certain points of time, companies may have surplus funds awaiting fruitful deployment. Pending such deployment, they park their funds to earn interest. Earning of interest on surplus funds is also on grounds of commercial expediency as such income would ultimately augment the working capital of the assessee. Therefore, placing of ICDs is in the usual course of business and a company doing so need not be in money lending business. If placing of ICDs is in the normal course of business, the loss arising therefrom cannot be anything else but arising in the usual course of business. It was the judgment of the assessee that the debt due from Shaw Wallace has become irrecoverable. It was not without any reason that the assessee judged the debt to have become bad and irrecoverable. The ICD was initially for 90 days. At*

the end of this period, it was rolled over again for another 90 days. At the end of the second period of 90 days, Shaw Wallace issued a cheque which it could not honour. If these are not good enough reasons to consider a debt as irrecoverable, what else is required. It is further interesting to note that the interest of Rs. 21,05,278 accrued on this very ICD is also claimed as a bad debt and the AO has allowed the same. Therefore, considering the facts of the case, the claim of the assessee for deduction of Rs. 1 crore is allowed."

13.13 The ld. Sr. Counsel vehemently contended that the assessee offered interest receipts from VHEL Industries I Ltd for tax a business income in the earlier years and the AO while disallowing the claim of the assessee did not make any addition with regard to the interest of Rs. 1,06,027/- accrued thereon as bad debt. Therefore, the ld. Sr. Counsel submitted that the issue is clearly covered in favour of the assessee by the above noted judgment of the Hon'ble Jurisdictional High Court and ITAT Hyderabad Bench [supra].

13.14 The ld. DR also placed rejoinder to the above submissions of the assessee and contended that in case of interest bearing loan or advance there are two exceptions viz. If the assessee is in the business of banking and money lending,

then the bad debts arising therefrom may be allowed u/s36(1)(vii) of the Act. Otherwise, if the loans/advanced has not been given in the regular course of business of the assessee, then the bad debts pertaining to said loans/advances cannot be allowed. The ld. DR also drew our attention that in the case of CIT Vs. Tulip Star Hotels [supra] where the company was engaged in the money lending business and the claim of bad debts were held to be allowable which is not the facts of the present case.

14. On a careful consideration of the above noted arguments of both the sides, at the very outset, we note that the assessee explained its stand by way of filing letter dated 14.12.2011 and submitted as under:

> *"During the year under assessment the assessee had entered into tripartite agreement and deed of assignment with M/s Hanuman Consumer Construction P Ltd. and M/s VHEL Industries P Ltd. according to which the debit outstanding from M/s VHEL Industries Ltd. to the assessee company were assigned to M/s Hanuman Consumer Construction P Ltd. As per the deed of assignment the entire debt of 73,01,06,027/- was assigned to M/s Hanuman Consumer Construction P Ltd. for 775,00,000/- and thus suffered a loss of 72,26,06,027/-."*

"Whereas the confirming party had taken Inter Corporate Deposits payable on 17.11.96, 17.12.96 & 17.01.97 from the Assignor where under the Confirming Party borrowed^ money by way of short terms deposits/loan/bill discounting and agreed to pay a sum of 7300 lacs, the details of which are as under:

Amount	*Period*	*Due Date*
100 Lacs	*163 days*	*17.11.1996*
100 Lacs	*193 days*	*17.12.1996*
100 Lacs	*224 days*	*17.01.1997*

The Confirming party had issued two post dated Cheque No.007584 dated 30.09.99 drawn on Punjab National Bank for 73,00,00,000/- in lieu of the principal amount and another Cheque No.007585 dated 30.09.99 drawn on Punjab National Bank for 71,09,01,8367- in lieu of interest and after deducting TDS."

VI.1 The claimed of the assessee company that it qualifies for deduction as bad debt is not acceptable as the debt has not been generated as part of money lending activity as the assessee company is not in the business of money lending. The judgement relied upon the assessee company are not applicable in the instance case as the facts are different in this case. Reliance is placed on following judgements:

"(12) Assessee's claim for bad debt of a loan given by him was held not allowable as the assessee was found to be not a money-lender [K.J. Somaiya & Sons Pr. Ltd. v. CIT, (1985) 155 ITR 605 (Bom)].

(14) The loan written off as bad was held not allowable as bad debt because the loan was not incidental to the carrying on of the business of supply of goods by the assessee [indequip Ltd. v. CIT, (1993) 202 ITR 417, 422 (Bom)]. "

14.1 We further observe that the assessee again filed its letter on this issue dated 19.12.2011 explained as under:

"This has reference to the discussion with the undersigned wherein you had asked why amount of Rs. 2,26,06,027/- claimed to be written off in the books of accounts be not disallowed. In this regard we have to submit as under:

As explained earlier, during the year under assessment the assessee company had assigned its debt of Rs. 3 crore recoverable from VHEL Industries Ltd. to Hanuman Construction Corporation Ltd. of Rs. 75,00,000/- thus suffering a loss of Rs.2,25,000,00/- which the assessee has rightly claimed as deduction u/s. 36(2) of the Income Tax Act. 1961.

Delhi High Court in the case of M/s. Tulip Star Hotels has held that, when the amount in question was given by way of ICD, it is to be treated as debt arid such debt having become bad, it qualifies for deduction u/s. 36(l)(vii) of the Income Tax Act, It

was also held that provisions of clause (i) of Section 36(2) do not come in the way of the assessee since the money was lent in the ordinary course of money lending carricd.aut on the assessee.

Claim of debts not recoverable has already been covered by the amendment in the provision of Section 36(l)(vii) of the Income 'Fax Act w.e.f. 1.04.1989 "that in order to obtain a deduction in relation to back debt, it is not necessary for the assessee to establish that the debt in fact has become irrecoverable and it is enough if the bad debt is written off as irrecoverable in the account of the assessee." Similar issue came up before the Id.

ITAT in the case of M/s. Hindusthan MI Swaco Limited, vs. DC IT Bharluch, Circle, Bharuch. Ahmadabad Bench-A, ITA No. 3774/AHD/2008, where the learned Member have held that "

This being the position, we find that in the present case, the facts are identical with the facts in the case of Poysha Oxygen Pvt. Ltd. (supra). Hence, by respectfully following this Third Member decision of the tribunal, we hold that the assessee is eligible for deduction as bad debt fqr the amount of Rs. 65 lacs written off by the assessee in the present year which has been advanced by the assessee as ICD in the financial year 1995-96. This ground of the assessee's appeal stands allowed."

The assessee also gets support from the following judgment

1) *1TW Sugar India Ltd. vs. DC IT 110 TTJ 117(HYD)*
2) *Poysha Oxygen (P). Ltd. vs. ACIT 10 SOT 711 (Del.)*

3) *C1T vs. Tulip Star Hotels Ltd. 57 DTR 210 (Del). H.C.*

4) *TRF Ltd. CIT 323 ITR 397 (SC)*

Also enclosed please find complete detail of legal and professional charges.

14.2 From the operative part of the assessment order, we note that the AO mainly disallowed the claim of the assessee of bad debts by observing that the assessee's claim is not acceptable as the debts is not generated as part of money lending business as the assessee company is not in money lending business. From the appellate order of the ld. CIT(A), we note that the fact pertaining to the issue has not been disputed by the AO that the assessee advanced Rs. 3 crores interest bearing loan to M/s VHEL Industries P. Ltd and the same was assigned to M/s Hanuman Construction Corporation Ltd for Rs. 75 lakhs under tripartite agreement and thus there was short fall of Rs. 2.25 lakhs which was claimed by the assessee as deduction u/s 36(2)/36(1)(vii) of the Act. The assessee also contended that rider created by clause (i) to section 36(2) of the Act does not come in the way of the assessee since the money was lent in the ordinary course of money lending carried out on the assessee which is an inter corporate deposit [ICD] and in view of the order of the Hyderabad

ITAT Bench in the case of ITW Signode I Ltd [supra] the claim of the assessee is allowable as bad debt u/s 36(1)(vii) of the Act.

14.3 The controversy remains that whether the claim of the assessee with regard to the bad debts arising from VHEL Industries Ltd is allowable u/s 36(1)(vii) of the Act and requirement of section 36(2) of the Act are satisfied. In the present case, undisputedly, the assessee had given inter corporate deposit on interest to M/s VHEL Industries Ltd which could not be recovered as the loanee company had become financially unviable and the appellant company wrote off the debts as bad debts in the books of account after assigning loan to M/s Hanuman Construction Company under tripartite agreement for Rs. 75 lakhs during the financial period under consideration. We cannot ignore an important fact that the interest income earned from said transaction of loan was also offered by the assessee for taxation and the same was taxed as business income of the assessee. In this situation, when the AO himself allowed interest accrued thereon during the financial period as bad debts, then the claim of bad debt of the assessee cannot be disallowed. From the last operative part of the impugned order, we note that the ld. CIT(A) has granted relief by following the dicta of the

Hon'ble Supreme Court in the case TRF Ltd Vs. CIT 323 ITR 397 [SC] and his conclusion does not carry any ambiguity or perversity as per the relevant provisions of the Act and available proposition of the Hon'ble Supreme Court and the Hon'ble High Court on this issue.

14.4 Finally, we are inclined to hold that the AO made disallowance and addition by taking a hyper approach whereas the ld. CIT(A) after considering the entire facts and circumstances of the case and the nature of transaction held that the bad debts arose from inter corporate deposit is allowable deduction u/s 36(1)(vii) of the Act and the rider created by the Legislature u/s 36(2)(i) does not come into play in the facts and circumstances of the case as the assessee advanced interest bearing loan to VHEL Industries under normal course of business which was actually inter corporate deposits. Accordingly, we are unable to see any valid reason to interfere with the conclusion arrived at by the ld. CIT(A) on this issue and consequently, Ground No. 3 of the Revenue being devoid of merits is also dismissed.

15. In the result, the appeal of the Revenue stands dismissed.

The order is pronounced in the open court on 18.03.2016.

Sd/-	**Sd/-**
(L.P. SAHU)	**(C.M. GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 18th March, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi