

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

Before Shri C.N. Prasad, Judicial Member
& Shri Rajesh Kumar, Accountant Member

ITA Nos. 3075/Mum/2012 & 2087/Mum/2015
Assessment Year : 2005 –06

M/s. Kamat Club Pvt. Ltd., 70-C, Nehru Road Vile Parle (E) Mumbai – 400 099 PAN : AABCK3821B	Vs.	ITO, RG- 8(2)(2) 2 nd Floor, Aayakar Bhavan Mumbai – 400 020
(Appellant)		Respondent)

Appellant By : Shri R.C. Jain
Respondent By : Shri M.C. Omi Ningshen

Date of Hearing : 14/05/2018	Date of Pronouncement : 30/05/2018
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ORDER

Per Rajesh Kumar, Accountant Member

These appeals are by the assessee against order of the CIT(A), Mumbai for A.Y. 2005-06 one against the confirmation of quantum addition and second against the confirmation of penalty u/s 271(1)(c) of the Income Tax Act(hereinafter called the Act) and therefore they were heard together and are being disposed of by this common order for the sake of convenience.

ITA No.3075/Mum/2012

2. The only effective issue raised in the various grounds of appeal by assessee was against the confirmation of disallowance of long term capital loss on sale of shares in five private limited companies to the tune of Rs.78,55,468/-.

3. The facts in brief are that assessee filed return of income on 31/10/2005 declaring a loss of Rs.60,186/- which was processed u/s.143(1) of the Act. The case of the assessee was under scrutiny and statutory notices were duly served on the assessee. During the assessment proceedings, the AO was not carrying on any business. During the year, assessee received compensation on surrendering of tenancy rights to the tune of Rs.75 lakhs from Bombay Amusement Park Pvt Ltd under High Court order. Assessee also booked a loss of Rs.75,10,750/- on sale of shares of unquoted shares of some group companies to another group company M/S Vishal Amusement Pvt Ltd at agreed price calculated on the basis of balance sheets of the respective company. All the said companies were loss making over the years. The said loss was set off against the compensation received from surrender of tenancy rights. The total long term loss after indexation was computed at Rs.78,55,468/-. After claiming the set off against the tenancy rights, the unabsorbed loss of Rs.3,55,468/- was carried forward for future set off. The AO observed that the assessee has sold share holdings in five private companies on 21/03/2005 to Vishal Amusement Pvt. Ltd. Which were group companies to another company as per details hereunder:-

Computation of loss on sale of shares to Vishal Amusements Ltd.

Sr No.	Scrip	No. of shares	Rate of sale of shares	Date of purchase	Cost	Sale of value	Index	Index Cost	Capital Loss
1	Bombay Amusement Park Pvt.Ltd.	5250	190.95	29.10.03	5012440	1002488	480/463	5196482	4193994
2	Kamat Holdings Pvt. Ltd.,	1300	60.00	27.06.02	390000	78000	480/463	404320	326320
3	Kamat Development Ltd.,	4450	70.00	27.06.02	1557500	311500	480/463	1614687	1303187
4	Supplyco Foods P. Ltd.	2400	60.00	28.06.02	720000	144000	480/463	746436	602436

5	Kamat Amusement Pvt. Ltd.,	425	804.00	20.11.03	1708500	341700		1771231	1429531
	Total				9388440	1877688		9733156	7855468

4. According to AO, the assessee has sold its share holdings in the group concerns to Vishal Amusement Pvt. Ltd, and was of the opinion that said transactions of sale of shares were sham transactions and these were carried out in the group companies and accordingly asked the assessee to furnish the method of valuation of shares of private limited companies which were sold to Vishal Amusement Pvt. Ltd. The AO also observed that the Vishal Amusement Pvt. Ltd is holding beneficial interest in the share capital of the assessee to the tune of 15% of the total paid up capital and thus, the company pertaining to the assessee's group. The AO observed that since the transaction took place on 21/03/2005 at the fag end of the year and therefore, the said transactions are nothing but a sham transaction entered into by the assessee intended to generate long term capital loss which could be set off against the compensation received. The AO further observed that sale proceeds on sale of shares had been credited in the bank account of the assessee on 15/04/2005 whereas the sale of shares took place on 21/03/2005 and thus doubted the whole transactions and finally rejected the setting off of loss of Rs.78,55,468/- from the long term capital gain on surrender of tenancy rights to the tune of Rs.75 lakhs and thus framed assessment vide order dated 28/12/2007 passed u/s.143(3) of the Act.

5. In the appellate proceedings, the Id CIT(A) dismissed the appeal of the assessee after taking into account the contentions of the assessee which has been incorporated in the appellate order in para 2.2 and passed a detailed

order holding the transactions of sale of shares by the assessee to another group company as sham with the motive to evade taxes. The CIT(A) relied on various decisions to support his contention as has been referred to in the appellate order.

6. Learned AR submitted before us that the assessee has genuinely entered into the transactions on sale of shares which the assessee was holding of other five group companies to M/S Vishal Amusement Park Pvt. Ltd which was also a group company. Learned AR stated that assessee entered into sale of shares on 21/03/2005 and the said sales considerations were received simultaneously by account payee cheques and was duly shown as cheques in hand at the year end and were realised in the month of April on or before 15/04/2005. Learned AR submitted that the transactions were executed after following due procedures as laid down in the respective laws. The learned AR brought to the attention of the Bench, the copies of resolution of the Board of Directors which is filed at page No.15 of the paper book evidencing that the decision to sell the said shares was taken in a meeting of the Board of Directors held on 18/03/2005 and the share transfer forms were duly executed after affixing the requisite stamp fee the copies whereof are filed at page No.17 to 28. Learned AR also took us through the copy of balance sheet filed at page No.10 of the paper book in which the cheques in hand were shown at Rs.33,27,233/-. Learned AR submitted that all the companies in which assessee was holding shares as sold during the year were incurring losses right from 1998-99 to 2003-04 details whereof is filed at page 36 of the paper book. Learned AR also took us through the copies of balance sheet of these private limited companies which are filed at page No.38 to 64 of the paper book corroborating that the said companies were making losses over the years and the shares in the said companies were valued on the basis of balance sheets of the said companies though the

learned AR candidly admitted that no valuation was obtained from any professional valuer.

7. Learned AR contended that the AO has failed to bring on record any adverse material/evidences on the basis of which the said transactions could be described as sham transactions and merely reached a conclusion on the basis that this long term capital loss on sale of shares was set off against the compensation received from surrender of tenancy rights. Learned AR relied on series of decision in defence of his arguments viz. CIT vs. Special Paints Ltd. (2013) 356 ITR 404 (Guj.), CIT vs. Tainwala Chemicals & Plastics India Ltd. (2013)215 Taxman 153(Bom), CIT vs. M/s. B Arunkumar & Co Order dated 08/03/2016 of the Bombay High Court, B Arunkumar & Co ITA No.2337 of 2013, Order dated 24/5/2013 passed by ITAT, Mumbai and CIT vs. Gillette Diversified Operations (P) Ltd. (2010) 324 ITR 226 (Del).

8. Learned DR on the other hand while relying heavily on the orders of the authorities below submitted that all the five companies the shares whereof were sold were the group companies and were knowingly planned in such a way to circumvent the tax liability on the long term capital gain on the compensation received by the assessee on the surrender of tenancy rights and even the shares were sold to another group company M/S Vishal Amusement Pvt. Ltd. Since the transactions on sale and purchase of shares were carried out between the related parties which could not be proved by the assessee at arm's length and therefore, contended that the conclusion drawn by the authorities below was correct and prayed before the bench to uphold the order of CIT(A).

9. Learned DR submitted that sale price of shares by the assessee was not based upon any valuation report and submitted that decision as relied by the Id AR in the case of CIT(A) vs. Special Paints Ltd.,(supra) was distinguishable on facts. In the case of CIT vs. Gillette Diversified Operations

(P) Ltd., (supra), Id DR submitted that in that case there is no loss to the revenue whereas in the present case, there is loss of the revenue and therefore this decision was distinguishable on facts and not applicable to the case of the assessee.

10. In the rebuttal, learned AR submitted that the transactions entered into by the assessee were very much as per law and there was nothing wrong in entering into selling of shares at a price determined on the basis of balance sheet of the respective companies and also by following the procedure laid down in the respective legislation. Finally learned AR prayed before the Bench that since assessee has entered into genuine transactions of sale of shares, the appeal of assessee deserved to be allowed by setting aside the order of the CIT(A).

11. We have heard rival submissions and perused the material on record. The undisputed facts are that assessee has received compensation of Rs.75 lakhs for surrender of tenancy rights from Bombay Amusements Pvt. Ltd under High Court order. The assessee was holding shares in five private limited companies for more than a year which were loss making companies over the years and incurring losses from year to year. The assessee sold the said shares on various rates mentioned in Column 4 of the table as stated hereinabove depending on the financial position of the respective companies as all these companies were loss making. Assessee sold these shares on 21/03/2005 to Vishal Amusement Park Pvt. Ltd., which is also group company. The case of the Revenue is that the transactions entered into by the assessee by way of sale of shares to M/s. Vishal Amusement Ltd., were sham transactions intended and designed to circumvent the tax due on the long term capital gain on compensation as received by the assessee on the surrender of tenancy rights. We observe from the records that the sale of shares were duly authorised in the Board of Directors meeting of the assessee company on 18/03/2005 and was executed on 21/03/2005. The

share transfer forms duly executed and affixed with the requisite stamp fee were also filed by the assessee in the paper book from page No.17 to 28. The copy of the Board resolution is filed at page No.15. The balance sheets of the various entities, copies of shares transfer forms and certificates were also placed in the paper book evidencing the fact that all these companies were loss making over the years and valuation was done on the basis of these balance sheets. Fairly admitting that no valuation was carried out for arriving at the value of the shares, however, Id AR the assessee submitted before us that the same were valued on the basis of balance sheets of the respective entities. We have also perused the balance sheet of the assessee which shows all the cheques received from M/s. Vishal Amusement Ltd., were shown in the balance sheet as on 31/03/2004 as Cheques in Hand and were realised in the next month as is evident from the copies of bank statement filed by assessee. Now, the issue before us is whether such transactions are sham transactions as held by the authorities below or genuine transactions. Considering the facts of the case and the supporting evidences, we are of the view that the assessee has genuinely entered into the sale of shares which are supported with the transfer deeds, Board resolution and the confirmation of payments for transfer of such shares and were duly shown in the books of accounts of the assessee. The sole issue raised by the revenue is that the price at which these were transferred was not based upon valuation report and thus the AO rejected the setting off the said loss against the long term capital gain. It seems to be a case of tax planning by the assessee, though the transactions having been carried out between the group companies. In the case of CIT(A) vs. B. Arunkumar & Co., the identical issue came up before the Jurisdictional High Court in which the Hon'ble High Court has held that the assessee has shown the full consideration received for the sale of shares which has been disclosed in the return of income and the same can not be substituted. We find that both Commissioner of Income Tax (Appeals) as well as the Tribunal have rendered a finding of fact that the

consideration of Rs.750/- and Rs.936/- per share received on the sale of the shares by the respondent assessee was in fact the full consideration which have been disclosed to the revenue. It is not the case of the revenue that the amount disclosed by the respondent assessee was less than what has been received by them or what had accrued on sale of its shares. The revenue has not in any manner shown that the consideration disclosed by the respondent assessee to the revenue is not the correct consideration received by them and that the same should be replaced. Moreover, wherever the Parliament thought it fit that the consideration on a transfer of a capital asset has to be ascertained on the basis of market value of the asset transferred specific provision has been made in the Act. To illustrate Section 50C of the Act provides for stamp value duty in case of transfer of land or buildings. Similarly, Section 45(2) and 45(4) of the Act in cases of conversion of the investment into stock in trade or transfer of shares on dissolution of a firm to its partners respectively has to be at market value. In this case computation of capital gain is governed by Section 48 of the Act and it only refers to full value of consideration received. The reliance upon the decision of the Apex Court by the Tribunal was therefore appropriate.

12. In the case of CIT(A) vs. Special Paints Ltd., the Hon'ble High Court of Gujarat has held that even if the assessee has consciously entered into the transactions on sale of shares with an object of earning and set off as the part of tax planning, revenue cannot object to the same as long as said planning is achieved through legitimate means. In this case, the AO disallowed the set off of the loss on the ground that transaction was a colourable device but the Tribunal has reversed the order.

13. In the case of CIT vs. Tainwala Chemicals & Plastics India Ltd., the Hon'ble Bombay High Court has held that it is not sufficient, however, Revenue has merely allowed that assessee had in fact received more

consideration. The High Court held that the Tribunal has got a finding that Revenue has not discharged the burden which cost upon it in terms of the decision of Apex Court in the case of K P Varghese. The High Court further held that the Tribunal has recorded that in case Revenue doubted the calculation of interest on value of share, so as to justify its allegation that price at which the shares were transferred was low and thus dismissal of the appeal has no question of law arise for consideration.

14. In the case of CIT(A) vs. Bhusam Capital & Credit Services (P) Ltd., the Hon'ble High Court has held as under:-

“The Tribunal observed that the transaction of purchase as well as sale of the shares of Rail Track India and Evergrowing Iron & Finvest were both done on the basis of networth of the shares as would be evident from the workings given by the assessee before the Assessing Officer as also before the Tribunal. The said shares were not quoted shares & that the valuation of the shares both at the time of purchases well as at the time of sale of the said shares was on the networth basis which have not been challenged by Assessing Officer or the Commissioner (Appeals). It is only that both these authorities have only raised certain doubts as to why such a loss was incurred. However, they have not been able to produce any evidence to dispel the credibility of the prices as indicated by the respondent assessee when there is no evidence to upset the purchase & sale prices of said shares. The prices arrived at on the basis of networth of the said companies as provided by the assessee, would have to be accepted. If that were to be done then the addition could not be made as the transactions would be in order. There is also no finding that the transactions were not legitimate or that the transactions were sham.”

15. Keeping in view the ratio laid down by the various High Courts, the Co-ordinate Benches and the facts of the assessee's case, we are of the considered view that the long term loss on sale of shares of Rs.78,55,468/- cannot be allowed to be non-genuine and therefore, we direct the AO to allow the set off such loss against the long term capital gain on compensation received by the assessee upon surrender of tenancy rights by setting aside the order of CIT(A) on this issue.

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

ITA NO. 2087/Mum/2015

17. The issue raised by the assessee in the various grounds of appeal is against the imposition of penalty u/s.271(1)(c) of the IT Act amounting to Rs. 15,68,250/-. Since, we have allowed the long term capital loss on sale of shares to be genuine and allowable to be set off against the compensation received from surrender of tenancy rights and thus allowed the appeal of the assessee in quantum appeal. Consequently, the penalty as levied u/s.271(1)(c) of the Act does not survive as the very basis is demolished and therefore, accordingly we direct the AO to delete the penalty.

18. In the result, both the appeals filed by assessee are allowed.

Order pronounced in the open court on this day of 30/05/2018.

**Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER**

**Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER**

Mumbai, Dated : 30/05/2018.
Karuna, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai