

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.322/PUN/2014

निर्धारण वर्ष / Assessment Year : 2010-11

Mr. Sunil Haripant Pophale,
C/o Vadivarhe Specialty Chemicals Ltd.,
Gat No.204, Nashik Mumbai Highway,
Vadivarhe,

Nashik – 422403

.... अपीलार्थी/Appellant

PAN: AAHPP4573G

Vs.

The Jt. Commissioner of Income Tax,
Range – 2, Nashik

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.448/PUN/2014

निर्धारण वर्ष / Assessment Year : 2010-11

The Asst. Commissioner of Income Tax,
Circle – 2, Nashik

.... अपीलार्थी/Appellant

Vs.

Mr. Sunil Haripant Pophale,
C/o Vadivarhe Specialty Chemicals Ltd.,
Gat No.204, Nashik Mumbai Highway,
Vadivarhe,

Nashik – 422403

.... प्रत्यर्थी / Respondent

PAN: AAHPP4573G

आयकर अपील सं. / ITA No.301/PUN/2014

निर्धारण वर्ष / Assessment Year : 2010-11

Smt. Sunita Ajay Ramnathkar,
22, Parijat, 95 Marine Drive,

Mumbai – 400002

.... अपीलार्थी/Appellant

PAN: AAFPR1193J

Vs.

The Asst. Commissioner of Income Tax,
Circle – 2, Nashik

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.447/PUN/2014
निर्धारण वर्ष / Assessment Year : 2010-11

The Asst. Commissioner of Income Tax,
Circle – 2, Nashik

.... अपीलार्थी/Appellant

Vs.

Smt. Sunita Ajay Ramnathkar,
22, Parijat, 95 Marine Drive,
Mumbai – 400002

.... प्रत्यर्थी / Respondent

PAN: AAFPR1193J

Assessee by : Shri Sunil Pathak
Revenue by : Shri S.B. Prasad, CIT

सुनवाई की तारीख / Date of Hearing : 24.01.2019	घोषणा की तारीख / Date of Pronouncement: 22.04.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by related assessee are against respective orders of CIT(A)-2, Nashik, both dated 06.12.2013 relating to assessment year 2010-11 against respective orders passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals of related assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.322/PUN/2014, relating to assessment year 2010-11 has raised the following grounds of appeal:-

1. *The CIT(A) erred in confirming the disallowance of short term capital loss of Rs.15,08,10,000 arising on the sale of shares of Vadivarhe Specialty Chemicals Ltd.*
2. *The CIT(A) erred in confirming the disallowance of long term capital loss of Rs.1,93,16,031 arising on the sale of shares of Pentagon Manufacturing and Marketing Ltd.*
3. *The CIT(A) erred in holding that the transactions of subscription to the shares of Vadivarhe Specialty Chemicals Ltd. @ a premium of Rs.9,900 per share and sale of 16,500 shares @ Rs.860 per share by the appellant were :-*
 - (i) *not genuine and,*
 - (ii) *had no business purpose and,*
 - (iii) *were undertaken with the sole purpose of avoiding tax.*
4. *The CIT(A) erred in holding that the transaction of sale of the shares of Pentagon Manufacturing and Marketing Ltd. @ Re. 1 per share was not a genuine business transaction.*
5. *The CIT(A) erred in :*
 - (a) *holding that there was no basis for determining the sale price of the share of Pentagon Manufacturing and Marketing Ltd. @ Re.1 per share*
 - (b) *determining the value of the said share at Rs.3.35 instead of Re.0.11 on 22.02.2010, the date of sale of the said shares.*

4. The Revenue in ITA No.448/PUN/2014, relating to assessment year 2010-11 has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, the CIT(A) erred in deleting the addition of Rs.5,34,47,817/- on account of loss claimed from sale of shares of Reliance Industries Ltd.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in holding the transactions of purchase and sale of Reliance Industries shares by the assessee as tax planning within the four corners of law and subsequently permitting the same.*
3. *The order of the CIT(A) be vacated and that of the A.O. be restored.*
4. *The appellant prays for admission of an additional ground of appeal or additional evidences, if required to support his case.*

5. First, we shall take up cross appeals in the case of Mr. Sunil Haripant Pophale.

6. Briefly, in the facts of the case, the assessee for the year under consideration had furnished return of income declaring total income of ₹ 85,29,72,540/-. The case of assessee was selected for scrutiny under CASS. The assessee was promoter, shareholder and Director of Fem Care Pharma Limited (in short 'FEM'). During the year under consideration, the assessee had sold his shares to Dabur India Ltd. at a consideration of ₹ 800/- per share. The assessee had received consideration of ₹ 114.64 crores on the sale of Fem and had shown long term capital gains of ₹ 109.07 crores. The assessee did not claim any indexation for the computation of capital gains on the said transfer of shares and paid taxes @ 10%. Against this long term capital gains, the assessee had set off of short term capital loss of ₹ 20.51 crores and long term capital loss of ₹ 1,31,94,000/-. The assessee had also claimed exemption under section 54F of the Act at ₹ 6.91 crores. Besides that the assessee had shown other income of ₹ 4.50 crores and also salary from Fem and income from business. Further, the assessee had claimed exempt income of ₹ 2.79 crores under section 10 of the Act, which included dividend of ₹ 2.36 crores, PF of ₹ 29,66,102/- and gratuity and leave encashment. The long term capital gains sold on shares of FEM at ₹ 109.07 crores was accepted by the Assessing Officer as per his deliberations in the assessment order and he observed that since no indexation for cost of acquisition has been claimed, then the same had to be taxed @10%. The assessee then was asked to furnish details of short term capital loss and long term capital loss claimed against the aforesaid shares. The first transaction was sale of shares of Vadhivare Specialty Chemicals Ltd. and the assessee had claimed loss of ₹ 15.08 crores. The Assessing Officer noted that the assessee had floated this company on 23.02.2009 and he was holding 4,940 shares at the face value of ₹ 100/-. Subsequently, the assessee purchased 16,500 shares on 13.01.2010 again at

face value of ₹ 100/- and at premium of ₹ 9,900/-. The assessee thus, had shown cost of acquisition of the said shares at ₹ 16,50,00,000/-. The said company had issued 8 bonus shares on one share held on 27.01.2010 (within 13 days of acquiring the said shares, the company had issued 8 bonus shares). Immediately after the announcement of bonus shares, the assessee sold original 16,500 shares on 22.02.2010 to Manasi S. Pophale at the face value of ₹ 100/- and at premium of ₹ 760/- per share. The total sale consideration was ₹ 1.41 crores as against cost of acquisition of ₹ 16.50 crores and hence short term capital loss of ₹ 15.08 crores. On show cause notice, the assessee explained the transactions of sale of shares of Vadhivare Specialty Chemicals Ltd. and claimed that the said transactions were recorded by the company and were genuine and real transactions and cannot be said to be colourable device for claiming the set off against long term capital gains arising on sale of shares of FEM. He admitted that it is one of the methods of tax planning to reduce tax liability. The Assessing Officer vide para 6.5.1 analyzed the transactions and noted that the concern Vadhivare Specialty Chemicals Ltd. was closely held company by the assessee and his family members, wherein the assessee was holding 98.8% shares of the said company. On verification of shareholding of the said company after issue of bonus shares, the Assessing Officer observed that the assessee was holding 1,92,960 shares out of total shares of 1,93,500. The shareholding of assessee thus, became after bonus shares at 99.72% as on 27.01.2010. On the analysis of the said facts, the Assessing Officer noted that the assessee had entered into an agreement with Dabur India Ltd. for sale of his shares on 21.11.2008 and the transaction was executed on 25.06.2009. Further, the assessee had floated Vadhivare Specialty Chemical Ltd. on 23.02.2009 and the company was closely held company in which on the date of incorporation the assessee had shareholding of 98.8% and subsequently, after the bonus shares, the assessee had shareholding of 99.71% and thereafter, on

22.02.2010 i.e. after 40 days of acquisition of shares, the assessee sold the original 16,500 shares to Manasi Pophale, who is assessee's daughter and the shares were sold on face value of ₹ 100/- with premium of ₹ 760/- for ₹ 1.42 crores. On the said transaction, the assessee had incurred short term capital loss of ₹ 15.08 crores. The Assessing Officer verified the audit report and financial statements of the company and found that the company had not carried out any transactions in financial year 2008-09. However, in financial year 2009-10 on some transactions, the net profit before taxation was shown at ₹ 10,30,941/- only. The Assessing Officer thus, observed that where the company had not carried out any significant business activity in the financial year 2009-10, therefore, there was no financial justification for purchasing the company's shares at the premium of ₹ 9,900/- per share. The Assessing Officer was of the view that premium of ₹ 9,900/- per share was decided by assessee on his own wish as he was the major shareholder of the company and the other shareholders were also his family members. The assessee thus, had no bonafide justification to purchase the shares at a premium of ₹ 9,900/- per share and this purchase clearly reflected the intention of assessee when subsequently, he sold the shares to his daughter. The Assessing Officer further notes that when the shares were sold to daughter on 26.02.2010, the premium had reduced to ₹ 760/-, whereas on 13.01.2010, he had purchased the shares at premium of ₹ 9,900/- per share. The Assessing Officer questioned the fall in premium of shares from ₹ 9,900/- per share to ₹ 760/- per share within period of 44 days when there was no change in the company's functions. On the analysis of said facts, the Assessing Officer came to the conclusion that short term capital loss shown by the assessee on account of sale of shares of Vadhivare Specialty Chemical Ltd. was not genuine. Hence the Assessing Officer held the entire transaction to be colourable and self-

servicing and hence, the explanation of assessee vis-à-vis loss on sale of shares of Vadhivare Specialty Chemical Ltd. was not accepted.

7. The CIT(A) was of the view that all the steps taken by assessee were for avoidance of tax, so the loss on sale of shares of Vadhivare Specialty Chemical Ltd. of ₹ 15.08 crores cannot be set off against capital gains on sale of shares of FEM at ₹ 109.07 crores. The CIT(A) upheld the order of Assessing Officer in this regard.

8. The assessee is in appeal against the order of CIT(A) and vide grounds of appeal No.1 and 3 has raised the issue of denial of set off of short term capital loss of ₹ 15.08 crores on sale of shares of Vadhivare Specialty Chemicals Ltd.

9. The learned Authorized Representative for the assessee has filed written submissions in this regard and has placed heavy reliance on the said submissions.

10. The learned Departmental Representative for the Revenue on the other hand, strongly pointed out that the assessee after entering into transaction of sale of shares of FEM to Dabur India Ltd., on which it earned huge profits had formed the concern Vadhivare Specialty Chemicals Ltd. and booked the losses. He heavily relied on the deliberations of Assessing Officer at pages 15 to 19 and on the order of CIT(A) in para 7 at page 20 of the appellate order.

11. We have heard the rival contentions and perused the record. The assessee had during the year under consideration earned capital gains on sale of shares of FEM and had shown capital gains of ₹ 109.07 crores. The said

transaction of the assessee has been accepted but one fact needs to be kept in mind is that the assessee had entered into an agreement with Dabur India Ltd. for sale of shares in FEM on 21.11.2008 and transaction was completed on 25.06.2009 i.e. in the year under consideration. Simultaneously, the assessee floated Vadhivare Specialty Chemicals Ltd. on 23.02.2009, which was closely held company of the assessee and his family members, in which the assessee was the major shareholder. On the date of incorporation, he had holding 98.8% shares of the company. The company was incorporated on 23.02.2009 and initially, the assessee had holding 4,940 shares at face value of ₹ 100/-. Subsequently, on 13.01.2010, the assessee purchased 16,500 shares at face value of ₹ 100/- and premium of ₹ 9,900/- per share for total consideration of ₹ 16.50 crores. The assessee claims that since it needed to purchase the unit of Specialty Chemicals, the funding was provided through share capital. The company on 27.01.2010 issued bonus shares in the ratio of 8:1 and on 29.01.2010 the assessee sold 16,500 shares at face value of ₹ 100/- and premium of ₹ 760/- per share. The said sale was to his daughter Manasi S. Pophale for total consideration of ₹ 1.42 crores and hence, the short term capital loss of ₹ 15.08 crores. The perusal of Balance Sheet, financials of the said company, wherein the company had not entered into any major transactions of carrying on the business reflects that there was no merit in purchase of shares at face value with premium of ₹ 9,900/- per share after few days of incorporation of the said company. Further, this purchase was on 13.01.2010 and on 27.01.2010 bonus shares were issued and on 29.01.2010 the shares were sold at face value of ₹ 100/- plus premium of ₹ 760/- per share. The assessee has failed to justify first the cost of purchase i.e. with premium of ₹ 9,900/- per share and then the sale consideration i.e. premium of ₹ 760/- per share. In the absence of the same, the loss claimed by assessee is not justified and we uphold the orders of authorities below in denying the set off of

short term capital loss of ₹ 15.08 crores on sale of shares of Vadhivare Specialty Chemicals Ltd. The grounds of appeal No.1 and 3 raised by assessee are thus, dismissed.

12. Now, coming to the next issue raised vide grounds of appeal No.2 and 4 i.e. against non set off of long term capital loss of ₹ 1.93 crores on sale of Pentagon Manufacturing and Marketing Ltd. (in short 'Pentagon')

13. Brief facts relating to the issue are that the said company was incorporated on 30.01.1995 and the assessee was one of the promoters of the company holding 5,39,800 shares at face value of ₹ 10/- as on 01.04.2009. He was also holding 3,00,000 preference shares. The total holding of 8,39,800 shares i.e. Equity and Preference shares were sold on 22.02.2010 for ₹ 1/- per share to Manasi Pophale for consideration of ₹ 8,39,800/-, which resulted in long term capital loss of ₹ 1.93 crores (after indexation). The Assessing Officer show caused the assessee to explain the said transaction and why set off should be allowed against long term capital gains shown by the assessee. The assessee claimed it to be tax planning and not colourable device. The Assessing Officer noted that shareholding pattern of Pentagon in which the assessee held 5,39,800 equity shares and 3,00,000 preference shares. On verification of financial statements of Pentagon for financial years 2006-07 to 2008-09, the Assessing Officer found that the company had shown losses in the said financial years. However, the price of shares was to be decided on the basis of valuation of shares. In this case, the valuation of shares was to be worked out on the basis of net asset value method. Since the company had shown losses, price to earning ratio for valuation shares was not applicable. The Assessing Officer thus, on the basis of share capital value, Reserves & Surpluses and contingent liability worked out net current asset. As per the

Assessing Officer, the net worth of company as on 31.03.2009 was ₹ 2.20 crores, where the company had 14,00,000 total number of shares, therefore, the net asset value per share of the company worked out to ₹ 15.70 per share. The company had not reduced losses from Reserves & Surplus. However, in order to derive correct net worth, the Assessing Officer was of the view that losses shown as on 31.03.2009 of ₹ 1.73 crores were to be reduced. Thus, net worth worked out to ₹ 47,00,602/- and considering this value of net worth, the net asset value per share came to ₹ 3.35. The Assessing Officer was of the view that on the basis of NAV as on 31.03.2009, the value of shares was ₹ 1570/- per share but after considering the effect of loss, the value of shares was ₹ 3.35 per share. However, the assessee had sold shares at the value of ₹ 1 per share which was sold to the daughter of assessee. The Assessing Officer noted that this company was closely held company of the assessee and his family members and the assessee himself was the major shareholder of the company. The Assessing Officer was of the view that there was no rationale justification of selling the shares at the price of ₹ 1 per share. The Assessing Officer further held that *The above transaction show that the assessee has sold the shares to his daughter at the price which is lower than the share price of the company. It proves that, this transaction has been carried out by the assessee' deliberately and intentionally as per his own wish without any rational justification. The only purpose behind this transaction was to incur long term capital loss so that it can be adjusted against the long term capital gains earned from sale of shares of Fem Care Pharma Limited. The transaction of sale of shares at the value of Rs.1/- per share by the assessee is thus fabricated, manipulated and sham. The transactions is carried out by the assessee purposely so that it appears as a genuine transaction.* The Assessing Officer was of the view that entire transaction was nothing but a colourable device

used by the assessee to manipulate the taxable income and therefore, explanation of assessee was not accepted.

14. The CIT(A) has upheld the order of Assessing Officer. The CIT(A) held that where the assessee was main promoter and Director of Pentagon having total shareholding of 8,39,800 and the total shareholding was sold to his daughter Manasi Pophale on 22.02.2010 for ₹ 1/- per share, he was of the view that transaction was entered in order to reduce his tax liability, wherein the shares were sold to his daughter @ ₹ 1/- per share as against face value of ₹ 100/- per share. The CIT(A) refers to premium of ₹ 9,900/- per share but that noting of the CIT(A) is incorrect. However, the CIT(A) does not accept the tax planning plea of assessee and held the transaction to be not genuine but the device to evade tax.

15. The assessee is in appeal against the said denial of set off of capital loss on sale of shares of Pentagon against long term capital gains arising on sale of shares of FEM.

16. The learned Authorized Representative for the assessee pointed out that the said company Pentagon was floated in 1995 and was dealing in the business of selling garments with bar code brand. The said company incurred losses. Our attention was drawn to the balance in Profit and Loss Account of the said concern, wherein it was pointed out that as against capital of the company at ₹ 1.40 crores, accumulated loss as per Profit and Loss Account of ₹ 2.18 crores. Thus, the entire capital was wiped away by losses incurred over the years. The Reserves & Surplus of ₹ 80 lakhs was out of share premium and were not out of profits of earlier years. The breakup value of shares as on 31.03.2010 was negligible and the details were given at page 124 of Paper

Book of Sunita A. Ramnathkar, which worked out to 0.11 per share. The assessee had sold the said shares @ ₹ 1/- per share to his daughter and had claimed capital loss of ₹ 1.93 crores. He challenged the orders of Assessing Officer and CIT(A) in denying the set off of this loss for the reason that there was no justification for valuing the shares so low; the assessee had lots of money and therefore, there was no reason to sell the shares and also that the sale was made to his daughter was not tax planning but device to evade taxes. He then placed reliance on series of decisions to point out that even where the transaction was pre-planned, but not a colourable device although entered into with motive that plan to reduce tax, the transaction cannot be brushed aside. We will refer to the said decisions at the relevant point of time.

17. The learned Departmental Representative for the Revenue on the other hand pointed out that the Assessing Officer has worked out the value of said shares at ₹ 3.35 per share, whereas the assessee sold the shares @ 1/- per share.

18. The learned Authorized Representative for the assessee in reply pointed out that the Assessing Officer had adopted the figures on 01.04.2009. Reference was made to page 21 of the order of Assessing Officer. However, the assessee's case is that it had sold the shares on 22.02.2010, then NAV has to be worked out as on 31.03.2010, wherein as against fund of ₹ 2.20 crores, there was loss of ₹ 2.18 crores. Hence, the net worth was Nil. However, as per computation of market value as on 31.03.2010, which is placed at page 124 of Paper Book in the case of Sunita A Ramnathkar, works out to ₹ 0.11 per share.

19. The learned Departmental Representative for the Revenue then referred to the case laws relied upon by the learned Authorized Representative for the assessee and stated that in none of the case laws relied upon by the learned Authorized Representative for the assessee, the transaction was with daughter. He relied on the ratio laid down by the Hon'ble Supreme Court in *Mc Dowell & Co. Ltd. Vs. Commercial Tax Officer* (1985) 154 ITR 148 (SC), *CIT Vs. Durga Prasad More* (1971) 82 ITR 540 (SC), Hon'ble High Court of Karnataka in *CIT Vs. Wipro Ltd.* (2014) 50 taxmann.com 421 (Kar), Hon'ble High Court of Delhi in *CIT Vs. Abhinandan Investment Ltd.* (2015) 63 taxmann.com 263 (Del) and Mumbai Bench of Tribunal in *Bombay Oil Industries Ltd. Vs. DCIT* (2002) 82 ITD 626 (Mum). He stressed that the transaction was a collusive transaction with daughter to evade payment of tax.

20. The learned Authorized Representative for the assessee in rejoinder pointed out that the shares were sold by assessee on 22.02.2010 @ ₹ 1/- per share were holding shares of Pentagon, held by the assessee from 1995. He stressed that there was no prohibition in law that if you sell the shares to daughter, then the loss cannot be claimed. Then, he rebutted the case laws relied upon by the learned Departmental Representative for the Revenue and stressed that the facts were entirely different and cannot be relied upon. He stressed that it was not a colourable device.

21. We have heard the rival contentions and perused the record. The assessee was one of the promoters of Pentagon, which was floated in 1995. The said company had incurred losses over the period of years. The perusal of Balance Sheet at pages 39 to 76 of Paper Book with special reference to page 70 reflects that capital of the company totaled to ₹ 1.40 crores; while the

accumulated losses were to the tune of ₹ 2.18 crores. In other words, the entire capital of the said concern was wiped out by the losses incurred over the period of years. Further, at page 72 of Paper Book, Reserves of ₹ 80 lakhs were out of share premium and not out of profits of earlier years. Taking the said figure, the breakup value of shares as on 31.03.2010 as worked out at page 124 of Paper Book in the case of Sunita A. Ramnathkar was ₹ 0.11 per share. The assessee had held 5,39,800 original shares and 3,00,000 preference shares for total value of ₹ 83,98,000/-. The entire shareholding was sold by the assessee to his daughter Manasi Pophale on 22.02.2010 @ 1/- per share for total consideration of ₹ 8,39,800/-, which resulted in loss of ₹ 1.93 crores (after indexation). The assessee claimed capital loss of ₹ 1.93 crores on sale of said shares and same was set off against capital gains declared by the assessee. The Assessing Officer did not accept the said set off of losses and was of the view that the same was carried out to evade taxes. However, the case of assessee was that it was genuine transaction and the shares were transferred to his daughter, which is not barred by any law and he admitted that it was case of legitimate tax planning. The Assessing Officer also denied the said loss set off in the hands of assessee on the ground that NAV of the said shares comes to ₹ 3.35. The assessee had sold the shares only at ₹ 1/- per share. For working out the figures of NAV, the Assessing Officer had adopted the figures as on 31.03.2009 i.e. opening of the year. However, the law requires that the same should be adopted at the close of the year. As per working, the value of shares works out to ₹ 0.11 per share as on 31.03.2010. The assessee having sold the same @ ₹ 1/- per share had duly sold at a price which is higher than NAV and the same cannot be questioned. The action of Assessing Officer in substituting consideration received by the figure higher, based on the breakup value of shares and disallowing the loss was not accepted by the Hon'ble Bombay High Court in CIT Vs. M/s. B. Arunkumar &

Co. in Income Tax Appeal No.2337 of 2013, judgment dated 08.03.2016, wherein it was held that where the Revenue has not proved that the assessee has received higher consideration than what is actually shown on sale of shares, the consideration shown by the assessee for sale of shares has to be accepted. Hence, the Hon'ble High Court allowed the capital loss in the hands of said assessee. Applying the said ratio to the facts of present case, we hold that where the Assessing Officer has not brought on record any evidence that it had received higher consideration than the one shown on sale of shares, then the said consideration shown by the assessee merits to be accepted, since there is no provision in the Act to substitute the consideration by a different figure.

22. The Hon'ble Supreme Court in K.P.Verghese Vs. ITO & Anr. (1981) 131 ITR 597 (SC) had held that for the purpose of section 48 of the Act, if the Revenue wants to tax higher consideration, firstly it has to prove that the assessee has actually received some consideration over and above that shown by him. As pointed out in the paras hereinabove, the Revenue has not brought on record any such evidence to prove that the assessee has received anything over and above ₹ 1/- from his daughter and in the absence of the same, the Assessing Officer is incorrect in taking NAV of the shares for the purpose of computing capital gains at ₹ 3.35 per share.

23. Now, coming to the next aspect of the issue whether even if it is held that the assessee has indulged in some tax planning i.e. sold shares held by it and the transaction being not doubted and thereafter claimed the set off of the capital loss against capital gains shown by the assessee on sale of another set of shares, then is it a case of tax planning or tax avoidance.

24. The Hon'ble Supreme Court in *Union of India & Anr. Vs. Azadi Bachao Andolan & Anr.* (2003) 263 ITR 706 (SC) held that citizen is free to carry on his business within four corners of law and mere tax planning without any motive to avoid taxes through colourable device is not frowned upon. The Apex Court further held that the principle laid down in *Mc Dowell & Co. Ltd. Vs. Commercial Tax Officer* (supra) relied upon by the learned Departmental Representative for the Revenue applies to an artificial transaction and not a real transaction.

25. In another celebrated decision, the Apex Court in *CIT Vs. Walfort Share and Stock Brokers (P.) Ltd.* (2010) 326 ITR 1 (SC) considering the case of a company, which had purchased the shares before dividend and received the dividend thereafter, which was tax free, and later on sold the shares ex-dividend and claimed capital loss on sale of shares, had held that even assuming that the company had made use of provisions of section 10(33) of the Act, such use could not be said to be abuse of law. It further held that even assuming that the transaction was pre-planned, there was nothing to impeach the genuineness of the transaction and hence, capital loss on sale of shares was allowed in the hands of assessee.

26. The Hon'ble High Court of Karnataka in *Bhoruka Engineering India Ltd. Vs. DCIT* (2013) 356 ITR 25 (Kar) had also held that where the arrangement, if any, made by assessee does not contravene any statutory provisions and is achieved within four corners of law but the same is entered into as part of tax planning, then no fault can be found with such a transaction.

27. The Hon'ble High Court of Punjab & Haryana in *Porrits & Spencer (Asia) Ltd. Vs. CIT* (2010) 329 ITR 222 (P&H) has laid down similar proposition and

also the Hon'ble High Court of Calcutta in Eveready Industries India Ltd. Vs. CIT & Anr. (2011) 334 ITR 413 (Cal).

28. Applying the said principles to the facts of present case, we thus, find no merit in the stand of Assessing Officer that the transaction of booking loss by selling shares by the assessee to his daughter is colourable device, cannot be accepted. Once the transaction has been entered into within four corners of law and the transaction has not been doubted; where the shares which were held by assessee for long period were sold at a price which was more than NAV value of shares as on date of sale of shares, then it may be case of tax planning within four corners of law and the same cannot be brushed aside. Merely because the transaction was pre-planned by the assessee would not affect the genuineness of transaction, where the transaction has been undertaken by the assessee within framework of law.

29. The Hon'ble High Court of Calcutta in CIT Vs. Oberoi Hotels (P) Ltd. (2011) 334 ITR 293 (Cal) had considered the similar proposition. In the facts before the Hon'ble High Court, the assessee purchased the shares of the company SKB in 1991 and later on, also subscribed to the additional shares at a hefty premium of ₹ 1800/- per share of ₹ 100/- face value. However, immediately thereafter, the assessee sold his shares at the price of ₹ 18,33,752/- as against the cost of ₹ 8,78,11,500/-. Thus, it booked the short term capital loss of ₹ 8,59,77,725/-. The said loss was allowed on the ground that the transaction was genuine. The Assessing Officer had disallowed the claim holding it to be a colourable transaction on the ground that the company could have invested further amount or waited for a reasonable period for the business to grow. The contention of Assessing Officer was rejected and the loss was allowed in the hands of assessee.

30. Another reason why the said loss was disallowed in the hands of assessee was that shares were sold by the assessee to his daughter. In this regard, we find support from the ratio laid down by Delhi Bench of Tribunal in Raghvendra Singh Vs. Inspecting Assistant Commissioner (1991) 39 ITD 463 (Delhi Trib.). In the facts of said case, the shares were sold by the said assessee to his daughter at loss. The legal form of transaction was accepted but the Assessing Officer did not allow the set off of loss on the ground that it was device to evade tax. The Tribunal allowed the claim of assessee especially when the legal form of transaction was accepted and there was no evidence to hold that the transfer was not legally effected.

31. The learned Departmental Representative for the Revenue had placed reliance on various decisions which are factually different and the said ratio are not applicable to the facts of present case, especially in view of the dictate of the Apex Court and the ratio laid down by the Hon'ble High Court of Calcutta in CIT Vs. Oberoi Hotels (P) Ltd. (supra) on identical issues. We thus, allow the claim of assessee.

32. Applying the ratio laid down by the Hon'ble High Court of Punjab & Haryana in Porrits & Spencer (Asia) Ltd. Vs. CIT (supra), wherein it has been held that once the transaction is genuine and merely it has been entered into with a motive to save tax, it would not become a colourable device and consequently, earn any disqualification. We direct the Assessing Officer to allow the claim of assessee and set off of loss on sale of shares of Pentagon against gains arising on sale of shares of FEM. The grounds of appeal No.2 and 4 raised by assessee are thus, allowed. The grounds of appeal raised by assessee are thus, partly allowed.

33. Now, coming to the appeal filed by Revenue which is against the order of CIT(A) in allowing the loss claimed on sale of shares of Reliance Industries Ltd.

34. The Assessing Officer had denied the said loss of ₹ 5.34 crores in the hands of assessee on the ground that the assessee had sold original shares immediately after acquisition of bonus shares. In the facts relating to the issue, the assessee had purchased 45,000 shares of Reliance Industries Ltd. on 10.08.2009 @ 2,201/- per share. Subsequently, bonus shares were issued by the said company i.e. one bonus share per original share. Immediately, after acquisition of bonus shares, original shares of 45,000 have been sold by the assessee on 27.11.2009 @ ₹ 1,013/- per share. The assessee had declared loss of ₹ 5.34 crores. The Assessing Officer was of the view that this was colourable device in order to book losses against gain arising from the sale of shares of FEM.

35. The CIT(A) allowed the plea of assessee holding the transaction to be genuine and legitimate tax planning within framework of law, since the shares of Reliance Industries Ltd. were quoted shares.

36. The Revenue is in appeal against the order of CIT(A).

37. The learned Authorized Representative for the assessee before us has pointed out that the issue stands covered by the ratio laid down by the Hon'ble Bombay High Court in Pr. CIT Vs. Adar Cyrus Poonawalla in Income Tax Appeal (IT) No.226 of 2016, judgment dated 19.11.2018, which has upheld the decision of the Pune Bench of Tribunal in Adar Poonawalla Vs. Addl.CIT in ITA

No.764/PN/2012 and cross appeal in ITA No.824/PN/2012, relating to assessment year 2007-08, order dated 30.01.2015.

38. In the case before the Tribunal in Adar Poonawalla Vs. Addl.CIT (supra), facts were similar. The assessee therein had purchased shares of HCL Technologies Ltd. and after announcement of bonus shares of one share for every one share held on 16.03.2007, the assessee sold the original shares which resulted into loss of ₹ 15.01 crores. The claim of assessee of short term capital loss was denied by the authorities below on the ground that it was for avoidance of tax liability. The Tribunal applying the principle laid down by the Hon'ble Supreme Court in CIT Vs. Walfort Share and Stock Brokers (P.) Ltd. (supra) had held the said transaction to be genuine and allowed capital loss. The Hon'ble Bombay High Court while deciding appeal of Revenue held that *Surely, the Revenue cannot object to the legitimate tax planning. Legitimately, if the assessee had claimed set off of loss against the gain in sale of shares, the Revenue cannot frown upon the same simply by pointing out that in the process, the assessee reduced his tax liability.*

39. Applying the said principle to the facts of present case, wherein the facts of assessee are similar to the facts before the Hon'ble Bombay High Court in Pr. CIT Vs. Adar Cyrus Poonawalla (supra), we hold that the sale of shares of Reliance Industries Ltd. by the assessee after the announcement of bonus issue at the market price which is available on the stock market and where the transaction has not been doubted, there is no merit in not allowing set off of capital loss on the ground that it was colourable device to evade payment of taxes.

40. Now, coming to the appeal filed by assessee in the case of Sunita A.

Ramnathkar, wherein following grounds of appeal have been raised:-

1. *The CIT(A) erred in confirming the disallowance of set off of the long term capital loss of Rs.1,28,70,103/- arising on the sale of shares of Pentagon Manufacturing and Marketing Ltd. ('PMML') against the long term capital gain from sale of shares of FEM Care Pharma Ltd.*
2. *The CIT(A) erred in holding that the sale of the shares of PMAML @ Re.1 per share by the Appellant to her daughter was not a genuine transaction but a device to avoid tax.*
3. *The CIT(A) erred in holding that:*
 - (a) *The price of shares of PMML was manipulated by the appellant for the purpose of avoiding tax.*
 - (b) *There was no basis for determining the sale price of the share of PMML @ Re.1 per share.*

41. The issue arising in the present appeal is similar to the issue arising vide grounds of appeal No.2 and 4 in the case of Sunil Haripant Pophale i.e. against allowance of set off of long term capital loss of ₹ 1.28 crores arising on sale of shares of Pentagon. The said loss was allowed in the hands of Sunil Haripant Pophale to be set off against long term capital gains arising on sale of shares of FEM. Following the same parity of reasoning as discussed in the paras hereinabove, we allow the grounds of appeal raised by assessee.

42. The Revenue in the case of Sunita A. Ramnathkar vide ITA No.447/PUN/2014, relating to assessment year 2010-11 has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, the CIT(A) erred in deleting the addition of Rs.90,71,917/- on account of loss claimed from sale of shares of Reliance Industries Ltd.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in holding the transactions of purchase and sale of Reliance Industries shares by the assessee as tax planning within the four corners of law and subsequently permitting the same.*
3. *The order of the CIT(A) be vacated and that of the A.O. be restored.*
4. *The appellant prays for admission of an additional ground of appeal or additional evidences, if required to support his case.*

43. The issue raised by the Revenue in cross appeal in the case of Sunita A. Ramnathkar is against order of CIT(A) in allowing set off of loss arising on sale of shares of Reliance Industries Ltd. We have already decided similar issue in the case of Mr. Sunil Haripant Pophale and following the same parity of reasoning, we dismiss the grounds of appeal raised by Revenue.

44. In the result, the appeal of assessee in ITA No.322/PUN/2014 is partly allowed, appeal of assessee in ITA No.301/PUN/2014 is allowed and both the appeals of Revenue are dismissed.

Order pronounced on this 22nd day of April, 2019.

Sd/-
(D.KARUNAKARA RAO)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 22nd April, 2019.
GCVSR

आदेश की प्रतिलिपि अद्येषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Nashik;
4. The CIT-2, Nashik;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune