

THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 982/Mum/2017 (Assessment Year 2012-13)

DCIT-1(1)(2) 579, Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. Hardcastle & Waud Manufacturing Co. Ltd. Gate No. 10, 1 st Floor Balbourne Stadium 87, Veer Nariman Road Churchgate Mumbai-400020. PAN : AAACH0398F
(Appellant)		(Respondent)

Assessee by	Shri Vijay Mehta
Department by	Shri Rajesh Kumar
Date of Hearing	4.4.2019
Date of Pronouncement	3.6.2019

ORDER

Per Shamim Yahya (AM) :

This appeal by the revenue is directed against order of learned CIT-A dated 18.11.2016 and pertains to assessment year 2012-13.

2. The grounds of appeal read as under :-

1. *"Whether on the facts and in the circumstances of the case and in Law, whether the Ld.CIT(A) is justified in deleting the disallowance of Long Term Capital Loss of Rs.19,67,85,586/- on sale of land at Kalyan, without rendering a decision regarding the correctness of FMV as on 1.4.1981 adopted for computing the Long Term Capital Loss.*
2. *Whether on the facts and in the circumstances of the case and in Law, whether the Ld.CIT(A) is justified in deleting the disallowance of Long Term Capital Loss of Rs.19,67,85,586/- on sale of land at Kalyan, without making enquiries or cause enquiries under section 250(4) of the I T Act, 1961 to ascertain the correctness of FMV as on 1.4.1981 adopted for computing the Long Term Capital Loss. Reliance is placed on the decision of Hon. Delhi Court in the case of*

CIT II Vs Jansampark Advertising and Marketing P Ltd in IT A No 525/2014 dated 11.3.2015.

3. *"On the facts and in the circumstances of the case and in Law, whether the Ld.CIT(A) is justified in the deleting the disallowance of Short Term Capital Loss of Rs. 16,80,60,000/-and Long Term Capital Loss of Rs. 3,83,35,481/- on sale of shares of Global Trendz Ltd to group concern for sale consideration of Rs.1 per share as against the NAV of Rs.(-)3.18 per share".*

3. Apropos disallowance of long-term capital loss

The assessee in this case is a company engaged in the business of manufacturing and dealing in industrial chemicals. During the course of assessment the assessing officer proceeded to examine the claim of long-term capital loss shown by the assessee in the return of income. The assessing officer found that the impugned asset was land at Kalyan. The assessing officer found that assessee had purchased the said land on 1947. The assessee had given the said land on lease to West Pioneer properties India private limited a group concern of the assessee on 5/5/2005. The assessee later on entered into an agreement dated 27/3/2012 for sale of reversionary interest in the said land to M/s. West Pioneer properties India private limited. The assessee in the books of accounts have booked a profit of rupees 18,99,18,608/- on the sale of the land. However in the computation for income tax purposes the assessee had shown are long-term capital loss of rupees 19,67,85,586/-. The assessing officer found the situation completely bizarre. The assessee was asked to file the valuation of land as on 1/4/1981. The assessing officer filed the valuation report done by M/s. Anmol Sekhari consultants private limited with valuation report dated 15/3/2012. The assessing officer also summoned and examined the said valuer. The assessing officer noted that the said valuer had admitted that he has not done any other valuation in the Kalyan locality. He submitted that he prepared the report on the basis of sale and purchase agreement deeds which were provided to him by the assessee. Hence assessing officer held that the valuation of the said land at rupees 4,92,70,151/- which was used to compute the same long-term capital gain is not established. The assessing officer noted

that valuer had admitted that no published ready reckoner rates were available for the area of Kalyan for the year 1981. The valuer adopted the rates of the year 2012 and back calculated with average growth rate of 10% per annum. The per square meter price was arrived at rupees 734.59, and the total valuation of the land was done at rupees 4,92,70,151/- as on 1.4.1981. The assessing officer proceeded to reject this valuation. He further observed that this issue has to be considered from the point of view that assessee has sold the said land to an associated party and that the indexed computation of long-term gain has resulted in a loss. Hence AO was of the opinion that this transaction was not at arm's-length.

4. The assessing officer further observed that on perusal of data published over the internet as on date [on Megabricks with short URL: <http://goo.gl/OxpKsA>] the land prices in Kalyan are in the range of Rs. 7000 per square meter. That therefore, the rate of Rs. 734.59 per square meter, in 1981, i.e. 34 years earlier are very much on the higher side. That even by the own estimate of the average incremental rate of 10% p.a. of the valuer, the current market rate should be about Rs. 18,777/-. This value is nowhere close to the current market price of the land. It is much higher. That it therefore appears that the assessee in unison with the valuer has worked out a favourable rate of land as on 01.04.1981. That on the basis of this valuation, the assessee has claimed LTCL in the return and has carried forward the same. That in view of the above discussion, the long term capital loss of the assessee at Rs. 19,67,85,586/- is not genuine, is fabricated and not as per the intent of law. That the same is therefore reduced to zero.

5. Without prejudice to the above the assessing officer observed that the land has been sold to the group company which had already been occupying the same land on the long-term lease of 99 years and had been operating a shopping mall on the same. This lease was entered on 5/5/2005. AO observed that the transaction for sale is only with respect to reversionary interest of the

assessee in the said Kalyan property and not the actual sale of land. Therefore the assessing officer held that the valuation of land as such is only two hoodwink the revenue and the valuation report is only a colourable device. He treated the transaction to be sham placing reliance on the decision of honourable apex court in the case of McDowell & Co Ltd. The assessing officer further observed that actual asset transfer is reversionary interest and not land therefore the computation of long-term capital loss in respect of the land sold is not reliable and it is false and liable to be rejected. Therefore holding the long-term capital loss to be not genuine and fabricated the same was treated at zero.

7. Upon assessee's appeal Learned CIT-A observed that the land sold by the assessee during the year under consideration was land acquired by it in 1947, small addition was made to it during the year 1974 and was acquired prior to year 1981. Hence CIT-A found that assessee in accordance with the provisions of section 55b of the income tax act opted to adopt the fair market value of the said land as on 1/4/81 as the cost of acquisition for the said land for the purpose of computation of long-term capital gain. The learned CIT-A observed that to ascertain the fair market value the assessee obtained valuation report from a professional and registered valuer. He found the methodology adopted by the said valuer to be quite correct. He observed that the assessing officer has not pointed out any specific defect. Further learned CIT-A held that valuation is the work of professionals and the assessing officer should not enter into the shoes of a professional. Learned CIT-A further found that assessing officer's comparison with the book profit was not at all relevant as in his opinion entries in the books were not determinative of the actual nature of the transaction. He further found that the reference to a private website of Megabricks by the assessing officer was not correct as it was not recognised by the government. The learned CIT-A observed that the income tax act does not recognise such private websites. Learned CIT-A further observed that in fact the income tax act recognises reference to valuation published by the state

government for the purpose of calculating the stamp duty. He observed that the valuer in the valuation report obtained by the assessee has also referred to valuation of land for the purpose of the stamp duty.

8. The learned CIT-A rejected the assessing officer's reliance upon the decision of honourable apex court in the case of McDowell's. Accordingly the learned Commissioner of income tax reversed the order of assessing officer and allowed the long-term capital loss claimed at Rs. 19,67,85,586/- .

9. Against the above order the Revenue is in appeal before us.

10. We have heard both the counsel and perused the records. Learned DR submitted that learned CIT(A) has clearly erred in accepting the valuation report which has not been prepared by the registered valuer. He submitted that facts and circumstances above clearly indicate that the assessee's transaction is not aboveboard. He submitted that the assessee only had leasehold right on the property and it has leased out the same to the assessee's sister concern already. Thereafter during continuation of lease transfer of reversionary interest has taken place. Despite showing huge book profit the assessee has shown long term capital loss by putting fair market value as on 1.4.1981 by a valuation report which cannot be accepted. He submitted that valuer has done nothing but to taken stamp duty rate of 2012 and worked it backward taking 10% as growth rate. Learned DR further submitted that in contemporaneous situation reliance by the Assessing Officer on the website of Megabricks cannot be rejected.

11. Per contra, learned Counsel of the assessee relied on the order of learned CIT(A). He submitted that the assessee has duly obtained fair market value of land computed by the registered valuer on 1.4.1981. He submitted that this cannot be substituted by a rate mentioned in the website. Further learned counsel placed reliance upon several case laws in this regard including the following :-

- Pr. CIT Vs. Smt. Vidhi Agarwal (88 Taxmann.com 306)
- CIT Vs. Shivakami Co. P. Ltd. (159 ITR 71)
- CIT Vs. B. Arunkumar & Co. (ITA No. 2337 of 2013)
- Arjun Malhotra Vs. CIT (403 ITR 354)
- Barjinder Singh Bhatti Vs. ITO (ITA No. 1101/Chd/2014)
- Pyare Mohan Mathur HUF Vs. ITO (ITA No. 471/Agra/2009)
- Adarsh Kumar Agarwal Vs. ACIT (ITA No. 66/Lkw/2014)
- Saraswati Industrial Syndicate Ltd. Vs. CIT (237 ITR 1)
- Jansampark Advertising and Marketing P. Ltd. (375 ITR 373)

12. We have heard both the counsel and perused the records. We find that learned Departmental Representative has pointed out that the valuation has not been obtained from a registered valuer. In this view of the matter, entire premise of learned CIT(A) that valuation has been done by the registered valuer and hence its veracity cannot be doubted, is found to be untenable at the threshold. However, learned Counsel of the assessee has subsequently furnished a letter from the said valuer claiming he is a registered valuer. Admittedly this is an additional evidence. Furthermore, valuer has adopted a bizarre method. The valuer has taken the stamp value rate of year 2012 and worked its backward @ 10% growth rate to obtain fair market value at 1.9.1981. In our considered opinion this is not at all an acceptable method. This submission of valuation report by unregistered valuer later on claiming to be a registered valuer without any sale instances of the period has to be looked into by taking into account the surrounding circumstances. The assessee has duly booked huge profit on the transaction in its books of account. The transaction has been done to group concern to whom land was already leased out. In these circumstances in our considered opinion learned CIT(A)'s acceptance of the said valuer's report as sacrosanct despite the palpable lack of veracity of the valuer or method of valuation is not at all sustainable. The lack of cogency of the valuation report is further highlighted by the huge difference found by the Assessing Officer when compared to data noted from website of Megabricks. The learned counsel of the assessee has submitted a case law from ITAT that such website information cannot be the sole basis for any value determination. But in the instant appeal, the surrounding circumstances

couple with these information clearly indicate towards of lack of veracity in said valuer's determination.

13. Decision of Hon'ble Allahabad High Court in the case of Smt. Vidhi Agarwal (supra) mentions that opinion of the approved valuer can be said to be sufficient. This case law does not help the assessee on the surrounding circumstances pointed out in this case. The case law from Azadi Bacho Andolan (supra) does not help the case of the assessee. It is the tax planning by legitimate means that is permissible but not any attempt to hoodwink revenue. In our considered opinion on the facts and circumstances of the case, the issue needs to be remitted to the file of the Assessing Officer. The Assessing Officer is directed to consider the issue afresh after obtaining valuation report from the departmental valuer. Needles to add assessee should be provided adequate opportunity of being heard.

14. Apropos deletion of short term capital loss and long term capital loss on sale of shares :

In this regard the Assessing Officer observed that the assessee had made sale of Global Trendz Ltd. (GTL) shares. These share were again made to group companies, hence Assessing Officer observed that sale of these shares are also not at arm's length. He further observed that the stock sold are not listed and hence off market transaction. Upon a show-cause, assessee explained that prices obtained were best price in the opinion of the management. Assessing Officer further observed that in the case of GTL net worth of the company were negative on the date of sale. Assessing Officer further observed that sister concern to whom shares were sold were already holding 31.03% and 46.27% of the shares of the said company. That the assessee was holding 3.72% and the total holding in GTL of the assessee and its group concerns was more than 80%. The Assessing Officer proceeded to hold the sales of share at Rs. 1/- per

share to GTL is colorable device and applying the ratio of the decision of Hon'ble Supreme Court in the case of *Mc Dowell & Co. Ltd.*(supra) held that short term capital loss and long term capital loss is not genuine and hence treated the same as zero.

15. Upon assessee's appeal learned CIT(A) found that in the case of unlisted share Net Asset Value (NAV) method is a recognized method of valuation. That even provisions of Rule 11UA of the I.T. Rules, 1962 recognized the said method. He observed that going by NAV method value of shares of GTL would come to rupees minus 3.18/-, whereas the assessee has earned Rs. 1/- per share as price of this share. Hence, he held that the assessee has got higher price than the NAV of such share. Learned CIT(A) further held that the assessee's justification that shares were sold to another two group companies so that control of said company does not go into the hands of third party seems to be commercially justifiable. Learned CIT(A) also referred to the decision of Hon'ble Supreme Court in the case of *CIT Vs. Calcutta Discount* (91 ITR 8), wherein it was held that company can sell shares to its subsidiary at a lower price in order to so arrange its affairs as to reduce its tax burden and therefore unless ITO on the basis of material before him was able to come to conclusion that the assessee had really made profits in the transaction, it was not permissible for him to add back to assessee's return any fictional income. Learned CIT(A) further referred to the decision of Hon'ble Apex Court in the case of *Union of India Vs. Azadi Bachao Andolan* (263 ITR 706).

16. Learned DR relied on the order of the Assessing Officer.

17. Per contra, learned Counsel of the assessee submitted that learned CIT(A) has passed correct order. NAV of the company whose shares were sold would come to negative at Rs. 3.18 hence, learned counsel submitted that no fault can be placed on sale of shares by price which is more than the NAV i.e. Rs. 1 per share. He submitted that the order of learned CIT(A) is correct and needs to be confirmed.

18. Upon careful consideration we find that the Assessing Officer has no material whatsoever with him to conclude that transactions of sale are not genuine or that the price based on the sale is understated rather he has not at all doubted the fact that net asset of the company was negative and NAV was minus Rs. 3.18/-. In these circumstance we are of the considered opinion that the findings of learned CIT(A) and case laws relied upon by him are flawless and duly support the case of the assessee. Hence, we do not find any infirmity in the order of learned CIT(A) and accordingly we uphold the same.

19. In the result, the appeal by Revenue is partly allowed.

Order has been pronounced in the Court on 3.6.2019.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 3/6/2019

Copy of the Order forwarded to :

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

//True Copy//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai