



आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.5627/Mum/2017
(निर्धारण वर्ष / Assessment Year:2010-11)

DCIT-14(2)(1) 432, Aaykar Bhavan 4 th Floor, M.K. Road Mumbai-400 020.	बनाम/ Vs.	M/s. Instant Holdings Pvt.Ltd. 213, Bezzola Complex "B" Wing 71, Sion Trombay Road, Chembur, Mumbai-400 071.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AACCK-5600-M		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	Shri Awungshi Gimson- Ld. CIT-DR
Assessee by	:	Shri Rakesh Mohan - Ld.AR

सुनवाई की तारीख/ Date of Hearing	:	28/06/2019
घोषणा की तारीख / Date of Pronouncement	:	13/09/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2010-11 contest the order of Ld. Commissioner of Income-Tax (Appeals)-12, Mumbai, [CIT(A)], *Appeal No. CIT(A)-12/DCIT-6(3)(1)/57/2013-14* dated 01/06/2017 on following grounds of appeal: -

1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance of Rs.17,68,16,989/- which is claimed loss on transfer of beneficial interest in RIFL Benefit Trust by the assessee, without noticing the colourable nature of the transaction merely relying on the various judicial precedents.
2. The CIT(A) erred in placing reliance on judicial decisions which were not discussed with reference to relevance applicability.



3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

2.1 Facts in brief are that the assessee being *resident corporate assessee* stated to be engaged in *investment in shares & securities* was assessed for impugned AY in scrutiny assessment u/s 143(3) on 23/03/2013 wherein the loss of the assessee was determined at Rs.16.04 Crores after certain disallowance as against returned loss of Rs.33.72 Crores filed by the assessee on 06/10/2010.

2.2 During assessment proceedings, it transpired that the assessee claimed *Short-Term Capital Loss* of Rs.17.68 Crores on certain share transactions. It was noted that the assessee acquired beneficial interest in *RIFL Benefit Trust* upon amalgamation of several transferor companies viz. Summit Securities Ltd., Brabourne Enterprises Ltd., Octave investments Ltd. & CHI Investments Ltd. with transferee company namely *RPG Itochu Finance Ltd. [RIFL]* under a scheme of arrangement formulated u/s 391 to 394 of The Companies Act, 1956. The said scheme was finally approved by Hon'ble Bombay High Court on 18/12/2009 and the terms of the scheme became effective from 23/12/2009. The name of transferee company i.e. *RIFL* has subsequently been changed to Summit Securities Limited [hereinafter referred to as *SSL*].

2.3 Proceeding further, *CHI Investments Ltd.* was holding investment in equity share capital of other three transferor companies and accordingly, entitled to receive the shares of transferee companies i.e. *SSL* against shareholding in the three transferor companies. The details of shareholding of *CHI Investments Ltd* in the 3 entities could be tabulated in the following manner:-



No.	Name of the Entity	No. of Shares	Cost (Rs.)
1.	Brabourne Enterprises Ltd	1064560	10,79,38,080/-
2.	Octave Investments Ltd.	250263	
3.	Summit Securities Ltd.	3128298	36,33,46,220/-
	Total	44,43,121	47,12,84,300/-
	Less : Diminution in Value of investments		1,81,67,311/-
		Total	45,31,16,989/-

Under the scheme, the shares held by *CHI investments Ltd.* in other 3 transferor companies had to be transferred to a trust called *RIFL Benefit Trust [RIFLBT]*. Accordingly, *SSL* issued 2,45,455 shares to *RIFLBT* as per the swap ratio under the scheme and all the four transferor companies including *CHI investments Ltd.* ceased to exist. The assessee purchased beneficial interest in *RIFLBT* from its 100% holding company i.e. *SSL* at Rs.45.31 crores, being the cost to the seller i.e. *SSL*.

2.4 Subsequently, the said beneficial interest was sold by the assessee for a consideration of Rs.27.63 Crores to another entity namely *Offshore India Limited*, an unrelated party resulting into capital loss of Rs.17.68 Crores in the hands of the assessee. The average cost of shares acquired by the assessee worked out to Rs.101/- per share as against average sale value per share of Rs.62/-.

2.5 In the above background, Ld. AO opined that the assessee bought the shares from related persons at book value but sold the same to an unrelated person at reduced negotiated price resulting into capital losses in the hands of the assessee. It was noted that the value of *SSL* shares worked out to be Rs.362/- per share & Rs.18/- per share based on net asset value method & profit earning capacity value method respectively, the average of the two being Rs.190/- per share as against the sale price



per share of Rs.62/-. Therefore, there was no logic in the transactions and the same was without any merit. Therefore, treating the transaction as sham transaction, the said capital loss was denied to the assessee.

3.1 Aggrieved, the assessee agitated the same with success before Ld. first appellate authority vide impugned order dated 01/06/2017 wherein the assessee, *inter-alia*, submitted that the beneficial interest was acquired at cost from its holding company in terms of Section 49(1)(iii)(e) r.w.s. 47(iv).

3.2 Regarding the sale price per share, the attention was drawn to the fact that the sale transaction took place on 05/02/2010. On that date, the value of *SSL* per share as calculated on *Net Asset value* worked out to be Rs.362/- per share as against Rs.1126/- per share fetched by the assessee and therefore, the question of inadequate consideration could not arise. The submissions were further fortified by the fact that the shares of *SSL* were listed on BSE w.e.f. 28/01/2011. The value of 2,45,455 shares of *SSL* on the date of listing would be Rs.5.14 Crores, if the high price of Rs.209.40 was to be considered. As against this, the assessee fetched higher aggregate sum of Rs.27.63 Crores. The submissions were made that the shares were transferred at negotiated price and the revenue could not step into the shoes of the businessman so as to re-write the terms of the agreement. It was also submitted that the assessee did not receive anything more than the agreed price from the buyer for transfer of beneficial interest. The action of Ld. AO in treating the same as sham transaction was rebutted on the ground that additions could not be made merely on the basis of conjectures, suspicion or doubts and the entire burden to dislodge the stand of assessee was on revenue.



3.3 The Ld. first appellate authority, after considering assessee's submissions and material on record and concluded the matter in assessee's favor with following observations: -

11.3 I have considered the submissions of the appellant carefully. I have also perused the assessment order and the material available on record including the copies of the documents submitted by the appellant in the paper book as well as during the course of appellate proceeding.

11.4 It is noted that the facts of the issue reveals that during the year under consideration, the appellant had acquired beneficial interest in RIFL Benefit Trust. The beneficial interest was the outcome of merger of several transferor companies with the transferee company. Vide a scheme of arrangement ('the scheme') formulated u/s. 391 to 394 of the Companies Act 1956 the transferor companies [i.e. Erstwhile Summit Securities Ltd (Erstwhile Summit), Brabourne Enterprises Ltd (Brabourne), Octave Investments Ltd (Octave) and CHI Investments Ltd (CHI)] were proposed to amalgamate with the Transferee company viz. RPG Itochu Finance Ltd ('RIFL'), subsequently name changed to Summit Securities Ltd ('SSL'). The Hon'ble Mumbai High Court had approved the scheme in its absolute terms vide its order dated 18.12.2009. The effective date of the scheme was 23.12.2009, as the said order of the Hon'ble High Court, was filed with the ROC on 23.12.2009 and with RBI on 24.12.2009. As CHI Investments Ltd., was one of the shareholders of other Transferor Companies, it was entitled to receive shares in the transferee company against its shareholding in other transferor companies. Under the scheme, the shares held by CHI investments Ltd. in other transferor companies, as referred to above, had to be transferred to a trust called RIFL Benefit Trust. Accordingly, against CHI Investment Ltd's holding in other transferor companies, SSL has issued 2,45,455 shares to RIFL Benefit Trust as per the swap ratio prescribed in the Scheme. As all the transferee companies, including CHI ceased to exist without winding up, the Transferee Company viz., SSL was the beneficial owner of such shares and interest therein. As a result, such shares are held by RIFL Benefit Trust for the beneficiary of such shares viz. SSL being the Transferee Company. On 02.01.2010, the appellant purchased 'Beneficial Interest' in RIFL Benefit Trust from its 100% holding company namely SSL at Rs 45.31 crores, being the cost to the seller i.e. SSL. The appellant sold 'beneficial interest' in RIFL Trust to Offshore India Ltd. at Rs 27.63 crores on 05.02.2010 thereby incurring a Short term capital loss ('STCL') of Rs.17.68 crores. The Assessing Officer disallowed the STCL of Rs.17.68 crores by considering the transaction as being sham in nature.

11.5 It is seen that the appellant had purchased 'Beneficial Interest' in RIFL Benefit Trust from SSL at Rs. 45.31 crores, being the cost to seller i.e. SSL. It is pertinent to note that the Beneficial Interest was purchased by the appellant from its 100% Holding Company i.e. SSL. The cost of this Beneficial Interest acquired from SSL has to be taken as cost of previous owner i.e. SSL as per Section 49(1)(iii)(e) rws 47(iv). Thus, the transaction had taken place at cost as in the books of transferor (i.e., SSL). Further, it seen that Rs. 45.31 crores represent cost to CHI because at this price the shares of Other Transferor Companies were acquired by CHI.



11.6 Regarding the transfer of beneficial interest by the appellant company to 'Offshore India Ltd.', it is seen that the transaction of transfer of beneficial interest took place at a price which is more than the NAV price. Further, it was submitted that the shares of SSL were listed on BSE w.e.f 28.01.2011. The value of 2,45,455 shares of SSL on the date of listing was Rs.5.14 crores, if high price is considered. The transaction of transfer took place at an agreed price of Rs.27.63 crores between the appellant and the Offshore India Limited and the agreed price was much higher than the NAV price or the price determined at the highest rate of exchange as on the date of listing which was Rs.5.14 crores. The appellant relied on various Hon'ble judgments substantiate that 'full value of consideration' cannot be construed as the market value but as the price bargained for by the parties to the sale.

11.7 Looking at the facts of the case as well as the Hon'ble judicial decisions available on this issue, I find no force in the arguments of the Assessing Officer. The appellant had purchased beneficial interest from its 100% holding company (SSL) at cost of previous owner i.e. SSL as per section 49(l)(iii)(e) rws 47(iv) of the Act. Accordingly, the cost in the hands of the appellant cannot be disturbed. Also, the transaction of transfer of beneficial interest from the appellant to 'Offshore India Ltd. had taken place at a price which is more than the NAV price. Hence, the disallowance of STCL made by the A.O. is not sustainable at all. Accordingly, the disallowance of Rs.17,68,16,989/- is deleted. Therefore, Ground No. 1 is allowed.

Aggrieved, the revenue is in further appeal before us.

4. The Ld. AR reiterated the submissions as made before lower authorities whereas Ld. CIT-DR submitted that the assessee suffered loss within a very short span of time without any plausible explanation.

5.1 We have carefully heard the rival submissions and perused relevant material in record. The basic facts are not in dispute. Upon perusal of the order of Ld. AO, it transpires that the whole premise to reject the impugned losses was the fact that the shares were sold at Rs.62/- per share as against cost price of Rs.101/- per shares and therefore, the transactions were treated as *sham* transaction. However, nothing more has been brought on record to fortify the same. No inquiry whatsoever, has been made from the purchaser, in this regard. The shares were sold by the assessee at negotiated prices under an agreement. Nothing on record would reveal that the assessee received



any extra consideration over and above to what was stated in the agreement. It is trite law that no additions could be made merely on the basis of presumption, suspicion, conjectures or surmises. The assessee had placed on record all the material to support the submissions and therefore, the burden to dislodge the assessee's claim was on Ld. AO by bringing on record any cogent material in support of the fact that the transactions were *sham* transactions. It is also noted that the shares were acquired by the assessee under approved scheme of amalgamation with compliance to all the statutory requirements. The allegation of Ld. AO that the shares were sold at less than *Net Asset value* also stood rebutted by the fact that the shares of SSL were sold at Rs.1126/- per share which was much higher than *Net Asset value* of Rs.362/- per share and also more than the listed price of the shares.

5.2 We find support from the decision of this Tribunal rendered in **Rupee Finance and Management Pvt. Ltd. Vs. ACIT [120 ITD 539]** wherein it has been observed as under: -

13.1there is no allegation much less, any evidence to show that these assesseees before us have received monies in excess of amounts of sale consideration recorded and disclosed in the transaction for the sale of shares. The first appellate authority has rightly noted that under section 48 the starting point for computation of capital gains is the amount of full value of consideration received or accruing as a result of a transfer of the capital asset. The Hon'ble Supreme Court in the case of *K.P. Varghese (supra)* held that sub-section (2) of section 52 can be invoked only when the full value of the consideration is received in respect of a transfer is shown at a lesser figure than that which is actually received by the assessee. It further laid down that the burden of proving such understatement of consideration is on the revenue and that the sub-section has no application in the case of a *bona fide* transaction, where the true consideration received by the assessee has been declared or disclosed by him. Section 50C, has come into the statute only with effect from 1-4-2003 by Finance Act, 2002 and is not applicable to the impugned assessment years. Hence, for the period prior to the insertion of section 50C no addition can be made by invoking the ratio of this section. The first appellate authority at page 21 of his order has rightly observed that, what in fact never accrued or was never received cannot be computed as capital gain. He relied on the decision of Calcutta High Court in the case of *CIT v. Smt. Nandini Nopani* [1998] 230 ITR 679 . He rightly held that it is manifest that the consideration for the



transfer of capital asset is what the transferor receives, in lieu of assets he parts with, *i.e.*, money or monies worth and that the expression 'full consideration' cannot be construed as having reference to the market value of the assets transferred but refers to the price bargained for by the parties and it cannot refer to the adequacy of the consideration. He also rightly observed that the Legislature has used the words 'full value of the consideration' and not 'fair market value of the assets transferred'. He recorded that the Assessing Officer has not brought on record any material to show that the assessee has received more than what has been disclosed in the books and under these circumstances the difference cannot be brought to tax under the head 'Capital gains'. We fully agree with these findings and the appeals filed by the revenue fail.

The aforesaid decision has not only been confirmed by Hon'ble Bombay High Court by way of dismissal of revenue's appeal but also followed in another decision titled as **CIT Vs Devesh Agarwal [81 Taxmann.com 257]** wherein Hon'ble Bombay High Court has observed as under: -

6. Being aggrieved the Revenue filed two appeals to the Tribunal. By the impugned order dated 10th April, 2014 the Revenue's appeal for both the Assessment Years was dismissed. The impugned order upheld the order dated 25th March, 2011 of the CIT (A). We note that the CIT (A) had, while reversing the view of the Assessing Officer had inter alia, placed reliance upon the decision of the Tribunal in *Rupee Finance & Management (P.) Ltd. v. Asstt. CIT* [2008] 120 ITD 539 (Mum.). Mr. Mohanty the learned counsel for Revenue very fairly points out that the Revenue had filed an appeal against the order of the Tribunal in *Rupee Finance and Management (P.) Ltd. (supra)* to this Court being Income Tax Appeal No. 1208 of 2008. (*CIT v. Rupee Finance & Management (P.) Ltd.*). This Court by an order dated 20th October, 2008 had dismissed the Revenue's above appeal, inter alia, on the issue of addition on account of undisclosed investments under Section 69 of the Act for purchase of shares at a price lesser than its market value. No distinguishing features in the present case has been shown to us which would warrant taking a different view. Moreover, in the absence of any corroborative evidence establishing receipts and payments outside the regular books of Account, it cannot be alleged that investments have been made which are not recorded. Further the Revenue has in this case proceeded to hold that there is investment in shares in excess of what is shown on the basis of pure suspicion *i.e.* the shares purchased at a price less than its actual valuation. Therefore unless it is first established beyond doubt that there is an investment which is not recorded by the Assessee in its books, no occasion to explain about the nature and source of the investment can arise. The invocation of Section 69 of the Act before establishing investment not recorded in its books of Account, is not justified.

7. In the above view, the proposed question do not give rise to any substantial question of law for both the Assessment Years. Thus not entertained.



In the aforesaid background, we concur with the stand of Ld. CIT(A) in the impugned order and accordingly, dismiss the appeal.

6. The appeal stands dismissed.

Order pronounced in the open court on 13th September, 2019.

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 13/09/2019

Sr.PS. Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**