IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI O. P. MEENA, ACCOUNTANT MEMBER&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No.1809/Ahd/2012
(Assessment Year : 2009-10)

Adani Agro Pvt. Ltd., 8th Floor, Shikhar Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad – 380 009.	Vs.	DCIT, Circle – 1, Ahmedabad.

[PAN No.AABCA 3183 G]

(**Appellant**) .. (**Respondent**)

Appellant by :	Shri S. N. Soparkar, Sr. Advocate with Parin Shah
Respondentby:	Shri L. P. Jain, Sr.D.R.
Date of Hearing	17.09.2019
Date of Pronouncement	20.09.2019

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against theorder dated 04.07.2012passed by the Commissioner of Income Tax (Appeals) – 6, Ahmedabad under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to 'the Act')arising out of the order dated 29.12.2011 passed by the Dy. Commissioner of Income Tax, Circle – 1, Ahmedabadfor Assessment Year 2009-10 with the following concise grounds of appeal:

> *"1. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in dismissing Ground No. 1 of the appellant's appeal challenging the validity of the assessment order impugned before him, on the ground that it was general in nature not requiring adjudication by him.*

2. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in upholding the disallowance of Long Term Capital Loss of Rs.2,41,93,750/- incurred by the appellant on the sale of shares of I Call India Pvt. Ltd.*
3. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in upholding the addition of the amount of expenditure disallowed u/s. 14A, while computing the appellant's book profit u/s. 115JB.*
4. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in dismissing Ground No. 9 of the appellant's appeal contesting adjustment by way of addition while computing the appellant's book profit u/s. 115JB, in respect of provision for doubtful debts amounting to Rs.3,48,46,722/-.*
5. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in dismissing the appellant's Ground No. 11 challenging levy of interest u/s. 234B (Rs. 10,59,696) and u/s. 234C (Rs. 1,62,168) on the ground that the levies were mandatory.*
6. *The appellant craves leave to add, amend and/or alter the ground or grounds of appeal either before or at the time of hearing of the appeal."*

2. **Ground No.1**is general ground challenging the validity of the assessment order and thus no separate order is need to be passed.

3. **Ground No.2.1**: The order passed by the Learned CIT(A) in upholding the disallowance of long term capital loss to the tune of Rs.2,41,93,750/- incurred by the appellant on the sale of shares of I Call India Pvt. Ltd. has been assailed before us.

4. The brief facts leading to this case is this that during the assessment proceeding on examination of computation of the total income, it was seen that the assessee has sold share at Rs.4,93,750/- whereas the cost of acquisition of the such share was of Rs.2,46,87,500/-. The assessee by and under a letter dated 04.06.2011 submitted the working of long term capital loss from where it appears that the assessee on 25.11.2007 purchased 49375 shares @ 500 each from one M/s. I Call India Pvt. Ltd. @ 10/- per unit which was subsequently

sold on 07.03.2009 to Anand Tradelink Pvt. Ltd. Paras Tradelink Pvt Ltd thereby incurred loss of Rs.2,4193750/-. Since it appears there is a huge difference of the purchase and sale price of the above shares and the transactions involved in such sale and purchase of shares are off-market transaction, the assessee was directed to explain the same whereupon following reply was made by the assessee:

> *On being enquired, the assessee vide submission dated 04/09/2011 submitted as under:-*
>
> > *"1. Your good self has sought details of short term capital loss incurred on sale of shares of I-Call India Pvt. Ltd. In this regard we submit that the assessee company had acquired the said shares with a view to earn profits in future on sale of shares of the said company as the said company is engaged in the business of BPO and operation of Call Center for various known Domestic as well as international companies. However, in view of the economic conditions in the western countries more particularly USA which contributed significant portion of revenue for the said investee company, the assessor company thought It fit to sale the shares even at loss. It is worth noting that in the year when the shares were acquired the invites company was making profit but in the year under consideration, the said investee company has had huge amount of accumulated loss. We are submitting herewith the financial statements of F.Y.2007-08 and 2008-09 as well as Statement of total income of F.Y.2007-08 and 2008-09 of (Call India Pvt. Ltd, (Annexure-l) In so far as basis of valuation of shams at the time of acquisition of shares is concerned, the valuation was done by way of negotiations having regard to the financial position of the company, the future of the BPO and call center business and the diversification of business interest of the assessee company."*

The assessee's contention is this that those shares were acquired by the assessee with a view to earn profit in future on sale of such shares of such company, which was engaged in the business of BPO and operation of call centre but due to bad economic condition in the western countries more particularly USA which is contributed significantly portion of Revenue for the

said investee company the appellant company thought it fit to sale such shares even at loss. Further that, the valuation was done by way of negotiations having regard to the financial position of the company, the future of the BPO and call centre business and the diversification of business interest of the assessee company. However, it was submitted by the assessee that no agreement has been entered into by and between the two companies in connection with the said transaction. The assessee was further requested to explain the business expediency of the transaction in the light of the loss incurred by the assessee in selling such shares at Rs. 10 per unit which was purchased at Rs.500 per unit. The assessee, then on 14.12.2011 submitted as follows:

> *"4. Your good self has sought the details regarding purchase and sale of shares of I-call (India) Pvt. Ltd and Adani Impex Pvt. Ltd. We submit that the assessee company has sold the shares of I-call (India) Pvt. Ltd. to Paras Tradelink Pvt. Ltd and the shares of Adani Impex Pvt. Ltd. has been sold to B2B India Pvt. Ltd. Please find attached herewith copies of ledger accounts of shares of I-call (India) Pvt. Ltd arid shares of Adani Impex Pvt. Ltd, share certificates issued by I-call (India) Pvt. Ltd and Adani Impex Pvt. Ltd along with Form no 20B filed with ROC i.e. Annual Return. Further Your good self has sought details as to why loss on sale of shares should not be disallowed. In this regard we submit that short term capital loss was incurred on sale of shares of Adani Impex Pvt Ltd. In this regard we submit that the assessee company has already detailed submission explaining the reasons for incurring the loss along with the valuation of shares vide point no 1 and 2 of our reply dated 4th September, 2011. As the assessee company has incurred capital loss on sale of shares of unlisted companies in off market transactions, the said capital loss incurred during the course of carrying on of the business is allowable in terms of Section 45 read with Section 48 of the IT Act. (Annexure-1)."*

According to the Learned AO the assessee since not entered into any agreement with the Anand Tradelink Pvt. Ltd. and Paras Tradelink Pvt. Ltd., nor any timeline was decided for purchase of those shares and not even the number of shares and the prices at which the shares were required to be transferred. The assessee failed to substantiate its genuineness. Further that, it

has been concluded by the Learned AO that the said transaction of purchase and sales of the shares within the group was a mere artifice or device so as to reduce the tax liability of the assessee-company and hence said loss of Rs.2,41,93,750/- was disallowed and added to the total income of the assessee which was, in turn, confirmed by the Learned CIT(A). Hence, the instant appeal before us.

At the time of hearing of the instant appeal, the Learned Sr. Counsel appearing for the assessee submitted before us that the details of transaction including the balance sheet and the ledger account of those companies were duly submitted before the assessing officer whereupon the purchase made by the appellant-company has not been disputed. He has also taken us to the balance sheet at Page 53 of the Paper Book in order to substantiate his argument. Apart from that, it was further argued that the Learned CIT(A) basically confirmed such disallowance on the fact that such transactions were entered into within the group entities thus both the purchase and sale transactions of shares are controlled transactions and finally holding the transaction not genuine; the same found to be manipulated on the basis of the facts and circumstances of the case is not permissible in view of judgments pronounced on identical facts by the Jurisdictional High Court in the matter of ACIT-vs-Biraj Investment Pvt. Ltd. Reported in (2012) 24 Taxman.com 273(Guj). Apart from that, he has also relied upon the judgment passed by the Co-ordinate Bench in ITA Nos.834 & 986/Ahd/2012 and ITA No.3462/Ahd/2014 for A.Y. 2008-09. The order passed by the Learned CIT(A) in sustaining the disallowance of loss on the sale of shares of M/s. Ankul Investments Pvt. Ltd. was challenged before the Learned Tribunal where the assessee company is a privative limited company engaged in the business of carrying business activity, the assessee in the year under consideration has shown short term capital loss of

Rs.4,73,22,942.00/- on sale of shares of companies namely Ankul Investments Pvt. Ltd and Anagram Stock Broking Ltd. It is relevant to mention that all those transactions both for purchase and sale of shares were carried out off market and were made among the related parties and the assessee had set off the impugned short term capital loss against the long term capital gain earned by it in the year under consideration. The claim of the assessee was finally decided favorable relying upon the assessee's own case for A.Y. 2010-11 in ITA No.218/Ahd/2016 for A.Y. 2010-11. The relevant portion whereof is as follows:

> *"11. We have heard the rival contentions and perused the materials available on record. At the outset, we note that the ITAT in the own case of the assessee involving identical issues in ITA No. 218/AHD/2016 pertaining to the assessment year 2010-11 vide order dated 31st December 2018 has decided the issue in favour of the assessee and against the Revenue. The relevant extract of the order is reproduced as under:*
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> > *10. We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has sold equity shares of Arvind Ltd at Rs. 28.83 per share which is less than the price listed on the stock exchange by Rs. 4.99 per share. The assessee has sold 30 Lacs shares of Arvind Ltd which resulted in the long-term capital loss of Rs. 1,49,70,000/- on account of the difference in the price as discussed above. The assessee sold these shares to Shri Sanjay Lalbhai who is the director in assessee company as well as Arvind Ltd. Accordingly, the AO was of the view that the loss claimed by the assessee has been generated through the use of a colorable device.*
> >
> > *10.1 Therefore, the same was disallowed. The view taken by the AO was subsequently confirmed by the learned CIT (A).*
> >
> > *10.2 Now the controversy arises whether the loss claimed by the assessee in the given facts and circumstances is based on business expediency or it was used as a tool of a colorable device to generate such loss.*
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> > *10.3 It is an undisputed fact that all the parties which carried out such transaction were identifiable and there was also a consideration among such parties. The limited issue before us is that whether the assessee can sale listed shares off-marketat a price lesser than the price listed on the stock exchange.*

10.4 The price prevailing on the stock exchange at the relevant time was Rs. 33.30 per share. It is an undisputed fact that among other things the price at the stock exchange is decided by demand and supply of the shares. It means if there is more supply of the shares in the market, the price of the share will fall and vice versa. Thus, if the assessee would have sold these shares through the network of the stock exchange, the possibility of the reduction in the value of shares in the market would not have been avoided. It is because at that relevant time the daily average number of shares traded in the stock exchange namely BSE & NSE were 4,87,085 and 9,56,701 respectively. The relevant details showing the average number of shares traded in the stock exchange is placed on pages 54 to 55 of the paper book. Thus the sudden supply of 30 lacks shares, that too by the promoter of the assessee company in the stock exchange would have adversely affected the price of the shares of Arvind Ltd.

10.5 We also note that the assessee must have saved transaction cost consisting of service tax, Security transaction tax, and brokerage by selling the shares off-market. Had the assessee gone through the network of stock exchange then he would have incurred the cost as stated above. Therefore the difference, to the extent of the cost involved in such transfer, as discussed above, between the market price and actual price requires due consideration for quantifying the loss arising from the sale of shares.

10.6 We also note that there is no provision under the Act prescribing the guidelines for pricing of the shares unlike the provisions contained under section 50C of the Act concerning immovable properties under the head capital gain. Thus in the absence of any specific provision to determine the sale price of the shares of the listed company, we are inclined to hold that the price declared by the assessee is correct and within the provisions of law.

10.7 We also find that a new section 50CA of the Act was inserted by the Finance Act 2018 which is applicable from 1st April 2018, the relevant extract of the section is reproduced as under:

> *"[**Special provision for full value of consideration for transfer of share other than quoted share.***
> ***50CA.** Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed [40a], the value so determined shall, for the purposes of section 48, be deemed to be the full value of*

consideration received or accruing as a result of such transfer.
Explanation.—For the purposes of this section, "quoted share" means the share quoted on any recognised stock exchange with regularity from time to time, where the quotation of such share is based on current transaction made in the ordinary course of business.]"

10.8 From the plain reading of the above provision we note that the law was amended to bring the transaction of unquoted sale and purchase of shares under the net of income tax concerning the sale price of the shares. As per the provisions of section 50CA of the Act, the sale price of shares other than quoted shares shall be the fair market rate which shall be determined as prescribed under the rule 11UAA of the Income Tax Rule.

10.9 From the above provisions it is clear that the lawmakers have not brought any mechanism to determine the sale price of quoted shares if sold off-market. Thus it is transpired that the sale price of the quoted shares shall be the price as agreed between two parties if it is soldoff-market.

10.10 We also note that there is no provision under the head capital gain which empowered AO to determine the fair sale or purchase price of the quoted shares between the related parties unlike the provisions of section 40A(2) of the Act under the head business & profession.

10.11 Thus after considering the above facts, we are of the opinion that AO is not correct in challenging the sales consideration decided by the parties. There is no mechanism in the law, as discussed above, which allows AO to take the listed price of a share in place of actual sales consideration.

10.12 We also note that it is not the case of the Revenue that there was some inflow of money from the buyer of the shares to the assessee which is unaccounted. As there is no dispute about the nature of the transaction and the consideration received by the assessee against the sale of shares, therefore the transaction cannot be termed as a sham transaction.

10.13 Moreover, the onus is on Revenue to establish that assessee has received some benefit over and above the actual sales consideration. In this regard, we find support and guidance from a recent judgment of Delhi high court in case Arjun Malhotra vs. CIT

(403 ITR 354) where the same issue has been dealt and decided in favor of the assessee. The relevant extract of the order reads as under:

> ***"24.*** *In view of the aforesaid discussion and pronouncement of law in K.P. Varghese case (supra), we fail to fathom how the tribunal had distinguished the said decision solely and entirely on the ground that in the present case the transaction was not at arm's length (see paragraphs 18 and 19 of the order of the tribunal quoted above in paragraph 16). K.P. Varghese case (supra) case holds that sub-sections (1) and (2) relate to transactions, which were not at arm's length between related parties and third parties respectively, but the two provisions were integrally connected inasmuch as they would apply when there was evidence and material to show that the consideration declared and disclosed was under-stated and not the actual consideration received by the assessee. Only when the said pre-condition was satisfied, the Assessing Officer was entitled to treat the fair market value as the full value of consideration. Difference between the consideration actually received and market value of consideration by itself would not justify invoking the said Section. The aforesaid ratio has been followed by the Supreme Court in CIT v. Shivakami Co. (P.) Ltd. [1986] 25 Taxman 80K/159 ITR 71, which observes that the provision would apply only when there was consideration and which consideration actually received was more than the consideration disclosed or declared. Further, onus was on the Revenue to prove under-statement of the said consideration. Section 52 was not meant to apply to tax capital gains on the basis that the assessee might have gained or could have gained a higher price which in factwas not received. Reference can be also made to CITv. Godavari Corpn. Ltd. [1993] 68 Taxman 344/200 ITR 567 (SC) and judgments of this Court in CIT v. Dinesh Jain, HUF [2012] 25 taxmann.com 550/211 Taxman 23/[2013] 352 ITR 629 and CIT v. Gulshan Kumar [2002] 123 Taxman 111/257 ITR 703 (Del).*
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> ***25.*** *As noted above, Section 52 of the Act was omitted by Finance Act, 1987 with effect from 1st April, 1988. The said provision, therefore, was not applicable in the Assessment Year 1999-2000. We have referred to the aforesaid judgment in K.P. Vearghese case (supra) as this judgment was referred to and distinguished by the tribunal in the impugned order. We have also referred to K.P. Varghese case (supra) to elucidate that the legal ratio propounded with reference tothen applicable Section 52 of the Act would be against the Revenue even if the said Section was applicable. It is obvious that when Section 52 of the Act itself was not applicable, the Assessing Officer could*

not have substituted the actual sale consideration received by the Assessee with another figure stating that this was the fair market value. The aforesaid discussion would also take care of the argument that M/s GIPL had paid for foreign travel of the assessee. The fact that M/s GIPL had incurred any such expenditure would not be a ground and reason to substitute the actual consideration received with the figure relying upon the market quotation of the share as the fair market value."

11. Now coming to the main allegation/finding of the AO, which was later confirmed by the ld. CIT(A), that assessee has used this transaction as a colorable device to reduce its future tax liability and heavily relied on Honorable Supreme court in case of McDowell & Co. Ltd vs. Commercial tax officer (154 ITR 148) dated 17-4-1985 wherein apex court observed that tax planning within the law is permitted, but colorable devices cannot be part of tax planning.

11.1 In the case of McDowell & Co, the assessee was not collecting the sales tax liability on the excise duty even after the amendment in the distillery rules 76 & 79 w.e.f. 4-8-1981. As such before the amendment in the rules, i.e., distillery rules 76 & 79 w.e.f. 4-8-1981, the buyers were liable to deposit the excise duty directly to the state government. Therefore the assessee did not collect the sales tax on such excise duty. It is pertinent to note that the Hon'ble SC before the amendment in the rules 76 & 79 decided the issue in favor of the assessee reported in 1 SCR 914 dated 25-10-1976. Thus the assessee defaulted in complying the amended distillery rules 76 & 79 w.e.f. 4-8-1981. Thus the Hon'ble Apex Court decided the issue in favor of Revenue. Hence we are of the considered view that the principles laid down by the Hon'ble Apex Court cannot be applied in the case before us as the facts are different.

11.2 It is also pertinent to note here that the Hon'ble apex court in case of Union Of India And Anrvs.AzadiBachaoAndolan (263 ITR 705) discussed the case McDowell & Co. Ltd vs. Commercial tax officer (supra) in detail and distinguished from it by observing as under:

"We may in this connection usefully refer to the judgment of the Madras High Court in M.V.Vallipappan and others v. ITO , which has rightly concluded that the decision in McDowell cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavour. Though the Madras High Court had occasion to refer to the judgment of

the Privy Council in IRC v. Challenge Corporation Ltd. , and did not have the benefit of the House of Lords's pronouncement in Craven , the view taken by the Madras High Court appears to be correct and we are inclined to agree with it."

11.3 Further, we also note that Hon'ble Jurisdictional High Court in case of Banyan And Berry Vs. Commissioner Of Income Tax (222 ITR 831) held that tax planning within the law is permissible and only if any transaction which is reducing the tax liability cannot be regarded as a colorable device. The court also discussed the meaning of colorable device and case of McDowell & Co. Ltd vs. Commercial tax officer (supra) in detail. The relevant extract of the order is read as under:

"From the aforesaid, it is apparent that on the factual aspect the Court was considering the case where in a going business a liability to pay duty which was legally of the assessee and which on such payment was to become part of its cost of commodity sold by it and to become part of its selling price to the buyers, was as a result of arrangement between the seller and buyer split into two, namely - duty so far paid separately directly to the tax authorities and the balance so paid to the seller; the arrangement was existing solely for the purpose of not paying the tax and it is not a transaction in reality of receiving less price than the one on which it was marketing.The Court no where said, that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell's case (supra).Ratio of any decision has to be understoodin the context it has been made. The facts and circumstances which led to McDowell's decision (supra) leaves us in no doubt that the principle enunciated in the above case has not affected the freedom of citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the frame work of law, unless the same fall in the category of colorable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity.

It was with this consciousness that the Court has used these expressions while depreciating the schemes of tax avoidance in the name of tax planning. All the expressions used by their Lordships in depreciating the methodology of tax avoidance through tax planning of resorting to 'colorable device', 'dubious methods or subterfuge' have special significance in legal world.

In the context of the present discussion, the meaning assigned to 'colorable' in Brown's Judicial Dictionary has been defined as 'reverse of bona fide'.
Black's Law Dictionary explain 'colorable' to mean 'that which is in appearance only, and not in reality, what it purports to be, hence, counterfeit, feigned having the appearance of truth'.

So also a device. The context in which the expression device has been used in its ordinary dictionary meaning as per Shorter Oxford Dictionary means 'inneuity, something device, arrangement, plan, contrivance, a plot or a trick. Black's Dictionary refers to device as contrivance, a scheme, trick. Subterfuge - according to ordinary meaning as per the Shorter Oxford English Dictionary - means that to which one refers for escape or concealment. Subterfuge on historical principles means, an article or device to which a person refers in order to escape the force of an argument, an excuse with which conceals a clue.So also the expression dubious refers to a doubtful or of questionable character.

That is to say what has been deprecated as tax planning for avoidance of tax are those acts which have doubtful, or questionable character as to their bona fide and righteousness. Not all legitimate acts of a taxpayer which in ordinary course of conducting his affairs a person does and are under law he is entitled to do, can be branded of questionable character on the anvil of McDowell (supra).

We are unable to read in the aforesaid decision that any act of an assessee which results in reduction of his tax liability or expectation of tax benefit in future amounts to colorable device, a dubious method or subterfuge to avoid tax and can be ignored if the acts are unambiguous and bona fide, merely on the ground that treating those as deliberate would result in tax liability in future.

While the planning adopted as a device to avoid tax had been deprecated, principle cannot be read as laying down the law

that a person is to arrange his affairs so as to attract maximum tax liability, and every act which results in tax reduction, exemption of tax or not attracting tax authorised by law is to be treated as device of tax avoidance."

11.4 It is also pertinent to mention here that whenever assessee has two options, any layman will always go for one which reduces its tax liability but to hold that the transaction as a colorable device Revenue needs to see it in entirety, as held by the Hon'ble Gujarat high court in the abovementioned case.

11.5 The AO in his order also relied on the judgment of Supreme Court in the case of workmen vs. Associated Rubber Industry limited (157 ITR 77) (SC) and held that facts of the above case are similar to assessee's case. However, we note that the above decision was in respect to the calculation of bonus payable to workers where an artificial entity was created to divert the income so that bonus liability can be reduced as the bonus was to be calculated at a fixed rate and diverting the income resulted in reducing the bonus liability. Therefore, Hon'ble Supreme Court held that it is not permissible as the artificial entity was later wound up in 2 years. But we find that facts in the case on hand are different from the case as mentioned in the immediately preceding paragraph. Further, we also note that the above case was related to the issue of labors while the present case is related to tax planning. Thus, the principles laid down concerning the labor laws cannot be adopted in the case before us.

11.6 We also note that there was no set off of such loss against any income till the date of passing the order as claimed by the assessee. The Learned DR before us has not brought any iota of evidence against the argument of the learned counsel for the assessee. Thus we feel that had the loss claimed by the assessee been colorable device then, the assessee should have claimed set off of such loss against the income as per the provisions of the Act. As the assessee has not claimed the set off of such loss, we are of the view that the same cannot be held as the result of the colorable device.

11.7 We also note that the purchase and sale of the shares by the assessee of the shares of Arvind Ltd were duly supported with the relevant shreds of evidence which are placed on pages 50 to 53 of the paper book. It is also pertinent to note that the lower authorities did not doubt the details of the purchases and sales of the securities.

11.8 In view of the above, we are not inclined to uphold the finding of authorities below. Accordingly, we set aside the order of learned

CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

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19. We have heard the rival contentions and perused the materials available on records. In the instant case, the assessee has acquired the shares of AKAL at Rs. 500 per share represented by the premium of Rs. 490 and face value of Rs.10 per share. The assessee acquired these shares on 20th March 2010 which were sold on 25th March 2010 at Rs.150 per share resulting in total short-term capital loss of Rs.3.50 crores which was treated by the AO as a colorable device to generate such loss. Accordingly, the AO disallowed the same and added to the total income of the assessee. The view taken by the AO was subsequently confirmed by the learned CIT (A).

19.1 Similarly, the assessee has claimed loss of Rs. 36,19,050 on account of forfeiture of share warrants of Arvind Ltd. As such the assessee did not exercise his right to acquire shares against the share warrants on the due date. Therefore, Arvind Ltd forfeited the amount advanced by the assessee. As per the assessee, such transaction was an extinguishment of his right, therefore, qualify within the definition of the transfer. Accordingly, the value of such extinguishment of right was determined by the assessee at Rs. 36,19,050/-. However, the AO treated the same as a colorable device on the ground that the transaction was carried out among the related parties which were belonging to the same group. Accordingly, the loss on account of forfeiture of shares as discussed above claimed by the assessee was disallowed by the AO. However, the view taken by the AO was subsequently reversed by the learned CIT (A).

19.2 Now the controversy before us arises whether the loss claimed by the assessee on the sale of shares of AKAL is generated as a tool of a colorable device. It is an undisputed the fact that all the parties involved in such transaction were identifiable and the whole transaction was based on the documentary evidence. Now the question arises to determine the price at which the assessee sold these shares. It is an undisputed fact that the assessee acquired shares of AKAL at a premium of Rs.490 per share having face value at Rs.10 per share only. These shares were sold at a price of 150 per share which is in excess than the fair market value of the shares determined as per rule 11UA of Income Tax rule. As per rule 11UA, the value of the share comes at Rs.109 per share. Therefore, there remains no doubt that the price of the share sold was at a higher price than the fair market value.

19.3 Under the income tax provision, we note that there was no mechanism to determine the purchase & sale price of the share at that the relevant time. The lawmakers to determine the transfer value of unquoted share brought special provision by introducing Section 50CA of the Act which reads as under:

> *"[**Special provision for full value of consideration for transfer of share other than quoted share.***
>
> ***50CA.** Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed [40a] , the value so determined shall, for the purposes of section 48, be deemed to be the full value of consideration received or accruing as a result of such transfer.*
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> *Explanation.—For the purposes of this section, "quoted share" means the share quoted on any recognised stock exchange with regularity from time to time, where the quotation of such share is based on current transaction made in the ordinary course of business.]"*

19.4 However, section 50CA is applicable w.e.f. 01st April 2018, therefore, for the assessment year under consideration there was no mechanism under the law to determine the sale price of unquoted shares. Similarly, there is also no provision under the provision of law to determine the price, which should be taken as the purchase cost of a capital asset.

19.5 Further, we also note that there is an amendment under the provisions of section 56(2)(x) of the Act which reads as under:

> *"[(x) Where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017, ---*
>
> *XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*
>
> *(c) any property, other than immovable property, -----*
>
> *(A) Without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;*
>
> *(B) For a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty*

thousand rupees, the aggregate fair market value of such property as exceeds such consideration:"

19.6 A plain reading of the above provision reveals that the person being the recipient is subject to tax if it acquires anything at a value lesser than the fair market price. These provisions have been brought under the statute with effect from 01.04.2017. We also note that the same provision was also there in the old provision under clause (vii) to section 56(2) of the Act. However, on reading the same, we note that the tax liability, if any arises will be applicable in the hands of the recipient and no liability, can be imposed on the transferor. Therefore, we are of the view that the assessee being the transferor of shares cannot be subject to tax in the instant case.

19.7 In holding so, we also find support and guidance from the judgment of Asara Sales and Investments Private Limited (ITA No. 1345/PUN/2014) wherein it was held as under:

> *"19. Another aspect of the issue is the allegation of Assessing Officer that as against book value of share as on 31.03.2008 at Rs.59.61 per share, the shares of GGDL were sold at Rs.48/- per share to another group concern BVHPL. These shares were acquired by the assessee @ Rs.74.25 in December, 2006. The said transaction as per the Assessing Officer suggested colorable device so that by selling the shares to its own subsidiary, at prices above or below the book value, the assessee was manipulating the income to reduce its tax liability. First of all, as decided in the paras hereinabove, the shares have not been sold to subsidiary of the assessee but to a concern from whom the assessee has raised loan to the extent of Rs.18 crores and the decision was taken to repay the loan and arrest the payment of interest on such loans, the shares of the group concern were sold in off market transaction to BVHPL. The said transaction is not a colorable device. Further, the assessee has sold the shares on the market price prevailing on the date of sale and no fault can be found with such transactions undertaken by the assessee. In case as against the market value, the other concern had purchased the shares at a higher value, then it would be questionable, but it is not so, in the present case and hence, we find no merit in the orders of authorities below in holding that the loss claimed by selling the shares of GGDL to its 100% subsidiary below the book value should be ignored while setting it off against the other income, if any, in current year or for carry forward and set off in subsequent years. The loss was worked out at (-) Rs.2,75,83,524/-. We reverse the orders of Assessing Officer*

and CIT(A) in this regard and hold that the total loss arising on the said transaction can be adjusted against the gain arising on sale of unquoted shares during the year and balance loss can be carried forward and set off against any other gain arising in the subsequent years."

19.8 We also note that in the case tax needs to be levied on the share capital & premium is taxable in the hands of the recipient. The share capital & premium can be brought to tax under the provisions of section 56(2) or 68 of the Act as the case may be. But there is no provision to tax the investment along with share premium amount in the hands of the payer or investor. It is an undisputed fact that the assessee has invested in AKAL by acquiring the shares at a premium. The act of acquiring the shares at a premium by the assessee does not result in any income in its hands. Thus there cannot be any tax in the hands of the assessee on account of the investment in shares in AKAL at a premium. In this regard, we draw the principles from the order of Mumbai Tribunal in the case of Pratik Syntex Pvt. Ltd. Vs. ITO reported in 94 taxmann.com 12 wherein the headnote reads as under:

"Section 68 of the Income-tax Act, 1961 - Cash credits (Share capital) - Assessment year 2012-13 - During relevant year, assessee received huge amount from three companies as share capital - Assessing Officer taking a view that transaction of issue of share capital was bogus, added said amount to assessee's taxable income under section 68 - It was noted that even though shares had been issued at a very high premium to new shareholders, yet assessee could not even give correct addresses of three applicant companies where they were located - Further, assessee did not file any cogent material/evidences to justify chargeability of such a huge share premium from three new shareholders vis-a-vis issuing shares at par to original promoters within same relevant year under consideration - It was also undisputed that three companies paying huge amount to assessee, had miniscule paid up capital and earned very small profits and, thus, they were not in a financial condition to subscribe to assessee's shares at such a high premium - Whether, in aforesaid circumstances, Assessing Officer rightly concluded that assessee failed to prove identity of parties and genuineness of share transactions and, thus, impugned addition was to be confirmed - Held, yes [Para 6] [In favour of revenue]"

19.9 We also feel to clarify that the issue of shares at a premium is the prerogative of AKAL which cannot be questioned. Similarly, the decision of the assessee to subscribe the shares of AKAL at a

premiumis its prerogative which cannot be questioned. The only test to treat the sum of share capital as income under section 68 of the Act or 56 of the Act and that too in the hands of the recipient i.e. AKAL in the instant case. In this regard, we find support & guidance from the judgment of Mumbai Tribunal in the case of Green Infra Limited Vs. ITO reported in 38 taxmann.com 253 wherein it was held as under:

> *"No doubt a non est company or a zero balance company asking for a share premium of Rs. 490 per share defies all commercial prudence, but at the same time one cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land."*

19.10 Thus we hold that the investment made by the assessee at such a high premium and subsequent sale at a loss cannot be the basis holding that such loss is bogus in the given facts & circumstances.

20. Now the 2nd controversy arises whether the loss incurred by the assessee on account of the sale of the shares of AKAL is the result of the colorable device used to generate such loss. We want to explain such loss incurred by the assessee with the help of an example.

20.1 Supposing Mr. X acquires 10 shares of ABC Ltd having a face value of ₹10 per share at a premium of rupees 490.00 per share in the financial year 2009-10. Accordingly, Mr. X has shown an investment of ₹5000 in its balance sheet as on 31.3.2010. On the acquisition of the shares, there is no question of working out any taxable income in the hands of the assessee. Thus the value of the investment shown by the assessee in its balance sheet will certainly be accepted by the Revenue. There cannot be any question of any income in the hands of Mr. X on account of investment in ABC Ltd. at a premium.

20.2 However, the provisions of the Act requires ABC Ltd. to justify the share capital & share premium in its hands. ABC Ltd. is required to explain the source of share capital and premium under section 68 of the Act. Similarly, ABC Ltd. is also required to explain the source of share premium in its hands under section 56(2) of the Act. Thus if ABC Ltd. fails to justify the same under the relevant section 68/ 56(2) of the Act, then it will be subject to tax in the hands of ABC Ltd. Thus the value of share price along with premium at the most can be brought to tax in the hands of the ABC Ltd if it fails to justify the same.

20.3 Now Mr. X sales the shares in the financial year 2012-13 say at ₹150 per share. The sale price of the shares was determined as per the provisions of rule 11UA of Income Tax Rule. Accordingly, the assessee shall claim the loss of ₹ 3,500.00 (Rs. 5000- 1500) in its books of accounts. The question arises whether the loss claimed by the assessee is allowable. The answer is yes. It is because the purchase value cannot be disputed and the sale price of the shares was determined as per the provisions of Income Tax Rule. Therefore the loss claimed by the assessee is within the provisions of the Income Tax Act.

20.4 In our considered view the same logic can be applied to the case on hand. However, the facts of the case in hand are a bit different from the example given above. In the case on hand, the shares were sold within 5 days from the date of acquisition. Accordingly, the loss was incurred in the same financial year in which the assessee acquired the shares. The transaction resulting the loss creates suspicion in the mind that it was generatedfor the purpose of the loss in order to set off the taxable income. Now the next doubt arises that such loss must have been set off against the income. But the fact is that the assessee has not claimed the set off of such loss in the year under consideration. In our considered view this fact cannot be ignored. It is because if the assessee would intend to set off of such loss in the same financial year, then it would have done so in that year only. But the assessee has not done so. Thus had there been any planning of the assessee for creating such bogus loss than it should have claimed the set off of such loss in that year only. It is also pertinent to note that such loss was not set off till the date of the passing of the order by the ld. CIT-A dated 16-11-2015.

20.5 We also note that the assessee acquired the shares at the fag end of the financial year which was sold immediately after the acquisition which resulted in the loss as discussed above, but the same was not set off against any other income.

20.6 In addition to the above, we also note that the assessee could have split the transaction into two financial years by acquiring the shares of AKAL in one year and selling the same in the year of setoff of such loss. So that there should not have been any question of any disallowance. On the contrary, the assessee has not done so rather incurred the loss within 5 days from the acquisition of the shares. It is also pertinent to note that the shares were acquired at the fag end of the previous year, and there were few days left for the expiry of such financial year. The assessee could have planned such transaction by splitting into2 different financial years as it was the matter of few days

only. Thus the action of the assessee does not show any malafide intention to use the sale of shares as the colourable device in creating such a loss. Accordingly, we are of the view that had there been any malafide intention of the assessee then it could have booked such loss in the more planned manner so that there should not have been any doubt. We are forming our view on the basis that the assessee did not set off such loss till the date of passing the order by the learned CIT-A. Had there been any malafide intention of the assessee, then it could have claimed the set off of such loss in the same financial year or the subsequent financial year.

20.7 Similarly, we also note that the future income under the head capital gain cannot be predicted for claiming the set off of such loss. Moreover, there was no allegation of the Revenue that such loss was created to claim the set off of the future income. The future income is unseen and unpredictable and it was not possible to design the same in the relevant year. Therefore, we are of the view that such loss cannot be disallowed keeping in mind the future income of the assessee.

20.8 Thus simply the transaction was carried out among the related parties can not the ground to hold that the loss claimed by the assessee is bogus. The taxability of the transaction has to be seen as per the provision of the Act. It cannot be decided based on emotions and the moral of the assessee. In this regard we find support & guidance from the judgment of Hon'ble Apex Court in the case of CIT Vs. A. Raman & Co. reported in 67 ITR 11 wherein it was held as under:

> *"Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented."*

20.9 Thus from the above, we note that the conduct of the assessee is suggesting that the loss was not created purposefully to meet some malafide purposes.

21. We also want to explain such loss incurred by the assessee with the help of another example.

21.1 Supposing Mr. X, a trader in shares, acquires 10 shares of ABC Ltd having a face value of ₹10 per share at a premium of rupees

490.00 per share in the financial year 2009-10. Accordingly, Mr. X has shown stock in trade at ₹ 5000 in its books of accounts. Further Mr. X requires to value such stock in trade in the balance sheet as on 31.3.2010 which comes to Rs. 1500.00. Thus there shall be a loss of Rs. 3500 to the assessee which will be allowed to him as a business loss.

21.2 But in case Mr. X classified the shares in its balance sheet as an investment then the loss cannot be allowed to him on account devaluation of the investment at the year-end unless Mr. X sells these. Thus the loss allowable to the trader of shares cannot be disallowed if such shares were held as an investment. But such loss will be allowed only on the sale of such shares.

21.3 We also find support & guidance from the order of this Tribunal in the case of DCIT Vs. Orbit Finmark Pvt. Ltd. in ITA 100/Ahd/1999 dated 9/11/2012 wherein it was held as under :

"10. After hearing both the parties and perusing the record we find that ld.

> *CIT(A) has given relief to the assessee by holding that the case of the assesseeis squarely covered by the Hon'ble Calcutta High Court decision in the case of CIT vs. Smt. NandiniNopany (230 ITR 679), the relevant portion of which reads as under:-*
>
> *"The genuineness of the transaction of the sale and purchase of the shares between the assessee and VishwaMangal Trading Co. Pvt. Ltd., has not been doubted by the Assessing Officer. This has not even been questioned by the Department. It is not disputed that the assessee had transferred those shares at the book value cost maintained by her. It is also not disputed that the book value cost was lower than the market value of the shares. In fact it is admitted that the market value of those shares was to the tune of Rs.20,67,876/-.*
> *Under those circumstances, holding that the assessee had derived any income, being the difference between the market value and the price on which the shares were sold by the assessee, in our opinion, was not correct. We are of the view that the Tribunal rightly upheld the finding of the Commissioner of Income-tax (Appeals). It is not a case where any understatement of value or misstatement of value of the shares sold was made by the assessee. This is a case where the assessee had sold the shares at a value admittedly lower than*

the market price. Yet the shares could not be assessed on the difference amount being her income because no inference can be drawn in the facts and circumstances of the case that the design of the assessee was such that she concealed certain facts and she received the difference of the value by fraudulent means. There was no evidence direct or inferential, nor was there any finding by any income-tax authority that the assessee indulged in such a practice. We are fortified in our view by a judgment of the Supreme Court in the case of CIT v. Shivakami Co. Pvt. Ltd. [1986] 159 ITR 71 (SC). We also find support in our view from a Division Bench judgment of the Bombay High Court in the case of India Finance and Construction Co. Pvt. Ltd. v. B.N . Panda, Dy. CIT[1993] 200 ITR 710."
A.Y. 1994-95 We further find that the order of ld. CIT(A) is in conformity with the decision of jurisdictional High Court in the case of MarghabhaiKishabhai Patel & Co.

(supra) wherein Hon'ble Court referred to the case of Madras High Court in the case of RamlingaChoodambikaiMils Ltd. vs. CIT (1955) 281 ITR 952 and that of Gujarat High Court in the case of CIT Vs. KeshavlalChandulal (1996) 59 ITR 120 and held as under:-

"In absence of evidence to show either that the sales were sham transaction or that the market price were in fact paid by the purchasers, the mere fact that goods were sold at a concessional rate to benefit to purchaser at the expenses of the company would not entitled to income-tax department to assess the difference between market price and price paid by the purchaser as profit of the company."

11. In view of the above and since no contrary decision was cited by the Revenue, we are not inclined to interfere with the order passed by ld. CIT(A) deleting the addition of Rs.14,14,06,326/- and the same is hereby upheld.

This ground of the Revenue is dismissed."

21.4 Further, in almost in a similar case Hon'ble Gujarat high court in case of Assistant Commissioner of Income-tax vs. Biraj Investment (P.) Ltd (24 taxmann.com 273) held as under:

***"14.** Having thus heard the learned counsel for the parties, we find that the relevant facts are not in dispute. The respondent assessee sold shares of Rustom Mills and Industries Ltd for a*

sum of Rs.4,01,000/- on which transaction, theassessee claimed long term capital loss of Rs.8,38,790/-. During the same period, the assessee also sold certain shares of Rustom Spinners Ltd. and showed long term capital gain of Rs.1,46,792 and short term capital gain of Rs.7,41,563/-. It is also not in dispute that the shares of Rustom Mills and Industries Ltd. were pledged by the assessee with IDBI Bank. The original share certificates along with the transfer form duly signed by the assessee were in possession of the IDBI Bank. The assessee had also undertaken not to transfer such shares.

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***17.** We are not inclined to accept the Revenue's contention that this was a colourable device and that the entire arrangement was a paper arrangement. Firstly, there is no provision in the Act which would prevent the assessee from selling loss making shares. Simply because such shares were sold during the previous year when the assessee had also sold some shares at profit by itself would not mean that this is a case of colourable device or that there is a case of tax avoidance. Further, there is no restriction that such sale or transaction cannot be effectedwith a group company. As long as the Revenue could not doubt the sale price of the shares, it would not be open for the Revenue to contend that the assessee had shown loss which it did not really suffer. In the present case, it is not even the case of the Revenue that shares were sold at a price lower than the market rate. If that be so, the question of inflating the loss by transferring the shares to group company would not arise. Under ordinary circumstances, it is always open to the assessee in his own wisdom to either hold on to certain bunch of shares or to sell the same to avoid further loss, if he finds that market value of the shares is fast diminishing. It is equally open for the assessee to effect such sale during the same year when he also chooses to dispose of certain profit making shares. In the present case, of course, there is a further angle of the shares in question being pledged to IDBI and therefore it would not be possible for the assessee to deliver the original share certificates to its purchaser along with the duly signed transfer forms. As already noted, such special angle may have repercussion insofar as the legal relation between the assessee and the IDBI is concerned and insofar as the purchaser's right to have shares transferred in its name is concerned. This, however, by itself would not establish that the sale of shares was only a paper transaction and a device contrived by the*

assessee to claim loss which it did not suffer and thereby seek set off against the capital gain received by it during the year under consideration.

***18.** In the case of CIT v. SakarlalBalabhai [1968] 69 ITR 186 (Raj.), a Division Bench of this Court observed that avoidance of tax cannot include every case of reduction of tax liability of an assessee. The assessee may enter into a transaction which has the effect of diminishing his income and consequently reducing his tax liability. In such a case, there would be no avoidance of tax, For example, a case where the assessee makes a gift of shares to his son. By reason of gift income from the shares would not accrue to the assessee but would accrue to the son and to that extent the income of the assessee would be diminished and his tax liability reduced. Thiscannot be regarded as a case of tax avoidance even if the motive of the assessee in making the gift was to save tax on the income from shares at a higher rate applicable to him.*

***19.** Under the circumstances, even without referring to the decision of the Apex Court in the case of Azadi Bachao Andolan (supra) and the observations made in the later decision in the case of Vodafone International Holdingss B.V. (supra), we do not find that this a case which would fall within the parameters of the decision in the case of McDowell & Ltd (supra).”*

21.5 In view the above the loss of Rs. 3,50 crores cannot be treated as generated through the use of colrabledecvice. The only alleagation of the Revenue was that the loss was generated as a device of coulorable tool. However, we disagree with the reasoning of lower authorities.

We also note that the Revenue has taken the different stand by taxing the gain with respect the transaction for the sale of shares within the group but disallowed the loss with respect the transaction for the sale of shares within the group. Thus the stand of the Revenue was contradictory.

12. In view of the above, we are not inclined to uphold the order of authorities below for short-term capital loss on sale of shares of AIPL for Rs. 1,80,00,000/- and uphold the order of ld. CIT(A) for the loss on sale of the shares of ASBL for Rs. 2,93,22,942/- only. Hence the ground of appeal of the assessee is allowed,and ground of appeal of the Revenue is dismissed.”

We have also carefully considered the judgment passed by the Jurisdictional High Court in the matter of ACIT-vs-Biraj Investment (P.) Ltd. while deciding the identical issue the Hon'ble High Court was pleased to observe as follows:

> ***"17.*** *We are not inclined to accept the Revenue's contention that this was a colourable device and that the entire arrangement was a paper arrangement. Firstly, there is no provision in the Act which would prevent the assessee from selling loss making shares. Simply because such shares were sold during the previous year when the assessee had also sold some shares at profit by itself would not mean that this is a case of colourable device or that there is a case of tax avoidance. Further, there is no restriction that such sale or transaction cannot be effected with a group company. As long as the Revenue could not doubt the sale price of the shares, it would not be open for the Revenue to contend that the assessee had shown loss which it did not really suffer. In the present case, it is not even the case of the Revenue that shares were sold at a price lower than the market rate. If that be so, the question of inflating the loss by transferring the shares to group company would not arise. Under ordinary circumstances, it is always open to the assessee in his own wisdom to either hold on to certain bunch of shares or to sell the same to avoid further loss, if he finds that market value of the shares is fast diminishing. It is equally open for the assessee to effect such sale during the same year when he also chooses to dispose of certain profit making shares. In the present case, of course, there is a further angle of the shares in question being pledged to IDBI and therefore it would not be possible for the assessee to deliver the original share certificates to its purchaser along with the duly signed transfer forms. As already noted, such special angle may have repercussion insofar as the legal relation between the assessee and the IDBI is concerned and insofar as the purchaser's right to have shares transferred in its name is concerned. This, however, by itself would not establish that the sale of shares was only a paper transaction and a device contrived by the assessee to claim loss which it did not suffer and thereby seek set off against the capital gain received by it during the year under consideration.*
>
> ***18.*** *In the case of CIT v. SakarlalBalabhai [1968] 69 ITR 186 (Raj.), a Division Bench of this Court observed that avoidance of tax cannot include every case of reduction of tax liability of an assessee. The assessee may enter into a transaction which has the effect of diminishing his income and consequently reducing his tax liability. In such a case, there would be no avoidance of tax, For example, a case where the assessee makes a gift of shares to his son. By reason of gift income from the shares would not accrue to the assessee but would accrue to the son and to that extent the income of the assessee would be diminished and his tax liability reduced. This cannot be regarded as a case of tax avoidance even if the motive of the assessee in*

making the gift was to save tax on the income from shares at a higher rate applicable to him.

19. *Under the circumstances, even without referring to the decision of the Apex Court in the case of Azadi Bachao Andolan (supra) and the observations made in the later decision in the case of Vodafone International Holdings B.V. (supra), we do not find that this a case which would fall within the parameters of the decision in the case of McDowell & Ltd (supra).*

20. *In the result, we answer the questions in the affirmative, i.e. in favour of the assessee and against the Revenue. Tax Appeal is accordingly dismissed."*

It appears that only because of the reason that the shares were sold to the related parties. The transaction has been held to be colorable devise in order to evade tax tough the entire books of accounts were placed before the authorities below where the entire transaction was reflected. The transaction has been levelled as ingenuine, manipulated without taking into consideration this particular aspect of the matter that there is no provision in the Act which would prevent the assessee from selling loss making share even in the present facts and circumstances of the case. Hence, respectfully relying upon the order passed by the co-ordinate Bench and jurisdictional High Court we find no reason for disallowance of the long term capital loss to the tune of Rs.2,41,93,750/- incurred by the appellant and hence the same is deleted.
This ground of appeal is thus allowed.

Ground No.3 The Learned CIT(A) has upheld the amount of expenditure disallowed u/s 14A while computing the appellant's book profit u/s 115JB.

Upon examination of the computation of the total income, it appears that the assessee added back provision for doubtful debts of Rs.27,625/- and provisions for doubtful loan of Rs.3,48,19,097/-. The assessee has not added back the

same while calculating the computation u/s.115JB of the Act against which the assessee submitted as follows before the Learned AO:

> *"7. our good self has asked us to show cause as to why provision for doubtful loan of Rs 3,48,19,097 should not be added to the book profit while computing tax as per the MAT provisions contained in Sec 115JB of the IT Act We reiterate the submission made vide point no 3 of our reply dated 4th September, 2009 wherein we stated that* #?e*said provision for loan represents diminution in the value of asset being* Lo3,~ *itself and it 1$ not in the. nature of provision for unascertained liability. The Hon'bie Supreme Court in the* case *of CIT Vs HCL Comnet Systems & Services Ltd reported in 305 ITR 409 (SC) has held that a provision for diminution in the value of asset is not in the nature of provision for unascertained liability but represents reduction in (he value of asset and therefore, it is not required to be added while computing books profit u/$115JB of the I T Act**

The assessee further replied as follows on 14.12.2011 in response to the show-cause issued dated 05.12.2011:

> "9. *Your good self has sought* as *to why provision for doubtful loan ofRs 3,48, 19,Q$7 should not be disallowed . in this regard,, we submit that the said ptvvision for doubtful loan has already been disallowed while computing income under the normal provisions of the IT Act, However, the said provision for doubtful loan has not been added to book profit while" computing tax as per the MAT provisions contained in Sec 115J8 of the IT Act in view of .the fact that the said provision for loan represents diminution in the value of assets being Loan and it is not in the nature of provision for unascertained liability. This view is supported by the decision of the Hon'ble Supreme Court in the case of GIT Vs HCL Comnet Systems & Services Ltd'f&potted in 305 !TR 400 (SC). The head note of the said decision is repfoduc&d herein under:*
>
> *"Section 115JA of the income-tax Act, 1961 - Minimum alternate tax - Assessment year 1997-98 - Whether for purposes of computing book pmfit under section 115JA, provision made by assessee for bad and doubtful debt can be added bach to net profit only if clause (o) of Explanation to section 115JA stands attracted - Held, yes - Whether clause (c) of said Explanation is attracted only if amount is set aside as provision; provision is made for meeting a liability; and provision is for an unascertained liability - Held, yes - Whether whore debt was amount receivable by* assesses, *any provision* mada*towards* irrecovenabi/ity of said debt *could be* said fo be s provision for fiabi/ity so as to attract clause (c) of Explanation and could be added back to net profit for purpose of computing book profit under section 115JA-HeJd, no Accordingly, provision for doubtful dobt*is not* required to be added wMe computing taxability u/s 1 \ *5JB* of the IT Act."

However such plea of the assessee was not found suitable and hence the expenses was disallowed u/s 14A to the tune of Rs.2,01,79,762/- and was added to the book profits u/s 115JB explanation 1(f) of the Act which was, in turn, confirmed by the first appellate authority.

At the time of hearing of the instant appeal, the Learned Sr. Counsel appearing for the assessee submitted before that this issue is squarely covered by the Jurisdictional High Court in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 wherein the disallowance made u/s 14A of the Act has been held not to be disallowed u/s 115JB of the Act. The Learned DR, however, failed to make any contrary submission to that of the contentions made by the Learned AR.

18. We have heard the rival contentions of both the parties and perused the materials available on record. The AO in the instant case has made the disallowance u/s 14A r.w.r. 8D of the Income Tax Rules for Rs. 35825/- while determining the incomeunder normal computation of income. Further, the AO while determining the income under Minimum Alternate Tax (MAT) as per the provisions of section 115JB of the Act, has added the disallowance made under the normal computation of Income under section 14A r.w.r. 8D of Income Tax Rule for Rs. 35825/- in pursuance to the clause (f) of explanation 1 to section 115JB of the Act.

However, we note that in the recent judgment passed by the Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while

determining the net profit u/s 115JB of the Act, The relevant portion of the said order is reproduced hereinbelow:

> *"In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made "without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962. "*

The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case in hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under clause (f) to explanation 1 to section 115JB of the Act. Hence we delete such addition.

In that view of the matter, we find no reason to substantiate such disallowance made u/s 115JB of the Act and hence the same is hereby deleted. This ground of appeal is allowed.

Ground No.4: This ground is consequent in nature and hence no order need to be passed.

5. In the result, the assessee appeal is thus allowed.

This Order pronounced in Open Court on	**20/09/2019**

Sd/- Sd/-
(O. P. MEENA) (Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER **JUDICIAL MEMBER**
Ahmedabad; Dated 20/09/2019
PritiYadav, Sr.PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-2, Vadodara.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad