

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òCö BENCH

**Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 635 & 636/Ahd/2019
Assessment Year 2009-10 & 2010-11**

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| Rakeshbhai Karsanbhai Patel, Nirma House, Ashram Road, Ahmedabad PAN: AGGPP2910C (Appellant) | Vs | The Dy. CIT, Circle-3(1)(1), Ahmedabad (Respondent) |
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Revenue by: Shri L.P. Jain, Sr. D.R.
**Assessee by: Shri S.N. Soparkar &
Shri Himanshu Shah, A.Rs.**

Date of hearing : 02-07-2019
Date of pronouncement : 26-09-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by assessee for A.Y. 2009-10 & 2010-11, arise from order of the CIT(A)-7, Ahmedabad dated 31-01-2019, in proceedings under section 143(3) of the Income Tax Act, 1961; in short òthe Actö. Since both the appeals of the assessee are interconnected to the issue in the appeal therefore for the sake of convenience these appeals are adjudicated together by this common order.

ITA No. 635/Ahd/2019

2. The assessee has raised following grounds of appeal:-

- “1) In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in points of law and facts.
- 2) In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in confirming disallowance of long term capital loss on sale of shares of Rs.95,74,720/-.
- 3) In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in confirming disallowance of short term capital loss on sale of land of Rs.1,47,250/-.”

3. The fact in brief is that assessee has filed return of income declaring income of Rs. 6,24,04,863/- on 29th July, 2009. The case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 19th August, 2010. During the course of assessment, the assessing officer has noticed that assessee has sold land at Gota for a sale consideration of Rs. 1.19 crore and declared long term capital gain on the said sale at Rs. 1,68,79,701/-. The assessee has also sold land at Thaltej for a sale consideration of Rs. 60.70 lacs and declared long term capital gain of Rs. 57,56,745/-. The assessee has set off the aforesaid capital gain against the sale of shares on 31st March, 2009. The details of shares sold are given as under:-

| Sr. No | Name of Asset | No. of shares | Date of Purchase | Date of Sale | Cost | Indexed Cost | Sale Value | Long Term Capital Loss |
|-------------------------|-------------------------------------|---------------|------------------|--------------|-------------------------------|--------------|---------------------------|------------------------|
| 1 | Shares of Amitabh Bachhan Corpn.Ltd | 25,000 | 06.03.95 | 30.03.09 | 2,000,000 @Rs.80 per share | 4,494,208 | 25,000 @Rs.1 per share | (4,469,208) |
| 2 | Shares of Business Standard Ltd. | 31,000 | 22.08.95 | 30.03.09 | 2,480,000 @Rs,80 per share | 5,136,512 | 31,000 @Rs,1 per share | (5,105,512) |
| Long Terrn Capital Loss | | | | | | | | (9,574,721) |

The assessing officer has further noticed that assessee has sold the aforesaid shares to Khodidas Vandas Patel Discretionary Trust, Ahmedabad. The detail of the trust, beneficiary of the trust and trustee of the trust as per the trust deeds are as under:-

| | |
|------------------------|---|
| Name | Khodidas Vandas Patel Disc. Trust |
| Address | Nirma House/Ashram Road, Ahmedabad |
| PAN No. | AAATK3530B |
| Beneficiaries of Trust | Shri Karsanbhai K Patel, S/o'Shri Khodidas V.Patel Smt.Shantaben K Patel, W/o Shri Karsanbhai Patel Shri Rakeshbhai K. Patel, S/o Shri Karsanbhai Patel Shri Hirenbhai K Patel, S/o Shri Karsanbhai Patel |
| Trustee of the Trust | Shri Ambubhaj M.Patel Shri Rajendra D Shah Shri Karsanbhai K Patel |

After verification of the details and information furnished by the assessee, the assessing officer observed that assessee purchased 25,000 shares of M/s Amitabh Bachchan Corporation on 6th March, 1995 for a consideration of Rs. 20 lacs at Rs. 80 per share and 11000 shares of M/s Business Standards purchased on 28th August, 1995 for Rs. 24,80,000/- at Rs. 80 per share. 25000 shares of ABC Ltd has been sold for sale consideration of Rs. 25000 at Rs. 1/- per share to Khodidas Vandas Patel Disc. Trust and 3100 shares of M/s Business Standard were sold to the same trust for sale consideration of Rs. 31000 at Rs. 1 per share. The assessee has claimed long term capital loss of Rs. 44,69,208/- on the sale of shares of M/s A.B. Corporation and Rs.

51,05,521/- on sale of shares of M/s Business Standard Ltd.. The assessing officer observed that the assessee was one of the beneficiaries of the trust to whom the shares were sold. The aforesaid trust was formed for the benefit of the family members and to distribute the properties among family members. The assessing officer has also observed that against the long term capital gain on sale of land, the assessee had claimed set off of the loss on sale of shares of M/s A. B. Corporation Ltd. and M/s. Business Standard Ltd to Khodidas Vandas Patel Disc. Trust. The assessing officer observed that similar kind of set off was also obtained by the brother of the assessee on selling of such shares to the aforesaid Trust. The assessing officer observed that said shares have not moved out of family even after alleged transfer to the trust. The assessing officer has treated the transactions of sale of shares to the trust in which the assessee was beneficiary as sham transactions as the alleged transfer of shares to the trust was only to create an artificial loss to set off the long term capital gain made on sale of land as cited above in order to reduce the incidence of tax. The assessing officer has further observed that mere transfer of shares between same entities cannot be construed as sale of shares and the assessee had failed to substantiate the claim of capital loss with any documentary evidences. The assessing officer has further observed as under:-

“3.9 To sum up the facts of the case,

- (i) The said sale of shares have been sold to the Trust, which is a family beneficiary Trust.*
- (ii) The said Trust is not a public charitable trust.*
- (iii) The trustees of the Trust include the father of the assessee apart from two other members.*
- (iv) The beneficiaries of the Trust, include the parents of the assessee, brother of the assessee and the assessee himself.*
- (v) There is no evidence for the actual transfer of shares to the Trust.*
- (vi) The said shares have been sold for a token amount of Re. 1 per share, which is only a notional value.*
- (vii) The said share transaction is an off-market transaction and not done through recognized stock exchange.*

(viii) The sale transaction has been made by the assessee with his own self in the garb of the Trust.

(ix) The facts, elaborately discussed clearly shows that, the said transaction of sale of shares to the Khodidas Vandas Patel Discretionary Trust is only an arrangement within the family to avoid tax."

In view of the above facts and circumstances, the assessing officer observed that sale of shares of M/s. ABC Ltd. and M/s Business Standard Ltd. to Khodidas Vandas Patel Disc. Trust to be sham transaction which was an arrangement within the family to reduce the taxable long term capital gain. Consequently, the assessing officer has disallowed the claim of loss on sale of shares of ABCL and Business Standard.

4. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee. The Id. CIT(A) vide order dated 23-10-2010 has stated that assessee has been giving more than 15 opportunities but the assessee failed to make compliance and the Id. CIT(A) has dismissed the appeal of the assessee. Subsequently, the ITAT Ahmedabad vide order vide ITA No. 404 and 405/Ahd/2016 dated 1st March, 2018 has restored the appeal of the Id. CIT(A) for fresh adjudication as required u/s. 250(6) of the act. Thereafter, the Id. CIT(A) has confirmed the disallowance vide order dated 31st Jan, 2019. The relevant part of decision of Id. CIT(A) is reproduced as under:-

"6.2 Consequently, the Appellate proceedings were restored for fresh adjudication. I have carefully considered the assessment order, facts of the case and the submissions made by the appellant. The Appellant has sold the land at Gotafor Rs. 1,90,00,000 and declared Long Term Capital Gain of Rs. 1,78,79,740. Similarly, Appellant sold land at Thaltej for Rs.60,71,000 wherein he declared Long Term Capital Gain at Rs.57,56,545. The Appellant, during the year, sold shares of M/s Amitabh Bachhan Corporation Ltd. for a sale consideration of Rs. 25,000/- and claimed long term capital loss of Rs. 44,69,208/. Further, the Appellant sold shares of M/s Business Standard Ltd. for a sale consideration of Rs. 31,000/- and claimed long term capital loss of Rs. 51,05,512/-. Therefore^ the Appellant has claimed an overall loss of Rs.95,74,721 on sale of shares of M/s Amitabh Bachhan Corporation Limited (ABCL) and M/s Business Standard Ltd.

during the year and such alleged loss is set off against above referred Long Term Capital Gain from the sale of land during the year under consideration.

6.3 Further, the Appellant has claimed to have sold the impugned shares of M/s Amitabh Bachhan Corporation Limited (ABCL) and M/s Business Standard Ltd. to Khodidas Vandas Patel Discretionary Trust, Ahmedabad, wherein one of the beneficiary is Appellant himself along with his brother and parents. The AO has observed that sale of shares is made to Trust which is family beneficiary trust, which is not a public charitable trust and there is no evidence for actual transfer of shares to Trust. Further, the AO observed that shares have been sold off-market at token price of Re.1 and held this loss as sham loss and AO disallowed set off of such loss against capital gain on sale of land.

6.4 During the course of appellate hearing, Appellant has claimed that Trust to whom shares was transferred was settled on the death of Khodidas Vandas Patel under Will which is separate legal entity. The Appellant has submitted copy of annual accounts of the Trust and Assessment Order passed in case of Trust for AY 2009-10 and claimed that Trust is a genuine trust and merely because shares are transferred to family trust, loss cannot be treated as non-genuine. There is no bar or restriction in holding the shares and securities by a trust. The Appellant has contended that he has also received cheque for above sale of shares which is duly reflected in the bank statement of buyer hence merely the transactions are not through recognized stock exchange or shares are not transferred to related concerns, such loss cannot be treated as non-genuine.

6.5 On careful consideration of entire facts, it is observed that Appellant has claimed to have sold the above shares on last day of Financial Year wherein gain was already accrued to Appellant. It is an undisputed fact that these shares are claimed to have been transferred to Trust wherein Appellant is one of the beneficiaries and his father is one of the Trustees hence the transaction is with related party and motive behind such transfer needs to be considered.

6.6 In this regard, I would like to place on record that the excessive reliance of the AR on the genuineness of the discretionary family trust created by virtue of the sad demise of his grandfather has clearly got nothing to do with the present dispute, which is required to be decided altogether on different set of facts. I have noticed that in the entire body of the assessment order, the genuineness of this trust has never been doubted by the AO and thus nothing was required in support of genuineness of the trust. The AO in fact could not have doubted this for the simple reason that at the relevant point of time, he was neither assessing the case of this trust, not even having jurisdiction over the same. What has been disputed by the AO is the claim of the sale of shares by the Appellant to the impugned trust which generated huge loss to him which was sufficient for his not paying any tax on the corresponding long term capital gain earned by him in the same year. In view of this, whatever is mentioned in support of the genuineness of this trust is clearly of no consequence and the same is thus disregarded and ignored while deciding the issue under appeal.

The AO in his Assessment order has observed as under:

"3.9 To sum up the facts of the case,

- (i) The said sale of shares have been sold to the Trust, which is a family beneficiary Trust.
- (ii) The said Trust is not a public charitable trust, (iii) The trustees of the Trust include the father of the assessee apart from two other members,
- (iv) The beneficiaries of the Trust include the parents of the assessee, of the assessee and the assessee himself,
- (v) There is no evidence for the actual transfer of shares to the Trust,
- (vi) The said shares have been sold for a token amount of Re. 1 per share, which is only a notional value,
- (vii) The said share transaction is an off-market transaction and not done Through recognized stock exchange,
- (viii) The sale transaction has been made by the assessee with his own self, in the garb of the Trust,

(ix) *The facts, elaborately discussed, clearly shows that, the said Transaction of sale of shares to the Khodidas Vandas Patel Discretionary Trust is only an arrangement within the family to avoid tax."*

6.7 *It is observed that under the facts and circumstances of the case, shares have been claimed to be sold to Trust which is family trust with a clear intention to avoid payment of tax on Long Term Capital Gain. This fact is further proved from the fact that during the year under consideration Appellant and his brother Hiren Patel have sold land which was jointly held by them on which they earned Long Term Capital Gain. Even the brother of Appellant has sold 20,000 shares of ABCL to above Trust and claimed Long Term Capital Loss on shares and similar shares are also sold by Appellant. This fact show that co-owners of the land were also the owners of the shares which were claimed to have been sold to the Trust wherein both the persons are beneficiaries. This proves that by entering into above transactions, shares have not gone out of the family of Appellant but by claiming that shares are sold, Appellant has obtained sham long term capital loss which is set off against actual gain from sale of land.*

6.8 *It is observed that Appellant has claimed that the Trust has also given cheque for above purchase of shares from him. Receiving money through account payee cheque does not mean that transaction is genuine. The Appellant has not proved that above shares are actually transferred in the name of Trust. The Appellant has not given any copy of Share Transfer form which can prove that shares are transferred from individual to Trust. The Appellant has claimed that the sale of shares was not required to be transferred because his father was one of the trustees and was holding the shares in the capacity of Trustee. During the Appellate proceedings, the AR of the Appellant further argued that since the shares were sold to trust and the Appellant was one of the beneficiaries and his father was one of the trustees, therefore, there was no need of transfer of Shares. However, the argument of the Appellant is not in accordance with the legal provisions. '*

6.9 *If shares are actually transferred to Trust and even if such shares are held Trustee, these details need to be updated on the records of the Company whose shares are in fact transferred. When shares are transferred from one person to another entity, it is incumbent to convey such details to Company more particularly when such shares are not transferred through recognized stock exchange and when the entity is now holding the share in a different capacity and in role of a trustee. It is an admitted fact that the Shares were not transferred in the records of the Company making the contention of the Appellant as absolutely self-serving one. Thus it is nothing, but arrangement made by Appellant to obtain contrived loss.*

It is thus interesting that in order to prove what is stated above, the appellant has only furnished certain irrelevant and self-serving documents and written submissions, while clearly remaining silent as to the non compliance of the provisions of the Companies Act and of the rules framed thereunder which would have ensured that what is stated by him to be apparent is also real by being cross verifiable from the documentary evidences available on the records of Ministry of Corporate Affairs and of the Share Registers of the companies concerned in this regard etc. This is because whenever the shares are transferred by one shareholder to the other, the said transaction is subject to compliance of certain legal procedures. This inter alia consists of payment of stamp duty which is required to be affixed on the share transfer forms being issued by the office of the Registrar of Companies (this is because the appellant himself has stated that these shares were held in physical form with him and the same were transferred off market). Such transfer forms along with the share certificates are required to be physically sent to the respective companies or to their transfer agents, as the case may be, for approval of such transfer by the Board and resultant endorsement of such transfer on the back of the share certificates, before the same are sent to the transferee. This will also be followed by the respective companies not only updating their shareholders' registers but also intimating the Ministry of Corporate Affairs either while e-filing their Annual Returns or otherwise as to the transferors and transferees of the shares during the specified period. If the transactions which are claimed to be so apparent been real too, the appellant would have furnished copies of all these evidences so as to prove and support his contention as to the shares having been sold to the family trust, as contended. The AR of the Appellant simply argued that since the Appellant has sold the shares to family trust and since the shares were sold off-market, therefore, there was no requirement of any legal formalities other

than payment of token price of Re. 1 per share paid through cheque. In support of his contentions, Appellant has only submitted the self-serving documents predominantly evidencing genuineness of the trust, as to the trust being assessed to tax and furnishing regular returns of income, as to the trust maintaining books of account in which the investment is very much reflected and as to certain amounts having been received from the said trust which are reflected in his banking account. While he produced all these documents, it is very clear that his father being one of the trustees of the said family trust, his late grandfather being the author of the trust and he and specified other members of the family which includes he himself, his brother and parents being the beneficiaries thereof, every single transaction carried out either by him or by this Trust was being controlled by him or by his father and one has to consider this vital aspect for deciding as to whether apparent is real or not.

6.10 Apart from above facts, it is observed that the entire issue is thus required to be seen in the context of human probability and surrounding circumstances and as a whole and not in bits and pieces. From the records very much available, it is an undisputed admitted fact that the appellant had transferred two plots of land held singly or jointly held by him with others, thus generating sizeable long term capital gain. In view of this, under normal circumstances, he would have required to pay tax on this long term capital gain at the applicable rate. It is further undisputed and admitted fact that he had brought forward long-term capital losses amounting to Rs.42,32,947/- and of Rs. 1,21,25,097/- in respect of A.Ys. 2005-06 and A.Y. 2008-09 respectively. He had also made investment of Rs.50,00,000/- in the bonds of NHAI, thus entitling him corresponding deduction under section 54EC of the Act. Even after claiming such deduction and set off, he was thus required to pay tax on the remaining long term capital gain amounting to Rs.72,99,940/-. Further, the Appellant had long term capital gain of Rs. 44,34,675/- from sale of Relief bond of RBI. in the subsequent year i.e. A.Y. 2010-11. It is noted that the Appellant has shown Long term Capital gain at NIL for A.Y. 2009-10 and 2010-11 after claiming set off of long term capital loss from Sale of Impugned Shares of M/s Amitabh Bachhan Corporation Ltd. and M/s Business Standard Ltd.. It is also very pertinent to mention that the contrived losses were sufficient enough to reduce the tax liability of the Appellant to NIL, on the long term capital gain on Sale of Land. The Appellant has not been able to justify the need to obtain loss from alleged sale of share to his family trust in the same year when he had earned long term capital gain. The circumstantial evidences cast serious doubt on the genuineness of the claim of the Appellant

In view of the undisputed and admitted fact as mentioned in the immediately preceding subparagraph, the appellant identified certain shares of two companies namely M/s Amitabh Bachhan Corporation Ltd. And Business Standard Ltd., which were held by him as long term capital asset for quite some time. These shares were acquired by him at a substantially higher price in financial years 1994-95 and 1995-96 respectively. It becomes very clear that as a prudent investor, which he was, the appellant never wanted to dispose of these shares. He rather wanted to stay invested in the same. He also at the same breadth wanted to ensure that he is not required to pay tax on the long term capital gain arising out of transfer of the plots of land as mentioned supra. To avoid the payment of tax, the Appellant resorted to colorable device and identified a separately assessable entity, in the name of Khodidas Vandas Patel Discretionary Trust, which was for all practical purposes and intent owned by him. He then decided to carry out a transaction on paper which may show that the shares are transferred to this entity. He accordingly contended that he has sold 25,000 and 38750 shares of the above referred two companies respectively at a price of Re.1 each to this family trust thereby incurring sizeable loss therefrom. This was, to the extent of positive long term capital gain, required to be set off under section 71 of the Act while the balance loss was carried forward to the subsequent year to be set off against balance capital gain. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. The Appellant has also not identified the urgency to allegedly sell the shares at huge loss to the trust where he is one of the beneficiaries along with other family members, in the same year when he was required to pay tax on capital gain on sale of land.

6.11 One more aspect to be seen in this regard is the concept of mutuality which remotely helps in deciding as to whether apparent is real or not. As per this concept, which is also approved by the

Supreme Court of this Country, a person cannot earn or benefit from himself and the revenue cannot thus tax the notional profit arising out of such transactions. Extending this very logic and ratio of mutuality, it can be conversely held that a person cannot at the same breadth avoid payment of tax merely by carrying out "on paper" transactions with an entity which, if the veil between him and this entity is pierced or lifted, amount to the transfer of something practically to himself. Even the history of family trust provisions as contained in the Income tax Act which have undergone various amendments following the judgments of various Courts, the notable being that of Hon'ble Gujarat High Court in the case of K.T. Doctor, as reported at [1980] 124 ITR 501 (Gujarat), which came to be confirmed by Hon'ble Supreme Court later, as reported at [1998] 230 ITR 744 (SC) clearly prove that the status of family trust was being misused by a section of the society and while the Government could not completely ban formation and functioning of such family trusts for bona fide and genuine reasons. Further, as the very name suggests, it is a "trust" the status and the assets of which are to be necessarily used for the benefit of the beneficiaries by the trustees. They thus cannot¹* be allowed to benefit others (the appellant in his individual capacity in the present context) at the cost of the beneficiaries in general. What is stated above clearly prove that the apparent is not real and what is claimed by the appellant is not supported by proper and plausible documentary evidences either. This also does not fit into the scheme of taxation for detailed reasons elaborated in the preceding paragraph. What is stated above is also supported by the ratio of the following judgments delivered none other than by Hon'ble Supreme Court of India:

(i) **Me Dowell 85 Co. Ltd. v. Commercial tax Officer - [1985] 154 ITR 148 (SC):**

In this landmark judgment, the Apex Court ruled against the assessee in respect of its having evaded the indirect tax, albeit by taking undue advantage of the provisions of law which prevailed at the relevant point of time. The following observation of the Apex Court is very relevant even while deciding the present appeal.

"23. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges".

For the sake of comprehension, I further state that while relying on the ratio of the above judgment of the Apex Court, I am fully aware and have in fact considered the subsequent judgment of Apex Court in the case of Azadi Bachao Andolan, the judgment of the territorial Gujarat High Court in the case of Banian and Berry etc., wherein the judgment of McDowell has been distinguished. I have considered all these judgments also, but considering the facts in its totality, as described above, I am of the considered view that when the abnormal and patent way of avoidance of tax by using a family trust as a separate assessable entity is used which is neither supported by proper documentary evidences and when admittedly, it was carried out merely on paper without due compliance of the Company's Act and the Stamp Act and the same does not inspire any confidence as to its genuineness and when the same is aimed at unduly benefiting the appellant at the cost both of the exchequer and the trust, and that too, by resorting to the dubious means, the present case is clearly not covered by the ratio of such later judgments and the same continues to be governed by what was originally held by the Apex Court in McDowell.

(ii) **Commissioner of Income-tax v. Durga Prasad More, [1971] 82 ITR 540 (SC):**

6.12 The facts of the case and the categorical finding of the Apex Court clearly vindicate the view taken by me in this ground. The relevant para from the order is reproduced below:

"8. Now we shall proceed to examine the validity of those grounds that appealed to the learned judges, (it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will

*be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. **The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents**".*

6.13 The observation of this landmark judgment of the Apex Court is directly applicable in the present case. From various documents filed by the Appellant in the form of paper books, it is noticed that there has been nothing available on record to prove or substantiate the fact that the shares were genuinely sold to the said trust. **The taxing authorities are entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents and the party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax.**

(iii) **Sumati Dayal v. Commissioner of Income-tax [1995] 80 TAXMAN 89 (SC):**

"Section 68 of the Income-tax Act, 1961 - Cash credits -Assessment years 1971-72 and 1972-73 - Assessee had shown certain amounts in capital accounts in books claiming same to be winnings from horse races - She filed sworn statement to effect that she started going for races only towards end of year 1969 and had no experience in races but she purchased jackpot tickets on combination worked out by her on basis of advice given by her husband - She had allegedly won 16 jackpots besides trebles -Assessing Officer disbelieved her version and taxed amount as income from undisclosed sources - Settlement Commission by its majority order upheld assessment order holding that it was reasonable to infer, on facts, that assessee did not participate in races but purchased winning tickets after events with unaccounted money -Whether matter in question had to be considered in light of human probabilities - Held, yes - Whether having record to conduct of assessee as disclosed by her in sworn affidavit as well as other material on record, an inference could reasonably be drawn that winning tickets were purchased by her after race event - Held, yes - Whether, therefore, finding of majority of Settlement Commission that amount in question was not winnings from horse races but income from undisclosed sources was justified - Held, yes"

6.14 It may be pertinent here to mention that in the case of Sumati Dayal, the revenue had taken an adverse view and the Apex Court had confirmed the same despite the fact that the assessee had filed sufficient documents to support her claim as to having received the underlying income from jackpot etc. Despite overwhelming presence of all these evidences, the Apex Court confirmed the view of the revenue by holding that in order to determine as to whether the apparent is real or not, one has to apply the test of human probability and surrounding circumstances and has to look beyond the apparent, when the situation does not successfully pass through these basic tests. The test laid down by the Supreme Court in the decision in Sumati Dayal's case (supra) is a well settled test which is applied in all civil proceedings particularly, with regard to testing the genuineness of a transaction. **Evidence produced must be analysed by applying theory of surrounding circumstances and human probabilities**

Further, when the intention of the assessee is of evasion of tax, which is quasi-criminal in nature, one has also to consider the ratio of the below mentioned judgment of Hon'ble Supreme Court.

(iv) **Collector of Customs v. D. Bhoormull AIR 1974 SC 859:**

"This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the department is not required to prove its case with mathematical precision to a demonstrable degree, for, in all human affairs, absolute certainty is a myth, and as Prof. Brett felicitously puts it—' all exactness is a fake'. El Dorado of

absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of \ the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case."

6.15 In view of above discussion it is observed that Appellant has sold the shares of Amitabh Bachhan Corporation Ltd.(ABCL), and Business Standard Ltd., held by him to his family Trust for evading his tax liability and evidences submitted by Appellant nowhere prove the genuineness of the transactions. The shares have been allegedly transferred internally without any knowledge of Company and there is no evidence to prove that shares are in fact transferred for the benefit of the Trust hence loss claimed on such transaction cannot be allowed to be set off against Long Term Capital Gain. As held supra, **the law does not require the prosecution to prove the impossible. All that it required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.**

6.16 This view is further supported by legal decisions mentioned herein below:

(i) **High Court of Bombay in the case of Killick Nixon Ltd. v. DCIT [2012] 20 taxmann.com 703 (Bom.)**

"II. Section 254 of the Income-tax Act, 1961, read with rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Orders of - Assessment year 2001-02 - Assessee transferred certain land to bank - Assessee claimed to have incurred long-term and short-term capital losses on share trading transactions - Accordingly, it set off said losses against capital gain earned on sale of land - Assessing Officer found that assessee entered into sham and bogus share trading transactions resulting in capital loss with purpose to reduce tax liability arose on capital gain - Assessing Officer, therefore, discarded capital losses - Commissioner (Appeals) confirmed order of Assessing Officer - Tribunal also confirmed order of Assessing Officer, and while doing so, referred to a decision of Supreme Court in case of Sumati Dayal v. CIT [1995] 214 ITR 801/80 Taxman 89 to held that evidence produced must be analysed by applying theory of \ surrounding circumstances and human probabilities - Assessee alleged that without bringing said case to notice of parties, revenue had caused prejudice to its case; all in violation of principles of natural justice and of rule 11 - Whether since decision of Supreme Court in Sumati Dayal case (supra) was cited by Tribunal only for purpose of reiterating well settled and established position of law, it could not be said to have caused prejudice Lo assessee - Held, yes - Whether when a transaction is sham and not genuine as in instant case, then it could not be considered to be a part of tax planning or legitimate avoidance of tax liability - Held, yes - Whether further since issues in instant case were purely questions of facts on which there were concurrent findings of authorities below, it was to be held that there was no question of law to be considered - Held, yes [In favour of revenue]

.....
The test laid down by the Supreme Court in the decision in Sumati Dayal's case (supra) is a well settled test which is applied in all civil proceedings particularly, with regard to testing the genuineness of a transaction. In fact the Commissioner (Appeals) has also applied the same test to reach the conclusion that the transactions claiming a capital loss on account of sale of shares were not genuine. The assessee submitted that the Tribunal by referring to the decision of the Supreme Court in Sumati Dayal's case (supra) was in breach of the proviso to rule 11 of the Income-tax Appellate Tribunal Rules, 1963. It is held that the proviso to Rule 11 would have no application to the instant facts, as the Tribunal has not based its decision on a ground which had not been urged by the parties before it. The decision of the Supreme Court supports a statement of a well settled position in law. In the instant facts, the decision of the Supreme Court in Sumati Dayal's

case (supra) was cited only for the purpose of reiterating the well settled/established position of law. Surrounding circumstances and human probabilities are to be taken into account while considering the evidence produced before the Tribunal to examine the genuineness of the case. The decision of the Supreme Court in the matter of Sumati Dayal's case (supra) would be applicable, whenever there are reasons to believe that the apparent is not real; then the taxing authorities are entitled to look into surrounding circumstances to find out the reality by looking at the surrounding circumstances and applying the test of human probabilities. A reference to the decision in Sumati Dayal's case (supra) on a principle of law cannot be said to have caused prejudice to the assessee. This conclusion is based while proceeding on an assumption that the aforesaid decision of the Supreme Court was not cited and/or referred to during the course of the hearing leading to the impugned order of Tribunal. In view of the above, no substantial question arises in the instant case. [Para 11]

It is found that the Tribunal has considered the evidence of purchase and sale of shares to book long-term and short-term losses and taking all the evidence together including the surrounding circumstances reached a finding that the purchase and sale of shares is not genuine. [Para 14]

The Supreme Court in the Vodafone International Holdings B.V. v. Union of India [2012] 204 Taxman 408/ 17 taxmann.com 202 (SC) makes it very clear that a colourable device cannot be a part of tax planning. Therefore where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. In the instant case the purchase and sale of shares so as to take long-term and short-term capital loss, was found as a matter of fact by all the three authorities to be a sham. Therefore, authorities came to a finding that the same was not genuine. As there are concurrent finding of the authorities below, no question of law arises. [Para 15]"

(ii) ITAT, Delhi in the case of Assessing Officer V/s Shiva Gases) [2005] 1 SOT 21 (DELHI)

"Section 28(i) of the Income-tax Act, 1961 - Business loss/deductions - Allowable as - Assessment year 1996-97 - Assessee deducted loss on sale of shares in 'B' Ltd. from profit on sale of fixed assets and dividend income - Assessing Officer noticed that six companies, to whom shares of 'B' Ltd. had allegedly been sold, were private limited companies controlled and managed by closely connected persons who were partners in assessee firm as well as directors in these companies; that all six transfer forms purportedly executed on different dates with different transferees had same witness; that even though transactions in question were claimed to be credit transactions and mere book entries had been made in books of assessee-firm as well as transferee companies yet all these entries were dated 31-3-1996, i.e., much after alleged date of transaction in February 1996 - Assessing Officer disallowed deduction claimed by assessee on ground that entire gamut of sale transaction was merely a part of tax planning resorted to with a view to reduce tax liability - Whether income-tax authorities were entitled to \ took into surrounding circumstances to find out reality of matter - Held, yes - Whether entirety of circumstances surrounding alleged sale of shares by assessee, when viewed in context of human probabilities, lead to % irresistible inference that sales transactions were sham and were merely an afterthought so as to reduce tax liability and, therefore, loss claimed by assessee was rightly disallowed by Assessing Officer - Held, yes

After going through the order of the tax authorities below as also the paper book filed by the revenue, there was no hesitation in holding that transactions in question were merely make believe affair and were merely colourable devices resorted to by the assessee with the aid of its sister concerns as a part of tax planning to reduce its tax liability. There was substance in the contention of the revenue that the income-tax authorities were entitled to look into surrounding circumstances to find out the reality of the matter.

The facts on record clearly indicated that the six companies to whom shares of 'B' Ltd. had allegedly been sold were private limited companies controlled and managed by

closely connected persons who were partners in the assessee-firm as well as directors in these companies. In certain cases, even the addresses were identical. For example, in the case of 'K' Ltd. and 'H' Ltd., the same address was mentioned in the share transfer form. Two of the vendees, namely, 'BS', Ltd. and S.K. Ltd., had identical address. Further, the company whose shares had, allegedly been sold being 'B' Ltd. had the same address as one of the transferee, further the shares transfer form were signed by V who was director in as many as three transferee companies. Another striking feature of the alleged sales transactions was that all the six transfer forms purportedly executed on different dates with different transferees had the same witness. Further page 9 of the paper book filed by the assessee showed that there were four partners of the assessee-firm. However, in the transfer deeds produced signatures of only three partners appeared and signatures of fourth partner were not appended. [Para 9]

*From the facts on record, it appeared that the so-called sales transactions had been manipulated by the assessee-firm much after the close of the accounting year in the month of April 1986 with a view to reduce the tax liability. The most telling feature which eloquently brought out the manipulation was the fact that even though the transactions in question were claimed to be V... credit transactions and mere book entries had been made in the books of the assessee-firm as well as the transferee companies yet all these entries were dated 31-3-1996, i.e., much after the alleged date of sale transaction in February, 1996. It was difficult^N to understand as to how after entering into transaction in the sale of shares in the month of February 1996, particularly when the transaction was a credit transaction, no entries were passed in the books even after share transfer forms along with shares had allegedly been handed over to the transferee companies. The whole story appeared to be unreal and unusual. There was no fault with the revenue for refusing to swallow such a fanciful story. **It appeared that the Assessing Officer had adduced cogent ground to disbelieve the story of sales which obviously was a story that did not accord with human probabilities. No evidence whatsoever had been adduced in support of the alleged sales transactions having taken place in February 1996. As pointed out by the Assessing Officer, even the sale consideration for the shares had not been paid by the transferees even after a lapse of two years. The entirety of circumstances surrounding the alleged sale of shares by the assessee, when viewed in the context of human probabilities, lead to the irresistible inference that the sales transactions were sham and were merely an after-thought so as to reduce the tax liability.** [Para 10]*

The Commissioner (Appeals) had been persuaded to accept the story of the assessee on the ground that the companies to whom the shares had been sold were independent entities and their books of account could not be disbelieved on surmises and conjectures alone. The Commissioner (Appeals) had ignored the facts of life. The facts were undisputed that the transferee companies were group companies under the direct control and management of partners of the assessee-firms and their close relations. It was a blatant case whereby the instrumentality of the corporate entities of the group had been utilized - nay mis-utilized to reduce the tax liability of the assessee by using colourable devices. [Para 11]

The cumulative effect of surrounding facts and circumstances concerning the sales transactions of the transferee companies clearly indicated that such transactions were sham and illusory ones and had been entered into as an after-thought with a view to reduce the tax liability of the assessee firm. The view taken by the Commissioner (Appeals) on the basis of treating the transferee companies as independent entities was, therefore, entirely mis-conceived and could not be sustained.

For the aforesaid reasons, it was to be held that sales transactions in question were sham and illusory ones and, therefore, loss claimed on such transactions was non-genuine. The finding of the Commissioner (Appeals) on the issue was therefore, reversed and the appeal of the revenue was allowed. [Paras 12 and 13]

(iii) ITAT, Kolkata, in the case of Edward Keventer (P) Limited V/s DCIT [2004] 89 ITD 347 (KOL.)

"Section 45, read with section 48, of the Income-tax Act, 1961 -Capital gains - Chargeable as - Assessment year 1993-94 - Whether under Act income-tax authorities are empowered to go behind transaction to find out real and if a transaction, on basis of evidence and surrounding circumstances of case, appears to be non-genuine or bogus or make-believe or sham with a view to avoid tax liability or if it appears that series of transactions effected by assessee to achieve desired result is sham or collusive or non-genuine, tax authorities can ignore transaction - Held, yes - Whether such powers of tax authorities are legally recognised and are not taken away by provisions of section 45 or section 48 - Held, yes - Whether, therefore, contention of assessee that for purpose of section 45 alleged motive is irrelevant inasmuch as section 45 comes into application at moment an assessee sales a capital asset and, therefore, Assessing Officer is duty-bound to compute profits/losses in accordance with provisions of section 45 read with section 48, has to be rejected - Held, yes - Assessee-company had promoted another company, K, as its 100 per cent subsidiary to carry out business of K - Assessee held 12,32,000 equity shares of face value of Rs. 10 each of K - In July 1992, assessee sold those shares to its five sister companies over whom assessee had influence and control at rate of Rs. 2.50 per share and transferred those shares to buyers immediately on 10-7-1992 without receiving sale consideration - Subsequently, assessee had bought back 12,80,000 shares of K at rate of Rs. 2.50 per share on 25-2-1993 and 4-3-1993 - Assessee suffered capital loss on account of sale of shares and it claimed allowance of same under section 45 read with section 48 - Assessing authority disallowed assessee's claim holding that sale and purchase of shares by assessee had been with a view to claim huge loss so as to get benefit of setting it off in future and entire loss was nothing but an arranged book loss - Commissioner (Appeals) upheld impugned order holding that assessee failed to establish its bona fides in respect of said transactions - Whether decision of assessee-company to sell its total holding to five group companies was against all human probabilities and commercial consideration which otherwise any prudent businessman would not have taken in normal course of business - Held, yes - Whether transactions effected by assessee-company were not bona fide commercial transactions but were sham, bogus, unreal, make-believe, collusive and artificial with a mala fide intention to acquire benefit for tax purposes - Held; yes - Whether, therefore, action of Assessing Officer, which had been confirmed by Commissioner (Appeals), in disallowing loss claimed by assessee-company, was justified and in order - Held, yes"

(iv) ITAT, Bombay in the case of Sturdia Chemicals Ltd V/s IAC [1994] 48 ITD 338 (BOM.)

Section 47 of the Income-tax Act, 1961 -Capital gains - Transfer not regarded as transfer - Assessment year 1983-84 - Assessee- company derived long-term capital gains on transfer of shares of a company CBL to its subsidiary company NTPL - NTPL had a share capital of Rs. 500 only, held by two persons of same group - It did not carry on any business activity and ceased to be a subsidiary when offer of its right shares was declined by assessee - NTPL having no funds of its own, was accommodated by assessee to enable it to purchase shares of CBL - NTPL could repay money raised by way of call deposit, after receiving deposits on interest from an associate concern - Whether on these facts, it could be said that assessee's case fell within ambit of ratio laid down by apex court in McDowell's case, and, thus, it was liable to capital gains tax on surplus arising from aforesaid transaction of sale of shares of CBL to its subsidiary - Held, yes"

6.17 Further, the Supreme Court in the Vodafone International Holdings B.V. v. Union of India [2012] 204 Taxman 408/ 17 taxmann.com 202 (SC) makes it very clear that a colourable device cannot be a part of tax planning.

6.18 Therefore where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. In the instant case the sale of shares so as to take long-term and short-term capital loss, is found to be a sham.

6.19 In view of what is stated above and relying on the binding ratio of various judgments of the Apex Court and other judicial pronouncements and after having regard to the facts of the case in its totality, I hold that there was no genuine transfer of the shares of Amitabh Bachhan Corporation Ltd., and Business Standard Ltd., carried out by the appellant during the course of

the year, as contended and it was clearly a colourable device to defraud the Revenue and to evade the payment of the legitimate and due tax and the same thus cannot be allowed. It is observed that Appellant has claimed to have sold the above shares on last day of Financial Year wherein gain was already accrued to Appellant. The entirety of circumstances surrounding the alleged sale of shares by the assessee, when viewed in the context of human probabilities, lead to the inference that the sales transactions were sham and an afterthought so as to reduce the tax liability. This ground of appeal is accordingly dismissed and the action of the AO in this regard is upheld.”

5. During the course of appellate proceedings before us, ld. counsel has submitted paper book comprising detail and copies of document furnished before the assessing officer and ld. CIT(A) at the time of hearing. During the course of appellate proceedings before us, ld. counsel has referred various pages of assessment order and contended that assessee actually transferred the shares of M/s ABC Ltd and shares of Business standard Ltd. to Khodidas Vandas Patel Disc. Trust and the assessing officer has disallowed the claim of long term capital loss on the sale of these shares on the reasoning that assessee was one of the beneficiaries of the aforesaid trust. The ld. counsel has contended that assessee has actually sold the unlisted shares and trust has also given cheque for purchase of shares from the assessee. The ld. counsel has also referred page no. 48 to 49 of paper book pertaining to working for book value of shares of M/s. Business Standard Ltd. and balance sheet as on 31st March, 2009 of M/s. Business Standard Ltd. The ld. counsel has further contended that the detail of account of M/s. ABC Ltd was not available therefore the shares were sold for charging token amount of Rs. 1/- per share. The ld. counsel has contended that ld. CIT(A) has erred in sustaining the addition without considering the fact that assessee has actually sold the shares to the trust therefore the long term capital loss was rightly claimed by the assessee. On the other hand, ld. departmental representative has vehemently contended that transaction of selling of shares on the last day of the financial year by the assessee to the trust in which the

assessee was beneficiary were sham transaction. The ld. departmental representative has also contended that assessee has not completed the process of transfer of the aforesaid shares as the same was not registered with the registrar of company. He has also submitted that the assessee has transferred the shares to the Khodidas Vandas Patel Disc. Trust in which the assessee himself was beneficiary just to set off long term capital gain which he has earned on selling of land. Ld. departmental representative has further submitted that assessing officer and ld. CIT(A) has rightly held that assessee had indulged in sham transaction and his claim of long term capital loss on sale of the shares of the aforesaid two companies were not genuine. The ld. counsel has also placed reliance on the judicial pronouncement in the case of ACIT vs. Biraj Investment Pvt. Ltd. dated 7th August, 2012 (2012) 24 taxman 273 (Guj) and the decision of Honøble High Court of Gujarat (2013) 33 taxman.com 463 in the case of CIT vs. Special Prints Ltd. dated 15th April, 2013.

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6. The fact in brief is that during the year under consideration, the assessee has claimed set off of an amount of Rs. 2012643/- as capital loss which was arised during the assessment year 2009-10 elaborated above in the ITA No. 635/Ahd/2019. The assessing officer has disallowed the brought forward long term capital loss of Rs. 24,22,030/- on the ground that during assessment year 2010-11 the claim of long term capital loss of the assessee was disallowed.

7. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee. Relevant part of decision of Id. CIT(A) is reproduced as under:-

"6.5 On careful consideration of entire facts, it is observed that Appellant has claimed to have sold the above shares on last day of Financial Year wherein gain was already accrued to Appellant. It is an undisputed fact that these shares are claimed to have been transferred to Trust wherein Appellant is one of the beneficiaries and his father is one of the Trustees hence the transaction is with related party and motive behind such transfer needs to be considered.

6.6 In this regard, I would like to place on record that the excessive reliance of the AR on the genuineness of the discretionary family trust created by virtue of the sad demise of his grandfather has clearly got nothing to do with the present dispute, which is required to be decided altogether on different set of facts. I have noticed that in the entire body of the assessment order, the genuineness of this trust has never been doubted by the AO and thus nothing was required in support of genuineness of the trust. The AO in fact could not have doubted this for the simple reason that at the relevant point of time, he was neither assessing the case of this trust, not even having jurisdiction over the same. What has been disputed by the AO is the claim, of the sale of shares by the Appellant to the impugned trust which generated huge loss to him which was sufficient for his not paying any tax on the corresponding long term capital gain earned by him in the same year. In view of this, whatever is mentioned in support of the genuineness of this trust is clearly of no consequence and the same is thus disregarded and ignored while deciding the issue under appeal

The AO in his Assessment order has observed as under:

"3.9 To sum up the facts of the case,

- (i) The said sale of shares have been sold to the Trust, which is a family beneficiary Trust.*
- (ii) The said Trust is not a public charitable trust,*
- (iii) The trustees of the Trust include the father of the assesses apart from two other members,*
- (iv) The beneficiaries of the Trust include the parents of the assesses, of the assessee and the assesses himself,*
- (v) There is no evidence for the actual transfer of shares to the Trust,*
- (vi) The said shares have been sold for a token amount of Re. 1 per share, which is only a notional value,*
- (vii) The said share transaction is an off-market transaction and not done Through recognized stock exchange,*
- (viii) The sale transaction has been made by the assessee with his own self, in the garb of the Trust,*
- (ix) The facts, elaborately discussed clearly shows that, the said Transaction of sale of shares to the Khodidas Vandas Patel Discretionary Trust is only an arrangement within the family to avoid tax."*

6.7 It is observed that under the facts and circumstances of the case, shares have been claimed to be sold to Trust which is family trust with a clear intention to avoid payment of tax on Long Term Capital Gain. This fact is further proved from the fact that during the year under consideration Appellant and his brother Hiren Patel have sold land which was jointly held by them on which they earned Long Term Capital Gain. Even the brother- of Appellant has sold 20,000 shares of ABCL to above Trust and claimed Long Term Capital Loss on shares and similar shares are also sold by Appellant. This fact show that co-owners of the land were also the owners of the shares which were claimed to have been sold to the Trust wherein both the persons are beneficiaries. This proves that by entering into above transactions, shares have not gone out of the family of Appellant but by claiming that shares are sold, Appellant has obtained sham long term capital loss which is set off against actual gain from sale of land.

6.8 It is observed that Appellant has claimed that the Trust has also given cheque for above purchase of shares from him. Receiving money through account payee cheque does not mean that

transaction is genuine. The Appellant has not proved that above shares are actually transferred in the name of Trust. The Appellant has not given any copy of Share Transfer form which can prove that shares are transferred from individual to Trust. The Appellant has claimed that the sale of shares was not required to be transferred because his father was one of the trustees and was holding the shares in the capacity of Trustee. During the Appellate proceedings, the AR of the Appellant further argued that since the shares were sold to trust and the Appellant was one of the beneficiaries and his father was one of the trustees, therefore, there was no need of transfer of Shares. However, the- argument of the Appellant is not in accordance with the legal provisions.

6.9 If shares are actually transferred to Trust and even if such shares are held by Trustee, these details need to be updated on the records of the Company whose shares are in fact transferred. When shares are transferred from one person to another entity, it is incumbent to convey such details to Company more particularly when such shares are not transferred through recognized stock exchange and when the entity is now holding the share in a different capacity and

in role of a trustee. It is an admitted fact that the Shares were not transferred in the records of the Company making the contention of the Appellant as absolutely self-serving one. Thus it is nothing, but arrangement made by Appellant to obtain contrived loss.

It is thus interesting that in order to prove what is stated above, the appellant has only furnished certain irrelevant and self-serving documents and -written submissions, while clearly remaining silent as to the non compliance of the provisions of the Companies Act and of the rules framed thereunder which would have ensured that what is stated by him to be apparent is also real by being cross verifiable from the documentary evidences available on the records of Ministry of Corporate Affairs and of the Share Registers of the companies concerned in this regard etc. This is because whenever the shares are transferred by one shareholder to the other, the said transaction is subject to compliance of certain legal procedures. This inter alia consists of payment of stamp duty which is required to be affixed on the share transfer forms being issued by the office of the Registrar of Companies (this is because the appellant himself has stated that these shares were held in physical form with him and the same were transferred off market). Such transfer forms, along with the share certificates are required to be physically sent to the respective companies or to their transfer agents, as the case may be, for approval of such transfer by the Board and resultant endorsement of such transfer on the back of the share certificates, before the same are sent to the transferee. This will also be followed by the respective companies not only updating their shareholders' registers but also intimating the Ministry of Corporate Affairs either while e-filing their Annual Returns or otherwise as to the transferors and transferees of the shares during the specified period. If the transactions which are claimed to be so apparent been real too, the appellant would have furnished copies of all these evidences so as to prove and support his contention as to the shares having been sold to the family trust, as contended. The AR of the Appellant simply argued that since the Appellant has sold the shares to family trust and since the shares were sold off-market, therefore, there was, no requirement of any legal formalities other than payment of token price of Re. 1 per share paid through cheque. In support of his contentions, Appellant has only submitted the self-serving documents predominantly evidencing genuineness of the trust, as to the trust being assessed to tax and furnishing regular returns of income, as to the trust maintaining books of account in which the investment is very much reflected and as to certain amounts having been received from the said trust which are reflected in his banking account. While he produced all these documents, it is very clear that his father being one of the trustees of the said family trust, his late grandfather being the author of the trust and he and specified other members of the family which includes he himself, his brother and parents being the beneficiaries thereof, every single transaction carried out either by him or by this Trust was being controlled by him or by his father and one has to consider this vital aspect for deciding as to whether apparent is real or not.

6.10 Apart from above facts, it is observed that the entire issue is thus required to be seen in the context of human probability and surrounding circumstances and as a whole and not in bits and pieces. From the records very much available, it is an undisputed admitted fact that the appellant had transferred two plots of land held singly or jointly held by him with others, thus generating

sizeable long term capital gain. In view of this, under normal circumstances, he would have required to pay tax on this long term capital gain at the applicable rate. It is further undisputed and admitted fact that he had brought forward long-term capital losses amounting to Rs.42,32,947/- and of Rs.1,21,25,097/- in respect of A.Ys. 2005-06 and A.Y. 2008-09 respectively. He had also made investment of Rs.50,00,000/- in the bonds of NHAI, thus entitling him corresponding deduction under section 54EC of the Act. Even after claiming such deduction and set off, he was thus required to pay tax on the remaining long term capital gain amounting to Rs.72,99,940/-. Further, the Appellant had long term capital gain of Rs. 44,34,675/- from sale of Relief bond of RBI. in the subsequent year i.e. A.Y. 2010-11. It is noted that the Appellant has shown Long term Capital gain at NIL for A.Y. 2009-10 and 2010-11 after claiming set off of long term capital loss from Sale of Impugned Shares of M/s Amitabh Bachhan Corporation Ltd. and M/s Business Standard Ltd.. It is also very pertinent to mention that the contrived losses were sufficient enough to reduce the tax liability of the Appellant to NIL, on the long term capital gain on Sale of Land. The Appellant has not been able to justify the need to obtain loss from alleged sale of share to his family trust in the same year when he had earned long term capital gain. The circumstantial evidences cast serious doubt on the genuineness of the claim of the Appellant

In view of the undisputed and admitted fact as mentioned in the immediately preceding subparagraph, the appellant identified certain shares of two companies namely M/s Amitabh Bachhan Corporation Ltd. And Business Standard Ltd., which were held by him as long term, capital asset for quite some time. These shares were acquired by him at a substantially higher price in financial years 1994-95 and 1995-96 respectively. It becomes very clear that as a prudent investor, which he was, the appellant never wanted to dispose of these shares. He rather wanted to stay invested in the same. He also at the same breadth wanted to ensure that he is not required to pay tax on the long term capital gain arising out of transfer of the plots of land as mentioned supra. To avoid the payment of tax, the Appellant resorted to colorable device and identified a separately assessable entity, in the name of Khodidas Vandas Patel Discretionary Trust, which was for all practical purposes and intent owned by him. He then decided to carry out a transaction on paper which may show that the shares are transferred to this entity. He accordingly contended that he has sold 25,000 and 38750 shares of the above referred two companies respectively at a price of Re. 1 each to this family trust thereby incurring sizeable loss therefrom. This was, to the extent of positive long term capital gain, required to be set off under section 71 of the Act while the balance loss was carried forward to the subsequent year to be set off against balance capital gain. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. The Appellant has also not identified the urgency to allegedly sell the shares at huge loss to the trust where he is one of the beneficiaries along with other family members, in the same year when he was required to pay tax on capital gain on sale of land.

6.1 | One more aspect to be seen in this regard is the concept of mutuality which remotely helps in deciding as to whether apparent is real or not. As per this concept, which is also approved by the Supreme Court of this Country, a person

cannot earn or benefit from himself and the revenue cannot thus tax the notional profit arising out of such transactions. Extending this very logic and ratio of mutuality, it can be conversely held that a person cannot at the same breadth avoid payment of tax merely by carrying out "on paper" transactions with an entity which, if the veil between him and this entity is pierced or lifted, amount to the transfer of something practically to himself. Even the history of family trust provisions as contained in the Income tax Act which have undergone various amendments following the judgments of various Courts, the notable being that of Hon'ble Gujarat High Court in the case of K.T. Doctor, as reported at [1980] 124 ITR 501 (Gujarat), which came to be confirmed by Hon'ble Supreme Court later, as reported at [1998] 230 ITR 744 (SC) clearly prove that the status of family trust was being misused by a section of the society and while the Government could not completely ban formation and functioning of such family trusts for bona fide and genuine reasons. Further, as the very name suggests, it is a "trust" the status and the assets of which are to be necessarily used for the benefit of the beneficiaries by the trustees. They thus cannot be allowed to benefit others (the appellant in his individual capacity in the present

context) at the cost of the beneficiaries in general. What is stated above clearly prove that the apparent is not real and what is claimed by the appellant is not supported by proper and plausible documentary evidences either. This also does not fit into the scheme of taxation for detailed reasons elaborated in the preceding paragraph. What is stated above is also supported by the ratio of the following judgments delivered none other than by Hon'ble Supreme Court of India:

(i) **Me Dowell & Co. Ltd. v. Commercial tax Officer** - [1985] 154 ITR 148 (SC):

In this landmark judgment, the Apex Court ruled against the assessee in respect of its having evaded the indirect tax, albeit by taking undue advantage of the provisions of law which prevailed at the relevant point of time. The following observation of the Apex Court is very relevant even while deciding the present appeal

"23. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid, the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges".

For the sake of comprehension, I further state that while relying on the ratio of the above judgment of the Apex Court, I am fully aware and have in fact considered the subsequent judgment of Apex Court in the case of Azadi Bachao Andolan, the judgment of the territorial Gujarat High Court in the case of Banian and Berry etc., wherein the judgment of McDowell has been distinguished. I have considered all these judgments also, but considering the facts in its totality, as described above, I am of the considered view that when the abnormal and patent way of avoidance of tax by using a family trust as a separate assessable entity is used which is neither supported by proper documentary evidences and when admittedly, it was carried out merely on paper without due compliance of the Company's Act and the Stamp Act and the same does not inspire any confidence as to its genuineness and when the same is aimed at unduly benefiting the appellant at the cost both of the exchequer and the trust, and that too, by resorting to the dubious means, the present case is clearly not covered by the ratio of such later judgments and the same continues to be governed by what was originally held by the Apex Court in McDowell.

(ii) **Commissioner of Income-tax v. Durga. Prasad More**, [1971] 82 ITR 540 (SC):

6.12 *The facts of the case and the categorical finding of the Apex Court clearly vindicate the view taken by me in this ground. The relevant para from the order is reproduced, below:*

*"8. Now we shall proceed to examine the validity of those grounds that appealed to the learned judges, (it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and. rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. **The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents"**.*

6.13 *The observation of this landmark judgment of the Apex Court is directly applicable in the present case. From various documents filed by the Appellant in the form of paper books, it is noticed that there has been nothing available on record to prove or substantiate the fact that the shares were genuinely sold to the said trust. **The taxing authorities are entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents and the party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax.***

(iii) **Sumati Dayal v. Commissioner of Income-tax [1995] 80 TAXMAN 89 (SC):**

"Section 68 of the Income-tax Act, 1961 - Cash credits -Assessment years 1971-72 and 1972-73 - Assessee had shown certain amounts in capital accounts in books claiming same to be winnings from horse races - She filed sworn statement to effect that she started going for races only towards end of year 1969 and had no experience in races but she purchased jackpot tickets on combination worked out by her on basis of advice given by her husband - She had allegedly won 16 jackpots besides trebles - Assessing Officer disbelieved her version and taxed amount as income from undisclosed sources - Settlement Commission by its majority order upheld assessment order holding that it was reasonable to infer, on facts, that assessee did not participate in races but purchased winning tickets after events with unaccounted money - Whether matter in question had to be considered in light of human probabilities

- Held, yes - Whether having record to conduct of assessee as disclosed by her in sworn affidavit as well as other material on record, an inference could reasonably be drawn that winning tickets were purchased by her after race event

- Held, yes - Whether, therefore, finding of majority of Settlement Commission that amount in question was not winnings from horse races but income from undisclosed sources was justified - Held, yes"

6.14 It may be pertinent here to mention that in the case of Sumati Dayal, the revenue had taken an adverse view and the Apex Court had confirmed the same despite the fact that the assessee had filed sufficient documents to support her claim as to having received the underlying income from jackpot etc. Despite overwhelming presence of all these evidences, the Apex Court confirmed the view of the revenue by holding that in order to determine as to whether the apparent is real or not, one has to apply the test of human probability and surrounding circumstances and has to look beyond the apparent, when the situation does not successfully pass through these basic tests. The test laid down by the Supreme Court in the decision in Sumati Dayal's case (supra) is a well settled test which is applied in all civil proceedings particularly, with regard to testing the genuineness of a transaction. **Evidence produced must be analysed by applying theory of surrounding circumstances and human probabilities**

Further, when the intention of the assessee is of evasion of tax, which is quasi-criminal in nature, one has also to consider the ratio of the below mentioned judgment of Hon'ble Supreme Court.

(iv) **Collector of Customs v. D. Bhoormull AIR 1974 SC 859:**

"This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the department is not required to prove its case with mathematical precision to a demonstrable degree, for, in all human affairs, absolute certainty is a myth, and as Prof. Brett felicitously puts it—' all exactness is a fake'. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case."

6.15 In view of above discussion it is observed that Appellant has sold the shares of Amitabh Bachhan Corporation Ltd.(ABCL), and Business Standard Ltd., held by him to his family Trust for evading his tax liability and evidences submitted by Appellant nowhere prove the genuineness of the transactions. The shares have been allegedly transferred internally without any knowledge of Company and there is no evidence to prove that shares are in fact transferred for the benefit of the Trust hence loss claimed on such transaction cannot be allowed to be set off against Long Term Capital Gain. As held supra, **the law does not require the prosecution to prove the impossible.**

All that it required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

6.16 This view is further supported by legal decisions mentioned herein below:

(i) **High Court of Bombay in the case of Killick Nixon Ltd. v. DCIT [2012] 20 taxmann.com 703 (Bom.)**

"II. Section 254 of the Income-tax Act, 1961, read with rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Orders of - Assessment year 2001-02 - Assessee transferred certain land to bank - Assessee claimed to have incurred long-term and short-term capital losses on share trading transactions - Accordingly, it set off said losses against capital gain earned on sale of land - Assessing Officer found that assessee entered into sham and bogus share trading transactions resulting in capital loss with purpose to reduce tax liability arose on capital gain - Assessing Officer, therefore, discarded capital losses - Commissioner (Appeals) confirmed order of Assessing Officer - Tribunal also confirmed order of Assessing Officer, and while doing so, referred to a decision of Supreme Court in case of Sumati Dayal v. CIT [1995] 214 ITR 801 / 80 Taxman 89 to held that evidence produced must be analysed by applying theory of surrounding circumstances and human probabilities - Assessee alleged that without bringing said case to notice of parties, revenue had caused prejudice to its case; all in violation of principles of natural justice and of rule 11- Whether since decision of Supreme Court in Sumati Dayal case (supra) was cited by Tribunal only for purpose of reiterating well settled and established position of law, it could not be said to have caused prejudice to assessee - Held, yes - Whether when a transaction is sham and not genuine as in instant case, then it could not be considered to be a part of tax planning or legitimate avoidance of tax liability - Held, yes -Whether further since issues in instant case were purely questions of facts on which there were concurrent findings of authorities below, it was to be held that there was no question of law to be considered - Held, yes [In favour of revenue]

.....
The test laid down by the Supreme Court in the decision in Sumati Dayal's case (supra) is a well settled test which is applied in all civil proceedings particularly, with regard to testing the genuineness of a transaction. In fact the Commissioner (Appeals) has also applied the same test to reach the conclusion that the transactions claiming a capital loss on account of sale of shares were not genuine. The assessee submitted that the Tribunal by referring to the decision of the Supreme Court in Sumati Dayal's, case (supra) was in breach of the proviso to rule 11 of the Income-tax Appellate Tribunal Rules, 1963. It is held that the proviso to Rule 11 would, have no application to the instant facts, as the Tribunal has not based its decision on a ground which had not been urged by the parties before it. The decision of the Supreme Court supports a statement of a well settled position in law. In the instant facts, the decision of the Supreme Court in Sumati Dayal's case (supra) was cited only for the purpose of reiterating the well settled/established position of law. Surrounding circumstances and human probabilities are to be taken into account while considering the evidence produced before the Tribunal to examine the genuineness of the case. The decision of the Supreme Court in the matter of Sumati Dayal's case (supra) would be applicable, whenever there are reasons to believe that the apparent is not real; then the taxing authorities are entitled to look into surrounding circumstances to find out the reality by looking at the surrounding circumstances and applying the test of human probabilities. A reference to the decision in Sumati Dayal's case (supra) on a principle of law cannot be said to have caused prejudice to the assesses. This conclusion is based while proceeding on an assumption that the aforesaid decision of the Supreme Court was not cited and/or referred to during the course of the

hearing leading to the impugned order of Tribunal. In view of the above, no substantial question arises in the instant case. [Para 11]

It is found that the Tribunal has considered the evidence of purchase and sale of shares to book long-term and short-term losses and taking all the evidence together including the surrounding circumstances reached a finding that the purchase and sale of shares is not genuine. [Para 14]

The Supreme Court in the Vodafone International Holdings B. V. v. Union of India [2012] 204 Taxman 408/ 17 taxmann.com 202 (SC) makes it very clear that a colourable device cannot be a part of tax 'planning. Therefore where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. In the instant case the purchase and sale of shares so as to take long-term and short-term capital loss, was found as a matter of fact by all the three authorities to be a sham. Therefore, authorities came to a finding that the same was not genuine. As there are concurrent finding of the authorities below, no question of law arises. [Para 15]"

(ii) ITAT, Delhi in the case of Assessing Officer V/s Shiva Gases) [2005] 1 SOT 21 (DELHI)

"Section 28(i) of the Income-tax Act, 1961 ~ Business loss/deductions - Allow-ahle as - Assessment year 1996-97 - Assessee deducted loss on sale of shares in 'B' Ltd. from profit on sale of fixed assets and dividend income - Assessing Officer noticed that six companies, to whom shares of 'B' Ltd, had allegedly been sold, were private limited companies controlled and managed by closely connected persons who were partners in assessee firm as well as directors in these companies; that all six transfer forms purportedly executed on different dates with different transferees had same witness; that even though transactions in question were claimed to be credit transactions and mere book entries had been made in books of assessee-firm as well as transferee companies yet all these entries were dated 31-3-1996, i.e., much after alleged date of transaction in February 1996 - Assessing Officer disallowed deduction claimed by assessee on ground that entire gamut of sale transaction was merely apart of tax planning resorted to with a view to reduce tax liability - Whether income-tax authorities were entitled to look into surrounding circumstances to find out reality of matter - Held, yes -Whether entirety of circumstances surrounding alleged sale of shares by assessee, when viewed in context of human probabilities, lead to irresistible inference that sales transactions were sham and were merely an afterthought so as to reduce tax liability and, therefore, loss claimed by assessee was rightly disallowed by Assessing Officer - Held, yes

After going through the order of the tax authorities below as also the paper book filed by the revenue, there was no hesitation in holding that transactions in question were merely make believe affair and were merely colourable devices resorted to by the assessee with the aid of its sister concerns as a part of tax planning to reduce its tax liability. There was substance in the contention of the revenue that the income-tax authorities were entitled to look into surrounding circumstances to find out the reality of the matter.

The facts on record clearly indicated that the six companies to whom shares of 'B' Ltd. had allegedly been sold were private limited companies controlled and managed by closely connected persons who were partners in the assessee-firm as well as directors in these companies. In certain cases, even the addresses were identical. For example, in the case of 'K' Ltd. and 'H' Ltd., the same address was mentioned in the share transfer form. Two of the vendees, namely, 'BS', Ltd. and S.K. Ltd., had identical address. Further, the company whose shares had allegedly been sold being 'B' Ltd. had the same address as one of the transferee, farther the shares transfer form, were signed by 'V' who was director in as many as three transferee companies. Another striking feature of the alleged sales transactions was that all the six transfer forms purportedly executed on different dates with different transferees had the same witness. Further page 9 of the paper book filed by the assessee 'showed that there were four partners of the assessee-firm. However,

in the transfer deeds produced signatures of only three partners appeared and signatures of fourth partner were not appended. [Para 9]

*From the facts on record, it appeared that the so-called sales transactions had been manipulated by the assessee-firm much after the close of the accounting year in the month of April 1986 with a view to reduce the tax liability. The most telling feature which eloquently brought out the manipulation was the fact that even though the transactions in question were claimed to be credit transactions and mere book entries had been made in the books of the assessee-firm as well as the transferee companies yet all these entries were dated 31-3-1996, i.e., much after the alleged date of sale transaction in February, 1996. It was difficult to understand as to how after entering into transaction in the sale of shares in the month of February 1996, particularly when the transaction was a credit transaction, no entries were passed in the books even after share transfer forms along with shares had allegedly been handed over to the transferee companies. The whole story appeared to be unreal and unusual. There was no fault with the revenue for refusing to swallow such a fanciful story. **It appeared that the Assessing Officer had adduced cogent ground to disbelieve the story of sales which obviously was a story that did not accord with human probabilities. No evidence whatsoever had been adduced in support of the alleged sales transactions having taken place in February 1996. As pointed out by the Assessing Officer, even the sale consideration for the shares had not been paid by the transferees even after a lapse of two years. The entirety of circumstances surrounding the alleged sale of shares by the assessee, when viewed in the context of human probabilities, lead to the irresistible inference that the sales transactions were sham and were merely an after-thought so as to reduce the tax liability.** [Para 10]*

The Commissioner (Appeals) had been persuaded to accept the story of the assessee on the ground that the companies to whom the shares had been sold were independent entities and their books of account could not be disbelieved on surmises and conjectures alone. The Commissioner (Appeals) had ignored the facts of life. The facts were undisputed that the transferee companies were group companies under the direct control and management of partners of the assessee-firms and their close relations. It was a blatant case whereby the instrumentality of the corporate entities of the group had been utilized - nay mis-utilized to reduce the tax liability of the assessee by using colourable devices. [Para 11]

The cumulative effect of surrounding facts and circumstances concerning the sales transactions of the transferee companies clearly indicated that such transactions were sham and illusory ones and had been entered into as an after-thought with a view to reduce the tax liability of the assessee firm. The view taken by the Commissioner (Appeals) on the basis of treating the transferee companies as independent entities was, therefore, entirely misconceived and could not be sustained.

For the aforesaid reasons, it was to be held that sales transactions in question were sham and illusory ones and, therefore, loss claimed on such transactions was non-genuine. The finding of the Commissioner (Appeals) on the issue was therefore, reversed and the appeal of the revenue was allowed. [Paras 12 and 13]

(iii) ITAT, Kolkata, in the case of Edward Keventer (P) Limited V/s DCIT [2004] 89 ITD 347 (KOL.)

"Section 45, read with section 48, of the Income-tax Act, 1961 -Capital gains - Chargeable as - Assessment year 1993-94 - Whether under Act income-tax authorities are empowered to go behind transaction to find out real and if a transaction, on basis of evidence and surrounding circumstances of case, appears to be non-genuine or bogus or make-believe or sham with a view to avoid tax liability or if it appears that series of transactions effected by assessee to achieve \ desired result is sham or collusive or non-genuine, tax authorities can ignore transaction - Held, yes - Whether such powers of tax authorities are legally recognised and are not taken away by provisions of section 45 or section 48 - Held, yes - Whether, therefore, contention of assessee that for purpose of section 45 alleged motive is irrelevant inasmuch as section 45 comes into application at

moment an assessee sales a capital asset and, therefore, Assessing Officer is duty-bound to compute profits/losses in accordance with provisions of section 45 read with section 48, has to be rejected - Held, yes - Assessee-company had promoted another company, K, as its 100 per cent subsidiary to carry out business of K - Assessee held 12,32,000 equity shares of face value of Rs. 10 each of K - In July 1992, assessee sold those shares to its five sister companies over whom assessee had influence and control at rate of Rs. 2.50 per share and transferred those shares to buyers immediately on 10-7-1992 without receiving sale consideration - Subsequently, assessee had bought back 12,80,000 shares of K at rate of Rs. 2.50 per share on 25-2-1993 and 4-3-1993 - Assessee suffered capital loss on account of sale of shares and it claimed allowance of same under section 45 read with section 48 - Assessing authority disallowed assessee's claim holding that sale and purchase of shares by assessee had been with a view to claim huge loss so as to get benefit of setting it off in future and entire loss was nothing but an arranged book loss - Commissioner (Appeals) upheld impugned order holding that assessee failed to establish its bona fides in respect of said transactions - Whether decision of assessee-company to sell its total holding to five group companies was against all human probabilities and commercial consideration which otherwise any prudent businessman would not have taken in normal course of business -Held, yes - Whether transactions effected by assessee-company were not bona fide commercial transactions but were sham, bogus, unreal, make-believe, collusive and artificial with a mala fide intention to acquire benefit for tax purposes - Held, yes - Whether, therefore, action of Assessing Officer, which had been confirmed by Commissioner (Appeals), in disallowing loss claimed by assessee-company, was justified and in order - Held, yes"

- (iv) *ITAT, Bombay in the case of Sturdia Chemicals Ltd V/s IAC [1994] 48 ITD 338 (BOM.) Section 47 'of the Income-tax Act, 1961 -Capital gains - Transfer not regarded as transfer - Assessment year 1983-84 - Assessee-company derived long-term capital gains on transfer of shares of a company CBL to its subsidiary company NTPL - NTPL had a share capital of Rs. 500 only, held by two persons of same group - It did not carry on any business activity and ceased to be a subsidiary when offer of its right shares was declined by assessee - NTPL having no funds of its own, was accommodated by assessee to enable it to purchase shares of CBL - NTPL could repay money raised by way of call deposit, after receiving deposits on interest from an associate concern - Whether on these facts, it could be said that assessee's case fell within ambit of ratio laid down by apex court in McDowell's case, and, thus, it was liable to capital gains tax on surplus arising from aforesaid transaction of sale of shares of CBL to its subsidiary -Held, yes"*

6.17 Further, the Supreme Court in the Vodafone International Holdings B. V. v. Union of India [2012] 204 Taxman 408/ 17 taxmann.com 202 (SC) makes it very clear that a colourable device cannot be a part of tax planning.

6.18 Therefore where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. In the instant case the sale of shares so as to take long-term and short-term capital loss, is found to be a sham.

6.19 In view of what is stated above and relying on the binding ratio of various judgments of the Apex Court and other judicial pronouncements and after having regard to the facts of the case in its totality, I hold that there was no genuine transfer of the shares of Amitabh Bachhan Corporation Ltd., and Business Standard Ltd., carried out by the appellant during the course of the year, as contended and it was clearly a colourable device to defraud the Revenue and to evade the payment of the legitimate and due tax and the same thus cannot be allowed. It is observed that Appellant has claimed to have sold the above shares on last day of Financial Year wherein gain was already accrued to Appellant. The entirety of circumstances surrounding the alleged sale of shares by the assessee, when viewed in the context of human probabilities, lead to the inference that the sales transactions were sham and an afterthought so as to reduce the tax liability. **This ground of appeal is accordingly dismissed and the action of the AO in this regard is upheld."**

6.6 Hence, it is held that there is no brought forward loss that can be adjusted against the capital gain pertaining to A.Y. 2010-11 because Capital loss resulting from sales transactions of Shares

*were held to be sham for A.Y. 2009-10 and the entire brought forward long term capital loss for Asst. Year 2008-09 amounting to Rs.52,53,644/- had already been allowed to the appellant by the AO vide assessment order u/s. 143(3) dated 29.12.1011 for A.Y. 2009-10. Therefore, there was no unabsorbed long term capital loss that could have been set off against long term capital gain for Asst. Year 2010-11. It is seen from the assessment order of A.Y. 2009-10 that the appellant has also accepted this position during the assessment proceedings. This ground of Appeal is accordingly **Dismissed.**"*

ITA No. 635/Ahd/2019

8. We have heard the rival contentions and perused the material on record. The assessee had sold land at Gota for Rs. 19,00,000/- and land at Thaltej for Rs. 60,71,000/- and declared long term capital gain of Rs. 1,78,79,740/- and Rs. 57,56,545/- respectively. During the year, the assessee had sold 25,000 shares of Amitabh Bacchan Corp. Ltd. and 31,000 share of Business Standard Ltd. at @ 1 per share to the Discretionary Trust Khodidas Vandas Patel and claimed long term capital loss of Rs. 44,69,208/- from sale of shares of Amitabh Bachchan Corp. Ltd. and long term capital loss of Rs. 51,05,512/- from the sale of share of business Standard Ltd. It is undisputed fact that the said shares have been sold to the trust which was a family beneficiary Trust. The said shares have been sold for a token amount of Rs. 1 per shares against the cost of price of 80 per shares. The assessing officer has held that the aforesaid sale transactions have been made by the assessee with his own self in the garb of the Trust to reduce the capital gain on the sale of lands. The assessee has claimed to have sold the above shares on last day of financial year when gain on sale of land was already accrued to the assessee. During the course of appellate proceedings, the ld. counsel has placed reliance on the decision of Honøble High Court of Gujarat in the case of ACIT vs. Biraj Investment P Ltd. 210 Taxman 418. We have considered that facts of the case of the assessee are distinguishable from the

facts of the above cited case relied upon by the assessee. The above cited case refers to the fact that original shares along with certificates along with transfer forms duly signed by the assessee was in possession of banks and the assessee entered into agreement with the purchaser company to sell such pledged shares and gave irrecoverable power to attorney and received full sale consideration whereas in the case of the assessee the shares were available with the assessee and the assessee has shown the sale on the last day of the financial year not supported with any original share certificates and transfer forms. The Id. counsel has also placed reliance on the decision of Hon~~o~~ble Gujarat High Court in the case of CIT vs. Special Prints Ltd. 33 taxmann.com 463. We have gone through the above cited judicial pronouncements and observed that its facts are distinguishable from the facts in the case of the assessee. In the above referred case, both transactions were genuine and the sale value of shares were determined as per the valuation report of the valuer whereas in the case of the assessee the sale value was not determined on the basis of the valuation report of the valuer and the assessee had claimed to sell the shares of token amount of Rs. 1 per share without substantiating the genuineness of the transactions with relevant supporting material. We also observe the following facts which demonstrate that assessee has failed to discharge its primary onus to genuineness of transactions:-

- (i) The said shares have been sold for a token price of Rs. 1 per share which is not corroborative with evidence i.e. valuation report of the valuer.
- (ii) No corroborative evidences as the parties with whom sale of shares transactions were carried out were directly under influence of the assessee and it is well known that while purchasing shares reasonable study of the net

worth of the company is made whereas in the case of the assessee even detail of account of ABC Ltd. was not available

(iii) No material or corroborative evidences were provided to demonstrate that the sale of share on the last day of the financial year at the token amount of Rs. 1 per share against the purchase price of Rs. 80/- per share was prompted by strong business consideration to the family trust in which the assessee was beneficiary along with other family members.

(iv) We have also placed reliance on the principles laid down by the Honøble Apex Court in the following cases where in the facts and circumstances the case of the assessee is supported with concrete and undoubted evidences.

CIT V. Durga Prasad More (1971) 82ITR 540(sc):-

"Therefore, the question is whether he has satisfactorily proved that case. Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece of evidence."

Sumati dayal v.CIT (1995) 80 Taxmann 89 (sc)

"This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities. In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence."

In view of the above facts and findings, we consider that assessee has failed to discharge his primary onus to substantiate the sale of share transactions with independent corroborate evidences. A prima facie interference from the fact is that the sale transaction of shares of M/s. Amitabh Bachchan Corporation Ltd. and M/s Business Standard Ltd.to the Khodidas Vandas Patel Discretionary Trust in which the assessee and his family were beneficiary @ Rs. 1 per share against cost price of Rs. 80 per share on the last day of the financial year without independent corroborative evidences by way of adjustment of losses against the capital gain on lands

were not genuine transaction. Accordingly, we do not find any infirmity in the decision of the Id. CIT(A), therefore, the appeal of the assessee is dismissed. We consider this was a fit case where the decision of Honøble Supreme Court in the case of McDowell & Co. Ltd. Vs. ITO 154 ITR 148 could be applied.

ITA No. 636/Ahd/2019

9. Since we have dismissed the appeal of the assessee vide ITA No. 635/Ahd/2019, therefore, the appeal vide ITA No. 636/Ahd/2019 has become infructuous.

10. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on 26-09-2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad : Dated 26/09/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क०० तलम अ० षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलअ अधकरण,
अहमदाबाद