

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” BENCH, MUMBAI**

**BEFORE SHRI PRMOD KUMAR, VP &  
SHRI AMIT SHUKLA, JM**

1. आयकरअपीलसं./ I.T.A. No. 1905/Mum/2020  
(निर्धारणवर्ष / Assessment Year: 2008-09)

<b>Dharti Commercial Trading Pvt. Ltd.</b> (Formerly known as Dharti Investment & Holdings Limited) Office No. C107, Plot No. 6, Sector 11, Dronagiri, Navi Mumbai-400702	<b>बनाम/ Vs.</b>	<b>ACIT Range-6(2)(2),</b> 5 <sup>th</sup> Floor, Aayakar Bhawan, Churchgate, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCD2509C		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

**&**

2. आयकरअपीलसं./ I.T.A. No. 496/Mum/2021  
(निर्धारणवर्ष / Assessment Year: 2008-09)

<b>ACIT Range-6(1)(1),</b> 5 <sup>th</sup> Floor, Aayakar Bhawan, Churchgate, Mumbai-400 020	<b>बनाम/ Vs.</b>	<b>Dharti Commercial Trading Pvt. Ltd.</b> (Formerly known as Dharti Investment & Holdings Limited) Office No. C107, Plot No. 6, Sector 11, Dronagiri, Navi Mumbai-400702
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCD2509C		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )
अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Madhur Agarwal & Ms. Moksha Mehta, Ld. ARs
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Sanjay Chandra, Ld. DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	09.06.2022
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	06.09.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid cross appeals have been filed by the assessee and revenue against the order dated 11.09.2020, passed by Ld. CIT (Appeals)-12, Mumbai for the quantum of assessment passed u/s 143(3)/147 for the AY 2008-09.

2. In the grounds of appeal, the revenue has raised the following grounds:-

1. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the Assessing Officer to allow the assessee's claim of loss on purchase and sale of shares of Amma Lines Ltd. without appreciating the fact that the Assessing Officer had clearly established that transactions entered into by the assessee were not genuine and the loss of (-) Rs.70,75,25,000/- claimed on sale of shares of the same company was nothing but a colourable device created for the purpose of evasion of tax."*

2. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the ratio of the decision rendered by*

*the Hon'ble Supreme Court in the case of McDowell & Co. Ltd. Vs. CTO [1985](154 ITR 148) while holding that the assessee's transaction of purchase and sale of shares of Amma Lines Ltd. is a genuine transaction and the resultant loss of (-)Rs. 70,75,25,000/- on sale of the said shares is a normal business loss eligible for set off against the business profits of the company."*

*3. "The Appellant prays that the order of the CIT(Appeals) on the above ground be set aside and that of the AO be restored."*

3. The assessee has raised the following grounds of appeal:-

*1. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in rejecting the appellant's contention that initiation of proceedings u/s. 147 of the I.T. Act, 1961 ('the Act') are bad-in-law*

*2. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in rejecting the appellant's contention that claims of depreciation on the Fixed Assets is allowable as per the provision of the Income Tax Act.*

*3. Each one of the above grounds of appeal is without prejudice to the other.*

4. The facts in brief are that, assessee is a Non-Banking Finance Company (NBFC) engaged in the business of lending, investment and trading in securities. The assessee has filed its return of income

for AY 2008-09 on 30<sup>th</sup> September, 2008 declaring total loss of Rs. 13,66,06,181/-. Thereafter the case was selected for scrutiny and assessment u/s 143(3) was completed vide order dated 30.12.2020 determining loss of Rs. 4,76,82,883/- after making various disallowances u/s 14A, 94(7) & 36(1)(iii) and disallowance on repairs and maintenance expenses.

5. After the completion of the assessment, assessee's case was sought to be reopened u/s 147 by issuing notice u/s 148 on 27.03.2014 which was after the expiry of 4 years from the end of the relevant assessment year. The reasons for reopening are as under:-

*1. Return of income for A.Y.2008-09 was filed by the assessee on 30.09.2008 showing a loss of Rs.13,66,06,181/-. Assessment u/s.143(3) was completed on 02/12/2010 determining the loss at Rs.4,76,82,883/- after making disallowance of interest, capitalization of Repair expenses and disallowance U/S.14A and others.*

*2. It is noticed that during the relevant previous year, the assessee company had shown purchase of 15,55,000 shares of face value of Rs.10 each of a Private limited company, M/s. Amma Lines Ltd on 11.08.2007 at a premium of Rs.990 per share, for a total*

consideration of Rs.155,50,00,000/-through private placement. And it has reportedly sold the entire shares to M/s.Vinamra Universal Traders P Ltd, within a period of 6 months on 24.03.2008 for a sum of Rs.84,74,75,000/-, at the rate of Rs.545 per share, thereby claiming a loss of Rs.70,75,25,000/- thereon. This loss has been claimed as a business loss and has thus been used to bring down the taxable income of the assessee company from its business of trading in listed shares and mutual funds for the year,

3. It is further seen that the assessee has shown two portfolios, one is the trading in shares and the other is investment in shares. It is pertinent to note that almost all other transactions in purchase and sale of shares of private limited companies, are shown only under its investment portfolio and those private limited companies are mostly of associates and group concerns of the assessee company. The trading portfolio comprises of listed shares and mutual funds only, except the impugned transaction.

4. The nature of the said purchase transaction, its genuineness, the basis of arriving at the value of premium at the time of purchase, the genuineness of sale transaction reported thereafter and the adequacy of the sale consideration or its reasonableness were not subject matter of original scrutiny assessment proceedings concluded u/s.143 (3) as seen from the issues under consideration of the then Assessing Officer. No information has been furnished in connection with the said transaction by the assessee on its own

motion either as to the nature of transaction or the basis of arriving at such an unusually high premium, and the reasons for disposing it off within such a short period at a huge loss.

5. The following facts came to the notice subsequent to the passing of the original scrutiny assessment proceedings u/s.143 (3) on 02.12.2010:

(i) The total source of funds of the issuer company, M/s.Amma Lines Ltd, before receipt of the share application money paid by the assessee company, is Rs.22 crore only. The turnover of the company, PBT, Dividend Rate an EPS in FY.2006-07 and FY.2007-08 vis-a-vis the Share Capital and General Reserve was as under:

	FY 2006-07	FY 2007-08
Share Capital	Rs 15.53cr	Rs 17.08cr
General Reserve	Rs 0.17cr	Rs 0.22cr
Turnover	Rs 13.14cr	Rs 11.72cr
PBT	Rs 1.99cr	Rs 1.67cr
Dividend Rate	6%	5%
Earning per Share	Rs.0.62 per share	Rs. 0.60 per share
Premium paid by the assessee company Rs.990.00 per share.		

(ii) *The Issued and paid up share capital of M/s.Amma Lines Ltd, the issuer company, as on 31.03.2007 was Rs.15,53 crore comprising of 1,55,30,000 equity shares of Rs.10 each issued at par to 8 persons, mostly the family members of Shri.Meka Papa Rao, the promoter of M/s.Amma Lines Ltd.*

(iii) *The assessee company is the only entity that has subscribed to the said private placement by M/s.Amma Lines Ltd, and overall it is the only entity to have purchased the shares of the said company at a premium, that too at an abnormally huge premium of Rs.990 per share.*

(iv) *Even though the first resolution seeking to issue 15,55,000 equity shares of Rs.10 each at a premium of Rs.990 each to the assessee company was passed by M/s.Amma Lines in its EGM on 4<sup>th</sup> August, 2007 only, almost the entire sum of Rs.155.50 crore as share application money had already been paid to M/s.Amma Lines Ltd by the assessee company in FY.2006-07 itself on the following dates, starting almost a year in advance:*

<i>Date</i>	<i>Particulars</i>	<i>Amount(Rs.)</i>
14.09.2006	A/c.312142-Dena Bank IFB	35,00,00,000
14.09.2006	A/c. 060010200005830- Bank, Worli	5,00,00,000
20.09.2006	A/c. 312142- Dena Bank IFB	75,00,00,000
03.10.2006	A/c.10499- Dadar Bank IFB , Term Loan a/c	7,00,00,000

03.10.2006	A/c. Dena Bank IFB	3,00,00,000
06.03.2007	A/c. Dena Bank Dadar	25,00,00,000
12.04.2007	A/c. Dena Bank Dadar OD a/c.	50,00,000
16.07.2007	A/c. Dena Bank Dadar OD a/c.	50,00,000
	<b>Total</b>	<b>155,50,00,000</b>

(v) The issuer company, M/s.Amma Lines Ltd is mainly into Engineering Contracts and almost the entire sum of Rs.155.50 crore given as "Share Application Money" by the assessee company is found to have been invested by M/s.Amma Lines Ltd in the unquoted shares of the following companies:

6. It is also noted that both the assessee company and M/s.Vinamra Universal Traders P Ltd, to whom the shares of M/s.Amma Lines were purportedly sold during the year at a loss of Rs.70,75,25,000/- are connected to Shri.Mukesh Ambani's - Reliance Group of companies and Shri. Anand Jain's Jai Corp Ltd, and were thus part of their associate groups since their incorporation.

7. The assessee company, M/s.Dharti Investment & Holding Ltd was initially 100% subsidiary of Mumbai SEZ Ltd, which is directly connected to Shri.Anand Jain's group. The assessee company was also the holding company of M/s.Urban Infrastructure Properties Limited, another group concern of Reliance and Jai Corp. In FY.2010-11, the buyer company, M/s.Vinamra Universal Traders P Ltd itself became one of the

shareholders of the assessee company and the other shareholders of the assessee company are also associates or group concerns of Reliance and Jai Corp either directly or by virtue of the shared office addresses or common directors.

8. Information available from public sources including newspaper, internet and other media points to the following:

(i) As early as on September, 2006 reports in the press read thus -"Shri.Mukesh Ambani controlled Reliance group and his associates have sealed one of the first crucial deals for their two mega special economic zones (SEZs) being set up across 35,000 acres in Navi Mumbai. Ambani's group company, Reliance Logistics Investment along with Jai Corp — a company belonging to his close aide, Anand Jain, inked a deal to buy a majority stake in Rewas Port. Confirming the deal, a Reliance official told TOI that Reliance Logistics and Jai Corp to have bought a 51% stake in Rewas Ports belonging to first generation entrepreneur Meka Vijay Papa Rao. There will be fresh issue of equity at par to new partners," said the official. However, future investment in the project whose first phase itself will cost Rs 2,500 crore will be tied-up by the new partners. Rewas Port has also included six new board members from Reliance group and Jai Corp including Anand Jain. Of the remaining board members of Rewas Port, three will be from Amma Lines belonging to Papa Rao and two from the Maharashtra Maritime Board which will take 11% in Rewas Port. In 2002, Amma Lines was awarded the license by

*the state government to develop Rewas Port. Now, the licence is transferred to Rewas Port. Shri.Papa Rao, however, will continue be the chairman."*

*(ii) Another report at the same time revealed that Rewas Port, which is 65 per cent owned by various investment companies of Reliance Industries, 24 per cent by Amma Lines and 11 per cent by Maharashtra Maritime Board, is building an all-weather deep draught port, 10 kmsouth of Jawaharlal Nehru Port. Reliance group companies including Reliance Logistics and Jai Corp, own 65%, Maharashtra Maritime Board (MMB) owns 11%, and the initial promoters -Amma Lines, the remaining 24%.*

*(iii) Similar report emerging from same period also states that-"Shri. Meka Vijay Paparao discovered the location in 1996. In 1997 the state government signed an MOU with Shri.Paparao's company Amma Lines for development of Rewas and Avare for a multi-cargo deep draft all-weather port. In 2002, the cabinet signed a concession agreement for 50 years with Amma Lines to develop this port on a Build, Operate, Own, Share and Transfer (BOOST) basis for handling container traffic. It formed an SPV known as Rewas Ports Ltd, for the purpose. In 2006, Amma Lines sold a majority stake to Mukesh Ambani's Reliance Group and Anand Jain's Jai Corp. The state government of Maharashtra also has a minor stake in the port."*

(iv) The company's official website of Rewas Ports Ltd also lists the following information which establishes the veracity of the reports referred supra:

Promoters- 1. Reliance Logistics& Ports Private Limited  
2. Jai Corp Limited,  
3. Amma Lines Limited  
4. Maharashtra MaritimeBoard.

Chairman - 5. Dr. Meka Papa Rao

Directors- 1. Mr. Anand Jain 2. Mr. Ajit Warty 3. Mr. Sanjay Punkhia 4. Mr. Natarajan Iyer 5. Mr. Gotam Kothari 6. Mr. J.B.Rohilla 7. Mr. S S Shinde 8. Mrs. Meka Rajyalaxmi Rao 9. Mr. Meka Hemant Rao

Address: Rewas Ports Limited, Jai Center, 1st floor, Opp Red Gate, 34, P D'Mello Road, Mumbai - 400 009 India. [Same as Assessee Company's address]

9. From the above information available from the public sources and also going by the peculiarities associated with the transaction wherein substantial sums of money has been passed on to M/s. Amma Lines Ltd, by the assessee company, under the garb of share premium, and also seen from the fact that the said money was directly invested in M/s. Rewas Ports Ltd by M/s. Amma Lines Ltd immediately thereafter, further going by the matching of these events and dates of synchronized payments in FY.2006-07 itself by the assessee company to M/s. Amma Lines Ltd, it is evident that

(i) the said share premium was in fact part of the purchase consideration for the acquisition of share holding in M/s. Rewas Ports Ltd from M/s. Amma Lines Ltd by Reliance Group and Jai Corp and

(ii) the resolution passed by M/s. Amma Lines Ltd on the purported private placement of its shares with assessee company at huge premium is only an extension thereof to enable the passing of the said consideration under the guise of share premium .

10. This is further confirmed by the Valuation Report dated 1<sup>st</sup> September, 2006 prepared by H.P.Biyani & CO., Chartered Accountants which is claimed as the basis on which the shares were previously placed with M/s.Dharti Investment & Holding Ltd by M/s.Amma Lines Ltd.

11. As per the said valuation report, it is clearly mentions therein that -

(i) The existing shareholder of Amma Lines Ltd were negotiating for sale of part of the equity capital of Amma Lines Ltd to the strategic investors.

(ii) Dharti Investment & Holdings Ltd, is interested to invest in the equity capital of Amma Lines Ltd mainly because of the concession agreement entered into with Government of Maharashtra and Maharashtra Maritime Board for development of Rewas-Aware port and its interest to development of the Vadhavan Port.

(iii) *Amma Lines is having the controlling interest in Rewas-Aware port project and Vadhavan Project.*

(iv) *The main intention of the investor is to invest in the Port Project undertaken by Amma Lines Ltd.*

(v) *As per the concession agreement entered into between Maharashtra Maritime Board and Amma Lines Limited and further agreement between Amma Lines Ltd with the various companies of Reliance Group, it has been decided that the holding of Amma Lines Ltd in Rewas Port Ltd shall be 25% of the total present value of Rewas Port.*

(vi) *For the purposes of valuation of the equity of Amma Lines Ltd, the holding of Amma Lines Ltd in Rewas port is presumed to be 25% of the total present values only".*

12. *Perusal of the return of income of Amma Lines Ltd for the relevant period does not indicate that any such sale of interest in the port project is offered to tax in its hand either. But the investment in Rewas out of the funds received from Dharti Investment & Holdings Ltd is appearing in the Balance Sheet.*

13. *From the foregoing, it is evident that by routing the divestment of Rewas port through the assessee company, in the guise of Share premium, it is sought to achieve multiple tax evasion in the hands of the parties concerned, namely-*

(i) *Camouflage the purchase consideration payable to M/s.Amma Lines Ltd for acquiring the shareholding in Rewas*

*Ports Ltd as share premium so as to avoid payment of taxes by M/s.Amma Lines Ltd on such sale which is a taxable income in its hands.*

*(ii) By transferring the shares to M/s.Vinamra Universal Traders Ltd, another group concern at a loss by the assessee company, the otherwise taxable business income of the assessee company during the year from its trading in shares and units is reduced to the extent of the purported loss on sale of shares of M/s. Amma Lines Ltd by inter se set off during the year.*

*14. In view of the above, there are reasons to believe that the said transaction of impugned buying of 15,55,000 equity shares of Rs.10 each of M/s.Amma Lines Ltd by the assessee company on 11.08.2007 for Rs.155,50,00,000/- at an abnormal premium of Rs.990 per share is not a genuine transaction of purchase of shares and that the subsequent sale of those shares on 24.03.2008 by the assessee company within a short period of six months to M/s.Vinamra Universal Traders P Ltd, another group concern at a loss of Rs.70,75,25,000/- is also nothing but a colourable device used with a view to reduce the taxable income of the assessee company by claiming set off against the taxable income for the relevant year.*

*15. From the facts as discussed above, there are strong reasons to believe that by set off of the purported loss of Rs.70,75,25,000/- on account of the impugned transaction in the shares of M/s.Amma Lines Ltd against the taxable profits*

*from business during the relevant year, income chargeable to tax has escaped assessment for reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, for the assessment year 2008-09.*

16. *Since the said escapement of income chargeable to tax is due to the non disclosure of material facts fully and satisfactorily by the assessee company during the course of original assessment u/s.143(3), the first proviso to section 147 of the Income Tax Act is' clearly attracted in the instant case and therefore, the assessment is hereby reopened in accordance with the provisions of section 148 on this issue after obtaining prior approval of the Commissioner of Income Tax-6, Mumbai under section 151(1) of the Act to bring to tax the incorrect allowance of the purported loss of Rs.70,75,25,000/- which is not a genuine business loss of the assessee company."*

6. In response to the notice u/s 148, assessee field reply on 25.04.2014 stating that the return filed earlier may be treated as return filed in response to the notice u/s 148. After the reasons provided to the assessee, the assessee requested for inspection of records and materials coming to the possession of AO which was rejected vide order dated 27.02.2015 by the Ld. AO.

7. On the basis of certain facts as noted by the AO and the reasons recorded which according to him came to his notice subsequent to the passing of original assessment order u/s 143(3) on 02.12.2010, the AO observed the assessee had not disclosed the facts fully and satisfactorily during the course of the assessment proceedings. As per the records, Assessee Company sought for inspection of the records and materials in the possession of the AO vide letter dated 30.01.2015 which was turned down by the AO stating that already all the material facts have been in detail in the reasons recorded. Once again, the assessee requested for inspection of the records and to make available any materials coming on record as stated in the reasons recorded which AO has received so that objections to the reopening can be filed. However, the AO held that such request is not possible at this stage and in this regard, he referred certain decisions as noted in the assessment order. Later on, the assessee filed its objections on 26.02.2015, the sum and substance of assessee's contention has been reproduced in the assessment order. Thus, the AO held that it is not a case of 'Change of Opinion', but it is a case of no opinion. It is also a case of failure

of the assessee on the issue which has been raised by him in his reasons recorded. According to him the real intent and purpose behind the transaction was never revealed before the AO. The key observations made by the AO in this regard are as under:-

*3.1 The real intent and purpose behind the transaction was never revealed before the AO. assessee company is a certified NBFC and its business is buying and selling of shares, securities and investment activities. Its dealings in private company shares were confined to the group concerns and that too only as an investment so far. There are no such transactions in private company shares except this sole transaction with an unrelated private limited company, whose business is totally unconnected, and whose performance is obscure as apparent from its own financials. The transaction in question was the sole instance of private placement that the investee company has ever made with persons other than its own promoter group.*

*3.2 Likewise, no other person had paid any premium to the investee company except the assessee. The shares were sold within a short span at a substantial loss and no reasons were adduced. The sale was with a related party and within a short span of six months. The loss so claimed has been used to reduce the taxable income from its business activity of trading in shares. Almost the entire amount of purchase price has been placed with the private limited investee company a year in advance, even*

*before the Board resolution was passed by the latter. The shares are not such that it can be traded freely in the market to be passed off as a genuine purchase of stock in trade. The entire chain of events and different aspects of the transaction smacks of a preordained and collusive transaction with the sole intent and purpose to avoid taxes and to reduce the taxable income by such self induced loss.*

*3.3 The reasons have been recorded by the AO duly quoting extensively the true and existent facts, naming the sources that are real and reliable, revealing the new information that has come into possession that was verifiable, with reference to the evidence gathered, and after clearly pointing out the concealment of true nature of the transaction by the assessee, the colorable device that was adopted, the failure on the part of the assessee to come clean on the issue before the AO during the course of original assessment and the non-formation of any opinion on the issue before by the AO in the absence of any such information made available to him at the relevant point.*

*3.4 It cannot be the claim of the assessee that it had disclosed all these material facts and thus were made known to the AO on its own volition; nor can it succeed in claiming that the AO had formed an opinion on the impugned transaction since the real nature of transaction itself was never revealed to the AO in the first place. Therefore, the claim of a complete or proper disclosure of facts by the assessee at the time of original assessment*

*proceedings stands negated on facts as brought out by in the detailed reasons clearly establishing a case of non-disclosure of real and relevant material facts.*

Thereafter, the AO referred various judgments to justify the reopening and rejecting the objections of the assessee.

8. The brief facts qua the issue relating to disallowance of loss on sale of shares of Amma Lines Ltd. ( herein referred to as ALL) of Rs. 70,75,25,000/- as gathered from the records which the AO has not discussed in his assessment order in elaborate, therefore the facts as brought on record and discussed in the order of the Ld. CIT(A) are reproduced herein for the proper appreciation of the facts and the contention of the assessee company:-

*4.3. The appellant submitted that ALL is one of the leading contractors in the Port development sector in India. ALL was the lead promoter of the proposed Rewas Port and also intended to develop the all weather port at Vadhavan. The Rewas Port and Vadhavan Port were planned in the Mumbai Harbour and West Coast. Rewas Port had already signed concession agreement with Maharashtra Maritime Board (MMB) while Vadhavan project was under the process of signing the concession agreement with MMB. The location of these Ports was ideal and it was an attractive business opportunity in the Port sector in India. The appellant*

company noted that many overseas Port developers and Private Equity firms had shown keen interest in the Port business in India. The potential valuation of ALL was expected to increase considerably with such major projects in hands. The appellant company wanted to grab this opportunity of participating in future prosperity of ALL. The valuation of interest of ALL, in the Rewas Port and Vadhavan Port, was done by the valuers H. P. Biyani & Co based on Discounted Cash Flow (DCF) method, wherein the fair value of equity share of ALL was computed at Rs 1835/- per share. However, as per the final negotiation with the ALL, the Board of Directors of the appellant company, in the meeting held on 06.09.2006, resolved to purchase 15.55 lakh equity shares of ALL at a price of Rs 1000/- per share, including the share premium of Rs 990/-. The copy of the said Valuation Report and Minutes of the Board Meeting are available on record.

4.4 The appellant has further submitted that it started subscribing towards the share application money from 14.09.2006 onwards. The appellant had already subscribed Rs 125 Crore, out of total amount of Rs 155 Crore, in September and October, 2006 only. Thereafter, ALL passed a resolution for allotment of shares to the appellant company on 11.08.2007. The copy of the said resolution passed by ALL, and copy of Form-2 filed by ALL with the Registrar of Companies, in respect of the allotment of shares to the appellant company, is available on record. In this regard, the appellant company has clarified that the allotment of shares is always a subsequent step, and prior thereto the share application money is

*forwarded to the share issuing company, which explains the time gap in the two events.*

*4.5 The appellant stated that as per normal business practice, it was keeping a watch on all project activities of ALL. In the course of such continuous monitoring, certain adverse developments were noted by the appellant company. The total navigational channel of 27.75 Km, which the Rewas Port was to required to dredge, included 17 Km of Channel passing through the water limits of Mumbai Port Trust for which the Mumbai Port Trust demanded Rs 5500 Crore as Right of Way Charges over the concession period. This cost was not envisaged by Rewas Port. There was substantial increase in estimation of dredging cost, as the quantity rose from 80 Million Cubic Metres to 120 Million Cubic Metre, thereby increasing the project cost further by Rs 1200 Crore. Rewas Port was required to pay royalty to Government of Maharashtra for quantum of sand dredged, which would add another Rs 350 Crore to the project cost. The Maharashtra Maritime Board demanded that the height of bridge for Road and Rail connectivity, for crossing the Amba River, should be kept at 35 Meters to allow high mast vessels to cross (as against 11 Metres earlier). This further condition also increased the project cost by Rs 300 Crore. The Gas Authority of India had demanded that the cost of re-routing of certain gas pipelines be borne by the Rewas Port, which also increased the estimates by around Rs 200 Crore. The environmental guidelines required that the port facilities have to be kept away from the mangroves. The new layout proposed by the*

*Rewas Port required construction of break waters to protect the basin area, which would add another Rs 200 Crore to the estimate. Thus, the overall impact of all these unexpected adverse developments was that the estimated project cost of the Rewas Project increased by approximately Rs 2,250 Crore. In particular, the issue of Right of Way Charges of Rs 5,5005- Crore demanded by the Mumbai Port Trust could never be settled. This made the Rewas Port project financially non-viable and a non-starter.*

4.6 *The appellant company also noted that the Jawaharlal Nehru Port Trust (JNPT) was planning for a fourth Terminal with capacity of 50 Million Tonnes, with Dedicated Freight Corridor planned up to JNPT. This would be completely to the disadvantage of Rewas Port as the later would lose its market share in competition to JNPT. Further, the Maharashtra Maritime Board (MMB) had not yet transferred the Government Land for Rewas Port even after lapse of six years from signing of the concession agreement. The acquisition of private land was also getting complex due to local agitations. Further, ALL had also failed to establish technical and financial feasibility for the Vadhavan Port, and this project was likely to be dropped by ALL. The appellant company also took note of the fact that there was lack of overall support from the Government of Maharashtra and Maharashtra Maritime Board in resolving the aforementioned issues, due to which the Rewas Port project had become unviable.*

4.7 In view of the above adverse developments, the appellant company had to take steps to minimize its losses and look out for Indian buyers who could understand the challenges of the project and buy the shares of ALL.

4.8 Meanwhile, Reserve Bank of India (RBI) issued a Circular in December 2006, whereby it declared all NBFC with asset size of Rs 100 Crore or more, as Systemically Important NBFCs. These NBFCs were required to comply with certain exposure norms. One of such exposure norms stipulated that the Systemically Important NBFC shall not invest in shares of another company exceeding 15% of the net owned funds. The NBFCs were required to comply with the revised framework with effect from 1<sup>st</sup> April 2007.

4.9 The appellant company came within the purview of such Systemically Important NBFCs. The appellant company requested RBI, vide letter dated 28.03.2007 for dispensing with the applicability of exposure norms for a period of seven years, on the ground that immediate liquidation of investments would result in heavy losses to the company, and also that the company had lent funds under contractual obligation and sudden withdrawal would cause financial hardships. In response, RBI vide their letter dated 19.06.2007 granted extension only up to 30.09.2007. The appellant company, under regulatory compulsion to liquidate its assets, also appointed external consultants to look into various aspects of the RBI. Circular. The appellant admittedly had regular discussions and correspondence with RBI regarding action taken

*by the appellant to comply with the revised norms. Copies of the correspondence of the appellant company with the RBI are available on record. In this factual background, the appellant has submitted that the appellant company had to sell-off not only the shares of ALL, but also various other scrip, such as Bajaj Auto Limited, Bharat Forge Co Ltd, Hindalco Industries Ltd etc, before 31.03.2008, in order to comply with the revised norms of RBI for Systemically Important NBFCs. The compliance with norms was important for the appellant company so as to retain the license of NBFC issued by RBI. In order to comply with RBI norms, the appellant company has stated that it was forced to make substantial reduction in its investment portfolio from 231.71 Crore to Rs 64.81 Crore (reduction of 72.03%), in its trading portfolio from Rs 759.91 Crore to Rs 81.10 Crore (reduction of 89.33%), during the Financial Year 2007- 08, from the opening position.*

4.10 Thus, the appellant company, after considering the status of the Rewas Port Project, and also keeping in view the compliance of new regulatory framework laid down by RBI, had to take a business decision to sell-off its equity share holding in ALL at Rs 545/- per share in march 2008, so as to minimize its losses. In this regard, the appellant company has clarified that it had entered into the transaction with ALL in September 2006 and made exit in March 2008, i.e. after a period of 18 months. The appellant has also stated that its decision to exit from ALL, in retrospect, has been proved to be fruitful. The Rewas Port is still struggling with the Right of Way issue and has failed to achieve financial closure,

*while the Vadhavan Project has been dropped by ALL. Therefore, the appellant has submitted that if the shares of ALL were not sold at that time, the losses to the appellant company would have been much higher.*

4.11 *The appellant has also submitted copy of valuation report obtained by the buyer, M/s Vinamra Universal Traders Pvt Ltd, from Systematix Corporate Services Ltd for purchase of 15.55 Lakh equity shares of ALL from the appellant company. The value of shares of ALL in the said valuation report has been determined at Rs 546.80/- per share. The appellant company sold the shareholding of ALL to the buyer at Rs 545/-*

4.12 *The appellant has further stated that it was not related to any of the parties to the transaction, i.e. ALL, Vinarnra Universal Traders Pvt Ltd, and Rewas Port Ltd. The shareholding and the list of Directors of the appellant company, and that of ALL, has been submitted by the appellant to substantiate the claim. The appellant has submitted that the appellant company is an NBFC and it is in the business of buying and selling of shares. This is not a case where an isolated transaction of purchase and sale of shares was undertaken with no connection with the business activity of the company. The appellant has also stated that the appellant company was holding merely 9.10% stake in ALL, and ALL was holding 24% stake in Rewas Port. Thus the indirect holding of the appellant company in Rewas Port amounted only to 2.18%, which is too small to enable the appellant company to take any advantage out of it.*

4.13 *In view of these facts, the appellant has submitted that the<sup>1</sup> transaction of purchase and sale of shares of ALL was a proper business transaction, driven by the appropriate decision in the best interest of the appellant. Merely because the appellant had claimed set-off of losses arising out of the said transaction, the transaction cannot be said to be a colourable device to evade payment of taxes. Therefore, the appellant has submitted that the transaction of purchase and sale of the shares of ALL were genuine, the prices of purchase and sale are based on proper valuation, and the losses arising on sale of shares of ALL are genuine, incurred in the normal course of business, and the same should allowed to be set-off against the profits earned by the appellant company.*

9. However, the Ld. AO held that the assessee has not brought on record any evidence on facts and according to him the said transaction entered into by the assessee in the shares of ALL was colorable device created and carried only with a view to evade taxes. Consequently, he disallowed the loss of Rs. 70,75,25,000/-.

10. Ld. CIT (A) in so far as changing the validity of reopening u/s 147 had rejected the assessee's objection holding that mere disclosure of details of purchase and sale of scripts during the year including that of ALL would not amount to full and true disclosure of material facts relevant to the said transactions. The loss of Rs.

70.75 crores was required to be substantiated with true and full disclosure of material facts. However on merits, Ld. CIT(A) after considering the submissions and the rationale for purchase of shares of ALL, held that both purchases and sales were on account of commercial expediency. The relevant observations are as under:-

*4.15 I have carefully considered the relevant and material facts on record, in respect of this ground of appeal, as brought out in the assessment order and submissions made during appeal proceedings. The moot point is whether, in the given facts and circumstances, the transaction of purchase and sale of shares of ALL by the appellant company, and the resulting loss in the hands of the appellant company, was a genuine business transaction, or it was a colourable device solely aimed at reducing the taxable income in the hands of the appellant company. I find that this issue has to be addressed having regard to all the material facts relating to the said transaction. The appellant has submitted a detailed rationale for purchase of shares of ALL. The appellant had admittedly taken the decision to purchase the equity shares in ALL, to participate in the future prospects of growth of ALL. The main underlying assets of ALL were its interest in Rewas Port and Vadhavan Port, which were promising projects in the Port Sector, at that point of time. The equity shares of ALL were valued at Rs 1835/- per share as per the Valuation Report based on the discounted future Cash Flow of the company from the Rewas Port*

*and the Vadhavan Port. The appellant company resolved to subscribe the shares of ALL at Rs 1000/- per share (as against the valuation of Rs 1835/- per share) purportedly based on final negotiation of the appellant company with ALL. In support, the relevant documents viz. the valuation report, the resolution passed by ALL, the Minutes of Board Meeting of the appellant company etc. have been brought on record. On a perusal of the above material facts, I concur with the contention of the appellant company that the decision to purchase the shares of ALL, at the given price, was driven by pure commercial expediency, with a motive to make use of an available business opportunity and prosper from it.*

4.16 *Similarly, appellant has submitted a detailed rationale for sale of shares of ALL. The appellant has elaborated upon various subsequent developments which adversely affected the financial and technical viability of the Rewas Port and the Vadhavan Port. The appellant company came to conclusion that it would be difficult to expect any overseas buyer to be interested in equity of ALL, as these Port projects were the main underlying assets of ALL. Therefore, the appellant company again took a business decision to start looking for a suitable Indian buyer to whom the shareholding in ALL could be sold. However, the final decision of the appellant to exit from holding of ALL was further hastened due to changes in certain regulatory framework ushered in by the RBI. The appellant company being a Systemically Important NBFC, having asset size of more than 100 Crore, was required by the new RBI norms, to ensure that its exposure in equity shares of another company did*

not exceed 15% of the net owned funds. The appellant had regular interaction and correspondence with the RBI regarding the issue of compliance with the new exposure norms. The appellant was finally compelled to liquidate its holdings in various scrips, including ALL, before 31.03.2008, to comply with the RBI norms. The appellant company sold its shareholding in ALL to the buyer, M/s Vinamra Universal Traders Pvt Ltd, at a price of Rs 5457- per share. The sale price is also based on a valuation report, made by a valuer appointed by the buyer M/s Vinamra Universal Traders Pvt Ltd, wherein the value of shares of ALL has been determined at Rs 546.80, using the Discounted Cash Flow method. On a perusal of the above material facts, I find that the decision made by the appellant company to sell the shareholding of ALL, at the given time and the given price, was driven purely by reasons of commercial expediency, and also compliance with applicable regulatory framework of RBI. The appellant company was required to take a business decision to exit the shareholding, which the appellant did in the best interest of the company, with a view to minimize its losses.

4.17 It is also noted that the AO has not brought any material on record, nor reverted any specific finding, to suggest as to how the various parties to the impugned transaction, i.e. the appellant company, ALL, M/s Vinamra Universal Traders Pvt Ltd, Rewas Port Ltd were related entities. The appellant on the other hand has submitted the shareholding pattern and the list of Directors of the appellant company, and ALL, which does not indicate that these

*are related entities. AO has entirely relied on the facts brought out in the recorded reasons to conclude that the impugned transaction was a colourable device, aimed at evading payment of taxes. Whereas the peculiar facts and information in public domain could certainly make a prime facie case, adequate for assuming the jurisdiction to reopen the assessment, the same could not constitute evidence to establish the transaction as a colourable device.*

11. Accordingly, he held that transaction of purchase and sale of shares of ALL was a genuine transaction and not a colourable device which was a normal business loss which should be allowed to set off of business profits during the year.

12. We have heard the rival contentions of the parties in detail and also perused the relevant material placed on record. In so far as the issue relating to validity of reopening which has been challenged by the assessee in its grounds of appeal, Ld. Counsel for the assessee Mr. Madhur Agarwal submitted that here in this case original assessment was completed u/s 143(3) wherein the entire transaction of purchase and sale were duly disclosed including the purchase and sale of shares of ALL. Thereafter, the assessment was completed u/s 143(3) after making various disallowances. Now in the reasons recorded, the AO has mentioned that certain facts came

to the notice subsequently to the passing of original assessment order. From the bare perusal of the reasons recorded wherein, he has illustrated certain facts, nowhere the AO has mentioned the source of information or what is the tangible material coming on record which goes to show that transaction of purchase and sale of ALL shares is not genuine so as to hold that the transaction of sale and purchase of shares is sham or colourable device. He merely discussed the facts from public domain and then drawn certain inferences without having any live link nexus that any income chargeable to tax has escaped assessment or the loss incurred by the assessee is not genuine. Here it is not a case of failure on part of the assessee to disclose fully and truly all material facts, albeit, the AO has tried to draw his own inference based on certain information on the public domain which nowhere goes to show that there was a colourable device to reduce the taxable income. Ld. Counsel on merits relied on the order passed by Ld. CIT(A) and pointed out that assessee has given the detail reasons and circumstances as to why the shares were sold at a price lesser than the price on which shares were purchased.

13. On the other hand, Ld. DR referred to the points which has been mentioned in the reasons recorded and submitted that here it is a case where AO gathered the facts which came to his knowledge after completion of the assessment, therefore not only the reasons recorded are in accordance with law, but AO has justified the reopening of assessment u/s 147. On merits, he strongly relied on the order passed by AO as well as the points in the reasons recorded which for the sake of repetition, same is not discussed.

14. Here it is a case where reopening has been done after expiry of 4 years from the end of relevant assessment year and therefore, one has to examine, whether reopening u/s 147 is valid in view of the conditions laid down in proviso to section 147. One important fact which emerges from the material placed on record is that, nowhere in the reasons recorded, AO has stated as to what was the information or material which has come to his possession after the completion of the assessment u/s 143(3) when assessee had duly disclosed in its books of account and also examined by the AO, the purchase of 15,55,000/- shares of ALL @ 1000 per share for a total consideration of Rs. 1,55,50,00,000/- and also the sale of shares

was Rs. 84,74,75,000/- @ 545 per share. The allegation of the AO is that no information has been furnished in connection with the said transaction by the assessee to justify such unusual high premium and the reasons for disposing it off within the short period of 6 months. Such observation is purely in the realm of certain presumption and surmises that without any information or material coming as a result of any inquiry or any other source information wherein it has been found that this transaction of sale and purchase is not genuine or some kind of colourable arrangement. The facts which has been discussed by the AO in the reasons recorded pertains to information regarding total funds of the issuer company (ALL) before the receipt of share application money paid by the assessee company and assessee company is the only entity which has subscribed to the said private placement and the said company had only 2 engineering contracts then how under DCF it was valued at such a higher price. He also referred that M/s Vinamra Universal Traders Pvt. Ltd. to whom the shares of M/s ALL were sold were connected to Reliance Group of Companies and Jai Corp Ltd. He also noted that assessee was 100% subsidiary of

Mumbai SEZ Ltd. which was directly connected to Shri Anand Jain Group and other information which were available on public domain. Such information in public domain merely giving the share holding pattern does not lead to any inference that some colourable device has been adopted by the assessee company.

15. After the notice u/s 148 was issued, the assessee on various occasions kept on requesting for providing material and the inspection of assessment on record as to what was the information against the assessee to doubt the genuineness of the transaction and the claim of loss. Despite such repeated request, AO has simply rejected assessee's contention without providing any material or information to the assessee. Nowhere the AO has mentioned as to what are the material facts which assessee has failed to disclose fully and truly relevant for the transaction. The onus of the assessee was to disclose the details of the transactions of the relevant records pertaining to such transaction which was duly provided to the AO in the course of original assessment proceedings and then, it was upon the AO to draw any legal or factual inference and call for further records if he was not satisfied. The failure of AO

cannot be ascribed to assessee. Assessee cannot be expected to produce any record or justification if it has not been asked by the AO. Only in the cases where certain information or material facts come on record, which shows that there was failure on part of the assessee to disclose fully and truly all material facts, then only AO can assume jurisdiction to reopen the case after the expiry of 4 years from the end of relevant assessment year. The information which was already on record then on some perceived notion based on information available in public domain as discussed in the reasons recorded will not amount to presumption of colourable device unless there is any inquiry conducted by some agencies of Government or by Investigation wing of the Income Tax Department or by the AO, that there was some colourable device in purchasing the share @ 1000 per share and selling the same on 545 per share. Further, when the assessee in response to the reasons recorded have given the details and facts and explanation as incorporated above in the foregoing paragraphs, wherein assessee has demonstrated that the price of 1000 per share was based on Valuer's report on DCF method wherein fair market value of equity

share of ALL was computed at Rs. 1835 per share. The assessee has also demonstrated and explained the events and circumstances which followed thereafter which has been discussed by the Ld. CIT(A) also in para 4.15 and 4.16 as incorporated supra as to why the shares were sold at a lower rate. Nowhere the AO has mentioned these explanations or has brought any material on record to show that such an explanation and material on record are incorrect based on certain inquiries or information. Nowhere the AO has discussed the material facts of these explanations in his assessment order and simply based on his presumption has said that it is a case of colourable device. At least AO should have brought some material on records once assessee has raised the objections, whether the assessee company, M/s Amma Lines Ltd, M/s Vinamra Universal Traders Pvt. Ltd, Rewas Ports Ltd. were related to entities or not or it was colourable arrangements. He has not linked the information in the public domain as discussed in the reasons recorded without any kind of enquiry or information or material that these purchase and sale of shares were done for some

ulterior motive of evading the tax or is in the nature of colourable device.

16. Further we find that, nowhere the AO has even rebutted the reasons and explanations given by the assessee that the purchase price was based on Valuer's report or the sale at lower price due to certain events and circumstances beyond the control of the assessee or has called for any further verification or conducted inquiry even during the course of reassessment proceedings to hold that such explanation of the assessee has unacceptable. The so called some new facts coming post completion of assessment u/s 143(3) as has been discussed in the reasons recorded alleged to be coming to his notice cannot be held to be any tangible material based on any inquiry or through proper source of information to hold that there was some live link nexus to dislodge the claim of loss or the purchase and sale of the transactions of shares were not genuine. The presumption and surmises cannot lead to reason to believe as same has to be based on good faith and inference drawn from material coming on record.

17. Though the Ld. CIT (A) had justified the assessment of jurisdiction to reopen the assessment however, he himself has noted the explanation and the facts on record which was given by the assessee before the AO, and also noted that there is no material or information coming on record to show that it was some kind of bogus transaction or arrangement or colourable device, then also he has held that such reasons are justified. Accordingly, we hold that the reasons recorded by the AO do not bring any material to show that there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment and therefore such reopening after the expiry of 4 years from the end of the relevant assessment year cannot be sustained. Hence, such reasons recorded do not clothe the AO with the jurisdiction to reopen and the assessment completed u/s 143(3) after the expiry of 4 years in terms of proviso to section 147. Thus the entire reopening of reassessment proceedings is held bad in law and the same is quashed.

18. Since we have held that the proceedings u/s 147 as void and entire reassessment order is quashed, therefore grounds on merits have become infructuous.

19. In the result, the appeal filed by the assessee is **allowed** and the appeal filed by the revenue is **dismissed**.

*Orders pronounced in the open court on 6<sup>th</sup> September, 2022.*

*Sd/-*  
(Pramod Kumar)  
Vice President

*Sd/-*  
(Amit Shukla)  
Judicial Member

मुंबई Mumbai;दिनांक Dated : 06/09/2022  
Sr.PS. Dhananjay

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

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

**आदेशानुसार/ BY ORDER,**

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