

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI VIKAS AWASTHY, JUDICIAL MEMBER**

**ITA No.7138/Mum/2019
(Assessment Year :2013-14)**

ACIT-19(2), Mumbai Office of the ACIT-19(2), Mumbai 2 nd floor, Room no. 207, Matru Mandir, Tardeo Road, Mumbai-400007	Vs.	Smt. Padmini Somani 131/132,13 th Floor, Laxmi Vilas, 87, Nepean Sea Road, Mumbai-400006
PAN/GIR No.AALPS0212R		
(Appellant)	..	(Respondent)

Assessee by	Mr. Niraj Seth, Adv.
Revenue by	Mr. Dharmvir D. Yadav, Sr. AR
Date of Hearing	17/10/2022
Date of Pronouncement	26/10/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No. 7138/Mum/2019 for A.Y. 2013-14 arises out of the order by the Id. Commissioner of Income Tax (Appeals)- 51, Mumbai in appeal No. CIT(A)-51/IT-132/ACIT-19(2)/17-18 dated. 16/08/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/03/2016 by the Id. Commissioner of Income Tax-19(2), Mumbai (hereinafter referred to as Id. AO).

2. The Revenue has raised the following grounds of appeal:-

1. *"Whether on the facts and facts and in the circumstances of the case and in law, Ld. CIT(A) erred in not upholding the action of the AO in recalculating the purchase price of the shares at Rs.2.69 per share disallowance of long Term Capital loss (LTCL) resulting in the LTCL of Rs.2.69 crs.?"*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) is justified in allowing the appeal of assessee holding that assessee had made similar investment in another company which has yielded profit in assessment year 2017-18 without appreciating, that does not make losses of assessee genuine?"*

3. *The appellant craves leave to amend or alter or add a new ground which may be necessary.*

3. We have heard rival submissions and perused the materials available on record. We find that assessee is deriving income from salary, capital gains and other sources. The return of income for the A.Y.2013-14 was filed by the assessee on 31/07/2013 declaring total income of Rs.36,70,750/-. The assessee claimed long term capital loss of Rs.2,68,26,678/- on sale of shares of Pyxis Systems Pvt. Ltd., The Id. AO sought to examine the veracity of these losses and sought to verify the details of purchase as well as sales of these shares during the course of assessment proceedings. The assessee submitted on 11/10/2011 & 02/12/2011 that she had invested in 1944599 shares of Pyxis Systems Pvt. Ltd., at a cost of Rs.2,99,46,827/- on the basis of negotiated price as advised by her advisor to whom an advisory fee of Rs.10,09,451/- was paid. These shares were acquired by the assessee at a premium of Rs. 14.40 per share for the face value of Rs.1/- per share. It was submitted by the assessee, that being a private equity investor, she had been making investments in various start-up companies based on advices given by various people including her own advisors. Since this start-up company (i.e. Pyxis Systems Pvt Ltd) could not improve its performance after the

investments made by the assessee, the assessee on 26/02/2013 sold these 1944599 shares at Rs.0.014 per share for consideration of Rs.27,224/- to Mr. Nandlal Bhatkar who is a promoter shareholder and Director of Pyxis Systems Pvt. Ltd. The assessee furnished the share valuation certificate dated 19/12/2012 obtained from an independent Chartered Accountant who has certified the book value per share of Pyxis Systems Pvt. Ltd., at the time of sale at Rs.0.0149 per share. The Id. AO observed that similar valuation certificate was not obtained at the time of making investment in shares at a premium by the assessee. Accordingly, the purchase price paid by the assessee was sought to be disputed by the Id. AO as the said company was having accumulated losses of Rs.22.92 Crores even at the time of making investments. Hence, in the opinion of the Id. AO, there was no justification for the assessee to make investments in the said company i.e. Pyxis Systems Pvt. Ltd., at a premium. Accordingly, he concluded that the purchase price at Rs.15.40 per share was grossly overvalued. The Id. AO sought to obtain information u/s.133(6) of the Act from Pyxis Systems Pvt. Ltd., to understand the entire transactions of the assessee with the said company. No response was received from Pyxis Systems Pvt. Ltd for the notice issued u/s.133(6) of the Act. The Id. AO based on the valuation report obtained by the assessee from an independent Chartered Accountant at the time of sale, wherein the book value per share of Pyxis Systems Pvt. Ltd., as on 31/03/2011 was arrived at Rs 2.69 per share, substituted the said rate of Rs 2.69 per share to be the purchase price of shares and recalculated the long term capital loss of Rs.2,68,26,678/- as against the figure claimed by the assessee while completing the assessment.

3.1. The assessee submitted the rationale for making investments in Pyxis Systems Pvt. Ltd., as under:-

“In FY 2011, the appellant has invested 19,44,599 shares of Pyxis Systems Private Limited at a cost of Rs. 2,99,46,827/- Pyxis was established in 2004 by Nandlal Bhatkar, Pyxis is a specialized player in technologies for Global Markets Front Office and Market Risk, related to cash and derivatives instruments. Pyxis delivers Derivatives and Risk Management services and KPO. It includes Domain and Technology Solutions, Independent Valuation/Hedge Accounting and front/Mid-office outsourcing. Pyxis is a platform based service provider to the Financial Services industry in areas such as equity, forex, commodities and interest rates. It started off from an IT product company by building an IT platform, RisKompass (an ERP for the risk management function it treasuries, banks and corporates), InoPot (IT platform for pricing and mark-to-market for equities and forex) and EMS (Exposure Management System)

The appellant invested based on the performance at the time of purchase and the expected performance / profitability over the years on the basis of the business plan. In FY 2010-11, the total revenue of the company was Rs. 8.68 Crores with loss of Rs. 3.44 Crores.

Valuation of companies in early growth stage is an art and a science as most companies are loss making but command premium valuations based on its future growth potential. Companies like Snapdeal & Flipkart has grown 680% and 531% respectively, in 2015 from 2014, while Ola's valuation rose 109% during the same period and are valued at 2x to 20x one year forward revenue despite incurring huge operating losses. These companies have been raising subsequent rounds of funding at substantially higher valuations despite their financials continuing to remain negative.”

3.2. The assessee also submitted the investment at the time of purchase as under:-

“The assessee rolled upon the advisory services of its investment manager Lumis Consulting Private Limited (Lumis) to advise it on the investment strategies.

The assessee paid advisory fees of Rs. 10,09,451/- to Lumis for advising it on investments @3% of cost plus service tax @12.36%. The rate at which advisory fees is paid is as per the prevailing rates paid for similar advisory services:

Regarding the background of Investment Manager - Lumis Partners, we submit that founded in 2006, Lumis Partners is in Operating Private Equity player with

specific focus on few sectors including education & human capital services, Service & Supply chain management and technology and consulting.

All the above details were submitted to the Ld. AO during the course of the assessment proceedings. Further, we also submitted to the AO, a report of Gartner, a globally renowned Independent research and advisory firm providing information technology related insights, in its report dated 07.04.2011, named Pyxis as one of the 'Cool Vendors in Application Services, 2011).

In view of the above, considering the growth potential of the company, the sector it caters to, pedigree of promoter, existing marquee investors, overall macro scenario, draft Term sheet which Pyxis had from Singapore based PE Fund by name Ojas Ventures (which incidentally was at higher valuation than entry price of MS. Padmini Somani) and on the advice of Investment Manager - Lumis, the assessee invested Rs. 3 Crores in Pyxis at Rs. 15.40/Share.

Further, some of the other Investors in Pyxis are as under.

<i>Sr. No.</i>	<i>Investor</i>	<i>Date of Investment</i>	<i>Amount Invested (Rs.Cr.)</i>	<i>Investment</i>
<i>1</i>	<i>Arvind Sethi</i>	<i>Aug-06</i>	<i>0.46</i>	<i>19.95</i>
<i>2</i>	<i>Janak Desai</i>	<i>Dec-06</i>	<i>1.38</i>	<i>19.50</i>
<i>3</i>	<i>Girish Kulkarni</i>	<i>Nov-08</i>	<i>0.17</i>	<i>19.50</i>

Brief profile of the above Investors is as under:

1.Mr. Arvind Sethi is a Director of Old World Hospitality India Pvt. Limited. Mr. Sethi is a Director of Rabo India Finance Limited, Rabo India Securities Pvt. Limited, and the Association of Mutual Funds in India. Previously, he was the Managing Director and Chief Executive Officer of Tata Asset Management Limited, also served as its Associate Director, Managing Partner at CAPM Consulting, Managing Director of Global Financial Markets at Bank of America, Treasurer at ANZ Grindleys, Head of Retail Banking at HSBC India, Associate in the firm's debt capital markets team and had also served as the Treasurer, Manager of Foreign Exchange at Grindlays Bank plc. Mr. Sethi earned an M.B.A. in Finance from INSEAD and an M.A. and a B.A. (Honors) degree in Philosophy, Political Science, and Economics from the Oxford University.

2. Janak Desai

Janak Desai is the Country Head of Wholesale Banking. Previously head of Financial Markets, Mr Desai is now responsible for the overall Wholesale Banking platform including Corporate and Investment Banking, Emerging Corporates, Wholesale Banking Products, Banks and Financial Institutions, and the Financial Markets business. Desai joined ING Vysya Bank from IDBI Bank where he was Country Head of Treasury from January 2001.

3. Girish Kulkarni:

An, alumnus of IIT (Bombay) and IIM (Ahmedabad), Girish has held several senior positions in different companies before starting his own Fund

Management Activity. Having supported and advised several start-ups, Girish has rich experience in creating and supporting entrepreneurs. A successful Investor, Girish wants to make that change and is willing to travel any distance to make it happen.

3.3. The assessee also submitted the reasons for exiting from the said investments as under:-

Reasons for exit:

a. Over the last decade, India has emerged as one of the top destinations for private equity investment. In FY 15, the country received \$22.4 Bn. In investments i.e. 47% increase over the previous year.

b. India has the fundamentals-large population that is young with rising incomes, increasingly online and consuming more-that make it one of the most interesting countries to invest in for investors with a long-term investment horizon and appetite.

c. However, this industry is subject to various macros factors that affect outcome of the investment. Some of the risks associated with PE investment include:

i. PE investments are illiquid as EXIT is dependent on conducive market environment and various external factors apart from performance of the Company.

ii. Such investments offer high risk - high reward as the subsequent rounds of valuation and exit are subject to the company being able to bring in new investors.

d. The global markets were in a turmoil post 2012. This impacted the growth of many promising companies in growth stage including Pyxis.

e. The Company was unable to acquire the targeted orders from potential customers leading to de-growth in the revenue.

f. In order to reduce its costs, the company reduced its employee strength by -50%.

g. However, due to the poor financial position and high attrition the company was unable to attract funding from external investors to continue its operations and maintain its growth.

h. The Company received an offer from Polaris to purchase the business (only assets) on going-concern basis for Rs. 3.5 Cr. The funds were needed to discharge outstanding liabilities including secured creditors & statutory liabilities. Post the transaction there would be no assets or Operating business left in the Company.

i. As the company was not receiving positive feedback from other external Investors and was in dire need for funds, it was keen to accept the offer presented by Polaris.

j. Despite being long term value investors, considering the financial position of the company and need of the hour, the investors including the appellant (based on the advice of its Investment Manager-Internal note dated 05.02.2013 enclosed along with other marquee investors like Janak Desai, Arvind Sethi & Girish Kulkarni agreed to sell their stake to Mr. Nandlal Bhatkar at NAV (Rs. 0.014/ Share) to facilitate this transaction.

3.4. Accordingly, it was submitted that assessee had proper rationale and justification for making investments in the shares of Pyxis Systems Pvt. Ltd., at Rs.15.40 per share considering the future potential of the said company. However, based on the macro factors and global turmoil experienced post 2012 which affected the start up companies like Pyxis Systems Pvt. Ltd., the said company was unable to achieve its target orders which lead to double reduction in its revenue. Under these special circumstances, the assessee had to sell its investment at a market price of Rs.0.014 per share only to the promoters as there were no buyers for the same. The assessee and the promoters of Pyxis Systems Pvt. Ltd., were not related in any manner whatsoever and hence, these transactions could not be construed as a pre-arranged transaction by any stretch of imagination. It was submitted that it was a genuine investment loss incurred by the assessee. The assessee also placed reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs. Sriram Investments reported in 77 taxmann.com 113 wherein it was held that the Id. AO could not reject sale of shares at a lower price without producing supporting documents to rebut such claim. The assessee also placed on record the provisions of Section 56(2)(viib) of the Act before the Id. CIT(A) wherein it was submitted that when the shares are issued at a price which exceeds face value of the shares, the consideration received which is in excess of book value would be added in the hands of the issuer company i.e. Pyxis Systems Pvt. Ltd., Hence, it was submitted that the excess of Rs.12.71 per share being the difference of issue price

of Rs.15.40 and book value of Rs.2.69 calculated by the Id. AO could only be added in the hands of Pyxis Systems Pvt. Ltd., and not in the hands of the assessee. Further, the assessee also submitted that apart from the investment made in Pyxis Systems Pvt. Ltd., she had also made other private equity investments in the shares of the following companies:-

<i>Investments made in</i>	<i>Year of Investment %</i>	<i>Year of Sale</i>	<i>Sold for</i>
<i>People Strong HR Services Pvt. Ltd.</i>	<i>Beginning from FY2012-13</i>	<i>FY2016-17</i>	<i>Gains of Rs, 17.45 crores, offered to tax</i>
<i>Anna Education Services Pvt. Lid.</i>	<i>FY 2014-1 5</i>	<i>Held till date</i>	<i>Not Applicable</i>
<i>High Ground Enterprises Ltd.</i>	<i>FY 201 5-1 &^</i>	<i>Held till date</i>	<i>Not Applicable</i>

3.5. Considering these facts, the Id. CIT(A) had granted relief to the assessee. Aggrieved, the Revenue is in appeal before us.

3.6. At the outset, we find that the Revenue is only seeking to disturb the purchase price of acquisition of shares paid by the assessee @15.40 per share in view of the fact that the company in which assessee had invested is a loss making company and did not command any investment at a premium. It is not in dispute that the payment for acquisition of shares has been made by the assessee out of disclosed sources and there is absolutely no element of any undisclosed income thereon. Now, the primary question that needs to be addressed in this regard is as to whether the Revenue could at all disturb the purchase price of acquisition of shares within the mandate provided in the Act. In our considered opinion, the answer is an emphatic 'no' in as much as there is no

provision in the Act warranting to disturb the purchase price of shares by the assessee. What is required to be seen is whether the assessee had sufficient sources for making such investment in shares. As stated earlier, there is absolutely no dispute that payments for acquisition of shares at Rs.15.40 per share had been duly met out of disclosed sources of the assessee. Moreover, it is also pertinent to note that the said investment had been made by the assessee in A.Y.2012-13 i.e. the earlier year. We find that assessee had duly explained the rationale behind making investment in the shares of Pyxis Systems Pvt. Ltd., at a premium, based on the advice given by certain parties and after analysing the various reports that are made available to her by her advisors and had also taken cognizance of the strength of the promoters of the said company and their capabilities. The assessee had also furnished the proper reasons for exiting out of her investment from the said company. None of these explanations furnished by the assessee were found to be false by the Revenue. Hence, it was only the failed investment deal of an assessee being a private equity investor, which had resulted in incurrence of loss for the assessee which is claimed as a long term capital loss by the assessee. We further hold that there is absolutely no basis for the Id. AO to arrive at the revised book value per share at Rs.2.69 per share based on the financials as on 31/03/2011 of Pyxis Systems Pvt. Ltd., and concluding that the said rate should be the fair market value which the assessee ought to have paid for the purpose of making investment in shares. If this is to be accepted then what will happen to the remaining money paid by the assessee towards acquisition of shares? The order of the Id. AO is completely silent on this aspect. Hence, we conclude that the Id. AO does not have any power to substitute the purchase price of shares with a different value than the value at which actually it was paid. We hold that the Id. AR was justified in placing reliance on the decision of the

Hon'ble Madras High Court in the case of CIT vs. Sriram Investments reported in 77 taxmann.com 113. The relevant question raised before the Hon'ble Madras High Court and its decision thereon are as under:-

4. *Whether on the fact and in the circumstances of the case, the Income Tax Appellate Tribunal was right in deleting the dis-allowance of Long Term Capital Loss of Rs. 3,98,07,218/- on account of sale of shares to a sister concern without applying the ratio of the Supreme Court's decision in the case of Aishini Least Finance P. Ltd., (309 I.T.R. 320)?*

4.
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“Adverting to question No. 4, the brief facts are as follows:—

The assessee/respondent is a Non Banking Financial Company engaged in the business of hire purchase, financing, leasing and investments. By virtue of guidelines issued by the Reserve Bank of India, Non Banking Financial Companies (NBFC) were required to concentrate on core financing business and exit from manufacturing and other activities. The assessee consequently wished to divest its shareholding in Shriram Auto Components (Madras) Limited (name changed to Rambal Limited) and Shripet Cybertech Systems Limited. The shareholding of the assessee in the aforesaid two companies was valued at the figure of Rs. 1/- per share and the sale resulted in a capital loss of an amount of Rs. 3.98 crores (Rs. 2.88 + 1.10 crores).

5. *During the course of assessment, the Assessing Authority raised a query on the allowance of capital loss on the sale of shares, specifically on the valuation adopted. The justification provided by the assessee in respect thereof reads thus:—*

"The company is a manufacturer of Automobile components. We had acquired 10 lakhs shares in this company at a cost of Rs. 100 lakhs in the year ended 30.03.99. The company had been incurring losses every year and had not declared any dividend since its inception in 1996. The accumulated debit balance in Profit & Loss Account as on 31.03.04 amounted to Rs. 594 lakhs against the share capital of Rs. 1288 lakhs. There was no return for us from the investment in the company. Further, due to the guidelines of Reserve Bank of India, we a Non Banking Financial Company had to concentrate on our core financing business and had to exit from manufacturing activities. There was no scope for the sale of these shares in market. In these circumstances, we had to sell these shares @ Rs. 1 per share and exit from the company.

Shripet Cybertech Systems Limited has been manufacturing pet bottles and had made very insignificant profits till 31.03.03 and had not declared any dividend since its inception. In the year ended 31.03.04, it had incurred a huge loss of Rs. 1,14,59,899/-. Due to loans, there has been erosion in share capital. We had acquired 683600 shares in this company for Rs. 68,36,000/- during the year ended 30.06.96 and we had not received any return from this investment. Further due to

the guidelines of Reserve Bank of India, we, a Non Banking Financial Company had to concentrate on our core financing business and had to exit from manufacturing activities. Though the equity shares of the company have been listed in the Madras and Ahmedabad Stock Exchanges, there were no transactions in the stock exchanges since April 2002. Hence there was no market for the shares. In these circumstances, we had to sell the shares @ Re.1 per share and exit from that company."

6. The assessee thus explained that the two companies were either incurring loss or making insignificant profits and neither had declared dividend since inception. Thus, though the equity shares of one of the companies were listed in the Madras and Ahmedabad Stock Exchanges, there had been no transactions in the said stock exchanges since April 2002 and hence there is no market for the shares. The shares were thus valued nominally for a price of Re.1/- per share. The Assessing Authority did not dispute the factum of sale. The only query raised at the stage of assessment was in regard to the value adopted, at a figure of Re.1/-, as against the face value of Rs. 10/- per share. He, thus, rejected the claim of long term capital loss, not permitting the assessee to carry forward and set off the same in future.

7. An appeal was filed before the Commissioner of Income Tax (Appeals) (in short 'the CIT (A)') that was allowed by order dated 24.12.2008, holding that the valuation adopted by the assessee appeared to be acceptable in the light of the justification offered by the assessee and also specifically noting that though the assessing officer rejected the valuation adopted by the assessee, he had not offered or arrived at any other alternative. The order of the CIT (A) was assailed before the Income Tax Appellate Tribunal, (in short, 'ITAT'), which by order dated 26.03.2010 confirmed the same, reiterating the findings of the CIT (A) to the effect that the valuation was in order. The Tribunal particularly notes that though a suspicion had been raised by the Assessing Officer regarding the valuation of the shares, nothing was placed on record to substantiate such suspicion or provide a more acceptable alternative. It is, in this background, that the Revenue is now before this Court.

8. We are of the view that the Assessee had provided an acceptable justification for both transactions of sale of shares including the aspect of valuation of the shares. The Assessing Authority, while accepting the genuineness of the transactions, merely raises a vague suspicion relating to the valuation adopted by the assessee. This, by itself, is insufficient to reject the claim of capital loss. While the Assessing Officer is certainly entitled to question the valuation, he ought to have produced some materials to either disprove the justification offered by the assessee or to substantiate his doubts. A mere suspicion, however strong it might appear, cannot take the form of a substantiated opinion sans supporting materials and hence it cannot form the basis for rejection of the claim.

9. The Standing Counsel appearing for the Department relied upon a judgment of the Supreme Court, in Civil Appeal Nos.3343 and 3344 of 2008, dated 06.05.2008, in the case of CIT v. Ashini Lease Finance (P.) Ltd. [\[2009\] 309 ITR 320](#), in support of his contention. On a perusal thereof, we find that the facts are distinguishable from the facts of the present case. The assessee, in that case, borrowed funds from its sister concerns, which were deployed towards purchase of equity shares in a company called AEC Ltd. Deduction of interest paid to the sister

concerns was claimed. Investigations carried out by the Department revealed that the entire exercise was only to enable the take-over of AEC Ltd by the sister concerns and that the transaction was a mere sham. The assessing officer had marshaled sufficient facts to indicate that the assessee in that case was a mere conduit and recorded a finding to such an effect. It was in the aforesaid circumstances that the Supreme Court concluded that the transaction 'would indicate circular trading entered into solely with the idea of evading tax'. Such a finding based on factual records is conspicuous by its absence in the present case.

10. Further more, the question of valuation in itself, is a pure question of fact particularly, when the same has been concurrently accepted by both the lower appellate authorities. No perversity has been either alleged or made out at any stage in appeal. We agree with the conclusions of the ITAT and are of the view that no substantial questions of law arise for consideration."

3.7. In view of the aforesaid observations and respectfully, following the judicial precedents relied upon hereinabove, the grounds raised by the Revenue are dismissed.

4. In the result, appeal of the Revenue is dismissed.

Order pronounced on 26/10/2022 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 26/10/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai