

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER**

ITA NO.1846/MUM/2022 (A.Y: 2015-16)

ACIT – 15(1)(1) Aayakar Bhavan, M.K. Road Mumbai - 400020	V.	Gauri Tandon Tandon Beach House Plot No. 35(PT), Aajad Road Juhu Koliwada, Santacruz (W) Mumbai - 400049 PAN: AAAPB4013C
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Vijay Mehta
Department Represented by	:	Shri Smiti Samant
Date of Hearing	:	06.12.2022
Date of Pronouncement	:	18.01.2023

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 22.05.2022 for the A.Y.2015-16.

2. Brief facts of the case are, assessee filed her return of income on 07.01.2016 declaring total income at ₹.22,57,43,956/-. The case was selected for limited scrutiny under CASS for the Large Deduction u/s.54B, 54C, 54D, 54G, 54GA, Large Value Transactions, Large Value of Commodity Exchange transactions, Large long term capital gains and High ratio of refund to TDS. Accordingly, notices 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee. In response, authorised representative of the assessee attended and filed relevant information as called for.

3. Further, a reference was made u/s 90 of the Act under Indo Singapore DTAA to the FT & TR on 21.12.2017. In response, several clarifications in regard to the information sought were sent by the FT & TR on various dates as mentioned in the Assessment Order and major informations are not received by the Assessing Officer till completion of the Assessment Order. Assessing Officer also collected third party information u/s. 133(6) of the Act from Jasper Infotech Ltd, HDFC Bank and Bombay Stock Exchange. All the parties responded and the informations were taken on record.

4. The assessee is an individual with high volume of investments in shares. During the assessment proceedings, Assessing Officer observed that the assessee purchased 8400 ordinary shares of M/s Accelyst PTE Limited (Singapore Company) in F.Y 2011-12 at the cost of \$1 per share. Subsequently, on 11.02.2014 the 8400 shares were further sub-divided into 8400000 ordinary shares in the F.Y 2013-14. As per share certificate No. 15 dated 11.02.2014 the share valuation of each share was \$4.17 as per the valuation report by Corporate Professionals dated 22.12.2017. These shares were then sold to Jasper Infotech Ltd. at \$3,49,72,754 as per the Share Purchase Agreement dated 11.03.2015. Accordingly, assessee calculated a long term capital gain of ₹.218,55,80,721.

5. The Assessing Officer observed that assessee purchased 6,26,125 shares of Tech Mahindra Ltd. [TML] and 7,34,875 shares of HCL technology [HCLT] on 17th and 18th March, 2015. The shares of TML underwent a split in a ratio of 1:2 and thus, the total shares of TML in the assessee's possession as on 18th March were 12,52,250. The shares of HCLT and TML further issued a bonus in the ratio 1:1. Accordingly, assessee received 7,34,875 more shares of HCLT as bonus and 12,52,250 more shares of TML. The total shares in the possession of the assessee are as per below table: -

SPLIT AND BONUS OF SHARES OF HCLT AND TML

	Original	Split	Bonus	Total Shares in Possession
HCLT	7,34,875	-	7,34,875	14,69,750
TML	6,26,125	12,52,250	6,26,125	25,04,500
Total	13,61,000	12,52,250	13,61,000	39,74,250

6. The assessee sold the original shares of HCLT and TML on the 19.03.2015, 20.03.2015 and 23.03.2015 by adopting the value of shares of original shares held by the assessee and retained the bonus shares at NIL value. Therefore, assessee declared loss in these transactions. Assessing Officer observed that the loss of ₹.171.68 crores was set off by the assessee with long term capital gain of ₹.218 crores and after taking deduction of ₹.25 crores u/s. 54 of the Act and declared the capital gain of ₹.22.1 crores.

7. The Assessing Officer is of the opinion that the transactions in the shares are to be treated as business income not as under the head "capital gain". In this regard he is of the opinion that assessee has purchased shares of M/s Accelyst PTE Limited. in the F.Y 2011-12 and sold the same in this particular Assessment Year and earned a capital gain of ₹.218 crores which should have been offered to tax at 20% under Income-tax Act. However, in order to reduce this tax liability of capital gain, the assessee entered into the purchase of only two shares i.e HCLT

and TML on the 17.03.2015 and 18.03.2015. Further, he observed that the securities of HCLT were to be issued a bonus was an information available in the public domain. Similarly, the informations of split and issue of bonuses shares of TML were also available in the public domain. He observed that it is fact that when the split and bonus shares are issued the value of shares will decline. Therefore, assessee has taken an advantage of the above facts and accordingly, claimed the loss. Therefore, the intention of the assessee was not in the nature of capital asset but rather an "adventure in the nature of trade" as specified u/s.2(13) in the definition of "business". He relied on the CBDT Circular No. 6/2016 dated 29.02.2016 and other case laws.

8. The Assessing Officer asked the authorised representative of the assessee as to how the exact calculation in terms of treating the original shares as well as bonus shares as stock in trade of the assessee. In this regard they filed a submissions vide letter dated 24.12.2018, for the sake of clarity it is reproduced below: -

"For the purposes of treating the shares as stock-in-trade, it can be seen that the assessee held a total of the following shares on 19th March, 2015 (being the record date):

Total TML-25,04,500

Total HCLT-14,69,750

During the calculation of capital gain, the cost of acquisition of the bonus shares Le (12,52,250 of TML and 7,34,875 of HCLT) is being treated as 0. But for the purposes of business income, the cost of the shares ie bonus + split + original will be equalized i.e

The total cost of 25,04,500 shares of TML The cost at which 6,26,125 shares of TML were purchased on 17/18th March, 2015.

Similarly, The total cost of 14,69,750 shares of HCLT - The cost at which the original 7,34,875 shares of HCLT were purchased on 17/18th March, 2015.

Based on the above, the cost per share will be calculated. Further, from the sale of shares on 19th March, the respective business loss shall be computed and shares which were not sold in March, 2015 but rather were sold in April 2015, will be treated as the Closing stock of A.Y 2015-16 and the opening stock of A.Y. 16-17":

9. After considering the submissions of the assessee, Assessing Officer observed that the cost of the bonus shares as well as the original shares is equalized instead of the treatment by the assessee of treating the cost of original shares at the original price and treating the cost of bonus shares at zero and thus, the loss of ₹.171.62 crore which is not an actual loss borne by the assessee but a mere change in the accounting treatment of the shares of TML and HCLT is not incurred with the above mentioned treatment and accordingly, he disallowed the loss claimed by the assessee.

10. Further, he is of the opinion that the loss claimed by the assessee is bogus by relying on the various share transactions carried by the assessee during the year and also relying on the report of BSE and NSE

data. Finally, he is of the opinion that the assessee has entered into a premeditated share transaction with malafide intentions to book the loss and possibly connived with the broker and the counter parties to colour the same as a genuine transaction. By relying on the analyses made by him in his order and reached to the conclusion that the assessee executed premeditated and synchronized trades with an intention to fraudulently effect the buy and sell which ultimately resulted into the huge loss. Accordingly, he disallowed loss claimed by the assessee of ₹.171,67,95,741/-.

11. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions on the issue of transfer of shares of HCLT and TML, Assessing Officer by gathering the information from BSE and NSE came to the conclusion that these transactions entered by the assessee in violation of the provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003. After considering the submissions of the assessee Ld.CIT(A) gave a detailed finding in favour of the assessee as under: -

"7.4 In order to decide this issue whether the loss incurred by the appellant is genuine or a bogus loss following factors hold importance.

7.5 The appellant has submitted the copy of the transaction statement of IIFL, contract notes of HCL & TML. The Ld. AO in her

assessment order has never doubted the genuineness of the documents. The transaction is carried on a recognized stock exchange. The shares are credited in the Demat account of the appellant. It is an established principle that while testing whether a transaction in shares is a genuine transaction the following has to be verified:

- i) Shares are transacted at a recognized stock exchange.*
- ii) Transaction of shares reflect in Demat account.*
- iii) There is actual delivery of shares.*
- iv) The purchase is done on market and not off market.*
- v) The payment is done through banking channel.*

In the case of the appellant all the conditions are fulfilled. There are no red blinkers that indicate that the transaction is bogus. Further, the shares transacted are very reputed company shares and not any penny stock company shares. The stock broker engaged by the appellant is also a reputed one with no known history of any fraud or involvement in bogus transactions.

7.6. The Ld. AO has alleged that the appellant has indulged in reversal trade. Here it becomes important to examine whether there is any reversal trade. As per the definition, reversal of trade implies that for a buying transaction initially entered upon by a broker for a particular client for a specific quantity, there is a corresponding sale transaction that takes place during the day for the same quantity between the same set of broker/clients and vice versa. In reversal trade there is no actual transfer of ownership of the shares. In the facts of the appellant, nothing is brought on record by the Ld. A.O. to prove that the ownership of shares is not transferred. Moreover in none of the parties, the number of shares purchased is equivalent to the number of shares sold to the same parties. Hence, the statement of the Ld. AO of reversal trading is found to be incorrect.

7.7 The Ld. AO has not brought anything on record to prove that the appellant along with the brokers/counter parties has indulged in manipulated transaction. There are no documents/evidences to justify that broker, counterparties and appellant were involved together in these transactions. The Ld. AO has not provided any statement recorded on oath wherein any of the parties have stated that the arrangement was made for booking of loss. The entire allegation is based on the working made by the Ld. AO which fails to prove that transactions are not genuine.

7.8 The broker of the appellant is M/s. IIFL whereas broker of the counter parties is M/s. Edelweiss Ltd. Accordingly, the brokers who are involved in the transactions are recognized brokers in the market with no history of fraud or bad reputation. The appellant and the counter parties have different brokers. In stock market, the person who is buying the shares are not aware who is selling the shares since the trading is computerized and there are millions of investors who are investing/selling every minute. Thus, without any corroborative evidence on record that the appellant has colluded with the stock brokers and the counterparties, it cannot be alleged that appellant has manipulated the transaction on the stock exchange.

7.9 The observation of the Ld. AO that beneficial ownership was not transferred is also found to be incorrect since on perusal of the transaction statement, it is evident that the shares were transferred and the same were held by the appellant in her own name.

7.10 Further, the most prominent point which the appellant has brought to my notice is that bonus shares of the same companies i.e. HCL & TML are sold in the next assessment year i.e. AY 2016-17. The appellant had offered an income of Rs.147,87,39,819/- on the sale of the said shares and the same was accepted by the Learned AO at the time of passing the assessment order of A.Y. 2016-17 u/s. 143(3) of the Act dated 29.12.2018. The appellant has submitted computation of income and the assessment order of AY 2016-17 from page no. 12 to 19 of the Paper Book. On perusal of the same, I am of the view that the Ld. AO has failed to take a consistent view by not allowing the losses in AY 2015-16 but by taxing the said gain of Rs.147,87,39,819/- in A.Y. 2016-17, wherein apart from declaration of loss in one year and gain in another, all other circumstances have been exactly same. Hence, it is seen that when there was a loss, the Ld. AO treated the loss as bogus loss whereas when there was a gain, the same was accepted by the Ld. AO. The treatment given by the Ld. AO is inconsistent. The approach of the Ld. AO is not found to be correct.

7.11 The stock traded by the appellant is the stock of reputed company. It is not a penny stock. The genuineness of the transaction was not doubted by the Ld. AO at the time of sale of bonus shares in next assessment years.

7.12 As far as statement of the Ld. AO is concerned that the appellant has violated the provisions of SEBI (P FUT P) Regulations, 2003, the Ld. AO has not brought anything on record how the said provisions are applicable to the facts of the case. The appellant was asked to bring on record if SEBI has issued any notices to the appellant or her broker. It was submitted that SEBI has not issued any notices to the appellant or to her broker regarding the violation

of the said regulations. Neither any such evidence regarding violation of provisions of SEBI has been brought on record by the Ld. AO. I also tried to find any such notices/objections raised by SEBI on the appellant or her broker which might be present online or in public domain. But no such records against the appellant or her broker are found. Further, as per the submission of the appellant, till date also the appellant has not received any notice from the SEBI. If the prescribed authority itself is not alleging that a particular person has made any violation of the regulation, than the allegation made by the Ld. A.O. are merely surmises without backed by any evidence.

7.12. Further it is seen that the show cause notice wherein it is alleged that the appellant has violated the provisions of SEBI was also issued for A.Y. 2016-17, However, for AY 2016-17, the income offered by the appellant was accepted by the Ld. A.O. without any adverse findings. This is contradictory given that the same AO has passed orders for both the years under exactly same facts and circumstances. There are no proved bogus transactions. But the differential treatment as visible from examination of records available before me is only due to booking of profits in one year while losses in another.

7.13 However, in the face of circumstances and evidences present it cannot be denied that the appellant has sold the shares at a time which was effectively planned in a manner to give rise to losses. However, it is not mentioned anywhere that any party involved in share trading cannot make sale giving rise to losses. In fact, as a general principle no one likes to make losses. However, there is also no denying that the sale is planned by the appellant at a time when she could book losses. However, this planning has been legitimately done, without violation of any rules and regulations within the four walls of law. However, the same can be only categorized under tax planning and not a case of tax evasion. It is pertinent to note that tax planning is a completely legitimate instrument the benefit of which cannot be denied to any assessee.

7.15 Based on the above facts, I am of the view that the Ld. AO has erroneously treated the short term capital loss of Rs.171.62 crores as bogus loss."

12. With regard to observation of Assessing Officer that loss claimed by the assessee ought to be business loss and not a short term capital loss;

in this regard, after considering the detailed submissions of the assessee,

Ld.CIT(A) decided the issue in favour of the assessee as under: -

"10. I have considered the facts of the case, submissions of the appellant, the observation of the AO contained in the assessment order and the other materials on this issue.

11.1 On perusal of the Balance Sheet submitted by the appellant in the Paper Book from pg.no.6 to 10, it is evident that the appellant has characterized all its investments under the head investment and not as stock in trade. Accordingly, the portfolio of the appellant was of investment and not that of trading.

11.2 The issue raised by the Ld. AO in the assessment order regarding treatment of profits and losses arising out of the said transactions as business income/loss is not supported by any evidence. It is pertinent to note that the appellant has not been in a business of share trading. Further the shares/ securities held by the appellant are characterized as investment in her books of account and balance sheet. This shows that the intention of the appellant was to invest and to have capital appreciation. The accounting treatment provided by the appellant is very important factor in determining whether the income from sale of shares is to be treated as business income or capital gains income. Simply because, the appellant has done the transactions in a span of 10 days, cannot make it in the nature of business activities. Hence, the losses booked by the appellant can neither be termed as business loss, not as fraudulent simply for the reason that she has booked huge short term capital loss and the same has reduced the profit from Capital gains during the year thereby bringing the tax liability down. It is very important to note that if an assessee uses the instrument of law to set off her/his losses, he is within the framework of law and the activities cannot be termed as fraudulent merely on the premise that losses have been booked.

11.3 Further it is seen that the appellant has not earned any business income during the year under consideration. The appellant is partner in partnership firm M/s. Western Enterprises. She also claims to a company known as Reliable Fashion India Pvt. Ltd which is in the business of imitation jewellery. The appellant has bought and sold shares of two scrips namely HCL and TML. The appellant is not a regular trader in the shares. The issue of classification of income on sale of shares as business income or as short term capital gains is to be decided based on the facts of each case. There is no provision under the Act which states that for determining short term capital gains on sale of shares. investment in shares are to be held

for a particular period of time. It can be for a month, for a year or for a week. The nature of income/ loss shall not change merely on the fact that the appellant has not held the investment for a long period of time or has held it for a very short period of time. If the contention of the Ld. AO is accepted then this would be contrary to be legislative mandate which itself provides that when the investment is held for less than 12 months, it is to be termed as short term capital asset.

11.3 The test to be applied for such determination is provided in CBDT Circular No.4 of 2007. The Circular provides the appellant the choice to maintain two portfolios one for trading and one for investment. The appellant has clearly maintained the portfolio of an investor in both the AYS i.e. AY 2015-16 and AY 2016-17. CBDT has also made it clear that once the portfolio has been decided by the assessee, he cannot change it later. The appellant has maintained consistency in this regard. However, the Ld. AO has failed to take a consistent view in the appellant's case by accepting her income under Capital Gain in the AY 2016-17 and treating the losses for AY 2015-16 under Business Activities.

11.4 Further, if the contention of the AO that the appellant is indulged in trading of shares is to be considered, than the Ld AO should have treated the income from sale of shares of Accelyst PTE Ltd. as business income of the appellant. However, the gain on sale of shares was treated as capital gain income only and not as business income. even in this scenario, the Ld. AO has taken an inconsistent view.

11.5 Further, the Ld.AO has treated the gain on sale of bonus shares in the subsequent year where the holding period was 14 days as capital gains income only. Thus the approach of the Ld. AO is clearly inconsistent. The Ld. AO cannot on its own whims and fancies treat the income as a capital gain income for one year and the losses as business losses in another year. In view of the above, the Ld. AO's argument that the sale of shares within a very short span is in the nature of business venture cannot be proceeded with.

Accordingly, based on the above facts, I am of the view that loss from sale of shares of HCL and TML is short term capital loss and not business loss.

Accordingly, Ground No. 2 is allowed in favour of the appellant."

13. Aggrieved revenue preferred appeal before us raising following grounds in its appeal: -

"(i) Whether on the facts and in the circumstances of the case and in law, the Ld. CMA) has erred in treating the loss of Rs 171.68 crores declared by the assessee as Short Term Capital Loss and not as profit/loss arising out of Business or profession without considering the issues raised by the Revenue against it in the appeal?

(ii) Whether on the facts and in the circumstances of the case and in law, the Ld. CITA) has erred in treating the loss of Rs 171.68 crores as a capital loss as per the assessee's contention and not as profit/ loss from business and profession arising out of adventure in the nature of trade" as specified under Section 2(13) in the definition of "business" as per the AO?

(iii) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the facts stated in the circular no. 6 of 2016 by CBDT which states that if listed shares and securities are held for a period of less than 12 months, then nature of transaction, intention/motive of assessee to realize profit/ loss would lead to inference of adventure in nature of trade rather than investment as was being treated by the assessee?

(iv) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the fact that it was apparent from the nature of the transaction of the assessee that, the intention of the transaction was only to obtain loss Rs 171.68 crores within a span of three days which is beyond any plausible explanations?

(v) The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

14. At the time of hearing, Ld. DR brought to our notice Page No. 3 of the Assessment Order wherein Assessing Officer has brought on record details of sales made by the assessee to Jasper Infotech Ltd, wherein assessee has sold the M/s Accelyst PTE Limited shares and brought on record clearly that the transactions carried by the assessee is nothing but

adventure in the nature of trade and not investment as claimed by the assessee. Therefore, as per the facts brought on record by the Assessing Officer it is only a business loss. Further, he submitted that the loss disallowed by the Assessing Officer is proper based on the facts brought on record by the Assessing Officer that this is nothing but a sham loss claimed by the assessee in order to avoid the capital gain payable by the assessee. Further, he brought to our notice Page No. 24 of the Ld.CIT(A) order wherein Ld.CIT(A) has observed that based on the circumstances and facts present, it cannot be denied that the appellant has sold the shares at a time which was effectively planned in a manner to give rise to losses. However, it is not mentioned anywhere that any party involved in share trading cannot make sale giving rise to losses. Further, he observed that, there is also no denying that the sale is planned by the appellant at a time when she could book losses and this planning has been legitimately done, without violation of any rules and regulations. He submitted that it is fact on record that he has acknowledged that assessee has planned to book losses. Further, he brought to our notice CBDT Circular No. 4 of 2007 and circular No. 6 of 2016 and he stressed on the point (iii) where it was highlighted that ordinarily the purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the

nature of trade/adventure in the nature of trade; but where the object of the investment in shares of a company is to derive income by way of dividend, etc., then the profits accruing by change in such investment will yield capital gain and not revenue receipt." By highlighting the above he submitted that the transaction carried by the assessee is in the nature of business and even otherwise the assessee has planned and booked the transactions in such a way it can take the benefit of booking the losses.

15. On the other hand, Ld. AR brought to our notice Page No. 4 of the Assessment Order and brought to our notice the investment of shares by the assessee in HCLT and TML and he submitted that the assessee has only made the investment. However, due to split of shares and issue of bonus shares which the respective companies has declared, in that process he brought to our notice Page No. 1 of the Paper Book which is 143(3) notice and he also brought to our notice Page No. 6 of the Paper Book which is also notice issued u/s. 143(3) of the Act for the A.Y. 2016-17. The same and similar issues were raised by the Assessing Officer for the next assessment year also. Further, he brought to our notice Page No. 11 of the Paper Book which is a common letter submitted by the assessee for both the A.Ys. 2015-16 and 2016-17. He brought to our notice Assessment Order for the A.Y. 2016-17, wherein Assessing

Officer has accepted the submissions made by the assessee and the assessee has sold the bonus shares by adopting the cost of acquisition at NIL. The facts in both the Assessment Years are exactly same and is no change in the method of accounting. He has also brought to our notice section 94(8) of the Act wherein the section is clearly supports the transactions carried on by the assessee, in this regard he brought to our notice decision of the ITAT, Pune Bench, in the case of Adar Poonawala *v.* Addl. CIT in ITA.No. 764/PN/2012 dated 30.01.2015. He submitted that the facts in the case of Adar Poonawala *v.* Addl. CIT (supra) is exactly similar to the facts in the present case under consideration. He brought to our notice Para No. 7 of the order wherein the assessee has earned the long term capital gain of ₹.17.32 crores and at the same time claimed the setoff of short term capital loss of ₹.14.95 crores wherein the ITAT has addressed both issues of trading the shares transactions is chargeable under the head capital gain not under the head profit and gains of business and also nature of quantification of loss incurred by the assessee on sale of shares. He brought to our notice the findings of the ITAT in detail wherein the concerns of Assessing Officer are rightly addressed by the Tribunal. Therefore, he submitted that the fact in the present appeal is exactly similar to the fact in the above mentioned case. He prayed that

the ratio of the decision may be considered for deciding the present appeal.

16. Considered the rival submissions and material placed on record, we observe from the record that no doubt assessee has sold the shares of M/s Accelyst PTE Limited to Jasper Infotech Ltd, under a share purchase agreement dated 11.03.2015 and earned a long term capital gain of ₹.218.55 crores and notice that in the same assessment year assessee has purchased from TML and HCLT shares on 17th and 18th March 2015. The respective companies have announced the split-up of shares as well as issued bonus shares to the assessee. In that process assessee acquired a split shares 1252250 shares and on issue of bonus shares 1987125 shares. During the same assessment year assessee has sold original shares acquired by the assessee of HCLT and TML and booked the loss. However, it retained the additional shares of split and bonus shares and sold the same in the next assessment year declaring the cost of purchase at NIL. However, the Assessing Officer reviewed the above transactions and came to the conclusion that the transactions entered by the assessee is sham as well as these transactions should be treated as adventure in the nature of trade and disallowed the same.

17. Ld.AR brought to our notice facts in the case of Adar Poonawala v. Addl. CIT (supra) wherein ITAT Pune Bench has considered a similar issue and decided the issue in favour of the assessee. In order to appreciate the facts in the case of Adar Poonawala v. Addl. CIT (supra) the facts in the above case and the relevant decision are reproduced below: -

"16. We have carefully considered the rival submissions. Factually speaking, shares of City Park Pvt. Ltd. sold by the assessee were neither purchased and nor acquired by the assessee on his own volition, but the same have been received as gift from his father. Notably, out of the total of 6,67,000 shares, the investee company allotted 6,66,333 shares to Cyrus S. Poonawalla (assessee's father) on 27.01.2006 on par (@ Rs.10/- each) and the balance 667 shares were allotted to him on 09.06.2006 on par. These shares were received by the assessee as a gift from him father (i.e. Cyrus S. Poonawalla) in the preceding year, i.e. on 01.09.2006. The fact-position emerging from the orders of the authorities below reveals that such shares were indeed held by assessee's father as an investment. In such a scenario, especially in the absence of any notable instances of other purchase and sale of shares of City Park Pvt. Ltd. by the assessee during the year under consideration, in our view, the onus was on the Revenue to demonstrate that the sale of shares of City Park Pvt. Ltd. by the assessee was a transaction akin to an adventure in the nature of trade.

17. The CIT(A) has observed that the investee company i.e. City Park Pvt. Ltd. is an unlisted Pvt. Ltd. Company and therefore its shares are not freely marketable or tradable. According to the CIT(A), shares of an unlisted private limited company do not have the basic characteristics of a marketable product, that are associated with the shares of a stock exchange listed company. On this aspect, we find no reason to differ with the observations of the CIT(A). The investee company, City Park Pvt. Ltd. was in the business of dealing in property, development of land, construction of building, development of industrial park, information technology park, etc.. It is emerging from the orders

of the authorities below that during the period when assessee held the shares of the said company and even during the period held by the assessee's father, the said company acquired land/other assets and undertook activities which enhanced the value of lands/other assets of the investee company, which did result in appreciation in the value of shares of the said investee company. It is, for this reason assessee canvassed before the lower authorities that he was offered a better price of the shares and therefore he decided to sell the shares held by him to Peninsula Land Ltd., when the said concern approached him. To the contrary, the plea of the Revenue is that the sale of shares of City Park Pvt. Ltd. by the assessee was intended to transfer the lands acquired by the investee company. Therefore, according to the Revenue, the shares of City Park Pvt. Ltd. were held by assessee as stock-in-trade and any sale thereof constitutes an adventure in nature of trade. We are unable to accept the aforesaid plea of the Revenue because the business and assets of a corporate entity are not business and assets of its shareholders, as held by the Hon'ble Supreme Court in the case of Mrs. Bacha F. Guzdar vs. CIT, (1955) 27 ITR 01 (SC). The CIT(A), in our view, made no mistake in disregarding the aforesaid plea of the assessee by relying on the judgement of the Hon'ble Supreme Court in the case of Mrs. Bacha F. Guzdar (supra). The following observations of the Hon'ble Supreme Court in the case of Mrs. Bacha F. Guzdar (supra) is worthy of notice, and which clearly support the conclusion of CIT(A) :-

"That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the Sholapur Mills case [1950] SCR 869 at 904. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are

entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders."

18. *On this aspect, we may also refer to the discussion by the CIT(A) in para 5.1.3 of his order wherein he has referred to the CBDT Circular dated 15.06.2007. As per the CIT(A), following the criteria laid down in the CBDT Circular, the shares in question are to be understood as 'investment' thereby giving rise to capital gain on its sale. The aforesaid finding of the CIT(A) has not been negated by the Revenue before us and is accordingly affirmed.*

19. *Another aspect raised by the Assessing Officer was that assessee or his father were not merely passive investors in City Park Pvt. Ltd. but were actively involved in the business operations of the company and therefore the shares held by them in City Park Pvt. Ltd. attain the character of stock-intrade. In our considered opinion, whether a shareholder is an active or a passive investor in an investee company is of no consequence to examine the nature of the shares held by him. In our view, the CIT(A) was justified in negating the aforesaid plea of the Assessing Officer in the process of determining the nature of the share holding of assessee in City Park Pvt. Ltd.*

20. *Before parting, we may also refer to a plea of the Assessing Officer that assessee had adopted a colourable device to avoid tax and in this context reliance was placed on the judgement of the Hon'ble Supreme Court in the case of McDowell and Co. Ltd. vs. CTO, 154 ITR 148 (SC). This objection of the Assessing Officer has been dealt with by the CIT(A) in para 5.1.5 of his order, which reads as under :-*

"5.1.5 The Assessing Officer has placed reliance on the judgment of Hon'ble Supreme Court in case of Mc. Dowell & Co. Ltd. and other authorities and observed that a colorable device was adopted by the appellant to avoid

tax. However, in this case, the issue involved is taxability of gains arising on sale of impugned shares under the head "capital gains" or as "profits of business". The conversion of erstwhile partnership firm into private limited company, holding of shares by appellant's father in City Park, receipt of shares by the appellant way of gift, subsequent sale of shares, genuineness of the transactions are not doubted by the Assessing Officer. It cannot also be glossed over that 50% of the shares in the company were held by other prompters, namely Mr. Anirudha Deshpande, Mr. Vithal Maniyar, Namrata Film Enterprises Ltd. In such circumstances, in so far as acquisition and sale of shares of City Pak are concerned, it is difficult to say that the appellant adopted colorable device to avoid tax. The manner in which the transaction in shares of City Park has been entered into by the appellant's father and appellant can at best be termed as tax planning, but it cannot be regarded as tax evasion. Tax planning is permissible as held by the Hon'ble Supreme Court in the case of Union of India vs. Azadi Bachao Andolan 263 ITR 706."

21. *In our view, the aforesaid discussion by the CIT(A) is fair and apt, having regard to the facts and circumstances of the case and we find no reason to interfere with the same. In any case, there is no material to suggest that any colourable device has been adopted by the assessee to avoid tax while carrying on the transaction of sale of shares of City Park Pvt. Ltd. to Peninsula Land Ltd..*

22. *In view of the aforesaid discussion, we hereby affirm the order of the CIT(A) holding that the surplus arising on the sale of shares in City Park Pvt. Ltd. is assessable as capital gain and not as profits and gains of business. Thus, on this aspect, Revenue fails.*

23. *Now, we may take-up the appeal of the assessee which relates to the 1 nature and quantification of loss incurred by the assessee on sale of shares of HCL Technologies Ltd..*

24. *To recapitulate, the background of the dispute in assessee's appeal can be summarized as follows. The assessee*

before us is an individual, who is Executive Director of Serum Institute of India Ltd.. In the period from 28.02.2007 to 13.03.2007, assessee purchased 4,71,517 equity shares of HCL Technologies Ltd. for a total consideration of Rs.29,36,28,768/- (inclusive of brokerage, etc.). The average purchase price of above purchase was Rs.622 per share. On 12.02.2007, HCL Technologies Ltd. announced bonus issue of shares in the ratio of one share for every one share held and the record date was fixed as 16.03.2007. Consequently, on account of his purchase of 4,71,517 equity shares, assessee received 4,71,517 bonus shares also. Subsequently, between 15.03.2007 to 28.03.2007 assessee sold 4,71,500 shares of HCL Technologies Ltd. out of the original 4,71,517 shares acquired by him. Such shares were sold for a consideration of Rs.14,28,67,804/- which reflected an average sale price of Rs.303 per share. Assessee declared a short term capital loss on sale of such shares of Rs.15,01,80,424/-.

25. The Assessing Officer has differed with the assessee on the treatment of the aforesaid transaction. As per the Assessing Officer, the aforesaid transaction reflected active involvement of the assessee as a 'trader', rather than as an investor. As per the Assessing Officer, assessee regularly dealt in the shares of HCL Technologies Ltd. which reflected a trading intention. Secondly, the stand of the Assessing Officer was that the motive for carrying out the aforesaid set of transactions in the shares of HCL Technologies Ltd. was to incur loss on account of bonus stripping and then set-off such loss against the long term capital gain accruing to the assessee on sale of shares of City Park Pvt. Ltd.. As per the Assessing Officer, the motive of the assessee in dealing in the shares of HCL Technologies Ltd. was tax avoidance and a dubious tax planning. Ultimately, the Assessing Officer disagreed with the assessee with nature and the quantification of loss on the sale of 4,71,500 equity shares of HCL Technologies Ltd.. The Assessing Officer computed the loss at Rs.39,41,287/- as per the Tabulation which we have reproduced earlier in this order. The point of difference on this aspect between the assessee and the Assessing Officer was with regard to the cost of the shares sold. The Assessing Officer followed the methodology of spreading the cost of original shares to total shares i.e. the original shares plus bonus shares. In other words, the total shares held by the assessee (i.e. original shares 4,71,517 + bonus shares 4,71,517)

were considered to have been acquired for an amount of Rs.29,36,28,768/-, i.e. the price originally incurred by the assessee. The Assessing Officer treated the shares of HCL Technologies Ltd. as stock-in-trade and therefore the loss of Rs.39,41,287/- treated as a business loss. The CIT(A) has affirmed both the stands of the Assessing Officer, namely, that the transaction in the shares of HCL Technologies Ltd. was a business transaction, and, secondly that the methodology of loss computed by the Assessing Officer was correct.

26. Before us, the Ld. Representative for the assessee vehemently argued that the lower authorities have erred in treating the activity of dealing in the shares of HCL Technologies Ltd. as a business activity. According to the Ld. Representative, assessee was whole-time involved as Executive Director of Serum Institute of India Ltd.; and, that there was neither an organized activity of trading in shares and nor was there any organizational support in this regard. With regard to the profit motive, it has been contended by the Ld. Representative that be it be a business transaction or an investment transaction, profit maximization is an element which is always present. It has also been contended that the lower authorities have erred in confirming that bonus shares received formed part of the stock-in-trade and taking the cost of shares sold on average basis was also wrong. In this context, reliance has been placed on the judgement of Hon'ble Supreme Court in the case of CIT vs. Madan Gopal Radhyey Lal, 73 ITR 652 wherein the Supreme Court held that in the hands of the dealer of shares, any bonus shares received constitute a 'capital asset' unless specifically converted into stock-in-trade. Based on the aforesaid judgement, it is contended that the assessee received the bonus shares as a 'capital asset' and never converted the bonus shares into stock-intrade. It is submitted that in the subsequent assessment years, the sale proceeds in respect of bonus shares sold were offered to tax under the head 'capital gain' after considering their cost of acquisition as Nil and such a treatment has been accepted by the Assessing officer in scrutiny assessments. It was therefore contended that the quantity of bonus shares could not be considered while determining the cost of the original shares sold during the year under consideration. According to the Ld. Representative, this is also on par with section 55(2)(aa)(iiia) of the Act wherein the cost

of bonus shares is to be taken as Nil and the entire cost is liable to be adjusted on the original shares.

27. *At the time of hearing, it has also been pointed out that during the year under consideration, assessee had sold other shares and units of mutual funds, and profit arising from such transactions have been accepted by the Assessing Officer to be assessable as 'capital gains'. Furthermore, it was pointed out that in the preceding assessment years as well as in the subsequent assessment years, the Assessing Officer has assessed the gain on sale of shares as an income assessable under the head capital gains, even in the course of scrutiny assessment. For all the aforesaid reasons, it has been canvassed that there was no scope for treating the impugned transaction as business transactions. It was also vehemently argued that there was no material to impeach the genuineness of the transactions and that at best the transaction can be termed as a 'use of the provisions of law' and it cannot be said to be 'a abuse of law', as was observed by the Hon'ble Supreme Court in the case of CIT vs. Walfort Share & Stock Brokers (P.) Ltd., 326 ITR 1 (SC) in a somewhat similar situation.*

28. *On the other hand, the Ld. Departmental Representative appearing for the Revenue has reiterated that the magnitude and frequency of the transactions in the HCL Technologies Ltd. shares was quite substantial which reflects that the intention of the assessee was to trade in such shares. With regard to assessee's intention, it was pointed out that at the time of undertaking transactions in HCL Technologies Ltd. shares, assessee was aware that he was considering the sale of shares of City Park Pvt. Ltd., which was to yield him substantial amount of capital gain and therefore he undertook the impugned transaction in shares of HCL Technologies Ltd. in order to incur a loss. According to the Ld. Departmental Representative, it is a common knowledge that share prices come down after the issue of the bonus shares, since the bonus shares are allotted after capitalizing the free reserves of a company. Therefore, assessee bought the shares of HCL Technologies Ltd. on cum bonus basis and after having received the bonus shares, the original shares were sold in the market at the reduced prices. According to the Ld. Departmental Representative, sequence of events clearly indicate that the*

purchase and sale of shares was undertaken with the sole intention of booking a loss so as to set-off the same against the gain from sale of shares of City Park Pvt. Ltd. and take the benefit of provisions of section 10(38) of the Act, thereby claiming the capital gain on sale of bonus shares as exempt on a later date.

29. *We have carefully considered the rival submissions. In the present case, the fundamental aspect which is permeating through the entire exercise carried out by the Assessing Officer is that the short term capital loss incurred by the assessee on sale of 4,71,500 shares of HCL Technologies Ltd. has been set-off against the long term capital gain earned by the assessee on the sale of shares of City Park Pvt. Ltd.. The appellant purchased 4,71,517 equity shares of HCL Technologies Ltd. at an average price of Rs.622 per share between 28.02.2007 to 13.02.2007. After receipt of 4,71,517 bonus shares, assessee sold 4,71,500 shares out of original shares between 16.03.2007 to 28.02.2007 at an average selling price of Rs.303 per share. Ostensibly, after the issue of bonus shares, the price of HCL Technologies Ltd. declined in the market and therefore the sale price realized by the assessee was only Rs.303 per share as against as the purchase price of cum-bonus shares of Rs.622 per share. The resultant loss was canvassed to be a short capital loss. In the subsequent years, assessee sold the balance shares remaining with him i.e. bonus shares of 471517 and the 17 out of the original 471517 shares. As the period of holding that was in excess of 12 months, in subsequent years the gain on sale of such shares has been accepted by the Assessing Officer as long term capital gain, which was exempt u/s 10(38) of the Act. Notably, while computing such capital gain, the cost of acquisition of the bonus shares was taken as 'Nil' by application of the provisions of section 55(2)(aa)(iia) of the Act. The aforesaid position has been accepted by the Assessing Officer in scrutiny assessment, as asserted by the assessee in the course of the hearing before us, and this material has not been repudiated from the side of the Revenue.*

30. *In the current year, assessee computed the loss on sale of 4,71,500 original shares by considering the average acquisition cost of Rs.622 per share. Ostensibly, it resulted in a loss because the sale price realized was only Rs.303 per share. First of all, the Assessing Officer viewed the whole transaction as a dubious tax*

planning. In this context, a reference has been made to the judgement of the Hon'ble Supreme Court in the case of Walfort Share & Stock Brokers (P.) Ltd. (supra). In the case before the Hon'ble Supreme Court, assessee purchased mutual fund units on 24.03.2000 and became entitled to dividend on the units @ Rs.4 per unit and earned a dividend of Rs.1,82,12,862/-. As a result of the dividend payout the value of the units reduced from Rs.17.23 to Rs.13.23 per unit on March 27, 2000, when assessee sold all the units and collected an amount of Rs.5,90,55,207/- as well as other incentives of Rs.23,76,778/-. In all, assessee received back Rs.7,96,44,847/- as against initial payout of Rs.8,00,00,000/-. In the return of income, assessee claimed dividend of Rs.1,82,12,862/- as exempt u/s 10(33) of the Act and also claimed a set-off Rs.2,09,44,793/- as loss incurred on sale of units. The Revenue disallowed the set-off of loss claimed which was negated by the Tribunal and thereafter the Hon'ble Supreme Court. As per the Hon'ble Supreme Court, it stood established that there was a sale and that assessee received a dividend, which was tax-free. In this context, the Hon'ble Supreme Court noted that the entire transaction could not be seen as 'abuse of law' but the assessee had made use of the "provisions of section 10(33)". The Hon'ble Supreme Court observed that even if it was to be assumed that there was a pre-planned action yet there was nothing to impeach the genuineness of the transaction. Adverting to the provisions of section 94(7) of the Act, the Hon'ble Supreme Court noted that in the case of assessment, before 01.04.2002 i.e. before insertion of section 94(7) of the Act, losses pertaining to the exempted income could not be disallowed. The assessment year before the Hon'ble Supreme Court was before the insertion of section 94(7) of the Act. It has also been observed by the Hon'ble Supreme Court that even after applying section 94(7) to cases for assessment years after 01.04.2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, the losses over and above the dividend received would still be allowed to be set-off. Considering the aforesaid scheme of the Act, the Hon'ble Supreme Court held that the Parliament has not treated the dividend stripping transaction as sham or bogus.

31. In our considered opinion, the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Walfort Share

& Stock Brokers (P.) Ltd. (supra) is definitely attracted in the present case too. In the present case, even if it is taken that the transaction in the shares of HCL Technologies Ltd. was pre-planned, but the inference drawn by the Assessing Officer that it was a dubious tax planning cannot be upheld because there is nothing to impeach the genuineness of the transaction carried out by the assessee. In the case before the Hon'ble Supreme Court also, similar situation prevailed and the Revenue had cast doubt on the transaction because of pre-planned nature of the transaction. The Hon'ble Supreme Court negated the stand of the Revenue, as noted by us earlier. Applying the similar parity of reasoning in the present case, the stand of the Assessing Officer that the transaction was pre-meditated with the intention of incurring loss and setting-off against capital gains income is an "abuse of law" cannot be affirmed.

32. *We may also refer to section 94(8) of the Act, which has been inserted by the Finance (No.2) w.e.f. 01.04.2005, and it provides that loss arising on bonus stripping of units is to be ignored after 01.04.2005. The phraseology of section 94(8) of the Act itself reveals that the Parliament in its wisdom restricted the scope of bonus stripping u/s 94(8) of the Act only to the units and did not extend it to the shares while the scope of the dividend stripping contained in section 94(7) of the Act applied both to shares/securities as well as units. Therefore, on the strength of section 94(8) of the Act also and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case Walfort Share & Stock Brokers (P.) Ltd. (supra), the transactions of purchase and sale of shares of HCL Technologies Ltd. are to be understood as a genuine transaction and are not covered by the provisions of section 94(8) of the Act.*

33. *Now, with regard to the stand of the assessee that he has acted as an investor and not as a trader while carrying out the aforesaid transaction in the shares of HCL Technologies Ltd. In this context, the sum and substance of the case made out by the Revenue is that within a short period of time assessee has carried out substantial purchase/sale transactions in the shares of HCL Technologies Ltd. As per the Assessing Officer, the transaction has been carried out in a systematic and organized manner and the intent was to incur a loss, which could be set-off against the*

capital gains income. Therefore, according to the Revenue, the transactions have to be understood as a 'business activity'.

34. It is trite law that whether a particular transaction is an adventure in the nature of trade or is an investment simpliciter is a mixed question of law and facts. It is also evident that there is a plethora of judicial rulings on this aspect. Nevertheless, a common thread which emerges from various judicial rulings is that no single test is conclusive but the entire conspectus of facts and circumstances of a given case have to be cumulatively appreciated in order to determine as to whether the transaction in question is an adventure in the nature of trade or is an investment simpliciter. In this background, we may examine the factual matrix of the present case. At the outset, the Ld. Representative pointed out that the gain derived on sale of other shares and mutual funds in this year has been accepted by the Assessing Officer to be assessable under the head 'capital gains'. It has also been pointed out that in the scrutiny assessment for the preceding assessment years as well as for the subsequent assessment years the profit on sale of shares earned by the assessee has been accepted as assessable under the head 'capital gains'. Notably, even with regard to the gain on sale of bonus shares of HCL Technologies Ltd., it was stated at Bar that in subsequent assessment years it has been accepted by the Assessing Officer as an income assessable under the head 'capital gains'. On all these aspects, the Revenue has not controverted the factual matrix brought out by the assessee. In this background, in our considered opinion, the onus was on the Revenue to establish that the transaction in the shares of HCL Technologies Ltd. was not assessable under the head 'capital gains', as declared by the assessee in the return of income. The moot point is as to whether or not, having regard to the discussion in the orders of the authorities below, such an onus has been discharged by the Revenue.

35. The only point made by the Revenue is that magnitude and frequency of the transaction in HCL Technologies Ltd. is substantial. In our considered opinion, in the present case, the nature of the assessee's dealing in shares as an investor stands established in past as well as also in future years. The assessee is full time involved in other activity of being Executive Director

of Serum Institute of India Ltd.. There is no material to suggest that any organizational structure or infrastructure is possessed by the assessee to undertake trading in shares as a business activity. There is no material to say that assessee acted as a frequent dealer in shares over an extended period of time. No doubt, for a short spell of time in the months of February and March, assessee has undertaken transactions in the shares of HCL Technologies Ltd.. But the same by itself cannot be categorized as a business activity, as it is not a continuous activity. Moreover, we also find weight in the plea setup by the Ld. Representative before us that if the intention was to incur loss, as canvassed by the Assessing Officer, then obviously such an activity cannot be categorized as 'business'. It is well understood that no business is carried out with an intention of making a loss, rather the intention is always to make profits. Therefore, by taking an overall view of the facts and circumstances of the present case, we are unable to uphold the stand of the lower authorities that the transaction in the shares of HCL Technologies Ltd. is a business transaction. We hereby set-aside the order of the CIT(A) on this aspect and direct the Assessing Officer to re-compute the capital gain/loss on the sale of shares of HCL Technologies Ltd. considering it to be assessable under the 20 head capital gains as per law. Thus, on this aspect assessee succeeds.

36. Resultantly, whereas the appeal of the Revenue is dismissed that of the assessee is allowed."

18. Respectfully following the above said decision, we observe that even in the present case assessee has claimed the losses by booking the cost of purchase of the original shares and retain the cost of additional shares due to split and bonus shares at ₹.NIL. The assessee has sold the above additional shares in the subsequent assessment year and declared the profit by considering the cost of purchase as Nil. As such, there is no loss

to the revenue. Therefore, the ratio and the facts are exactly similar to the facts in the present case. Respectfully following the above decision, we are inclined to dismiss the grounds raised by the revenue. Accordingly, appeal filed by the Revenue is dismissed.

19. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 18th January, 2023

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Mumbai / Dated 18/01/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum