

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri K. Narasimha Chary, Judicial Member

ITA Nos.1106 /Hyd/2017		
Assessment Year: 2011-12		
Dy. C.I.T. Circle 1(1) Hyderabad	Vs.	Alpha Villas P Ltd Hyderabad PAN:AAFCA8949L
(Appellant)		(Respondent)
ITA Nos.1107 /Hyd/2017		
Assessment Year: 2011-12		
Dy. C.I.T. Circle 1(1) Hyderabad	Vs.	Alpha Avenues (P) Ltd Hyderabad PAN:AAFCA8948M
(Appellant)		(Respondent)
Assessee by:	Shri K.A. Sai Prasad, CA	
Revenue by:	Shri Jeevan Lal Lavidiya, CIT(DR)	
Date of hearing:	05/06/2023	
Date of pronouncement:	12/06/2023	

ORDER

Per R.K. Panda, A.M

The above two appeals filed by the Revenue are directed against the separate orders dated 17.03.2017 of the learned CIT (A)-1, Hyderabad relating to A.Y.2011-12. Since identical grounds have been raised by the Revenue in both the appeals, therefore, these were heard together and are being disposed of by this common order.

ITA No.1106/Hyd/2017 (2011-12) Alpha Villas (P) Ltd

2. Facts of the case, in brief, are that the assessee is engaged in the business of real estate and share investment. It filed its return of income on 29.9.2011 declaring total income at Rs.54,26,00,434/-. The case was selected for scrutiny and statutory notices u/s 143(2) & 142(1) were issued to the assessee in response to which the AR of the assessee appeared before the Assessing Officer from time to time and filed the requisite details.

3. During the course of assessment proceedings, the Assessing Officer noted that the assessee has incurred STCL of Rs.53,70,98,641/-on the sale of equity shares of Bharati Cements which it has purchased during the year 2009-10 as secondary purchases from Sri Y. Jagan Mohan Reddy and allotment from Raghuram Cements (presently Bharati Cements) during the year 08-09 & 09-10. On the sale of shares of Bharati Cements, which were acquired in 07-08, it also admitted LTCG. He noted that M/s. Bharati Cements is assessed to tax with DCIT-2(1) who held that the amounts paid by Alpha Avenues and Alpha Villas towards the premium for the acquisition of the shares of Bharati Cements (then Raghuram Cements) is taxable u/s.56 of the I.T. Act by holding that the investment of Alpha Villas and Alpha Avenues could be for availing benefits from the Govt. of AP for conducting activity of liaison work with the company. He has also elaborately discussed the capacity of M/s. Bharati Cements to command premium of Rs. 1440/- for its share and also held that M/s. Alpha Villas and Alpha Avenues do not have the requisite income profile to make such huge investments. He also referred to the disclosure of Rs. 10 crores made by Alpha Villas (P) Ltd during the survey by the Investigation Wing which is on account of

investment from Kolkata based Shell Company. Since the Assessing Officer of M/s. Bharati Cements held that the so-called premium is not for the value of the share and for other benefits and had taxed u/s.56, therefore, he held that the assessee has not acquired the shares for a premium. In the light of the above analogy and facts, the Assessing Officer determined the cost of acquisition of shares of Bharathi Cements at Rs 10/- per share and accordingly determined the cost price of 689649 shares at Rs.68,96,490/- and computed the Short-Term Capital Gain (STCG) at Rs.45,59,95,919 as under:

<i>Sale consideration on sale of 689649 shares @671.2</i>	<i>=Rs.46,28,92,409/-</i>
<i>Less : Cost of Acquisition</i>	<i>= Rs.68,96,490/-</i>
<i>Taxable STCG</i>	<i>= Rs.45,59,95,919/-</i>

4. In appeal, the learned CIT (A) deleted the addition by observing as under:

“4. Decision:

The submissions of the appellant and the order passed by the Assessing Officer have been carefully considered.

5. Ground Nos. 1& 13 are general in nature.

6. Ground No.2 to 12: Addition u/s.56 of Rs.45,59,95,919/-.

During the course of assessment proceedings, the Assessing Officer noticed from the return of income that the assessee had incurred Short Term Capital Loss (STCL) of Rs.53,70,98,641/- on the sale of equity shares of M/s. Bharathi Cements. The assessee had purchased the shares during the year 2009-10 as secondary purchasers from Sri Y. Jagan Mohan Reddy and allotment from M/s. Raghuram Cements (presently M/s. Bharathi Cements) during the year 2008-09 & 2009-10. On the sale of shares of M/s. Bharathi Cements which were acquired in 2007-08, the assessee also admitted LTCG.

The Assessing Officer relied on the assessment order of M/s. Bharathi Cements, wherein it was held that:

- the amounts paid by M/s. Alpha Avenues and M/s. Alpha Villas towards the premium for the acquisition of the shares of M/s. Bharathi Cements (then M/s. Raghuram Cements) was taxable u/s 56 by holding that the investment of M/s. Alpha Villas and M/s. Alpha Avenues could be for availing benefits from the Govt. of AP for conducting activity of liaison work with company.*

- It clearly discussed the capacity of M/s. Bharathi Cements to command premium of Rs. 1440/- for its share and also held that M/s. Alpha Villas Pvt Ltd and M/s. Alpha Avenues Pvt Ltd do requisite income profile to make such huge investments.
- Disclosure of Rs. 10 crores made by M/s. Alpha Villas Pvt Ltd during the survey by the Investigation Wing which was on a/c of investment from Kolkata based Shell Company.

The Assessing Officer relying on the assessment order of M/s. Bharathi Cements held that the so-called premium was not for the value of the share. The premium amount was actually for other benefits and to be taxed u/s 56 income from other source'. Having concluded this, the Assessing Officer fixed the cost of acquisition of shares of M/s. Bharathi Cements at Rs.10 per share and the cost price of 689649 Nos of shares worked out to be Rs.68,96,490/-. Calculation of the Capital gains by the Assessing Officer is as follows :

Sale consideration on sale of 689649 shares @671.2	=Rs.46,28,92,409/-
Less : Cost of Acquisition	= Rs.68,96,490/-
Taxable STCG	= Rs.45,59,95,919/-

The STCG was worked out to Rs.45,59,95,919/- was added as income by the Assessing Officer.

6.2 Before me, the Appellant submitted that it had acquired 6,89,649 shares of Rs.10/- each of M/s. Bharathi Cements Ltd during FY 2009-10 for a consideration of Rs.99,99,91,050/- including premium of Rs.99,30,94,560/- @ Rs 1,440/- per share. The shares were reflected in the balance sheet of the Appellant for FY 2009-10. The appellant submitted the copies of the share certificates. The Appellant has acquired 1,82,757 shares from secondary purchases and 5,06,892 shares directly from Bharathi Cements as follows:

S.No	Shares acquired/ subscribed from	No. of shares	Amount paid for face value	Amount paid for premium	Total paid
1	Secondary purchase from M/s. Suguni Constructions	68,965	6,89,650	9,93,09,600	9,99,99,250
2	Secondary purchase from Mr Y S Jaganmohan Reddy	1,13,792	11,37,920	16,38,60,480	16,49,98,400
3	Direct subscription from Bharathi Cements (Rs.6,600 treated as misc. charges)	5,06,892	50,68,920	72,99,24,480	73,49,93,400
	Total	6,89,649	68,96,490	99,30,94,560	99,99,91,050

The appellant further submitted as follows :

A. In the assessment order of M/s. Bharathi Cement Corporation Pvt Ltd for AY 2010-11 dated 31.03.2013, the sums received by the company during AY 2010-11 only were dwelt upon. The sums paid by the Appellant for acquisition of secondary purchase were not Considered as the same were not paid to the company but to the shareholders of the company. Hence, it is submitted that the amounts of Rs.26,31,70,080/- paid towards premium for secondary purchase of shares should not have been disallowed by the Assessing Officer.

B. The appellant submitted that the cost of acquisition of shares for the purpose of capital gains is exhaustively defined as "the amount actually paid for acquiring" such shares u/s. 55(2) (aa)) of the IT Act. The Assessing Officer has not questioned the fact that the Appellant has not actually paid for acquiring the shares. The Appellant was allotted 5,06,892 shares and was issued share certificates. In fact, only after acquiring the shares, that the Appellant can sell them, offer the same for taxation. There are no provisions under the Income Tax Act where the Assessing Officer could disallow or reduce the costs actually paid for. There is no finding by the Assessing Officer of M/s. Raghuram Cements that the funds received towards the shares have been diverted by the said company. These funds were used to invest in plant and machinery, to give deposits and for other purposes to commence the production. In fact the company commenced production of cement during FY 2009-10. The appellant submitted that there are no reasons why the Assessing Officer should disallow the cost of acquisition in the form of premium. The relevant equity shares were acquired by the Appellant during FY 2009-10 and the same was verified vide order assessment order dated 15.03.2013. The appellant submitted that the Assessing Officer verified the sources for acquisition of the equity shares by the Appellant in the FY 2009-10. The appellant submitted that no addition to the income returned made by the Assessing Officer in A.Y 2010-11.

C. In the order of M/s Bharathi Cements for AY 2010-11 dated 31.03.2013, the Assessing Office noted that –

"the Appellant and another group concern Alpha Villas do not have requisite income profile to make such huge investments" and also held that "the investment of Alpha Villas and Alpha Avenues could be for availing benefits from the Govt of AP for conducting activity of liaison work with company".

Such a noting is self-contradictory and is not based on facts. The Assessing Officer used the phrase "could be" implying that he pre-supposes or assumes that the amounts were paid not for equity but for some benefits, but is not very certain of such assumption. The appellant submitted that an assessment cannot be done on plausibility, assumptions or surmises it has to be based on facts. The Assessing Officer has not proved that the investment by the Appellant was for availing benefits from the Government of AP. Further the appellant submitted that in this case, the Assessing Officer allowed deduction of the face value of the shares and only the premium was disallowed as in the case of M/s Raghuram Cements case.

D. The Appellant also acquired 20,19,228 Equity Shares in M/s. Bharathi Cements Ltd (previously known as Raghuram Cements Ltd) @ Rs 104 per share including premium of Rs.18,98,07,432/ @ Rs 94 per share during FY

2007-08. The Appellant has reflected the same in its Balance Sheet since FY 2007-08 till FY 2009-10 and its case for FY 2007-08 was taken up for scrutiny and proceedings were concluded vide order dated 28.12.2010 and the sources for the acquisition thereof were not questioned. The Assessing Officer has allowed the premium of Rs.18,98,07,432/- paid for acquisition of those equity shares as deduction for arriving at the long-term capital gains. It is further submitted that the Assessing Officer has also not issued any show cause notice to the Appellant with regard to the proposed addition nor has he considered the submissions made by the Appellant. Thus the addition made by the Assessing Officer is legally invalid.

E. The shares were reflected in the balance sheet of the Appellant for FY 2009-10.

F. It is submitted that Section 56 of the IT Act envisages to tax the unjustified premium in the hands of the Company raising the equity. There is no provision in the Act to disregard or disallow Such part of premium as cost of acquisition in the hands of investor, in case the same is taxed in the hands of the Company u/s 56 of the IT Act.

G. Subsequently, these shares were sold to a multi-national French Cement Company, resulting in surplus of Rs.274.95 crores, the appellant's share of consideration being Rs.181.82 crores.

6.3 I have gone through the submissions of the Appellant and analysis off the Assessing Officer. The cost of acquisition of shares, as defined in Section 55(2) (aa) (i) is –

“the amount actually paid for acquiring the original financial asset”.

There is no dispute, in this case, about the quantum of the amounts paid by the appellant for the acquisition of the shares, in question. The payments for acquisition of these shares were made during the immediately preceding FY 2009-10, relevant to the AY 2010-11, The assessment for the AY 2010-11 was completed u/s. 143 (3) on 15-03-2013 and later u/s.143(3) r.w.s.147 on 09.03.2015. The investment in these shares and the sources for such investment were examined and accepted. The point raised by the Assessing Officer that the appellant did not have the requisite income profile to make such a huge investment, therefore, has no bearing as far the question of quantum of investment is concerned.

On issue of disallowance of the premium paid, as cost of acquisition, the Assessing Officer relied on the Assessment order in the case of M/s.Raghuram Cements (now M/s. Bharathi Cements), wherein the premium was assessed as income u/s.56 for the AY 2010-11.

I do not find any legal support for relying on such treatment in that case and applying the same treatment in the appellant's case. There is no provision in the Income Tax Act to disallow the cost, including premium, incurred in acquiring the shares for working out the capital gain/loss. Even after the insertion of section 56(2) (viib), with effect from 1-4-2013 onwards, which authorizes the assessing of the excess premium as income in the hands of the Investee company. However, there is no corresponding/ parallel provision, enabling disallowance of cost in the hands of the investor.

The recipient company, M/s Raghuram Cement (now M/s Bharathi Cements), had gainfully invested the equity amounts, as well as the loan amounts for acquiring fixed assets for its own plant, to the tune of Rs.912 crores as on 31st March 2012. This cannot be concluded as, the funds were diverted for the interests of the appellant.

The appellant submitted during the course of assessment proceedings before the Assessing Officer, that other companies, of its group companies, have invested during FYs 2006-07 to 2009-10, Rs.285.5 crores in M/s.Raghuram Cements (now M/s Bharathi Cements) for acquiring shares, constituting 14.55% of the total equity, and later during F.Y.2010-11 realised Rs.560.45 crores by selling those shares to a multinational French .Cement Company, resulting in surplus of Rs.274.95 crores, the appellant's share of consideration being Rs.181.82 crores. Also, the premium of Rs.94 per share, which was paid for acquisition during the FY 2007-08 was allowed towards cost of acquisition in the computation of long-term capital gain.

In this background, I do not see any reason for disallowance of premium, in working out the cost of shares for the purposes of computation of short-term capital gains. The premium paid on acquisition in an earlier year of the shares of the same company, was allowed in the computation of the long term capital gains.

Also it is very decisive to refer, to the observation of the Assessing Officer, that the 'investment could be for availing benefits from the Government of A.P. is, by itself, not a conclusive finding. The benefits, if any, could be in addition to the consideration already accrued to the appellant and has nothing to do with the computation of capital gains, under this appeal.

*In this scenario, I find the addition made by the Assessing Officer is not supported by any concrete evidence. Hence, the same is deleted.
Ground Allowed.*

7. In the result, the appeal is allowed”.

5. Aggrieved with such order of the learned CIT (A) the Revenue is in appeal before the Tribunal by raising the following grounds:

“(i) The learned CIT(Appeals) erred in deleting the addition made by the Assessing Officer under the head capital gains' on account of disallowance of share premium as cost of acquisition while computing the short-term capital gains from sale of shares of Bharati Cements Ltd during the year.

(ii) The learned CIT (Appeals) ought to have considered that the Assessing Officer of Bharati Cements Limited held in the assessment of said company that the so called premium is not for the value of the shares issued but for other benefits and accordingly assessed the share premium as income from other sources in the hands of the said company.

(iii) The learned CIT (Appeals) ought to have further appreciated that the assessee has acquired the shares in question at a premium of Rs. 1,440/- during the years 2008-09 & 2009 as compared to acquisition of same shares at a premium price of Rs. 94/- during the year 2007-08 and within the short span of one year the said company cannot command premium of Rs.1,440/- for its share which clearly indicate that the premium was paid for some other benefits.

(iv) The learned CIT (Appeals) failed to note that once premium is not paid for acquisition of shares as held in the assessment of said company and as is apparent from abnormal premium paid as compared to the shares acquired during the year 2007-08, the same cannot be treated as cost of acquisition of shares while computing short term capital gains from transfer of subject shares.

(v) The appellant craves leave to add, delete, substitute and amend any ground of appeal before and/or at the time of hearing of the appeal.

(vi) For these and other grounds that may be urged before/at the time of hearing of the appeal, it is prayed that the short-term capital gains as computed in the assessment order restricting the cost of acquisition be restored.”

6. The learned DR strongly challenged the order of the CIT (A) and filed the following written submission:

“The following submissions are made for the kind consideration of Hon'ble ITAT with regard to the above appeal:

1. The only issue in the appeal is on the treatment of transaction of sale of shares of M/s Bharati Cement Corporation Ltd sold by the assessee during the relevant previous year. The assessee declared short term capital loss and long-term capital gain on account of the sale. The assessing officer treated the purchase of the shares at premium by the assessee as sham and adopted the acquisition value at the face value of the shares and worked out capital gains. The learned CIT(A) deleted the additions made by the AO without appreciating the true nature of the transactions. The Department is in appeal against the decision of the CIT(A).

2. It is humbly submitted that the following brief facts would reveal the true nature of the transaction:

(i) Though M/s Bharati Cement Corporation Ltd did not commence operations (the operations commenced in September 2009), the assessee purchased 20,19,228 shares of M/s Bharati Cement Corporation Ltd (earlier known as Raghuram Cements Ltd) with face value of 10/- per share at 104/- per share during F.Y 2007-08 from a sister concern. Thereafter, during F.Y 2008-09, 68,965 shares were purchased from a sister concern. Subsequently during F.Y 2009-10, 1,13,792 shares were purchased from Shri Y.S Jagan Mohan Reddy

(promoter of Bharati Cement Corporation Ltd) and 5,06,892 shares were allotted by Bharati Cement Corporation Ltd in a private placement both at a price of 1450/- per share. There is no valuation of the share in any of the year which merits such a high price.

(ii) Though it is claimed that the investment is in a high growth sector and the assessee group is claimed to be prudent investors, it is not known why shares of a company which even did not commence its operations are purchased at very high value though shares of public listed companies in the same sector (with higher capacity and profit making) were available on stock market at much lower value.

(iii) It is humbly submitted that the shares were sold to Parcifim SAS, France on 16/04/2010 i.e immediately after the end of the year of purchase at 671.20/- per share. It is humbly submitted that acquisition of shares of Bharati Cement Corporation Ltd by Parcifim is not a overnight event and the due diligence process in such cases normally takes several months. Therefore, it is quite probable that the assessee purchased the shares at a very high value knowing fully well that it is certain that they would be sold at lesser value.

(iv) The financials of the assessee also are not adequate to purchase shares at very high value and sell them within a short period at huge loss. Substantial amounts are shown as unsecured loans from sister concerns and one of the promoters of the assessee. However, almost the entire sale proceeds of the sale of shares including the alleged profits are reinvested in shares of M/s Jagati Publications Pvt Ltd at a huge premium of 340/- per share though the said company is a continuous loss making company.

(v) The assessee had no role in negotiation or fixation of the price at which the shares are transferred to Parcifim. From the sequence of events, it is clear that the transactions are not in the nature of purchase and sale of shares and done purposely with a view to transfer funds irretrievably to the companies promoted by Shri Y S Jagan Mohan Reddy and his family members. The fact that the shares were purchased at exorbitant value to be sold in a short duration only to book short term capital loss, the assessee had no role in negotiation of the price at which shares are transferred to Parcifim and the sale proceeds were immediately reinvested in a group company promoted by Shri Y S Jagan Mohan Reddy clearly indicate that the money is irretrievably transferred to Shri Y S Jagan Mohan Reddy group and the transactions of purchase and sale are only sham transactions.

(vi) It is also humbly submitted that the assessee and M/s Alpha Avenues Pvt Ltd were held to be conduits by the Hon'ble ITAT, Hyderabad in its decision dated 14/02/2018 in the own case of the assessee and M/s Alpha Avenues Pvt Ltd in ITA Nos.1413 & 1424/Hyd/2014. At paragraph 23 of the said decision, the Hon'ble ITAT held as follows:

"The undisputed facts are that WPPL and Indu group are related parties and WPPL had invested in share capital of CPIPL, which in turn, had

invested in the assesseees before us and the assesseees', in turn have invested the said amount in RCL and JPPL. The amount invested by CPIPL in the assesseees' i.e AAPL and APPL is 14.99 crores each, which has in turn, has been invested by the assesseees' into JPPL and RCL. Thus, it is clear that the assesseees are the conduits for the investment of share capital in RCL and JPPL, and the number of share and the premium paid by the CPIPL to the assesseees and by the assesseees to RCL and JPPL Os also the same. Thus, it is clear that the assesseees' have not earned or retained any income to treat it as their income u/s 68 of the IT Act".

(vii) The valuation report of Pani & Associates prepared in April, 2010 for the purpose of submission to RBI in the transaction of sale of shares to Parcifim determines the book value of each share of Bharati Cement Corporation Ltd at 68.13 using the NAV method. This report is prepared on the basis of unaudited financial results as on 31/03/2010. The valuer did not consider the audited financial results as on 31/03/2009 and 31/03/2008 because there were no commercial operations. The company incurred losses in the first year of its operation and the cumulative figure for the three years was a loss of 118.58 Cr. Even the value based on future projections of maintainable profit was 221/-. The assessee being a shareholder was surely in the knowledge of all the events and was in a well-informed position before purchasing shares at very high value and sell them within a short period for loss.

3. From the above, it is clear that the transactions of purchase and sale of shares of Bharati Cement Corporation Ltd by the assessee fail the test of "human probability". It is also submitted that the transactions of the assessee are also subject matter of CBI case in which Shri N. Prasad, one of the promoters of the assessee is an accused. The CBI alleged that Prasad had invested whopping sums in Jagathi Publications Pvt Ltd, Bharati Cement Corporation Ltd and other concerns of Shri Y S Jagan Mohan Reddy group and Shri Prasad allegedly routed these investments through various firms such as Gilchrist Investments Pvt Ltd, Alpha Villas Pvt Ltd and Alpha Avenues Pvt Ltd. It is alleged that in return, he was awarded by the Government of AP with a major infrastructure project called VANPIC (Vodarevu and Nizampatnam Port Industrial Corridor), a proposed world-class port and an integrated industrial cluster, for which nearly 18,000 acres of land was allocated in Guntur and Prakasam districts of Andhra Pradesh.

4. The entire transactions are collusive in nature and the cost of acquisition of the shares is only the face value as the premium is a device to inflate the price of the share to transfer huge funds in irretrievable manner to Shri Y S Jagan Mohan Reddy group. Therefore, the AO was correct in adopting the face value of the share as the cost of acquisition. When artificial price is fixed for assets in a transaction with ulterior motive, the apparent has to be rejected in favour of the real. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of Guzdar Kajora Coal Mines Ltd [1972] 85 ITR 599 (SC). In the said decision, the Hon'ble Supreme Court held that "if circumstances exist showing that a fictitious price has been put on the asset or there is fraud or collusion between the vendor and the vendee and there has been

inflation or deflation of value for ulterior purposes it is open to the income-tax authorities to refuse to accept the price mentioned in the deed or alleged by the assessee and to ascertain what the actual original cost was".

5. With regard to the applicability of "human probability test", reliance is placed on the decision of Hon'ble Supreme Court in the case of Durga Prasad More (1971] 82 ITR 540 (SC) and Sumati Dayal [1995] 214 ITR 801 (SC). Reliance is also placed on the decision of Hon'ble Supreme Court in the case of Jijayjeerao Cotton Mills Ltd [1958] 34 ITR 888 (SC) wherein it was held that "Every person is entitled so to arrange his affairs as to avoid taxation but the arrangement must be real and genuine and not a sham or make-believe".

6. Reliance is also placed on the decision of Hon'ble ITAT, Delhi Bench in the case of B.S. Infosolution Ltd (Decision dated 23/08/2018 in ITAT No: 2989/DEL/2016), wherein it was held that "No prudent person with some commercial prudence would pay a hefty premium of Rs. 190/- on a book value of Rs. 82/-, hold it for one year, and then sell the same shares at book value" (paragraph 23 of the decision). It is humbly submitted that the promoters of the assessee are prudent investors and their conduct in the present case fails the test of human probability. Reliance is also placed on the decision of Hon'ble Karnataka High Court in the case of Wipro Ltd (2014) 50 taxmann.com 421 (Karnataka), wherein it was held that "An obligation is cast on every citizen to pay the taxes without resorting to subterfuges. When the statute provides certain rights, which if properly applied would reduce the tax burden on the assessee or exempts him from the payment of tax, the assessee is entitled to the said benefit. However, if he is invoking the said provisions with the intention of evading payment of tax, then it would be a colorable device to avoid payment of tax, which cannot be entertained by the Court. It is in this context, Court has to find out whether the transaction is real or unreal and then record a finding whether it is a colorable device or sham transaction". It is humbly submitted that in the present case amounts irrevocably transferred to Shri Y S Jagan Mohan Reddy group are camouflaged as transactions of purchase of shares at premium.

7. Reliance is also placed on the decision of Hon'ble Punjab & Haryana High Court in the case of Harjit Kaur [2014] 45 taxmann.com 186 (Punjab & Haryana), where in it was held that "the CIT(Appeals) ignored the surrounding facts and circumstances of the case and failed to properly appreciate the series of steps taken by the assessee appellants, as a whole and in an integrated manner, for the object of creating artificial loss. Such transactions involve the series of preconceived steps, the performance of each of which is depending on the others being carried out, in accordance with the common intention of the assessee appellants and the sad company who allotted the shares to the appellants, the nature and effect of the whole scheme has to be taken into consideration, in determining the true intent and nature of such share transactions".

In light of the above, the appeal of the Department may kindly be allowed.

7. The learned Counsel for the assessee, on the other hand, heavily relied on the order of the CIT (A) and filed the following written submission:

"5. The respondent has acquired 6,89,649 shares of Rs.10 each of Bharathi Cements Ltd during financial year 2009-10 for a consideration of Rs.99,99,91,050 including a premium of Rs.99,30,94,560 @ Rs.1440 per share. The appellant has acquired 1,82,757 shares from secondary purchases and 5,06,892 shares directly from Bharathi Cements in the following manner:

S.No	Shares acquired/subscribed from	No. of shares	Amount paid for face value	Amount paid for premium
1	Secondary purchase from M/s. Suguni Constructions	68,965	6,89,650	9,93,09,600
2	Secondary purchase from Mr. Y.S. Jaganmohan Reddy	1,13,792	11,37,920	16,38,60,480
3	Direct subscription from Bharathi Cements	5,06,892	50,68,920	72,99,24,480
	Total	6,89,649	68,96,490	99,30,94,560

The shares were reflected in the balance sheet of the Respondent for financial year 2009-10 at page 77 of the Paper Book filed before your Honours.

6. *During the assessment year 2011-12, the Respondent sold the shares of Bharathi Cements and offered to tax the net long-term capital gains of Rs.54,32,56,728/- after setting off the short-term capital loss of Rs.53,70,98,641/-. The learned Assessing Officer disallowed the cost of acquisition for the claim of short-term capital loss of Rs.99,99,91,050/- based on the order passed u/s 143(3) of the Act in the case of M/s. Bharati Cements for A.Y 2010-11.*

7. *The respondent submits that, for the year under consideration, there is no provision in the Act to disregard or disallow such part of premium as cost of acquisition in the hands of investor, in case the same is taxed in the hands of the Company u/s 56 of the IT Act, 1961.*

8. *The cost of acquisition of shares for the purposes of capital gains is exhaustively defined as "the amount actually paid for acquiring" such shares u/s*

55(2)(aa)(i) of the Act. The learned Assessing Officer has not questioned the fact that the Appellant has not actually paid for acquiring the shares. The appellant was allotted 5,06,892 shares and was issued share certificates. There are no provisions under the Income Tax Act where the learned Assessing Officer could disallow or reduce the cost actually paid for. There is no finding by the learned Assessing Officer of M/s. Bharati Cements that the funds received towards the shares have been diverted by the said company. These funds were used to invest in plant & machinery, to give deposits and for other purposes to commence the production. Hence, there are no reasons, why the learned Assessing Officer should disallow the cost of acquisition in the form of premium.

9. The Respondent further submits that the relevant equity shares were acquired by the Respondent during the financial year 2009-10 and the proceedings u/s 143(3) of the Act were concluded vide order dated 15.03.2013, after verification of the sources for the said acquisition. The learned Assessing Officer has verified the sources of acquisition of the equity shares by the Appellant. No addition to the income returned was made by the learned Assessing Officer in the A.Y 2010-11. However, the learned Assessing Officer for the ay2011-12 (the year under consideration) has disallowed the cost of acquisition which was verified and accepted by the learned Assessing Officer himself in the A.Y 2010-11 without providing any basis. The reliance placed by the learned Assessing Officer on the assessment order passed in the case of M/s. Bharathi Cements Corporation Pvt Ltd wherein it was alleged that "the investment of Alpha Villas and Alpha Avenues could be for availing benefits from the Govt. of A.P for conducting activity of liaison work with the company". The learned Assessing Officer used the purchase "could be" implying assumption of some benefits being received. It is humbly submitted that an assessment cannot be done on plausibility, assumptions or surmises".

8. Referring to the decision of the Coordinate Bench of the Tribunal in the case of M/s. Jagati Publications Ltd vs. ACIT in ITA Nos. 18/Hyd/2012 for the A.Y 2008-09 and ITA No.790/Hyd/2013 for the A.Y 2008-09, he drew the attention of the Bench to Para 17.3 to Para 17.3.6 of the order which reads as under:

"17.3. It is not in dispute that the investor companies had decided to make investments in the assessee company at a premium of Rs 350 per share by placing reliance on the valuation reports issued by M/s Jagadisan Co., Chartered

Accountants dated 12/07/2007 and by M/s Deloitte dated 16/11/2007. Admittedly, these two valuers had valued the assessee Company at more than Rs 3000 crores, by taking into account the proposed publication of 'Sakshi' newspaper and the untapped market in the Newspaper readership in Andhra Pradesh which is later certified by the Audit Bureau of Circulations, Mumbai, which justifies the allotment of shares to the investor companies at a premium of Rs 350 per share. We find from the perusal of the valuation reports, they had clearly defined the various parameters used by them for valuing the assessee company together with the method used for valuation after due consideration of the financial projections given by the management of the assessee company and after duly considering the market forces and the datas available in respect of competitors and others in the market. The entire parameters used in the said valuation reports have already been detailed in the facts hereinabove and hence the same are not reiterated herein for the sake of brevity. The technical specifications proposed to be utilised by the assessee company in its proposed news industry which had been taken due cognizance by the valuers, which are already reproduced in the arguments of Id AR hereinabove, are not disputed by the revenue before us and hence the same are not reiterated herein.

17.3.1. We find that M/s Jagadisan & Co had initially valued the assessee company on 01/11/2006 at a much lesser figure while determining the value of holding company (i.e M/s Caramel Asia) of assessee. While valuing the holding company, the valuer thought it fit to value subsidiary co. i.e assessee herein also at that point in time, based on the figures available at that relevant point in time. Thereafter, he had valued the assessee company at Rs 3450 crores in the second valuation report dated 12/07/2007. The basis adopted in the second valuation report is doubted by the revenue. In this regard, it was submitted that the valuation report assumptions had undergone huge change in the 2nd valuation report. Assessee was also valued at lesser price based on facts prevailing at that point of time. The 2nd valuation report was done exclusively for assessee based on facts prevailing at that point of time. When 2nd valuation was done, the CA had taken cognizance of subsequent prospects and business plan of the assessee. Modified business plan was assessee, which had presented to CA by the enabled the valuation report to change. The undergo huge changes or modified business plan is reflected in the statement of facts by the assessee before the lower authorities.

17.3.2. We find that the Id. Special Counsel for the Revenue placed heavy reliance on the statement of Shri P.N.Sudarshan, Director of M/s. Deloitte recorded by CBI authorities. We find that this statement was included in the paper book filed by the department in the form of additional

evidences, which is not admitted by this tribunal for reasons stated supra. However, the ld. Special Counsel for the Revenue was still given liberty to verify those documents while addressing the issue in dispute before us. From the perusal of the said statement, we find that the statement provided by Shri P.N. Sudarshan before the CBI authorities is self-contradictory since he himself has admitted that the date of valuation report is academic as the date for which valuation of the company remained unchanged. Further Shri P.N. Sudarshan has submitted that the valuation was based on future projections and as such change of date of valuation report would not impact the valuation per se. This is a very crucial factor in as much as even if some adverse inference is to be drawn still it would not on the aspect of valuation report being pre-dated impact the valuation, as the date for which valuation is done would be relevant and not the date of valuation report.

17.3.3. One more crucial fact which requires consideration is that there was a complete change in business plan from A.Y. 2007-08 right from the numbers with regard to newspaper circulation figures between the first valuation and the second valuation report given by M/s Jagadisan & Co., Chartered Accountants. In this regard, we find that in the first valuation report dated 01/11/2006, the management of the assessee company had projected sale of only 600000 copies per day in Year 5, which figure had increased to 1500000 copies per day in the second valuation report dated 12/07/2007. This specifically proves that the entire business plan and business model had undergone drastic change based on subsequent developments and untapped market in the news paper industry. In view of this, the valuation figure in the second valuation report is bound to have significant difference when compared to the first valuation report (where the main focus of the valuer was only to value the holding company M/s Caramel Asia and not the assessee company, being subsidiary).

17.3.4. The main grievance of the revenue is that the financial projections have been made in an unviable manner with more optimistic approach. What is to be seen is that the projections estimated in the valuation report had eventually turned out to be true or not in the subsequent actual performance of the assessee company. In this regard, it was pointed out that on the date of its launch, the newspaper 'Sakshi' had a record sale order of 1286670 numbers. Further readership figures projection has been achieved by the assessee company as per the below mentioned chart vis-à-vis rival:-

Period	Sakshi	Eenadu (Rival News Paper)
Jan-Jun 2009	1256809	1316883
Jul-Dec 2009	1218485	1293275

Jan-Jun 2010	1414175	1507359
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17.3.5. Hence it could be safely concluded that the projections made in the financials which has been used for the purpose of valuation by the valuer viz., M/s. Jagadisan and Co and M/s. Deloitte cannot be termed as unrealistic as they are strengthened and proved by actual performance. The reason for drop in advertisement revenue between the projections and the actual performance is also well explained by the assessee as detailed in the arguments of the ld. AR hereinabove. In this regard, it was pointed out that one of the strong reasons is that the monopoly status of Eenadu newspaper was not challenged till the assessee entered the market and after the entry of the assessee, 'Eenadu' newspaper reduced their advertising tariff, which forced the assessee also to reduce the tariff, being a newcomer. This fact is also evident from the dropping profit margins of Eenadu i.e. Rs. 107.29 Crores from publication division as on 31/03/2008 to Rs.21.76 Crores at the end of 31/03/2009. This has contributed to the slump in revenue of assessee also and consequent loss which majorly includes depreciation loss. It is well accepted principle that the projections and actual performance would always differ and as long as the difference is not alarming or huge, the figures reflected in the projections attain greater credibility. Hence in the DCF method used by the valuer wherein the projections and cost estimates used by the management and submitted to the valuers for preparation of valuation reports were prepared in a very scientific manner. The ld. AR had also pointed out that as per the Indian Readership Survey (IRS), which is the survey conducted by Media Research Users Council (MRUC), an autonomous body of advertising agencies and publications, around the year provides results of publications every quarter. The IRS number of Sakshi for the average issue readership is 48.16 per quarter while that of the total issue readership is 133.78 lakhs per quarter which can be tabulated as under:

Readership	Sakshi	Eenadu	Andhra Jyothi	Vaaritha
Average	48.16	60.91	22.51	6.37
Total	133.78	147.94	56.35	25.55

17.3.6. Based on the aforesaid figures, the learned AR stated that the publication of newspaper by the assessee company has indeed reached the targeted figures within 1 ½ years whereas the rival newspaper 'Eenadu' has achieved its success in 30 years of its operation. We hold that the subsequent actual performance fully ratifies the fact that the assessee company is managed by proper key managerial personnel having both technical and business acumen in the relevant field. Hence the allegations levelled by the learned AO and learned CIT(A) in their respective orders in this regard is dismissed as baseless.”

9. He submitted that the Tribunal in the said decision has held that there is no evidence to prove that anything wrong or passing of illicit consideration or quid-pro-arrangement amongst the respondent group companies and accordingly the addition was deleted. He accordingly submitted that there is no quid-pro-arrangement as alleged by the Assessing Officer. Further, the action of the Assessing Officer that section 56 of the Act has been invoked in the case of Bharathi Cements Ltd for the share premium paid by the respondent cannot be the basis for disallowing the premium which forms part of the cost of acquisition. He accordingly submitted that the order of the learned CIT (A) be upheld, and the grounds raised by the Revenue should be dismissed.

10. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the AO in the instant case disallowed the premium of Rs.99,99,91,050/- forming part of cost of acquisition of 6,89,649 shares of M/s. Bharathi Cements Ltd on the ground that the premium paid for acquisition of shares was taxed as income u/s 56 in the hands of M/s. Bharathi Cements Ltd. According to him since the Assessing Officer of Bharathi Cements Ltd has held that the so-called premium is not value of the shares and for other benefits for which he had taxed the same u/s 56 of the I.T. Act, 1961, therefore, it is evident that the assessee has not acquired the shares for premium. He accordingly determined the cost of shares at Rs.10/- per share and determined the cost price of 6,89,649 shares at Rs.68,96,490/-. After deducting the cost of acquisition of Rs.68,96,490/- from the sale consideration at

Rs.46,28,92,409/-, the Assessing Officer determined the STCG at Rs.45,59,95,919/- as against STCG loss of Rs.53,70,98,641/-. We find the learned CIT (A) deleted the addition made by the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraph.

11. It is the submission of the learned DR that the financials of the assessee are not adequate to purchase shares at a very high value and sell them within a short period at huge sum. It is also his submission that the transaction of purchases and sale of shares of Bharati Cement Corporation Ltd by the assessee fails the test of human probability. It is also his allegation that the online transactions are collusive in nature and the cost of acquisition of shares is only the face value as the premium is a device to inflate the price as the share to transfer huge funds in irretrievable manner to Shri Y. Jagan Mohan Reddy Group and therefore, the Assessing Officer is justified in adopting the face value of the shares as the cost of acquisition.

12. It is the submission of the learned Counsel for the assessee that in view of the decision of the Tribunal in the case of M/s. Jagati Publications Ltd (Supra), the issue stands decided in favour of the assessee and therefore, the order of the CIT (A) be upheld.

13. We find the Tribunal in the case of Jagati Publications at Para 17.3.7 has observed as under:

“17.3.7. One more excruciating fact which requires consideration is that the ld. AO had recorded a statement on 13/12/2010 u/s 131 of the Act from Shri Nimmagadda Prakash, Director of M/s Alpha Avenues Pvt Ltd., M/s Alpha Villas Pvt Ltd, M/s Gilchrist Investments Pvt Ltd, among others. In response to the specific question posed by the

ld. AO to him with regard to the premium of Rs 350 per share charged by the assessee company vide Question No. 8, he had replied as under:

"8. Please give detailed evaluation and reasons for purchase of shares at a high premium rate of Rs.350 per share when a company started its commercial operations on 24.3.2008.

A. As we have proposed to invest in five growth sectors as mentioned above of which Media is one of them, we have evaluated the proposal from Jagathi. We have compared our investment with the proposed investment by M/s. Blackstone USA into Eenadu. After considering discount of 20% on Eenadu valuation, we justified our investment in M/s. Jagathi Publications Limited. The valuation was later verified with the Valuation Report given by M/s. Deloitte Bangalore."

17.4. We find substantial force in the argument advanced by the learned AR that the revenue had not brought on record any corroborative material by conducting any independent inquiry that the transactions between the assessee and the investor companies are in the nature of quid-pro-quo arrangement. No direct material whatsoever has been brought on record by the revenue by conducting independent inquiry, which could serve as an evidence linking the transactions between the investor companies and the assessee company to show that the capital investment in the assessee company was due to the grant of any land or project by the Government of Andhra Pradesh, even after a lapse of more than 10 years from the end of the assessment year under consideration. The various documentary evidences submitted by the assessee in the instant case were not at all doubted by the lower authorities. The said documentary evidences substantiates the contention of the assessee that the issue of shares during the year under consideration was genuine. The burden of proof to show that the assessee company as alleged had such an arrangement for fastening such huge additions is on the revenue and that burden cannot be said to be discharged by merely referring to the chargesheets filed by CBI which are yet to reach finality/conclusion before the Hon'ble Special Court of CBI. In any case, these charge sheets are not admitted as additional evidences by this tribunal for elaborate reasons stated supra."

14. We find in the instant case, the order of the Tribunal in the case of Jagati Publications Ltd (Supra) was passed on 23.12.2021 which is after the order passed by the Assessing Officer and CIT (A). Since identical issue has been decided by the

Tribunal in the above-mentioned case relating to the group companies, therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to decide the issue afresh and in accordance with law. While doing so he may keep in mind the decision of the Tribunal in the case of Jagati Publications cited (Supra) and any other information that he may require. Needless to say that the Assessing Officer shall give due opportunity of being heard to the assessee and decide the issue as per facts and law. The grounds raised by the Revenue are accordingly allowed for statistical purposes.

ITA 1107/Hyd/2017 – A.Y 2011-12 (Alpha Avenues (P) Ltd).

15. The grounds raised by the Revenue for the A.Y 2011-12 reads as under:

“(i) The learned CIT(Appeals) erred in deleting the addition made by the Assessing Officer under the head capital gains’ on account of disallowance of share premium as cost of acquisition while computing the short-term capital gains from sale of shares of Bharati Cements Limited during the year.

(ii) The learned CIT (Appeals) ought to have considered that the Assessing Officer of Bharati Cements Limited held in the assessment of said company that the so-called premium is not for the value of the shares issued but for other benefits and accordingly assessed the share premium as income from other sources in the hands of the said company.

(iii) The learned CIT (Appeals) ought to have further appreciated that the assessee has acquired the shares in question at a premium of Rs. 1,440/- during the years 2008 09 & 2009 as compared to acquisition of same shares at a premium price of Rs.94/- during the year 2007-08 and within the short span of one year the said company cannot command premium of Rs.1,440/- for its share which clearly indicate that the

(iv) The learned CIT (Appeals) failed to note that once premium is not paid for acquisition of shares as held in the assessment of said company and as is apparent from abnormal premium paid as compared to the shares acquired during the year

2007-08, the same cannot be treated as cost of acquisition of shares while computing short term capital gains from transfer of subject shares.

(v) The appellant craves leave to add, delete, substitute and amend any ground of appeal before and/or at the time of hearing of the appeal.

(vi) For these and other grounds that may be urged before/at the time of hearing of the appeal, it is prayed that the short term capital gains as computed in the assessment order restricting the cost of acquisition be restored.”

16. After hearing both sides, we find the grounds raised by the Revenue are identical to the grounds of appeal raised by the Revenue in ITA No.1106/Hyd/2017 for the A.Y 2011-12. We have already decided the issue and the grounds raised by the Revenue have been allowed for statistical purposes. Following similar reasonings, the grounds raised by the Revenue are allowed for statistical purposes.

17. In the result, both the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced in the Open Court on 12th June, 2023.

SD/- (K. NARASIMHA CHARY) JUDICIAL MEMBER	SD/- (R.K. PANDA) ACCOUNTANT MEMBER
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Hyderabad, dated 12th June, 2023

Vinodan/sps

Copy to:

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5	DR, ITAT Hyderabad Benches
6	Guard File

By Order