IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER

And

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 7461/MUM/2017 (A.Y: 2011-12)

ACIT – 2(2)(1) Room No. 545, 5th Floor Aayakar Bhavan, M.K. Road Mumbai - 400020	*v.*	M/s. Jasani Realty Pvt Ltd., 23, Morvi House 28/30 Goa Street, Ballard Estate Mumbai - 400038 **PAN: AABCJ0563H**
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Subhash Chandra Tiwari**
Department Represented by	**:**	**Shri Ankush Kapoor**
Date of conclusion of Hearing	**:**	**15.11.2023**
Date of Pronouncement	**:**	**07.02.2024**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the revenue against the order of Learned Commissioner of Income Tax (Appeals)-5, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 06.10.2017 for the A.Y. 2011-12.

2. Brief facts of the case are, assessee filed its return of income on 30.09.2011 declaring total income at ₹.22,14,57,470/-. The case was selected for scrutiny and assessment was completed u/s.143(3) of Income-tax Act, 1961 (in short "Act") on 24.03.2014 determining total income at ₹.22,17,85,465/-. Subsequently, the case was reopened after recording the reasons and notices u/s 148 of the Act was issued and served on the assessee.

3. The Assessing Officer recorded the reasons which is reproduced in the assessment order itself that Assessing Officer has received information from the office of the ITO, Ward-1(1)(4), Baroda, wherein it was informed that the claim of expenses of ₹.40 crores was made by the assessee in the A.Y.2011-12. The said expense was claimed in respect of deed of relinquishment entered into with M/s.Khevana Securities and Finstock Ltd., (in short "KSFL") and the same was paid by means of issue of certain shares of the assessee company to KSPL., @ ₹.1,000/- per share. It was informed that KSFL subsequently sold the said shares to M/s Coroa Investments Pvt. Ltd., at ₹.11/- per share only. The Assessing Officer observed that as such, the claim of revenue expenses amounting to ₹.40 Crores claimed by the assessee are seen to be non-genuine in nature. Subsequently, assessee vide letter dated 19.01.2016 raised

various objections against the validity of the re-assessment proceedings and issue of notice under section 148 of the Act. The above objections were disposed off by the Assessing Officer by order dated 09.02.2016.

4. The Assessing Officer observed that assessee is engaged in the business of construction and is a builder and developer. During the current re-assessment proceedings, notice u/s 142(1) of the Act was issued along with certain questionnaires were issued to the assessee. Further, notices u/s.133(6) of the Act were issued to various parties who has received compensation against the surrender of rights on the land, which includes KSFL. Further, the Assessee has furnished its submissions vide letters dated 19.01.2016 and 26.02.2016. After considering the submissions, the Assessing Officer observed that assessee has credited a sum of ₹ 95.80 Crores under the head Income Compensation Received against Oshiwara' as shown in Schedule-11. The Assessing Officer observed that this amount of ₹.95.80 Crores is the net amount of compensation income, which was arrived at after adjusting compensation paid of ₹.85.19 Crores against gross amount (compensation received) of ₹.181.00 Crore. The break-up of such items are given under: -

Particulars	**Amt. (in Rs.)**	**Amt.(in Rs.)**
compensation received against surrender of Land from Emgeen Holdings Pvt. Ltd., Mumbai		181,00,00,000
Less : Compensation Paid against Surrender of Land		
a) Khevana Securities &FInstock Ltd.	40,00,00,000	
b) Kotak Mahindra Prime Ltd,	3,62,14,601	
c) Amit Bhosale	30,00,00,000	
d) Vijay Thakkar	4,50,00,000	
e) Dev Construction	50,00,000	
f) Thakur Construction	7,00,000	
g) Aarti Enterprises	4,72,50,000	
h) Avanish Maniar	1,83,01,875	
		85,19,66,476
Total		95,80,33,524

5. The Assessing Officer eventually considered the admissibility, genuineness and adequateness of payment of ₹.40 Crore to KSFL as Compensation paid against surrender of Land [₹.2.50 Crores paid through RTGS and ₹.37.50 Crores in the form of issue of shares]. For the specific query of the above said compensation paid to KSFL, the assessee vide letter dated 29.02.2016 has submitted as under: -

> *"1) Our company M/s Jasani Realty pvt. Ltd. was the owner of a large tract of lands on Oshiwara, Mumbai. Part of the land was in adverse possession in succession by M/s Khevana Securities &Finstock Ltd (post 1993 by M/s Khevana and before that by one Mr.Randhava). In 2005, we intended to develop the property for which an oral agreement was made with M/s. Khevana Securities &Finstock Ltd., by which we would compensate them developed areas in proportion to the adverse possession they had on our land. After considerable delay and discussions at various forums we and M/s.Khevana Securities &Finstock Ltd. executed an agreement on 23/08/2010 (Copy of the agreement enclosed and is marked as Annexure 'A') by which it was agreed that about 90,000 Sq. Ft. of developed area will be given to them at a subsidized price of Rs.7,000/- per Sq. Ft. for a total consideration of Rs. 63.00 Crores as against the ruling price of about Rs. 12,000/- Sq. Ft. (Rs. 108.00 Crores). Accordingly, a sum of Rs.6,30,000/- being 1% of the consideration as mentioned in the agreement was paid to us in cash on 23/08/2010. Simultaneously, there were talks going on*

with us to take a share in our company for foregoing their interest in the property/in lieu of developed area as mentioned in the agreement dated 23/08/2010.

2) This agreement was subsequently cancelled on 15/12/2010 (Copy enclosed and marked as Annexure 'B') by which the subsidised sale as mentioned on para (1) above was cancelled due to the inability of M/s. Khevana Securities &Finstock Ltd. for the payment of balance 99% of the consideration amounting to Rs. 62.93 Crores Further, the terms was modified to pay a lump sum consideration of Rs. 40.00 Crores to M/s. Khevana Securities &Finstock Ltd by us and at the same time refunding to them the amount of Rs. 6,30,000/ already paid by them to us under the agreement dated 23/08/2010.

3) Based on the above facts, we paid Rs. 2.50 Crores on 30/03/2011 through RTGS to their bank account and further sent to them cheques amounting to Rs. 30.00 Crores (Copy of our Letter attached and marked as Annexure 'C').

4) On 01/04/2011, Mr. Pandoo Naig of the Company who used to interact with us and his associates met our director along with our cheques for Rs. 30.00 Crores sent to them (As per para (3) above) and told him that instead of the remaining Rs. 37.50 Crores payable to him, he is interested in part ownership of the company and stated that he is into financial markets and can guide the company for Public Issue. He also returned the cheques to our Director. At this stage, the current valuation of the company and the share premium for allotment of shares come up for discussion and m independent Chartered Accountant was appointed, who after going through all the books of accounts of the company finalized the same as Rs.1,000/- per share with Face Value of Rs. 10/- and Rs 990/- as Share Premium and allotment of Shares in lieu of company's liability to M/s Khevano Securities &Finstock Ltd.

5) Based on this, on 09/09/2011, 3,35,000 shares of our company was allotted to him for a total consideration of Rs. 35.50 Crores (Copy of confirmation letter dated 09/09/2011 is attached and marked, Annexure 'D'). M/s Khevanu Securities &Finstock Ltd confirmed this with their undated letter about this arrangement, (Please see Annexure 'E']

6) The allotment of 3,55,000 shares was also reported to Registrar of Companies as per ROC fillings for the relevant period (Copies of the returns are attached and marked, Annexure 'F')

7) Simultaneously, we paid Rs. 2.00 Crores by RTGS to the bank of M/s. Khevana Securities &Finstock Ltd. on 09/09/2011.

8) Thus we have paid M/s.Khevanru Securities &finstack Ltd., Rs.2.50 Crores in FY 2010-11 (They had also paid Ms.6.30 Lakhs in Cash on 23/08/2010 that was later returned to them on 16/12/2010) and Rs. 2.00 Crores in FY 2011-12 and further 3,55,000 Shares of the company for a value of Rs.35.50 Crores".

6. Further, with regard to reasonableness of issue price of shares, the assessee has explained as under: -

"At the beginning of the financial year 2010-11 the Company JRPL Share Capital comprised of 2,50,000 Equity Shares Face Value of Rupees 10/ each. During the year FY 2010-11 they further issued 1,50,000 equity shares to the Mills Store Company Bombay Pvt. Ltd., at Rs.700/- per share i.e. 37.5% of the Equity Capital then belonged to Mills Store Company. In the year 2011-12 the company further issued 3,55,000 share and its paid up capital increased to 7,55,000 Equity Shares of Rs. 10/- each thereby resulting into the Share of Mills Store Company reducing to 19.86% from 37.5%. As confirmed with The Mills Store Company they invested this amount of Rs 10.50 Crore from its Internal resources ie the advances received by them from their flat buyers from their Chandivali project.

JRPL's post tax net profit for FY 2010-11, 2011-12 was ₹.14..33 and 4.82 crores respectively. This means that the company mills store already gained Rs.5.37 crores & 0.96 crore of its share a profit for the year 2010-11 2011-12. It can be observed that the return on investment of Rs. 10.50 Crores is quiet decent. Further, the book value of each equity share of JRPL as on 31.03.2011 works out to ₹.617 per share & its EPS (earning per share) was ₹.358/ Looking at all the above factors, i.e, book value of shares, EPS & the Return on Investment it would be prudent to say that the valuation & issue price of Rs. 700/- per share by JRPL to The Mills Store Company is absolutely correct & reasonable".

7. Further, Assessing Officer acquired the copy of the order under section 143(3) of the Act dated 29.03.2014 passed by the ITO, Ward - 1(4), Baroda, in the case of KSFL for A.Y. 2011 12. Based on the information received the Assessing Officer has observed that KSFL has

recorded receipt of ₹.2.5 Crores during the financial year 2010-11 relating to A.Y. 2011-12 and receipt of payment of ₹.2 Crores during financial year 2011-12 relevant to A.Y. 2012-13 and sale of 3,55,000 shares of assessee Company (Jasani Realty Pvt Ltd.,) sold @ ₹.11/ per share on 26.09.2011 for the total consideration of ₹.39,05,000/-.

8. Further, Assessing Officer observed that the assessee has attempted to justify the reasonableness of issue price of shares at a price of ₹.700/- per share, and furnished that the valuation of share has been made on the basis of profits booked by it in Financial years 2010-11 and 2011-12. The Assessing Officer observed that this statement is a generalized statement and not supported by any scientific calculation as to how such price of ₹.700/- was arrived at. The Assessing Officer, further observed that, the assessee, ideally, must have filed justification for issue of shares at high premium as compared with the net assets of the company, calculation of fair market value of shares based on Net Asset Value (NAV), DCF & PECV methods, which assessee has omitted conveniently, valuation report obtained from a qualified person. The Assessing Officer heavily relied on the fact that the assessee has issued the share at ₹.700/- and which was sold by KSFL at a small price of ₹.11/- per share. Based on the above observations in his order, the

Assessing Officer further observed that substantial funds were shown to have invested into the assessee company as share capital at exorbitant premium. He observed that funds shown in the company under the garb of share capital and premium were nothing but the profits siphoned off by way of compensation paid. With the above observation, the Assessing Officer disallowed the entire expenditure of ₹.40 crores claimed on account of compensation paid to KSFL against surrender of land and the assessed income was increased to ₹.62,17,85,430/-.

9. Aggrieved, assessee preferred appeal before the Ld. CIT(A) and after considering the detailed submissions of the assessee, Ld. CIT(A) allowed the grounds raised by the assessee and deleted the additions with the following observations: -

> *"3.3. In the submissions appellant had objected to the issue of notice u/s 148. According to the appellant Rs.40Crs. paid to Kevana Securities & Finstock Ltd. was assessed by ITO-1(4), Baroda by his order dated 29.3.2014 as income of Kevana Securities & Finstock Ltd. as a business receipt on accrual basis. According to the appellant as the amount claimed as compensation paid to kevana Securities & Finstock Ltd. at Rs. 40 Crs. out of which Rs. 35.5 Crs, was paid by issue of shares at Rs.1,000/- and Rs.4.5Crs was paid as cash by RTGS. So according to the appellant as the amount paid by them to Kevana Securities & Finstock Ltd. was assessed as business receipts by ITO-1(4), Baroda, for Rs.40Crs., hence appellant states that as the income claimed by them was assessed a business income of Kevana Securities & Finstock Ltd, here the income has not escaped assessment. As the income claimed by them was assessed to tax as business receipt by the ITO-1(4), Baroda for Rs. 40 Crs., hence appellant states that for reopening of assessment, income escaping the assessment is a main criteria. As*

here the income has not escaped assessment, hence appellant states that this reopening is bad in law.

3.3.2 To examine the appellant's claim, the assessment order of ITO-1(4), Baroda, which was passed u/s 143(3) dated 29.3.2014 which was also referred by AO in his reassessment order in para 5.3.2, was examined. ITO-1(4), Baroda has assessed this Rs. 40 Crs. paid to Kevana Securities & Finstock Ltd. as business receipts and added to the total income of Kevana Securities & Finstock Ltd. The concluding part of the ITO's order is as under:

> *9.7 In view of the above it is held that the considerations received by the assessee from M/s Jasani Realty Pvt. Ltd. in pursuance of deed of relinquishment, dated 16.12.2010, are nothing but business receipts of the assessee and, therefore, the same are taxable.*
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> *9.8 The assessee is following mercantile system of accounting. Therefore, it has to consider the income on que basis. In this case the facts are crystal clear that the assessee was to receive additional Rs.40 Crores from M/s Jasani Realty Pvt. Ltd. in the F.Y. 2010-11 itself, in terms of relinquishment deed dated 16.12.2010. Thus, all the receipts of Rs.40 Crores became due to the assessee in the F.Y. 2010-11 itself. Out of that an amount of Rs.2.5 Crores was received by it during the F.Y.2010-11 and balance of Rs.37.5 Crore remained receivable from M/s Jasani Realty Pvt. Ltd of the end of the year. However, the assessee subsequently received Rs.2 Crores through bank and accepted balance amount of Rs. 35.5 Crores in the form of equity shares of M/s Jasani Realty Pvt. Ltd. Thus, the assessee indeed received total considerations of the value of Rs.40 Crore from M/s Jasani Realty Pvt. Ltd. which were due from them in the F.Y. 2010-11.*
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> *9.9 The assessee has contended that it received 3,55,000 shores of Mis Jasani Realty Pvt. Ltd. @ Rs.1,000/- per share in lieu of Rs. 35.5 Crores receivables from M/s Jasani Realty Pvt. Ltd. But, these shares were sold by it for total consideration of Rs.39,05,000/- only. Therefore, it actually received total consideration of Rs. 4,89,05,000/- only (Rs 2,50,00,000/- through bank in the F.Y. 2010-11, Rs.2,00,00,000/- through bank in the F.Y. 2011-12 and Rs. 39,05,000/- through sale of 3,55.000 shares of M/s Jasani Realty Pvt. Ltd., in the F.Y. 2011-12] and not Rs 40 crores as mentioned in the relinquishment deed dated 16.12.2010. This contention is also not tenable. The value of shares of M/s Jasani Realty Pvt. Ltd. @ 1000/-, including premium of*

Rs. 990/- per share, was agreed and accepted by the assessee at the time of offer of the shares. Thus, the assessee willingly accepted full value of balance amount receivable i.e. Rs.35.5 Crores in kind in the form of shares of M/s Jasani Realty Pvt. Ltd. and in addition to already received amounts of Rs.4.5 crores through banks. Therefore, the assessee received total consideration of Rs. 40 Crores from M/s Josani Realty Pvt. Ltd. in pursuance of the relinquishment deed, dated 16.12.2010. Therefore, this amount of Rs. 40 crores is the amount of business receipts representing taxable income of the assessee for the A.Y. 2011-12, in addition to the income/loss offered in its return.

9.10. Out of total dues of Rs. 40 crores, the assessee received Rs.4.5 crores through banks. The assessee willingly accepted 3,55,000 shares of M/S Jasani Realty Pvt. Ltd. 1,000/-on 9.9.2011 i.e. In the FY 2011-12, in lieu of balance consideration of Rs. 35.5 crores. The assessee immediately willingly sold all the shares Rs.11/- per share on 26.9.2011, for total consideration of Rs. 39,05,000/-. Thus, these transactions cannot be termed as receipt of consideration from M/s Jasani, Realty Pvt. Ltd. to the extent of Rs.39,05,000/- in lieu of dues of Rs.35.5 Crores from them. Otherwise also the assessee has not made any claim from M/s Jasani Realty Pvt. Ltd. for Rs.35,10,95,000/- [35,50,00,000-3905,000) claiming the same as still payable by them in terms of the relinquishment deed, dated 16.12.2010. This fact confirms that the assessee itself has considered that it has received all the balance dues of ₹.35.5 Crores from M/s Jasani Realty Pvt. Ltd. in the form of Rs. 1,551000 shares of M/s. Jasani Realty Pvt. Ltd.

9.11 By this way, the assessee received dues of Rs. 35.5 crores, pertaining to the F.Y. 2010-11, in the form of shares in the subsequent year i.e. F.Y. 2011-12. The assessee then sold these shares in the F.Y. 2011-12 and claimed loss of Rs.35,10,95,000/-(35,50,00,000 39,05,000] in respect thereof in the F.Y. 2011-12. However, this loss of Rs. 35,10,95,000/- pertaining to the F.Y. 2011-12 is reduced by the assessee from the receipts of Rs. 35.5 crores due in the F.Y. 2010-11 which is not allowable under the provisions of the Act.

9. 12. In view of the above discussions, an addition of Rs. 40,00,00,000/- (40 crores) is made to the total income of the assessee for the AY 2011-12 treating the same as net business income of the assesse.

When we peruse the above order, here ITO assessed this Rs.40Crs paid to Kevana Securities &Finstock Ltd. by the appellant as a business receipt on accrual basis. It is also clear from this order that it was clearly mentioned that kevana Securities & Finstock Ltd. had received Rs. 40 Crs from the appellant at due basis in the A.Y.2011-12 and out of this Rs. 40 Crs., Kevana Securities & Finstock Ltd received Rs. 4.5 Crs through banks and 3,55,000 shares of Jasani Realty at Rs.1,000/-in 9.9.2011, in the FY. 2011-12 1.e. A.Y. 2012-13 in view of balance consideration of 35.5 Crs. Kevana Securities & Finstock Ltd. sold all these shares at Rs. 11 per share on 26.09.2011 for Total consideration of Rs. 39,05,000/-. Though Kevana Securities & Finstock Ltd. sold these shares for Rs. 39,05,000/- they have not made any claim from Jasant Realty for balance amount till the time of passing of the order. Here according to the ITO, Rs. 40 Crs received by Kevana Securities & Finstock Ltd is a business receipt of Kevana Securities & Finstock Ltd. for A.Y. 2011-12 and if there is any loss incurred by Kevana Securities & Finstock Ltd. by selling the shares which are received for Rs.1,000/- on 26.9.2011 to Coroa Investments of Goa, this is loss incurred in the subsequent year. In the subsequent assessment year in para 9.11 of the order it is also mentioned that Kervana Securities & Finstock Ltd. sold the shares in the F.Y.2011-12 and claimed loss of Rs. 35,10,95,000 in respect thereof in the F.Y. 2011-12 However, this loss of Rs. 35,16,95,000/- pertaining to the F.Y. 2011-12 is reduced by the appellant from the receipts of Rs. 35.5Crs due in the F.Y. 2010-11 which is not allowable under the provisions of the Act.

3.3.4 So it is clear that Kevana Securities & Finstock Ltd. was to adjust the income of the previous year with loss of later year which is not permissible as per Income tax laws. Thus, ITO assessed the income as business receipts and added this Rs. 40 Crs. as Income of Kevana Securities & Finstock Ltd.

3.3.5 For reopening the assessment, Supreme Court in their various case laws had stated that for power to reopen under section 147 two conditions have to be satisfied. Firstly, that AO has reason to believe that income, profits or gains chargeable to income tax has escaped assessment. Secondly, he must have a reason to believe that such escapement was due to failure to disclose fully and truly all material facts necessary for assessment. In the case of Calcutta Discount Company, Ltd vs ITO [1961] 41 ITR 191[Supreme Court), CIT vs Sun Engg. Works 198 ITR 297 and also in various other case laws this issues were discussed. Main condition for reopening assessment was income has escaped assessment.

3.3.6 When we examine the above facts, here appellant had paid Rs. 40 Crs. to Kevana Securities & Finstock Ltd. as compensation for surrender of land. This amount was claimed as a expenditure in the A.Y. 2011-12. In the original assessment order, after considering the submissions this was allowed. This Rs. 40 Crs. was paid by appellant through RTGS for Rs. 4.5 Crs. i.e. Rs.2.5Crs. paid on 30.3.2011 and second payment by RTGS for Rs.2Crs. on 9.9.2011 and further issued 3,55,000 shares on 9.9.2011 for Rs.1,000/ per share i.e. face value Rs. 10/- and premium of Rs. 990/-, All these amounts which are paid to Kevana Securities &Finstockd totaling to Rs. 40 Crs was assessed as business receipts of Kevana Securities & Finstock Ltd. by their concerned AO i.e. ITO-1(4), Baroda, where the ITO assessed is Rs. 40 Crs. for A.Y. 2011-12 as business receipts on due basis. Now from the above fact it is clear that appellant's claim of Rs. 40 Crs which was allowed initially was assessed as business receipts of Kevana Securities & Finstock Ltd. by ITO-1(4), Baroda. So the expenditure which is allowed to the appellant was assessed as income of the receiver Kevana Securities & Finstock Ltd. So here the income received by Kevana Securities Finstock Ltd., as compensation from the appellant was assessed to tax. So the income received Kevana Securities & Finstock Ltd. from the appellant was assessed to tax in A.Y. 2011-12 itself which is the A.Y. in which it was claimed expenditure by the appellant. So here the expenditure claimed by the appellant was assessed as income of receiver i.e, Kevana Securities & Finstock Ltd., hence appellant is correct in stating that there is no income which escaped assessment for the A.Y. 2011-12,

3.3.7 AO in his assessment order suspected the valuation of shares of Jasani Realty at 1,000/ (face value Rs. 10/-, premium Rs. 990/-) which were issued to Kevana Securities & Finstock Ltd. by the appellant. These shares were issued on 9.9.2011 and the same shares were sold by Kevana Securities & Finstock Ltd, at Rs. 11/- to Coroa Investments on 26.9.2011. So when we examine this facts, these two transactions of se of shares and sale of shares were in the next A.Y. i.e. A.Y. 2012-13. As far as A.Y. 2011-12 is concerned, the expenditure claimed by appellant was assessed as income of Kevana Securities & Finstock Ltd. by ITO-1(4), Baroda. So from is assessed income it clear that Kevana Securities &Finstock Ltd. had acquired the shares of the appellant at premium of Rs. 1,000/- which were sold at Rs. 11/- to Coroa in A.Y. 2012-13. So once the income which was claimed by the appellant in A.Y. 2011-12 was assessed a income of receiver i.e. Kevana Securities & Finstock Ltd. for this A. Y. i.e. A.Y. 2011-12, there is no escaping of assessment. In transactions which have taken place in later assessment-year i.e issue of shares at premium to kevana Securities & Finstock Ltd Later sale to Coroa Investments, by these transactions it cannot be treated that the compensation paid by

Jasani Realty to Kevana Securities & Finstock Ltd. is a non-genuine transaction, since the amount paid by Jasani Realty was assessed to tax by ITO- Baroda, as income of Kevana Securities & Finstock Ltd. for AY 2011-12

3.3.8 In conclusion, it is clear from the above details that there is no income escaping assessment. This is the main criteria for reopening the assessment u/s 148. As here is no income escaping assessment, the AO's issue of notice u/s 148 cannot be sustained in law.

3.3.8 Even in merits here the expenditure claimed by appellant was assessed to tax in the hands of Kevana Securities & Finstock Ltd. by ITO-1(4), Baroda. Here AO reopened the assessment u/s 147, reassessed the claim which was earlier allowed by AO i.e. compensation paid to M/s Kevana Securities & Finstock Ltd, for ₹.40 Crs, this claimed is allowed in reassessment. Here it is pertinent to mention that AO referred in reassessment order regarding assessment order of ITO-1(4), Baroda where the compensation received by Kevana Securities & Finstock Ltd. was assessed as business receipts on due basis for Rs.40Crs. and added to total income for A.Y. 2011-12. So for same A.Y. 2011-12 here in Mumbai AO reopened the assessment and disallowed the compensation paid to Kevana Securities & Finstock Ltd. and ITO-1(4), Baroda assessed by the same amount as business receipts on due basis. So for the same amount in Mumbai AO had disallowed in reassessment and in Baroda same amount is assessed and added to total income as business receipts. This is a double taxation of same amount which is not permitted in Income Tax law.

3.3.9 In view of the above discussion, here I hold that there is no income escaping assessment to issue notice u/s 148, hence reassessing the income which is already taxed cannot be sustained in law, hence AO's disallowance in reassessment is deleted. Ground of appeal is allowed."

10. Aggrieved with the above order, revenue is in appeal before us raising following grounds in its appeal: -

"1. Whether on the facts and in circumstances of the case and in law, Ld. CIT(A) erred intreating the reopening of proceedings is bad in law without appreciating the fact that the basis of reopening was on the new piece of information received by the Assessing Officer relating to the value of share indicating the excess amount of compensation claimed by the assessee company?"

2. Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) erred in as much as without appreciating the fact that the value of premium shown by the assessee at Rs. 990/ per share is an inflated value since as per the Real Term Transaction by M/s KSFL. Shares could fetch only Rs 1/-per share as premium in the transaction which happened within five days of the allotment of shares by the assessee company?"

11. At the time of hearing, Ld. DR brought to our notice facts of the case by drawing our attention from the assessment order and findings of the Ld. CIT(A) from Para No. 3.3.1 to 3.3.9. Further, Ld. DR brought to our notice decision of the ITAT, Ahmedabad Bench in the case of KSFL for the A.Y. 2011-12 and brought to our notice Page No. 17 of the order (Para No. 8.16 to 8.19). Further, Ld. DR specifically brought to the notice of the Bench the relevant Para No. 8.17 in which the ITAT, Ahmedabad bench has specifically mentioned that JRPL and KSFL has entered into colorable devise in order to extend the benefit to JRPL i.e, assessee and the bench has decided the issue in favour of KSFL. Therefore, by relying on the above said decision, Ld. DR submitted that assessee has adopted a colorable devise to claim the huge benefit through compensation claim and he prayed that the issue may be decided in favour of revenue considering the specific findings of the ITAT, Ahmedabad Bench.

12. On the other hand, Ld.AR of the assessee objected to the submissions of the Ld. DR and submitted as under: -

"2. With reference to the Paragraph 1 and 2 of the order sheet, it is submitted that the Assessee has explained the history of transaction with M/s. Khevana Securities and Finstock Ltd in the letter dated 1 March 2014 to the Assessing Officer which letter has been placed at Page 34 of the Paper book. The learned DR has filed a copy of the decision of ITAT A Bench Ahmedabad dated 10.01.2022 in the case of M/s. Khevana Securities and Finstock Ltd for Assessment Year 2011-12. It is the humblest submission of the Assessee that the said ITAT order, insofar as its observations about the Assessee herein, are in violation of the principles of natural justice as explained in detail in the Note filed by us on 05.09.2023,

3. With reference to Paragraph 3 of the order sheet, the Assessee submits that all its transactions with M/s Khevana Securities and Finstock Ltd. (Hereinafter referred to as 'Khevana') are supported by the agreements executed from time to time. The history of transactions with Khevana has been submitted to learned Assessing Officer in Assessee's letter dated 1 March 2014 and Annexures thereto. The same are placed in the Assessee's paper book from Page 34 to 94 and 146 to 156. The allotment of shares to Khevana is supported by documents filed with MCA placed at paper book Pages 21 to 26. All financial transactions are through regular banking channels. The Assessee most respectfully submits that a question of fact should be determined based on material on record and not on any suspicion, conjectures and surmises. Suspicion, howsoever strong cannot be substitute for evidence or material. Mehta Parikh & Co. v. CIT 30 ITR 181 (SC); Umacharan Shaw & Bros v. CIT 37 ITR 271 (SC); Lalchand Bhagat Ambica Ram v. CIT 37 ITR 288 (SC); Sona Electric Co. V. CIT 152 ITR 507 (Del); SukhdayalRambilas v. CIT 136 ITR 414 (Bom); R. Y. Durlabhji v. CIT 211 ITR 178 (Raj.); CIT v. Bedi& Co. Pvt. Ltd 230 ITR 580 (SC) etc. It is also settled law that legal effect to the agreements must be given. Courts and Tribunals cannot rewrite agreement between parties. Union of India and another v. AzadiBachaoAndolan and another (AIR 2004 SC 1107), State of Karnataka v. M/s. Videocon International Limited in STRP No.4/2000 (Karnataka), M/s. Bhoruka Engineering Inds. Ltd v. DCIT ITA No. 120 of 2011 (Karnataka). Law is trite that the apparent state is real and the onus to prove that the apparent is not the real is on the party who claims it to be so. If it is revenue which claims that the apparent is not the real the onus is on revenue. Reference in this respect is invited to CIT v. U. M. Shah 90 ITR 396 (Bom); CIT v. Daulat Ram Rawatmull 87 ITR 349 (SC); CIT v. Bedi& Co. Pvt. Ltd. 230 ITR 580 (SC) and a host of other cases where this dictum has been applied. This burden of proof is onerous.

4. The Assessee has been directed in Paragraph 3 of the order sheet to substantiate that the Assessee was owner of the property

in question and Khevana was having adverse position on the said property. Reference in this behalf is invited to the agreement dated 28.10.2005 placed at Pages 121 to 145 whereunder the various co-owners of the property agreed that the Assessee company shall have full and exclusive development rights to develop the property in question to the maximum extent as may from time to time be permitted by BMC and that the Assessee company had paid a sum of Rs. 18 Crore to the co-owners. As regards the adverse possession of Khevana kind attention is invited to Paragraph 1 of the Assessee's letter dated 1 March 2023 to learned Assessing Officer. This contention of the Assessee is not in dispute. Moreover, the Assessee had entered into an agreement to transfer/assign/sell 50% of their entitlements subject to minimum 55.000 sq.ft. carpet area from out of saleable area of the sanctioned building plan of the property to Khevana for the sum of Rs. 63 Crore by an agreement dated 23 August 2010. The said agreement is placed at Pages 146 to 156 of the Assessee's paper book.

5. Secondly, the Assessee has been directed in Paragraph 3 of the order sheet to explain the terms and conditions on which the amount of Rs. 40 Crore was agreed to be settled. In this regard kind attention is invited to Memorandum of Understanding made and executed on 23rd August 2010 between Khevana and the Assessee which is placed in the paper book at Pages 146 to 156. This Memorandum of Understanding was later on cancelled by Deed of Relinquishment (copy placed at Pages 7 to 18 of the Paper book) A fair typed copy of the aforesaid agreement is enclosed. By this Deed of Relinquishment, the agreement dated 23rd August 2010 between the parties was cancelled for the lump sum consideration of Rs. 40 Crore payable by the Assessee to Khevana. Following this Deed ofRelinquishment, the Assessee refunded to Khevvana the sum of Rs.6.30 Lakh under the MOU and later on 30.03.2011 paid a sum of Rs. 2.50 Crore to Khevana by RTGS. Subsequently on 09.09.2011, at the request of Khevana 3,55,000 shares were allotted to them for Rs. 35.5 Crore and balance sum of Rs. 2 Crore was paid to Khevana by RTGS.

6. Thirdly, the Assessee has been directed in Paragraph 3 of the order sheet, to explain how and under which circumstances liability of Rs. 40 Crore out of which Rs. 35.5 Crore have been discharged through allotment of shares at high premium when the other party sold it just for Rs. 11 per share. The Assessee has been asked to bring on record as to who has purchased the shares from Khevana and its relation with Assessee and why the value has decreased from Rs, 1000? The Assessee states and submits that 35,500 shares allotted to Khevana have been transferred by Khevana to M/s. Coroa Investments Pvt. Ltd., Dempo Villa, Altinho, Goa (PAN-AACCC0303M) through Share Transfer Form signed by

both parties. These documents are placed on paper book at Pages 166 to 169. The Assessee states and submits that the transferee Coroa Investments Pvt. Ltd. is not a related party of the Assessee. As regards the question as to how and in which circumstances the shares purchased @ of Rs. 1000 per share came to be sold just for Rs, 11 per share, the Assessee most humbly and most respectfully states and submits that the question has been wrongly put to the Assessee. The Assessee has not been a party to this transaction of sell of shares @ Rs. 11 per share which was made behind the back of the Assessee. The Assessee is not responsible for the acts or omissions of third parties. At the same time, the Assessee will justify hereinbelow the premium received for issue of shares to Khevana. It is the humble submission of the Assessee that learned Assessing Officer has merely assumed, without any inquiry and based on no material at all that the sale @ Rs. 11 by Khevana was the truevalue of shares and therefore the transaction between the Assessee and Khevana is not genuine. The Assessee submits that the claim of deduction of Rs. 40 Crore has been wrongly rejected by the Assessing Officer holding arbitrarily ad without application of mind the transaction between Khevana and Coroa as correctly priced. Hence, there is no merit in the appeal filed by Revenue.

7. Fourthly, the Assessee has been directed in Paragraph 4 of the order sheet, to explain whether M/s. Khevana Securities and Finstock Ltd. was to pay Rs. 63 Crore to the Assessee for purchase of certain lands from the Assessee and whether this transaction has any link with the transaction in which the Assessee has stated that it was paying Rs. 40 Crore to the said party. As stated in Paragraph 4 above the Assessee had entered into an agreement to transfer/assign/sell 50% of their entitlements subject to minimum 55.000 sq.ft. carpet area from out of saleable area of the sanctioned building plan of the property to Khevana for the sum of Rs. 63 Crore by an agreement dated 23 August 2010. The said agreement is placed at Pages 146 to 156 of the Assessee's paper book. Subsequently b Deed of Relinquishment dated 16th December 2010 the earlier agreement dated 23nd August 2010 was cancelled for which purpose the Assessee agreed to pay a lump sum amount of Rs. 40 Crore to Khevana. All these documents have been furnished to the Assessing Officer during assessment proceedings.

8 Fifthly, the Assessee has been directed in Paragraph 4 of the order sheet, to furnish the valuation of shares at the time of allotment to Khevana and thereafter how within few days it has been sold at Rs. 11/-? The Assessee states and submits that a simple look at the balance sheet of the Assessee would reveal that selling price @ Rs. 11/- is ridiculous and blatantly under- priced. The Assessee has placed at Page 93 and 92 the valuation of

sharesby Mr. Suresh C. Shah CA. determining the value of shares as on 31.03.2011 @ Rs. 1228.51/- (Rounded off to Rs. 1000) after taking into consideration 3,55,000 shares to be allotted to Khevana. Based on this valuation the shares were allotted to Khevana in September 2011 @ Rs. 1000/- per share. This valuation report was submitted to the Assessing Officer.

9 In nutshell, the facts of the case are that the Assessee Company deals in real estate with authorized capital of Rs. 1 Crore divided into 10 Lakh shares of the face value of Rs. 10 each. As at the beginning of AY 2011- 12 2.5 Lakh shares had been issued subscribed and paid up. During AY 2011-12 it further issued 1.5 Lakh shares @ Rs. 700/- per share to the Mills Store Company Bombay Pvt. Ltd. During AY 2012-13 the Assessee issued 3.55 Lakh shares @ Rs. 1000/- per share which is at the core of the dispute in this appeal. The Assessee Company had acquired development rights in a huge tract of land along with Emgeen Holdings Pvt. Ltd. (a Raheja Company) by virtue of an agreement made on 28.10.2005 placed at Paper book Pages 121-145. This land was partly in adverse position of Khevana. Subsequently, the Assessee wished to exit from the project at Oshiwara and entered into a Memorandum of Understanding with Khevana on 23rd August 2010 whereby the Assessee agreed to sell its rights in the project to Khevana for a consideration of Rs. 63 Crore. A copy of MoU is placed at Pages 146 to 156 of Paper book. M/s. Windsor Realty Pvt. Ltd. (formerly Emgeen Holding Pvt. Ltd.) showed interested in acquiring the entire project for themselves after buying out the Assessee's share and made a far superior offer of Rs. 181 Crore to the Assessee. Accordingly, Assessee negotiated with Khevana and obtained Deed of Relinquishment from Khevana for consideration of Rs. 40 Crore. A copy of Deed of Relinquishment is placed at Page 7 to 18 of the Paper book. Simultaneously, the Assessee entered into an agreement with M/s. Windsor Realty (Formerly Emgeen Holdings Pvt. Ltd.) transferring to later its share in the project for consideration of Rs. 181 Crore resulting into M/s. Windsor Realty having the entire project to themselves. A copy of agreement with M/s. Windsor Realty is placed at Pages 170 to 178 of the Paper book.

10. In pursuance to Relinquishment Deed the Assessee paid to Khevana on 16.12.2010 the sum of Rs. 6.30 Lakh that had been received by the Assessee from Khevana under earlier agreement dated 23.08.2010 and a further sum of Rs. 2.50 Crore by RTGS on 30.03.2011. Thereafter, Khevana approached the Assessee with request that instead of the balance sum of Rs. 37.50 Crore they were interested in acquiring shares in the Assessee company. After discussion, the Assessee agreed to allot 3.55,000 shares to Khevana for Rs. 35.50 Crore and the remaining sum of Rs. 2 Crores

was paid to Khevana on 16.12.2010 by RTGS. The Assessee filed return of income for Assessment Year 2011-12 on 30.09.2011 declaring total income at Rs. 22,14,57,470. The Assessee declared the sum of Rs. 181 Crore received from Windsor Realty as income receipt against which the Assessee claimed deduction of Rs. 85,19,66,476 as compensation paid against surrender of land. The details of this deduction have been reproduced in Assessment order in Para 5.1. the return of income filed by the Assessee was selected for scrutiny and assessment was completed u/s 143(3) determining total income at Rs. 22,17,85,465. Subsequently, a notice u/s 148 was issued on 27.03.2015 on the ground that the shares issued to Khevana @ of Rs. 1000/- had been sold by Khevana @ of Rs. 11/- per share. During the reassessment proceedings the Assessee has furnished audited accounts and tax audit report and all relevant documents. The Assessee supported allotment of shares @ of Rs. 1000/- per share bythe valuation report that had been obtained prior to issue of shares to Khevana. The same is placed in the Paper book at Pages 93 and 92.

11. During Reassessment proceedings learned AO harped upon the sale of shares by Khevana and asked the Assessee to explain as to how the deduction of Rs. 40 Crore was claimed @ Rs. 1000/- per share when the same shares were sold by Khevana @ Rs. 11/- per share. Learned Assessing Officer did not consider it necessary to ask Khevana as to why he sold the shares at the meager me sum of Rs. 11/- per share when the same had been acquired by him @ Rs. 1000/- per share. In the reassessment order learned Assessing Officer merely recorded that he had issued a notice u/s 133(6) to Khevana calling for certain details but the notice was returned by postal authorities with the remarks "LEFT". Thereafter, learned Assessing Officer did not pursue the matter further and did not even correspond with the Assessing Officer in Baroda having jurisdiction over the assessment of Khevana. As regards the buyer of shares @ Rs. 11/- per share M/s. Coroa Investments Pvt. Ltd. Assessing Officer did not make any inquiry. Learned Assessing Officer assumed that the price at which Khevana sold viz. @ Rs. 11/- was sacrosanct even though the Balance Sheet of the Assessee for AY 2011-12 stared at him.

12. During Reassessment proceedings the Assessee strongly relied upon the facts of the case as revealed by documents filed and the Valuation Report. Thus, the Assessee discharged the initial burden of proof that lay upon him and it was for the Assessing Officer to gather material and set up a case that the apparent state of affairs was not true. Instead, learned Assessing Officer just cut the matter short taking the stand that the price at which Khevana sold the shares was gospel truth.

13. As pointed out the Assessee obtained valuation of shares from a qualified Chartered Accountant to decide upon issue price of shares to Khevana. In the reassessment order learned Assessing Officer has dealt with this aspect at length and given his reasons in Paragraph 5.3.1 to 5.3.7 for not accepting the issue price. The reasons given by learned AO scarcely go into the question of valuation and they all revolve around his basic theme that shares having been sold by Khevana for Rs. 11/- the Assessee's transaction ought to be held non-genuine. In short, the Assessing Officer has not found any fault in the valuation report submitted by the Assessee.

14. In Paragraph 5.3,1 learned alleges that in its submissions dated 29.02.2016, though the Assessee stated that the confirmation from Khevana was being arranged no such confirmation was furnished till the date of passing the assessment order. This statement of the Assessing Officer is incorrect. The confirmation letter from Khevana had been filed with the Assessing Officer as Annexure - D to the letter dated 1 March 2014 and is placed in the Paper book at Page49 and 50.

15. In Paragraph 5.3.2 learned AO states that in their assessment proceedings Khevana had shown total receipts from the Assessee at Rs. 4,89,05,000 including Rs. 39,05,000 from 3,55,000 shares sold @ Rs. 11/-. This is nothing but harping on third party transactions behind the back of the Assessee.

16. In Para 5.3.3 the AO alleges that the valuation of shares filed by the Assessee at pages 93 and 92 of the Paper book are merely based on profits booked by the Assessee in AY 2012-13. This was a generalized statement not supported by any scientific calculation. According to learned AO the Assessee, ideally, must have filed justification for issue of shares at high premium as compared with net asset value (NAV), DCF and PECVmethods. These observations of learned AO are based on ignorance. Valuation of shares of Assessee company as on 31 March 2011 done by CA Suresh C. Shah Chartered Accountant at page 93 and 92 of Paper book is based on Discounted Free Cash Flow Analysis which is prescribed method at the option of the Assessee as per Rule 11UA(2)(A)(b) of IT Rules 1962. As regard net asset value (NAV) the learned Assessing Officer himself could have easily done that with reference to the Balance Sheet filed by the Assessee (Page 185 of Paper book). The net asset value as per the Balance Sheet as at 31 March 2011 is Rs. 255,959,507 and divided by 4 Lakh issued shares works out at Rs. 639.90 and not Rs. 11/- held sacrosanct by Assessing Officer. Khevana sold shares at Rs. 11/- on 26.09.2011. Net Asset Value as per Balance Sheet of the Assessee as at 31.03.2012 is Rs. 856,952,949 and divided by 7.55 Lakh

shares yields NAV of Rs. 1135/- per share. On these facts, it is stupefying to see learned AO clinging to Rs. 11/- all the time.

17. In Para 5.3.4 learned AO once again harps on sell of shares by Khevana at meager Rs. 11/- per share. This myopic vision of learned AO has misdirected him on facts and in law.

18. In Para 5.3.5 learned AO states that the Assessee company had been asked for certain documents like Board's Resolution, Copy of Form No.2, calculation of fair market value of shares, the same were not submitted for the reason best known to the Assessee itself. These statements from learned AO are incorrect. Form No. 2 has been submitted to learned Assessing Officer through letter dated 26th February 2016 and is placed in the Paper book at Pages 51 to 56. The valuation given by the Chartered Accountant at Pages 93 and 92 is calculation of fair market value within the meaning of Rule 11UA of Income Tax Rules, 1962.

19. In Para 5.3.6 learned Assessing Officer states, "on cumulative analysis of the aforesaid observations, it reveals that substantial funds were shown to have invested into your company as 'share capital' that too at exorbitant premium. All these funds pumped into your company under the grab of 'share capital' & 'premium' and later siphoned off by way of forfeiture of convertible warrants are nothing but your own funds round tripped and brought into your books." The Assessee categorically and absolutely deny these statements. Para 5.3.6 appears to be copy-paste from some unrelated document. To dispel any doubts the Assessee is submitting hereto Annual Accounts for the year ended 31.03.2012. The Assessee states and submits that both the Mills Store Company Ltd. and M/s. Coroa Investments Pvt. Ltd. continue to be shareholders of the Assessee company till today.

20. As regards narration of the AO in Para 5.3.6 the Assessee categorically and absolutely deny these facts. Para 5.3.6 appears to be copy paste from some unrelated document. At any rate the AO is not relying on any particulars and therefore rebuttal other than denial is not possible.

21. In short, only material brought on record by learned AO after reopening of the Assessment u/s 147 is the transaction of sale of shares by Khevana to Coroa i.e., third party transactions the Assessee is not involved. Learned Assessing Officer has merely ignored the overwhelming evidence brought on record by the Assessee. Therefore, there is no merit in the appeal filed by the revenue and may kindly be dismissed.

22. Apart from the sound case on facts and in law has enumerated in the forgoing Paragraphs, the Assessee has

significant alternative contention. The Assessee follows mercantile system of accounting. The liability to pay Rs. 40 Crore to Khevana accrued during FY 2010-11 by virtue ofMemorandum of Understanding dated 23.08.2010. This MOU was acted upon by the Assessee and Khevana on payment of Rs. 2.50 Crore on 30.03.2011. The allotment of 3,55,000 shares is an event that happened in FY 2011-12. The Assessee states, without prejudice and without accepting or conceding, if at all the case of revenue is remission of liability in FY 2011-12 due to value of 3,55,000 shares falling short of Rs. 3.55 Crore. For this reason, no interference can be made towards the income declared by the Assessee in its return of income."

13. Further, he submitted a separate note on the decision of ITAT, Ahmadabad Bench, which is reproduced below: -

"1. In this case Revenue has on 24th July, 2023 submitted the copy of ITAT A Bench Ahmedabad decision dated 10-01-2022 in ITA No.1427/AHD/2017 in the case of M/s Khevana Securities and Finstock Ltd. Learned DR has relied upon certain observations made in that order in relation to the respondent herein.

2. It is the respectful submission of the Respondent that it has never received any query, inquiry, notice or any communication whatsoever from Hon'ble ITAT A Bench Ahmedabad in relation to their observations as referred to in Para 1 above. The Respondent is regular assessee at Mumbai. It has filed its return of income for all assessment years including assessment year 2011-2012 in Mumbai. It received notice u/s 143(2) from the Assessing Officer for Assessment Year 2011-2012 and assessment order u/s 143(3) was made by the Assessing Officer on 24-03-2014 accepting the Respondents transactions with M/s Khevana Securities and Finstock Ltd. as reflected in its books of accounts. However, the Notice u/s 148 was issued by the Assessing Officer on 27-03-2015 disputing the correctness of the direction of Rs 40 Crores paid to Khevana and claimed by the Respondent as compensation paid against surrender of land and eventually an order u/s 143(3) read with Section 147 was made by the AO on 31-03-2016 withdrawing the deduction of Rs 40 Crores allowed in the original assessment order. Aggrieved, Respondent filed an appeal against the said assessment order u/s 143(3) read with Section 147 made on 31-03-2016. During the course of hearing of the appeal by learned CIT (Appeal)the respondent made detailed submissions and filed voluminous details none of which have been taken on record, referred to and considered by Hon'ble ITAT A Bench Ahmedabad

while pronouncing their decision in the case of M/s Khevana Securities and Finstock Ltd. as referred to Para No 1 above.

3. Law is trite that no finding or decision prejudicial to any person can be given without allowing that person a reasonable opportunity of being heard. Audi altermpartem. The observations of Hon'ble ITAT A Bench Ahmedabad is so far as the same pertained to respondent have been made in gross violation of principles of natural justice and for that reason the same are nugatory and of no consequence at all. The respondent therefore prays that the order of ITAT A Bench Ahmedabad relied upon by revenue be simply ignored as having been made in gross violation of the principles of natural justice in so far as the same contains any observations relating to the respondent.

4. The respondent submits that principles of natural justice being relied upon by it do not require any authority in support and have to be observed by all courts and tribunals in India. However, the respondent has attached to this note a copy of the judgement of Hon'ble Supreme Court in the case of Union of India v GM Foods (2022) 143 taxmann.com 154 (SC).”

14. Considered the rival submissions and material placed on record, we observe that the assessee is the absolute owner of the huge chunks of lands in Oshiwara Mumbai, certain part of the land was under adverse possession of KSFL. In order to develop the same, the assessee and KSFL reached an agreement, as per which the assessee agreed to compensate by developing about 90000 sft. at a subsidized price. The total subsidized consideration was worked out to ₹.63 crores. With the above agreement, the KSFL also paid 1% as initial consideration. The relevant agreement executed on 23/08/2010 and copy was submitted before lower authorities as part of submissions.

15. Subsequently, the above said agreement was cancelled due to inability on the part of KSFL. Afterwards, the terms of settlement was modified to compensate them by way of lump sum compensation of ₹.40 crores. Based on this modified terms of settlement, the assessee has paid ₹.2.50 crores on 30/03.2011 i.e., in the A.Y.2011-12. For the balance payments also the assessee had paid ₹.30 crores by way of post dated cheques.

16. In the subsequent assessment year, KSFL offered to return the above said payments along with the remaining payments and shown interest in part ownership in the assessee business. Based on the above proposition the assessee agreed to settle the balance settlement amount by issue/allotment of 355000 shares and further cash payment of ₹.2 crores. The issue and allotment of shares were made based on the current market value at that point of time. The valuation was carried with the independent Chartered Accountant, who valued the shares at ₹.1228.51 /-. Based on the above valuation, the shares were issued at face value of ₹.10/- and share premium of ₹.990/- per share. Accordingly, the assessee issued 355000 shares on 09/09/2011. The assessee has followed the due process of law for issue of shares by filing the relevant forms before Registrar of Companies. The assessee also filed

above returns before tax authorities. The regular assessment was also completed on the basis of books of account and return of income for the impugned assessment year. In this assessment year the assessee has claimed the settlement amount as expenditure against the overall compensation received from Emgeen Holdings Pvt Ltd of ₹.181 crores during this year. The Assessing Officer accepted the transaction in his order passed 143(3) of the Act.

17. In the subsequent year, KSFL had sold the above shares @ ₹.11 per share. The reason for selling these shares at such low price was best known to them nor was it brought on record by the Assessing Officer by conducting any inquiry from the said party as to why the shares were sold at such a low price. We observe from the assessment order, which has been extracted by Ld CIT(A) in his order, that in the case of KSFL, the Assessing Officer of KSFL has observed the above transactions in the assessment order u/s 143(3) of the Act and acknowledge that the KSFL has agreed to receive settlement compensation of ₹.40 crores by receipt of 355000 shares @ ₹.1000 per share and cash compensation of ₹.4.50 crores. He also acknowledged that the assessee has received 355000 shares in the Financial year 2011-12 and sold the same at ₹.11 per share. He rejected the submissions of the KSFL and proceeded to

make the addition of ₹.40 crores in the AY 2011-12 in their hand. Assessing Officer of KFSL also informed the present Assessing Officer of the assessee of the above developments. Based on the above information, the case of the assessee was also reopened and the claim of the assessee towards compensation expenses for making settlement to KSFL was disallowed. Both the assessee as well as KSFL preferred appeal before first appellate authorities. The respective first appellate authorities have decided the issues under consideration based on the facts on record, i.e., the case of disallowance of settlement amount was allowed in the assessee's hand based on the assessment record of KSFL. With regard to KSFL, the appeal was dismissed by sustaining the findings of Assessing Officer. Against the above order of FAA, both, the revenue in the case of present appeal and assessee (KSFL) has preferred appeal before respective ITAT.

18. In the case of KSFL, the coordinate bench of Ahmadabad has allowed the appeal of KSFL by taking the facts as presented by the KSFL and made certain remarks without considering the other relevant facts and material relating to the settlement of the amount under consideration, for the sake of clarity the same is reproduced below the relevant remarks:

"8.17. Besides the above, we also note that the assessee before the authorities below has submitted time and again to have received a sum of ₹.4.89 crores as mutually agreed between it and M/s JRPL. Thus the question arises that once the amount was finalised at ₹.4.89 crores only, then why the assessee agreed in the cancellation agreement for ₹.40 crores. It is also a fact on records that M/s JRPL has claimed the deduction for ₹.40 crores as expenses in the financial statement. Thus if we see all the facts in the aggregation of aforesaid information, it is transpired that the assessee along with M/s JRPL has adopted the colourable device. The prime purpose of the colourable device is to extend the benefit to M/s JRPL which is the beneficiary of major amount. The assessee in this process derived the benefit of ₹.4.89 crores only as conduit.

8.18 However, as far as tax liability is concerned even in case of colourable device, it seems to us that the party who has been benefited from such colourable device should only be brought to tax. Indeed, the assessee was a party in such colourable device but the same cannot be made subject to tax for the reason that the beneficiary of the colourable device is M/s JRPL. The Revenue is at liberty to proceed against M/s JRPL in the manner as provided under the provisions of law. Thus the ground of appeal of the assessee is allowed."

19. We noticed that the Ld DR has heavily relied on the above said decision and observations of the bench. From the records of the assessee available before the authorities below and before us, we find that the whole transaction has been explained with documents and the allotment of shares at premium duly supported by valuation report which has not been disputed or rebutted by the Assessing Officer. The case of the Assessing Officer was simply based on the information received from the Assessing Officer of KSFL and despite that not even inquired as to why

KSFL has sold the shares at such a low price. It is also not the case that the party who has purchased has any kind of link with the assessee or its directors. The aforesaid observation of the tribunal, does not have any persuasive precedence because the records and the documents of the assessee were not before them nor it was brought on record. There is no basis that the assessee is the beneficiary of major amount because the assessee has not received any money albeit has allotted shares to KSFL and why KSFL has disposed off the shares at a low price has not been discussed or are brought on record. Thus, we are not inclined to accept the above observation without actually appreciating the facts on record and the bench also gave passing remarks without properly giving opportunity to the other side or calling for the records. Therefore, we are not inclined to proceed with the above observations/comments.

20. Coming to the present appeal, we observe that the Assessing Officer has rejected the submissions of the assessee without properly verifying the material facts on record. The primary allegation of the Assessing Officer was that the shares were sold at ₹.11/- and the assessee issued the shares without justifying the share valuation. We observe from the records with regard to transaction relating to issue of shares to KSFL and it is fact on record that the shares were issued and

allotted to the unrelated person. KSFL is independent and taken call to invest in the assessee company without there being any initial offer from the assessee. Unless the transaction with the related person, the allegation made by the Assessing Officer may have implication. From the record there is no allegation of round tripping of the transactions or there is any investigation made in this line. Further KSFL has sold the shares to Coroa Investments, even Coroa Investments were not related to anyway to the assessee nor there is any finding that there is round tripping of transaction to anyway beneficial to the assessee. It clearly shows that the transaction of issue of shares are independent and genuine atleast from the records submitted before us.

21. With regard to share valuation, we observe from the record that the assessee has issued 150000 shares during the financial year 2010-11 to Mills Store Company (MSC) at the valuation of ₹.700 per share. During subsequent Financial year, similar shares were issued to KSFL of 355000 shares after valuation of shares before issue of above said shares. The value adopted to issue these shares at ₹.1000/- by properly and adhering to the formalities as per Companies Act. The relevant forms and compliance were filed before tax authorities. From the records it is clear that the three tranches of shares were issued by the assessee i.e.,

250000 shares of initial subscription by the promoters, 150000 shares issued with the valuation of ₹.700 and finally 355000 shares with the valuation of ₹.1000 per share. Can we say that the existing share valuation be taken only on the basis of face value or at the sale price of KSFL? This is absurd way of treating the value of the shares of the assessee company based on sale price accepted by KSFL. The share premium is internal part of share holder funds and the final valuation has to be on the basis of net assets basis or on the future valuation method based on Discounted Cash Flow basis of valuation. At the worst scenario in which the Assessing Officer tries to value the shares atleast it has to be based on the net assets basis and as per information available on record, it can never be equal to ₹.11 at which the KSFL has sold the shares. In our considered view, the adoption of ₹.11 as the value of shares of the assessee is absurd.

22. Coming to the issue under consideration, the Assessing Officer has disallowed the whole amount paid to KSFL for settlement towards land dispute disregarding the part payment thru cash settlement of ₹.4.5 crores. Further he did not believe the valuation of shares at ₹.1000 per share. For the current assessment year, the issue to be considered is whether the claim of settlement made by the assessee is genuine or not.

After considering the facts on record, in our view, the assessee has entered into MOU with the KSFL and agreed to settle the same by payment of ₹.4.5 crores by cash and balance by issue of shares by valuing the same at ₹.1000 per share. The same was agreeable to the KSFL and based on the terms of agreement, it was settled in the same manner. The assessee has adhered to the same and made the settlement. As per record the valuation process and earlier issue of shares at premium (@690 per share) justify the stand of the assessee to make the settlement. For the current assessment year, the issue of settlement of compensation is concern, the same is demonstrated by the assessee to be genuine based purely on the documents submitted. Therefore, we are inclined to accept the facts on record in favour of the assessee and accordingly, we are inclined to agree with the findings of Ld.CIT(A) and dismiss the grounds raised by the revenue.

23. We are aware of the fact that there are two distinct findings from us and the coordinate bench of Ahmedabad. The real transaction of sale of shares was occurred in the AY 2012-13, when the shares were sold at ₹.11 against the actual issue price of ₹.1000/-. The issue relating to settlement of land dispute is concern which took place in the AY 2011-12 and we gave our findings relating to only on the issue of allowability of

claim of settlement and not on the issue of sale of shares and their circumstances. The issue cropped up because the KSFL has claimed loss on sale of shares, which prompted the Assessing Officer of the KSFL to initiate the proceedings for AY 2011-12 and made the addition of ₹.40 crores as income for the AY2011-12. The issue has to be verified in the AY 2012-13 in which such sale transaction was taken place and to evaluate the reason for selling the shares at such low price. Therefore, there is absolutely no impact or correlation on the conduct of the independent party in selling the shares in one hand and on the issue of shares by the another independent party particularly when they submit the various documents with due compliance in the transaction of issue of shares. Accordingly, we uphold the order of Ld CIT(A).

24. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 07th February, 2024.

(AMIT SHUKLA)
JUDICIAL MEMBER

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 07/02/2024
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum