IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI
BEFORE Ms. KAVITHA RAJGOPAL, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 889/Mum/2024 (A.Y.2017-18)

ACIT Circle 2(1) (1),
R. No. 575, 5th floor,
Aayakar Bhavan,
Mumbai- 400 020. ..... Appellant

Vs.

Shri Vallabh Roopchand Bhansali,
18th floor, 191, Dongarsi Road,
Walkeshwar, Mumbai-400 006
PAN: AABPB4198H ..... Respondent

Appellant by	:	Shri Ankush Kapoor, Ld. DR
Respondent by	:	Shri C. Balaram Murthy, Ld. AR
Date of hearing	:	31/07/2024
Date of pronouncement	:	06/08/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by revenue is directed against the order of National Faceless Appeal Centre (for short "NFAC") dated 04.01.2024 passed u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2017-18. The revenue has raised the following grounds of appeal:-

1. The learned CIT(A) erred in holding that loss incurred by the assessee through the 'off market' sale of shares to a partnership firm, controlled and managed by assessee, without parting with control on the sold assets, is not colourable device and eligible for set off and carry forward.

2. The learned CIT (A) erred in holding that loss incurred by the assessee through the 'off market' sale to partnership firm, controlled and managed by assessee, is legal and valid exercise of his right to choose any of the option and taxing authority cannot question the reason for selection of the option, completely ignoring the fact that in the impugned sales, assessee has never parted his control and interest in assets sold and it always was with assessee even after such transfer.

3. The learned CIT(A) erred in holding that loss incurred by the Assessee through 'off market' sale of shares to partnership firm, controlled and managed by assessee, is legal and valid on the ground that the assessing officer has not made any inquiries to establish that the transaction was in genuine, completely ignoring that the assessee has himself admitted that such transactions were done in 'off market' mode' as a matter of legitimate and permissible tax planning, which was considered by the AO only as colourable devise, to reject and deny the carry forward and set off such loss.

4. The learned CIT (A) erred in holding that loss incurred by the assessee through 'off market' sale of shares to partnership firm, controlled and managed by assessee, is eligible for set off and carry forward and legal, on the ground that the AO failed to prove that assessee has been benefited during the year and in any manner and there is any arrangement whereby taxes have been evaded, completely failing to acknowledge the finding of the AO uncovering the 'apparent to identify the 'real' i.e. the admitted purpose of it being considered as legitimate and permissible tax planning, lifted by the AO as colourable device and in deciding the appeal based only from the 'apparent' and ignoring the 'real'.

5. The decision of the learned CIT(A) in acknowledging the loss from the sale to related party, controlled and managed by the assessee without losing control over the transferred assets, as genuine and as eligible for set off and carry forward even when the purpose of sale to related party, acknowledged and admitted as permissible tax planning and legitimate, based only on the 'apparent' and ignoring the 'real' uncovered by the AO as colourable device, is perverse and liable to be quashed and set aside on facts and in law.

6. the appellant craves the leave to add, amend, alters and/ or deletes any of the grounds of appeal as above.

2. The Brief Facts of the Case are that the Assessee is an individual and has sources of income from investments in shares/mutual funds on the stock exchange for listed securities and also off market for unlisted securities. He is also a partner in M/s. Everfresh Enterprises, LLP and is a director in a few other companies. He gets income from his remuneration as a director, income from capital gains, income from house property, and income from interest and dividend. The Assessee e-filed his return of income on 21.09.2017 declaring total income for the A.Y. 2017-18 at Rs. 4,10,38,610/-. The Assessee's case was selected for scrutiny and a notice was issued to him on 09.08.2018 under section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). In response to the notice the Assessee e-filed his written submissions.

3. The AO perused these written submissions and held that the Assessee had declared income from L.T.C.G. on sale of equity shares through stock exchange after paying STT and claimed exemption u/s. 10(38) of the Act and also sold unlisted securities on which he earned a long term capital gain of Rs. 6,96,06,436/- (5,44,96,271/- + 2,23,06,540/- -71,96,375/-) ,the Assessee had declared a long-term capital loss of Rs. 16,15,92,420/- which he did partly set off against the LTCG on unlisted securities amounting to Rs. 6,96,06,436/- and balance amount carried forward to the A.Y. 2018-19. The AO observed that those shares on the equity market that were yielding gain were sold by the Assessee after paying the STT, whereas those shares which were not yielding gain were sold by the Assessee through an off-market transaction to his Sister Concern viz.

M/s. Ever fresh Enterprises LLP. The Assessee owns 60% of the shares in this LLP and the rest of the shares (40%) are owned by his son. The scrips in question which were sold through an off-market transaction for a loss were 'Ansal Properties and Infrastructure Ltd.' and 'Welspun Enterprises Ltd.'. Both the scrips were listed on bourses. The Assessee submitted before the AO that the scrips were sold at the prevailing market price and that it was not relevant to consider whether the transaction was on market or off market as there was no provision of law being contravened and thus he claimed that the transactions were correct and therefore the LTCL should be allowed to be carried forward after set off against current year's gain on unlisted securities.

4. However, the AO observed that the Assessee had declared income from Long Term Capital Gain at Rs. 49,59,76,976, this income was claimed as exempt under section 10(38) of the Act. The AO thus held that the transaction of sale of shares of 'Ansal Properties and Infrastructure Ltd.' and 'Welspun Enterprises Ltd.' was a colourable device and artificial transaction done solely with the purpose to reduce the exempt LTCG income and increase the losses in the taxable category of capital gains to set them off against taxable income in future, the AO therefore held that the transactions of Rs. 16,15,92,430/- as incurred through transactions not done on the stock exchange and hence did not allow the LTCL to be set off against the current year's LTCG and further carried forward.

5. The Assessee being aggrieved by the order of the AO passed under section 143(3) of the Act, dated 28.12.2019 preferred an Appeal before the Ld. CIT (A), Mumbai, the appeal was subsequently migrated to the National Faceless Appeals

Centre in terms of the notification issued by the CBDT. The Ld. CIT Appeals overturned the decision of the AO and held that since the Assessee is doing business of investment in Shares, the sale and purchase of shares are a commercial consideration and not routing transactions through the exchange is also a commercial consideration. The Ld. CIT (A) further held that the Assessee only did tax planning and the same is permissible. The Ld. CIT (A) placed reliance on this Hon'ble Tribunal's decision in **Nomura India Investment Fund Mother Fund v. ADST(ST) (2020) 186 DTR 212/203 TTJ 660 (Mum. (Trib.)**.

6. The ACIT, Circle-2(1) (1), Mumbai being aggrieved by the order of the Ld. CIT (A) preferred the present appeal before us. We have gone through the order passed under section 143(3) of the Act, order of the Ld. CIT (A) passed under section 250 of the Act and submissions of the Appellant along-with grounds taken before us. It is observed that the Assessee had declared income from Long Term Capital Gain at Rs. 49,59,76,976 while filing its return of income originally under section 139(1) of the Act vide 21.09.2017. The only issue before us is whether the 'off market' sale of the scrips falls under the ambit of legitimate tax planning or is a colourable device used to evade tax. We observe that the AO held that the sale of the two scrips viz. 'Ansal Properties and Infrastructure Ltd.' and 'Welspun Enterprises Ltd.' violated the Spirit of the Act and is a colorable device through which the Assessee on the one hand seeks to take advantage of the Statutory Provisions i.e., Section 10(38) of the Act, by claiming exemption of Long-Term Capital Gains but on the other hand creates Long Term Capital Loss artificially by transfer the shares to his sister concern in order to offset current and future gains against losses as mentioned (supra).

7. The Hon'ble Supreme Court in the case of ***McDowell & Co. Ltd. v. CTO*, (1985) 3 SCC 230** has categorically held: -

> "***45.*** *Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."*

This view of the Hon'ble Supreme court was reiterated by it in the case of ***Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613*** wherein the Hon'ble Supreme Court held that:-

> *"**68.** The majority judgment in McDowell [(1985) 3 SCC 230: 1985 SCC (Tax) 391] held that: (SCC p. 254, para 45)*
>
> > *"45. Tax planning may be legitimate provided it is within the framework of law."*
>
> *In the latter part of para 45, it held that: (SCC pp. 254-55)*
>
> > *"45. … Colourable devices cannot be [a] part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods."*
>
> *It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para 46 where the majority holds: (McDowell case [(1985) 3 SCC 230: 1985 SCC (Tax) 391], SCC p. 255)*
>
> > *"46. on this aspect one of us, Chinnappa Reddy, J., has proposed a separate … opinion with which we agree."*
>
> *The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is*

illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority.

69. *in the judgment of Reddy, J. in McDowell [(1985) 3 SCC 230: 1985 SCC (Tax) 391] there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from Westminster [IRC v. Duke of Westminster, 1936 AC 1 : 1935 All ER Rep 259 (HL)] and tax avoidance—these are clearly only in the context of artificial and colourable devices.*

70. *Reading McDowell [(1985) 3 SCC 230: 1985 SCC (Tax) 391], in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between McDowell [(1985) 3 SCC 230: 1985 SCC (Tax) 391] and Azadi Bachao [(2004) 10 SCC 1] or between McDowell [(1985) 3 SCC 230: 1985 SCC (Tax) 391] and Mathuram Agrawal [(1999) 8 SCC 667]."*

8. Thus, in light of the above judgements it is patently clear that the Assessee should not be encouraged to avoid payment of tax by resorting to dubious methods through colourable devices and that such devices cannot be a part of tax planning. We came to this conclusion in view of the fact that assessee transferred the above mentioned two listed securities to its partnership firm, which in turn no doubt passed the consideration also to the assessee. In nutshell, if we analyse the whole transaction it can be concluded that effectively money is lying with the assessee i.e. consideration paid by the partnership firm to the assessee, securities /shares are still with the assessee i.e. hold by the partnership firm of the assessee, on the other hand without any effective loss of control of the securities and artificial transfer of consideration, he made himself entitled to create a long term

capital loss which is available for set off against the current years capital gain and also available for future long term capital gains.

9. In these circumstances, the case laws relied upon by the assessee and Ld. CIT (A) is of no help as the facts of those judicial pronouncements vis-a-vis the facts of the assessee's case cannot be equated. Further, in such type of matter, inference can be drawn from **Section - 95,** [***CHAPTER X-A*** **GENERAL ANTI-AVOIDANCE RULE], although applicable w.e.f. A.Y. 2018-19 onwards. It is** further held that the arrangement under scrutiny appears to lack commercial substance. It was noticed that the transaction under consideration created extraordinary rights and obligations that do not align with principles of fairness, suggesting it qualify as an impermissible avoidance arrangement. The court observed that in the facts of the present case, the evidence and facts suggests that the arrangement was designed primarily for tax evasion.

10. The question of substance over form consistently getting importance and has consistently arisen in the implementation of taxation laws. In the Indian context, judicial decisions have varied. While some courts in certain circumstances had held that legal form of transactions can be dispensed with and the real substance of transaction can be considered while applying the taxation laws, others have held that the form is to be given sanctity. The existence of anti-avoidance principles is based on various judicial pronouncements. There are some specific anti-avoidance provisions but general anti-avoidance has been dealt only

through judicial decisions in specific cases introduced w.e.f. 01.04.2016 but deferred for A.Y. 2018-19.

11. In an environment of moderate rates of tax, it is necessary that the correct tax base be subject to tax in the face of aggressive tax planning and use of opaque low tax jurisdictions for residence as well as for sourcing capital. Most countries have codified the "substance over form" doctrine in the form of General Anti Avoidance Rule (GAAR). In the above background and keeping in view the aggressive tax planning with the use of sophisticated structures, there is a need for statutory provisions so as to codify the doctrine of "substance over form" where the real intention of the parties and effect of transactions and purpose of an arrangement is taken into account for determining the tax consequences, irrespective of the legal structure that has been superimposed to camouflage the real intent and purpose. Internationally several countries have introduced and are administering statutory General Anti Avoidance Provisions. It is, therefore, important that Indian taxation law also incorporate a statutory General Anti Avoidance Provisions to deal with aggressive tax planning. The basic criticism of statutory GAAR which is raised worldwide is that it provides a wide discretion and authority to the tax administration which at times is prone to be misused. This vital aspect, therefore, needs to be kept in mind while formulating any GAAR regime.

12. Documents are executed as required by law. In some areas these are executed to regulate the inter se relationship between parties to an agreement. Particularly in the case of execution of a duly registered document, law attaches importance to the recital in the said document. But where recital in such a document is tainted, the position would be different. For example the form of a benami transaction is deceptive. It employs various subterfuges in legal language. What is true of a tax avoidance scheme is also true of a benami transaction. In such cases apparent is not real. Therefore, 'form' of the transaction has to be pierced through to ascertain the true meaning of a document and recital made therein.

13. In State of AP v. Kone Elevators India Ltd. [2005] 181 ELT 156 (SC), it was held that the substance of a contract is determinative but not form. The essence of a contract is to be ascertained taking into account the intention of parties. In Sundaram Finance Ltd. v. State of Kerala AIR 1966 1178 (SC), the emphasis was placed on substance of a transaction taking into account surrounding circumstances. It was held that the Court is entitled to go behind a transaction ignoring its form. In a benami transaction, a wholesome appreciation of evidences - documentary, oral and circumstantial is a requirement. In the process, the form of a transaction has to be evaluated keeping in view the substance of a transaction. If the form of the transaction points to a dubious device, the said transaction needs to yield to substance of the transaction.

14. In these circumstances and facts on record we uphold the appeal and set aside the order passed by the Ld. CIT (A) and restore the decision passed by the AO keeping in view the ratio laid down by the Hon'ble Supreme Court in the cases of ***McDowell & Co. Ltd. v. CTO*, (1985) 3 SCC 230** and ***Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613*.**

15. **In the result, appeal of the Revenue is allowed.**

Order pronounced in the open court on 6th day of August, 2024.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 06/08/2024
Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Asstt. Registrar)
ITAT, Mumbai