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

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 7410//Mum/2012 (Assessment Year-2006-07)

In the matter of

Mrs. Madhu Sarda ,
38,Vikas Center,
S.V. Road, Santacruz (West)
Mumbai-400054
PAN: AAJPS 5135R Appellant/ Assessee

Versus

Income Tax Officer, -19(4)
Mumbai Respondent/ Revenue

Assessee by	:	Sh. Harish M. Kapadia Advocate
Revenue by	:	Sh. V. Vidhyadhar (Sr.DR)
Date of hearing	:	09.03.2018
Date of Pronouncement	:	09.03.2018

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of Income-tax Act is directed against the order of Commissioner (Appeals)-35 Mumbai dated 4th September 2012, which in turn arises from assessment order passed under section 143(3) on 26 December 2008 for assessment year 2006-07. The assessee has raised following grounds of appeal;

(1) The Hon'ble Commissioner of income tax (Appeals) erred in confirming the order of learned assessing officer by not allowing long term capital loss of Rs. 29,14,440/-suffered in respect of loss on sale of shares held by the assessee since 1991 by treating the such share transaction as sham

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transaction. It is submitted that the appellant has incurred loss respect of shares held and long term capital loss as claimed should be allowed in full.

2. Brief facts of the case are that for assessment year 2006-07 the assessee filed return of income on 30 July 2006 declaring total taxable income of Rs.10,68,030/-. The assessment was completed under section 143(3) on 8th September 2008. The assessing officer while passing the assessment order disallowed the set off of loss on account of long term capital loss suffered by assessee on sale of shares against the profit of long term capital gain earned on sale of immovable asset. On appeal before ld. Commissioner (Appeals), the action of assessing officer was confirmed. Thus, aggrieved by the order of ld. Commissioner (Appeals) the assessee filed present appeal before us.

3. We have heard the learned AR of the assessee and the learned DR for revenue and perused the material available on record. The learned AR of the assessee submits that during the year under consideration assessee sold 900 shares of National Tiles & Industries Private Ltd (NTPL) at the rate of Rs. 100/-per share on their fair market value. These shares were held by the assessee for last 15 years. The assessee purchased the share in the year 1991 from NEC Investment Company. During the relevant financial year the assessee also sold a property situated in Santacruz Mumbai. After claiming indexation benefit the assessee offered long term capital gain of Rs. 25 Lacs (approx) on sale of such property. It was

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submitted that assessee also sold 900 shares of National Tiles & Industries Private Ltd to her son. Her son had returned from abroad after completing his education and was interested in starting his own business. The aforesaid 900 share was sold at the fair market value. The shares were transferred by executing share transfer Form and after paying the requisite Stamp duty, the company NTPL also passed a Board Resolution for transfer of those shares. The consideration of share was effected to through banking channel. The learned AR of the assessee drawn our attention about the fair market value arrived by assessee, as furnished before Commissioner (Appeals), (page No. 74 of PB). It was submitted that transactions is genuine, merely because the assessee has claimed set-off of capital loss against the capital gain earned during the same period, which cannot be said to be a colourable device or method adopted by assessee to avoid the tax. Transactions of sale of share were genuine and transacted at a proper valuation. The lower authority has not disputed the genuinity of transaction. All the transactions carried by assessee are valid in law, and cannot be treated as *non-est* merely on the basis of some economic detriment or it may be prejudicial to the interest of revenue. The learned AR of the assessee further submits, mainly because the period co-existed or permitted the assessee to set off her capital loss against the capital gain earned itself would not give rise to the presumption that the transaction was in the nature of colourable device. In

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support of his submission his submissions the reliance is made on the following case law ;

(i) CIT Vs George Henderson & Co Ltd 66 ITR 622 (SC)
(ii) K.P. Verghese versus ITO 131 ITR 597(SC)
(iii) Union of India versus Azadi Bachao Andolan 263 ITR 706(SC)
(iv) CIT vs Morarjee Textile Ltd ITXA 778/2014 dt. 24.01.2017(Bombay)
(v) Morarjee Textile Ltd vs. ACIT, ITA 1979/M/09 dated 10.05.2013
(vi) CIT vs. Hede Consultancy Co. Pvt. Limited, 231 Taxman 421(Bombay)
(vii) CIT vs. Shriram Investments [2017] 77 taxmann.com 113(Madras)
(viii) CIT vs. Special Prints Ltd 356 ITR 404(Gujarat)
(ix) ACIT vs. Biraj Investment Pvt. Ltd. 210 Taxman 418(Gujarat)
(x) Porrits & Spencer (Asia) Ltd. vs. CIT, 329 ITR 222(P&H)
(xi) Rupee Finance & Management Pvt. Ltd vs. ACIT 120 ITD 539(Mum)
(xii) Nariman Point Building Services & Trading Pvt. Ltd vs. CIT 54 SOT 7 (Mumbai)
(xiii) Tainwala Chemicals & Plastics India Ltd. vs. ACIT 47 SOT 169(Mum)
(xiv) Mishapar Investments Ltd. vs. ITO, 8 SOT 532(Mum)
(xv) DCIT vs. Jindal Equipment Leasing and Consultancy Services Ltd. 131 ITD 263(Delhi)
(xvi) ACIT vs. Turner Morrison & Co. Ltd. 47 ITD 638(Cal)

4. On the other hand the learned AR for the revenue supported the order of authorities below. It was submitted that National Tiles & Industries Private Ltd is owned and managed by the family members of the assessee. The assessee sold the shares to his son. The assessee developed a colourable device under the guise of share transaction to avoid the tax.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. The assessing officer disallow the

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set off of Long Term Capital loss on sales of shares against the Long-term Capital Gain holding that the assessee has chosen the sale of shares to her son only after the assessee has gain on sale of flat, though the assessee was holding the share from assessment year 1991-92. Further the assessee has not made efforts to sell the shares to the third party. Thus, it is a sham transaction. The second objection of assessing officer was that the worth of the company is not negative as on the date on the selling the shares on the face value to her son. The assessee has allowed her son to capitalize 900 shares at Rs. 90,000/- as the assessee has taken the benefit of long term capital loss. Before the ld CIT(A) the assessee furnished the working of valuation of shares as per Wealth Tax Rules, 1957. The working of valuation is referred here;

> "As per Rule-1D as per wealth Tax Rules 1957.
>
> | | |
> |---|---|
> | Total asset of Company as on 31.03.2005 | Rs.1,55,69,651/- |
> | Less: Total liability of the company as on31.03.2005 | Rs.509,68,050/- |
> | | ------------------------- |
> | | Rs. (-) 35368050/- |
> | Total no. of Shares | 25,000 |
> | Value of the Equity Shares | (-) Rs.141/95/- per shares |
> | Breakup value per share being 80% of above | (-) Rs. 1699/13/- |
>
> As against the same, the assessee has sold the shares @ Rs.100/- per shares which is face value of each equity share."

6. The assessee also furnished the copy of Income tax return of her son showing the investments in shares, copy of share transfer form and share certificate and copy of bank statement to substantiate the genuinity of transaction. The ld CIT(A) confirmed the action of the assessing officer on similar lines. We have noted that the lower authorities have not

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disputed the working of valuation of shares. The grounds for denial of set off of Long-term capital loss against the long- term capital gain is because of related parties transaction.

7. The Hon'ble Apex Court in UOI Vs Azadi Bachao Andolan [2003] Taxman373 (SC) held that an act which is otherwise valid in law cannot be treated as *non-est* merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the notional interest as perceived by the revenue.

8. Further, Hon'ble Bombay High Court in CIT Vs Hede Consultancy Co. (P.) Ltd. [2014] 49 taxmann.com 56 (Bombay) held that when the assessee sold shares of a company at a price quoted at stock exchange whereas shares of sister concern were sold at loss because said company was in red, there being no doubt about genuineness of share transactions, assessee's claim for set off of loss arising from sale of shares of sister concern against income arising from shares of other company was to be allowed. The Hon'ble Gujarat High Court in CIT Vs Special Prints Ltd [2013] 33 taxman.com held that once a transaction is genuine and traded at proper valuation , even if entered with a motive to avoid tax, would not become colourable device subject to any disqualification.

9. Similarly Hon'ble Punjab and Haryana High Court in Porritis & Spencer (Asia) Ltd VS CIT [2010] 190 TAXMAN 174 (P&H) while considering the question of law if the Tribunal was right in holding that the

transaction for purchase and sale of share the appellant with Bank, after holding that the transaction were genuine, were(a) not bonafide transaction, (b) entered with a motive to avoid the liability of tax held as under;

> "**17.** Hon'ble the Supreme Court also proceeded to approve the following view of Gujarat High Court in *Banyan and Berry* v. *CIT* [1996] 222 ITR 831 while interpreting *McDowell's & Co. Ltd.'s* case (*supra*) :-
>
> *"The court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell's case [1985] 154 ITR 148 (SC). The ratio of any decision has to be understood in the context it has been made. The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity."*
>
> **18.** The aforesaid discussion would show that once the transaction is genuine merely because it has been entered into with a motive to avoid tax, it would not become a colourable devise and, consequently, earn any disqualification. Hon'ble the Supreme Court in the concluding paras of its judgment in *Azadi Bachao Andolan's* case (*supra*) has rejected the submission that an act, which is otherwise valid in law, cannot be treated as *non est* merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interest

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as per the perception of the revenue. The aforesaid view looks to be the correct view. It has ready support from the Division Bench judgment of this Court rendered in the case of *Satya Nand Munjal* (*supra*) and the Division Bench judgment of Orissa High Court in the case of *Industrial Development Corpn. of Orissa Ltd.* (*supra*) and various other judgments of Delhi and Madras High Courts (*supra*).

20. When the principles laid down in the case of *Azadi Bachao Andolan* (*supra*) are applied to the facts of the present case it becomes evident that the question is liable to be answered in favour of the assessee-appellant and against the revenue-respondent. In the present case, the transaction concerning purchase of units has been held to be genuine by the Tribunal. It is also evident that the basic object of purchasing the units by the assessee-appellant was to earn dividends, which are tax-free under section 80M of the Act and to sell the units by suffering losses. Thus, it cannot be concluded by any stretch of imagination that the assessee-appellant used any colourable devise, particularly when it has been recognized with effect from 1-4-2002 by incorporating sub-section (7) of section 94 of the Act. By inserting the aforesaid provision, the Parliament has now recognized and regulated the purchase and sale of units and the dividends/income received from such units. Therefore, question No. 2 is liable to be answered against the revenue-respondent."

10. The coordinate bench of Mumbai Tribunal in Morarjee Textile Ltd Vs ACIT in ITA No.1979/M/2009, while considering the similar ground of appeal held as under;

"15. We have considered the issue and examined the record. As far as the price adopted by the AO, we cannot approve the value as taken by the demat authorities as there seems to be an error in mentioning the value as the said company is a private limited company and there cannot be any market value as it is not quoted in the Stock Exchange. Therefore, part of AO's finding about the value of demat statement is not correct. With reference to the future profit and also adoption of book value there is nothing brought on record by the AO

how these amounts were arrived at. Therefore, we are unable to support the substitution of value even on facts. Be that as it may, first of all, the AO does not have power under the I.T. Act to substitute 'fair market value' for 'full value of consideration'. There are specific provisions for substitution of fair market value for full value of consideration like computation under section 50C and 50D in the I.T. Act at present but in the relevant assessment year, the AO has no power to adopt the 'fair market value' in place of 'full value of consideration'. The method of computation as prescribed under section 48 superficially mention that "income chargeable under the head 'Capital Gains' shall be computed, by deducting from the full value of consideration received or accruing as a result of the transfer of the capital asset the following amount, namely: - (i) expenditure incurred wholly and exclusively in connection with such transfer, and (ii) the cost of acquisition of the asset and the cost of any improvement thereto". The 'full value of consideration' is clearly different from the 'fair market value'. Section 50D inserted w.e.f. 01.04.2013 permits fair market value being the full value of consideration in certain cases where as a result of transfer of capital asset by and assessee the consideration received or accruing is not ascertainable or cannot be determined. Under section 50C, there is special provision for substitution of full value of consideration in cases where Stamp Authorities adopts a particular value, i.e. deemed to be the full value of consideration received or accruing. Reference to Valuation Officer under section 55A is also for the limited purpose of arriving at the cost of asset at the fair market value in certain circumstances but it does not empower the AO to substitute the 'fair market value' to 'full value of consideration'. These two words, 'full value of consideration' and 'fair market value ' are differently used in the Income Tax Act and fair market value cannot be substituted in place of full value of consideration, unless it is specifically empowered by the Act. The AO has also wrongly relied on section 2(22B)(i), which is as under: "the fair market value, in relation to a capital assets, means - (i) the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date". This fair market value substitution is applicable only to the situation where the AO is empowered to determine the fair market value under the Act. As far as computation of capital gains on sale of shares are concerned

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under section 48 it does not empower the AO to substitute the fair market value for the full value of consideration..

16. The Hon'ble Supreme Court in CIT vs. George Henderson and Co. Ltd. (1967) 66 ITR 622 (SC) on the issue that the market value of the shares which were allotted at Rs. 136/- per share was Rs. 620/- per share considered the expression " full value of consideration" as occurring in section 12B(2) of the Indian Income Tax Act and , 1922, which is analogous to section 48 of the Act has held as under:-

" .... It is manifest that the consideration for the transfer of capital asset is what the transferor receives in lieu of the asset he parts with, namely, money or money's worth and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer. It follows that the expression "full consideration" in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only means the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The consideration for the transfer is the thing received by the transferor in exchange for the asset transferred and it is not right to say that the asset transferred and parted with is itself the consideration for the transfer. The main part of section 12B(2)provides that the amount of a capital gain shall be computed after making certain deductions from the "full value of the consideration for which the sale, exchange or transfer of the capital asset is made." In case of a sale, the full value of the consideration is the full sale price actually paid. The legislature had to use the words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money. If it is therefore held in the present case that the actual price received by the respondent was at the rate of Rs.136 per share the full value of the consideration must be taken at the rate of Rs.136 per share. The view that we have expressed as to the interpretation of the main part of section 12B(2) is borne out by the fact that in the first proviso to section 12B(2) the expression "full value of the consideration" is used in contradistinction with "fair market value of the capital asset" and there is an express power granted to the Income-tax Officer to "take the fair market value

of the capital asset transferred" as "the full value of the consideration" in specified circumstances. It is evident that the legislature itself has made a distinction between the two expressions "full value of the consideration" and "fair market value of the capital asset transferred" and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2), the market value of the asset transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are(1) that the transferor was directly or indirectly connected with the transferee , and(2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer."

17. In CIT vs. Gillanders Arbuthnot & Co. (1973) 87 ITR 407 (SC) Their Lordships after applying the principles enunciated in George Henderson and Co. Ltd. supra has observed and held as under (page 419):-

"Now let us see what is the impact of section 12B(2) on the transaction? Under that provision, the amount of capital gains has to be computed after making certain deductions from the full value of the consideration for which the sale is made. What exactly is the meaning of the expression "full value of the consideration for which sale is made"? It is the consideration agreed to be paid or is it the market value of the consideration ? In the case of sale for a price, there is no question of any market value unlike in the case of an exchange. Therefore, in case of sales to which the first proviso to sub-section (2) of section 12B is not attracted, all that we have to see is what is the consideration bargained for. As mentioned earlier, to the facts of the present case, the first proviso is not attracted. As seen earlier, the price bargained for the sale of the shares and securities was only rupees seventy-five lakhs. The facts of this case squarely fall within the rule laid down by this court in Commissioner of Income-tax vs. George Henderson & Co. Ltd. Therein this Court observed:-

"In case of a sale, the full value of the consideration is the full sale price actually paid. The legislature had to use the words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money. If it is therefore held in the present case that the actual price received by the respondent was at the rate of Rs.136 per share the full value of the consideration must be taken at the rate of Rs.136 per share. The view that we have expressed as to the interpretation of the main part of section 12B(2) is borne out by the fact that in the first proviso to section 12B(2) the expression "full value of the consideration" is used in contradistinction with "fair market value of the capital asset" and there is an express power granted to the Income-tax Officer to "take the fair market value of the capital asset transferred" as "the full value of the consideration" in specified circumstances. It is evident that the legislature itself has made a distinction between the two expressions "full value of the consideration" and "fair market value of the capital asset transferred" and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2), the market value of the asset transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are(1) that the transferor was directly or indirectly connected with the transferee , and(2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer."

Applying the principles enunciated in that decision we think that the full value of the sale price received by the assessee was only rupees seventy- five lackhs. That being so, the capital gains made by the company were Rs. 27,04,772 as held by the High Court."

18 In K.P.Varghese vs. ITO (1981) 7 Taxman 13(SC); (1981) 131 ITR 597 (SC) it has been held vide para 15 and 18 as under:-

"15. It is, therefore, clear that sub-section (2) cannot be invoked by the revenue unless there is understatement of the consideration in respect of the transfer and the burden of showing that there is such understatement is on the revenue. Once it is established by the revenue that the consideration for the transfer has been understated or, to put it differently, the consideration actually received by the assessee is more that what is declared or disclosed by him, sub-section (2) is immediately attracted, subject, of course, to the fulfillment of the condition of 15 per cent or more difference, and the revenue is then not required to show what is the precise extent of the understatement or, in other words, what is the consideration actually received by the assessee. That would in most cases be difficult , if not impossible, to show and hence sub-section (2) relieves the revenue of all burden of proof regarding the extent of understatement of concealment and provides a statutory measure of the consideration received in respect of the transfer. It does not create any fictional receipt. It does not deem as receipt something which is not in fact received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee and brings to tax capital gains on the footing that the fair market value of the capital asset represents the actual consideration untruly declared or disclosed by him. This approach in construction of sub-section (2) falls in line with the scheme of the provisions relating to tax on capital gains. It may be noted that section 52 is not a charging section but is a computation section. It has to be read along with section 48 which provides the mode of computation and under which the starting point of computation is "the full value of the consideration received or accruing". What in fact never accrued or was never received cannot be computed as capital gains under section 48. Therefore, sub-section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him and it must be confined to cases where the actual consideration received for the transfer is understated and since in such cases it is very difficult , if not impossible, to determine and prove the exact quantum of the suppressed consideration, subsection (2) provides the statutory measure for determining the consideration actually received by the assessee and permits the revenue to take the fair market value

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of the capital asset as the full value of the consideration received in respect of the transfer.

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18. We must, therefore, hold that sub-section (2) of section (2) of section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or, in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is understatement or concealment of consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration........... "

19. . In Rupee Finance & Management (P) Ltd. (2008) 22 SOT 174 (Mum); (2009) 120 ITD 539 (Mum) it has been held in penultimate para of the order that:

" As already held in the order of Rupee Finance & Management Pvt. Ltd. there is no allegation much less, any evidence to show that these assesses before us have received monies in excess of amounts of sale consideration recorded and disclosed in the transaction for the sale of shares. The first appellate authority has rightly noted that under section 48 the starting point for computation of capital gains is the amount of full value of consideration received or accruing as a result of transfer of the capital asset. The Hon'ble Supreme Court in the case of K.P.Varghese (supra) held that sub-section (2) of section 52 can be invoked only when the full value of the consideration is received in respect of a transfer is shown at a lesser figure than that which is actually received by the assessee. It further laid down that the burden of proving such understatement of consideration is on the revenue and that the sub-section has no application

in the case of a bona fide transaction, where the true consideration received by the assessee has been declared or disclosed by him. Section 50C, has come into the statute only with effect from 1.4.2003 by Finance Act, 2002 and is not applicable to the impugned assessment years. Hence, for the period prior to the insertion of section 50C no addition can be made by invoking the ratio of this section. The first appellate authority at page 21 of his order has rightly observed that, what in fact never accrued or was never received cannot be computed as capital gain. He relied on the decision of the Calcutta High Court in the case of CIT vs. Smt. Nandini Nopani (1998) 230 ITR 679. He rightly held that it is manifest that the consideration for the transfer of capital asset is what the transferor receives, in lieu of assets he parts with, i.e. money or monies worth and that the expression 'full consideration' cannot be construed as having reference to the market value of the assets transferred but refers to the price bargained for by the parties and it cannot refer to the adequacy of the consideration. He also rightly observed that the Legislature has used the words 'full value of the consideration' and not 'fair market value of the assets transferred'. He recorded that the Assessing Officer has not brought on record any material to show that the assessee has received more than what has been disclosed in the books and under these circumstances the difference cannot be brought to tax under the head 'Capital gains'. We fully agree with these findings and the appeals filed by the revenue fail."

20. In view of the principles laid down above, we cannot uphold the orders of the AO and the CIT(A) in redetermining the full value of consideration by adopting the fair market value. Since the provisions of the Act does not provide for substitution of the values and the said provisions for substitution provided under the Act is not applicable to the facts of the case, we cannot approve the action of the AO in revaluing the sale price. Similar view was taken by the Coordinate Bench in the case of MGM Shareholders Benefit Trust (supra) wherein the ITAT ultimately did not approve the substitution of sale price on the facts of that case. The final finding in para 41 is as under: -

"41. There is no quarrel on the principle of law laid down in the other decisions relied on by ld. D.R. However, in view of the principles enunciated by the

Hon'ble Supreme Court, in the above decisions referred in para 31 to 36 and the Tribunal decision in para 37 of this order we are of the view that the full value of the sale price received by the assessee was only Rs.0.10p Per share and, hence, the short term capital loss shown by the assessee at Rs.5,21,28,059/- is accepted and the order passed by the Assessing Officer and the ld. CIT(A) in this regard are set aside. The grounds taken by the assessee are, therefore, allowed and the grounds taken by the revenue are rejected."

21. In view of the above, we have no hesitation in allowing the grounds raised by the assessee on the issue and direct the AO to adopt the full value of consideration as received by the assessee and to recompute the long term capital gains or losses accordingly. The orders of the AO and the CIT(A) to that extent are modified. Ground is allowed."

11. The coordinate bench of the Tribunal on similar facts in ACIT Vs Turner Morrison & Co. Ltd [1993] 47 ITD held as under (we are extracting the entire fact as the fact of the case is almost similar) ;

" **2.** The appeal arises this way. During the year, the assessee sold a flat in Bombay and there was a capital gain of Rs. 35,70,661. On 24-12-1985 the assessee sold two lakh equity shares of M/s. Grahmas Trading Co. (I) Ltd. and 10,500 equity shares of M/s. Shalimar Works Ltd. The cost price of these shares (Rs. 10 face value) was Rs. 24,05,332 and Rs. 13,40,514. These shares were held as investments in the assessee's balance-sheet. These shares have been held by the assessee for quite some time. They were sold for Rs. 1 lakh in respect of the shares in M/s. Grahmas Trading Co. (I) Ltd. and for Rs. 2,625 in respect of the shares in M/s. Shalimar Works Ltd. The long-term capital loss came to Rs. 36,43,221. The loss was set off against the capital gains in the return. The ITO did not accept the claim. He summoned the broker to whom the shares were sold under section 131 of the Act and examined him as well as his books of account. He noticed that 75,000 shares of M/s. Grahmas Trading Co. (I) Ltd. had been sold by the broker on 7-5-1987 for a profit

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of 3 paise per share and shares of M/s. Shalimar Works Ltd. were still lying with him unsold. According to the ITO, it was not acceptable that a prudent share broker would lock up a sum of Rs. 1,02,625 for a period of 1½ years merely to earn a profit of 3 paise per share. He, therefore, took the view that the sale of shares by the assessee was a colourable device resorted to merely for avoiding the tax on the capital gains. He invoked the doctrine in *McDowell & Co. Ltd.* v. *CTO* [1985] 154 ITR 148 (SC) and disallowed the capital loss. On appeal, the CIT (A) took the view that since the ITO did not challenge the genuineness of the sale of shares to the broker it was not open to him to defeat the assessee's claim merely because the assessee sought to set off the capital loss against the capital gain. The CIT(A) also found that there was nothing on record to suggest that there was collusion between the assessee and the share broker in effecting the sale of shares and in the absence of this, the McDowell doctrine had been wrongly invoked. In this view of the matter he upheld the assessee's claim.

3. The revenue is in appeal to contend that the CIT(A) should have upheld the view of the ITO. We are unable to uphold the contention. Firstly there is nothing on record to show that the sale of shares to the share broker was sham. The CIT(A) has recorded a categorical finding that there is nothing on record to suggest any collusion between the assessee and the share broker. Even the ITO does not appear to take a view that the sale of shares to the share broker is sham or a make-belief transaction in spite of having summoned the broker and having examined him and his books of account. In the absence of any such conclusion, the view of the ITO that the assessee is not entitled to claim set off of the loss in the share transaction against the long-term capital gain is not justified. Secondly, even assuming that the assessee had deliberately chosen to sell the shares in the accounting year. having held them for quite a long period, it cannot be stated that the assessee cannot take advantage of the provisions of the Income-tax Act. As the facts would show, the shares were not worth much and in any case there was no point in the assessee holding on to them. It is not as if the shares were blue-chip investments and were sold

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for a lesser price deliberately to purchase a loss to be set off against the capital gains. The shares in any case would have to be sold only at a loss; that the assessee chose this particular year, that too towards the close of the accounting year which was the calendar year. does not automatically lead to the conclusion that the loss should be disallowed and should not be set off against the long-term capital gains. For one thing, as stated earlier. the transaction is a genuine transaction and nothing has been said against it. No facts have been brought on record to impeach the genuineness of the sale of shares. If so much is granted, there is nothing to prevent the assessee from selling the shares in order to reduce the tax liability in respect of the capital gains. The doctrine laid down in MeDowell does not apply to the cases like the present one in *M.V. Valliappan* v. *ITO* [1988] 170 ITR 238, the Madras High Court held that a legitimate transaction which does not amount to a dubious device is not hit even by the new approach adopted by the Supreme Court in *McDowell & Co. Ltd.'s* case (*supra*). In that case a partial partition effected by the assessee was not recognised on the ground that under section 171(9) of the Act. any partial partition effected after 31-12-1978 cannot be recognised by the ITO. The provisions of section 171(9) were challenged as being violative of Article 14 of the Constitution of India. One of the defences of the revenue before the High Court was that the derecognition of partial partition was enacted as a measure to prevent tax evasion and should, therefore, be upheld having regard to the decision in McDowell's case. It was while repelling the above defence that the Madras High Court presided over by his Lordship, the Learned Chief Justice M.N. Chandurkar, held that a real and genuine transaction which is not a dubious device for avoiding the tax is not hit even by the doctrine of *McDowell & Co. Ltd.* (*supra*). In *Union of India* v. *Play world Electronics (P.) Ltd.* [1990] 184 ITR 308 the Supreme Court has held that tax planning may be legitimate provided it is within the frame work of the law. In the present case it can hardly be suggested that the assessee cannot take advantage of the provisions of the Income-tax Act to claim set off of the capital loss against the capital gain. The department would have to go to the extent of proving the sale of shares as a sham

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transaction if it were to so suggest. But that is not the case here and as stated earlier no evidence has been let in to show that the sale of the shares was not genuine or was a collusive transaction. Thus the transaction is genuine and is also within the frame work of law but it results in a tax advantage to the assessee. In such circumstances the tax advantage cannot be stated to the result of a dubious device. We are fortified in this view by the observations at paragraph 16 at page 53 of the decision in the case of *Sutlej Cotton Mills Ltd.* v. *Asstt. CIT* [1993] 45 ITD 22 (Cal.) (SB).

4. For the aforesaid reasons we uphold the order of the CIT(A) directing the ITO to set off the capital loss of Rs. 36,43,221 against the capital gains arising on the sale of shares."

12. Considering the factual matrix of the case and legal discussions cited above we are convinced that the shares were sold by assessee at the fair market value. In our view the transactions being genuine, merely because the assessee has claimed set-off of capital loss against the capital gain earned during the same period, cannot be said to be a colourable device or method adopted by assessee to avoid the tax. The shares were transferred by executing share transfer Form and after paying the requisite Stamp duty. The company NTPL also passed a Board Resolution for transfer of those shares (Page-35of PB). The consideration of share was effected to through banking channel (Page 14 of PB). The fair market value arrived by assessee, as furnished before Commissioner (Appeals), (page No. 74 of PB). The balance sheet of NTPL for assessment years 2004-05 to 2006-07 is at (page 76-81of PB). In our view the transactions of sale of share were genuine

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and transacted at a proper valuation. The lower authority has not disputed the genuinity of transaction. The transactions carried by assessee are valid in law, cannot be treated as *non-est* merely on the basis of some economic detriment or it may be prejudicial to the interest of revenue. Further, if the period co-existed or permitted the assessee to set off her capital loss against the capital gain earned, would itself not give rise to the presumption that the transaction was in the nature of colourable device. We notice that the assessee has taken indexed case of acquisition of share at Rs. 30,40,400/-. We notice that the Assessing Officer has not examined the same and accordingly direct him to verify the computation given by the assessee and allow set off of correct amount of Long Term Capital Loss against Long Term Capital Gain. In the result, the grounds of appeal raised by the assessee are treated as allowed.

13. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 9th day of March 2018.

Sd/-	Sd/-
(B.R.BASKARAN)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 09/03/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.

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4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER

(Asstt.Registrar)
ITAT, Mumbai