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

Before Shri P.M.Jagtap, Accountant Member
& Shri Vivek Varma, Judicial Member.

I.T.A. No. 6382/Mum/2011.
Assessment Year : 2007-08.

Chemosyn Limited, Akshay Mittal Industrial Premises Co-op. Soc. Ltd., Sanjay Building No.5-B, Unit No.46, Ground Floor, Sir M.V. Road, Andheri (East), Mumbai – 400 059. PAN AAACC2044D.	**Vs.**	Asstt. Commissioner, of Income Tax, 8(3) (OSD), Mumbai.
Appellant.		Respondent.

Appellant by : Shri Jignesh Shah.
Respondent by : Shri A.C. Tejpal.

Date of hearing : 10-07-2012.
Date of pronouncement : 07-09-2012

O R D E R

Per P.M. Jagtap, A.M. :

This appeal filed by the assessee is directed against the order of learned CIT(Appeals)-16, Mumbai dated 01-07-2011.

2. The issue raised by the assessee in ground No.1 of this appeal relates to the addition made by the AO and sustained by the learned CIT(Appeals) to the extent

of Rs.2,17,88,000/- on account of alleged consideration in the form of constructed area of 18000 sq.ft. as capital gain.

3. The assessee in the present case is a company which is engaged in the business of manufacturing and trading of pharmaceutical products. The return of income for the year under consideration was filed by it on 31-10-2007 declaring total income of Rs.3,61,95,670/-. The assessee company was owner of two plots of land bearing CTS No. 256 and 257 at village Gundavali, Taluka Andheri, District Mumbai. The area of plot No. 257 was approximately 1713 sq.mtrs. and by a development agreement entered into with M/s Dipti Builders, the development rights therein were agreed to be sold by the assessee for consideration of Rs.16.11 crores. M/s Dipti Builders had also agreed to construct 18000 sq.ft. of carpet area for the benefit of the assessee on plot No. 256 which was admeasuring 3899.4 sq.mtrs. In the return of income filed for the year under consideration, capital gain arising from sale of plot No. 257 was computed and offered by the assessee by taking into account the consideration of Rs.16.11 crores. The constructed area of 18,000 sq.ft. was not taken into account while offering the capital gain. During the course of assessment proceedings, the assessee was called upon by the AO to explain why the market value of the constructed area of 18,000 sq.ft. should not be taken as part of consideration for sale of plot. In reply, it was submitted on behalf of the assessee that before M/s Dipti Builders could start the development/construction work, the entire property comprising of plot No. 256 and 257 was sold to a third party M/s Financial Technologies Ltd. by a tripartite conveyance deed executed on 5th July, 2007 for a total consideration of Rs.29.11 crores. It was submitted that the assessee thus never received the constructed area of 18,000 sq.ft. and whatever was received as additional consideration of Rs.13 crores (29.11 crores - 16.11 crores) was offered to tax in assessment year 2008-09

as capital gain arising as a result of conveyance deed executed on 5th July, 2007. It was contended that the constructed area of 18,000 sq.ft. thus could not be considered as part of sale consideration for computing the capital gain chargeable to tax in assessment year 2007-08 as the same was not actually received by the assessee.

4. The explanation offered by the assessee on this issue was not found acceptable by the AO. According to him, as a result of development agreement entered into by the assessee with M/s Dipti Builders, there was a transfer of property within the meaning of section 2(47)(v) of the Income-tax Act read with section 53A of the Transfer of Property Act in the year under consideration and the capital gain arising from the said transfer chargeable to tax was liable to be computed taking into consideration the sum of Rs.16.11 crores as well as the market value of constructed area of 18,000 sq.ft. For this conclusion, he relied on the decision of Hon'ble Bombay High Court in the case Chaturbhujdas Dwarkadas. Kapadia 260 ITR 491. Accordingly, the market value of 18,000 sq.ft. of commercial area was worked out by him at Rs.9,51,50,500/- as per the prevailing rate given in the ready reckoner and addition to that extent was made by him to the total income of the assessee on account of long term capital gain.

5. The addition made by the AO of Rs.9.51 crores on account of capital gain was challenged by the assessee in an appeal filed before the learned CIT(Appeals). It was submitted on behalf of the assessee company before the learned CIT(Appeals) that the consideration against development rights of plot No. 257 agreed to be paid by M/s Dipti Builders was a sum of Rs.16.11 crores and the construction of 18,000 sq.ft. free of cost. It was submitted that although the sum of Rs.16.11 crores was duly paid by M/s Dipti Builders to the assessee, the construction to be done by M/s Dipti Builders on plot No. 256 belonging to the

assessee never happened. It was contended that the consideration to that extent thus was neither received nor accrued to the assessee and there was no question of taking into account the said consideration not received by the assessee for the purpose of computing capital gain. It was submitted that immediately within the period of 13 months from the development agreement entered into with M/s Dipti Builders, a tripartite conveyance deed was executed on 5th July, 2007 between the assessee, M/s Dipti Builders and M/s Financial Technologies Ltd. whereby entire property comprising of plot Nos. 256 and 257 was sold and conveyed to M/s Financial Technologies Ltd. for total consideration of Rs.29.11 crores. It was contended that the additional consideration received by the assessee in the monetary terms as a result of the said transfer of property was duly offered by the assessee to tax in assessment year 2008-09. It was contended that the net effect of this subsequent conveyance deed executed on 5th July, 2007 is that the earlier development agreement dated 16th June. 2006 stood modified and the consideration in the form of free of cost construction of 18,000 sq..ft. was cancelled. It was contended that no income on account of the said consideration thus accrued or arose to the assessee in real terms. It was also contended that the entire consideration finally received by the assessee on transfer of its property i.e. plot No. 256 and 257, in any case, was offered to tax in assessment years 2007-08 and 2008-09 resulting no loss to the Revenue on this count. Without prejudice to this main contention and as an alternative, it was also submitted on behalf of the assessee that the market value of 18,000 sq.ft. constructed area adopted by the AO at Rs.9.51 crores on the basis of ready reckoner rates was not correct as the construction of 18,000 sq.ft. was to be made by M/s Dipti Builders on plot No. 256 which was belonging to the assessee. It was contended that the role of the developer in so far as the construction of this area is concerned, was that of a mere contractor who had agreed to construct area of 18,000 sq.f. free of cost on the plot

of land already owned by the assessee. It was contended that the value of this benefit thus at best could be construction cost that was to be incurred by M/s Dipti Builders which he had agreed to bear. It was contended that the said benefit in the form of construction of 18,000 sq.ft. free of cost, however, was never received by the assessee and the same, therefore, could not be subjected to tax in the hands of the assessee. In support of this contention, reference was made by the assessee to the doctrine of real income. It was contended that the position in this regard is well settled that subsequent events, developments or modifications in the terms of an agreement can be taken into consideration to determine the accrual and taxability of income. In support of this contention, reliance was placed on behalf of the assessee, inter alia, on the following judicial pronouncements :

i) Kalpataru Construction Overseas P.Ltd. 13 SOT 194.

ii) CIT vs. Shoorji Vallabhdas & Co. 46 ITR 144 (SC)

iii) Birla Gwalier P. Ltd. 89 ITR 255 (SC)

iv) Godhra Electricity Co. vs. CIT 225 ITR 756.

v) J.H. Doshi vs. CIT 212 ITR 211 (Bom.).

vi) CIT vs. Shivsagar Estate 204 ITR 1 (Bom.).

6. After considering the submissions made by the assessee as well as the material available on record, the learned CIT(Appeals) did not find merit in the stand taken by the assessee that consideration in the form of constructed area of 18,000 sq.ft. to be given to the assessee by M/s Dipti Builders as per the development agreement had not accrued in the year under consideration. Relying on the decision of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra), he held that there was a transfer of property i.e. plot No. 257 as a result of development agreement entered into by the assessee with

M/s Dipti Builders giving rise to capital gain. He held that the said development agreement was not only executed but also acted upon by both the parties and, therefore, the consideration as agreed in terms of the said development agreement was chargeable to tax in the year under consideration in which there was a transfer of property. He held that constructed area of 18,000 sq.ft. to be built by M/s Dipti Builders for the benefit of the assessee free of cost was integral part of the said consideration. He, however, agreed with the alternative plea of the assessee that only the cost of construction of 18,000 sq.ft. should be taken as consideration and not the market value of 18,000 sq.ft. as taken by the AO on the basis of ready reckoner rates meant for stamp duty purposes. Accordingly, relying on the report of the Government approved valuer, he adopted the cost of construction of 18,000 sq.ft. at Rs.2,17,88,000/- and restricted the addition made by the AO on this issue to the income of the assessee to Rs.2,17,88,000/-.

7. The learned counsel for the assessee submitted that the constructed area of 18,000 sq.ft. as agreed to be given by M/s Dipti Builders as per the development agreement was never received by the assessee as a result of subsequent events that took place. He contended that consideration to that extent thus did not accrue to the assessee as a result subsequent events culminating into tripartite conveyance deed executed in July, 2007. He contended that the said conveyance deed executed subsequently modified the consideration originally agreed and this modification has to be taken into account to ascertain the income accrued to the assessee on account of capital gain. In support of this contention, he relied on the decision of the Tribunal in the case of Bio Pharma vs. ITO 5 SOT 478 (Ahd) (page 40 of the paper book) and in the case of Kalpataru Construction Overseas (P) Ltd. 13 SOT 194 (Page 135 of the paper – page 207 relevant.). He also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Shakuntala Kantilal 190 ITR

56 to contend that the modification in the consideration as per subsequent conveyance deed relates back to the date of original development agreement. He then referred to the submissions made before the learned CIT(Appeals) in writing on the aspect of real income theory (page 6 of the paper book) and strongly relied on the same. He contended that real income theory applicable for ascertaining accrual of income also as held by Hon'ble Bombay High Court in the case of CIT vs. Shivsagar Estate 204 ITR 1.

8. The learned DR, on the other hand, strongly supported the impugned order of the learned CIT(Appeals) in support of the Revenue's case on this issue. He submitted that all the judicial pronouncements cited by the learned counsel for the assessee in support of the assessee's case on this issue are distinguishable on facts. He submitted that for instance, in the case of Kalpataru Construction Overseas (P) Ltd. (supra), consideration was modified due to certain specific reasons which is not the case of the assessee. He submitted that similarly in the case of Bio Pharma vs. ITO 5 SOT 498, consideration was reduced as a result of intervention of the Court under legal compulsion whereas in the case of the assessee the consideration was modified voluntarily without any such compulsion.

9. The learned DR relied on the decision of Hon'ble Calcutta High Court in the case of CIT vs. Smt. Bharati C. Kothari 244 ITR 352 as well as that of Mumbai Bench of ITAT in the case of ACIT vs. Vidhata Textile (P) Ltd. 70 ITD 357 to contend that consideration modified subsequently will not have any bearing on computation of capital gain. He also relied on the decision of Hon'ble Delhi High court in the case of Saraswati Insurance Co. Ltd. vs. CIT 252 ITR 430 to contend that subsequent events are not relevant to ascertain the accrual of income. The learned DR submitted that capital gain in the present case had arisen in the year under consideration as a result of transfer of plot No. 257 by the assessee to

M/s Dipti Builders on execution of development agreement as held by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra) and the same was required to be computed on the basis of consideration agreed upon in terms of the said development agreement as rightly held by the AO as well as by the learned CIT(Appeals).

10. We have considered the rival submissions and also perused the relevant material on record. It is observed that the development rights in the property i.e. plot of land No. 257 owned by the assessee were agreed to be sold to M/s Dipti Builders as per the development agreement dated 16-06-2006 for a total consideration of Rs.16.11 crores and construction of 18,000 sq.ft. free of cost. The said construction was to be done by M/s Dipti Builders on another plot of land bearing No. 256 owned by the assessee. In the return of income filed for the year under consideration, capital gain arising from this transaction was offered by the assessee by taking into consideration the sale consideration of Rs.16.11 crores only and the area of 18,000 sq.ft. to be constructed by M/s Dipti Developers free of cost was not taken into account on the ground that the consideration in this form was never received by it as a result of tripartite agreement executed on 5th July, 2007 whereby the entire property comprising plot No. 256 and 257 was sold to a third party. As per the said tripartite agreement, consideration of Rs.13 crores was additionally received by the assessee and the capital gain arising from the said transaction was offered to tax in assessment year 2008-09. According to the assessee, the terms of development agreement with M/s Dipti Builders thus had got modified to the effect that consideration only to the extent of Rs.16.11 crores was actually received in monetary terms and the constructed area of 18,000 sq.ft. was never received. According to the assessee, the consideration in the form of constructed area of 18,000 sq.ft. thus was neither received nor accrued as per the

real income theory and there was no question of any capital gain resulting from the said consideration.

11. The AO as well as the learned CIT(Appeals), however, did not accept the stand of the assessee on this issue based on real income theory. They held that there was a transfer of property bearing Plot of land No. 257 by the assessee on execution of development agreement with M/s Dipti builders in the year under consideration and capital gain arising from the said transfer was required to be computed taking into account the entire consideration as agreed in terms of the development agreement including the area of 18,000 sq.ft. In support of this stand, they have relied on the decision of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra). A perusal of the judgment of Hon'ble Bombay High Court in the said case, however, shows that the issue involved therein was whether the assessee had transferred the property owned by him during the relevant previous year as a result of development agreement whereby complete control over the property was transferred by the assessee in favour of the developer giving rise to capital gains chargeable to tax. In the present case, the issue involved, however, is different inasmuch as the assessee has not disputed at any stage that there was a transfer of property as a result of development agreement entered into with M/s Dipti Builders giving rise to capital gain chargeable to tax in the year under consideration. As a matter of fact, the assessee has offered such capital gain to tax in the return of income filed for the year under consideration and the only dispute is relating to the exact quantum of sale consideration that is to be taken for the purpose of computing such capital gain. According to the assessee, although the total consideration as agreed in terms of development agreement was Rs.16.11 crores in monetary terms and constructed area of 18,000 sq.ft. free of cost, what has been finally received by it is only the monetary consideration to the

tune of Rs.16.11 crores. The balance consideration in the form of constructed area of 18,000 sq.ft. was never actually received by it as a result of subsequent developments/events whereby the entire property owned by the assessee comprising of plot No. 256 and 257 was sold to a third party. The question, therefore, is what exactly is the consideration to be taken into account while computing the capital gain arising as a result of transfer of property of the assessee by way of development agreement entered into with M/s Dipti Builders in the year under consideration.

12. The provisions relating to computation of income from capital gains are contained in Chapter IV of the Income-tax Act, 1961. Section 45 of the said Chapter is a charging provision which provides that any profits or gains arising from a transfer of the capital assets effected in the previous year shall, save as otherwise provided in other sections, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. Section 48 gives a mode of computation of capital gains and provides that the income chargeable under the head "Capital gains" shall be computed after allowing certain deductions from the full value of the consideration received or accruing as a result of the transfer of the capital asset. The question that arises for our consideration in the present case is what exactly is the full value of the consideration received or accruing to the assessee as a result of the transfer of the capital asset by the development agreement entered into with M/s Dipti Builders during the year under consideration. The claim of the assessee is that the consideration in the form of constructed area of 18,000 sq.ft. as stated in the development agreement having not been actually received by it, the same cannot be taken into account for computing the capital gains. It has been pleaded on behalf of the assessee that no such area having been actually constructed or

handed over to it by M/s Dipti Builders as a result of subsequent events/developments, the consideration in the form of constructed area never accrued to it. The stand of the Department is that the total consideration including the value of constructed area as agreed to be given to the assessee by M/s Dipti Builders in terms of the agreement had accrued to the assessee in the year under consideration and the same, therefore, was to be taken into account for computing the capital gains irrespective of the subsequent events/developments which are not relevant in this context.

13 In support of the stand of the Revenue, the learned DR has placed reliance mainly on the decision of Hon'ble Delhi High Court in the case of Saraswati Insurance Co. Ltd. vs. CIT 252 ITR 430. It is, however, observed that the issue involved in the said case was relating to accrual of interest income and since the interest income accrues periodically when it falls due, the Hon'ble Delhi High Court held that interest had already accrued to the assessee on the due dates and waiver of such interest subsequently was not relevant in this context. Similarly in the case of CIT vs. Bharati C. Kothari 244 ITR 352 cited by the learned DR, the decision was rendered by the Hon'ble Calcutta High Court in the context of accrual of interest income and keeping in view that such income had accrued to the assessee on day to day basis, it was held that modification of interest rate subsequently would not be relevant. In the present case, the issue, however, is in the context of computation of capital gain and the question is relating to accrual of the consideration as a result of the transfer of capital asset for the purpose of computing capital gains. In this regard, we find that the decision of coordinate bench of this Tribunal in the case of Kalpataru Construction Overseas P. Ltd. vs. DCIT 13SOT 194 (Mum.) is directly relevant. In the said case, the assessee had agreed to sale its subsidiary by selling its entire equity shares therein for a

consideration of Rs.1.25. The amount of consideration, however, was finally settled at Rs. 1 crore and it was held by the Tribunal that such a subsequent event settling finally the consideration at Rs.1 crore would relate back to the assessment year under consideration. It was held by the Tribunal that there is no inflexible rule that subsequent events can never be considered for deciding the matter under dispute. It was observed that it is the duty of the assessee to pay correct amount of tax on its income chargeable to tax and it is the right of the Department to realize the tax from the assesses on their income chargeable to tax.

14. In the case of Bio Pharma vs. ITO 5 SOT 478 (Ahd.) cited by the learned counsel for the assessee, the business was sold by the assessee at a slump price as a going concern for Rs.3,64,00,000/-. The Civil Court vide an order passed subsequently in civil suit, reduced the sale consideration at Rs.1,41,49,707/- which was accepted by both the parties. This subsequent event/development resulting into obtaining of decree was termed by the Department as a collusive device by the assessee resorted with the ulterior motive of evading capital gain tax. The Tribunal, however, did not accept the same and held that only the final consideration as reduced by the Civil Court should be taken into account for the purpose of computing capital gains. The learned DR has made an attempt to distinguish the case of Bio Pharma (supra) decided by the Tribunal on the ground that the consideration in that case was reduced by a Court order whereas the consideration in the present case has been reduced voluntarily by both the parties by mutual consent. In our opinion, this distinction is not very material in the present context. What is material and relevant is whether the subsequent event or development resulting into reduction of consideration has any bearing on the accrual of consideration and on this aspect of the matter, the decision of

Ahmedabad Bench of ITAT in the case of Bio Pharma (supra), in our opinion, fully supports the case of the assessee.

15. Before the learned CIT(Appeals) as well as before us, the doctrine of real income has been pressed into service on behalf of the assessee in support of its contention that there cannot be accrual of income that has never been received by the assessee in the real sense. In support of this contention, reliance has been placed by the learned counsel for the assessee on the decision of Hon'ble Bombay High Court in the case of CIT vs. Shivsagar Estates (AOP) reported in 204 ITR 1. In the said case, the assessee had leased a plot on rent and had made certain advances on interest to M under an agreement. M was to construct a hotel on the said plot which he was unable to do. A fresh agreement, therefore, was entered into between the assessee and M subsequently under which the assessee waived rent and interest and received back the plot. In these facts and circumstances, doctrine of real income was held to be applicable by the Hon'ble Bombay High Court holding that no rental or interest income could be charged in the hands of the assessee on the basis of earlier agreement with M. For this conclusion, the Hon'ble Bombay High Court relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Shoorji Vallabhdas & Co. 46 ITR 144 wherein it was held that income-tax is a levy of income and although Income-tax Act takes into account the accrual of the income also as the point of time at which the liability to tax is attracted, the substance of the matter is the income. It was held that if income does not result at all, there cannot be a tax and where the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income.

16. Keeping in view the legal position emanating from the judicial pronouncements discussed above and having regard to all the facts of the case, we are of the view that the consideration in the form of constructed area of 18,000

sq.ft. as agreed in terms of the development agreement was not actually accrued to the assessee as a result of subsequent developments/events going by the doctrine of real income and the same, therefore, cannot be taken into account for the purpose of computation of capital gain arising from transfer of capital asset as pet the development agreement. It is also worthwhile to note here that the total consideration actually received by the assessee from transfer of its entire property comprising of plot No. 256 and 257 as per the tripartite conveyance deed executed on 5th July, 2007 was Rs.29.11 crores and the same having been entirely offered to tax in assessment years 2007-08 and 2008-09, there is no loss to the Revenue on this count as rightly contended by the learned counsel for the assessee. We, therefore, delete the addition made by the AO and sustained by the learned CIT(Appeals) on this issue and allow ground No.1 of the assessee's appeal.

17. The issue raised by the assessee in ground No.2 relates to the disallowance of Rs.6,81,60,200/- made by the AO and confirmed by the learned CIT(Appeals) on account of expenditure incurred on purchase and cancellation of shares.

18. The expenditure of Rs.6,81,60,200/- incurred by the assessee on purchase and cancellation of its own shares was debited to the profit & loss account filed along with the return of income. While justifying its claim for deduction of the said expenditure, it was explained by the assessee company that there were two groups holding the shares of the assessee company. One group headed by Samir Shah was owning 66% shares while the other group headed by his brother Umesh Shah was owning 34% shares. Owing to difference between these two groups there were lot of problems and the dispute reached the Company Law Board as well as to the Hon'ble Supreme Court thereafter. In order to settle these disputes, a family settlement was finally arrived at and taking note thereof, the Company Law Board directed the assessee company to buy 34% shareholding of Umesh Shah group.

Since the disputes arising as a result of differences between two group of shareholders had adversely affected its business, sales, status, income etc. for a period of more than six years, the assessee company purchased 8398 shares held by Umesh Shah group for a total consideration of Rs.6.90 crores as against their face value of Rs.8,39,800/- and the difference of Rs.6,80,60,200/- was claimed by it as expenditure incurred wholly and exclusively for the purpose of running its business. According to the AO, the said expenditure, however, was incurred as a part of the family dispute settlement and the same, therefore, could not be attributed to the business of the assessee company. He also held that the said expenditure even otherwise was a capital expenditure as the same was incurred for the acquisition of capital asset or a right of permanent character or a benefit or advantage of enduring nature. He, therefore, disallowed the expenditure incurred by the assessee on purchase of its own shares and made an addition of Rs.6,81,60,200/- to the total income of the assessee.

19. The disallowance of Rs.6,81,60,200/- made by the AO on account of expenditure incurred on purchase of its own shares was challenged by the assessee in an appeal filed before the learned CIT(Appeals). It was submitted on behalf of the assessee before the learned CIT(Appeals) in support of its case on this issue that the expenditure in question was primarily incurred for getting rid of recalcitrant group of shareholders for the smooth and efficient working of the business of the assessee company. It was contended that the same was incurred on purchase of shares in terms of an order passed by the Company Law Board and that too out of commercial expediency in the larger business interest. It was contended that the incurring of the said expenditure did not result in bringing into existence any capital asset nor did it result in any enduring benefit to the assessee falling in the capital field. It was submitted that Umesh Shah group of

shareholders, which was in minority, was creating a lot of hurdle and difficulties in the day to day management of the assessee company which had seriously hampered the smooth and efficient carrying on of the business. It was submitted that even the profitability of the assessee had affected adversely as a result of these disputes. It was pointed out that in order to create more impediments to the smooth carrying on of the business of the assessee, the Umesh Shah Group had filed a petition u/s 397 and 398 of the Companies Act, 1956 in the Company Law Board in Sept., 2000 alleging mismanagement of the affairs of the company and oppression of the minority shareholders. It was submitted that this protracted litigation was going on in the Company Law Board for six long years during which due to constant bickering and hurdles created by the Umesh Shah Group, the business of the assessee company could not be carried on in a smooth and efficient manner which resulted in continued business losses, erosion of the capital, enforcement by legal proceedings by Banks to recover the loans by filing cases in the Debt Recovery Tribunal. It was contended that the assessee company thus had left with no choice but to settle the disputes and purchase the shares owned by Umesh Shah group at premium as per the final order dated 17th May, 2006 passed by the Company Law Board. Accordingly, the shares of Umesh Shah group were purchased and cancelled by the assessee company and the premium of Rs.6,81,60,200/- paid was claimed as expenditure incurred wholly and exclusively for the purpose of business as the same was to enable the assessee company to carry on this business smoothly, efficiently and profitably. It was pointed out that after incurring the said expenditure on purchase of shares and settlement of dispute, the turnover of the assessee company started showing sign of recovery and it improved substantially in the latter years. The assessee company also started making profits from the year under consideration as against the losses incurred consistently in the earlier years in which there was dispute. It was contended that

the expenditure incurred on purchase and cancellation of shares thus enabled the assessee in getting rid of trouble making shareholders and for making smooth, efficient and profitable working of the business and the same being a revenue expenditure was allowable as deduction. It was also contended that since the said expenditure was incurred in terms of an order/decree of the Company Law Board, the same could not be disallowed by holding it to be pertaining to the family dispute because the order passed by the Company Law Board is always considered to be in the interest of the company and not in the interest of individual shareholders/family members. In support of its stand on this issue, the assessee relied on the following judicial pronouncements :

i) Echjay Industries Ltd. vs. DCIT 88 TTJ (Mumbai) 1089..

ii) Atul Chemicals Industries Ltd. vs. ITO (ITA No.1395/Mum/1980 dt. 5th Sept., 1981)

iii) IRC vs. Carron Co. 45 TC 18 (HL).

20. The submissions made on behalf of the assessee on this issue did not find favour with the learned CIT(Appeals). As regards the emphasis laid by the assessee on the order of Company Law Board, he held that the consent terms in the case of the assessee were agreed by the family as a part of the family settlement and the Company Law Board had simply observed in its order that the parties were prepared to abide by the said settlement. According to the learned CIT(Appeals), the purchase of shares was a result of mutual settlement amongst the family members and the expenditure incurred for this purpose was of personal nature. He held that the said expenditure was incurred for the purpose of acquiring shares by a group of persons and not by the assessee company. He also held that the assessee company could not produce any evidence to show that the group of minority shareholders was actually causing any disturbance in the conduct of the business.

He held that the expenditure incurred by the assessee company on purchase of shares thus was a capital expenditure of personal in nature which could not be allowed as deduction. Accordingly, the disallowance made by the AO on this issue was confirmed by the learned CIT(Appeals).

21. The learned counsel for the assessee submitted that there was a dispute between two groups of Directors of the shareholders which had created various problems in the smooth functioning of the business of the assessee company. He submitted that in order to get over the said problems and to carry on its business smoothly and efficiently, the assessee company purchased the shares of one group as per the Company Law Board's order. He submitted that in the similar facts and circumstances involved in the case of Echjay Industries Ltd. (supra) the Tribunal has held that the expenditure incurred on purchase of shares is deductible as business expenditure being revenue in nature. He submitted that the said decision of the Tribunal which is directly applicable to the facts of the present case has been upheld by the Hon'ble Bombay High Court by dismissing the appeal filed by the Revenue against the said decision by its order dated30th July, 2008 passed in ITA No. 337 of 2004. He has contended that a similar issue thus has been decided in favour of the assessee by the Hon'ble jurisdictional High Court which is binding on this Tribunal.

22. The learned DR, on the other hand, strongly supported the impugned order of the learned CIT(Appeals) on this issue. He submitted that as rightly held by the learned CIT(Appeals) on appreciation of the facts of the assessee's case, the shares were purchased as a result of mutual settlement amongst the family members and the expenditure incurred for this purpose was personal in nature. He contended that no evidence whatsoever has been brought on record by the assessee to show that any serious disturbance was created by the minority shareholders affecting its

day to day business. He submitted that in the case of Echjay Industries Ltd. 257 ITR 1 (AT) there was serious dispute amongst the shareholders affecting growth of the assessee company and in the facts and circumstances of that case, the expenditure incurred on purchase of shares by the assessee company was held to be allowable expenditure by the Tribunal. He submitted that similarly in the other cases cited by the learned counsel for the assessee there was a specific finding regarding obstacles created by the minority shareholders and, therefore, the expenditure incurred to get over the said difficulties by purchase of shares was held to be an allowable business expenditure. He relied on the decision of Hon'ble Gujarat High Court in the case of Vikram Mills Ltd. vs. CIT 242 ITR 290 (Guj.) wherein it was held that betterment charges paid by the assessee are not deductible. He contended that the payment made by the assessee in the present case for purchase of shares is like betterment charges only and the same, therefore, are not deductible. He also relied on the decisions of Hon'ble Delhi High Court in the case of Buland Sugar Co. Ltd. Vs CIT 130 ITR 434 and in the case of Mehra Khanna and Co. Vs CIT 250 ITR 436 and submitted that the expenses of similar nature claimed by the assesses in the said cases were disallowed holding the same as not incidental to the business or capital in nature.

23. We have heard the rival submissions and also perused the relevant material on record. It is observed that shares of a warring group of shareholders, who were creating problems in the smooth functioning of the business, were purchased by the assessee company at premium as per the order of the Company Law Board and the said premium has been claimed as deductible expenditure being wholly and exclusively incurred for the purpose of business. In support of this claim, reliance has been mainly placed on behalf of the assessee before the authorities below as well as before us on the decision of coordinate bench of this Tribunal in the case of

Echjay Industries Ltd. vs. DCIT 88 TTJ (Mumbai) 1089. As mentioned by the learned CIT(Appeals) in his impugned order as well as by the learned DR in the course of his arguments raised before us, the facts involved in the present case, however, are different from the facts involved in the case of Echjay Industries Ltd. (supra). According to the learned CIT(Appeals), the purchase of shares by the assessee company was a result of mutual settlement amongst the family members and the expenditure incurred for this purpose on payment of premium was of personal nature. He held that the Company Law Board had simply accepted this family settlement keeping in view that both the sides were prepared to abide by the said settlement. It is observed from the perusal of the order passed by the coordinate bench of this Tribunal in the case of Echjay Industries Ltd. (supra) that similar fact situation was involved in that case also. As mentioned in paragraph No. 22 of the order of the Tribunal passed in the case of Echjy Industries Ltd. (supra), the assessee company was a private limited company with four brothers and their family members as Directors/Shareholders. Serious disputes broke out between them with the result that the functioning of the company and its growth was impeded so much so that the matter was carried to the Court. Two shareholders, namely, Hasmukhdas H. Doshi and Shri Manharlal H. Doshi filed petitions before the Hon'ble Bombay High Court under the provisions of sections 397 and 398 of the Companies Act, 1956 alleging mis-management and oppression of minority and seeking Court's intervention. After a period of over 6 years good sense prevailed between two warring groups and consent terms were drawn by the shareholders. Hon'ble Bombay High court in its order passed on 2nd May, 1991 decreed approving the consent terms, inter alia, giving the direction that the company would purchase the shares of the family members of Shri Maganlal H. Doshi, Shri Hasmukhdas H. Doshi and Shri Manharlal H. Doshi at a premium of Rs.900/- per share. The facts involved in the present case on this aspect of the

matter are similar inasmuch as after prolonged dispute, settlement was reached between the warring groups of shareholders which were belonging to one family and taking note thereof, the Company Law Board directed the assessee company to buy 34% shareholding of Umesh shah group at premium

24. In his impugned order, the learned CIT(Appeals) has held that the expenditure in question on payment of premium was incurred for the purpose of acquiring shares by a group of persons and not by the assessee company. He has held that the said expenditure thus was of a personal nature and it cannot be said that the same was incurred for the purpose of the business of the assessee company. It is observed that a similar allegation was made by the Revenue in the case of Echjay Industries Ltd. (supra) but the Tribunal did not agree with the same. It was held by the Tribunal that the impugned expenditure was incurred by the assessee company in the larger interest of the business necessity or expediency because it was necessary for it to get rid of the minority shareholders who were undisputedly creating hurdles in the smooth working of the company. The Tribunal in this context relied on the commentary of Ramaiah on Company Law wherein it was clearly mentioned with reference to various case laws that where compromise or settlement is shown to have been arrived at between the parties to the proceedings u/s 397 and 398 of the Companies Act, the Court has to consider whether such settlement is in the interest of the company as well as in public interest and if it is not so, the Court is not bound to accept and record the same. It was noted that proceedings u/s 397 and 398 of the Companies Act are not like a suit between private parties which may be compromised in any manner they choose. The interests of the company are of paramount importance and the Court may accept a compromise which is in the larger interest of the company or in

public interest. The Tribunal held that the allegation of the Revenue that the settlement was in the interest of only two warring groups thus was not correct.

25. In his impugned order, the learned CIT(Appeals) has observed that the assessee company could not produce any evidence to show that the group of minority shareholders was actually causing any disturbance in the conduct of the business. Taking cue from this observation of the learned CIT(Appeals), the learned DR has contended that in the case of Echjay Industries Ltd. (supra), undisputedly there was serious dispute amongst the shareholders affecting growth of the assessee company whereas no such case has been made out in the present case showing the disturbance created by the minority shareholders affecting its business. In this regard, it is observed that in the case of Echjy Industries Ltd., a chart was prepared and furnished by the assessee showing that the profits of the company which was going down during the period of dispute, had improved considerably after the settlement and relying on these facts and figures, the Tribunal held that the impugned expenditure was incurred by the assessee company for the benefit and smooth functioning of the business. In the present case, similar statements have been prepared and furnished by the assessee at paper book page Nos. 265 to 270 and a perusal of the same shows that total sales of the assessee which were in the range of Rs.20 crores to Rs.25 crores per annum during the pre-dispute period had come down to around Rs.9 crores in the financial year 1999-2000 when the dispute arose and remained in the range of Rs. 10 to 14 crores during the period of litigation spanning over six overs. After the settlement of dispute in the financial year 2005-06, there was, however, substantial increase with the sales touching nearly Rs.18 crores in the financial year 2008-09. Similarly, the profits which were in the red (i.e. Loss) during the period of disputes became positive after the settlement and touched a figure of about Rs.17 crores in financial

year 2007-08 with other income of Rs.21.10 crores received by the assessee in that year. The statements prepared and furnished by the assessee further show that the gross block of assets remained at the same level during the period of disputes from financial year 1999-2000 to 2005-06 and the substantial increase therein was made only after the settlement of dispute in the year 2007-08 and 2009-10. It is also relevant to note here that there were very few new products launched by the assessee company during the period of disputes while many new products were launched during the post settlement period giving boost to the business of the assessee. Other documentary evidence furnished by the assessee shows that demand notices were issued by the Mumbai Debt Recovery Tribunal to the assessee for recovery of debts during the period of disputes whereas after the settlement, a fresh loan was sanctioned by bank to the assessee for the purpose of working capital as well as for the purpose of acquiring new assets. In our opinion, all these facts and figures furnished by the assessee are sufficient to show that the disputes between the shareholders had affected the day to day business of the assessee and the settlement of the said dispute certainly helped the assessee to run its business smoothly and effectively enabling it to achieve further growth.

26. As regards the stand of the Revenue that the impugned expenditure incurred by the assessee company on payment of purchase of shares at premium is a capital expenditure, it is observed that a similar stand was taken by the Revenue before the Tribunal in the case of Echjy Industries Ltd. (supra). The Tribunal, however, did not accept the same by holding that by getting rid of the minority shareholders, the company could not be said to have acquired any enduring benefit. It was also observed by the Tribunal in this context that even if it is assumed that an enduring benefit has been obtained, such enduring benefit is not relatable to fixed capital structure of the assessee company because it has neither increased the assessee's

assets nor the assessee company could be said to have acquired any right of income yielding nature. It was held that the amount in question was paid to secure peace and harmony and smooth management of the company in the interest of business and the amount paid for this purpose was on revenue account.

27. In view of the above discussion, we are of the view that the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of Echjay Industries Ltd. (supra) decided by the Tribunal and respectfully following the said decision of Coordinate Bench of this Tribunal, we hold that the expenditure in question incurred by the assessee company on payment of premium for purchase of its own shares from warring group of shareholders is revenue in nature and the same being wholly and exclusively incurred for the purpose of its business, is allowable as deduction in computing its income under the head "Profits and gains of business or profession". The case Laws cited by the learned DR, on the other hand, involved different issue and different facts and the same, in our opinion, cannot be of any help to support the Revenue's case on this issue. As submitted by the learned counsel for the assessee, the decision of the Tribunal in the case of Ecnjay Industries Ltd. (supra) in fact has been upheld by the Hon'ble Bombay High Court dismissing the appeal filed by the Revenue against the said decision. We, therefore, delete the disallowance made by the AO and confirmed by

the learned CIT(Appeals) on this issue and allow ground No.2 of the assessee's appeal.

28. In the result, the appeal of the assessee is allowed.

Order pronounced on this 7th day of Sept., 2012.

Sd/-	Sd/-
(Vivek Varma)	(P.M. Jagtap)
Judicial Member	Accountant Member

Mumbai,
Dated: 7th Sept., 2012.

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, A-Bench.

(True copy)

By Order

Asstt. Registrar, ITAT, Mumbai.

Wakode.