

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Ravish Sood (Judicial Member)]**

ITA No. 4286/Mum/17
Assessment year: 2010-11

Michael E Desa**Appellant**
3, Shewa Apartment, 33b, 3rd Road, Khar West,
Mumbai 400 052 [PAN: AHQPD1138F]

Vs

Income Tax Officer
International Taxation Ward 1(1), Mumbai**Respondent**

Appearances by

B N Rao for the appellant
T Oommen for the respondent

Date of concluding the hearing: : September 16, 2021
Date of pronouncing the order : September 20, 2021

O R D E R

Per Pramod Kumar, VP:

1. This appeal is directed against the order dated 15th February 2017, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2010-11. The appeal is time-barred by two days, but the assessee has moved a condonation petition praying that the delay, which had arisen on account of delay in delivery of papers by the courier agency, be condoned. Having perused the petition and material on record, and having rival contentions on this condonation petition, we are inclined to condone the delay and proceed to take up the matter on merits.

2. The short issue that we are required to adjudicate in this appeal, as learned representatives fairly agree, is whether or not the authorities below were justified in declining set off of long term capital loss of Rs 1,11,66,165, incurred by the assessee on the sale of shares in a company by the name of VCAM Investment Managers Pvt Ltd, against the long term capital gains of Rs 95,12,556, earned by the assessee on the sale of a property.

3. The assessee before us is a non-resident Indian now fiscally domiciled in the United States. During the relevant previous year, the assessee sold a property, of which he was 50% co-owner, and reported an earning of long term capital gain of Rs 95,12,556. The quantification of this gain is not in dispute. The assessee also reported a long term capital loss of Rs 1,11,87,578 on sale of certain shares in VCAM Investment Managers Pvt Ltd (VCAM, in short). The Assessing Officer was of the view that “the (this) **long term capital loss was attributed on account of equity shares of VCAM (Investment Managers Pvt Ltd) which**

appears to be prima facie fictitious and not entitled to be adjusted against any taxable income". It was in this backdrop that the assessment was reopened, and this round of proceedings started. The Assessing Officer probed this transaction in detail, and the information was requisitioned even from the purchaser of these shares- one Kevin Saldhana. These shares were held by the assessee since 3rd April 2007 i.e. when the said company VCAM was incorporated, and were purchased by Kevin Saldhana for Rs 2,95,445 on 25th March 2010- even though the payment was stated to be made for Rs 3,00,000. The Assessing Officer took note of this discrepancy and treated this as evidence of lack of bonafides. It was also noted that this person had some other transactions with the assessee, which indicated that the transaction was not a genuine transaction but simply a sham and make-belief story. The Assessing Officer further noted that even after the sale of these shares, the address of the VCAM in the records of the Registrar of Companies continued to be premises of the assessee. There was, however, no dispute that as against total assets of Rs 1,00,00,000, miscellaneous expenditure amounted to Rs 97,04,555, and the net worth of these shares was only Rs 2,95,445, resulting in net asset value price of the shares at Rs 2.95 each. The Assessing Officer noticed that the valuation report also commented that the method of valuation presumes continuity of business" and commonly accepted approach for valuation "capitalises average earnings, past and projected at an appropriate rate of capitalisation to arrive at a fair market value per share". It was then noted that these observations in the valuation report had been ignored. It was further noted that no business is carried on by VCAM after the sale of shares which showed that Saldhana did not purchase the shares 'with an intention to continue to carry on the business of the company' or "any other business activity of the company". The Assessing Officer noted that the assessee knew Saldhana for over 10 years and had close business connections with him. It was then noted that under sections 23 and 24 of the Indian Contract Act, 1872, when the object is to defeat any provisions of law, and when consideration is of such nature that, if permitted, it would defeat the provisions of any law, the contract will be void. It was noted that the transaction is only to nullify the levy of long term capital gains. It was thus observed that the sale contract for the sale of shares is vitiated in law. He also noted that Saldhana was one of the directors of the company, and he had every reason to know that the company is worthless, and, in these circumstances, the purchase of shares was motivated for tax benefits to the assessee rather than any material gains to Saldhanas. The Assessing Officer observed that "the transfer of shares by the assessee to Mr Saldhana is preconceived, preordained and fabricated for extra commercial considerations, and a device to generate artificial and incorrect long term capital loss in the hands of the assessee". He thus rejected this long term capital loss by concluding as follows:

9.16 The alleged transaction, the valuation report and the facts and the circumstances as appearing in the case, the legal position of the supporting Acts and Laws and the absence of common prudence expected in the transaction of commercial/business nature only points to the fact that the losses in the company which were in the nature of business losses in the hands of the company had been given the color of capital loss in the hands of the assessee apparently to circumvent the law and to avoid payment of taxed under the Income Tax Act. The said LTC loss se9-mem to be prima facie fictitious and premeditated. It has been created to avoid the tax liability on account of sale of immovable property.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) extensively reproduced from, and reiterated, the findings of the

Assessing Officer. The action of the Assessing Officer was thus confirmed. The assessee is not satisfied and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. We find that there is no dispute, even going by the analysis in the assessment order to the effect that **“the net worth of the company is fully eroded and is wiped out by losses”** and **“the value of these shares is in negative with no future profit earning capacity or any future business prospects”**- para 9.11 at page 12 of the assessment order, that the shares in VCAM were practically worthless and that these shares were acquired by the assessee, way back on 3rd April 2007 for a consideration of, indexing apart, Rs 99,99,000 (99,990 equity shares of Rs 100 each). There is thus clearly a loss to the assessee, and, to that extent, there can be no doubt or controversy. However, this loss could be booked only when the shares are actually sold by the assessee, and it is for the assessee to decide when he does so and find a buyer willing to buy these shares. When he actually sells the shares in question, and the said transaction is given factual and legal effect, the loss will crystallize. That is what probably leaves a window for planning the affairs, as long as the assessee can actually dispose of these shares, so as to minimise the tax liability in respect of long term capital gains, if any, since such a loss can only be set off against the long term capital gains.

7. Ironically, however, the Assessing Officer has primarily questioned the timing of booking the loss and selling these shares, which, even according to the Assessing Officer, are “worthless”. It is not for the Assessing Officer to take a call on how should an assessee organise his fiscal affairs so as to serve the interests of the revenue authorities. This transaction may be tax-motivated, but that factor does not, by itself, render the transaction a sham transaction or a colourable device so as to be, to use the inimitable words of Justice Ranganath Mishra in the case of Hon’ble Supreme Court in the case of **McDowell & Co Ltd Vs CTO [(1985) 154 ITR 148 (SC)]**, ignored on the ground that **“the 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 not the tax planning simpliciter, but tax planning through dubious methods or colourable devices which has been deprecated by Their Lordships in the aforesaid observations. Even these oft quoted words were preceded by the observation that **“(t)ax planning may be legitimate provided it is within the framework of law”**. In the case of **Vodafone International Holdings BV Vs Union of India [(2012) 341 ITR 1 (SC)]**, Their Lordships have reiterated the principle that **“every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury”**. Viewed thus, nothing at all turns on the timing of booking the loss on account of the shares having become worthless with the passage of time. The emphasis on timing, as is placed by the authorities below, is not germane in the present context.

8. The loss is real, and going by the stand of the Assessing Officer- actual loss is even more than the loss claimed, because assessee has sold the shares for Rs 3,00,000 whereas Assessing Officer states that these shares were completely worthless. The question really is whether the sale of shares is bonafide or not. The sale consideration, as is also stated in the sale instrument- copy of which is filed before us, is Rs 3,00,000, and not Rs 2,95,445 as is referred to by the Assessing Officer, and that is the amount which has been paid to the assessee. The Assessing Officer has apparently confused the valuation of the shares @ Rs

2.95 each with the sale consideration. Nothing, therefore, turns on the variation between valuation report value and transaction value which is anyway a round figure on the basis of negotiations. The next objection is that the shares are sold to a person who has other business transaction with the assessee and who was a director in the company. That is again wholly irrelevant. What is relevant is that whether the transaction actually took place, inasmuch as whether sale was actually effected and whether the consideration was actually received, and whether there is anything to substantiate that suspicion that even after the sale of the shares, the assessee continued to remain owner, legal or beneficial, of these shares. In effect, when it is demonstrated that the transaction was only on paper, and not in reality, one can ignore the transaction. That is not the case here. The fact remains that the buyer of the shares, and his wife, are now only shareholders in the company and they own the company. As documents filed before us evidence, post this transaction, not only the sale has been effected in records but there has also been a change in the composition of the board of directors, and buyer's wife also joined the company as a director. The ownership is transferred, the consideration is paid and the transaction is complete. The buyer was a director of the company in question and this is a sale of shares in a private limited company which is made only on private basis and not by way of, for example, a stock exchange. The next issue raised by the Assessing Officer is that why should someone buy these dud shares and what he does after buying these shares. Those commercial decisions must be best left to the persons concerned. What the buyer of these shares does to the company is business of the buyer of the shares, and it is not even necessary that he would do anything immediately. It is incorrect to say that these shares are completely worthless inasmuch as these are majority shares in VCAM Investment Managers Pvt Ltd, and by virtue of holding these shares, a person gets control over that existing and duly incorporated juridical entity- whatever negligible be its worth. As to what use that juridical entity be put to, it is not necessary to have a ready answer thereto but one thing is certain that it can be put to use and it's a common practice to find such companies also changing hands, of course for a consideration, in the real-life situations. In any event, how is the assessee concerned about as to what how will the buyer of shares use the company so acquired by him. As regards the objections of the Assessing Officer to the effect that the assessee was well known to the seller and they had many other transactions as well, the mere fact of these transactions, and resultant association with the assessee, does not mean that this transaction did not take place. The fact that the records of the Registrar of Companies still show address of the company as a premises belonging to the assessee cannot negate the fact that the ownership of the shares is with the buyer of these shares, and that the seller is not associated with, or is even beneficial owner of, this company- particularly when the company in question has no business activities at present. Nothing is on record to substantiate that implicit allegation that the assessee continued to be owner of the company. As a matter of fact the assessee, as also Saldhana, were shareholders in this company, and, as the assessee was no longer living in India and was not in any way associated with this company, and as investment in the said company turned out to be a dud investment, he sold entire shareholdings in this company to Saldhana, one of the directors of the company. There is nothing unusual about it. It was a commercial decision of Saldhana to buy these shares on a token consideration of Rs 3 lakhs which was almost the same amount as its net effective worth and book value. There is nothing wrong, or even unusual, in this transaction either.

9. As regards the transaction of sale of shares having been rendered illegal under section 23 and 24 of the Indian Contract Act, 1872, this proposition proceeds on the fallacious assumption that minimising tax liabilities through lawful means, even if the sale of shares be treated as tax-motivated, is illegal. Undoubtedly, when the object of a contract is illegality or

something which would frustrate the law, such a contract will be void, but then minimisation of tax liability, as long as it is through legitimate tax planning and without using colourable devices, is not at all illegal; it is not even immoral as it is everybody's duty to himself to manage his affairs properly within the framework of the law. Let us see the whole transaction from a different perspective. As the assessee is looking at his long term capital gains, he realises, or his consultant points out to him, that he has already incurred a long term capital loss by making an investment in the shares of VCAM and that he can book this loss in case he can find a buyer for these shares even at zero value. He then looks around and narrows down to Saldhana, a director in the same company and his associate, who is ready to buy these shares at a token consideration at 3% of the face value of these shares, and the assessee then sells the shares to book the loss incurred by him in these shares. His long term capital loss is thus crystallised, and the corollaries are to follow. The benefit of this long term capital loss could not be declined to the assessee, as long as transaction has been actually effected, only on the ground that if the assessee had not taken these proactive measures, even if that the sale of shares can be described as a proactive measure, he would have paid more taxes. The assessee may so end up saving taxes but then that is perfectly legitimate. The Assessing Officer cannot disregard a transaction just because it results in a tax advantage to the assessee. Just as much as we cannot legitimize and glorify tax evasion through colourable devices and tax shelters, we cannot also deprecate and disapprove genuine tax planning within the framework of law. The line of demarcation between what is permissible tax planning and what turns into impermissible tax avoidance may be somewhat thin, but that cannot be excuse enough for the tax authorities to err on the side of excessive caution.

10. In view of these discussions, as also bearing in mind the entirety of the case, we deem it fit and proper to vacate the stand of the authorities below on this point. The Assessing Officer is directed to allow set-off of this long term capital loss on the sale of shares in VCAM Investment Managers Pvt Ltd, against the long term capital gains on the sale of the property. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 20th day of September 2021.

Sd/-
Ravish Sood
(Judicial Member)
Mumbai, dated the 20th day of September, 2021

Sd/-
Pramod Kumar
(Vice President)

Copies to:	(1)	The appellant	(2)	The respondent
	(3)	CIT	(4)	CIT(A)
	(5)	DR	(6)	Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai