IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND

SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

Appeal No.	Appellant	Assessment Year	Respondent
ITA Nos. 1569 & 1600/Bang/2014	The Deputy Commissioner of Income Tax, Circle – 4 (1) (1), Bangalore.	2006-07	M/s. Epsilon Advisors Pvt. Ltd., No. 642, 4th Main, 2nd Stage, Indira Nagar, Bangalore – 38. **PAN: AAACE4111H**
ITA Nos. 1607 & 1608/Bang/2014	M/s. Epsilon Advisors Pvt. Ltd., No. 642, 4th Main, 2nd Stage, Indira Nagar, Bangalore – 38. **PAN: AAACE4111H**		The Commissioner of Income Tax (Appeals) – I, Bangalore.

Assessee by	:	Shri S. Parthasarathi, Advocate
Revenue by	:	Shri K.V. Arvind, Standing Counsel
Date of hearing		12.09.2018
Date of Pronouncement	:	29.11.2018

O R D E R

Per Shri A.K. Garodia, Accountant Member

Out of this bunch of four appeals, two appeals are cross appeals filed by the assessee and revenue in proceedings of penalty u/s 271 (1) (c) of I. T. Act for A. Y. 2006 – 07 and remaining two appeals are also cross appeals filed by the assessee and revenue in quantum proceedings for the same year i.e. A. Y. 2006 – 07. All these appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. First we take quantum appeals. The grounds raised by the revenue in ITA No. 1569/Bang/2014 are as under:-

"1. The Order of the Ld.CIT (A) is opposed to the facts of the case.

2. On the facts of the case, the Ld.C1T(A) erred in holding that the disallowance of advisory fee should have been based on the number of shares sold as against sale consideration.

3. On the facts of the case and on law, the Ld.CIT (A) has erred in not considering the remand report in determining the claim of eligibility

of the advisory fee.
4. On the facts of the case, the order of the Ld.CIT(A) holding that the advisory fee ought to be determined on the number of shares sold, works out to a higher amount which is far above the agreed amount.

5. On the facts of the case, the CIT(A) erred in working out the allowable advisory fee at Rs. 3,17,23,480/-.

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

7. The appellant craves for permission to add, modify or delete the grounds of Appeal mentioned above at the time of hearing he case with a prayer to restore the order of AO."

3. The grounds raised by the assessee in ITA No 1607/Bang/2014 are as under:-

"*1. That having regard to the facts & circumstances of the case. Ld. Commissioner of Income Tax (Appeals-1) hereinafter referred to CIT has erred in law and fact in passing the assessment order.*
2. That on the facts and in the circumstances of the case and in Law, The Ld. CIT has erred in upholding the assessment order under section 147 of the Income Tax Act, 1961 without following the mandatory procedure prescribed under section 147 to 151 of the Income Tax Act, 1961, as such it is prayed that the assessment be held as bad in law and be Set aside.
3. The Ld.CIT should have appreciated the fact that the assessment order under section 147 of the Income Tax Act, 1961 was passed without passing a speaking order against the objections raised by the assessee.
4. The CIT ought to have considered the fact that the AO has passed an assessment order without appreciating the facts and details on record and without according proper opportunity of being heard to the Assessee passed an assessment order under section 147 / 144 of the Income Tax Act 1961.
5. The CIT has erred in making an addition of Rs. 82,76,520 out of the advisory fee of Rs 4,00,00,000 paid by the appellant.
6. The CIT has not specified any basis or provided any reason why he choose to disallow Rs 82,76,520 and allow Rs 3,17,23,480 out of the Rs 4,00,00,000 paid by the appellant to M/s Morgan Sranley as consulting fee.
7. The CIT has erred in upholding the disallowance of the average cost of shares as determined by the Assessing officer under section 143(3) of the Act, in the Assessment Year 2003-2004.
8. The CIT has allowed the average cost worked out by the assessing officer for the assessment year 2003 - 04 in the case of M/s Vectra Holdings P Limited, an associate company fo the appellant.

9. The CIT has considered the facts of the above claim when he allowed that the loss determined by the above said assessment order should be carried forward. By the same reason, the average cost should also have been allowed to the appellant.

10 That considering the facts and circumstances of the case, the CIT has erred in upholding the disallowing the Short Term Capital Loss of Rs.1 17,76,40,000 in respect of the sale of shares of M/s Jupiter Capital Advisory Private Limited, without giving an adequate opportunity of being heard and without confronting the information submitted by the appellant.

11. That considering the facts and circumstances of the case, the Ld. AO has erred in disallowing the Short Term Capital Loss of Rs 42,896,900 in respect of the sale of shares of M s BBNL without giving an adequate opportunity of being heard and without confronting the information submitted by the appellant.

12. "The Appellant craves leave to add, amend alter, vary and/or withdraw or rescind all or any of the GROUND OF APPEAL on or before the final Hearing."

4. Learned AR of the assessee submitted that as per Grounds 1 to 4 of the assessee's appeal, the issue raised by the assessee is about validity of reassessment proceedings. Regarding the reasons recorded by the AO for reopening, he submitted that the same are reproduced by the AO in Para 3 of the assessment order. He placed reliance on a judgment of Hon'ble Karnataka High Court rendered in the case of C. M. Mahadeva as reported in 404 ITR 747.He also placed reliance on another judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Chaitanya Properties Pvt. Ltd. as reported in 240 taxman 659. In particular, our attention was drawn to Para 22 of this judgment. Learned DR of the revenue supported the orders of the lower authorities. He also submitted that none of the judgments cited by the learned AR of the assessee is applicable in the present case because facts are different. He placed reliance on the judgment of Hon'ble apex court rendered in the case of Rajesh Jhaveri, 291 ITR 500. He also submitted copy of a tribunal order rendered in the case of M/s Cornerstone Property Investments Pvt. Ltd. vs. ITO in ITA No. 665/bang/2017 dated 09.02.2018 and placed reliance on the same. In particular, our attention was drawn to Para 5.4.2 of this tribunal order. He also placed reliance on a judgment of Hon'ble apex court rendered in the

case of ITO vs. TechSpan India Pvt. Ltd. As reported in 302 CTR 74. In particular, our attention was drawn to Paras 7 to 12 of this judgment.

5. We have considered the rival submissions. First of all, we reproduce Para 3 of the assessment order because the reasons recorded by the AO for reopening are reproduced by the AO in this Para.

> *"3. A detailed reference dated 1-02-2012, had been received from the O/o. JCIT(OSD), Circle-12(5), Bangalore giving details of concealment of income in the hands of the assessee concern for Asst. year : 06-07. Subsequently, another letter dated 16-02-2012 had also been received from the O/o. Addl. Commissioner of Income-tax, Range-12, Bangalore. Considering the specific issues of tax evasion noted, a notice dated 28-03-2012 had been issued u/s. 148 of the Income Tax Act initiating reassessment proceedings The proceedings had been initiated after obtaining the approval of the Addl. Commissioner of Income-tax, vide his approval dated 28-03-2012. The following are the reasons recorded for initiation of 148 proceedings.*
>
> *"M/s Epsilon Advisers Private Limited filed its return of income for the A.Y. 2006-07 on 30.11.2008 declaring a loss of Rs. 16,11,05,349/ -. The return was processed u/s 143(1) of the Income-tax, Act, 1961. The case had not been selected for any scrutiny assessment proceedings.*
>
> *2. In this case information has been received from the office of the Addl. Commissioner of Income-tax, Range-12, Bangalore, who was in receipt of Investigation Report from the Investigation Wing, Unit-I, Bangalore.*
>
> *3. The report received from 0/ o. Addl. Commissioner of Income-tax, Range-12 as well as from the Investigation Directorate on investigations conducted in various 2G scam related cases have given details of understatement of capital gains transactions in the hands of the assessee concern on account of sale of shares of BPL Cellular company to M/ s. Essar Group of promoters. Similarly, the information received have also given details of inaccurate and manufactured capital loss claimed on account of sale of shares of M/s. Jupiter Capital Private Ltd during this year for adjusting the said losses against the capital gains received on sale of BPL Cellular company shares.*
>
> *4. The Profit and Loss account declared by the assessee company is as under :*
> *EPSILON ADVISERS PRIVATE LIMITED*
>
> *PROFIT AND LOSS ACCOUNT FOR THE PERIOD ENDED*

31ST MARCH 2006

	31-03-2006 Rs.	***31-03-2005 Rs.***
INCOME		
Profit on sale of investments	*122,09,92,716*	*-*
Interest onIncometaxrefund	*81,119*	*-*
Liabilities No longer required written back	*3,57,24,208*	
	125,67,98,043	*-*
EXPENDITURE		
Administrative Expenses	*4,10,95,155*	*19,22,356*
Finance Charges	*1,08,413*	*24,35,293*
Provision for Gratuity	*-*	*51,250*
Loss on sale of investments	*122,05,36,900*	*-*
Depreciation	*9,220*	*9,220*
	126,17,49,688	***44,18,119***

5. The statement of income filed by the assessee as per return of income filed for Asst. Year : 06 07 is as below :

Profits and Gains from Business :	***Amount Rs.***	***Amount Rs.***	***Amount Rs.***
Net Loss as per Profit and Loss Account		*(49,51,645)*	
Add : Items re-considered :			
Loss on sale of investments	*122,05,36,900*		
Interest payment disallowable u/s. 40a(ii) for non deduction of TDS	*25,000*		
Depreciation	*9,220*		
Advisory fee on sale of shares-reconsidered	*4,00,00,000*	*126,05,71,120*	
		125,56,19,475	
Less : Depreciation allowable u/s. 32(1) (As per statement enclosed)	*3,750*		
Profit on sale of investments	*122,09,92,716*	*122,09,96,466*	
		3,46,23,009	
Taxable Income from Business			*3,46,23,009*
Capital Gain/ Loss			
1. Long Term Capital Gain on sale of investments			
Sales consideration	*65,00,00,000*		
Less : Advisory fee on sale of shares	*40,00,00,000*		

Less : Average cost/proportionate loss in AY 2002-03 on account of non-transfer of the shares as per Asst. order	*20,11,91,458*		
Long Term Capital Gain		*40,88,08,542*	
2. Short Term capital Loss/ Gain on sale of investments			
Sales Consideration	*67,44,63,100*		
Less : Cost of acquisition	*127,90,00,000*		
Short Term Capital Loss		*(60,45,36,900)*	
Net Capital loss on transfer of investments			*(19,57,28,358)*
Total Income/(Loss)			*(16,11,05,349)*
Tax payable thereon			*NIL*

6. The assessee company had claimed to have subscribed to 4,50,07,284 number of shares of M/ s. BPL Communications Ltd. However the investment amount had only been shown at Rs. 4,50,07,284/ - as per the Balance sheet filed as on 31-03-2005. The assessee company has also claimed to have acquired 35,00,00,000 shares of M/s. BPL Communications Ltd from M/ s. Coimbatore Cable Net Private Ltd on exercising call option during the Financial Year : 05-06. By selling this share holding of 4,50,07,284 shares and 35,00,00,000 shares to M/ s. Santa Trading Pvt. Ltd. the assessee company has received a sale consideration of Rs 126,50,00,000/, The sale of shares of M/ s. BPL Communication Ltd by assessee group companies is given as per table below :

Sold by	***No. of shares***	***Consideration (Rs.)***
Tayana Consult Pvt. Ltd.	*19,91,98,770*	*65,00,00,000*
Coimbatore Cable Net Pvt. Ltd.	*14,97,69,241*	*43,40,00,000*
Vectra Holdings Pvt. Ltd.	*2,60,92,814*	*70,00,00,000*
Epsilon Advisors Put. Ltd.	*4,50,07,284 & 35,00,00,000 Acquired from Coimbatore Cable Net Pvt. Ltd. on exercising call option*	*126,50,00,000*

7. As per the Profit and Loss account filed, the assessee company has shown a profit on sale of investments of Rs. 122,09,92,716/ -. However, as per the statement of income filed, the assessee company has not clearly shown the capital gains arising on account of sale of M/ s. BPL Communication Ltd. shares. The schedule of capital gains submitted by the assessee as per the

return of income is as below :

Computation of capital Gain/loss :

Long Term Capital gain/loss			
1. Equity Shares of BPL Comm.			
Sales Consideration		*65,00,00,000*	
Less : Advisory fee so n sale of shares		*4,00,00,000*	
Average cost/ proportionate loss in AY 2003-04 on account of non transfer of the shares as per Assessment order		*20,11,91,458*	
Long term capital gain			*40,88,08,542*
Short Term Capital Gain/Loss			
1. Equity Shares of BPL Comm.			
Sales Consideration	*66,50,00,000*		
Less : Cost of acquisition	*4,90,00,000*		
Short Term capital Gain		*61,60,00,000*	
2. Equity Shares of Jupiter Capital			
Sales Consideration	*23,60,000*		
Less : Cost of acquisition	*118,00,00,000*		
Short Term capital Loss		*(117,76,40,000)*	
3. Equity Shares of BBNL			
Sales Consideration	*71,03,100*		
Less : Cost of acquisition	*5,00,00,000*		
Short Term capital Loss		*(4,28,96,900)*	
Net Short Term Capital Loss			*(60,45,36,900)*
Net Capital Loss			*(19,57,28,358)*

No. of shares of BPL Comm. Sold during the year 2005-06		
	No.	***Cost***
Long Term	*4,50,07,284*	*20,11,91,458*
Short Term	*35,00,00,000*	*4,90,00,000*
Total	***39,50,07,284***	***25,01,91,458***
No. of shares of Jupiter Capital sold during the year 2005-06		
Short Term	*2,36,000*	*118,00,00,000*
No. of shares of BBNL sold during the year 2005-06		
Short Term	*71,03,100*	*5,00,00,000*

8. It is seen from the above that the assessee company has claimed

a cost of Rs. 20,11,91,458/- on 4,50,07,284 shares. In addition to the above, the assessee company has claimed an expenditure of Rs. 4,00,00,000/ - on its transactions whereas the Advisory Fee paid pertained to the sale of all the BPL communication Ltd shares and did not pertain only to the sale of 4,50,07,284 shares. The excessive advisory fees paid needs to be disallowed and the excessive cost of acquisition claimed needs to be restricted.

9. The assessee company has purchased and sold 71,03,100 shares of M/ s. BBNL. The assessee company has claimed cost of acquisition of 5,00,00,000 towards these BBNL shares which are in turn sold for Rs. 71,03,100/- only. This short term capital loss claimed of Rs. 4,28,96,900/ - is incorrect, overstated and an attempt to evade tax by reducing the incidence of long term capital gain arising from sale of M/ s. BBNL shares and requires to be corrected.

10. On going through the report of Investigation Wing, it is also seen that the assessee company had been allotted 5,20,565 shares of face value of Rs. 10/- each at a premium of Rs. 4,990/ - per share of M/s. Jupiter Capital Private Ltd The assessee company had subscribed to the shares of M/s. Jupiter Capital Private Ltd. along with other group concerns. The table of such allotment of shares of M/s. Jupiter Capital Pvt. Ltd is as below:

Jupiter Capital Pvt. Ltd.					
Details of equity shares & share premium					
Period	***Names of the Shareholder s***	***No. of shares***	***Face Value Rs. 10***	***Premium Rs. 4,990/-***	***Total***
2005-06 Allotment at par	*K Venkatarame Gowda*	*500*	*5,000*	*--*	*5,000/-*
Purchased at par	*Vectra Holdings Pvt. Ltd*	*26,400*	*2,64,000*	*--*	*2,64,000/ -*
Preferential allotment	*Epsilon Adviser Pvt. Ltd*	*2,36,000*	*2,36,000*	*117,76,40,000 100% called up*	*1,18,00,00,0 00*
	Tayanya Consul Pvt. Ltd.	*1,86,800*	*1,86,800/*	*69,99,67,000 75% called up*	*70,09,67,000*
	Coimbatore cable Net Pvt. Ltd	*91,700*	*9,17,000*	*34,31,87,250 75% called up*	*34,41,04,250*

	Larite Industries Ltd	*2,665/-*	*26,650/-*	*99,73,762 75% called up*	*1,99,99,412*
	Nucent Technologies Pvt Ltd	*3,400/-*	*34,000/-*	*1,27,24,500 75% called up*	*1,27,58,500*
	Total as on 31/03/2006	***5,47,465 /-***	***54,74,650/-***	***224,26,24, 512***	***224,80,99,162***

11. As it is evident from the table above, the assessee company had subscribed to 2,36,000 shares of M/ s. Jupiter Capital Private Ltd by paying up 100 % of the called up value of Rs. 118,00,00,000. It would be surprising to note that the four companies M/ s. Tayana Consult Pvt. Ltd. , M/ s. Coimbatore Cable Net Private Ltd., M/ s. Larite Industries Ltd and M/ s. Nucent Technologies Ltd which had subscribed to a total of 2,84,565 shares by paying 75 % of the share premium agreed to forego their share investment by expressing inability to pay the balance 25 %. In their place, another group company M/ s. Vec ra Holdings Pvt. Ltd. has paid the balance 25 % of the share premium and acquired 2,84,565 shares from these four companies by paying only Rs. 28,45,650/ -. Together these four companies have foregone an amount of Rs. 106,58,52,512/ -, which they had paid as share premium for acquiring shares of M/ s. Jupiter Capital Pvt. Ltd.

12. Surprising to note that the assessee company, M/ s. Epsilon Advisers Pvt. Ltd. which had subscribed to 2,36,000 shares at a total cost of Rs 118,00,00,000/ - has sold the entire share holding of 2,36,000 to M/ s. Vectra Holdings Pvt. Ltd. for a consideration of Rs. 23,60,000/ thereby incurring a loss of Rs. 117,76,40,000/ -. These losses artificially engineered have been adjusted against long term capital gains arising from the sale of shares of M/s. BPL Communications Ltd for the year.

13. The entire transaction of subscribing to 2,36,000 shares at a premium of Rs. 4,990/- and subsequent sale of these shares at face value of Rs. 10/- to a group company are all exercises in tax evasion created solely for the purpose of claiming set off against long term capital gains arising on sale of shares of M/ s. BPL Communication Pvt. Ltd owned by the assessee. This incorrect, bogus and manufactured capital losses cannot be allowed as a deduction and needs to be disallowed. On account of this, the entire short term capital losses claimed of Rs. 117,76,40,000/ - needs to be disallowed and added to the income returned by the assessee for the year.

14. On account of the facts and circumstances as above, I have reasons to believe that the taxable income of the assessee has escaped

assessment.

15. Issue notice u /s. 148 to initiate reassessment proceedings."

6. In the light of these reasons recorded by the AO for reopening, we first examine the applicability of two judgments cited by the learned AR of the assessee. The first judgment cited by him is the judgment of Hon'ble Karnataka High Court rendered in the case of C. M. Mahadeva (Supra). As per first question of law in this case, the notice u/s 148 was issued on 10.12.2007 and at that point of time, the original return of income filed by the assessee on 21.03.2007 remained undisposed of. As per second question of law in this case, the AO had categorically admitted in the assessment order u/s 147 that notice u/s 148 was issued for reopening the assessment in order to verify the source of investment. As per Para 24 to 26 of this judgment, it is held that in view of these facts which are admitted by the learned counsel for the revenue before Hon'ble High Court that there was investigation required with regard to the investment made by the assessee, reopening is not valid. In the present case, as per the reasons recorded by the AO for reopening as reproduced above, this is not the basis that for further enquiry, assessment is reopened. In our considered opinion, this judgment is not applicable in the facts of the present case.

7. The second judgment cited by him is also the judgment of Hon'ble Karnataka High Court rendered in the case of M/s Chatanya Properties Pvt. Ltd. (Supra). Our attention was drawn to Para 22 of this judgment. As per this Para, it was noted that all facts were available before the AO when he completed original assessment u/s 143 (3) and reopening was on the basis of change of opinion only. In that case, proviso to section 147 was also applicable because the reopening in that case was initiated after expiry of four years from the end of the relevant assessment year and in Para 23 of this judgment, it is held that the reopening is bad in law because this is not the allegation of the AO in the reasons recorded by him that there was failure on the part of the assessee to fully and truly disclose all material facts. In the present case, there is no assessment completed u/s 143 (3) and therefore, proviso to section 147 is not applicable and since no opinion was formed by the AO, there is no question of any change of opinion.

Therefore, in our considered opinion, this judgment also is not applicable in the facts of the present case.

8. As per above discussion, we have seen that none of the judgments cited by the learned AR of the assessee is rendering any help to the assessee in the present case. In fact, as per the judgment of Hon'ble apex court cited by the learned DR of the revenue having been rendered in the case of ITO vs. TechSpan India Pvt. Ltd. (Supra), it was held that before holding that the reopening is on change of opinion, it should be ensured that some opinion was formed on the point which is the basis of alleged escapement of income. Hence, in view of this judgment also, the judgment of Hon'ble Karnataka High Court rendered in the case of M/s Chatanya Properties Pvt. Ltd. (Supra) is not applicable because no opinion was formed by the AO earlier in the present case and hence, there cannot be a change of opinion. In view of detailed reasons recorded by the AO as reproduced above and by respectfully following this judgment of Hon'ble apex court rendered in the case of Rajesh Jhaveri (Supra), we hold that reopening of the assessment in the present case is valid.

9. Learned AR of the assessee submitted that the first issue on merit in the appeal of the assessee is as per Ground nos. 5 and 6 about confirming by CIT (A) of the disallowance to the extent of Rs. 82,76,520/- out of disallowance made by the AO of Rs. 257.20 Lacs being 64.3 % of the amount paid by the assessee of Rs. 4 Crores to M/s Morgan Stanely as consulting fees for which, Ground No. 5 in the appeal of the revenue is also relevant being inter connected. He also submitted that the only issue on merit involved in the appeal of the revenue is interconnected to this issue in the appeal of the assessee because the grievance of the revenue is in respect of granting of part relief by CIT (A) to the assessee by restricting the disallowance to Rs. 82,76,520/- out of disallowance made by the AO of Rs. 257.20 Lacs being 64.3% of the amount paid by the assessee to M/s Morgan Stanely as consulting fees. He submitted that this issue on merit in these two cross appeals may be decided together. He submitted that the decision of CIT (A) on this issue is contained in paras 5.1 to 5.6 of his order. He reiterated the same submissions which were made before CIT (A) as

reproduced by him in Para 5.2 of his order. He submitted that instead of deleting part disallowance, learned CIT (A) should have deleted the same in full. At this juncture, the bench wanted to see the agreement with Morgan Stanley on the basis of which, this payment of Rs. 4 Crores was made by the assessee. In reply, it was submitted by the learned AR of the assessee that the agreement is not readily available but he submitted that as per the chart reproduced by CIT (A) in Para 5.5 of his order, the total amount of payment to J M Morgan Stanley (JMM) by the group was of Rs. 10 Crores total including Rs. 4 Crores by the present assessee, another Rs. 4 Crores by M/s Vectra holdings Pvt. Ltd. And Rs. 1 crore each by M/s Tanya Consulting Pvt. Ltd. And M/s Coimbatore Cablenet Pvt. Ltd. and the payment is not as per no. of shares sold or value of shares sold because M/s Vectra holdings Pvt. Ltd. is paying same amount of Rs. 4 Crores whereas the percentage of sale by that company is only 3% as against 51% by the present assessee. He also pointed out that in the hands of M/s Vectra holdings Pvt. Ltd., the AO has allowed Rs. 229.60 Lacs for sale of 3% only but in the present case, although the sale is 51%, the AO allowed only Rs. 142.80 Lacs on the basis of proportionate sale consideration but CIT (A) decided that it should be allowed on the basis of proportionate no. of shares sold. But as per the assessee, full amount should be allowed.

10. In reply, learned DR of the revenue submitted that as per page 27 of the order of CIT (A), the amount of fees payable by various group companies to (JMM) is without any basis as per the agreement. He submitted that the order of CIT (A) should be reversed and that of the AO should be restored on this issue. In fact, Para II of the written submissions filed by the Learned DR of the revenue contains his arguments on this issue and therefore, this para of his written submissions from page 3 of written submissions is reproduced herein below for ready reference:-

> *"II.Ground No. 5-6*
>
> *a) The assessee and its group companies entered into an agreement with M/s.J.M.Morgan Stanley Pvt Ltd for sale of shares and agreed to pay a sum of Rs. 10 crores as advisory fee. The Assessing Officer by considering the total consideration received, apportioned the same on the basis of the consideration. The Appellate Commissioner, modified the order by apportioning the*

same on the basis of the number of shares sold. On this issue both the assessee and the revenue are in appeal before this Hon'ble Tribunal.

b) In the absence of any basis for allocation of the advisory fee to be borne by the respective companies, apportionment of the advisory fee on the basis of the total consideration received on sale of shares is appropriate. Hence the Appellate Commissioner without any basis or logic, apportioned the same on the basis of the number of shares. Hence the order of the Appellate Commissioner is liable to be set aside to the extent of modification of order of assessment."

11. Regarding Grounds No. 7 to 9 of the assessee's appeal, learned AR of the assessee submitted that the copy of the assessment order for A. Y. 2003 – 04 is available on pages 75 to 76 of the paper book. He pointed out that in that year, the AO accepted the claim of the assessee about Long Term capital Loss Rs. 59,18,58,714/- and Short Term capital Loss Rs. 57,89,24,765/- total Rs. 117,07,83,479/- and this was added to Total loss as per Return of Income Rs. 2,31,09,744/- and in this manner, loss was computed at Rs. 119,38,93,223/- but from the same, proportionate loss in respect of 450,07,284 shares transferred by the assessee company to M/s Tayanna Consult. Pvt. Ltd. being the amount of Rs. 20,11,91,458/- was disallowed for this reason that these shares were pledged with ICICI and hence, not delivered by the assessee. He submitted that in the present year, the same 450,07,284 shares were sold and the same loss of Rs. 20,11,91,458/- was claimed by the assessee as cost of acquisition but the AO as per Para 12 of the assessment order held that in A. Y. 2003 – 04, the assessee had claimed in the return of income loss of only Rs. 231,09,744/- and since, no revised return was filed to claim extra loss, it was not proper to allow extra loss of Rs. 117,07,83,479/- in that year and allowing of such extra loss in that year was not proper and therefore, loss disallowed of Rs. 20,11,91,458/- in A. Y. 2003 – 04 cannot be allowed in the present year as cost of acquisition. He submitted that the assessment order for A. Y. 2003 – 04 is dated 30.12.2005 and the present assessment order is dated 31.03.2013 and therefore, even if there is a mistake in that assessment order for A. Y. 2003 – 04, it is not rectifiable on 31.03.2013 u/s 154 and therefore, the stand of the AO is not proper. At this juncture, the bench

wanted to know the sale price in A. Y. 2003 – 04 and the sale price in the present year along with the cost of acquisition of these shares because if the sale price in both years are same, the loss in the present year will be same and only the nature of loss whether short term or long term may vary but if the sale price in the present year is more, the loss will be less and it may be gain also. In reply, learned AR of the assessee submitted that the sale price in the present year is Rs 65 Crores as stated in the Computation of income filed by the assessee for A. Y. 2006 – 07 and he submitted a chart containing sale proceeds in A. Y. 2003 – 04 along with dates and cost of acquisition. He pointed out that in A. Y. 2003 – 04, the sale price was Rs. 1 per share and in this manner, the sales value of 450,07,284 shares was Rs. 450,07,284 as against Rs. 65 Crores in the present year. He pointed out that in the present year, the assessee is not claiming any loss on sale of these shares. He pointed out that the assessee has declared LTCG on sale of these shares of Rs. 40,88,08,542/ as reproduced by the AO on page 5 of the assessment order. He submitted that it is noted by the AO also on this page of the assessment order that the assessee has computed LTCG of Rs. 40,88,08,542/- on sale of these 450,07,284 shares of BPL. In this working, the assessee has repor ed sales consideration of Rs. 65 Crores and from that, the assessee ha first deducted Rs. 4 Crores being Advisory Fees paid on sale of shares and then reduced Rs. 20,11,91,458/- as cost of acquisition of these shares being the proportionate loss on sale of these shares in A. Y. 2003 – 04 disallowed in that year. He submitted that the AO has partly disallowed both these claims. Out of the claim of Rs. 4 Crores, the AO held that only Rs. 142.80 Lacs which is 35.7% of Rs. 4 Crores paid by the present assessee is allowable and made disallowance of the balance amount of Rs. 257.20 Lacs and learned CIT (A) restricted this disallowance to Rs.82,76,52/-. He submitted that the revenue is in appeal for this relief allowed by CIT (A) by restricting the disallowance to Rs.82,76,52/- as against disallowance made by the AO of Rs. 257.20 Lacs and the assessee is in appeal seeking full allowance of Rs. 4 Crores. He further submitted that regarding the claim of the assessee for deduction of Rs. 20,11,91,458/- as cost of acquisition of these shares being the proportionate loss on sale of

these shares in A. Y. 2003 – 04 disallowed in that year, the AO held that only Rs. 450,07,284/- is allowable and learned CIT (A) has confirmed this disallowance in full and the assessee is requesting for deletion of this disallowance. Learned DR of the revenue supported the orders of the authorities below. In fact, Para III of the written submissions filed by the Learned DR of the revenue contains his arguments on this issue and therefore, this Para of his written submissions from pages 4 & 5 of written submissions is reproduced herein below for ready reference:-

> *"III. GROUND NO.7-9*
> *a) The assessee claimed a loss of Rs.20,11,91,458/- in view of sale and purchase back of shares held by assessee to M/s.Tayanna Consult Private Limited. During the Assessment Year 2003-04 the Assessing Officer disallowed the loss to an extent of Rs 15,61,84,174/-, and allowed only Rs.4,50,07,284/- (book value). The assessee has claimed a sum of Rs.20,11,91,458/- a loss as cost of acquisition in respect of the shares sold of M/ s. BPL Communications Ltd. The AO considering the same as fraudulent and also a colourable device has disallowed the same. The same aspect has been confirmed by the CIT(A).*
>
> *b) It is submitted that creation of loss by virtue of sale and purchase back of equity shares to M/s.Tayanna Consult Private Limited being related company is a devise adopted by the assessee to inflate the cost of acquisition in order to reduce the capital gains liability during the current Assessment Year. Further the sale of the shares to the controlled entity at a higher price without any basis and purchasing the same back at the sale price from the controlled entity with frivolous reasons is a clear case of devise adopted to inflate the cost of acquisition. If the transaction is examined in the real sense, it is nothing but the device adopted by the controlled entities. Hence AO and CIT(A) were justified in disallowing the loss and consequently as cost of acquisition.*
>
> *c) The Apex Court in the case of Vodafone which has been placed in the compilation has clearly held that the transaction between the 2 closed controlled entities has to be seen by lifting the corporate veil. By applying the doctrine of lifting the corporate veil and substance over the form, the loss is a devise to inflate the cost of acquisition and reduce the capital gains liability and the same needs to be disallowed and has rightly been disallowed."*

12. We have considered the rival submissions. We find that even as per the assessment order Para 9, this is not the case of the AO that the amount paid to (JMM) is not an allowable expenditure. He has noted that out of total

sale consideration of Rs. 354.40 Crores received by the present assessee and other 3 sister concerns, the present assessee has received only Rs. 126.50 Crores which is 35.7 % and on this basis, he held that only 35.70% of total advisory fees paid to (JMM) is allowable in the hands of the present assessee. He calculated the allowable deduction at Rs. 142.80 Lacs which is 35.7% of Rs. 4 Crores paid by the present assessee but even as per the logic of the AO, it should be 35.70% of total advisory fees paid by the group of the present assessee and its three sister concerns, which is Rs. 10 Crores and 35.70% of Rs. 10 Crores comes to Rs. 357 Lacs and not Rs. 142.80 Lacs. Hence, even as per the stand taken by the AO, the allowable amount comes to Rs. 357 Lacs out of Rs. 400 Lacs. But in our considered opinion, in view of the facts of the present case, where it is seen that same amount of Rs. 400 Lacs is paid by M/s Vectra holdings Pvt. Ltd. for sale of 260,92,814 shares for a sale proceeds of Rs. 70 Crores as against 39,50,07,284 shares by the present assessee for sale consideration of Rs. 126.50 Crores, the amount of fees paid by these four group companies is neither in proportion of sale proceeds nor in proportion of no. of shares sold and the AO says in same Para 9 of the assessment order that the amount disallowed by him in the present case of Rs. 257.20 lacs can be claimed in the hands of other three sister concerns. Considering all these facts, in our considered opinion, the AO has not made out a case for disallowance of any part of this amount and therefore, the amount paid by the present assessee should be allowed in full as cost of transfer while computing LTCG on sale of shares of BPL. We hold accordingly.

13. We have considered the rival submissions in respect of cost of acquisition also. In our considered opinion, in view of the facts noted above, the stand of the AO is not acceptable that since the loss on sale of shares in A. Y. 2003 – 04 was not claimed by the assessee by filing a revised return, it is not allowable in the present year. In our considered opinion, the loss of Rs. 20,11,91,458/- was not allowed in A. Y. 2003 – 04 and this is not the case of the AO that this claim in the present year is not as per return of income filed in the present year. Even if the claim is not as per return of income or revised return of income but by way of a letter, the same may not be

accepted by the AO but the CIT (A) and tribunal has to examine and decide about such claim on merit and there is no restriction on these two authorities in doing so. The loss allowed in A. Y. 2003 – 04 is of Rs. 99,27,01,765/- including the loss as per return of income of Rs. 231,09,744/- and before us, the issue involved is not forming part of loss allowed in that year of Rs. 99,27,01,765/-. Hence, the claim of the assessee for allowing this loss of Rs. 20,11,91,458/- as cost of acquisition of these shares in the present year has to be examined and decided on merit.

14. We find that as per the AO, the cost of acquisition is Rs. 450,07,284/-. It appears that the amount of sales consideration of these shares in A. Y. 2003 – 04 @ Rs. 1/- per share refunded by the assessee to the buyer because of inability of the assessee to give delivery of these shares in that year is considered by the AO as cost of acquisition of these shares but the same is not correct. In fact, the loss on sale of these shares in A. Y. 2003 – 04 was accepted at Rs. 20,11,91,458/- on proportionate basis and the same is not in dispute. The sale proceeds of these shares in A. Y. 2003 – 04 was stated to be Rs. 450,07,284/ and this is also not in dispute. When sale proceeds and loss on sale is known and undisputed, the cost of acquisition can be easily arrived by adding these two figures and the same comes to Rs. 24,61,98,742/ . The assessee could have claimed deduction of this amount as cost of acquisition of these shares but the assessee has claimed only Rs. 20,11,91,458/- before the lower authorities and also before us. In view of these facts, we find that the claim of the assessee deserves to be allowed. Under these facts, we also notice that even if some part of advisory fees paid by the present assessee of Rs. 4 Crores is held to be not allowable, the ultimate LTCG on sale of these shares will not change because in that situation, the deduction on account of cost of acquisition has to be increased because the same is allowable up to Rs. 24,61,98,742/- as against Rs. 20,11,91,458/- only claimed by the assessee and as a result, LTCG declared by the assessee has to be accepted. Hence, in nutshell, the computation of LTCG on sale of 450,07,284 shares of BPL at Rs. 40,88,08,542/- deserves to be accepted. We direct the AO to accept the

same. All the grounds of the revenue are rejected and Ground Nos. 5 to 9 of the appeal of the assessee are allowed.

15. Learned AR of the assessee submitted that Ground No. 11 is not pressed and accordingly, this ground is rejected as not pressed.

16. Regarding Ground No. 10, it is submitted by the learned AR of the assessee that as per page 7 of the assessment order, there is a complete list of the acquirer of the shares of Jupiter Capital Pvt. Ltd. (JCPL) purchased on a premium of Rs. 4,990/- per share and as per the same, total 5 entities has purchased at this price and out of that, two parties are not related parties i.e. 1) Larite Industries Ltd. And 2) Nucenmt Technologies Pvt. Ltd. He submitted that although the quantity of shares purchased by these two entities is small being 2665 shares and 3400 shares respectively but this has to be accepted that even unrelated parties have also paid Share Premium of Rs. 4,990/- per share. Learned AR of the assessee submitted that this transaction of purchase of the shares of JCPL @ Rs. 5000/- per share and subsequent sale @ Rs.10/- per share has been explained before the AO as per letter dated 14.03.2013, contents of which are reproduced by the AO in Para 14 on pages 22 to 24 of the assessment order. Thereafter, he submitted that the objections of the AO are noted on page 25 of the assessment order and as per the same, this is the objection of the AO that how the price of Rs. 10/- per share was arrived at for sale when the purchase was made @ Rs. 5000/- per share only a few days back. His second objection is this that why the shares were sold in a hurry and why the sale was to a sister concern. Learned AR of the assessee submitted that the reply to these objections of the AO are contained in the reply dated 14.03.2013 reproduced by the AO but the same was disregarded by the AO. Regarding various judgments followed by the AO, he submitted that in the facts of the present case, these judgments are not applicable. He further submitted that as per Para 7.6 of the order of CIT (A), the only basis of his order is this that the shares sold for a huge loss within 4 months and 11 days after acquisition and sale is of the shares of a sister concern to a sister concern. He submitted that this basis is not proper because same share premium was paid by unrelated buyers also and the basis of payment of

share premium is explained that the assessee company was eying for expansion and on account of projected financial needs, the assessee company desired to have a control over a financial company for easy funding and for this purpose, the shares of JCPL were purchased at a premium of Rs. 4990/- per share and equal premium was paid by two unrelated parties also and this premium was demanded by JCPL on the basis of future potential. Subsequently, RBI did not grant permission to JCPL to act as a NBFC and because of this, there was no taker of the shares of JCPL. He submitted that under these facts, the loss is genuine and it should be allowed.

17. Learned DR of the revenue supported the orders of the lower authorities. In fact, Para IV of the written submissions filed by the Learned DR of the revenue contains his arguments on this issue and therefore, this Para of his written submissions from pages 5 to 12 of written submissions is reproduced herein below for ready reference:-

> *"**IV. GROUND NO.10***
> *a) The assessee purchased/acquired the shares of M/s. Jupiter Capital Private Limited by paying a premium of Rs 5000/- per share as against the face value of Rs 10/- per-share on 12/10/2005. The assessee sold the same shares to M/ s. Vectra Holding Private Limited on 28/2/2006 at Rs 10/- each. M/s. Jupiter Capital Private Limited and M/s. Vectra Holding Private Limited are the subsidiaries or holding companies of the assessee group.*
>
> *b) The assessee during the same accounting year has sold shares held in M/s. BPL communication and received a consideration of Rs 131 .50 crores and the same was liable for capital gains.*
>
> *c) The Assessing Officer examined the matter and also the explanation offered for payment of such a higher premium for purchase of shares that too in a new company which has not started any business and also the closely held company, proceeded to record a finding that there is no basis for determining the premium paid for purchase of the shares and in view of the close relationship between the assessee and M/s. Jupiter Capital Private Limited, concluded that the transaction of purchasing shares of M/s. Jupiter Capital Private Limited at Rs 5000/- per share and sale of the same to M/s. Vectra Holding at Rs 10/- per-share is a devise adopted in order to create a loss and set of the same again as the capital gains liability of the assessee in view of sale of shares held by it in M/s. BPL Communication. The theory of the assessee that sale was made in order to avoid any further loss was*

found to be far from truth. The Assessing Officer by applying the theory of lifting corporate veil and looking at the real transaction held that the entire transaction is to evade payment of capital gains liability in view of sale of shares by the assessee held in M/s. BPL Communication and consequently disallowed the loss of Rs.117, 76, 40, 000/-.

d) The CIT(A) by detailed consideration of the various aspects including the purchase and sale of the shares during the same accounting year in which shares of the assessee held in M/s. BPL Communication which attracted capital gains tax and the modus operandi of creating a loss to claimed set off against the capital gains liability of the assessee, confirm the finding recorded by the AO.

e) It is submitted that there is no valuation in order to pay a sum of Rs 5000/- per sale as against the face value of Rs.10/- per share in a new company especially when there was no business being commenced.

f) It is submitted that in view of the close relationship between the assessee, M/s. Jupiter Capital Private Limited and M/s. Vectra Holdings Private Limited, especially in a situation when the assessee has capital gains liability in view of sale of shares held by it in M/s. BPL Communication, the transaction has to be looked into by lifting the corporate veil and also substance over the form of transaction is to be seen. By applying the above principle, it is clear beyond doubt that an entire modus operandi of purchasing the shares of M/s. Jupiter Capital Private Limited at Rs 5000/- per share as against Rs 10/- per-share is nothing bu a devise adopted by the assessee to create artificial loss in order to claim the gain arisen to the assessee by virtue of the sale of shares held in M/s. BPL communication has set off.

g) The Apex Court in the case of Vodafone International Holdings BV 341 ITR 1 has considered the issue regarding lifting of corporate veil and examination of the transaction by applying the principle of substance over the form. By applying the law laid down by the Apex Court, if the facts of the case are tested, it is clear that the assessee has used the controlled companies as a conduit for the purpose of creating artificial loss in order to wrongfully/ illegally claim set off of the same against capital gains liability in view of sale of shares held by it in the case of M/s. BPL Communication Ltd. (Para 67, 74, 79 of the judgement).

h) This Hon'ble Tribunal in the case of M/s. Cornerstone Property Investments Private Limited ITA 665/bang/2017 dated 9/2/2018 has reiterated the requirement of fair market value of the shares for the purpose of payment of premium especially in a situation where the transaction is among the controlled companies. (Para 6.9 and 6.10 of the order of this Hon'ble Tribunal).

i) This Hon'ble Tribunal in the case of M/s. Fidelity Business Services India Private Limited has held that Fair Market Value of the shares in order to examine the correctness of the share premium is required. (Para-7 (ii) of the order).

j) It is submitted that the above judgement/order of this Hon'ble Tribunal in the case of M/s. Fidelity Business Services India Private Limited is upheld by the Hon'ble High Court in the case of the assessee in ITA 512/2017 dated 23/7/2018 reiterating the requirement of lifting the corporate veil and also determination of fair value in the closed-holding structure.

k) Similar issue was considered by the Hon'ble Karnataka High Court in the case of Wipro Ltd reported in (2014) 50 taxman.com 421 (Karnataka) which is similar to the facts of the present case. (Para 12, 22, 23, 43, 46, 53 and 56 of the judgement is relied on).

l) Hon'ble Madras High Court in the case of Trans Corporate Advisory Services Ltd (2017) 77 taxman.com 21 (Madras) has dealt with the similar issue of huge premium.

m) ITAT Hyderabad bench has dealt with the share premium in the case of Northgate Technologies Ltd (2013) 35 taxman.com 576 (Hyderabad - Tribunal).

n) Hon'ble Bombay High Court in the case of Killick Nixon Ltd (2012) 20 taxman.com 703 (born) has held that evidence to be analysed by applying theory of surrounding circumstances and human probabilities. If the above theory held by the Hon'ble Court is applied, the transaction of purchase of shares at a premium of Rs 5000/- per-share of a company where the business itself has not commenced and selling of the same at Rs 10/- per-share within a period of 3 months would be beyond the human probabilities and the business prudence. Hence only inference can be drawn is a devise adopted by the assessee to evade payment of capital gains by artificially creating the capital loss by virtue of the structured transaction with the controlled/related companies and claim set off of gain against the loss."

18. We have considered the rival submissions. We reproduce Paras 15 to 19 of the assessment order for ready reference because in these paras, the AO has noted the explanation of the assessee, the objections of the AO and his decision. The same are as under:-

"15. The submissions made by the assessee company are examined now. The assessee has come with a story now that M/s. Jupiter Capital

Pvt. Ltd. intended to be a NBFC and that the assessee company did not want to hold the shares of NBFC. It is also claimed that if the RBI were to delay granting NBFC status to M/s. Jupiter Capital Pvt. Ltd., it would have had an adverse effect on the value of shares of M/s. Jupiter Capital Pvt. Ltd. So the assessee now claimed that to avoid this uncertainty to prevent any possible loss, the share holding of M/s. Epsilon Advisors Pvt. Ltd. in M/s. Jupiter Capital Pvt. Ltd. was sold to M/s. Vectra Holdings Pvt. Ltd. at Rs. 10/-.

16. The explanation now filed by the assessee company is evasive, contingent on certain surmises and not backed by any facts. It is noted that the assessee company has not explained the following :

a) Why and how the share value was arrived at Rs. 10/- only at the time of sale, when a few days back, the same shares had been purchased at Rs. 5,000/- per share.

b) Why the shares had to be sold in a hurry when the assessee company could have waited for the business operations of M/s. Jupiter Capital Pvt. Ltd. from stablising.

c) Why the shares had to be sold to another sister concern, M/s. Vectra Holdings Pvt. Ltd. only with a purpose of booking loss to the extent of Rs. 117 crores.

d) If the intention of the assessee were to reduce loss from a commercial point of view, why the shares were dumped at Rs. 10 /- per share from the purchase price of Rs. 5,000/- per share to its own sister concern which again is a core company of same Mr. Rajiv Chandrashekar group.

17. It is obvious that the assessee company does not have any explanation on all these issues. The losses were created only for the purpose of setting it off against the profits already arising from the sale of M/s. BPL Communication Ltd. shares. But for the losses cooked up, the assessee company had to pay taxes on Capital gains on the sale of shares of M/s. BPL Communication Ltd.

18. The assesee company has claimed that the sale of shares to M/s. Vectra Consultancy is genuine and that the department has not proved the receipt of any extraneous consideration. It is true that there is no extraneous consideration. However, it is not correct to say that the transaction is genuine. In this case, the revenue is compelled to lift the corporate veil and go behind the nature of the transactions. The assessee company has clearly entered into this transaction with a view to evade payment of capital gains. This type of tax evasive transactions have been disapproved by the Hon'ble Supreme Court in the following cases :

1. Raja Bahadur Kamakhya Narayan Singh Vs. CIT 77 ITR(SC) 53
2. CIT Vs Durga Prasad More 82 ITR(SC) 540
3. Juggilal Kamalapat Vs CIT 73 ITR(SC) 702
4. Mc Dowell & company Ltd. Vs CIT 154 ITR(SC) 148
5. Sunil Sidharth Bai Vs CIT 156 ITR(SC) 509
6. Sumathi Dayal Vs CIT 214 ITR(SC) 801

19. In all the above cases, the Hon'ble Supreme Court has held that the Income Tax authorities are entitled to lift the veil covering sham

or illusive transactions to ascertain the correct factual position and status of the embedded transactions. In all the above cases, the Hon'ble Supreme court has held that substance of the transaction is as important if not more than the nature of the transactions. Considering the same, the entire transactions of purchase and sale of M/s. Jupiter Capital Pvt. Ltd. , thereby incurring a loss of Rs. 117,76,40,000/- is hereby disallowed. This amount is disallowed and it is ordered accordingly."

19. From the above paras, the exact objection of the AO is not coming out as to whether he is doubting the payment of share premium of Rs. 4,990/- per share or whether he is doubting sale price of Rs. 10/- or both. The AO has stated in Para 19 of the assessment order that the entire transaction of purchase and sale of shares of JCPL incurring a loss of Rs. 117,76,40,000/- is disallowed without indicating any exact basis for doing so because the AO has not pin pointed his objection as to whether the purchase price of Rs. 5,000/- per share is doubted or sale price of Rs. 10/- per share is doubted. Hence, we feel it proper to restore this matter back to the file of the AO for a fresh decision by way of a speaking and reasoned order after providing adequate opportunity of being heard to the assessee. We direct the AO that regarding purchase of shares at a premium of Rs. 4,990/- per share, it is explained that some unrelated companies have also purchased these shares at same premium and therefore, it cannot be said that payment of this much share premium is excessive or unreasonable. This explanation should be considered while deciding this as to whether the payment of share premium @ Rs. 4,990/- per share is excessive or unreasonable if that is the objection of the AO that the payment of share premium of Rs. 4,990/- per share is excessive or unreasonable. If the objection of the AO is this that sale price of Rs. 10/- per share to a related party is abnormally low, the same should be examined and decided in the light of the explanation of the assessee in this regard as per the submission of the assessee in Para 29 of the Statement of Facts filed before CIT (A) as reproduced herein below:-

"*29. The Assessee in order to expand its business purchased 2360000 shares of Jupiter Capital Advisers Private Limited(Hereinafter referred to as JCPL) on 12th day of October 2005 at a premium of Rs. 4990 for Rs 1,180,000,000 (Form 2 for the allotment of these shares was properly filed with the Ministry of Corporate affairs), It may kindly be noted that several other companies had also participated in*

the issue and subscribed for the shares at the same price as the Assessee, the premium was demanded by JCPL on account of future potential of its License of NBFC and as a prudent businessman, the Assessee company considering it as a fruitful investment.

On Account of refusal of NBFC License by Reserve Bank of India business plan could not take off. With a view to avoid uncertainty, the Assessee immediately sells its investment over at a loss.

As the Business Plan of JCPL failed to take off it becomes more and more difficult for the Assessee to get buyers for these shares therefore, the Assessee finally sell these shares on the 28th day of February 2006 at loss of Rs. 1,177,640,000 to M/s Vectra Holding Private Limited, for a total consideration of Rs.23,60,000 all the transac ions are duly recorded in the books of Accounts of the Assessee which was duly inform and filed with the Ministry of Corporate Affai s, Government of India within the time frame allowed under the Statute.

The Ld. AO in its order erred in saying that "the Assessee company has clearly entered in to the transaction with a view to evade payment of Capital Gain and disallowed to the Assessee the short term capital loss of Rs. 117,76,40,000 in respect of sale of equity shares of Jupiter Capital Private Limited by the Assessee to M/s Vectra Holdings Private Limited."

20. In the result, the quantum appeal of the assessee is partly allowed in the terms indicated above and the quantum appeal of the revenue is dismissed.
21. Now we take up the cross appeals of the assessee and revenue in penalty proceedings u/s 271 (1) (c) of the I T Act.
22. At the very outset, it was submitted by the learned AR of the assessee that the penalty order is bad in law because as per the notice issued by the AO u/s 274 rws 271 of the I T Act, he has not made it clear as to whether the allegation is about concealment of income or furnishing of inaccurate particulars of income. He submitted that the said notice is available on page no. 1 of the paper book filed in respect of these penalty appeals. He placed reliance on the tribunal order rendered in the case of Mahaveer Saraswathi vs. ITO in ITA No. 801 & 802/Bang/2015 dated 29.07.2016, copy available on pages 24 to 38 of the same paper book. He pointed out that the tribunal has followed the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunatha Cotton & Ginning factory, 359 ITR 565 and a later judgment of Hon'ble Karnataka High Court rendered in the case of

Saffina Hotels Pvt. Ltd. Vs. CIT in ITA No. 240/2010 dated 25.01.2016 in which Hon'ble Karnataka High Court reiterated the same principle as laid out in the case of CIT vs. Manjunatha Cotton & Ginning factory (Supra). As against this, learned DR of the revenue placed reliance on a judgment of Hon'ble apex court rendered in the case of CIT vs. Amitabh Bachchan as reported in 384 ITR 200. He submitted that as per this judgment rendered in the case of CIT vs. Amitabh Bachchan (Supra), it was held that issue of show cause notice u/s 263 is not mandatory and he submitted that for penalty u/s 271 also, issue of show cause notice is not mandatory and the only requirement under both sections is to extend opportunity of hearing to the assessee. He submitted that this is not the case of the assessee that opportunity of being heard was not provided to the assessee and therefore, in view of this later judgment of Hon'ble apex court, these two judgments of Hon'ble Karnataka High Court and the tribunal order cited by the learned AR of the assessee should be disregarded.

23. We have considered the rival submissions. We find that in the assessment order, the AO has simply stated that penalty proceedings u/s 271 (1) (c) of the I T Act are initiated separately without specifying the allegation as to whether there is c ncealment of income or furnishing of inaccurate particulars of income. Be that as it may. But we cannot ignore the contents of the notice. We find that in the notice issued by the AO u/s 274 rws271 of the I T Act, the AO has not made it clear as to whether the allegation is about concealment of income or furnishing of inaccurate particulars of income. Not only this, in Para 5.2 of the penalty order also, the AO says that penalty of Rs. 45,16,52,017/- is levied u/s 271 (1) (c) of I. T. Act for concealment of income and for furnishing inaccurate particulars of income. Hence, it is seen that even in the penalty order, it is not made clear as to what is the exact objection. This judgment of Hon'ble apex court is not in context of section 271 (1) (c) of the I. T. Act and it is in the proceedings u/s 263 whereas the two Judgments of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunatha Cotton & Ginning factory (Supra) and in the case of Saffina Hotels Pvt. Ltd. Vs. CIT (Supra) and also the tribunal order rendered in the case of Mahaveer Saraswathi vs. ITO (Supra) are

rendered in the course of penalty proceedings under same section 271 (1) (c) and therefore, we follow these two Judgments of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunatha Cotton & Ginning factory (Supra) and in the case of Saffina Hotels Pvt. Ltd. Vs. CIT (Supra) and also the tribunal order rendered in the case of Mahaveer Saraswathi vs. ITO (Supra) and hold that the penalty order is bad in law and we quash the same. In view of this decision, individual grounds raised by both sides in these two penalty appeals does not require separate adjudication.

24. In the result, penalty appeal of the assessee is allowed and penalty appeal of the revenue is dismissed.

25. In the combined result, Quantum appeal of the assessee is partly allowed in the terms indicated above and the quantum appeal of the revenue is dismissed and penalty appeal of the assessee is allowed and penalty appeal of the revenue is dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(SUNIL KUMAR YADAV)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 29th November, 2018.
/MS/

Copy to:

1. Appellant	4. CIT(A)
2. Respondent	5. DR, ITAT, Bangalore
3. CIT	6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.