

आयकर अपीलीय अधिकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
 (समक्ष)Before श्री ए. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम .बालागणेश, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

**I.T.A. No. 1441/Kol/2016**  
**Assessment Year: 2010-11**

Deputy Commissioner of Income-tax, Circle-6(1), Kolkata	Vs.	M/s. Off-shore India Ltd. (PAN:AAACO6223E)
Appellant		Respondent

Date of Hearing	11.07.2018
Date of Pronouncement	10.10.2018
For the Appellant	Shri Goulen Hangshing, CIT, DR
For the Respondent	Shri D. S. Damle, FCA

**ORDER**

**Per Shri A.T.Varkey, JM**

This is an appeal preferred by the revenue against the order of the Ld. CIT(A)-9, Kolkata dated 29.03.2016 for AY 2010-11.

2. The issue involved in this appeal relate to the liability of Short Term Capital Loss of Rs.34,96,00,895/- incurred by the assessee on sale of investments against Short Term Capital Gain of Rs.1,33,67,748/- earned on sale of shares.

3. Brief facts of the case are that during the year under consideration, the assessee company had declared income under the head “Short Term Capital Gain” in respect of which STT has been paid and non-STT paid, cess all belonging to RPG Group Companies. The AO noted that the assessee was also a company belonging to the RPG Group and the shares purchased and sold by the assessee company also belonged to the same RPG Group as also the purchasers and the sellers of shares were entities belonging to RPG. The AO found that in the non-STT paid transaction, the assessee company had declared substantial

loss under the head “Capital Gains” which after being set off against STT paid Short Term Capital Gain of Rs.1,33,67,748/- was claimed for carry forward. According to AO, the transactions involving purchase and sale of shares being entirely conducted within the RPG Group entities, he considered the same to be colourable device so as to provide the assessee tax benefit for the year under consideration as also in the subsequent years. Although the AO assessed the profits derived on sale of investments in RPG Group Companies sold within the same group but disallowed the loss of Rs.34,96,00,895/- declared on sale of share/investments of RPG group entities. Aggrieved by the AO’s order, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to allow the relief to the assessee by observing as under:

*“5. I have carefully considered the submissions of the A/R. I have also examined the details of purchase and sale of shares which the assessee conducted during the year. I have also given my due consideration to the judicial decisions relied upon by both the parties and have considered applicable legal provisions. On scrutiny of the accounts and the details of capital gains, I note that during the FY 2009-10 relevant to AY 2010-11 the assessee had transacted in shares of 8 bodies corporate. In the case of 3 scripts the assessee had earned gain of Rs.2,86,59,932/-. In the case of Shares of Noida Power Co Ltd, no profit or loss was made. In the case of shares and securities of 4 companies, the assessee however incurred loss of Rs.34,96,09,895/-. In support of these 8 transactions the AR of the assessee had filed copies of the transactional documents from which I find that the assessee maintained same documentary evidences supporting the purchase/sale transactions. I note that all the 8 transactions related to shares of RPG group companies. Not only the investee companies were associates of RPG Group but the shares were acquired from companies associated with RPG Group and they were transferred also to companies associated with RPG Group. I therefore find that the AO was right in observing that the transactions involved were internal arrangement among the group companies. The question however to be decided is whether the loss or gain which accrued on transfer of shares was an artificial loss or gain and whether for the purposes of income-tax assessment these transactions could be ignored by regarding them as fiscal nullity. In the impugned order the AO has stated that that the loss incurred was not assessable since the assessee had adopted a colourable device for avoidance of tax and therefore these transactions were required to be ignored for tax purposes. I however find that the conclusions reached by the AO are not well-founded.*

*6. During the relevant year the assessee carried out transactions in shares of 8 companies all of which belonged to RPG Group. In the impugned order the AO disbelieved and doubted the genuineness of purchase and sale transactions only in shares of 4 companies wherein loss was incurred. However, the material on record shows that during the same period the assessee also conducted transactions of purchase and sale of other 4 RPG Group companies where it had gain of Rs.2,86,59,932/-. The transactional documents and evidences maintained by the assessee in relation to purchase and sale of all companies were identical. In all 8 cases securities transacted were of RPG group companies. In all 8 cases the shares were acquired from and shares were transferred to companies belonging to RPG Group. The AO did not bring on record any material to show that in the books of the corresponding parties the transactions were not given effect to or that in the hands of sellers or purchasers the sale or*

*purchase transactions were doubted or disbelieved. I further find that in the impugned order the AO accepted the assessee's transactions in shares of 4 companies to be genuine and bona fide and accordingly gain of Rs.2,86,59,932/- which the assessee earned from transfer of shares to four group companies was assessed to tax. I therefore find that only where the assessee incurred loss the AO doubted and disbelieved the genuineness of the assessee's transactions involving purchase and sale of shares and securities of group companies. On these facts therefore I find that the AO's action was inconsistent while holding that the transaction amongst group companies involving shares of the group companies was an artificial arrangement amounting to colourable device adopted for avoidance of tax. If the intention of the assessee was to avoid payment of tax at all then the assessee would have reported losses in transactions of all shares and there was no need for the assessee to disclose any gain on transfer of shares of 4 group companies.*

*7. I further note that the only reason which prompted the AO to conclude that the transactions were not real was the fact that the assessee had reported substantial loss in these transactions involving shares of group companies and the sale was also made to group companies. In my considered opinion however, the mere fact that the assessee transacted in shares of its group companies and the shares were purchased and sold from other group companies by itself cannot be the ground for disbelieving the transaction. The AO has not brought on record any tangible material which in any manner shows that the assessee did not actually purchase or acquire the shares in question. No material has been brought on record by the AO to show that the purchase and sale transactions were not recorded in the books of the transferors and transferees. On the contrary I find that where in the intra Group transactions the assessee made gain of Rs.2,86,59,932/- the AO accepted the genuineness of those transactions without question and brought to tax such gain. In the circumstances if the transactions with group companies under the identical circumstances resulting in gain were accepted by the AO to be genuine, then on the same set of circumstances it was not open to the AO to doubt the genuineness of the transactions which resulted in loss.*

*8. I further note that the AO disbelieved and doubted the genuineness of the transaction on the ground that the loss was artificially created to derive undue tax benefit. From the facts which are placed on record I however find that the loss which the assessee suffered during the relevant year was Rs 34 96,09,895/-. During the FY 2009-10, the assessee had made gain of Rs.2,86,59,932/- under the head short term capital gain (non-STT paid) and short term capital gain (SIT Paid) of Rs.1,33,67,748/-. The non-STT paid short term capital gain was derived from the transfer of shares of group companies and these shares were transacted in the identical circumstances in which loss was incurred. As such one cannot say that the loss of Rs. 35 crores was required to be generated as artificial loss for claiming set-off against STT paid short term capital gain of Rs.1,33,67,748/-. No prudent assessee would have resorted to generation of loss of Rs. 35 crores just to save tax @ 10% on SIT paid short term capital gain of Rs.1,33,67,748/. I therefore find that the AO's premise that the assessee created artificial loss by adopting colourable device for the purpose of tax avoidance appears to be untenable. From the computation of total income filed with return I find that out of the loss of Rs. 35 crores the assessee claimed carry forward of loss u/s 74 to the extent of Rs.30,80,00,032/-. In the course of appellate proceedings the AR of the assessee filed particulars of returns filed upto AY 2015-16 from which it was noted that in the income-tax returns of A Ys 2011-12 and 2013-14 the assessee had claimed set-off only for Rs.4,21,309/- and thereafter the remaining loss assessable under the head short term capital gain lapsed in AY 2014-15 since investment division of the appellant company was demerged and merged into Rainbow Investments Ltd and in terms of section 72A benefit of carry forward was not available to the resultant company. From these facts and figures I find that out of the total short term capital loss of Rs.35 crores which the assessee claimed in AY 2010-11, loss of Rs.30.76 crores or 88% was*

*never set-off against any income since such loss lapsed in AY 2014-15 upon demerger taking effect. From these facts and figures, therefore I find that the AO's conclusion that the transactions amongst the group companies resulting in loss creation was intended to act as a colourable device for avoidance of tax was not based on any tangible material and the same on the facts of the case appears to be untenable.*

*9. In the impugned order the AO relied on the judgement of Supreme Court in the case of Mc Dowell & Co Ltd (supra). On scrutiny of the facts of the case however I find that the ratio laid down in that judgement is not at all applicable. In the said decision the Court found that the assessee had adopted an accounting policy by which part of the sale proceeds having component of excise duty was artificially bifurcated and thereby the assessee had under stated its business receipts to avoid payment of sales tax. The Court held that the assessee had adopted a colourable device for avoidance of tax. In the case of Killick Nixon Ltd vs. DCIT, the Bombay High Court was concerned with a case where during the year under consideration, the assessee had first earned substantial capital gain on sale of its land amounting to Rs.49.72 crores. During the same year the assessee incurred a matching loss of Rs.49.73 crores on account of transaction of trading in shares. The AO brought on record material to show that these transactions were colourable device adopted to avoid payment of tax on the capital gain derived on sale of land. The AO had therefore substantiated his finding that the assessee had actually derived undue gain by setting off short term capital loss on sale of shares against long term capital gains on sale of land. In the present case however I find that that the total short term capital loss was Rs.35 crores and short term capital gain was Rs.2.86 crores and both of which were from transactions within group and of the group companies. The mode and manner of group transactions was identical and the AO doubted the genuineness of only transactions resulting in loss. As such it cannot be said that the assessee created artificial gain and loss for tax avoidance purposes. It is seen that the transactions which led to loss in appellant's hand and had been held as "colourable device" have been held to be genuine in the hands of the group companies. Further, I note that for avoiding payment of tax on short term capital gain of approximately 4 crores, the assessee had no need to generate artificial loss in excess of Rs.35 crores. If the intention was only tax avoidance and nothing else the assessee would not have indulged in creation of loss in excess of Rs. 35 crores. I also find that in the subsequent year the benefit of set-off claimed was only Rs.4.21 lacs and the rest of the loss of Rs.30.76 crores was never set-off against any income since such loss lapsed in AY 2014-15 upon demerger taking effect. On the facts of the assessee's case therefore the ratio laid down in the judgement of the Bombay High Court is found not applicable.*

*10 . In the present case however, the assessee maintained identical set of documentary evidences in support of purchase / sale transactions of all group companies. In transactions where the assessee made gains, genuineness of the transactions was accepted by the AO. But the transactions in which loss was suffered only were considered to be sham. I therefore find that the AO's actions are not consistent and adverse inferences have been drawn only because the loss was incurred. Nothing has been brought on record by the AO which in any manner proved that the actual price or consideration which was exchanged by the parties was anything other than the price recorded in the books of the respective parties. Nothing was brought on record by the AO to show that the transactions of purchase and sale were not accepted by the authorities in the case of purchasers and sellers of the same shares. Nothing has been brought on record by the AO which proved that the consideration passed between the parties was anything other than what was recorded by the assessee in its books of accounts. In the circumstances merely because the assessee incurred loss in some securities could not be the reason for disbelieving the loss. Moreover, the fact of the assessee's case also disprove the AO's contention that the loss was artificially created to derive undue tax*

*advantage. The facts brought on record rather prove that loss of Rs.30.76 crores out of loss of Rs.35 crores or 88% of loss was never claimed or allowed to be set-off either in AY 2010-11 or in any subsequent year and therefore the AO's conclusion that the loss was artificially created by the assessee by adopting a colourable device is bereft of any factual foundation. The AO's reliance on the judgement of the Supreme Court in case of Azadi Bachao Andolan (supra) is also factually and legally untenable. Rather the said decision advances the case of the assessee. In the later judgement in the case of Azadi Bachao Andolan, the Supreme Court specifically dissented from the view earlier expressed in the case of Mc Dowell & Co Ltd (supra) and reiterated that the Ramsey's principle laid by the House of Lords still holds field in the matter.*

*11. The A/R of the assessee in his submissions has relied on several judicial decisions in which the view has consistently been taken that the assessing authorities cannot doubt the genuineness of the transaction merely because the assessee has incurred loss on transfer of a capital asset or that the full value of consideration received by the assessee is not commensurate with the market value of the capital asset. The judgement of the Supreme Court in case of CIT vs George Henderson & Co Ltd (66 ITR 622) provides that the full value of consideration for transfer of a capital asset means the price actually bargained for by the parties to the sale. The consideration for the transfer of a capital asset is what the transferor receives in lieu of the asset he parts with. In the present case the transactional documents show that the assessee had conducted purchase and sale of shares of 8 companies. The manner of conducting these transactions, the manner in which these were accounted in assessee's books and the documents maintained in support of these transactions were same and identical. Four purchase/sale transactions in which the assessee made gain were accepted without question. In other words genuineness of 4 transactions was accepted. However 4 transactions in which assessee incurred loss have been held to be sham and bogus without bringing on record any conclusive material to disprove these transactions. The AO has held the transactions resulting in loss were colourable device, adopted for avoidance of tax. However the facts on record show that there was no need for the assessee to create loss to the extent of Rs.35 crores for avoiding payment of current tax. Further almost 88% of the loss suffered by the assessee lapsed without being set-off against any income in the subsequent years and therefore the AO's hypothesis that the loss was artificially created for deriving undue tax benefit stands disproved. Having considered the totality of facts I therefore find that the AO was not justified in rejecting assessee's claim for assessment of loss on transfer of shares of 4 companies amounting to Rs.34,96,09,895/-. The AO is accordingly directed to assess the loss on transfer of these shares at Rs.34,96,09,895/- and allow its set-off and carry forward as permissible u/s 74 of the Act.”*

Aggrieved by the aforesaid order of the Ld. CIT(A), the Revenue has preferred this appeal before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case as well as the judicial precedent relied upon by both the sides. The Ld. DR drew our attention to the fact that investments in which the losses were incurred were purchase and sale of shares by the assessee during the same financial year and pointed out that even though the purchase and sale of investments were carried out within a very short span of

time, proper explanation was not furnished by the assessee company as to why there was such difference between the purchase price and sale price. According to hi, since the entire transaction resulted in loss was carried out within the entities belonging to the RPG group and since the AO did not find any commercial rationale behind the prices at which the investments were purchased and sold. According to Ld. DR, the AO rightly concluded that the only motive for undertaking the sale transaction was to create an artificial loss which has partly set off by the assessee against the current year's gain realized on sale of short term investments and the balance was carried forward with a view to set off the same against the profits to be derived in coming years. In support of the aforesaid contention, the Ld. DR placed heavy reliance on the judgment of the Hon'ble Bombay High Court in the case of Killick Nixon Ltd. Vs. DCIT 208 Taxman 45 and urged before us that the AO's order needs to be upheld.

5. Per contra, the Ld. AR submitted that the STT paid short term capital gain of Rs.1,33,67,748/- and non-STT paid short term capital gain of Rs.2,86,59,932/- was also derived by the assessee from purchase and sale of shares of RPG Group companies and in those cases also the purchasers and sellers were RPG group companies only. The Ld. AR pointed out that during the FY 2009-10, the income under the head STCG was declared in respect of sale of investments in 9 companies and in 5 instances the assessee did not incur any loss but in fact earned gain and which the AO has assessed without question only because the assessee did not report any loss. It is only in respect sale of all investments that the assessee had incurred loss. In support of this submission, the Ld. DR drew our attention to page 33 of the paper book which provided the break-up of short term investments sought during the year extract whereof is as follows:

Details of STCG-Non-STT Paid

Scrip	Qty.	Book Value	Sale Value	Gain/Loss
Brabourne Investments Ltd	1343100	134310000	13431000	-120879000
Brabourne Investments Ltd	27486	680979	274860	-406119
Chattarpoti Investments Ltd	111120	38253400	2778000	-35475400
Duncan Investments &	4000	1	4000	3999

Industries Ltd				
Eastern Aviation & Industries Ltd	65815	6082008	314815	-5767193
Fairluck Commercial Co Ltd (Deb)	575000	48875000	57500000	8625000
KEC International Ltd	36890	337	20031270	20030933
Noida Power Co Ltd	1000000	10000000	10000000	0
Beneficial Interest in RIFL Benefit Trust		276300000	88800000	-187500000
		514501725	193133945	-321367780

## Details of STCG - SIT Paid

Scrip	Qty.	Book Value	Sale Value	Gain/Loss
Ceat Ltd	3882	134900	553302	418402
KEC International Ltd	28879	263	12949610	12949347
		135163	13502911	13367748

6. The Ld. AR submitted that if in AO's opinion the shares transferred by the assessee belonging to the RPG group were manipulated by the assessee then there would have been no necessity for the assessee to declare substantial gain in respect of sale of 4 investments and in such case also, the assessee would not have reported any gain, if the intention of the assessee was to avoid tax s. The Ld. AR further submitted that if the intention of the assessee was only to reduce its taxable income in the relevant year in which it had earned STCG of only Rs.4,20,27,680/- there would not have created loss of Rs.34,96,00,895/- particularly when assessee has loss in investment transaction of group companies was created only for deriving tax benefit. It was submitted before us that no prudent person would be created an artificial loss of this magnitude if the intention was to avoid payment of tax on an income which was barely 10% of the loss incurred on sale of investments. As regards the AO's allegation that loss was created with a view to provide tax shirked against profits of future years. The Ld. AR pointed out that the Ld. CIT(A) has recorded specific finding in para 9 that in following two years the assessee had claimed set off in respect of such loss only to the tune of Rs. 4.21 lacs and thereafter, the carry forward of loss lapsed on account of demerger of the assessee's investment division. The Ld. AR pointed out that no

material has been placed by the Ld. DR to controvert this factual finding recorded by the Ld. CIT(A). The Ld. AR, therefore, submitted that the conclusion drawn by the AO that the assessee had created the artificial loss to gain undue tax advantage was, therefore, void with any factual foundation. Accordingly, the Ld. AR further submitted that on the facts of the case the law laid down by Hon'ble Bombay High Court in the case of Killick Nixon Ltd. (supra) was not applicable to the assessee's case. He, therefore, strongly relied on the order of the Ld. CIT(A) allowing the relief and does not want us to interfere with the reasoned order passed by the Ld. CIT(A).

6. After giving our thoughtful consideration the submission of both the parties, we find that the entire controversy has arisen on account of the investment transactions, which were conducted by the assessee company in relation to share belonging to the RPG group to which the assessee belonged. Since such transactions were entirely carried out within the group entities also involved the investments in group entities resulted in both profit and loss, which fact raised suspicion on the part of the AO regarding the economic rationale behind such transaction. Even in the course of appellate proceedings before us, a query was put to the Ld. AR with regard to the purpose for which such intra-group transactions were conducted during the relevant year. In response, the Ld. AR clarified that all the transactions related to intra group investment between intra group companies and did not involve any third parties. He clarified that these companies belonged to the RPG group of which Shri R. P. Goenka the eminent industrialist who was the principal promoter and the said group had a Pan-India presence throughout India and carried on business in diverse fields such as manufacture tyres, generation of power, power distribution, carbon black, hospitality, information technology etc. According to Ld. AR, economic activities were conducted through the aegis of various listed companies whose shares were held through entities belonging to RPG group companies. Since the group's size was increasing, the need was felt for carrying out restructuring of management and control over these operating companies, particularly in view of the advancing age of the patron of the group Shri R. P. Goenka. In the circumstances, with a view to disentangle the intra group investments and to

ensure the smooth transition to the revised control structure, transfer of shares were carried out within the group, consequently had transactions which resulted either in profit or loss. However, the Ld. AR pointed out as demonstrated before the lower authorities, the assessee never claimed benefit of the net loss given in future years. Thus, we take into account the peculiar facts and circumstances of the case, as submitted before us, which we find relevant and considering the totality of the circumstances, the intra-group transaction carried out by the assessee cannot be said to be bogus or colourable device adopted by the assessee to reduce its legitimate tax liability because it is a fact that Ld. CIT(A) has recorded that assessee has claimed set off in respect of such loss only of Rs.4.21 lacs which fact has not been controverted before us and which fact distinguishes cases cited by Id DR. We also note that the income against which the loss was claimed by way of set off was also earned by the assessee by sale of intra group investments for which consideration was also received from other group companies. We, therefore, find that it was not a case where profits were earned by the assessee in respect of transaction with third parties and thereafter, the loss was artificially created to be set off against such income which is a distinguishing factor. We also take note that both the gain as well as the loss related to sale of shares by the assessee within the group and in respect of group entities and the principal purpose of such transaction was to achieve the restructuring of the RPG group and so cannot be termed as colourable device adopted by assessee to reduce its legitimate tax on the peculiar facts of this case. We also find that no substantial tax benefit was derived in the future years as well. On these peculiar facts, therefore, we agree with the Ld. AR's contention that the ratio laid down in the judgment of Killick Nixon Ltd., supra are not applicable in the facts and circumstances of this case. We note that in the case of Killick Nixon Ltd., supra it was demonstrated by the revenue that the assessee had profits in respect of transactions with third parties and thereafter the assessee had entered into security transactions which apparently had no commercial or economic rationale and the only purpose was to create artificial loss and set off against gain earned. On the contrary, we find in the present case both profit and loss have arisen only from the intra group transactions and, therefore, the AO could not have on one hand accepted the genuineness of the transaction which resulted

in gain, but on other hand doubted the genuineness only where the transaction resulted in loss, which action of AO cannot be countenanced because AO being a quasi-judicial authority has to be fair and reasonable. Moreover, we find that the assessee has not taken the benefit of loss in subsequent years as discussed above and was only to the tune of Rs.4.21 lakhs only. Therefore, on these peculiar facts and circumstances of the case, the impugned order of the Ld. CIT(A) cannot be termed as perverse or erroneous, therefore, we find no reason to interfere in the order passed by the Ld. CIT(A) and, therefore, we are inclined to dismiss the appeal filed by the revenue.

7. In the result, appeal of revenue is dismissed.

Order is pronounced in the open court on 10/10/2018

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(A. T. Varkey)  
Judicial Member

Dated: 10th October, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – DCIT, Circle-6(1), Kolkata.
- 2 Respondent – M/s. Off-shore India Ltd., 31, Netaji Subhas Road, Kolkata-700 001. .
- 3 CIT(A)-9, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary