

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
" D " BENCH, AHMEDABAD
(Through Virtual Court)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.472/Ahd/2016 (by Revenue)

CO No.59/Ahd/2016 (by Assessee)

[in ITA No.472/Ahd/2016]

(निर्धारण वर्ष/Assessment Year : 2009-10)

The DCIT Central Circle-1(3) Ahmedabad	<u>बनाम/ Vs.</u>	M/s.Ganesh Plantation Ltd. Ganesh Corporate House 100 Ft. Hebatpur-Thaltej Road Nr. Sola Bridge, Off. S.G. Highway Ahmedabad-380 054
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG 7004 R		
(Appellant)	..	(Respondent & Cross Objector)

Revenue by :	Shri Karunkant Ojha, CIT-DR
Assessee by :	Ms. Nipur Shah, AR

सुनवाई की तारीख/ Date of Hearing	26/10/2020
घोषणा की तारीख / Date of Pronouncement	11/12/2020

आदेश / ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The appeal has been filed by the Revenue and the Cross Objection has been filed by the assessee for A.Y. 2009-10 which are arising from the order of the CIT(A)-2, Ahmedabad dated 18.12.2015, in the proceedings under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short "the Act").

2. The Revenue has raised the following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and/or on facts in not sustaining the notice issued



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 2 -

u/s. 148 of the Act and treating the order passed u/s. 143(3) r.w.s. 147 of the Act as invalid.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and/or on facts in deleting the disallowance of loss claimed of Rs. 10,18,15,500/- on sale and purchase of shares although no valuation report of share was submitted by the assessee justifying the huge loss incurred.

3. On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the A.O.

4. It is, therefore, prayed that the order of the CIT(A) be set aside and that of the A.O. be restored to the above extent."

3. The first issue raised by the Revenue is that the Learned CIT(A) erred in cancelling/quashing the assessment framed under Section 147 read with Section 143(3) of the Act.

4. The facts in brief are that the assessee in the present case is a Private Limited Company and engaged in the business of financing and granting of loans and advances. The assessee for the year under consideration filed its return of income declaring total income of Rs. 7,40,330/- dated 30th September 2009 which was assessed under Section 143(3) of the Act at Rs. 25,92,480/- vide order dated 27th December 2011.

4.1. Subsequently, the AO on verification of the assessment records found that the assessee has claimed loss on the sale of shares with respect to certain private limited/ limited companies amounting to Rs. 10,81,15,500/- which was set off against the gain on the sale of land rights of Rs. 8,84,79,010/- only. As per the AO the shares with respect to which the loss was incurred, were purchased at a very high price and these shares were subsequently sold within a short span of time at a very low price. The AO



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 3 -

also observed that the price of the impugned shares were not supported any valuation report. Accordingly, he was of the view that the genuineness of the loss claimed by the assessee on such sale of shares cannot be relied.

4.2. Based on the above, the AO was of the opinion that the amount of loss booked on the transaction of shares was artificially generated to set off the income earned from the sale of rights in land. As such the transactions for booking loss on the sale of shares of private limited/ limited company was nothing but a colourable device adopted by the assessee in order to escape the income tax liability. Accordingly, the AO held that he/she has reason to believe that income has escaped assessment and initiated the re-assessment proceedings by issuing notice under Section 148 of the Act dated 26th March 2014.

4.3. However, the assessee challenged the initiation of the proceedings under Section 147 of the Act vide letter dated 21st July 2014. It was pointed out that the AO during the original assessment proceedings under Section 143(3) of the Act has verified all details related to sale and purchase of impugned share on which loss was incurred by the assessee which can be verified from the notice issued under Section 142(1) of the Act dated 31st May 2011. In the said notice, the details for the loss on the sale of shares vide paragraph No. 13 was requisitioned.

4.4. The assessee with respect to the loss on the sale of shares of the private limited companies has furnished the confirmation from the parties, PAN of the parties, Form No. 2 filed with the ROC, copies of the bank statement to the AO during the original assessment proceedings under Section 143(3) of the Act. As such the AO after verification of the necessary



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 4 -

details as discussed here in above has allowed the impugned loss in the assessment framed under Section 143(3) of the Act vide order dated 27th December 2011.

4.5. The assessee regarding the valuation of shares submitted that there was no requirement for valuing the shares on the purchase and sale for the year under consideration under the provisions of the Act. As such there was an amendment brought under section 56(2)(viiia) of the Act requiring the valuation of shares but the same was effective from 01.06.2010. Thus such provisions are not applicable for the year under consideration (P.Y 2008-09 corresponding to A.Y 2009-10). Accordingly, no doubt can be pointed out on the purchase and sale price of the shares in the absence of any valuation report in the year under consideration.

4.6. In view of the above, the assessee contended that initiation of the proceedings under Section 148 of the Act represents the change of opinion based on the same set of documents which were available during the original assessment proceedings. Therefore, initiating reassessment proceeding without bringing any new tangible material on record is not desirable under the provisions of law. Accordingly, the assessee before the AO requested to drop the proceedings initiated 148/147 of the Act.

4.7. However, the AO rejected the contention of the assessee vide order dated 16th September 2014 and held the reassessment proceedings under Section 147 of the Act is well within the provisions of law.

5. Aggrieved assessee preferred an appeal to the Learned CIT(A) who allowed the ground of appeal of the assessee by observing that the



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 5 -

reopening of the assessment under Section 147 of the Act which was concluded assessment under Section 143(3) of the Act was based on the same set of facts which were available during the original assessment proceedings. Thus, the reopening was based on the change of opinion and without bringing any new tangible material on record. Accordingly, the Learned CIT(A) allowed the ground of appeal of the assessee by observing as under:

"2.19 In view of the aforesaid discussion, it is apparent that notice u/s. 148 of the I. T. Act 1961 has been issued by the AO, solely on the basis of the issue which has already been examined by the earlier AO in the scrutiny assessment completed u/s. 143(3) of the I. T. Act, 1961 on 27.12.2011, which is against the provisions of law. The same AO i.e. DCIT, Circle-4, Ahmedabad had passed the assessment order u/s. 143(3) of the I. T. Act, 1961 in the appellant's case having considered the relevant materials submitted in the original assessment proceedings. Thus, the issue of notice u/s. 148 subsequently on the same material as available with the Assessing Officer at the time of original assessment completed u/s. 143(3) of the I. T. Act was nothing but a change of opinion by the successor AO who issued the notice u/s. 148 which is not permissible as per the judgment of Hon'ble Supreme Court in the case of ACIT Vs. Kelvinator India Ltd. (Supra) and other judgments of jurisdictional and other High Courts / ITAT referred above. Thus, in view of the detailed discussion in preceding paras initiation of reassessment proceedings in the case of appellant was not in accordance with the provisions of law as per the binding judgments / decisions of honourable jurisdictional High Court, ITAT and other courts, and therefore, the issue of notice u/s. 148 consequently reassessment completed is not sustained."

6. Being aggrieved by the order of the Learned CIT (A), the Revenue is in appeal before us.

7. The Learned DR before us submitted that the details filed by the assessee qua the loss occurred with respect to the purchase and sale of shares were not verified by the AO during the original assessment proceedings. This fact can also be verified from the assessment order.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 6 -

Therefore, the question of forming the opinion on the details filed by the assessee does not arise.

8. On the other hand, the Learned AR before us filed a Paper Book running from pages 1 to 582 and submitted that the proceedings under section 147 of the Act was initiated on the basis of same set of documents which were available during the original assessment proceedings which is nothing but change of opinion. Accordingly, the learned AR contended that the assessment framed under section 147 of the Act is liable to be quashed.

8.1 Both the learned DR and the AR before us vehemently supported the order of the respective authorities below as favourable to them.

9. We have heard the rival contentions of both the parties and perused the materials available on record.

9.1. The Provisions of Section 147 of the Act, authorizes the AO, if he has "reasons to believe" that the income has escaped assessment, to assess or reassess the income escaped from assessment. Now to form the reasons to believe for the escapement of income, the AO first, should be in possession of some /fresh new material which was previously not available with him viz a viz it impacts the aspect, that there is some undisclosed income. Secondly, the reason to believe for the escapement of income should not reflect the change of opinion.

9.2. Indeed it has been a very controversial issue whether re-opening of an assessment would tantamount to re-assessment or change of opinion.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 7 -

9.3. Now the question comes what is fresh material. It refers the material which comes to the AO from the outside. Meaning thereby, information which was not available on record at the time of making the assessment and the assessment is completed initially, without taking into consideration the alleged information. Such information, can be called as new information, which requires fresh investigation/observation.

9.4. To understand the term 'New Information', we like to refer the judgment of Hon'ble Delhi High Court in case of Piani Investments and Industries Corporation v. ACIT, [IT Appeal 668 (Kol) of 2013] wherein courts have emphasized the need of new information for re-opening of an assessment u/s. 147/148 of the Act the relevant extract reads as under:

"There is no change of law. No new material has come on record. No information has been received. In such circumstances, it can be said that it is merely a fresh application of mind by the same Assessing Officer to the same set of facts."

9.5. We further make reference to another Judgment of Hon'ble Delhi High Court in case of Fashion Age Corporation (P.) Ltd. v. Dy. CIT [IT Appeal No.3542 (Delhi) of 2012, dated 23-11-2017]

"Considering the above discussion, it is clear that assessee disclosed primary facts and information regarding accommodation entry was already with the Department. Therefore, no new material was with the A.O. to form second time the reasons that income chargeable to tax has escaped assessment"

9.6. As could be gathered from above, to re-open a case u/s. 147/148 of the Act, there has to be fresh information, which was initially not available. As fresh application of mind to same set of facts is not allowable in the grab of Sec. 147/148 of the Act.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 8 -

9.7. Now coming to the Change of opinion, it refers to the fact that the AO forms an opinion on a given facts and circumstances of a case but in the same facts a different view is sought to be adopted. In other words the AO alters the view initially taken during the previous assessment despite there was absolutely no change in the facts as well as Law.

9.8. The term 'Change of Opinion' was particularly the point for consideration before the Hon'ble Supreme Court in the case of ITO vs. Tech Span India Ltd. reported in 404 ITR 10 where the same has been defined in Para 9 and 10, Para 9 of the order reads as under:

"(9) Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review."

9.9. In Para 9, the court has particularly highlighted the fact that, if the case is sought to be re-opened only on the basis of material, which was initially also available with the assessing authority at the time of making previous assessment, the same would amount to change of opinion provided there was no change in the facts as well as the Law. As such it is not available as an option to reopen the case u/s. 147/148 merely to reform a view, initially taken. Similarly Para 10 of the above order reads as under:

"(10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection."



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 9 -

9.10. Vide Para no.10; the Court has again laid emphasis on the phrase 'change of opinion'. The court has specifically quoted that, for change of opinion, there must an opinion/belief formed initially, and then only a differing view would amount to Change of opinion.

9.11. That is, to say, when a particular issue was not at all considered at the time of making initial assessment and now on that very issue the case is re-opened the same would not amount to review, as initially the alleged issue was not a point for consideration and accordingly, no view was formed thereon. Accordingly, a review can only be possible when initially a view was taken thereon.

9.12. In this respect we would to make further reference to the judgment of Hon'ble SC in case CIT v. Kelvinator of India Ltd., [2010] 187 Taxman 312/320 ITR 561 (SC) wherein the meaning of word, 'change of opinion' was considered by the Courts after making reference to the judgment of Tech Span India Ltd. (Supra) and held as under:

"4. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 10 -

garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

9.13. Further, the Hon'ble Delhi High Court in case Director of Income-tax, International Taxation-II v. Rolls Royce Industrial Power India Ltd. [2017] 82 taxmann.com 166/394 ITR 547 (Delhi) also highlighted the fact that there was no new information on record which requires fresh examination and view once formed cannot be subjected to review, and held as under:

"19. The fact of the matter is that during the course of the original assessments under Section 143 (3), the AO did serve upon the Assessee a detailed questionnaire. The AO examined the nature of the transactions involving the Assessee and the payments received therefore. The reopening was not based on any fresh material. By revisiting the same materials the successor AO now concluded that the payments received by the Assessee pursuant to the O&M Agreements should be treated as FTS. In the circumstances, the view taken by a successor AO on the same material was indeed nothing but a mere change of opinion. It is a well-settled legal proposition, as explained in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) that once an Assessee has discharged the burden of not only producing the account books and other documents, but also the specific material relevant to the assessment, "it is for the Income-tax Officer to draw the proper inferences of fact and law there from and the Assessee cannot further be called upon to do so for him." In Indian Oil Corporation v. ITO [1986] 159 ITR 956/26 Taxman 336 (SC). the Court pertinently observed "it is for the taxing authority to draw inference. It is not necessary for the Assessee to draw inference." These observations apply on all fours to the case on hand. Here the Assessee had discharged its burden of disclosing fully and truly all the material facts before the AO during the original assessments. There was no basis for the successor AO to conclude that "no opinion with regard to taxation" of the payments received for the services rendered had been formed by the AO. It is plain that the precondition for invoking Section 147 did not exist. The assumption of jurisdiction under Section 148 of the Act was not valid."



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 11 -

9.14. In the light of the above discussion, we proceed to adjudicate the issue on hand. For this purpose we refer to the reasons recorded by the AO for initiating the proceedings under Section 147/148 of the Act which are placed on pages 81 to 85 of the Paper Book. On perusal of the reasons recorded by the AO, we find that the AO at the threshold has perused the profit and loss account, which was available during the original assessment proceedings, to point out that the loss incurred by the assessee on the purchase and sale of shares was manipulated to wipe out the profit on the sale of rights in the land. Furthermore, the purchase price and the sale price of the shares, resulting losses of Rs.10,81,15,500/- only, was not based on valuation of the shares of the companies. Undisputedly, all these details were available during the original assessment proceedings which can be verified from the following details.

- i. A table showing the purchase and sale of the equity shares of the private limited companies wherein the impugned loss was shown. Such table is placed on page 339 of the Paper Book.
- ii. The purchase receipts and the sale will of the shares along with shares transfer forms of all the private limited companies are placed on pages 340 to 358 of the Paper Book.
- iii. The confirmation of the parties to whom the assessee has sold the shares are placed on pages 359 to 355 of the Paper Book.

9.15. From the above details, we note that all the materials used by the AO in the initiation of reassessment proceedings was available before him during the assessment proceedings and after application of his mind the preceding AO framed the assessment. Therefore, the same cannot be used for initiating the proceedings under Section 147 of the Act. As such there has to be some new/fresh information on record, which requires a fresh



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 12 -

examination. When there is no change in the facts and circumstances of case, the power to re-open u/s. 147/148 cannot be exercised, since at the time of initial assessment a view was formed on the available facts, and the same cannot be re-viewed again.

9.16. Now coming to the issue whether the AO has formed any opinion with respect to the impugned loss as discussed above during the original assessment proceedings. In this regard we note the Learned CIT (A) have given exclusive finding that the AO has specifically raised various question during the original assessment proceedings under Section 143(3) of the Act with respect to the impugned loss on sale of shares. This fact can be verified from the order of the Learned CIT (A). The relevant finding placed at page 22 to 26 of his/her order. We further note that the Learned DR has not brought any material contrary to the finding of the Learned CIT (A). Therefore no ambiguity remain to the fact that the predecessor AO has called for the information, verified and after application of his mind allows the claim of the assessee.

9.17. In the notice issued under Section 142(1), more particularly, the details of sought vide Paragraph No. 9 of the said notice. The copy of the notice reads as under:

"NOTICE UNDER SECTION 142(1) OF THE INCOME-TAX ACT. 1961

PAN : AAACG7004R

**To
The Principal Officer,
(1),
Ganesh Plantations Ltd.,
'Ganesh Corporate House',
Bldg,
100 Feet Road, Hebatpur,**

**Office of the
Income-tax Officer, Ward.4
Ahmedabad. ft
1st floor, Navjeevan Trust
Ashram Road, Ahmedabad.**



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 14 -

3.(Sr.No.13) Your honour has called for the details of loss on sale of shares. In this regard, we are submitting herewith the said details as per Exhibit-III.-"

9.19 The Exhibit–III showing the loss on the purchase and sale of shares is given here-in-below.

"GANESH PLANTATIONS LTD.							
F.Y. 2008-09				A. Y. 2009-10			
	SHARESPURCHASE			SHARES SOLD			PROFIT /
NAME OF COMPANY	DATE	QTY	AMOUNT	DATE	QTY	AMOUNT	-LOSS
KHANDELWAL INFRASTRUCTURE PVT LTD.	01-04-2008	80000	10000000	20-03-20.09	80000	800000	-9200000
SECURITY ANANYSIS INDIA P.LTD	26-05-2008	2590	82880000	19-03-2009	2590	27972000	-54908000
SURAJ LTD.	24-09-2007	100000	10000000	24-03-2009	100000	500000	-9500000
TPL FINANCE LTD.	01-04-2008	138000	13800000	19-03-2009	138000	1380000	-12420000
WI NTER FRESH FOODS PVT LTD.	01-04-2008	116250	23250000	19-03-2009	116250	1162500	-22087500
TOTAL			139930000			31814500	-108115500"

9.20. From the above, it can be construed that the AO has formed an opinion about the impugned loss as discussed above and thereafter such loss was allowed to be set off against the income generated by the assessee



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 15 -

on the sale of rights in the land. This fact can also be verified from the order of the AO under Section 143(3) of the Act placed on pages 252 to 255 of the PB. The relevant extract reads as under:

"In schedule-8, out of amount of Rs.11,06,67,007/-, an amount of Rs. 10,81,15,500/- is in respect of loss on sale of shares, Rs. 2,76,803/- is in respect of interest and Rs. 22,40,861/- is in respect of professional fees for land transaction."

9.21. Accordingly, we hold that the view initially formed by the AO during the original assessment proceedings cannot be altered for initiating the proceedings under Section 147 of the Act. If the AO does so that will amount to review which is not desirable under the provisions of Section 147 of the Act. In view of the above and after considering the facts in totality, we do not find any reason to interfere in the order of the Learned CIT (A). Hence the ground of appeal of the Revenue is dismissed.

10. The 2nd issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of loss made by the AO for ₹10,18,15,500.00 on account of purchase and sale of shares.

10.1. The assessee in the year under consideration has incurred the loss of ₹10,18,15,500.00 on the purchase and sale of shares of certain private limited companies/ limited companies. None of the company was listed company. Such loss was set off by the assessee in the year under consideration against the income shown by the assessee on the sale of rights in the land. The details of such loss stands as under:



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 16 -

"(i)	Winter Fresh Foods Pvt.Ltd.	Rs.22087500
(ii)	Security Analysis India Pvt.Ltd.	Rs.54908000
(iii)	TPL Finance Ltd.	Rs.12420000
(iv)	Suraj Ltd.	Rs. 9500000
(v)	Khandelwal infrastructure Pvt.Ltd.	<u>Rs. 9200000</u>

Total Loss

Rs.108115500"

10.2. The assessee in support of the impugned loss has furnished the details of the companies, confirmation of the parties, details of the purchases of the shares, sale of the shares, share transfer form, share certificates, copies of PAN, applications form for the allotment of shares and the bank statement/ bank book wherein the transactions for the purchase and sale of shares were recorded.

10.3. The assessee during the assessment proceeding also contended that there was no valuation of shares carried out in connection with the purchase and sale of the shares for determining the price for the purchase and sale of the shares. It was contended that there was no provision under the Act in force for the year under consideration requiring the assessee for determining the valuation of the shares with respect to the purchase and sale transactions. As such the provisions brought under the statute by the Finance Act under the provisions of section 56(2)(viiia) of the Act with effect from 1 June 2010 do not apply for the year under consideration.

10.4. The assessee also submitted that it has purchased the shares of the companies on the basis of their financial position and expected future growth/ high returns on such investments.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 17 -

10.5. The assessee also submitted that it got the information from the market that the impugned companies are going to be converted into public limited companies which will bring public issue on the high premium which will result good return to it (the assessee). Accordingly the assessee claimed that it has made the investment in the impugned companies. However, on a later date it was discovered that these companies are not going to be listed. Accordingly it was decided to make the sale of the investments held in such companies at the negotiated price. As a result, the assessee has incurred the losses.

10.6. However, the AO during the assessment proceedings made certain observations for the each company in respect of which the loss was incurred by the assessee. The observation of the AO goes as under:

I. Loss with respect to the shares of TPL Finance Ltd. For Rs. 1.24 crores

- i. The notice issued under section 133(6) of the Act to TPL Finance Limited was not responded.
- ii. Similarly, the notice issued under section 133(6) of the Act to Shri R.C. Adani, buyer of the shares from the assessee, was returned as unserved.
- iii. The assessee as well as the company has not submitted any documentary evidence in support of the genuineness of the transactions for the purchase and sale of the shares.

I. Loss with respect to the shares of Security Analysis India Pvt. Ltd. for Rs. 5.49 crores

- i. The notice issued under section 133(6) of the Act to Security Analysis India Pvt. Ltd. was not responded.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 18 -

- ii. The assessee sold the shares of the above company at a loss of Rs. 5.49 crores to its group company namely M/s Ganesh Fin trade Pvt. Ltd.
- iii. The assessee as well as the company has not submitted any documentary evidence in support of the genuineness of the transactions for the purchase and sale of the shares.

II. Loss with respect to the shares of Suraj Limited for Rs. 95 Lacs

- i. The assessee was allotted the shares of the above company at a premium of ₹ 90.00 per share and having face value at ₹10 per share, aggregate to ₹ 100.00 per share without any valuation report of the shares. Furthermore, the company has shown losses of Rs. 66,99,106.00 in the financial year 2006-07 but the assessee has acquired the shares at premium as discussed above but without any basis.
- ii. The query raised to the company i.e. Suraj Limited whether it had sold its shares to any other company except the assessee at a price of Rs. 100, was not responded in reply to the notice furnished under section 133 (6) the Act.
- iii. Similarly, the assessee has not furnished any reason for buying shares of the loss incurring company at a premium as discussed above. As such no detail was submitted what the assessee expected for the growth of the company.
- iv. The shares were sold to the group company of Suraj Limited i.e. Suraj Impex Pvt. Ltd. at ₹5 per share which resulted loss to the assessee of ₹95 lakhs. As such, the assessee failed to justify for making the sale of the shares at loss within a period of few months from the purchase of shares.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 19 -

- v. Similarly, the assessee could not justify that it had the information that the shares of M/s Suraj Limited was not going to be listed.

III. Loss with respect to the shares of M/s Khandelwal Infrastructure Pvt. Ltd. for Rs. 92 Lacs

- i. The assessee was allotted the shares of the above company at a premium of ₹ 115.00 per share and having face value at ₹10 per share, aggregate to ₹125.00 per share without any valuation report of the shares.
- ii. The query raised to the company whether it had sold its shares to any other company except the assessee at a price of Rs. 100, was not responded in reply to the notice furnished under section 133 (6) the Act.
- iii. There was no detail submitted what the assessee expected for the future growth of the company.
- iv. The assessee failed to justify for making the sale of the shares at loss within a period of few months from the purchase of shares.
- v. Similarly, the assessee could not justify that it had the information that the share of the company was not going to be listed.

IV. Loss with respect to the shares of M/s Winter Fresh Foods Pvt Ltd. for Rs. 2,20,87,500.00 only

- i. The assessee has purchased the shares of the above company at ₹ 200.00 per share, though the face value is at ₹10 per share without any valuation report of the shares.
- ii. Similarly, the notices issued under section 133(6) of the Act to certain parties who sold the shares to the assessee, was returned as unserved.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 20 -

- iii. The assessee as well as the individual who sold the shares to the assessee has not submitted any documentary evidence in support of the genuineness of the transactions for the purchase and sale of the shares, resulting such huge loss.

10.7. In view of the above, the AO disallowed the loss of ₹ 10,81,15,500.00 claimed by the assessee by observing as under:

*"3.7. Considering the above facts and circumstances, the genuineness of share transactions could not be proved and remained unsubstantiated. The essential documents and evidences for the verification of genuineness of the share transaction have also not been produced by the assessee and the assessee failed to discharge its onus of proving the genuineness of the transaction. It is relevant to mention that all these transactions were executed between such parties **"off market"**. Such transactions were not executed through stock exchange Neither the assessee nor the companies the shares of which were purchased and sold could furnish a copy of valuation report with regard to valuation of shares or any document which could justify the basis of valuation of shares or charging of high premium. Further, the assessee failed to explain as to what were the circumstances that compelled the assessee company to sell the shares at a low price as the assessee could not offer any valid documented / evidential explanation. The reply of the assessee on this issue has been found very general in nature. The assessee has also not been able to furnish any documentary evidence that prompted the assessee to buy the shares at a high premium. The assessee also had failed to furnish any documentary evidence with regard to the market price of the shares at the time of purchase as well as sale other than the general reply given on 02/01/2015.*

In view of the above, transactions of shares cannot be considered as genuine transaction. The nature of transactions in absence of evidences clearly proves that it a colourable device with intent to reduce the tax liability. Therefore, the claim of set off of loss of Rs.108115500/- incurred on sales and purchase of shares against the profit of the business is not found justified and is disallowed. Accordingly, the claim of loss incurred on such share transactions amounting to Rs.108115500/- is added back to the total income of the assessee."



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 21 -

11. Aggrieved assessee preferred an appeal to the learned CIT (A).

12. The assessee before the learned CIT (A) submitted that it has furnished all the details in support of purchase and sale of shares which has resulted loss to it in the year under consideration. Such details include the application for the shares, board resolution, copies of share certificate, form No. 2 filed by the companies, PAN Card, share transfer form along with sale note, address of TPL Finance Ltd, confirmation of the parties along with share transfer form etc. The transactions with respect to certain parties were also confirmed in response of the notice issued to them under section 133(6) of the Act. Accordingly the AO after verifying the above details in the original proceedings has allowed the claim of the assessee. Thus the allegation of the AO that the assessee failed to furnish the documentary evidence is not correct.

12.1. The assessee also contended that it has acquired the shares of the companies based on financial position as well as expected future growth and in anticipation of high returns. There was also the information that these private limited companies will become public limited companies and will bring public issues at high premium. Based on such information, the investment was made. But on a later date when it was discovered that such companies are not going to bring any public issue viz a viz will not become public limited companies. Thus it was decided to sale of the shares at a negotiated price.

12.2. The assessee also contended that there was no requirement under the provisions of law for valuing the shares of the private limited companies



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 22 -

in the year under consideration. As such, the requirement was brought under the statute under the provisions of section 56(2)(viiia) of the Act which is effective from 1-6-2010.

12.3. In view of the above, the assessee argued that the transaction of purchase and sale of shares resulting the loss of ₹ 10,81,15,500.00 cannot be treated as a colourable device for setting off against the capital gain income. Accordingly, the assessee prayed to the learned CIT (A) to delete the addition made by the AO.

12.4. The learned CIT (A) after considering the submission of the assessee, deleted the addition made by the AO by observing as under:

"3.9. With regard to the transactions in respect of transactions of shares of Security Analysis India Pvt. Ltd. and TPL Finance Limited, the appellant submitted the following documents in respect of the transactions, to the AO in the assessment proceedings vide its letter dated 22/07/2014.

- (i) Application form for allotment of equity shares by the appellant in the shares of Security Analysis (I) Pvt. Ltd.*
- (ii) Copy of share certificates dated 09/06/2008 allotting the 2590 shares.*
- (iii) Copy of Form No. 2, i.e. return filed by Security Analysis (India) Pvt. Ltd. in the ROC.*
- (iv) Copy of PAN Card of Security Analysis (India) Pvt. Ltd. bearing PAN Number AAFCS 7479 B.*
- (v) Copy of share transfer form in respect of the transfer of shares by the appellant in favour of Shree Ganesh Fin Trade Limited to whom the shares were sold.*

3.10. Further, the appellant vide its letter dated 29/09/2014 to the AO, also submitted the copies of following documents which were also provided to the AO during the original assessment proceedings vide letter dated 12/12/2011:-



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 23 -

(B) Following documents for the sale of shares of Securities Analysis (India) Pvt. Ltd.:

(a) Application for equity shares by the assessee company to Securities Analysis (India) Pvt. Ltd. along with Board Resolution as per Exhibit - IV.

(b) Xerox copy of Share Certificate as per Exhibit - V.

(c) Form No. 2 filed by Securities Analysis (India) Pvt. Ltd. for the allotment of shares to the assessee company as per Exhibit-VI.

(d) PAN Card of Securities Analysis (India) Pvt. Ltd. as per Exhibit - VII,

(e) Share transfer form along with sale note for sale of shares to Shree Ganesh Fin Trade Ltd. as per Exhibit -VIII.

(C) Following documents for TPL Finance Ltd were submitted.

(a) Confirmation regarding sale of shares of TPL Finance Ltd. to Shri R. C. Adani having PAN No. ADDPA 7838 C on 19/03/2009.

(b) Copy of share transfer form of the shares in the name of transferee namely; Shri R.C. Adani in respect of 138000 shares.

3.11. From the above, it is evident that all the documents in support of the share transactions were on record, and nothing new has been brought on record to doubt the transactions with the sellers from whom the appellant has purchased the shares and with the purchasers to whom said shares were sold. No inquiries with regard to the purchasers of the shares namely; Shri Ganesh Fintrade Limited to whom shares of Security Analysis India Pvt. Ltd. were sold was made to verify rate of sale of sellers. The purchasers of both the scrips were having PAN, hence their identity was established. Further, the payments have also been received by the appellant from them by banking channels and the appellant had transferred the shares in their names.

3.1.2. In fact, the appellant during the course of reassessment proceedings vide its letter dated 02/01/2015 has provided the changed address of the company namely; TPL Finance Limited i.e. 1 / 4, Mittal Chambers, Niharika Park, Opp. Uco Bank, Khanpur, Ahmedabad. However, no inquiry on the changed address of the company was made. The complete addresses, PAN Nos., details of payments and confirmations from the sellers as well as the purchasers were available on record with the AO which prima facie proved



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 24 -

the genuineness of the transactions of the shares. Thus, nothing adverse about the authenticity of these supporting documents were pointed out. Since the payments have been routed through account payee cheques and no cash having been taken by the appellant from the purchasers or taking back from the sellers, over and above to the consideration has been proved, thus, in absence of any other material on record, the purchase rate and sale rate of the shares could not be doubted and same are held to be on the prevalent market rates. Therefore, the primary onus cast upon the appellant has been duly discharged.

3.13. (ii) **Loss on sale of shares in Suraj Limited:**

On inquiry by the AO u/s. 133(6) of the I. T. Act, M/s. Suraj Limited has stated that, it had allotted 1100000 shares of Rs. 10 each at a premium of Rs. 90/- to the appellant. The AO held that in absence of any valuation report or any basis of valuation, the purchase transaction of shares was not found justified. The AO also observed that M/s. Suraj Limited had not sold any shares to other companies except to the appellant company @ Rs.100/- per share. Since as per the balance sheet of Suraj Limited, there were losses in F. Y. 2006-07 and it was an off market transaction and M/s. Suraj Limited was not a listed company, so there was no justification on the part of the appellant company to buy the shares at such a high premium, in absence of any valuation report and evidentiary information, on the basis of which the future growth of M/s. Suraj Limited had prompted the appellant to buy the shares at a premium. It was observed by the AO that no evidence / documents have been submitted which could prove that the appellant had a genuine and reasonable basis for making the investment at the higher rates. It was also observed by the AO that the shares were sold by the appellant to the group company of M/s. Suraj Limited namely; Suraj Impex Pvt. Ltd. @ Rs. 5/- per share in F. Y. 2008-09 for which no evidences / documents to prove that M/s. Suraj Limited was going to be listed were submitted.

3.14 With regard to the transactions in respect of purchase of shares of Suraj Limited, the appellant submitted the following documents in respect of the transaction, to the AO in the assessment proceedings vide letter dated 29/09/2014 which were also submitted to AO in the original assessment proceedings vide letter dated 12/12/2011.

(i) Copy of application for allotment of equity shares by the appellant for 1100000 shares with the cheque of Tamilnadu Mercantile Co-operative Bank, Ellisbridge, Ahmedabad for the consideration of Rs. 11 crores.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 25 -

- (ii) Copy of PAN Card of M/s. Suraj Limited bearing PAN NO. AAICS 9693 L.
- (iii) Copy of Form No. 2 i.e. return of allotment filed in ROC containing the appellant being allottee for the allotment of shares on 24/09/2007.
- (iv) Copy of share certificate of M/s. Suraj Limited in the name of appellant dated 24/09/2007.
- (v) Copies of sale note for sale of shares to Suraj Impex Pvt. Ltd. dated 24/03/2009. The PAN No. of Suraj Impex Pvt. Ltd. was AACCS9971 R.

3.15. It has been noticed that the AO has issued the notice u/s. 133(6) of the I. T. Act to M/s. Suraj Ltd. and in response to the same, the said company has confirmed that the appellant company had purchased 1100000 shares as per the consideration agreed between the appellant, and the company. This confirmation has not been controverted by way of bringing anything adverse on record. Further, in spite of available of all the documents on record, nothing has been brought on record to doubt the transactions with the sellers from whom the appellant has purchased the shares and with the purchasers to whom said shares were sold by the appellant. No inquiry with the purchasers of the shares namely; Suraj Impex Pvt. Ltd. to whom appellant has sold some of the shares has been made giving rise to doubt the authenticity of the rates of transaction. The purchaser company was having PAN, hence its identity was established. Further, the payments have also been received by the appellant from it and the appellant had transferred the shares in its name. The complete addresses, PAN Nos., details of payments and confirmations from the sellers as well as the purchasers were available on record with the AO which prima facie proved the genuineness of the transactions of the shares. Thus, in absence of no adverse observations about the authenticity of these supporting documents, the payments having been routed through account payee cheques and no cash having been taken by the appellant from the purchasers or taking back to the sellers, over and above to the consideration has been proved, thus, the purchase rate and sale rate of the shares could not be doubted and same are held to be on the prevalent market rates. Therefore, the primary onus cast upon the appellant has been duly discharged.

3.16. (iii) **Loss on sale of shares of Khandeiwal Infrastructure Pvt. Ltd.**

In response to the notice issued u/s. 133(6) of the I. T. Act it was replied that, M/s. KIPL has allotted 80,000 shares of Rs. 10/- each at a premium of Rs. 115/- to the appellant. However, with regard to the valuation, M/s. KIPL has not given any specific reply. It was observed by the AO, since it was an off market



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 26 -

transaction and M/s. KIPL was not a listed company, thus there was no justification on the part of the appellant company to buy the shares of KIPL at such a high premium in absence of any valuation report. The AO further observed that the shares of M/s. KIPL were sold to the director of M/s. KIPL @ Rs. 10/- per share in F. Y. 2008-09 without any specific evidence and documents which could be held as genuine transaction.

3.17. With regard to the transactions in respect of purchase of shares of Khandeiwal Infrastructure Pvt. Ltd., the appellant submitted the following documents in respect of the transaction, to the AO in the assessment proceedings vide letter dated 22/07/2014 and 29/09/2014.

(i) Copy of application form for application for 20000 shares for the capital value of Rs.25 lacs for which the cheque of Tamilnadu Mercantile Bank Ltd. bearing cheque No. 927270 dated 15/02/2008 was given by the appellant.

(ii) Likewise, another application for 20000 shares on 23/02/2008 was made with the cheque of Tamilnadu Mercantile Bank Ltd. bearing cheque No. 947554 dated 23/02/2008 was made.

(iii) Further, one more application for allotment of 20000 shares was made on 28/02/2008 with the cheque of Rs. 25 lacs of Tamilnadu Mercantile Bank Ltd. dated 28/02/2008.

(iv) Further, one more application for allotment of 20000 shares was made on 14/02/2008 with the cheque of Rs. 25 lacs with the cheque of Tamilnadu Mercantile Bank Ltd. bearing No. 92726788 dated 14/02/2008.

(v) Also submitted the copy of share transfer form in respect of sale of shares by appellant to various parties.

(vi) Confirmation for sale of shares with transfer forms.

(vi) Copy of bank statement of the appellant through which payments have been made towards the purchases and credit of the sale proceeds of the bank account in Tamil Nadu Mercantile Bank Ltd. Also submitted the bank book of the appellant.

3.18. It has been noticed that the AO has issued 1he notice u/s. 133(6) of the I. T. Act to M/s. Khandelwal Infrastructure Pvt. Ltd. and in response to the same, the said company has confirmed that the appellant company had purchased 80000 shares as per the consideration agreed between the appellant and the



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 27 -

company. This confirmation has not been controverted by way of bringing anything adverse on record. Further, in spite of available of all the documents on record, nothing was brought on record to doubt the transactions with the sellers from whom the appellant has purchased the shares and with the purchasers to whom said shares were sold by the appellant. No inquiries with the purchasers of the shares namely; Shri Shyamlal H. Gupta, Shri Dilip S. Khandelwal and Shri Ashok S. Khandelwal have been made to whom the appellant has sold the shares to verify the genuineness of the rate of the transaction. All the three purchasers were having PAN, hence their identity was established. Further, the payments have also been received by the appellant from them and the appellant had transferred the shares in their names. The complete addresses, PAN Nos., details of payments and confirmations from the sellers as well as the purchasers were available on record with the AO which prima facie proved the genuineness of the transactions of the shares. Thus, nothing adverse about the authenticity of these supporting documents were pointed out. Since the payments have been routed through account payee cheque and no cash having been taken by the appellant from the purchasers or taking back to the sellers, over and above to the consideration has been proved, thus, in absence of any other material on record, the purchase rate and sale rate of the shares could not be doubted and same are held to be on the prevalent market rates. Therefore, the primary onus cast upon the appellant has been duly discharged.

3.19. (iv) **Loss on sale of shores of Winter Fresh Foods Pvt. Ltd.**

The details of purchase and sale of shares by the appellant are depicted as under:-

Date of purchase	Purchases from	PAN of transferor	Qty	Rate	Amt(Rs.)	Date of sale	Name of purchaser	PAN of purchaser	Qty	Rate/ Amt
01/04/2008	Chenani Pushpaben R.	AEBPC0637G	15000	200	3000000	19/3/2009	Pratik J. Patel	ALIPP0788P	29000	
01/04/2008	Chenani Manohartal M.	ADTPC8623M	15000	200	3000000	19/3/2009	Prodip R. Gupta	AEPPG33S7M	29000	
01/04/2008	Chenani SagarM.	AGFPC4143F	10000	200	2000000	19/3/2009	Vasant Jadwani	AFPPJ1033A	29000	
01/04/2008	Chenani MeenaM.	AEBPC0610F	52000	200	10400000	19/3/2009	Joikishan Jethwani	AHIPJ7179G	29500	
01/04/2008	Kukreja HorishM.	AFOPK6389P	7750	200	1550000	19/3/2009				
01/04/2008	Chenani Rajkumar M.	AEBPC0615A	16500	200	3300000	19/3/2009				
			116250	200	23250000				116250	Rate 10 Amt



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 28 -

										1162500
--	--	--	--	--	--	--	--	--	--	---------

3.20. In response to the notice u/s. 133(6) of the I. T. Act, M/s. WFFPL has stated that the appellant company has purchased the shares from different parties as per the consideration agreed between the transferor and appellant. The AO observed that in absence of any valuation report and any other documentary evidences, the purchase of shares @ Rs.200/-per share as against the face value of Rs. 10 was not the genuine transaction. Since the shares were purchased from the various parties and hence notices u/s. 133(6) of the I. T. Act were issued to the parties for cross verification of the said transactions, but no compliance from any of the parties u/s. 133(6) has been received. Further, the AO observed that in absence of any documentary evidences to establish the genuineness of the said transactions, the loss accounted for by the appellant was not found justified. Thus, the genuineness of the transaction could not be proved and remained unsubstantiated and the appellant has failed to discharge its onus in proving the genuineness of the transactions, as these transactions were made off market and such transactions were not executed through stock exchange, and the same were not supported with any valuation report with regard to valuation of- shares. Thus, there was no justification for the high premium paid and sold the same on lower price.

3.21. With regard to the transactions in respect of purchase of shares of Winter Fresh Foods Pvt. Ltd., the appellant submitted the following documents in respect of the transaction, to the AO in the assessment proceedings vide letter dated 22/07/2014 and 29/09/2014 which were filed to the AO in original assessment proceedings vide letter dated 12/12/2011.

(i) Copies of share transfer forms in respect of transfer of shares in favour of the appellant by the transferor / seller of the shares duly signed by each of them.

(ii) Confirmations in the form of sale receipts duly signed by the transferor/seller of all the six parties from whom shares of Winter Fresh Foods Pvt. Ltd. purchased. Also submitted the share transfer form duly signed by the transferor / seller.

(iii) Confirmation letters by the purchaser of the shares to whom the appellant has sold the shares containing their signature, PAN numbers, complete



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 29 -

address, details of cheque no., bank and branch and the amount of sale consideration etc.

]

3.22. It has been noticed that the AO has issued the notice u/s. 133(6) of the I. T. Act to M/s. Winter Fresh Foods Pvt. Ltd. and in response to the same, the said company has confirmed that the appellant company had purchased the shares from different parties as per the consideration agreed between the transferor and transferee. This confirmation has not been controverted by the AO by way of bringing anything adverse on record. Further, in spite of available of all the documents on record, nothing has been brought on record to doubt the genuineness of the transactions with the sellers from whom the appellant has purchased the shares and with the purchasers to whom said shares were sold. Merely the parties have not made any response to the notices u/s. 133(6) would not be enough to disbelieve the transactions since the appellant did not have any control over the said parties. As per the judicial pronouncements, due to absence of the reply from the aforesaid parties, no adverse view can be taken against the appellant. The complete addresses, PAN Nos., details of payments and confirmations from the sellers as well as the purchasers were available on record with the AO which prima facie proved the genuineness of the transactions of the shares. Thus, no adverse observations about the authenticity of these supporting documents have been found. Since the payments have been routed through account payee cheque and no cash having been taken by the appellant from the purchasers or taking back to the sellers, has been proved, thus, in absence of other material on record, the purchase rate and sale rate of the shares could not be doubted and same were held to be on the prevalent market rates. Therefore, the primary onus cast upon the appellant has been duly discharged.

3.23. In view of the aforesaid discussion, while completing the reassessment on the aforesaid share transactions, the AO has made the observations that -

(i) The shares were purchased by the appellant at a price which was unreasonably high. There was no valuation report to justify the price.

(ii) AO held that there was no circumstances which compelled the appellant company to sale these shares at a low price.

(iii) AO also mentioned .that notices u/s. 133(6) were issued to various parties and some of them have not replied whereas the reply of the other parties were not satisfactory.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 30 -

(iv) The AO concluded that the transactions were not genuine and hence he added the entire loss in its income.

3.24. Having considered all the facts and submissions, it is found that with regard to valuation of the shares, since the shares were in respect of unlisted companies, and as per the provisions of law, for the year under consideration there was no legal obligations on the part of the appellant to obtain the valuation report of each of such scrips of shares at the time of transaction. The provisions of section 56(2) (viiia) has been introduced w.e.f. 01/06/2010 only and not applicable with retrospective effect. Therefore, any purchases / sale of shares before that date were left on the commercial sense of the parties and it was not mandatory to have a valuation report before purchasing / selling of the shares prior to 01/06/2010.

3.24.1. As per the submission made by the appellant, the investment in the shares were made on the basis of the financial position of the said companies and expected future growth and in anticipation of high returns, which would be available on such shares. As per appellant, the appellant company had the information from the market that the aforesaid companies were going to become Public Limited Companies and would come for public issue on the higher premium and on the basis of such market reports, the appellant had purchased the share at a higher premium with an intention to get good returns. It is universal practice that no prudent businessman would make any investment in a company where the future of the said company is not good.

3.24.2. The reasons extended for sale on loss was due to decrease the burden of interest upon the investment by liquidating the shares at the earliest when there were no hopes for higher rates to be realised in future. In fact, in response to the notice u/s. 133(6), the replies have also been received by the appellant from Khandelwal Infrastructure Ltd., Suraj Ltd. & Winter Fresh Foods Pvt. Ltd. which were confirming to the transactions taken place by the appellant. In fact in the case of TPL Finance Ltd., no notice by the said company has been received on its changed address. Since in respect of all the share transactions the appellant has provided the supporting evidences in the form of application for shares to the company, copies of share certificates, Form No.2 filed by the company to the ROC wherein the name of the appellant company was appearing as a shareholder, PAN Card copies of the companies, sale note for sale of shares, confirmation letters and payments / receipts through banking channels which have been elaborately discussed in the preceding paras for each of the scrips separately and in these circumstances, there remained no doubt on the genuineness of the transactions.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 31 -

3.25. In view of the aforesaid discussion, the disallowance made by the AO in respect of the losses is found not correct on merits, and therefore, the disallowance is deleted.”

13. Being aggrieved by the order of the Id. CIT-A, the Revenue is in appeal before us.

14. The Id. DR before us submitted that the assessee has purchased the shares of the companies at a high price and sold the same at a very low price which has resulted loss to it under the head capital gain. As such the price for the purchase and sale of shares was not based on any valuation report. Accordingly the learned DR contended that the loss claimed by the assessee cannot be allowed as genuine.

15. On the other hand, the Id. AR before us contended that there was no requirement under the Act for obtaining the valuation report with respect to the purchase and sale of shares for the year under consideration.

16. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

17. We have heard the rival contentions of both the parties and perused the materials available on record. In the instant case, the assessee has claimed to have incurred losses on the purchase and sales of shares of certain private Ltd and limited companies amounting to ₹10,81,15,500.00 which was disallowed by the AO for various reasons elaborated in the preceding paragraph.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 32 -

17.1. One of the allegation of the AO was that the assessee has not furnished necessary details justifying the genuineness of the impugned loss. However, on perusal of the details filed by the assessee, particularly placed on pages 335 to 337 of the paper book we note the following details:

“(ii) The assessee company is providing herewith the following documentary evidences in respect of purchase and sale of shares:-

- (A) We are submitting herewith following details for the shares of Winter Fresh Food Pvt Ltd.
 - (a) Confirmation of the parties from whom shares of Winter Fresh Food Pvt. Ltd. purchased along with Xerox copies of transfer form as per **Exhibit-II.**
 - (b) Confirmation of the parties to whom the shares of Winter Fresh Food Pvt. Ltd. sold as per **Exhibit-III.**
- (B) We are attaching herewith the following documents for the sale of shares of Securities Analysis (India) Pvt. Ltd. :
 - (a) Application for equity shares by the assessee company to Securities Analysis (India) Pvt. Ltd. along with Board Resolution as per **Exhibit-IV.**
 - (b) Xerox copy of Share Certificate as per **Exhibit-V.**
 - (c) Form no.2 filed by Securities Analysis (India) Pvt. Ltd. for the allotment of shares to the assessee company as per **Exhibit-VI.**
 - (d) PAN Card of Securities Analysis (India) Pvt. Ltd. as per **Exhibit-VII.**
 - (e) Share transfer form along with sale note for sale of shares to Shree Ganesh Fintrade Ltd. as per **Exhibit-VIII.**
- (C) We are attaching herewith the following documents for TPL Finance Ltd.
 - (a) Confirmation regarding sale of shares of TPL Finance Ltd. along with share transfer form as per **Exhibit-IX.**
- (D) We are attaching herewith the following documents for Suraj Ltd.
 - (a). Application form for allotment of equity shares as per Exhibit-X.
 - (b). PAN Card of Suraj Ltd. as per Exhibit-XI.
 - (c). Form No.2 for allotment of shares to the company along with Xerox copy of share certificate as per Exhibit-XII.
 - (d) Sale note for sale of shares of Suraj Ltd. as per Exhibit-XIII.
- (E) We are attaching herewith the following documents for Khandelwal Infrastructure Pvt. Ltd.
 - (a) Application form for making shares as per **Exhibit-XIV.**



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 33 -

(b) Confirmation for sale of shares of Khandelwal Infrastructure Pvt. Ltd. with transfer form as per **Exhibit-XV**.

(iii) The assessee company is submitting herewith the copy of bank statement of Tamilnadu Mercantile Co.Op.Bank Ltd. and HDFC Bank as per **Exhibit - XVI**. The assessee company is also attaching herewith the copy of bank book of the aforesaid banks as per **Exhibit-VXII**.

(iv) The assessee company has to contend that it has incurred the genuine business loss on sale of shares and the same is required to be allowed in toto.”

17.2. Admittedly, the primary onus to prove the correctness of the transaction is on the assessee as it has the special knowledge of the circumstances and privy to the facts of the case. Hence, the assessee has to satisfy the AO about the correctness of the impugned loss. After going through the details filed by the assessee as discussed above, we find that the assessee has discharged its onus to justify the loss claimed by it on the purchase and sale of the shares. Thus the onus shifts on the AO to disprove the contention of the assessee by collecting contrary evidence. But The AO has not brought any contrary evidence against the assessee to prove that the loss claimed by it was not a genuine loss. In other words no contrary evidence was collected or confronted by the AO against the contention of the assessee. Thus it can be inferred that the burden of proof has been discharged by the assessee.

17.3. A situation also arises that there was no compliance by certain parties against the notice issued by the AO under section 133(6) of the Act. But question is that whether the assessee can be blamed for non-response of the notice issued by the AO under section 133(6) of the Act. The answer stands against the Revenue and in favour of the assessee. It is because the assessee is not under any obligation to enforce the parties to response to



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 34 -

the notice issued by the AO under section 133(6) of the Act. In fact the AO has been authorized to exercise its power granted under the statute i.e. under section 133 (6) of the Act and if the other party does not cooperate then the AO has power to levy the penalty on such party under section 272A of the Act. But the assessee under no circumstance can be penalized on account of non-response of the notice issued under section 133(6) of the Act to the parties. In holding so we draw the support and guidance from the judgment of Hon'ble Gujarat High Court in the case of Rohini Builders reported in 127 Taxman 523, where the head note reads as under:

"- Whether merely because summons issued to some of creditors could not be served or they failed to appear before Assessing Officer, could not be ground to treat those credits as non-genuine - Held, yes -"

17.4. The next question arises about the non-availability of valuation report of the shares of the companies in which the assessee has incurred losses. In this regard we note that there was no provision under the Act requiring the assessee, being transferor of the shares, to furnish the valuation report of the shares of the companies in respect of which it has incurred the loss. The lawmakers to determine the transfer value of unquoted share brought special provision by introducing Section 50CA of the Act which reads as under:

"[Special provision for full value of consideration for transfer of share other than quoted share.

50CA. Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed, the value so determined shall, for the purposes of section



ITA No.472/Ahd/2016 (by Revenue) &
 CO No.59/Ahd/2016 (by Assessee)
 DCIT vs. M/s.Ganesh Plantation Ltd.
 Asst.Year – 2009-10

- 35 -

48, be deemed to be the full value of consideration received or accruing as a result of such transfer.

Explanation.—For the purposes of this section, "quoted share" means the share quoted on any recognised stock exchange with regularity from time to time, where the quotation of such share is based on current transaction made in the ordinary course of business.]”

17.5. However, section 50CA is applicable w.e.f. 01st April 2018, therefore, for the assessment year under consideration there was no mechanism under the law to determine the sale price of unquoted shares.

17.6. Further, we also note that there is an amendment under the provisions of section 56(2)(x) of the Act which reads as under:

"[(x) Where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017,-----

--- XXX

(c) any property, other than immovable property, -----

(A) Without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(B) For a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:"

17.7. A plain reading of the above provision reveals that the person being the recipient is subject to tax if it acquires anything at a value lesser than the fair market price. These provisions have been brought under the statute with effect from 01.04.2017. We also note that the same provision was also there in the old provision under clause (vii) to section 56(2) of the Act. However, on reading the same, we note that the tax liability, if any arises



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 36 -

will be applicable in the hands of the recipient and no liability, can be imposed on the transferor. Therefore, we are of the view that the assessee being the transferor of shares cannot be subject to tax in the instant case.

17.8. Thus. we hold that there was no provision under the Act for the year under consideration prescribing the guidelines for pricing of the shares unlike the provisions contained under section 50C of the Act concerning immovable properties under the head capital gain. Thus in the absence of any specific provision to determine the sale price of the shares of the company, we are inclined to hold that the price declared by the assessee is correct and within the provisions of law.

17.9. Without prejudice to the above, we note that the AO on one hand has recorded his finding with respect to the shares of certain companies that its face value stands at ₹10 but the assessee has purchased the same at a higher value. The basis of arriving at the conclusion that the assessee has purchased the shares at a higher value was non-availability of shares valuation. In other words the AO himself has admitted the value of the shares of certain companies at ₹10 but he has not given any benefit of such value while working out the loss with respect to purchase and sale of shares. As such the AO has treated the entire loss on the purchase and sale of shares as not genuine which is contrary to the observations made by him during the assessment proceedings. In fact the AO, in the given facts and circumstances, was under the obligation to determine/ work out the valuation of the shares before rejecting the claim of the assessee.



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 37 -

17.10. It is an undisputed fact that all the parties with whom the assessee carried out such transaction were identifiable and there was also a consideration among such parties. Admittedly, the price of the shares in market is not always based on the company's financial position, profit/growth rather its value/price is determined on the demand and supply of the script/shares and various other factors such as elaborated below:

- a. the field in which the company is operating
- b. the competition that the companies facing
- c. the difficulty for making the entry in the particular field
- d. the background of the promoters
- e. the economic boom
- f. Govt. policy
- g. budget proposals
- h. future plans
- i. development chances
- j. existing growth in sales
- k. high capital
- l. reserve
- m. Positive net worth and no borrowings so on and so forth.

17.11. There are various companies incurring huge losses but price of their shares in market are high. Similarly there are various companies having high book value but trading at a very low price. Accordingly, we are of the view that the high profit/taxable income cannot be a criteria to decide the price of the share/script. Thus any unusual price rise/ fall in the shares of the company cannot be a basis to draw an inference that capital loss generated by the assessee is bogus in nature. Thus after considering the above facts,



*ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10*

- 38 -

we are of the opinion that AO is not correct in challenging the loss declared by the assessee on the purchase and sale of shares.

17.12. We also note that it is not the case of the Revenue that there was some inflow of money from the buyer of the shares to the assessee which is unaccounted. As there is no dispute about the nature of the transaction and the consideration received by the assessee against the sale of shares, therefore the transaction cannot be termed as a sham transaction. Moreover, the onus is on Revenue to establish that assessee has received some benefit over and above the actual sales consideration.

17.13. In view of the above, we are not inclined to interfere in the order passed by Id. CIT(A) deleting the addition of Rs. 10,81,15,500.00 and the same is hereby upheld. This ground of the Revenue's appeal is dismissed.

18. In the result, the Revenue's appeal is dismissed.

Coming to CO No. 59/Ahd/2016 for A.Y. 2009-10 (By Assessee):-

19. At the outset, we note that the CO filed by the assessee is supporting the order of the Ld. CIT-A, thus, the same does not require any separate adjudication. Hence, we dismiss the same as infructuous.

20. In the result, the C.O. filed by the assessee is dismissed as infructuous.



ITA No.472/Ahd/2016 (by Revenue) &
CO No.59/Ahd/2016 (by Assessee)
DCIT vs. M/s.Ganesh Plantation Ltd.
Asst.Year – 2009-10

- 39 -

39. In the combined result, the appeal filed by the Revenue is dismissed and the Cross Objection filed by the assessee is dismissed as infructuous.

This Order pronounced in Open Court on 11/12/2020

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT
Ahmedabad; Dated 11/12/2020

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Tanmay SrPS/ टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-2, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad