

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.766/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Amritlal T. Shah, B-4, Khandelwal Co-Op Society, Plot No. 485/486, 17 <sup>th</sup> Road, Khar (W), Mumbai - 400 052.	<b>बनाम/</b> v.	ITO - 19(1)(3), Mumbai.
स्थायी लेखा सं./PAN : AACPS7522D		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Dr. K. Shivaram
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख / **Date of Hearing** : 30-6-2016

घोषणा की तारीख / **Date of Pronouncement** : 22-09-2016

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee , being ITA No. 766/Mum/2012, is directed against the appellate order dated 16<sup>th</sup> December, 2011 passed by learned Commissioner of Income Tax (Appeals)- 22, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 20<sup>th</sup> December, 2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. The learned CIT(A) erred in upholding the action of the AO who valued the sale consideration of shares at Rs. 202/- as against Rs.1195/- per shares shown by the assessee, thereby assessing the consideration of Rs. 20,25,720/- as unexplained income without appreciating that there is no provision under the Act whereby the AO could reduce the value of sale consideration of shares sold and tax the difference amount as unexplained income .

2. The Id. CIT(A) failed to appreciate that the value of shares is accepted by department in A.Y. 2007-08 in case of Mr. Satish A. Shah (Son) thus the computation capital gain by the assessee may be allowed and benefit u/s. 54EC of the Act may also be allowed.”

3. The brief facts of the case are that assessee is an individual deriving income from salary, income from house property, capital gains and income from other sources.

During the course of assessment proceedings u/s. 143(3) read with Section 143(2) of the Act, it was observed by the A.O. that the assessee has sold 2040 equity shares of face value of Rs. 100/- per share in BEC Industrial Investment Company Pvt. Ltd. to another company BAT Enterprises Ltd. and booked a net profit of Rs. 22,33,800/-. The details of which are as under:-

Sale of 2040 shares @ Rs. 1195/- per share at a total sale consideration of	Rs. 24,37,800
Less: Cost of acquisition of 2040 shares @ Rs. 100/- per share	<u>Rs. 2,04,000</u>
Long term capital gain as per books	<u>Rs. 22,33,800</u>

The assessee after taking indexed cost at Rs. 8,17,928/- and further having invested Rs. 16,20,000/- in Government REC bonds had offered net taxable capital gain at Rs. Nil. The A.O. observed that it was necessary to verify whether this exorbitant high sale price of share at Rs. 1195/- per share was justified and based on same working or was it arbitrary, and the assessee wanted to avoid tax which he otherwise was required to pay. The A.O. observed that the transaction of sale of shares related to a Private Limited Company which is not a listed company in any stock exchange therefore the generally valuation adopted is based on Net asset Value (NAV) method of the company of which the shares belongs. The assessee was directed to file the Balance Sheet of BEC Industrial Investment Company Private Ltd. and on verification of the Balance Sheet, it was observed that the NAV of the above company was just Rs. 202/- per share. The calculation is as under based on annual report of the company as on 31<sup>st</sup> March, 2007:-

Issued, subscribed and paid up capital of company (35000 shares of Rs. 100/- each)	Rs.35,00,00
Add: Reserve and surplus	
General reserve	Rs. 8,50,000/-
P&L account	<u>Rs. 27,21,831/-</u>
Total net assets	Rs. 70,71,831/- =====

$$\text{NAV per share} = \frac{\text{Net assets of the company}}{\text{No. of shares}} = \frac{\text{Rs. 70,71,831}}{35,000} = \text{Rs.202 per share}$$

Thus assessee was asked to explain the justification and working of the valuation of shares of BEC Industrial Investment Company Private Limited taken by the assessee at Rs. 1195/- per share which are sold to BAT Enterprises Ltd.

The assessee in reply submitted that BEC Industrial Investment Company Pvt. Ltd. is 100% holding company of BEC Chemicals Pvt. Ltd. and as such valuation of share of BEC Industrial Investment Company Pvt. Ltd. depends upon the valuation of BEC Chemicals Pvt. Ltd. , and BEC Chemicals Pvt. Ltd. is a manufacturing company having turnover of more than Rs. 10 crores and also it is EOU. It was submitted that BEC Chemicals Pvt. Ltd. is also having factory at Roha, whose valuation of shares as per books is Rs.562/- per share and if depreciation till date is not considered book value comes to Rs.1406/- per share as on 31<sup>st</sup> March, 2007 , and apart from the above goodwill valuation is also to be considered as well necessity of the buyer is to be taken into account while negotiating price of the share. It was also submitted that when valuation of shares of principal company is derived, valuation of subsidiary is also taken into account.

The A.O. considered the submission of the assessee but rejected the same. The A.O. observed that the assessee has not provided any working or basis of valuation of adopting sale price at Rs.1,195/- per share of BEC Industrial Investment Company Private Limited. Therefore, it seems that the same is taken arbitrarily without any calculation or base. The A.O. observed from the Balance Sheet of the above company BEC Chemicals Private Limited that the said company is in-fact a loss making company. It has incurred a loss of Rs.16,43,220/- for the year ended March, 2007, which was further increased to net loss of Rs. 31,43,652/- for the year ended March, 2008 and moreover the company has not declared any dividend also. Thus, It was observed that the subsidiary company which is loss making and not paying any dividend cannot add value to the holding company and hence the AO rejected the contentions of the assessee.

The AO also observed that the said BEC Chemicals Private Ltd. has issued 15000 new shares @ Rs. 100/- each at par during the year ended 31-03-2008 which itself is contradictory to assessee's claim of high valuation. Thus, if the assessee claim would have been right, the said company BEC Chemicals Private Ltd would have also issued shares at a premium of Rs.1100 per share. It was also observed that the registered office of M/s BEC Industrial Investment Company Pvt. Ltd. in which the assessee was holding shares and the corporate office of BAT Enterprises Ltd., the buyer of the shares, is same premises and even Fax and phone number of both the companies are same which proves that both the companies are under same management and the assessee was in a position to influence both the companies. Hence, the buyer of shares cannot be said to be genuine and it contradicts assessee's claim that the valuation also depend upon necessity of buyer.

Thus, it was held by the AO that the assessee was interested in both the companies namely BEC Industrial Investment Company Private Limited whose shares were sold and BAT Enterprises Limited , who purchased the shares from assessee and thus, the assessee was in a position to influence their business and that is why he had to receive large sum of money to avoid tax burden whereby the sale of shareholding in BEC Industrial Investment Company Pvt. Ltd. to BAT Enterprises Ltd. was made at an unjustifiably and abnormally high price of Rs.1195/- per share in order to avoid the tax liability and also to get the benefit u/s 54EC of the Act , thus causing huge loss to the Revenue.

The A.O. considering the above facts, worked out the income under the head capital gains as under:-

Total consideration on sale of 2040 shares  
@ Rs. 202/- per share

Rs. 4,12,080/-

Less: Indexed cost of 2040 shares	<u>Rs. 8,17,928/-</u>
Long term capital loss(allowed to be carry forward)(-)	Rs.4,05,848/-
	=====

and the difference between the sale proceed shown by the assessee and the sale proceed based on NAV of shares @ Rs. 202/- per share was worked out by the AO at Rs. 20,25,720/- which was taxed in the hands of the assessee as unexplained income under the head 'income from other sources' instead of 'income from capital gains' , vide assessment order dated 20<sup>th</sup> December, 2010 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 20-12-2010 passed by the A.O. u/s. 143(3) of the Act, the assessee filed the first appeal before the Id. CIT(A).

5. Before the Id. CIT(A) , the assessee reiterated the submissions what were made before the A.O. which are not repeated and submitted that the sale of shares to its promoters by BEC Chemicals Pvt. Ltd. at par is for subsequent period and hence not relevant. It was submitted that the rate of Rs. 1195/- per share of BEC Industrial Investment Company Private Limited was fixed in pursuance to mutual agreement and there is no provision under the Act whereby to reduce the value of share sold.

The Id. CIT(A) rejected the contentions of the assessee and agreed with the finding of the A.O. that there was no basis for taking an exorbitant value @ Rs. 1195 per share as compared to the NAV of Rs.202/- worked out by the A.O. . It was observed by learned CIT(A) that M/s BEC Chemicals Pvt. Ltd. is a loss making company and hence valuation of shares of BEC Industrial Investment Company Private Limited @ Rs. 1195/- per share against face value of Rs 100 per share was not reasonable. Further it was observed that the assessee himself admitted that it was fixed mutually among the buyers and the assessee which proves that there was no basis for the same. The A.O.

adopted the scientific formula being NAV method for valuing the shares. The A.O. is duty bound to check the valuation and to tax correct income. The ld. CIT(A) accordingly held that the A.O. has rightly taxed the income of Rs.20,25,720/- under the head 'Income from other sources' as unexplained income and the learned CIT(A) upheld the assessment order dated 20-12-2010 passed by the AO u/s. 143(3) of the Act, vide appellate order dated 16.12.2011 passed by learned CIT(A).

6. Aggrieved by the appellate order dated 16.12.2011 passed by the ld. CIT(A), the assessee filed second appeal with the Tribunal.

7. The ld. Counsel for the assessee submitted that the assessee has sold 2040 equity shares of face value of Rs. 100/- per share in M/s BEC Industrial Investment Company Pvt. Ltd. to BAT Enterprises Ltd. @ Rs. 1195/- per share. The A.O. adopted the value of sale per share at Rs. 202/- based upon the Net asset Value (NAV) and the balance income has been treated as unexplained income under the head 'Income from other sources' and brought to tax as such. The ld. Counsel took us through the orders of the ld. CIT(A) and submitted that the ld.CIT(A) has not considered the arguments raised by the assessee in proper perspective. The ld. Counsel contended that it is mutual agreement between the buyer and the seller and the price was fixed at Rs. 1195/- per share of BEC Industrial Investment Company Private Limited. The ld. Counsel submitted that BEC Industrial Investment Co. Pvt. Ltd was holding 100% shares in BEC Chemicals Private Limited who has factory at Roha and also having turnover of more than Rs. 10 crores and is an EOU unit. The ld. Counsel submitted that the valuation of shares of BEC Chemicals Pvt. Ltd., which is also having factory at Roha, as per the book is Rs. 562/- per share and if depreciation is not considered, the book value comes to Rs. 1406/- per share, as on 31<sup>st</sup> March, 2007. It was submitted that the above valuation does not include increased valuation of land and building

held by the said BEC Chemicals Private Limited as also goodwill of the said company. The ld. Counsel drew our attention to paper book page No. 5 filed with the Tribunal whereby a letter dated 29<sup>th</sup> October, 2010 addressed by the assessee to the A.O. wherein detail explanations was given by the assessee to justify the valuation of shares . The ld. Counsel also took us through the audited accounts of BEC Industrial Investment Co. Pvt. Ltd. and the BEC Chemicals Pvt. Ltd. as on 31<sup>st</sup> March, 2007. The share capital of BEC Industrial Investment Co. Pvt. Ltd. is Rs. 70 lakhs while the reserves and surplus is Rs. 3.23 crores. The ld. Counsel also took us through paper book page 108 wherein the calculation of book value of BEC Chemicals P. Ltd. is worked out which comes to Rs. 562/- per share of Rs. 100/- face value and market value of fixed assets such as land and building was not considered. It was also submitted that the assessee has entered into share purchase agreement dated 6<sup>th</sup> March, 2007 whereby the sellers have agreed to sell their equity shares at an agreed price of Rs.1195/- per share, which is placed at paper book page 57 to 79. The ld. Counsel also drew our attention to the share transfer form which is placed at paper book page 80 & 81 wherein the assessee has transferred 2040 shares of BEC Industrial Investment Company Pvt. Limited to BAT Enterprises Limited for a total consideration of Rs. 24,37,800/-. The consideration was received by way of cheque, the photocopy of the same is placed at paper book page 83. The confirmation letter from M/s BAT Enterprises Ltd. having confirmed the purchase of 2040 shares of Rs. 100/- at the price of Rs. 1195/- per share by the assessee is placed at paper book page 85. The Board Resolution passed by the BAT Enterprises Limited is also placed at paper book page 86 approving the purchase of 2040 shares of BEC Industrial Investment Company Private Limited. The ld. Counsel submitted that there is no provision under the Act to substitute full value of consideration. Section 48 of the Act clearly defines that the full value of the consideration i.e. actual sales consideration should be taken for the purpose of computation of capital gain. It was further submitted that



assessment has been framed in the case of Mr. Satish Amritlal Shah for the assessment year 2007-08 wherein he also sold 1665 equity shares of BEC Industrial Investment Company Private Limited under the share purchase agreement dated 06-03-2007 @ Rs.1195/- per share and there is no addition made by the Revenue and capital gains declared have been accepted by the Revenue in the assessment framed in the case of Mr. Satish Amritlal Shah u/s 143(3) of the Act. The assessment order dated 20-08-2009 passed in the case of Mr Satish Amritlal Shah for the assessment year 2007-08 u/s. 143(3) of the Act has been placed at paper book page 96 to 101. Similarly, it was submitted that assessment has been framed in the case of BAT Enterprises Ltd. for the assessment year 2007-08 u/s 143(3) of the Act whereby no additions have been made by the Revenue.

8. The ld. D.R., on the other hand, relied upon the orders of the authorities below.

9. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee is a shareholder of the company namely BEC Industrial Investment Company Limited along with his family members holding in aggregate 5000 equity shares of BEC Industrial Investment Company Private Limited of face value of Rs 100 each of which 2040 equity shares were held by the assessee . Thus, the assessee family member also hold equity shares in the said company and aggregate shareholding of the family is 5000 equity shares of face value of Rs.100 each in BEC Industrial Investment Company Private Limited out of the total shares being 35000 equity shares issued by BEC Industrial Investment Company Private Limited. Out of the shareholding consisting of 5000 equity shares of BEC Industrial Investment Company Private Limited , the assessee holds 2040 equity shares jointly with Mrs. Shantaben Amritlal Shah , Mrs Shantaben Amritlal Shah holds 1295 equity shares jointly with Mr. Amritlal

T. Shah i.e. the assessee , while Mr Satish Amritlal Shah holds 1665 equity shares jointly with Mr. Amritlal T. Shah i.e. the assessee in BEC Industrial Investment Company Private Limited. The assessee had sold 2040 equity shares of face value of Rs. 100/- per share of BEC Industrial Investment Company Private Ltd. to BAT Enterprises Ltd. @ Rs. 1195/- per share whereby the assessee has received Rs. 24,37,800/- as sales consideration and the long term capital gain was worked out as per provisions and scheme of the Act and the same was invested by the assessee in REC Bonds claiming exemption u/s 54EC of the Act whereby long term capital gain declared in the return of income was at Rs. Nil. The assessee along with his family members namely Mrs Shantiben Amritlal Shah and Mr Satish Amritlal Shah entered into two share purchase agreements dated 06-03-2007 and 07-04-2007 with BAT Enterprises Limited and others which are placed in the paper book page 57-79 whereby the assessee and his above family members agreed to sell the equity shares of BEC Industrial Investment Company Private Limited at Rs. 1195/-per share to BAT Enterprises Limited. The said valuation is based upon the price mutually agreed and negotiated between both the parties i.e. the willing buyer and the willing seller and vide these share purchase agreements it was agreed to sell share holding in BEC Industrial Investment Co. P. Ltd. @ Rs. 1195/- per equity share to BAT Enterprises Limited. Further it is on record that BEC Industrial Investment Co. P. Ltd. is a 100% holding company of BEC Chemicals Private Ltd. (page 24/paper book) and hence the valuation of share of the former depends on the valuation of the shares of later which value of shares of BEC Chemicals Private Limited has necessarily to be included for computing value of share of BEC Industrial Investment Company Private Limited which is 100% holding of BEC Chemicals Private Limited who was having a manufacturing unit at Roha and is an EOU unit , whereby the book value of the share of BEC Chemicals Private Limited , as per the books was Rs. 562/- per share as on 31st March, 2007 and if depreciation is excluded the book value comes to Rs. 1406/- per

share. This value is supported by the audited financial statement of BEC Chemicals Private Limited and the valuation details which are placed at page 7-55 & 108/paper book . The said valuation details states that goodwill of BEC Chemicals Private Limited is not considered in this valuation and also market value of land and building of BEC Chemicals Private Limited is also not considered while valuing the above price which is computed from the audited financial statements being NAV of BEC Chemicals Private Limited with or without depreciation. The copies of audited financial statements of BEC Chemicals Private Limited is filed by the assessee for the financial year 2006-07 which shows that share capital of BEC Chemicals Private Limited is Rs 70 lacs and reserves and surplus is Rs. 323.07 lacs as at 31-03-2007 as per audited financial statements of BEC Chemicals Private Limited The said valuation is not disputed by the Revenue. It is the say of the assessee that even market value of land and building held by the BEC Chemicals Private Limited is also to be factored while valuing BEC Chemicals Private Limited apart from goodwill of BEC Chemicals Private Limited. On perusal of the share purchase agreements dated 06-03-2007 and 07-04-2007, it clearly reveals that the assessee was Director of BEC Industrial Investment Company Private Limited and BEC Chemicals Private Limited on the date of sale of afore-stated and he resigned from directorship of these companies pursuant to sale of 5000 equity shares held by himself and his family members held in BEC Industrial Investment Company Private Limited which were sold to BAT Enterprises Limited which is borne out from clause 2.3(iv) of the share purchase agreement dated 06-03-2007 whereby Resolutions were also obtained from these companies accepting the resignation of the assessee as Director of these companies. The said share purchase agreement dated 06-03-2007 also stipulates that the assessee shall be relieved from the personal guarantees provided by him for working capital finance as well as term loan or any other personal guarantees' to Bank and financial institution in his capacity as a Director of these companies namely BEC Industrial Investment

Company Private Limited and BEC Chemicals Private Limited . Thus, in our considered view the entire transaction of sale of 5000 equity shares of BEC Industrial Investment Company Private Limited @ Rs. 1195 per shares by the assessee( out of total 5000 equity shares sold, the assessee selling 2040 equity shares) and his family members is a genuine and bonafide transaction which is to enable restructuring and re-aligning the shareholding pattern of these companies whereby the one shareholders group consisting of the assessee and his family members holding 5000 equity shares in BEC Industrial Investment Company Private Limited have sold and exited from the shareholding held by them in BEC Industrial Investment Company Private Limited in favour of BAT Enterprises Ltd. at a mutually agreed negotiated price between the willing seller and willing buyer to make an exit from the shareholding in BEC Industrial Investment Company Private Limited and its subsidiaries . The exit from the closely held company BEC Industrial Investment Company Private limited with its subsidiaries could in commercial parlance definitely command premium in addition to the normal price based on NAV as first of all the valuation of the subsidiary would get embedded in the price of share of BEC Industrial Investment company Private Limited and that valuation has to be done based on present value of enterprise and not necessarily the book value as represented by financial statements and also controlling premium is embedded in the price for the shares paid by acquiring shareholders to the selling shareholder group to vest/strengthen their control in the BEC Industrial Investment Private Limited which shall get embedded in mutually agreed negotiated price between the buyer and the seller, hence, under these circumstances and on analyzing the whole transactions in proper perspective , we have no hesitation in holding based on material on record that the entire transaction for sale of share represented through share purchase agreements dated 06-03-2007 and 07-04-2007 produced by the assessee is a genuine and bonafide transaction of sale of shares held by the assessee and his family members in BEC Industrial

Investment Company Private Limited to BAT Enterprises Limited and the assessee has rightly computed the capital gain in the return of income filed with the Revenue by taking actual sale consideration of 2040 equity shares @ Rs 1195/- per share as full value of consideration as contemplated u/s. 48 of the Act. The issue of shares by BEC Chemicals Private Limited to the promoters subsequently at face value at Rs 100 per shares is all irrelevant consideration having no bearing on establishing the genuineness and bonafide of transactions for sale and purchase of share executed by the assessee and his family members with BAT Enterprises Limited vide share purchase agreements dated 06-03-2007 and 07-04-2007. Similarly that the BEC Industrial Investment Company Private Limited and BAT Enterprises Limited has common address etc and the assessee could be able to manipulate the transaction are again having no relevance and are merely conjectures and conjectures . In-fact on perusal of share purchase agreement dated 06-03-2007 and 07-04-2007 will reveal that pursuant to these agreement, the assessee and his family members have agreed to shift the offices of their companies and concerns from IBI house by 30-4-2007 , clause 4.6 of the agreement dated 06-3-2007(page 65/paper book). Nothing incriminating has been brought on record by the Revenue and conjectures and surmises has no place while computing and bringing to tax income of the tax-payer within the chargeability to tax under the provisions and scheme of the Act . The Revenue has also accepted the capital gains based on actual sale consideration in the case of Mr Satish Amritlal Shah while framing assessment u/s 143(3) of the Act for the assessment year 2007-08 in the hands of Mr Satish Amritlal Shah wherein the said Mr. Satish Amritlal Shah also sold 1665 equity shares of BEC Industrial Investment Company Private Limited to BAT Enterprises Limited @ Rs 1195 per share vide share purchase agreement dated 06-03-2007 . The Revenue has also accepted the purchase of equity shares of BEC Industrial Investment Company Private Limited @ Rs 1195/- per share from the assessee and his family members vide share purchase agreement dated

06-03-2007 in the hands of BAT Enterprises Limited while framing assessment u/s 143(3) of the Act for the assessment year 2007-08 of BAT Enterprises Limited. The assessment orders are placed in the file w.r.t. Mr. Satish Amritlal Shah and BAT Enterprises Limited for the assessment year 2007-08. We do not find any reasons to interfere in the working of capital gains furnished by the assessee computed in the manner by taking actual sale consideration @ Rs.1195 per equity shares of BEC Industrial Investment Company Private Limited as full value of consideration as contemplated u/s. 48 of the Act. As such we set aside the orders of the Id. CIT(A) and the AO computing capital gains by adopting NAV @ Rs 202 per share and bringing to tax balance amount of Rs. 20,25,720/- as unexplained income under the head 'income from other sources' which in our considered view cannot be sustained in the eyes of law. We accordingly allow the appeal of the assessee as indicated above. We order accordingly.

10. In the result, appeal filed by the assessee in ITA No. 766/Mum/2012 for the assessment year 2008-09 is allowed.

Order pronounced in the open court on 22<sup>nd</sup> September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22-09-2016 को की गई ।

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **22-09-2016**

I

व.नि.स./ R.K., Ex. Sr. PS

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai