IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

Before: **Shri J. Sudhakar Reddy, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 880/Kol/2014
A.Y: 2010-11

M/s. Emami Infrastructure Limited	**Vs.**	**I.T.O., Ward 12(1), Kolkata**
PAN: AALCS5120P		
[Appellant]		[Respondent]

For the Appellant : Shri R.N. Bajoria, Sr. Counsel, ld.AR
For the Respondent : Shri Avinash Mishra, CIT, ld.DR

Date of hearing : 27-11-2017
Date of pronouncement : 28-02-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

This appeal by the Assessee is directed against the order dt. 03-03-2014 of the Commissioner of Income Tax (Appeals)-XII, Kolkata for A.Y 2010-11.

2. The only issue is to be decided as to whether the CIT-A justified in confirming the order of AO in determining the long term capital gain at Rs. 29,05,83,769/- against the claim of assessee as long term capital loss of Rs.25,05,20,775/- in the facts and circumstances of the case.

3. Brief facts of the case are that the assessee is a company. The assessee filed its return of income for the A.Y under consideration declaring total income at Rs.88,79,544/-. Notices u/s. 143(2) and 142(1) of the Act were issued. In response, the AR representing the assessee appeared and furnished requisite details and explanation in support of its claim. The AO determined the total income of the

assessee at Rs.29,99,30,657/- as against the Rs.88,79,544/- vide his order dt:30-03-2013 u/s 143(3) of the Act.

4. During the A.Y under consideration the assessee claimed long term capital loss on account of sale of 286329 equity shares of Zandu Realty Ltd as under:-

> *(2) Long term capital gain on sale of 286329 equity shares of M/s. Zandu Realty Ltd., on which STT has not been paid:-*
>
> | | | |
> |---|---|---|
> | *Sale consideration* | | *Rs. 60,12,90,900/-* |
> | *Less; Cost of acquisition* | | *Rs. 85,05,20,775/-* |
> | *Long term capital loss* | *(-)* | *Rs.25,05,20,775/-* |

5. On an examination of above, the AO was of the opinion that the said sale transaction was off market transaction, accordingly, the assessee was asked to furnish the explanation in respect of difference between at which rate shares were sold to its sister concern and its related party i.e. rate on sale transactions were made through stock exchange. In response to which, the assessee submitted its explanation through letter dt. 21-11-2012 by stating that the said 2,86,329 shares were sold to M/s. Emami Rainbow Niketan Pvt. Ltd which is 100% subsidiary of assessee's subsidiary, i.e M/s. Emami Realty Ltd in accordance with the decision on 23-03-2010 of the Board of Directors in accordance with the valuation report of M/s. SSKM Corporate Advisory Pvt. Ltd. Further, the AO verified the price of shares of M/s. Zandu Realty as on 31-03-2010 through the website of National Stock Exchange *hereafter in short as* NSE and found as under:-

Previous Closing	*Opening*	*High*	*Low*	*Closing*	*Average price*
3966.65	*3990.00*	*4044.00*	*3950.00*	*3965.00*	*3989.80*

6. The AO also found that the assessee had sold shares of M/s. Zandu Realty Ltd at the price ranging from Rs.6200 per share on 23-12-2009 to Rs.4390 share on 11.02.2010. Accordingly, show cause

notice dt:18-01-2013 was issued to assessee seeking explanation why the sale price per share of Zandu Realty Ltd should not be taken at Rs.3989.80 being the average price traded at NSE as on 31-03-2010 against sale price of Rs.2100 per share taken by the assessee. In response to which, vide letter dt:11-02-2013 the assessee submitted as under:-

"It has been submitted by the assessee company that market price of listed shares are driven by various market forces, some of which can be calculated while some others cannot be calculated. While referring to the sale price of a traded share over a period of time one should also notice the trend in the price of the share each day i.e. whether the trend is a falling trend or a rising trend and also how this price reacts to the investors activities on purchase and sale, number of shares traded in the market, Number of deliverable quantity of shares out of such traded quantity etc. After study of these factors only, one can make an estimate of expected price of a share on particular date and the said price would still to be an estimation and may vary from the real price in the actual market. The assessee has also submitted a calculation of estimated selling price of shares of Zandu Reality Ltd. as on 3.03.2010 claimed to be based on the following factors:-

(a) Everyday closing price
(b) Total traded quantity of shares on NSE everyday
(c) Deliverable quantity of shares out of total traded quantity of shares on NSE everyday
(d) Percentage of deliverable quantity of shares to traded quantity of shares everyday
(e) Percentage of traded quantity to total number of shares everyday
(f) Percentage change in rise from share of last close price
(g) Number of time change in price for 1% change of traded quantity

The said calculation has been made for the period from 21.1209 to 31.03.10. As per the basis of the said calculation of the assessee, the off-market sale price per share of Zandu Reality Ltd. has been computed at Rs.1418/-. It is noticed that the valuer M/s. SSKM Corporate Advisory Pvt. Ltd. has determined the price of Rs.2100/- as share value of Zandu shares. Therefore, there is a huge difference in the aforesaid two valuations/computations.

Further, the assessee company has also submitted the following explanation vide letter dated 20.03.2013 :-

"The provisions of Income tax act, as applicable during the assessment year under review, did not contain any provision for taxability of deemed capital gain in the hands of seller on sale of property except in case of an immovable property. Therefore to understand the applicability of provisions of deemed capital gains, if any, it will be worthwhile here to make a reference to provisions of erstwhile sec 52 of Income Tax Act which was omitted by Finance Act 1987 w.e.f. 01-04-1988 solely for the reason that the provisions contained in sec 52 were not appropriate and was against the various judicial pronouncements and therefore it was not a correct law. The said section contained provisions for taxation of deemed capital gain on transfer of a capital asset and various judicial precedents were given to settle the anomalies arising out of that section. These decisions laid down the principles of taxation of deemed capital gain which is discussed here in reference to the given case:

a. The Hon'ble Supreme Court in case of K.P. Varghese vs Income Tax Officer in {1981} 311TR 597 has held as follows:

"The provisions of deemed income can be invoked only where the consideration for transfer has been understated by the assessee or in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such understatement or concealment is on the revenue. It cannot be applied in case of an honest and bonafide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration."

b. Similar view was also upheld by Calcutta High Court in case of CIT', West Bengal vs Hari Charan Shyam Sundar Pvt. Ltd. in 159 ITR 703 (1986). in this case shares were sold at Rs. 120 per share by the assessee company to close relatives of its members and shareholders. However the AO held a view that fair market value of shares was Rs. 167 per. share and computed the capital gains accordingly by invoking provisions of sec 52 (2). However the Hon'ble High Court of Kolkota finally held that "there is no finding by any of the authorities that the assessee had actually received more as consideration than what the assessee had declared. The said section has no application in the case of honest and bonofide transaction. A transaction would be honest and bonafide where the consideration received by the assessee has been correctly declared or disclosed by him and there is no concealment or suppression of the consideration. If the Revenue could have established that the assessee has received more than it had declared, then the difference between the market value of capital asset sold and price received therefore of any portion of such difference might be assessed to tax depending upon the facts and circumstances of the case.

c. The above decision of the Apex Court was followed by High Court of Delhi in case of Commissioner of income Tax vs I.P.Chaudhari in [2010] 328 ITR 7 dated 16th August 2010; wherein the High Court held that in the given case the Assessing Officer could not estimate the sale consideration of transferred shares at a higher price because the Assessing Officer did not record any finding that consideration has been understated and the assessee had actually received more than what had been declared by him in the tax return.

In this case the assessee had sold equity shares of the face value of Rs. 800 each to his family members at Rs. 110 per share and the ITO estimated the sale consideration of those shares @ Rs. 230 per share by applying the provisions of sec 52. It may be noted that the sale of shares in this case was to the related parties of the assessee.

The facts of this case are squarely similar to those in our case.

d. Similar views were also held in the following cases; all of which referred the principle of taxation of deemed income laid down by the Apex Court in case of K.P. Varqhese (supra):

-High Court of Gujarat in case of CIT vs Mono G. Sarabhai in [1993]203 ITR 366 dated 29th January 1993 High Court of Delhi in case of ClT vs Gulshan Kumar [2002} 257 ITR 703 dated 3rd May 2002
-In this case the assessee have sold certain shares to his employees, dealers and close relations

e. Reliance is also placed on CBDT Instruction No. 648/C8DT dated 24-06-1974 (copy enclosed) directing the Assessing Officers to keep in mind the assurance given by the Finance Minister while introducing sec 52 in the Income Tax Act and that the provisions of said section shall not be invoked in case of bonafide transactions. The Minister of Finance had made the following observation in respect of the provisions of section 52(2) of the Act during his reply to the debate in the Lok Sabha at the time of clause by clause consideration of the Finance Bill, 1964:

"Today, practically every transaction of the sale of property is for much lower figure than what is actually received. The deed of registration mentions a particular amount, the actual money that passes is considerably more. It is to deal with these classes of sales that this amendment has been drafted - It does not aim at perfectly bona fide transaction but essentially related to the day-to-day occurrences that are happening before our eyes in regard to the transfer of property. I think, this is one of the key sections that should help us to defeat the free ploy of unaccounted money and cheating of the Government."

The principle of taxation laid down in aforesaid judgments is squarely applicable to the facts and circumstances of our case. We have not received anything directly or indirectly over and above the declared sale value of shares. The shares were sold to our subsidiary at a fair value as determined by the independent valuer. The shares were sold to our 100% subsidiary. Considering the trends of prices in stock exchange and also the volume of transactions; such quantity of shares could not have been sold through the stock exchange and if attempts were made to sell them through the brokers, the prices would have fallen drastically for which separate calculations and explanations is ready filed. Moreover by selling the shares in the open market the company would have lost control over the management of the company which is very important consideration.

It is reiterated that as per the income tax law as applicable for the year under assessment there is no provision of taxability of deemed capital gain on sale of capital asset being shares and that too when there is no case for consideration not recorded in the books."

The assessee company also relied upon the provisions of Section 45(2A) of the Act in respect of cost of acquisition of the said shares. The relevant portion of the submission dated 20.03.2013 of the assessee is as under ;-

"Sec 45(2A) of the Act deals with mechanism of computing profits or gains arising from transfer of shares held in dematerialized form. The said section clearly specifies that it will be applicable for computation of capital gains under sec 48 of the Act. Therefore profits and gains arising to the assessee i.e. Emami Infrastructure Ltd. from sale of shores of Zandu Realty Ltd. shall be computed as per provisions of sec 45(2A) read with section 48.

Sec 45(2A) states that in case of shares held in demat form; the cost of acquisition and period of holding shall be determined on FIFO basis and as per para 5(b) CBDT Circular No. 768 dated 24-06-1998; in case of multiple demat accounts FIFO method should be followed account wise. Thus in accordance with provisions of sec 45(2A) read with referred circular, the cost of acquisition of Zandu shares sold by Emami Infrastructure Ltd has been computed on FIFO basis after considering period of holding of Emami Ltd. eligible to us. Emami Ltd. had purchased 5,55,636 shares of Zandu Pharmaceutical Works Ltd. in its two demat account as follows:

Demat Account Nos.	*Number of Shares purchased*
A/c No 1201060001387516 (hereinafter Account 1)	*2,38,578*
Ac No 10026664 (hereinafter Account 2)	*3,17,058*

Out of 2,38,578 shares in Account 1; 1,13,733 shares were transferred to Account 2 on 15-10-2008 and hereafter purchases were made in Account 2 on and from that date. 1,11,134 shares of Zandu were sold from Account 1 on 23-12-2009 and remaining balance of 13,711 shares in Account 1 was transferred to Demat Account No. 1201060001730169 (hereinafter Account 3) of the assessee.

Demat Account 2 had received l,13,733 shares from Demat Account 1 and had market purchases of 3,17,058 shares totaling to 4,30,791 shares of Zandu which was transferred in its entirety to Demat Account (Account 3) of Emami Infrastructure Ltd.

Therefore Demat Account 3 had two credit entries on 29-12-2009 on account of shares received from two demat accounts of Emami Ltd. as stated above:

From Demat Account Nos.	*Number of Shares purchased*
A/c No 1201060001387516 (Account 1)	*13,711*
Ac No 10026664 (Account 2)	*4,30,791*

As per the circular referred above; when the date of credit of shares in an account is same; the shares which are credited first in the demat account shall be considered first for calculating profit / loss on sale of shares from such demat account. The said principle should hold good even in the case where shares credited first had been actually purchased at a date later than the date of purchase of those shores which are credited in the demat account later on. Thus in case of the assessee where shares from two demat accounts have been credited on the same date in its Demat Account 3; 13,711 shares credited first shall be considered for computation of profit/ loss on FIFO basis and 4,30,791 shares shall be considered later. Attention is invited to the fact that although date of acquisition of 13,711 shares is later than date of acquisition of 4,30,791 shares; 13,711 shares will be considered first because had there been a sale of shares in between the two credit entries on the same date; shares entered first before that sale would have been considered on FIFO basis for computing profit or loss. Thus profit/ loss arising on sale of shares of Zandu by the assessee has been calculated by applying FIFO method to each of the three demat accounts i.e Account 1, Account 2 and Account 3 and accordingly cost of acquisition of shares and period of holding of such shares has been determined."

7. The AO found the explanation offered by the assessee to the said show cause notice cannot be accepted and further opined, that there is a huge price variance between the quoted price in NSE and the off-market selling price shown by the assessee and held when the shares are traded in its stock exchange the best way to determine the selling price of a share is the price quoted in the stock-exchange.

Accordingly, long term capital gain is determined at Rs.29,05,83,769/- as against the claim of loss of Rs.25,05,20,775/- shown by the assessee in the return of income for the following reasons:

The above explanation of the assessee cannot be accepted due to the following reasons:-

i) In the case of shares listed in recognized Stock Exchange the market price as determined in the stock exchange is the fair market value of the shares on any particular given day. In this case average price of the shares of M/s., Zandu Reality Ltd. was Rs.3989.80 on 31.03.2010. Hence, fair market value of shares was Rs.3989.80 as on 31.-3.2010.

ii) It is noticed that in the case of take-over of the companies or for the buyback of shares as well, the price quoted on the stock exchange on a particular day is considered for giving an offer to the shareholders for purchase of their shares.

iii) It is further seen that the assessee company has sold these shares to its related party M/s. Emami Rainbow Niketan Pvt. Ltd. which is its 100% step down subsidiary. Hence, selling price of the shares of MI5. Zandu Reality Ltd. has not been at arms length price.

iv) The valuer M/s. SSKM Corporate Advisory Pvt. Ltd. had determined the price at Rs.2100 per share based on (a) discounting cash flow method (b) market quoted value method (c) underlined asset valiue method. The assessee has calcu1ated the expected price of the said shares at Rs.1418 in its arithmetical calculation based on various permutations and combinations. There is a huge variance between the valuation done by the valuer and the calculation done by the assessee. When the shares are traded in its Stock Exchange the best way to determine the selling price of a share is the price quoted in the stock-exchange.

v) The decisions in respect of Sec. 52(2) relied upon by the assessee are not relevant and applicable in the case of the "'assessee. The decisions relied upon are ill respect of sale transactions of immovable properties where there had been prevalence of undervaluation of sale consideration and there were dispute in respect of value of the property. However, in this case the shares quoted and traded in stock exchange have been sold by the assessee company arbitrarily at a very low price as compared to the pr ice quoted in the stock exchange and that too to a step-down subsidiary company.

vi) In the case of a transaction with an associated enterprise or a related party, the transaction should be at arms length price. In this case, there is a huge between the quoted price in NSE and the selling price off-market. Considering the above, the selling price of the shares M/s. Zandu Reality Ltd. as on 31.03.10 is taken at RS.3989.80 which is the fair market value of the aforesaid shares.

vii) As regards applicability of provisions of Sec 45 (2A) in the case of the assessee, it is seen the that shares of Zandu Realty Ltd. have been received by the assessee on demerger from the demerged company MI5 Emami Ltd. in terms of Sec 2(19AA) of the I.T.Act,1961. AS per sec 2(19AA) (iii), the property i.e. shares of Zandu Realty Ltd. has to be transferred at values appearing in the books of account of the demerged company immediately before the demerger. In this case, the shares were valued at Rs, 2975/ per share in the books of account of M/s Emami Ltd, immediately before the demerger. Hence , the cost of acquisition of the shares of M/s Zandu Realy Ltd. has to be Rs. 2975/- per share for the assessee company. In its computation of income submitted along with return of income, the cost of acquisition of the shares of Zandu Realy Ltd. has been shown at Rs. 2975/ cost of acquisition of the shares of Zandu Realy Ltd. has been shown at Rs. 2975/ share only. However, the assessee is now making a revised claim in respect of cost of acquisition of the aforesaid shares relying on the provisions of Sec 45 (2A). The claim of the assessee is misplaced and has no merit. Once the assessee is claiming the transfer of the said shares from the demerged company to the resulting company i.e. the assessee company as tax neutral as per section 47(vib) read with 2(19AA) r the provisions of section 45 (2A) have no applicability in the case of the assessee. Further, as per the provisions of sec 45 (2A) the transfer of shares held by the depository on behalf of the client will not be taxed in the hands of the depository but will be taxed in the hands of the beneficial owner of the said shares. In this case, the date of transfer has been claimed to be the appointed date as per the scheme of arrangement approved by the High Court. The cost of acquisition of the shares has to be the cost shown in the books of account of the

demerged company immediately before the demerger. The value of the said shares in the hands of the demerged company has been worked out at Rs. 2975/ share. Hence the cost of acquisition of 286329 shares of Zandu Realy Ltd. is taken at Rs. 85,18/11,675/- as shown by the assessee in its return of income.

In view of the above discussion, long term capital gain from the off-market sale of 286329 equity shares of M/s. Zandu Reality Ltd. is determined as under :-

Fair market value of 2,86,329 shares of Zandu Realty Ltd.= 2,86,329 x 3989.80 = Rs. 114,23,95,444/-
(as discussed above)
Less- Cost of acquisition as shown in return of income= Rs. 85, 18,11,675/-
Capital Gain = Rs. 29/05/83,769/-

Accordingly, long term capital gain is determined at Rs.29,05,83,769/- as against loss of Rs.25,05,20,775/- shown by the assessee in the return of income. "

8. Aggrieved by such order of the AO, the assessee challenged the same before the CIT-A and contended that the AO erred in computing long term capital gains (LTCG) on sale of 2,86,329 shares of Zandu Realty Ltd. at Rs. 29,05,83,969 by adopting Fair Market Value of the shares sold at Rs. 3989.80 per share being the average market price quoted on the Stock Exchange. The AO did not consider the FMV of Rs. 2100/- per share as determined by an approved valuer. The LTCG of Rs 29,05,83,969 computed by AO is against the provisions of the Income Tax Act in as much as the Act does not contemplate taxation of deemed capital gains on sale of shares. Further submitted the AO not accepted the provisions of sec 47(iv) only on the ground that the shares were sold to a step down subsidiary. The AO has taken the cost of acquisition of Zandu shares at an average price of Rs. 2975/ share instead of the actual date wise purchase cost. The finding of the AO is wrong in concluding that provisions of sec 45(2A) are not applicable to the case of assessee and denying the claim for computation of capital gains in accordance with provisions of sec 45(2A) of the Act.

9. The CIT-A considering the submissions of assessee confirmed the action of the AO by observing as under:-

I have considered the facts of the case, the material placed on record, the submissions of the AR and also have gone through the case laws relied by him. I have also considered the observation of the AO in the impugned assessment order and further submission of the AO. After going through the entire facts of the case and for the following reasons these grounds of appeal are decided against the appellant:-

i) The submission of the AR that if in the stock exchange, the shares of Zandu Reality Ltd were sold on 31.3.2010 then there would have been steep fall in the price of share is incorrect. There is separate provision for block deal of shares in stock exchange. As per the bye-law of stock exchange with the prior intimation to stock exchange the block deal of share can be transacted at the market rate prevailing on the date of deal. This provision of block deal applies even to the 'promoters share provided the share transfer is as per law. The question of valuing the shares as per valuation report arises only if the shares are not quoted on stock exchange. Hence, I am of the view that the shares were correctly valued by the AO by taking average purchase price of 'the share on stock exchange on the date of sale.

ii) In the case of Vodafone International Holding BV vs. Union of India 341 ITR 1 the Hon'ble Supreme Court has explained it's earlier decision in the case of McDowell & Company Ltd. reported in 154 ITR 148 and has held that there is no conflict between the ratio of McDowell viz-a-viz Azadi Bachao and Mathuram Agarwal. Accordingly the colourable device made with the object of avoidance of tax without any commercial substance not acceptable.

In the case of Sumati Dayal Vs. CIT 214 ITR 801, the Hon'ble Supreme Court has held that test of human probabilities is to be considered circumstances warrants so.

In the case of the appellant it is seen that it has acquired on demerger the shares of Zandu Reaiity Pvt. Ltd. @ Rs.2975/- and the average quoted price stock exchange on the date of sale to Emami Rainbow Niketan Pvt. Ltd. was Rs 3989.80. However, the appellant has sold the share @2100/-and has claimed in its return loss on sole of the shares of Zandu Reuiity Pvt. Ltd of Rs 29,05,83,969/-. The AR was not able to give any explanation about the financial compulsion of the appellant to sell the share of loss. The AR accepted the fact that sale consideration was not received immediately after sale. Hence, in view of the legal position discussed above, for this reason else the AO was fully justified in not accepting sale of shares of at Rs. 2100/- per share and reworking capital gain by taking sale price of Zandu Reality Pvt. Ltd share at Rs 3989.80 per share.

The decision of Delhi High Court in the case reported in 328 ITR 7 and 257 ITR 703 relied upon by the appellant company relates to sale of shares of a private limited company and in these cases shares were not sold tit less than purchase price on last day of accounting veer to claim the loss. These companies were also not listed on stock exchange. Furthermore, the decisions in the cases of CIT Vs. I.P. Choudhari 328 ITR 7(Delhi) and CIT Vs Late Gulshan Kumar through LR (2002 25T ITR 703(Del) dealt with the action of the Assessing Officer under sec. 52(2) of the Act as it stood then. The provisions of sec. 52 stand omitted w.e.f. 1.4.1988 by the Finance Act, 1987. In the appellant's case, the valuation of fair market value is supported by valuation report, whereas the Assessing Officer has adopted the value applying the market value quoted on the stock exchange as on the date of transfer, which on the facts and circumstances of the case is appropriate.

iii) The appellant has acquired the shares of Zandu Reality Ltd. on demerger of Emami Ltd. As per the AR, Emami Ltd. has acquired the shares of Zandu Reality Ltd at different rates on different dates. But it is not in dispute that average price per shares of Zandu Reality Ltd in the books of Emami Ltd comes to Rs. 2,975/- . The sub-section (iii) of section 2(19 AA) relied by the AR provides as under :-

(iii) The property and liabilities of the undertaking' or undertakings being transferred by the demerged company are transferred at Values appearing in its books of accounts immediately before the demerger."

From the bare reading of the above sub-section it is evident that the assets are deemed to be transferred at book value. Since in the present case, it is not in dispute ·that the Emami Ltd. has purchased the share of Zandu Reality Ltd @ 2975/- hence, the cost price in the case of the appellant will be Rs. 2975/- per share. As regard the applicability section 45(2A) read with CBDT Circular No. 768 dated 24.6.1998 and Circular No. 704 dated ----, relied upon by the appellant, I am of the opinion that the section and Circulars are applicable if the assessee has purchased shares from time to time at different rate. Since, in the instant case of the appellant, it has acquired all the shares of Zandu Reality Ltd at the time of demerger, hence the average price per share as per books of Emami Ltd has to be taken. Accordingly, this submission of the AR is also found to be unsupportive and hence liable to be rejected.

iv) The AR has not disputed that the appellant has not claimed the benefit of section 47 (iv) in its return of income but has claimed it by way of letter 10.12.2012 during the assessment proceeding. I am of the view that the claim of benefit of 47(iv) is a new claim. Hence in view of Hon'ble Supreme decision in the case of Goetze (India) Ltd. Vs. CIT 284 ITR 323 (SC), I am of the view that the AO has correctly not allowed the deduction under section 47 of the Act.

The AR has relied on number of decisions in supper of this contention, but the factual position of those cases differs from the case of the appellant because in the case of the appellant an altogether new deduction has been claimed by way letter dated 1 0.12.2012.

The Hon'ble Gujarat High Court has held in the case of Kalindi Investment P Ltd Vs. CIT 256 ITR 713 that the benefit of section 47 (iv) is not available on the transfer of shares by holding company to subsidiary of the subsidiary company. The relevant portion from the head note of the report is reproduced hereinafter:-

"The Legislative has taken case to provide in section 47 of the Income-tax Act, 1961, that certain transfers shall not be considered as transfers for the purpose of levy of capital gains. Section 47 of the Income –tax Act provides that transfer of a capital asset by a holding company to its Indian subsidiary company or by a subsidiary company to its Indian holding company is not be treated as a transfer for the purposes of capital gains. The "words" any transfer of a capital asset by a company to its subsidiary company" would according to the ordinary grammatical construction, contemplate only the immediate subsidiary company of the holding company as the holding company holds the share capital only of its immediate subsidiary company. The companies for the purpose of section 47(9v) and (v). The wider definition of a holding company with emphasis on "control" as the guiding factor is not adopted in clauses(iv) and (v) of section 47. It is specifically provided that the parent company or its nominees must hold the whole of the share capital of the company. The Legislature while enacting the Income-tax Act therefore made a clear departure from the definition of holding company as contained in the Companies Act. Hence, there is no justification for invoking clauses (c) of sub-section (1) of section 4 of the 1956 Act while interpreting the provisions of clauses (iv) and (v) of section 47."

Since in the case of the appellant, it has sold shores to Emami Rainbow Niketan Pvt. Ltd which is a subsidiary of Emami Realty Ltd a 100% subsidiary of the appellant company, hence the decision of Gujarat High Court in the case of Kalindi Investment P Ltd (Supra) is squarely applicable to the c:aseof the appellant. Section 47(iv) and (v) covers only the immediate subsidiary company of the holding company. The Hon'ble Gujrat High Court in the case cited supra has held that there is no justification for transplanting the definition of 'holding company' under the Companies Act into the provisions of section 47 automatically. Further, sections 47 A, 49(3) and proviso to sec. 47 (ivJ, (v), provide for withdrawal of exemption or non-availability of exemption in certain circumstances as below:

a. If at any time before the expiry of eight years from the date of transfer of a capital asset between holding company and its wholly owned subsidiary company, such capital asset is converted by the transferee- company into (or is treated by it as) stock-in-trade of its business.

b. The holding company ceases to hold the whole of the share capital of the subsidiary company before the expiry of the period of eight years as aforesaid.

c. The holding/subsidiary company transfers a capital asset as stock-in-trade after February 29, 1988. In such a case the transfer shell be regarded as "transfer" and will be taxed according to normal provisions of capital gains.

In the above noted two cases (i.e. 1 and 2), transfer of capital asset between holding and subsidiary company is chargeable to tax by virtue of section 47 A. In such a case, cost of acquisition in the hands of the transferee-company will be the cost for which the asset was acquired by it.

In the light of 1he above discussion, keeping in view the facts and circumstances of the case as well as the principle of law laid down by the Hon.ote Gujrat High Court cited supra, I am of the view that the Assessing Officer was justified in computing the long term capital gains on transfer of shares to the subsidiary company of the subsidiary of the appellant company by adopting the Zandu Reality Ltd share value at Rs. 3989.80 being average market value of the share on stock exchange on the date of sale of share by the appellant to Emami Rainbow Niketan Pvt. Ltd. The action of the Assessing Officer is, therefore, confirmed. The ground nos. 2 to 9 of appeal are accordingly decided against the appellant. "

10. Heard rival submissions and perused material on record. We find that the case of the assessee was that it sold equity shares of M/s. Zandu Realty to M/s. Emami Rainbow Niketan Pvt. Ltd, based on

the price of the shares determined by SSKM Corporate Advisory P.Ltd. M/s. Emami Rainbow Niketan is a 100% subsidiary of M/s. Emami Realty Ltd. M/s. Emami Realt Ltd is a 100% subsidiary of M/s. Emami Infrastructure Ltd, the assessee herein. Therefore, two issues arise for our adjudication. These are:-

a) The first issue is, whether there is a transfer of share in view of provisions of section 47(iv) of the Act.

11. Section 47 of the Act provides certain category of transactions, which are not regarded as transfer for the purpose of section 45 of the Act.

Transactions not regarded as transfer
Section 47(iv)(a), (b):
Section 47. Nothing contained in section 45 shall apply to the following transfers:-
(iv)any transfer of a capital asset by a company to its subsidiary company
(a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and
(b) the subsidiary company is an Indian Company.

b) The second issue is, if we come to conclusion that the transaction in question is not covered u/s. 47(iv) of the Act, then whether the computation of capital gains as made by the AO and confirmed by the ld. CIT(A) is correct or not and whether the AO can substitute the sale consideration of the shares sold with the F.M.V as determined by him?

12. If, we come to our conclusion that this is not transfer, than the assessee' s claim that it had incurred long term capital loss and the same has to be carried forward, cannot be allowed. Similarly, the capital gain computed by the AO based on fair market value computed by him and substituted for the sale consideration agreed to by the seller and buyer has to be cancelled.

13. We first consider whether there is a transfer, in view of section 47(iv) of the Act. The undisputed fact is that M/s. Emami Realty Ltd is a 100% subsidiary of M/s.Emami Infrastructure Ltd, the assessee herein. M/s.Emami Rainbow Niketan Pvt. Ltd is in turn a 100% subsidiary of M/s. Emami Realty Ltd. In other words, this is a second

step down 100% subsidiary of the assessee. The issue is whether the provisions of section 45(iv)(a)(b) is applicable to a second step down subsidiary. They are divergent views on this issue. The Hon'ble Bombay High Court in the case of Petrosil Oil Co.Ltd Vs. CIT reported in 236 ITR 220 (Bom.) held as under:-

"*In this case, the Income-tax Act nowhere defines what is a "subsidiary company". The Finance (No. 2) Act also does not define what is a "subsidiary company". There would be a dichotomy if the assessee-company were to be a subsidiary company of the U.S. company for the purposes of the Companies Act, but were deemed not to be a subsidiary of the U.S. company for the purposes of the Income-tax Act. I am in agreement with the view expressed by my brother Dr. Saraf J., that the meaning given to the term "subsidiary company" under section 4(1)(c) of the Companies Act must be imported into section 108 of the Income-tax Act. Of course, the further condition laid down under section 108(b) must also be fulfilled. Thus, a sub-subsidiary would be a subsidiary under section 108(b) if the whole of its share capital has been held by the parent company or its nominees throughout the previous year. 84. If that meaning is incorporated then it is very clear that the assessee is a subsidiary within the meaning of section 108(b) of the Income-tax Act. This is so because, admittedly, the U.S. company is a company in which the public are substantially interested and falls within section 108(a). A 100 per cent. owned sub-subsidiary of a 100 per cent. owned subsidiary would be a subsidiary within the meaning of section 4(1)(c) of the Companies Act and also within the meaning of section 108(b) of the Income-tax Act. The assessee fulfils the condition of section 108(b) inasmuch as throughout the previous year 100 per cent. of its share capital was held by the U.K. company. Throughout the previous year 100 per cent. of the share capital of the U.K. company was held by the U.S. company. The U.K. company is thus a nominee of the U.S. company. The assessee would thus be a subsidiary within the meaning of section 108(b). In this view of the matter, it is not necessary to consider the Petrosil Oil Company Ltd. vs Commissioner Of Income-Tax on 22 September, 1993 Indian Kanoon three other angles propounded by Mr. Dastur. 85. I am, however, unable to accept the view that for the purposes of Paragraph F not only the assessee but the parent company/companies must also be domestic companies. A reading of Paragraph F does show that the rates of tax applicable therein are applicable to a "domestic company". The reference to "domestic company" in the beginning is to the assessee. By virtue of section 2(6) (a) of the Finance (No. 2) Act, 1971, one has to go to section 108 of the Income-tax Act to determine whether a company is a company in which the public are interested. It is clear that section 108 of the Income-tax Act does not limit its applicability to a "domestic company". Section 108 does not provide in clause (a) that it is to apply only to a domestic company. On the contrary, it applies to "any" company. Similarly, clause (b) of section 108 does not provide that it applies to a subsidiary of a domestic company. Thus, under section 108(a) a company could be a company in which the public are substantially interested even though it is not a "domestic company". If that be so then a "subsidiary" under section 108(b) could be a "subsidiary" of a company which is not a domestic company. As stated above, the definition of a "subsidiary" under section 4(1)(c) includes a "sub-subsidiary". As stated above the definition of "subsidiary" under the Companies Act must be imported into the Income-tax Act. Thus, even a sub-subsidiary would be a "subsidiary" under section 108(b). Such "subsidiary" may be a "sub-subsidiary" of a company which is not a domestic company. That under section 108 a company need not be a domestic company is also clear from the circular of the Central Board of Direct Taxes and from section 2(17) of the Income-tax Act. The authority in Indo-Nippon Chemical Co. Ltd.'s case [1986] 161 ITR 635 (Bom), also supports this view. 86. Thus the Legislature was well aware that a company can be a company in which the public are substantially interested by being a subsidiary or a sub-subsidiary of a company which is not a domestic company. Knowing this the Legislature, in Paragraph F, has only provided that the assessee is to be a domestic company. If the intention of the Legislature was that not only the assessee but its parent company/companies should be domestic company/companies, then the Legislature would have had to specifically so provide. In that case the Legislature could not/would not have, by virtue of section 2(6) (a) imported section 108 of the Income-tax Act. In that case, the Legislature would have in clause I(1) of paragraph F provided words to the effect "where the company and its parent company/companies is/are domestic company/companies in which the public are substantially interested". The Legislature has purposely omitted to do so and the court cannot add words. 87. If it is held that the words "domestic company" in the opening part to clause I of Paragraph F govern the entire clause I, then there would be conflict between clause I and section 108 of the Income-tax Act. To avoid that conflict one would have to add words to section*

108(b) of the Income tax Act to restrict a subsidiary to be a subsidiary of a domestic company. Where the Legislature intentionally omits to do so, the court cannot add words. This is particularly so when it is possible to harmonise both, without addition of any words to either, if it is held that the parent company/companies need not be domestic company/companies. It is settled law that if two interpretations are possible, then the one which harmonises must be accepted. It will, therefore, have to be held that so long as the assessee is a "domestic company", it could be a company in which Petrosil Oil Company Ltd. vs Commissioner Of Income-Tax on 22 September, 1993 Indian Kanoon the public are substantially interested, even if the parent company/companies is/are not domestic company/companies. 88. In this view of the matter, it will have to be held that the assessee is domestic company in which the public are substantially interested Accordingly, the first question is answered as above. 89"

14. Applying the above decision of the Hon'ble Bombay High Court in the case of supra, we have to hold that the transaction in question cannot be regarded as transfer in view of provisions of section 47(iv) of the Act, as it is a transfer of capital asset by a company to its subsidiary company and as a second step down 100% subsidiary company is also as subsidiary of the assessee company under the Companies' Act 1956 as the term 'subsidiary company' has not been defined under the Income-tax Act, 1961.

15. Hon'ble Gujarat High Court in the case of Kalindi Investments Pvt. Ltd reported in 256 ITR 713 held as follow:-

"The Legislative has taken case to provide in section 47 of the Income-tax Act, 1961, that certain transfers shall not be considered as transfers for the purpose of levy of capital gains. Section 47 of the Income –tax Act provides that transfer of a capital asset by a holding company to its Indian subsidiary company or by a subsidiary company to its Indian holding company is not be treated as a transfer for the purposes of capital gains. The "words" any transfer of a capital asset by a company to its subsidiary company" would according to the ordinary grammatical construction, contemplate only the immediate subsidiary company of the holding company as the holding company holds the share capital only of its immediate subsidiary company. The companies for the purpose of section 47(9v) and (v). The wider definition of a holding company with emphasis on "control" as the guiding factor is not adopted in clauses(iv) and (v) of section 47. It is specifically provided that the parent company or its nominees must hold the whole of the share capital of the company. The Legislature while enacting the Income-tax Act therefore made a clear departure from the definition of holding company as contained in the Companies Act. Hence, there is no justification for invoking clauses (c) of sub-section (1) of section 4 of the 1956 Act while interpreting the provisions of clauses (iv) and (v) of section 47."

16. This judgment was followed and applied by the ld. CIT(A). If the above proposition of law laid down by the Hon'ble High Court of Gujarat is applied to the facts of this case, then we have to come to our conclusion that the transaction in question does not fall within the ambit of provisions of section 47(iv) of the Act.

17. After going through the two judgments referred above, we prefer to follow the decision of the Hon'ble High Court of Bombay in

the case of Petrosil Oil Co. Ltd as in our view, a second step down 100% subsidiary is also covered by the provision of Section 47(iv) of the Act, as this is the letter and spirit of the enactment.

18. Hence, respectfully following the decision of the Hon'ble High Court of Bombay in the case of supra, we hold that the transaction of sale of shares of M/s. Zandu Realty by the assessee to M/s. Emami Rainbow Niketan Ltd is not regarded as a transfer in view of Sec.47(iv) of the Act. Hence, the question of computing either capital loss or capital gain does not arise. Thus, the assessee is not entitled to carry forward the capital loss of Rs.25 crores as claimed. Therefore, the ground nos. 2 & 3 raised by the assessee in the appeal are dismissed and Ground No. 4 is allowed.

19. As we have held that the transaction in question is not a transfer, we do not adjudicate the issue as to whether the AO can substitute the sale consideration of shares with F.M.V as computed by him, it would be an academic exercise.

20. In the result, the appeal of the assessee is allowed in part.

Order pronounced in the open court on 28-02-2018

Sd/-	Sd/-
J. Sudhakar Reddy	**S.S. Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dated :28-02-2018

PP(Sr.P.S.)
Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Emami Infrastructure Limited, Emami Tower, 687 Anandapur, Kolkata-107.
2 Respondent/Revenue : The ITO, Ward 12(1), Aaykar Bhawan P-7, Chowringhee Square, Kolkata-69.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr.PS/H.O.O
ITAT Kolkata