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

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 2145/Kol/2014

Assessment Year : 2011-12

Electrocast Sales India Ltd. [PAN: AAACE 5671 N] (Appellant)	-vs-	DCIT, CC-XXI, Kolkata (Respondent)

For the Appellant : Shri Ravi Tulsiyan, FCA

For the Respondent : Shri S. Dasgupta, Addl. CIT (DR)

Date of Hearing : 28.02.2018

Date of Pronouncement : 09.03.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals), Central-II, Kolkata [in short the ld CIT(A)] in Appeal No.38/CC-XXI/CIT(A)C-II/14-15 dated 22.12.2014 against the order passed by the DCIT, CC-XXI, Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 13,03.2014 for the Assessment Year 2011-12.

2. The first issue to be decided in this appeal is as to whether the action of the revenue in not granting the benefit of brought forward losses of amalgamating company in the hands of the amalgamated company in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee company filed its return of income for the Asst Year 2011-12 on 20.9.2011 declaring total income of Rs 4,86,02,986/- under the normal provisions of the Act. and Rs 4,29,19,975/- u/s 115JB of the Act. Later a revised return of income was filed on 30.3.2013 declaring total income of Rs Nil after

claiming set off of brought forward business losses and brought forward short term capital losses. The assessee company is a non-banking finance company (NBFC). During the year under consideration, by virtue of the order of the Hon'ble Calcutta High Court dated 6.10.2010 , the following six companies with unabsorbed capital and business losses as detailed below were merged with the assessee company w.e.f. 1.4.2010 :-

Sl No.	Name of the amalgamating company	Unabsorbed Short-Term Capital Loss (Rs.)	Unabsorbed Long-Term Capital Loss (Rs.)	Unabsorbed Business loss (Rs.)
1.	Celluor Vyapaar Ltd.	4,94,00,000/-	1,73,560/-	1,29,706/-
2.	Ramoli Vinicom (P) Ltd.	2,66,00,000/-	41,078/-	-
3.	Gagan Vintrade (P) Ltd.	-	4,20,146/-	745/-
4.	Nutshell Holdings (P) Ltd.	44,123/--	-	
5.	Greenfield Techno Services (P) Ltd.	2,66,00,000/-	-	5,33,123/-
6.	Saptarshi Vinimay Pvt. Ltd.	-	-	-
	TOTAL	**10,26,44,123/-**	6,34,784/-	**6,63,574/-**

The assessee vide its revised return claimed unabsorbed short term capital loss of Rs 4,86,48,349/- and unabsorbed business loss of RS 4,95,893/- incurred by the amalgamating companies. The ld AO in the course of assessment denied the set-off and carry forward of losses by invoking the provisions of section 79 of the Act. In the course of appellate proceedings by the ld CITA, the assessee submitted that section 79 of the Act was not applicable to the assessee's ase. Reliance in this regard was placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs Select Holiday Resorts (P) Ltd reported in 35 taxmann.com 368 (Del HC). The said contention was accepted by the ld CITA. However, the claim of carry-forward and set-off of losses was denied on the ground that the amalgamating companies in the instant case did not own an 'industrial undertaking' as defined u/s 72A of the Act. Aggrieved, the assessee is in appeal before us on the following grounds:-

1. *That the learned Commissioner of Income Tax (A), Central-II, Kolkata, was not justified in dismissing the claim of set-off of brought forward loss of Rs.*

4,95,893/- against Current Year's Business Income though it was accepted that section 79 of Income Tax Act, 1961 is not applicable.

2. *That the learned Commissioner of Income Tax (A), Central-II, Kolkata was not justified in dismissing the claim of set-off of brought forward Short Term Loss of Rs. 4,86,48,349/- against Current Year's Short Term Capital Gain and to carry forward balance Short Term Capital Loss of Rs. 5,39,95,774/-*

4. We have heard the rival submissions and perused the materials available on record including the various paper books of the assessee. The contents of the paper books are as under:-

a) Scheme of Amalgamation approved by the Hon'ble Calcutta High Court vide its order dated 6.10.2010 – Enclosed in Pages 4 to 32 of PB;

b) Letters to the respective AOs for surrender of PAN of amalgamating companies – Enclosed in Pages 33 to 37 of PB;

The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the provisions of set-off of losses of amalgamating companies in the hands of the amalgamated company are available in section 72A of the Act. The Provisions of section 72A of the Act mandates the enterprise , whose loss is to be set off with the merged entity , to own an 'industrial undertaking' . In the instant case, admittedly, the amalgamating companies did not own any industrial undertaking. It is not in dispute that the assessee had not complied with the provisions of section 72A of the Act. In this regard, the ld AR placed heavy reliance only on a particular clause provided in the scheme which allowed the accumulated losses of amalgamating companies for all purposes shall get carried forward and get vested with the amalgamated company and that such scheme of amalgamation in accordance with sections 391 to 394 of the Companies Act, 1956 were duly approved by the Hon'ble Calcutta High Court vide its order dated 6.10.2010 with effective date from 1.4.2010 and because of the said order, it is the argument of the ld AR that the order of the

Hon'ble Calcutta High Court supercedes the provisions of the Act herein. For the sake of convenience, the relevant clause in the scheme of amalgamation is reproduced hereunder:-

> ***10. CONDUCT OF ACTIVITIES TILL EFFECTIVE DATE :***
>
> *10.1. With effect from the Appointed Date and up to the Effective Date :*
>
> *i. …….*
> *ii. …….*
> *iii. All profits or income accruing or arising to the Transferor Companies or expenditure or losses arising or incurred by the Transferor Companies including accumulated losses shall for all purposes be deemed to have accrued as the profits or income or expenditure or losses, as the case may be, of the Transferee Company.*
>
> *(Underlining provided by us)*

The ld AR placed reliance on the following decisions in support of his contentions:-

a) Hon'ble Gujarat High Court in the case of Wood Polymer Ltd reported in 109 ITR 177 (Guj)

b) Hon'ble Bombay High Court in the case of Casby CFS (P) Ltd reported in 231 Taxman 89 (Bom)

c) Hon'ble Supreme Court in the case of J.K.(Bombay) (P) Ltd vs New Kaiser –I-Hind Spg.& Wvg.Co. reported in 1970 AIR 1041 (SC) dated 22.11.1968

d) Hon'ble Madras High Court in the case of Pentamedia Graphics Ltd vs ITO reported in 236 CTR 204 (Mad)

e) Co-ordinate Bench of this Tribunal in the case of Vivada Chemicals Pvt Ltd vs DCIT in ITA No. 1764/Kol/2014 dated 18.12.2014

f) Co-ordinate Bench of this Tribunal in the case of ITO vs Purbanchaal Power Co. Ltd in ITA No. 201/Kol/2010 dated 17.7.2014.

4.1. The ld AR argued that the Union of India is made a party in the said scheme of arrangement, meaning thereby, that all the central government regulatory authorities had a right to object to the scheme of merger before the Hon'ble High Court before the merger. In the instant case, the income tax department , who is part of Union of India, had not filed any objections before the Hon'ble High Court objecting to the merger. Hence the department cannot object to the same at this point of time while implementing the said order of merger. In case if the income tax department is having any grievance from the order of merger approved by the Hon'ble High Court, it is entitled to contest the same in higher forum , but cannot take a different stand while implementing the said order.

4.2. In response to this, the ld DR argued that admittedly the assessee had not complied with the provisions of section 72A of the Act and that the losses arising out of merger / amalgamations are covered only under section 72A of the Act and that when the same is not complied with, the assessee cannot be given the benefit of set off of losses of amalgamating companies. The ld DR also placed reliance on the decision of the Hon'ble Supreme Court in the case of Marshall Sons & Co. (India) Ltd vs ITO reported in 138 CTR (SC) 1.

4.3. In rejoinder, the ld AR argued that the said decision of Marshall Sons & Co supra had been duly considered by the Hon'ble Madras High Court in the case of Pentamedia Graphics Ltd vs ITO supra relied upon by the assessee herein and further stated that the same is in favour of the assessee.

4.4. We find that the scheme of amalgamation would be approved by the Hon'ble High Court only after ensuring that the same is not prejudicial to the interests of its members or to public interest. Hence the merger scheme approved by the Hon'ble High Court having in mind the larger public interest, cannot be disturbed by the revenue merely

because the assessee is not entitled for benefits u/s 72A of the Act. The expression 'Public interest' was discussed by the *Hon'ble Gujarat High Court in the case of Wood Polymer Ltd reported in 109 ITR 177 (Guj)* wherein the Hon'ble Court refused to sanction the scheme of amalgamation formulated solely for the purpose of avoiding taxes. It was held that :

> *"The court is charged with a duty, before it finally permits dissolution of the transferor-company by dissolving it without winding up, to ascertain whether its affairs have been carried on, not only in a manner not prejudicial to its members but in even public interest. The expression "public interest" must take its colour and content from the context in which it is used. The context in which the expression "public interest" is used, enables the court to find out why the transferor company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of the transferor company and why it was being dissolved by merging it with another company, That is the colour and content of the expression "public interest" as used in the second proviso to section 394(1) of the Act which have to be enquired into. If the only purpose appears to be to acquire certain capital asset through the intermediary of the transferor-company created for that very purpose to meet the requirement of law, and in the process to defeat tax liability which would otherwise arise, it could not be said that the affairs of the transferor-company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset through its medium, have not been carried on in a manner prejudicial to public interest. Public interest looms large in this background and the machinery of judicial process is sought to be utilized for defeating public interest and the court would not lend its assistance to defeat public interest. The court would, therefore, not sanction the scheme of amalgamation.´*

Hence it could be safely inferred that the Court would exercise due diligence and would conduct detailed enquiries before sanctioning the scheme. A scheme formulated for the purposes of tax evasion cannot be held to be in 'public interest' and hence the same cannot be sanctioned under the provisions of Companies Act, 1956. The fact that the Hon'ble Calcutta High Court had accorded its sanction to the scheme of amalgamation in the assessee's case implies that the same had been done by considering representations from the various fields and by duly considering the tax evasion point for income tax purposes. In this regard, we would like to place reliance on the functions, powers and discretions of the court that had been noted by Shri A .Ramaiya in the Companies Act, Part 2 at pages 2499 and 2500 in Point No. 6 incorporated hereunder:

"That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same."

4.4.1. Further we find that the provisions of section 394A of the Companies Act, 1956 reads as under:-

Notice to be given to Central Government for applications under sections 391 and 394 – The court shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections.

Hence if there be any objections for the income tax department , they could raise the same at that stage i.e prior to sanction of scheme by the court. Once the scheme is approved, it implies that the same has been done after duly considering the representations from the Government / revenue. Similar view was expressed by the *Co-ordinate bench of this Tribunal in the case of ITO vs Purbanchaal Power Co. Ltd in ITA No. 201/Kol/2010 dated 17.7.2014* wherein it was held that :-

From the above provisions of section 394A of the Companies Act, 1956, legal position enunciated in the decisions of Hon'ble Gujarat High Court in the case of Wood Polymer Ltd ., in re and Bengal Hotels Pvt Ltd in re, supra and Vodafone Essar Gujarat Ltd., supra, evidently makes the purpose clear that if the revenue wants to object to the proposed scheme of amalgamation, it has to do so in the course of proceedings before the High Court but before the final order is passed. Whenever such objections have been raised, these have been considered on merits by the concerned High Court and also incorporated the condition for safeguarding the interest of revenue in the very scheme. As a matter of public policy, once a scheme of amalgamation is approved by Hon'ble High Court no authority should be allowed to tinker with the scheme. In the present case of the assessee, neither the official liquidator nor the Regional Director nor Central Government raised any objection to the scheme of amalgamation. In such circumstances , we are of the view that the revenue has nothing to say at the time of approval of the scheme by Hon'ble High Court in the present case.

4.5. We find that the *Hon'ble Madras High Court in the case of Pentamedia Graphics Ltd vs ITO reported in 236 CTR 204 (Mad)* had categorically held that *once the scheme had been sanctioned with effect from a particular date by the Court, it is binding on everyone including the statutory authorities. It further held that having regard to the law declared by the Hon'ble Apex Court as to the effect of the scheme sanctioned by the Court, the only course open to the revenue would be to act as per the scheme sanctioned effective from 1st Jan 2004, which means that the tax authorities are bound to take note of the state of affairs of the applicant as on 1st Jan 2004 and a return filed regarding the same cannot be ignored on the strength of section 139(5) of the IT Act. The merits or otherwise on the returns filed , however, is a matter of assessment for the authorities to consider and pass order in accordance with law. It was further held that when the claim of the assessee in the appeal had already been granted, on a mere circumstance that the Department had not accepted the same and gone before the appellate forum does not mean that the scheme sanctioned would be of no consequence to the respondent. The respondent cannot ignore the order of this Court approving the scheme giving the effective date as 1st Jan, 2004.* Similar view, that once the court sanctions the scheme , the Income tax department will be bound by the same, including the appointed date and cannot review the same, has been held by the *Hon'ble Bombay High Court in the case of Casby CFS (P) Ltd reported in 231 Taxman 89 (Bom) dated 19.3.2015*

(underlining provided by us)

4.5.1. We also find that the *Hon'ble Supreme Court in the case of J.K.(Bombay) (P) Ltd vs New Kaiser –I-Hind Spg.& Wvg.Co. reported in 1970 AIR 1041 (SC) dated 22.11.1968* had held :

> *The Principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties ; it becomes binding on the company, the creditors and the shareholders and has statutory force , and therefore the joint-*

debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of sec. 391 of the Act, a scheme is statutorily binding even on creditors , and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration.

(underlining provided by us)

4.5.2. We find that the aforesaid observations of the Hon'ble Supreme Court had been followed by the *Hon'ble Bombay High Court in the case of Sadanand Varde and Others vs State of Maharashtra reported in 247 ITR 609 (Bom)* wherein it was held that :

"Once a scheme becomes sanctioned by the court, it ceases to operate as a mere agreement between the parties and becomes binding on the company, the creditors and the shareholders and has statutory operation by virtue of the provisions of section 391 of the Companies Act."

The said judgement of Hon'ble Bombay High Court further provided that an appeal, if any, against the order of amalgamation lies u/s 391(7) of the Companies Act, 1956 and the same cannot be agitated in any collateral proceeding. The relevant extract of the same is reproduced hereunder for the sake of ready reference :-

"We are of the view that the amalgamation, which has become final and binding, cannot be permitted to be challenged by the petitioners, without locus standi, in a collateral proceeding in the present writ petition. An amalgamation order can only be challenged under the Companies Act by an appeal under section 291(7) by any one of the parties, but no such appeal was ever filed."

In the instant case before us, the ld AR informed that the Income Tax Department , which is part of Union of India, had not filed any appeal u/s 391(7) of the Companies Act, 1956 against the order of amalgamation sanctioned by the Hon'ble High Court. This fact was not controverted by the ld DR before us.

4.6. The ld AR further argued that the scheme of amalgamation, as sanctioned by the Hon'ble Calcutta High Court, was effective from 1.4.2010 and the parties had acted according to the said scheme and cannot be subjected to reversal after a period of 7 years by virtue of the *principle of 'res judicata' , 'constructive res judicata' and 'acquiescence*'. In this regard, the ld AR placed reliance on the decision of *Hon'ble Supreme Court in the case of Forward Construction Co. and Others vs Prabhat Mandal reported in 1986 AIR 391 (SC)* wherein it was held that :

> *"The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided . It could only be deemed to have been heard and decided."*

We find that in the instant case, the income tax department had the opportunity to controvert the specific clause mentioned in para 10(iii) in the scheme of amalgamation , when the scheme was presented before the Hon'ble High Court for approval. Thus applying the principles of res judicata as explained by the Hon'ble Apex Court in the aforesaid case, the issue can be deemed to be heard and decided . Accordingly, the argument that the same cannot be agitated in appeal u/s 391(7) of the Companies Act, 1956 deserves attention and merit. *The English Court of Chancery in case of Henderson vs Henderson reported in (1843-60) All ER Rep 378 while construing Explanation IV to Section 11 of Code of Civil Procedure* quoted hereunder:-

> *The plea of res judicata applies, except in special case (sic), not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".*

4.7. It would be relevant to note tha the scheme of amalgamation was approved on 6.10.2010 and intimation to this effect was sent by the assessee to the income tax department in January 2011 (copies of letters enclosed in pages 33 to 37 of paper book)

. The same was acted upon by the assessee assuming acceptance from the income tax department since no appeal against the said judgement of the Hon'ble High Court was filed before the Hon'ble Supreme Court. Thus, at this juncture, if the revenue is allowed to challenge the same u/s 391(7) of the Companies Act, 1956, then it would be clearly barred by the doctrine of acquiescence and estoppel. In law, acquiescence occurs when a person knowingly stands by without raising any objection to the infringement of his or her rights, while someone else unknowingly and without malice aforethought acs in a manner inconsistent with their rights. As a result of acquiescence, the person whose rights are infringed may lose the ability to make a legal claim against the infringer, or may be unable to obtain an injunction against continued infringement. The doctrine infers a form of 'permission' that results from silence or passiveness over an extended period of time. Applying this principle to the instant case before us, the assessee probably paid a consideration for the set off of accumulated losses taken over from the amalgamating companies and accordingly the share exchange ratio (as approved under the scheme) was acted upon assuming acceptance from the income tax department. Thus by applying the Doctrine of acquiescence, the department would be now barred from raising an objection to the scheme. Further a claim of estoppel arises when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time. The second party may be said to have acquiesced to the claim, and thus to be estopped from later challenging it or making a counterclaim based upon the actions of the other party. In the instant case also, the fact of amalgamation was intimated to the income tax department 7 years back against which no appeal was preferred by them. Accordingly the claim of estoppel applies. These Doctrines of Estoppel and Acquiescence had been approved by the *Hon'ble Calcutta High Court in the case of Suresh Kumar Rungta and Ors vs Roadco India Pvt Ltd dated 22.9.2011* wherein the Hon'ble Calcutta High Court upheld the view of Trial Court wherein it was held that *" the present appellants / applicants had knowledge about the passing of order of winding up. They had knowledge or have had*

occasion to come before this Court earlier, and did not come because they have accepted legality and validity of amalgamation".

Applying the Doctrine of Acquiescence and Estoppel the Hon'ble Court held that *"It appears to us all the appellants have accepted the scheme of amalgamation and now these companies against whom relief is sought for are no longer in existence and they cannot be reverted back to their earlier position as by this time third parties right have been created by reallocation or reallotment of shareholding for there may be fresh subscribing. In true sense there has been sea change in the shareholding pattern of these companies. Therefore we dismiss the appeal.*"

4.8. In view of the aforesaid observations and findings in the facts and circumstances of the case, we hold that the accumulated losses of amalgamating companies, comprising of unabsorbed short term capital loss of Rs 10,26,44,123/- ; unabsorbed long term capital loss of Rs 6,34,784/- and unabsorbed business loss of Rs 6,63,574/- , would belong to the amalgamated company pursuant to clause in para 10(iii) of the scheme of amalgamation which was approved by the Hon'ble Calcutta High Court vide order dated 6.10.2010. Since the losses belonged to the amalgamated company i.e the assessee herein, the provisions of section 72 and section 74 of the Act would come into play with respect to set off of the same against the respective incomes of the assessee . In view of this, the provisions of non-compliance of section 72A of the Act as narrated by the ld CITA does not hold any water. Accordingly, the Grounds 1 & 2 raised by the assessee are allowed.

5. The Ground No. 3 raised by the assessee was stated to be not pressed by the ld AR during the course of hearing for which necessary endorsement was made in our file. Accordingly the Ground No. 3 raised by the assessee is dismissed as not pressed.

6. The last issue to be decided in this appeal is as to whether the ld CITA was justified in confirming the disallowance of Long Term Capital Loss of Rs 62,12,753/- without Securities Transaction Tax (STT) and not allowing the same to be carried forward, in the facts and circumstances of the case.

6.1. The brief facts of this issue is that the assessee incurred Long Term Losses of Rs 62,12,753/- on sale of 1066797 unquoted shares of M/s GK & Sons Pvt Ltd which were sold at Rs 2 per share on 31.3.2011. The assessee in support of its claim produced copy of invoice raised on the purchase i.e Malay Commercial Enterprises Ltd and Extracts of Register of Shareholders evidencing the transfer of shares in the name of the purchaser. The ld AO observed that the same company shares were sold by the assessee in May 2010 at Rs 13.50 per share. Accordingly, the ld AO challenged the sale price carried out on 31.3.2011 and held that the assessee failed to prove that Rs 2 per share constituted market value as on 31.3.2011. With these observations, the ld AO disallowed the claim of long term capital loss of Rs 62,12,753/- without STT in the assessment and did not allow the same to be carried forward to subsequent assessment years . This action of the ld AO was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us on the following ground:-

> *4. That the learned Commissioner of Income Tax (A), Central-II, Kolkata was also not justified in confirming the disallowance of Long Term Capital Loss of Rs. 62,12,753/- without STT and not allowing the same to be carried forward.*

6.2. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. The contents of the paper book are as under:-

a) Invoice raised on Malay Commercial Enterprises Ltd for sale of Shares – Enclosed in page 1 of PB ;

b) Relevant extracts of Register of Shareholders showing the transfer of shares in favour of Malay Commercial Enterprises Ltd – Enclosed in pages 2 & 3 of PB.

The ld AR argued that by submitting the aforesaid documents before the ld AO , the assessee had duly discharged its burden of proving the genuineness of the losses claimed by it in the return. The ld AO did not point out any discrepancy in the invoice or in the register of shareholders produced by the assessee. He further argued that there is no provision in the Income Tax Act to increase the consideration of assessee and hence the share sale consideration at Rs 2 per share disclosed by the assessee should be accepted by the revenue. He placed reliance on the decision of the Hon'ble Supreme Court in the case of K.P.Varghese reported in 131 ITR 597 (SC) in this regard. In response to this, the ld DR vehemently relied on the orders of the lower authorities. We find that it is not in dispute that the 100797 shares of GK Sons Pvt Ltd were held by the assessee for a period of more than 12 months from the date of its purchase. The purchase consideration thereon is not disputed by the revenue. We find that the assessee had produced the requisite evidences and documents in support of its claim and the sale consideration reported therein had been doubted by the ld AO. In such circumstances, it is incumbent on the part of the ld AO to make further investigations by cross verifying the same from the purchaser of shares i.e Malay Commercial Enterprises Ltd in the procedure known to law. Without doing so, he cannot simply disbelieve the consideration reported by the assessee and disallow the long term capital loss claimed thereon. There is no material brought on record by the revenue to controvert the claim of the assessee or any material that would show that the assessee had sold at a price higher than Rs 2 per share. In the instant case, if the revenue alleges that the assessee sale consideration of Rs 2 per share has been grossly understated, then the onus is on the revenue to prove with cogent materials that the assessee had indeed received higher sale price more than Rs 2 per share. In this regard, the *Hon'ble Supreme Court in the case of K.P.Varghese vs ITO reported in 131 ITR 597 (SC)* had held that : *"It is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the revenue and the second condition being as much a condition of taxability as the first, the burden lies on the revenue to show that there is an*

understatement of the consideration and the second condition is fulfilled. (underlining provided by us). To throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish a negative, that he did not receive any consideration beyond that declared by him." Though this decision was rendered in the context of erstwhile provisions of section 52(2) of the Act which was later omitted from the statute, the ratio decidendi would be applicable to the facts of the instant case. No enquiries whatsoever were conducted in the hands of the purchaser of shares. We find that the entire disallowance of long term capital loss had been made only out of surmises, suspicion and conjectures. In view of these findings in the facts and circumstances of the case, we hold that the assessee would be entitled to claim the long term capital loss of Rs 62,12,753/- and the same would be eligible to be carried forward to subsequent years for set off against long term capital gains u/s 74 of the Act. Accordingly, the Ground No. 4 raised by the assessee is allowed.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 09.03.2018

Sd/-	Sd/-
[A.T. Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 09.03.2018

SB, Sr. PS

Copy of the order forwarded to:
1. Electrocast Sales India Ltd., 19, Camac Street, Kolkata-700017.
2. DCIT, CC-XXI, Kolkata, Aayakar Bhawan Poorva, 110, Shantipally, 5th Floor, Kolkata-700107.
3. C.I.T(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches