IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 1180 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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COMMISSIONER OF INCOME TAX
Versus
NAMAN ASSOCIATES

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Appearance:
MR MR BHATT, SENIOR COUNSEL with MRS MAUNA M BHATT(174) for the Appellant(s) No. 1
MR SN SOPARKAR, SENIOR COUNSEL with MR BS SOPARKAR with MRS SWATI SOPARKAR(870) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 24/07/2020

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. The following questions of law are admitted as substantial question of law for consideration of this Court by order dated 17th April 2007, which reads thus :-

> *"Heard learned counsel for the appellant.*
>
> *The appeal is admitted in terms of the following questions:-*
>
> *"(A) Whether the Appellate Tribunal was right in law and on facts in deleting the addition of undisclosed interest income of the assessee in the proportion of investment in shares of Ashima Synthetics Ltd.?*
>
> *(B) Whether the Appellate Tribunal was right in law and on facts in holding that disallowance of losses treating them to be contrived losses cannot be disallowed in block assessment proceedings?"*
>
> *Issue notice to the other side. Paper book be filed within 3 months.*
>
> *List the appeal for final hearing after 3 months."*

2. The short facts of the case are as under:-

2.1 By this appeal under section 260A of the Income Tax Act,1961, (for short "the Act,1961") the revenue has challenged the order dated 28th February 2006 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench B in appeal being IT (SS) A. No.22/Ahd/2005 against block assessment order for the period from 1st April 1995 to 27th September 2001 passed under section 158BD r.w.s. 158BC of the Act,1961.

2.2 A search was carried out in the year 2001 on 27th September 2001 at office premises of the company Nirma Limited and office premises of associate companies of Nirma Management Services Pvt. Ltd of Nirma Group. The respondent assessee is one of the associate entities of the Nirma Group of cases.

2.3 Notice under Section 158BD read with Section 158BC of the Income Tax Act, 1961 (for short "the Act, 1961") was issued on 30th September 2002 for the block period showing undisclosed income of Rs. Nil as under :-

"2. The return of income for the block period was filed on 28-10-2002. Showing undisclosed income of Rs. Nil as under:-

Sr. No.	Assessment Year	Total income including undisclosed income u/s. 158BB	Returned/ Assessed as on the date of search/requisition
1.	1996-97	3819390	3819390
2.	1997-98	2661250	2661250
3.	1998-99	Nil	Nil
4.	1999-00	Nil	Nil
5.	200-01	1485850	1485850
6.	1-4-01 to 27-9-01	Nil	Nil

Total undisclosed income for the block period Rs. Nil."

2.4 The Assessing Officer, considering the common control of Shri K.K. Patel, Managing Director of M/s Nirma Limited over the transactions of its associate entities noted that during the course of search in Nirma Group of cases, in page-1 of worksheet of the file "Ashima xls" in floppy disk 2-2A seized from the residence of Shri Rahul Devi, erstwhile DGM Finance of the Nirma Ltd, wherein details of purchases of shares of Ashima Syntex Limited were noted. The total investment made in shares of Ashima Syntex Limited was Rs.3.29 Crore. It was noted by the Assessing Officer that on perusal of the worksheet that on the very specific dates on which investment in shares of Ashima Syntex Ltd. were made, equivalent investment in shares of Nirma Ltd. were also made. Therefore, the total purchases made of shares of Nirma Ltd. were also of Rs.3.29 Crore.

2.5 During the course of assessment proceedings of the Nirma Ltd., on 15th October 2003, it was noted that 5 entities of Nirma Group of cases, which are Nirchem Associates, Navin Associates, Neo Associates, Naman Associates and Nirman Associates have made investment of Rs.3.29 Crore in the shares of Ashima Syntex as noted in the worksheet in the seized floppy disk. According to the Assessing Officer investment of Rs.3.29 Crore in shares of Nirma Ltd. as noted in the seized floppy were all material transactions in these investments made by the Company Ashima Syntex Ltd.

2.6 It was further found from the page nos.1 and 2 of the worksheet-1 of file named 'NIR Ashima' in Floppy disk 2-2A, that the interest was calculated showing that the transactions were not in the nature of pure investments decisions but on these counter investments sharafi interest was calculated and the same was settled across entities.

2.7 The Assessing Officer further found that letter dated 24th January 2003 written to Ashima Syntex Ltd. under the signatures of Shri Rahul Devi for settlement of interest for mutual co-related investment made by the different entities, a demand for payment of Rs.3.11 lacs from the company Ashima Syntex Ltd. was made. The Assessing Officer therefore, issued notice to the respondent assessee and after considering the submissions of the assessee, he calculated interest income of Rs.30,11,500/- as per the seized paper, which was due to five entities including the respondent assessee and thereafter apportioned it on proportionate basis and as per such apportionment, the interest income attributable to the assessee amounting to Rs.6,07,214/- was considered as not disclosed in any of the returns filed by the respondent assessee during the block period and addition was made for such income in the total income of the assessee.

2.8 The Assessing Officer during the course of the assessment and scrutiny of the loose papers, files and floppies, books of accounts, shares and other documents found during the course of search from the residence of Rahul Devi erstwhile DGM Finance of the Nirma Ltd., found that there was booking of contrived losses due to transactions between associate entities within the Nirma Group which were done as per direction and control of Shri Rahul Devi by buying and selling entities.

2.9 It was found by the Assessing Officer that these losses were booked and claimed in the returns of income filed for the block period; however, no delivery of the physical shares was effected after more than a year of booking of the losses till the date of search i.e. 27th September 2001. The Assessing Officer after referring to the Annexure-A, seized from the premises of Nirma Managmenet Service Pvt. Ltd., pertaining to seizure of shares and debentures as documentary evidence establishing

that without actual transfer of shares and debentures individual and associate entities of Nirma Group of cases have claimed capital losses and it was further found that after a lapse of two years from the date of booking of these losses no entries were made in the memorandum of transfer of the shares.

2.10 The Assessing Officer after elaborately analyzing the evidence with regard to the contrived nature of losses, issued show cause notice to the respondent assessee and considering the reply, losses claimed in the return of income pertaining to shares of 12 companies amounting to Rs.2,97,27,995/- was disallowed.

2.11 The assessee being aggrieved and dissatisfied with the assessment order, preferred appeal before the CIT(A). The CIT(A) confirmed the order of Assessing Officer by observing as under :-
And para-2.7.5 on page 74 to 2.7.6 page 76.

> *"2.6.5 I have carefully considered the facts and the submissions made and do not find the arguments given to be acceptable for the following reasons:*
>
> *(i) This letter cannot be treated to be a mere draft only because it is addressed to the company for kind attention of Mr. Rajiv Shah who was their advisor. The A. O. has reported in appeal proceedings vide letter dtd. 18-11-04 that -*
>
> *"In the matter of confidential letter written by Shri Rahul Dev to Rajiv Shah of Ashima Syntex*

Ltd. based on which Rs. 30,11,703/- has been added as undisclosed income on proportionate basis in the hand of five persons, the submission of assessee that this was only a draft letter which have been found in this folder, which was prepared by Shri Rahul Devi in his computer were final formats of the letters. This is proved from the fact that many letters, in the physical form, which have been found and died during the search were exactly tailying from the letter prepared in the computerized folder RVD-1, RVD-11, dmat^1, NASIM^1, etc"

(ii) Although there is no mention of the subject in the letter, but the contents are clear and mere absence of a subject will not wash away these contents.

(iii) The reference of Rs. 30,52,400/- of payment made on 6-10-1995 is perhaps not reflected in the other pages because obviously the amount refers to communication of Ashima Syntex Ltd. to Nirma Group and not Shri Rahul Devi who in fact says that interest should computer at Rs.34,68,499/- instead.

(iv) It was for the appellant to explain the contents of the documents found in the CD obtained from an office of the group i.e. DGM

Finance residence and pertaining to its transactions, instead of the A. O. having to establish the same.

(v) There is no doubt that on verification from Ashima Syntex Ltd., the cross investment of Rs. 3.29,51,999)- by Nirma Group is admitted for which a payment of Rs.30.11,500/- has been made austensibly under the head brokerage which fact stands revealed now that it was hot brokerage. This is proved by the Ashima Syntex Ltd, not having raised any ground of appeal against the disallowance of the alleged brokerage payment to "Neo Soaps & Detergent P. Ltd." and "Niman Associates" totalling to Rs. 30,11,500/-. They have admitted as much in their letter dtd. 29-10-2003 to the A. O.

2.6.6 The appellant had made an investment of Rs. 66.47 lacs in the shares of Ashima Syntex Ltd. and accordingly proportionate interest of the sum of Rs. 30,11,500/- paid by Ashima Syntex Ltd. was towards such investment which receivable amount has not been shown in the I. T. Return by the appellant. Therefore, addition made by the A. O. is found to be justified and the same is upheld and ground of appeal No.6 is rejected."

2.7.5 I have carefully considered the facts of the case and the submissions made and I do not find

substance in the arguments advanced for the following reasons :

(i) I find that there is no contemporary evidence that there was any genuine transaction of sale of shares in as much as none of the brokers through whom shares were allegedly sold, received delivery of shares from the seller to hand over the same to the purchaser. No evidence has been given of such a transaction by the appellant.

(ii) Therefore, the allegation that the purchaser was required to get the change of names made at its own level does not carry weight because the genuine transaction of delivery to the broker has not taken place.

(iii) The appellant has also not been able to deny the facts given by the A.O. regarding Shri Rahul Devi's having a clear hand planning these financial transactions without any written directions from the members of the appellant. Therefore, sequence of events at related by the A. O. clearly shows that the losses claimed do not pertain to any genuine transactions but were only contrived.

(iv) It is at the same time clear that the

evidences submitted by appellant of postal return of letters sent to different companies for change of registration, or actual registration of shares in the purchaser's name are only subsequent to the search.

(v) Also the letter issued by Jethiben K. Patel Discretionary Family Trust to Naman Associates, directly certifying to the physical receipt of shares, is not the procedure which is normally followed by any broker of shares, as physical delivery is given by the seller of the shares to the broker of shares, as physical delivery is given by the seller of the shares to the broker who then delivers it to the purchaser. Here it is apparent that the planning has been done in a manner that entities of this group have purchased and sold shares from each other without following the normal channels of physical delivery of shares.

vi) There is also no contemporary evidences of directions by members of the AOP for making such sales which are obviously being done by Rahul Devi who was holdng the post of DGM Finance in "Nirma Limited".

The detailed explanation given does not change the fact that there is absence of contemporary evidences to witness any directions given for sale

of shares. The disallowance made by the AO. is therefore, found to be justified and is accordingly sustained.

2.7.6. This ground of appeal is thus rejected."

2.12 The assessee therefore, being aggrieved by the order passed by the CIT(A) filed Second Appeal before the Tribunal along with other associated concerns. The Tribunal by common order dated 28th February 2006 passed in IT (SS) A Nos.21 to 30/Ahd/2005 and IT(SS) A Nos.64 to 67/Ahd/2005 disposed of all the appeals filed by the assessee.

2.13 With regard to issue of addition in respect of treating interest amount in respect of Ashim Syntex Ltd., as undisclosed income, the Tribunal has held as under :-

"31. Next Ground raised against upholding following additions in respective appeals as undisclosed income on assumption, presumption and without any corroborative evidence in respect of Ashima Syntex Ltd. transaction as under :-

22/Ahd/2005	*:*	*Rs.6,07,214/-*
23/Ahd/2005	*:*	*Rs.5,91,594/-*
27/Ahd/2005	*:*	*Rs.6,03,013/-*
28/Ahd/2005	*:*	*Rs.5,95,430/-*

32. Brief facts are - during the course of search at the residence of Shri Rahul Devi, from the seized floppy a letter dated 24/01/98 alleged to

have been written by him to Ashima Syntex Ltd. for attention of their CA. Rajiv Shah and some interest calculation sheets were found. Copy placed at Page No 29 to 32 of the PB in case of Nirchem Associates ITA No.28/Ahd/2005, AO, held that from the perusal of the papers it is obvious that the cross investments were made by Nirma Group & Ashima Group in shares and NCDs and sharafi interest was calculated by Shri Rahul V. Devi as receivable at Rs.30,11,703/- by the Nirma Group. A., made an inquiry requiring information from Ashima Syntex Ltd., u/s. 133(6) of the Income Tax Act, wherein they informed that Shri Rajiv Shah (to whom the letter is alleged to have been written) has left the Company since last three years and the details are not available. It further stated as under. Moreover, they were able to lay our hands on the entries for two debit notes issued by Nirma Group of Companies. The said debit notes are around the same period. The papers which was communicated speaks about settlement of net amount of Rs 30.11,703/-. But the debit notes referable to that papers are for Rs.30,11,500/-, The said debit notes are debited in our books of accounts under Brokerage Account. Also, it may kindly be noted that a sum of Rs.61.75 lacs are disallowed and addes back in the computation of our total come out of brokerage expenses and the

said sum of Rs.61.75 lacs includes the amount of debit notes issued for brokerage for Rs 30.11.500/- Copy of account was enclosed. They have not undertaken any cash transaction with Nirma Group of companies at any point of time. All the transactions have been carried out through account payee cheques the transactions, the details of which are given in the debit notes are the only mansactions with the aforesaid companies. The copy of the account from the hooks of Ashima Syntex Ltd. reflected that the brokerage for atanging NCDS for them, totaling to Rs.30,11,500 /- as per the following details have been paid.

13/07/98 - Neo Soaps & Detergents Pvt. Ltd. - 5,11,500/-

13/07/98 - Nirman Soaps & Detergents Pvt. Ltd - 25,00,000/-

A.O. considered the amount of Rs 30,11,7038-as undisclosed interest income of the assessee in the proportion of investment in shares of Ashima Syntex Ltd by the five entities and the same was confirmed by CIT(A).

33. Learned counsel for the assessee contends as under:

(i) The note dated 24/01/98, which is alleged to be a letter written by Shri Rahul V. Devi to Ashima Syntex Ltd is a draft and the content of

the note self proves the same. The draft does not suggest the entity from whom and where the letter is written. It does not state normal salutation like Dear Sir/Madam etc. nor does it states reference or subject which is common for such correspondence. Even on appellant's inquiry with the officials of Ashima Syntex Ltd., it was stated that as per their record, they do not seem to have received any such communication.

(ii) The para-wise comments on the draft letter, as submitted to CITA) in appellate proceedings is as under:

Para 1 speaks about amount of payment made on 06.10.95 at Rs.30,52,400/- (this is not reflected as payment in any of the other papers referred to).

Para 2 refers to 'correct amount at Rs.34,68,499 balancing figure to tally total investment.' The said figure of Rs.34,68,499- in any way does not tally or reflect in the total investment of Rs.3,29,51,999/-, the details of Ashima shares purchased (as referred to in Annexure B1 & B2/1, page 29 & 30 of the paper book).

Para 3 refers to an interest differential of Rs.16,81,753/- which is nowhere reflected in the

other pages. Annexure B-2/1 refers to net interest to be received Rs.1,84,425/-.

Para 4 refers to interest at Rs.14,15,593/- logically appears to be difference between the amounts in para 3 and para 4, where it is stated that net amount as on 18.12.97 has been worked at Rs 30,11,703/-. Neither the date 18.12.97 nor the amount in any way tallies with the other pages.

After para-4, in bold letters it is stated that the set amount receivable on 27/01/98 is Rs.30,90,915/- after adding interest on Rs.30,11,703/- from 19/12/97. A.O. has totally relied on the words amount receivable Rs.30,11,703/- and has co-related the same with the receipt of Rs.30,11,500/- by Neon Soaps & Detergents Pvt. Ltd., and Nirman Soaps & Detergents Pvt Ltd., which has been accounted on 25/03/98 by the respective assesses.

Going by the same logic the amount which was at Rs.30,11,703/- on 18/12/97 and Rs.30,90,915/- on 27/01/98 would be about Rs.32,06,650/- on 25/03/98. But the amount accounted by Neo Soaps & Detergents Pvt Lid. and Nirman Soaps & Detergents Pvt. Lid. amounted to Rs.30,11,500/- on 25/03/98,

which clearly establishes that the letter dated 24/01/98 to Ashima Symex Ltd. alleged to have been written By Shri Rahul V. Devi was a draft only.

Without prejudice, in alternate it is submitted that when the Acts of the line opinion that Rs 30,11,703/- written in (draft) letter and receipt of Rs.30,11,500/- by Neo Soaps & Detergents Pvt. Ltd. and Nirman Soaps & Detergents Pvt. Ltd., are same, the said income has been offered by respective assesses in their assessments and the tax has been paid there and if they are different amount then there is no case of income. So in any case, there is no ease of undisclosed income.

Examining other seized papers, viz. Annexure-B1, B2/1, B2/2, where investment and interest calculations are reflected, it evident that Annexure-B1 refers to the specific dates on which investment in shares of Ashima Syntex Ltd., were made and the dates on which investment in shares of Nina were made. Number of days to 22/02/96 has been calculated and the products (Amount of investment X number of days up to 22/02/96) has been calculated. Annexure-B2/1 is an interest calculation on product and Ashima's investment where the net interest to be received Rs.1,84,425/- has been calculated. A.O.

has considered interest of Rs.30,11,703/- as undisclosed income, whereas the interest calculation sheet relied upon by the A.O. only refers to the net interest of Rs.1,84,425/- and therefore, there is no question of considering Rs.30,11,703/- as undisclosed income.

(iii) Presumption u/s. 132(4A) is not available to Ld. A. O. as the print outs taken from the floppy seized from the residence of Shri Rahul V. Devi and annexed to assessment order are not part of the satisfaction recorded. The papers referred have neither been found nor seized from the possession or control of your assessee. The floppy seized is too general an evidence and specifically the same have not been referred to in the satisfaction recorded.

Assuming such interest on notional basis on assumption conjecture and surmises definitely traveling much beyond the scope of Income Tax Act and the addition made by Ld. A.O. and confirmed by CIT(A) needs to be deleted.

34. Learned DR, on the other hand, supported order of lower authorities and contends that the transaction in shares of Ashima Syntex Ltd., have been admitted and some of the letters contained in the seized floppy were also found in physical

form and therefore the letter dated 24/01/98 to Ashima Syntex Ltd. in which it is stated that the net interest receivable is Rs.30,11,703/- is not a draft letter. The calculations related to Annexure-B1 Page-29 of Assessee's Paper Book which is Page-55 of Department Paper Book and in Annexure-B2/1 Page-30 of Assessec's Paper Book and Page-57 of Department Paper Book are representing different transactions.

35. Learned counsel for the assessee in reply contended as under:

(i) Ld. DR has made general mark that some of the letters contained in the seized floppy were also found n physical form to justify that the draft note dated 24.01.98 was in fact a letter issued to Ashima Syntex Ltd., without specifically-mentioning which letters contained in the floppy were fined in physical form. Neither AO nor CIT(A) has held the letter to be not a draft letter on the basis of the argument propounded by Ld. DR which has been raised for the last time before Hon'ble Tribunal and has no merits therein.

The appellant, in their submissions to AO and CIT(A), which have been summarized hereinabove, clearly furnished the reasons on the

basis of which, it has concluded that the note dated 24/01/98 was only a draft and not a letter actually written to Ashima Syntex Ltd.

(ii) As regards to the alternative contention, of the appellant that without prejudice only net interest of Rs.1,84,425/- only could have been considered as undisclosed income, Ld. DR's contended that the calculations referred to in Annexure-B1 and in Annexure-B2/1 represents different transactions, which is absolutely incorrect. In fact, the amount paid as referred to in column-2 of Annexure-B1 (Page-29 of the Paper Book) is the same as column-2 & 3 titled Nirma's investment and Ashima's investment referred in Annexure-321 (Page 30 of the PB) and therefore it is incorrect to state that the calculations as referred to in the said two popes represents the different transactions.

36. We have heard rival submissions and perused material available on record. It emerges from record that the assessees' group concern and Ashima Syntex Group concern had interse relationship in terms of financial dealings in shares, NCD, Sharafi interest etc. Floppy in question, in our opinion, gives gross calculation about the amount to be received and paid group as a whole and not of individual concern, more so, when the AO himself has given an observation

that transaction in respect of Neo Soaps & Detergents Pvt. Ltd, and Nirman Soaps & Detergents Pvt. Ltd., have been offered by the respective assesses in their assessment. In view thereof, we hold that alleged floppy contains cross calculation of units assessee group i.e. assessees mentioned above and Ashima Syntex Group. In view thereof, we hold that net different on the items product has to be held as undisclosed, therefore, we find merit in the alternative submission of the assess that net difference being Rs.1,84,425/-, which is mentioned in the paper itself being net interest to be received on product basis taking group as a whole, shall be held as undisclosed income. In view thereof, we hold that total addition to be sustained in this behalf is Rs.1,84,425/-, which shall be bifurcated in the hands of above assessee in proportion of investment of shares of Ashima Syntex Ltd. by these assesses, in view thereof, this ground is partly allowed in respect of these assesses."

2.14 The Tribunal with regard to the addition made on account of contrived losses booked through inter entity transactions has held as under :-

"42. We have heard rival submissions and perused material on record. It emerges from the record that copy of sale bills were received from

the brokers. Payment has been received by account payee cheques, delivery of shares were given to the buyer. In view of these facts, right in the property stands transferred. There is a difference between transfer of shares within the meaning of Companies Act and I.T. Act. Assessee having received full consideration of shares, there was extinguishment of the assessee's right in shares. We find merit in the arguments of the learned counsel for assessee that there may be various reasons for not transferring shares immediately, which are mentioned above and transactions were duly incorporated in the books, besides, the assessee has furnished evidences in respect of confirmations of purchases, group of shares subsequently transferred and in case of non-transfer lodging of complaints with SEBI, instances of shares sold by purchases through stock exchanges, offering of capital gains by the assessee in their return of incomes. In consideration of all these facts, we are of the view that assessee having duly incorporated all these share transactions in the capital accounts and offered capital gain thereof, this cannot be held to be undisclosed transactions and resulting losses as contrived losses that too in block assessment proceedings, only due to certain assumed irregularities on the part of revenue. Consequently, we hold that these losses cannot be

disallowed in block assessment proceedings, holding them to be contrived losses, therefore, claim of losses made in this ground are allowed in all these cases."

3. Mr. M. R. Bhatt, learned senior advocate appearing for the appellant – revenue submitted that the Assessing Officer and the CIT(A) have given cogent reasons, which were not considered by the Tribunal. According to Mr. Bhatt, the Tribunal has passed the impugned order in a very perfunctory manner without discussing in detail the submissions made on behalf of the revenue by accepting what is submitted on behalf of the respondent assessee in holding that the assessee having duly incorporated all the transactions in the shares in the capital account and offered capital gain thereof it cannot be held to be undisclosed transactions and resulting losses as contrived losses that too in the block assessment proceedings.

4. Learned senior advocate for the revenue submitted that the Assessing Officer in the assessment order has given detailed analysis of the evidence found during the course of search and thereafter has arrived at findings, which are rightly considered by the CIT(A) in the order by confirming the assessment order. However, the Tribunal without giving any cogent reason to reverse the findings of the Assessing Officer as well as CIT(A) deleted the disallowance of contrived losses claimed by the assessee.

5. It was further submitted that for the losses claimed in the returns of income for the A.Ys. 2000-01 and 2001-02 there was no contemporary verifiable evidence of having effected delivery of the shares pertaining to the share transactions done with other group

entities till date of search i.e. 27th September 2001. In such circumstances, the Assessing Officer and the CIT(A) have rightly disallowed the contrived losses claimed by the assessee in the return of income.

6. Learned senior advocate for the appellant further submitted that the Tribunal has recorded the following submissions made on behalf of the revenue.

> *"40. Learned DR, on the other hand contends as under:*
>
> *(i) All the shares and debentures were found at one place i.e. at the Office of Nirma Management Services Pvt. Ltd. at Kashmira Chambers, Ashram Road, Ahmedabad.*
>
> *(ii) All the shares found during the course of search and inventorised (Department Paper Book Page No.29 to 47) were not transferred in the name of transferee.*
>
> *(iii) The department has not made addition in cases where shares were not found transferred in the name of buyer, if sold recently. It is only where the longtime had elapsed to the date of transaction and still if the shares were not transferred in the name of buyer, the addition is made.*

(iv) Ms.Ulka S. Mehta, the broker has made a statement in the course of survey proceedings that no physical delivery of the shares were routed through her.

(v) Buyer and seller have not contacted the broker, but carried out the transaction directly. The transaction is not routed thourgh the stock exchange.

(vi) No proof of physical delivery of shares was found during the course of search.

Decision in case of Unique Invin Ltd. Vs. ACIT 74 ITD 43 (Cal.) was relied upon in which the issue of allowability of loss incurred on dealing in shares to/from sister concerns under the same management and carrying on their business from the same place has been discussed.

Decision in case of CIT Vs. Shekhawati Rajputana Trading Co. Pvt. Ltd., 236 ITR 950 (Cal.) is also relied upon wherein the loss on sale of shares by the Assessee Company to its Chairman was held to be not genuine.

Reliance is also placed on the decision in case of Madras Industrial Investment Corporation Vs. CIT 225 ITR 802 (SC) where it is stated that the loss incurred is an expenditure and therefore, the

losses from the share transactions would be covered under the amended definition of undisclosed income u/s.158B(b).

Ld. D.R. also stated that in alternate, if the transaction is held to be genuine, then the same may be set-aside to A.O. for verification of the rate at which the transaction has taken place as the aspect of valuation has not been considered by A.O. during the assessment proceedings."

7. The above submissions made on behalf of the revenue are brushed aside by the Tribunal in para – 42 of the impugned order. It was therefore, submitted that the impugned order of the Tribunal is perverse and liable to be quashed and set aside.

8. The learned senior advocate relied upon the following decisions in support of his submissions.

(1) *Commissioner of Income Tax Vs. Deepak Nitrite Limited reported in (2001) 247 ITR 362 (GUJ)*, it was contended that this Court while considering the ambit and scope of the powers under Section 256 of the Act, 1961 after considering the various decision of the Supreme Court has held as under :-

"31. From the decisions referred to above, in our opinion, the legal position seems to be fairly well-settled. But a pure finding of fact based on evidence cannot be made the subject-matter of reference to the High Court. Likewise, an

inference of fact, drawn from findings of fact also remains a question of fact and cannot be challenged before the High Court. But a pure question of law, unrelated to the facts, can always be challenged and the High Court can examine such a question in the exercise of its jurisdiction u/s.256. On mixed question of fact and law, whereas the finding of the Tribunal on facts found has to be treated as final, the legal effect of such finding is a question of law and can be reviewed by the High Court. Likewise, a finding on a question of fact is open to challenge if there is no evidence to support such finding or the finding is perverse or is such as could not have been arrived at by a reasonable man on the facts and in the circumstances of the case."

(2) *Glass Lines Equipments Co. Ltd. Vs. Commissioner of Income Tax, reported in (2001) 253 ITR 454.*

"7. It is true, as contended on behalf of the revenue, that the findings recorded by the C.I.T. (Appeals) and the Tribunal are based on facts and evidence on record, but on close reading of the order of the First Appellate Authority we find that he has misdirected himself in law while taking into consideration the affidavit filed by the Director of the Company. The C.I.T.(Appeals) for the purpose of upholding partial disallowance has relied upon one portion of the affidavit viz.

Where the assessee company has through its Director offered Rs.38,349/- for disallowance. As regards the balance portion the affidavit is categorical in terms and as can be seen from the extract reproduced hereinbefore, the assessee company has made a positive averment to the effect that all other items of expenditure are allowable, I.e. all other items of expenditure are relatable to setting up the plant and bringing fixed assets into existence and putting them into working condition. In none of the appellate orders, viz., those of the C.I.T.(Appeals) and the Tribunal we find any discussion in relation to this part of the affidavit. In fact, the order of the Tribunal is absolutely silent as regards the affidavit and there is no indication whatsoever in the order as to whether the Tribunal was even aware about the existence of the affidavit which was on record.

8. As laid down by the Supreme Court in the case of Mehta, Parikh & Co. (Supra) none of the authorities considered it necessary to cross examine the deponent with reference to the statement made in the affidavit, and hence, under these circumstances it was not open to the revenue to challenge the correctness of the statement made by the deponent in the affidavit. In other words, consequently, the assessee was entitled to assume that the authorities were

satisfied with the affidavit as sufficient proof on this point. In the present case, we find that C.I.T. (Appeals) while dealing with the affidavit has conveniently chosen to accept only one part of the statement which was in favour of the revenue and against the assessee while ignoring the rest of the portion wherein specific averments were made in relation to the balance items of expenditure.

9. In view of the settled legal position, it was not open to either C.I.T. (Appeals) or Tribunal to ignore a part of the contents of the affidavit. We are conscious of the fact that the findings recorded by the C.I.T.(Appeals) and the Tribunal are concurrent as regards the facts and evidence on record and but for the averments made in the affidavit which have been ignored, we would not have interfered with the said findings. It is well settled cannon of interpretation that a document has to be read as a whole : it is not permissible to accept a part and ignore the rest of the document.

10. Out of the total expenditure incurred by the assessee company there is one item of depreciation amounting to Rs.53,957/- which would stand on a different footing as against the remaining items. In relation to this, the Tribunal has held that depreciation cannot be allowed to be capitalised as it does not represent an

expenditure incurred towards installation of assets whether directly or indirectly. It is further held that depreciation being notional allowance towards wear and tear of capital assets it is treated as deductible item on revenue account to be set off against revenue receipts for the purpose of ascertaining the real income chargeable to tax. According to the Tribunal, it would not be open to the assessee to claim deduction in relation to the depreciation for the purpose of setting off against its revenue receipt and at the same time seek capitalisation of the same by treating the said item as relatable to a period prior to commencement.

11. There cannot be any dispute as regards the principle laid down by the Tribunal that assessee cannot claim benefit twice in relation to the item of depreciation , once on revenue account and again by seeking capitalisation of the same. However, from the facts available on record it is not possible to state with certainty that the assessee has in fact claimed double benefit as apprehended by the Tribunal. In fact, the learned Counsel appearing for both the sides are not in a position to inform or state as to whether in fact the assessee had claimed deduction against its revenue receipt on the one hand and again capitalised the said item for the purpose of claiming depreciation and development rebate. In

view of these circumstances, in so far as the item as regards depreciation is concerned, we direct the Tribunal to adjust its decision after ascertaining factual position. In the event of the assessee having not claimed amount of depreciation relatable to assets of the office on revenue account the assessee may be permitted to capitalise the same.

12. We, therefore, hold that in the circumstances of the case the Tribunal was not justified in law in holding that expenditure, except as regards the item of depreciation was not part of actual cost of the plant. In the result, the question referred to us is answered in the negative, subject to our direction in relation to item of depreciation I.e. in favour of the assessee and against the revenue with no order as to costs."

(3) *Nirman Textiles Pvt. Ltd., Vs. Assistant Commissioner of Income Tax, reported in (2006) 284 ITR 325 (GUJ).*

11. The legal position is well-established and bears no repetition. It was necessary for the Tribunal to bear in mind that the assessment order had merged with the order of the C.I.T. (Appeals) and in case the Tribunal was inclined to reverse the order of C.I.T. (Appeals) it was necessary for the Tribunal to record, howsoever briefly, the reasons for the same. The impugned

order of the Tribunal nowhere reflects as to what were the facts and evidence placed before the C.I.T. (Appeals) by the assessee and on the basis of which the C.I.T. (Appeals) accepted the explanation of the assessee. In the view that the Court is inclined to take it is not necessary to enter into discussion on merits of the issue involved nor the veracity or the weightage to be assigned to the evidence available on record. Suffice it to state that as against the statement regarding admission at the time of survey, the assessee had placed on record its letter of retraction and evidences in support of such retraction. The least that was expected of the Tribunal was to discuss that evidence with reasons as to why the said retraction coupled with the evidence was not acceptable, especially when the same had been accepted by the C.I.T. (Appeals). The Tribunal states that the explanation was not furnished before the Assessing Officer and was placed on record before the C.I.T. (Appeals) for the first time overlooking the fact that the C.I.T. (Appeals) in Paragraph No.2.1 of his order has categorically recorded that the said evidence in the form of paper books was forwarded to the Assessing Officer and the Assessing Officer had after perusing the same offered his comments vide letter dated 06-10-1995. This is just an instance of the modality, i.e.

the cursoriness with which the Tribunal has dealt with the issue.

12. In 1959 the Apex Court had observed that if the Tribunal arrives at its own conclusion of fact after due consideration of evidence before it the Court will not interfere, but for this purpose it was necessary that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the points for determination before it, and what was the evidence pro and contra in regard to each of the issues and what were the findings reached on the evidence on record before it. (Omar Salay Mohamed Sait Vs. Commissioner of Income-Tax, Madras, [1959] 37 ITR 151). This position has been reiterated once again in 2002 by this Court after referring to the aforesaid judgment in the two decisions rendered in case of Mercury Metals (P.) Ltd. Vs. Assistant Commissioner of Income-Tax, [2002] 257 ITR 297 and Rameshchandra M. Luthra Vs. Assistant Commissioner of Income-Tax, [2002] 257 ITR 460. The Tribunal has passed the order on 29-08-2003 and yet seems to be blissfully unaware of the legal position.

> *In light of the aforesaid fact situation, the impugned order of the Tribunal is quashed and set aside to the extent of addition of Rs.11,66,465/- and the matter is restored to the file of the Tribunal for the purposes of adjudication afresh in light of the well established legal principles enunciated by the Apex Court and this Court.*
>
> *13. Accordingly, the appeal is allowed to the aforesaid extent. The question is answered in light of what is stated hereinbefore. The Reference stands disposed of accordingly. There shall be no order as to costs."*

9. Relying upon the aforesaid decision, it was submitted that when the Tribunal has reversed the order of CIT(A), it was necessary for the Tribunal to record reasons for the same. On perusal of the impugned order passed by the Tribunal, more particularly para 42 thereof, does not reflect as to what were the facts and evidence before the CIT(A) by the assessee nor the submissions made by the revenue including the cases relied before the Tribunal are at all considered or discussed by the Tribunal. In such circumstances, it was prayed that the impugned order of the Tribunal is required to be quashed and set aside and to restore the matter to the file of the Tribunal for the purpose of adjudication afresh in light of the well established legal principles enunciated by the Apex Court and this Court.

10. On the other hand, Mr. S. N. Soparkar, learned senior

advocate assisted by Mr. B. S. Soparkar, learned advocate for the respondent assessee submitted that the Tribunal has passed the impugned order after considering all the facts and after perusal of the documentary evidence and record produced before it. It was further submitted that the Tribunal is final fact finding authority and on perusal of the impugned order passed by the Tribunal it is clear that the Tribunal has considered the submissions made on behalf of the assessee as well as revenue and thereafter has arrived at findings of fact. It was pointed-out that the Tribunal has sustained the addition of Rs.1,84,425/- with regard to the interest income as it was found as a matter of fact that the interest calculated by the assessing officer was a gross calculation about amount to be received and paid by the group as a whole. The Tribunal, therefore, has rightly added sustained the addition of net difference on the item products holding the same to be undisclosed income by directing the Assessing Officer to add proportionate amount of net difference in the interest of Rs.1,84,425/- in proportion to the interest of shares of Ashima Syntex Ltd. by the respondent assessee.

11. With regard to the deletion of disallowance of contrived loss, the learned senior advocate submitted that the Nirma Management Service Pvt. Ltd., is admittedly an entity, which is rendering the services to both the buyers and the seller in respect of accounting investment, taxations and other related services and the shares were kept in the custody of the said service company and only because the shares which were lying unregistered in the name of buyer were duly delivered upon the sale and transaction being completed. It was therefore submitted that when it is not in dispute that the delivery of share given by the seller to the buyer, the transaction was completed and there was transfer of shares as per the definition of transfer under Section 2(47) of the Act, 1961.

12. It was further submitted that the consideration for the transaction of the shares was paid through cheque and the same was accounted in the books of accounts of the respective buyer and seller and therefore, no proof of delivery of shares was found during the course of search is no ground to disallow the loss. It was further submitted that the quantum of loss is not disputed by the Assessing Officer or CIT(A). The only ground for disallowing such loss was that there was no proof of delivery of shares prior to the date of search.

13. Learned senior advocate further submitted that it was also contended before the Tribunal that when the transaction is viewed as tax planning, though it is not, assessee was entitled to plan his transaction so that his taxes are minimized. Moreover, the respondent assessee has disclosed the loss in the return of income supported by the evidence of payment is considered by the Tribunal is a finding of fact. Copies of sale bill received from the brokers and payments made through cheque and delivery of shares were given to the buyers are not in dispute. It was therefore, submitted that there is extinguishment of right of the assessee in the shares resulting in the transfer and therefore, the Tribunal has rightly held that the transactions which are duly incorporated in the books of the assessee in addition to the evidences furnished before the assessing officer including the confirmation of purchasing of the shares by the seller and the buyer and subsequently transferring such shares and in case of non transfer lodging a complaint and offering the capital gains as well as losses in the returns of income, the Tribunal has rightly deleted the disallowance of contrived losses.

14. Learned senior advocate further submitted that the Tribunal has given the findings of fact and there is no question of law raised by

the revenue with regard to the perverse findings given by the Tribunal. IT was therefore, submitted that the revenue cannot be permitted to contend that the impugned order passed by the Tribunal is perverse.

15. It was also submitted that when the Tribunal after analyzing the material on record and after recording the submissions made by both, the appellant as well as the revenue, has arrived at finding of fact giving reasons which goes to the root of the case, then in such circumstances, it cannot be said that the Tribunal has not given any cogent reason in support of the findings recorded by it.

16. It was therefore, prayed that the impugned orders are not require to be interfered as both the questions of law are in fact questions of fact and the same should not be considered as substantial questions of law arising from the impugned order of the Tribunal.

17. Having considered the submissions made by the learned advocates for the respective parties and having perused the impugned orders passed by the Assessing Officer, CIT(A) and the Tribunal, we are of the opinion that the Tribunal has arrived at finding of fact after considering the material evidence on record so as to hold that the assessee is entitled to the claim of the contrived losses suffered by it. The Tribunal has also rightly considered the fact that in the assessment under the block period only the undisclosed income, which is found from the seized material can only be considered for the addition as in the total income of the assessee. In the facts of the case, the assessee has already disclosed the losses by making necessary entries in the books of accounts and therefore, the assessing officer and CIT(A) were not justified in disallowing the contrived losses claimed by the assessee. The Tribunal has also taken into consideration the factual aspect of the matter that the sale bills were issued by the brokers, the payments were made by cheque

by the respective buyer of the shares and such transactions are duly reflected in the books of accounts. In such circumstances, it cannot be said that the Tribunal has committed any error in holding that the assessee is entitled to claim the contrived losses in the total income for the respective year by the respective assessee.

18. We are in agreement with the ratio of the decisions cited at bar by the learned advocate for the revenue, but in view of the findings of fact recorded by the Tribunal in the present case, we are of the opinion that there is no need to restore the matter back to the Tribunal to give any further reasons in support of findings of fact arrived at on the basis of material on the record by the Tribunal.

19. In view of the above, it cannot be stated that the impugned order of the Tribunal is without any reason whatsoever so as to remand the matter back to the Tribunal. Even if the matter is remanded back to the Tribunal, the ultimate result arrived at by the Tribunal in the impugned order relying upon the facts emerging from the records the same would not be different in any view of the matter. In such circumstances, we do not find any merit in the appeal. The questions of law are answered in favour of the assessee and against the revenue. The appeal stands dismissed accordingly.

(J. B. PARDIWALA, J.)

(BHARGAV D. KARIA, J.)

AMAR RATHOD...