

Rohit Prakash Goyal Vs. Assistant Commissioner of Income

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SooperKanoon Citation : sooperkanoon.com/70067

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Apr-06-1998

Appellant : Rohit Prakash Goyal

Respondent : Assistant Commissioner of Income

Judgement :

1. These are three appeals by the assessee against common order of the CIT(A)-XII, New Delhi pertaining to asst. yrs. 1993-94, 1994-95 and 1995-96.
2. Since the issues involved in all these appeals are common, and the issues have been disposed of by the CIT(A) by a consolidated order, therefore, for the sake of convenience, these appeals are also disposed of by this common order.
3. The assessee has raised 14 grounds challenging validity of the reopening of assessments under s. 148 of the IT Act, 1961, for these three years and also the view of the CIT(A) that the sales transaction made to his HUF, is sham transaction and thereby confirming the recasting of the P&L a/c and determining the total income at Rs. 12,92,080, Rs. 13,52,290 and Rs. 29,64,200 for the asst. yrs. 1993-94, 1994-95 and 1995-96 vide assessment order dt. 29th March, 1996, instead of income declared and accepted by intimation under s. 143(1)(a) at Rs. 5,52,80, Rs. 2,34,290 and Rs. 2,30,950 for the asst. yrs. 1993-94, 1994-95 and 1995-96 respectively.
4. The brief facts of the case are that the assessee is an individual deriving income from business of dealing in securities, shares and units and also from the sources

as reflected in the computation of income. The assessee filed its returns of income for the three assessment years which were accepted under intimation by an order under s. 143(1)(a) at the said declared amounts. Thereafter a notice under s.

148 was issued on 12th December, 1995, whereby the learned Asstt. CIT proceeded to reopen the assessments by means of notice under s. 148 of the IT Act. In the notice dt. 8th January, 1996, the Asstt. CIT intimated the following reasons for reopening the said assessments : "While inspecting the books of accounts during the course of assessment proceedings for the asst. yr. 1994-95, it was observed that you had purchased 30,000 units from Unit Trust of India @ Rs. 14.90 on 15th July, 1992 and you had sold 4 lakhs units @ Rs. 13.90 on 16th July, 1992 to your HUF, M/s Shankar Lal Ved Prakash. As you know the sale and repurchase prices of US 64 of UTI remain the same during the month hence sale to HUF was made to create a fictitious loss. An immediate need for money forcing you to sell the units cannot be a reason for the sale because the HUF has not made any payment to you till the end of the year. Hence the above sale was done only to create a loss of Rs. 30,000." In response to the aforesaid notice the assessee filed a reply dt. 26th December, 1995, requesting the Asstt. CIT to treat the original returns as filed in response to notice under s. 148 of the IT Act and also requested to supply the reasons recorded for initiation of reassessment proceedings. On receipt of the reasons recorded, the assessee raised preliminary objection pertaining to the initiation of reassessment proceedings vide his reply dt. 26th February, 1996, in which it is submitted that the reasons for initiating the reassessment proceedings for sale of 30,000 units of US 64 of UTI, which were purchased from UTI at the rate of Rs. 14.90 per unit were purchased on 15th July, 1992 and the same has not been sold till that date. Rather 4,00,000 units of US 64 of UTI which were purchased on 26th May, 1992, 29th May, 1992, and 30th May, 1992 at the rate of Rs. 15.75 per unit were sold on 16th July, 1992, to HUF at the rate of Rs. 13.90 per unit, which according to the assessee, were sold at a gain of 65 paise per unit because the assessee was to receive dividend at the rate of Rs. 250 per unit of the sale proceeds of Rs. 13.90 per unit, for the sale and purchase made by the assessee were at the prevalent rate price of the units. The total sale made by the assessee to the HUF M/s Shanker Lal Ved Prakash aggregated to Rs. 1,38,76,000 and the interest debited to their account was Rs. 12,51,192 as

detailed below : In this way, the total of sales and interest to the HUF M/s Shanker Lal Ved Prakash debit comes to Rs. 1,51,27,192 out of which the outstanding as on that date was Rs. 52,63,695. On 31st March, 1994, the debit balance in the account of the purchaser HUF was Rs. 77.13 lakhs against which the loan provided by the purchaser, the HUF was Rs. 74.48 lakhs.

However, the AO in terms of an order dt. 29th March, 1996, computed the total taxable income of the assessee-applicant as stated above by holding that the dividend income of an amount of Rs. 10,05,500 be taxed under the head 'Income from other sources' as per s. 56(2) of the IT Act, as against the claim of the assessee treating the same to be business income. The learned AO alleged that the assessee did not sell the UTI's units to the HUF. Except making book entries no real transaction has taken place. The HUF neither came in possession of the units because they were pledged to the bank and sold by the assessee, as and when he wished, nor any payment was made by the HUF to the assessee. The units were never transferred by the assessee to the HUF as it is clear from the fact that these units were pledged to the bank by the assessee. The certificates though remained in the bank custody till 10th December, 1995. When the certificates were in bank's custody, he could not transfer or mortgage the same in anyway. There is no record in the bank to show that he has sold these units to HUF, M/s Shanker Lal Ved Prakash. There was no attempt by M/s Shanker Lal Ved Prakash, i.e., units were never sent to UTI for transfer. The dividend has always been coming in the name of the assessee and credited in his bank account even after the alleged sale. In this way, he concluded that there was no profit motive for the sale of these units to HUF. No payments were received. There was no delivery of units to the HUF. The sale was in the nature of a device to reduce the incidence of tax. The assessee is adopting this practice on a regular basis to sell the units in the month of July every year in order to avoid the due payment of taxes. Buyers and sellers of units is one and the same person. Account of M/s Shanker Lal Ved Prakash was not credited by any loan. There cannot be any other purpose but to evade the payment of tax because the assessee could have sold the shares in open market at an average price whereas in the present case the units were sold at lower rate. In this way, the AO concluded that the transaction of sale to the HUF is a sham transaction for the following reasons : (b) No payments were received by the

assessee on the sale of such units.

(c) No delivery of the units was made nor any attempt was made to get the units transferred.

(e) The assessee could have sold the units in the open market at an average price.

(f) The sale of units clearly established that the assessee never intended to sell the same and the sale thus shown was same and was entered into to reduce income.

(g) There could be no sale to self and since the sale was made by the assessee to his HUF, there was no sale.

(h) Sale of 50,000 units in the financial year 1994-95 (asst. yr.

1995-96) which was pledged with bank by the assessee could not have been sold.

(k) Rights of a person purchasing the units in January were the same as those of a person purchasing the units in May.

(l) The account of M/s Shanker Lal Ved Prakash HUF had not been credited by the assessee with the amount of loan.

(m) The assessee paid interest of Rs. 272 and Rs. 1,76,205 to the bank but debited Rs. 2,39,330 in the account of the HUF M/s Shanker Lal Ved Prakash." Accordingly, the AO recasted the Trading and P&L a/c and computed income of the assessee, as above. The dividend that he has earned on these units will be taxable and while making the sale to the HUF he created a loss for being set off against the dividend income and thus held that the assessee had adopted a novel way to avoid sales made by the assessee to its HUF. In this way the dividend income of the assessee from the above units was taxed as income from other sources as per s. 56(2) of the IT Act for the detailed reasons given in paras 4 to 9 of the assessment order, which were also incorporated in the order of the CIT(A).

5. However, the first appellate authority concurred with the finding given by the AO, basically on the similar reasoning. The CIT(A) also justified the reopening of

assessments under s. 148.

6. Aggrieved by that order, the assessee filed appeals before the Tribunal.

7. The learned assessee's counsel challenged the reopening of the proceedings under s. 148 of the IT Act, on the basis that the reasons given by the AO for reopening the assessment is not justified. It is pointed out that in the reasons recorded the AO stated that the assessee had purchased 30,000 units at the rate of Rs. 14.90 per unit on 15th July, 1992 and sold 4 lakhs units at the rate of Rs. 13.90 per unit on 16th July, 1992 to his HUF, M/s Shanker Lal Ved Prakash.

According to the AO, sale and purchase price of units US 64 of the UTI remained the same during the month and sale to HUF was a sham transaction in order to create fictitious loss. Against this, the learned assessee's counsel submitted that the assessee had purchased 4 lakh units in May, 1992 on dates 26th May, 1992, 29th May, 1992, and 30th May, 1992, at the rate of Rs. 15.75 per unit-cum-dividend. The dividend was received in July, 1992, at the rate of Rs. 2.50 per unit.

Thus, the effective cost of each unit purchased aggregated to Rs. 13.25 per unit, whereas the present units were sold by the assessee at Rs. 13.90 per unit to the HUF soon after the declaration of dividend.

Whereas UTI's repurchase rate was Rs. 13.85 per unit because the UTI pays Rs. 1 less if purchase is made by existing Unit-holders. These rates were verified by the AO. It is evident that there are two different transactions, one pertaining to the purchase of 4 lakh units earlier to the purchase of 30,000 units of dt. 15th July, 1992. The assessee sold the earlier 4 lakh units at the rate of Rs. 13.90 per unit whereas the second transaction of purchase of 30,000 units were never sold by the assessee in the year under consideration. Therefore, there was no question of there being any loss in respect of 30,000 units, which is the basis for reopening of the present proceedings.

Thus, it is submitted that the reopening of the assessment for these years is unjustified and illegal. The AO wrongly assumed that as a result of aforesaid transaction, the assessee reduced his dividend income thus creating a fictitious

loss. The basis of the aforesaid conclusion in itself is wrong. The assessee purchased the units at Rs. 15.75 per unit, which were including dividend, and if the element of dividend is excluded, it must be that there is real income and not a loss. In this connection, the learned assessee's counsel invited our attention to the synopsis given in the paper-book to illustrate the benefit as under : "In the asst. yrs. 1993-94, 1994-95 and 1995-96 the assessee earned Rs. 10,00,000, 15,60,000, 12,35,000, respectively which represented the dividend on the units sold (see p. 2, 8 and 11 respectively of paper-book pertaining to the disputed transaction). Losses suffered are 7,40,000 78,000, 10,21,250Asst. yrs.

1993-94	1994-95	1995-96	Loss suffered	7,40,000	78,000	10,21,250	Dividend earned	10,00,000	1,56,000	12,35,000	Net gain	2,60,000	78,000	2,13,750
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Calculation sheet arising from the sale/purchase of unitsAsst. yr. 1993-94 (Year ending 31st March, 1993).

Date	Units	Rate	Amount	26, 29 & 30 May, 1992	Purchased	4,00,000	15.75	63,00,000
16th July, 1992	Sold	4,00,000	13.90	55,60,000	-----	However,	dividend aggregating to Rs. 10,00,000 @ 2.50 earned on 30th June, 1992.	

If the transaction of sale is disputed, then the purchaser will not be liable of assessment of dividend from units which on 30th June, 1993, aggregates to 10,40,000 and further, when purchased by M/s Shanker Lal Ved Prakash @ 13.90 were sold @ 17.95 and hence the difference of Rs. 405 aggregating in all to 16,20,000 is not taxable in the hands of M/s Shanker Lal Ved Prakash.

(See computation of income of M/s Shanker Lal Ved Prakash p. 24 of the paper-book).

Asst. yr. 1994-95 (year ending 31st March, 1994).

Date	Units	Rate	Amount	30th January, 1993	Purchased	60,000	16.40	9,84,000
30th July, 1993	Sold	60,000	15.10	9,06,000	-----	However,	dividend aggregating to Rs. 1,56,000 @ 2.60 earned on 30th June, 1993.	

If the transaction of sale is disputed, then the purchaser will not be liable of assessment of dividend from units which on 30th June, 1994, aggregates to

1,56,000 and further, when purchased by M/s Shanker Lal Ved Prakash @ 15.10 will be sold in future and hence, the difference of sale price and purchase price of 15.10 is not taxable in the hands of M/s Shanker Lal Ved Prakash. Further, the interest aggregating to Rs. 2,39,330 for asst. yr. 1994-95 paid on overdraft to the bank should be allowed in the hands of the assessee.

Asst. yr. 1995-96 (year ending 31st March, 1995).

Date	Units	Rate	Amount
31st July, 1993	Purchased 50,000	16.00	8,00,000
30th December, 1993	Purchased 1,25,000	17.25	21,56,250
26th February, 1994	Purchased 3,00,000	18.25	54,75,000
12th July, 1994	Sold 4,75,000	15.60	7,41,00,000

----- However, dividend aggregating to 12,35,000 @ 2.60 earned on 30th June, 1994.

If the transaction of sale is disputed, then the purchaser will not be liable of assessment of dividend from units which on 30th June, 1995, aggregates to 12,35,000 and further, when purchased by M/s Shanker Lal Ved Prakash @ 15.60 will be sold in future and hence, the difference of sale price and purchase price of 15.60 is not taxable in the hands of M/s Shanker Lal Ved Prakash. Further, the interest aggregating to Rs. 9,11,084.24 for asst. yr. 1995-96 paid on overdraft to the bank should be allowed in the hands of the assessee." Thus, it was demonstrated that the assessee earned net income of 65 P. per unit but on the purchase and sale of 4 lakh units he earned net income of Rs. 2.4 lakhs. It is submitted that there is a difference between sale rate and repurchase rate of unit to the extent of Rs. 1 approximately per unit. In other words, if the units are repurchased by UTI from the existing unit-holder, the UTI pays Rs. 1 approximately.

The UTI rate of repurchase was lesser, i.e., Rs. 13.85 per unit.

Therefore, there is no justification to compare the purchase and sale rate. In the instant case the selling rate of Rs. 13.90 per unit to the HUF, M/s Shanker Lal Ved Prakash had given a profit of 05 P. per unit, then, if it was sold to the UTI. There is, therefore, no justification to compare the rate of purchase and sale of the unit. It is pointed out that the object of UTI's US 64 Scheme is to provide growing income.

This is the first scheme of the trust, which was introduced on 1st July, 1964. The sale and repurchase of units are always ever since inception the scheme in 1964, is lowest in July with gradual monthly increases and the highest in May before the books close from 1st June, until 30th June. The sale and repurchase prices, as stated above, are increased by Unit Trust of India every month starting from July onwards. The very basis on which the UTI determines such monthly increases is primarily interest-oriented and the very object is to provide the unit-holder a regular income, as is the prime object of the scheme so that the unit-holder can earn in the form of dividend and by selling the units at any time of the year even if the unit-holder decides not to wait until usual July month for the receipt of annual interest/dividend. Thus, the buyer of units pays a base price plus interest or dividend, in case of his purchase in a month subsequent to the month of July and similarly the seller of units receives a higher rate that is basic price of July plus interest or dividend accrued for until the month of his sale. In order to illustrate the learned assessee's counsel invited our attention to the Annexure "A", "B" and "C" to this order of Tribunal.

8. It is pointed out that the dividend received by the HUF in respect of these units were shown by the HUF as their income, which has been duly assessed as income of the HUF, where the income of the HUF exceeds more than Rs. 10 lakhs. It is pointed out that there is no difference of rate or incidence of tax if it was to be assessed in the assessee's hands or in the hands of the HUF, and as such the question of assuming a colourable device does not arise. The learned assessee's counsel submitted that the reopening of the assessments is totally untenable and there is no escapement of income because the income has been assessed in the hands of the HUF on substantive basis by Dy. CIT. Therefore, to say that the income has escaped assessment is wrong.

Thus, there is no basis for reopening of the assessment. In fact as shown by the assessee, so far as 30,000 units are concerned the same in any manner, has not been transferred, sold or dealt with, but they continue to remain the assessee's investments till date. So the basis of reopening the assessment is non-existent and action taken thereon is without jurisdiction. The AO committed factual substratum by assuming jurisdiction on this basis. It is submitted that if it was a

colourable device, no efforts were made by the AO to find out the realities of the same by recording statement of Karta. In this case no statement of Karta had been recorded, whereas income has been assessed in the hands of the HUF and interest has been allowed to HUF on the money borrowed from the bank. The interest had been debited in the accounts of HUF. The objection of the Department that merely book entry has been made firstly, has no reality but even if it is presumed that book entry had been made, it is said to be as entry showing payment according to the IT Act. Thus, it is sufficient in the eye of law to assume the real state of affairs. It is further pointed out that an individual can throw its assets in the common hotchpotch of the HUF at any time because it is permissible under the personal law which governs the Hindu. It is also pointed out that same income cannot be assessed in the hands of individual as well as the HUF. Once the Department has treated the dividend income in the hands of HUF and assessed the same, even the interest has been allowed, it is accepted by the Department that the dividend income belongs to the HUF, otherwise there was no purpose of allowing any interest claimed to have been paid to the bank.

So far as the Department is concerned, income has been assessed, it cannot be twice assessed in the hands of the assessee. Reliance was placed on the following decisions :State of Uttar Pradesh & Anr. vs. Raza Buland Sugar Co. Ltd. (1978) 118 ITR 50 (SC); (4) Ramalinga Chhodambikai Mills Ltd. vs. CIT (1955) 28 ITR 952 (Mad); (5) India Finance Construction Co. (P) Ltd. vs. B. N. Panda, Dy. CIT (1993) 200 ITR 710 (Bom); and (6) Imperial Chemical Industries Ltd. vs. CIT (1979) 119 ITR 46 (Cal).

9. As against this, the learned Departmental Representative relied on the order of the CIT(A) and the AO. He brought to our notice the basic features of the orders by reading out the paras of the orders.

10. We have considered the rival submissions of the parties. The AO while proposing to reopen the assessments observed that the assessee had purchased 30,000 units from UTI at Rs. 14.90 per unit on 15th July, 1992, whereas the assessee sold 4 lakh units at Rs. 13.90 per unit on 16th July, 1992 to the assessee's HUF, M/s Shanker Lal Ved Prakash. He further observed that the sale

and repurchase prices of unit US 64 Scheme remained the same during the month and sale to HUF was to create a fictitious loss. The immediate need for money forcing the assessee to sell the units cannot be the reason for sale because the HUF, M/s Shanker Lal Ved Prakash had not made any payment. Therefore, he concluded that income had escaped assessment. The reasons recorded for reopening of the assessments is based on mere suspicion that the sale and repurchase of 30,000 units of US 64 remained the same during the month of July and this assumption led to the reopening of the assessments, is based on no valid material. Firstly, the assessee has purchased 4 lakh units on 26th May, 1992, 29th May, 1992, and 30th May, 1992, at the rate of Rs. 15.75 per unit whereas he sold the 4 lakh units at the rate of Rs. 13.90 per unit on 16th July, 1992, to the assessee's HUF, M/s Shanker Lal Ved Prakash, whereas 30,000 units which is mentioned in the reasons recorded were not sold to the HUF during these years and remained with the assessee. Therefore, the assumption of jurisdiction by the AO is not supported by material on record. The assumption which is based on no valid reason cannot be said to be valid ground which can be adopted by the AO to reopen the assessment. It will be pertinent to mention here that there is difference of Re. 1 approximately between the sale and repurchase rate of US 64 units. The price of unit is lowest in the month of July, whereas it is higher in the month of May. Every month there is a difference of Re. 1 approximately. Even if the units are repurchased by the UTI from the existing unit-holder, the UTI pays Re. 1 approximately less whereas the same is purchased from the UTI, higher rate is being charged. The assessee has brought evidence to show that he purchased 4 lakh units in May 1992, at the rate of Rs. 15.75 per unit-cum-dividend. The dividend was received in July, 1992, at the rate of Rs. 2.50 per unit. Thus, the effective cost of each unit purchased aggregated to Rs. 13.15 per unit, whereas the present units were sold at Rs. 13.90 per unit to the HUF since after the declaration of dividend, whereas the UTI's repurchase rate was Rs. 13.85 per unit. In this way, the sale thereof did not result into loss but income by way of dividend. In such circumstances, the assumption of jurisdiction for initiation of proceedings under s.

148 of the IT Act was arbitrary and not based on any valid material. In the case of ITO vs. Lakhmani Mewal Das (1976) 103 ITR 437 (SC) at p.

448, the Hon'ble Supreme Court has observed as under : "The reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief.

Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of his belief that there has been escapement of income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go to the sufficiency or adequacy of the material and substitute its own opinion for that of the ITO on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distinct, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words 'definite information' which were there in s. 34 of the Act, 1922, at one time before its amendment in 1948, are not there in s. 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence." In the case of *Indian Oil Corpn. vs. ITO* (1986) 159 ITR 956 (SC) the Hon'ble Supreme Court has further held that reason to believe is not the same as reason to suspect. Similar view was expressed by the Bombay High Court in the case of *India Finance & Construction Co. (P) Ltd. vs.*

B. N. Panda, Dy. CIT (supra). Therefore, having regard to the fact that the assessee has sold unit to M/s Shanker Lal Ved Prakash HUF, which were purchased on 26th, 29th and 30th June, 1992 at the rate of Rs. 15.75 per unit and after getting dividend sold the same to the HUF, was in fact sold at a profit of 65. per unit, as demonstrated in Annexures "A", "B" and "C" in the paper-book, which were duly disclosed in the P&L a/c. Therefore, the effective cost of unit was Rs. 13.25 per unit whereas the same was sold at Rs. 13.90 per unit. It will be pertinent to mention here that nearabout the date of declaration of dividend the value of unit goes up keeping in view the date of declaration of the dividend which effectively

reduces the cost of unit. Therefore, the assumption of jurisdiction for reopening by the AO on the basis that the units have been sold at less than market rate and secondly the assumption that there is a loss on 30,000 units is not based on any valid material. In this way, there was no reason much less a valid reason for initiating the proceedings under s. 148 of the IT Act. The assessee has given calculation sheet as additional paper-book given at pp. 4 to 6 in order to show that in fact the assessee had not suffered any loss but made a gain of Rs. 2,60,000 in asst. yr. 1993-94, Rs. 78,000 in asst. yr. 1994-95 and Rs. 2,13,750 in asst. yr. 1995-96, because of the fact that the assessee had earned dividend from these units before the sale is made to M/s Shanker Lal Ved Prakash HUF. But this fact has been ignored by the Revenue. The AO accepted purchase of the units and receipt of dividend and ignored the third part, the sale of units to the HUF. Whereas the transaction has to be seen in totality. If we go through the calculation sheet given by the assessee, which is not challenged by the Departmental Representative, it will reveal that in fact there is no loss at all in the said transaction.

Had the assessee not entered into this transaction, his income would have been less by the net profit shown in the calculation sheet for these assessment years respectively. The learned AO was of the view that motive to make the sale was not for any business purpose and there was no profit motive, which is not correct. These units were purchased by the assessee cum-dividend and the assessee earned a dividend of Rs. 10,50,500 at the rate of Rs. 2.50 per unit on the purchase made by it which was just prior to the closing of books by UTI, i.e., 1st June and declaration of dividend and therefore, the effective cost of the unit to the assessee came to Rs. 13.25 per unit. In this way, he has made a profit of 65 per unit. The next objection of the AO was that the assessee did not receive the sale price. The assessee in his reply at pp. 84 and 85 of the paper-book demonstrated that the total amount debited to M/s Shanker Lal Ved Prakash was as under : Thus the total debit against Shri Shanker Lal Ved Prakash HUF was Rs. 1,51,27,192, which is clear from the copy of account at pp. 19 to 22 of the paper-book and it very clearly establishes that the payments for the units sold had been made from time to time by the purchaser and the allegation of the AO is not correct. In facts as on 31st March, 1996, the amount receivable from the purchaser has reduced from

Rs. 1,57,27,192 to Rs. 62,33,043. Approximately 60 per cent of payment amounting to Rs. 89 lakhs has been received by the assessee. Whereas the AO notes that no payment has been made. The balance was further reduced to Rs. 52,63,695, which is clear from p. 85 of the paper-book.

In this way, the conclusion of the AO that no payment was made, is not substantiated by evidence. It will be pertinent to mention here that M/s Shanker Lal Ved Prakash is a separate assessable unit and accounts have been accepted by the Department by processing their assessments under s. 143(3) of the IT Act. It is true that on the date of purchase no money payment was made but the purchaser had arranged a loan from Punjab National Bank amounting to Rs. 74.48 lakhs, the interest on which amounting to Rs. 12,51,192 was charged by the purchaser, which is clear from the paper-book at p. 100. This aspect proves beyond doubt that the units were purchased by M/s Shanker Lal Ved Prakash with the genuine intention of making payment. The learned AO has completely ignored that M/s Shanker Lal Ved Prakash, HUF, has raised an overdraft limit of Rs. 75 lakhs from Punjab National Bank and provided the same to the assessee. The said HUF has paid interest in the asst. yrs.

1994-95, 1995-96 and 1996-97 towards interest on the amount borrowed and provided to the assessee. This important aspect also proves that the HUF had purchased the units and had provided the funds when required to the assessee-HUF. It is not necessary that a person must pay the price immediately in a trade practice if the person may finance transaction from borrowed funds. Merely because one has no immediate funds by itself for financing the transactions, cannot be regarded as a sufficient ground to conclude that the transaction was sham. It is true that in the records of UTI the name of the unit holder assessee was entered. Therefore, in the normal course of event, as the units were not registered in records of UTI, it was the assessee, who has executed the documents of loan. It will be pertinent to mention here that a person has two capacities, one of his individual and another as a member of HUF. He binds the HUF with all his acts. Therefore, execution of document for loan by the assessee will not amount that this was a personal loan to the individual and not to the HUF.¹¹ In this case, M/s Shanker Lal Ved Prakash HUF had filed return of income showing the units

purchased from the assessee as well as income earned from the units so purchased. The purchaser (HUF) at no stage was called upon by the AO to explain whether such purchases were made by the HUF or not. It could have been done by calling the Karta of HUF, Shri V. P. Goyal, but no efforts were made to record his statement.

This would clearly establish that there had been no denial and rather it is explicit acceptance on the part of the HUF, M/s Shanker Lal Ved Prakash that they had acquired these units from the assessee. The relevant evidence placed on record indicates that the units were actually sold, the payments had been received and delivery/possession of units was given to the HUF, M/s Shanker Lal Ved Prakash. This fact is corroborated by bills for sale of unit (paper-book pp. 16 to 18), computation of income filed with its return duly disclosing income earned from the units purchased (pp. 23 to 25 of the paper-book) and balance sheet (pp. 26 to 31 of the paper-book). Besides this from the paper-book pp. 36, 37 and 38, it will be clear that the Department has accepted return of income for asst. yrs. 1994-95 and 1995-96, thereby accepting the purchase of units. In fact, return of income of purchaser-HUF for these assessment years had been duly processed by the Department on substantive basis under s. 143(3) wherein the income on the purchase of units arising out of the disputed transaction had been declared and accepted and tax paid was determined. It is showing that Department on the one hand treated the sale of units in the hands of the seller as sham but on the other hand, the Department accepted the purchase of same units as transaction in the hands of the purchaser.

The Department further taxes the purchaser on the units, again taxes the same on the same income of units alleged to have been sold in the hands of seller by declaring the sales to be sham. It will be pertinent to mention here that the units were transferred to the HUF, M/s Shanker Lal Ved Prakash by physical delivery of the units along with the executed transfer deed, which is born out from the records. The allegation of the AO that the assessee subsequently in March, 1995, sells the units to UTI for repurchase, is based on no material. Rather the allegation of the assessee is that these units were sent by HUF, which is borne out from the records that the Department has accepted the returned income from these units. It

will be pertinent to mention here that the assessee had earned Rs. 10,05,500 by way of dividend on these units and thereby had taken the full advantage of the purchase by receiving dividend and it was only thereafter that the units were sold to the HUF. We do not understand as to how the Department is affected, whether the tax is paid by the assessee or is paid by his HUF, makes no difference to the Revenue and in such a situation, it cannot be concluded that the nature of device to reduce the incidence of tax was followed by the assessee, especially when there is no difference in the rate of tax chargeable from an individual and from his HUF. In this way, there has been no loss in the entire transaction. If for a moment it is believed that the seller and the purchaser are the same, then in what way the Department stands aggrieved. The assessee buys units for Rs. 15.75 per unit, receives dividend at Rs. 2.50 per unit and sells for Rs. 13.90 per unit, thereby making a profit of Rs. 0.65 per unit.

At the same time the HUF's cost price is reduced to Rs. 13.90 per unit and when he actually sells the units purchased at Rs. 13.90 per unit for Rs. 17.90 per unit to the UTI, it is clear from p. 24, he makes a profit of Rs. 4.05 per unit. After this transaction the seller gets gain of Rs. 0.65 per unit while the HUF earns Rs. 4.05 per unit on which tax has been paid. The AO had adopted the view that the assessee could have sold the units in the open market at an average price. In the trade of securities there is any term known as average price/rate, is not established on record, as no material whatsoever has been brought on record, but it is a fact that these units were not listed with any stock exchange at that time. The sale or purchase price were determined by the UTI and, therefore, can it be proved that sale price of the assessee was lower than the sale price determined by the UTI While determining the question of taxability, the Department has ignored the important factor that HUF is a separate legal entity. Sec.

2(3) of the IT Act defines a "person", which includes individual and HUF". If it was not so then why is it so that separate returns of income were filed by the assessee and for HUF and it was accepted by the Department. Therefore, the sale of units to HUF cannot be considered as sale to individual. There was no sale made by the assessee to self, and hence, the ground on which the learned AO has drawn adverse inference, remains unsupported by any evidence. The opinion

of the AO that the sale of units in asst. yr. 1995-96 when pledged with the bank, does not stand to reason because pledged goods can be sold subject to the right of the pledge.

12. The learned AO was of the view that the sale by the assessee of these units was made to self and the business cannot be carried on with one-self. Therefore, he concluded that it was a colourable device, which was a part of tax planning to avoid payment of legitimate tax. In coming to this conclusion, he has taken support from the decisions in the cases of CIT vs. Mazagaon Dock Ltd. (1969) 72 ITR 35 (Bom) and CIT vs. B. M. Kharwar (1969) 72 ITR 603 (SC) and decision of CIT vs.

McDowell & Co. Ltd. (1985) 154 ITR 148 (SC), *Burmah Oil Co. vs. IRC* 54 IC 213.

As against this, the learned contention of the assessee's counsel was that it was a legitimate tax planning which is permissible in law. In the case of *McDowell & Co. Ltd.* wherein all these decisions were considered, the Hon'ble Supreme Court has observed that tax planning may be legitimate provided it is within the framework of the law. But certainly colourable device was denounced to be a part of tax planning.

So it is pleaded that if there is a legitimate tax planning, it can be approved by the Courts. In the case of *IRC vs. Duke of Westminster* (1936) AC 1 : 19 Tax Cases 490 finds place at p. 152 of the said decision, it was observed that every man is entitled if he can order his affairs so that the tax attaching under the appropriate tax is less than it otherwise would be.

If he succeeds in ordering them so as to secure this result then, however, unappreciative the IRCs or his fellow tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax.

Therefore, it is clear that the law permits legitimate tax planning within the framework of law and not a colourable device. In the case of *CIT vs. Calcutta Discount Co. Ltd.* (supra) the Hon'ble Supreme Court has observed as under : "Whether a trader transfers his goods to another trader at a price less than the market price, and the transaction is a bona fide one, the taxing authority cannot

take into account the market price of those goods, ignoring the real price fetched, to ascertain the profit from the transaction. "An assessee can so arrange his affairs as to minimise his tax burden." In the case of CIT vs. A. Raman & Co. (1968) 67 ITR 11 (SC) the Hon'ble Supreme Court has observed as under : "Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the IT Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violative, but it may lawfully be circumvented." Taking into consideration the totality of the facts and circumstances discussed above, we are of the opinion that it is a legitimate tax planning of the assessee and not a colourable device especially in a circumstances that the Department itself has accepted the income returned in the hands of the HUF, M/s Shanker Lal Ved Prakash while processing the assessment under s. 143(3) and also accepted the payment of interest to the bank. Therefore, it cannot be said to be a colourable device. Secondly, it is clear that the tax rate for individual and HUF is the same. Whether the tax is paid by individual or HUF, will make no difference. Therefore, we are of the opinion that there is no colourable device to avoid the payment of tax. So far as the decision in the case of CIT vs. Mazagaon Dock Ltd. (supra) is concerned, it will be pertinent to mention that such case pertains to s. 42(2) of the Indian IT Act, which corresponds to s. 92 of the IT Act and the issue involved was that the quantum of profit of a resident carrying on business in a taxable territory with a non-resident and the case is no authority for business with oneself. In the case of B. M.Kharwar (supra) the facts of the case were that the firm carried on business of manufacture and purchase and sale of cloth. It closed its manufacturing side of the business and transferred its machinery to a private limited company. In the asst. yr. 1959-60 the ITO brought to tax under s. 10(2)(vii), proviso (ii) of the IT Act, 1922 excess realised over the written down value. In that circumstance the Court has held that taxing authority is entitled to determine the legal position resulting from the transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device. But in the present case the facts are entirely different, and known to the Department. Therefore, the principal laid down in that

case is distinguishable on the facts of the present case. Taking into consideration the totality of facts and circumstances, we are of the opinion that the sale of units by the assessee to the HUF was not a sham transaction but at arm's length.

Therefore, the computation of income by the AO treating the sale by assessee to his HUF as sham, is unjustified. We, therefore set aside the order of the Revenue authorities and direct the AO to delete all the additions in the hands of the individual-assessee.

Basic Price in July, 1991	-	14.10	Dividend Accrued	1.65	Total	15.75
July, 1991 to Sale/Realisation	13.90	2.50	16.40	(-) .20	(+) .85	(+) .65
Total on 4 lakh units	(-) 80,000	(+) 3,40,000	(+) 2,60,000	ANNEXURE "B"		
Basic price in July, 1992	14-90	Dividend accrued	1.50	Total	16.40	July 1992 to Sale/realisation
15.10	2.60	17.70	(+) .20	(+) 1.10	(+) 1.30	Total on 60,000 units
66,000	(+) 78,000	ANNEXURE "C"				
Basic price in July 93	16.00	Dividend accrued on 1,25,000 units	1.25	Total	17.25	Sale/realisation
15.60	2.60	18.20	Gain/Loss per unit	(-) .40	1,25,000 units	(+) 1.35
(+) .95	3,00,000 units	(+) .35	(-) .05			

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