

Assistant Commissioner of Income Vs. Affection Investments Ltd.

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Feb-19-2003

Reported in : (2003)80TTJ(Ahd.)278

Judge : B Kothari, D Garasia

Appellant : Assistant Commissioner of Income

Respondent : Affection Investments Ltd.

Judgement :

1. The respondent-assessees belong to one of the most respected groups known as "Shri Lalbhai Group" or "Arvind Mills Group"). All of them did not claim deduction in respect of alleged loss on sale/renunciation of "Right offer" sold by them in favour of their sister concerns for a consideration of several lakhs in their original returns of income obviously because the "rights" were acquired by them without payment of any purchase price but those were received as such right to acquire "Right offer" of new issue was embedded in the original shares of Arvind Mills Ltd. owned by them. However, all of them have made claim for deduction of short-term capital losses on sale/renunciation of such "Right offer" by subsequently filing revised returns. It appears that most brilliant tax planners in the country Grafted an unjust device of tax avoidance in an attempt to dodge the ever watchful eyes of law on the basis of misinterpretation of judgment of Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia v. CIT (1967) 63 ITR 651 (SC) divorced from its context and facts.

1.1 The Hon'ble apex Court in this case observed that "Right offer" of acquiring 710 new shares of TISCO was embedded in the 710 original/old shares of TISCO held by Miss Dhun D. Kapadia. The cost of original/old shares as per third proviso to Sub-section (2) of Section 12B of the IT Act, 1922, was Rs. 341 per share, which included the cost of "rights" embedded in the original share. Miss Kapadia instead of subscribing the new issues opted to sell/renounce "Right offer" to third party in open market for a total consideration of Rs. 45,252. The assessee claimed that for working out capital gain on sale/renunciation of "rights", proportionate cost of acquisition of rights worked out by the assessee at Rs. 53 per share i.e., Rs. 37,630 should be deducted from sale consideration of Rs. 45,252. The Hon'ble Supreme Court observed that the cum-right price of shares of TISCO immediately prior to issue of right offer was Rs. 253 and right price soon after the issue of right offer was Rs. 198.75. Thus, there was a depreciation in value by Rs. 54.25 per share, which can be treated as cost of "Right offer" embedded in the value/cost of original shares. It is noteworthy that cum-right price and ex-right price was below the original cost of acquisition of Rs. 341 and there was a real depreciation/loss in value of shares as compared to its actual cost of acquisition. The Hon'ble Supreme Court in the case of Miss Dhun Dadabhoj Kapadia followed the principles laid down in the case of CIT v. Dalmia Investments Co. Ltd. (1964) 52 ITR 567 (SC). The Hon'ble Supreme Court held in this case that the original cost of share has to be spread over in an equitable and reasonable manner depending on the facts of each case. But what is required to be apportioned in case of sale of bonus shares/right shares/rights, etc., is the original cost of acquisition of shares. The judgment of Hon'ble Supreme Court in the case of Miss Dhun D. Kapadia (supra) and Dalmia Investments Co. Ltd. (supra), if read in an honest manner with a view to find out its real ratio, it is abundantly clear that the Hon'ble Supreme Court observed that where "rights" are sold/renounced, capital gain on sale thereof should be worked out after deducting from their sale price the cost of acquisition of such rights, which has to be computed by apportionment of the cost of acquisition of original/old shares in an equitable manner on the basis of accepted commercial practices. This judgement of Hon'ble Supreme Court can by no stretch of imagination be interpreted to mean that the proportionate cost of rights, which is only a part of the original share, or only a fractional interest embedded in the

original share can exceed the actual/total cost of acquisition of shares. However, several companies belonging to various leading groups throughout the country have realised several lakhs/crores by sale/renunciation of "Right offer" in favour of companies of their own groups, The controlling power/voting rights of the group concerns remained intact. The "Right offers" were acquired to them without paying any purchase price. They have not paid any tax on capital gains of several lakhs/crores derived on sale of such rights but on the other hand they have claimed deduction of short-term capital loss of several lakhs/crores in each such case by claiming deduction of cost of acquisition of "Right offer" at a figure higher than the total/actual cost of acquisition of original/old shares held by them. The present cases involved consideration of claim of such short-term capital losses on sale/renunciation of "Right offers" The AO disallowed such claim of losses. The CIT(A) allowed the same.

2. The Revenue has raised the following identical grounds in all these appeals :
"1.1. The learned CIT(A) has erred in law and on facts in deleting the short-term capital gain of Rs. 5,60,000 in ITA No. 3706/A/1997; Rs. 1,86,000 in ITA No. 3709/A/1997, Rs. 8,06,000 in ITA No. 3713/A/1997 and Rs. 42,000 in ITA No. 3714/A/1997, when as per admitted facts on record assessee received the aforesaid amount on sale of right renunciation forms for which no cost was incurred.

1.2. The learned CIT(A) has erred in law and on facts in directing to allow the carry forward of short-term capital loss of Rs. 12,88,000 in ITA No. 3706/A/1997; Rs. 4,29,000 in ITA No. 3709/A/1997; Rs. 18,55,180 in ITA No. 3713/A/1997 and Rs. 96,000 in ITA No. 3714/A/1997 on sale of right renunciation forms when as per admitted facts on record assessee actually benefited by receipt of Rs. 5,60,000 in ITA No. 3706/Ahd/1997; Rs. 1,86,000 in ITA No. 3709/A/1997; Rs. 8,06,000 in ITA No. 3713/A/1997 and Rs. 42,000 in ITA No. 3714/A/1997 on sale of right renunciation forms for which no additional cost was incurred when there was actually no loss incurred by assessee, and as per admitted facts price of ex-right share was Rs. 150 as against cost of acquisition at Rs. 35 only.

1.3. The learned CIT(A) has erred in law and on facts in holding that the judgment of Dhun Dadabhoy Kapadia (1967) 63 ITR 651 (SC) was applicable to the facts and circumstances of the case when the facts were clearly different and distinguishable.

1.4. Learned CIT(A) has erred on facts and in law in holding that the decision in the case of Dhun Dadabhoy Kapadia was applicable in the changed position of taxation of capital gains under 1961 Act, where as per the entire share, no deduction for any notional amount is allowable as "cost of acquisition" or "cost of improvement" except the actual cost of acquisition or the value of capital asset on 1st April, 1981, as per the option of the assessee and subsequent case of improvement, if any.

1.5 The learned CIT(A) erred on facts and in law relying on the decision of Hon'ble Supreme Court in Dhun Dadabhoy Kapadia's case (supra) which was rendered under the provisions of 1922 Act, in preference to later judgment of Hon'ble Supreme Court rendered on the provisions of 1961 Act in the case of R.K. Palshikar (HUF) v. CIT (1988) 172 ITR 311 (SC) and A.R. Krishnamoorthy and Anr. v. CIT (1989) 176 ITR 417 (SC).

1.6. The learned CIT(A) has erred in law and on facts in holding that the price prevailing on 26th June, 1992, i.e., about a month earlier from the snares become ex-right on 24th July, 1992, has to be adopted for arriving at the depreciation in the value of shares becoming ex-right. The learned CIT(A) has erred in law and on facts in holding that naturally closing share price of about a month back was to be taken as the opening price when trading started on forward basis, when it is a known fact that the opening price on any given day on stock exchange can vary widely in relation to the closing price of the previous working day, not to speak of the price quotation of about a month back.

1.7. The learned CIT(A) has erred in law and on facts, in not deciding the alternative contention taken in written submission filed that if at all the depreciation in the value of shares becoming ex-right has to be considered, that should be worked out with reference to the actual cost of acquisition.

1.8. The learned CIT(A) has erred in law and on facts in not following the appeal order of CIT(A)-V, Ahmedabad, dt. 21st Jan., 1996, in the case of Sunil Siddharthbhai for asst. yr. 1993-94 of the same group on identical facts and circumstances, wherein it was held that decision of Hon'ble Supreme Court in the case of Dhun Dababhoy Kapadia (supra) was not applicable on the facts and circumstances of the case and taking into consideration changed position of law for taxation of capital gains under 1961 Act as applicable to the assessee's case. In doing so learned CIT(A) has ignored the decision of Hon'ble Gujarat High Court in the case of Taraben R. Patel and Anr. v. ITO and Ors. (1995) 215 ITR 323 (Guj) wherein it has been categorically held that on identical facts the appellate authorities will not depart from previous decisions at his sweet will in absence of material circumstances or without giving reasons for such departure.

1.9. The learned CIT(A) has further erred in law and on facts in relying on other judgments in support of his finding that the decision of Dhun Dadabhoy Kapadia (supra) was applicable in the facts and circumstances of the case when the facts and circumstances of those cases were materially different and distinguishable with the facts of assessee's case.

1.10. The learned CIT(A) has erred in law and on facts in not appreciating that in the case before Hon'ble Supreme Court the assessee had actually suffered a loss in the price of shares held by her, with reference to the cost of acquisition, whereas in the case of the assessee, even after the shares became ex-right the ruling price of those shares at Rs. 180 was much higher than the actual cost of acquisition by the assessee at Rs. 35 and, thus, there was no loss to the assessee which could be allowed as a deduction for determining the capital gains and directing the same to be allowed to be carried forward.

1.11. The learned CIT(A) in this process failed to appreciate that unless provided by statute specifically, the assessee cannot claim and be allowed any deduction for notional loss and admittedly there was no real loss to the assessee on sale of right renunciation forms.

2.1. The learned CIT(A) has erred in law and on facts in holding that finding of AO in para 6 of assessment order regarding transaction being void was not taken to

logical conclusion and learned CIT(A) further erred in observing that if the said transactions were void there was no case of taxation of capital gains.

2.2. The learned CIT(A) has failed to appreciate that even the profit earned and accrued from void and illegal transaction was clearly liable to be taxed under the provisions of IT Act.

2.3. The learned CIT(A) has failed to appreciate that even if AO has not taken any finding to its logical conclusion, there was nothing to prevent him from doing so, as his powers are co-terminus with that of AO. The learned CIT(A) was rather duty-bound, to bring the same to its logical conclusion as he ought to have done what AO has failed to do. The learned CIT(A) has thus erred on facts and in law in coming to the conclusion that no finding was called for on the effect of such illegal and void transaction.

2.4. The learned CIT(A) has erred on facts and in law in allowing the carry forward of loss, when the transaction entered into by the assessee regarding right renunciation was clearly illegal, being hit by provisions of Section 13 of Securities Contract Act, 1956, as not being transacted on the floor of the stock exchange.

3.1. The learned CIT(A) has erred in law and on facts in holding that the amendment brought under the provisions of Section 55(2)(aa) in the matter of determination of the value of rights to financial assets was not explanatory and clarificatory in nature and hence not applicable to all pending proceedings.

3.2. The learned CIT(A) has erred in law and on facts in not appreciating that in view of the judgment of Hon'ble Supreme Court in the case of CWT v. Shrivankumar Swaroop and Ors. (1994) 210 ITR 886 (SC) and judgment of Hon'ble Gujarat High Court in the case of CIT v. Chandulal Venichand (1994) 209 ITR 7 (Guj) to the proposition that the amendment brought as aforesaid being for rationalisation and simplification of existing provisions was clarificatory in nature and thus applicable to all pending proceedings.

4.1. The learned CIT(A) has erred in law and on facts in not at all considering the deciding the alternative submission filed in the course of appeal hearing that the

amount received by assessee on sale of right renunciation form, was clearly in the nature of profits, there being no cost or expenses incurred and was liable to be taxed as real income following various decisions of Hon'ble Supreme Court including in the cases Ramesh Narain Saxena and Ors.

v. CIT (1996) 220 ITR 19 (SC), CIT v. Lakshmi Vilas Bank Ltd. (1996) 220 ITR 305 (SC), CIT v. Karam Chand Thapar and Ors. (1996) 222 ITR 112 (SC) and CIT v. T.V. Sundaram Iyenger & Sons Ltd. (1996) 222 ITR 344 (SC).

4.2 The learned CIT(A) has erred in law and on facts in not holding as contended by way of alternative contention that the aforesaid amount received was liable to be treated as income under any other proper head including Section 10(3) of the Act.

5. On the facts and in the circumstances of the case, the learned CIT(A) ought to have upheld the order of the AO. 6. It is, therefore, prayed that the order of the learned CIT(A) may be set aside and that of the order of AO be restored to be above extent." 3. The three respondent-companies are investment companies of Lalbhai group (also known as Arvind group). The fourth respondent-assessee Shri Anangbhai Ajaybhai is also a person belonging to the same group.

4. Shri Narendra Kumar, the learned AO has passed elaborate orders in the cases of the three respondent-companies. The facts relating to these cases are briefly as under: The assessee filed a return of income declaring total income at NIL on 31st Dec., 1993. The return was processed under Section 143(1)(a). Subsequently, a revised return of income was furnished on 30th March, 1994, declaring NIL income. The assessee also claimed short-term capital loss of Rs. 12,88,000 in respect of sale of "Right offer", to be carried forward to subsequent years. The assessee was holding 27,990 shares of Arvind Mills Ltd. The cost price was shown at Rs. 6,00,638. The average cost of each share came to Rs. 22, Out of this, 5,000 shares were sold during the previous year. Arvind Mills Ltd. declared rights in the ratio of one convertible debenture for 10 shares held as on 18th Aug., 1992 (the record date). The assessee thus became entitled to get 2,800 rights in the ratio of 1:10. The assessee did not subscribe for the right offer of debentures but preferred to sell (renounce) these rights in favour of other group companies at

the rate of Rs. 200 per right.

The sale proceeds of Rs. 5,60,000 so received by way of consideration for the aforesaid transfer of right offer was credited as profit in the P&L a/cs. At the time of filing of the original return, no income attributable to aforesaid sale consideration of right offer transferred by the assessee was shown in view of the judgment of the Hon'ble Supreme Court in the case of CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) in which it was held that where cost of acquisition cannot be envisaged, no tax on capital gain can be levied. However, in the revised return the assessee claimed a loss of Rs. 12,88,000 in relation to the aforesaid transfer of right offer on the basis of interpretation of the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia v. CIT (supra). The value of shares of Arvind Mills Ltd. on 23rd July, 1992, as quoted on Ahmedabad Stock Exchange immediately prior to announcement of right offer was Rs. 246 per share. The first ex-right quotation as on 24th July, 1992, was Rs. 180. Thus there was a fall of Rs. 66 per share as a result of announcement of right offer by Arvind Mills Ltd. Since the one right was announced for 10 shares, the cost of one right was determined by the assessee at Rs. 660 per right on the basis of judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). The assessee accordingly claimed loss of Rs. 12,88,000 at the rate of Section 460 per right offer (Rs. 660 being cost of one right computed as aforesaid minus Rs. 200 being sale price of right offer], in respect of 2,800 rights transferred by them.

In this case also the assessee in the like manner claimed loss on sale of right offer by filing the revised return on 30th March, 1994. The assessee was holding 9,333 shares of Arvind Mills Ltd. and the average cost as per the balance sheet comes to Rs. 21 per share.

The assessee became entitled to 933 rights which were sold by the assessee in favour of another group company viz., Arvind Polycoat Ltd. at the rate of Rs. 200 per right for a total consideration of Rs. 1,86,600. In the original return no capital gain/loss was shown on such sale of rights for Rs. 1,86,600. However, in the revised return the loss of Rs. 4,29,180 has been claimed on similar basis.

The assessee submitted original return showing total income of Rs. 16,840 on 24th Dec., 1993. They filed a revised return on 30th March, 1994, declaring same income but also claiming carry forward of short-term capital loss of Rs. 18,55,180 on the sale of right offer issued by Arvind Mills Ltd. for allotment of one convertible debenture for 10 shares held. The assessee was holding 40,333 shares of Arvind Mills Ltd. costing Rs. 8,44,660 as per the assessee's balance sheet. The average cost of one share comes to about Rs. 20.

The assessee became entitled for 4,033 rights for the shares held. They preferred to renounce/sell those rights to one of the group concerns M/s Arvind Polycoat Ltd. and received sale consideration at the rate of Rs. 200 per right amounting to Rs. 8,06,600. No capital gain/loss was shown at the time of filing of the original return on the aforesaid sale consideration of Rs. 8,06,600 received by the assessee, on the basis of the decision of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra). However, in the revised return the assessee claimed loss on the basis of the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhay Kapadia (supra) on similar basis. The loss was worked out as under: In this case also the assessee made a claim for short-term capital loss of Rs. 36,340 on sale of right offer by filing a revised return on 30th March, 1994. The assessee owned 14,952 shares of Arvind Mills Ltd. He, therefore, became entitled to get 1,495 debentures in the ratio of 1:10 of shares held. The assessee renounced such right offer and transferred the same in favour of one of its group concerns at the rate of Rs. 200 per right. The assessee received Rs. 15,800. The loss was claimed on similar basis by computing the cost of right at Rs. 660. The short-term capital loss of Rs. 36,340 was worked out on similar basis.

5. The AO in the assessment orders of the respondent-companies has observed that all these assesseees were owning certain shares of Arvind Mills Ltd. The average cost of such shares owned by all of them ranged between Rs. 20 to Rs. 22 per share as per their respective balance sheets. These assesseees did not subscribe to the convertible debentures but opted to sell or renounce such right offer to other group concerns of the same group at the rate of Rs. 200 per right. The cum-right market value of one share of Arvind Mills Ltd. immediately prior to announcement of right offer was Rs. 246 per share and ex-right value after

announcement of right offer was Rs. 180 per share. Thus, there was a decline in the market value of such shares by a sum of Rs. 66.

However, the sale of right offer by these assesseees did not affect the cost of original shares by these assesseees. Even after announcement of right offer, the value of each share was Rs. 180. The market value of such shares as on 31st March, 1993, was Rs. 100 per share. The original cost of acquisition of these shares was approximately Rs. 20 to Rs. 22 per share. Thus, there was no depreciation in the original cost/value of these shares shown in the balance sheets of these respective assesseees.

5.1. The AO further observed that in spite of appreciation in the value of investments in these shares as compared to its original cost of acquisition, the assessee is claiming deduction in respect of hypothetical/notional loss, which cannot be regarded as real loss as the assessee has not actually paid purchase price nor incurred any expenditure nor there is any depreciation in the original value/cost of acquisition of such shares held by the assessee. Such loss cannot be regarded as real loss.

5.2. The AO elaborately considered the facts of the assesseees cases in the light of principles of law laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). The AO observed that the shares of Arvind Mills Ltd. were traded on spot basis. After elaborate discussion in para 2.7 to 2.10 of assessment order in the case of Ajax Investments Ltd. he has observed that the rates of these shares regularly quoted on spot basis were as under: 5.3. He thus observed that the difference between the ex-right price and the cum-right price was Rs. 35 only per share. The cost of right can be worked out by multiplying Rs. 35 x 10 which comes to Rs. 350 per right as against the cost of Rs. 660 per right computed by the assessee. These facts have stated in the assessment order only with a view to point out the glaring mistake in the working of short-term capital loss claimed by the assessee on sale of such right offer. The AO, however, observed that the assessee is not entitled to any deduction in respect of short-term capital loss claimed on the basis of misinterpretation of the judgment of the Hon'ble apex Court in the case of Miss Dhun Dadabhoy Kapadia (supra).

5.4. The AO has also given a detailed chart on pp. 10 and 11 of the assessment order in the case of Ajax Investments Ltd., giving complete details of rights of FCD transferred by various companies of this group in favour of Arvind Polycoat Ltd. M/s Arvind Polycoat Ltd. is also a company of the same group who had availability of finances with them.

They made major investments in the right issue of Arvind Mills Ltd. by purchasing rights for FCD at the rate of Rs. 200 per FCD from various other companies of the same group. The details of other group companies who had invested in the right issue of Arvind Mills Ltd. by purchase of rights from other group companies, could not be gathered by the AO till completion of assessments in question. He has, however, observed that the whole scheme of operation of transfer of rights for FCD inter se between the companies of the share group are similar.

5.5. The AO has observed that these respondent-companies have sold their rights at the rate of Rs. 200 per right on 17th Oct., 1992, which was a holiday. The official quotations show that the right offer of Arvind Mills Ltd. were traded at the rate of Rs, 330 on 15th Oct., 1992, and at rates fluctuating between Rs. 270 to Rs. 330 on 16th Oct., 1992, The assessee produced quotation for Rs. 215 as on 17th Oct., 1992, but this purchase was for odd lot which is much lower than the marketable lots.

5.6. The AO observed that the ratio of judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) cannot be applied to the facts of the present cases, as the facts of the present cases are substantially different from the case of Miss Dhun Dadabhoy Kapadia (supra) e.g.,

(a) That the assessee in the present cases have sold the rights to convertible debentures which was to be converted into 10 equity shares at a lower price after a gap of one and one-half years while in the case of Miss Dhun Dadabhoy Kapadia (supra), the appellant had sold her right to equity shares; and (b) In the case of Miss Dhun Dadabhoy Kapadia (supra), the issue related to financial year 1955-56 and the matter was decided in accordance with the provisions of the old IT Act, 1922, as were in force during that year. The AO has given legislative history of the old provisions contained in IT Act, 1922, and the corresponding

provisions contained in IT Act, 1961. He has observed that in view of clear and specific provisions contained in IT Act, 1961, the fair market value ratio held in Miss Dhun Dadabhoy Kapadia's case (supra) is not applicable to the -present cases.

"None of test (laid down in various judicial precedents) is either exhaustive or universal. Each case depends on its own facts and close similarity between one case and another case is not enough because even a single significant detail may defer the entire aspect." 5.8. On p. 15 of the assessment order in the case of Ajax Investments Ltd. the AO has observed that the assessee instead of paying any tax on the sale proceeds of right offer has shown NIL income in the original return on the basis of judgment of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra) but later on they have filed the revised return and claimed capital loss by calculating notional depreciation in value of shares. No reasonable explanation for filing the revised return by changing the stand as mentioned above was furnished during the assessment proceedings. It has also been observed that various other persons of the same group viz., Chinubhai Chimanbhai and Ashokbhai Chimanbhai for asst. yr. 1993-94 have sold their rights to FCD of Arvind Polycoat Ltd. and have contended that there will be no cost of acquisition of such rights and consequently there will be no capital gains tax in view of Supreme Court decision in the case of B.C.Srinivasa Setty (supra). These assessees have not claimed any capital loss on the basis of Miss Dhun Dadabhoy Kapadia's case (supra). The AO observed that the assessees have wrongly and deliberately applied the ratio of Miss Dhun Dadabhoy Kapadia's case in the present cases by filing the revised returns only with a view to claim set off of capital loss against current and future capital gains. The assessee has transferred such right offer to companies of the same group. In this process these assessees have transferred the benefit to the group companies and have created notional loss for themselves. The intention of these assessees of entering into such transactions is only to reduce the tax liabilities. The AO placed reliance on the judgment in the case of Viscount Simon in *Latilla v. IRC* (1943) 25 Tax Cases 107 (HL) p. 117 to support his conclusion that the tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning. The AO has also placed reliance on the judgment of the Hon'ble Supreme Court in the case of

McDowell & Co. Ltd v. CTO (1985) 154 ITR 148 (SC). He has further observed that these assesseees have made wrong claim of capital loss deliberately with a view to reduce its current and future liabilities to pay tax on capital gains. The AO also placed reliance on the decision of Hon'ble Calcutta High Court in the case of Atul Kumar Deovrat & Co. v. CIT (1987) 31 Taxman 87 (Cal). On pp. 17 and 18 of the said assessment order the AO has observed that the value of shares of Arvind Mills Ltd. on the date of renunciation on 10th Oct., 1992, was about Rs. 145 per share. Thus, even after so-called depreciation in the market value of the ex-right shares, there was substantial gain in the market value of such shares held by the assesseees as compared to the original purchase price of those shares which were ranging between only Rs. 20 to Rs. 35 per share. There was no loss to the assesseees in the form of real expenses or in the form of depreciation in the original cost/original value of such shares held by them. The AO has pointed out that an absurd conclusion would follow if the assesseees' contention is accepted. He has observed that the cost of shares in these cases was only Rs. 20 per share to Rs. 22. Against this the assessee has already realised Rs. 20 per share on sale of right at the rate of Rs. 200 per right. The assessee has claimed loss of Rs. 66 per share to be carried forward. If the assessee now sells the shares of Arvind Mills Ltd. at the rate of Rs. 80 per share, there will be no net capital gain to the assessee after setting off this loss of Rs. 66. Such a conclusion is contrary to the clear provisions contained in the IT Act for computation of capital gains. There is no provision which permits such a situation that an assessee who sells shares at the rate of Rs. 80 which costed him only Rs. 20 or Rs. 22 per share should not attract any tax on capital gains arising as a result of sale thereof. Such a view is against commonsense and is also contrary to claim provisions of law.

5.9. The AO on p. 18 of the said assessment order has placed reliance on the judgment of the Hon'ble Supreme Court in the case of CIT v. J.H.Gotia (1985) 156 ITR 323 (SC) in which it has been observed that the intention should be found out from the language used by the legislature and if strict literal construction leads to an absurd result a result not intended to be subserved by the object of the legislation, then if another construction is possible apart from strict literal construction, then that construction should be preferred. The AO has observed on p. 19 of the said assessment order that instead of following the spirit of decision in

the case of Miss Dhun Dadabhoy Kapadia (supra), the assessee has tried to use this decision as a tool for tax evasion. The assessee has stretched few words from the judgment of the Hon'ble Supreme Court too far and out of context and has come out with a conclusion which was totally unintended and unexpected. The assessee has gone even further and has quoted wrong facts and date.

5.10. The AO has thereafter, placed reliance on the amendment made by the Finance Act, 1995, in which it has been provided that the cost of right renunciation of bonus should be the actual sum paid by the assessee towards acquisition of right or bonus and if the assessee does not have to pay anything it should be taken to be NIL. The AO has held that the said amendment has been made with a view to simplify and rationalize the provisions relating to computation of cost of acquisition in relation to such capital assets. The amendment is not substantive one and is merely procedural. The Explanation has been inserted to remove ambiguities and complications created by the assessees as a result of certain Court decisions. The AO has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Collector Central Excise and Anr. v. Parle Exports (P) Ltd. (1990) 183 ITR 624 (SC) to support this view that the amendment is merely procedural. The AO also placed reliance on the judgment in the case of K. Eapen Chako v. Provident Investments Co. (P) Ltd. AIR 1976 SC 2610, 2617 and Mithilesh kumari and Anr. v. Prem Bharati Khare (1989) 177ITR 97 (SC) at p. 107 as well as the decision of the Hon'ble Gujarat High Court in the case of CWT v. Niranjan Narottam (1988) 173 ITR 693, 702 (Guj) to support his conclusion that the amendment dealing with the procedure are deemed to be retrospective unless such inference is likely to lead to unjust results.

5.11. Likewise, the AO further relied upon the judgment of the Hon'ble M.P. High Court in the case of CIT v. Badri Prasad Agarwal (1983) 142 ITR 353 (MP), Manikchand & Co. v. State of Tamilnadu (1977) 39 STC 12, AIR 1977 SC 518 and the decision of the Hon'ble Supreme Court in the case of CIT v. P. Doraiswamy Chetty (1990) 183 ITR 559 (SC). The AO on the basis of the aforesaid judgment observed that the cost of acquisition of right has to be taken as NIL.

5.12. The AO on pp. 22 and 23 of the said assessment order has examined the question as to whether loss claimed by the assessee is real or notional. He has placed reliance on the judgments in the case of CIT v.S. Arumugham Pillai (1969) 73 ITR 382 (Mad), Tripty Drinks (P) Ltd. v.CIT (1978) 112 ITR 721 (Ori) and CIT v. Indian Overseas Bank (1985) 151 ITR 446 (Mad). Applying the principles laid down in these judgments the AO has observed that in the instant cases it has been found that the assessee's original investment in shares has appreciated by three times and in addition to such appreciation, the assessee has also received the amount by way of sale of right offer, for which no purchase price was paid by the assessee. Thus, there is neither any loss in the value of investments when compared with the cost price nor there is any other loss to the assessee. The entire exercise of computation of loss undertaken by the assessee is hypothetical and theoretical. No businessman will say that when your investment appreciates there-fold and you also receive substantial amount on sale of rights, you are incurring losses, Because if this is loss, then everyone will like to have such loss, where one can make huge money without paying any taxes.

5.13. The AO thereafter on p. 23 of the said assessment order has also observed that the transaction of transfer of rights to FCDs has contrary to the provisions of Securities Contract Regulation Act, 1956.

On p. 24 of the said assessment order the AO has observed that the cost of acquisition of rights to the assessee was NIL in accordance with the legislative intention indicated by the amendment and also on the basis of decision of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). Even if the principles of law laid down by the Hon'ble apex Court in the case of Miss Dhun Dadabhoy Kapadia are followed, there is no depreciation in the value/cost of acquisition of original shares held by these assesseees consequent to the sale of rights. Even after considering all fluctuations in the market, the assessee's investment actually appreciated by almost three times during the previous year as compared to the original cost of acquisition. The AO, therefore, held that the amount of sale proceeds received by the assessee on transfer of right of FCDs is liable to tax as short-term capital gain in the hands of these assesseees.

6. The learned CIT(A) following his order dt. 26th Sept., 1997, in the case of Amazon Investment Ltd. for asst. yr. 1993-94, directed the AO to allow the loss as claimed by the assessee on the basis of decision of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) and not to tax any short-term capital gain.

7. It may be relevant here to mention that the appeal preferred by the Revenue in the case of Amazon Investments Ltd. has been decided by the Tribunal vide order, dt. 20th April, 1999, in ITA No. 36107 And/1997.

The Tribunal after considering all the relevant facts, submissions and judgments gave the following findings : (a) That the decision of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) is applicable to all cases of sale/renunciation of right shares/convertible debentures under 1961 Act also because w.e.f. 1st April, 1994, the legislature amended the law by introducing Section 55(2) relating to the valuation of cost of financial assets which is applicable to asst. yr. 1995-96 and subsequent years.

(b) The judgment of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra) is not applicable as that decision relates to valuation of goodwill which is a self-generated asset and whose cost of acquisition cannot be determined. However, in the present cases the transfer is not of a goodwill but is that of right to receive convertible debentures, whose cost can be determined on the basis of depreciation in the valuation of original shares consequent upon declaration of right by the company and such depreciation in value will be deemed to be the cost of acquisition of the right, which the assessee sold/renounced in favour of third party for a consideration, (c) The Tribunal further held that the depreciation in value of shares as a result of right offer computed by the assessee at Rs. 66 per share cannot be accepted. The rates of spot delivery are better indicator of the actual market value of the shares. The Tribunal accepted that the depreciation in the value of shares consequent to the declaration of right will have to be calculated as under: (d) The Tribunal after taking into consideration the totality of the facts and circumstances directed the AO to compute the capital loss suffered by the assessee on the basis of the ratio of the decision of the Hon'ble Supreme Court in

the case of Miss Dhun Dadabhoy Kapadia (supra) by taking depreciation in the value of shares from cum-right to ex-right at Rs. 35 per share.

8. Shri V.K. Gupta, the learned senior Departmental Representative, represented the Department. He submitted that the assessee has not suffered any real loss. The cost of acquisition of original shares was substantially lower than the market value of shares even after right offer was announced. Thus, there is no depreciation in the cost of acquisition of shares. Such rights of FCDs of Arvind Mills Ltd. have been transferred by all these assessees to the companies of the same group. The ratio of McDowell & Co. 's case (supra) was rightly applied by the AO in the facts and circumstances of the present cases. The learned senior Departmental Representative, relied upon the elaborate reasons given in the assessment order.

9. Shri J.P. Shah, the learned senior advocate, appeared on behalf of the respondent-assessees. He submitted that the Tribunal on identical facts in the cases of other companies of the same group have directed the AO to compute short-term capital loss by adopting the cost of acquisition of "rights" at the rate of Rs. 35 per share by applying the principles of law laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). This matter is, therefore, fully covered in favour of the assessees by the decision of the Tribunal on identical facts in the case of Amazon Investments Ltd. (supra). The learned counsel submitted that the order of the Tribunal in the case of Amazon Investments Ltd. (supra) has been followed by the Tribunal in the appeals filed by the Revenue in ITA Nos. 3704, 3705, 3710, 3711 and 3712/Ahd/1997 for asst. yr. 1993-94 in the cases of following five parties belonging to the same group involving consideration of identical facts and grounds : Copies of orders passed by the Tribunal in ITA No. 3610/Ahd/1997 in the case of Asstt. CIT v. Amazon Investments Ltd., dt. 20th April, 1999, and in the cases of aforesaid five parties, dt. 17th Aug., 1999, were submitted. The learned counsel also submitted copies of assessment orders of all these six assessees to show that the facts relating to all those cases are absolutely identical and similar. Shri Shah contended that the earlier decisions of the Tribunal on identical facts are binding. The successor Bench must follow the earlier decisions. The view taken by the Tribunal in the

above referred cases is fully supported by the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). He also drew our attention to the judgment of the Hon'ble Bombay High Court in the case of Miss Dhun Dadabhoy Kapadia v. CIT (1963) 48 ITR 882 (Bom) with a view to bring to our notice the relevant facts of the said case. The provision of Section 12B of the old IT Act, 1922, have also been reproduced on p.

891 of the said report. It was pointed out that the language of Section 12B so far as it relates to computation of capital gains is almost similar as contained in the corresponding provisions of the IT Act, 1961.

9.1. The learned counsel referred to the judgment of the Hon'ble Supreme Court in the case of CIT v. Dalmia Investment Co. (supra). The headnote of the said judgment is reproduced below : "Where bonus shares are issued in respect of ordinary shares held in a company by an assessee who is a dealer in shares, their real cost to the assessee cannot be taken to be nil or their face value. Per Hidayatullah and Shah JJ. They have to be valued by spreading the cost of the old shares over the old shares and the new issue (viz.

the bonus shares) taken together if they rank pari passu, and if they do not, the price may have to be adjusted either in proportion of the face value they bear (if there is no other circumstance to differentiate them) or on equitable consideration based on the market price before and after issue." 9.2. He then referred to the judgment of the Hon'ble Supreme Court in the case of CIT v. Gold Mahore Investment Co. Ltd. (1968) 68 ITR 213 (SC). In this case, the Hon'ble Supreme Court, following the earlier judgment in the case of Dalmia Investment Co. (supra), set aside the judgment of the High Court and remanded the case for rehearing after calling for a supplementary statement of case.

9.3. The learned counsel then referred to the judgment of the Hon'ble Supreme Court in the case of CIT v. Gold Mahore Investment Co. Ltd. (1969) 74 ITR 62 (SC) in which it was held as under: "In the case of a dealer in shares who values his stock at cost, where bonus shares issued in respect of ordinary shares held by him rank pari passu with the original shares, the correct method of valuing the cost to the dealer of the bonus shares is to take the cost of the original shares, spread

it over the original shares and the bonus shares collectively and find out the average price of all the shares." 9.4. Shri Shah then referred to the judgment of the Hon'ble Bombay High Court in the case of CIT v. K.A. Patch (1971) 81 ITR 413 (Bom). Our attention was invited towards the observations made by the Hon'ble Bombay High Court at p. 419 where the distinction between the bonus shares and right issue has been explained. In cases where bonus shares are issued, the bonus shares can be sold only after they are actually issued. In the cases of rights shares, however, the right itself to apply for the new shares offered to a particular shareholder can be sold and the sale would be even before the rights shares are actually issued and if sold it would be the purchaser of the right who would be entitled to apply for and actually obtain the rights shares. In the cases of issue of bonus shares, the bonus shares would be given to the holders of the then existing shares and the working out of the cost to the shareholder would be simple. The working out of the cost would be to add the number of bonus shares to the number of the old shares and spread out the cost of the old shares over the aggregate of the old and the bonus shares. The result would be the average price of each share of the combined lot of the old and the bonus shares.

He also invited our attention to various examples given at pp. 420 and 421 of 81 ITR. It was pointed out that if the principle in Dhun Dadabhoy Kapadia's case (supra) is held applicable in each of these two examples, what would be the taxable gain would be Rs. 5, though in example No. 1 the profit is Rs. 22.50 and in example No. 2 there is a loss of Rs. 50. The learned counsel contended that the method of averaging out of the cost as laid down in the three cases dealing with bonus shares, may, with some reservations, apply only if, in the case of a rights issue, the shareholder actually applied for the share offered to him, pays to the company the money payable in respect of these shares and obtains the shares from the company. The Hon'ble Bombay High Court observed that this is a case where the assessee did not himself apply for any of 350 right shares offered to him but sold out the right to obtain such right asset in the open market. The facts of the said case were not only similar but identical to those before the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). The Hon'ble Bombay High Court, therefore, decided the reference on the basis of principles laid down in the case of Miss Dhun Dadabhoy Kapadia (supra).

9.5. Shri Shah then relied upon the judgment of the Hon'ble Calcutta High Court in the case of CIT v. Oberoi Building and Investment (P) Ltd. (1993) 203 ITR 403 (Cal) at p. 406. The assessee-company held certain shares of "E" as investment. 'E' declared bonus as well as right shares in the proportion of one share for every five shares held in both the cases. Simultaneously, it also issued new equity shares for the public. The assessee sold its right to purchase 29,000 right shares at Rs. 3.50 per right share. The assessee found that the quotation of the shares of E went down from Rs. 42.75 to Rs. 30.25 per share as a result of the issue of the aforesaid right shares and bonus shares. The depreciation in the value amounted to Rs. 12.50 per share. The Tribunal held that the cost of acquisition of the right shares should be taken at Rs. 6.25 per share and short-term capital gain or loss would be computed accordingly. The Hon'ble High Court applied the principles laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) and confirmed the order of the Tribunal.

9.6. The learned counsel also invited our attention to the judgment of the Hon'ble Calcutta High Court in the case of CIT v. Tushar Commercial Co. Ltd. (1998) 230 ITR 910 (Cal). In this case, the Hon'ble High Court, after referring to the judgments of the Hon'ble Supreme Court in the cases of Miss Dhun Dadabhoy Kapadia and B.C. Srinivasa Setty (supra), gave the following findings : "We are of the considered view that when rights shares or debentures are issued, there can be a fall in the value of original shares and that cannot be ignored while computing the capital gain on sale of such rights shares or debentures. If their value is included and that is not more than the cost invested in the share capital, the sale amount of rights shares or debentures cannot be taxed as capital gain. Thus, in view of the fact that those original shares were treated as capital assets and when there is no finding that the assessee is a dealer in shares and considering the decisions of their Lordships, relied upon by the Tribunal, if after including that gain, the value of the shares on that date falls short of the cost invested in the shares, no capital gain remains for tax." 9.7. The learned counsel then referred to the judgment of the Hon'ble Gujarat High Court-in the case of CIT v. Suhasbhai Vadilal (1999) 239 ITR 362 (Guj) it was held in the aforesaid case that : "the shares in R were given to the shareholders of S as a matter of right, depending upon their holding and at the ratio of 1:1. Though they were not rights issues properly so-called of S the fact

remained that the shares of S carried with them the right to receive the shares of R in view of the special arrangement made between the two companies and the resolution passed by R linking its issue directly with the holding of the shares in S. When this right to receive the shares of R went with the shares of S, their value was Rs. 543.75 per share, but soon after shares of R were issued, the value of share of S diminished to Rs. 410 per share. The depreciation in value of shares of S to the extent of Rs. 108,75 was directly related to the issuance of shares by R and that depreciation was the amount lost to the assessee in acquiring the new shares of R. To the extent of this depreciation which in the instant case was Rs. 108.75 as per the facts found, the assessee must be deemed to have invested money in the acquisition of the shares of R. Therefore, the cost of acquisition having so crystallized the passage of time when these new shares were sold, would not make the difference in that cost. The assessee was entitled to claim deduction of the amount of depreciation in the value of his shares in S being the loss incurred by him in his capital asset in the transaction in which he acquired the shares in R. The Hon'ble Gujarat High Court applied the principles laid down in the case of Miss Dhun Dadabhoy Kapadia (1967) 63 ITR 651 (SC)." 9.8. The learned counsel brought to our notice the following judgments to support his contention that the earlier decisions of the Tribunal in the cases of various companies of this very group involving consideration of identical facts and grounds are binding :Union of India and Ors. v. Kaumudini Narayan Dalai and Anr.

(2001) 249 ITR 219 (SC) It was held in this case that it was not open to the Revenue to accept the earlier judgment in the case of one assessee and challenge its correctness without just cause in the cases of other assessees.Union of India v. Satish Panalal Shah In this case also it was held that it was not open to the Revenue to accept the earlier judgment in the case of one assessee and challenge its correctness without just cause in the cases of other assessees.Government of AP. and Ors. v. A.P. Jaiswal and Ors. (2001) 1 SCC 748 The Hon'ble Supreme Court in para 24 of the said judgment has observed as under : "24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of

precedents, principle of stare decisis, etc. These rules and principles are based on public policy and if these are not followed by Courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of Sub-Inspector Rooplal v. Lt Governor held thus : (See p. 654 para 12) At the outset, we must express our serious dissatisfaction in regard to the manner in which a coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents.

Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency, in interpretation of law alone can lead to public confidence in our judicial system, This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law.

A subordinate Court is bound by the enunciation of law made by the superior Courts. A coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement¹." (d) Agarwal Warehousing and Leasing Co. v. CIT (2002) 257 ITR 235 (MP) It was held that the Tribunal has no right to come to a conclusion contrary to the one reached by another Bench of the same Tribunal on the same facts. If the Tribunal wants to take an opinion different from the one taken by an earlier Bench, it ought to place the matter before the President of the Tribunal so that he can have the case referred to a Bench consisting of three or more members for which there is provision in the IT Act itself. Dr. Vijay Laxmi Sadho v. Jagdish AIR 2001 SC 600 : The relevant extracts from the headnote are reproduced below.

"As single Judge of M.P. High Court in *Jai Bhansing's* case was not in agreement with view expressed in *Devlal's* case, and expressed a contrary view, rather than referring matter to larger Bench, Supreme Court expresses its distress over procedure adopted by Court in *Jai Bhansing's* case and holds that, if a Bench co-ordinate jurisdiction disagrees with another Bench of co-ordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments- to operate creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs." It has been held by the Hon'ble Supreme Court that once a Division Bench of a High Court has held a particular provision of law to be constitutional and not violative of Article 14 of the Constitution of India, it is not open to another Division Bench to hold that the same provision of law is unconstitutional. Judicial discipline demands that one Division Bench of a High Court should, ordinarily, follow the judgment of another Division Bench of that High Court. In extraordinary cases, where the later Division Bench finds it difficult, for stated reasons, to follow the earlier Division Bench judgment, the proper course is to order that the papers be placed before the Chief Justice of High Court for constituting a larger Bench. *State of A.P. v. V.C. Subbarayaddu and Ors.* AIR In this case it was held that a Division Bench disagreeing with earlier Bench ruling should as a matter of propriety refer the matter to the larger Bench.

It was held by the Hon'ble Madras High Court in this case that a decision is to be regarded as a precedent for its ratio decidendi and not for the facts in relation to which such ratio was laid down.

(i). *Vishnu Traders v. State of Haryana and Ors.* 1995 Supp (1) SCC 461 It was observed by the Hon'ble Supreme Court that the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes requires that all similar matters should receive similar treatment except where factual differences require a different treatment.

It was observed by the Hon'ble Supreme Court that where a second Division Bench was of the opinion that it had to take a different view than that taken by the first Division Bench, the matter should, as a matter of propriety, have been referred to a larger Bench, it is certainly a question of self-discipline which the Court should observe. *Rajesh Kumar Verma v. State of M.P. and Ors.* AIR The Hon'ble Supreme Court in para. 5 of their judgment observed that a division Bench of the High Court not following earlier concurrent Bench decision on the ground that it had not taken into consideration Supreme Court decision on the point, should refer the matter to larger Bench.

9.9. The learned counsel on the strength of aforesaid judgments strongly urged that the order passed by the Tribunal in the case of Amazon Investments Ltd. (supra) on identical facts should be followed.

If the Bench is not inclined to follow the said decision, it should refer the matter to the Hon'ble President, ITAT, for constituting a Special Bench.

10. We have carefully considered the submissions made by the learned representatives of both sides and have gone through the orders of the learned Departmental authorities. We have also carefully gone through all the judgments cited by the learned representatives.

11. It is true that the facts relating to the case of Amazon Investments Ltd. in ITA No. 3610/Ahd/1997, dt. 20th April, 1999, and in the cases of Aeon Investments Ltd. and four other assesseees in ITA Nos.

3704/Ahd/1997 and others, dt. 17th Aug., 1999, decided by the Tribunal are absolutely identical. All those cases relate to computation of capital gains/loss on sale/renunciation of right over FCDs of Arvind Mills Ltd. In all those cases the above named assesseees had renounced/transferred their rights in favour of other companies of the same group at the rate of Rs. 200 per right. The loss was claimed by computing the cost of acquisition on the basis of difference between the quoted cum-right and ex-right value soon before and after the offer of right over FCDs was announced. The relevant figures of sale price or rights renounced/sold by all those six assesseees at the rate of Rs. 200 per right offer and

the short-term capital loss claimed by them allegedly on the basis of principles of law laid down in the case of Miss Dhun Dadabhoy Kapadia (supra) are as under: 12. The Tribunal vide its order, dt. 20th April, 1999, in the case of Amazon Investments Ltd. and order, dt. 17th Aug., 1999, in other five cases directed the AO to compute the loss suffered by the assesseees by taking depreciation in the value of share being difference between cum-right and ex-right value on spot rate basis at Rs. 35 per share as against Rs. 66 per share worked out by the assesseees, on the basis of judgment in the case of Miss Dhun Dadabhoy Kapadia (supra).

13. The corresponding figures of sale price of rights sold in the present cases and short-term capital loss claimed by these assesseees are as under: 14. Shri J.P. Shah, the learned senior advocate, explained the principles relating to binding nature of precedents and judicial discipline in an extremely admirable and lucid manner. There cannot be any dispute that ordinarily there should be conformity in approach and uniformity in exercise of judicial discretion respecting similar cases as consistency is the cornerstone of the administration of justice or that the successor Bench should follow the earlier concurrent Bench decisions. There also cannot be any doubt that the ratio or an obiter of the judgment of the Hon'ble apex Court or of Hon'ble jurisdictional High Court are binding on subordinate Tribunals.

15. However, it is also well settled that the judgment of the Hon'ble Supreme Court or the Hon'ble High Court must be read as a whole and the observations from the judgment have to be considered in the light of the question, context and the facts of that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Hon'ble apex Court, divorced from the context of the question under consideration and treat it to be the complete law laid down by the Hon'ble Court. It is also equally well settled that a decision is to be followed for what it actually decides and not necessarily for what logically follows from it. A useful reference may be made to the following judgments to properly, understand the principles of law laid down by the Hon'ble Supreme Court in this regard : (a) CIT v. Sun Engineering Works (P) Ltd. (1992) 198 ITR 297 (SC) at p. 320 : "Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case.

It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In *Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India* (1971) 3 SCR 9 : AIR 1971 SC 530, this Court cautioned (at p. 578 of AIR 1971 SC): 'It is not proper to regard a word, a clause or a Sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment'." (b) *Gujarat State Co-op. Bank Ltd. v. CIT* (2001) 250 ITR.229(Guj) at p.265: "As per the settled legal position, a decision is an authority for what it actually decides and not necessarily for what logically follows from it. Equally well settled is the principle that a decision to be law under Article 141 must not be a mere conclusion by which the case is disposed of. Because, a conclusion, a mere conclusion, may be on facts, it may not and does not necessarily involve consideration of law. It is well settled that Article 141 will not be attracted if law is not declared or stated vocally to support the conclusion reached for deciding the lis. A mute declaration of the mere conclusion is not contemplated under Article 141. [vide *Manager, Panjarapole, Deodar v. CM. Nat.*, 1997 (2) GLR 1321-1325]." (c) *Ambica Quarry Works v. State of Gujarat* AIR 1987 SC 1073 at p.

1077 in para, 18 "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not that logically follows from it. [See Lord Halsbury in *Quinn v. Leathern* (1901) AC 495 (HL)]." All interpretations must subserve and help implementation of the intention of the Act. This interpretation, in our opinion, will subserve the predominant purpose of the Act." (d) *Goodyear India Ltd. v. State of Haryana and Anr.* (1991) 188 ITR 402 (SC) at p. 424 "It is well

settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follow from it. See *Quinn v. Leathern* (1901) AC 495 (HL) and *State of Orissa v. Sudhansu Sekhar Misra* (1968) 2 SCR 154. Therefore, the ratio of the said decision cannot be properly applied in construing the provisions of Section 9(1)(b) in this case to determine what is the taxable event." "It is now well known that a decision is an authority for what it decides and not what can logically be deduced therefrom." *Mahendra Mills Ltd. v. P.B. Desai*, AAC and Anr. (1975) 99 ITR 135 (SC) at p. 143 : "In our opinion, there is no room for any such apprehension. It must be remembered that a decision is a precedent on its own facts. Each case presents its own features. The IT authorities and Tribunals are supposed to apply the ratio of a decision to the facts of particular cases with due care and discernment bearing in mind the restricted scope of their jurisdiction under Section 35 and the object for what it is conferred." "Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. The decision, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive.

What is decisive is the nature of the business, the nature of the expenditure, the nature of the right incurred, and their relation inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in such cases." (h) *CIT v. J.H. Gotla* (supra) : The relevant extract from the headnote are reproduced below : (p. 324) : "If a strict and literal construction of the statute leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation ascertained from the scheme of the legislation, then, if another construction is possible apart from the strict literal construction, then, that construction should be preferred to the strict literal construction.

Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational result.

By The Court : Though equity and taxation are often strangers, attempts should be made and these do not remain always so and if a construction in equity rather than in injustice, then such construction should be preferred to the literal construction."

(i) K.P. Varghese v. ITO (1981) 131 ITR 597 (SC) : The relevant extracts from the headnote are reproduced below : "A statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Where the plain literal interpretation of a statutory provisions produces a manifestly absurd and unjust result which could never have been intended by the legislature, the Court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction." 16. We will have to understand the real ratio of the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) in its true spirit and correct perspective in the light of the principles laid down in the above referred judgments. The binding nature of the orders passed by the Tribunal in the case of Amazon Investments Ltd. & Ors. (supra), will also have to be considered by keeping in mind as to whether the ratio of the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) has been properly and correctly applied and whether the conclusion arrived at by the Tribunal in earlier decisions is in conformity with the clear provisions relating to computation of capital gains contained in the IT Act, 1961.

17. The Tribunal in the case of Amazon Investments Ltd. (supra) has rendered three important findings; viz.

(a) The first finding given by the Tribunal is that the provisions of Section 55(2)(aa) introduced by the Finance Act, 1994, and subsequently amended by the Finance Act, 1995, inter alia, provided that the cost of acquisition in relation to any right to renounce right share shall be NIL, will be applicable prospectively w.e.f.

1st April, 1995, and will accordingly apply in relation to asst. yr.

1995-96 and subsequent years, We respectfully following the aforesaid decisions of the Tribunal hold that the AO was not justified in invoking the amended provisions of Section 55(2) in relation to the present cases pertaining to asst. yr. 1993-94, (b) We also agree with the findings given by the Tribunal in the aforesaid

cases that the decision of the Hon'ble Supreme Court in the case of MISS Dhun Dadabhoy Kapadia rendered under the old IT Act, 1922, will be applicable to the cases adjudicated under the provisions of IT Act, 1961, because the phraseology used in Section 12B of the 1922 Act is in pari materia with the language used in corresponding provisions contained in IT Act, 1961.

(c) We also agree with the findings given by the Tribunal in the aforesaid cases that the decision of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra) is not applicable in relation to determination of capital gains/loss arising due to transfer/renunciation of rights in favour of third party for a consideration.

(d) However, with utmost respect, we are unable to agree with the findings given by the Tribunal in the case of Amazon Investments Ltd. & Ors., that the cost of acquisition of right over FCDs in the present cases should be taken at Rs. 35 per share or at the rate of Rs. 350 per right offer on the basis of depreciation in the value of shares consequent to the depreciation of right offer. But we agree with the aforesaid determination of the figure of depreciation in the market value of shares at Rs. 35 per share on the basis of spot rate quotations. In our humble view, this ratio of fall in market value by Rs. 35 (which comes to 16.28 per cent of cum-right value) can be adopted for bifurcation/apportionment of the actual cost of acquisition of share for determination of cost of "Right offer" embedded in original share in view of elaborate reasons given hereinafter.

18. A plain reading of Section 48 of IT Act, 1961, provides, that the income chargeable under the head "capital gains" shall be computed by deducting from the full value of consideration received or accruing as a result of transfer of capital asset, the following amounts, viz.; (i) cost of acquisition of the assets and the cost of any improvement thereto ; (ii) the expenditure incurred wholly and exclusively in connection with such transfer.

19. The cost of acquisition normally means the price actually paid by the purchaser. In case of long-term capital gains, deduction in respect of indexed cost of acquisition is allowed. All the present assesseees acquired the shares of Arvind Mills Ltd. at an average cost ranging between Rs. 20 to Rs. 22 per share as indicated from the cost of acquisition of such shares stated in the balance sheets

of these respective assesseees. At the time when these shares were acquired, the ownership of the shares conferred upon these shareholders various privileges such as privilege to participate in the dividend as and when declared, privilege to participate in the management of the company as provided in the Companies Act, right to have the share in the assets of the company if the company goes into liquidation and they also had a privilege to get the right to subscribe to the issuance of new capital as and when issued. Such a right to acquire "Right offer" as and when the new issues, are announced by the company flows from the relevant provisions contained in the Companies Act. The cost of acquisition of original shares includes the cost of acquisition of such "rights" conferred on the assessee. The real question before the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) was the apportionment of the cost of acquisition of original shares having right embedded therewith between (i) the cost of old shares after announcement of right offer, and (ii) the cost of acquisition of right offer. The question which was referred by the Tribunal to the Hon'ble Bombay High Court in the case of Miss Dhun Dadabhoy Kapadia was whether the Tribunal was right in rejecting the claim of the applicant to deduct from the computation of capital gain the cost of right determined in accordance with the accepted principles of accountancy in the light of provisions of Section 12B of the 1922 Act. The Hon'ble Supreme Court laid down a principle of law that in working out the capital gain or loss on renunciation/sale of right the principles that have to be applied are those which are a part of the commercial practice or which an ordinary man of business will resort to when making computation for his business purpose. The Hon'ble Supreme Court did not lay down that the cost of this fractional interest viz., right offer forming part of original shares held by the assessee can exceed total cost of acquisition of such shares of which such right offer is only a part thereof. In the present cases, the average actual cost of shares held by these assesseees ranged between Rs. 20 to Rs. 22 per share as per their respective balance sheets. It is unimaginable that the cost of small fractional interest viz., right offer can be taken at Rs. 35 which is substantially more than the cost of entire bundle of rights contained in that share.

20. It may, therefore, be imperative to examine the facts of the case of Miss Dhun Dadabhoy Kapadia (supra) as recorded in the judgment delivered by the Hon'ble

Bombay High Court reported in 48 ITR 882 (Bom) (supra).

20.1. Miss Dhun Dadabhoy Kapadia (supra), the assessee in that case, derived income from investment in securities and shares and interest on fixed deposits. Amongst the shares held by her as investments (not as stock-in-trade), she had inherited sometime prior to 1st day of January, 1954, 710 shares of Tata Iron & Steel Co. Ltd. (TISCO), In accordance with a special resolution passed at an extraordinary general meeting of the said company held on 12th March, 1956, the assessee became entitled to be offered new ordinary shares issued in the ratio of one new ordinary share for one existing ordinary share held as on 26th April, 1956. The assessee did not subscribe to the new shares but renounced her right to apply for all the 710 ordinary shares at the preferential price of Rs. 105, by selling it in the open market on 12th June, 1956, @ Rs. 63.75 per right. She, thus, actually realised a sum of Rs. 45,262.50 by selling her said rights.

20.2. The assessee having inherited the said 710 shares earlier than 1st Jan., 1954, was entitled to exercise the option given to her of substituting the market value of shares as on 1st Jan., 1954, in place of actual cost under the third proviso to Sub-section (2) of Section 12B of the IT Act, 1922. She had exercised that option and the market price of each share as on 1st Jan., 1954, was Rs. 341.

20.3. At the time of issue of "Right offer" in March, 1956, the Board of Directors of the Native Stock & Share Association Ltd. passed a resolution that the transactions in these shares would be "cum-right" upto and including 1st June, 1956, and from 4th June, 1956, "ex rights". The market quotation of old Tata ordinary shares as on 1st June, 1956, was Rs. 253 ("cum-right") and it was Rs, 198.75 on 4th June, 1955 (ex-right). Thus, there was a fall in the market quotation of old shares of Rs. 54.25 per share.

20.4. The Hon'ble Bombay High Court held that the assessee had not expended any sum or laid out any expenditure for the purpose of acquisition of these rights. She got it by reason of her holding the 710 shares and by reason of the provisions of Section 105C of the Indian Companies Act. The Tribunal was right in holding that the entire amount of Rs. 45,262.50 was a capital gain.

20.5. The Hon'ble Supreme Court in the aforesaid case reported in 63 ITR 651 (supra), inter alia specifically noted the fact at p. 652 that the appellant Miss Dhun Dadabhoy Kapadia was holding 710 ordinary shares of TISCO, which she had inherited sometime prior to 1st Jan., 1954, as an investment. The Hon'ble Supreme Court held as under: "The capital asset which the appellant originally possessed consisted of 710 ordinary shares of the company. There was already a provision that, if the company issued any new shares, every holder of the old shares would be entitled to such number of ordinary shares as the board may, by resolution, decide. This right was possessed by the appellant because of the ownership of the old 710 ordinary shares, and when the board of directors of the company passed a resolution for issue of new shares this right of the appellant matured to the extent that she became entitled to receive 710 new shares. This right could be exercised by her by actually purchasing those shares at the prescribed rate, or by renouncing those shares in favour of another person and obtaining monetary gain in that transaction. At the time, therefore, when the appellant renounced her right to take these new shares, the capital asset which she actually possessed consisted of her old 710 shares plus this right to take 710 new shares. At the time of her transaction, her old shares were valued at Rs. 253 per share, so that the capital asset in her possession can be treated to be the cash value of 710 multiplied by Rs. 253 of the old shares plus this right to obtain new shares, the capital assets that came into her hands were the 710 old shares, which became valued at Rs. 198.75 per share, together with the sum of Rs. 45,262.50. The net capital gain or loss to the appellant obviously would be the difference between the value of the capital asset and the cash in her hands after she had renounced her right and realised the cash value in respect of it, and the value of the capital asset including the right which she possessed just before these new shares were issued and before she realised any cash in respect of the right by renouncing it in favour of some other person. As we have indicated above, the value of the capital asset, after renouncement, would be 710 multiplied by Rs. 198.75 plus the sum of Rs. 45,262.60 while the value of the asset, immediately before the renouncement would be 710 multiplied by Rs. 253, there being no cash value at that time of the right to be taken into account. Thus, the capital gain or loss would be worked out at Rs. 45,262.50 after deducting from it the sum worked

out at 710 multiplied by the difference between Rs. 253 and Rs. 198.75. This last amount comes to a little more than the sum of Rs. 37,630 which the appellant claimed should be deducted from Rs. 45,262.50 in computing her capital gain. The claim made by the appellant was thus clearly justified because the net capital gain by her in the transaction, which consisted of issue of new shares together with her renouncement of the right to receive new shares and make some money thereby, could only be properly computed in the manner indicated by us above.

In the alternative, the case can be examined in another aspect, At the time of the issue of new shares, the appellant possessed 710 old shares and she also got the right to obtain 710 new shares. When she sold this right to obtain 710 new shares and realised the sum of Rs. 45,262.50, she capitalised that right and converted it into money.

The value on the right may be measured by setting off against the appreciation in the face value of the new shares the depreciation in the old shares and, consequently, to the extent of the depreciation in the value of her original shares, she must be deemed to have invested money in acquisition of this new right. A concomitant of the acquisition of the new right was the depreciation in the value of the old shares, and the depreciation may, in a commercial sense, be deemed to be the value of the right which she subsequently transferred. The capital gain made by her would, therefore, be represented only by the difference between the money realised on transfer of the right, and the amount which she lost in the form of depreciation of her original shares in order to acquire that right.

Looked at in his manner also, it is clear that the net capital gain by her would be represented by the amount realised by her on transferring the right to receive new shares, after deducting therefrom the amount of depreciation in the value of her original shares, being the loss incurred by her in her capital asset in the transaction in which she acquired the right for which she realised the cash. This method of looking at the transaction also leads to the same conclusion which we have indicated in the preceding para." It is clear from the aforesaid judgment that the right to receive new ordinary shares pursuant to "Right offer" was a right embedded in her old shares and that right matured to the extent that she became

entitled to receive 710 new shares. Therefore, a fraction of the total cost of the old shares, represented by the depreciation in the value of the old share immediately before and after the right offer, was regarded as cost of acquisition of this new right (which was renounced) for the purposes of computing taxable capital gain. The relevant details about computation of capital gain in the said judgment are summarised hereunder: (i) Miss Dhun D. Kapadia inherited 710 ordinary shares of TISCO prior to 1st Jan., 1954.

(ii) The assessee, did in fact, exercise the option for substituting the market value as on 1st Jan., 1954, in place of actual cost under the third proviso to sub-s. (2) of s. 12B of the IT Act, 1922. The value as on 1st Jan., (iii) Value immediately prior to "Right offer" i.e., "Cum- right" price on 1st June, 1956 (iv) Value immediately after the right offer "ex-right" price as on 4th June, 1956 (vi) Sale consideration of renunciation of rights received by the assessee (vii) Assessee claimed deduction for cost of acquisition of right @ Rs. 53 per share (53 x 710 shares), which was allowed by the Hon'ble Supreme Court 21. The provisions of Section 48 of the IT Act, 1961, provide that the income chargeable under the head "capital gains" shall be computed by deducing from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely, inter alia, the cost of acquisition of the asset and the cost of any improvement thereto [Section 48(ii)]. Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, then the provisions of Clause (ii) shall have effect as if for the words "Cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted. The expressions "indexed cost of acquisition" and "indexed cost of any improvement" have been defined in the Explanation below Section 48. Section 55(2)(b), as it existed in the relevant year [i.e., prior to insertion of Section 55(2)(aa)(ii) w.e.f. 1st April, 1995] further provides that for the purposes of Section 48, "cost of acquisition" in relation to any capital asset which became the property of the assessee before the 1st April, 1981, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on 1st April, 1981, at the option of the assessee.

22. In the case of Miss Dhun Dadabhoy Kapadia (supra) the fall in market quotation of shares as a result of right offer was taken as proportionate cost of rights because the market value of the shares including the right was Rs. 253 per share which was less than the actual cost of Rs. 341 per share as per third proviso to Section 12B(2) of the IT Act, 1922. The depreciation in the share being difference between cum-right price and ex-right price of Rs. 54.25 per share further resulted in the actual loss suffered by the assessee in its deemed cost of acquisition of Rs. 341 per share. In the present cases, the cum-right price of the shares of Arvind Mills Ltd. prior to announcement of right offer was Rs. 246 as on 23rd July, 1992, which reduced to Rs. 180 being the ex-right price as on 24th July, 1992. The ex-right quotation of Rs. 180 per share was substantially more than the average cost of acquisition of the old shares including the right offer embedded therein. Thus, there was only a notional fall in the market value of share but there was no depreciation or loss as compared to the actual cost of acquisition of shares paid by the assessee for purchase of those shares which included the right to have the right shares, as and when it is announced by the company. In a case where cum-right price or ex-right price of the share before and after announcement of the right offer is more than the actual cost of acquisition of share, the depreciation in the market value of share as a result of right offer cannot be treated as real loss in the original cost of acquisition and such difference cannot be regarded as cost of acquisition of right. The proportionate cost of acquisition of "Right offer" has to be apportioned from the total cost of acquisition of the original shares in a reasonable and rational manner according to the accepted commercial practices.

23. In the present cases, the capital gain derived by these assesseees arising due to renunciation of rights to acquire FCDs is a short-term capital gain. Even if the old shares in which the value of embedded right is included, is transferred, the "cost of acquisition" or "indexed cost of acquisition", if it is long-term capital gain has to be based on the actual cost of acquisition viz., Rs. 20 to Rs. 22 in the cases of these assesseees as per their respective balance sheets.

Therefore, the cost of acquisition of the "Right offer", which is embedded in the cost/value of old shares has to be only a portion or a fraction of the "cost of

acquisition" or "indexed cost of acquisition" of old shares. The cost of acquisition of such embedded right, which is only a fractional interest embedded in the old shares, cannot exceed the total "cost of acquisition" of such old shares. The judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadbhoy Kapadia (supra) cannot, therefore, be interpreted or read so as to mean that the cost of acquisition of such fractional right embedded in the old shares can exceed the actual and total cost of acquisition of the old shares in which the right to have right share was embedded. The cost of acquisition of right offer is a part of the total cost of acquisition of the share. In the case of Miss Dhun Dadabhoy Kapadia as against the deemed cost as on 1st Jan., 1954, of old shares at the rate of Rs. 341 per share, only a fractional or proportionate cost of embedded right to acquire PCDs pursuant to right offer was taken at the rate of Rs. 53 per "Right offer". Such claim made by the assessee at the rate of Rs. 53 was found to be reasonable on the basis of difference in the cum-right price and ex-right price before and after the issue of right offer of Rs. 54.25 per share, on the facts of that case. The principle laid down by the Hon'ble Supreme Court was that proportionate cost of acquisition of "Right offer" should be deducted for computing capital gains and such proportionate cost should be ascertained as per accepted commercial practices. But the working, the formula or the mode of apportionment will differ from case to case. The cost of acquisition of the right offer will, therefore, have to be apportioned from the total cost of acquisition of share in a reasonable and equitable manner. The Tribunal has computed the depreciation in the value of shares on the basis of spot quotations at Rs. 35 per share being difference between the cum-right price of Rs. 215 declining to Rs. 180 as ex-right price quoted at the stock exchange. The value as a result of announcement of right offer thus declined by 16.28 per cent ($35/215 \times 100$). This fractional interest viz., the right to, acquire the right over FCDs embedded in the original shares can reasonably be taken at 16.28 per cent of the original shares. The cost of acquisition of original share shown as per the balance sheet can, therefore, be reasonably apportioned in the ratio of 16.28 per cent as the cost of acquisition of such right offer in accordance with the principles laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). in view of the aforesaid facts and circumstances of the present cases.

24. It may also be relevant here to reproduce the extracts from the judgment of the Hon'ble Bombay High Court in the case of Miss Dhun Dadabhoy Kapadia (supra) at p. 887 where Mr. Kolah, appearing for the assessee, inter alia, contended as under: "Mr. Kolah, appearing for the assessee, contends that the said 710 shares have been inherited by the assessee earlier than 1st Jan., 1954. The assessee, therefore; was entitled to exercise the option given to her of substituting the market value of the shares as on 1st Jan., 1954, in place of the actual cost under the third proviso to Sub-section (2) of Section 12B of the Act. She had exercised that option and the market price of each share on that date was Rs. 341.

Referring us to the provisions of Section 105C of the Indian Companies Act, which is in following terms : 'Where the directors decide to increase the capital of the company by the issue of further shares, such shares shall be offered to the members in proportion to the existing shares held by each member irrespective of class, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting the time within which the offer, if not accepted, will be deemed to have been declined; and after the expiration of such time or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.' Mr. Kolah further contends that in the said cost of Rs, 341 is included the cost of the right conferred on the assessee under Section 105C of the Companies Act. When the board of directors of the company decided by passing the resolution of 12th March, 1956, to issue additional capital, that right became crystallised.

Referring us to certain observations in four books on principles of accountancy, viz., Accountancy by Pickles and Dunkerley, 2nd edition, p. 1167, Accountants' Handbook by Rufus Wixon & W.G. Keel, 4th edition, pp. 13,22, A Dictionary for Accountants by Eric L.

Kohler, 1951, edition, at p. 369, and Principles of Accounting-Intermediate by Finney & Miller, 5th edition at p. 299, Mr. Kolah contended that the value of this right, according to the principles of accountancy stated in these four books would come to about Rs. 73 to Rs. 76 and this should be taken to be the actual cost of

the right within the meaning of Sub-clause (ii) of Sub-section (2) of Section 12B of the Act for the purpose of determining the capital gains arising to the assessee as a result of the transaction in question." Mr. Kolah has himself contended before the Hon'ble High Court that the deemed cost of acquisition of Rs. 341 as on 1st Jan., 1954, included the cost of right conferred on the assessee under Section 105C of the Companies Act. He, therefore, wanted only an apportionment of cost of Rs. 341 for arriving at the cost of acquisition of the right offer.

This argument was not accepted by the Hon'ble Bombay High Court but was ultimately accepted by the Hon'ble Supreme Court.

25. The learned counsel appearing for the assessee also placed reliance on the judgment of the Hon'ble Bombay High Court in the case of CIT v.K.A. Patch (supra). The appeal submitted by the Department against the said judgment has also been dismissed by the Hon'ble Supreme Court as CIT v. K.A. Patch (1986) 159 ITR 940 (SC) in which the Hon'ble Supreme Court has observed as under: "It appears from what is stated before us that the tax liability involved in this case is an extremely petty amount. In the circumstances, without expressing any opinion on the merits of the High Court judgment under appeal, we decline to interfere with that judgment." Shri Dastur, appearing for the assessee before the Hon'ble Bombay High Court in this case, submitted before the High Court as under [pp. 421 and 422 of 81 ITR].

"Mr. Dastur, the learned counsel for the assessee, tried to explain that the difficulties and anomalies, sought to be pointed out by Mr.

Joshi to exist, arise by reason of ignoring what according to Mr.

Dastur is the correct position. He pointed out that when bonus shares are issued what a shareholder gets by way of bonus is a share, but when rights shares are issued, what the shareholder gets is an option either to accept the offer and by paying the necessary amount to the company actually obtains the share, or, in the alternative, to sell his right to apply for the rights share, He pointed out that the two modes available under this option are totally different and independent of each other. In the first case he exercises his option and gets the actual share itself. In

the latter case, however, he does not get any share at all, but sells the right to obtain a share, the right to obtain a share being different from the obtaining of the share itself. He contended that when a shareholder sells his right, he effects a totally different and independent transaction uncorelated to his holding of the original or old share. He contended that the real profit or loss on the amount thereof resulting in the case of each holder of the old shares should be ascertained at the time when he sells his old shares but, of course, after the actual cost of the old shares is reduced by the depreciation suffered in respect of the old share at the time of the sale of the right which sprang out of the old share, the depreciation being the shortfall ascertained by deducting the ex-right price from the cum-right price at the time of the issue of the rights shares. Mr. Dastur contended that the method suggested by Mr. Joshi, dealing with bonus shares, may with some reservations, apply only if, in the case of a rights issue, the shareholder actually applied for the share offer to him, pays to the company the money payable in respect of those shares and obtains the shares from the company." It is clear from the aforesaid submissions that the cost of acquisition of rights shares to be determined in accordance with the commercial practice or in any reasonable or rational manner is to be a part of the actual cost of original/old shares. The apportioned cost of right share embedded in the cost of original share will have to be deducted out of the cost of acquisition of old share at the time when the old shares are sold thereafter. The cost of acquisition of part of the capital asset or fraction of the capital asset, which in the present cases, is the cost of acquisition of right offer included in the cost of acquisition of original/old shares, has to be a part of the cost of acquisition of that capital asset. The apportionment of the cost of acquisition has to be made when one of the units out of bundle of rights contained in the share is sold., The apportionment of fair market value is not required to be made for computing the cost of acquisition deductible while computing capital gains. The Hon'ble Supreme Court has adopted the formula of depreciation in the market value by taking the difference between the cum-right price and ex-right price, as that provided a reasonable basis on the facts of that case to ascertain the extent of proportionate interest of right offer embedded in the original share. On that basis the Hon'ble Supreme Court held that the cost of acquisition of right at the rate of Rs. 53 per share claimed by the assessee out of

deemed cost of acquisition of Rs. 341 per share was reasonable. In that case there was a real depreciation in the original cost/original value of shares. However, in the present cases, the original cost of share is Rs. 20 to Rs. 22 per share only in these cases as against its market value at Rs. 246 cum-right price and Rs. 180 ex-right price as contended by the assessee, Thus, there was no depreciation in the original cost of acquisition of the shares in the present cases as in the case of Miss Dhun Dadabhoy Kapadia (supra). It is true that the cost of acquisition -of old/original share in which the right to acquire right share is embedded will have to be apportioned but the apportionment of the cost of acquisition of Rs. 20 to Rs. 22 has to be made in a reasonable and rational manner. Cost of acquisition of "rights" which is only a part of the share cannot be taken at a figure of Rs. 66 per share, as against total actual cost of share of Rs. 20 per share. The ratio of fall in the market value, may be applied for bifurcation/apportionment of the cost of acquisition of shares.

26. A useful reference may also be made to the judgment of the Hon'ble Supreme Court in the case of A.R. Krishnamurthy and Anr. v. CIT (1989) 176 ITR 417 (SC). The relevant extract from the headnote is reproduced below : "Held, affirming the decision of the High Court, that the grant of the mining lease was transfer of a "capital asset" within the meaning of Section 45 of the IT Act, 1961. The cost of acquisition of the land would include the "cost of acquisition" of the mining right under the lease and the date of acquisition of the right to grant lease had to be the same as the date of acquisition of the freehold rights. The amount paid by the appellant to purchase the land was for acquiring a bundle of rights in the land including the right to grant a lease. The cost of acquisition had to be apportioned in each case on the basis of evidence. The determination of the cost of the right to excavate clay in the land in terms of money might be difficult but was nonetheless of a money value and the best valuation possible had to be made." The ownership over the shares consist of a bundle of rights including the right to have dividend right to have bonus shares or right shares as and when declared, etc. When a part of this bundle or rights, viz., which in the instant case is a right offer embedded in the bundle of rights contained in the shares is transferred, the cost of acquisition of the shares has to be apportioned in the best possible manner.

However, the cost of acquisition of such portion of the asset sold, by no stretch of imagination, can exceed the total cost of acquisition of the entire bundle of rights contained in those shares.

27. The learned counsel had also placed reliance on the judgment, of the Hon'ble Gujarat High Court in the case of CIT v. Suhashbhai Vadilal (1999) 239 ITR 362 (Guj). In that case the question before the Hon'ble Gujarat High Court was as to what was the cost of acquisition of the shares of Rajesh Textile Mills Ltd., to the assessee. The evidence on record shows that the shares in Rajesh Textile Mills Ltd., were given to the shareholders of Sayaji Mills Ltd., as a matter of right, depending upon their holding in the ratio of 1:1. Though they were not rights issues properly so-called of Sayaji Mills Ltd., the fact remained that the shares of Sayaji Mills Ltd. carried with them the right to receive the shares of Rajesh Textile Mills Ltd. in view of the special arrangement made between the two companies and the resolution passed by Rajesh Textile Mills Ltd., linking its issue directly with the holding of the shares in Sayaji Mills Ltd. When this right to receive the shares, of Rajesh Textile Mills Ltd., went with the shares of Sayaji Mills Ltd., their value was Rs. 543.75 per share, but soon after the shares of Rajesh Textile Mills. Ltd. were issued, the value of shares of Sayaji Mills Ltd. diminished to Rs. 410 per share. The depreciation in the value of shares of Sayaji Mills Ltd. to the extent of Rs. 108.75 was directly related to the issuance of shares by Rajesh Textile Mills Ltd. and that depreciation was the amount lost to the assessee in acquiring the new shares of Rajesh Textile Mills Ltd. Therefore, the cost of acquisition of shares of Rajesh Textile Mills Ltd., was the cost of such shares plus depreciation in the value of shares in Sayaji Mills Ltd. The actual original cost of acquisition of shares of Sayaji Mills Ltd., is not mentioned in the said judgment. It is not known whether depreciation in the value of shares computed at Rs. 108.75 per share was only a fraction of the actual cost of original shares or whether Rs. 108.75 was more than the actual cost of share of Sayaji Mite Ltd. whose market value prior to such issue of right was Rs. 543.75 per share, Unless fall in market value or depreciation in market value of shares as a result of announcement of right offer is compared with the actual cost of acquisition, the question relating to apportionment of cost of acquisition of original share cannot properly be decided in conformity with the principles laid down by the Hon'ble Supreme Court in the case of Miss Dhun

Dadabhoy Kapadia (supra) and in the case of A.R. Krishnamurthy (supra). Moreover, it is not a case of transfer of a right offer but in this case the assessee acquired the shares of Rajesh Textile Mills Ltd. pursuant to arrangement made before those two companies. In this case also the determination of cost of acquisition was made by spreading over the cost of original shares by adopting an equitable and reasonable mode of apportionment. It has been held by the Hon'ble Supreme Court in the case of Dahnia Investments Co.

Ltd. (supra) that the mode of cost accounting in a case where cost of original shares have to be apportioned, may have to be different in each case, but in essence and principle there is no difference. The Hon'ble Supreme Court in the case of A.R. Krishnamurthy (supra) also observed that the amount paid by the appellant to purchase the land was for acquiring bundle of rights in the land including the right to grant of lease. The cost of acquisition of land would include "cost of acquisition of the mining rights" under the lease. The computation of capital gain on premium of Rs. 5 lakhs received by the assessee by granting mining lease to a private company to excavate clay for a period of ten years will have to be computed by deducting the proportionate cost of acquisition of such mining right. It was held that the cost of acquisition had to be apportioned in each case on the basis of evidence. The determination of the cost of right to excavate clay in the land in terms of money might be difficult but was nonetheless of money value and the best possible valuation had to be made. The spreading over of the cost of original asset will, therefore, have to be made in the most equitable and reasonable manner depending on the facts of each case. The Hon'ble Gujarat High Court has applied the principles of law laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra). We have made humble attempt in this order to understand the principles of law laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia in its true spirit and correct perspective.

28. We may once again go through the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) with a view to further understand the principles of law laid down by the Hon'ble apex Court in that case.

"(a) The Hon'ble Supreme Court at p. 654 has observed that the capital asset which the appellant actually possessed consisted of 710 shares of TISCO. There was already a provision that, if the company issued any new shares, every holder of old shares would be entitled to such number of ordinary shares as the board may, by resolution, decide. This right to receive 710 new shares was crystallized when the Board of Directors of that company passed a resolution for issue of new shares. This right could be exercised by the appellant by actually purchasing those shares at the prescribed rate, or by renouncing those shares in favour of another person and obtaining monetary gain in that transaction. At the time, therefore, when the appellant renounced her right to take these new shares, the capital asset which she actually possessed consisted of her old 710 shares plus this right to take 710 new shares, The cost of acquisition of such capital asset comprising of old shares along with the right embedded therein was Rs. 341 per share and the formula of depreciation in the market value being the difference between the cum-right price and ex-right price was applied only for apportionment of such cost of acquisition. According to that formula the proportionate cost of right offer came to Rs. 54.25 per share as against which the assessee claimed deduction for cost of acquisition of such right at the rate of Rs. 53 on the basis of accounting principles, which was held to be reasonable on the basis of such formula." The proportionate cost of right offer was thus determined by the Hon'ble Supreme Court by measuring the amount of depreciation in the value of her original shares. It is noteworthy to repeat that the deemed cost of acquisition in this case as on 1st Jan., 1954, which was deductible for computing capital gain on sale of such shares was Rs. 341 per share. The Value immediately prior to right offer i.e., cum-right price was Rs. 253 per share which further declined to Rs. 198.75 per share after right offer. Thus, there was a real loss in the original cost of acquisition also. The market value of the share at the time of right offer was itself below the original cost of acquisition.

The loss has to be reckoned with reference to cost/value of original shares. In a case where there are wide fluctuations in the market value, which at all times remain above the total cost of acquisition, the fall in market value as a result of issue of right offer cannot be substituted as proportionate cost of acquisition of right offer but that ratio of decline in the market rate as a result of right offer can

perhaps be applied for finding out the proportionate extent of the cost of right embedded in the total cost of acquisition of the share. The cost of acquisition of the old/original shares can thus be apportioned in the ratio of decline in the market value-before and after right offer was announced.

29. The Hon'ble Supreme Court had laid down the following principles in the case of Miss Dhun Dadabhoy Kapadia (supra) : "In working out capital gains or loss, the principles that have to be applied are those which are a part of the commercial practice or which an ordinary man of business will resort to when making computation for his business purposes." The aforesaid principles of law will apply for working out the cost of acquisition of right offer in all cases where capital gain/loss is required to be worked out on sale/renunciation of right offer. However, method, mode and formula of apportionment of actual cost of acquisition of share will differ from case to case. The cost of acquisition of shares of same company owned by various shareholders may be different depending on the actual purchase price paid by them at the time of purchase of those shares. The proportionate cost of such right embedded in old/original shares in the hands of various assesseees is also, bound to be different depending on their respective cost of acquisition.

30. The Hon'ble Supreme Court has observed that the view they have taken in this case finds support from the principles laid down by the Hon'ble Supreme Court in the case of Dalmia Investment Co. Ltd. (supra) for valuation of bonus shares issued by a company to holders of original shares. The Hon'ble Supreme Court in the said case of Dalmia Investment Co. Ltd. (supra) have held that where bonus shares are issued in respect of ordinary shares held in a company by an assessee they will have to be valued by spreading the cost of old shares over the old shares and the new shares (viz., bonus shares). At p. 580 of the said judgment, the Hon'ble Supreme Court has observed as under: "The method of cost accounting may have to be different in each case but in essence and principle there is no difference. One possible method is to ascertain the exact fall in the market price of the shares already held and attribute that fall to the price of the bonus shares. This market price must be the middle price and not as represented by any unusual fluctuation. The other method is to take the amount spent by the shareholder in

acquiring his original shares and to spread it over the old and new shares treating the new as accretions to the old and to treat the cost old price of the original shares as the cost price of the old shares and bonus shares taken together. This method is suggested by the Department in this case. Since the bonus shares in this case rank pari passu with the old shares there is no difficulty in spreading the original cost over the old and the new shares and the contention of the Department in this case is, right. But this is not the end of the present discussion. This simple method may present difficulties when the shares do not rank pari passu or are of a different kind. In such cases, it may be necessary to compare the resultant price of the two kinds of shares in the market to arrive at a proper cost valuation.

In other words, if the shares do not rank pari passu, assistance may have to be taken of other evidence to fix the cost price of the bonus shares. It may then be necessary to examine the result as reflected in the market to determine the equitable costs." The Hon'ble Supreme Court was dealing with the question as how to determine the cost of acquisition of bonus shares for ascertaining the profits made on sale thereof. It has been laid down by the Hon'ble Supreme Court that the cost of acquisition of bonus shares issued in respect of ordinary shares held by the assessee will have to be determined by spreading/appportioning the cost of old shares in a reasonable manner. If the old shares and bonus shares rank pari passu, the cost of old shares will be spread over the number of old shares and new bonus shares taken together and if the old shares and bonus shares do not rank pari passu, the cost of acquisition of old shares will have to be apportioned in an equitable manner on the basis of relevant evidence.

31. The Hon'ble apex Court in the case of Miss Dhun Dadabhoy Kapadia (supra) has followed the aforesaid principle of spreading the cost of old shares in an equitable manner in relation to right offer embedded in the old/original shares by finding out the fall in the price of original shares on the stock exchange and treated such fall/depreciation in value of original share as the cost of acquisition of right offer. The proportionate/apportioned cost of acquisition attributable to such right offer was thus computed by the Hon'ble Supreme Court at Rs. 54.25 per share out of actual cost of acquisition of original share at Rs. 341. The cost of acquisition of

right offer was thus only a small fraction of cost of acquisition of the share. It is, therefore, clear that the cost of acquisition of right offer in accordance with the principles laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) based on the earlier judgment in the case of Dalmia Investment Co. Ltd. (supra), has to be only a proportionate part of the cost of acquisition of original/old shares. In the present cases the proportionate cost of right offer adopted by the assesseees at the rate of Rs. 66 per share or at the rate of Rs. 35 per share held by the Tribunal in the case of Amazon Investments Ltd. in fact exceeds the actual cost of original shares.

The average cost of acquisition of share, in the case of Ajax Investments Ltd. is Rs. 20 per share and in the case of Aligator Investments Ltd. it is Rs. 21 per share and in the case of Affection Investments Ltd. it is Rs. 22 per share only. The cost of right share will have to be determined by apportioning the total cost of acquisition of these shares in which such right to acquire FCDs are embedded. Therefore, the cost of Rs. 20 or Rs. 21 or Rs. 22 being the cost of acquisition of shares in the hands of these three respondent-companies will have to be apportioned in an equitable manner with a view to determine the proportionate cost of right offer. The proportionate cost of right offer embedded in the original share cannot exceed the total cost of acquisition of the share but it has to be a reasonable proportionate part thereof. The clear provisions relating to computation of capital gain provide that the cost of acquisition which normally means the purchase price for acquisition of that capital asset should be deducted out of the sale proceeds of the capital assets in question, When only a part of capital asset owned by the assessee is sold, only a proportionate cost of acquisition or a part of such cost of acquisition determined in a reasonable and equitable manner has to be deducted from the sale proceeds in order to determine the amount of capital gain chargeable to tax. Therefore, the assesseees claim for grant of deduction of Rs. 66 per share or deduction granted by the Tribunal at the rate of Rs. 35 in the case of Amazon Investments Ltd. with utmost respect is not in conformity with the principles of law laid down by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) following the decision in the case of Dalmia Investments Co. Ltd. (supra) nor it is in conformity with the judgment of the Hon'ble Supreme Court in the case A.R. Krishnamurthy (supra).

Such claim of deduction of cost of acquisition of fractional interest at an amount higher than the actual cost of acquisition of the share in which such fractional interest is embedded, is also contrary to the clear provisions contained in ss. 45 and 48 read with the other provisions dealing with the computation of capital gains.

32. In our view such claim of deduction of short-term capital loss on sale/renunciation of rights over the FCDs by claiming the cost of acquisition of right offer embedded in the original/old shares at a figure higher than the actual cost of acquisition of the share itself which includes such right, on the basis of misinterpretation of the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) without taking into consideration the context and the facts of that case, is a well-planned device to avoid tax, which cannot be accorded approval in such judicial proceedings.

33. We may also refer here to the following extract from the Second R.C. Ghiya Memorial Lecture delivered by the Hon'ble Chief Justice of India, Shri J.S. Verma at Jaipur on 28th June, 1997, and published in the Journal section of 228 ITR at p. 5, namely : "The law has to be interpreted according to the current societal standards. The law when enacted, in spite of the best effort and capacity of the legislators cannot visualise all situations in future to which that law requires application. New situations develop and the law has got to be interpreted for the purpose of application to them, for the purpose of finding a solution to the new problems. That is how the law advances. That is the area or field of judicial creativity to fill in the gap between the existing law and the law as it ought to be. If you have proper perception and proper values, those will influence your thought process and the exercise which you perform in the form of judicial creativity would be tempered more by morality and ethics. Complete justice or true justice must encompass within it morality and ethics. Mathematically stated "abstract law plus morality or ethics is equal to justice".

That is the task which we Judges are required to perform in the course of administration of justice, This is the kind of role which the judiciary has to perform and by judiciary because it is together we form the machinery for the administration of justice.

The interpretation of laws have to be purposive. When I say purposive, it means the interpretation has to be to subserve the object of the enactment of the law keeping in view the supreme law, the Constitution. Every law has to accord with the Constitution, otherwise it suffers the defect of invalidity or unconstitutionality and therefore, even while construing statute law, one must always bear in mind the provisions of the Constitution and the constitutional goals, the constitutional purpose which is sought to be achieved." It may also be important to reproduce the extract from the headnote of the judgment of the Hon'ble Supreme Court in the case of McDowell & Co.

Ltd. v. CTO (supra) : "Tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

There is behind taxation laws as much moral sanction as is behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation. The proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and to expose the devices for what they really are and to refuse to give judicial benediction.

By the Court: The evil consequences of tax avoidance are manifold. First, there is substantial loss of much needed public revenue, particularly in a welfare state like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there

is 'the large hidden loss' to the community by some of the best brains in the country being involved in the perpetual war waged between the tax avoider and his expert team of advisers, lawyers and accountants on one side and the tax gatherer and his, perhaps not so skilful, advisers on the other side. Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'. Last, but not the least, is the ethics of transferring the burden of tax liability to the shoulders of the guideless, good citizens from those of the 'artful dodgers.'" As stated earlier, some of the expert brains in the country involved in tax planning activities appear to have advised large number of big groups of concerns throughout the country to use the judgment of the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia (supra) as a device for reduction of their tax liabilities. In this context it may be relevant here to mention that the Tribunal "C" Bench Delhi (then comprising of one of us, namely, B.M. Kothari, AM and B.S. Saluja, JM) forwarded a statement dt. 2nd Dec., 1997, to the then Hon'ble President, ITAT, for constituting a Special Bench under Section 255(3) of the Act for disposal of ITA No. 2994/Del/1996 and ITA No.5770/Del/1996. In ITA No. 2994/Del/1996, the assessee claimed short-term capital loss of Rs. 2,10,00,000 on sale/renunciation of right entitlement in favour of another company of that very group, Likewise in ITA No. 577/Del/1996, the assessee claimed short-term capital loss of Rs. 16,80,000 on sale/renunciation of right in favour of their sister concerns. After transfer of AM (B.M. Kothari) to Ahmedabad, when similar matters came for hearing before the Tribunal, Ahmedabad Benches, the office of ITAT was directed to find out from the head office as to whether the Special Bench as proposed by the Tribunal Delhi Bench "C" in the year 1997 was constituted by the Hon'ble President, ITAT, and if so, whether the above referred matters have already been decided by the Special Bench. The head office of ITAT Mumbai informed that the appeals in question were returned to the Dy.

Registrar, Delhi, pursuant to order, dt. 20th July, 2000, passed by the Hon'ble President, ITAT. It appears that the successor Tribunal Bench "C" Delhi thereafter decided the matter in ITA No. 5770/Del/1996 vide order, dt. 20th Sept., 2001, in favour of the assessee. The Delhi Tribunal had inter alia relied upon the earlier decision in ITA No. 5425/Del/1994, dt. 12th Jan., 2001, rendered by the same

Bench. In this case the Tribunal Delhi Bench "C" allowed loss of Rs. 1,68,59,960 claimed by the assessee in respect of sale/renunciation of right shares of M/s Jindal Iron & Steel Co. transferred in favour of other parties. These are only few instances of startling claims for grant of deduction in respect of short-term capital loss in relation to sale/renunciation of right offers. Such claims have been made by various leading companies belonging to several well-known groups throughout the country which has resulted in loss of revenue of several crores to the national exchequer, In the context of aforesaid facts viewed in the light of principles of law laid down by the Hon'ble Supreme Court in the case of McDowell & Co. Ltd. (supra) and also in the context of the observations made by the Hon'ble Supreme Court in various cases, such matters require serious consideration and in our humble opinion such claims of losses arising due to sale/renunciation of right offers in favour of other companies of the same group pursuant to "Right offers" announced by the companies of the same group by claiming cost of acquisition of "Right offer" at a figure higher than the cost of original shares was a part of colourable device adopted by these assessees.

34. In view of the facts and detailed discussion in this order, we do not consider it proper to make a reference, once again, to the Hon'ble President, ITAT under Section 255(3) of the IT Act, 1961, to constitute a Special Bench to decide these appeals involving similar points. We have made this humble attempt to decide these appeals in conformity with the clear provisions of law and in consonance with the principles of law laid down by the Hon'ble apex Court in the case of Miss Dhun Dadabhoy Kapadia (supra), read with the principles laid down in the case of Dalmia Investment Co. Ltd. (supra) followed in Kapadia's case (supra) and the principles laid down by the Hon'ble Supreme Court in the case of A.R. Krishnamurthy (supra) and various other judgments cited supra. However, in the interest of fairness and justice, we direct the AO to stay the operation of this order till the expiry of time-limit for filing an appeal before the Hon'ble High Court under Section 260A of the IT Act, 1961.

35. After giving our deep and thoughtful consideration to the entire relevant facts, we are of the considered opinion that the cost of acquisition of "Rights" over FCDs transferred/renounced by these assessees should be computed by apportioning

the actual cost of original/old shares in a reasonable and equitable manner by following the principles laid down by the Hon'ble apex Court in various cases referred to hereinbefore including the case of Miss Dhun Dadabhoy Kapadia. The Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia in order to ascertain the reasonableness of the proportionate cost of acquisition of right offer claimed by the assessee at Rs. 53 per share out of total cost of acquisition of original/old share of Rs. 341 per share, had taken into consideration the fall/depreciation in the market value of such share as a result of announcement of right offer. The Hon'ble Supreme Court thereby estimated the proportionate extent of value of right embedded in the value of original shares. By applying this formula, the Hon'ble Supreme Court determined the extent of fractional interest of right embedded in the original shares. In the present cases, the Tribunal in the case of Amazon Investment Ltd- has determined the fall in value of original shares as under: The fall in the value of shares as a result of right offer thus comes to 16.28 per cent [$35 \times 100 / 215$]. Thus, the extent or proportion of right embedded in the original share in terms of money value can be taken at 16,28 per cent. In order to determine the cost of acquisition of right offer for computing capital gains on the sale thereof, the cost of acquisition of the shares may be apportioned in the same ratio in order to arrive at an equitable cost of acquisition of such rights transferred/renounced by the assessees.

35.1. The meaning of "cost of acquisition" deductible for computing capital gains has undergone changes from time to time. The provisions of Section 55(2)(b)(i) of the IT Act, 1961, are similar to third proviso to Sub-section (2) of Section 12B of the IT Act, 1922, referred to in the case of Miss Dhun Dadabhoy Kapadia (supra). It provides that the expression "cost of acquisition" occurring in Sections 48 and 49 in relation to an asset acquired, before 1st day of April, 1981, would mean the cost of acquisition of the asset to the assessee or the fair market value of the asset on 1st day of April, 1981, at the option of the assessee, will be regarded as "cost of acquisition" for computing capital gains. The original cost of shares, if such shares have been acquired by the present assessees before 1st April, 1981, will have to be substituted by their fair market value as on 1st April, 1981, if the assessees exercise such an option permissible under Section 55(2)(b)(i) of the Act.

35.2. It may also be relevant here to mention that the entire system of taxation of long-term capital gains has been changed by the Finance Act, 1992. The scope and effect of the amended provisions inserted by the Finance Act, 1992, applicable from asst. yr. 1993-94, have been elaborated in the Departmental Circular No. 636, dt. 31st Aug., 1992.

The relevant extracts from the said circular contained in paras. 35 to 35.2 are reproduced below : "Taxation of capital gains--35. The Finance Act, 1992, has recast the system of taxation of long-term capital gains. At present an asset is considered to be long-term if it is held for a period of more than 36 months except for shares of a company, where the period of holding should be more than 12 months. This definition continues to be the same in the changed format. In the scheme prior to 1st April, 1992, a basic deduction of Rs. 15,000; and a fixed percentage of the balance amount of capital gains was allowed as deduction under Section 48(2). The percentage depended on the nature of the asset and the status of the assessee, but was unrelated to the length of the period of holding. This deduction was intended to give a rough and ready relief for inflation, to counteract bunching of profits and to exclude from the tax net capital gains which were relatively small. As an additional measure to offset the effect of inflation, all appreciation before 1st April, 1974, in the value of assets was excluded from taxation. A fair method of allowing relief for these factors is to link it to the period of holding. For this purpose, the cost of acquisition of and the cost of improvement to the asset are to be inflated to arrive at the indexed cost of acquisition and indexed cost of improvement and then deduct these amounts from the sale consideration to arrive at the long-term capital gains. The cut-off date for assets held for purposes of indexation is taken as 1st April, 1981. Accordingly, for an asset acquired before this date its value as on 1st April, 1981, will be taken for indexation. The cost of improvement after this date only will be taken into account for indexation.

35.1. As per the revised format of Section 48, the long-term capital gains arising out of sale of a long-term asset is to be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts : (i) Expenditure incurred wholly and exclusively in

connection with such transfer; (ii) The indexed cost of acquisition of the asset and the indexed cost of any improvement thereto.

35.2. 'Indexed cost of acquisition' means an amount which bears to the cost of acquisition the same proportion as cost inflation index for the year in which the asset is transferred bears to the cost inflation index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later." 35.3. If these respondent-assessees have owned the original shares for a period exceeding one year and if they would have sold such original shares along with the right embedded therein, they would have been entitled to grant of deduction of indexed cost of acquisition out of sale proceeds of such shares. It will, therefore, be more appropriate and equitable if such indexed cost of acquisition of original share is apportioned in the ratio of 16.28 per cent. In other words, the proportionate cost or right offer transferred by the assessee in the year under consideration viz., asst. yr. 1993-94 will be 16.28 per cent of indexed cost of acquisition of original/old shares.

35.4. The Cost of acquisition of shares of Arvind Mills Ltd. by these respondent-assessees viz., Affection Investments Ltd., Aligator Investments Ltd. and Ajax Investments Ltd. as discussed in the assessment orders of these respondent-companies was Rs. 22 per share, Rs. 21 per share and Rs. 20 per share, respectively. The actual cost of acquisition in the case of Shri Anangbhai Ajaybhai has not been given in the assessment order. The AO should verify the actual average cost of acquisition of original, shares in cases of all four respondent-assessees. He should, thereafter ascertain the indexed cost of acquisition of such shares on the basis of cost inflation index notified for the purpose of computing the capital gains from asst. yr.

1993-94 and onwards. Such indexed cost of acquisition will be apportioned in the ratio of 16.28 per cent. In other words, 16.28 per cent of such indexed cost of acquisition of original shares will be regarded as cost of acquisition of right shares for purpose of computing the capital gains on sale/renunciation of right shares.

35.5. Let us give an illustration. Assuming that the shares of Arvind Mills Ltd. were acquired by one of these respondents in the financial year 1982-83 for Rs. 20 per

share. The indexed cost of original share in asst. yr. 1993-94 will be computed as under: Indexed cost as per notified cost inflation index for financial year 1982-83 Indexed cost as per notified cost inflation index for financial, year 1992-93 (Asst. yr. 1993-94) The indexed cost of Rs. 20 will be multiplied as under: $20 \times 199/100 =$ Rs. 39.80 or say Rs. 40 per share.

The proportionate indexed cost of "Right offer", which is 16.28 per cent of original share will then come to Rs. $40 \times 16.28/100 =$ Rs. 6.51 per share. The right offer of one FCD was announced for 10 shares held by the existing shareholders. Thus, this cost of acquisition of "Right offer" will be Rs. 65.10 paise or say Rs. 65 per "Right offer". The capital gain on sale value of Rs. 200 realised by the assessee on sale/renunciation of right offer will be computed by deducting cost of acquisition so determined @ Rs. 65 per right offer. The taxable capital gain will work out to Rs. 135 per right in the said example. It is further noteworthy to point out that when original shares are subsequently transferred, the indexed¹ cost of acquisition of such shares will be reduced by a sum of Rs. 6.51 paise per share, which represents proportionate cost of acquisition of right offer already allowed as deduction in computing capital gains on sale/renunciation of right offer.

35.6. The AO will compute the amount liable to tax as capital gains accordingly.

35.7. Before parting, we would like to record our feelings of appreciation for admirable order passed by the AO Shri Narendra Kumar.

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