IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH 'B' MUMBAI

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT,
SHRI R.S.SYAL, ACCOUNTANT MEMBER &
SHRI T.R.SOOD, ACCOUNTANT MEMBER

I.T.A.NO.3013/Mum/2007 – A.Y 2002-03

Bennett Coleman & Co. Ltd., Times of India Bldg., Dr. D. N. Road, Mumbai 400 001. PAN: AAACB 4373 Q	**Vs.**	**The Addl. Commissioner of I.T., Range- 1(1), Mumbai.**
(Appellant)		**(Respondent)**
Appellant by	**:**	**S/Shri Arvind Sonde & Shri S. Venkatraman**
Respondent by	**:**	**Shri Pavan Ved.**

Date of Hearing: 16-08-2011	**Date of Pronouncement: 30-09-2011**

O R D E R

Per T.R.SOOD, AM:

This Special Bench has been constituted by the Hon'ble President to consider the following question:

> "Whether on the facts and in the circumstances of the case, the CIT(A) was justified in declaring long term capital loss of Rs.22,21,85,693/- on account of reduction in paid up equity share capital? "

2. At the commencement of the hearing, it was noticed by the Bench that the question is not very happily framed and, therefore, this was put to the parties. Both the parties agreed that the question referred by Hon,ble president implies that we have to answer the substantial issue as to whether reduction of capital would lead to claim for long term capital loss. Both the parties requested that we can proceed with the hearing without reframing the question. Therefore, we are proceeding with the same question on the

understanding that issue involved is whether on the facts and circumstances of the case, Ld. CIT(A) erred in disallowing the claim of long term capital loss.

3. Facts necessary for the disposal of the issue on hand are stated in brief. During the course of assessment proceedings, the Assessing Officer noticed that assessee had claimed long term capital loss amounting to Rs.22,21,85,693/-. It is not in dispute that assessee made an investment of Rs.2484.02 lacs in equity shares of a group company viz., Times Guarantee Limited [for short TGL]. Under sec.100 of the Companies Act, 1956 TGL applied for reduction of equity share capital and approached the Hon'ble Bombay High Court for approval of the same. The Hon'ble High Court approved the petition of TGL and allowed reduction in its share capital by 50% by reducing the face value of each equity share from Rs.10/- to Rs.5/- . Consequently, assessee's investment in TGL got reduced from Rs.2484.02 lacs to Rs.1242.01 lacs. After applying the indexation a sum of Rs.22,21,85,693/- was claimed as long term capital loss. On a query as to how this loss was allowable, it was mainly contended that in view of the decision of the Hon'ble Supreme Court in the case of Kartikeya V. Sarabhai [228 ITR 163]- wherein it was held that reduction in face value of shares would amount to transfer- such loss was allowable. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. G. Narsimhan (Decd) And Ors. [236 ITR 327], wherein similar view was taken.

4. The Assessing Officer, after considering these submissions, was of the opinion that in the case of Kartikeya V. Sarabhai [supra] the court was concerned with the reduction of non-cumulative preference shares. Therefore, according to the Assessing Officer, this was merely a case involving reduction

in face value of preference shares and accordingly same should not be applied particularly because the Hon'ble court had also observed that in terms of sec.87[2][i] the voting rights were also reduced proportionately on the resolution which effected the rights of preference shareholders whereas, in case of equity shares , there is no reduction in the rights of such equity shareholders. He further observed that in the present case assessee has not received any consideration for reduction in the value of shares, nor any part of the shares have been passed to anyone else. This means, that there was no change in the rights of the assessee vis-à-vis other shareholders and, therefore, no transfer had taken place and, thus, assessee was not entitled to the claim of long term capital loss.

5. On an appeal, similar submissions were made before the Ld. CIT(A) who upheld the action of the Assessing Officer on similar reasoning.

6. Before us, Ld. Counsel Shri Arvind Sonde, adverted our attention to pages 30 to 31 of the assessment order and also paras 17.2 to 17.5 of the appellate order to point out that the claim of long term capital loss has been rejected mainly on the ground that no transfer had taken place. Then he referred to page 60 of the paper book -which is a copy of a notice of Annual General meeting of TGL- which shows that a special resolution was proposed for reduction of share capital u/s.100 of the Companies Act, 1956 subject to the approval of the order of Hon'ble Bombay High Court; It was proposed that share capital of the company has to be reduced from Rs.179862990, divided into 17986299 equity shares of Rs.10/- each, to Rs.8993149, divided into 17986299 equity shares of Rs.5/- each , by cancelling the capital to the extent of Rs.5/- per equity share. Thus, TGL reduced the face value of each equity

share from Rs.10/- to Rs.5/-. After reduction of capital, two equity shares of Rs.5/- each, were consolidated into one equity share. Thus, it resulted in reduction by way of reducing initially the face value of each share of Rs.10/- to Rs.5/- each and then by consolidating such equity shares of Rs.5/- each into one equity share of Rs.10/- fully paid. He adverted our attention to explanatory notes (page 61 of PB) which shows that carried forward loss of Rs.42,96,53,000/- was also written off by reducing the amount of reduction of share capital amounting to Rs.8,99,31,495/- and further the balance sum was written off by utilising the share premium account. In fact, TGL had suffered loss and the whole proposal and purpose of reduction in share capital was to write off the losses. Learned counsel referred to pages 62 to 71 of the paper book, which is copy of the order of the Hon'ble High Court through which the High Court allowed the petition for reduction of the capital. Then he referred to page 73 which is a copy of intimation letter issued by TGL through which assessee company was intimated regarding the reduction of share capital and it was pointed out that assessee's holding in TGL before reduction which was 13474799 has been reduced to 6737399 and the same has been credited in the demat form in assessee's demat account. Then he referred to page 74 which is a copy of the Schedule E reflecting the investments by the assessee company as on 31-03-2001 where again TGL shares were shown at 1,34,74,799 and the book value of the investment has been shown at Rs.24,84,01,810/-. This has been reduced in the year ending 31-03-2002 for which he referred to page 75 of the paper book, wherein the investment in TGL shares at 6737399 has been shown at Rs.12,42,00,905/-. He argued that this fact clearly shows that share capital is reduced by the company (TGL) in terms of sec.100 of the Companies Act, 1956 which has been approved by the Hon'ble High Court. The company was accordingly allotted 67,37,399 new shares in place of old shares at 1,34,74,799. He also filed a copy of the transaction statement issued by the HDFC Bank Ltd. which is a copy of the demat account of the assessee with the bank wherein first on 20-11-2001 67,73,799 shares have been reduced from the opening balance of 1,34,74,799 shares. Further, 67,37,399 shares have been shown as credit. He pointed out that even ISIN No. has changed from INE 289C01025 to INE 289C01017, which basically means that new shares are different shares because different ISIN INE No. has been allotted. On a query by the Bench he filed a copy of the clarification issued by the SEBI and pointed out at para-29 wherein it has been clarified as under:

> "ISIN [International Securities Identification Number] is a unique identification number allotted for a security [E.g –INE 383C01018]. Equity-fully paid-up, equity partly paid up, equity with differential voting/dividend rights issued by the same issuer will have different ISIN."

Thus, Learned counsel contended that old shares have been replaced with new shares which is a reduced number and this should be treated as exchange of shares which is clearly covered by the definition of 'transfer' and once the shares have been transferred it is a basic condition for attracting sec.45, then the loss incurred on the same should be treated as capital loss.

7. Ld. Counsel Shri Sonde submitted that the decisions of Hon'ble Supreme Court in the cases of Kartikeya V. Sarabhai [supra], CIT vs. G. Narsimhan (Decd) And Ors. [supra] and Anarkali Sarabhai vs. CIT [224 ITR 422] have been distinguished by the Assessing Officer as well as the CIT(A) mainly on the ground that these decisions relate to reduction in face value of preference shares and, therefore, they are not applicable to the facts of assessee's case.

He submitted that Hon'ble Supreme Court, in the case of Kartikeya V. Sarabhai [supra], observed that definition of transfer given in sec.2[47] is an inclusive definition and, inter alia, provides that relinquishment of an asset or extinguishment of any right therein would also amount to transfer of a capital asset. Apex court further noticed that to invoke of the provisions of section 45 r/w 2(47) sale of a capital asset is not a necessary condition.. After referring to various observations of the court he pointed out that even reduction in the value of preference shares was held to be a case of transfer. He then submitted that similar view was taken in the case of Anarkali Sarabhai vs. CIT [supra].

8. The ld. Counsel further submitted that even if it is assumed that the principles laid down by the Hon'ble Supreme Court in the case of preference shares are not applicable, the principle laid down in the case of CIT vs. G. Narsimhan (Decd) And Ors., squarely applies since the issue therein was regarding reduction of equity share capital. He filed paper book No.2 in which copies of the assessment order as well as copy of the order of the Tribunal in the case of CIT vs. G. Narsimhan (Decd) And Ors. were annexed. He referred to the assessment order and order of the Tribunal and pointed out that in this case also equity share capital of the company was reduced and when the matter finally travelled to Hon'ble Apex Court it was held that in view of the decision of Hon'ble Supreme Court in the case of Kartikeya V. Sarabhai [supra] even reduction in equity share capital would amount to transfer and by applying this decision the loss claimed by the assessee is allowable because same has arisen from reduction of equity share capital.

9. He further referred to the decision of Hon'ble Supreme Court in the case of CIT vs. Grace Collis & Ors. [248 ITR 323]. He carried us through the facts and the question raised before the Hon'ble Court and submitted that the court, after considering another decision of that court in the vas of Vania Silk Mills Pvt. Ltd. vs. CIT [191 ITR 647], observed that the definition of transfer clearly contemplates extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. The court further observed that the expression 'extinguishment of any right therein' can be extended to mean extinguishment of right independent of or otherwise than on account of transfer. Thus, even extinguishment of right in a capital asset would amount to transfer and in the case before us since assessee's right got extinguished proportionately, to the reduction of capital, it would amount to transfer. Reliance was placed on the following three decisions of the Tribunal wherein similar view was expressed; Following the decisions of Kartikeya V. Sarabhai [supra] CIT vs. G. Narsimhan (Decd) And Ors., Anarkali Sarabhai vs. CIT and of CIT vs. Grace Collis & Ors. [supra]**,** it was held that reduction of capital would amount to transfer and accordingly capital loss was held to be allowable.

i. Zyma Laboratories Ltd. Vs. Addl. CIT 7 SOT 164 [Mum]

ii. DCIT vs. M/s Polychem Ltd. ITA No.4212/M/07 [Mum] and

iii. Ginners & Presser Ltd. vs. ITO ITA No.398/M/07 & 4193/M/07

10. During the course of hearing it was pointed out that the capital loss has not been disallowed by the Assessing Officer on the only ground that it did not amount to transfer but mainly on the point that assessee had not received any consideration i.e., by applying the principle laid down by the

Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [128 ITR 294] wherein it was held that if computation provision fails, capital gains cannot be assessed u/s.45.

10. Bench pointed out to the decision of Hon'ble Gujarat High Court in the case of CIT vs. Mohanbhai Pamabhai [91 ITR 393] and the decision of Hon'ble Bombay High Court in the case of The Bombay Burmah Trading Corporation Ltd. vs. CIT [147 Taxation Reports 570].

11.To clarify the doubts posed by the bench the Ld. Counsel submitted that the Hon'ble Supreme Court, in the case of B. C. Srinivasa Setty [supra], was concerned with the transfer of goodwill and held that it was not possible to ascertain the cost of goodwill and therefore it was not possible to apply the computational provision. He stressed that the proposition was not that if no consideration was received then no gain can be computed but the proposition was that if any of the element in computation provision could not be ascertained then computation provision would fail and such gain could not be assessed to capital gains tax. In this regard he further referred to the decision of the Hon'ble Bombay High Court in the case of Cadell Weaving Mill Co. P. Ltd. & Ors. Vs. CIT [249 ITR 265] wherein the issue was whether surrendering of tenancy rights would be taxed as casual income or it can be subjected to capital gains tax. He invited our attention to page 285 of the report and pointed out that ultimately court observed that full value of the consideration of the tenancy rights could not be assessed because then the tax is not levied on capital gain but it is being levied on capital value of the asset which is not permissible. Hon'ble Court, in turn, relied upon the decision Hon'ble Supreme Court in the case of CIT vs. B. C. Srinivasa Setty [supra] to hold that if cost of acquisition is not ascertainable, computation provision fails and amount received on surrender of tenancy rights is not taxable. On further appeal, this decision has been confirmed by the Supreme Court in the case reported at 273 ITR 1. He also referred to the decision of the Hon'ble Karnataka High Court in the case of DCIT vs. BPL Sanyo Finance Ltd. [312 ITR 63]. In this case the assessee was holding shares of IDBI which were partly paid-up and assessee did not pay the call amount called by the company and, therefore, the shares were forfeited. This was claimed as short term capital loss which was not allowed by the AO. The Hon'ble High court however held that forfeiture of shares would amount to transfer in terms of sec.2[47] because assessee would be deemed to have acquired rights in shares when same were allotted and once such shares were forfeited then such right got extinguished, which would amount to transfer

12. The Ld. Counsel of the assessee also referred to the decision of Hon'ble Gujarat High Court in the case of CIT vs. Mohanbhai Pamabhai [supra], and pointed out that in this case also what the court meant was that when consideration was not ascertainable, then the provisions for charging the capital gains would fail. However, in the case of the assessee consideration was ascertainable, in the sense that same should be taken as zero. While addressing the Bench on the decision of Hon'ble Bombay High Court in the case of The Bombay Burmah Trading Corporation Ltd. vs. CIT [supra], he submitted that since it was a very short judgment and facts are not discussed, therefore, he would not like to comment. However, he submitted that if in the case of zero consideration if transfer of a particular asset did not attract the levy of capital gain, then why clause [iii] was inserted

to sec.47 [which provides that transactions provided in that provision shall not be considered as transfer] by which any transfer of a capital asset by way of a gift is exempt because in case of gift no consideration would be involved. If the idea was not to subject zero consideration transaction to capital gain tax u/s.45, then there was no need for clause [iii] for gifts in sec.47. He concluded his arguments by submitting that during the process of reduction of share capital, transfer has definitely taken place and consideration received by the assessee should be considered as zero and, therefore, capital loss should be allowed.

13. On the other hand Ld. Sr. DR Shri Pavan Ved, submitted that in this case capital has been reduced by the company in two phases. The face value of shares was reduced from Rs.10/- each to Rs.5 each, which means the capital was reduced by 50% and then such two shares of Rs.5/- each were consolidated into one share and such new share has been allotted to the company. However, the value of the assets of the company remained same before and immediately after such reduction and therefore no loss was caused to the assessee. He further argued that after all a share means proportionate share of an asset of the company. In this regard he referred to sec.84 of the Companies Act, 1956 which defines that a share certificate shall be prima facie evidence of the members to such share. Since share of the assessee in the company's assets have not gone down, therefore, no loss can be said to have been incurred by the assessee. He further explained this proposition by pointing out that when a person is owner of a house the same is evidenced by the title deed. He posed a query whether it can be said with reference to the title deed that a person is only owner of that deed the

obvious answer would be no. The answer would be that through that title deed the particular person is holding ownership of the house. Similarly through ownership of shares assessee is holding proportionate share in assets of the company which have not gone down and, therefore, no loss has been suffered. Mere reduction of share capital at best can lead to a notional loss.

14. The Ld. Sr. DR further invited our attention to clause [v] of sub section (2) to section 55 which defines cost of acquisition in case of shares in the event of consolidation, division or conversion of original shares; as per this clause, original cost has to be taken as cost of present acquisition. In case before us, therefore, the cost of acquisition would remain same to the assessee in terms of this provision and if the loss on reduction of share capital is allowed at this stage and in future if such shares are sold, then the assessee can again take the original cost as cost of acquisition which would mean double benefit to the assessee, which is not permissible under the law and in this regard he referred to the decision of the Hon'ble Supreme Court in the case of Escorts Ltd. Vs. UOI [199 ITR 43].

15. He further submitted that whenever a company issues bonus shares no capital gain is chargeable on the same on mere receipt of such bonus shares and capital gain, if any, can be charged only at the stage when such bonus shares are sold by such assessee. Similar principle needs to be applied in the case when assessee's shareholding is reduced on reduction of such capital. He also argued that at best in case bonus shares are sold by an assessee, cost of the same has to be taken on the basis of average cost as held by the Hon'ble Supreme Court in the case of CIT vs. Dalmia Investment Co. Ltd. [52 ITR 567]. This means that in case of bonus shares, the cost of share gets

adjusted and ultimately cost of acquisition is taken at average value and same principle would apply on reduction of share capital and in that case the average cost of balance holding after such reduction of capital would increase and the loss can be reckoned only when such shares are transferred for a consideration. He submitted that this principle has been further affirmed by the Hon'ble Supreme Court in the case of Miss Dhun Dadabhoy Kapadia vs. CIT [63 ITR 651]. In this case when the assessee was allotted right shares the assessee instead of subscribing to such right shares sold such rights in the market at a premium. A question arose whether such premium would be taxable or the reduction in the value of shares which are held by the assessee has to be considered for the purpose of computing the capital gains tax. The Hon'ble court ultimately held that gain has to be understood in the similar way as understood by the commercial world and ultimately it was held that the particular receipt of sale of right to subscribe to right shares, is required to be reduced by fall in the value of existing shareholding. Following the same principle, at best in assessee's case the value of reduced shareholding can be increased i.e. cost of acquisition can be increased but the loss cannot be allowed, because at the stage of reduction of capital, it is only a notional loss.

16. In the rejoinder, Ld. Counsel referred to page 77 of the paper book which gives computation of capital loss incurred on reduction of share capital of TGL shares and pointed out that cost has been taken on the basis of cost to the assessee which has been indexed as per the provisions of sec.48 and, therefore, no double benefit had been obtained by the assessee and such cost has been further reduced from the value of investment as pointed out earlier. Therefore, there is no question of further double benefit. He gain

emphasized that it is a simple case of transfer in terms of decisions of Hon'ble Supreme Court in the cases of Kartikeya V. Sarabhai [supra], CIT vs. G. Narsimhan (Decd) And Ors., and Anarkali Sarabhai vs. CIT [supra] and of CIT vs. Grace Collis & Ors. [supra] and, therefore, loss should be allowed.

17. We have considered the rival submissions in the light of material on record as well as the decisions cited by both the parties. Initially the Ld. Counsel argued that share capital of TGL was reduced from Rs.17,98,62,990/- divided into 17986299 equity shares of face value of Rs.10/- each to Rs.8,99,31,495/- divided into 17986299 of Rs.5/- each paid up. This means basically the capital was reduced by reducing the face value of Rs.10/- paid up of each share to Rs.5/- paid up of each share. As a second step such shares(Rs 5/- per share) were again consolidated into Rs.10 paid up share and number of shares were reduced to 89,93,149. The Ld. Counsel had argued that basically the original shares got extinguished and, in fact, new shares have been issued by TGL. If the argument is that earlier shares have been replaced or substituted by new shares then the same would not amount to transfer at all. In that case, it would be merely a case of substitution of one kind of share with another kind of share which has been received by the assessee because of its rights to the original shares on the reduction of capital. This position was clarified by the Hon'ble Supreme Court in the case of CIT vs. Rasiklal Maneklal (HUF) [177 ITR 198] In that case, the assessee was holding 90 shares in one S. company of face value of Rs.100/- each. Pursuant to the scheme of amalgamation sanctioned by the High Court, the holders of the shares in S. company were to be allotted one share of Rs.125/- each of NS Company for two shares in S. company and S. Company was to

be dissolved. The assessee in that case was allotted 45 shares in N.S company. A question arose, whether this would amount to transfer and the Hon'ble Supreme Court held that there was neither an 'exchange' nor a 'relinquishment' in this transaction. The Hon'ble Supreme Court observed as under:

> *"An "exchange" involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another.*
>
> *A "relinquishment" takes place when the owner withdraws himself from the property and abandons his rights thereto. It presumes that the property continues to exist after the relinquishment. Where, upon amalgamation, the company in which the assessee holds shares stand dissolved, there is no "relinquishment" by the assessee."*

The apex court had also observed that in case of exchange that one person transfers a property to another person in exchange of another property, the property continues to be in existence. In that case, shares of S. company had ceased to be in existence and therefore the transaction did not involve any transfer. Similarly in the case before us if argument of assessee is accepted then the older shares with different ISIN number ceases to exist and new shares with a different ISNI numbers have been issued and, therefore, it cannot be called a case of extinguishment or relinquishment and it is a mere case of substitution of one kind of share with another. In case before us also assessee got the new shares on the strength of its rights with the old shares and, therefore, same would not amount to transfer.

18. However, the main thrust of the argument on behalf of the assessee is that the reduction of capital would amount to transfer in view of the decisions of the Hon'ble Supreme Court in the cases of Kartikeya V. Sarabhai [supra], and Anarkali Sarabhai vs. CIT [supra], CIT vs. G. Narsimhan (Decd) And Ors.

[supra] and of CIT vs. Grace Collis & Ors. [supra]. It may be necessary to outline the factual matrix and the conclusion reached in the case of CIT vs. G. Narsimhan (Decd) And Ors., because that was also a case of reduction of share capital and that too in respect of equity shares.

19. In that case the court was concerned with the issue whether reduction of face value of equity share from Rs.1000/- each to Rs.210/- each after reduction of share capital which was duly approved by the High Court would amount to transfer. It is important to note that in this case **on reduction of capital, certain assets were also given to the shareholders in the form of property, payment of cash and/or adjustment of debit balances**. When the matter travelled to Hon'ble Supreme Court, following the decision of Kartikeya V. Sarabhai [supra] **the apex court held that such reduction of capital would constitute transfer** and any profit or gain arising from the transfer of capital asset is liable to be taxed u/s.45. In the above mentioned case 90 non-cumulative preference shares, of the face value of Rs.1000/-, were purchased at a price of Rs.420/- per share from a company called Sarabhai Limited. In 1965, a sum of Rs.500/- per preference shares was paid to the assessee upon reduction of share capital and the face value of preference shares was reduced to Rs.50/- per share and further payment of Rs.450/- per share was made to the assessee. The ITO was of the opinion that the sum of Rs.450/- per share which was received now was liable to be taxed under the head 'capital gain'. However, assessee contended that since no transfer had taken place in terms of sec.2 [47], no tax could be imposed. When the matter travelled to Hon'ble Supreme Court it was held that definition of transfer u/s.2 [47] was inclusive and would include

relinquishment of an asset or extinguishment of any right therein. It was further observed that even preference shareholders have right to vote on resolutions which would effect the right of preference shareholder u/s. 87(2)(a), 87(2)(b) and 87(2)(c). Therefore the rights of preference shareholders are curtailed to that extent. A careful analysis of the above decision indicates that whenever there is reduction of shares and upon payment by company to compensate the value equivalent to reduction, apart from the effect on shareholders' rights to vote etc., a transfer can be said to have taken place. However, the question is whether the same can still attract sec.45? The answer is given by the Hon'ble Gujarat High Court in the case of CIT vs. Mohanbhai Pamabhai [supra]. In this case the issue was whether there is a transfer if a particular partner retired from the firm and his share in the partnership was worked out by taking the proportionate value of his share in the net partnership assets after deduction of liability and prior charges. The ITO was of the opinion that the amount received by the assessee to the extent which included his proportionate share in the value of the goodwill is liable to be taxed as capital gain. When the matter travelled to the High Court their lordships observed, at pages 404 & 405, as under:

> But, even if we are wrong in taking this view and the correct view is that when a partner retires from the partnership his interest in the partnership assets is extinguished and there was, therefore, in the present case, "transfer" of interest of each of the assessees in the goodwill when the assessees retired from the firm, the amount received by each assessee in respect of his share in the value of the goodwill must still be held to be outside the pale of chargeability to capital gains tax. **It is not every transfer of a capital asset which attracts the charge of capital gains tax. Section 45 which is the charging section, undoubtedly, provides that any profits or gains arising from the transfer of a capital asset shall be chargeable to income tax under the head "capital gains". But, section 48 shows that the transfer that is contemplated by section 45 is a transfer as a result of which consideration is received by the assessee or accrues to the assessee. Section 48 provides the**

> **mode of computation of capital gains by enacting that the income chargeable to tax as capital gain shall 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, namely: (i) expenditure incurred wholly and exclusively in connection with such transfer ; and (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto. The amounts specified in clauses (i) and (ii) are to be deducted from the " consideration received or accruing as a result of the transfer of the capital asset " for the purpose of determining the profits or gains chargeable to tax. It is, therefore, clear that the transfer of a capital asset, in order to attract the capital gains tax, must be a transfer as a result of which consideration is received by the assessee or accrues to the assessee. If there is no consideration received or accruing to the assessee as a result of the transfer, the machinery section enacted in section 48 would be wholly inapplicable and it would not be possible to compute profits or gains arising from the transfer of the capital asset. The transaction in order to attract the charge of tax as capital gains must, therefore, clearly be such that consideration is received by the assessee or accrues to the assessee as a result of the transfer of the capital asset. Where transfer consists in extinguishment of a right in the capital asset, there must be an element of consideration for such extinguishment, for then only it would be a transfer exigible to capital gains tax.**

Thus, it becomes absolutely clear that even if a transfer had taken place, unless and until some consideration is received, the transfer of such asset would not attract the provisions of sec.45. The Revenue has challenged this position in appeal before the Hon'ble Supreme Court and the court dismissed the appeal of the Revenue in Addl. C.I.T. vs. Mohan Bhai & Pama Bhai [165 ITR 166] in view of the decision of Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT [156 ITR 509]. Decision of Hon'ble Gujarat High Court was not approved by the Hon'ble Supreme Court, while adjudicating the case of B. C. Srinivasa Setty, on another point i.e. whether building of goodwill in a business which did not cost anything could still be regarded as capital asset for the purpose of charging the same under the head 'capital gains'. However, as far as proposition that a transfer cannot be subjected to provisions of sec.45 in the absence of consideration still remains valid. It may not be out of place to refer to the commentary on Income Tax Law, Fifth Edition, Volume-2 page 2772, by Chaturvedi & Pithisaria wherein it has been observed as under:

> "**Transfers not chargeable**.- It is not every transfer of a capital asset which attracts the charge of capital gains tax. Although section 45 provides the generality of the charge, it is followed by several sections exonerating the charge under stipulated circumstances. Section 48 provides the mode of computation and in doing so, it excludes expenditure incurred wholly and exclusively in connection with the transfer as also the cost of acquisition of, as well as any improvement to, the capital asset concerned.
> **The transfer of a capital asset, in order to attract the capital gains tax, must be a transfer as a result of which consideration is received by the assessee or accrues to the assessee. Without the element of consideration, no transfer will attract capital gains tax [CIT v. Mohanbhai Pamabhai, (1973) 91 ITR 393, 404 (Guj), not approved, on another point, in (1981) 128 ITR 294 (S.C)]"**

In any case, to understand the matter further we shall go through the decision of the Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT [supra]. In this case, the issue involved was whether transfer of personal capital assets to the firm towards contribution of capital, would constitute transfer and whether such transfer would attract capital gain tax? The court held that such contribution of capital asset of a partner into the firm would definitely constitute a transfer because in that case the partner's interest in such asset is reduced from exclusive interest to a shared interest. In respect of taxability of this transfer, three arguments were made before the Hon'ble court which are being extracted from page 515 of the report of the above judgment in the case of Sunil Siddharthbhai vs. CIT [supra] as under:

1. There must be a "transfer" of a capital asset either under the general law or within the definition in clause [47] of section 2 of the Income-tax Act.
2. Consideration must be received or must accrue as a result of the transfer and the consideration must be capable of being determined in monetary terms in order that the computation of capital gains may be made as required by section 48.
3. Profits or gains must arise from the transfer and must be embedded in the consideration.

Since the point raised in the first argument is not material regarding the issue involved before us, therefore, it would suffice to point out that the Hon'ble court held that such contribution of the capital by way of transfer of personal capital assets into the firm would constitute transfer. In respect of the 2nd and 3rd arguments the Hon'ble Supreme Court observed at pages 520 to 522 as under:

> "On the basis of that proposition learned counsel for the assessee has urged that s.45 is not attracted in the present case because to compute the profits or gains under s.48 the value of the consideration received by the assessee or accruing to him as a result of the transfer of the capital asset must be capable of ascertainment in monetary terms. The consideration for the transfer of the personal assets is the right which arises or accrues to the partner during the subsistence of the partnership to get his share of the profits from time to time and, after the dissolution of the partnership or with his retirement from the partnership, to get the value of a share in the net partnership assets as on the date of the dissolution or retirement after a deduction of liabilities and prior charges. The credit entry made in the partner's capital account in the books of the partnership firm does not represent the true value of the consideration. It is notional value only, intended to be taken into account at the time of determining the value of the partner's share in the net partnership assets on the date of dissolution or on his retirement, a share which will depend upon a deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predicate before hand what will be the position in terms of monetary value of a partner's share on that date. At the time when the partner transfers his personal asset to the partnership firm, there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither the date of dissolution or retirement can be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. **In the circumstances, we are unable to hold that the consideration which a partner acquires on making over his personal asset to the partnership firm as his contribution to its capital can fall within the terms of s.48. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in s.45, such a case must be regarded as falling outside the scope of capital gains taxation altogether.**
>
> The third contention of learned counsel for the assessee is that no profit or gain can be said to arise to a partner when he brings his personal asset into a partnership firm as his contribution to its capital. It is urged that the capital gains chargeable under s.45 are real capital gains computed on the ordinary principles of commercial accounting and that the capital gains must be

> embedded in the capital asset. In Miss Dhun Dadabhoy Kapadia v. CIT (1967) 63 I.T.R.. 651, the appellant held by way of investment some ordinary shares in a limited company. An offer was made by the company to her by which she was entitled to apply for an equal number of new ordinary shares at a premium with an option of either taking the shares or renouncing them in favour of others. The appellant renounced her rights to all the shares and realised Rs. 45,262.50. When this amount was sought to be wholly taxed as a capital gain the appellant claimed that on the issue of the new shares the value of her old shares depreciated and that as a result of the depreciation she suffered a capital loss in the old shares which she was entitled to set off against the capital gain of Rs. 45,262.50. In the alternative she claimed that the right to receive the new shares was a right which was embedded in her old shares and consequently when she realised the sum of Rs. 45,262.50 by selling her right, the capital gain should be computed after deducting from that amount the value of the embedded right which became liquidated. This Court upheld the claim of the appellant that she was entitled to deduct from the sum of Rs. 45,262.50 the loss suffered by way of depreciation in the old shares. The Court proceeded on the basis that in working out capital gain or loss, the principles which had to be applied are those which are a part of commercial practice or which an ordinary man of business would resort to when making computation for his business purposes. It will be noticed that this principle was applied by the Court in a case where a capital gain was sought to be taxed under the Income Tax Act. That profits or gains under the Income Tax Act must be understood in the sense of real profits or gains, that is to say, on the basis of ordinary commercial principles on which actual profits are computed, a sense in which no commercial man would misunderstand, has been regarded as a principle of general application, and there is a catena of cases of this Court which affirms that principle. Reference may be made to Calcutta Co. Ltd. v. CIT (1959) 37 I.T.R. 1 (S.C), CIT v. Bai Shirinbai K. Kooka, (1962) 46 I.T.R. 86 [S.C], Poona Electric Supply Co. Ltd. v. CIT (1965) 57 I.T.R. 521 [S.C], (1973) 89 I.T.R. 266 [s.c] and Bafna Textiles v. ITO (1975) 98 I.T.R. 1 [Kar].

Thus, from the above it is clear that the court relied on the principles laid down in the case of B. C. Srinivasa Setty [supra] and held that unless and until the consideration was present the computation provision of sec.48 would not be workable and, therefore, such transfer could not be subjected to tax. The court further went on to hold that unless and until the profits or losses are real, same cannot be subjected to tax.

20. In the case of B. C. Srinivasa Setty [supra] a partnership firm was carrying on the business of manufacturing and selling of agarbattis vide instrument of a Partnership Deed dated 28th July, 1954 and no valuation was made for the goodwill and it was provided that goodwill will be valued only on

dissolution. The period of partnership was extended and when the firm was dissolved in 1965 goodwill of the firm was valued at Rs.1,50,000/- and a new partnership by the same name was constituted which took over all assets including the goodwill and liabilities of the dissolved firm. This goodwill was not included as capital gain in the hands of the dissolved firm by the ITO but a revisionary order was passed by the Commissioner in which it was directed to make fresh assessment after taking into account the capital gain arising on the sale of goodwill. The head note of the above judgment reads as under:

> All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. **What is contemplated by s.48[ii] is an asset in the acquisition of which it is possible to envisage a cost: it must be an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it.** None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. When goodwill generated in a new business is sold and the consideration brought to tax, what is charged is the capital value of the asset and not any profit or gain. Further, the date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains; but in the case of goodwill generated in a new business it is not possible to determine the date when it comes into existence.

Thus, it is clear that unless and until a particular transaction leads to computation of capital gains or loss as contemplated by sections 45 and 48, the same would not attract capital gain tax.

21. Now in the case before us the assessee has not received any consideration for reduction of share capital. What has happened is that ultimately the number of shares held by the assessee has been reduced to 50% and nothing has moved from the side of the company to the assessee. The Ld. Counsel of the assessee submits that the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Mohanbhai Pamabhai [supra] is not

applicable because, in the case before us, it was possible to ascertain the consideration by envisaging the same as zero. In this regard he relied on the decision of the Hon'ble Bombay High Court in the case of Cadell Wvg. Mill Pvt. Ltd. vs. CIT [supra] and, in particular, referred to the observations at pages 284 and 285 of the report wherein it was observed that whole of the value of the capital asset transferred could not be brought to tax because that would amount to taxing the value of asset and not profit as contemplated in sec.45. In this case the issue involved was whether the compensation received on surrender of statutory tenancy rights is chargeable as casual income u/s.10[3] or it should be charged u/s.45. The court, after examining the issue in detail, held that amount received on such surrender is chargeable only u/s.45. The court observed that whole value of the compensation could not be charged u/s.56 because same was chargeable u/s.45 and the decision of the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] was applied. It was also noted that, in fact, sec.55 [2][a] itself was amended by Finance Act, 1994 w.e.f. 1-04-1995 and the cost of acquisition of tenancy rights was to be taken at nil, therefore, this provision could not be applied retrospectively. Thus, it is clear that the decision of Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] was followed in principle wherein it has been held that if computation provision of sec.48 fails, then such transaction cannot be brought to tax u/s.45. The court specifically declined to entertain the argument that cost of tenancy right should be taken at zero because that would amount to charging of capital value of the asset and not capital gain. In the case of reduction of capital nothing moves from the coffers of the company and, therefore, it is a simple case of no consideration which cannot be substituted to zero. It is pertinent to note that after the decision of Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra], the legislature has introduced specific provision wherein cost of acquisition of goodwill was to be taken at nil. Similar amendments were made to specify the cost with reference to trademark, cost of right to manufacture or produce or process any article or thing etc. Therefore, wherever Legislature intended to substitute the cost of acquisition at zero, specific amendment has been made. In the absence of such amendment it has to be inferred that in the case of reduction of shares, without any apparent consideration, that too in a situation where the reduction has no effect on the right of shareholder with reference to the intrinsic rights on the company, it is always possible to argue that cost of acquisition cannot be ascertained and, therefore, provisions of sec.45 would not be applicable. Since no amendment has been made in respect of consideration, principles laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Mohanbhai Pamabhai [supra]- later confirmed by the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] and also in the case of Sunil Siddharthbhai vs. CIT [supra]- are applicable.e., if the consideration cannot be ascertained, then provisions of sec.45 would not apply. No doubt Learned counsel forcefully submitted that the legislature has listed out all transactions which are not regarded as transfer such as gifts etc, (sec.47-iii) and per contra any other transfer even without specific or zero consideration should be considered for taxation U/s 45 but we find no force in it. The situation regarding non ascertainment of any of the element of sec.48 came to light only after the pronouncement of the decision of the Hon'ble

Supreme Court in the case of B. C. Srinivasa Setty [supra]. Perhaps legislature intended to exempt only gifts from subject matter of capital gains and that is why clause (iii) to sec.47 must have been put in the statute. In any case, the decision of the Hon'ble Bombay High Court in the case of The Bombay Burmah Trading Corporation Ltd. Vs. CIT [supra] is directly on the issue wherein third question referred before the Court reads as under:

> "3. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that where in a case of compulsory acquisition by Government without compensation no capital loss will ensure?"

This question was answered by the Hon'ble court vide para which reads as under:

> "4. So far as the third question is concerned, the same is covered by the ratio of the decision of the Supreme Court in B. C. Srinivasa Setty [1981] 128 ITR 294. The answer to the question is, therefore, self-evident. Questions Nos.1, 2 and 3 are not preferable questions of law."

Thus, from the above it is clear that when no consideration is received, no loss can be allowed in view of the principles laid down by the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] which was followed in above decision. In fact, assessee has not suffered any loss on reduction of share capital which we shall see little later.

22. Reliance was also placed before us on the decision of DCIT vs. BPL Sanyo Finance Ltd. [supra]. In this case the court was concerned with the issue where assessee had applied for one lakh equity shares of IDBI Ltd. in response to the public issue. The assessee was allotted 89,200 shares against the application of one lakh shares and share application money was appropriated accordingly. The assessee was asked to remit the balance sum of Rs.83,46,000/- for issuance of the shares and since the allotment money was not paid, IDBI Ltd. cancelled the allotment and forfeited the shares. A

question arose whether such forfeiture would amount to capital loss. The Hon'ble Karnataka High Court observed that a binding contract existed between the assessee and IDBI Ltd. and once shares were cancelled, this would amount to transfer and accordingly the capital loss was allowed. As observed earlier, in the case before us shares have not been cancelled but only number of shares has been reduced and assessee at best would suffer only a notional loss. Further, in this case the principles laid down by the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] have not been considered. Moreover, the Hon'ble Karnataka High Court decided this issue on the basis of decision of Hon'ble Supreme Court in the case of CIT vs. Grace Collis & Ors. [supra]. In that case, the facts were that assessees were shareholders of Ambassador Seamen Ship Pvt. Ltd. and that company got amalgamated with Collis Lines Pvt. Ltd. with the approval of Hon'ble Kerala High Court. As per the scheme of amalgamation, all assets and liabilities of the amalgamating company were to vest in the amalgamated company and in consideration of that the amalgamated company was to issue to shareholders of the amalgamating company 14 equity shares of Rs.100/- each credited as fully paid-up in the amalgamated company for each share held in the amalgamating company. During the relevant year, assessee sold the shares of amalgamated company and the gain arising on the same was charged by the ITO as capital gain. The assessee contended that same could not be charged because the cost of shares obtained by amalgamation could not be determined as there was no transfer involved during the amalgamation. The assessee had not furnished the details of cost of the shares of the amalgamated company. However, the ITO noted that under the scheme assessees had received 14 shares of the face value of Rs.100/- each in the amalgamated company for one share of the face value of a share in the amalgamating company. He multiplied the number of shares of the amalgamated company that assessee had sold by their face value of Rs.100/- each and divided by 14 to arrive at their cost. After reducing this cost from the sale price the balance was subjected to capital gains tax. The ITO rejected the contention of the assessee that sections 49(2) and 47(iii) were not attracted as the assessee had not become the owner of the shares of the amalgamated company in consideration of the transfer of their share in the amalgamated company. Before the Hon'ble apex court another decision in the case Vania Silk Mills Pvt. Ltd. vs. CIT [supra] was relied. The Hon'ble court after detailed discussion in CIT vs. Grace Collis & Ors. [supra] held as under:

> "We have given careful thought to the definition of "transfer" in section 2(47) and to the decision of this court in Vania Silk Mills Pvt. Ltd.'s case [1991] 191 ITR 647. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression "extinguishment of any rights therein" to such extinguishment on account of transfers or to the view that the expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, **the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer."**

Thus, from the above it is clear that even extinguishment of rights in a particular asset would amount to transfer. The chargeability of the capital gain was upheld because on extinguishment of shares in the amalgamating company, the assessee got the new shares and, therefore, the question whether any cost of acquisition could be ascertained was answered in favour of the Revenue. **In the case before us, as pointed out by the Ld. DR,**

the assessee's rights have not been extinguished. We had asked during the hearing that how much percentage assessee was holding in TGL and it was submitted that it was more than 51%. On verification of the details, it is seen that after reduction, TGL is having 89,93,149 equity shares of Rs.10/- each [after reduction and consolidation] and assessee is holding 67,37,399 shares which comes to about 74.9% i.e 75% for easy calculation. Let us examine whether assessee's rights have been extinguished or not.

23. As pointed out by Ld. DR, assessee's percentage of share holding, immediately before reduction of share capital and immediately after such reduction, remained the same. **Therefore, assessee was holding 74.9% shares of TGL immediately before the reduction of capital and also immediately after the reduction of capital.** Such capital has been reduced not only in the case of assessee by TGL but the same has been reduced for all the shareholders of the TGL. Though under the concept of joint stock company, the joint stock company is having independent legal entity but for all practical purposes the company is always owned by the shareholders. Therefore, sum total of 100% shareholders would own the net assets of the company. Now let us say a company started with a capital of Rs.100/- and had assets of Rs.100/-, then 75% shareholders would own 75% of such assets i.e. Rs.75. If after few years, this company suffers a loss and the assets are reduced to Rs.50, then share of the assessee in the assets of the company would be only Rs.37.50. If the capital of the company is reduced by 50%, even then the share of the assessee would be 75% and it would remain same at Rs.37.50. Therefore, the effective share of assessee, in the assets of the company, would remain the same immediately before and after

reduction of such capital. In other words, the loss suffered by the company would belong to the company and that cannot be allowed to be set off in the hands of the assessee. This position is further supported by another example. If, in the above illustration, after few years, instead of assets becoming Rs.50/- , it increases to Rs.200/-, because of profit, and in turn this company issued bonus shares, even then the profit would remain in the books of the company and mere allotment of such bonus shares cannot be subjected to tax. This position was accepted even by the Ld. Counsel of the assessee. Therefore, when the profits of the company which have been distributed to the shareholders by way of bonus shares cannot be assessed, on the same principle losses of the company which have been adjusted by reducing the capital cannot be allowed.

24. Now let us examine the issue from another angle. Let us assume that Mr. 'A' holds 100% shares of a company, and the company, in turn, has invested its entire funds in a property. If the value of this property falls and the company decides to reduce its capital and if the capital is reduced by 50% and Mr. A 's holding is reduced to 50 shares, it will not make any difference, because he is still holding 100% shares and the fall in the value of the property in the hands of the company is only a notional fall or notional loss which would not effect the shareholding. Let us take another illustration. A company known as 'Z' started with an equity capital of Rs.1,000/- divided into 100 shares of Rs.10 each. The company borrowed another Rs.4,000/- and after 10 years the value of assets and liabilities of the company changes. Such changes would occur differently in the case of a profitable company and in case of a loss making company. Let us assume that the company incurs a

loss of Rs.10,000/- or alternatively earns the profit of Rs.10,000/-, then the balance-sheet of the company after 10 years would read as under:

In case of the loss Company
Balance Sheet as on 31-3-xxxx

	Rs.		Rs.
Share capital	1000	Assets	5000
Loan liabilities	14000	Debit balances in P&L A/c.	10,000
	15000		15,000

In case of the profitable Company
Balance Sheet as on 31-3-xxxx

		Rs.		Rs.
Share capital	1000		Assets	15,000
Loan liabilities	4000	5000		
Credit Balance in P&L A/c Profit carried forward		10000		
		15000		15,000

Let us further assume that no dividend was paid by the profit making company. Now, it can be said that in case of loss making company the value of shares has gone down because of the loss, but the shareholder's rights would not be affected because such loss belongs to the company and is assessable in the hands of the company. If such loss making company reduces the capital, such proportionate shareholding would still remain and entitled to the same proportion of asset and assessee's interest is not effected. Same situation would prevail in case of profit making company and if such profit making company issues bonus shares they cannot be taxed in the hands of such shareholders and they can be taxed only when such shares are sold by the shareholders. Therefore, whether the company suffers loss or earns profit, the proportionate interest of the shareholder is not affected.

25. Now let us further understand the exact effect of the reduction of share capital with the following illustration:

Position prior to reduction in capital

Liabilities	Rs.	Assets	Rs.
Share Capital	1000	Assets	2500
Loans	2000	P&L A/c. Bal (Loss)	500
	3000		3000
Net worth of the company (2500 – 2000)			Rs.500

Now, let us assume further that share capital is reduced by 50% and the same is adjusted against loss, then following position would emerge:

Position after to reduction in capital

	Rs.		Rs.
Share Capital	500	Assets	2500
Loans	2000		
	2500		2500

Net worth of the company (2500 – 2000) = Rs.500

As can be seen from the above example, even after reduction of capital from Rs.1000/- to Rs.500/-, the net worth of the company remains the same and the share of every shareholder also remains the same. For example, suppose 'X' was holding 50 shares out of total 100 shares prior to reduction, he will hold 25 shares out of total 50 shares after reduction of 50%, but his share in the total share capital of the company as well as in the net worth of the company would remain the same i.e., at 50%. Thus, in this illustration, share of 'x' in the net worth remains at Rs.250/- i.e. 50% of Rs.500/- before and after reduction of the number of shares. There is thus no change in the intrinsic value of his shares and even his rights vis-à-vis other shareholders as well as vis-à-vis company would remain the same. There is thus no loss that can be said to have actually accrued to the shareholder as a result of reduction in the share capital. There would be no change even in the cost of acquisition of shares which the shareholder would be entitled to claim as deduction in computing the gain or loss as and when the said shares are transferred or sold in future as per sec.55(v). Similarly, in the case before us the percentage of holding of the assessee remains at 74.9 even after the reduction of its capital and assessee has the right to share 74.9% net worth of TGL and no loss has been caused to the assessee.

26. The Ld. Counsel of the assessee had also relied on the following decisions of the Tribunal-

a) Zyma Laboratories Ltd. Vs. Addl. CIT 7 SOT 164 [Mum]
b) DCIT vs. M/s Polychem Ltd. ITA No.4212/M/07 [Mum] and
c) Ginners & Presser Ltd. vs. ITO ITA No.398/M/07 & 4193/M/07

But in all these cases the principle laid down by the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra] was neither cited, nor considered and, therefore, these decisions are distinguishable and in any case, not binding on the Special Bench. In fact such profit or loss arising out of issue of bonus shares or reduction of capital is only a notional profit or notional loss and this concept has been approved by the Hon'ble Supreme Court in the case of Miss Dhun Dadanbhoy Kapadia vs. CIT [supra] and further confirmed by the Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT [supra]. In the case of Dhun Dadanbhoy Kapadia vs. CIT [supra] the facts noted by the Hon'ble apex court are as under:

> The appellant was holding 710 ordinary shares of the Tata Iron and Steel Company Ltd. (hereinafter referred to as " the company "), which she had inherited some tine prior to 1st January, 1954, as an investment. It was admitted that she was not a dealer in shares. Under a special resolution passed at an extraordinary general meeting of the company oil 12th March, 1956, the appellant, as holder of 710 ordinary shares, became entitled to purchase new ordinary shares issued in the ratio of one new ordinary share for one existing ordinary share as held on 26th April, 1956. In pursuance of this resolution, an offer was made to the appellant by the company by its circular letter dated 15th May, 1956, that she was in terms of the resolution, entitled to apply for 710 new ordinary shares to be paid for at the rate of Rs. 105 per new ordinary share. This payment was to represent Rs. 75 as the face value of the share and Rs. 30 as premium. She was also given the option of either taking the shares wholly or partly, or renouncing them either wholly or partly, in favour of any other person or persons. The appellant chose to renounce her right to all the 710 ordinary shares instead of taking the shares herself, and when renouncing the shares, she sold them in the open market on 12th June, 1956, as a result of which she actually realised a sum of Rs. 45,262,50P. It was common ground before the income-tax authorities as well as the Tribunal that this amount received by her was a capital gain and the whole of this amount was sought to be taxed as capital gain received by the appellant. On behalf of the appellant the plea was that, on the issue of the new ordinary shares, the value of her old ordinary shares depreciated, because ***<u>the assets of the company remained stationary</u>***, while the number of shares increased. It was in consideration of this depreciation in her original holdings that she was given the right to purchase these new ordinary shares, or to renounce them in favour of some other person and make up the loss which she would suffer on her original shares. The board of directors of the Native Stock and Shares Association Ltd. had passed a resolution that the transactions in these shares were to be cum-right up to and including 1st June, 1956, and were to be ex-rights from 4th June, 1956, onwards. The intervening days, 2nd and 3rd June, being official holidays, there were to be no transactions on those days. The market quotation of the old Tata ordinary shares was Rs. 253 per share on 1st June, 1956, and fell to Rs. 198.75nP. On 4th June, 1956. There was, thus, a fall in the market quotation of old shares of Rs. 54.26P. per share. It was claimed by the appellant that, as a result of this depreciation in the price of her old ordinary shares, she suffered a capital loss in those shares to the extent of Rs. 37,630, and she was entitled to set off this loss against the capital gain of Rs. 45,262.50P. which she realised on selling her right to take the new ordinary shares. In the alternative, the case was put forward on the basis that the right to receive these new ordinary shares was a right which was embedded in her old ordinary shares, and, consequently, when she realised the sum of Rs. 45,262,50P by selling her right, the capital gain should be computed after deducting from this amount realised the value of the embedded right which became liquidated. The value of that right, according to the appellant, should be calculated in accordance with the principles of accountancy, as laid down by various authors on the subject to be applied in such Situations. Even if this principle be accepted, the amount taxable as

> capital gain in her hands would have to be reduced by at least a sum of Rs. 37,630, if not more.

The contention of the assessee was rejected by the income tax authorities as well as by the Tribunal and the High Court confirmed the decision of the Tribunal. When the matter travelled to Hon'ble Supreme Court, the apex court observed as under:

> "In order to answer the question referred to the High Court, it appears to us that the nature of the transaction, which resulted in this receipt of Rs. 45,262.50P. by the appellant, must be analysed and properly understood. The amount, it is the agreed case of the parties, was a capital gain. 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 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 her 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 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. After she had transferred this right to obtain new shares, the capital assets that came into her hands were the 710 old shares, which became valued at Rs. 198.75P. per share, together with the sum of Rs. 45,262.50P. The net capital gain or loss to the appellant obviously would be the differ ence 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 res pect 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. 198.75P. Plus the sum of Rs. 45,262.50P 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. 45,262.50P. after deducting from it the sum worked out at 710 multiplied by the difference between Rs. 253 and Rs. 198.75P. This last amount comes to a little more than the sum of Rs. 37,630 which the appellant claimed should be deducted from Rs. 45,262.50P. 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 use 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. 45,262.50P., she capitalised that right and converted it into money. The value of 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 this 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 paragraph."

In the above case, Hon'ble court has made it clear that capital gain on account of sale of rights shares has to be understood similarly as understood in the commercial world. It has to be noted that while stating the facts, the Hon'ble Supreme Court noted and stressed that assets of the company remained stationary and that is why depreciation has accrued in the value of old ordinary shares, because same assets would be represented by old ordinary shares plus the new rights shares. Thus, when there was no change in the value of assets of the company on the date of issuance of rights shares, then such reduction in the value of new shares has to be reckoned because assets remained the same. Similarly, in the case before us the value of asset of a company immediately before and after reduction of share capital remained the same and therefore by reducing the amount and number of shares the assessee's proportionate share in such assets remained the same. In the case before us also the value of assets even after reduction of capital remained the same and, therefore, loss, if any, at best can be called notional loss which cannot be allowed as observed by the Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT [supra] at pages 521 & 522 which we have reproduced earlier.

.. It was noticed that perhaps during the earlier hearing of this case, reliance has been placed by the department on the decision of the Ahmedabad Bench of the Tribunal in the case of Ajay C. Mehta vs. DCIT 305 ITR (AT) 155. In that case also assessee had claimed short term capital loss. The assessee had applied for 2,00,000 warrants and paid Rs.2.70 per warrant as upfront payment. Later on, assessee exercised the option only in respect of 40,000 warrants and the right with respect to 1,50,000 warrants was extinguished, which was claimed as short term capital loss. This claim of loss was rejected by the Tribunal because no consideration was received by following the decision of the Hon'ble Supreme Court in the case of B. C. Srinivasa Setty [supra]. In any case, in addition to the above detailed discussion, the issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of The Bombay Burmah Trading Corporation Ltd. Vs. CIT [supra] wherein it is clearly held that if no compensation is received, then capital loss cannot be allowed. It was argued by the Ld. Counsel of the assessee that detailed facts are not available, but we find that the Hon'ble Madhya Pradesh High Court in the case of National Textile Corporation vs. CIT [171 Taxman 339] has clearly held that a decision of jurisdictional High Court cannot be ignored by the Tribunal simply because it is assumed that certain aspects of the issue might not have been considered by the jurisdictional high court. In the case of National Textiles Corporation, it was observed as under:

"**It is neither permissible nor legal for any Court and Tribunal to comment upon the decision of Supreme Court/High Court**. Similarly, it is also not permissible for the Tribunal to comment upon the manner in which a particular decision was rendered by Supreme Court/High Court. It is also not permissible for Tribunal to sidetrack or/and ignore the decision of High Court on the ground that it did not take into consideration a particular provision of law. If such approach is resorted to by subordinate Courts/Tribunals then it is held to be not in conformity with the law laid down by Supreme Court. It was deprecated by Supreme Court as being improper.
When the High Court has no jurisdiction to comment upon any decision of Supreme Court nor High Court has a power to ignore such decision by virtue of mandate contained in Article 141 of Constitution then on the same reasoning, the Tribunal being subordinate to High Court has to follow the decision of jurisdictional High Court without making any comment upon the said decision or/and without ignoring it on any ground except those which are well recognized as indicated hereinbelow. In other words, when law laid down by Supreme Court is binding on all Courts/Tribunals in the country by virtue of Article 141 of Constitution of India then law laid down by High Court is equally binding on Courts/Tribunals they being subordinate to High Court by virtue of powers conferred by Articles 215, 226 and 227 of Constitution of India and by judicial precedents."

Therefore, in our view, the decision of Hon'ble Bombay High Court is binding and has to be applied.

27. Further, recently the Authority For Advancing Rulings (Income-Tax), New Delhi, presided over by Hon'ble Justice P.K.Balasubramanyan, Chairman, in the case of Goodyear Tire & Rubber Company, In re* (2011) 199 Taxman 121, also took the same view in almost identical circumstances. In this case, the applicant Goodyear Tire & Rubber Co., USA which is incorporated in USA was holding shares in Goodyear India Limited. As part of the global strategy, it was contemplating re-organising all its investments and, therefore, proposed to enter into Share Contribution Deed to contribute voluntarily entire 74% of its holdings in Goodyear India Ltd., to Goodyear Orient. (P) Ltd., Singapore without consideration and voluntarily. The following question was referred for consideration of the Hon'ble authority-

"Whether the Applicant is liable to tax in India under the provisions of section 45 read with section 48 or under A.Y other provisions of the Income-tax Act, 1961 ("Act") in relation to the proposed contribution of its shares in Goodyear

India Limited ("GIL") to Goodyear Orient Company (Private) Limited ("GOCPL") without consideration?"

The Authority after detailed discussion observed at para-8 as under:

> "8. It is settled law that section 45 must be read with section 48 and if the computation provision cannot be given effect to for any reason, the charge under section 45 fails. The Hon'ble Supreme Court has explained the interplay and relative scope of the two sections in the cases of B. C. Srinivasa Setty [1981] 128 ITR 294 and Sunil Siddharthbhai vs. CIT [1985] 156 ITR 509 (S.C)."

And further observed at para-10 as under:

> "10. As no consideration will pass on transfer of shares of GIL by GTRC, no income will arise. The provision of sections 92 to 92F of the Act will not be applicable in the absence of liability to pay tax."

28. We also find force in the submissions of the Ld. DR that as per sec.55(v) the cost the cost of acquisition of shares even after conversion etc. has to be taken with reference to the cost of original shares. Therefore, after reduction of share capital the cost of acquisition of the remaining shares would be reckoned with references to the original cost. Though at this stage assessee has not obtained any benefit because loss has been computed with reference to the actual cost, but,in future, if assessee decides to sell its shareholding in TGL then assessee has the right,U/s 55[v], to substitute the cost of acquisition with reference to the original shareholding and in that case it may amount to double benefit later on which is not permissible under the law.

29. Therefore, in the light of the above discussion, we are of the opinion, that the loss arising on account of reduction in share capital cannot be subjected to provisions of sec.45 r.w.s. 48 and, accordingly, such loss is not allowable as capital loss. At best such loss can be described as notional loss

and it is settled principle that no notional loss or income can be subjected to the provisions of the I.T.Act.We hold accordingly.

30. The other grounds of appeal raised are as under:

> 1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in confirming the disallowance of Rs.48,60,835/- towards obsolete/non moving material written off.
> 2. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not allowing deduction u/s.80IB of Rs.1,68,11,086/- in respect of Chennai Industries undertaking.

31. The Ld. Counsel Shri Venkatraman, submitted that the issues raised in both these appeals are covered by the earlier order of the Tribunal in I.T.A.Nos.5741 & 5665/M/2007, copy of which has been filed on record.

32. On the other hand, Ld. DR relied on the order of the AO.

33. The issue raised in ground No.1 came up for consideration of the Tribunal in A.Y 2003-04 in I.T.A.Nos.5741 & 5665/M/2007 and the same had been adjudicated vide paras 4 and 5. In para 4 the contentions of both the parties have been considered and ultimately the issue had been adjudicated vide para-5 which is as under:

> "5. We have also heard the Learned D.R. on this issue. As submitted by the Learned Counsel, the identical issue has been considered by the Tribunal in assessee's own case for the A.Y 2000-01 and the operative part of the findings is in para No.4 which reads as under:
>
> > "4. The ground of appeal No.6 of the assessee is as under:
> >
> > "6. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of Rs.31,33,240/- being obsolete/non-moving material written off."
> >
> > This ground of appeal consists of two parts i.e. with regard to the addition of Rs.17,11,240/- on account of Times Music Pop albums and the other addition of Rs.14,22,000/- on "Planet M". Learned Counsel for the assessee has not pressed the ground of appeal with regard to the addition of Rs.14,22,000/- of "Planet M" and the ground of appeal of the assessee with regard to this addition of Rs.14,22,000/- is dismissed. With regard to the other addition of Rs.17,11,240/- of times music, the Ld. Counsel for the assessee submitted that the assessee has the method of accounting by which one year it values the obsolete music cassettes of over three years and over one year at

Rs.1/- per casette, which has resulted in the loss of Rs.17,11,240/-, during the relevant period and is allowable nature. The Ld. D.R. has relied on the orders of the Assessing Officer and CIT(A). We have considered the rival submissions. We find that the cassettes becomes obsolete after expiry of considerable time and there is nothing wrong in the method of accounting of the assessee in valuing the obsolete cassettes at Rs.1/- per cassette resulting in loss to the assessee during the relevant period. The loss being genuine and very much incidental to the business is of allowable nature and is accordingly allowed and the ground of appeal No.6 with regard to the amount of Rs.17,11,240/- of time music is allowed.

The order of the Tribunal for the A.Y 2000-01 is also followed in the subsequent A.Y 2002-02. as the facts are identicla in this year, therefore following the order of the Tribunal in assessee's own case cited [supra], we delete the addition confirmed by the Ld. CIT(A). Accordingly, ground No.1 is allowed."

Following the above order, this issue is decided in favour of the assessee.

34. The issue raised in ground No.2 has been adjudicated vide paras 15, 16 & 17 and para 17 reads as under:

"17. We have heard the Learned D.R. on this issue. it is seen that the issue for allowability of the deduction u/s.80IB in respect of Chennai Unit has been dealt with by the Tribunal while deciding the order passed by the CIT u/s.263 for the A.Y 1986-87 being I.T.NO.3125/M/2001, order dated 30-11-2004 and it is held that Chennai unit is an "Industrial Undertaking' within the meaning of Section 80IA. The operative part of the order reads as under:

"Regarding Chennai unit we find that the Board Circular No.347 as reported in 37 (Stat.) 14 has approved the view of the Hon'ble Madras & Calcutta High Courts in 107 ITR 822 117 ITR 718 respectively. As per these Judgments and as per this circular, book publishing company even if not printing or binding of books themselves are to be treated as industrial company. In the present case also, the objection of the CIT is based on this fact that the assessee is not printing the paper and hence is not an industrial unit. We are of the considered opinion that the assessee has to be treated as an industrial unit for Chennai also in view of this Circular, otherwise also, as per section 80IA[12], Industrial undertaking shall have the same meaning assign. Such Explanation to section 33B is reproduced below:
Explanation: In this section, "industrial undertaking" means any undertaking which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining.

From the above, we find that any undertaking which is mainly engaged in processing of goods is also an industrial undertaking and in the present case, the Chennai unit is mainly engaged in gathering the news and procurement of advertisements and then processing the same to result in a news paper.

> These activities fulfil the condition of processing of goods and hence has to be treated as an industrial undertaking"
>
> The said order has been followed by the Tribunal in the other assessment years. As the facts are identical, we confirm the order of the Ld.CIT[A] in this year also and dismiss Ground No.4 taken by the Revenue.

Following the above order, we decide this issue in favour of the assessee and direct the AO to allow deduction u/s.80IB in respect of profits of Chennai industrial undertaking.

35. In the result, appeal is partly allowed.

Order pronounced in the open Court on this day of 30/09/2011.

Sd/-		**Sd/-**
(D.MANMOHAN)	**(R.S.SYAL)**	**(T.R.SOOD)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**	**ACCOUNTANT MEMBER**

Mumbai: 30/9/2011.
P/-*