$~
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 26.02.2015
% **PRONOUNCED ON: 20.03.2015**

\+ **ITA 25/2001**
COMMISSIONER OF INCOME TAX ..... Appellant
versus
M/S. ABHINANDAN INVESTMENT LTD. ..... Respondent

ITA 840/2008
COMMISSIONER OF INCOME TAX DELHI II ..... Appellant
versus
MEDICARE INVESTMENTS LTD. ..... Respondent

ITA 26/2001
COMMISSIONER OF INCOME TAX ..... Appellant
versus
JINDAL EQUIPMENTS LEASING & CONS. SERV. .... Respondent
Through : Sh. Rohit Madan,
Sh. P. Roychaudhuri and Sh. Ruchir Bhatia,
Advocates, for the Revenue.

Sh. Ajay Vohra, Sr. Advocate with
Ms. Kavita Jha, Adv. for assessees.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. These three appeals involve common questions of law directed against a common order of the Income Tax Appellate Tribunal (ITAT) dated 05.06.2000. Initially, a Division Bench had decided the case on, 08.10.2001, reported in (2002) 254 ITR 0538 (*Commissioner of Income Tax v.*

Abhinandan Investments); it had ruled in favour of the assessee, holding that no substantial question of law arose. That judgment was challenged; the matter was sent back by remand, by the Supreme Court (in CA 4596/2003, decided on 19.01.2010) which, *inter alia*, framed a question of law, in the following terms:

> *"Whether, on the facts and circumstances of this case, the Tribunal was justified in directing the Assessing Officer to allow deduction of the losses at Rs.111/- per NCD as a business loss?"*

2. The brief facts are that the assessee in ITA 25/2001 (hereafter "Abhinandan") and assessee in ITA 26/2001 (hereafter "JELCS") claimed a loss of ₹111 per debenture on the sale of debentures of Jindal Iron and Steel Co ("JISCO") to UTI. These assessees were shareholders of JISCO, which declared a right issue of secured redeemable non-convertible debentures (NCD) of ₹500/- each. The size of the issue was about ₹500 crores. The issue opened on 21.11.94 and closed on 19.12.94. Interest @10.5% was payable by JISCO on those debentures. To make the debenture issue attractive, JISCO fixed a detachable warrant (DW) with each debenture, the holder of which was eligible to apply for one share of JISCO within a specified period. The salient features of the rights issue of NCD as approved by SEBI were as under:-

a) Each debenture was of face value of ₹500/-.

b) Every residential shareholder had to pay a sum of ₹111/- per debenture on making application and balance of ₹389/- per NCD was payable on allotment.

c) For non-residence/FI's NR renounces will contribute a sum of ₹500/- each debenture on application.

d) If the company did not receive the minimum subscription of about 90% of the issue of NCD within sixty days from the closure of the issue the company had to refund the entire subscription amount received.

e) NCD with DW was offered to existing shareholders of the company whose names appeared in the register of a company on 31.10.94.

f) 23 debentures for every 100 equity shares held on 31.10.94 were to be issued.

3. The shareholding pattern of JISCO as on 12.8.94 was under:-

1.	Promoters	30.93%
2.	Financial Institutions	14.84%
3.	Mutual Funds	2.32%
4.	NRIs	6.46%
5.	Banks	2.14%
6.	Foreign Institutional Investors	2.88%
7.	Public	40.43%
		100%

The terms of the issue also stated that the promoters' holding in percentage in JISCO will not fall below the existing percentage holding even after the allotment of the right issue.

4. Before the right issue, JISCO made certain arrangements with UTI in July 1994 according to which the allottees of NCDs could surrender all the NCDs to UTI after the application was made and UTI agreed to pay the balance allotment money (₹389/- per NCD) to JISCO and secure the NCD registered in its name. The assessees and other promoter companies applied for NCDs as per their shareholding and made the payment of ₹111/- each NCD on application. However, all the said promoter companies (including the assessees) opted for the arrangement entered into between JISCO and the UTI - mentioned earlier. Therefore, when UTI paid the balance allotment money (₹389/- per NCD) on behalf of assessee, and in exchange became debenture holder, the assessee was allotted the DWs. Abhinandan sold some DWs @ ₹20/- per DW and claimed difference (of ₹91/- per DW) as a short term capital loss for the assessment year. Similar action was taken by JELCS. Subsequently the assessees claimed before the AO that by such arrangement it sold their NDCs to UTI as a result of which it incurred a loss of ₹111 each NCD and, was deductible.

5. The AO considered the assessees' claim and observed that JISCO had given loans to some Mumbai based group companies and in turn these group companies invested in the placement of preference shares of all the said assesses/appellant companies. The AO therefore felt that it was JISCO's own fund which was used in subscribing to its NCD issue in the name of assessees. The AO also held that all the five assessees/ appellants were not acting in their own capacity or taking market oriented decisions and were acting on behalf of JISCO. He further observed that the funds flowed into the assessees from JISCO which has flowed back to JISCO in the shape of application money for NCDs. Thus the assessees were merely conduits in

this transaction and, therefore, the loss claimed by it was not allowable. The AO further observed that the agreement between JISCO and UTI was for the benefit of the promoter company only. He observed that there was no reference to this arrangement in the letter of offer though the arrangement with UTI was already reached before the offer dated 12.11.94. The AO also noted that the five assessee companies endorsed the allotment letters issued to them, in favour of UTI, which paid the allotment money and that there was no agreement between the UTI and the assessees for making the payment of allotment money on their behalf. Rather, the arrangement was between JISCO and UTI and the assessee could not take the benefit of such arrangement. Relying on the decision of the Supreme Court in *McDowell Ltd v Commercial Tax Officer* 154 ITR 148 (SC), the AO held the arrangement to be a colorable device to avoid future tax liability, by booking the losses. The AO concluded that all the five assesses - including the present assessee, were name lenders and the loss claimed by the assessees was not genuine. He, therefore, disallowed the loss.

6. Aggrieved by the order (of the AO), Abhinandan and JELCS appealed to the CIT (A). In appeal it was highlighted that the assesses were investment companies like other shareholders and that during the year all the said five companies came up with a private placement of Jindal's preference shares and also subscribed to the right issue of NCD of JISCO. The assessees also subscribed to the equity issue of Jindal Vijaynagar Steel Ltd. (JVSL), a new company of the group floated during February 1995. It was highlighted that the face value of JISCO's NCD was ₹500/- and each entitled the holder to a detachable warrant (DW). The face value of the share was ₹10/- but the premium payable was ₹190/-. The DW was a post-dated

entitlement by which the holder could buy one JISCO share @ ₹200/- at a time to be determined by JISCO but not later than 60 months. Secondly, the DWs were to be given to the holders only when the allotment money was paid. The DWs were to be listed and traded separately. The application money for this rights issue was ₹111/- per NCD and the allotment money was ₹389/- per NCD. The rights issue opened on 11.11.94. An arrangement with UTI, by JISCO was made in July, 1994 which was accepted by the former in September, 1994. In terms of the arrangement, NCD allottees could surrender the NCD to UTI which would pay the allotment money of ₹389/- per debenture to JISCO on behalf of subscribers. UTI accordingly paid the sum @ ₹389/- per NCD to JISCO on behalf of assessees. In turn the assessees transferred their NCDs to UTI, which were registered in the name of UTI. Originally the assessees claimed short term capital loss for each DW on the sale of DW. Later, however, the assessees revised the claim of loss before AO. Since the assessees suffered loss on the sale of NCDs to UTI, the loss at the rate of ₹111/- per NCD was allowable according to them.

7. The CIT (A) held that NCDs were allotted on January 14, 1995 on payment of application money of ₹111/- per NCD. Between January 20, 1995 and January 25, 1995, the assessees and others transferred the NCDs to UTI without consideration. It was also held that the assessees never became owners of the fully paid NCDs and that they had paid ₹111/- as application money to acquire NCD; the DWs were received *gratis*. The claim of loss of ₹111/- per debenture on its sale was made for the first time in appeal and not in assessment proceedings. It was noted that the assessees applied for NCDs *after* the arrangement between JISCO and the UTI without any

consideration and with the intention of incurring loss of ₹111/- on each NCD and that they had not fully paid for the NCDs. Therefore they were disentitled to the DWs, because in terms of the issue conditions, the DW was to be allotted only after the NCDs were fully paid. The NCDs were transferred to UTI immediately after the allotment and entirely according to the arrangement between JISCO and the UTI. Such transfer was an act of forfeiture of application money at ₹111/- per NCDs. The beneficiary of the transfer was not UTI but JISCO. Thus, the loss was deliberately incurred for the benefit of JISCO. It was held that as such, no loss arose to the assessees on transfer of the NCDs and, therefore, the question of allowing loss did not arise. The CIT (A) consequently dismissed the assessee's appeal.

8. The assessees and other companies appealed to the ITAT and argued that together, they held 30.93% (and about 40.43% being held by general public) shares in JISCO and the balance was with the banks and the financial institutions. According to SEBI guidelines, if 90% of any given issue was not subscribed JISCO had to refund the entire application money received by it; the guidelines also prescribed that even after the issue and allotment of one share of each DW attached with the NCD, the shareholding pattern of the promoters would not undergo any change. Therefore, the assessees and other companies had no option but to subscribe to the issue of NCDs. Had they not so subscribed - to the public issue of NCDs, JISCO's entire issue would have failed. As a promoter company this could have brought bad repute to the assessees. It was further urged that the most important aspect was that there was no underwriter to the issue. Thus, the assessees were compelled to subscribe to the issue of NCDs. Since 90% of the issue had to

be subscribed by the existing shareholders, this was not an easy task. In order to make the issue attractive, a DW was attached to each NCD which could entitle the holder to apply for one equity share of JISCO at ₹200/- per share (₹10 face value + ₹190 premium). As per the terms of the issue, ₹111/- per NCD was payable on application and the balance of ₹389/- was payable on allotment. The allotment of DW was to be only when the full payment at ₹500/- on each NCD was made.

9. With respect to balance amounts paid by UTI, assessees submitted that UTI's certificate that it made paid at ₹389/- per NCD to JISCO on behalf of the assessees, was not considered. In a sense, their stand was that only when the entire consideration for the NCDs was received by JISCO further course of action was followed. The materials were placed to show that DWs were given to the assessees when NCDs were fully paid up. As to the conclusion of the CIT (A) that the assessees never became the owner of NCD/DWs, it was submitted that the letter of allotment was in the name of the assessees; UTI made payment of allotment money to JISCO on behalf of the assessees and in turn the assessees transferred the NCDs in favour of UTI which was registered in UTI's name and therefore the factual conclusions of the CIT (A) were wrong. The assessees denied that they were the beneficiaries of the transaction but it was UTI who became the owner of the NCDs of the face value of ₹500/- by paying ₹389/- only per NCD. UTI also received interest from JISCO at full value of ₹500/- each debenture. Moreover UTI was entitled to the full redemption money at ₹500/- per debenture on redemption though actually they had paid at ₹389/-. UTI earned a substantial annual gain of 256% on this transaction. It was urged

that the assessees too benefited due to the arrangement because after losing ₹111/- on each debenture it became entitled to one dividend warrant which enabled it (the assessee) to own an equity share at ₹200/- though the market price of the share on that date was much higher. A chart indicating the gains by the assessee-companies was also furnished before the ITAT. The assessees argued that there was no camouflage in the transaction to evade tax.

10. The ITAT, in its impugned order held that the five assessee-companies were promoters of JISCO through whom JISCO invested in various public limited companies. They held about 34% of JISCO's shareholding; the rest was held by the financial institutions and the public. During the assessment year in question, JISCO came up with the rights issue worth ₹500 crores. According to the terms of the issue - as approved by the SEBI - if 90% of the issue was not subscribed then it would fail and JISCO then was to refund the entire money collected by it. The assessees were therefore, compelled to subscribe to the rights issue. The failure of such issue would have been detrimental to the assessees and other companies, as they were investors/promoter companies of JISCO. Thus, the assessees had no option but to subscribe to the rights issue of NCDs. A sum of ₹111/- per NCD was payable on making application as per the terms of the issue and the balance ₹389/- was to be paid on allotment. To popularize the issue, JISCO also provided that on payment of the full value of the NCD, the subscriber was entitled to one DW which in turn would entitle the holder to one equity share of JISCO at ₹200/- per share. The market value of one share of JISCO was ₹320/-. As these conditions attached to the issue had

SEBI approval, all the assessees applied for the rights issue and paid a sum of ₹111/- per NCD on application. JISCO was also interested that the rights issue should meet with success. They therefore negotiated with UTI and UTI was agreeable to making payment of allotment money on behalf of any subscriber on the sale of NCDs to UTI. But the price quoted by UTI after negotiation was ₹389/- per NCD and that too was limited to investment of ₹350 crores. Such arrangement was given effect to by the assessees. Resultantly, UTI made payment at ₹389/- per NCD directly to JISCO and in turn the assessee-companies transferred their NCDs worth ₹500/- per NCD in to the UTI. The assessee too benefited because they got DWs which entitled them to an equity share of JISCO at ₹200/- per share. The DWs were given to the assessees who later sold them and originally claimed the loss incurred as deduction. However, during the course of assessment proceedings the assessees claimed that as they sold NCDs worth ₹500/- per NCD at ₹389/- per NCD, they had suffered a loss @ ₹111/- per NCD which should be allowed as deduction. The claim was, *inter alia*, rejected on the preliminary ground that such a ground was not before the AO. The ITAT noted that in a large number of decisions it was held that any view the assessees propound may be irrelevant while considering assessment under the Act. The only consideration for the revenue at that point of time is as to what was the true legal effect of the transaction. Reference was made to several decisions in *Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income Tax* [1971] 82 ITR 363 (SC) ; *Delhi Stock Exchange Association Ltd. v. Commissioner of Income Tax* [1961] 41 ITR 495 (SC) and *First Addl. ITO v. T. M. K. Abdul Kassim* [1962] 46 ITR 149 (SC). It was therefore

observed that even if the return filed by the assessee did not set out the proper position that cannot be a reason for not allowing the claim.

11. The ITAT considered the reasoning of the AO and CIT (A) and held, firstly that when the assessees applied for NCDs and paid the requisite sum of ₹111/- per NCD, the offer of allotment was issued to them in terms of which all applicant companies had to make a further payment at ₹389/- per NCD. As the arrangement was in place with the UTI (which had to purchase the NCDs at ₹389/- per NCD), the assessees gave effect to it (the arrangement). UTI paid ₹389/- per debenture to JISCO and in turn the assessees transferred their NCDs in to UTI. Such transfers were also registered in the register of JISCO. Payment was made by UTI to JISCO on behalf of the assessees. Secondly, it was held that the approved condition of the SEBI that on payment of full consideration the holder of the NCD will be entitled to one DW which in turn entitled the holder to apply for one equity share of JISCO. In its letter, JISCO had clearly confirmed that the DWs were given to the assessees only when it had received the full amount of NCDs either from the assessees, or from UTI - on its behalf. Thirdly, dealing with the reasoning that the entire transaction was aimed at giving an undue advantage to JISCO, reference was made to a chart filed by the assessees, which indicated the extent to which the UTI had benefited from the transaction. Fourthly, with respect to the deployment of funds, it was held that actually the payment of application money was made by the assessees from their funds. Much later, some companies close to JISCO had made advances to the assessees. The ITAT observed that even assuming that the assessees were indirectly provided funds by JISCO to invest in the rights

issue of NCDs, there was no legal bar for doing so. Lastly, dealing with the reasoning that the sale transaction between the assessees and UTI not being at arms' length, since the NCDs were made over to UTI for ₹389/- when their face value was ₹500/-, the ITAT held the ground to of no substance. Here, it was noted that as per the scheme approved by the SEBI, the assessees had no option but to subscribe to the rights issue - a factor applicable to all the shareholders. The general public accounted for about 40% of the shareholding of JISCO. In case the assessees did not opt to subscribe to the issue, it would have failed, (as provided in the terms of the issue, which mandated subscription of 90% of the rights issue) and JISCO would have been compelled to refund the entire money. That would have been detrimental to the assessees, promoter companies of JISCO. ITAT found that UTI had secured an annual yield of about 25%. Therefore, it was held that the transaction of selling NCDs at the face value of ₹500/- to the UTI at ₹389/- per debenture was not a colourable device. It also noted that when JISCO came with the rights issue of NCDs, many other companies like Apollo Tyres, Usha Ispat Ltd., Dhunseri Tea Industries Ltd., and Sri Ram Industrial Enterprises, etc., had come out with similar rights issues with almost identical terms and conditions. In the case of Apollo Tyres, the buy-back was done by JM Financial and Investment Consultancy Services Ltd. whereas in the case of Usha Ispat, Dhunseri Tea and Sri Ram Industrial Enterprises, the buy-back was by UTI, DSP Financial Consultancies Ltd. and Sri Ram Financial Services Ltd. respectively. In the case of the assessees, the buy-back was by UTI which could not be influenced by the terms of either the assessee or JISCO. Consequently, it was held that the sum of ₹111/- per share had to be treated as business loss.

Facts in Medicare Investments, ITA No. 840 of 2008

12. The assessee company held shares in Max India Ltd. a widely held, listed company. During the previous year ended 31.03.96 Max India Ltd. came up with a Rights Issue in which the assessee company also participated as a shareholder. The facts relating to the said issue of Max India Ltd. were that 8,23,720, Zero coupon Fully Convertible Debentures (FCDs) of ₹500/- each were offered, for cash at par aggregating to ₹41,18,60,000/- on rights basis in the ratio of 1 FCD for every 10 Equity Shares held, to the existing Equity Shareholders. 12.5%, Secured, Non-convertible debentures (NCDs) aggregating 16,47,440, were issued, at ₹250/- each, for cash at par aggregating to ₹41,18,60,000/- along the Detachable Warrants (DWs) on rights basis in the ratio of 1 NCD for every 5 Equity Shares held to the existing equity shareholders. The assessee subscribed to and was allotted, in the above referred rights issue of Max India Limited, 1,95,000, 12.5% Secured, redeemable Non-Convertible Debentures of ₹ 250/- each with (with Detachable warrants). The assessee company has sold these NCDs (without warrant), in terms of the Scheme, at the rate of ₹169/- per debenture. The issue price (at par) of ₹250/- was allocated as under:

i) Non-Convertible Debenture ₹250/-

ii) Warrant NIL

13. On the above basis, loss on sale of debentures was computed at ₹l,57,95,000/- (i.e. ₹250/- minus ₹169/-) *x* 1,95,000, and warrants were shown in the Balance sheet at NIL cost. The A.O. examined this issue and concluded that by opting for scheme B there was no acquisition of NCD by the assessee at all. The A.O. also observed that:-

> *"Whatever may be the arrangements which the transaction has been gone through, one has to look at the very essence of the transaction. The essence of the transaction, here, is that, if the investor opts for Scheme-A, he gets two products namely, one combined price warrant plus NCD for Rs.250/-, but if he opts for Scheme-B, he gets only one product i. e. the warrant, for Rs.81/- and other product, the NCD is given to IL&FS for Rs.179/.*

The A.O. held that the arrangement was preconceived and the claim of loss is untenable. He has highlighted that there is no transaction which resulted in a loss of ₹81/- per warrant for the cost of the warrant has to be taken at ₹81/- For these reasons, the assessee's contentions were rejected.

14. The assessee appealed to the CIT (A) where it was contended that in terms of Max India Ltd's letter of offer dated December 8, 1995, each NCD carried a face value of ₹250 and was attached with one detachable warrant. Each warrant enabled the holder to apply for and be allotted one equity share of Max India Limited at a price which was to be calculated at a discount of 33% on the prevailing market price or ₹225, whichever was less, any time between the period of 24 to 48 months from the date of allotment of NCDs. It was argued that if the right attached to the warrant had not been exercised by the holder thereof within the period specified by Max India Ltd., the entitlement for the shares was liable to be automatically lapsed. It was also clarified that the warrant holders exercising their option for allotment of equity shares were not entitled to seek any appropriation of the amount paid on the NCDs against the amount payable for the equity shares which was to be paid in full separately. It was contended that the said warrants thus were completely detachable from the NCDs and their holders were entitled to sell the NCDs separately after detaching the warrants. It was also contended that

since the purchase price, face value as well as redemption price of the said NCDs was ₹250 each, that was rightly taken as cost of acquisition by the assessee and the loss resulting in the sale of the said NCDs by taking the said cost of acquisition was allowable in the hands of the assessee. These arguments did not prevail and the reasoning of the AO was left undisturbed. The CIT (A) also observed that:

> *" 4. I have carefully considered the matter. To my mind, the Assessing Officer's order suffers from no infirmity on this count. The Assessing Officer has correctly observed that the entire arrangement was pre-conceived. I find that the Assessing Officer has discussed this issue in a comprehensive manner and has correctly arrived at the finding that the cost of the warrant is to be taken at Rs.81 only and not nil. I am in agreement with the arguments given by the Assessing Officer in the assessment order. Accordingly, this ground is decided against the appellant-company. The disallowance of loss on sale of debentures of Rs.1,57,95,000 is upheld."*

The assessee appealed to the ITAT. By that time, the decision in Abhinandan's case was rendered. Having regard to the orders of various Benches of the ITAT, a Special three member Bench was constituted to decide the issue, which was answered as follows:

> *"On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in upholding the order of the learned Assessing Officer in respect of the disallowance of Rs.1,57,95,000 on account of loss on sale of debentures."*

The ITAT preferred to follow the decision in Abhinandan's case and allowed the assessee's claim.

Contentions of the revenue

15. It is argued by revenue that there was no sale of NCDs by the assessee to UTI as there was no agreement of sale between them. The arrangement was between JISCO and UTI. There was no stipulation in the scheme for buy back of khokha (NCDs) as was made by the other companies while issuing the prospectus for their rights issues on which the ITAT relied. No title was transferred to the UTI as the assessee claimed. ITAT also observed that the UTI paid ₹389 per debenture on behalf of the assessee. Were the NCDs sold to UTI (as claimed by the assessee), the question of paying allotment money at ₹389 would not have arisen, on the part of the assessee. If a transaction was for sale of NCDs, the UTI would have paid on its own behalf. Here the sale did not take place because as per the scheme only a paid up debenture entitled the holder/allottees to receive the DW. If the sale had taken place, only UTI would have been entitled for the DW. Here the DWs were issued to the assessee whereas the UTI had paid the allotment money. The assessee had shown the amount of application money as the cost of DWs which was evident from the fact that the assessee claimed the loss to the extent of DWs sold. It was in fact a financial arrangement between JISCO and the UTI and the UTI agreed to pay ₹389/- per debenture on the condition that (i) interest would be paid at 10.5 %; and (ii) refund of ₹500/- would be given in three instalments. In the process, the assesse allowed its capital to be forfeited by JISCO, which was a unilateral act on its part. It is like the case of unclaimed credits/ debts. A sum of ₹111/- per NCD was capital investment in the hands of the assessee as it had shown it as investment and declared the loss as short-term capital loss while filing its return. The assesse is an investment company of the Jindal group.

16. It was argued that no definition of "investment company" existed in the statute. However, several definitions were enacted. "Financial investment company" was inserted by the Finance (No. 2) Act, 1991. By Section 2(9)(d) it is defined as

> *"a company whose gross total income consists mainly of income which is chargeable under the heads 'Income from house property', 'Capital gains' and 'Income from other sources' or of income by way of interest on securities."*

It was highlighted that in the present case, money which had flowed from JISCO came back to it with financing from the UTI and the assessee also claimed loss in the year under consideration, to claim set off against an income of the present year as well as subsequent years. JISCO had made an arrangement with the UTI to finance the debentures at ₹389 per debenture. UTI had agreed to the extent of ₹350 crore. The UTI did not restrict it only for the promoters and to the exclusion of others. JISCO intended to avail of the whole of this benefit for itself and that is why it did not mention with reference to *khokha* sale in the scheme itself as was done by other companies.

17. Senior counsel for the assessee in all the cases argued that there is no infirmity in the approach and conclusions of the ITAT. It was submitted that the revenue's arguments about the assessee not being allottee of the NCDs is baseless, because as a matter of record, they were allotted in its favour on 14.01.1995 (6,67,000 NCDs) and transferred later, on 25.01.1995 to UTI-evidenced from the endorsements at the reverse of the document. The share transfer form dated 20.01.1995 also strengthened this submission. That UTI funded ₹389/- per NCD was not relevant, because there is nothing in law

prohibiting such arrangement. Likewise, the previous agreement whereby such funding took place also could not detract from the true nature of the transaction, which is what the ITAT looked at. Counsel urged that the assessee is an investment company and treated as a promoter of JISCO, whose shares to a substantial extent were acquired from time to time. Abhinandan's ordinary line of business is investment in shares. Reliance is placed on three years' income for previous years in support of this argument. Urging that it would be anomalous to uphold the revenue's stand that on the one hand, it urges that JISCO's shares were held as stock in trade and at the same time, contend that DWs - acquired as a consequence of the share-holding, had to be treated in the same manner.

18. Counsel also argued that the loss in question was a business loss and not a capital loss and further that according to the revenue itself the assessee's JISCO shares were stock in trade (and therefore in the revenue account). In view of this stand, the Revenue cannot argue to the contrary. It would be contradictory and illogical to say that the shares of JISCO are to be held as stock in trade but the NCD's which were acquired by virtue of the shareholding in JISCO and which were held for 10 days are to be treated as an investment and held on capital account.

Analysis & Findings

19. Before we proceed to analyse the contentions of the parties, it would be useful to set out, in a tabular form, the salient facts relating to the two sets of appeals:

Sl. No.	Abhinandan Investment & JELCS	Medicare Investment Ltd
1.	Right issue of JISCO: 10.5% redeemable NCDs with DW	Right issue of Max India: 12% redeemable NCDs with DW
2.	NCD face value ₹500/- each	NCD face value ₹250/- each
3.	DW entitled holder to apply for an equity share of JISCO of ₹10/- face value at a premium of ₹190/- per share	DW entitled holder to apply for an equity share of JISCO of ₹10/- face value at a price to be calculated at a discount of 33% of prevailing market price or at a price of ₹225/- whichever was lower
4.	₹111 per NCD application money for the rights issue and allotment money ₹ 389/- per NCD	₹81/- per NCD application money for the rights issue and allotment money ₹169/- per NCD
5.	JISCO made arrangements with UTI	Max India made arrangements with Infrastructure Leasing & Financial Services Ltd (IL & FS)
6.	Allottee could surrender NCDs to UTI which would pay balance ₹389/- (to JISCO) and at the same time allottee would retain DW	Allottee could surrender NCDs to IL & FS which would pay balance ₹169/- (to Max India) and at the same time allotee would retain DW
7.	UTI agreed to the arrangement to the extent of total funding ₹350 crores.	Arrangement with IL & FS open to all without any monetary limits

8.	Assessee sold 2/3rd of DWs allotted @ ₹20 per share Assessee in the return of income claimed the difference of Rs.91 (₹111 - ₹20) per detachable warrant as short-term capital loss. Before CIT(A), the assessee claimed ₹111 as cost of debentures and claimed capital loss as short-term capital loss on NCD sale to UTI.	Assessee company claimed ₹81 as cost of NCD and capital loss as short term capital loss, on sale of NCDs to IL & FS.

20. The revenue's *rationale* for disallowing the loss claimed by the assessee is to be seen from the perspective that it was never its position that the cost of acquisition of NCD in the hands of the assessee was only ₹389 and the remaining amount of ₹111 was attributable to the DW cost. What entails scrutiny is whether the payment, by the assessee, towards ₹111/- per NCD signified the cost paid for each DW and the remaining sum, i.e., ₹389 was the cost actually paid for acquiring each NCD. This claim was rejected by the revenue authorities. They held that per NCD cost of acquisition was ₹500/- and the DW was received *gratis*, without consideration according to the terms of the scheme. The revenue could not suggest that the assessee never stated that the sum of ₹111/- paid by it, was to be treated as the price paid by it to acquire DWs: in fact, the assessee had contended as much when claiming loss on sale of DW @ ₹20/- each. The plea was rejected.

21. There is no doubt that the assessee claimed before ITAT that it incurred a loss of ₹111/- per debenture. Having spelt out its position that the entire amount of ₹500 paid by the assessee was on account of cost of acquisition of NCDS, <u>the revenue never stated that ₹111/- paid by the assessee should be treated as the price paid for acquiring DWs</u>. The ITAT

nonetheless considered the salient features of the NCD rights issue with DWs as approved by SEBI; it also took note of the assessee's original claim before the AO which was subsequently altered due to the revenue's position i.e., that of the sum of ₹500 paid by the assessee under the said right issue, nothing was attributable to DWs which was received *gratis* without any consideration. The ITAT considered the different bases on which the assessee's claim regarding loss of ₹111/- on sale of debenture was disallowed by the AO as well as by the learned CIT (A). Thereafter, the ITAT considered the terms of the right issue and held that the true legal effect of the relevant transaction has to be seen for the purpose of income-tax assessment and not the entries made in the books of account or claim made in the return of income. ITAT therefore, accepted the claim of the assessee for loss of ₹111 per debenture stemming from sale thereof to UTI and consequently found that in terms of the allotment scheme, cost of acquisition of each debenture was ₹500 whereas the DW was received (by the assessee) cost-free- which was the true legal effect of the transaction. Therefore, the question of cost incurred by the assessee to acquire the NCD (as well as the DWs, which were intrinsic part of the scheme itself) was before the ITAT which duly considered it.

22. This Court notices that the salient facts are that the assessees (Abhinandan and JELCS) were promoters of JISCO. Together with other three assessee companies, these assessees held over 30.93% shares in JISCO. When the NCD offer was made, a necessary condition (stipulated by SEBI) was its mandatory subscription to the extent of 90%. Being a NCD rights offer, no doubt, existing share-holders had the option of choosing not

to invest in the issue. However, there was an inherent risk, especially for promoters/shareholders such as the assessees - in case of under-subscription, (i.e., less than 90%) the amounts received - by JISCO, had to be refunded. This would have predictably resulted in loss of reputation to both JISCO and the assessees. The findings of the ITAT underscore the commercial compulsion which the assessees were faced with, in the circumstances, to subscribe to the extent of their shareholdings, in the NCDs.

23. Upon application the amount of ₹111/- was payable as application money. Thereafter- on allotment, the balance ₹389/- per NCD was payable. In this case, as a result of the terms agreed with UTI, the transfer of the NCD allotment to it meant that the balance ₹389 was payable. Concurrently, the rights to DW remained with the assessee companies. This court notices that fundamentally, the AO fell into error in overlooking that *in fact*, the NCDs were allotted on January 14, 1995 on payment of application money of ₹111 for NCDs. Between January 20, 1995 and January 25, 1995, they were *transferred* and transfer forms were executed. The CIT (A) no doubt took note of this singular omission (by the AO) but in turn erroneously held that the transfer was not based on any consideration. Both these authorities were considerably influenced by the fact that the NCD partial funding arrangement had been arrived at by JISCO with UTI sometime in July 1994. So they went about finding if there were other suspicious facts to establish that the entire scheme was a ruse to defraud the revenue. What was not considered was that the UTI scheme was apparently wide in nature; it sought to fund NCD applicants - the assessee shareholders and other companies being some of them, to the extent of 30.93 %, as much as 40% shares being

held by the general public and the rest being institutional shareholders. Significantly, UTI limited the funding under the scheme to ₹350 crores. Equally, what was lost sight of was that both the UTI and the applicants stood to benefit, because (a) UTI picked up the NCDs at a discounted rate, i.e., ₹389/- whereas its face value was ₹500/- each (that amount being the redeemable value at the end of the maturity period). It also received 10.5% per annum interest on ₹500/- even though it invested only ₹389/- per NCD. The assessees on the other hand, retained the right to the DWs which entitled allotment of shares at a pre-determined rate of ₹200/-. The assessees held quoted shares as on 31.03.1995 to the extent of ₹165,526,458/50 of which the value of JISCO's shares was ₹43,143,836/00. They held shares in 12 other listed companies besides shares in unlisted companies, debentures and other securities. Their dividend income was in excess of ₹75 lakhs. Other income, by way of interest, on loans, securities, etc was in excess of ₹1.05 crores.

24. Now, it is essential to deal with the findings of the AO that the loans advanced by ₹89,76,69,968/- to JISCO to one Sun Investments, found its way back to fund the NCDs in question and that the transaction involving UTI's limited funding was not at arms' length. These findings resulted in the conclusion that the purchase of the NCDs was not a genuine transaction. However, as noticed earlier, the share inventory and investments of Abhinandan were not confined to JISCO shares and securities. Likewise, the materials on record show that JELCS too had substantial shareholding and securities (more than ₹2.49 crores out of a total inventory of ₹5.50 crores) which had no connection with JISCO. It reported a total income of ₹2.23

crores, of which ₹81 lakhs was by dividends and ₹97.23 lakhs was from sale of investments. These figures establish that JELCS, like Abhinandan, had independent substantial sources of income and was not a conduit or alter ego of JISCO.

25. Here allotment of the NCDs with detachable warrants was made by JISCO in terms of clear and transparent offer under the SEBI Regulations. Apart from the observations of the AO and the CIT, based on incomplete appreciation of facts, there was no machination or tax evasion ruse. The NCDs were allotted to the assessees and transferred after the allotment (again a crucial point missed by the lower revenue authorities). Here, the right to allotment could not be renounced in favour of third party. The warrants were acquired for no price and the payment made was only for acquisition of the NCDs whose terms of issue included a return of 10.5 % annually. The purpose of issue was commercial and they were not issued by the JISCO only to attract subscriptions to the DWs attached thereto. Depending on share market volatility, the apparent sweetener (to the issue), i.e., the free DWs could become worthless; after all, the DWs entitled the holders to equity shares in the event of an issue, at a pre-determined price of ₹200/-.

26. A distinction made by the revenue between the case of Abhinandan and JELCS on the one hand and Medicare on the other was that in the former instance, the application cost was ₹111/- and the balance ₹389/- was payable by UTI, as the result of a prior arrangement whereas in the latter case, the terms of payment given in the offer document itself offered two options to the allottees and depending upon their exercise of option (at the stage of

application itself), the amount payable was determined. The subscriber going for option (a) thereby agreeing to sell the NCDs, which is called Khoka sale, amount payable on application was only ₹81/- per NCD whereas the subscriber not exercising the option of Khoka sale as given in option (b), the entire face value of ₹250/- was payable on application. The contention was that the subscriber opting for option (a) thus, was paying ₹81/- per NCD on application as a consideration for detachable warrant and this was explicitly the true effect of the transaction. This court notices that the distinction was rejected by the ITAT, which reasoned as follows:

> *"31. After having given a careful consideration to this entire matter relating to the different options given to the allottee/subscriber in the offer documents in both the cases, we find it difficult to accept that the two options given by the issuing company in the present case made a world of difference as far as the true effect of the transactions or outcome thereof are concerned. We find that in all the cases i.e. that of the assessee as well as that of Abhinandan Investments Ltd. and Ors. (supra), options were given to the allottees/subscribers to surrender or sell the NCDs at a discounted price to the finance company as per the arrangement made by the issuing company and the difference was only in the stage at which such option was to be exercised. For example, in the case of Abhinandan Investments Ltd. and Ors. (supra), such option was to be exercised only after allotment of the concerned NCDs, whereas in the case of the assessee, such option was to be exercised at the time of filing an application itself. Since the said option was to be exercised at the time of filing of an application itself in the case of the assessee, the payment of Rs. 169 per NCD to be received by the subscriber from the finance company was agreed to be adjusted directly against the remaining amount payable against each NCD since it was clear at the time of application itself that the subscriber opting for option (a) would be entitled to receive that much amount from the finance company. In the case of subscriber going for option (b), there was however, no such amount and since the entire amount was to be paid along with the*

application as per the terms of payment given in the offer document, he was required to pay a sum of Rs. 250 per NCD on application itself. In the cases of Abhinandan Investments Ltd. and Ors. (supra), the terms of payment given in the offer document, however, were different inasmuch as a sum of Rs. 111 was payable on application, whereas Rs.389 was payable on allotment and since the option to surrender the NCDs to UTI was to be exercised only on allotment, there was no difference in the amount payable on application by the allottees deciding to surrender the NCDs to UTI and the allottees not going for opting for such surrender. It was thus, merely a difference in the terms of payment of NCDs as per the offer document whereby in one case, the entire amount payable against NCDs was to be paid along with the application itself, whereas in the other cases, the amount payable against NCDs was to be paid in two instalments, one at application stage and the remaining on allotment.

32. There were thus two distinctive features in the scheme of allotment as per the offer made in the case of the present assessee and in the case of Abhinandan Investments Ltd. and Ors. (supra). Firstly, there was a difference in the stage at which the option of Khoka sale was to be exercised and secondly, there was a difference in terms of payment. These two distinctive features, however, were hardly of any material nature as far as the final outcome of the transaction is concerned inasmuch as in both the cases, the allottee/subscriber going for Khoka option ultimately paid Rs. 81 and Rs. 111 on application for getting allotted one detachable warrant whereas the remaining amount of Rs. 389 and Rs. 169 received/receivable on account of sale of NCDs to the financial institution was adjusted/paid against the remaining amount payable towards NCDs. In our opinion, the effect of these transactions thus ultimately was the one and the same and the distinctive features of allotment of NCDs in these cases as pointed out on behalf of the Revenue would not change the very nature of the transaction which, in our opinion, was exactly similar."

This court holds that the above reasoning is sound and logical. The revenue could not show any fallacy; nor is it possible to agree with its contentions that the difference in the terms between the cases of Abhinandan and JELCS

on the one hand and Medicare on the other, made such a world of difference as to influence the outcome entirely.

27. At the outset, it is interesting to note that in one of the appeals before the ITAT, i.e., ITA 1948/(Del)/99, identical findings were rendered together with the appeals of JELCs and Abhinandan, in fact, by the same order dated 05.06.2000. That order was apparently accepted and acted upon, because the consequential "appeal effect" given by the AO became the subject matter of further appeal which was eventually decided by this court. That is now a reported decision - *Commissioner of Income Tax v Nalwa Investments* 322 ITR 223- by a Division Bench of this Court. The court first narrated the facts as follows:

> *"5. In 1994, JISCO which was desirous of making a rights issue of secured redeemable non-convertible debentures (hereinafter referred to as "SRNCD") approached the Securities and Exchange Board of India (hereinafter referred to as "the SEBI") for necessary approval in that regard. It is not disputed that the SEBI gave its approval for the rights issue of SRNCD with the condition that if JISCO failed to garner subscription equivalent to 90 per cent. of the issue, the issue shall be deemed as having failed and JISCO shall be liable to refund the entire money collected under the said issue. With this crucial condition appended to the rights issue, JISCO embarked upon the said course and made an issue of Rs. 500 crores of SRNCDs of a face value of Rs. 500 each. The essential features of the rights issue of SRNCDs as approved by the SEBI and as indicated in the order of the authorities below were as follows :*
>
> *(a) each debenture will be of the face value of Rs. 500 each ;*
>
> *(b) every residential shareholder will pay a sum of Rs. 111 per debenture on making an application and the balance sum of Rs. 389 per SRNCD was payable on allotment ;*

(c) if the company does not receive a minimum subscription of 90 per cent. of the issue of SRNCD within sixty days from the closure of the company (i.e., JISCO) it shall refund the entire subscription amount received ;

(d) SRNCD with detachable warrant (in short "DW") was offered to the existing shareholders of the company (i.e., JISCO) whose names appeared in the register of the company (i.e., JISCO) on October 31, 1994 ;

(e) 23 debentures for every 100 equity shares held as on October 31, 1994, were required to be issued.

6. It is important to note that at the relevant point in time, in JISCO the public held nearly 40.43 per cent. of the shares, while the financial institutions, mutual funds and banks together held nearly 18.80 per cent. This was excluding the shares held by foreign institutional investors and nonresidents of the Indian origin.

7. Continuing with the aforesaid narration, the rights issue of SRNCDs opened on November 21, 1994, with December 19, 1994, as the date of closure. In order to attract a large number of subscribers to the rights issue JISCO attached a fixed DW with each debenture with a face value of Rs. 10 and a premium of Rs. 190. JISCO being aware of the fact that in order to make the rights issue a success it had to ensure availability of finance to its investors. In order to achieve the said purpose JISCO entered into an arrangement with the Unit Trust of India (hereinafter referred to as "UTI") whereby the UTI agreed to pay the balance sum of Rs. 389 per SRNCD on behalf of the allottees to JISCO. The assessee being an existing stakeholder applied for the rights issue made by JISCO. In accordance with the conditions of the issue, the assessee paid an application money of Rs. 111 per debenture. As arranged the UTI paid the balance sum of Rs. 389 to JISCO whereupon JISCO issued a DW in favour of the assessee as well as the other investors including Abhinandan Investment Ltd. (i.e., the appellant in I. T. A. No. 480 of 2007).

8. It is also admitted that the assessee as well as the other investors (which includes Abhinandan Investments Ltd.) transferred the said SRNCD having a face value of Rs. 500 to UTI. This transfer was carried

out in the background of the arrangement between JISCO and UTI whereby UTI had agreed to invest a sum of Rs. 350 crores in JISCO by agreeing to purchase the SRNCDs at a value of Rs. 389 per debenture.

9. It is in this background that the assessee had filed a return for the assessment year 1995-96. The said return was filed on November 29, 1995. In the said return the assessee had initially claimed a short-term capital loss of Rs. 91 per DW on the ground that it had sold each DW at the rate of Rs. 20. This return was admittedly filed within time as prescribed under section 139 of the Act and in accordance with sub-section (3) of section 139. In the return a loss had been claimed even though the loss claimed, as indicated above initially was pegged at Rs. 91 per DW. It is also not disputed that if a revised return had been filed by the assessee the time for the said return would have expired on March 31, 1997.

10. The assessee, however, during the course of the assessment proceedings became wiser and consequently by way of a letter dated March 24, 1998, intimated the Assessing Officer that it was entitled to claim a loss at the rate of Rs. 111 on each SRNCD transferred to UTI. The said loss was claimed as a business loss. The Assessing Officer disallowed the loss on the ground that it was not genuine. The Assessing Officer was of the view that the appellant as well as the other investment companies were merely money-lenders and the arrangement so configured to give benefit to JISCO and UTI."

Thereafter the court noticed the order of the ITAT (which is the subject matter of these appeals, i.e., ITA Nos.25-26/2001) and the background in which the AO disallowed the claim for carry forward of losses, impelling the assessee to approach ITAT again:

"14. By the very same order the Assessing Officer observed that since the loss on the SRNCD had been determined by him pursuant to an order of the Tribunal, it was not a loss determined in pursuance of a return filed under section 139(3) of the Act and, hence, the said assessed loss on Rs.6,27,81,805 shall not be allowed to be carried forward and set off against future income of the assessee. It is

important to note that the order passed by the Assessing Officer dated October 27, 2000, is captioned as one having been passed under section 254 of the Act.

15. Aggrieved by the observation of the Assessing Officer that the said assessed loss could not be carried forward and set off against its future income the assessee preferred an appeal to the Commissioner of Income- tax (Appeals). The Commissioner of Income-tax (Appeals) by an order dated February 22, 2002, rejected the appeal both on the ground that it was not maintainable as well as on the merits. On the maintainability the Commissioner of Income-tax (Appeals) was of the view that since the order passed by the Assessing Officer (Joint Commissioner of Income-tax) was evidently passed under section 254 of the Act, it was not an order which was appealable under the provisions of section 246A of the Act being the provision for preferring appeals to the Commissioner of Income-tax (Appeals). On the merits the Commissioner of Income-tax (Appeals) was of the view that the direction contained in paragraph 32 of the order dated June 5, 2000, passed by the Tribunal merely required the Assessing Officer to allow deduction of loss as a business loss at the rate of Rs. 111 per SRNCD and since the Tribunal had not directed that loss which had been determined was required to be carried forward, the Assessing Officer had not exceeded his jurisdiction in not permitting the carry forward of the loss as the same could have been carried forward only in accordance with law. The Commissioner of Income-tax (Appeals) was, therefore, of the view that since the loss had been claimed by the assessee during the course of assessment proceedings by a letter dated March 24, 1998, which was a date much beyond the time available for filing a revised return, it was not a loss which could be carried forward keeping in view the provisions of section 80 read with section 139(3) of the Act. In sum and substance the Commissioner of Income-tax (Appeals) approved of the reasoning set out in the order of the Assessing Officer in disallowing the carry forward and set off of loss against the future income of the assessee."

The Court thereafter held that the AO's approach was untenable:

"17. Having heard the learned counsel for the Revenue as well as the assessee we are of the view that the answers to the questions framed

have to be found in favour of the assessee and against the Revenue for the reasons given hereinafter. It is clear upon a perusal of the facts and circumstances quoted by us hereinabove that if JISCO had to have a successful rights issue it was incumbent that it received a subscription equivalent to at least 90 per cent. of the issue. The condition with respect to the same imposed by the SEBI while approving the rights issue was quite explicit in that regard. The fact that there was an arrangement between JISCO and UTI as also the fact that upon receipt of the face value of Rs. 500 per debenture JISCO would issue DW which would enable the holder to acquire one equity share in JISCO, was clearly part and parcel of the terms and conditions of the issue. The arrangement between a public financial institution-UTI and JISCO for part financing the investment had been examined by the Tribunal in the first round. The Tribunal after noting the benefit which had accrued both to the assessee and UTI, that is, while the assessee had acquired an equity share on the other hand UTI had acquired not only a SRNCD of a face value of Rs. 500 at the rate of Rs. 389 but also a yield of nearly 24 per cent. ; it reversed the orders of the Assessing Officer and the Commissioner of Income-tax (Appeals) and held that the assessee was entitled to claim a loss on sale of SRNCD to UTI as a "business loss" at the rate of Rs. 111 per SRNCD. By the very same order dated June 5, 2000, the Tribunal directed the Assessing Officer to allow deduction of loss at the rate of Rs. 111 per SRNCD.

18. The Assessing Officer (Joint Commissioner of Income-tax) while giving effect to the order of the Tribunal dated June 5, 2000, verified the loss of SRNCD. Upon verification of the loss the Assessing Officer adjusted the loss on the sale of 11,98,000 SRNCD at the rate of Rs. 111 per SRNCD amounting to Rs. 13,29,78,000 against an income of Rs. 7,01,96,195 and arrived at a loss of Rs. 6,27,81,805 under section 143(3) of the Act. The Assessing Officer, however, observed that the assessee was not entitled to carry forward the said assessed loss of Rs. 6,27,81,805 and set it off against its future income as the loss had been determined during the course of the proceedings by virtue of a letter dated March 24, 1998, filed before the Assessing Officer in the first round and was not loss determined in pursuance of a return filed in accordance with the provisions of section 139(2) of the Act and, hence, could not be carried forward and set off under section 80 of

the Act. This view was sustained by the Commissioner of Income-tax (Appeals). We are of the view that the Tribunal correctly appreciated the provisions of section 80 of the Act read with section 139(3) of the Act and allowed the carry forward of loss for the purposes of set off against the income of the subsequent year(s). A plain reading of the provision of section 80 of the Act permits an assessee to carry forward a loss and seek its set off under section 72(1) or 73(2) or sub-section (1) of section 74 or 74A(3) except when the loss has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139. Section 80 of the Act reads as follows :

> *"Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139 shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A."*

19. In the instant case, there is no doubt that the assessee had filed a return under section 139 of the Act within the prescribed time. It is also not disputed that a loss had been claimed even though the same had been claimed to the extent of Rs. 90 and that too as a capital loss with respect to DWs issued to the assessee, on the assessee investing in the rights issue of JISCO. The assessee carried out a course correction by claiming a loss on sale of SRNCDs to UTI at Rs. 111 per SRNCD as it had sold SRNCDs of a face value of Rs. 500 to UTI at Rs. 389 per SRNCD. The Tribunal in the first round in its order dated June 5, 2000, came to a conclusion based on the judgments of the Supreme Court as well as those of various High Courts that what was important and relevant was the true legal effect of a transaction and in coming to the said conclusion the view that the assessee may take in the return of income or the treatment that is meted out in the books of account or the method of accounting that an assessee uses are not relevant in considering the effect to be given to the transactions which are governed by the provisions of the Act. The Tribunal went on to observe while allowing the claim of loss by the assessee that the fact that in the return filed by the assessee wherein the assessee does not take a proper position, cannot be a ground to

take advantage of the ignorance of the assessee if the assessee is otherwise entitled to relief and/or claim of loss as in the instant case. Keeping the aforesaid rationale in mind the Tribunal, vide order dated June 5, 2000, had directed the Assessing Officer to allow the assessee's claim of loss on sale of SRNCDs at the rate of Rs. 111 as a business loss. It is evident that the Assessing Officer (Joint Commissioner of Income-tax) in the second round while giving effect to the orders of the Tribunal dated June 5, 2000, was determining the income/loss in pursuance of an original return filed by the assessee under section 139 of the Act. In the return the assessee had claimed erroneously a loss to a lesser extent, that is, at Rs. 91 against DWs as against SRNCDs which was corrected pursuant to a stand taken before conclusion of proceedings by the Assessing Officer in the first round and a stand which was sustained by the Tribunal by its order dated June 5, 2000. In view of the said circumstances obtaining in the present case the Tribunal in the second round, vide the impugned judgment has correctly held, in our opinion, that both the Commissioner of Income-tax (Appeals) and the Assessing Officer had misdirected themselves in law in preventing the carry forward and the set off of the assessed loss against subsequent profits as the conditions prescribed for triggering the provisions of section 80 of the Act were not present in the instant case.

20. The matter can be looked at from another angle also. It would in one sense turn the law on its head if after the Tribunal, vide its order dated June 5, 2000, had allowed the assessee's claim of loss on sale of SRNCDs at the rate of Rs. 111 per SRNCD as a business loss based on the reasoning that the assessments had to be carried out keeping in mind the real effect of a legal transaction notwithstanding the treatment meted out by the assessee, it would then appear anomalous and incongruous if the Assessing Officer while giving effect to the said order would denude the efficacy of the Tribunal's order by, in a manner of speaking, taking away with one hand what was given by the other, that is, even while adjusting loss in the assessment year 1995-96, deprive the assessee of a consequent benefit of carry forward and set off of the balance loss in the subsequent year(s).”

28. Having once accepted the decision of the ITAT, in the same fact situation, - in fact in the same common order, the revenue cannot legitimately agitate a position contrary to the one it accepted in *Nalwa* – especially because Nalwa Investments is one of the share-holder companies of JISCO, which had sought and was allotted NCDs at ₹111/- per NCD and later transferred the allotments to UTI, which paid the balance amount. Its initial claim for capital loss was changed to business loss, and finally accepted by the ITAT.

29. Another good reason for this Court to reject the revenue's contention is that in all the cases (Abhinandan, JELCS and Medicare) the assessees are investment companies, whose business includes share acquisition and transfer. The balance sheet and share inventories of Abhinandan and JELCs clearly reflected – as on 31.03.1994 and as on 31.03.1995, the value of shares of JISCO and several other companies. Having treated those and other shares as distinct from assets, but rather as part of the share inventory, it could not be said that the NCDs and the resultant DWs were to be treated otherwise. Here, the court is conscious that the assessees did claim initially to have incurred capital loss; however, they later corrected their stand and claimed business loss. We are of the opinion that the earlier stand of the assessees could not have shackled them to that position, preventing them from asserting the true character of the amount. Nor is the revenue bound to treat the position of the assessee as the gospel truth, or pin it to one or the other stand. The revenue is obliged to independently assess the amounts having regard to the provision of the Act. In *Kedarnath Jute Manufacturing Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC) this was underlined:

> *"Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter."*

30. This court notices that various Benches have taken an identical approach with respect to the opinion regarding sale of NCDs with free tradable detachable warrants that entitle holders to shares. These Bench decisions are:

(i) *Lazer Syntex Ltd. vs. Dy. CIT* (ITA No. 781/Ahd/1996, dt. 18th Sept., 1997 Mumbai 'B' Bench);

(ii) *Karamchand Thaper & Bros. vs. Dy. CIT* (ITA No. 2649/Cal/1996, of Calcutta 'E' Bench, dt. 12th June, 1997);

(iii) *Dy. CIT vs. Jogiya Traders Ltd.* (ITA No. 2992/Mum/1998, Mumbai 'B' Bench, dt. 30th May, 2003);

(iv) *Dy. CIT vs. Kanakadnara Traders (P) Ltd.* (ITA No. 2993/Mum/1998, dt. 3rd June, 2003, Mumbai 'E' Bench);

(v) *Asara Sales & Investment (P) Ltd. vs. Dy. CIT* (2001) 72 TTJ (Pune) 737: 32 SCL 652

(vi) *Nowrosjee Wadia & Sons v Assistant Commissioner of Income Tax* 2008 (10) DTR (AT) 603 (Mum).

31. In a decision of the Gujarat High Court in *Deepak Nitrite Ltd v Commissioner of Income Tax* 2008 (307) ITR 289 (Guj), the issue of whether such detachable warrants in the context of debenture issues had a monetary value, was dealt with in the following manner:

"The Tribunal failed to appreciate that at no stage was the issue of quantification ever in dispute between the parties. The Assessing Officer had categorically recorded that for the reasons stated in his order the claim of loss "is not acceptable and the same is ignored in the computation of income". If the Assessing Officer had not undertaken quantification of the loss, the Commissioner (Appeals) had not undertaken such an exercise, there was no ground raised by the revenue before the Tribunal in the appeal the Tribunal on its own could not have undertaken the said exercise without first deciding the controversy brought before it by the parties, more particularly, the appellant. Merely because during the course of argument some contentions were raised as to whether detach- able warrants had any cost or not was not sufficient for the Tribunal to embark upon such an exercise in absence of any controversy between the parties. The Tribunal failed to appreciate that in absence of any exercise of quantification by the Assessing Officer there was no occasion for the assessee to carry the matter any further and therefore the said issue could not arise out of the order of Commissioner (Appeals). Once that was the position the Tribunal could not have taken it upon itself to raise the issue and decide the same which did not properly arise out of the Order of Commissioner (Appeals) as no ground could be taken by either side in absence of any findings by the Commissioner (Appeals)."

32. The findings of the AO and CIT regarding the NCD funding not being at arms' length are unsustainable, because UTI on redemption, was entitled to full redemption money @ ₹500 each debenture on redemption though actually they had paid @ ₹389 only. The ITAT's discussion reveals that material was led to establish that UTI earned a substantial annual gain of about 25% on the transaction. Furthermore it was held that on the other hand, the assessees too benefitted because after losing the initial application money on each debentures they were entitled to one dividend warrant which

enabled them to an equity share of ₹200/- (in the case of JISCO NCDs) and based on a pre-determined formula in the second instance (Medicare) though the market price of the shares on those dates was higher. A chart indicating the gains by the assessees too was furnished by the learned counsel (at pages 53 and 54 of the ITAT paper book).

33. When JISCO came out with the NCDs right issue several other companies i.e., Apolo Tyres, Usha Ispat Ltd, Dhunseri Tea Industries Ltd., Sri Ram Industrial Enterprises etc. had floated similar right issues with almost identical terms and conditions. In the case of Apolo Tyres the buyback was done by Om Financial and Investment Consultancy Services Ltd. whereas in the case of Usha Ispat, Dhunseri Tea and Sriram Industrial Enterprises the buyback was done by UTI, DSP Financial Consultancies Ltd. and Sri Ram Financial Services Ltd. respectively. In the case of the assessee the buyback was done by UTI, a Central Government undertaking.

34. In view of the above discussion, we hold that the assessee companies suffered business loss on their sale and such loss was business loss that constituted allowable deduction. The question of law is consequently answered in favour of the assessees in all the cases. The revenue's appeals are therefore dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 20, 2015