
[2015] 54 taxmann.com 108 (Bombay)/[2015] 229 Taxman 256 (Bombay)

IT : Where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income under section 68

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[2015] 54 taxmann.com 108 (Bombay)

HIGH COURT OF BOMBAY

Commissioner of Income-tax-13

v.

Shyam R. Pawar*

S.C. DHARMADHIKARI AND A.A. SAYED, JJ.

IT APPEAL NOS. 1568 TO 1571 OF 2012[±]

DECEMBER 10, 2014

Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 - Assessee declared capital gain on sale of shares of two companies - Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus - Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted - Held, yes [Para 7] [In favour of assessee]

FACTS

- The assessee declared certain capital gain on sale of shares of two companies, namely, STPL and RMPL.
- The Assessing Officer observing that for the impugned penny stock, assessee had transacted through the broker at Calcutta and the entities/companies, whose shares were traded, were not having sufficient business activities justifying the increase in their shares prices, held that certain operators of the companies and brokers devised a scheme to convert unaccounted money of the assessee to accounted income and the assessee utilised the scheme. The Assessing Officer, therefore, disallowed the assessee's claim of earning capital gain and made addition under section 68.
- On appeal, the Commissioner (Appeals) confirmed the addition.
- On second appeal, the Tribunal deleted the addition holding that the Commissioner (Appeals) and the Assessing Officer failed to note some relevant and germane material.
- On revenue's appeal;

HELD

- It was revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of STPL and RMPL respectively. Out of these two, only RMPL is listed in the appraisal report and it is stated to be involved in the *modus operandi*. It is on this material that the Assessing Officer holds that the transactions of sale and purchase of shares are doubtful and not genuine. In relation to assessee's role in all this, all that the Commissioner observed is that the assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the assessee to the accounted income and the assessee utilized the scheme. [Para 5]
- The Tribunal concluded that there was something more which was required, which would connect the assessee to the transactions and which are attributed to the promoters/directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the revenue. A copy of the DMAT account, placed before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available which gave details of the transactions. The contract note is a system generated and prescribed by the stock exchange. From this material, the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client code has been referred to. But the Tribunal concluded that same, by itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from stock exchange have been relied upon for the purposes of faulting the revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in the Tribunal's order are not vitiated by any error of law apparent on the face of the record either. [Para 6]
- The appeals do not raise any substantial question of law. They are accordingly dismissed. [Para 7]

Suresh Kumar for the Appellant. **K. Gopal** and **Ms. Neha Paranjape** for the Respondent.

JUDGMENT

1. We have heard Mr.Sureshkumar appearing on behalf of the Revenue in all these Appeals. Mr.Sureshkumar submits that the Tribunal's order and impugned in these Appeals dated 4 May 2012 for the Assessment Years 2003-04 to 2006-07 raises the following substantial questions of law:

- "(1) Whether on the facts and in the circumstances of the case and in law, the ITAT is correct in deleting the addition confirmed by the CIT (A) under section 68 of the IT Act 1961?
- (2) Whether on the facts and circumstances of the case and in law, the finding recorded by the Tribunal contrary to the record and thus perverse?

Additional question in Income Tax Appeal No.1568 of 2012

- (3) Whether on the facts and circumstances of the case and in law the Tribunal is correct in law in deleting the disallowance of claim of loss of Rs.5,95,720/- incurred on the sale of share capital market Ltd.?"

2. Mr.Sureshkumar would submit that the Tribunal seriously erred and in law in reversing the finding of fact by the Commissioner and the Assessing Officer. That was based on a report of the Investigation Branch of the Department, Bhuvaneshwar. That revealed and as the Commissioner noted that there was an erroneous client head mentioned. That would prove that the Department did not proceed merely on suspicion but on cogent and satisfactory evidence with it. The Tribunal should not have reversed this concurrent finding and by relying upon some of the conclusions in the report. The Tribunal should have adverted to this specific finding of the Commissioner. In para 21 of the Commissioner's order, in an Appeal pertaining to 2003-04, he has

observed that the Department is having material to show that the Directors of a company namely Bolton Properties Ltd. have manipulated the share price of Bolton Properties Ltd. Investigating Wing has revealed in its report as to how there were two operators namely Mr.Sushil Purohit and Shri Jagdish Purohit and one of them was the Director of this Company. Mr.Jagdish reportedly floated several investment companies which were aggressively used in the entire deal with the broker M/s.Prakash Nahata & Co. The shares offloaded by the beneficiaries through M/s.Prakash Nahata & Co. were ultimately purchased by the investment companies controlled by Shri Purohit, and some of such companies have been enlisted. The name of the Assessee Mr.Shyam Pawar figured during the course of the investigation. The Commissioner has observed that the Assessee is not new to shares dealing. He is purchasing and selling the shares through a broker in Mumbai. For the impugned penny stock, he has transacted through the broker at Calcutta, which itself raises doubt about the genuineness of the transaction. The entities/ companies, whose shares were traded on exchange namely M/s.Bolton Properties Ltd., Prime Capital and M/s.Mantra were not having sufficient business activities justifying the increase in their shares prices. The Commissioner, therefore, concluded that certain operators and brokers devised a scheme to convert the unaccounted money of the Assessee to accounted income and the Assessee utilized this scheme. Therefore, the claim that the Assessee earned capital gain was disallowed and addition of Rs.25,93,150/- made under section 68 of the IT Act was upheld.

3. Mr.Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumar, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

4. Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny. It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.

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*In favour of assessee.

†Arising out of order of the Tribunal dated 4-5-2012.