

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री छल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.548/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2014-15)

Jagdish B. Prajapati (HUF) 311B, Urmila CHS Ltd., Kol Dongri Sahar Road, Andheri (E) Mumbai – 400 069	बनाम/ Vs.	ACIT-24(2) 6 th Floor, Piramal Chambers Lalbaug, Parel Mumbai - 400012
PAN No. : AAEHJ-9503-P		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Neelkanth Khandelwal-Ld. AR
Revenue by	:	Ms. Usha Gaikwad – Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	03/05/2021
घोषणा की तारीख / Date of Pronouncement	:	17/06/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2014-15 contest the order of Ld. Commissioner of Income Tax (Appeals)-36, Mumbai [CIT(A)], Appeal No.CIT(A)-36/IT-471/ACIT-24(2)/2016-17 dated 25/11/2018. The assessment was framed by learned Assessing Officer u/s 143(3) vide order dated 27/12/2016.

2. Though the assessee has raised multiple grounds of appeal, however, in sum and substance, the assessee is aggrieved by

confirmation of certain additions u/s 68 in view of the fact that the exemption claimed u/s 10(38) with respect to Long-Term Capital Gains (LTCG) earned on sale of certain shares was denied to the assessee and sale proceeds of shares was brought to tax as unexplained cash credit u/s 68. Consequently, another estimated addition on account of alleged commission expenses @ 5% against these transactions was also made which is also disputed under the appeal.

3. We have carefully heard the rival submissions and perused relevant material on record including documents as placed in the paper book. The judicial precedents as relied upon during the course of hearing have duly been deliberated upon. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. The Ld. AR relied on various favorable decisions of the Tribunal / Hon'ble High Courts rendered on similar factual matrix. On the other hand, Ld. DR submitted that the assessee obtained huge benefit on sale of shares without any plausible justification.

Assessment Proceedings

4.1 The assessee being resident HUF was assessed u/s 143(3) on 27/12/2016. While framing the assessment, the assessee was denied exemption u/s 10(38) on certain Long-term capital gains (LTCG) earned on sale of shares of an entity namely M/s Moryo Industries Ltd. (MIL). The said gains were ultimately added to the assessee's income as unexplained cash credit u/s 68 of the Act. The assessee has also been saddled with addition u/s 69C for Rs.38.47 Lacs on account of estimated commission income which is consequential to the main addition.

4.2 The aforesaid gains arose on sale of 377500 shares of an entity namely M/s Moryo Industries Ltd. (MIL). Since the gains so earned fulfilled the conditions of Sec. 10(38), the same were claimed to be exempt while filing the return of income. The shares were stated to be purchased by the assessee on 27/10/2012 for a sum of Rs.50 Lacs and the same were sold between the periods January, 2014 to March, 2014 thereby yielding Long-Term Capital gains (LTCG) in the hands of the assessee. The details of purchase & sale of shares have already been tabulated in para 3.2 of the assessment order.

4.3 In support of purchase transactions, the assessee furnished share allotment advice as well as its bank statements evidencing payment through banking channels. The shares were stated to have been received by the assessee in demat account. These shares were shown as investment in Balance Sheet As on 31/03/2013. Similarly, in support of sale transactions, the assessee furnished contract notes issued by the brokers i.e. M/s Prabhudas Lilladher Private Limited, Account statements issued by the broker, bank statement evidencing inflow of funds through banking channels. Upon perusal of contract notes, it could be noted that the shares have been sold by the assessee at stock exchange in online mode of transaction. On the basis of these documentary evidences, the assessee substantiated the stated transactions.

4.4 However, in the background of investigation carried out by Kolkata investigation wing in the matter of penny stocks, it was alleged by Ld. AO that gains were arranged, premeditated and bogus. The aim of the scheme was to route the unaccounted money of beneficiaries as exempt income in the garb of LTCG by showing sale of shares of premeditated

scrips on recognized stock exchanges. After making preferential allotment, the price of the shares would be rigged up / jacked up through circular trading by cartel of brokers acting in concert. This would be managed by the operator of the scrip who would manage overall affairs of the scheme. During the investigation, statements of various operators, entry providers and stock brokers were recorded wherein the said facts of their engagement in providing accommodation entries in the form of Long-Term Capital Gains (LTCG) / Short-Term Capital Losses (STCL) were admitted. In the above background, the gains earned by the assessee were alleged to be pre-arranged in connivance with the operators of the scrip.

4.5 It transpired that the assessee was allotted shares at face value of Rs.25/- per share. Thereafter, the shares were sub-divided into two. The shares were ultimately sold at an average rate of Rs.203/- per share (approx.) to various buyers (15 in number) as tabulated in para 6.2 of the order. Notices issued u/s 133(6) to all the buyers did not elicit any satisfactory response.

4.6 It was noted by Ld.AO that there was sharp rise in the price of the scrip since its allotment. Upon analysis of financials of M/s MIL, it was observed that its net worth was negligible and it was alleged that the share prices were artificially rigged by operators to accommodate desirous beneficiaries.

4.7 During survey u/s 133A by investigation wing on one Shri Pravin Agarwal, director of a stock-broking entity namely M/s Gateway Financial Services Ltd., he admitted to have helped various persons to obtain accommodation entries in various scrips including the scrip of M/s MIL.

Similar statement was recorded from Shri Sanjay Vora, director of broking firm M/s Anand Rathi Shares & Stock Brokers wherein an admission was made that his broking firm traded in the scrip of M/s MIL on behalf of various clients for claiming bogus LTCG entries. Similar Statement was recorded from Shri Soumen Chaudhary of M/s Gateway Financial Services Ltd. as well as from Shri Suresh Kumar Saraf of M/s Bindal Equities Limited.

4.8 In the background of investigation findings, Ld. AO alleged that the scrip of M/s MIL was penny stock scrip used to provide undue benefits to the beneficiaries. The sharp price rise was not supported by any fundamentals of the entity or any other genuine factors. There was direct evidence that share price of M/s MIL were artificially hiked to create non-genuine LTCG. In fact, SEBI passed an order u/s 11(1), 11(4) & 11B of the SEBI Act, 1992 which named the assessee as one of the beneficiary. Accordingly, the assessee was show caused as to why the sale proceeds of shares be not treated as accommodation entries of cash-credit in the garb of Long-Term Capital Gains. Along with the notice, statements of various persons as well as SEBI order was provided to the assessee.

4.9 The assessee, vide reply dated 22/12/2016, submitted that he was a regular investor in shares since last couple of years as evidenced by its financial statements. Similar gains were earned in earlier years which were offered to tax and accepted by the revenue. The assessee also demanded cross-examination of persons whose statements were being relied upon by Ld. AO. In the absence of such cross-examination, those statements could not be used against the assessee. The assessee also

submitted that these statements did not name the assessee specifically. The allegations of Ld. AO were termed as based on mere presumption and surmises. Rather attention was drawn to the documentary evidences furnished by the assessee in support of the stated transactions. Regarding allegation that M/s MIL was penny stock company, it was submitted that the conclusion was not based on any direct evidence. The assessee also submitted that the findings of investigation wing were general in nature without implicating the assessee specifically. Similarly, SEBI report did not hold the assessee as beneficiary of price rigging scam. Mere holding of shares could not implicate the assessee of being a beneficiary of such price rigging scam. Further, the shareholding pattern of M/s MIL, as obtained from stock exchanges, would show that there were number of non-promoters shareholders in the said entity. The price of the scrip would be totally dependent upon market perception and sentiment in which the assessee would have no role to play. The assessee also assailed the invocation of Sec.68 on these transactions. In support, reliance was placed on various judicial pronouncements.

4.10 However, not convinced with assessee's explanations, the sale proceeds as received by the assessee was treated as unexplained cash credit u/s 68. The commission against these transactions was estimated @5% while framing the assessment.

Appellate Proceedings

5. Though the assessee reiterated its submissions before Ld. CIT(A), however, going by the findings of Ld. AO, it was held that revenue could not accept such make-believe transactions. Truth of genuineness of such transactions must prevail over the smoke-screen created by way of

pre-meditated series of steps taken by the assessee with a view to impart color of genuineness and character of commercial nature to such transactions. One has to look at the whole transactions and series of steps taken to accomplish such transactions in integrated manner, with a view to ascertain the true nature and character of such purchase and sale of shares. In the said background, the judicial pronouncements as relied upon by the assessee were rejected.

6. It was also observed by Ld.CIT(A) that though the earlier order of SEBI dated 04/12/2014, prohibiting many entities, was subsequently revoked by Whole-time director (WTD) of SEBI vide order dated 21/09/2017, however, the proceedings would continue against M/s MIL. Finally the action of Ld. AO was upheld against which the assessee is in further appeal before us.

7. Our findings and Adjudication

7.1 So far as the material facts are concerned, we find that the assessee has sold certain shares of a scrip namely M/s MIL during the year. These shares were purchased during October, 2012 at cost of Rs.50 Lacs and sold during the period 17/01/2014 to 26/03/2014 thereby yielding Long-term capital gain in the hands of the assessee. The shares so purchased by the assessee were reflected as investment in assessee's Balance Sheet as on 31/03/2013. The payment towards purchase of shares was made through banking channels and the shares were duly received in the demat account. The purchase of shares is further evidenced by the Share Allotment Advice dated 29/01/2013 wherein the assessee has been allotted the said shares.

7.2 The shares so purchased by the assessee have ultimately been sold in online mechanism of stock exchange through registered stock-broker. The sale transactions are duly evidenced by the contract notes issued by the broker. The sale proceeds have been received through banking channels and the shares have been delivered by the assessee from assessee's demat account. These transactions have been subjected to Securities Transaction Tax (STT). All these documents were furnished by the assessee before Ld. AO. The same has also been placed before us in the paper-book (Page nos. 24 to 77 of assessee's paper-book). The perusal of all these documents would show that the shares have been sold through registered stock brokers in online mechanism wherein the identity of the buyer would not be known. Upon perusal of all these documents, it is quite discernible that the assessee had furnished all the requisite documentary evidences to substantiate the transactions and discharged the primary onus as required under law to establish the genuineness of the gains so earned during the year. No defect has been pointed out by the revenue in documentary evidences furnished by the assessee. Therefore, the onus had, thus, shifted on revenue to disprove assessee's claim and establish with cogent evidences that the transactions were non-genuine transactions through which assessee's unaccounted money has flown back to assessee in the garb of bogus capital gains. However, we find that except for general findings of investigation wing and third-party statements on the basis of which it has been alleged that the scrip of M/s MIL was penny stock, there is nothing in the kitty of the revenue to prove the assessee's involvement in manipulating the prices of the scrip. No exchange of cash

between the assessee and the various exit providers could be proved. Therefore, the onus as casted upon revenue to dislodge the assessee's claim could not be discharged.

7.3 So far as the observations of Ld. AO as to financial and profitability of MIL is concerned, we find that the sales transactions have taken place in online mechanism through recognized stock exchange wherein the identity of the buyer would not be known and there would be no privity of contract between the assessee and prospective buyers of shares. In online mode of trade, the prices would be guided by the buyer willing to buy the shares at certain prices and the seller willing to sell the shares at certain prices. The prices would be guided more by the market forces rather than the financials or other parameters. There would be buyers and sellers lining up on either side of a potential trade; one party willing to part with ownership and other party willing to acquire the ownership. When both the parties would agree upon a price, the trade is matched and that price would become new market quotation. Therefore, the financials of underlying entities, in such cases, would lose much relevance in so far as the price movement of scrip is concerned. Nothing adverse could be drawn against the assessee on the basis of the same. Therefore, the aforesaid observations as well as conclusion of Ld. AO would not be much germane as to the adjudication of the issue.

7.4 Proceeding further, it could be observed that the primary reason to doubt the genuineness of assessee's transactions is findings of investigation wing which was based on general statement of various stock-brokers / operators including Shri Pravin Agarwal, Shri Sanjay Vora, Shri Soumen Chaudhary & Shri Suresh Kumar Saraf wherein

these persons, without naming the assessee specifically, made an admission that the scrip of M/s MIL was a penny stock scrip. However, despite specific request of the assessee, the adverse material which form the very basis of Ld. AO's conclusion, no opportunity to cross-examine these persons was ever provided to the assessee. The failure to do so would make the additions unsustainable as per settled legal position. Further, the adverse statements made by these persons are not backed by any cogent corroborative material on record to establish the assessee's involvement in price rigging of shares of MIL. No collusion between the assessee and alleged entry providers or operators or exit providers is shown to have existed. There is no admission or evidence based finding that any cash got exchanged between the assessee and any of the bogus purchasers of the scrip. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmise. The addition thus made purely on the basis of third-party statement recorded at the back of the assessee could not be sustained in the eyes of law unless the same are confronted to the assessee and the same are backed by any corroborative material. No effective investigation is shown to have been carried out by Ld. AO to dislodge the assessee's claim by bringing on record cogent evidences as well as confronting the same. We find that except for general allegations as narrated in the investigation wing report, there is no evidence which would link assessee's involvement in jacking up the prices of the shares with a view to earn artificial gains. The additions so made could not be sustained in the eyes of law as per the decision of Hon'ble Apex Court in **Kishanchand Chellaram V/s CIT (125 ITR 713)** and also in **M/s**

Andaman Timber Industries V/s CCE (CA No.4228 of 2006 dated 02/09/2015) wherein it has been held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. Similar is the ratio of decision of Hon'ble Bombay High Court in **H.R.Mehta V/s ACIT (387 ITR 561)**.

7.5 The proposition that that additions made purely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law stem from the decision of Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151)** wherein it was held that the suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**. The additions made on mere presumptions could not be sustained and there must be something more than mere suspicion to support the assessment as per the decision of Hon'ble Apex Court in **Dhakeshwari Cotton Mills Ltd. V/s CIT (26 ITR 775)**. The assessment should not be based merely on suspicion or guess work but on legitimate material from which reasonable inference of income could have been drawn.

7.6 So far as the SEBI proceedings are concerned, we find that SEBI had passed an ad-interim ex-parte order on 04/12/2014 in the matter of M/s Moryo Industries Limited thereby restricting 98 entities including the assessee, M/s MIL and its promoters & directors from accessing the securities market and prohibiting them from dealing in shares. Pursuant

to the interim order, SEBI conducted a detailed investigation of the entire scheme employed, connection amongst debarred entities, funds used for the price manipulation of the scrip of M/s MIL and other companies so as to ascertain the violation of the securities law. Upon completion of investigation by SEBI, it was noted that there was no adverse evidence / findings against 85 entities including assessee or their role in price manipulation of the scrip of M/s MIL warranting continuation of action u/s 11B & 11(4) of the SEBI Act. Accordingly, an order was passed on 21/09/2017 revoking all previously confirmed interim order. Therefore, the reliance of Ld.AO in SEBI order would not be of much help to the revenue.

7.7 The last aspect of the matter is that the additions have been made by Ld. AO invoking the provisions of Section 68. The addition u/s 68, in our considered opinion, is not sustainable in view of the fact that credit in assessee's bank account represents sale proceeds of shares sold in recognized stock exchange through registered stock broker. The sale transactions have taken place through recognized stock exchange and the money was received in settlement through banking channels. The assessee had delivered the shares from his demat account to the broker, who, in turn, paid sale consideration to the assessee. In such a case, there could be no doubt as to fulfillment of primary ingredients of Sec.68 viz. identity of the payer, their creditworthiness and the genuineness of the transactions. The source of credit received in the bank account could not be held to be unexplained unless it was established that assessee's own money was routed in his bank account in the garb of Capital gains.

7.8 The various case laws as cited by Ld. AR also support our view, some of which could be tabulated as under: -

- (i) Hon'ble Bombay High Court in **CIT V/s Mukesh Ratilal Marolia (ITA No.456 of 2007; 07/09/2011)**
- (ii) Hon'ble Gujarat High Court in **CIT V/s Maheshchandra G.Vakil (40 Taxmann.com 326; 25/09/2012)**
- (iii) Hon'ble Rajasthan High Court in **CIT V/s Smt. Sumitra Devi (49 Taxmann.com 37; 24/02/2014)**
- (iv) Hon'ble Rajasthan High Court in **CIT V/s Pooja Agarwal (ITA No.385/2011 dated 11/09/2017)**
- (v) Hon'ble Delhi High Court in **Pr.CIT V/s Smt. Krishna Devi & Ors.(ITA No.125/2020 & ors. Dated 15/01/2021)**

We find that the ratio of aforesaid decisions is equally applicable to the fact of the present case before us.

7.9 Finally, keeping in the facts and circumstances of the case, we are inclined to hold that impugned additions are not sustainable in the eyes of law. The assessee had discharged the primary onus of establishing the genuineness of the transactions whereas the onus as casted upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The whole basis of making additions is third-party statement and no opportunity of cross-examination has been provided to the assessee to confront these parties. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue. Hence, going by the factual matrix and respectfully following the binding judicial precedents as enumerated in the order, the additions made by Ld. AO and confirmed by Ld. CIT(A), are not sustainable in the eyes of law. Therefore, we are inclined to delete the

same. We order so. Consequentially, the addition of estimated commission also stands deleted. Resultantly, the appeal stand allowed.

Conclusion

8. The appeal stands allowed in terms of our above order.

Order pronounced on 17th June, 2021

Sd/-

(C.N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 17/06/2021

Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.