

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC – C” BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 2169/Bang/2016
Assessment year : 2007-08

Shri Vijay Nahar(HUF), # 121, Bull Temple Road, Opp: Maratha Hostel, Bangalore – 560 019. PAN: AAJPN 3398K	Vs.	The Income Tax Officer, Earlier: Ward-3(3), Now: Ward -5(2)(4), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Suman lunkar, CA
Respondent by	:	Shri AR.V. Sreenivasan, JCIT(DR)

Date of hearing	:	23.02.2017
Date of Pronouncement	:	21.04.2017

ORDER

Per Vijay Pal Rao, Judicial Member

This appeal by the assessee is directed against order dated 06.10.2016 of CIT(A). The assessee has raised the following grounds for the assessment year 2007-08.

1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The impugned orders being bad in law, void ab-initio are required to be quashed.

2. In any case, the conditions precedent for the issue of notice u/s. 148 of the Act being absent, the re-opening of assessment becomes bad in law and consequently the order as passed/confirmed being also bad in law is required to be quashed.

3.1 In any case the order passed in gross violation of the principles of natural justice and fair play, especially in the absence of the cross examinations of the persons whose averments are sought to be relied upon by the Assessing Officer while passing the order, make the order totally bad in law and liable to be cancelled.

3.2 The learned Commissioner of Income tax (Appeals) has instead of quashing the impugned order on the above grounds, has just confirmed the order of Assessing Officer without properly considering the fact and circumstances of the case, arguments of the appellant and the law applicable.

3.3. In any case and without prejudice, the orders passed by the authorities below being contrary to binding dictum of the jurisdictional High Court are bad in law and are liable to be quashed.

4. The assessing officer had in any case, erred in treating a sum of Rs. 7,53,499/- being sale consideration received on sale of shares as 'Income from other sources' and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The action of authorities below has no support in law; is contrary to facts and evidence available. Such a treatment deserves to be rejected totally.

- 5.1 In any case and without further prejudice, the authorities below have erred in:
- a) Taxing/ confirming the entire sale consideration received on sale of shares as income under the head other sources.
 - b) Not considering the fact that the appellant had earned Long Term Capital Gain on sale of shares and same was exempt U/s. 10(38) of the I.T. Act..
 - c) Holding without basis that the transactions in shares are fraudulent
 - d) Alleging without any basis that the appellant has obtained accommodation entries and appellant's own money come back in the guise of capital gains.

The conclusions / observations of authorities below being totally erroneous and without basis both on facts and law is to be disregarded.

5.2 The several observations made and various conclusions drawn by the lower authorities in the course of order are without basis and evidence and are made/drawn on surmises, probabilities and conjectures. Such observations and conclusions by quasi-judicial authorities have no support in law and deserve to be rejected in toto.

6. The appellant had actually sold shares through demat account and had earned Capital Gain thereon and same needs to be accepted as such.

7. The appellant denies the liability to pay interest. The interest having been levied erroneously is to be deleted.

8. In view of the above and other grounds to be adduced at the time of hearing it is requested that the impugned order be quashed or atleast the income from Long Term Capital Gain as claimed exempt U/s. 10(35) of the I.T. Act, 1961, be accepted, the assessment of entire sale proceeds shares as Income from Other Sources be deleted and the interest levied be also deleted.

2. Ground nos. 1 and 2 are regarding validity of reopening. At the time of hearing the ld. AR of the assessee has stated at bar that the assessee does not press ground nos. 1 and 2 and the same may be dismissed as not pressed. The ld. DR has raised no objection if ground nos. 1 and 2 are

dismissed as not pressed. Accordingly, the ground nos. 1 and 2 of the assessee's appeal is dismissed being not pressed.

3. Ground nos. 3 to 8 are regarding disallowance of claim of long term capital gain on sale of shares and treating the same as income from other sources.
4. I have heard the ld. AR as well as ld. DR as well as relevant material on record. An identical issue arising from identical facts was involved in the connected group cases in ITA Nos. 2193 to 2195/Bang/2016 wherein the Tribunal vide order dated 18.04.2017 has decided this issue as under.

" 4. Ground nos. 3 to 8 are regarding rejection of claim of long term capital gain from sale of shares and treating the same as income from other sources. The assessee is an individual and filed the return of income declaring inter alia the long term capital gain of Rs. 7,40,586/- on sale of shares of M/s. Talent Infoway Limited and claimed exempt u/s. 10(38) of the Act. There was a search and seizure action u/s. 132 of the IT Act in case of M/s. Mahasagar Securities and Mukesh Choksi Group on 25.11.2009, wherein Shri Mukesh Choksi the key person of the said group admitted in the statement recorded by the investigation wing that his group companies including M/s. Mahasagar Securities, M/s. Alliance Intermediatires & Networks Pvt Ltd. etc were engaged in providing accommodation entries in order to enable the clients to declare speculative profit / loss, short term capital gain, long term capital gain on account of commodity trading, share application money etc. Accordingly, the investigation wing of the IT department gave information to the AO that during the financial year 2006-07, the assessee purchases M/s. Talent Infoway Limited shares through the broker M/s. Goldstar Finvest Pvt. Ltd. The assessment was reopened by the AO by issuing notice u/s. 148 of IT Act. The AO completed the reassessment by making an addition u/s. 68 towards the sale

consideration received on account of sale of M/s. Talent Infoway Limited. Thus the AO made an addition on account of share transactions treating them as income from other sources on the ground that Shri Mukesh Choksi has stated in the statement that the entries are accommodative in nature and the broker who issued the contract notes was not entitled to operate in any of the stock exchange. Further the assessee claimed to have purchased the shares of M/s. Talent Infoway Limited by way of cash and dematerialization of the shares subsequently was held by the AO has after thought to get benefit out of such accommodative entries by colorable device. The assessee challenged the action of the AO before the CIT(A) but could not succeed.

5. *Before the Tribunal, the Id. AR of the assessee has submitted that the assessee purchases the shares of M/s. Talent Infoway Limited on 15.04.2004 for a consideration of Rs. 11,914/- which were dematerialized in the month of December 2005 and thereafter the shares were sold on 27.02.2007. Thus the Id. AR has submitted that the sale of shares were not in dispute as the assessee sold the shares from its demat account and the entire transaction of sale was through banking channel. Thus, the profit on sale of shares of M/s. Talent Infoway Limited is long term capital gain which is exempt u/s. 10(38) of the IT Act. He has further contented that the assessee in support of its claim furnished the contract notes of the broker thereby the shares were purchased by the assessee. Further the assessee has duly shown the shares in the balance sheet as on 31.03.2005. Therefore, the assessee has produced all relevant evidence to establish the genuineness of the transaction of purchase and sale of 7,900 shares of M/s. Talent Infoway Limited. He has referred to the demat account details of the assessee and submitted that a transaction has been reflected in the demat account and therefore it cannot be doubted as held by the AO and confirmed by the CIT(A) treating it as a bogus transaction in the nature of accommodation entries taken from a group concern of Shri Mukesh Choksi. In support of his contention he has relied upon decision dated 23.03.2011 of the coordinate bench of the Tribunal in case of Smt. Vimala Devi Chhajer at page 25 of the paper book and others in ITA Nos. 513 to 526/Bang/2010, 946/Bang/2010 to 949/Bang/2010, 953/Bang/2010 to 956/Bang/2010, 970/Bang/2010, 1000/Bang/2010 to 1005/Bang/2010 and 1071/Bang/2010 and submitted that when the shares were reflected in the balance sheet of the assessee as well as in the demat account and sales of shares were shown in demat account of the assessee then the transaction cannot be doubted. Therefore, the profit on sale of*

shares has to be treated as long term capital gain. The Id. AR has also referred to the provisions of section 10(38) and submitted that if a transaction of sale of shares is subjected to Security Transaction Tax (STT) then the long term capital gain arising of such transactions is exempt. He has then referred to the contract note and submitted that the transaction of sale was duly subjected to STT and therefore the benefit of section 10(38) cannot be denied.

- 6. On the other hand, the Id. DR has submitted that the sale in question is not through stock exchange and therefore no STT was paid on these transactions. Further, the entire transaction is for the accommodation entries provided by Mukesh Choksi Group through its group concerns. The assessee has not proved the genuineness of purchase of shares as it was claimed the purchases against cash. Therefore, the claim of the assessee in the absence of evidence cannot be accepted. The AO has examined the contract note relied upon by the assessee and found that the broker in question was not authorized to trade in the stock exchange and in the shares. Therefore, the contract note produced by the assessee does not prove the transaction of purchase. Further, the assessee has also failed to prove the payment of consideration as the assessee has claimed the payment through cash. He has relied upon the orders of the authorities below.*
- 7. I have considered the rival submissions as well as relevant material on record. The assessee claimed to have purchased 7,900 shares of M/s. Talent Infoway Limited on 15.04.2004. In support of its claim the assessee produced contract note of the broker. However, the AO in the enquiry found that the alleged broker was not an authorized broker of the stock exchange to deal in the sale and purchase of shares. Therefore the AO rejected the said contract note. Further, since the assessee has claimed to have purchased the shares against cash the AO has rejected the claim. The purchase price claimed by the assessee is only Rs. 11,914/- whereas the shares were sold for a consideration of Rs. 7,51,816.31/- and thereby claim to have earned long term capital gain of Rs. 7,39,902.31/- against the investment of Rs. 11,914/-. The nature of transaction itself is not free from the doubt of manipulation in the purchases and sale transaction and therefore the AO was required to conduct a proper enquiry. The AO has rejected the claim of the assessee on the ground that in the case of search and seizure action u/s. 132 of the IT Act Shri Mukesh Choksi in his statement has stated that he is providing accommodation entries in order to enable the claims to declare speculation provided capital gain etc. It is*

pertaining to note that though the purchase transaction as claimed by the assessee on 15.04.2004, may not be acceptable however, when the shares are dematerialized and shown in the demat account of the assessee then on the said date of dematerialization of shares the existence of the shares in the name of the assessee cannot be disputed. Therefore even if the assessee has not produced a conclusive evidence to prove the transaction of purchase on 15.04.2004 however the holding of shares by the assessee as on the date of dematerialization cannot be doubted. The assessee has claimed that the shares were dematerialized in the month of December 2005. In support of claim the assessee has referred the dematerialization request form dated 08.12.2005, and the details of demat account wherein the transaction of sale of shares of M/s. Talent Infoway Limited has been reflected. It is not in dispute that these shares were finally dematerialized and shown in the demat account of the assessee however, the actual date of dematerialization entry in the demat account is not proved by the assessee. The request for dematerialization dated 08.12.2005 itself is not a conclusive proof of converting the shares into the demat account and further the details filed by the assessee regarding the demat account also do not reflect the entry of shares in the demat account. Only the sale transaction as on 27.02.2007 has been reflected in the demat account. Therefore the transaction of sale is no doubt proved by the assessee. But, the date of purchase is still not clear. Thus the only question which remains to be ascertained is the date of dematerialization of these shares and therefore the market price of the shares on the date of dematerialization would be considered as purchase consideration of the shares and consequently the sale on 27.02.2007 may result short term capital gain or long term capital gain as case may be depending upon the date of dematerialization of the shares. Further the quantum of capital gain is also depending on the purchase price which is the prevailing price on the date of dematerialization. Accordingly, this issue of computation of capital gain whether it is short term or long term as well as the purchase price on the date of dematerialization is remanded to the record of the AO for proper verification. The AO is specifically directed to find out the actual date of dematerialization of shares and the prevailing market price of the shares on the date of dematerialization to be considered as purchase consideration and then compute the capital gain. Since the facts are identical in all the cases therefore the issue in all three cases is set aside to the record of the AO."

5. Accordingly, this issue is set aside to the AO on the same terms.
6. In the result the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on this 21st day of April, 2017

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dated, the 21st April, 2017.

/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.