

आयकर अपीलिय अधिकरण, मुंबई "जी" खंडपीठ
Income-tax Appellate Tribunal -"G"Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member
आयकर अपील सं./ITA/539/Mum/2014,निर्धारण वर्ष /Assessment Years: 2009-10

M/s. G.R. Pandya Share Broking Ltd.C/o., Shah and Company Tax Consultants 201, Princess Street, Kesar Bldg., 1 st Floor, Room No.11Mumbai-2. PAN:AAACG 3748 A	vs.	ACIT,CC-13 11 th Floor, Room No.1103, Old CGO Bldg., MK Road Mumbai-400 020.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri P.O. Meena-DR

Assessee by: Shri Ashwin Kashinath-AR

सुनवाई की तारीख / **Date of Hearing:** 17.08.2016

घोषणा की तारीख / **Date of Pronouncement:**26.08.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 22.11.2013 of CIT(A)-37, Mumbai the assessee has filed the present appeal.

2.The assessee,vide its letter dated 16/06/2016,has requested to admit additional evidences under Rule 29 of the Income tax Appellate Tribunal Rules, 1963(Rules). In its application,the assessee has mentioned that it could not substantiate the transaction of LTCL before the AO, is the sufficient evidences could not be produced,that during the course of assessment proceedings the AO had asked for the details, that upon receipt of the letter of the AO it made an effort to obtain the requisite details but was not able to furnish the same in the short period of time ranted by the AO, that it had closed its business in the month of number 2002, that the shares in questions were purchased in the AY.2002-03,that due to closure of the business and loss of records it was not able to furnish the documents to prove the genuineness of the transaction,that during the appellate proceedings it had filed an submission, that it had made several efforts to obtain old records of the business to locate evidence of purchase of shares but was unable to get the same,that the affairs of the company were managed wholly by Bharat Pandya,that he was suffering from old days and was unable to compile the relevant information, that the assessee was in receipt of copy of PAN of NPS,that the said evidence was not furnished before the AO/FAA, that the balance sheets not filed before the FAA were traced by it,that there was no malafied intention on part of the assessee not to furnish the evidences earlier.The assessee relied upon the decision of Prabhavati S Shah(231ITR 1).

2.1. During the course of hearing before us, the AR reiterated the arguments that were part of the application made by the assessee for admitting the additional evidences. He further argued that assessee had transferred the shares in physical form, that it could not furnish a copy of the Dmat account,, that the shares were handed over to NPS, that the assessee could not provide the details of PAN to the AO/FAA. The Departmental Representative (DR) contended that the assessee had not shown any reasonable cause for not submitting the evidences before the law authorities, that it could have filed the evidences during the appellate proceedings. After considering the rival submissions, we are admitting the additional evidences produced by the assessee.

3. Assessee-Company, engaged in the business of share-broking, filed its return of Income on 26.03.2011 declaring total at Nil. The AO completed assessment, on 27.12.2011, u/s 143(3) of the Act, determining income of the assessee at Rs 15.34 lakhs. Effective Ground of appeal is about disallowance of Long Term Capital Loss (LTCL) of Rs. 21.26 lakhs. During the assessment proceedings, the AO found that the assessee claimed loss of Rs. 1.82 lakhs on account of setting off of LTCL of Rs. 21,26,931/- with LTCG of Rs. 19.44 lakhs. He directed the assessee to file explanation in that regard. Vide its letter, dated 12.12.2011, the assessee stated that it had sold 65000 shares of TSL Ltd. (TSL) at Rs. 1.75 per share to NPS for Rs. 1.13 lakhs on 30.6.2008, that cost of the shares was Rs. 22.40 lakhs (being Rs. 34.47 per share in the year of investment prior to 7.11. 2002), that the loss incurred was of Rs. 21.26 lakhs, that same was to be treated as LTCL, that NPS was paid Rs. 1.13 crores, that the assessee had suffered loss of Rs. 21.26 lakhs, that the said shares were sold in order to satisfy the outstanding dues of NPS, that it had received shares from BSE at Rs. 1 per share, that it had sold 400 shares for Rs. 19.45 lakhs resulting in LTCG of Rs. 19.44 lakhs, that the LTC and of Rs. 1.82 lakhs was on account of LTC year of Rs. 21.26 lakhs and LTCG of Rs. 19.44 lakhs.

The AO directed the assessee to produce the demerit account showing the holdings of TSL, address and PAN of NPS along with contract notes share transfer certificate. As per the AO the assessee did not submit any of the documents. Considering the above facts, the AO held that the assessee had not produced evidences which were critical to establish the genuineness of the transaction, that in the absence of documentary evidences loss of Rs. 21.26 lakhs could not be treated as genuine, that same could not be set off against the LTCG. He added Rs. 19.44 lakhs to the total income of the assessee.

4. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, the assessee stated that the business carried out by it was discontinued in November 2002, that it had obtained the shares of TS LL in physical form and same were reflected in the balance sheet as on 31/03/02 to 31/03/200 it, that the relevant balance sheets showed the investment in 2.5 lakhs TSLL shares at the rate of Rs. 44 per share, that the station questions were received in physical form and had not been dematerialized.

After considering the submission of the assessee and the assessment order, the F AA observed that before the AO the assessee had claimed that shares were purchased at the rate of Rs.34.47 per share, that in the, as on 31/03/ 2002, the price was shown at Rs. 44 per share, that the assessee did not explain the discrepancy during the appellate proceedings, that in the balance sheet, as on 31st/03/2006, description of shares was not given, that the balance sheets subsequent to 31/03/2006 had not been produced, that no contract note for sale of 65,000 shares of TCELL to NPS at the rate of Rs. 1.75 per share was produce, that the copy of share transfer form was also not furnished, that assessee had claimed that sale receipts were adjusted against the outstanding due of NPS, that no evidence was available to show that NPS did exist, that no confirmation from NPS with regard to the transaction question was filed, that shares were not sold through any recognised stock exchange. The FAA called for above details, during the appellate proceedings held on 31.10.2013.

He observed that the assessee had failed to establish the genuineness of the loss claimed in respect of the shares of TCELL, that it was not only the question of cost of shares, that the genuineness of the loss claimed was also in question, that income of the assessee had been under-assessed to the extent of Rs. 1.82 lakhs,. He brought it to the notice of the Authorised Representative (AR) of the assessee, as it would result in enhancing the income. Finally, he dismissed all the grounds of appeal raised by the assessee and enhanced its income by Rs. 1.82 lakhs.

4. We have heard the rival submissions and perused the material before us. We find that the assessee had claimed LTCL on account of sale of shares to NPS, that it was claimed that shares were handed over to NPS in-person, that the said transaction resulted in LTCL, that the AO and the FAA had called for details about the transactions to examine the genuineness of the claim, that the assessee did not furnish the basic documents in its support, that it had not explained as to at what rate the shares were sold i.e. were at Rs. 34 or at Rs. 44 per share. The FAA has given a categorical finding of fact that the assessee had not explained the

discrepancy. Even before us, the assessee did not throw any light in that regard. It had not produced NPS before the AO or the FAA. Now it is claimed that NPS is no more. In our opinion, nothing prevented the assessee to file an affidavit or a confirmation letter from the alleged purchaser of the shares of TSL. Once it had received the order of the AO, it very well knew that the transaction entered into by it with NPS was rejected by the AO and he had held that it was not a genuine transaction. In these circumstances, he should have produced some reliable evidences before the FAA to substantiate the genuineness of the transaction. Even if the shares were in physical form the transfer forms, transferring the shares in favour of NPS, should have been filed. After the alleged demise of NPS the assessee has filed PAN card of NPS. There is no evidence to hold that the PAN card produced by the assessee belonged to the same person whom it had sold the shares. In our opinion, the transaction itself is proved. As the assessee had claimed the loss, so following the principles of burden of proof, it should have discharge the onus. In our opinion, the assessee had miserably failed to prove the genuineness of the transaction. The so-called additional evidences, produced by the assessee before us, do not prove in any manner the genuineness of the sale of the shares to NPS during the year under consideration. As the existence of NPS and sale of the shares have not been proved by the assessee, so, we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity. The assessee itself is to be blamed for the position in which it finds itself today. The FAA had, after considering the available material, had taken an informed decision. So, we do not want to interfere with it. Here, we would like to refer to the case of Durga Prasad More (82 ITR 540), wherein the Hon'ble Apex Court has observed as under:

"Now, coming to the question of onus, the law does not prescribe any quantitative test to find out whether the onus on a particular case has been discharged or not. It all depends on the facts and circumstances of each case. In some cases, the onus may be heavy whereas, in others, it may be nominal. There is nothing rigid about it.... Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece or evidence."

If the surrounding circumstances of the case are considered it becomes very clear that the assessee had failed to prove that the stand taken by the departmental authorities was arbitrary. It had not produced the person to whom the shares were claimed to have been sold. It is also a fact that no confirmation about the alleged transaction was produced during the assessment/appellate proceedings. Though it was claimed that shares were handed physically

to settle the outstanding balance with NPS,yet the copies of the share certificates were never produced before the AO to make further verification with the company that had issued the shares.Thus, the assessee had prevented the AO to make any further investigation.As per the established principles of the taxation jurisprudence claim made by an assessee has to be proved by it.Considering the above,first ground of appeal is decided against the assessee.

5.Second ground deals with the enhancement made by the FAA.We find that the FAA had enhanced the income after intimating the AR of the assessee about the proposed action. Thus,he had followed the mandate of section 251(2)of the Act, though a formal notice under the said section was not issued.In our opinion, the FAA had rightly enhance the income, because the AO had erroneously allowed the deduction to the tune of Rs.1.82 lakhs.As an appellate authority,the FAA has power to enhance the income of the assessee. So,we do not find any legal infirmity in his order.Second ground is also decided against the assessee.

6.Last ground,dealing with interest to be levied u/s.234,being consequential in nature is not being adjudicated.

As a result,appeal of the Assessee stands dismissed.

फलतःनिर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 26th August,2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 26 अगस्त, 2016 को की गई ।

Sd/-

(राम लाल नेगी / R.L.Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांकDated : 26 .08.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “ G ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.