



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI NABIN KUMAR PRADHAN, ACCOUNTANT MEMBER

ITA no.6163/Mum./2014
(Assessment Year : 2006-07)

Deepika Ashok Agarwal
13, C-1, Matru Ashish
39, Neapeansea Road
Mumbai 400 039
PAN – AGYPA 2139E

..... Appellant

v/s

Income Tax Officer
Ward-16(2)(1), Mumbai

..... Respondent

Assessee by : Shri Vijay Kothari
Revenue by : Shri B.S. Bist

Date of Hearing – 09.08.2016

Date of Order – 24.08.2016

ORDER

PER SAKTIJIT DEY, J.M.

Instant appeal by the assessee is directed against the order dated 19th August 2014, passed by the learned Commissioner (Appeals)-27, Mumbai, for the assessment year 2006-07. Assessee has raised following grounds:-

"1. The learned Commissioner of Income Tax (Appeals) erred in upholding the validity of the notice issued u/s. 148 and the order passed in pursuance to the u/s. 143(3) r.w.s. 147 and while doing so he amongst others failed to appreciate:

a. That there was no income chargeable to tax which had escaped assessment;

b. *That the reasons stated for reopening of assessment were not having any relation to the facts on record for the relevant previous year;*

c. *That merely on the deposition of Shri Mukesh Choksi on 25.11.2009, no adverse inference could be drawn against the appellant.*

2. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the addition of the consideration paid for purchase of shares was wrongly made under the head 'income from undisclosed sources' in so far as the entire consideration for purchase of shares of Rs. 8,34,273.41, was paid to the broker by account payee cheque.*

3. *The learned Commissioner of Income Tax (Appeals) erred in assessing the capital gains of Rs. 12,16,456.49 as income from undisclosed sources."*

2. Brief facts are, the assessee is an individual. She filed her return of income for the impugned assessment year on 7th July 2006, declaring loss of ₹ 13,44,110, which included short term capital gain on sale of shares amounting to ₹ 12,40,841. As observed by the Assessing Officer, a search and seizure operation was carried out in case of Mahasagar Securities Pvt. Ltd. and Alliance Intermediaries and Network Pvt. Ltd., in the course of which the directors of the company Shri Mukesh Choksi and Shri Jayesh K. Sampat, had stated of being engaged in fraudulent billing activities by providing bogus speculations profit / loss, short term loss, capital gain / loss entries, on the basis of these information the Assessing Officer re-opened the assessment under section 147 by issuing notice to the assessee under section 148 of the Act. In the course of assessment proceedings, in response to

the query raised by the Assessing Officer, it was submitted by the assessee that she had purchased and sold shares of one company Sucheta Metal Ltd. and the transactions were made through the share broking firm Alliance Intermediaries and Network Pvt. Ltd. In support of the genuineness of the share transactions, the assessee submitted bank statement, demat statement, broker's bill pertaining to transactions of purchase and sale of shares. However, the Assessing Officer did not find merit in the submissions of the assessee. Relying upon the statement recorded from Shri Mukesh Choksi, under section 131 of the Act, on 11th December 2009, the Assessing Officer ultimately concluded that the share transaction is bogus and the assessee has merely taken the entries of share transaction from the broker company for converting unaccounted funds to accounted funds in the guise of short term capital gain. Thus, he treated the short term capital gain shown by the assessee as income from other sources. The Assessing Officer also treated the purchase value of shares as bogus and sham transaction and added back the amount as income from undisclosed sources. Accordingly, he completed the assessment.

3. Assessee challenged the assessment order by preferring an appeal before the learned Commissioner (Appeals) who also confirmed the assessment made by the Assessing Officer.

4. Learned Authorised Representative submitted before us that in the return of income, the assessee has provided all material relating to share transaction, therefore, there was no tangible material before the Assessing Officer for forming belief that income has escaped assessment. Learned Authorised Representative submitted, the investment in shares having been made by the assessee from disclosed sources under no circumstances can lead to escapement of income. Therefore, re-opening of assessment is bad-in-law. As far as merits of the addition made by the Assessing Officer, learned Authorised Representative submitted, the assessee in course of assessment proceedings has submitted all documentary evidences to conclusively prove the genuineness of the share transactions. He submitted, the Assessing Officer made the addition solely relying upon the statement recorded from Shri Mukesh Choksi, under section 131 of the Act. However, neither the statement was confronted / supplied to the assessee nor the assessee was allowed to cross examine Shri Mukesh Choksi to test the veracity of his statement. He submitted, assessee in the course of assessment proceedings has furnished all relevant and necessary documentary evidence to prove the genuineness of share transactions. Whereas, the Assessing Officer without bringing any material on record to disprove the claim of the assessee and solely relying upon the statement of a third party, that

too, without confronting to the assessee has made the addition as income from other sources. He submitted, when the assessee has entered into the share transaction in regular course, the same cannot be treated as sham / bogus by relying upon some untested / unverified material collected from third parties. He, therefore, submitted the addition made should be deleted. In support of his contention, learned Authorised Representative relied upon the following decisions:-

- i) *Shri Chandrakant G. Patel v/s ITO, ITA no.2705/Mum./2004 dated 25.5.2016;*
- ii) *Smt. Rasila N. Gada v/s ITO, ITA no.2802/Mum./2014, dated 31.5.2016;*
- iii) *DCIT v/s Vinay Kumar Agarwal, ITA no.153/Hyd./2015, dated 4.9.2015;*
- iv) *Smita Patil v/s ACIT, [2015] 55 taxmann.com 346 (Pune.);*
- v) *Mr. Sandeep R. Shorewala v/s ITO, ITA no.1610/Mum./2007, etc., dated 14.5.2010'*
- vi) *Anil Nandkishore Goyal v/s ACIT, ITA no.1256/PN./2012, etc., dated 19.4.2013;*
- vii) *CIT v/s Smt. Jamnadevi Agarwal, [2010] 328 ITR 656 (Bom.).*

5. Learned Departmental Representative relying upon the order of the learned Commissioner (Appeals) and the Assessing Officer submitted, when the directors of the company from which the assessee had purchased the shares admitted of having provided

accommodation entries only, the share transaction cannot be accepted as genuine.

6. We have considered the submissions of the parties and perused the material available on record. Undisputed facts are, the assessee claimed to have purchased 68,500 shares of Sucheta Metals worth ₹ 83,44,185, through a share broking company Alliance Intermediaries and Network Pvt. Ltd. The assessee also claimed to have sold the shares for a sale consideration of ₹ 20,51,375 and has declared capital gain of ₹ 12,16,956. It is also evident, in the course of assessment proceedings, assessee has submitted all relevant and necessary details such as demat statement, broker bills pertaining to purchase and sale of shares, bank statement copies reflecting share transactions before the Assessing Officer. As against the aforesaid documentary evidence submitted by the assessee to prove the share transactions, the Assessing Officer has treated the share transaction as sham / bogus by solely relying upon the statement of Shri Mukesh Choksi, director of Mahasagar Securities Pvt. Ltd. and Alliance Intermediaries Network Pvt. Ltd., wherein he allegedly admitted of having provided accommodation entries only and there was no share transaction actually made. Apart from the statement of Shri Mukesh Choksi, the Assessing Officer has not referred to any other material or evidence which could corroborate or conclusively prove the facts stated by Shri

Mukesh Choksi. Moreover, it is uncontroverted fact that the statement recorded of Shri Mukesh Choksi, under section 131 and other adverse materials claimed to be in the possession of the Department, which were utilised for treating the share transactions of the assessee as sham / bogus was never confronted to the assessee nor the assessee was supplied with those materials. Further, the assessee was not allowed the opportunity to cross examination Shri Mukesh Choksi, to test the veracity of statement made by him under section 131 of the Act. Though, the assessee raised this issue before the learned Commissioner (Appeals), but the learned Commissioner (Appeals) has neither properly considered nor appreciated the contention of the assessee. In our view, without confronting the statement of third party on the basis of which the Assessing Officer made the addition and without allowing opportunity to the assessee to cross examine the concerned person no addition can be made on the basis of such untested material. More so, when the assessee has brought on record documentary evidence to demonstrate that the share transactions were genuine. We have noted, in a dispute of identical nature in the case of Shri Chandrakant G. Patel (HUF) v/s ITO, ITA no.2705/Mum./2004, dated 25th May 2004, dated 25th May 2016, the co-ordinate bench of the Tribunal has deleted the addition made by the Assessing Officer. The other decisions relied upon by the assessee

have also expressed similar view. In fact, the Hon'ble Jurisdictional High Court has approved such view expressed by the Tribunal in Sandeep R. Shorewala v/s ITO, ITA no.16120/8Mum./2007 dated 14th May 2010 (judgment of High Court in ITA no.2009 of 2009 dated 18th September 2009). In view of the aforesaid, we hold that the addition made by the Assessing Officer treating the share transaction as sham / bogus is unsustainable. Accordingly, we delete the addition made by setting aside the order of the learned Commissioner (Appeals). As we have decided the issue on merit, there is no need to adjudicate the legal issue raised by the assessee challenging the validity of re-opening of assessment under section 147 of the Act.

7. In the result, appeal is partly allowed.

Order pronounced in the open Court on 24.08.2016

Sd/-
NABIN KUMAR PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 24.08.2016

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai