



आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में
**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

श्री अमित शुक्ला, न्यायिक सदस्य एवं
श्री मनोज कुमार अगरवाल, लेखा सदस्य के समक्ष ।

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA No. : 7430/Mum/2014

(Assessment year: 2006-07)

ACIT –CC 3(3), Cen Rg. 3, R. No. 401, 4 th Floor, Aayakar Bhavan, Mumbai -400 020	Vs	श्री प्रदीप कनिया Shri Pradeep Kaniya 60/62, Kika Street Gulalwadi, Mumbai -400 004 PAN: AACP K 1625 P
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

C.O. No. 143/Mum/2015

Arising out of ITA No. : 7430/Mum/2014, AY 2006-07

श्री प्रदीप कनिया Shri Pradeep Kaniya Mumbai -400 004 PAN: AACP K 1625 P	Vs	ACIT –CC 3(3), Cen Rg. 3, R. No. 401, 4 th Floor, Aayakar Bhavan, Mumbai -400 020
Cross Objector अपीलार्थी		प्रत्यर्थी (Respondent)

ITA No.: 7431/Mum/2014

(Assessment year : 2006-07)

ACIT –CC 3(3), Cen Rg. 3(3), R. No. 401, 4 th Floor, Aayakar Bhavan, Mumbai -400 020	Vs	श्रीमति पद्मा कनिया Smt Padma Kaniya 60/62, Kika Street Gulalwadi, Mumbai -400 004 PAN: AACP K 1626 Q
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

C.O. No. 144/Mum/2015

Arising out of ITA No. : 7431/Mum/2014, AY 2006-07

श्रीमति पद्मा कनिया Smt Padma Kaniya Mumbai -400 004 PAN: AACP K 1626 Q	Vs	ACIT –CC 3(3), Cen Rg. 3, R. No. 401, 4 th Floor, Aayakar Bhavan, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Assessee by		श्री सी एस सलदानहा Shri C S Saldanha –
Revenue by		श्री सी एस शर्मा Shri C S Sharma

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सुनवाई की तारीख /Date of Hearing : 29-09-2016
 घोषणा की तारीख /Date of Pronouncement : 29-09-2016

आदेश
ORDER

श्री अमित शुक्ला, न्यायिक सदस्य
PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the Revenue as well as cross objections by the above named assesseees, against impugned order of even date 23.09.2014, passed by Ld. CIT (Appeals)-39, Mumbai for the quantum of assessment passed under section 143(3) r.w.s. 147 for the assessment years 2006-07. Since issues involved in both the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will first take-up ITA No.7430/Mum/2014 and CO No.143/Mum/2015 in case of Shri Pradeep Kaniya. In the grounds of appeal, the revenue has raised following effective ground:-

- “1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in Deleting the addition of a sum of Rs.56,95,435/- made by the AO relating to unexplained cash credit of Rs.54,24,224/- (LTCG from sale of shares) and unexplained expenditure of Rs.2,71,211/- (expenditure of 5% commission towards the LTCG)”.

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3. In the Cross Objection, the assessee has challenged the validity of reopening under section 147 on the following grounds:

“1. The notice under section 148 of the Act dated 24.09.2010 for reopening of completed assessment u/s 143(3) r.w.s. 153A dated 31.12.2007 is bad in law as the assessee had declared full and true particulars of his income, therefore, notice of reopening is liable to be quashed.

2. The reopening of assessment is bad-in-law as the completed assessment was reopened without any new tangible material and such reopening is nothing but “change of opinion”.

4. At the outset, the Ld. Counsel submitted that, exactly similar issue was involved in the case of Anil Kaniya, who is one of the family member of the assessee before this Tribunal for the same assessment year viz. 2006-07 (in ITA No. 4077/Mum/2013 vide order dated 22.03.2016), wherein, the Tribunal has decided this issue in favour of the assessee after detailed discussion. Not only that in another separate order of the Tribunal in the case of Smt. Neelam Kaniya (in ITA No.4081/Mum/2013 vide order dated 09.12.2015) again for the same assessment year viz. 2006-07, the Tribunal had decided the same issue in favour of the assessee and against the Department. The main issue involved in these appeals is taxability of Long-term-capital-gain on sale of shares which has been claimed as ‘exempt’ by the assessee but treated to be taxable as ‘income from other sources’ under section 68 by the Assessing officer.

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5. Brief facts are that, the assessee has shown purchase of 23,000 shares of 'G K Consultants Ltd' on 10.06.2003 through a broker 'Rajendra Prasad Shah' for sum of Rs.96,140/- and same were sold in month of May, 2005 for Rs.55,20,364/-. The shares were purchased in physical form on 10.06.2003 and were demated on 15.03.2005. The assessee had thus disclosed the gain as 'Long-term-capital-gain' at Rs.54,24,224/- in his return of income for the assessment year 2006-07 filed on 16.03.2007. The assessment of said return of income was completed under section 153A r.w.s. 143(3) on 31.12.2007 at Rs.25,25,560/-, whereby the return of income was accepted along with the computation of LTCG. Subsequently, the assessee's case was reopened under section 148 on the following "reasons recorded", as incorporated by the Assessing Officer at page 1 of the assessment order:-

"During the course of assessment for A. Y. 2007-08, it was noticed that the assessee had indulged in alleged purchase and sale of penny- stock shares (M/s. Oasis Cine Communication). The broker concerned had denied any transaction with the assessee. Also, SEBI had initiated enquiries against the various brokers involved in transaction of MIS. Oasis Cine Communication.

Considering these facts, there is reason to believe that income to the tune of Rs.35,86,500/- has escaped assessment in A. Y. 2006-07. Since the original assessment had been made u/s. 143(3) r.w.s. 153A on 31.12.2007 and 4 years have not

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elapsed from the end of the relevant assessment year, assessment is being re-opened."

6. The Ld. Assessing Officer held that, the transaction of sale of shares is bogus as it is a sale of penny stock and not only that, he also added 5% commission on alleged accommodation of transaction of shares of Rs.2,71,211/-. The Assessing Officer's relevant observations on alleged transaction of shares being non-genuine were as under:

- i. Shares were purchased in physical form and Dematerialized 2½ months before sale.
- ii. The modus-operandi is absolutely same for all the Members of the Kainya Group.
- iii. Once the purchase itself is questioned, the incidence of capital gain cannot be attracted.
- iv. These adjustments were made leading to belated filing to return.
- v. The balance sheet and profit and loss of account of the company G.K. Consultant Ltd. is insignificant and it does not warrant such huge magnitude of purchase and sale.
- vi. During the course of search action, several beneficiaries have admitted that cash equivalent of sale receipt was given intermediaries who arranged back dated purchase invoices for which commission was paid.

After referring to various decisions, he taxed the entire amount of LTCG as 'income from other sources' and also

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added Rs.2,71,211/- on account of unaccounted commission paid.

7. Before the Ld. CIT(A), the assessee made very elaborate submission, the sum and substance of which are as under:

- (i) During the course of search carried out in the case of assessee as on 18.01.2006, the entire transaction of the assessee was examined by the Investigation Team of the Department and no adverse inference was drawn and shares which were held by the assessee in the earlier years were duly disposed off prior to the date of search and it also revealed that 33000 shares of G.K. Consultant Ltd. were sold on various dates on which LTCG was claimed and the same was allowed by the Assessing Officer in the scrutiny assessment for the assessment 2005-06 and 2006-07;
- ii) Once the purchase of same shares has been shown as an investment in the balance sheets and accepted by the Department in the scrutiny proceedings and also the sale of certain lot of the same shares has been accepted as LTCG in the earlier year, then no different view can be taken.
- iii) The contract note issued by the broker for the purchase along with the copy of ledger account, bank statement, confirmation letters received from the G.K. Consultant

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Ltd. host of other evidences were also filed, to prove the genuineness of the transaction.

8. The Ld. CIT (A) after taking note of the various gamut of fact observe that, the assessee had placed following material documents to prove the genuineness of the transaction:

- i) The shares held in M/s G K Consultants Ltd were disclosed as investment for AY 2004-05;
- ii) The sale of shares of O.K. Consultants Ltd. in A.Y. 2005-06 and disclosure of Long term capital gain thereon was accepted by the AO;
- iii) Copy of contract note issued by Rajendra Prasad dated 10.06.2003 evidences purchase of shares, which has not been rejected or disowned by the A. O. Hence, there is documentary evidence available for purchase of shares;
- iv) Payment was made through banking channels and the shares were held in the demat account of the assessee;
- v) Contract note has been filed evidencing sales through broker of stock change and payment received through account payee cheque.

Based on these documents, he allowed the assessee's appeal after observing and holding as under:-

"From the above, it can be observed that requisite material to evidence the transaction was placed on record by the appellant. The said evidence has not been discounted. When the appellant has submitted copies of contract note, shown

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that money has been received in the bank account, from sale of shares, the purchases of which had not been doubted in the earlier year, it is not possible to accept the finding of the AO that the income is from undisclosed source. From the records it can be seen that appellant had submitted contract note, sales bill, demat statement and statement of account to substantiate that sales had been effected. I also find that the shares have been shown in the Balance Sheet of the appellant since last two years, assessment of which was completed under section 143(3) of the Act and no adverse finding about the investments have been brought on record. Further, in A.Y. 2005-06, Long Term Capital Gain earned on sale of shares of G. K. Consultants Ltd. claimed by the appellant as exempt u/s 10(38) was accepted by the AO. That being so, the addition on account of Long Term Capital Gain has been made by the AO purely on the basis of surmises which cannot be sustained”.

Consequently, he also deleted the addition on account of 5% commission.

9. The Ld. DR has strongly relied upon the order of the Assessing Officer whereas the Ld. Counsel for the assessee placed his reliance on the order of the AO as well as order of the CIT(A), as referred to above.

10. We find that, first of all, the AO had admitted that similar transaction in same script was involved in the case on other family members of the assessee like in the case of Shri Anil Kaniya (*supra*) and Smt. Neelam Kaniya. In these cases

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the matter had reached upto the stage of the Tribunal, wherein detailed finding on similar gamut of facts have been considered and this issue has been decided in favour of the assessee and revenue's appeal has been dismissed. The relevant finding of the Tribunal in the case of Shri Anil Kaniya (*supra*) is reproduced hereunder:-

"3.6. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, the major grievance of the Revenue is that though the shares were claimed to be purchased in June 2003 but the payments were made on or after 22/12/2004 and the shares were sent for dematization in April 2005. Another grievance of the Revenue is that the purchase price of the claim shares was very low, whereas, the same were sold at the rate of 250 per shares, causing huge artificial gain to the assessee. On the other hand, the ld. counsel for the assessee explained that the transaction was genuine and identically for A.Y. 2007-08, the issue was decided in favour of the assessee and against the order of the ld. Commissioner of Income Tax (Appeals) (for A.Y. 2007-08), no further appeal was filed by the Department. It is noted that vide order dated 01/11/2013 on identical issue, the ld. Commissioner (Appeals), wherein, the assessee claimed to have purchased 9000 shares on 29/09/2004 of Oasis Sine Communication Ltd. through one broker Shri Prem Lal Roy for Rs.58,680/- and the same were claimed to be sold during the year through stock exchange for Rs.25,99,731/-, causing gain of Rs.25,41,051/-. Those shares were also purchased in physical form and sold in demat form. The ld. Assessing Officer held the same to be non-genuine. Ultimately, the issue was decided in favour of the assessee. The assessee is relying upon this decision of the ld. Commissioner of Income Tax (Appeals). In the case of the assessee, the shares of M/s G.K. Consultants Ltd. were purchased through broker Shri Rajendra Prasad Shah. Admittedly, the company of which, the shares were purchased and the broker are different. However, there is no dispute that the shares were purchased in physical form in June 2003 and were dematted on 15/04/2005. The stand of the Revenue is that there were various persons, who were

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beneficiaries of bogus capital gain on sale of shares of Penny Stock Companies. However, the ld. Assessing Officer has not brought on record any evidence (i) that M/s G.K. Consultants ltd. is a Penny Stock Company (ii) the Assessing Officer did not made any investigation from Calcutta with respect to the credentials of M/s G.K. Consultants Ltd. (iii) the Assessing Officer has not disputed that the shares were dematerialized and the impugned amount was received on sale of such shares. A broad and balled observation has been made that various persons are beneficiaries of bogus capital gains on sale of certain scrips of Penny Stock Companies. The assessee has neither proved that either M/s G.K. Consultants Ltd. is a Penny Stock Company or is involved in providing bogus shares. It seems that the addition was made merely on presumption. In such a situation, we are of the view that presumption cannot take the shape of evidence however strong it may be. Even otherwise, the ld. Assessing Officer has not substantiated his presumption with the help of any documentary evidences. The assessee has produced the copies of contract note, money was received through banking channel from sale of shares, purchases of earlier years were not doubted. Dematting was done by the assessee, sale was affected, thus, there is no reason to interfere with the finding of the ld. Commissioner of Income Tax (Appeals), thus, it was rightly held that the addition made u/s 68 of the Act cannot be sustained and also the resultant disallowance of commission at the rate of 5% made by the Assessing Officer. Even otherwise, for making addition u/s 68 of the Act, there has to be credit of amounts in the books of the assessee and if the assessee offers no explanation about the nature and source of such credits, then, the some so credited may be charged to tax as income of the assessee. However, in the present case, the assessee has offered its explanation and if the ld. Assessing Officer is still not satisfied with such explanation, onus shifts upon him to prove otherwise. The assessee's burden is confined to prove creditworthiness of the creditor with reference to the transaction found in the books of the assessee. In the present appeal, the identity of the creditor is not in doubt, the sale proceeds were received through banking channel, no adverse material was brought on record by the Assessing Officer to substantiate his presumption, the shares remained in the demat account of the assessee for more than twelve months, sold through recognized stock exchange on which STT was paid, the quotation of the aid scrips were available on the

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exchange, thus, the appeal of the Revenue is having no merit, consequently, dismissed.

4. Now, we shall take up the cross objection of the assessee for assessment year 2006-07, wherein, notice issued u/s 148 dated 24/09/2010 for reopening of the completed assessment u/s 143(3) r.w.s 153A dated 31/12/2007 was claimed to be bad in law as the assessee had declared full and true particulars of his income, therefore, notice is liable to be quashed. The ld. counsel advanced arguments which is identical to the ground raised by placing reliance upon the decision ITA No.4081/Mum/2013. Without going into much deliberation, we have decided the appeal of the Revenue, on merit, in favour of the assessee, therefore, we are refraining ourselves to decide the issue of reopening and thus dismiss the cross objection of the assessee as in-fructuous”.

We find that, similar view has been taken independently by the Tribunal in the case of Smt. Neelam Kaniya (*supra*). Thus respectfully following the above precedents we do not find merits in the grounds raise by the revenue.

11. Apart from that, it is noted that, there are no material on record to rebut the aforesaid finding of the Ld. CIT(A) by the Department and once the purchases which is reflected in the Balance sheet of the earlier years has been accepted in the scrutiny proceedings along with the part of the sale of the same scripts in the AY 2005-06, then the sale of the balance scripts in this year cannot be doubted. Accordingly, the finding of the CIT(A) is affirmed and grounds taken by the revenue is dismissed.

12. As regards the validity of reopening as challenged by the assessee in Cross objection, the same will become purely academic in view of the our findings given above on merits, as

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the matter has been decided in favour of the assessee. Accordingly, cross objection filed by the assessee is treated as in-fructuous.

13. In the case of Smt. Padma Kaniya, also as admitted by both the parties identical facts are permeating through and similar ground has been raised by the revenue and also similar cross objection raised by the assessee. For the sake of ready reference, the same are reproduced here in under:-

“1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in Deleting the addition of a sum of Rs.57,13,172/- made by the AO relating to unexplained cash credit of Rs.54,41,116/- (LTCG from sale of shares) and unexplained expenditure of Rs.2,72,056/- (expenditure of 5% commission towards the LTCG)*”.

In Cross Objection, following grounds have been raised:-

“1. *The notice under section 148 of the Act dated 24.09.2010 for reopening of completed assessment u/s 143(3) r.w.s. 153A dated 31.12.2007 is bad in law as the assessee had declared full and true particulars of his income, therefore, notice of reopening is liable to be quashed.*

2. *The reopening of assessment is bad-in-law as the completed assessment was reopened without any new tangible material and such reopening is nothing but “change of opinion”.*

14. Admittedly, the facts here in this case are also identical, therefore, our findings given above will apply *mutatis mutandis* and accordingly, the revenue’s appeal is treated as dismissed, whereas, Cross Objection is filed by the assessee is treated as in-fructuous.

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15. In the result, both the appeals raised by the revenue and cross objections of the assesseees are dismissed.

Order pronounced in the open court on 29th September, 2016.

Sd/-
 (मनोज कुमार अगरवाल)
 लेखा सदस्य
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-
 (अमित शुक्ला)
 न्याईक सदस
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 29th September, 2016.

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT (Appeal) –39, Mumbai.
 - 4) The CIT-Cent.II, Mumbai
 - 5) विभागीय प्रतिनिधि "सी", आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "C" Bench, Mumbai.
 - 6) गार्ड फाईल \
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आदेशानुसार/By Order

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*Chavan, Sr.PS