

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH-SMC " B "**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.341/Bang/2017 (Assessment Year : 20)		
Shri Sajjan Kumar, No.173, Police Road, Ranasinghpeta, Bengaluru-560 053 PAN AFWPK 2187 H	Vs.	Income Tax Officer, Ward 1(3) Now : Ward 2(2)(5), Bengaluru.
Appellant		Respondent.

Appellant By : Shri B. Sudheendra, C.A. Respondent By : Smt. H.L. Soumya Achar, Addl. CIT (D.R)
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Date of Hearing : 12.04.2017.

Date of Pronouncement : 31.05.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.7.12.2016 of Commissioner of Income Tax (Appeals), Bengaluru-2 for the Assessment Year 2008-09.

2. The assessee has raised the following grounds :

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, makes 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, 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. 23,19,755/- 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 and therefore deserves to be rejected.

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 Short term capital gain on sale of shares and such gain was offered to taxation.
- 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 Short Term Capital Gain earned on sale of shares as returned by the appellant be accepted, the assessment of sale consideration received on sale of shares as Income from Other Sources be deleted and the interest levied be also deleted.

3. The Ground Nos.1 & 2 are regarding validity of reopening under Section 148 of the Income Tax Act, 1961 (in short 'the Act').

4. I have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The assessee filed the return of income on 2.12.2008 which was processed under Section 143(1) of the Act. Thereafter the Assessing Officer reopened the assessment by issuing a Notice under Section 148 on 26.3.2013 on the reason that information was received from Director of Income Tax (Intelligence and Criminal Investigation) New Delhi that a search was conducted in **Mahasagar Group of Companies** on 25.11.2009. During the search sworn statement of **Sri Mukesh Chokshi** under Section 131 of the Act was recorded in which he admitted that he and his group of companies were engaged in fraudulent billing activity and was involved in giving accommodation entries in order to enable the clients to declare speculative profit or loss as they wish. It was also found that M/s. Mahasagar Group of Companies deliberately conducted transactions in such a manner that part of transaction is evidenced through bank or stock exchange to give colour of genuineness to the entire transaction. The assessee is also one of the persons benefited of such transaction. Accordingly, the Assessing Officer has recorded the reasons to believe that an amount of Rs.23,90,755 chargeable to tax as income from other sources has escaped

assessment on account of the Short Term Capital Gain (STCG) declared by the assessee from purchase and sale of shares of **Talent Infoway**. I find that prior to the said information the Assessing Officer was not having any material to reject the claim of STCG offered by the assessee. Therefore the information received by the Assessing Officer clearly made out a case for the Assessing Officer to believe that the transaction of purchase and sale was nothing but an accommodative entry and therefore the income assessable to tax has escaped assessment. In view of the peculiar facts that during the search and seizure action in the case of Mahasagar Group of Companies Mr. Mahesh Chokshi has admitted to have engaged in providing accommodation entries and billing activities to the clients and therefore this material was sufficient to believe that income assessable to tax has escaped assessment for the purpose of reopening of assessment under Section 148 of the Act. Hence I do not find any merits or substance in the objections raised by the assessee against the opening of the assessment.

5. The next issue is regarding treatment of the sale consideration of Rs.23,19,755 as 'income from other sources' instead of the capital gain declared by the assessee out of the said sale consideration (STCG).

6. I have heard Id. AR as well as Id. DR and considered the relevant material on record. It is noted that the assessee purchased 65,000 shares of Talent Infoway on 12.03.2008. The assessee then stated to have sold these shares in the lot of 40,000 on 18.3.2008 and remaining 25,000 shares on 19.3.2008 and claimed to have earned STCG of Rs.12,58,905. The learned Authorised Representative of the assessee has submitted that the shares in question were dematerialized in the Demat account of the assessee therefore the genuineness of the transaction cannot be doubted. Further he has referred to the contract notes of the broker regarding purchase and sale of the shares and submitted that the assessee has produced all the relevant record then the transaction cannot be held as bogus and consequently the claim of the assessee cannot be denied.

7. On the other hand, the learned Departmental Representative has submitted that the assessee has claimed to have purchased these shares without full payment and only a part of payment has been paid by the assessee in cash. Therefore the purchase of shares has not been approved. He has relied upon the orders of the authorities below.

8. On analyzing of the record and material relating to the transactions of purchase and sale of shares of Talent Infoway, I find that the shares were dematerialized and recorded in the Demat account of the assessee before the same were sold on 18th and 19th of March, 2008. Therefore the holding of the shares in question in the name of the assessee cannot be doubted when these are duly recorded in the Demat account of the assessee. However the transaction in question is not normal transaction of purchase and sale of shares for investment purpose. The assessee claimed to have purchased the shares without making the payment to the broker and the purchase price has been claimed to have been adjusted against the sale proceeds of the shares. Therefore the transaction carried out in such a fashion that without investing any money the assessee got these shares in his name and just after the shares were held in the name of the assessee immediately the same were sold by the assessee on 18.3.2008 and 19.3.2008. Therefore the entire transaction of alleged purchase and sale of shares cannot be considered as investment but clearly it is for the purpose of earning an immediate profit from the sale of these shares and that too without any initial investment by the assessee. Thus

it is a clear case of transaction wherein the assessee had no intention to retain the shares but to earn the profit from immediate sale of shares and therefore the transaction is purely speculative or trading in nature. Hence the claim of capital gain cannot be accepted keeping in view the manner in which transaction is carried out by the assessee by purchasing the shares without making the purchase consideration and then selling the entire shares immediately without any time gap. Thus the transaction was clearly with the motive and purpose of earning immediate profits from the sale of shares in question and accordingly it is trading activity by the assessee. Hence the income arising from the transaction has to be assessed as business income of the assessee.

9. As regards the quantum of the addition, since the assessee has received the amount after adjustment of the purchase consideration therefore whatever amount received by the assessee on sale of these shares the same has to be assessed as business income of the assessee. The orders of the authorities below are accordingly modified and the Assessing Officer is directed to assess the net receipts of the assessee as business income.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 31st May, 2017.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

Bangalore,
Dt.31.05.2017.

*Reddy gp

Copy to :

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

Assistant Registrar
Income Tax Appellate Tribunal
Bangalore.