

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1355/MUM/2012  
Assessment Year: 2003-04**

Nanavati Associates P.  
Ltd. Ratna, 32 Jai Hind  
Co-operative HSG.  
Society,  
Mumbai-400049

Vs.

ITO-5(2)(4)  
Aayakar Bhavan,  
M.K. Road  
Mumbai-400020.

**PAN No. AABCN5971F**

**Appellant**

**Respondent**

Assessee by : Shri Nitesh Joshi, AR  
Revenue by : Shri Suman Kumar, DR

Date of Hearing : 04/07/2017  
Date of pronouncement : 27/09/2017

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2003-04. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-9, Mumbai and arises out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under: -

- i. On the facts and as per provisions of law, The Commissioner of Income Tax Appeals (hereafter referred to as CIT(A)) has erred in:
  - a. Confirming the assessment order passed by assessing officer, and
  - b. Rejecting the grounds of appeal and submissions made by the appellant.
  - c. In ignoring and overlooking the facts and material on record
- ii. On the facts and as per provisions of law the order passed by the assessing officer was against the principles of natural justice and was unjust and unfair.
- iii. On the facts and as per provisions of law the CITA has erred in confirming the re-assessment u/s.147 read with section 143(3).
- iv. On the facts and as per provisions of law the CIT(A) has erred in confirming the additions made twice by the assessing officer against the transactions of speculative loss which was not set off against any other income.

2.1 The assessee also filed an additional ground stating that the Ld. CIT(A) erred in upholding the conclusion of the Assessing Officer (AO) with respect to denial of appellant's claim for carry forward of speculation loss of Rs.63,93,418/-.

As the above additional ground arises out of the order of the Ld. CIT(A) we admit the same for adjudication.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the AY 2003-04 on 27.11.2003 declaring loss of Rs.9,804/-. The same was processed u/s 143(1) on 27.11.2003. The AO received information from the Deputy Director of Income Tax (DDIT) (Inv.), Unit-1(4), Mumbai that the assessee was a beneficiary of M/s Goldstar Finvest Pvt. Ltd. which was engaged in fraudulent billing

activities and also providing bogus speculation profit/loss. Therefore, the AO reopened the assessment by issuing notice u/s 148.

The AO observed that Shri Mukesh Choksi, Director of M/s Goldstar Finvest Pvt. Ltd. had stated in his statement on the date of search by the Revenue and subsequently that all transactions carried out by his various companies were bogus and he used to provide accommodation bills. M/s Goldstar Finvest Pvt. Ltd. had also stated during its assessment proceedings that it was doing the business of providing 'accommodation entry' only and declared 'commission income' from 'entry providing' as its business. The ITAT in the case of M/s Goldstar Finvest Pvt. Ltd. has upheld its income from commission @ 0.15%.

The AO further found that none of the companies run by Shri Choksi had a valid license as a broker to trade in any stock exchange during the period when the alleged transactions were carried out for the beneficiaries. As per the provisions of section 13 of the Securities Contracts (Regulation) Act, 1956, the Central Government has notified Greater Mumbai since 1957, as one of the areas in which any contract other than transactions entered into between members of a recognized stock exchange as illegal transaction. Shri Choksi's Companies were situated in Mumbai.

In view of the above facts, the AO came to a finding that the speculation loss to the tune of Rs.63,93,418/- shown by the assessee represented undisclosed income. In all these transactions, there was no

share purchase on the date mentioned in the bills as they had not been routed through any stock exchange. In the return of income, the assessee had claimed carry forward of speculation loss of Rs.67,10,500/-. In view of the aforementioned facts, the AO treated the said speculation loss to be bogus and disallowed the same to be carried forward.

The AO then issued a show cause notice dated 24.12.2010 to the assessee to explain why the speculation loss of Rs.63,93,418/- should not be treated as unexplained investment u/s 69 of the Act. The assessee filed a written submission vide letter dated 27.12.2010 before the AO stating that:

“Section 69 is very much specific about unexplained i.e. ‘where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of accounts, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing officer satisfactory, the value of investments may be deemed to be income of the assessee of such financial year’. In the case of source of payment is explained i.e. receipts are from M/s Maneklal Vadilal & Co. and M/s M.V. Exports and also note that all the payments are made from banks accounts vide cross account payee cheque the printout of the bank account is already produced before your good selves.”

However, the AO was not convinced with the above explanation as the assessee-company had paid cash to take entries of artificial/bogus

speculation loss of Rs.63,93,418/-. Therefore, the AO made an addition of Rs.63,93,418/- u/s 69 of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) agreed with the reasons given by the AO and thus dismissed the appeal by the assessee.

5. Before us, the Ld. counsel of the assessee submits that the assessee would not press ground no. 1 and 2 of the appeal. Then he submits that the disallowance of speculation loss has not been contested by the assessee and section 69 invoked by the AO is not applicable to the present case. He draws our attention to page 56 and 57 of the Paper Book (P/B) which is the ledger account of the assessee in respect of speculation loss. Also he refers to page 73 to 75 of the P/B which is the ledger account of Goldstar Finvest Pvt. Ltd. appearing in the books of the present assessee. The Ld. counsel further draws our attention to page 32 to 34 of the P/B which contains the bank statement of the assessee in HDFC Bank and Goble Trust Bank Ltd. It is thus stated by him that section 69 which is applicable with regard to unexplained investment is not applicable to the present case.

6. *Per contra* the Ld. DR submits that the AO has rightly made the addition u/s 69 as the assessee-company had made the payment to take entries of artificial/bogus speculation loss of Rs.63,93,418/-. He supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We have mentioned earlier that the return of income of the assessee for the impugned assessment year was processed u/s 143(1). Then the AO reopened the assessment by issuing notice u/s 148 on the basis of information that the assessee was a beneficiary of M/s Goldstar Finvest Pvt. Ltd. which was engaged in fraudulent billing activities and providing bogus speculation profit/loss. As the return of income was processed only u/s 143(1), the Ld. CIT(A) has rightly upheld the reopening relying on the judgment of the Hon'ble Supreme Court in *ACIT vs. Rajesh Zhaveri Stock Brokers (P) Ltd.* 219 ITR 500 (SC) wherein it has been held that in the case of assessment u/s 143(1)(a), the reopening cannot be invalid since there is no application of mind by the AO while issuing intimation u/s 143(1). In view of the above reasons, we dismiss the 3<sup>rd</sup> ground of appeal filed by the assessee.

7.1 Now we turn to the 4<sup>th</sup> ground and the additional ground of appeal filed by the assessee. At this moment, we refer to the statement given by Shri Mukesh Choksi recorded u/s 131 on 11.12.2009 and the same is produced below:

"Q.3. Kindly describe in detail the modus operandi followed by you in providing these different types of entries, details of receipt of cash/cheques and details of services provided by you to the beneficiaries.

Ans. 1) Speculation Profit

- a) Our agents send us the names of entry seekers & their respective amount of entries desired by them. We receive this information either through phone or fax.
- b) On receipt of information we prepare the bills.

- c) We deliver the bills to the agents.
- d) Agents issue cheques to the beneficiaries. The signed cheque books are kept with the agents.
- e) The agents receive the fund and deposit the same in the bank account. The cheque issued by them are then cleared.
- f) We receive the commission on the total amount of bank transaction on monthly basis.

When the agents are new, we request them to carry out transactions through us. Few agents are getting bills printed outside also and doing transaction less paying commission to us.

## 2) Short Term Profit:

- a) We receive the information about short Term Gain desired by the beneficiaries.
- b) We then select the scrips whose prices have appreciated the most during the last 6 months;
- c) We then request the parties to deliver the funds or manage the shares by themselves;
- d) They receive the shares in their demat account out of their own funds
- e) They then sell the shares in the open market
- f) The difference between purchase price and sale price is the Short Term Gain.

## 3. Long Term Gain:

- a) The party first decides the amount of LTG required by them
- b) We then decide the scrips
- c) They acquire the shares in their demat account out of their own funds.

- d) They sell them in the open market.
- e) We simply provide purchase bill in the STG & LTG

4. Share Application adjustment entry:

- a) The party / agent provide us the name of the company which desire such entries;
- b) We sign the application forms & provide the necessary documents.  
Then party complete the bank transaction out of their own funds.

"Q.7 How genuine are these sales and purchases (of shares)?

Ans. Both sale and purchase bills issued by me are bogus transactions. I would like to clarify here that the client may have acquired the shares from elsewhere in cash but most definitely the transactions mentioned by me in my sale /purchase bill is not a genuine one.

Q. 10 Has the cash component /component of commission been received in respect of these transactions?

Ans. No. we receive our commission only when the deal goes through.

Q. 12 It is seen that the companies Mahasagar Securities Pvt. Ltd, M/s Alliance Intermediatories & Network Pvt. Ltd., and M/s Goldstar Finvest Pvt. Ltd. have entered into such huge transactions amounting to crores of rupees. Have regular books of accounts being maintained for these companies?

Ans. No. Apart from Bank Book, no books of accounts are being maintained for these companies and the transactions reflected in them are bogus transactions.

Q. 13 Then on what basis are the Profit and Loss Accounts, Balance Sheets etc. of these companies (which were found during course of action u/s 132 at your office) prepared?

Ans. Last year balances are carried forward with only a difference in bank balance. The turnover of the various companies represents the total of the entries in the bank statements of the various companies. (i.e. turnover of bogus share billing/adjustment entries).

.....”

7.2 The verification of the payment through cheque would establish the genuineness of transaction. We bring out the same from the ledger account of Goldstar Finvest Pvt. Ltd. as reflected in the assessee's books of accounts (P/B 73-75). We mention the same below:

Date	Bank	Cheque No.	Amount (Rs.)
03.02.2003	Global Trust Bank	528532	2,35,000
17.02.2003	HDFC Bank Ltd. 12139	015601	4,00,000
19.02.2003	Global Trust Bank	528503	6,50,000
19.02.2003	HDFC Bank Ltd. 12139	015602	3,28,381.25
24.02.2003	HDFC Bank Ltd. 12139	015603	1,60,000
25.02.2003	HDFC Bank Ltd.12139	015605	5,00,000
26.02.2003	HDFC Bank Ltd. 12139	015606	4,00,000
03.03.2003	HDFC Bank Ltd. 12139	015607	9,37,230
05.03.2005	HDFC Bank Ltd. 12139	015610	5,00,000
05.03.2005	HDFC Bank Ltd. 12139	015608	7,00,000
06.03.2003	HDFC Bank Ltd. 12139	015611	2,45,000
06.03.2003	Global Trust Bank	528504	2,05,000
07.03.2003	HDFC Bank Ltd. 12139	015609	2,23,434.35
28.03.2003	HDFC Bank Ltd. 12139	015613	8,58,000

7.3 Section 69 shows that when investments outside the books of accounts are found, the assessee is entitled to offer an explanation about

the nature and source of the investment. No addition on account of unexplained investment is possible unless an opportunity has been given to the assessee to explain its source. We find that the assessee vide letter dated 28.12.2010 had asked the AO for a copy of the statement recorded from the Director of Goldstar Finvest Pvt. Ltd. and also to provide an opportunity to cross-examine him. The AO provided to the assessee a copy of the statement of Shri Choksi, the Director. The AO tried but could not facilitate the cross-examination by the assessee of Shri Choksi.

We find that the assessee had taken the ground of not being provided by the AO the opportunity to cross examine Shri Choksi before the Ld. CIT(A). We find that the Ld. CIT(A) has simply reiterated the observation of the AO.

It is the duty of the AO to enforce attendance of a witness if his evidence is material. At the same time the assessee must furnish the complete address of such person.

A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral

evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

The importance of cross-examination has been emphasized by the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [WP(L) No. 3114 of 2014].

It is a fundamental rule of the law of taxation that, unless otherwise expressly provided, the same income cannot be taxed twice.

Having regard to the above, we set aside the order of the Ld. CIT(A) in respect of the 4<sup>th</sup> ground and the additional ground of appeal and restore the matter to the file of the AO to give an opportunity to the assessee to cross-examine Shri Choksi and then frame an order after (i) verification of the payment through cheque delineated at para 7.2 hereinbefore and (ii) giving reasonable opportunity of being heard to the assessee. We direct the assessee to file documents/evidence before the AO. Thus the 4<sup>th</sup> ground and the additional ground of appeal are allowed for statistical purposes.

8. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 27/09/2017.**

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/09/2017

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**