

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC – A” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.1671/Bang/2017
Assessment year : 2009-10

Bharat Kumar (HUF), No.12, II Cross, Malleswaram, Bengaluru – 560 003. PAN: AAFHK 8670P	Vs.	The Income Tax Officer, Ward 2(2)(3), [formerly Ward 9(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Suman Lunkar, CA
Respondent by	:	Shri Vikas Suryawanshi, Addl. CIT(DR)

Date of hearing	:	16.11.2017
Date of Pronouncement	:	27.11.2017

ORDER

This appeal is preferred by the assessee against the order of the CIT(Appeals) *inter alia* on 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.

2.1 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.

2.2 In any case and without prejudice, the learned Assessing officer had erred in not passing the separate speaking order disposing of the objections raised by the appellant and the learned CIT(A) instead of quashing the order has erred in confirming the same. The impugned order which was passed not following the binding dictum of honourable Supreme Court becomes bad in law and is liable 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. 4,34,894/- being sale consideration 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 Long term capital gain on sale of shares and such LTCG is eligible for exemption u/s. 10(38) of the Act.

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 Long 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.”

2. During the course of hearing, the Id. Counsel for the assessee has invited my attention that the impugned issues are squarely covered by the order of the Tribunal in the case of *Shri Arvind Kumar Moolchand in ITA No.509/Bang/2017* in which the Tribunal has restored the issue to the file of the AO having observed that the additions were made on the basis of statement of Mr. Mukesh Choksi without confronting the said statement to the assessee. The Tribunal accordingly restored the matter to the AO with a direction to confront the statement of Mr. Mukesh Choksi to the assessee

and thereafter allow him to cross-examine Mr. Mukesh Choksi and the issue may be adjudicated afresh, after affording opportunity of being heard to the assessee.

3. The Id. DR did not dispute these facts.

4. I have carefully examined the order of the lower authorities in the light of the order of the Tribunal on the impugned issue and I find that the impugned issue is squarely covered by the order of the Tribunal in the aforesaid case wherein the Tribunal restored the matter to the AO with certain directions. For the sake of reference, we extract the relevant portion of the order of the Tribunal :-

“5. Having carefully examined the orders of lower authorities in the light of rival submissions, I find that during the course of search conducted upon the Mukesh Choksi group, statement of Mukesh Choksi was recorded and in his statement he has admitted that he was providing accommodation entries to those who were interested to earn capital gain. On a careful perusal of the assessment order, I find that there is no finding with regard to the supply of statement of Mukesh Choksi to the assessee. Moreover, nothing is available on record, wherefrom it could be inferred that assessee was ever allowed to cross-examine Mr. Mukesh Choksi. It is settled position of law that statement or the evidence which is being relied upon by the AO for making the addition in the hands of assessee, the same should be confronted to the assessee and the assessee should be allowed to cross-examine the witness in this regard.

6. From a careful perusal of the orders of lower authorities, it is quite evident that statement of Mr. Mukesh Choksi was relied on for making the addition, but assessee was never allowed to cross-examine him. In these circumstances, I am of the view that the AO was not justified in making addition in the hands of assessee, without allowing the assessee to cross-examine Mr. Mukesh Choksi, whose statement was relied upon for making the above additions. I accordingly set aside the order of CIT(Appeals) and restore the matter to the file of AO with a direction to first confront the statement of Mr. Mukesh Choksi to

the assessee and allow him to cross-examine Mr. Mukesh Choksi to dig out the truth in this regard. Accordingly, the appeal of assessee is allowed for statistical purposes.”

5. Since the Tribunal has taken a particular view in similar set of facts, we find no reason to take a contrary view in this appeal. Accordingly, we set aside the order of the CIT(Appeals) and restore the matter to the AO with a direction to readjudicate the issue afresh in terms of directions issued by the Tribunal in the aforesaid case. Needless to mention here that proper opportunity of being heard should be afforded to the assessee.

6. In the result, appeal by the assessee is allowed for statistical purposes.

Pronounced in the open court on this 27th day of November, 2017.

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 27th November, 2017.

/ Desai Smurthy /

Copy to:

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

By order

Senior Private Secretary
ITAT, Bangalore.