

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.968/Ind/2016
Assessment Year: 2008-09**

Shri Omprakash Phatandas Panjwani, 44, Gopal Bagh, Indore	Vs.	Asstt. Commissioner of Income Tax, Circle 1(2) Indore
(Appellant)		(Respondent)
PAN No.ADMPP8053F		

Respondent by	Shri Rajeev Jain, Sr.DR
Appellant by	Shri Girish Agrawal, CA (AR)
Date of Hearing:	02.01.2018
Date of Pronouncement:	19.01.2018

ORDER

PER MANISH BORAD, AM.

This appeal filed by the Assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-I, Indore [in short referred to as the CIT (A)] dated 23.05.2016 is arising out of the order u/s 143(3) of the Income Tax Act dated 15.12.2010 framed by the Assistant Commissioner of Income Tax, Circle 1(2), Indore pertaining to Assessment Year 2008-09.

2. The assessee has raised following grounds of appeal.

“1 Because of facts and in circumstances of the case, the learned CIT(Appeal) has erred in confirming action of Ld. Assessing Officer of treating short term capital gains as income u/s 68 of the IT Act 1961 at Rs.6,62,870/-

2. The learned CIT(A), erred in making his on view that the purchase of shares can be considered only on the date of dematerialization and hence, erred in holding that the purchase value of the shares sold be taken at the average price of the shares traded on the NSE and BSE on the date dematerialization viz. Rs.7,82,400/- and treating the difference as income from unknown sources therefore the Ld. CIT is wrong in holding that the short term capital gains of Rs.6,62,870/- (7,82,400 – 1,19,530) be taxed as unexplained credit u/s 68 of the IT Act 1961.

3. The learned CIT(Appeals), erred in confirming the finding of the Assessing Officer in not considering the gains on the sale of shares of Rs.6,44,816/- as short term capital gains and thereby also confirming the consequent denial of Income tax rate of 10% u/s 111A of the Income-tax Act, 1961.

4. Because on facts and in circumstances of the case, both Ld. Assessing Officer and ld. CIT(A) has erred in going into undue considerations and making baseless observations.

5. Because on facts and in circumstances of the case, no attention was given to the submissions made by the assessee either by the Ld. Assessing Officer of ld. CIT(A) and both of them gone into self made stories without bringing anything on record.

6. Without prejudice to above, the appellant has made investment in shares in earlier year which were duly reflected in the balance sheet of the appellant, hence the addition of Rs.6,61,870/- under 68 of the IT Act may be deleted.”

3. Briefly stated facts as culled out from the records are that the assessee is an individual engaged in the manufacturing and trading of PVC Tubing Rolls. Return of income filed on 15.10.2008 declaring total income of Rs.14,23,060/- which inter-alia included short term capital gain of Rs.6,44,816/- earned from sale of equity shares of IFCI Limited. Case selected for scrutiny. Notices u/s 143(2) and

142(1) of the Act were duly served upon the assessee. Necessary details as called for were examined. Ld. Assessing Officer while examining the transaction of sale of equity shares of IFCI Limited observed that the assessee purchased the shares on 17.10.2006 through a broker but the shares were transferred to demat account on 13.8.2007 and immediately thereafter these shares were sold. Purchase price of Rs.1,19,530/- was paid on 1.07.2007. The Ld.AO called for the details from the broker Chandravadan Bhaichand Muchchala, Mumbai as well as National Security Exchange. He was not convinced even though confirmation of account confirming the impugned transaction was received. The Ld.A.O doubted the purchases and took a view that the alleged transaction of short term capital gain is bogus and actually Rs. 7,64,346/- is unexplained credit liable to be added to the income of the assessee. Alongwith other minor disallowances income assessed to Rs.15,76,610/-.

4. Aggrieved assessee filed an appeal before the Ld. CIT(A) and partly succeeded. However the issue relating to unexplained credit of Rs.7,64,346/- was dealt by the Ld.CIT(A) observing as follows thereby restricting the addition to Rs.6,62,870/-;

2. Finding and order:- During the appellate proceedings the A/R of the appellant appeared. He confirmed following facts:

- 1. The appellant asked the broker M/s Chandravadan Bhaichand Muchchala to buy 12000 shares of IFCI on 17.10.2006.*
- 2. The payment for these shares @9.95 per share was made on 1/7/2007 by a/c payee cheque.*
- 3. The shares were transferred to the appellant's D Mat account on 13/8/2007*

4. The shares were sold on 17 August 2007 through broker Angel Capital & Debt Market Ltd
5. Appellant was not related to M/s. Chandravadan Bhaichand Muchchala and in past not many transactions were done through them.

These facts speak for themselves. As per prevailing practice in the share market the payment for purchase of shares is done within 24 hours. If the payment is not done within the specified time the shares are auctioned i.e. Shares are sold by auction and the difference between the contracted purchase price and the auctioned sale price is debited to the client's (purchaser) account. Under no circumstances the payment can be delayed beyond 48 hours. The appellant claims that he asked the broker M/s. Chandravadan Bhaichand Muchchala to buy 12000 shares of IFCI on 17/10/2006. IFCI on 17/10/2006. The appellant admits that he did not make any payment to the broker till 1/2007. If shares were brought on 17/10/2006 who made the payment? And why? Admittedly appellant is not related to the broker and did not have many transactions through them even the sale of these shares was not done through them, then why broker will make payment on behalf of the appellant? The appellant did not claim that the broker or somebody else made payment on his behalf on 17/10/2006. If no payment was done then how were shares purchased? This question the appellant could not answer.

The A/R produced bank statement of the appellant showing payment on 1/7/2007. After receipt of the payment the broker must have acted on the instruction of the appellant to buy shares. The shares were credited to the Dmat account of the appellant on 13/8/2007. Common sense tells that the shares must have been purchased on one or two days earlier. It takes two to three days to get the shares in the Dmat account after purchase. The A/R furnished the rate of IFCI shares as quoted in stock exchange on 13/8/2010 was around Rs.68 the closing rate on 13/8/2007 was Rs.66.05. Closing rate of IFCI shares on 10/8/2007 (which is most likely to be the date of purchase being three days prior to the date on which shares were credited to the appellant's Dmat account) was Rs.65.20.

As mentioned above the shares were sold on 17/8/2007 i.e. only after four days after actual purchase.

Short term capital gain on purchase and sale of IFCI shares will be as under:

Sale price for 12000 shares as declared Rs.764346.

Less cost of shares as on 13/8/2007 at average @ Rs.65.2 = $67 \times 12000 = 782400$. Thus this transaction would have resulted in short term capital loss of Rs.18054.

The appellant has not shown source of Rs 782400/- which he must have paid to buy shares. The appellant has shown payment of Rs 119530/- to M/s. Chandravadan Bhaichand Muchchala. On 10/8/2007 appellant could not have purchased 12000 shares of IFCI for Rs.119530/- since the cost at prevailing stock exchange rate was Rs.782400 @ Rs.65.20 per share. Logically the appellant must have paid the balance amount i.e. $782400 - 119530 = 662870$ from unknown sources.”

5. Aggrieved, the assessee is now filed an appeal before the Tribunal raising 7 grounds of appeal out of which Ground No.7 is general in nature which needs no adjudication and Ground No. 1 to 6 are focused towards addition of Rs. 6,62,870/- confirmed by the Ld.CIT(A). The Ld. Counsel for the assessee submitted that; “Assessee purchased 12,000 shares of the IFCI Limited on 17.10.2006 at a price of Rs.9.95 per share. The same can be verified from the contract note and bill issued by the broker. IFCI Limited is a listed company. IFCI, previously Industrial Finance Corporation of India, is an Indian government owned development bank to cater to the long-term finance needs of the industrial sector and is a well recognized government undertaking. Assessee got these shares of IFCI converted into D-Mat form and received the same in his D-mat account on 13.08.2007. Afterwards, the assessee sold these shares on 17.08.2007 for a sum of Rs.7,64,346/- (average price of Rs.63.69 approx.). Assessee disclosed these transactions in his return and offered the difference amount of Rs.6,44,816/- ($7,64,346 - 1,19,530$) as short term capital gain. Date of actual purchase and date of dematerialization are not relevant since the character of gain resulting from sale of shares of IFCI remains Short Term Capital Gain, whichever date is concerned. It is not a case where benefit of long term capital gain is being claimed by the assessee.

He further mentioned that in the present case, the Ld. CIT(A) has not brought on record any evidence to prove that the assessee has in fact purchased the shares of IFCI Ltd on 10.08.2007 at the alleged price of Rs.7,82,400/- and on the contrary he has summarily rejected the evidences regarding the purchase of these shares placed before him. More so he has

accepted the amount of purchase price originally paid of Rs.1,19,530/- and has also allowed credit of the same from his hypothetical calculation of alleged purchase price paid. This entire exercise, it is most respectfully submitted, is based purely on guess work. None of the documents including contract note for purchase, for sale, confirmation letter from the broker along with ledger account of the assessee in his books of account relating to purchase transaction, DMAT account, bank pass book, share price from the website of www.bseindia.com have been proved to be bogus, fabricated, sham, false, fictitious by the authorities below. The impugned transaction made through DMAT account is in itself a sufficient evidence to prove its genuineness. The basis of addition u/s 68 and the basis of sustaining the same, both are contrary to law and also to the facts of the case. It is a settled position of law that onus of proof that the apparent is not real lies upon the person who claims it to be so. In the present case the Ld.CIT(A) has not brought on record any documentary or other evidence to substantiate his conclusion (assumption) that the assessee has purchased the said shares on 10.08.2007.

This view was upheld by the Hon'ble Supreme Court in the case of **CIT vs Dualat Ram Rawatmull [87 ITR 349 (SC)]** The relevant paragraphs of the order are reproduced below:-

“The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of B, the burden laid on the department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of B. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. So far as the source was concerned, there was no material on the record to show that the amount came from the coffers of the respondent firm or that it was tendered in B Calcutta branch of the Central Bank, on behalf of the respondent. As regards the destination of the amount, there was nothing to show that it went to the coffers of the respondent. On the contrary, there was positive evidence that the amount was received by B. It would thus follow that both as regards the source as well as the destination of the amount, the material on the record gave no support to the claim of the department”

Further the addition u/s 68 to the extent of Rs.6,62,870/- has been confirmed by the Ld.CIT(A) only on the basis of assumptions and conjectures (that the assessee **must have paid** some amount and was not able to prove the source of the same). It is mostly respectfully submitted that the assessee cannot prove source of a payment which has been assumed to have been made, by the Ld. CIT(A).

He added that it is well settled position in law that no addition can be made merely on the basis of conjectures and surmises. The addition must be based upon relevant information and evidences. An addition sustained only on the basis of conjectures and surmises is vitiated and deserves to be deleted. This view has been fortified by the **Hon'ble Apex court** in the case of **Dhakeswari Cotton Mills Ltd. vs. CIT (26 ITR 775 (SC))** relevant paragraphs are reproduced for sake of convenience to your honours:-

“As regards the second contention, although ITO is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in **making the assessment under section 23(3) he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all and there must be something more than bare suspicion to support the assessment**”

Also in the case of **Shreelekha Banerjee and others vs. CIT(A) 49 ITR 112**. The Hon'ble **Supreme Court** has held that before department rejects any evidence, it must either show an inherent weakness in the explanation or rebut the same by putting to the assessee some information or evidence which it has in its possession. The department cannot by merely rejecting unreasonably a good explanation convert good proof into no proof.

6. On the other hand the Ld. Departmental representative supported the order of lower authority.

7. We have heard rival contentions and perused the records carefully.

8. In Ground No. 1 to 6 raised by the assessee, the sole grievance is against the order of Ld.CIT(A) partly confirming the addition made by Ld. A.O by treating the short term capital gain of Rs.6,62,870/- as income from undisclosed sources which was added by the Ld.A.O applying provisions of section 68 of the Act. We observe

that the issue revolves round the transaction of short term capital gain from sale of shares. The Ld.A.O has doubted the genuineness of purchase of IFCI shares which were bought through the broker M/s. Chandravan Bhaichand Muchchala, Mumbai by contract note No.7024 dated 17.10.2006. At that point of time price per equity share of IFCI Ltd was Rs.9.95. However the payment for this purchase of Rs.1,19,530/- was made after nine months i.e. 1.7.2007. The 12000 equity shares bought by the assessee @Rs.9.95 per share were transferred to Dmat account on 13.8.2007 and then these were sold on 17.8.2007 and the price per equity share on the date of sale was around Rs.63.

9. The Ld.A.O doubted the impugned purchase because the payment was made after nine months even when there was no regular transaction between the assessee and broker and also there was extra ordinary increase in the prices of the equity shares. As mentioned by the Ld.A.O in the impugned assessment order that National Stock Exchange denied of having any transaction of purchase of IFCI td. shares by the assessee due to this reason the purchases were doubted and the transaction was treated as spam and the alleged sale receipt from sale of shares was treated as unexplained income. When the matter came up before the Ld.CIT(A), he ignored the existence of any purchase made on 17.10.2006 and calculated the short term capital gain by taking cost of equity shares on the date of dematizing of 12000 equity shares. This resulted into the short term capital gain loss totaling Rs.18,504/-.

The Ld.CIT(A) accordingly treated Rs.6,62,870/- as income from unknown sources after giving benefit of purchase cost of Rs.1,19,530/- against the sale consideration.

10. Before moving further we will like to reproduce the findings of Hon'ble Gujarat High Court in the case of CIT V/s Himani M Vakil [2014] 41 taxmann.com 425 (Gujarat HC) wherein similar issue and almost identical facts came up for adjudication and Hon'ble High Court dismissed the revenue's appeal observing as follows;

“Whether on facts and circumstances of the case and in law, the Hon'ble ITAT is right in deleting the addition of Rs.36,72,631/- made u/s 68 by the Assessing Officer by treating the Short Term Capital Gain as unexplained cash credit?”

2. The assessment year is 2006-07 and the relevant accounting period is 1.04.2005 to 31.3.2006. The respondent – assessee, an individual, filed her return of income showing total income of Rs.8,72,299/- including short term capital gain of Rs.2,78,413/- and long term capital gain of Rs.3,41,683/-. During the year under consideration the assessee claimed long term capital gain of Rs.34,65,171/- on a scrip named Shri Nidhi Trading Limited. On scrutinizing the complete transaction the total sale value came to Rs.36,72,631/- and total purchase value came to Rs.2,07,460/-. The assessee accordingly showed capital gain of Rs.34,65,171/-. The Assessing Officer after seeking details from the parties treated the sum of Rs.36,72,631/- credited in the books of accounts unexplained cash credit under section 68 of the Act and brought it to tax. The assessee carried the matter in appeal before the Commissioner (Appeals) who allowed the said ground of appeal and directed the Assessing Officer to accept the claim of the assessee of Rs.34,65,171/- as capital gains. The revenue carried the matter in appeal before the Tribunal, but did not succeed.

3. Mr. Manav Mehta, learned counsel for the appellant has assailed the impugned order by placing reliance upon the reasoning adopted by the Assessing Officer.

“4. As can be seen from the impugned order, the Tribunal, after appreciating the evidence on record, has found that before the Assessing

Officer the assessee had explained that the purchase transactions were made on the "Online Trading System" and these transactions are genuine. Earlier, this is prior to 1.4.2005, it was not compulsory for the client to have his own transaction record under SEBI guidelines. Therefore, the purchases earlier were made using the broker's code, and it was for this reason that the broker had used the "self code". Since the shares were sold after 1.4.2005, the transactions were not under the broker's code. As regards service tax and stamp charges the contract note of the broker clearly mentioned that the brokerage was inclusive of service tax etc. In the case of the selling broker the Service tax Securities Transaction tax and Education Cess were separately mentioned. As regards the point raised by the Assessing Officer that there was absence of broker-client agreement, the Tribunal accepted the submission of the assessee that the genuineness of the transactions was already proved by the contract notes for sale and purchase, the bank statement of the broker, the Demat Account showing transfer in and out of shares, as also abstract of transactions furnished by the CSE. The Tribunal, after appreciating the evidence on record, concurred with the findings recorded by the Commissioner (Appeals) that the assessee had furnished complete details which were not found false or bogus by the Assessing Officer and that it was only on suspicion that the Assessing Officer had treated the capital gain declared by the assessee as unexplained cash credit under section 68 of the Act. In the light of the aforesaid findings of fact recorded by it, the Tribunal dismissed the appeal of the revenue.

5. In the light of the above findings of fact recorded by the Tribunal, it is not possible to state that the view adopted by the Tribunal is, in any manner, unreasonable or perverse. Besides, the learned counsel for the appellant is not in a position to show that the Tribunal has placed reliance upon any irrelevant material or that any relevant material has been ignored, nor is he able to point out any material to the contrary so as to dislodge the concurrent findings of fact recorded by the Tribunal. Under the circumstances, the impugned order being based upon concurrent findings of fact recorded by the Tribunal upon appreciation of the evidence of record, does not give rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeal is, accordingly, dismissed."

11. Now in order to appreciate and examine the facts in the light of above judgment, we find that the assessee placed following documents before the lower authorities;

1. Contract note cum bill of broker from whom shares were purchased;

2. *Confirmation of accounts from the same broker*
3. *Copy of ledger accounts of Broker*
4. *Copy of bank account of the assessee*
5. *Copy of D-mat account of the assessee*
6. *Copy of statement of affairs of the assessee*
7. *Copy of contract note cum bill for sale of shares*

12. Now above referred details except for the genuineness of purchase, the Ld.A.O has not challenged the genuineness of other details most importantly the sale of shares which have been effected by the assessee through Bombay Stock Exchange portal and sold through Angel Capital & Debt Market Ltd. The relevant documents in the paper book from page 23 to 30 prove beyond doubt the genuineness of sale of equity shares. It is also not disputed that the share of IFCI Ltd were dematized after the purchase and they have been debited from this account at the time of sale. As far as purchase is concerned the shares have been purchased through a registered broker who is a member of Stock Exchange, Bombay having SEBI registration No.INB010005219. For the only reason that the payment of purchase has been made after a lapse of 9 months cannot render the purchase as non genuine unless and otherwise any material is brought on record which could negate this fact.

13. Further we find that the addition has been made for the unexplained credit of Rs.7,64,346/- but nowhere right from the assessment proceedings and till the proceedings before the appellate authority, revenue authorities have ever doubted the

source of amount of sale consideration of Rs.7,64,346/- which the assessee received through banking channel from sale of shares held in Dmat account through the recognized stock exchange which is verifiable from the contract note.

14. We therefore in the given facts and circumstances of the case are of the considered opinion that both the lower authorities erred in treating the alleged transaction of sale of equity shares as a sham transaction. We accordingly set aside the findings of both the lower authorities and allow the appeal of the assessee and further hold that the assessee has rightly shown the short term capital amounting to Rs.6,44,816/- from sale of equity shares of IFCI Ltd. In the result Ground No. 1 to 6 of the assessee's appeal are allowed.

15. In the result the appeal of the assessee is allowed.

The order pronounced in the open Court on 19.01.2018.

Sd/-

(KUL BHARAT)

JUDICIAL MEMBER

Sd/-

(MANISH BORAD)

ACCOUNTANT MEMBER

दिनांक /**Dated : 19 January, 2018**

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore

- 1.** Date of dictation : 16/01/2018
- 2.** Date on which the typed draft is placed before the Dictating Member : 17/01/2018
- 3.** Date on which approved draft comes to the Sr.P.S./P.S: 18.1.2018
- 4.** Date on which the fair order is placed before the dictating Member for pronouncement: 18.1.2018
- 5.** Date on which the fair order comes back to the Sr.P.S./P.S.:19.1.18
- 6.** Date on which the file goes to the Bench Clerk:
- 7.** Date on which the file goes to the Head Clerk:
- 8.** The date on which the file goes to the Assisstant Registrar for signature of the order.
- 9.** Date of Despatch of the Order: