

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES (SMC), JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 624/JP/2015  
निर्धारण वर्ष/Assessment Year : 2005-06

Shri Suresh Poddar C/o M/s Poddar Yarn Agencies, Katla Purohit, Johari Bazar, Jaipur.	बनाम Vs.	Income Tax Officer, Ward 1(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACLPP3746K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (C.A.)  
राजस्व की ओर से / Revenue by : Smt. Poonum Rai (DCIT)

सुनवाई की तारीख / Date of Hearing : 30/11/2017  
उदघोषणा की तारीख / Date of Pronouncement : 30/01/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 24.04.2015 of Id. CIT(A), Jaipur for the assessment year 2005-06. The assessee has raised the following grounds:-

*"1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in summarily upholding the action of Id. AO of initiating proceedings u/s 148 and consequently completing assessment u/s 147 r.w.s. 143(3) of the Income Tax Act, 1961 merely on the basis of statements of third party who was not even allowed to be cross examined, thus, the said action of Ld.*

*CIT(A) as well as Ld. AO deserves to be held bad in law and the consequent order passed deserves to be hold void-ab-initio.*

*2. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the addition of Rs. 4,35,282/- made by holding the capital gain declared by assessee as bogus without appreciating the submission of assessee and the evidences submitted by assessee duly substantiating the transaction of purchase and sale of equity shares of m/s Talent Infoways Ltd., Jaipur. Thus, the action of Ld. AO in making the impugned addition deserves to be held bad in law and the addition of Rs. 4,35,282/- deserves to be deleted.*

*2.1 That the Ld. CIT(A) has further in upholding the action of Ld. AO in making the impugned addition by solely relying upon the statements of director of M/s Mahasagar Group of companies, without:*

- a. Verifying his statements with the evidences available on record*
- b. conducting any independent inquiry*
- c. allowing any opportunity of cross examination of Sh. Mukesh Choksi*

*Thus, the action of Ld. AO in making the impugned addition of Rs. 4,35,282/- deserves to be deleted.*

*3. That the appellant craves the right to add, delete, amend or abandon any of the grounds of this appeal at the time or before the actual hearing of the case."*

2. Ground No. 1 is regarding validity of reopening of the assessment. The assessee is an individual and filed his return of income for the assessment year under consideration on 29.10.2005 declaring income of Rs. 4,07,974/-. After claiming the deduction u/s 54F of the Act against long term capital gain arising from sale of shares of M/s Talent Inforways Ltd. The return of income was processed u/s 143(1) subsequently, the AO

received a report from DDIT Investigation, Mumbai regarding the search carried out at the premises of Mahasagar group of companies belonging to Shri Mukesh Choksi who admitted to have provided accommodation entries shares profits, capital gain etc. Accordingly, the AO proposed to reopen the assessment by issuing a notice u/s 148 on 06.01.2012. The assessee filed the objections against notice issued u/s 148 of the Act which were disposed of by the AO by separate orders dated 22.10.2012. The AO accordingly completed the reassessment u/s 143(3) r.w.s. 147 on 23.01.2013 making an addition of Rs. 4,35,282/- on account of sale proceeds of shares of M/s Talent Infoways Ltd. by treating the transaction as bogus. The assessee challenged the action of the AO before the Id. CIT(A) and also raised the objection against the validity of reopening of assessment. The Id. CIT(A) issued a remand order and after considering the remand report of the Assessing Officer upheld the validity of the reopening of the assessment.

3. Before us, Id. AR of the assessee has submitted that the assessment was reopened by the AO without recording proper satisfaction as to the escaped income and by forming the belief merely on the basis of information supplied by some other authority and by relying upon the uncorroborated statement of third party. Therefore, the AO not applied its own mind while forming the belief that the income assessable to tax has

escaped assessment but the AO has solely relied on the information received from DDIT Investigation, Udaipur and the report of DDIT Investigation Mumbai. The Id. AR has thus submitted that the reasons recorded by the AO are not sufficient to form the belief that the income assessable to tax has escaped assessment. He has referred to the reason recorded by the AO for reopening of assessment and submitted that the assessment was reopened merely on the basis of the information gathered from Investigation Wing without arriving at the objective conclusion drawn after examining the so-called evidence gathered. Therefore, the belief has been formed on the basis of the so called information supplied by the DDIT that the assessee has obtained bogus entries of capital gain without actual entering into any such transaction. In support of his contention he has relied upon the decision dated 21.05.2014 Jodhpur Bench of Tribunal in case of Vinayak Shyam Enterprises (P) Ltd. vs. ITO in ITA No. 104/Jodh/2014 and submitted that the Tribunal has held that when the AO has initiated proceeding u/s 147/148 of the Act merely on the basis of the information received from DDIT Investigation then the AO has not applied his mind to the information to independently arrive at a belief that on the basis of material before him the income has escaped assessment. He has also relied upon the decision of Jodhpur Bench of Tribunal dated 16.05.2014 in case M/s Surbhi Minchem Pvt. Ltd. vs. ITO in ITA No. 102&

103/Jodh/2014 and submitted that the Tribunal has reiterated its view on the issue that when the Assessing Officer has acted on the information supplied by the DDIT Investigation but has not applied independent mind then, the initiation of proceeding u/s 147/148 of the Act are bad in law.

4. On the other hand, Id. DR has submitted that the return of income filed by the assessee was processed u/s 143(1) of the Act, therefore, there is no assessment. He has further submitted that in the reasons recorded for reopening of assessment, the AO has clearly stated that after going through the return of income filed by the assessee as well as the information/ report received from DDIT Investigation, Mumbai and Udaipur it was found that the income assessable to tax on A/c of claim of exemption u/s 10(38) of M/s Talent Infoways Ltd. being bogus transaction. On sale of share he has relied upon the decision of Hon'ble Supreme court in case of ACIT vs. Rajesh Jhaveri Stock Broker Pvt. Ltd. 291 ITR 500 and submitted that at the stage of reopening of the assessment the AO is not required to establish the correctness of the information or material but if the information and material came to be knowledge of the AO prima facie sufficient to form the belief that the income assessable to tax as escaped assessment then the reopening is proper and valid. In the case of the assessee the DDIT report disclosed that M/s Mahasagar Securities Pvt. Ltd. indulged in fraudulent activity of providing accommodation entries of

capital gain and the assessee has claimed to have purchased the shares through M/s Mahasagar Securities Pvt. Ltd. constitute as tangible material sufficient to form the belief that the income assessable to tax as escaped assessment. He has relied upon the orders of the authorities below.

5. I have considered the rival submissions as well as relevant material on record. The assessee filed his return of income on 29.10.2005 declaring long term capital gain of Rs. 4,35,282/- arising from the sale of shares of M/s Talent Infoways Ltd. The Assessee has also claimed deduction u/s 54F of the Act of Rs. 4,27,779/- for purchase of residential house out of long term capital gain arising of sale of shares. The assessee has claimed to have purchased 5,900 equity shares of M/s Talent Infoways Ltd. for Rs. 7,455/- on 24.04.2003 through the broker of M/s Mahasagar Securities Pvt. Ltd. the payment of purchase consideration was stated to have been made in cash. The return of income was initially processed u/s 143(1) however, subsequently the AO reopened the assessment by issuing a notice u/s 148 of the Act on 06.01.2012 by recording the reasons for reopening as under:-

*"(3) Long Term Capital Gain (LTCS): In such cases a back dated purchase bill is issued to the clients. Against such purchase bills. If the client has cash in hand, on the alleged date of purchase, it is shown to have been received on that day but if not, a back dated speculation profit bills is given of a similar amount so that the so that he purchase can be shown to have been made out of such*

*profit. But obviously no actual delivery of shares takes place on the date of purchase because the entire purposes are fraudulently shown to have taken place on an earlier date. The minor balance, if any, lying in the ledger account is transferred to the 'discount' account. The shares are transferred to the demat account of the client (off market) when the client wishes to avail Long Term Capital Gain (generally around of few days before the date when the client wishes to avail the gain). Many clients ask for what are known as holding letters which are basically letters issued from the various alleged broking companies of the Mahasagar /Alag group that they have purchased 'x' amount of shares on behalf of the such clients on a particular date and these companies are holding them in their poor account on behalf of these clients. This letter is usually produced before various authorities to prove that the alleged purchase of shares has taken place over a year ago. The client then does one of tow things-either he sells the shares in the open market ( through BOLT i.e. through his stock broker) and avails LTCG or STCG. In such cases also, if the shares involved are prominent shares like MMTC, the sale actually takes place in the open market. But if these are shares some penny stock companies like Talen Infoway Limited etc. then the shares are purchased by the group companies of Mukesh Choksi or by this associates through BOLT available in their offices. In the other types of cases, the client/beneficiary transfer these shares to the Mukesh Choksi group of companies (through off market transactions). Such off –market receiving back of shares is recorded is 'Touch and Go' bills transactions. The alleged broking companies issue sale bills to the client. However the bills provided by the 'broking' companies reflect the transaction as having been done on market. Thus in Touch and Go cases both sides of the transaction are bogus."*

It is apparent from the reasons recorded that the Assessing Officer has reopened the assessment after examination of return of income filed by the assessee, claim of exemption u/s 54F of the Act of Rs. 4,27,779/-

against the long term capital gain arising from sale of shares M/s Talent Infoways Ltd. Thus, the AO after receiving the information from Investigation Wing, Udaipur along with the report of DDIT, Mumbai noted that the assessee purchased the shares of M/s Talent Infoways Ltd. through broker M/s Mahasagar group of companies which were found to be providing accommodation entries and engaged fraudulent billing activity etc. The Assessing officer has clearly stated in the reasons recorded that such sale of shares transaction is made in lieu of cash paid out of undisclosed source of income and the same was shown as investment made in the property to the extent of Rs. 4,27,779/- claimed as not taxable u/s 54F of the Act and therefore, such sum has escaped assessment. There is no dispute that at the time of initiation of proceedings u/s 147/148 of the Act what is required formation of belief on the basis of the material came to the knowledge of the AO indicating the income chargeable to tax as escaped assessment. Sufficiently of correctness of material is not required to be considered at the stage of initiation proceeding u/s 147/148 of the Act. Therefore, if the material available with the AO is prima facie sufficient to form the belief that the income chargeable to tax has escaped assessment then it is immaterial whether the said material subsequently found to be not sufficient for making the addition, the commencement of reassessment proceeding

cannot be held as invalid if the same is sufficient to form the belief at the time of initiation. Accordingly, I hold that the Assessing officer has applied his mind on the relevant material comprising of return of income filed by the assessee, the transaction of purchase and sale of shares, claim of long term capital gain as well as deduction u/s 54F of the Act in light of information received from DDIT Udaipur along with the report of the DDIT Mumbai. The decisions relied upon by the Id. AR are not applicable in the case of the assessee because of the reasons that the Tribunal has decided the issue in those cases by taking note of the fact that the AO issued notice u/s 148 of the Act acting on the directions given by DDIT Investigation. Therefore, it was considered by the Tribunal that the Assessing Officer has not applied his own independent mind to arrive at the belief but simply followed the directions of the DDIT Investigation whereas, in the case of the assessee the AO applied his own mind to form an independent belief after analyzing the relevant material and information that the income chargeable to tax has escaped assessment to the extent of claim of long term capital gain on purchase and sale of shares. Hence, I do find any reason to interfere with the orders of the authorities below qua this issue.

6. Ground No. 2 is regarding the addition made by the AO of Rs. 4,35,282/- treated the same as undisclosed income of the assessee. The

Id. AR of the assessee has submitted that the assessee has produced all the relevant details and evidence in support of transaction of purchase of shares of M/s Talent Infoways Ltd. The assessee has produced the contract note of M/s Mahasagar Securities Pvt. Ltd. through whom the shares were purchased in payment of cash. He has further contended that the AO has treated the transaction of purchase and sale of shares as bogus transaction on the basis of the statement of Shri Mukesh Choksi whereas no evidence was found during the course of search which could establish that the assessee has entered into bogus transaction of capital gain. Further, the Shri Mukesh Choksi has not stated anything about the transaction with the assessee or the name of the assessee was mentioned by him. Even he has not mentioned the name of M/s Talent Infoways Ltd. in his statement and therefore, the said statement of Shri Mukesh Choksi cannot be applied in general in respect of all the transactions of purchase and sale of shares through broker M/s Mahasagar Securities Pvt. Ltd. He has further submitted that no opportunity to cross examine Shri Mukesh Choksi was provided to the assessee inspite of repeated request. The assessee produced contract note for purchase as well as sale of shares, copies of stock statement wherein the sale consideration of the shares were reflected and balance sheet as on 31.03.2004 where in the said shares have been shown under the head investment. Therefore, the

capital gain cannot be treated as bogus when the assessee has produced all relevant evidence in support of claim. He has relied upon the decision of Hon'ble Bombay High Court dated 07.09.2011 in case of CIT vs. Shri Mukesh Ratilal Marolia in ITA No. 456 of 2007 whereby the order of the Tribunal has been upheld on the issue of the capital gain treated by the AO as bogus. The Id. AR has further submitted that the Mumbai Bench of Tribunal in case of M/s Farrah Marker vs. ITO in ITA No. 3801/MUM/2011 dated 27.04.2016 has also held that when the assessee has purchased the shares in physical form and then dematerialized before the sale thereof then the assessee established holding of the shares which cannot be treated as bogus. Thus, the Id. AR of the assessee has submitted that capital gain declared by the assessee is genuine claim and the authorities below have treated the same as bogus only on the basis of the statement of Shri Mukesh choksi a third party without giving the assessee an opportunity of cross examination or without any corroborating evidence, therefore, the same is not justified.

7. On the other hand, Id. DR has relied upon the orders of the authorities below and submitted that the assessee has failed to prove the genuineness of the transaction because he claimed of purchase of shares against the cash which clearly show that the assessee has indulged in

obtaining the bogus entry of capital gain in the penny stock paying a nominal amount on record and receiving the huge amount of capital gain which clearly show that the assessee has paid the amount which is undisclosed income of the assessee for converting the same as long term capital gain to be claimed as exempt u/s 54F of the Act. He has relied upon the decision of Hon'ble Supreme Court in case of C. Vasabtkalal & Co. vs CIT 45 ITR 206.

8. I have considered the rival submissions as well as relevant material on record. I find that the assessee claimed to have purchased 5,900 equity shares of M/s Talent Infoways Ltd. for a consideration of Rs. 7,455/- on 24.04.2003. The shares were purchased through broker M/s Mahasagar Securities Pvt. Ltd. a company of Shri Mukesh Choksi which was found to be indulged in providing bogus bills as well as the shares application money and capital gain accommodation entry during the search and seizure conducted by the Investigation Wing, Mumbai. There is no dispute in his statement Shri Mukesh choksi has stated to have provided the accommodation entry of shares, speculative profit, capital gain etc. It is also undisputed facts that he has not specifically stated about the transaction of providing the accommodation entry to the assessee. In the case in hand the assessee paid purchase consideration of Rs. 7,455/- for

purchase of 5,900 equity shares which show that the shares were purchased at a price just about Rs. 1.50/- per share and therefore, it was a transaction of purchase of penny stock. The assessee then, sold these shares on 28.07.2004 for a consideration of Rs. 4,35,420/- through the same broker M/s Mahasagar Securities Pvt. Ltd. The decision relied upon by the assessee are based on the facts that after purchasing the shares the assessee got dematerialized the same and thereafter, the shares were sold from the demat account of the assessee and therefore, it was held that the holding of the shares by the assessee in the demat account cannot be disputed and consequently the transaction of sale of shares cannot be held as bogus transaction. However, in the case in hand the assessee has not produced any record to show that the shares were dematerialized prior to the sale and therefore, the decisions relied upon by the assessee are not applicable in the facts of the case. As regards the transactions of purchase and sale as claimed by the assessee it is apparent from the quantum of purchase consideration and sale consideration that the assessee has purchased the shares as penny stock and then claim to have sold the shares at very high price. The transactions are shown in such way that even after one year of the alleged transaction the same can be shown in the books of accounts as the return of income is filed much after the end of the financial year and therefore, the purchase has been shown

in April, 2003 and sale of shares have been shown in the month of July, 2004 just before the filing the return of income for the assessment year 2004-05. Accordingly even it cannot be ruled out that the transfer can be manipulated in the accounts as prior to the filing of return of income for the assessment year 2004-05 the assessee can very well show the shares in the balance sheet as on 31.03.2004. Thus, the record and material filed by the assessee in support of transaction of the purchase and sale of shares are not sufficient to come to the conclusion that the assessee as actual purchase these shares on the date as claimed by the assessee and even the prevailing market price of the shares of M/s Talent Infoways Ltd. at the time of purchase was same as the purchase price claimed by the assessee. All these aspects have not been examined by the AO but the addition has been made by the AO on the basis of the Investigation report and statement of Shri Mukesh Choksi. Accordingly, I am of the considered view that this matter requires a proper investigation and verification of the relevant facts particularly the prevailing market price or fair market price of the shares of M/s Talent Infoways Ltd. at the time of alleged purchase as well as at the time of alleged sale of shares. Further, if the shares were dematerialized before the same were sold then the holding of the shares cannot be disputed as at the time of dematerialized and the purchase consideration can be considered on the date of dematerialization after

considering the prevailing market price or fair market value of the shares on that date. Since, the transfers of purchase and sale are all market transactions and therefore, a proper investigation and inquiries is needed in this case. Accordingly the issue is set aside to the record of the AO for conducting the proper inquiry and for adjudication of issue without relying on the statement of Shri Mukesh Choksi alone.

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

Order pronounced in the open court on 30/01/2018.

Sd/-  
( विजय पाल राव )  
(VIJAY PAL RAO)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 30/01/2018

\*Santosh

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Suresh Poddar, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 624/JP/15)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar