

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं

श्री एस जयरामन, लेखा सदस्य के समक्ष

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND  
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.2786 & 2787/Chny/2017

निर्धारण वर्ष /Assessment Years: 2010-11 & 2011-12

Shri Heerachand Kanunga,  
360, Mint Street,  
Sowcarpet,  
Chennai-600 079.

**Vs.** The Income Tax Officer,  
Non-Corporate Ward-4(4),  
Kannammai Building,  
No.611, Anna Salai,  
Chennai-06

**[PAN: AAMPK 5896 L]**  
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Ms.Sushma Harini.A, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.N.Madhavan, ACIT

सुनवाई की तारीख/Date of Hearing

: 03.05.2018

घोषणा की तारीख /

: 03.05.2018

Date of Pronouncement

**आदेश / O R D E R**

**PER GEORGE MATHAN, JUDICIAL MEMBER:**

ITA No.2786/Chny/2017 is an appeal filed by the assessee against the Order of Commissioner of Income Tax (Appeals)-5, Chennai, in ITA No.133/CIT(A)-5/2016-17 dated 19.09.2017 for the AY 2010-11 and ITA No.2787/Chny/2017 is an appeal filed by the assessee against the Order of Commissioner of Income Tax (Appeals)-5, Chennai, in ITA No.132/CIT(A)-5/2016-17 dated 19.09.2017 for the AY 2011-12.

2. Mr.N.Madhavan, ACIT, represented on behalf of the Revenue and Ms.Sushma Harini.A, Adv., represented on behalf of the assessee.

3. As both the appeals are related to the same assessee and are on identical issues, the same are being disposed off by this common order.

4. In the assessee's appeal, the assessee has raised the following grounds:

*1. The order of the Ld. CIT(A), is erroneous, opposed to law and facts and liable to be cancelled in full.*

*2.1 The CIT(A) erred in upholding the jurisdiction of the AO in re-opening the assessment u/s.147, in the absence of any tangible material brought on record to show escapement of taxable income.*

*2.2 The CIT(A) failed to note that the AO has not provided the Appellant reasons for reopening in spite of a specific request made.*

*3.1 The CIT(A) grossly erred in enhancing the income of the Appellant, which is untenable and without application of mind.*

*3.2 In any event, the CIT(A) could not have considered the purchase price of shares as income of this year.*

*4.1 The CIT(A) erred in upholding the denial of exemption u/s.10(38) of the Income-tax Act.*

*4.2 The CIT(A) ought to have seen that the sworn statement recorded from the stock broker Shri Ashok Kumar Kayan, upon which the entire re-assessment is based, has not been provided to the Appellant despite repeated requests during the scrutiny proceedings; nor an opportunity to cross examine him was afforded. This is arbitrary and against the principles of natural justice.*

*4.3 The CIT(A) erred in not appreciating the detailed evidences produced to prove the purchase and sale of shares of M/s. Bakra Prastisthan Ltd.*

5. At the time of hearing, it was a submission that the assessee does not wish to press the Ground Nos.2.1 & 2.2 in respect of the re-opening of the assessment. Consequently, Ground Nos.2.1 & 2.2 of the assessee's appeal are dismissed as not pressed.

6. It was submitted by the Ld.AR that the assessee is an individual who is doing business of stationery supplier. It was a submission that during the relevant Assessment Year, the assessee had filed his return of income, wherein, the assessee had claimed the benefit of exemption u/s.10(38) of the Act in respect of the Long Term Capital Gains in respect of the sale of the shares of M/s.Bakra Pratisthan Ltd., (in short "M/s.BPL") to an extent of Rs.52,87,500/- for both the years together with break-up being Rs.35,25,000/- for the AY 2010-11 and Rs.17,62,500/- for the AY 2011-12. It was a submission that the assessee had purchased 15000 shares of M/s.BPL @ Rs.20/- per share from M/s.Alishan Binimay Pvt. Ltd., (in short "M/s.ABPL"), Kolkata, for a consideration of Rs.3.00 lakhs on 24.04.2008. The shares were demated with M/s.Stock Holding Corporation of India Ltd., and sold through Shri Ashok Kumar Kayan, Stock Broker, on various dates and the sale proceeds credited into the bank account. On being questioned, the assessee had submitted that the shares were demated and sold through Shri Ashok Kumar Kayan and that he did not have any details of the company like the net profit, dividend, etc., and that he has not received any Annual Report nor he had attended any shareholder meeting. It was submitted by the Ld.AR that the AO on the basis of certain report received by him in respect of the said company M/s.BPL as also the said Stock Broker Shri Ashok Kumar Kayan was providing bogus Long Term Capital Gains entries had doubted the assessee's claim. It was a submission that it is alleged that Shri Ashok Kumar Kayan has mentioned the assessee's name in his statement, wherein, the list of

clients to whom he has provided the bogus Long Term Capital Gains facility. It was a submission that the statement of Shri Ashok Kumar Kayan has not been given to the assessee nor has the said Shri Ashok Kumar Kayan been provided to the assessee for cross-examination. It was a submission that the statement of Shri Ashok Kumar Kayan cannot be considered in so far as the principles of natural justice and the opportunity to cross-examine was not provided. The assessee relied upon the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries reported in 281 CTR 241 (SC). It was a submission that the assessee having produced all the evidences to show the genuineness of the transaction, the assessee's claim of exemption u/s.10(38) was liable to be allowed.

7. In reply, the Ld.DR vehemently supported the order of the AO & the Ld.CIT(A). It was submitted by the Ld.DR that the Ld.CIT(A) has also enhanced the assessment in so far as the entire sale proceeds of M/s.BPL was treated as the income of the assessee. It was a submission that in the statement recorded from Shri Ashok Kumar Kayan, it has been admitted by him that he was providing bogus Long Term Capital Gains entries to interested persons and the assessee's name had been specifically identified along with his PAN as one of the beneficiaries to the bogus transaction. It was a submission that the order of the Ld.CIT(A) & the AO was liable to be sustained.

8. We have considered the rival submissions.

9. A perusal of the facts in the present case admittedly given room for suspicion. However, assessments are not to be done on the basis of mere suspicion. It has to be supported by facts and the facts are unfortunately not forthcoming in the Assessment Order, in the order of the Ld.CIT(A) nor from the side of the assessee. The main foundation of the assessment in the present case is the statement of one Shri Ashok Kumar Kayan who has admitted to have provided bogus Long Term Capital Gains to his clients. The said Shri Ashok Kumar Kayan also allegedly seems to have provided the assessee's name and PAN as one of the beneficiaries. However, this statement given by Shri Ashok Kumar Kayan cannot be the foundation for the purpose of assessment in so far as Shri Ashok Kumar Kayan has not been provided to the assessee for cross-examination. In the absence of opportunity of cross-examination, the statement remains mere information and such information cannot be foundation for assessment.

10. Admittedly, the assessee has claimed to have purchased 15000 shares from M/s.BPL @ Rs.20/- per share totaling into Rs.3,00,000/-. The assessee claims to have paid cash for the purchase of these shares. The primary question would be as to where the purchase was done? If the purchase has been done in Kolkata, how was the cash transferred? When did the assessee received the share certificates and the share transfer

forms? How did the assessee overcome the provisions of Sec.40A(3)? Was there adequate cash availability in the books of the assessee on 24.04.2008? Did the assessee travelled to Kolkata? How was the transaction done? Who applied for the demating of the shares? When were they demated? When were the shares transferred to the demat account of the assessee? To whom were the shares sold during the Assessment Years 2010-11 & 2011-12? When were the cheques received by the assessee? From whom did the assessee received the cheques? Was there any cash deposit immediately prior to the issuing of the cheque from the bank account of the purchaser of the shares of the assessee?

11. A perusal of the Assessment Order at Para No.7.1 shows that in the Written Submissions, the assessee states that he has purchased 15000 shares of M/s.BPL from M/s.ABPL, Kolkata. However, in Para No.8.3, it is mentioned that the assessee in good faith has purchased the shares of M/s.BPL from a sub-broker in his friends circle. What is the true nature of the transaction? From whom did the assessee actually purchase the shares? Did the assessee take possession of the shares in its physical form? In Para No.8.1 of the Assessment Order, it is mentioned that the assessee is an investor and has been regularly trading in shares. If this is so, does the demat account show such transactions being done by the assessee or is this the only one of transaction. Thus, clearly the facts required for adjudicating the appeals are not forthcoming. There is no evidence whatsoever to show that the assessee has held the shares for

more than 12 months. This is because assuming that the demat has been done and the shares of M/s.BPL has come into the assessee's demat account and has immediately flown out. Then the factum of the possession of the shares for more than 12 months have to be proved by the assessee. This is also not forthcoming. In reply to a specific query, as the date of the demat of shares, it was submitted by the Ld.AR that the demat was done on various dates. Then the question rises as to why there is so much of difference in the dates of demating when 15000 shares have been purchased together on 24.04.2008. No details in respect of M/s.BPL company is known, what is the product of the company which had lead to the share value of the company to go up from Rs.20/- to Rs.352/- in a period of two years. This would clearly be a case where the share value of the company was hitting the circuit breaker of the stock exchange on a daily basis and obviously it would have drawn attention. This being so, as the facts are not coming out of the Assessment Order nor the order of the Ld.CIT(A) nor from the side of the assessee, we are of the view that the issues in this appeal must be restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity to substantiate its case and we do so.

12. The statement recorded by the Revenue from Shri Ashok Kumar Kayan cannot be used as an evidence against the assessee in so far as the statement has not been given to the assessee nor has Shri Ashok Kumar Kayan been provided to the assessee for cross-examination. However,

the assessee shall prove the transaction of the Long Term Capital Gains in respect of which the assessee has claimed the exemption u/s.10(38) by providing all such evidences as required by the AO to substantiate the claim as also by producing the persons through whom the assessee has undertaken the transaction of the purchase and sale of the shares which would include the sub-broker, friend and the broker through whom the transaction has been done, before the AO for examination.

13. In the result, the appeals filed by the assessee in ITA Nos.2786 & 2787/Chny/2017 are partly allowed for statistical purposes.

Order pronounced in the Open Court on May 03, 2018, at Chennai.

**Sd/-**

(एस जयरामन)

**(S. JAYARAMAN)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

**Sd/-**

(जॉर्ज माथन)

**(GEORGE MATHAN)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: May 03, 2018.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF