

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

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2991/Chny/2017
निर्धारण वर्ष /Assessment Year: 2010-11

Shri Ashok Jain,
No.46, Perumal Mudali Street,
Sowcarpet,
Chennai-600 079.

Vs. The Income Tax Officer,
Non-Corporate Ward-4(1),
Chennai-600 006.

[PAN: ADZPA 4031 F]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mrs.A. Sushma Harini, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.B.Sagadevan, JCIT

सुनवाई की तारीख/Date of Hearing

: 20.06.2018

घोषणा की तारीख /Date of Pronouncement

: 25.06.2018

आदेश / ORDER

PER ABRAHAM P.GEORGE, ACCOUNTANT MEMBER:

Assessee in this appeal which is directed against the order dated 05.10.2017 of the Commissioner of Income Tax(A) is aggrieved on the denial of exemption claimed by her u/s.10(38) of the Act.

2. Ld.Counsel for the assessee submitted that a sworn statement taken/recorded from stock broker Shri Ashok Kumar Kayan and used by the Revenue for denying the exemption claimed by the assessee u/s.10(38) of the Act. However, this statement

as per the Ld.AR was never put to the assessee, nor the assessee given an opportunity to cross-examine the said person. As per the Ld.AR, the authorities lower had disbelieved the sale of shares made by the assessee through Shri Ashok Kumar Kayan based on his statement. As per the Ld.AR, the lower authorities erroneously considered the sale to be of penny stocks and round tripping thereby generating bogus Capital Gains which was claimed as exempt. Further, as per the Ld.AR, in a similar case in Smt.Anjana Jain v. ITO in ITA No.2606/Chny/2017, where also the very same broker was involved, this Tribunal had remitted the issue back to the file of the AO for giving a copy of the statement of Shri Ashok Kumar Kayan to the assessee.

3. Per contra, the Ld.DR submitted that another Co-ordinate Bench in the case of Heerachand Kanunga v. ITO in ITA Nos.2786 & 2787/Chny/2017 through its order dated 03.05.2018 had remitted a similar issue back to the AO with specific directions.

4. We have heard the rival contentions and perused the material placed on record. It is not disputed that exemption claimed by the assessee u/s.10(38) of the Act was denied disbelieving the claim of Long Term Capital Gains. The main reason why the claim was disbelieved was the statement given by a share broker Shri Ashok Kumar Kayan. It seems Shri Ashok Kumar Kayan stated that he was providing accommodation entry in the form of bogus Long Term Capital Gains, in connivance with entry operators and promoters of penny stock scripts. What was held by the Co-ordinate Bench of this Tribunal in the case of Smt. Anjana, supra, where also similar penny stocks were disbelieved based on the statement very same Shri Ashok Kumar Kayan is reproduced hereunder:

4. We have considered the rival submissions on either side and perused the relevant material available on record. The entire assessment appears to be made only on the basis of the statement of Shri Ashok Kumar Kayan, who is considered to be a penny stock broker. Admittedly, the statement said to be recorded from Shri Ashok Kumar Kayan was not furnished to the assessee. It is also not known whether the purchase price of the shares was paid by cheque or by cash. The Assessing Officer observed that the assessee did not disclose the mode of payment of purchase price. In those circumstances, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer. Accordingly, the orders of both the authorities below are set aside and the entire issue raised by the assessee is remitted back to the file of the Assessing Officer. The Assessing Officer shall furnish a copy of the statement said to be recorded from Shri Ashok Kumar Kayan to the assessee. The assessee shall also disclose the mode of payment of purchase price for purchasing the shares of Bakra Pratisthan Limited. Thereafter, the Assessing Officer shall examine the matter and decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

5. In the case of Shri Heerachand Kanunga (supra) where also the very same Shri Ashok Kumar Kayan was involved, what was held by the Tribunal is reproduced hereunder:

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.

6. In both the above cases, the matter has been remitted back to the AO. The directions given required the assessee to prove the transactions of the Long Term Capital Gains by providing all evidence required by the AO and the Revenue has been directed to give the statement of Shri Ashok Kumar Kayan to the assessee for rebuttal. Similar directions are given here also and the matter is remitted back to the AO for fresh consideration, in accordance with law.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court in June 25, 2018, in Chennai.

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P.GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated: June 25, 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