

**आयकर अपीलीय अधिकरण, 'ए' (SMC) न्यायपीठ, चेन्नई**

IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' (SMC) BENCH : CHENNAI

**श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।**

[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No. 3076/CHNY/2017

निर्धारण वर्ष /Assessment year : 2014-2015.

Rajesh Singhvi & Sons (HUF) **Vs.** The Income Tax Officer,  
No.156, Mint Street, Non Corporate Ward 6(1)  
Sowcarpet, Chennai.  
Chennai 600 079.

[PAN AAAHR 6894P]

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Mrs. B.Jaisheila, C.A.  
प्रत्यर्थी की ओर से /Respondent by : Mr. B. Sagadevan, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 03-07-2018

घोषणा की तारीख /Date of Pronouncement : 04-07-2018

**आदेश / ORDER**

In this appeal filed by the assessee directed against an order dated 03.10.2017 of Id. Commissioner of Income Tax (Appeals)-5, Chennai, it is aggrieved on denial of exemption claimed by it u/s.10(38) of the Income Tax Act, 1961 (in short "the Act") for the long term capital gains on sale of certain shares.

2. Ld. Counsel for the assessee submitted that assessee had earned ₹25,52,680/- on sale of 25,000 equity shares of M/s.Cresanda Commercial Solutions Ltd and 40,000 equity shares of M/s.Surabhi Chem & Investment Ltd. As per the Id. Authorised Representative, assessee had purchased these shares in 2007, 2009, 2010 and 2012 and held such shares as investment. Ld. Authorised Representative, submitted that the gains arising from sale of these shares which were held for more than twelve months, were not allowed exemption u/s.10(38) of the Act. According to him, whole of the consideration received on sale was treated as income under the head "income from other sources". As per the Id. Authorised Representative, lower authorities disbelieved the purchase and sale of the shares of M/s.Cresanda Commercial Solutions Ltd relying on the statements of Shri. Deepak Patwari, Shri. Anup Maheswari, Shri. Bikas Surekha, Shri. Anil Khemka, Shri. Amit Saraogi, Shri. Sauraj Jhunjhunwala, Mr. Sajendra Mookim, and Shri. Sanjeev Kumar Agarwal. For disbelieving the transactions relating to M/s.Cresanda Commercial Solutions Ltd, according to Id. Authorised Representative, lower authorities believed the statements given by various persons pursuant to a survey under Section 133A of the Act conducted in the premises of one M/s. Sikaria Share & Stock Broking Services Pvt. Ltd. Further, according to Id. Authorised Representative, records impounded during this survey were

also considered by the Id. Assessing Officer. However, as per the Id. Authorised Representative, none of these statements and records were given to the assessee nor such persons made available for a cross examination. Contention of the Id. Authorised Representative was that statements recorded behind the back of the assessee could not have been relied on by the Revenue for fastening a tax liability on the assessee. As per the Id. Authorised Representative, Id. Commissioner of Income Tax (Appeals) had confirmed the order of the Id. Assessing Officer treating the transactions to be that of penny stock companies relying on the reports of Investigation Wing of Income Tax Department, Kolkata.

**3.** Per contra, Id. Departmental Representative placing reliance on a decision of a Co-ordinate Bench in the case of *Heerachand Kanunga vs. ITO*, (ITA Nos.2786 & 2787/CHNY/2017, dated 03.05.2018) submitted that the issue might be required to be remitted back to the Id. Assessing Officer, so that due process of law is followed.

**4.** I have considered the rival contentions and perused the orders of the authorities below. Claim of the assessee for exemption u/s.10(38) of the Act, on alleged long term capital gains arising on sale of shares of M/s.Cresanda Commercial Solutions Ltd and

M/s. Surabhi Chem & Investment Ltd were disallowed by the Id. Assessing Officer considering these to be penny stock companies and alleging assessee's failure to bring evidence with regard to the genuineness of the transactions. It is not disputed by the Id. Departmental Representative that Revenue had relied on statements recorded during a survey u/s.133A of the Act in one M/s. Sikaria Share & Stock Broking Services Pvt. Ltd. for disbelieving the sale of shares in M/s.Cresanda Commercial Solutions Ltd. The assessment order also refers to statements of Mr. Deepak Patwari and Mr. Anup Maheswari, at para 4.4.2, statements of Mr. Bikas Sureka, Mr. Anil Khemka, Mr. Amit Saraogi, Mr. Sauraj Jhunjunwala, Mr. Sajendra Mookim at page 7 and that of Mr. Sanjeev Kumar Agarwal at page 8. These were all relied on by the Id. Assessing Officer for disbelieving the claim of sale in the shares of M/s. Surabhi Chemicals and Investments Ltd. It is also not disputed that statements recorded from these persons and records relied on by the Revenue for disbelieving the claim of the sale of shares, were not put to the assessee. Undisputedly, the sale of shares were through recognized stock exchange and through a recognized stock broker. In a similar case of *Heerachand Kaunga (supra)* decided by a Co-ordinate Bench, where also sale of shares in what is called as penny stock companies were disbelieved by the

Revenue for almost similar reasons, this Tribunal had held as under at para 9 to 12 of its order dated 03.05.2018.

*“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”.*

In line with the above, I am of the opinion that question regarding genuineness of the claim of long term capital gains requires to be restored to the Id. Assessing Officer for reconsideration after granting assessee adequate opportunity to substantiate its case. Revenue has to furnish to the assessee all the statements relied on by them. Useful reference may be made to the law laid down by Hon'ble Apex Court in the case of *CIT vs. Sunita Dhadha, SLP (Civil ) No.9432/2018, dated 28.03.2018*, while affirming a judgment of Hon'ble Rajasthan High Court in the case of *CIT vs.Smt. Sunita Dhadha*, where the importance of providing an opportunity to cross examine the witness has been stressed. Their lordship held that this was an important constituent of natural justice. Only after all the steps required under law is complete, it can be ascertained whether claim of capital gains was bogus or not. I therefore set aside the orders of the lower authorities and remit the issue back to the file of the Id. Assessing Officer for consideration afresh in accordance with law.

5. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced on Wednesday, the 4th day of July, 2018, at Chennai.

Sd/-  
(अब्राहम पी. जॉर्ज)  
**(ABRAHAM P. GEORGE)**  
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:4th July, 2018

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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