

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

श्री अब्राहम पी. जॉर्ज, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष ।
[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER]

आयकर अपील सं./I.T.A. No. 900/Mds/2018
निर्धारण वर्ष /Assessment year : 2013-2014.

Shri. Rajendra Kumar Hirawat,
No.10, Monteith Lane,
Egmore,
Chennai 600 008.

Vs. The Assistant Commissioner of
Income Tax,
Non Corporate Circle -9(1),
Chennai.

[**PAN AAAPH 6105P**]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. D. Anand, Advocate
प्रत्यर्थी की ओर से /Respondent by : Shri. Clement Ramesh Kumar,
Addl. CIT

सुनवाई की तारीख/Date of Hearing : 20-08-2018
घोषणा की तारीख /Date of Pronouncement : 03-09-2018

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the assessee, which is directed against an order dated 22.12.2017 of the Commissioner of Income-tax (Appeals)-10, Chennai, it is aggrieved that its claim of exemption on long term capital gains on sale of equity shares was not allowed but

considered as unexplained income u/s.68 of the Income Tax Act, 1961 (in short "the Act").

2. Facts apropos are that assessee filed his return of income for the impugned assessment year disclosing income of ₹78,49,730/-. Assessee had claimed long term capital gains of ₹58,83,606/- as exempt u/s.10(38) of the Act. Explanation of the assessee was sought on such long term capital gains. Its reply as under:-

"The assessee has been since year dealing in shares and securities and holding investments in various companies. The assessee had originally applied for 12500 shares of Parinidhi Properties Ltd. on 14.3.2011 and the payment amounting to ₹125000/- was made through Central Bank of India vide Chq No.217206 dated 14.3.2011 in favour of the company. The above company has allotted 12500 shares to the assessee vide their allotment letter dated 21.4.2011. The respective shares were dematted subsequently and are appearing in the demat holding at the assessee alongside the various other share holding. During the year 2012-13 on 20.10.2012 the said company Parinidhi properties was merged with luminaire Technologies vide court order and the 12500 shares of Luminaire Technologies Ltd were allotted directly in the demat account subsequent to merger. Further on 22.11.2012, 07.01.2013 and 14.02.2013 the assessee had sold the said 12500 shares in Bombay Stock Exchange Ltd (where the shares were listed) through a broker Shilpa Stock Broker Private Ltd. The assessee duly paid the applicable Securities Transaction Tax (STT). The respective contract of sale is enclosed for your kind perusal and records. The assessee duly received payment from the respective broker. "

3. Ld. Assessing Officer based on information coming out of investigations conducted by the Directorate of Income Tax (Inv) Kolkata, came to an opinion that the claim of long term capital gains

was on sale of penny stock of a paper company, operated by an entry operator called Shri. Deepak Patwari. As per Id. Assessing Officer Shri. Deepak Patwari had indentified the script of Luminaire Technologies Ltd, as one of such penny stock companies and also identified the persons to whom he had provided bogus long term capital gains. Further, as per Id. Assessing Officer assessee's name appeared in such list. He concluded that Shri. Deepak Patwari had in his statement accepted the creation of bogus entries for taking advantage of exemption given under section 10(38) of the Act on capital gains arising on sale of shares. Thus, he held that claim of long term capital gains by the assessee was not acceptable. The claim was not accepted and the amount of ₹58,83,606/- was added u/s.68 of the Act.

4. Appeal of the assessee before the Id. Commissioner of Income Tax (Appeals) was not successful. Id. Commissioner of Income Tax (Appeals) held that capital gains claimed by the assessee on sale of the shares of M/s.Luminaire Technologies Ltd was bogus. He upheld the order of the Id. Assessing Officer.

5. Now before us, Id. Authorised Representative submitted that the statement of Shri. Deepak Patwari was never made available to the assessee nor assessee given an opportunity to cross examine the said

person. Further, as per the Id. Authorised Representative, the reports of Investigation Department of Revenue (Calcutta) relied on by the Id. Assessing Officer was also not put to the assessee. Thus, according to him, there was gross violation of the rules of natural justice. Reliance was placed on decision of Co-ordinate Bench in the case of Vimal Chand Gulab Chand vs. ITO, Praveen Chand vs. ITO, Mahendra Kumar Bhandari C vs. ITO (ITA No.2003/2017, 1721/2017, 2293/17 & 2748/17, dated 06.4.2018).

6. Per contra, Id. Departmental Representative strongly supporting the orders of the lower authorities submitted that whole transactions were sham and make belief. According to him, Id. Commissioner of Income Tax (Appeals) was justified in treating the sum of ₹58,83,606/- as unexplained income u/s.68 of the Act. Reliance was placed on the decision of Co-ordinate Bench in the case of Heerachand Kanunga vs. ITO (ITA 2786 & 2787/2017, dated 03.05.2018).

7. We have considered the rival contentions and perused the orders of the authorities below. It is not disputed that long term capital gains claimed by the assessee as exempt u/s.10(38) of the Act arose on account of sale of equity shares of M/s. Luminairire Technologies Ltd. It appears that assessee could not produce any evidence as to

how it identified equity shares of M/s.Pardhi Properties Ltd., for making an off market purchase. Assessee received shares in M/s. Luminairre Technologies Ltd. by virtue of its holding in M/s.Pardhi Properties Ltd, when latter was merged with the former. In the case of Shri Heerachand Kanunga (supra) relied on by the Id. Departmental Representative what was held by the Co-ordinate Bench 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 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, we are 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, who has to give 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 Dhadda, 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 Dhadda*, 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. We 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.

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

Order pronounced on Monday, the 3rd day of September, 2018, at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)
(DUVVURU RL REDDY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)
(ABRAHAM P. GEORGE)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:3rd September, 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 |