

आयकर अपीलीय अधिकरण, ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' 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. 2660/CHNY/2017
निर्धारण वर्ष /Assessment year : 2014-2015.

M/s. Shanthilal & Sons (HUF)
No.31, Chandrappa Mudali
Street,
Sowcarpet, Chennai 600 079.

Vs. The Income Tax Officer,
Non Corporate Ward 6(3)
Chennai.

[PAN AAEHS 4521C]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Shri. D. Anand, Advocate

प्रत्यर्थी की ओर से /Respondent by

: Shri. Marudhu Pandian, Addl. CIT.

सुनवाई की तारीख/Date of Hearing

: 10-09-2018

घोषणा की तारीख /Date of Pronouncement

: 11-09-2018

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the assessee directed against an order dated 24.08.2017 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") on the long term capital gains on sale of certain shares.

2. Ld. Counsel for the assessee submitted that during the relevant previous year assessee had received sale consideration of ₹18,37,526/- on sale of 1,30,000 equity shares of M/s. Essar India Limited. As per the Id. Authorised Representative, assessee had purchased these shares on 28.06.2009 and held it as investment. Ld. Authorised Representative, submitted that the gains of ₹18,26,544/- arising from sale of these shares, which were held for more than twelve months, was 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. Essar India Ltd relying on the statements of Shri. Bikas Sureka, Shri. Anil Khemka, Shri. Amit Saraogi, Shri. Sauraj Jhunjunwala, Shri. Pravin Aganval, Shri. Pawan Kayan, Shri. Anand Rathi, Shri. Anil Aganval, Shri. Abhishek Kayan and Shri. Sajendra Mookim. According to Id. Authorised Representative, lower authorities also believed the statements given by various persons pursuant to surveys under Section 133A of the Act conducted in the premises of M/s. Gateway Financial Services Ltd and M/s. Dynamic Equities Pvt. Ltd. Further, according to Id. Authorised Representative, records impounded during these surveys 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. We 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.Essar India Ltd was disallowed by the Id.

Assessing Officer considering this to be a penny stock company 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 various statements recorded from various persons and records impounded during surveys u/s.133A of the Act mentioned at para 2 above for disbelieving the sale of shares. The assessment order refers to statements of of Mr. Bikas Sureka, Mr. Anil Khemka, Mr. Amit Saraogi, Mr. Sauraj Jhunjhunwala, Mr. Sajendra Mookim. These were all relied on by the Id. Assessing Officer for disbelieving the claim of sale in the shares. 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, 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 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. 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.

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

Order pronounced on Tuesday, the 11th 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: 11th 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 |