

आयकर अपीलीय अधिकरण, 'डी' (SMC) न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' (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.1264/CHNY/2018

निर्धारण वर्ष /Assessment Year : 2015-2016

Smt. Sarala Devi Betala,
No.13, Perummal Koil –
Garden St.,
Sowcarpet,
Chennai-600 079.

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

[PAN: AASPS 4297 D]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr. N.Vijay Kumar, CA
प्रत्यर्थी की ओर से /Respondent by : Shri. B. Sagadevan, JCIT.

सुनवाई की तारीख/Date of Hearing : 11.10.2018

घोषणा की तारीख /Date of Pronouncement : 15.10.2018

आदेश / ORDER

In this appeal filed by the assessee, which is directed against an order dated 13.02.2018 of Commissioner of Income-tax (Appeals)-5, Chennai, it has taken altogether twelve grounds of which grounds 1 & 12 are general, needing no specific adjudication.

2. Grievance raised by the assessee through its grounds 2 to 11 is on a disallowance of its claim of exemption u/s.10(38) of the Income Tax Act (in short "the Act") on long term capital gains arising out of sale of 5500 equity shares of one M/s.Lifeline Drugs & Pharma Ltd., and treating the consideration of Rs.13,56,420/- received on such sale under the head "income from other sources".

3. Ld. Counsel for the assessee submitted that assessee had acquired 200 equity shares of face value of Rs.10/- each of one M/s.Lifeline Drugs & Pharma Ltd., through off market purchase on 18.07.2012. As per the Ld.Authorised Representative, assessee on account of a bonus shares issued in the rate 4:1, received another 800 shares. Thereafter, as per the Ld.AR, the face value of the share were split in to Rs.1/- per share, thereby increasing the holding of the assessee to 10,000 shares. As per the Ld.AR, 5500 shares out of them were sold. After dematting, through a recognized stock exchange. However, as per the Id. Authorised Representative, lower authorities disbelieved sale of these shares relying on a report of Directorate of Income Tax (Investigation) Kolkata and Delhi which apparently mentioned that M/s.Lifeline Drugs & Pharma Ltd., was a penny stock company and statements of one Shri Pravin Agarwal and one Shri Pawan Kalyan. Contention of the Id. Authorised Representative was

that purchase of the shares was genuine though it was done off market. As per the Id. Authorised Representative, sale of these shares was made through recognized stock exchange and ought not have been disbelieved. All receipts, as pr the Id. Authorised Representative were through banking channels. Relying on the decision of Co-ordinate Bench in the cases of *Vimalchand Gulabchand vs. ITO, Praveen Chand vs. ITO, Gatraj Jain & Sons (HUF) vs. ITO and Mahendra Kumar Bhandari vs. ITO (ITA Nos.2003/17, 1721/2017, 2293/17 and 2748/2017 dated 06.04.2018)*, Id. Authorised Representative submitted that in similar cases, the Tribunal had directed the Id. Assessing Officer to reconsider the issue adhering to the rules of natural justice.

4. Per contra, Id. Departmental Representative submitted that there were sufficient and more reason for lower authorities to disbelieve the transactions claimed in the shares of M/s.Lifeline Drugs & Pharma Ltd. As per the Id. Departmental Representative, assessee could not produce any evidence to show, how he identified the shares of M/s.Lifeline Drugs & Pharma Ltd., for making an off market purchase. Id. Departmental Representative also placed reliance on the decision of the Co-ordinate Bench in the case of *Shri Heerachand Kanunga vs. ITO (ITA Nos.2786 & 2787/Chny/2017, dated 03.05.2018)*.

5. I 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.Lifeline Drugs & Pharma Ltd. It appears that assessee could not produce any evidence as to how it identified equity shares of M/s.Lifeline Drugs & Pharma Ltd., for making an off market purchase. 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 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. Fact situation in the case before me in my opinion is similar to the one decided by the Co-ordinate Bench. The question is whether transactions claimed by the assessee were real or sham. Ld. Assessing Officer predominately relied on the reports of Directorate of Income Tax (Investigation) Kolkata and Delhi, and the statement of one Shri Pravin Agrawal and one Shri Pawan Kalyan for coming to a conclusion that M/s.Lifeline Drugs & Pharma Ltd., was a penny stock company and the transactions were entered only for claiming exemption u/s.10(38) of the Act on long term capital gains which were bogus. However, in my opinion, before relying on such Investigation reports and statement of a third party, it should have been put to an assessee for rebuttal. Rules of natural justice requires that evidence which is used against the assessee is first put to it and explanation sought, before reliance is placed on such evidence. I am therefore of the opinion that the matter requires a fresh look by the Id. Assessing

Officer. I set aside the orders of the lower authorities and remit the question regarding genuineness of the claim of long term capital gains from alleged sale of shares of M/s.Lifeline Drugs & Pharma Ltd., back to the Id. Assessing Officer for consideration afresh in accordance with law. Assessee has to be given all records relied on by the Id. Assessing Officer so that it can offer its explanation. Id. Assessing Officer is also to keep in mind the spirit of the direction given by the Tribunal in the case of Heerachand Kanunga (supra) while coming to a conclusion. Grounds 2 to 11 of the assessee are allowed for statistical purpose.

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

Order pronounced on the 15th day of October, 2018, at Chennai.

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: October 15, 2018

TLN

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 |