

**आयकर अपीलीय अधिकरण, 'बी' SMC न्यायपीठ, चेन्नई**

IN THE INCOME TAX APPELLATE TRIBUNAL

' B' SMC BENCH : CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A.No.1244/Chny/2018

निर्धारण वर्ष /Assessment year :2015-16

**Shri Kushal Praveen Kumar Jain,** Vs The Income Tax officer,  
46,Ragunayakulu Street,, Non-Corporate Ward -5(1),  
Park Town, Chennai.  
Chennai 600 003.

**[PAN AETPJ 1537 L ]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Mr.N.Arjun Raj,C.A for  
S.Sridhar,Advocate  
प्रत्यर्थी की ओर से /Respondent by : Mr.B.Sagadevan,JCIT,D.R  
सुनवाई की तारीख/Date of Hearing : 08-11-2018  
घोषणा की तारीख /Date of Pronouncement : 08-11-2018

**आदेश / ORDER**

This is an appeal filed by the assessee against the order of the Commissioner of Income-tax (Appeals)-5, Chennai in ITA No.75/CIT(A)-5/2017-18 dated 01.03.2018 for the assessment year 2015-16.

2. Shri N.Arjun Raj represented on behalf of the Assessee and Shri B.Sagadevan represented on behalf of the Revenue.

3. It was submitted by Id.A.R that the issue in this appeal was against the action of the Ld.CIT(A) in confirming the addition made by Id. Assessing Officer in treating the purchase and sale of shares by the

assessee in M/s.Kailash Auto Finance Ltd., as penny stock transactions. It was the prayer that the claim of exemption u/s.10(38) of the Act on the long term capital gains on sale of shares may be allowed.

4. In reply, it was submitted by Id.D.R that the issue was now squarely covered by the decision of Co-ordinate Bench of this Tribunal in the case of Shri Heerachand Kanunga for assessment year 2010-11 & 2011-12 in ITA Nos.2786 & 2787/Mds/2017 vide order dated 03.05.2018 wherein the issue has been restored to the file of Id. Assessing Officer with certain directions. It was a submission that on identical directions, the issue in this appeal can also be restored to the file of Id. Assessing Officer.

5. I have considered the rival submissions. A perusal of assessee's case shows that it is similar to the facts in the case of Shri Heerachand Kanunga referred to supra. Consequently as we have already held in the case of Shri Heerachand Kanunga referred to supra, as follows:-

*"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.”*

respectfully following the above decision of the Co-ordinate Bench of this Tribunal, the issue is restored to the file of Id. Assessing Officer for re-adjudication on identical directions as given in the case of Shri Heerachand Kanunga referred to supra.

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

Order pronounced in the open court after conclusion of hearing on 08<sup>th</sup> November, 2018, at Chennai.

Sd/-

( जॉर्ज माथन)

**(GEORGE MATHAN)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated: 08<sup>th</sup> November,2018.

**K S Sundaram**

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        |