

**IN THE INCOME TAX APPELLATE TRIBUNAL
'SMC' BANGALORE BENCH ' C '**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

I.T. A. No.2520/Bang/2018
(Assessment Year : 2015-16)

Sri Avinash Agarwal,
No.12/A, 1st Floor, 100 Feet Road,
J.P. Nagar, 6th Phase,
Bangalore-560 078.
PAN AIBPA 3453E

... Appellant.

Vs.

Income Tax Officer,
Ward 4(3)(5), Bangalore.

..... Respondent.

Appellant By : Shri R.K. Ganeriwala, C.A.
Respondent By : Smt. P. Renugadevi, JCIT (D.R)

Date of Hearing : 19.11.2018.
Date of Pronouncement : 27.11.2018.

O R D E R

Per Shri Jason P Boaz, A.M. :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-4, Bangalore, dt.26.06.2018 for the Assessment Year 2015-16.

2. Briefly stated, the facts of the case are as under :-

2.1 The assessee, an individual, filed his return of income for Assessment Year 2015-16 on 30.3.2016 declaring income of Rs.23,90,350 from 'Business', 'other sources' and 'Long Term Capital Gains (LTCG)' of Rs.14,93,000 claimed as exempt under Section 10(38) of the Income Tax Act, 1961 (in short 'the Act'). The case was taken up for scrutiny and the assessment was concluded under Section 143(3) of the Act vide order dt.28.12.2017, wherein the assessee's income was determined at Rs.38,83,350, in view of the capital gains of Rs.14,93,000 arising on account of sale of 5,000 shares of M/s. Jackson Investment Ltd., being treated and brought to tax as 'income from other sources'. On appeal, the CIT (Appeals) – 4, Bengaluru, dismissed the assessee's appeal vide the impugned order dt.26.06.2018.

3.1 Aggrieved by the order of the CIT (Appeals) – 4, Bengaluru, dt.26.06.2018 for Assessment Year 2015-16, the assessee has preferred this appeal wherein it has raised the following grounds :-

1. The learned Assessing Officer (AO) and the First Appellate Authority (FAA) has erred in law by disallowing the claim of exempt LTCG u/s 10(38) of the I.T. Act, 1961.
2. The learned AO has erred on facts of the case as all the documents submitted in support of facts of the case were rejected and the Report from the Investigation Wing of the I.T. Department, Kolkata was relied upon based on which on assumptions and presumptions, that the assessee has also indulged in bogus LTCG transaction had denied claim of exemption u/s 10(38).
3. The request from the appellant to peruse the documents relied upon by the Investigation wing and consequently also relied upon the learned assessing authority and to cross examine the so called entry operators and other named unscrupulous persons in the said Report to discharge his onus of proof that he was not involved in alleged transactions was denied thereby the act of AO was contrary to principles of natural justice.

4. It is submitted that the provisions of section 10(38) were scrupulously complied and on legitimate purchase and sale transactions applicable taxes and duties were duly paid and shares were held beyond mandatory period of 12 months, even in Depository, hence claim of exemption was lawful and ought to have been allowed.
5. It is submitted that the learned AO did not bring any evidence on record from his examination of the documents of the assessee to prove his stand that this transaction was bogus and sham and was part of '*penny stock*' operations.
6. The learned FAA has erred in law as Standard Operating Procedure prescribed vide Circular no. 246/151/2017 – A&PAC-1, dated 10.1.2018 relating to assessment of income under section 68 though brought to his notice were not considered while framing the appellate order.
7. The appellant seeks leave to urge any other ground at the time of hearing.

3.2 During the course of hearing, the Id.AR for the assessee submitted that on similar facts and circumstances, the matter for consideration is squarely covered by the decision of the ITAT, Kolkata Bench in its order in ITA No.2394/Kol/2017 in the case of *Prakash Chand Butoria*. It is submitted that in the cited case (supra) also, the assessee, an individual, filed his return of income claiming income on sale of shares as exempt u/s 10(38) of the Act. The Assessing Officer (AO) treated the receipt of sale consideration as unaccounted income and made an addition u/s 68 of the Act. On appeal the CIT(A) upheld the AO's order. However, on further appeal, the ITAT, Kolkata Bench allowed the assessee's appeal observing that the addition was unsustainable since the AO made the addition in a routine and mechanized manner: merely on suspicions based on Report of enquiries made by the Investigation Directorate of DIT, Kolkata, without bringing the same on record or confronting the assessee with OR supplying the assessee copies of the documents relied upon for making the addition and providing him opportunities for rebuttal. It is prayed that in view of the above, the orders of the authorities below be set aside and the assessee's appeal be allowed.

3.3 Per contra, the Id. DR for Revenue submitted that on similar facts and circumstances as in the case on hand, issue for consideration is covered by the decisions of the Bengaluru ITAT in the cases of *Arvind Kumar Moolchand* in ITA No.509/Bang/2017 and *Pukhraj Hasmukhlal* in ITA No.1927/Bang/2017 wherein the Tribunal has restored the issue to the file of the AO having observed that the additions were made based on reports of the Investigation Directorate at Kolkata and statements of various persons without confronting OR making them available to the assessee for rebuttal. In those cases, the Tribunal restored the matter to the file of the AO with the direction to confront the assessee with the reports/documents/ statements proposed to be used against the assessee, allow rebuttal thereof and cross examination of parties on whose testimony is proposed to be relied upon and the matter be adjudicated afresh after affording the assessee adequate opportunity of being heard and to also file details/submissions in this regard.

3.4 In Rejoinder, the Id.AR for the assessee did not dispute the proposition put forth by the Id. DR for restoring this issue to the file of the AO for *de novo* adjudication.

3.5 I have heard both parties and perused and carefully considered the material on record including the judicial decisions cited and the orders of the authorities below. Taking into consideration the facts and circumstances of the case and the judicial decisions cited, I find that the issue for consideration is squarely covered by the orders of the Bengaluru ITAT in the cases of *Arvind Kumar Moolchand* (supra) and *Pukhraj Hasmukhlal* (supra). Following the aforesaid orders (supra), I set aside the orders of the AO and restore the matter of treatment of profit declared on sale of shares, claimed as exempt u/s 10(38) of the Act, to the file of the AO to re-adjudicate the issue afresh; after making available to the assessee for rebuttal all documents; including Statements, Investigation Reports, etc. relied upon by Revenue for making the additions/disallowances and providing adequate opportunity to the assessee for cross-examination of persons whose statements are being relied upon. It is accordingly ordered.

4. In the result, the assessee's appeal for assessment year 2015-16 is allowed for statistical purposes.

Order pronounced in the open court on the 27th day of Nov.,2018.

Sd/-

(JASON P BOAZ)
ACCOUNTANT MEMBER

Bangalore,
Dt.27.11.2018.

*Reddy gp

Copy to :

1	Appellant	4	CIT(A)
2	Respondent	5	DR. ITAT, Bangalore
3	CIT	6	Guard File

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Asst. Registrar
Income Tax Appellate Tribunal
Bangalore.