

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'SMC' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 4714/DEL/2018  
[Assessment Year: 2015-16]

Shri Vishal Kumar Vijay  
220, Chahmemran  
Nandram Chowk, Meerut.

Vs.

The I.T.O,  
Ward - 2(4)  
Meerut

PAN: AEYPV 6911 M

[Appellant]

[Respondent]

Date of Hearing : 26.11.2018  
Date of Pronouncement : 28.11.2018

Assessee by : Shri Manish Jain, CA.

Revenue by : Shri S.L. Anuragi, Sr. DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:**

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - Meerut dated 18.05.2018 pertaining to assessment year 2015-16.

2. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in confirming the addition of Rs. 18,85,274/- made by the Assessing Officer treating the long term capital gain [LTCCG] as bogus.

3. Briefly stated, the facts of the case are that the assessee filed return of income on 28.08.2015 for the year under consideration showing income of Rs. 4.99 lakhs. The return was selected for scrutiny assessment through CASS and, accordingly, statutory notices were issued and served upon the assessee.

4. During the course of scrutiny assessment proceedings, the A.O observed that the assessee has shown LTCCG on sale of shares. Referring to the investigation made by the Directorate of Investigation, Kolkata, the Assessing Officer formed a belief that the assessee is one of the beneficiaries of accommodation entries provided by the entry provider in the form of LTCCG involving penny stock companies. Drawing support from the Investigation Wing, Kolkata, the Assessing

Officer issued show cause notice to the assessee asking him to explain as to why LTCG should not be treated as bogus. The assessee filed a detailed reply and alongwith the reply, the assessee furnished complete details of share transactions. The contract notes were furnished alongwith bank statements. The details filed by the assessee did not find favour with the Assessing Officer who was of the opinion that the report of the Kolkata DIT [INV] was specific and the statement of Shri Sanjay Vohra explaining the nature of transaction and, therefore, the LTCG shown by the assessee is nothing but outcome of bogus transactions in penny stock companies and, accordingly, disallowed the claim of LTCG and made the addition of Rs. 18.85 lakhs.

5. The assessee carried the matter before the CIT(A) but without any success.

6. Before me, the ld. AR reiterated what has been stated before the lower authorities.

7. Per contra, the Id. DR strongly supported the findings of the first appellate authority.

8. I have carefully perused the orders of the authorities below and relevant documentary evidences brought on record in the form of paper book. There is no dispute that the transaction of sale and purchase of shares are duly supported by relevant documents in the form of share certificates, purchase bills, sale bills, bank statements and demat statements. Transaction statement with NSDL is also exhibited at page 75 of the paper book.

9. I have examined the transaction statement of the stock broker, contract note for sale of shares, transaction and holding statement, statement of account from the broker certifying the sale of shares. In my considered opinion, the entire addition has been made by the Assessing Officer only on the basis of presumptions and surmises without pointing out any specific defect in the documentary evidences filed by the assessee. Moreover, the additions have been made by

the Assessing Officer on the basis of statement of one Shri Sanjay Vohra, who, in his statement, has stated that he has indulged in bogus LTCG transactions in Kolkata Stock Exchange and M.P. Stock Exchange. The Assessing Officer completely ignored the fact that the assessee has done transactions with BSE.

10. Though the Assessing Officer has given detailed explanation regarding the modus operandi of the bogus LTCG Scheme, but has failed to bring anything on record to show that the facts of the case fell within the purview of the same. Considering the documentary evidences brought on record, I have no hesitation to hold that the lower authorities grossly failed in bringing out any case in favour of the Revenue. Moreover, not granting opportunity to cross examine Shri Sanjay Vohra in itself is gross violation of the principles of natural justice and against the ratio laid down by the Hon'ble Supreme Court in the case of *Andaman Timber Vs. CIT Civil Appeal No. 4228 OF 2006* wherein it has been held as under:

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating

Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

14. Considering the facts of the case in totality from all possible angles, the impugned addition made by the Assessing Officer is not sustainable and deserves to be deleted. I order accordingly.

15. In the result, the appeal filed by the assessee in ITA No. 4714/DEL/2018 is allowed.

The order is pronounced in the open court on 28.11.2018.

Sd/-

**[N.K. BILLAIYA]**  
**ACCOUNTANT MEMBER**

Dated: 28<sup>th</sup> November, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	