

आयकर अपीलीय अधिकरण , ' डी' न्यायपीठ,चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI

श्री जॉर्जमाथन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1507/Chny/2018

निर्धारण वर्ष/Assessment Year : 2014-15

Shri Santhosh Agarwal,
No. 9-A, Arihant Orchard,
54, Flowers Road, Kilpauk,
Chennai – 600 010.

Assistant Commissioner of Income
Vs. Tax,
Non-Corporate Circle -10(1),
Chennai.

[PAN: AFRPA 1436Q]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by
Revenue by

: Shri. N. Vijaya Kumar, CA
: Shri. M. Srinivasa Rao Vana, JCIT

सुनवाईकीतारीख/Date of Hearing : 29.10.2018
घोषणाकीतारीख/Date of Pronouncement : 29.10.2018

आदेश/ ORDER

PER S. JAYARAMAN, ACCOUNTANT MEMBER :

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-12, Chennai in ITA No. 186/CIT(A)-12/2016-17 dated 03.04.2018 for assessment year 2014-15.

2. Mr. Santhosh Agarwal, the assessee, an individual, purchased 7500 shares of unlisted company, M/s. Transcend commerce Ltd., later amalgamated with M/s S R K Industries Ltd @ Rs.10 per share on 13.9.2012, off market from Subhmangal Sales Pvt Ltd, Kolkata. Later, the face value of share was reduced from Rs Rs.10 per share to Rs.5 per share on 24.10.2013, thereby the number of shares increased to 33,000. Subsequently, sold them on 16.12.13 & 17.12.2013 through M/s Ventura Securities Ltd for Rs. 64,89,038 and earned a profit of Rs 64,92,499/- and claimed it as an exemption u/s. 10(38). The Id. Assessing Officer, on the basis of investigations done by the Revenue and after analyzing these transactions in detail denied the claim of exemption u/s. 10(38). Aggrieved, the assessee carried the matter on appeal before the CIT(A). The Ld. CIT(A) dismissed the appeal of assessee. Aggrieved against that order, the assessee filed this appeal before the Tribunal.

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. Transcend commerce 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. Per contra, Id. D.R submitted 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 years 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. We have considered the rival submissions. It is noticed that the assessee has not been given any opportunity to prove the genuineness but the assessment has been made based on the evidences collected by the Revenue in the course of the investigation conducted by them on brokers / share broking entities etc. This is not permissible. This being so, in the interest of natural justice, the issue of the genuineness of the transactions require re-adjudication. Since, the right to exemption must be established by those who seek it , the onus therefore lies on the assessee. In order to claim the exemption from payment of income tax, the assessee had to put before the Income Tax authorities proper

materials which would enable to come to a conclusion. (35 ITR 312 (SC)). Thus, the A O must keep in mind that the onus of proving the exemption rests on the assessee. If the AO does have any evidence to the contrary, it is to be put to the assessee for his rebuttal. The internal communications of the Revenue are evidences for drawing an opinion on possible wrong claims but they are not the final evidence. Further, perusal of assessee's case shows that it is similar to the facts in the case of Shri Heerachand Kanunga referred to supra. The relevant portions from that order is extracted as under :-

"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 order, the issue of exemption in this appeal is restored back to the file of the AO for re-adjudication on the lines indicated above. Therefore , the AO shall require the assessee; to establish who, with whom, how and in what circumstances the impugned transactions were carried out etc., to prove that the impugned transactions are actual , genuine etc. The assessee shall comply to the A O's requirements as per law.

On appreciation of all the above aspects, the AO would decide the matter in accordance with law. The AO is also free to conduct appropriate enquiry as deemed fit, but shall furnish adequate opportunity to the assessee on the material etc to be used against it and decide the matter in accordance with law.

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

Order pronounced in the open court on 29th October, 2018 at Chennai.

Sd/-
(जॉर्जमाथन)
(GEORGE MATHAN)
न्यायिकसदस्य/Judicial Member

Sd/-
(एसजयरामन)
(S. JAYARAMAN)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 29th October, 2018

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF