

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 279/JP/2017  
निर्धारण वर्ष/Assessment Year : 2008-09.

Shri Paras Kumar Jain, 65, New Grain Mandi, Kota.	बनाम Vs.	The Income Tax Officer, Ward 1(3), Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. ABKPJ 1406 G		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से / Assessee by : Shri N. Kataria (CA)  
राजस्व की ओर से / Revenue by: Shri Jai Singh (JCIT)

सुनवाई की तारीख / Date of Hearing : 10.12.2018.  
घोषणा की तारीख / Date of Pronouncement : 13/12/2018.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 19<sup>th</sup> January, 2017 of Id. CIT (A), Kota for the assessment year 2008-09. The assessee has raised the following grounds :-

- “ 1.1. The assessment order passed u/s 148 is bad in law as well as on facts and hence, the same may please be quashed.
- 1.2. The reasons recorded by the Id. AO did not form any reason to believe that any income escaped from assessment and hence the consequent reopening of assessment is also bad in law as well as on the facts of the present case and the Id. CIT (A) erred in sustaining the same.

Without prejudice to above

3. Rs. 17,00,180/-: The Id. AO erred in law as well as on the facts of the present case in treating income from long term capital

gain as income from undisclosed sources and the Id. CIT (A) erred in sustaining the same and hence, the entire addition may please be deleted.”

2. The assessee is an Individual and proprietor of M/s. Paras Namkeen Bhandar. The assessee filed return of income on 10<sup>th</sup> March, 2009 declaring income of Rs. 6,23,510/-. Subsequently, the AO received information from the Investigation Wing, Mumbai regarding accommodation entries in the shape of Long Term Capital Gain from the concerns of Shri Mukesh Choksi. Accordingly, the AO reopened the assessment by issuing notice under section 148 of the IT Act on 26<sup>th</sup> March, 2015. In response to the notice issued under section 148, the assessee vide letter dated 16.04.2015 submitted that the return of income filed on 10<sup>th</sup> March, 2009 may be treated as return of income filed in compliance to notice under section 148. The AO consequently completed the re-assessment under section 143(3) read with section 147 of the Act on 11.01.2016 whereby long term capital gain on sale of shares were treated as undisclosed income of the assessee and the amount of Rs. 17,00,180/- was added to the total income of the assessee. The assessee challenged the addition before the Id. CIT (A) but could not succeed.

**Ground No. 1 is regarding challenging the validity of the order passed under section 148 of the IT Act.**

3. The Id. A/R of the assessee has submitted that the AO has reopened the assessment based on the information/report of the Investigation Wing, Mumbai without conducting a separate and independent enquiry about the fact whether the claim of the assessee of long term capital gain is genuine or bogus. Hence the

reopening is not sustainable in law as the same is based on the borrowed satisfaction and not on independent application of mind.

4. On the other hand, the Id. D/R has submitted that the assessee has shown the purchase and sale of 32,000 shares of M/s. Axon Infotech Ltd. through broker M/s. Alliance Intermediaries & Network Pvt. Ltd. which is a group concern of Shri Mukesh Choksi and in the investigation proceedings in case of Shri Mukesh Choksi it was detected that all the concerns including M/s. Alliance Intermediaries & Network Pvt. Ltd. were engaged in providing accommodation /bogus entries of Long Term Capital Gains etc. on receipt of money. Thus once the AO has received the information along with the statement of Shri Mukesh Choksi wherein the transactions of purchase and sale of shares through the group concern of Shri Mukesh Choksi were found to be bogus and accommodation entries to avoid the tax liability, then the AO was having reason to believe that the income assessable to tax in the shape of long term capital gain of Rs. 21,00,720/- has escaped assessment. He has relied upon the orders of the authorities below.

5. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the return of income filed by the assessee under section 139 of the IT Act was not taken up for scrutiny assessment. Subsequently, the AO received the information from Investigation Wing, Mumbai regarding the discovery of the fact that Shri Mukesh Choksi through his various concerns including M/s. Alliance Intermediaries & Network Pvt. Ltd. has indulged in providing accommodation and bogus entries of long term capital gain etc. against receipt of cash from the persons. This information along with the statement of Shri Mukesh Choksi constitutes a tangible material to form the belief that the income assessable

to tax and claimed as exempt from tax has escaped assessment. Therefore, once the original return of income was not taken up for scrutiny assessment, then the said information and facts discovered by the Investigation Wing Mumbai along with the statement of Shri Mukesh Choksi constitutes a material on the basis of which the AO can reasonably form a belief that the income in the shape of long term capital gain claimed as exempt has escaped assessment. At the stage of reopening of the assessment what is required is prima facie reason to believe that income assessable to tax has escaped assessment and the AO is not required to establish the fact by legal evidence or conclusion. Accordingly we do not find any error or illegality in the impugned order of Id. CIT (A) qua this issue.

**Ground No. 3 is regarding the addition made by the AO by treating the long term capital gain as income from undisclosed sources.**

6. The Id. A/R of the assessee has submitted that the assessee purchased 4000 shares of M/s. Axon Infotech Ltd. on 5<sup>th</sup> July, 2006 for a consideration of Rs. 2,08,540/- and again purchased 4000 shares of the same company on 10<sup>th</sup> July, 2006 for a consideration of Rs. 2,02,000/-. These shares were purchased through M/s. Alliance Intermediaries & Network Pvt. Ltd. as per the Contract Note dated 10<sup>th</sup> July, 2006. Subsequently, the said company issued bonus shares in the ratio 3:1 in the month of September, 2007, hence 8000 shares held by the assessee were converted to 32000 shares. The assessee finally sold 16,000 shares on 16.01.2008 and balance 16,000 shares on 08.02.2008 for a total consideration of Rs. 21,10,720/-. The Id. A/R has thus submitted that when the assessee held these shares for more than one year as these shares were acquired in the month of July, 2006 and sold in the month of January and February, 2008 then the gain arising

from sale of shares is a long term capital gain. Further, the sale of shares were not through broker M/s. Alliance Intermediaries & Network Pvt. Ltd. but these shares were sold through a different broker which is not related to Shri Mukesh Choksi or his concerns. He has referred to the sale bill/broker's note at pages 33 and 34 of the paper book and submitted that the shares were sold through M/s. A.C. Choksi Share Brokers Pvt. Ltd. which is not a group concern of Shri Mukesh Choksi. Hence, once the shares were sold by the assessee not through the group concern of Shri Mukesh Choksi, the capital gain on sale of the shares cannot be treated as bogus claim. In support of his contention, he has relied upon the CBDT Circular No. 704 dated 28<sup>th</sup> April, 1995 and submitted that the CBDT has clarified that in case of securities transacted through Stock Exchanges, the date of broker's note should be treated as the date of transfer in cases of sale and purchase of shares. The Id. A/R then submitted that Shri Mukesh Choksi in his statement has not mentioned the name of the assessee as the beneficiary of the alleged accommodation entries provided by his group concern. Further, the shares were sold through a different broker and, therefore, there is no question of giving any cash for obtaining the long term capital gain in question. Once the assessee has placed the relevant record showing the purchase of shares through the broker's note, sale of shares through a different broker and receipt of sale consideration through banking channel, then the transactions of purchase and sale of shares cannot be held as bogus and consequently the claim of capital gain cannot be treated as income from undisclosed sources of the assessee. The Id. A/R has relied upon the following decision in support of his contention :-

- (1) Order dated 4<sup>th</sup> September, 2015 of Hyderabad Bench of the Tribunal in case of DCIT vs. Vinay Kumar Agarwal in ITA No. 153/Hyd/2015 & C.O. No. 16/H/2015 and submitted that the Tribunal after considering the CBDT Circular No. 407 dated 28<sup>th</sup> April, 1995 has held that the date of purchase of shares shall be taken as the date of Broker's Note and not the actual date of transfer of shares.

He has then relied upon the decision of Mumbai Bench of the Tribunal in case of Kamla Devi S. Doshi vs. ITO, (2017) 50 CCH 72 (Mumbai Trib.) as well as the decision of Hon'ble Jurisdictional High Court in case of CIT vs. Pooja Agarwal dated 11<sup>th</sup> September, 2017 in DBIT appeal no. 385/2011. Thus the Id. A/R has submitted that once the assessee has produced the record showing the purchase and sale transactions made on-line and identity of seller and purchasers are unknown then the transactions cannot be held as bogus transactions. He has further contended that as the assessee has shown the purchase of 8000 shares of M/s. Axon Infotech Ltd. in the Balance Sheet as on 31<sup>st</sup> March, 2007 and the AO has accepted that fact for the assessment year 2007-08, then the said transaction cannot be held as bogus only when the shares were sold by the assessee in the subsequent year. He has further contended that the transactions of purchase and sale has suffered STT and carried out through Stock Exchange, therefore, the question of genuineness of the transaction cannot be raised. Hence the Id. A/R has submitted that the AO has treated the transaction as bogus based on the statement of Shri Mukesh Choksi which is not a conclusive evidence to take a decision when the assessee was not stated as the beneficiary of the transaction provided by Shri Mukesh Choksi and his group concerns.

7. On the other hand, the Id. D/R has submitted that this is a clear case of taking the accommodation entries when the assessee claimed to have purchased the

shares in the month of July, 2006 through Stock broker M/s. Alliance Intermediaries & Network Pvt. Ltd. which is a group concern of Shri Mukesh Choksi. However, the shares were not transferred in the name of the assessee till the month of January, 2008 when the shares were finally sold by the assessee. Therefore, just few days before the sale of shares the shares were transferred in the account of the assessee and prior to that there was no record to show that these shares were actually transferred in the name of the assessee or in the account of the assessee. Therefore, the claim of purchase of shares in the month of July, 2006 itself is bogus claim and not proved by the assessee except producing a Contract Note of a tainted company for which the Investigation Wing found it indulged in providing accommodation entries. In view of the facts as brought by the AO that the said company M/s. Alliance Intermediaries & Network Pvt. Ltd. is one of the group concerns of Shri Mukesh Choksi and engaged in providing accommodation /bogus entries in capital gain, then the claim of the assessee solely based on the contract note was found to be bogus. He has relied upon the orders of the authorities below and submitted that the Id. CIT (A) has discussed this issue in detail and after relying upon various decisions has confirmed the finding of the AO that the claim of long term capital gain exempt from income-tax is nothing but a bogus claim.

8. We have considered the rival submissions as well as the relevant material on record. The assessee claimed to have purchased 4000 shares of M/s. Axon Infotech Ltd. on 5<sup>th</sup> July, 2006 and again 4000 shares of the same company on 10<sup>th</sup> July, 2006 for a total consideration of Rs. 4,10,540/-. It is pertinent to note that as per contract note dated 10<sup>th</sup> July, 2006 there is no transfer of purchase consideration by the assessee either in favour of the broker or in favour of any other party. Thus the

said broker's note relied upon by the assessee does not prove the transaction of purchase of shares by the Broker on behalf of the assessee against consideration. The assessee has not placed any record regarding payment of purchase consideration, therefore, in the absence of any record or material to show payment of purchase consideration by the assessee, the broker's note itself cannot be considered a conclusive proof of purchase of shares when the actual holding of the shares taken place only in the month of January, 2008 itself. We note that in the month of September, 2007 the company M/s. Axon Infotech Ltd. issued bonus shares 3:1 and thereby the assessee claimed that the 8000 shares were converted into 32000 shares by virtue of bonus shares. Even after the issuance of bonus shares, there is no record to show that either the original shares or the bonus shares were transferred in the name of the assessee prior to 11<sup>th</sup> January, 2008 when the shares were finally credited to the demat account of the assessee. It is pertinent to note that the purchase and sale of the shares are claimed to have been made on-line and, therefore, there is no physical transfer of shares and once the shares are purchased on-line and in the digital form then immediately after purchase the shares are to be credited into the demat account of the assessee. However, the only explanation of the assessee in this respect is that the shares were in the common pool of the broker's account though purchased on behalf of the assessee. We do not accept this explanation of the assessee in the absence of any record to show that the shares were purchased by the broker in the name of the assessee. It appears that the shares were held by the broker M/s. Alliance Intermediaries & Network Pvt. Ltd. and only in the month of January, 2008 these shares were transferred in the name of the assessee and finally credited in the demat account of the assessee on

11<sup>th</sup> January, 2008. Therefore, prior to 11.01.2008 there is no material or record to show that the assessee had ever held these shares. The Id. A/R of the assessee though contended that the assessee has shown the shares in his balance sheet as on 31<sup>st</sup> March, 2007, however, we find that the return of income for the assessment year 2007-08 was filed by the assessee only on 27<sup>th</sup> March, 2008 which is subsequent to the sale of the shares in the months of January and February, 2008. Thus filing of the return for the assessment year 2007-08 will not help the assessee to claim that these shares were declared by the assessee in the balance sheet when the return was filed belatedly and that too after the sale of the shares. Accordingly, the purchase transaction of the shares remained unsubstantiated. The Id. A/R has relied upon the various decisions on the point that the date of broker's note should be considered as date of purchase of shares. However, we find that only in case of dispute about the date of purchase when there is a reasonable time gap between the Contract Note and actual transfer of the shares in the name of the assessee then subject to the condition that the shares are actually transferred in the name of the assessee, the date of purchase shall be considered as the date of broker's note. In the case in hand, the broker's note as relied upon by the assessee was not found to be a genuine document as there is no other supporting evidence to prove the transaction of purchase and particularly the payment of purchase consideration is not proved by the assessee. Therefore, the decisions relied upon by the assessee are not in help to the case of the assessee. Once the facts on record have established that the shares in question were transferred in the name of the assessee only on 11.01.2008, then prior to the said date the claim of the assessee cannot be accepted as a genuine claim. The entire claim of the assessee is based on the

contract note dated 10<sup>th</sup> July, 2006 which itself does not establish the fact of purchase in the absence of any purchase consideration and any other record showing the transfer of the shares in the name of the assessee. Hence, we find that the Id. CIT (A) has decided this issue as under :-

“ As regards Ground of appeal no. 2, it is seen that the shares of so-called companies were never with the assessee in the physical format (Demat) since his Demat account was opened much after the alleged purchase in 2006 itself. Secondly, the very brokerage firm which had ‘arranged’ the capital gains receipt for the assessee was figuring in the list of ‘controlled’ brokers of Sh. Mukesh Chokshi, the person behind ‘arranging’ such bogus Capital Gains entries in exchange of cash as is very clear from his statements given in the course of search proceedings elsewhere in which he had listed the beneficiaries of such “bogus” Capital gains receipts, and the appellant figured in that list.

The assessee appellant on his part has produced no documentary evidences in his support like confirmations of ledger accounts of the broker showing his transaction, evidence of holding possession of the shares in question at any time physically etc. Thirdly, once the activities of the broker company being suspect, and it was also ‘blacklisted’ by SEBI, the regulatory body for the stock & share dealings, the beneficiaries attached to his transacted business, in the light of his own admissions could not be held to have had genuine Capital gains Income on which they could be given benefit of Tax exemptions. HIGH COURT OF DELHI in the case of Commissioner of Income-tax v. Nova Promoters & Finlease (P) Ltd. 18 taxmann.com 217 (Delhi) held that –

Section 68 of the Income-tax Act, 1961 – Cash credits – Assessment year 2000-01 – for relevant assessment year, assessee filed its return declaring loss – Said return was processed under section 143(1) – Subsequently, Assessing Officer received information from Investigation Wing that assessee had obtained accommodation entries in garb of share application monies – In order to examine genuineness and creditworthiness of companies which gave entries to assessee, Assessing Officer

issued summons to two persons namely, 'M' and 'R' who did not appear before him – Subsequently, assessee filed a letter with Assessing Officer along with affidavits of 'R' and 'M' in which both of them had stated that transactions with assessee were genuine and earlier statements recorded from them by investigation wing were given under pressure – Assessing Officer did not accept those affidavits and made certain addition to assessee's income under section 68 – Tribunal, however, taking a view that there was no dispute about identity of share holders namely 'M' and 'R', deleted addition made by Assessing Officer – On revenue's appeal, it was noted that both 'M' and 'R' had admitted before Additional Commissioner (Investigation) that they were acting as accommodation entry providers – They had also given a list of 22 companies in which they were operating accounts – It was also apparent that out of 22 companies whose names figured in information given by them to investigation wing, 15 companies had provided so-called 'share subscription monies' to assessee – Whether on facts, there was specific involvement of assessee company in modus operandi followed by 'M' and 'R'. Held, yes – Whether, therefore, impugned order passed by Tribunal deleting addition was to be set aside – Held, yes (In favour of revenue).

Section 148 of the Income-tax Act, 1961 – Income escaping assessment – Issue of notice for – Assessment year 2000-01 – Whether at stage of issuing notice under section 148 merits of matter are not relevant and Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment – Held, yes – Whether however, once that stage is crossed and reassessment proceedings are set in motion, material on basis of which requisite belief was formed by Assessing Officer has to be appraised and examined – Held, yes ..... *the Court cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed 'accommodation entry providers', whose business it is to help assessee bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicted by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such*

*'entry providers'. The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. The ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under section 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The instant case does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.*

Thus when viewed in the context of the modus operandi involved in the present case as well, the bonafides get obliterated in the background of the findings recorded from the alleged entry provider Sh. Mukesh Chokshi. Though the addition in this case has not been made u/s 68, but the principle behind introducing entries on the receipt side of the books of accounts is guided by the principle of genuineness of the source of such receipts.

In a similar context, the Special Bench in the case of CIT v. Sophia Finance Ltd. (1994) 205 ITR 98/70 Taxman 69 (Delhi) opined that section 68 is very widely worded and an Income-tax officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine.

HIGH COURT OF DELHI in Sarita Aggarwal v. Income-tax Officer, 56 taxmann.com 195 (Delhi) referred to certain other legal precedents while deciding on the issue of section 68 that Reference can be made to CIT v. Durga Prasad More (1971) 82 ITR 540 (SC), CIT v. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC) and other cases referred to in CIT v. Nova Promoters and Finlease (P) Ltd. (2012) 342 ITR 169 (Delhi). In these cases, it has been observed that what is apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real. Caution must be exercised on self-serving statements made in the

*documents as they are easy to make and rely upon in case an assessee wants to evade taxes. Proof is required and the assessing authorities should not put blinkers while looking at the documents before them. Surrounding circumstances are equally important.” (Emphasis supplied).*

Since the appellant, in the course of assessment as well as appellate proceedings, has failed to bring any evidences on record to justify that these were genuine transactions, and on the contrary looking to lack of evidences, background & nature of dubious activities admitted clearly by the broker providing such bogus capital gains, I am of the view that the addition of Rs. 17,00,180/- has rightly been made in this case by the AO as income from undisclosed sources and the same deserves to be confirmed.

This ground of appeal is accordingly dismissed.”

Therefore, we concur with the view to the extent that the claim of purchase of shares in question in the month of July, 2006 is not proved by the assessee. However, once the shares were finally credited in the demat account of the assessee on 11.01.2008, then the said fact of holding the shares as on 11<sup>th</sup> January, 2008 cannot be denied. The shares were then sold on 16<sup>th</sup> January, 2008 and 8<sup>th</sup> February, 2008 consequently the gain, if any, in the transaction would be only short term capital gain. However, there is another aspect in this transaction which is the purchase price as on 11.01.2008. Since the transaction is on-line and through stock exchange, therefore, the prevailing price of the shares in question can be ascertained from the stock exchange and, therefore, the difference of prevailing price and the cost of purchase claimed by the assessee can be treated as unexplained investment. Accordingly, we set aside this issue to the record of the AO

to reconsider the same in the light of above observation and after giving an opportunity of hearing to the assessee.

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

Order is pronounced in the open court on 13/12/2018.

Sd/-  
(विक्रम सिंह यादव)  
(VIKRAM SINGH YADAV )  
लेखा सदस्य/Accountant Member

Sd/-  
(विजय पाल रॉव )  
(VIJAY PAL RAO)  
न्यायिक सदस्य/Judicial Member

Jaipur

Dated:- 13/12/2018.

Das/

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. The Appellant- Shri Paras Kumar Jain, Kota.
2. The Respondent – The ITO Ward 1(3), Kota.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 279/JP/2017)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar

