

**IN THE INCOME TAX APPELLATE TRIBUNAL
'SMC' BENCH, KOLKATA**

Before Sri J. Sudhakar Reddy, Accountant Member

**I.T.A. No. 549/KOL/2013
Assessment Year: 2005-06**

Surendra Kumar Khater.....Appellant
[PAN :AETPK 1619 N]

D.C.I.T, Central Circle-XXVII, KolkataRespondent

Appearances by:

Shri S. K. Tulsyan, Advocate, appeared on behalf of the Appellant.
Shri Robin Choudhury, Addl. CIT, appeared on behalf of the Respondent.

Date of concluding the hearing : January 10, 2019

Date of pronouncing the order : January 23, 2019

ORDER

Per J. Sudhakar Reddy :-

This appeal by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals)-II, (hereinafter the 'Id. CIT(A)'), dated 04.01.2013 passed u/s 250 of the Income Tax Act, 1961 (the 'Act') for the assessment year 2005-06.

2. The assessee is an individual and derives income from salary, capital gain and other sources. He filed his original return of income on 20.05.2006 declaring total income of Rs.1,11,150/-. A search and seizure operation was conducted in the premises of one Shri Narendra Kumar Shyamsukha. Consequently, the assessment of the assessee was reopened based on some material and notice u/s 148 was issued on 20.12.007. In response to this notice

u/s 148, the assessee requested Assessing Officer to treat the original return as a return filed in response to the said notice.

3. The Assessing Officer completed the assessment u/s 147 r.w.s 143(3) on 31.12.2008 determined total income at Rs.14,90,060/- inter alia making an addition of Rs.13,78,910/- as unexplained cash credit u/s 68 of the Act.

4. On an appeal, the Id. First Appellate Authority confirmed the action of the Assessing Officer.

5. Further, aggrieved, the assessee is in appeal before us. After hearing rival contentions, we find that a similar issue has come up before the Kolkata Bench of the ITAT in the case of Premlata Baid vs. DCIT in ITA Nos.543/Kol/2013 order dated 16.12.2015 wherein it was held as follows:

“2.5. We have heard the rival submissions and perused the materials available on record. We find lot of force in the arguments of the Learned AR that just because Sri Narendra Kumar Shyamsukha had disclosed the commission income on the transactions of shares in his returns, the assesses are in no manner concerned with such disclosure and no adverse inference could be drawn against the assesses for such disclosure of commission income by a third party.

2.5.1 We find that the assesses have categorically denied making any cash payment to Shri Narendra Kumar Shyamsukha and had also denied even knowing him. We also find that even the broker, through whom the transactions of sale of shares that gave led to long term capital gains, was also examined by the revenue and he also had denied knowing Shri Narendra Kumar Shyamsukha. There is absolutely no direct evidence that is brought on record that the assesses indeed had paid any cash to Shri Narendra Kumar Shyamsukha or to any other person with an intention to launder their cash for converting into cheque in the guise of long term capital gains. We find that even during the course of cross examination proceedings, Shri Narendra Kumar Shyamsukha could not prove that the assesses had paid any cash to him or any other person.

2.5.2. We also find that the Learned CIT(A) had confirmed the addition by making the following observations among others :-

I also do not find any merit in the submission of the appellant that there is no direct evidence that any amount of cash was paid by the appellant. I am of the opinion that there could not be any eye witness for this, but, there are documentary and circumstantial evidences that the appellant had paid cash to obtain entry of long term capital gain. It is an open secret that during the Financial Years 2002-03 , 2003-04 and 2004-05 etc. the practice of taking accommodation entries of long term capital gain was rampant in Kolkata. Thus, the documents seized from the possession of Shri Narendra Shyamsukha cannot be ignored or cannot be treated as waste pieces of paper.

We hold that the above observations only goes to prove that the entire addition has been confirmed by the Learned CITA out of mere suspicion, surmise and conjecture ignoring the legal provisions of the Act and the principles of onus of proof. This is a case wherein the revenue had completely shifted its focus on the different persons (i.e the assesses herein) instead of proceeding in the hands of Shri Narendra Kumar Shyamsukha in whose premises the entire seized documents were found. We find lot of force in the arguments of the Learned AR that since the seized documents were not found in the premises of the assesses, there is no onus on them to disprove the claim of Shri Narendra Kumar Shyamsukha that the transactions of long term capital gains listed in the seized documents are bogus.

2.5.3. We find that the presumption u/s 292C of the Act would have to be applied only in the hands of Shri Narendra Kumar Shyamsukha in the facts and circumstances of this case . Strangely we find that no addition has been made in the hands of Shri Narendra Kumar Shyamsukha with regard to the subject mentioned capital gains as unexplained cash credit and the assessments have been completed in his hands by just accepting the commission income offered by him on all these transactions. The Presumption contemplated u/s 292C of the Act is not available against the third parties (ie the assesses herein). We place reliance on the decision of the coordinate bench of this tribunal in the case of [Niranjan Kumar Agarwal vs ACIT](#) in ITA No. 558 / Kol /1998 wherein it was held that :

"the books and documents on which the department relied upon solely were not found from the premises of the assessee. No involvement of the assessee with such books has been established in any way like the assessee himself writing the books etc. therefore, there would be no onus on the part of the assessee to disprove the genuineness of recitals in the aforesaid seized books. Burden of proving lies fully with the department to show beyond doubt that the receipts of the two amounts under consideration were actually made by the assessee."

2.5.4. We also find that according to the statement of Shri Narendra Kumar Shyamsukha, he was an intermediary between the broker, Ahilya Commercial Pvt Ltd and another person named as Suresh Kumar and that Suresh Kumar was an intermediary of beneficiaries on whose behalf bogus capital gain was booked. However, from the seized documents, there is no mention of Suresh Kumar and further Shri Narendra Kumar Shyamsukha also did not provide the address of Suresh Kumar and hence there is no credibility that could be attached to the statement given by Shri Narendra Kumar Shyamsukha.

2.5.5. We find that the director of M/s Ahilya Commercial Pvt Ltd (stock broker) in his deposition u/s 131 of the Act also denied to have known Shri Narendra Kumar Shyamsukha. The seized documents reflect that the share transactions were carried out through the broker 'Ashika' but enquiry from stock exchange revealed that M/s Ahilya Commercial Pvt Ltd was the broker for the said transaction. This itself goes to prove that the assesses herein have nothing to do with the seized papers found from the premises of Shri Narendra Kumar Shyamsukha.

2.5.6. With regard to the finding recorded by the Learned AO that the concerned broker M/s Ahilya Commercial Pvt Ltd had made a disclosure of Rs. 65 lacs on account of receipt of commission for raising bogus long term capital gains for his clients, we hold that the assesses are not concerned with the modus operandi of that broker's trading with his other clients. We hold that as long as the assesses had purchased and sold the shares through known and accepted procedure, the brokers' misdealing with others should not be a criterion to suspect the assesses' genuine share transactions and capital gains thereon. Similarly we hold that the assesses have no control over Shri Narendra Kumar Shyamsukha nor is it a matter of their concern in what manner he had maintained his documents and what he records in these documents.

2.5.7. We find that the purchase of shares of M/s Continental Fiscal Management Limited and M/s Swastik Securities and Finance Ltd were duly disclosed in the balance sheets of the assessee as on 31.3.2003 and 31.3.2004 and the same has been accepted as genuine by the revenue. The payments for purchase of shares were made by account payee cheques. These shares were sold during the Asst Year 2005- 06 through a registered broker with Calcutta Stock Exchange who had given proper contract notes evidencing the sale of shares and made payment of sale proceeds to the assessee by account payee cheques. We also find that the revenue had not brought any evidence on record that the documents comprising of purchase bills, contract notes, delivery challans and demat account were found to be false or fabricated. We hold that the transactions cannot be treated as bogus merely on the basis of the statement of Shri Narendra Kumar Shyamsukha, unless some independent enquiry has been conducted and a finding has been drawn by the Stock Exchange that these transactions are bogus. We find that this is a case wherein the assessee had carried out all their transactions through a recognized medium i.e through a registered share broker and Calcutta Stock Exchange, wherein the price of shares are determined by the market forces and assessee have bought the shares when the price was low through their Demat accounts and duly accounted for it in their respective books and when they found a hike in the price of these shares, they sold them to make a gain and transaction was again done through their Demat account. We don't find any abnormality or improbability in such a procedure adopted by the assessee. Thus the allegation that the assessee had laundered their cash for conversion into cheque by raising bogus long term capital gains does not hold water in the facts and circumstances of the case. No evidence is brought on record that the entire transactions had been carried out with some kind of connivance with the registered stock brokers for the introduction of unaccounted money and hence we hold that no addition could be made in these circumstances. Reliance in this regard is placed on the decision of Hon'ble Calcutta High Court in the case of [CIT vs Korlay Trading Co. Ltd](#) reported in (1998) 232 ITR 820 (Cal) wherein it was held :-

"The assessee has given the name of the company, who issued the concerned shares, number of shares purchased, when purchased, for how much amount the same was purchased, when it was sold, for how much amount it was sold and through whom it was sold. Even the broker appeared before the ITO and prayed for time to produce his proper books. It is not the case of the Revenue that the assessee has not maintained the books. The case of the Revenue is that as the broker did not maintain the books and has failed to produce the books, the transaction is not genuine. Once the assessee has discharged its initial burden, no proper steps have been taken by the ITO to bring on record, the materials to controvert the claim of the assessee. The claim of the assessee cannot be denied only on the ground that the broker through whom the transaction was made has failed to produce the proper books. Therefore, the transaction could not but be said to be genuine. Considering the facts of the case, the assessee has discharged its initial burden. No proper investigation was made by the ITO. No material has been brought to disbelieve such transaction. In view of the above, it cannot be said that the findings of the Tribunal is perverse. When the finding is not perverse, no interference is called for. Hence for the assessee's claim for loss on sale of shares was allowable.

2.5.8. We find that the action u/s 68 of the Act has been taken merely on the basis of the statement of the third party. We find that the assessee has duly proved the identity, creditworthiness and genuineness of the broker from whom the sale proceeds of shares were received by the assessee and hence the resultant long term capital gains thereon cannot be doubted with. Hence there is no scope for making any addition u/s 68 of the Act in the facts and circumstances of the case.

2.5.9. This issue is squarely covered by the coordinate bench decision of this tribunal in the case of *Ashok Kumar Gupta and Mrs Amita Gupta vs DCIT in ITA Nos. 500-502 / Kol / 2013* dated 2.6.2015. The relevant operative portion of the said order is reproduced herein below:-

"6. I have heard the rival contentions and carefully gone through orders of the Tax Authorities Below. I noted the fact in each of the cases, the shares which has been sold by the assessee were brought during the financial year 2002-03 and were shown in the balance sheet as on 31-03-2003 and 31-03-2004. The shares were sold only during the impugned assessment year. The shares were purchased by making the payment through account payee cheque. Similarly, the shares were sold by receiving of the account payee cheque through the broker Ahilya Commercial Pvt. Ltd. It is not the case that the shares were brought or sold through cash. The statement of Broker CMFL was also recorded but he denied that he knows Shri Narendra Kumar Shyamsukha. The presumption available u/s. 292C of the Act relied on by the Id.DR are available against the person in whose possession the books of account other documents etc., were found. The presumption is not available against the third party and transactions are through Demat account. The assessee filed all the documents and these purchases were made by the assessee through account payee cheque have not been doubted by the Revenue. The action u/s. 68 of the Act has been taken on the basis of the statement of the third party. During the course of search at the premises of Shri Narendra Kumar Shyamsukha no iota of evidence was found which could prove/lead to any inference that assessee had paid cash to Shyamsukha or the cheque has been received or paid to the broker in lieu of cash except a statement which is not in the handwriting of the assessee and which contains numerous details. No action has been taken by the Revenue in treating the purchase to be the bogus. Under these facts and circumstances, I am of the view that it is not the case where the addition u/s. 68 of the Act could be made. The assessee duly proved the identity, creditworthiness and genuineness of the broker as well as that assessee received the consideration on the sale of the shares from the broker. I accordingly set aside the order of CIT(A)."

7. In the result, all the appeals filed by the respective assessee are allowed."

2.5.10. In view of the aforesaid facts and circumstances and respectfully following the aforesaid judicial precedents relied upon, we have no hesitation in directing the Learned AO to delete the addition made u/s 68 of the Act. Accordingly, the grounds raised by all the assesses in this regard are allowed.

6. Applying the proposition of law laid down in the above case laws to the fact of the case, the addition in question has to be deleted.

Some of the facts are noted below:

- (a) the share sold by the assessee were brought during the F.Y 2002-03 and were duly reflected in the balance sheet ending in 31.03.2003 and 31.03.2004;
- (b) shares were purchased by making payments through account payee cheques;

(c) during the year the shares were sold and payments were received through account payee cheques through the broker M/s. Ahilya Commercial Pvt. Ltd.;

(d) the addition was made merely on the basis of a statement of the third party and there was no evidence that cash was exchanged between the parties.

7. Under these circumstances, as the assessee has proved the identity, creditworthiness and genuineness of the transactions, the addition in question is bad in law.

8. In the result, I delete the addition of Rs.13,78,910/- and the appeal of the assessee is allowed.

Kolkata, the 23rd January, 2019.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 23.01.2019
RS(Sr.PS)

Copy of the order forwarded to:

- 1. Surendra Kumar Khater, C/o. M/s. Jain Impex Pvt. Ltd., 2nd Floor, 113B, Manohar Das Street, Kol-1.***
- 2. D.C.I.T, Central Circle-XXVII, Kolkata, 110, Shatipally, Ayakar Bhawan, Poorva, Kolkata - 700 107.***
- 3. CIT(A)-***
- 4. CIT- ,***
- 5. CIT(DR),***

True copy

By order

Assistant Registrar , Kolkata Benches