

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 3212/DEL/2019
[A.Y 2015-16]

Shri Deepak Nagar
C-1/67, Safdarjang Development Area
New Delhi

Vs. The A.C.I.T
Central Circle -17
New Delhi

PAN No: AAIPN 5965 B

[Appellant]

[Respondent]

Date of Hearing : 06.06.2019
Date of Pronouncement : 12.06.2019

Assessee by : Shri S.K. Tulsiyan, Adv
Ms. Nisha Rochh, FCA

Revenue by : Ms. Nidhi Srivastava, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

With this appeal, the assessee has challenged the correctness of the order of the CIT(A)-27, New Delhi dated 25.03.2019 pertaining to A.Y 2015-16.

2. The sum and substance of the grievance of the assessee is that the Id. CIT(A) wrongly confirmed the disallowance of exemption of Long Term Capital Gain [LTCG] u/s 10(38) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] amounting to Rs. 11,93,55,564/- and by doing so, the CIT(A) erred in confirming the assessment, which is solely based on the information received from the DIT [INV], Kolkata and statements recorded u/s 131 of the alleged operators.

3. Facts emanating from the assessment records reveal that during the year under consideration return, of income was filed on 31.10.2015, declaring income at Rs. 37,73,650/-. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. The assessee is a Chartered Accountant providing professional services and was also working as a Director in few companies. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown exempt income of Rs. 11,93,55,564/- on account of LTCG from transactions on which Securities Transaction Tax was paid. The assessee was asked to give details of capital gains alongwith complete details of shares sold/purchased by him in respect of each company.

4. In his reply, the assessee explained that he was allotted 2,50,000 equity shares of Malti Textile Mills Ltd at a price of Rs. 12/- per share on 13.02.2013. In the meanwhile, the name of the company Malti Textile Mills Ltd was changed to Effingo Textiles & Trading Ltd [ETTL] and one share of the face value of Rs. 10/- of the company was subdivided into 10 shares of Re. 1/- each on 27.09.2013. Accordingly, 2,50,000 shares of Malti Textiles Mills Ltd became 25 lakh shares of ETTL. The assessee sold 14,40,500 shares on various dates through recognised stock exchange on which he earned LTCG of Rs. 11,93,55,564/-. With these factual details, the assessee also furnished copies of the following documents:

- a) Proof of payment for acquisition of shares
- b) Copy of board resolution passed by the invitee company approving preferential allotment of shares
- c) Approval letter from BSE/SEBI for preferential allotment of shares
- d) Copy of share certificate
- e) D-mat account statement
- f) Proof of payment of "Securities Transaction Tax
- g) Proof of receipt of sale consideration in bank."

5. Instead of examining the details furnished by the assessee, supported by documentary evidences, the Assessing Officer was simply carried away with the report of the DIT, INV, Kolkata in which large scale manipulations in the capital market on Bombay Stock Exchange trade stocks, Directorate of Income tax [INV], Kolkata who had conducted several searches and surveys on entry operators as a part of its exercise to unravel the modus operandi of the entry operators providing LTCG on penny stocks was given.

6. As mentioned elsewhere, the Assessing Officer was simply carried away with this report and observed that as the name of the company ETTL found place in the said report, the assessee was required to show cause as to why LTCG of Rs. 11.94 crores should not be treated as bogus and added back to his total income as per provisions of section 68 being unexplained credits.

7. The assessee filed reply which reads as under:

"This is in relation to the captioned matter, wherein your goodself has asked us show cause as to why the long term capital gain of Rs. 11,90,79,561/- on the sale of shares of M/s Effingo Textile & Trading Ltd (formerly called Mold Textile Mills Ltd., referred as

Investee Company) should not be treated as the bogus and added to total income of the assessee. "

1. In this regard it is respectfully submitted that the Assessee was allotted 2,50,000 equity shares of the Investee Company at a price of Rs. 12/- per share on 13th February, 2013 on preferential basis. The payment of Rs. 30,00,000/- for the allotment of shares was made through banking channels. Details of payment had already been submitted in earlier replies.
2. During the year under review, after holding the shares for more than a year, part of the share holding was sold on various dates through normal banking channels on Recognized Stock Exchange and long term capital gain of Rs. 11,90,79,561/- was earned after payment of Securities Transaction Tax ("STT"). This gain was claimed as exempt under section 10(38) of the Act.
3. It is respectfully submitted that the Assessee has submitted following documents for substantiating the claim for the afore-said exemption vide its reply dated —
 - a. Copy of application to the Investee Company for allotment of shares.
 - b. Copy of board resolution passed by the investee company approving allotment of shares.
 - c. Copy of share certificate.
 - d. Copy of Demat Account Statements.
 - e. Copy of application dated 5th January, 2013 by the investee company seeking approval for allotment of shares to the Assessee from the Bombay Stock Exchange ("BSE") and letter dated 7th February, 2013

- of the BSE granting the approval for the same, f
Details regarding the computation of gain on the sale of
shares and the proof of receipts of the sales
consideration in the bank account. However, your
goodself seeks to disallow the afore-said claim of
exemption claim on the basis of some allegations made
against the company, of which the assessee held
shares, on the basis of Investigation Report of Pr. DIT
(Inv) Kolkata and financial results of the investee
company.
- 4.
5. Further, it is respectfully submitted that the Assessee has purchased the shares after approval from the BSE and sold the same on the recognized stock Exchange after following the relevant applicable laws. The Assessee in no manner has been alleged and punished merely because the assessee has been able to earn profits on sale of shares of a company, he cannot be saddled with the unwarranted adverse tax consequences for certain activities of the company. It is simple case of profit booking which any ordinary and prudent person would do when his investment yields and handsome return. Therefore, no. addition can be made merely on the basis of surmises and conjectures.

Also, pursuant to amendment in section 10(38) of the Income Tax Act, 1961, by Finance Bill 2017, CBDT had issued a notification no 43/2017/F. No. 370142/09/2017-TPL, clarifying that, the sale of shares through recognized stock exchange, where the acquisition was made through preferential allotment, duly approved by competent authority, irrespective of date of acquisition, is exempt

u/s 10(38) of the Income Tax Act, 1961. Considering the notification issued, after all the investigations, as alleged by the AO, intention of law is clear, whereby, the capital gain under consideration is kept out of the taxability under the Income Tax Act 1961. Therefore, addition so proposed in show cause, is not justified and if made, is not in line with the intention of law. For your reference, copy of notification is enclosed.

Therefore, in view of the above facts, the Assessee has hereby discharged the initial burden of proof regarding the genuineness of the transaction and any addition, if made, on these facts would not be tenable. Reliance in this regard may be had to the decision of jurisdictional tribunal in the case of *Income Tax Officer, Ward 20(1) vs. Naveen Gupta [2006] 5 SOT 94 (Delhi)*. Hence no change in characterization is warranted as the same would be unjust and untenable. "

8. Reply of the assessee did not find any favour with the Assessing Officer who further observed as under:

"The above reply of the assessee was considered but not found in the light of the facts narrated in the report received from the DIT(Inv.), Kolkata and other information as available on records. The exhaustive report forwarded by the Directorate of Income Tax (Inv.), Kolkata clearly mentions that the prices of shares of certain companies including Effingo Textiles & Trading Limited were rigged artificially to provide bogus long term capital gain. All

the features of the companies which were used for providing bogus long term capital gain as illustrated above, are clearly matching with the trend of the shares of Effingo Textiles & Trading also *i.e.* the trade pattern of the shares following bell shape, the company having hardly any business activity, splitting of shares taken place, the company does not having any history of dividend payouts etc. Actually, splitting of shares is proved to be the most effective way to camouflage the price of shares. After split of shares, the price of shares on the exchange goes down automatically in proportion with the ratio of split and one doesn't see anything adverse happening in the script. So, this practice was also apparently adopted by this company to avoid any hype on such rise in the prices of the shares. It is further noted that the shares of the company were very thinly traded and gradually jacked to a desired level in a period of one year or so to provide desired amount to selected beneficiaries. The movement in the price of the shares was not backed by any fundamentals of the companies.

"7. The above set of facts and circumstances compelling to see the transactions entered into by the assessee in a larger frame of accommodation entry scam as reported by the Directorate of Income-tax (Inv.), Kolkata. Investments by the assessee in a company having no financial worth did not conform to normal behavior of an investor. In the present case what apparent does not appear real. In such a situation, view of Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC) are relevant which observed that the taxing authorities are entitled to look into the surrounding circumstances to find out the

reality and the matter has to be considered by applying the test of human probabilities. The same view was also expressed by their lordships in the case of *Sumati Dayal Vs. CIT* (1995) 214 ITR 801(SC).

9. Hence, considering surrounding circumstances and applying the test of human probabilities coupled with the report of the Directorate of Investigation as discussed above, it is held that the assessee had entered into pre-designed modes of transactions and invested in the shares of Effingo Textiles & Trading Ltd. just to convert his unaccounted cash in the guise of long term capital gain and so, total long term capital gain amounting to Rs. 11,93,55,564 /- is treated as assessee's income from undisclosed sources denying claim of exemption as Long Term Capital Gain. Accordingly, addition of Rs. 11,93,55,564/- is made to the total income of the assessee for the year under consideration being unexplained credits as per provisions of Sec. 68 of the Income-tax Act, 1961. Tax is to be charged on this amount as provided u/s. 115BBE of the I.T. Act, 1961

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

10. While dismissing the appeal of the assessee, the CIT(A) observed as under:

"7.4 During the appellate proceedings the appellant has relied on the same set of evidences as in assessment proceedings. He has further argued that material had been collected at his back & no cross examination has been allowed to rebut the same. Another argument given by appellant is that no addition can be made on the basis of investigation report and mere statement without corroborative evidence cannot be the basis of addition. He has relied on many judicial pronouncements to justify his transactions & claim.

7.5 Let us set the context before moving towards the final decision on the issue.

- The appellant had effectively returned sizable exemption on account of Long Term Capital Gain on sale of shares of such unimaginable gains running into crores out of scrips of no presence or financials.
- There is no prior experience in share market and these are only isolated transaction in shares. The invested companies had no activity or assets as such to even merit any investments per se.
- The investment made in the said companies was strange, as it was not related to the principle business of the appellant and its related entities to be called strategic investment and there was nothing in the books of this company to be considered valuable for investment.

- The statement of brokers recorded by investigation wing is one of great evidentiary value to prove that these brokers are acting as entry operators and managing the transactions of the companies mentioned by them including the one in which appellant had claimed to be transacted.
- The large scale evasion of taxes have been planned by professionals, executed by middlemen and benefitted by the individuals/entities through a device of the multiple transactions and manipulation of stock prices to provide a legally plausible cover in order to deceive the revenue and government authorities at the expense of common man and honest tax payers.
- The circumstantial evidences are very strong in this case indicating bogus accommodation entries of LTCG. Support Is drawn from the judicial pronouncements referred in para 7.5.5 and 7.5.6 of this order.

7.5.1 All the cases quoted by the AO in the assessment order and referred in para 7.5.5 & 7.5.6 of this order are applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the circumstances and not getting influenced by the picture shown by the appellant, which is colored by the use of sham devices. The case laws relied upon by the AR have been perused. No doubt that the decisions in these cases are in favour of the appellant but it appears that the Hon'ble Tribunals/Courts, which have passed these judgments have not

been made aware of the entirety of the circumstances. Moreover, the fact that the appellants in these cases failed to clear the test of human probabilities, has not been brought to the knowledge of these judicial authorities. Therefore, these cases are not **being found relevant in the** present case where the AO has gone to the very root of the transactions after doing deep analysis of the facts and circumstances and after taking into account the various inputs available with him from different sources.

7.5.2 In the present case, there is an obvious and plain transaction of tax evasion which has been clothed with the smoke-screen of subterfuges, by the appellant. The facts of the present case clearly reveal that the transactions of purchase and sale of shares had been effected to create bogus profit under the head LTCG. The appellant resorted to a readymade scheme for purchase and sale of shares which was floated by some Entry Operators. Such transactions are not genuine and natural transactions, but preconceived transactions, resulting in creation of bogus profits which are tax exempt. Such transactions are mutually self-serving to the parties to the transactions. I have come to conclude on the basis of above analysis, documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities that what is apparent in this case is not real, that these financial transactions were sham ones and that this entire edifice was only a colourable device used to evade tax. Moreover, the impugned transactions of shares are preordained one, not for legitimate purpose in view but for the purpose of creating non- genuine and artificial profits, with a view to reduce valid tax liability.

Therefore, I agree in toto with the view of the AO as stated in the assessment order that the said transactions are sham transactions and accordingly, the addition and the findings made by the AO in detail in the assessment order are confirmed."

11. In our considered opinion, whether the assessee has discharged the onus cast upon him by provisions of section 68 of the Act or not is purely a question of fact and therefore, judicial decisions relied upon by the representatives of both the sides will be considered on finding parity in facts with the facts of the case in hand.

12. Facts on record show that 2,50,000 shares of Malti Textile Mills Ltd were purchased on 13.02.2013 when certificates were received by the assessee on 22.03.2013 were demated on 30.4.2013, which means that immediately after receiving share certificates, the assessee dematerialised the same, which is evident from the demat statement exhibited at pages 10 to 12 of the paper book.

13. When Malti Textiles Mills Ltd became ETTL, the split shares were credited in the demat statement on 19.11.2003. 80,000 shares were sold on 31.07.2014. 85000 shares were sold on 06.08.2014. 2 lakhs each were sold on 22.09.2014 and on 13.10.2014, 2,50,000/- were sold

on 29.10.2014, 5 lakh shares were sold on 27.11.2014 and 2 lakhs shares were sold on 22.12.2014. On 31.10.2018, 1,54,500 shares were credited as unsold shares thereby making total quantity of shares sold to Rs. 14,40,500/-. All the shares were sold through Bombay Stock Exchange and sale consideration has been received through regular banking channel.

14. These facts have not been demolished by the Assessing Officer nor the CIT(A). In our considered opinion, the Assessing Officer and the first appellate authority chose to restrict themselves to the general inference drawn from the report of the DIT, INV Wing, Kolkata.

15. Section 142 of the Act contains the provisions relating to enquiry before assessment. It is provided u/s 142(2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary.

16. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first appellate authority are devoid of any such enquiry. The

Assessing Officer and the CIT(A) heavily relied upon the alleged report of the INV Wing Kolkata wherein ETTL has been purportedly identified as one of the penny stock companies whose share prices had been artificially rigged by promoters/brokers/operators to create non-genuine LTCG. The Assessing Officer failed to bring on record any part of the said report wherein the name of the appellant or his broker has even been named or implicated. The lower authorities have failed to bring on record any evidence to prove that the transactions carried out by the assessee were not genuine or that the said documents furnished in support thereof were not authentic. It would not be out of place to mention here that no specific enquiry or investigation was conducted in the case of the assessee and/or his broker either by the INV Wing or by the Assessing Officer during the course of assessment proceedings.

17. It is a matter of fact that SEBI looks into irregular movements in share prices and range and warns investors against any such unusual increase in share price. No such warning was issued by SEBI nor there is any evidence that the company ETTL was ever delisted by SEBI or that the transactions in the shares of ETTL were ever suspended by SEBI. The Assessing Officer, by making the impugned addition, has acted merely on suspicions and surmises and failed to produce any

evidence whatsoever to prove that the proceeds received against the sale of shares represented the assessee's undisclosed income. The Assessing Officer has also failed to produce any material/evidence to dislodge or controvert the genuineness of the conclusive documentary evidences produced by the assessee in support of his claim. Surprisingly, neither the assessee nor his broker are named as illegitimate beneficiary to bogus LTCG in any of the alleged statements of the operators/brokers or reports/orders of SEBI or INV wing. In our considered view, the additions made by the Assessing Officer and confirmed by the CIT(A) are heavily guided by surmises, conjectures and presumptions and therefore, has no legs to stand on.

18. The Id. DR has heavily relied upon the various judgments fo the co-ordinate benches, namely, Anip Rastogi Vs. ITO ITA No. 3809/DEL/2018 and Smt. M.K. Rajeshwari ITA No. 1723/Bang/2018. The Id. DR also drew our attention to the decision of the Hon'ble Delhi High Court in the case of Udit Kalra ITA No. 220/2019. We find that in the decision of the Hon'ble Delhi High Court, the glaring fact is that the company was directed to be delisted from the stock exchange whereas the facts of the case in hand is devoid of any such finding. The Id. DR supported the findings of the Assessing Officer and the CIT(A) and also

drew our attention to the judgement of the Hon'ble Supreme Court in the case of Durga Prasad More 82 ITR 540 and Sumati Dayal 214 ITR 801. In our considered opinion, both these judgments relate to issue of circumstantial evidence, surrounding circumstances and applying the test of human probability.

19. In our considered opinion, facts of the case in hand are clearly distinguishable on the facts of the cases relied upon by the Id. DR. The assessee is a habitual investor and a qualified professional. In fact, during the year under consideration, the assessee has sold 6698 shares of Appian Associates Infrastructure Pvt Ltd at Rs. 8.20 crores and 3000 shares of NGC Solutions Pvt Ltd for a consideration of Rs. 60,000/- and has claimed exemption u/s 54F of the Act. These sale transactions have been accepted by the Assessing Officer.

20. The details of investment in shares are as under:

Shares	Value
Bindal Agio Chemicals Limited	11,666
Coal India Limited	23,275
Fidelo Power & Infrastructure Limited	20,00,000
Galaxy Commercial Limited	15,52,141
Malti Textile Mills Limited	12,71,400
Mass Agencies Pvt Ltd	4,41,670
Onida Savak Limited	3,000

Reliance Power Limited	6,800
Sainilc Finance & Industries Limited	1,515
Galaxy Gems jewels & handicraft Pvt Ltd	1,50,90,000
Sky bird Infotech Pvt Ltd	11,50,000
Transcedent Advisory Services Pvt Ltd	90,000

21. These facts clearly demonstrate that the assessee is a habitual investor and being a qualified professional [Chartered Accountant], is well aware of market trends of shares in the stock market.

22. For the sake of repetition, the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the INV Wing as well as information received from the INV Wing. It is apparent from the assessment order that the Assessing Officer has not conducted any independent and separate enquiry in this case of the assessee. Even the statement recorded by the INV Wing has not been got confirmed or corroborated by the person during the assessment proceedings. The Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the INV Wing is required to be corroborated and reasserted/reaffirmed during the assessment proceedings by examining the concerned persons who can affirm the

statements already recorded by any other authority of the department.

23. There is no dispute that the statement which was relied upon by the Assessing Officer was not recorded by the Assessing Officer in the assessment proceedings but it was pre existing statement recorded by the INV Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidence to disprove the evidences produced by the assessee.

24. Our above view is fortified by the decision of the Hon'ble Delhi High Court in the case of Fair Invest Ltd 357 ITR 146. The relevant findings of the Hon'ble Jurisdictional High Court of Delhi read as under:

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer

chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under [Section 131](#) summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of [Section 68](#)."

25. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore, the judicial decisions relied upon by the Id. DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand. We, accordingly, direct the Assessing Officer to accept the LTCG of Rs. 11,93,55,564/- declared as such.

26. Since we have accepted the genuineness of the LTCEG, we do not find any merit in the consequential addition of Rs. 6,05,312/- and the same is also directed to be deleted.

27. In the result, the appeal filed by the assessee in ITA No. 3212/DEL/2019 is allowed.

The order is pronounced in the open court on 12.06.2019.

Sd/-

**[SUDHANSHU SRIVASTAVA,]
JUDICIAL MEMBER**

Sd/-

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

Dated: 12th June, 2019

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	