

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-A” BENCH : BANGALORE**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

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| ITA No.744/Bang/2019 |
| Assessment year : 2007-08 |

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| Shri. Niren Mehta, No.258, 44 th Cross, 9 th Main, 5 th Block, Jayangar, Bangalore – 560 041. PAN : AAAHN 6822 M | Vs. | The Income Tax Officer, Ward – 5(2)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

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| Assessee by | : | Smt. Suman Lunkar, CA |
| Revenue by | : | Shri. Priyadarshi Misra, JCIT |

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| Date of hearing | : | 06.06.2019 |
| Date of Pronouncement | : | 03.07.2019 |

ORDER

This appeal filed by the assessee is directed against the order of the CIT(A)-12, Bangalore, dated 18.03.2019 for Assessment Year 2007-08.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, an individual, filed his return of income for Assessment Year 2007-08 on 31.07.2007 declaring total income of Rs.1,58,940/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short ‘the Act’). Based on information received that the assessee’s share transactions (i.e., STCG of Rs.38,640/- on sale of shares) were carried out through the Mahasagar Securities

Services Pvt. Ltd., which were said to be non-genuine, the reassessment proceedings were initiated and notice under section 148 of the Act was issued to the assessee. In response thereto, the assessee requested the Assessing Officer (AO) to consider the original return of income filed on 31.07.2007 as filed in response to the notice under section 148 of the Act. The assessment was concluded under section 143(3) r.w.s. 147 of the Act vide order dated 17.12.2013 wherein the assessee's income was determined at Rs.1,59,480/-, in view of the AO bringing to tax an amount of Rs.39,177/- (i.e., Rs.38,640/- + Rs.537/- of security transaction tax) as 'Income from Other Sources', which was earlier declared as short term capital gain of Rs.36,640/- arising on sale of shares through Mahasagar Group. On appeal, the CIT(A), vide order dated 18.03.2019, upheld the AO's order, not for the reason taken by the AO, i.e., that the share transactions are not genuine as it is done through Mahasagar Group; but on the grounds that (a) contract note for purchase / sales are not issued by broker of recognized stock exchange, (b) the purchase and sale are off market and (c) the transactions do not qualify as spot delivery contracts.

3. Aggrieved by the order of CIT(A)-12, Bangalore, the assessee has filed this appeal before the Tribunal, wherein it has raised the following grounds:-

1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The orders passed are bad in law and are liable to be quashed.

2.1 In any case, the conditions precedent for the issue of notice u/s. 148 of the Act being absent, the re-opening of assessment becomes bad in law and consequently the order as passed/confirmed being also bad in law is required to be quashed.

2.2 In any case the assessing officer having not complied with legal provisions / procedure for reopening / reassessment, the consequential order becomes bad in law and liable to be quashed.

3.1 *In any case the order passed in gross violation of the principles of natural justice and fair play, especially in the absence of the cross examinations of the persons whose averments are sought to be relied upon by the Assessing Officer while passing the order, makes the order totally bad in law and liable to be cancelled.*

3.2 *The learned Commissioner of Income tax (Appeals) has instead of quashing the impugned order, has just confirmed the order of Assessing Officer without properly considering the facts and circumstances of the case, arguments of the appellant and the law applicable.*

3.3 *In any case and without prejudice, the orders passed by the authorities below being contrary to binding dictum of the jurisdictional High Court are bad in law and are liable to be quashed.*

4. *The assessing officer had in any case, erred in treating a sum of Rs. 39,177/- being short term capital gain earned on sale of shares as 'Income from other sources' and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The action of authorities below has no support in law; is contrary to facts and evidence available and therefore deserves to be rejected.*

5.1 *In any case, the learned CIT(A) has erred in holding that*

- a) *it was proposed not to rely on the statements of third party therefore the question of cross examination does not arise at all.*
- b) *The contract note for purchase and sale of shares were not issued by a broker of recognized stock exchange.*
- c) *The purchases and sales are off market*
- d) *The transactions do not qualify as spot delivery contracts*
- e) *The validity of purchases and sales could not be established by the appellant*
- f) *The short term capital gain is taxed u/s 68 of the Act.*

On proper appreciation of facts and the law applicable, the conclusions drawn are wholly erroneous both on facts and law are to be disregarded and the addition as confirmed is to be deleted.

5.2 *The several observations made and various conclusions drawn by the lower authorities in the course of order are without basis and evidence and are made/drawn on surmises, probabilities and conjectures. Such observations and conclusions by quasi-judicial authorities have no support in law and deserve to be rejected in toto.*

6. *The authorities below have erred in not appreciating the fact that the shares dealt in were of blue chip companies and in no case such shares be treated as bogus*

or accommodative in nature. The action of authorities below being wholly erroneous both on facts and law applicable is to be negated and the short term Capital Gain as offered by the appellant is to be accepted as such.

7. The appellant denies the liability to pay interest. The interest having been levied erroneously is to be deleted.

8. In view of the above and other grounds to be adduced at the time of hearing, it is requested that the impugned order be quashed or atleast the income from short Term Capital Gain earned on sale of shares as returned by the appellant be accepted, the assessment of Short term capital gain earned on sale of shares as Income from Other Sources be deleted and the interest levied be also deleted.

4.1 The learned AR for the assessee has drawn the attention of the Bench to the Assessment Order to highlight the fact that the re-assessment proceedings under section 147/148 of the Act for Assessment Year 2007-08 were taken up by the AO solely on the basis of information that the capital gains on shares transacted (i.e., purchased and sold) by the assessee in the period under consideration were not genuine as they were carried out through the Mahasagar Group; that these transactions never actually took place and proceeded to complete the assessment holding the declared capital gains to be 'Income from Other Sources'. It is contended that in completing the assessment, the AO never put the assessee on notice as to his suspicions in the matter; the basis thereof, or made available the report / statements of the persons of Mahasagar Group that he relied upon in coming to his conclusions, thereby denying the assessee the opportunity to present its rebuttal, and / or cross – examination of any person whose statement was relied upon, if any. It is contended that the above actions on the part of the AO are in gross violation of the principles of natural justice. The learned AR submits that in view of the above, the additions made by the AO are not sustainable in the eyes of law and ought to be set aside / deleted. In this regard, the learned AR placed reliance on the decision of the Hon'ble Karnataka High Court in the case of Chandra Devi Kothari in W.A. No.39370/2014 dated 02.02.2015 (copy placed on record), submitting that at para 8 thereof, the Hon'ble Court has held that the matter is

required to be re-considered by the AO by providing fair and reasonable opportunity of hearing to the assessee after furnishing details / report / copies of statements based on which the impugned assessment order has been passed. It is prayed that in the light of the facts of the case on hand and as per the directions / observations of the Hon'ble Karnataka High Court in the case of Chandra Devi Kothari (supra), the entire matter be restored back to the file of the AO for fresh adjudications with the same directions.

4.2 Per contra, the learned DR supported the orders of the authorities below.

4.3.1 I have considered the rival submissions and first of all, I reproduce Para No.8 of the judgment of Hon'ble Karnataka High Court rendered in the case of M/s. Chandra Devi Kothari (Supra) and this is as under:

“8. In the light of the facts and circumstances as adverted to above and as the petitioner has been denied an opportunity of fair hearing by providing copy of the statement and related details regarding the alleged share amount, I am of the view that the matter requires to be re-considered by the respondent by providing fair and reasonable opportunity of hearing to the petitioner and by furnishing the details / copy of the statement based on which the impugned assessment order has been passed.”

4.3.2 From the above Para 8 of the judgment of Hon'ble Karnataka High Court in the case of Chandra Devi Kothari (supra) it is seen that matter was restored back to the file of the AO for fresh decision after providing the assessee copy of the details / statement and other related details relied upon by the AO to frame the Assessment Order. The facts noted by the High Court in the earlier paras of judgment (supra) appears to be similar to the fact situation in the case on hand and therefore by respectfully following the judgment in the case of Chandra Devi Kothari (Supra), I set aside the impugned order of learned CIT(A) for Assessment Year 2007-08 and restore the matter to the file of the AO for fresh adjudication with

the same directions as were issued by the Hon'ble Karnataka High Court in the case as per Para No.8 of the judgment reproduced above. In view of this decision, no adjudication is called for at this stage in respect of other grounds; both legal and on the merits of the addition.

5. In the result, the assessee's appeal for Assessment Year 2007-08 is allowed for statistical purposes.

Order pronounced in the open court on this 3rd day of July, 2019.

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 3rd July, 2019.

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Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.