

THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" Bench, Mumbai  
Before Shri Shamim Yahya (AM)

I.T.A. No. 1698/Mum/2018 (Assessment Year 2014-15)

Shri Sunil H. Tharwani-HUF Tharwani Bunglow Royal Residency, Near New Telephone Exchange Ulhasnagar-421 001  PAN : AABHT1065P  (Appellant)	Vs.	DCIT-2 2 <sup>nd</sup> Floor Mohan Plaza Wayale, Near Khadakpada Kalyan West Pincode- 421 301.  (Respondent)
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Assessee by	Shri Jitendra Jain
Department by	Shri Chaitanya Anjaria
Date of Hearing	20.6.2019
Date of Pronouncement	25.6.2019

ORDER

This appeal by the assessee is directed against the order of learned CIT(A) dated 21.12.2017 and pertains to A.Y. 2014-15.

2. The issue raised is that learned CIT(A) erred in confirming the addition made by the Assessing Officer u/s. 68 of the Act at Rs. 30,72,759/-.

3. Brief facts of the case are as under :-

Return of income declaring total income of Rs.11,86,851/- was filed on 31.03,2015. During the course of assessment proceedings, the AO noticed that the assessee has earned exempted long term capital gain on sale of shares of Rs. 35,21,075/-. The case was selected for scrutiny for examining suspicious long term capital gain on sale of shares on the basis of inputs from Investigation Wing, Kolkata. The investigation carried out by the Directorate of Investigation, Kolkata, has established that a racket generating bogus entries of Long Term Capital Gain which is exempt from tax was busted. In this racket, the operators make the beneficiary to buy shares of a pre-determined penny stock company controlled by them. These shares are transferred to

beneficiary at a very nominal price through preferential allotment of off-line sale to save STT. The beneficiary holds the share for the statutory period and when the price reaches the desired level, the beneficiary who bought the shares at a normal price, is made to sell it to a dummy paper company of the operator and claimed LTCG exemption u/s.10(38). The assessee has purchased 2000 shares for Rs.4,48,316/- of M/s. NCL Research Limited (Formerly known as Akai Asian Limited) (Penny Stock) through preferential offer and later on these shares were sold on in May 2013 for a consideration of Rs.35,21,075/-. On analyzing the share transitions of M/s. NCL Research Limited, the AO noticed that the shares have been abnormally accelerated after a prescribed period of one year and sale value of shares were pre-arranged in the form of obtaining accommodation entry. Statement was recorded u/s 133A on 27.05.2015 of Shri Mahavir Prasad Saraswat and he stated that Mr. Manish Baid used the share of INCL Research and Financial Service Ltd. for providing bogus long term capital gain. The appellant's statement u/s 131 was also recorded on oath on 27.12.2016 and assessee confirmed to have had no knowledge about the working of the share market. Therefore, the AO concluded that the transactions were sham transactions and aimed only to bring unaccounted money in the guise of exempted long term capital gains. Accordingly, the AO denied the claim of long term capital gain of Rs.30,72,759/- by relying on various decisions of courts and the same was added u/s.68 of the Act.

4. Upon assessee's appeal learned CIT(A) noted that nobody attended despite several notices, accordingly he proceeded to decide the issue on merits on the basis of written submissions made by the assessee. Learned CIT(A) reproduced extensively the submissions of the assessee. Learned CIT(A) addressed the issue of lack of opportunity for cross examination. Learned CIT(A) rejected the same on the ground that it is basically a futile attempt just to buy time and prolong the proceedings. He also found that it is humanly not possible for the operators/brokers to be present for oral cross examination. He noted that the Assessing Officer recorded statement u/s. 131 of the assessee

on 27.12.2016 and the assessee has never requested the Assessing Officer for cross examination of Mr. Mahavir Prasad Saraswat, Mr. Manish Baid and Mr. Anuj Agarwal. Learned CIT(A) thereafter proceeded to reject the contention of the assessee. Learned CIT(A) also referred to details of case laws referred in assessment order and noted that the assessee has purchased 2000 shares for Rs. 4,48,316/- of M/s. NCL Research Ltd. through preferential offer and later on these shares were sold in May, 2013 for a consideration of Rs. 35,21,075/-. He also referred to the financial position of the company starting from 2011-12 to 2015-16 mentioned in the assessment order. From the same he inferred that operators/entry provider in connivance with the main persons of company has rigged the share prices and the beneficiaries have booked bogus claim of long term capital gains exempted u/s. 10(38) of the Act. Thereafter learned CIT(A) referred to the decision of Hon'ble Apex Court in the case of Sumati Dayal Vs.CIT (214 ITR 801), CIT Vs. Durga Prasad More (82 ITR 540) and Hon'ble Bombay High Court decision in the case of Shri Sanjay Bimalchand Jain L/H of Shantidevi Bimalchand Jain (ITA No. 18/2017 order dated 10.4.2017).

5. Against the above order, assessee is in appeal before us.

6. I have heard both the counsel and perused the records. Learned Counsel of the assessee stated that the observation of the authorities below is not correct that it is an offline transaction. He submitted that the transaction was very much routed through the stock exchange. He further submitted that the authorities below have wrongly mentioned that the assessee has dealt with only in shares of NCL. He submitted that the assessee has dealt with other shares also including Maruti and others. Learned counsel stated that shares were purchased at a cost of Rs. 241/- each hence they cannot be treated as penny stock. Learned counsel of the assessee submitted that there was only jump of three and half times in the share prices. He submitted that the same is duly justified by the details of increase in sales recorded by the Assessing Officer from the analysis of financial report of the said company in the

assessment order itself. Hence, learned counsel submitted that there were economic and financial justification of the increase in share price. He further referred to Hon'ble Bombay High Court decision in the case of CIT Vs. Shyam R. Pawar (54 taxmann.com 108) for the following proposition :-

*Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 - Assessee declared capital gain on sale of shares of two companies -Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus - Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted - Held, yes [Para 7] [In favour of assessee]*

7. Per contra, learned Departmental Representative relied upon the orders of authorities below. He submitted that this is a case of penny stock transaction and abnormal gain has rightly been treated as unexplained credit u/s. 68 of the I.T. Act. He relied upon the case laws referred in the order of learned CIT(A).

8. Upon careful consideration, I find considerable cogency in the facts as distinguished by learned Counsel of the assessee in this case and that noted by the authorities below. Learned Counsel of the assessee pointed out that the authorities below have treated this as an offline transaction. However learned counsel contends that this transaction has been very much routed through the stock exchange. Further, it has been pointed out that the authorities below have wrongly mentioned that the assessee dealt with only in shares of NCL. However, it is pointed out that the assessee has dealt with the shares of other companies like Maruti and others. Further learned counsel has pointed out that this is not at all the case of penny stock as shares purchased were costing more than Rs. 200/-each as such they cannot be said to be penny stock transaction. Hence, he pleaded that

various case laws referred by the authorities below regarding preponderance of probability are not applicable. Further, learned counsel submitted that economic and financial justification of share prices increase is emanating out in the Assessing Officer's order itself, wherein there is three folds increase in the turnover of the said company which sufficiently justifies the three folds increase in price. Hence, learned counsel submitted that the case laws for proposition that there has been many folds abnormal increase in price, without economic and financial justification of penny stock shares is not applicable on the facts of the case. Furthermore, we note that Hon'ble Bombay High Court decision referred by learned counsel hereinabove is germane and is rendered on similar facts. It is not the case that the said decision has been subsequently explained or distinguished in any of the Hon'ble High Court decision. Hence, the same does not cease to have value as precedence. In these circumstances in the background of aforesaid factual discrepancies pointed out by learned counsel, I deem it appropriate to remit this issue to the file of the Assessing Officer. The Assessing Officer is directed to consider the issue afresh keeping in mind the observations hereinabove.

9. In the result, this appeal by the assessee stands allowed for statistical purposes.

Order has been pronounced in the Court on 25.6.2019.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 25/6/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai

6. Guard File.

//True Copy//

*PS*

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai