

**आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, CHENNAI**  
**श्री जॉर्ज माथन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य के समक्ष**  
**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND**  
**SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.2430/CHNY/2018  
(निर्धारण वर्ष / Assessment Year: 2013-14)

Shri Mukesh K Jain, Flat No.504, Tower 2, Ananda Door No.4,5,6 & 7, Stepenson Road, North Town, Perambur Barracks, Chennai – 600 012.	Vs	The Income Tax Officer, Non Corporate Ward – 5(3), Chennai.
PAN: AAIPM5894Q		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri H. Yeshwanth Kumar, CA
प्रत्यर्थी की ओर से/Respondent by	:	Shri S. Bharath,CIT

सुनवाई की तारीख/Date of hearing	:	13.06.2019
घोषणा की तारीख /Date of Pronouncement	:	05.08.2019

**आदेश/ORDER**

**Per S.JAYARAMAN, AM:**

The assessee filed this appeal against the order of Commissioner of Income Tax (Appeals)-5, Chennai, in ITA No.295/CIT(A)-5/2017-18 dated 29.06.2018 for the assessment year 2013-14.

2. Shri Mukesh K Jain, the assessee, an Individual, purchased 3000 shares of M/s. Bakra Pratisthan Ltd, on 16.5.2008 for Rs.60,000/-, by cash, off market, from Epica Tracon (P) Ltd, Kolkatta. Subsequently, he

sold those shares for Rs.10,65,550/-, earned a profit of LTCG of Rs. Rs.10,05,098/- and claimed it as an exempt income u/s. 10(38). The Assessing Officer, on the basis of the report of investigations done by the Revenue in Kolkata in which one of the brokers named the assessee as a beneficiary of bogus LTCG, reopened the assessment. During the re-assessment, the AO issued a letter to the seller of shares which was returned by the postal authorities marking not known. Thereafter, the Assessing Officer considering the assessee's explanation, material etc., on the basis of investigations done by the Revenue and after analyzing these transactions in detail, inter alia, held that the assessee has entered into an engineered transaction to generate artificial LTCG and hence assessed the entire sale consideration as an unexplained credit and refused the assessee's exemption claim under section 10(38). Aggrieved, the assessee carried the matter on appeal before the CIT(A). The Ld. CIT(A), inter alia, relying on the decisions in the cases of ITO, 19(3) (4) Mumbai Vs Shamim M Bharwani, reported in 69 taxmann.com 65 (Mumbai –Trib) and Sanjay Bimalchand Jain v PCIT-1, Nagpur reported in 89 taxmann.com 196 (Bomb HC) dismissed the appeal of assessee. Aggrieved against that order, the assessee filed this appeal before the Tribunal.

3. It was submitted by Id. A.R that the issue in this appeal was against the action of the Ld. CIT(A) in confirming the addition made by Id. Assessing Officer in treating the purchase and sale of shares by the assessee, as penny stock transactions. The Ld AR submitted on the lines of grounds of appeal and relied on the order of this Tribunal in the case of Shri Heerachand Kanunga for assessment years 2010-11 & 2011-12 in ITA Nos. 2786 & 2787/Mds/2017 dated 03.05.2018. Per Contra, the Ld DR submitted that the assessee has claimed deduction u/s 10 (38) but he has not proved the genuineness, therefore, reiterating the facts and circumstances of this case from the orders of the lower authorities the Ld. DR supported the orders of the lower authorities.

4. We have considered the rival submissions. It is noticed that the assessee has not been given a fair opportunity to prove the genuineness but the assessment has been made based on the evidences collected by the Revenue in the course of the investigation conducted by them on brokers / share broking entities etc. This is not permissible. This being so, in the interests of natural justice, the issue of the genuineness of the transactions require re-adjudication. Since, the right to exemption must be established by those who seek it, the onus therefore lies on the assessee. In order to claim the exemption from payment of income tax, the assessee had to put before the Income Tax authorities proper

materials which would enable them to come to a conclusion. (35 ITR 312 (SC)). Thus, the Assessing Officer must keep in mind that the onus of proving the exemption rests on the assessee. If the Assessing Officer does have any evidence to the contrary, it is to be put to the assessee for his rebuttal. The internal communications of the Revenue are evidences for drawing an opinion on possible wrong claims but they are not the final evidence. Further, perusal of assessee's case shows that it is similar to the facts in the case of Shri Heerachand Kanunga, a decision of the Coordinate Bench of this Tribunal made for assessment years 2010-11 & 2011-12 in ITA Nos. 2786 & 2787/Mds/2017 dated 03.05.2018 . The relevant portions from that order is extracted as under :-

*"9. A perusal of the facts in the present case admittedly given room for suspicion. However, assessments are not to be done on the basis of mere suspicion. It has to be supported by facts and the facts are unfortunately not forthcoming in the Assessment Order, in the order of the Ld.CIT(A) nor from the side of the assessee. The main foundation of the assessment in the present case is the statement of one Shri Ashok Kumar Kayan who has admitted to have provided bogus Long Term Capital Gains to his clients. The said Shri Ashok Kumar Kayan also allegedly seems to have provided the assessee's name and PAN as one of the beneficiaries. However, this statement given by Shri Ashok Kumar Kayan cannot be the foundation for the purpose of assessment in so far as Shri Ashok Kumar Kayan has not been provided to the assessee for cross-examination. In the absence of opportunity of cross-examination, the statement remains mere information and such information cannot be foundation for assessment.*

*10. Admittedly, the assessee has claimed to have purchased 15000 shares from M/s.BPL @ Rs.20/- per share totaling into Rs.3,00,000/-. The assessee claims to have paid cash for the purchase of these shares. The primary question would be as to where the purchase was done? If the purchase has been done in*

*Kolkata, how was the cash transferred? When did the assessee received the share certificates and the share transfer forms? How did the assessee overcome the provisions of Sec.40A(3)? Was there adequate cash availability in the books of the assessee on 24.04.2008? Did the assessee travelled to Kolkata? How was the transaction done? Who applied for the demating of the shares? When were they demated? When were the shares transferred to the demat account of the assessee? To whom were the shares sold during the Assessment Years 2010-11 & 2011-12? When were the cheques received by the assessee? From whom did the assessee received the cheques? Was there any cash deposit immediately prior to the issuing of the cheque from the bank account of the purchaser of the shares of the assessee?*

*11. A perusal of the Assessment Order at Para No.7.1 shows that in the Written Submissions, the assessee states that he has purchased 15000 shares of M/s.BPL from M/s.ABPL, Kolkata. However, in Para No.8.3, it is mentioned that the assessee in good faith has purchased the shares of M/s.BPL from a sub-broker in his friends circle. What is the true nature of the transaction? From whom did the assessee actually purchase the shares? Did the assessee take possession of the shares in its physical form? In Para No.8.1 of the Assessment Order, it is mentioned that the assessee is an investor and has been regularly trading in shares. If this is so, does the demat account show such transactions being done by the assessee or is this the only one of transaction. Thus, clearly the facts required for adjudicating the appeals are not forthcoming. There is no evidence whatsoever to show that the assessee has held the shares for more than 12 months. This is because assuming that the demat has been done and the shares of M/s.BPL has come into the assessee's demat account and has immediately flown out. Then the factum of the possession of the shares for more than 12 months have to be proved by the assessee. This is also not forthcoming. In reply to a specific query, as the date of the demat of shares, it was submitted by the Ld.AR that the demat was done on various dates. Then the question rises as to why there is so much of difference in the dates of demating when 15000 shares have been purchased together on 24.04.2008. No details in respect of M/s.BPL company is known, what is the product of the company which had lead to the share value of the company to go up from Rs.20/- to Rs.352/- in a period of two years. This would clearly be a case where the share value of the company was hitting the circuit breaker of the stock exchange on a daily basis and obviously it would have drawn attention. This being so, as the facts are not coming out of the Assessment Order*

*nor the order of the Ld.CIT(A) nor from the side of the assessee, we are of the view that the issues in this appeal must be restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity to substantiate its case and we do so.*

*12. The statement recorded by the Revenue from Shri Ashok Kumar Kayan cannot be used as an evidence against the assessee in so far as the statement has not been given to the assessee nor has Shri Ashok Kumar Kayan been provided to the assessee for cross-examination. However, the assessee shall prove the transaction of the Long Term Capital Gains in respect of which the assessee has claimed the exemption u/s.10(38) by providing all such evidences as required by the AO to substantiate the claim as also by producing the persons through whom the assessee has undertaken the transaction of the purchase and sale of the shares which would include the sub-broker, friend and the broker through whom the transaction has been done, before the AO for examination.*

*13. In the result, the appeals filed by the assessee in ITA Nos.2786 & 2787/Chny/2017 are partly allowed for statistical purposes."*

5. Respectfully following the above order, on the facts and circumstances of this case, we deem it fit to remit the issue of exemption in this appeal back to the file of the Assessing Officer for re-adjudication on the lines indicated above. Therefore, the Assessing Officer shall require the assessee; to establish who, with whom, how and in what circumstances the impugned transactions were carried out etc., to prove that the impugned transactions are actual, genuine etc. The assessee shall comply to the Assessing Officer's requirements as per law. On appreciation of all the above aspects, the Assessing Officer would decide the matter in accordance with law. The Assessing Officer is also free to conduct appropriate enquiry as deemed fit, but shall furnish adequate opportunity

to the assessee on the material etc., if any, to be used against him and decide the matter in accordance with law.

6. In the result, the assessee's appeal is treated as partly allowed for statistical purposes.

Order pronounced in the court on 5<sup>th</sup> August, 2019 at Chennai.

Sd/-

( जॉर्ज माथन )  
(George Mathan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated 5<sup>th</sup> August, 2019

Sd/-

( एस जयरामन )  
(S. Jayaraman)

लेखा सदस्य /Accountant Member

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT     | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF             |