

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'B' BENCH, CHENNAI
श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य के समक्ष
**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.423/CHNY/2019
(निर्धारण वर्ष / Assessment Year: 2012-13)

Smt. Saroj Mootha,
31, Chandrappa Mudali Street,
Chennai – 600 079.

Vs The Income Tax Officer,
Non Corporate Ward – 6(3),
Chennai.

PAN: AKXPM 1768Q

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri D. Anand, Advocate
प्रत्यर्थी की ओर से/Respondent by : Smt. G.D. Jayanthi Angayarkanni, JCIT
सुनवाई की तारीख/Date of hearing : 19.08.2019
घोषणा की तारीख /Date of Pronouncement : 03.09.2019

आदेश / ORDER

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-5, Chennai in ITA No.354/CIT(A)-5/2017-18 dated 14.12.2018 for the assessment year 2012-13.

2. Smt. Saroj Mootha, the assessee, an individual purchased 41,500 shares of M/s. Esaar India Ltd., on 17.05.2019 for Rs.41,500/- by cash, off market, and subsequently earned a profit of LTCG and claimed it as an exempt income U/s.10(38). The Assessing Officer received a report from the investigation wing of Kolkata, in which, inter alia, the assessee was specified as one of the parties who indulged in bogus / non-genuine long term capital gain from the transactions of alleged purchase and sale of shares of Esaar (India) Ltd. Further, the shares of Esaar India Ltd were found by them as penny stock company which has been used for generating bogus LTCG and the investigations revealed that a scheme was hatched by various players to obtain / provide accommodation of entry of bogus LTCG through manipulation of stock market. Therefore, the Assessing Officer re-opened the assessment. During the reassessment, the Assessing Officer required the assessee to furnish particulars. The assessee has not furnished the required particulars. Therefore, the Assessing Officer examined the entire set of transactions in the background of the information received from the DIT(Inv), Kolkatta and upon such examination of facts and on detailed analysis of the transactions held, inter alia, that the transaction of purchase and sale of shares are not genuine, it is a

colourable device adopted by the assessee to give the substantial gains shown on the sale of such penny stocks, within colour of genuineness so as to convert the unaccounted money into accounted money without the need to pay any taxes. Therefore, the Assessing Officer treated the entire sale at Rs.63,77,513/- added to the income. Further, the assessee claimed interest expenditure of Rs.4,69,089/-. Since, the interest claim did not commensurate with the earning, the Assessing Officer disallowed Rs.70,363/- and added to the returned income. Moreover, the Assessing Officer disallowed Rs.77,248/-, the dividend claimed by the assessee and added to the income. Aggrieved, the assessee filed an appeal before the CIT(A). The Ld CIT(A) dismissed the appeal. Aggrieved against that order, the assessee filed this appeal.

3. It was submitted by Ld.AR that the issue in this appeal is against the action of the Ld. CIT(A) in confirming the additions made by the Assessing Officer in treating the purchase and sale of shares by the assessee as penny stock transactions. The Ld.AR submitted that the Ld.CIT(A) upheld the interest disallowance made by the Assessing Officer although such expenses were incurred by the

assessee and upheld the disallowance of dividend income without appreciating the facts and circumstances of the case. Per Contra, the Ld DR submitted that the assessee has claimed deduction u/s 10 (38) but she has not furnished any material in support of her claim and to prove the genuineness of the transactions. Further, the assessee has not furnished any material and substantiated its interest claim. Therefore, reiterating the facts and circumstances of these cases 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 of the transactions but the assessment has been made primarily based on the evidences collected by the Revenue in the course of the investigation conducted by them on the 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 AO must keep in mind that the onus of proving the exemption rests on the assessee. If the AO 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. This Tribunal in the case of Kanhaiyalal & Sons (HUF) v. ITO in I.T.A. No.1849/Chny/2018 dated 06.02.2019, has remitted back the matter to the file of the Assessing Officer for reconsideration. This Tribunal has observed at para 4 of its order as under:-

“4. We heard Shri AR.V. Sreenivasan, the Ld. Departmental Representative also. Admittedly, the Assessing Officer disallowed the claim of the assessee on the basis of the information said to be received from the Investigation Wing of the Department at Kolkata with regard to investment made by the assessee in the penny stock company. It is not in dispute that a copy of the investigation report said to be received from Kolkata was not furnished to the assessee. Moreover, details of the enquiries said to be made by the Assessing Officer were also not furnished to the assessee. In those circumstances, this Tribunal is of the considered opinion that the Assessing Officer has to reconsider the issue

afresh after furnishing the material relied upon by the Assessing Officer. Accordingly, the orders of both the authorities below are set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall bring on record the role of the assessee in promoting the company and the relationship of the assessee, if any with the promoters, role of the assessee in inflating the price of shares, etc. The Assessing Officer shall also furnish a copy of the investigation report said to be received from the Investigation Wing of the Department at Kolkata and other materials if anything in his possession and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee."

4.1 Further, perusal of the above case show that it is similar to the facts in the case of Shri Heerachand Kanunga, a decision of the Co-ordinate 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."

4.2 Respectfully following the above orders, 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 AO for re-adjudication on the lines indicated above. Therefore, the AO 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 AO's requirements as per law. The AO is also free to conduct appropriate enquiry as deemed fit. The Assessing Officer shall also bring on record the role of the assessee in promoting the company and relationship of the assessee with other promoters, role of the assessee in inflating the price of shares, etc. as had been held by the Co-ordinate Bench of this Tribunal in the case of Kanhaiyalal & Sons (HUF) v. ITO in I.T.A. No.1849/Chny/2018, dated 06.02.2019 referred to supra. The AO shall furnish adequate opportunity to the assessee on the material etc to be used against her and on appreciation of all the aspects, the AO would decide the matter in accordance with law. Thus, the issues of exemption claim u/s 10(38) are restored to the file of the Assessing Officer for re-adjudication on the lines indicated above. Since the main issue is restored to the file of the AO for re-adjudication, we restore the other

issues also to Assessing Officer for a fresh examination and due decision.

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

Order pronounced in the court on the 3rd September, 2019 at Chennai.

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated 3rd September, 2019

Sd/-

(एस जयरामन)

(S. Jayaraman)

लेखा सदस्य /Accountant Member

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant

2. प्रत्यर्थी/Respondent

3. आयकर आयुक्त (अपील)/CIT(A)

4. आयकर आयुक्त/CIT

5. विभागीय प्रतिनिधि/DR

6. गार्ड फाईल/GF