

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA No.1873/Bang/2019
Assessment year : 2011-12

Smt. Kamala Devi Baid, No.1, 3 rd Floor, V.K.V.M. Complex, 189/191, A.S. Char Street, Bengaluru – 560 053. PAN: ACQPB 3866R	Vs.	The Income Tax Officer, Ward 2(2)(4), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Suman Lunkar, CA
Respondent by	:	Shri Ganesh R. Ghale, Standing Counsel for Dept.

Date of hearing	:	09.10.2019
Date of Pronouncement	:	16.10.2019

ORDER

This appeal by the assessee is against the order dated 17.07.2019 of the CIT(Appels)-II, Bengaluru, relating to assessment year 2011-12.

2. The issue that needs to be adjudicated in this appeal is as to whether the revenue authorities were justified in treating a sum of Rs.15,35,759 which was claimed by the assessee to be long term capital gain on sale of shares as unexplained cash credit u/s. 68 of the Income-Tax Act, 1961 [“the Act”] and adding the same as income under the head ‘income from other sources’.

3. The assessee is an individual having income under the head income from house property, capital gain and other sources. The assessee claimed to have purchased shares of a company by name 21st Century Ltd. for consideration of Rs.60,000 in the FY 2007-08 and sold the same during the FY 2010-11 for a total sale value of Rs.15,55,757, thereby deriving a long term capital gain of Rs.15,35,758. This long-term capital gain was claimed as exempt u/s. 10(38) of the Act.

4. The AO noticed that there was an investigation carried out by the Directorate of Investigation throughout the country in which it came to light that there was an organized racket of generating bogus entries of long-term capital gain which is exempt. The *modus operandi* was to buy shares of companies controlled by the operators at a less price and thereafter rig the price of the stock to a high level and sell the shares and declare long-term capital gain. According to the investigation carried out by the department, the operators were dummy paper companies and the long-term capital gain declared and claimed as exempt was nothing but assessee's own money which has to be added u/s. 68 of the Act.

5. Based on the above said investigation carried out by the Directorate of Investigation, Kolkata, and the statements of various operators, entry providers and stock brokers admitting accommodation entries of long term capital gain, the AO was of the view that the long-term capital gain declared by the assessee has to be treated as unexplained cash credit and added to the total income of the assessee. Accordingly, the AO treated the long term capital gain as unexplained cash credit u/s. 68 of the Act and added the same to the total income of assessee. The CIT(Appeals) confirmed the order of AO.

6. At the time of hearing, the Id. counsel for the assessee brought to my notice that in ground No.4 raised by the assessee before the

CIT(Appeals), the assessee has specifically challenged the order of AO as an order passed in gross violation of principles of natural justice inasmuch as the material and report based on which the AO drew his conclusion were not made available to the assessee. He brought to my notice that the CIT(A) did not deal with the aforesaid aspect at all.

7. Even before the Tribunal in ground Nos. 3.1 to 3.3, the assessee has projected its grievance of violation of principles of natural justice in the following manner:-

“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.

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.”

8. The Id. counsel for the assessee filed before me a copy of the order dated 05.12.2018 in the case of *Shri Ramesh Kumar Shah Vs. ACIT ITA No.595/Bang/2018* wherein this Tribunal on identical facts of violation of principles of natural justice, remanded the matter for fresh consideration to the AO with the following observations:-

“3.3 Per contra, the learned DR for Revenue submitted that on similar facts and circumstances as in the case on hand, issue for consideration is covered by the decisions of the Bengaluru ITAT in the cases of Arvind Kumar Moochand in ITA

No.509/Bang/2017 and Pukhraj Hasmukhlal in ITA No.1927/Bang/2017 wherein the Tribunal has restored the issue to the file of the AO having observed that the additions were made based on reports of the Investigation Directorate at Kolkata and statements of various persons without confronting OR making them available to the assessee for rebuttal. In those cases, the Tribunal restored the matter to the file of the AO with the direction to confront the matter to the file of the AO with the direction to confront the assessee with the reports / documents / statements proposed to be used against the assessee, allow rebuttal thereof and cross examination of parties on whose testimony is proposed to be relied upon and the matter be adjudicated afresh after affording the assessee adequate opportunity of being heard and to also file details / submissions in this regard.

3.4 In Rejoinder, the Id.AR for the assessee did not dispute the proposition put forth by the Id. DR for restoring this issue to the file of the AO for de novo adjudication. 3.5 We have heard both parties and perused and carefully considered the material on record; including the judicial decisions cited and the orders of the authorities below. Taking into consideration the facts and circumstances of the case that the assessee specifically requested for cross-examination of the deponents whose statements were the basis of addition by the AO and also the report of the Investigation Directorate, Kolkata for rebuttal; from the judicial decisions cited, we find that the issue for consideration is squarely covered by the orders of the Bengaluru ITAT in the cases of Arvind Kumar Moolchand (supra) and Pukhraj Hasmukhlal (supra). Following the aforesaid orders (supra), we set aside the orders of the AO and restore the matter of treatment of profit declared on sale of shares, claimed as exempt u/s 10(38) of the Act, to the file of the AO to re-adjudicate the issue afresh; after making available to the assessee for rebuttal all documents; including Statements, Investigation Reports, etc., relied upon by Revenue for making the additions/disallowances and providing adequate opportunity to the assessee for crossexamination of persons whose statements are being relied upon. It is accordingly ordered. Consequently, ground No. 2 is disposed off as above. "

9. A copy of the judgment of the Hon'ble Karnataka High Court in the case of *Mrs. Chandra Devi Kothari Vs. ITO W.P.39370/2014 (T-IT)* was also filed before me wherein on identical issue of accommodation/bogus entries based on statement of third parties, the Hon'ble Karnataka High Court took the view that the matter requires to be re-considered by providing fair and reasonable opportunity of hearing to the Assessee after providing copies of statement relied upon by the revenue.

10. The Id. DR, on the other hand, submitted that the assessee did not ask for an opportunity before the AO and it was only before the CIT(Appeals) that such a plea was made.

11. I have carefully considered the rival submissions. I find that identical issue was considered by this Tribunal in the case of *Shri Ramesh Kumar Shah (supra)* and the Tribunal remanded the issue to the AO for fresh consideration with a direction that the assessee should be provided with all the relevant evidence relied upon by the AO for making the addition and also allow opportunity of cross-examination of statements of persons which has been relied upon by the Investigation Agency. I also find that the Hon'ble High Court of Karnataka has given similar directions in the case of *Mrs. Chandra Devi Kothari (supra)* wherein also the issue was with regard to long term capital gain on sale of shares being treated as unexplained cash credit u/s. 68 of the Act by the revenue. In the light of the aforesaid directions, I set aside the order of the CIT(Appeals) and remand the question of treating the long term capital gain as unexplained cash credit to the AO for fresh consideration as directed by the Tribunal in the case of *Shri Ramesh Kumar Shah (supra)*. I make it clear that all issues raised by the assessee in this appeal are also left open for consideration.

12. In the result, the appeal by the assessee is treated as allowed for statistical purposes.

Pronounced in the open court on this 16th day of October, 2019.

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 16th October, 2019.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.