

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' 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./ITA No.2519/Chny/2019
निर्धारण वर्ष /Assessment Year: 2015-16

Shri J. Ashok Kumar & Sons,
No.30, Market Street, Perambur,
Chennai – 600 029.

Vs. The Income Tax Officer,
Non-Corporate Ward-10(2),
Chennai.

[PAN: AAAHJ 2809N]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri D. Anand, Advocate
: Shri AR V. Sreenivasan, JCIT

सुनवाई की तारीख/Date of Hearing

: 20.11.2019

घोषणा की तारीख /Date of Pronouncement

: 29.11.2019

आदेश / ORDER

PER SHRI S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-12, Chennai in ITA No.107/CIT(A)-12/2017-18 dated 19.07.2019 for the assessment year 2015-16.

2. Shri J. Ashok Kumar & Sons, the assessee, a HUF had purchased 6000 shares of M/s. GCM Securities at the rate of Rs.20 per share from M/s. Purva Shareregistry (India) Pvt. Ltd., off-market, on 04.04.2013. Later, the assessee sold these shares and claimed the Long Term Capital Gain to the extent of Rs. 32,88,507/-. During the assessment, after considering the assessee's explanation, material etc., based on the outcome of the investigations done by the Revenue by the Directorate of Investigation, Kolkata, and after analyzing these transactions, the Assessing Officer concluded that the Long Term Capital Gains claimed by the assessee is basically a colourable device to give the colour of genuineness to the transaction through which he was successful in bringing back his own unaccounted cash into his books without the need to pay any taxes. The humongous gains made by the assessee in a penny scrip is devoid of any fundamentals, defies any logic or human probabilities and therefore cannot be genuine. After considering the circumstantial evidences, the Assessing Officer held that the transactions are sham transactions and aimed only to bring unaccounted money in the guise of long term profit on sale of shares being accretion to capital account and paper work has been done merely to give a colour of authenticity and creating a façade of

legitimate transactions. Therefore, he assessed Rs.32,88,507/- as an unexplained credit U/s.68 and refused to allow the exemption claimed U/s.10(38). Aggrieved against that order, the assessee filed an appeal before the CIT(A). The Ld. CIT(A), inter alia, relying on the decisions in the case of Sanjay Bimalchand Jain v PCIT-1, Nagpur reported in 89 taxmann.com 196 (Bomb HC, Nagpur Bench) etc dismissed the appeal of the assessee. Aggrieved against that order, the assessee filed this appeal.

3. It was submitted by Ld. AR that the issue in this appeal was against the action of the Ld. CIT(A) in confirming the addition made by the Ld. 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 Mr Sunil Kumar Lalwani Vs ITO & others, Non Corporate Circle 9(4), Chennai in ITA No 659 & 660/ CHNY/2018 dt. 09.01.2019. 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 those orders and pleaded that this appeal be upheld.

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 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. The relevant portion of the

order of this Tribunal in the case of Mr. Sunil Kumar Lalwani Vs ITO & others, Non Corporate Circle 9(4), Chennai in ITA No 659 & 660/CHNY/2018 dt. 09.01.2019 is extracted as under:

"5. Per contra, Id. A.R submitted that the Hon'ble Delhi High Court in the case of Pr.CIT Vs. M/s.Laxman Industrial Resources Ltd., in ITA N'o.169/2017, C.M.APPL.7385/2017 vide order dated 14.03.2017 has held the issue in favour of the assessee. The Id. A.R also placed before us the decision of the Co-ordinate Bench of this Tribunal in the case of Shri Aravind Nandlal. Khatri Vs. Income Tax Officer, in ITA No.2035/Chny/2038 for assessment year 2011-12 vide order dated 03.12.2018 wherein the Co-ordinate Bench of this Tribunal has held as follows:-

"5. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the A.O received information from Investigation Wing of the Department at Kolkata with regard to investment of the assessee in penny stock company, namely, M/s. Concrete Credit Limited. The assessee also admittedly sold the said shares and claimed exemption under Section 10(38) of the Act during the year wider consideration. Therefore,, the Assessing Officer has not disputed the source for investment. The Assessing Officer disallowed the claim of exemption on the ground that the investment was in a penny stock company. From the material available on record it appears that a copy of information said to be received from the Investigation Wing of the Department at Kolkata was not furnished to the assessee. It is not brought on record the relationship of the assessee with the promoters of M/s Concrete Credit Limited. It is also not brought on record the role of the assessee in promoting the company, namely, M/s Concrete Credit Limited, issue of public shares, inflation of price of shares, etc. In those circumstances, this Tribunal is of the considered opinion that the matter needs to be re-examined 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 A.O shall 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.. The Assessing Officer shall also furnish a copy of the report said to be received from the Investigation Wing of the Department at Kolkata to the assessee and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee."

5. 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 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.”*

6. 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 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 with the Assessing Officer's requirements as per law. The Assessing Officer 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

Assessing Officer shall furnish adequate opportunity to the assessee on the material etc to be used against him and on appreciation of all the aspects, the Assessing Officer would decide the matter in accordance with law. Thus, the issue of exemption claim u/s 10(38) is restored to the file of the Assessing Officer for re-adjudication on the lines indicated above.

7. In the result, appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the court on 29th November, 2019 in Chennai.

Sd/-

(एन.आर.एस. गणेशन)
(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated 29th November, 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 |