

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER

AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 649/Bang/2019
Assessment Year : 2015-16

Shri Rameshchand Kothari, HUF No.39, 1 st Anjaneya Temple, Sheshadripuram, Bangalore – 560 020. PAN: ACZPK7883N	Vs.	The Assistant Commissioner of Income Tax, Ward – 2 (2) (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri G.S Prashanth, CA
Revenue by	:	Shri K.N.Dhandapani, Addl.CIT

Date of hearing	:	12-12-2019
Date of Pronouncement	:	13-12-2019

O R D E R

PER SMT. BEENA PILLAI, JUDICIAL MEMBER

1. Present appeal has been filed by assessee against order dated 31/01/19 passed by Ld. CIT (A)-2, Bangalore for assessment year 2015-16.
2. Brief facts of the case are as under:

Assessee is a HUF and filed his return of income for year under consideration declaring total income of Rs.12,84,670/-. Ld.AO observed that assessee has claimed exemption under section 10(38) amounting to Rs.1,16,85,790/- towards sale of equity shares. The case was selected for scrutiny to verify the suspicions long term capital gains on shares in pursuance to the inputs from investigation wing.

2.1. Ld.AO observed that, during the year assessee sold 25,000 shares of M/s Sunrise Asian Ltd., at Rs.492/- per share. Assessee upon being quarried by Ld.AO submitted that originally assessee bought 25,000 shares of M/s Conart Traders Ltd., for a price of Rs.20/- each on to November 2011 through M/s Santoshima Trade Links Ltd. It has been submitted that, this company subsequently merged into M/s.Sunrise Asian Ltd., and shares of transferee company being M/s.Sunrise Asian Ltd., were allotted to assessee. Assessee submitted that these shares were in physical form and assessee got the same dematerialised and was sold during the year under consideration. Assessee submitted before Ld.AO that transaction of sale was done through recognised stock exchange openly, and he was unaware of the scrip being a penny stock company.

2.2. It has been submitted that assessing officer concluded the assessment by holding that the transaction in the share price of M/s Sunrise Asian Ltd is not owing to commercial principles and market factors and that assessee resorted to a preconceived scheme to procure long term capital gains by way of price difference in

share transactions. Ld.AO also held that assessee did not discharge his onus of proving the rise in share price to be natural and based on market forces, and, in view of order of SEBI finding that company Sunrise Asian Ltd., was involved in providing bogus long term capital gains, claim of exemption of long term capital gains earned by assessee was denied.

3. On appeal before Ld.CIT (A), observations and findings by Ld.AO were upheld.

4. Aggrieved by order of Ld. CIT (A) assessee is in appeal before us.

4.1. At the outset assessee, raised claim to cross examine persons whose statements were used against assessee to which Ld.AO has referred to in assessment order. In support, Ld.AR placed reliance upon decision of *Hon'ble Karnataka High Court* in case of *Chandra Devi Kothari vs ITO* in *Writ Petition No. 39370/2014 dated 02/02/2015*, wherein matter was restored back to file of AO for fresh decision after providing copy of statement and other related details relied upon by Ld.AO. It has been submitted by Ld.AR that on identical facts and in respect of same script this *Tribunal* in case of individual set aside this issue too Ld.AO vide order dated *28/08/19 in ITA No. 699/B/2019 for assessment year 2014-15*.

Ld.Sr.DR on the contrary filed written submission stating that assessee's claim of genuineness is merely confined to the act that the shares were sold through recognised stock exchange and payment/receipt of consideration was through banking channels. He submitted that these transactions are tailor made and when the circumstantial evidence point on an opposite direction the claim is

proven to be illegitimate. Ld.Sr.DR placed reliance upon order dated 17/09/19 passed by *Hon'ble Delhi High Court* in case of *Suman Poddar vs ITO* in ITA No. 841/2019. We have perused decision of *Hon'ble Delhi High Court*, wherein assessee raised plea regarding failure to accord opportunity of cross examination, for which *Hon'ble Court* relied on judgment in case of *Prem Castings Pvt.Ltd. Vs.CIT* passed by *Hon'ble Allahabad High Court* reported in 88 *Taxmann.com* 189, against which, SLP filed before *Hon'ble Supreme Court* has been dismissed.

We have perused submissions advanced by both sides in light of records placed before us.

5. We are conscious of principle laid down by *Hon'ble Supreme Court* as well as various high courts that, without opportunity of cross- examination, such statements cannot be relied upon against any person. However, such right, as held in various decisions by *Hon'ble Supreme Court*, is not an absolute right and depends on circumstances of the case and the statute concerned, as held in *State of J&K Vs. Bakshi Gulam Mohd. AIR 1967 (SC) 122*, and *Nath International Sales Vs. UOI* reported in *AIR 1992 Del 295*. Similar is the view taken by *Hon'ble Allahabad High Court* in case of *In case of Prem Castings Pvt.Ltd. Vs.CIT (Supra)*. At this juncture we referred to decision of *T. Devasahaya Nadar V. CIT* reported in *(1964) 51 ITR 20 (Mad)*, wherein, it has been held that;

"it is not an universal rule that any evidence upon which the department may rely should have been subjected to cross-examination, if the assessing officer refuses to produce an informant

for cross-examination by the assessee there cannot be any violation of natural justice.”

6. Further in case of *GTC Industries Ltd. V. Asstt. CIT* reported in (1998) 60 TTJ (Bom-Trib) 308 , it has been held that, where statement and report of third parties are only secondary and subordinate material which were used to buttress the main matter connected with the quantum of addition, denial of opportunity to cross examine third parties did not amount to violation of natural justice. Each case has got to be decided on facts and circumstances of that case. Thus in our considered opinion, relevant factors to be considered are surrounding circumstances, objective facts, evidence adduced, presumption of facts based on common human experience in life and reasonable conclusions.

7. In present facts of the case it is further observed that Ld. AO has not examined/called for any evidences in respect of purchase/sale of alleged scripts. Assessee is therefore directed to provide all relevant documents to establish sound financial of alledged companies and that fluctuation in price was market driven. Ld.AO shall take all evidences into consideration and then decide the issue as per law.

In the event *de hors* statement, there are overwhelming evidences and assessee is unable to establish genuineness of sale and purchase of alledged scripts, adverse view would be taken by holding the transaction to be sham.

8. Ld.AO is directed to provide all statements recorded by investigation wing to assessee, referred to in assessment order. In

the event, statements recorded are not of secondary and subordinate category, cross examination has to be granted to assessee. Ld.AO is directed to re-examine the case of assessee in the light of aforesaid direction in accordance with law. Needless to say that proper opportunity shall be granted to assessee to represent its case as per.

Accordingly we allow ground raised by assessee on preliminary legal issue.

In the result assessee's appeal stands allowed for statistical purposes.

Order pronounced in the open court on

(A.K. GARODIA)
Accountant Member

(BEENA PILLAI)
Judicial Member

Bangalore,
Dated
am*

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.