

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA No.2377/Bang/2018
Assessment year : 2014-15

Laxmipat Dudheria (HUF), No.66, Navniketan, K.R.Road, Basavanagudi, Bengaluru-560 004. PAN: AABHL5328K	Vs.	The Income Tax Officer, Ward 5(2)(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri M.V. Padmanabha, Advocate
Respondent by	:	Shri Ganesh R. Ghale, Standing Counsel for Dept.

Date of hearing	:	02.01.2020
Date of Pronouncement	:	10.01.2020

ORDER

This appeal by the assessee is against the order dated 23.07.2018 of the CIT(Appeals)-10, Bengaluru, relating to assessment year 2014-15.

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.46,16,000, which was claimed by the assessee to be sale proceeds of sale of shares giving rise to 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 a HUF. The assessee claimed to have purchased 100000 shares of a company by name M/s. Blue Circle Services Ltd. for consideration of Rs.15,00,000 in the Financial year 2011-12 (AY 2012-13)

and sold those shares during the AY 2014-15 for a sale value of Rs.46,16,000/-. The Assessee declared Long Term Capital Gain (LTCG) on sale of the aforesaid shares at Rs.30,86,000/- and claimed the said long-term capital gain 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, Kolkata into 84 Penny Stocks of which the company M/s.Blue Circle Services Ltd., was one. According to the AO, such investigation brought 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 sale of shares resulting in 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 sales proceeds of shares 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 before the AO the Assessee sought in its letter dated 13.12.2016 filed before the AO, to provide evidence or data proving that

the transactions as entered by the Assessee has been rigged or is so called bogus in nature and that unless such information in possession of the department is made available to the Assessee, the Assessee will not be in a position to submit effective reply and erase any doubts in the mind of the AO. The Assessee also sought three weeks' time after such information is provided so that the Assessee can give proper reply. The request of the Assessee was not acceded to by the AO.

7. Our attention was also drawn to grounds Nos. 3 to 5 filed before the CIT(A) wherein the Assessee has raised specific grounds regarding violation of principles of natural justice and the action of the AO in relying on the findings of the Investigation wing without furnishing the material relating to the same to the Assessee and also on relying on material which were irrelevant. The CIT(A) has given a finding in paragraph-2 of his order that sufficient opportunity was given to the Assessee by the AO and that the AO has not made the addition solely on the basis of report of the Investigation Directorate, but on his own conclusion after analysis of the financials of Blue Circle Services Ltd. that there was no reason why the prices of the shares should increase so much and that the increase in price was artificial.

8. He brought to my notice that before the Tribunal the Assessee has raised 3 to 5 highlighting violation of principles of natural justice and the action of the AO in relying on the findings of the investigation wing without furnishing the material relating to the same to the Assessee and also on relying on material which were irrelevant. He submitted that the issue should be sent back to AO with direction to provide the Assessee with all relevant material based on which the AO came to various conclusions regarding the nature of LTCG declared by the Assessee being not genuine. The learned DR relied on the order of the CIT(A) on the issue of lack of proper opportunity of being heard.

9. I have considered the rival submissions and I am of the view that there has been violation of principles of natural justice in as much as the the AO relied on the findings of the investigation wing without furnishing the material relating to the same to the Assessee and also on relying on material which were irrelevant. The findings of the CIT(A) that the Assessee was afforded proper opportunity is not correct as the request of the Assessee for furnishing of copies of relevant documents were not acceded to by the AO.

10. I also find that this Tribunal on identical facts on identical issue of penny stock, in an order dated 05.12.2018 in the case of *Shri Ramesh Kumar Shah Vs. ACIT ITA No.595/Bang/2018* 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 Moolchand 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 ld.AR for the assessee did not dispute the proposition put forth by the ld. 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 cross-examination of persons whose statements are being relied upon. It is accordingly ordered. Consequently, ground No. 2 is disposed off as above. "

11. The Hon'ble Karnataka High Court in the case of *Mrs. Chandra Devi Kothari Vs. ITO W.P.39370/2014 (T-IT)* on identical issue of addition on account of LTCG based on accommodation/bogus entries based on statement of third parties, 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.

12. I am of the view 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.

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

Pronounced in the open court on this 10th day of January, 2020.

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 10th January, 2020.
/ Desai Smurthy /

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

By order

Assistant Registrar
ITAT, Bangalore.