

आयकर अपील अाधिकरण, अहमदाबाद ढायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1354/AHD/2017

अाधरण वष/Asstt. Year: 2010-2011

Jain Parasmal Vaghmal(HUF), 27, Vijay Society, New Khanderao Road, Baroda. PAN: AABHJ4682E	Vs.	I.T.O., Ward-3(1)(5), Vadodara.
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(Applicant)		(Respondent)
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Assessee by :	Shri P.D. Shah, A.R
Revenue by :	Shri L.P. Jain, Sr.D.R

सुनवाई का ताराख/Date of Hearing : 08/01/2020

घोषणा का ताराख /Date of Pronouncement: 20/01/2020

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-3, Vadodara dated 17/03/2017 (in short "Ld.CIT(A)") arising in the matter of assessment order passed under s.143(3) r.w.s 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dt.31/03/2015 relevant to the Assessment Year 2010-2011.

The assessee has raised the following grounds of appeal.

1. *That the learned Commissioner of Income tax (Appeals) has erred in law by confirming the action of issue of notice u/s.148 of the Income Tax Act 1961, which is beyond the powers vested with the AO and therefore the order passed by the Id.AO should be quashed.*
2. *That the learned Commissioner of Income Tax (Appeals) has erred in law and facts by confirming the addition of long term capital gain as undisclosed income of rs.1,22,26,357/- and therefore the learned AO should be directed to delete the said addition while computing the total income.*
3. *That the appellant craves liberty to add, amend, alter and delete any grounds of appeal before the final hearing.*

2. The assessee in ground no.1 has challenged the assessment framed u/s 147 of the Act.

3. Briefly stated facts are that the assessee in the present case is a HUF and engaged in the business of dealing in stainless and mild steel. The assessee in the F.Y. 2007-08 has purchased and sold certain shares of ZEN Shavings Ltd. through a sub-broker namely M/s Alliance Intermediaries & Network Pvt. Ltd. (for short AINPL).

3.1 The assessee sold these shares in the year under consideration through a sub-broker namely M/s Goldstar Finvest Pvt. Ltd. and earned long term capital gain income of Rs. 1,22,26,357/- which was claimed as exempted u/s 10(38) of the Act. The assessee in support of the claim filed the copies of contract note of AINPL.

3.2 However, the AO during the assessment proceedings observed certain facts as detailed under:

- i. The company through which the assessee purchased the shares namely M/s AINPL belongs to Mukesh Chokshi Group – Chartered Accountant based in Mumbai.
- ii. The company through which the assessee sold the shares namely M/s Goldstar Finvest Pvt. Ltd also belongs to Mukesh Chokshi Group.

- iii. There was a search operation in the case of Mukesh Chokshi group dated 25.11.2009.
- iv. Shri Mukesh Chokshi in his statement admitted that he was engaged in providing accommodation entries to various parties.
- v. Shri Mukesh Chokshi also identified the name of the assessee to whom the bogus entry for long term capital gain was provided.
- vi. M/s. AINPL was the sub broker in NSE through ISE Securities and Services Ltd w.e.f 26.02.2001. However, the membership of AINPL was cancelled w.e.f 21.06.2004 whereas, the assessee has shown purchased and sales transaction through M/s. AINPL subsequent to the date of cancellation as discussed above.
- vii. M/s. Goldstar Finvest Pvt. Ltd. was also the sub broker in NSE through ISE Securities and Services Ltd w.e.f 26.02.2001. However, the membership of M/s. Goldstar Finvest Pvt. Ltd. was cancelled w.e.f 19.02.2004 whereas, the assessee has shown sales transaction through M/s. M/s. Goldstar Finvest Pvt. Ltd. subsequent to the date of cancellation as discussed above.

3.3 As the assessee has made transactions through M/s. AINPL and M/s. Goldstar Finvest Pvt. Ltd. which was not a registered broker. Therefore the long term capital gain claimed by the assessee was referred as bogus capital gain.

3.4 On question by the AO on the observations as discussed above the assessee replied that it cannot be penalized for the non-registration of AINPL with recognized stock exchange. The assessee in support of its long term capital gain income filed necessary details of purchase and sales. However, the AO was of the view that the income of the assessee has escaped assessment and accordingly issued a notice u/s 148 of the Act. Thus the AO finally treated the impugned income as bogus LTCG, therefore he disallowed the exemption under section 10(38) of the Income Tax Act.

4. Aggrieved, assessee preferred an appeal to the Id CIT(A). The assessee before the Id CIT(A) submits that it has not concealed any information on account of long term capital gain income rather it has disclosed all the transactions of long term capital gain earned by it during the year.

4.1 The assessee also submits that no opportunity of cross examination of Shri Mukesh Chokshi was provided to it during the assessment proceedings. Accordingly, the assessee claimed that the reopening on the basis of third party statement is not valid.

4.2 However, the Id. CIT(A) disregarded the contention of the assessee and upheld the validity of the reopening of the assessment u/s 147 of the Act by observing as under:

5.2 The fact is that the AO had received specific information from CCIT (Central-1), Mumbai that the appellant had shown long term capital gain on account of sale and purchase of shares through M/s. Alliance Intermediaries & Network Pvt, Ltd. belonging to Mukesh Choksi Group. A search action u/s 132 of the Act was conducted in the case of Mukesh Choksi Group and during the course of search action 'Shri Mukesh Choksi i.e. the main person of this Group in his sworn statement stated that he and his group companies were only involved in accommodation entries. He had also identified the name of the appellant along with the name of other beneficiaries after perusing all the data with respect to appellant at the time of giving such statement. Accordingly, the AO reopened the case of the appellant for the year under consideration after recording reason for the same i.e. on the ground that the appellant had taken accommodation entries in respect of purchase and sale of shares of Zen Shaving Ltd. It may be mentioned that the assessment in the case of the appellant was reopened by the AO on 06/02/2014 which is within the period of four years from the end AY 2010-11. Thus, the issue of change of opinion while reopening the assessment is not involved in the present case. Further, the case of the appellant has been reopened on the basis of specific information received by him regarding the bogus long term capital gain shown by him. Such information is on the basis of statement given by Shri Mukesh Choksi and also on the basis of other incriminating documents found during the course of search in his group companies which were found to be engaged in the business of providing accommodation entries, It is mentioned that the reopening of the assessment in the similar circumstances as are in the case of appellant has been upheld by the Hon'ble High Court of Mumbai in the case of Bright Star Syntex (P.) Ltd., 71 taxmann.com 64 (2016). The relevant decision of Hon'ble Bombay High Court in this referred case is reproduced hereunder for reference;

"6. It is settled position in law that while considering a challenge to a reopening notice on the ground that it is without jurisdiction, the Court has to keep in mind that a settled position in law is not being disturbed as evident from the orders passed earlier, without any justification. However, the Court will certainly interfere where the reason to believe that income has escaped assessment, is a clear case of change of opinion i.e. the same material was subject to consideration in regular assessment proceedings or where the reopening is being done only on suspicion and/or to carry out investigation or where the assessment is sought to be reopened after a period of more

than four years from the end of the relevant assessment year and there has been no failure on the part of the assessee to truly and fully disclose all material facts necessary for assessment. However, in all other cases of reopening of assessment, the Court will examine whether there is material available with the Assessing Officer to form a reasonable belief that income chargeable to tax has escaped assessment and for that purpose ensure that the material is not vague and/or irrelevant. However at this stage i.e. on issue of reopening notice, the Assessing Officer is not required to "have conclusive evidence that income chargeable to tax has escaped assessment but is only required to have reasonable belief of the same. The reasons recorded must on the basis of the material available establish a link between the material available and the conclusion. This should lead to prima facie view that income chargeable to tax has escaped assessment. At this stage, we are not required to consider the merits of the case nor the sufficiency or correctness of the material but only whether the Assessing Officer had reason to believe on the material available that income chargeable to tax has escaped assessment.

*7, We find that the reasons in support of the impugned notice indicates that the Assessing Officer has received definite information that one Mr, Praveen Kumar Jain and the companies controlled by him was in the business of providing accommodation entries. On receipt of the aforesaid information, the Assessing Officer called for the necessary information in regard to the accommodation entries made in respect of the assesseees in **his** jurisdiction. Consequent thereto, the Assessing Officer found that the information received indicated that the eight companies mentioned in the reasons belonged to Mr. Praveen Kumar Jain group and formed the basis of his reasonable belief. At this stage the Assessing Officer has merely to establish that there is justification for him to form a reasonable belief that income chargeable to tax had escaped assessment and not conclusively prove the same. The reliance by the petitioner on the decision of the Apex Court in S.P. Chaliha case (supra) rendered in a completely different fact situation can have no application. In that case the reasons recorded clearly reveal that investigation into allegation is to be done where certain persons appear to be name-lenders and the reasons in support of the impugned notice clearly states that investigation with regard to the loans is necessary. Thus, the Court held that there was no prima facie view reflected in the reasons as the same was subject to investigation of the transaction to find its genuineness. Similarly the decision in Lakhmani Mewal Das (supra) was a case of a notice beyond four years from the end of the relevant assessment year. In that case one of the persons had confessed to the Revenue that he was dealing in providing accommodation entries i.e. name-lending. Amongst the various reasons the Supreme Court pointed out that there was no indication in the reasons as to when the confession was made by the name-lender and also to which assessment year the confession relates. Therefore, the material before the Assessing Officer was vague or Indefinite and it could not be the basis for having the reason to believe that income chargeable to tax had escaped assessment for that year. Reliance was also placed upon the decision of this Court in Rushab Enterprises (supra). We find the decision of this Court was rendered in the context of the assessment being reopened beyond a period of 4 years from the end of the relevant assessment year. In the facts of that case and on the basis of reasons recorded therein, the Court held that there was no basis for having reasonable belief that income chargeable to tax has escaped assessment. Albeit, the Court does record that an Assessing Officer does have power to reopen an assessment, provided there was tangible material to form a reasonable belief that income chargeable to tax has escaped assessment. In the present case we are of the view that the statement of Mr. Praveen Kumar Jain is relevant tangible material with the Assessing Officer to form a reasonable belief that Income chargeable to tax had escaped assessment."*

5.3 As can be seen from the above that the decision of Hon'ble Bombay High Court is squarely applicable to the facts of the case of the appellant also. Further, the Hon'ble High Court of Gujarat has also upheld the reopening of such assessments on the basis of information received regarding accommodation entries. The Hon'ble High Court of Gujarat has held that where subsequent to completion of assessment, the AO, on the basis of search carried out in the case of another person, came to know that loan transactions of the assessee with the Finance Company were bogus as the said company was engaged in providing accommodation entries, it being a fresh information, he was justified in initiating reassessment proceedings in the case of assessee. This decision of Hon'ble High Court of Gujarat has been reported as (2014) 46 taxmann.com 56 in the case of Yogendra Kumar Gupta. This decision is pertaining to AY 2006-07. In this particular case the assessrnet u/s 143(3) was completed in respect of original assessment proceedings and during such proceedings, the assessee has provided the address, PAN and details of amount Invested as also confirmation letters. Based on this the order u/s 143(3) was completed by the AO on 22/12/2008. Later on, the notice u/s 148 was issued on 28/03/2013 which was beyond the period of four years from the end of relevant assessment year. The Hon'ble High Court of Gujarat after examining the relevant judicial pronouncement has held as under;

"21, This Court has examined the belief of the Assessing Officer to a limited extent to inquiry as to whether there was sufficient material available on record for the Assessing Officer to form a requisite belief whether there was a live link existing of the material and j the income chargeable to tax that escaped assessment. This does not appear to be the case where the Assessing Officer on vague or unspecific information initiated the i proceedings of reassessment, without bothering to form his own belief in respect of such \ material, We need to notice that the Joint Director, CBI, Mumbai, intimated to the DIT\ (Investigation), Mumbai. A case is registered against Mr.Arun Datmfa, Harsh Dafmia andi during the search at their residence and office premises, the substantial material indicated! that 20 dummy companies of Mr.Arun Da/mia were engaged in money laundering and the! income-tax evasion. The said entities included Basant Marketing Pvt. Ltd. also. From the\ analysis of details furnished and the beneficiaries reflected, which are spread across the! country, the CIT, Koklata, suspected the accommodation entry related to the assessment! year 2006-07 as well, this information has been provided to Director General of Income-tax, Kolkata, who in turn, communicated to the Chief Commissioner of Income-tax, \ Ahmedabad, Further revelation of investigation as could be noticed from the record! examined (file) deserves no reflection in this petition. Insistence on the part of the, petitioner to provide any further material forming the part of investigation carried out' against Dalmias also needs to meet with negation, as the law requires supply of information on which Assessing Officer recorded her satisfaction, without necessitating supply of any specific documents. The proceedings initiated under section 147 of the Act would not be rendered void on non-supply of such document for which confidentiality is, claimed at this stage, following the decision of the Delhi High Court in case of Acorus Unitech Wireless (P.) Ltd. (supra), Assumption of jurisdiction on the part of the Assessing Officer is since based on fresh information, specific and reliable and otherwise sustainable under the law, challenge to reassessment proceedings warrant no interference",

5.4 As can be seen from the above that Hon'ble High Court of I Gujarat has held that the specific documents on the basis of which an ! assessment has been reopened are not required to be handed over to the assessee. The Hon'ble High Court of Gujarat in another case of Peass industrial Engineers Pvt. Ltd., (2016), 72 taxrnnann.com 302, also has approved that the re-opening was valid in law in the similar circumstances as are in the case of appellant.

5.5 In view of the facts as discussed in just preceding paragraphs of this appeal order and also in view of the legal position in the light of decisions of Hon'ble High Court of Gujarat, it is held

that the AO has validly and rightly reopened the assessment of the appellant for the year under consideration. Thus, the ground of appeal no.1 of the appellant is dismissed.

Being aggrieved by the order of Id CIT(A), the assessee is in appeal before us.

4. The Id AR before us submitted as under:

- 1- That from the perusal of the reasons for the reassessment it is evident that the learned AO has reopened the assessment under section 147 of the Act; Only on account of information received from the DIT(I &C), Ahmedabad and*
- 2- The AO during the assessment proceedings has not provided opportunity of cross examination of Shri Mukesh chokshi, therefore the assessment order framed under section 147 of the Act is invalid.*
- 3- Your honors are requested to consider the above submission while deciding the appeal and oblige."*

6. on the other hand, the Id. DR vehemently supported the order of authorities below.

7. We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has declared long term capital gain of Rs. 1,22,22,638.00 which was treated by the AO as bogus long term capital gain. The view taken by the AO was subsequently confirmed by the Id CIT(A).

8. At the outset, we find in the identical facts and circumstances the Hon'ble ITAT in the case of Shri Pratik Suryakant Shah vs ITO and others in ITA Nos. 810/Ahd/2015 and others has decided the issue in favor of assessee. The relevant extract of the order is reproduced as under:

"13. Having heard the rival contentions, we have carefully perused the orders of the authorities below. As mentioned elsewhere, we have considered the facts in ITA No.810/Ahd/2015. We find that the assessee had purchased 3000 shares of Telant Info Ltd from M/s. Mahasagar Securities Pvt Ltd on April 2004. The consideration was paid and the payment of consideration is not in dispute. The shares of Telant Info Ltd were listed in the Bombay Stock Exchange at that point of lime. The shares so purchased were sold through M/s. Alliance Intermediateries & Network Pvt Ltd and the consideration was received by

cheque. It would be pertinent to mention here that though the shares were purchased in physical form, the same were sent to the company with share application form and the shares were transferred by the company in the name of the purchaser. Thereafter, the shares were transferred in the demat account, from where they were sold. It is not the case of the Revenue that the consideration paid by the assessee at the time of purchase of shares was received back in cash, nor it is the case of the Revenue that the sale consideration received by the assessee was returned back in cash. It is also not the case of the Revenue that the shares in question are still lying with the assessee, nor it is the case of the Revenue that the amounts received by the assessee on sale of the shares is more than what is declared by the assessee.

14. *The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee. nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-*

"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."

15. *The Hon'ble Apex Court held as under:-*

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of tire Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority, As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as

mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on i/c basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause

We, thus, set aside the impugned order as passed In/ the Tribunal and allow this appeal."

16. *On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.*

17. *For the sake of the completeness of the adjudication, even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.*

18. *In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.*

19. *As mentioned elsewhere and as agreed by the Representatives of both the sides; since the facts are common in all the impugned appeals, all the appeals by the assesseees are allowed. The Assessing Officer is directed to treat the surplus as Long Term Capital Gains and allow the exemption as claimed by the assesseees."*

8.1 We also note that the view taken by the Hon'ble ITAT in the case as discussed above was also upheld by the Hon'ble Gujarat High Court in the case of PCIT vs. Bharti Somchad Shah in Tax Appeal No.1023 of 2017, wherein it was held as under:

"1. The appellant-revenue in this appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) has challenged the order dated 21.10,2016 made by the Income Tax Appellate Tribunal, Ahmedabad Bench B in ITA

No.926/And/2015 for assessment year 2008-09, by proposing the following questions stated to be substantial questions of law:

[A] Whether the Appellate Tribunal Is correct in law and on facts in not considering the statement of Shri Mukesh M. Chokshi taken on oath u/s. 132(4) of the Act and is binding as evidence or not?

[B] Whether the Appellate Tribunal is correct in law and on facts in deleting the additions without appreciating the fact that the assessee had not carried out share transactions through stock exchange and those transactions were carried out off market, thus should be treated as illegal and fraudulent or not?

2. Heard Mrs. Mauna Bhatt, learned senior standing counsel for the appellant and Mr. O.K. Puj, learned advocate for the respondent in the appeal.

3. The learned advocate for the respondent has drawn the attention of the court to the order dated 12.09.2017 passed by this court in the case of Principal Commissioner of Income Tax-5 v. Dhvani Mahendra Shah, rendered in Tax Appeal No.674 of 2017, to submit that in an appeal arising out of the common order of the Tribunal, raising identical questions, this court has dismissed the appeal and upheld the order passed by the Tribunal. It was submitted that therefore, for the same reasons, this appeal also deserves to be dismissed.

4. Mrs. Mauna Bhatt, learned senior standing counsel for the revenue, is not in a position to dispute the aforesaid position of law.

5. Having regard to the fact that the controversy involved in the present case stands concluded by the above referred decision of this court, it is not necessary to set out the facts and contentions in detail. For the reasons recorded in the order dated 12.9.2017 passed by this court in Tax Appeal No.674 of 2017, it cannot be said that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise any question of law, much less, a substantial question of law as proposed or otherwise. The appeal, therefore, fails and is, accordingly, summarily dismissed."

8.2 The facts of the case on hand are identical to the facts as discussed above. Therefore, the principles laid down by the Tribunal which were subsequently confirmed by the Hon'ble Gujarat High Court are squarely applicable to the facts in the case on hand. Therefore respectfully following the same we hold that the re-assessment proceedings initiated u/s 147 of the Act is not sustainable. Accordingly, we quash the order framed u/s 147 of the Act.

8.3 As we have decided the issue in favour of the assessee by holding that the assessment proceedings as invalid, we are not inclined to adjudicate the issue

raised by the assessee on merit. Hence, the ground of appeal of the assessee is **allowed**.

9. In the result, appeal of the assessee is **partly allowed**.

Order pronounced in the Court on 20/01/2020 at Ahmedabad.

**-Sd-
(RAJPAL YADAV)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated ^(True Copy) 20/01/2020
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