

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री एस. जयरामन, लेखा सदस्य के समक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.404/Chny/2019
निर्धारण वर्ष /Assessment Year: 2011-12

Smt. Veena B. Jain,
No.2/2A, Demellows Road,
NMZ Complex, 1st Floor,
Choolai,
Chennai – 600 112

[PAN: AAFPV3231P]

(अपीलार्थी/Appellant)

The Income Tax Officer
Non-Corporate Ward-6(4)
Vs. Chennai – 600 034

(प्रत्यर्थी/Respondent)

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

: Mr. Suresh Kumar C.A.
: Mr. AR.V. Sreenivasan, JCIT

सुनवाई की तारीख/Date of Hearing

: 16.12.2019

घोषणा की तारीख /Date of Pronouncement

: 16.12.2019

आदेश / ORDER

PER GEORGE MATHAN, JUDICIAL MEMBER:

This is an appeal filed by the Assessee against the order of the learned
Commissioner of Income Tax (Appeals)-5, Chennai in ITA No.34/CIT(A)-
5/2017-18 dated 16.11.2018 for the Assessment Year 2011-12.

2. Shri Suresh Kumar, Chartered Accountant represented on behalf of the Assessee and Shri. AR.V. Sreenivasan, JCIT represented on behalf of the Revenue.

3. It was submitted by the learned Authorized Representative that the issues raised in this appeal was against the action of the learned CIT(A) in confirming the disallowance of the exempt income u/s.10(38) of the Act. The issue in this appeal is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of Shri Sunil Kumar Lalwani vs. ITO in ITA No.659/Chny/2018 and also in the case of Shri Aashesh Kumar Lalwani vs. ITO for the AY 2014-15 dated 09.01.2019, wherein, the Co-ordinate Bench of this Tribunal has held as follows:

4. *In reply, it was submitted by Id. D.R that the issue was now squarely covered by the decision of Co-ordinate Bench of this Tribunal in the case of Shri Heerachand Kanunga for assessment years 2010-11 & 2011-12 in ITA Nos.2786 & 2787/Mds/2017 vide order dated 03.05.2018 wherein the Tribunal has been held as follows:-*

“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.”

It was a submission that on identical directions, the issue in these appeals can also be restored to the file of Id. Assessing Officer.

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 No.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.”

6. *We have considered the rival submissions. Respectfully following the above decisions of the Co-ordinate Bench of this Tribunal, the issue is restored to the file of Id. Assessing Officer for re-adjudication on identical directions as given in the case of Heerachand Kanunga referred to supra. The Id. 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 Shri Aravind Nandlal Khatri Vs. I.T.O referred to supra. The Id. Assessing Officer shall keep in mind the directions of the Hon'ble Delhi High*

Court in the case of Pr.CIT Vs. M/s.Laxman Industrial Resources Ltd., referred to supra when re-adjudicating the issue. The issues in both the appeals of assessee mentioned in the title are restored to the file of Id. Assessing Officer for re-adjudication after granting the assessee adequate opportunity of being heard.

4. In reply, the learned Departmental Representative vehemently supported the order of the Assessing Officer and the learned CIT(A).

5. Respectfully following the decision of the Co-ordinate Bench of this Tribunal in the case of Shri Sunil Kumar Lalwani vs. ITO and also in the case of Shri Aashesh Kumar Lalwani vs. ITO, referred to supra, the issue raised in these appeals are restored to the file of the Assessing Officer for re-adjudication.

6. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 16th December, 2019 in Chennai.

Sd/-

(श्री एस. जयरामन)

(S. JAYARAMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai,

दिनांक/Dated: 16th December, 2019

IA, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF