

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B" , BANGALORE**

Before Shri Chandra Poojari, AM & Smt.Beena Pillai, JM

ITA No.2326/Bang/2019 : Asst.Year 2008-2009

Sri.R.Jagannath "Aishwarya", No.22/9, 4 th Main, ITI Layout, Near S.K.Garden Bengaluru – 560 046 PAN : AAKPJ8068R.	Vs.	The Dy.Commissioner of Income-tax, Central Circle 2(1), Bengaluru.
(Appellant)		(Respondent)

Appellant by : Smt.Suman Lunkar, CA

Respondent by : Shri Muzaffar Hussain, CIT-DR

Date of Hearing : 28.01.2020	Date of Pronouncement : 31.01.2020
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ORDER

Per Chandra Poojari, AM :

This appeal filed by the assessee is directed against the order of the CIT(A), dated 30.09.2019. The relevant assessment year is 2008-2009.

2. The assessee has raised the following grounds:-

"1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The orders passed are bad in law and are liable to be quashed.

2.1 The impugned order passed by the Assessing officer u/s 143(3) r.w.s 153A of the Act is bad in law in as much as the precondition for assumption of jurisdiction u/s 153A of the Act are not present. The assumption of jurisdiction being bad in law and consequent order also being bad in law is liable to be quashed.

2.2 Even otherwise there being no recording of satisfaction, the impugned order is bad in law and is liable to be quashed.

3.1 In any case the order passed is in gross violation of the principles of natural justice and fair play, especially in the absence of report/information and cross examination of persons whose statements were relied upon by the Assessing Officer while passing the order, makes the order totally bad in law and liable to be cancelled.

3.2 The learned Commissioner of Income tax (Appeals) has instead of quashing the impugned order, has just confirmed the order of Assessing Officer without properly considering the facts and circumstances of the case, arguments of the appellant and the law applicable.

4. The assessing officer had in any case, erred in treating a sum of Rs.64,65,162/- being Short term capital gain earned on sale of shares as Income under the head Business and the learned CIT(A) has erred in confirming the same. On the facts and circumstances of the case and the law applicable, the conclusion drawn is wholly erroneous both on facts and law is to be deleted.

5. In any case and without further prejudice, the authorities below have erred in:

(a) Taxing/ confirming the Short term capital gain earned on sale of shares as Income under the head Business.

(b) Holding without basis that the transactions in shares are fraudulent.

(c) Alleging without any basis that the appellant has obtained accommodation entries and appellant's own money came back in the guise of capital gains

The conclusions / observations of authorities below being totally erroneous and without basis both on facts and law is to be disregarded.

6. The appellant had actually sold shares through demat account and had earned Short term Capital Gain thereon and same needs to be accepted as such.

7. The appellant denies the liability to pay interest U/s. 234A, 234B and 234C of the Act. The interest having been levied erroneously is to be deleted.

8. In view of the above and other grounds to be adduced at the time of hearing, it is requested that the impugned order be

quashed or atleast the assessment of short term capital gain as Income from business be deleted. The Short term capital gain as returned by the appellant be accepted and the interest levied be also deleted.”

2. Briefly stated the facts of the case are that the assessee is an individual. For the year consideration, i.e., A.Y. 2008-2009, the assessee received an order dated 24.03.2014 passed u/s 143(3) r.w.s. 153A of the I.T.Act. In this order, the income of Rs.64,65,162 offered by the assessee as income from short term capital gain, is not so assessed but is assessed as income from business. The assessee had sold various shares during the year and the net short term capital gain thereon was offered to tax by the assessee. The shares sold were dematted and transaction in shares were supported by contract notes. The Assessing Officer held that these transactions in shares are not genuine, and thus he concluded that (a) the brokers through whom the transaction was done were not recognized, (b) the transaction did not pass through stock exchange, (c) that though the shares were dematted, there was a delay in getting the share dematted, (d) that the assessee has not paid any security transaction tax, and (e) that it is mandatory for all share transactions to happen through stock exchange. The A.O. thereafter levied penalty u/s 234A, 234B and 234C of the I.T.Act. In first appeal, the CIT(A) confirmed the addition by the Assessing Officer.

3. Aggrieved by the orders of the Income Tax Authorities, the assessee is in appeal before the Tribunal.

3.1 At the outset, the learned AR pleaded that there is gross violation of the principles of natural justice and fair play, especially in the absence of report / information and cross examination of persons whose statements were relied upon by the Assessing Officer while passing the order, makes the order totally bad in law and liable to be cancelled.

4. We have heard the rival submissions and perused the material on record on legal issue in ground No.3.1 hereinabove. We find that similar issue was considered by this Tribunal in the case of Shri. Kirti K.Bhansali v. ITO for assessment year 2008-2009 in ITA No.105/Bang/2019. Vide order dated 24.05.2019, the Tribunal held as under:-

“4.3.1 I have considered the rival submissions and first of all, I reproduce Para No.8 of the judgment of Hon’ble Karnataka High Court rendered in the case of M/s. Chandra Devi Kothari (Supra) and this is as under:

“8. In the light of the facts and circumstances as adverted to above and as the petitioner has been denied an opportunity of fair hearing by providing copy of the statement and related details regarding the alleged share amount, I am of the view that the matter requires to be re-considered by the respondent by providing fair and reasonable opportunity of hearing to the petitioner and by furnishing the details / copy of the statement based on which the impugned assessment order has been passed.”

4.3.2 From the above Para from the judgment of Hon’ble Karnataka High Court, it is seen that matter was restored back to the file of the AO for fresh decision after providing copy of the statement of Shri Mukesh Choksi and other related details. As per the facts noted by the High Court in the earlier paras of judgment (supra) and as per the facts of the case on hand, there appears to be no difference in facts and therefore by respectfully

following this judgment in the case of Chandra Devi Kothari (Supra), I set aside the impugned orders of learned CIT(A) for Assessment Year 2008-09 and restore the matters to the file of the AO for fresh decision with the same directions as were issued by the Hon'ble Karnataka High Court in the case as per Para No.8 of the judgment reproduced above. In view of this decision, no adjudication is called for at this stage regarding the merits of the addition.”

5. In view of the above order of the Tribunal (supra), we inclined to remit the issue to the file of the Assessing Officer to decide the issue afresh with similar directions to furnish the copy of the documents relied by the A.O. and to provide an opportunity of cross-examination of concerned parties therein, as held by the Tribunal in the case of Shri.Kirti K.Bhansali (supra).

5.1 In view of the above, we are not inclined to comment upon any other grounds of appeal on merits of the issue at this stage.

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

Order pronounced on this 31st day of January, 2020.

Sd/-
(Smt.Beena Pillai)
JUDICIAL MEMBER

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Bangalore ; Dated : 31st January, 2020.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-11, Bengaluru.
4. The Pr.CIT-Central, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore