

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "F" : DELHIBEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBERITA.No.8314/Del./2018
Assessment Year 2014-2015

Shri Riaz Munshi, E-5, 1 st Floor, Kailash Colony, New Delhi – 110 048. PAN AAMPM2657F	vs.	The ACIT, Circle-17(2), New Delhi.
(Cross Objector)		(Respondent)

For Assessee :	Shri Gautam Jain, Advocate Shri Rajeev Sabharwal, C.A.
For Revenue :	Shri Sanjay Tripathi, Sr. DR

Date of Hearing :	05.03.2020
Date of Pronouncement :	11.03.2020

ORDER**PER BHAVNESH SAINI, J.M.**

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-28, New Delhi, Dated 30.10.2018, for the A.Y. 2014-2015 challenging the addition of Rs.73,58,953/- under section 68 of the I.T. Act, 1961,

and addition of Rs.2,20,768/- on account of commission under section 69C of the I.T. Act, 1961.

2. Briefly the facts of the case are that assessee is an individual filed return of income declaring income at Rs.16,86,200/-. The case was selected for scrutiny on the reasons "*suspicious transaction relating to long term capital gain on shares*". The assessee is a Director of a Company named M/s. N. Chirag Travels Pvt. Ltd from where he has drawn gross salary amounting to Rs.16,78,350/- during the year. The assessee has income from other sources also i.e., income from house property of Rs.2,67,889/-, income from other sources of Rs.85,796/-. There is no income from business and profession and income from capital gains. The assessee in the reply before the A.O. claimed long term capital gains on sale of shares of M/s Esteem Bio Organic Food Processing Ltd. ("EBFL"). The sale value of 15,600/- shares is of Rs.73,58,953/-. The purchase value was Rs.1,56,000/-. Thus, net sale value was Rs.72,02,953/-. However, this long term capital gains was not shown in the return of income claimed as exempt. The A.O, thereafter,

noted the brief details of *modus operandi* of tax evasion through bogus LTCG and referred the report of Director of Investigation, Kolkata to show that these are cases of penny stock companies. There are two types of companies i.e., **(1)** An old already listed company, the entire shareholding of which is bought by the syndicate to provide LTCG entries. These are generally dormant company with no business and with accumulated losses and **(2)** A new company which is floated just for the purpose giving LTCG entries. The A.O. further noted as to how the parties have been operating through the entry provider and rigging the price to show long term capital gains and loss. The A.O. also noted that SEBI has indicted the assessee as one of beneficiary of LTCG of artificial price jacking of shares of M/s EBFL, a paper company. In the interim order, the SEBI has directed that such company including the assessee shall not buy, sell or deal in securities either directly or indirectly in any manner, whatsoever, till further Orders. The interim order of the SEBI is considered against the assessee. The A.O. also referred to the investigation carried out by Kolkata

Investigation Wing and noted fundamentals of scrip of the same company and came to the conclusion that there is a price raise without any reasons which cannot be accepted. The show cause notice was issued to the assessee as to why the same be not treated as unexplained income under section 68 of the I.T. Act, 1961 and commission on sale of share had also not added.

2.1. The assessee filed detailed reply before A.O. which is reproduced in the assessment order in which the assessee briefly explained that assessee has entered into the sale and purchase of shares which are genuine transaction which is supported by statement of share capital gain/loss from A.Ys. 2007-2008 to 2013-2014, acknowledgment slip of the share application money received, bank statement, copy of the dematerialize request form, acknowledgement of DRF, copy of certificate of M/s EBFL of allotment of 20,000 shares, copy of certificates of M/s EBFL of 50,000 shares, copy of De-mat account statement of M/s EBFL shares for the period of 01.01.2008 to 16.11.2016, copy of the master data of M/s EBFL, copy of the scrip-wise net possession of

equity shares and future position and copy of the contract note with M/s. Mithun Securities Pvt. Ltd., The assessee further submitted that purchase was made in earlier year through account payee cheque which is also shown. The shares were purchased in the off-market directly from the company under the preferential allotment of shares and same are reflected in the balance-sheet of the assessee as on 31.03.2013. The shares are quoted in Bombay Stock Exchange. Shares were sold through Demat account of the assessee. The assessee regularly deals in shares for last 10 years which is evident from the copy of the return filed with the Revenue Department. The shares were held for more than 12 months and Security Transaction Tax ("STT") have been paid by assessee. Therefore, assessee entered into genuine transaction and long term capital gains is genuine and non-taxable. The assessee also given details of the comparative investment in shares by assessee to show that there is no unrealistic return through investment. The assessee relied upon several decisions in support of the

contention that assessee entered into the genuine transaction.

2.2. The A.O. however did not accept the contention of assessee and noted that assessee has failed to prove that he has entered into genuine transaction and in the light of investigation carried-out by SEBI through interim order the capital gain of Rs.73,58,953/- on sale of shares of M/s EBFL was treated as bogus and same was added under section 68 of the I.T. Act, 1961. The A.O. further made addition of Rs.2,20,768/- on account of commission paid for sale of shares.

3. The assessee challenged both the additions before the Ld. CIT(A). The submissions of the assessee are reproduced in the appellate order in which the assessee reiterated the submissions made before the A.O. and filed details of purchase and sale of M/s EBFL shares to show that he has entered into genuine transaction which is supported by documentary evidences. It was further submitted that the interim order of the SEBI have been revoked and assessee and M/s EBFL have been cleared

from all allegations. The Ld. CIT(A), however, did not accept the contention of assessee and following the Rule of Preponderance of Probability dismissed the appeal of assessee.

4. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to PB-65 which is final Order of the SEBI in which SEBI after detailed investigation revoked the interim order against the assessee as well as M/s EBFL. He has submitted that this was the sole reason for rejecting the claim of assessee. The A.O. did not make any further investigation into the matter. He has referred to the financials of M/s EBFL from A.Ys. 2011-2012 to 2017-2018 and copy of the same is filed at page-76 of the PB which is supported by P & L A/c and balance-sheet to show that this company is not penny stock company and has been dealing in scrip and has good financials and have declared income also. The financials for the assessment year under appeal is reproduced as under :

Particulars	A.Y. 2014-2015
Share Capital	24,86,33,330.00
Reserve and Surplus	13,62,71,538.41
Tangible Assets	17,49,48,159.00
Inventories	35,25,000.00
Trade Receivables	2,06,86,280.00
Cash and Cash equivalents	1,21,47,199.00
Revenue from operations	3,39,64,070.00
Other Income	22,27,738.00
Profit before tax	1,29,71,312.00

4.1. Learned Counsel for the Assessee submitted that financials of M/s EBFL clearly show that it is a genuine company dealing in the shares and scrips. Therefore, transactions carried-out by them with the assessee could not be treated as bogus transaction. Learned Counsel for the Assessee submitted that the investment and disinvestment made by assessee was in respect of group of M/s EBFL and it has been held that in respect of such scrips, its investment was in accordance with Law and, therefore, additions made by denying the exemption was not in accordance with Law. He has relied upon the following decisions in which such proposition have been held in favour of the assessee.

- i) Sunita Khemka vs., ACIT 53 CCH 415 (Del.-Tribu.)
- ii) Amar Nath Goenka vs., ACIT 54 CCH 344 (Del.Tribu.)
- iii) Smt. Karuna Garg vs., ITO, Ward 39(4), New Delhi & Others ITA.No.1069/Del./2019 etc., Dated 06.08.2019.
- iv) Swati Luthra, New Delhi vs., ITO, Ward-51(5), New Delhi & Others ITA.No.6480/Del./2017 etc., Dated 28.06.2019.

4.2. He has submitted that neither assessment order nor the Order of the Ld. CIT(A) reflecting the name of the person whose statement have been relied upon against the assessee and as such even till date it is not known as to who was the entry operator stating that assessee has undertaken the alleged accommodation entry. The assessee submitted before A.O. during the course of assessment proceedings that cross-examination of such persons may be allowed whose statements have been relied upon by the A.O.

However, same have not been granted to the assessee. The denial of right of cross-examination is a flaw which renders the assessment order a nullity. The Counsel for Assessee relied upon Judgment of Hon'ble Supreme Court in the case of Kishanchand Chellaram 125 ITR 713 (SC) and Andaman Timber Industries vs., CCE 314 ELT 641. Learned Counsel for the Assessee submitted that in case of Amar Nath Goenka vs., ACIT (supra), the Tribunal considered an identical issue in support of the same company M/s EBFL. In that case also interim order of the SEBI was rejected and appeal of assessee have been allowed. He has, therefore, submitted that the issue is covered in favour of the assessee by the aforesaid decisions.

5. The Ld. D.R. on the other hand relied upon the Orders of the authorities below and submitted that the assessee entered into bogus transaction and purchase value is very less and shares have been sold at a high price. Therefore, the Ld. CIT(A) rightly invoked principles of preponderance of probability against the assessee. The

modus operandi was seen by the Kolkata Investigation Wing because there is a rigging in the profit. Therefore, the authorities below correctly made the addition against the assessee. He has relied upon Order of Hon'ble ITAT, Delhi Bench in the case of Suman Poddar vs., ITO Dated 25.07.2019, which is confirmed by the Hon'ble Delhi High Court dismissing the appeal of assessee vide Order Dated 17.09.2019 in ITA.No.841/2019. He has also relied upon Judgment of Hon'ble Delhi High Court in the case of Udit Kalra vs., ITO in ITA.No.220/2019 Dated 08.03.2019 in which scrip of M/s. Kappac Pharma Ltd., has been considered.

6. We have considered the rival submissions and perused the material on record. The assessment order clearly show that the A.O. merely reproduced the *modus operandi* of the entry providers who booked bogus long term capital gains through penny stock companies in which either there is no business or they have accumulated losses or a Company is floated only for that purpose. Learned

Counsel for the Assessee has filed financials of M/s EBFL from A.Ys. 2011-2012 to 2017-2018 and for the assessment year under appeal the financials are reproduced above, which clearly show that this Company is dealing in actual business activities. Its financials are very heavy and as such the *modus operandi* of this type of penny stock companies would not be available in the case of M/s EBFL. The findings of the A.O. are entirely based upon interim order of SEBI. However, it is an admitted fact that interim order of the SEBI have been later on revoked by the SEBI on assessee as well as M/s EBFL have been cleared from all allegations and charges. In the case of Amar Nath Goenka vs., ACIT reported in 54 CCH 344, the ITAT, Delhi Bench considered the scrips of M/s EBFL on identical facts and held as under:

“Assessee placed sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased shares through banking channel and actually got the shares transferred in his name. Purchase was made through cheque which is supported

by bank statement. The transactions of sale have been made through Demat account. The contract note along with other details were produced to show that purchase and sale of the shares have been made through banking channel through recognized Stock Exchange through Demat account on which Security Transaction Tax have also been paid. The A.O. did not make any enquiry on the documentary evidences filed by the assessee. No material have been brought on record against the assessee to disprove the claim of assessee. It is not the case of the Revenue that amount received on sale of shares is more than what is declared by the assessee. The assessee pleaded that the Interim Order of the SEBI have been diluted by passing final order in which no adverse view have been taken against the aforesaid company. Thus, the assessee's claim of purchase and sale of shares have been supported by documentary evidences. The statement of Shri Sanjay Vohra was recorded by the Investigation Wing, Kolkata, but, the same was not confronted to the assessee and

his statement was also not subjected to cross-examination on behalf of the assessee. Therefore, his statement cannot be read in evidence against the assessee. The A.O. did not mention any fact as to how the claim of assessee was sham or bogus. The assessee satisfied the conditions of Section 10(38). The broker through whom transactions were carried-out have not denied the transaction conducted on behalf of the assessee. It, therefore, appears that the addition is merely made on presumption and assumptions of certain facts which are not part of the record. There is no other material available on record to rebut the claim of assessee of exemption claimed under section 10(38). Issue is decided in assessee 's favour."

6.1. In the present case, the assessee submitted sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased the shares through banking channel and actually got the shares transferred in his name. The purchases are supported by bank statements. The transaction of the sale have been

made through Demat Account which is corroborated by contract note and other details and transaction is carried out through banking channel through stock exchange through Demat Account on which Security Transaction Tax have also been paid. The A.O. merely relied upon interim order of the SEBI to make addition against the assessee, otherwise, there were no evidence or material on record to disprove the claim of assessee. Since the interim order of the SEBI have been revoked against the assessee and M/s EBFL, therefore, nothing survives in favour of the A.O. The A.O. did not make any further investigation or enquiry into the matter and merely relied upon the interim order of the SEBI and investigation carried out by the Kolkata Wing. Further, it is not clear from the assessment order whether Investigation Wing report have been confronted to the assessee or any right of cross-examination have been allowed to any statement recorded at the back of the assessee. The assessee asked for the cross-examination of any statement which is used against the assessee for making the addition. But, the assessment order is silent on

this aspect. Therefore, the above facts clearly show that assessee entered into the genuine transaction and as such the profit on sale of scrip was exempt from tax. The Ld. D.R. relied upon decisions of the ITAT, Delhi Benches, Delhi in the cases of Suman Poddar vs., ITO (supra) and Udit Kalra vs., ITO (supra), in which the findings of the Tribunal had been that these are cases of penny stock companies which fact is not there in the present case. Therefore, these decisions would not support the case of the Revenue as having distinguishable on facts. The authorities below have not rebutted the explanation of assessee that he has indulged in dealing in scrips in earlier year as well as in subsequent years. It would, therefore, show that assessee is regularly dealing in scrips. The A.O. has not brought any adverse material against the assessee so as to make the above additions. Considering the totality of the facts and circumstances of the case and financials of M/s EBFL as reproduced above and other years [PB-76], we set aside the Orders of the authorities below and delete both the additions.

7. In the result, appeal of the Assessee allowed.

Order pronounced in the open Court.

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 11th March, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'F' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.