



**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"C" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**

**SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA no.695/Mum./2018  
(Assessment Year : 2014-15)

Mrs. Pratibha S. Mhatre  
B-5, Sai Garden CHS  
Near Dhuri Service Centre  
Dewanman, Vasai (West)  
Mumbai 401 202  
PAN – BBRON4613G

..... Appellant

v/s

Income Tax Officer  
Ward-4(3), Mumbai

..... Respondent

Assessee by : Shri Neelkanth Khandelwal  
Revenue by : Ms. Shreekala

Date of Hearing – 23.03.2021

Date of Order – 11.06.2021

**ORDER**

**PER S. RIFAUR RAHMAN, A.M.**

The aforesaid appeal has been filed by the assessee challenging the impugned order dated 1<sup>st</sup> November 2017, passed by the learned Commissioner (Appeals)-3, Mumbai, pertaining to the assessment year 2014-15.

2. The grounds raised by the assessee are as under:-

*"The Commissioner of Income-tax (Appeals)-3, Thane (hereinafter*

*referred to as the CIT(A)) erred in upholding the action of the Income-tax Officer - 4(3), Thane (hereinafter referred to as the Assessing Officer) in making an addition of Rs 1,20,11,807 under section 68 of the Act, holding the long-term capital gains on sale of shares of Shree Shaleen Textiles Limited to be bogus and thereby not allowing exemption under section 10(38) of the Act.*

*The appellant contends that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the transaction of sale of shares of Shree Shaleen Textiles Limited as bogus inasmuch as the said shares have been purchased as investment during an earlier year; the same being sold during the year under reference shall necessarily give rise to capital gains and the shares being long-term capital asset, the capital gains Rs 1,20,11,807 are long-term capital gains in respect of which the Assessing Officer ought to have allowed exemption of section 10(38) of the Act; accordingly, the impugned addition under section 68 of the Act is not justified.*

*The appellant further, contends that the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the assessment order has been framed in violation and utter disregard to the principles of natural justice inasmuch as, amongst others, the Assessing Officer has not given the documents/ statements on oath to the appellant for rebuttal, which are in his possession and on which he has relied upon and has not given an opportunity to the appellant to cross examine the persons whose statement the Assessing Officer has relied upon.*

*The appellant further, contends that the Assessing Officer has made the impugned addition without proving that the cash emanated from the coffers of the appellant."*

2. Facts of the case are, the assessee is a partner in a firm M/s. Saurabh Realtors, engaged in the business of construction. She filed her return of income on 21<sup>st</sup> November 2014, declaring total income of ₹ 5,52,450. The Assessing Officer noticed that the assessee had purchased share of M/s, Shree Shaleen Textiles Ltd., through preferential offer in the year 2012-13 and purchased 50,000 shares by

payment of ₹ 5,75,000. The company later on split these shares at ₹ 2, per share on 7<sup>th</sup> March 2013. Therefore, the total shares allotted to the assessee was 2,50,000 shares. The assessee had sold 2,50,000 shares of M/s. Shree Shaleen Textiles Ltd., for trade value of ₹ 1,26,05,797, during the year under consideration. In the computation of income, the long term capital gain of ₹ 1,20,11,807, was claimed under section 10(38) of the Act which arose out of the above transactions. The Assessing Officer tried to verify the genuineness on the basis of material available on record and the submissions made by the Authorised Representative of the assessee. However, not convinced with the submissions of the assessee, the Assessing Officer on the basis of circumstantial evidences available on record concluded that the transactions were sham transactions and aimed only to bring unaccounted money in the guise of exempted long term capital gain and paper work was made up and done merely to give a colour of authenticity to the transaction and by creating a façade of legitimate transactions. Therefore, the total amount of ₹ 1,20,11,807 was added under section 68 of the Act as the assessee has deliberately and willfully concealed its unaccounted income. The assessee being aggrieved by the aforesaid order of the Assessing Officer, filed appeal before the first appellate authority.

3. The learned Commissioner (Appeals) dismissed the appeal filed by the assessee by observing as under:-

*"6.0 Ground Nos.2,8,9,10,11,12,13,14 are directed against the addition of Rs.1,20,11,807/- treating the Long Term Capital Gain as unexplained cash credit and not allowing the claim of exemption u/s.10(38) of the Act, therefore, these grounds are taken up together for the sake of convenience.*

*(i) The Directorate of Investigation(Wing), Kolkata had carried out search and survey action, to unearth the organized racket of generating bogus entries of Long Term Capital Gain(LTCG) and claiming exemption u/s.10(38) of the Act. In this racket, the operators make the beneficiary to buy shares of a pre-determined penny stock company controlled by them. These shares are transferred to beneficiary at a very nominal price through preferential allotment of off-line sale to save STT. The beneficiary holds the share for the statutory period and when the price reaches the desired level, the beneficiary who bought the shares at a low or normal price, is made to sell at an exorbitant profit and claimed LTCG exemption u/s.10(38). The operators rig the price of the stock and gradually raise its price many times, often 500 to 1000 times. Accordingly, the AO denied the claim of long term capital gain of Rs.1,20,11,807/- and the same is added as unexplained cash credit u/s.68 of the Act.*

*(ii) From the findings of the Directorate of Investigation, Kolkata, it cannot be denied that the appellant has not purchased penny stock through operators/brokers and after rigging the price, the same was sold and also claimed LTCG exemption u/s.10(38) of the Act. The modus operandi carried out by these operators is in public domain and most importantly, SEBI and BSE have also taken action against such operators and barred these entities to trade in stock exchanges.*

*In the cases of penny stock including the Scrip of Shree Shaleen Textiles limited, a detailed enquiry was conducted on entry providers, riggers, beneficiaries etc by the Directorate of Income-tax(Investigation) and found that several taxpayers had invested money in penny stocks, which are lowly priced stocks of companies with weak fundamentals through the operators, stock brokers and owners for raising bogus long term capital gains by artificially raising the share price for booking bogus claims of LTCG or STCL by various beneficiaries.*

(iii) In this regard: vide EFS Instruction No.53 of Directorate of System dated 08.03.2016 of CBDT issued instruction regarding the handling of Penny Stock cases (Suspect LTCG /STCL etc). Vide EFS Instruction under reference a new button 'Penny Stock' has been added on Individual Transaction Screen (ITS) to display information related to penny stock, which is enabled on the screen of the Assessing Officers(AOs). The crucial information has been provided to the AOs regarding the manipulative transactions carried out by the entry providers and riggers have been captured in the functionality, including the investigation report of the Kolkata Investigation Directorate.

(iv) The investigation of penny stock cases is carried out by various agencies like Directorate of Income-tax(Investigation), BSE, SEBI surveillance team etc. In fact, the crucial information obtained by the Directorate of Income-tax, (Investigation) found at the time search and survey has been intimated and shared with SEBI and vice versa. As such, such rampant manipulations call for concerted and coordinated action by the various enforcing agencies concerned. In this regard, SEBI's proactive role in the above context is crucial and has also established the modus operandi carried out by the entry providers, and both SEBI as well as BSE, have banned trading in these penny stock securities.

Based on information received from the IT department and also through its own surveillance systems, SEBI had passed orders under section 11(B) of the SEBI Act, 1992, in case of 13 such companies and debarred 1,336 entities. Further, SEBI had suspended trading in the shares of 203 companies and reduced the price band of 168 companies to the lowest band.

(v) In the instance case, regarding the purchase and sale of M/s.Shaleen Textiles Ltd scrip, the AO has elaborately discussed from Para 4, page 5 to Para 11, page 32, in the assessment order. Even in the appellate proceedings, the AR of the appellant has only explained what was explained before the AO and has also not rebutted the findings made by the Directorate or Income-Tax(Investigation) Kolkata, SEBI surveillance team, and else, BSE has suspended the trading in the securities of the following companies including M/s.Shree Shaleen Textiles Ltd. (505513) in pursuant to directions received from SEBI.

(vi) As discussed from Para 4 in the assessment order, the details of purchase and sale of shares of M/s.Shree Shaleen Textiles Ltd. are as follows:- purchased 50000 shares for Rs.5,75,000/- and later on split these shares at Rs.2/- per share on 07.03.2013 and allotted shares totalling to 2,50,000 shares

and sold 2,50,000 shares on various dates for Rs.1,26,05,797/- including the financial positions of the company starting from 2009-2010 to 2013-14 which clearly shows that the operators/entry providers in connivance with the main persons of company has rigged the share prices and the beneficiaries have booked bogus claim of LTCG exemption u/s.10(38) of the Act.

*(vii)* Reference is also made to the assessment order in the case of M/s. Shashikant Mhatre (HUF) (appellant's husband) since both are connected with same issue and facts. Therefore, in Para 13.1 in the assessment order of Shashikant Mhatre (HUF), the AO has discussed elaborately that at the time of Survey u/s.133A of the Act, the Chairman and Managing Director of company have confirmed on oath that they have provided and accommodated bogus Long Term Capital Gains.

*(viii)* The appellant being very new to trading in penny stock and the earn of such huge income by a person not known to such type of trading is against human probabilities. For this proposition; relied on the decision of Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT (Supra) reported in 2 ITR 801, the Hon'ble Supreme Court categorically observed that if there sufficient indication based on the probabilities of an occurrence to disbelieve the statement made by the assessee, even when advanced with prima facie evidence, the AO may be justified in disbelieving the statement.

Further reference may be made to another landmark judgment by the Hon'ble Supreme Court in the case of CIT v. Durga Prasad More (1971) reported in 82 ITR. 540. The Hon'ble Apex Court observed that it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real. If all that an assessee who wants evade tax is to have some recitals made in a document either executed him or executed in his favour then the door Will be left wide open to evade tax. The Hon'ble Court also observed that the taxing authorities were required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents and the matter has to be considered by applying the test of human probabilities.

It was argued that the scrip in which investment was made by the appellant is admittedly a penny stock and the said stock by its very nature a functioning is mysterious. Normally, in the share market an investment always made only in good stock and the good stock is identified in the market where it has sound

*fundamentals with a good target record of giving dividend over a period of time. The share in question it was argued is definitely not a stock in that category. The penny stock it was argue basically always exhibit a cyclic pattern where both the buyer and seller see an advantage of an artificially' created market situation to exploit and avoid taxation.*

*(vii) A reference may gainfully be made to the following judicial pronouncement of the Hon'ble Supreme Court. In the case of Mcdowell & Co. Ltd. v. CTO [1985] reported in 154 ITR 148, the Hon'ble Supreme Court held and observed as under:*

*"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."*

*Reliance is also placed on the recent decision of the Hon'ble Bombay High Court in the case of Shri Saujay Bimalchand Jain L/H of Shantidevi Bimalchand Jain vs. The Pr. Commissioner of Income Tax-I, Nagpur & Another reported in ITA No.18/2017 order dated 10.04.2017 has upheld the decision of the Hon'ble ITAT in appellant's own case reported in ITA No.61/Nag/2013, A.Y.2006-07 order dared 18.07.2016. The Hon'ble High Court has decided in favour of the Revenue on penny stock addition, therefore, in principle, even in the case of the appellant is squarely applicable.*

*In view of the above stated facts, the addition made by the AO is confirmed as the appellant has claimed LTCG in a dubious manner as established by the Directorate of Investigation, Kolkata and further established at the time of assessment proceedings. Hence, the appeal of the appellant is dismissed."*

4. Aggrieved by the order of the learned Commissioner (Appeals), the assessee is in further appeal before the Tribunal.

5. Before us, at the time of hearing, the learned Counsel for the assessee brought to our notice Page-23 of the assessment order and Page-26 of the order of the first appellate authority to submit that

facts in this appeal are identical to the HUF of the assessee's husband's case in *Shashikant B. Mhatre v/s ITO*, being ITA no.694/Mum./2018, order dated 29<sup>th</sup> May 2019, a copy of which is placed on record. The learned Counsel submitted that the issue being identical to the issue raised in HUF of her husband's case, therefore, the same may be decided in favour of the assessee by relying upon the order of the Co-ordinate Bench in *Shashikant B. Mhatre (supra)* case.

6. The learned Departmental Authorities, on the other hand, objected to the above submissions of the learned Counsel for the assessee and submitted that the assessee cannot cherry pick the issues and cases.

7. Considered the rival submissions and perused the material on record. We find that the issue for our adjudication relates to the disallowance under section 68 of the Act on account of unaccounted income. Exactly similar issue has been decided by the Co-ordinate Bench of the Tribunal, Mumbai, in HUF of her husband's case in *Shashikant B. Mhatre v/s ITO*, being ITA no.694/Mum./2018, order dated 29<sup>th</sup> May 2019, a copy of which is placed on record, wherein the Co-ordinate Bench of the Tribunal, on identical and on similar set of facts and circumstances, after considering the submissions of the parties has decided the issue in favour of the assessee and against the

Revenue. Respectfully following the above decision, we allow the appeal filed by the assessee.

8. In the result, appeal is allowed.

Order pronounced in the open court on 11.06.2021

**Sd/-  
MAHAVIR SINGH  
VICE PRESIDENT**

**Sd/-  
S. RIFAUR RAHMAN  
ACCOUNTANT MEMBER**

**MUMBAI, DATED: 11.06.2021**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai