

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय जस्टिस श्री पी. पी. भट्ट, अध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य
BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.4297/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

Income Tax Officer-20(2)(1) Room No.216, 2 nd Floor Piramal Chambers, Lalbaug Parel, Mumbai-400 012	बनाम/ Vs.	Shri Jimeet Vipul Modi 66/1, Hansa Villa Bhaudaji Cross Road Matunga (E), Mumbai-400 019
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AQXMP-9261-G		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Paresh Shaparia-Ld. AR
Revenue by	:	Dr.Shanteshwar Swami -Ld.DR

सुनवाई की तारीख/ Date of Hearing	:	28/06/2021
घोषणा की तारीख / Date of Pronouncement	:	29/07/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year (AY) 2014-15 contest the order of Ld. Commissioner of Income-Tax (Appeals)-32, Mumbai, [in short referred to as ‘CIT(A)’], Appeal No.CIT(A)-32/IT-584/ITO-20(2)(1)/16-17 dated 20/03/2018 on following grounds: -

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) deleted the addition of Rs.3,21,31,930/- being purchase of shares of penny stock

Gomti Finlease (India) Ltd, without considering the fact that an information was received from Kolkata investigation directorate.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate the fact that the Assessing Officer disallowed Rs.6,39,240/- on account of commission paid u/s.69C being 2% of addition of Rs.3,21,31,930/- without considering the fact that since the STCG was treated as bogus, the commission paid also stands to be disallowed.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that the onus is on the assessee to explain and substantiate the genuineness and true nature of the share transaction.

4. The appellant prays that the order for the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.

As evident, the revenue is aggrieved by deletion of addition of Rs.321.31 Lacs as well as estimate commission of 2% as made by Ld. AO while framing the assessment for the year u/s 143(3) on 30/12/2016. The assessee being resident individual is stated to be engaged in the business of share-broking.

2. We have carefully heard the rival submissions and perused relevant material on record including the orders of lower authorities. The Ld. DR, drawing attention to the factual matrix of the case, pleaded for restoration of the assessment as framed by Ld. AO. The Counsel for Assessee (AR), on the other hand, drawing attention to the findings of learned CIT(A) in the impugned order, submitted that the provisions of Sec.68 as invoked by Ld. AO were not applicable to the facts of the case and therefore, the additions have rightly been deleted. Our adjudication would be as given in succeeding paragraphs.

Assessment Proceedings

3.1 During assessment proceedings, it transpired that the assessee suffered Short-Term Capital Loss (STCL) of Rs.213.08 Lacs on sale of shares of an entity namely Gomti Finlease. This entity got merged with another entity namely KDJ Holidayscapes Resorts. The set-off of losses

thus suffered during the year was claimed against short-term capital gains earned during the year. The working of loss has been tabulated in para-4.2 of the assessment order. Upon perusal of the same, it could be seen that the assessee purchased the shares of Gomti Finlease between the period 19/12/2013 to 07/01/2014 at average price of Rs.182/- approx. per share whereas the shares were sold on 19/02/2014 at average price of Rs.33/- approx. per share.

3.2 The quantum of losses was found suspicious in view of the finding of Kolkata investigation wing while carrying out investigation into 84 penny stock scrips. During investigation, statement of various operators, entry-providers and stock-brokers were recorded wherein they admitted to have provided accommodation entries in the form of Long-Term Capital gains and Short-term capital losses. In the statement recorded from Shri Nikhil Jain and Shri Bidyoot Sarkar, it was admitted that M/s Gomti Finlease i.e. KDJRL was a penny stock scrip which was used to provide artificial losses to various beneficiaries. On the basis of the same, the scrip dealt with by the assessee was held to be a penny stock scrip.

3.3 The price movement of this scrip was tabulated by Ld. AO in para-6.5 of the order. It was observed that losses were booked when the share prices were going down whereas the gains were earned when the prices were increasing. It was also noted that price of the share was not commensurate with the financial performance of the company and accordingly, it was concluded by Ld.AO that the share prices of the scrip were manipulated in order to provide artificial gains / losses. These shares were purchased by the assessee from a family concern namely

Smruddhi Stockbrokers Ltd. The statement of the assessee was also recorded on 21/12/2016.

3.4 However, in reply to show-cause notice dated 26/12/2016, the assessee refuted the allegations of Ld. AO and submitted that the direct evidence in the form of purchase bill of shares, bank statements, demat statements were filed in support of the transactions. Therefore, the losses were genuine and fully allowable. The sale / purchase of shares was done on recognized stock exchange which was supported by the contract-cum-bill of transactions issued by registered stock-broker, ledger account as well as demat account statement showing movement of shares. The purchase as well as sale transactions took place through banking channels. The assessee denied having known Shri Nikhil Jain or Shri Bidyoot Sarkar. The assessee also demanded cross-examination of these persons in case their statement was used against the assessee as evidence.

3.5 However, rejecting all these submissions and going by the investigation findings, Ld. AO concluded that set-off of short-term capital losses could not be allowed and the amount of Rs.321.31 Lacs as paid by the assessee towards purchase of shares was to be added back to assessee's taxable income as unexplained cash credit u/s 68 of the Act. The Ld. AO also estimated commission of 3% against these transactions and made another addition of Rs.6.39 Lacs in the hands of the assessee u/s 69.

Appellate Proceedings

4.1 During appellate proceedings, the assessee again refuted the allegations of Ld. AO by way of elaborate written submissions which

have already been extracted in the impugned order. The Ld. CIT(A), at the outset, noted that provisions of Sec.68 were invoked by Ld. AO to add back the purchase price of shares. However, the payment for purchase of shares was made through banking channels which stood corroborated by various documents submitted by the assessee. All the payment for purchases was made through account payee cheques which were debited in assessee's books of accounts. Thus, the transaction was a debit entry in the books of accounts and therefore, the purchase price paid by the assessee could not be held to be unexplained cash credit in the books of account. This being so, the provisions of Sec.68 would have no applicability to the fact of the case and the addition was totally on a wrong footing. Therefore, the impugned additions were not sustainable under law.

4.2 At the same time, in para-5.3, it was observed by Ld. CIT(A) that Ld. AO had not considered the documents pertaining to purchase and sale of shares of Gomti Finlease (India) Limited. These documents were in the shape of contract note, bank statements, brokers ledger and Demat Account statement of the assessee which were duly submitted at the time of assessment proceedings. The assessee had fully discharged the onus to prove the transactions. The assessee had purchased the shares of a listed company through recognized stock broker on BSE and similarly sold the shares through recognized stock broker on BSE at the prevalent price. As regards adjustment / fluctuation in rate (Rs 494/- to Rs. 99/-), the same was due to splitting of shares since the scrip had face value of Rs.10/- which was split on 26/12/2013 to Rs.2/- per share. Accordingly, the market value was reduced in that proportion. The

assessee had fully discharged his onus to prove the transaction of purchase of shares including source of funds for the purchase. The assessee furnished justification for purchase of shares based on the market information that the said company, as per Special Resolution passed on 29/11/2012 and the Board of Directors meeting held on 09/03/2013, had decided to invest Rs.15 Crores in the equity of KDJ Hospital Limited wherein the company had existing equity of 40.76%. By making additional investment, the holding would be more than 75% and accordingly, the scrip exhibited a consistent Higher-Top Higher-Bottom pattern on its charts. It has also exhibited pattern of correcting and bouncing back from its 14 days moving average which also coincided with a lower-bottom in the charts. The stock was trading well above the long-term average i.e. 200 days moving average of the stock, which indicated that the long term trend of the stock was firmly up. The said shares were sold as the price of any script would be market driven. Since the assessee was an investor, when the prices were continuously falling, the assessee exited from the said script and booked losses to safeguard himself against future losses. The statement of Shri Nikhil Jain and Shri Bidyoot Sarkar as referred to by Ld. AO did not contain any reference to the assessee. The reliance on the said statement without any co-relation does not prove that the transactions were non-genuine. There was no evidence of any cash transaction and Ld. AO failed to bring on record any evidence to support the conclusions that the losses were not genuine. Rather the conclusions were based merely on surmises and conjectures. On the other hand, the assessee had furnished all the documentary evidences in support of the claim.

4.3 Finally, relying upon the decision of Hon'ble Bobay High Court in the case of **CIT vs. Mukesh Ratilal Marolia (ITA 456 of 2007 dated 07/09/2011)**, the decision of Hon'ble Punjab & Haryana High Court in case of **Pr. CIT vs. Prem Lal Gandhi (ITA No.95 of 2017 dated 18/01/2018)** and the decision of Delhi Tribunal in **Chander Prakash vs. ITO in (ITA No.6880/Del/2017 dated 12/03/2018)**, the impugned additions as well as consequential addition of estimated commission, as made by Ld.AO, was deleted. Aggrieved, the revenue is in further appeal before us.

Our findings & Adjudication

5. After having gone through the findings of Ld. CIT(A) in the impugned order, the undisputed fact that emerges are that the purchase as well as sale transactions have taken place on stock exchange through stock-broker. There is movement of shares in assessee's demat statement. The transactions have taken place through banking channels and duly supported by broker's contract notes, demat statements, ledger statements as well as bank statements. The assessee is regular investor in shares. The assessee has always maintained that the transactions were genuine. As against this, the only adverse material in the armory of Ld. AO is the investigation findings. However, the assessee has not been named in any of the statement. The assessee has denied having known Shri Nikhil Jain & Shri Bidyoot Sarkar whose statements form the very basis of doubting the assessee's transactions. The assessee, as rightly pointed out by Ld. CIT(A), had duly discharged the onus to establish the genuineness of the transactions and the onus was on Ld. AO to dislodge them. However, except for mere allegations, there is no

adverse material against the assessee and the additions are based merely on conjectures and surmises. Another aspect is that the provisions of Sec.68, as invoked by Ld. AO, had no applicability to the fact of the case. The invoking of wrong provisions would make the additions unsustainable in the eyes of law. Therefore, we are of the considered opinion that the issue has been clinched in the right perspective by Ld.CIT(A) in the impugned order. Finding no reason to interfere in the same, we dismiss the appeal.

6. In the result, the appeal stands dismissed.

Order pronounced on 29th July 2021.

Sd/-

(Justice P.P. Bhatt)
President

Sd/-

(Manoj Kumar Aggarwal)
Accountant Member

मुंबई Mumbai; दिनांक Dated : 29.07.2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.