

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No. 822/MUM/2021
Assessment Year: 2015-16**

Varun Banka, 48, Neelkanth, J.B. Nagar, Andheri (E), Mumbai - 400059 PAN: AIKPB1858M	Vs.	Pr. CIT-17, R. No. 120, 1 st Floor, Kautilya Bhawan, Bandra Kurla Complex, Bandra (E), Mumbai - 400051
(Appellant)		(Respondent)

Assessee by : Abhishek Shamdasani (AR)

Revenue by : Achal Sharma (DR)

Date of Hearing : 09/11/2021
Date of Pronouncement: 23/11/2021

ORDER

PER SAKTIJIT DEY, JM

In the present appeal, assessee has assailed order dated 27.03.2021 passed by learned Principal Commissioner of Income Tax (PCIT), Mumbai-17 under section 263 of the Income Tax Act, 1961 for the assessment year 2015-16.

2. Briefly the facts are, the assessee is an individual. For the assessment year under dispute, assessee had filed his return of income on 24.08.2015 declaring total income at Rs. 18,11,640/-. In course of assessment proceedings, the Assessing Officer (AO) noticed that in the year under consideration, the assessee had earned long term capital gain of Rs. 1,23,09,953/-, which was offered under Income Disclosure Scheme-2016 (IDS)

and tax due was paid. Thus, based on such information, and following CBDT Instruction No. 12 of 2016 dated 11.11.2016, the AO completed the assessment under section 143(3) of the Act accepting the income returned by the assessee. Subsequently, in exercise of power conferred under section 263 of the Act, learned Pr. CIT called for and examined the assessment records of the assessee for the impugned assessment year. After examining the assessment record, he was of the view that the assessment order passed is erroneous and prejudicial to the interest of revenue as the AO has not added the entire sale consideration of Rs. 1,25,67,400/- without deducting purchase cost and has also not added commission income for availing accommodation entry by way of bogus long term capital gain. Thus, after issuing a show cause notice to the assessee and considering his submission, learned Pr. CIT ultimately held the assessment order to be erroneous and prejudicial to the interest of revenue for non consideration of issues raised in the show cause notice issued under section 263 of the Act and set aside the assessment order with a direction to frame the order of assessment de novo keeping in view the observations made in the order passed under section 263 of the Act.

3. Learned Counsel for the assessee submitted, in course of assessment proceedings, the AO has enquired into the long term capital gain on sale of scrip of Parag Shilpa Investment Limited. He submitted, since the long term capital gain was offered as income under the IDS, the AO following the CBDT Instruction accepted the returned income. He submitted, allowability or otherwise of purchase cost is a debatable issue on which more than one view is possible. Since, the AO has taken possible view, the assessment order cannot

be termed as erroneous and prejudicial to the interest of revenue. He submitted, the purchase cost was paid through cheque and assessee purchased the scrip in a transaction conducted in stock exchange. Therefore, it cannot be said that assessee has not paid the purchase cost without proving the fact that the money paid through cheque has again returned back to the assessee. Further, he submitted, merely on presumption surmises it cannot be said that the assessee has paid commission for obtaining accommodation entry relating to long term capital gain. In support of such contention, learned Counsel relied upon the following decisions:-

- i. *Manju Osatwal Vs. Pr. CIT-10, Kol*
in ITA No. 707/Kol/2019 dt. 15/01/2020
- ii. *Mrs. Manisha Ajay Shah Vs. Pr. CIT-30, Mumbai*
in ITA No. 3001/Mum/2019 dt. 14/10/2020
- iii. *Mr. Akshay Ramprasad Agarwal Vs. ITO 17(1)(1), Mumbai*
in ITA No. 153/Mum/2021 dt. 08/10/2021.”

4. Learned Departmental Representative strongly relying upon the observations of the learned PCIT submitted, once it is found that the long term capital gain is in respect of a penny stock company, the entire transaction has to be held as non genuine. Hence, the purchase cost of shares along with the commission paid by the assessee has to be added back to the income. He submitted, the AO having not examined these aspects, the assessment order is erroneous and prejudicial to the interest of the revenue.

5. We have considered rival submissions In the light of decisions relied upon and perused the materials on record. Undisputedly, the long term capital

gain arising out of sale of shares has been offered to tax by the assessee under the IDS. It is also a fact that the assessee has paid the tax due as per IDS. The only reason for which learned PCIT has invoked his power under section 263 of the Act is, AO should have added back the purchase cost of the shares with alleged commission paid by the assessee for obtaining the entries relating to long term capital gain. As could be seen from record, the assessee had paid the purchase cost of shares through account payee cheque and the transaction was carried out through SEBI registered broker and on stock exchange platform. The assessee has furnished the contract note relating to purchase of shares as well as the bank statement showing the transaction made through banking channel. There is no material on record to suggest that the payment made of Rs.2,00,000 through cheque towards purchase cost has been routed back to the assessee. There is nothing on record to suggest that the assessee has paid commission for obtaining accommodation entry. A reading of the impugned order passed under section 263 of the Act reveals that merely on presumption and surmises learned PCIT has assumed jurisdiction under section 263 of the Act. It is also evident, before the revisionary authority assessee has specifically stated that all relevant materials including evidence for payment made towards purchase cost were furnished before the AO. Therefore, it cannot be said that the AO has not enquired into the issue. It could be a fact that after considering the materials available on record the AO was satisfied that the assessee had incurred the expenditure towards cost of the shares. That being a plausible view, cannot be termed as erroneous. Further, we find that the issue is squarely covered by the decision of the co-

ordinate Bench in case of *Mrs. Manisha Ajay Shah Vs. Pr. CIT* (supra), wherein, the co-ordinate Bench while dealing with identical issue concerning exercise of jurisdiction under section 263 of the Act has held as under:-

“4. We have heard the submissions made by ld. Departmental Representative and have examined the material available on record. The PCIT has invoked revisional jurisdiction under section 263 of the Act on the ground that the Assessing Officer has failed to examine the transaction of purchase and sale of shares. Another reason for invoking revisional jurisdiction by the PCIT is, that the assessee in IDS 2016 has only declared long term capital gain on penny stock, whereas, the assessee should have declared gross sale receipt of the shares. The immunity is granted to the assessee to the extent declaration is made under IDS 2016 and not against the entire transaction. The PCIT invoked revisional jurisdiction to tax the difference between gross sale price of the shares Rs.34,30,000/- and Long Term Capital Gains declared by the assessee Rs.32,86,815/-. In other words, the PCIT seeks to tax even the purchase cost of the shares i.e. Rs.1,43,185/- stating it to be a bogus purchase transaction.

5. After examining the documents on record we do not concur with the view of the PCIT. The assessee has demonstrated from the bank statement that the amount has been paid for purchase of shares of GCM Securities Ltd. through cheque. This is further corroborated by share application form of GCM Securities at page 22 of the Paper Book and transaction-cum-holding statement in the case of assessee issued by Stock Holding Corporation of India Ltd. at page 19 of the Paper Book. The documents furnished by the assessee clearly indicates that the shares were indeed purchased by the assessee through banking transactions. It is not the case of the Revenue that the amount paid by the assessee for purchase of shares has travelled back to the assessee in the form of cash or any other manner.

6. The provisions of section 263 of the Act can be invoked if, the twin conditions mandated under the section are satisfied, i.e:
(i) the order of the Assessing Officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the revenue.

If any one of these two conditions is absent, the Commissioner of Income Tax cannot take recourse to section 263 of the Act.

7. In the present case, we find that the Assessing Officer has issued a questionnaire wherein specific information was sought on transaction of equity shares and working of short term capital gain/long term capital gain. The assessee furnished a detailed reply to the notice issued under section 142(1) of the Act, wherein the assessee while replying to the query on transaction of shares, informed that a declaration under IDS 2016 has been made in respect of long term capital gain arising on sale of shares to GCM Securities Ltd. Ostensibly, the Assessing Officer after examining the documents accepted the same and made no addition. Merely for the reason that the Assessing Officer has taken a plausible view after examining the records that is not acceptable to the PCIT, would not make the assessment order erroneous. In the present case twin conditions set out in section 263 are not satisfied and hence, the PCIT wrongly assumed revisional jurisdiction.”

6. Facts being more or less identical, respectfully following the aforesaid decision of the coordinate Bench, we hold that in the facts of the present case, the assessment order cannot be held as erroneous and prejudicial to the interest of the revenue. Accordingly, we set aside the impugned order passed under section 263 of the Act and restore the assessment order. Grounds are allowed.

7. In the result, appeal is allowed.

Order pronounced in the open court on 23rd November, 2021.

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 23/11/2021

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**