

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

माननीय श्री अमरजीत सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI AMARJIT SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. Nos.7923/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2012-13)

&

2. आयकरअपील सं./ I.T.A. Nos.7924/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2013-14)

Shri Nilesh Vasantlal Kikavat 1201, D-Wing, Kukreja Towers, Garodiya Nagar, Ghatkopar (E), Mumbai-400 077	बनाम/ Vs.	DCIT-CC 3(4), 1915, 19 th floor Air India Building Nariman Point, Mumbai-400 021
स्थायीलेखासं./जी आइ आर सं./PAN/GIR No. AABPK-2207-J		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Neelkanth Khandelwal– Ld. AR
Revenue by	:	Ms. Usha Gaikwad– Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	22/11/2021
घोषणा की तारीख / Date of Pronouncement	:	17/12/2021

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeals by assessee for Assessment Years (AY) 2012-13 & 2013-14 were heard on 22/11/2021 along with appeals of other family members of the assessee. It was admitted position that the facts as well as issues were pari-materia the same in all the appeals and adjudication in any appeal shall apply to the other appeals also. Since

we have already passed orders in the lead appeal i.e. ITA No.7921 & 7922/Mum/2019 in the case of Shri Vasantlal Nyalchand Kikavat, the ratio of the same would be applicable here as well. In the above background, our adjudication to the appeals would be as given in succeeding paragraphs.

2. The registry has noted a delay of 22 days in the appeals, the condonation of which has been sought by the assessee on the strength of sworn affidavit. It has been submitted that delay occurred due to the fact that the case records were voluminous. Keeping in view the period of delay, the bench formed an opinion that the delay was to be condoned. Accordingly, we proceed for adjudication of the appeals on merits.

3. Aggrieved by confirmation of certain additions u/s 68 & 69C vide impugned orders dated 20/08/2019, the assessee is in further appeal before us. The assessment for both the years was framed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Act vide separate orders, both dated 30/11/2017, wherein these additions were made in the hands of the assessee.

Assessment Proceedings

4.1 The assessee being resident individual was assessed for both the years u/s 143(3) r.w.s. 147 on 30/11/2017. Previously, an assessment was already framed for both the years u/s 143(3) r.w.s. 153A on 30/03/2016.

4.2 The assessments were reopened pursuant to receipt of certain information from investigation wing, Kolkata wherein it was alleged that the assessee was beneficiary of bogus Long-Term Capital gains (LTCG) by dealing in a scrip namely M/s Unisys Software & Holding Industries

Ltd. (in short 'Unisys'). Accordingly, the cases were reopened as per due process of law and notice u/s 148 was issued on 14/09/2016 wherein the assessee was directed to substantiate the aforesaid transactions. The assessee was also show-caused as to why the gain so earned be not treated as income from undisclosed sources and added to the income of the assessee along with estimated commission.

4.3 It is matter of record that the assessee sold 15000 shares of Unisys during March, 2012 & another 148000 shares during July, 2012 as detailed in the respective assessment orders. Since the gains so earned fulfilled the conditions of Sec. 10(38), these were claimed to be exempt while filing the returns of income.

4.4 During assessment proceedings, the assessee filed sufficient documentary evidences in support of the transactions and submitted that the transactions of sale and purchase of shares were carried out at recognized Stock Exchange through registered stock brokers. The investments were made for the purpose of capital appreciation since the assessee was a regular investor in shares. Therefore, the gains were genuine and the same were exempt as per the provisions of the act. However, rejecting the same, Ld. AO denied the exemption in both the years and added the sales proceeds of the shares as unexplained cash credit u/s 68 of the Act. The assessee has also been saddled with addition u/s 69C for estimated commission @6% which is consequential to the main addition.

Appellate Proceedings

5.1 During appellate proceedings, the assessee challenged the validity of assessment proceedings on the ground that reopening was based merely on change of opinion. However, the same could not convince Ld.

CIT(A) who opined that subsequent to completion of assessment proceedings, certain information was received by Ld. AO through departmental channels and the information was credible and actionable. The said material was sufficient to invoke the provisions of Sec.147 and no infirmity could be found in the action of Ld. AO to reopen the cases of the assessee. The legal grounds, thus raised by the assessee, were dismissed.

5.2 Proceeding further, Ld.CIT(A), going by the findings of investigation wing, observed that the scrip of Unisys was penny-stock scrip which was controlled by entry operators which was evident from statements of various brokers, entry operators & exit providers given by them during investigation. Therefore, the action of Ld. AO, in making the impugned additions, in both the years, was to be confirmed. Aggrieved, the assessee is in further appeal before us.

6. Our findings and Adjudication

We find that identical issue has already been dealt with by us in ITA No.7921/Mum/2019 in the case of **Shri Vasantlal Nyalchand Kikavat** as under: -

4. Our findings and Adjudication

4.1 So far as the material facts are concerned, we find the assessee has sold certain shares of a scrip namely Unisys during the year. These shares were purchased during March, 2010. The shares were purchased in online mechanism at recognized stock exchange through registered share broker and the shares were duly credited in assessee's demat account (page 79 of the paper-book). The payment has been settled through banking channels. Similarly, the shares have ultimately been sold in online mechanism at recognized stock exchange through registered share broker namely M/s Pragya Securities Limited (page nos. 76-77 of the paper-book). The purchase / sale transactions are duly evidenced by contract notes, broker's ledger, demat account statement and bank statements etc. The sale proceeds have been received through banking channels and the shares have been delivered by the assessee from demat account. These transactions have been subjected to applicable Securities Transaction Tax (STT). Prima-facie the assessee has fulfilled all the requisite conditions to claim exemption u/s 10(38).

4.2 The perusal of assessee's Balance Sheet, as placed in the paper-book, would reveal that the assessee hold investment in various scrips. On the basis of the same, it could be said that the assessee was a regular investor of share. The same is also evident from the fact that the assessee has earned short-term capital gain on various scrips during the year which has been offered to tax in its computation of income.

4.3 We find that all the aforesaid documents were furnished by the assessee before lower authorities and the same has also been placed before us in the paper-book. The perusal of all these documents would show that the shares have been purchased and sold through registered stock brokers in online mechanism wherein the identity of the seller & buyer would not be known. The findings of Ld. CIT(A) regarding exit providers do not show that the assessee was, in any way, known to these exit providers and connived with them to procure bogus LTCG. Therefore, the general statements given by the exit providers without specifically naming the assessee, on stand alone basis, was not quite sufficient to hold that the gains earned by the assessee were fictitious.

4.4 Upon perusal of all the aforesaid documents, it is quite discernible that the assessee had furnished all the requisite documentary evidences to substantiate the transactions and discharged the primary onus as required under law to establish the genuineness of the gains so earned during the year. No defect has been pointed out by the revenue in documentary evidences furnished by the assessee. Therefore, the onus had, thus, shifted on revenue to disprove assessee's claim and establish with cogent evidences that the transactions were non-genuine transactions through which assessee's unaccounted money has flown back to assessee in the garb of bogus capital gains. However, we find that except for general findings of investigation wing and third-party statements on the basis of which it has been alleged that the scrip of Unisys was penny stock, there is nothing in the kitty of the revenue to prove the assessee's involvement in manipulating the prices of the scrip. No exchange of cash between the assessee and the various exit providers could be proved. Therefore, the onus as casted upon revenue to dislodge the assessee's claim, remain un-discharged.

4.5 So far as the observations of Ld. AO as to financial and profitability of Unisys is concerned, we find that the sales transactions have taken place in online mechanism through recognized stock exchange wherein the identity of the buyer would not be known and there would be no privity of contract between the assessee and prospective buyers of shares. In online mode of trade, the prices would be guided by the buyer willing to buy the shares at certain prices and the seller willing to sell the shares at certain prices. The prices would be guided more by the market forces rather than the financials or other parameters. There would be buyers and sellers lining up on either side of a potential trade; one party willing to part with ownership and other party willing to acquire the ownership. When both the parties would agree upon a price, the trade is matched and that price would become new market quotation. Therefore, the financials of underlying entities, in such cases, would lose much relevance in so far as the price movement of scrip is concerned. Nothing adverse could be drawn against the assessee on the basis of the same. Therefore, the aforesaid observations as well as conclusion of Ld. AO would not support the case of the revenue.

4.6 Proceeding further, it could be observed that the primary reason to doubt the genuineness of assessee's transactions is findings of investigation wing which was based on general statement of various stock-brokers / operators including statement

of Shri R.K. Kedia and Shri Jagdish Prashad Purohit, wherein these persons, without naming the assessee specifically, made an admission that the scrip of Unisys was a penny stock scrip. However, despite specific request of the assessee, the adverse material which form the very basis of addition, no opportunity to cross-examine these persons was ever provided to the assessee. The failure to do so would make the additions unsustainable as per settled legal position. Further, the adverse statements made by these persons are not backed by any cogent corroborative material on record to establish the assessee's involvement in price rigging of shares of Unisys. No collusion between the assessee and alleged entry providers or operators or exit providers is shown to have existed. There is no admission or evidence-based finding that any cash got exchanged between the assessee and any of the bogus purchasers of the scrip. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmise. The addition thus made purely on the basis of third-party statement recorded at the back of the assessee could not be sustained in the eyes of law unless the same are confronted to the assessee and the same are backed by any corroborative material. No effective investigation is shown to have been carried out by Ld. AO to dislodge the assessee's claim by bringing on record cogent evidences as well as confronting the same. We find that except for general allegations as narrated in the investigation wing report, there is no evidence which would link assessee's involvement in jacking up the prices of the shares with a view to earn artificial gains. The additions so made could not be sustained in the eyes of law as per the decision of Hon'ble Apex Court in **Kishanchand Chellaram V/s CIT (125 ITR 713)** and also in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006 dated 02/09/2015)** wherein it has been held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. Similar is the ratio of decision of Hon'ble Bombay High Court in **H.R.Mehta V/s ACIT (387 ITR 561)**.

4.7 The proposition that additions made purely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law stem from the decision of Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151)** wherein it was held that the suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**. The additions made on mere presumptions could not be sustained and there must be something more than mere suspicion to support the assessment as per the decision of Hon'ble Apex Court in **Dhakeshwari Cotton Mills Ltd. V/s CIT (26 ITR 775)**. The assessment should not be based merely on suspicion or guess work but on legitimate material from which reasonable inference of income could have been drawn.

4.8 The last aspect of the matter is that the additions have been made by Ld. AO invoking the provisions of Section 68. The addition u/s 68, in our considered opinion, is not sustainable in view of the fact that credit in assessee's bank account represents sale proceeds of shares sold in recognized stock exchange through registered stock broker. The sale transactions have taken place through recognized stock exchange and the money was received in settlement through banking channels. The assessee had delivered the shares from his demat account to the broker, who, in turn, paid sale consideration to the assessee. In such a case, there could be no doubt as to fulfillment of primary ingredients of Sec.68 viz. identity of the

payer, their creditworthiness and the genuineness of the transactions. The source of credit received in the bank account could not be held to be unexplained unless it was established that assessee's own money was routed in his bank account in the garb of Capital gains.

4.9 Besides the case laws cited by the assessee during appellate proceedings, the other case laws also support our view, some of which could be tabulated as under: -

- (i) Hon'ble Bombay High Court in **CIT V/s Mukesh Ratilal Marolia (ITA No.456 of 2007; 07/09/2011)**
- (ii) Hon'ble Gujarat High Court in **CIT V/s Maheshchandra G.Vakil (40 Taxmann.com 326; 25/09/2012)**
- (iii) Hon'ble Rajasthan High Court in **CIT V/s Smt. Sumitra Devi (49 Taxmann.com 37; 24/02/2014)**
- (iv) Hon'ble Rajasthan High Court in **CIT V/s Pooja Agarwal (ITA No.385/2011 dated 11/09/2017)**
- (v) Hon'ble Delhi High Court in **Pr.CIT V/s Smt. Krishna Devi & Ors.(ITA No.125/2020 & ors. Dated 15/01/2021)**

We find that the ratio of aforesaid decisions is equally applicable to the fact of the present case before us.

4.10 Finally, keeping in the facts and circumstances of the case, we are inclined to hold that impugned additions are not sustainable in the eyes of law. The assessee had discharged the primary onus of establishing the genuineness of the transactions whereas the onus as casted upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The whole basis of making additions is third-party statement and no opportunity of cross-examination has been provided to the assessee to confront these parties. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue. Hence, going by the factual matrix and respectfully following the binding judicial precedents as enumerated in the order, the additions made by Ld. AO and confirmed by Ld. CIT(A), are not sustainable in the eyes of law. Therefore, we are inclined to delete the same. We order so. Consequentially, the addition of estimated commission also stands deleted. Resultantly, the appeal, on merits, stand allowed.

4.11 So far as the legal grounds are concerned, we find that subsequent to framing of assessment u/s 143(3) r.w.s. 153A, Ld. AO came into possession of tangible material in the shape of investigation wing report which indicated possible escapement of income in the hands of the assessee. In our opinion, at this stage, nothing more was required to reopen the case of the assessee. Therefore, we concur with the findings of Ld.CIT(A) as given in the impugned order, in this regard. The legal ground, thus raised, stand dismissed.

5. The appeal stands partly allowed in terms of our above order.

We find that the factual matrix is identical in the present appeals and the aforesaid findings / adjudication is squarely applicable to the facts of the cases. Applying the same, we delete the impugned additions as made by

Ld. AO u/s 68 & 69C for both the years and allow the appeals on merits.

The legal grounds stand dismissed.

7. Both the appeals stand partly allowed.

Order pronounced on 17/12/2021

Sd/-

(Amarjit Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 17/12/2021
Sr.PS, Dhananjay

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.