

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 5763/Mum/2019
(Assessment Year 2012-13)

Amit H Patel(HUF) 1/135, Prabhu Niwas Opp.SIWS College Wadala Mumbai-400 031 PAN : AAEHA4171N (Appellant)	Vs.	DCIT,CC-3(4) Room No.1915, 19 th Floor Air India Building Mumbai-400 021 (Respondent)
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Assessee by	Shri Neelkanth Khandelwal
Department by	Shri Anil Gupta
Date of Hearing	18.11.2021
Date of Pronouncement	27.01.2022

ORDER

Per Shri Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-51 dated 23.17.2019 and pertains to assessment year 2012-13.

2. Grounds of appeal read as under:-

1. On the facts and circumstances of the Appellant's case and in law the Ld. CIT(A) erred in confirming the action of Id A.O. in making the various additions/disallowance in the absence of any incriminating material found during the course of search action, as per the grounds stated in the order or otherwise.
2. On the facts and circumstances of the Appellant's case and in law, Id. CIT (A) erred in confirming the action of Assessing Officer in treating the short term capital loss suffered by the appellant as non-genuine and bogus transaction, as per the grounds stated in the order or otherwise.
3. On the facts and circumstances of the Appellant's case and in law, Id. CIT (A) erred in confirming the action of Assessing Officer in not allowing the carry forward

of short term capital loss amounting to Rs.16,22,785/- as per the grounds contained in the assessment order or otherwise.

3. Brief facts of the case are that a search and seizure action u/s. 132(1) of the Act was carried out in the premises of Shri Amit H Patel, karta of Amit H.Patel (HUF). Pursuant to the search, AO noted that assessee is a partner in the firm M/s. NMC Industries. That the main allegation about the assessee leading to the search action was that assessee has been indulging in the generated of bogus long term capital gains. The AO noted that pursuant to the search action, notice u/s. 153A was issued to the assessee. The AO noted that assessee has filed return of income on 20.09.2011 at Rs. 18,07,738/-. This was also filed pursuant to the notice u/s. 153A. AO further noted as under:-

The assessee is an HUF. For the assessment year 2012-13, the assessee has shown income from house property and income under the head 'income from other sources'. The assessee has declared short term capital loss of Rs. 26,76,357/- on purchase & sale of shares. The assessee has also declared exempt income of Rs. 7,97,496/- which includes share of profit from partnership firm of Rs. 5,35,868/-, PPF interest of Rs 1,29,628/- and dividend of Rs. 1,32,000/-.

4. The AO referred to the statement u/s. 132(4) by Shri Amit H Patel. He noted that Shri Amit H. Patel was evasive in his reply. That the evasive answers of Shri Amit H Patel regarding the entire process of investment in penny stocks is not acceptable. After elaborating upon the modus operandi in such cases. AO referred to the show-cause notices given to the assessee and response by the assessee, he referred to several case laws and concluded as under:-

The following points summarise that Comfort Intech Ltd. is a bogus penny stock company:

- The business profile and financial of Comfort Intech Ltd. show that the company was not engaged into any substantial activity, esp. when the preferential shares were allotted. It is also seen that the company was not having any future plans which could attract investors from all over India to invest in the company.
- The whole process of preferential allotment was a prearranged and managed process so as to allot preferential shares to beneficiaries of bogus LTCG/STCG.

- The reported profits were also not commensurate with the price rise. The shares were rigged on the Stock Exchange. The price of Comfort Intech Ltd. has moved in absolute disregard to the general market sentiments.
- Various share brokers have confirmed the fact that the shares of Comfort Intech Ltd. have been used for providing entry of bogus LTCG/STCG.
- During this period of price rigging, the volume of the shares traded on each trading day was very low and on each day just 1-2 trades have been done with a constant rise in the price of the shares which was kept just short of the circuit limit for price rise as per the exchange guidelines.
- Various Exit Providers have confirmed that they have purchased the shares of Comfort Intech Ltd. to provide entries of bogus LTCG/STCG.
- These Statements on oath as reproduced above, constitute a strong testimony in order to establish the manipulation of the said scrip leading to conversion of unaccounted income into bogus LTCG/STCG through accommodation entries by various beneficiaries including the assessee group.

In the light of the facts & discussion in the preceding paragraphs, I am of the opinion the transactions of purchase & sale of 4000000 shares of Comfort Intech Ltd. leading to generation of short term capital loss of Rs. 16,22,785/- are not genuine transactions. Hence the said loss is disallowed and not allowed to be carried forward for set off in the following assessment years. Penalty proceedings u/s 271(l)(c) are initiated as the assessee has furnished inaccurate particulars of his income.

5. Against the above order, assessee is in appeal before the Ld.CIT(A). Ld.CIT(A) confirmed the AO's order.

6. Against the above order, assessee is in appeal before ITAT.

7. I have heard both the parties and perused the records. Ld.CIT(A) dismissed the assessee's objection to the jurisdiction for making assessment without incriminating material by observing that a statement of Shri Amit Patel, where he could not explain the basis for investment and the abnormal rise is more than sufficient to implicate the assessee. Further, Ld.CIT(A) referred certain case laws regarding the evidentiary value of incriminating material in cases other than that u/s. 153A of the Act.

8. I note that it is settled law that in assessment framed u/s. 153A of the I.T Act in case of non abated assessment, no addition can be made de hors incriminating material found in search. The finding of the authorities below is that though no incriminating material has been found and seized on this issue, but evasive reply of Shri Amit Patel is sufficient to implicate the assessee. I note that the issue is fully settled that in such cases addition cannot be made without incriminating material found and seized. In this regard, I refer to the decision of Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. [137 ITR 645 (Bom.)], where it was held that de hors incriminating material, no addition can be made in case of non abated assessment framed u/s. 153A of the I.T.Act. The reference to case laws by Ld.CIT(A) is not germane in the present case as they are not with reference to addition in assessment pursuant to 153A notices.. In this view of the matter, the view of revenue authorities that the evasive reply of Shri Amit Patel is incriminating material granting jurisdictional basis for addition is not justified. Hence, I set aside the orders of the authorities below and decide the issue in favour of the assessee.

9. Since, it has been held that in case of non abated assessment addition de hors incriminating material cannot be made, the adjudication on the issue on merits is only of academic interest. Hence, the same is not being engaged into.

10. In the result, appeal by the assessee is partly allowed.

Pronounced in the open court on 27.01.2022

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 27.01.2022

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai