

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH
(Conducted Through Virtual Court)
Before: Ms. Annapurna Gupta, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 115/Ahd/2020
Assessment Year 2011-12

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| The ITO, Ward-4(2)(4), Ahmedabad (Appellant) | Vs | Shri Palak Chinubhai Patel, A/503, Aurum Sky, Opp. Sola Water Tank, Science City Road, Sola Ahmedabad-380060 PAN: ANLPP9385K (Respondent) |
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Assessee by: Shri Tej Shah, A.R.
Revenue by: Shri S.S. Shukla, Sr. D.R.

Date of hearing : 23-02-2022
Date of pronouncement : 28-02-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

The present appeal has filed by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals)-4, Ahmedabad [in short referred as "CIT(A)"] dated 28-11-2019 u/s. 250 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the Assessment Year 2011-12.

2. At the outset, the Id. counsel for the assessee pointed out that the appeal filed by the Department needs to be dismissed as withdrawn on account of low tax effect i.e. the tax effect involved in the instant case is below prescribed limit for filing appeals by the Department before ITAT vide CBDT Circular No. 17 of 2019 dated 8th August, 2019. The Id. counsel for the assessee pointed out that the limit prescribed vide aforesaid Circular is less than Rs. 50 lakhs while the tax effect involved in the present appeal was only Rs. 3,51,871/-.

3. The Id. Departmental Representative on the other countered by stating that the assessee's case is covered by Circular Number 23 dated 6th September, 2019 and Office Memorandum F. No. 279/MISC./M-93/2018-ITJ(PT.) dated 16-9-2019, which carves out an exception to the above Circular and states that the monetary limit fixed for filing appeal before the ITAT shall not apply in case of assessee's claiming bogus gains / losses through penny stocks and appeals in such cases shall be filed on merits.

4. The Id. counsel for the assessee responded by stating that the above Memorandum dated 16-09-2019 does not apply to the assessee's set of facts. As per the plain language of the Memorandum, for the exception to apply the assessee should be claiming bogus long term capital gain/short term capital loss through penny stocks. However, in the instant set of facts, the assessee has not claimed either long term capital gains or short term capital losses through sale of stocks. The assessee drew our attention to the income tax return filed by the assessee for the captioned year wherein he pointed out that income from sale of shares has been reflected as "income from business

or profession” and no income under the head “capital gains” has been declared by the assessee in the return of income. Accordingly, the assessee submitted that since the Circular specifies that the monetary limit shall not apply in cases of assessee’s claiming bogus LTCG/STCL through penny stocks, the assessee’s case does not come within the purview of the express language of the memorandum and accordingly its case does not fall within the exception provided therein.

5. We have heard both the sides and also perused the contents of the Circular Number 23 dated 6th September, 2019 and Office Memorandum dated 16th September 2019. The issue for consideration before us is whether if the assessee has not earned any income under the “capital gains” through sale of alleged penny stocks, whether still his case is covered under the exception provided by Office Memorandum dated 16th September 2019 (which is to the effect that monetary limits fixed for filing appeals before ITAT shall not apply in case of assesses claiming bogus LTCG/STCL through penny stocks).

6. In order to appreciate the submissions made by the Id. AR of the assessee and the Ld. DR, it would be beneficial to reproduce the operative part of Circular dated 6-9-2019 and Office Memorandum dated 16-9-2019:

Circular No. 23 of 2019 dated 6-9-2019

2. *Several references have been received by the Board that in large number of cases where organised tax evasion scam is noticed*

through bogus Long Term Capital Gain (LTCG)/Short Term Capital Loss (STCL) on penny stocks and department is unable to pursue the cases in higher judicial fora on account of enhanced monetary limits. It has been reported that in large number of cases, ITATs and High Court have recognized the unique modus operandi involved in such scam and have passed judgements in favour of the revenue. However, in cases where some appellate fora have not given due considerations to position of law or facts investigated by the department there is no remedy available with the department for filing further appeal in view of the prescribed monetary limits.

3. In this context, Board has decided that notwithstanding anything contained in any circular issued u/s 268A specifying monetary limits for filing of departmental appeals before Income-tax Appellate Tribunal (ITAT), High Courts and SLPs/appeals before Supreme Court, appeals may be filed on merits as an exception to said circular, where Board, by way of special order direct filing of appeal on merit in cases involved in organised tax evasion activity.

Office Memorandum F. No. 279/MISC./M-93/2018-ITJ(PT.), dated 16-9-2019

The undersigned is directed to refer to Circular No. 23 of 2019 dated 6th September, 2019 and to say that by virtue of powers of the Central Board of Direct Taxes u/s. 268A of Income-tax Act, 1961, the monetary limits fixed for filing appeals before ITAT/HC and SLPs/appeals before Supreme Court shall not apply in case of

assesses claiming bogus LTCG/STCL through penny stocks and appeals/SLPs in such cases shall be filed on merits.

7. In Circular No. 23 of 2019 dated 06.09.2019, the CBDT had stated that notwithstanding anything contained in any Circular issued under Section 268A specifying monetary limits for filing of departmental appeals before the Income Tax Appellate Tribunal (ITAT), High Courts and SLPs/ Appeals before the Supreme Court, appeals may be filed on merits as the exception to the said Circular, where the Board by way of special order direct filing of appeals on merits in cases involved in organized tax evasion activity. The Office Memorandum dated 16.09.2019 was issued pursuant to the said circular dated 06.09.2019 stating inter alia that by virtue of the powers of CBDT under Section 268A of the Income Tax Act, the monetary limits fixed for filing appeals before ITAT/High Court and SLPs/Appeals before Supreme Court shall not lie in case of assessee claiming **bogus LTCG/STCL** through penny stocks and appeals/ SLPs in such cases appeals shall be filed on merits.

8. From a plain reading of the language of Circular No. 23 of 2019 dated 06.09.2019 read with Office Memorandum dated 16.09.2019, in our view, the same shall apply when assessee has earned / claimed **bogus LTCG/STCL through penny stocks**. However, there is nothing to suggest that the Circular read with Memorandum would apply with equal force even if the assessee has shown sale and purchase of such alleged penny stocks as “income from business or profession” in its return of income. In our view, the language of Circular read with Memorandum is very categorical and

does not suggest any scope for a wider interpretation so as to cover within its scope even 'business income' from purchase and sale of alleged penny stocks. A perusal of the return of income and the computation of income filed by the assessee shows that the assessee has filed return of income declaring income from sale of shares to the tune of Rs. 4,83,946/- under the head 'income from business or profession'. The assessee has not declared any income/ loss under the head 'capital gains'. The total tax effect from the assessment framed during the captioned year is Rs. 3,51,871/- which as admitted by both parties is below the prescribed limit for filing appeals before Tribunal. Therefore, in our view, the case of the assessee does not fall within the exceptions as provided by CBDT Circular No. 23 of 2019 dated 06.09.2019 read with Office Memorandum dated 16.09.2019 and therefore, the impugned appeal filed by the Revenue deserves to be treated as withdrawn on account of low tax effect.

9. In view of the same, the appeal filed by the Revenue is dismissed as withdrawn.

10. The appeal of the Revenue is accordingly dismissed.

Order pronounced in the open court on 28-02-2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER
Ahmedabad : Dated 28/02/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद