

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

ITA NO. 779/MUM/2020 (A.Y: 2013-14)

Barkha Ramesh Merchant 110/111, Crescent Mansion Gamdevi Lane, Gamdevi Mumbai-400007 PAN: AFNPM4225P	v.	ACIT – 16(1) Room No. 439 Aayakar Bhavan M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri Chintan Patel
Department by	:	Shri Dilipkumar Shah
Date of Hearing	:	17.01.2022
Date of Pronouncement	:	12.04.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 05.11.2019 for the A.Y. 2013-14.

2. Brief facts of the case are, assessee filed return of income for the A.Y. 2013-14 on 30.09.2013 declaring total income of ₹.87,152/-. The return was processed u/s. 143(1) of the Income-tax Act, 1961 (in short

"Act"). Based on the information received from the Directorate of Investigation, Kolkata the case of the assessee was reopened and notice u/s. 148 of the Act were issued and served on the assessee. Based on the information that assessee is the beneficiary, who has taken bogus entries of long term capital gain. Considering the informations and statements recorded by the investigation wing of Kolkata the reassessment was initiated. During the re-assessment Assessing Officer observed that assessee has shown long term capital gain on shares of M/s. Shreenath Commercial & Finance Ltd., of ₹.2,12,47,086/- by crediting it to the capital account and treated it as exempt u/s. 10(38) of the Act. When the assessee was asked to substantiate the claim made u/s. 10(38) of the Act and why the claim should not be rejected. In response assessee filed letter dated 20.12.2017 which is reproduced below: -

"With reference to our abovementioned client, we the undersigned authorized representatives acknowledge the receipt of your letter requiring the assessee to show cause as to why the Sale Consideration of long term capital gains offered should not be treated as unexplained cash credit. Sir, in this connection we wish to state that the income is rightly offered as long term capital gains and the same cannot be treated as income u/ s 68 of the Act in the light of the following submission.

2. Sir, during the year, the appellant has earned Rs. 2,07,59,000/- in the form of long term capital gains from sale of shares of Shreenath Commercial & Finance Ltd. In order to understand the entire chain of events on the transactions pertaining

to Shreenath Commercial & Finance Ltd, a factual matrix is reproduced hereunder.

.....

.....

3. *Ongoing through the above chain of events, it is clear that each and every transaction is backed by supporting documentary evidence. Furthermore and importantly, the company as per SEBI Regulations has timely reported the financial to the stock exchange, Thus it is evident that Sale and Purchase of above said shares have taken place on the floor of BSE through its member(Broker Shree Naman Securities & Finance Put Ltd] and thus we strongly object here again the statement so relied upon which are not yet produced to the assessee, It is pertinent to state that assessee has truly disclosed all its transaction with all the documentary evidences to prove that transaction carried out by the assessee is genuine and not bogus.*

4. *Further, ongoing through your letter it is noticed that your good self have based your proposal of treating the LTCG claimed by the assessee as unexplained cash credits u/ s 68 of the Act on the following points/ presumptions.*

a. *Kolkata Investigation Directorate had undertaken investigation into penny stocks including Shreenath Commercial & Finance Ltd and has given detailed findings indicating bogus LTCG/STCL entries claimed by a large number of beneficiaries.*

Contentions and arguments of the assessee

5. *Sir first and foremost, we wish to state that the assessee is an investor in shares since many years and the same is self evident from the returns of income filed for last many years wherein capital gains have been regularly offered as income. Further, as per demat statement of Standard chartered, the assessee was holding shares of 10 companies as on that date. Please refer to Page 1-8 attached herewith reflecting detailed transaction carried on by the assessee.*

6. *As regards the information received from Kolkata - Investigation Directorates, we politely wish to state that the assessee is not provided with any adverse statements/ documents/ information and therefore the same cannot be used against the assessee.*

7. AS regards your good selfs contention that assessee is one of the beneficiary of some dubious scheme wherein the assessee's own unaccounted money has come back in the form of exempt LTCCG, we wish to state that this is merely a presumption and surmise on your part. The direct evidences furnished by the assessee support the claims made by him in the return of income. The purchase of the shares of Shreenath Commercial & Finance Ltd in FLY. 2010-11 is through a reputed broker (Shree Naman Securties & Finance Put Ltd). The said shares are received in the demat account of the assessee. The sale of shares of Shreenath Commercial & Finance Ltd is through a reputed broker (Shree Naman Securities & Finance Put Ltd) and the transaction is undertaken on the floor of Bombay Stock Exchange. The said broker has remitted the sale proceeds and the same its reflected in the bank statement of the assessee. Please refer to documents submitted at Page 1-8 as well as bank statements of the assessee submitted during the course of assessment proceedings.

8. As regards the invoking of section 68, we wish to reiterate that the sale of shares is transacted with the stock exchange through its broker Shree Naman Securities & Finance Put Ltd., _the said stock exchange has remitted funds to the assessee through the said broker and therefore the identity of the payer, source of funds received and genuineness of the transaction is absolutely established.

.....

.....

.....

In the light of the above legal and factual submission and no other corroborative documents available against the assessee to prove the transaction as bogus, no addition is called for by treating the LTCCG offered by the assessee as unexplained cash credits u/ s 68 of the Act. The assessee prays that no adverse view may please be taken”.

3. After considering the above submissions, Assessing Officer rejected the contention of the assessee and considering the search, survey, enquiries conducted in the case of brokers, operators and entry providers

and the nature of transactions entered and circumstances and evidences gathered in the case of the assessee, he held that the amount of ₹.2,12,47,086/- shown to be on sale of shares through one broker viz., Shree Naman Securities and Finance Pvt. Ltd., is treated as unexplained Cash credit u/s. 68 of the Act.

4. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) considered the detailed submissions submitted before him and he rejected the above submissions and dismissed the grounds raised by the assessee.

5. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. The learned Assessing Officer [AO] erred in passing the order U/s 143(3) r.w.s 147 dated 31.12.2017 in gross contravention of provisions of law as the Ld AO failed to provide necessary statements so relied upon for reopening of assessment and an opportunity to cross-examine the person(s) who had given adverse statements and thus reopening of assessment is bad in law and is in contravention of principal of natural justice.

2. The Ld. A.O. erred in making additions amounting to Rs.2,12,47,086/- u/s 68 of the Income Tax Act, 1961 by holding that the Long Term Capital Gains earned by the appellant were bogus in nature and were merely accommodation entries without appreciating the fact that

a) the appellant had earned capital gains on shares by purchasing and selling shares on the floor of Bombay Stock Exchange (Recognized Stock Exchange) by paying the STT

and receiving the sale consideration through its bank accounts and transacting through demat accounts;

b) the company's shares listed on the recognized stock exchanges Viz BSE, were complying with various regulatory compliances of SEBI and MCA are open for investors to invests based on individual risks and thus could not be generally stated that all transaction in relation to the said shares were bogus in nature when the assessee himself doesn't know from whom it has purchased the shares and sold the same as the same were transacted on the floor of stock exchange;

c) No reliance can be placed upon the information/findings received from the Investigation Wing without verifying in statement whether it is applicable to the appellant or not;

d) No reliance can be placed upon the unilateral statements given by certain operators as none of such operators had specifically admitted to be providing any accommodation entries to the appellant neither the assessee knows from whom and to whom the shares are sold being the fact that the shares were purchased and sold on the floor of recognized stock exchange.

3. The learned A.O. further erred in computing the assessed income as the additions made of Rs. 2,12,47,086/ is much more than long term capital gains earned from sale of shares of M/s.SHREENATH COMMERCIAL FINANCE (alleged penny stock company) of Rs. 2,07,59,000/.

4. The Ld. AO erred in levying interest u/s 234B and 234C of the Income Tax Act, 1961."

6. At the time of hearing, Ld. AR submitted that facts in the present case and facts in the case of Mrs. Pallavi Pandey and Shri Rajendra Chaturvedi are exactly similar and the issue is fully covered in favour of the assessee. He relied on the ITAT decision in the case of Mrs. Palavi

Pandey v. DCIT in ITA.No. 7124/Mum/2019 and Shri Rajendra Chaturvedi v. DCIT in ITA.No. 7581/Mum/2019 dated 23.12.2020.

7. On the other hand, Ld.DR relied on the orders of the lower authorities.

8. Considered the rival submissions and material placed on record, we observed that the issue involved in this case are squarely covered in the case of Mrs. Palavi Pandey v. DCIT (supra) and for the sake of clarity it is reproduced below: -

"11. We have heard the rival submissions of both the parties and perused the material on record including the various case laws referred by the rival parties during the course of hearing. The undisputed facts are that the assessee has purchased 28 lakhs of shares of M/s. Shrinath Commercial and Finance Ltd. between 04.03.2011 to 15.03.2011. M/s. Shrinath Commercial and Finance Ltd. thereafter issued bonus shares in the ratio of 1:1 on 22.03.2011 and thus the assessee came to hold 56 lakh shares in the said company. We note that these shares were purchased through recognised stock exchange through registered broker and were credited in the D-mat account of the assessee. Similarly the bonus shares were also credited in the said D-mat account held by the assessee. All these purchase of shares were supported by the contract notes issued by the authorised brokers of the stock exchange and the payments were made through banking channels. Thereafter, the assessee sold these shares during the period commencing on 23.08.2012 to 08.02.2013 for a total consideration of Rs.41,48,39,241/- and was received through banking channel thereby making a long term capital gain of Rs.35,44,38,501/- which was claimed as exempt under section 10(38) of the Act as long term capital gain on sale of shares. We notice that all these transactions were carried out on a recognised stock exchange by the assessee through registered brokers duly evidenced by the contract notes and

entries in the D-mat account and the sale and purchase consideration reached through banking channels. The AO has also only relied on the investigation carried out by the Investigation wing, Kolkata and Mumbai that assessee is a beneficiary of these bogus long term capital gain entries. Nowhere the AO has brought on record any other evidence than relying on the report of investigation wing that the assessee is beneficiary of this huge racket of taking bogus entries of long term capital gain. The AO has disbelieved these documents by observing that these are sham and bogus documents without pointing out any specific defect or infirmity as these were issued as per the system of the recognised stock exchange through registered brokers. Similarly, the Ld. CIT(A) has upheld the order of AO by holding that the assessee is beneficiary of a big racket whereby the prices of the shares were rigged and manipulated to yield bogus gain to various entities/individuals of which assessee was one. Thus we find merit in the arguments of the Ld A.R. that assessee has furnished all the informations, details, documentary evidences before the AO but the AO has not done any further verification to find out the truth or done anything to prove the money trail of the funds as has been alleged in the order. Under these circumstances, we are not in a position to sustain the order of Ld. CIT(A) upholding the order of AO wherein the long term capital gain has been held to be non genuine and bogus. The case of the assessee is supported by a series of decisions as relied upon by the Ld. A.R. which are discussed as under:-

- In case of CIT vs. Shyam R. Pawar (supra) the Hon'ble Bombay High Court has dismissed the appeal of the revenue by observing and holding as under:*

"5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny. It was also revealed during the course of inquiry by

the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt. Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt. Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme. 6. It is in that regard that we find that Mr.Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,1507-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DM AT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out

by the Calcutta Stock Exchange regarding client Code has been referred to. But The Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either. 7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs."

- In the case of CIT Vs Sumitra Devi(supra), the Hon'ble Rajasthan High court has held that where the assessee has furnished all the documents comprising contract notes, brokers note, cash book extracts, copies of share certificates and D-Mat statements etc and the AO has failed to show that the material documents placed on records by the assessee were false, fabricated or fictitious , then the transactions of purchase and sale of shares can not be treated as non genuine.*

- We have also perused other decisions of the coordinate Mumbai benches wherein under similar facts the issue has been decided in favour of the assessee.*

12. We do not find merit in the argument of the Ld. D.R. as the decisions relied by the Ld. D.R. clearly are distinguishable on facts. In view of the above facts and the ratio laid down as discussed above, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition made under section 68 of the Act of Rs.41,48,39,241/-.

13. Since we have deleted the addition as made by the AO under section 68 of the Act by setting aside the order of Ld. CIT(A), the other addition of Rs.2,07,41,962/- as made by the AO towards

commission paid on the accommodation entry is a consequential one and is also deleted."

9. Respectfully following the above said decision and the facts in the present appeal are exactly similar, we are inclined to allow the grounds raised by the assessee.

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

Order pronounced in the open court on 12.04.2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai / Dated 12.04.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum