

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.1808/DEL/2020
Assessment Year 2015-16

Anusha Maheshwari, KU-112, Vishakha Enclave, Pitam Pura, Delhi.	v.	ITO, Ward-39(5), New Delhi.
TAN/PAN: AIPPM1192E		
(Appellant)		(Respondent)

I.T.A. No.1809/DEL/2020
Assessment Year 2015-16

Shruti Maheshwari, KU-112, Vishakha Enclave, Pitam Pura, Delhi.	v.	ITO, Ward-39(5), New Delhi.
TAN/PAN: AMYPM0748F		
(Appellant)		(Respondent)

Appellant by:	Shri A.K. Srivastava, CA		
Respondent by:	Shri Ishtiyaque Ahmed, CIT		
Date of hearing:	28	03	2022
Date of pronouncement:	04	05	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeals have been filed at the instance of the assessee against the revisional order of the Pr. Commissioner of Income Tax (Appeals), [‘Pr.CIT’ in short], dated 22.04.2020 passed under Section 263 of the Income Tax Act, 1961 (the Act) whereby the assessment order passed by the Assessing Officer dated

27.12.2017 under Section 143(3) of the Act concerning Assessment Years 2015-16 were sought to be set aside for *de novo* assessment in terms of supervisory jurisdiction.

2. As per the grounds of appeal, the assessee has sought to challenge the jurisdiction assumed by the Pr.CIT under Section 263 of the Act and as a corollary, sought to impugn the revisional order passed by Pr.CIT.

3. Briefly stated, the return of the assessee was selected for complete scrutiny by CASS. The reasons as per CASS were “suspicious sale transaction in share [penny stock tab in ITS)”. The assessment was completed under Section 143(3) of the Act by the Assessing Officer accepting the return of income vide order dated 27.12.2017. Thereafter, the Pr.CIT in exercise of its revisionary powers, issued show cause notice dated 11.03.2020 under Section 263 of the Act requiring the assessee to show cause as to why the assessment was framed under Section 143(3) of the Act should not be modified/set aside on the ground that such order is erroneous insofar as it is prejudicial to the interest of the Revenue. The show cause notice issued in this regard is extracted herein for ready reference.

*To,
Anusha Maheshwari
KU-112 Vishakha Enclave, Pitam Pura
Delhi 110088, Delhi
India*

<i>PAN: AIPPPM1192E</i>	<i>Assessment Year : 2015-16</i>	<i>Dated 11/03/2020</i>	<i>DIN & Letter No. ITBA/COM/F/17/2019- 20/0126451683(1)</i>
-----------------------------	--	-----------------------------	--

Sir/Madam/M/s.

Subject: Notice u/s. 263 of the Income Tax, 1961, in the case of Ms. Anusha Maheshwari (PAN : AIPPPM1192E) for A.Y. 2015-16 reg.

1. *The Income tax return declaring taxable income of Rs. 14,82,770/- was filed on 29/09/2015. The case was selected for Complete Scrutiny by CASS. The reason for selection was “suspicious sale transaction in shares (Penny Stock tab in ITS)”. Assessment was completed u/s 143(3) on 27.12.2017 at returned income.*
2. *Trading in 4000 shares of M/s. Channel Nine Entertainment Ltd has been made. The assessee has sold 4000 shares at Rs. 17,43,600/- The assessee has purchased shares at Rs. 2.5 each and sold at Rs 435.75/- each. The profit of the share has been routed through share trading account. After selling off loss in trading shares of other company, income of Rs. 9,41,358/- has been shown as other income in the credit side of profit and loss account.*
3. *On perusal of case records, it has been found that as the AO has not made proper enquiry and verification of sale and purchase of the shares. The various information and copy of statement recorded by the Investigation wing of share broker, accommodation entry provider etc, available in Individual transactions statement, have not been used by the AO. As per information available, the script M/s Channel Nine Entertainment Ltd has described as penny stock. In various statement recorded by the investigation wing, it has been found that bogus transactions have been conducted by various brokers and accommodation entry provider in this script, and bogus profit/loss have been generated.*
4. *The AO has not made some crucial enquiry about profit generated on sale of penny stock like abnormal increase in price, history of the assessee in trading of penny stock and experience of trading in shares etc.*
5. *The facts mentioned above shows that AO has not made proper inquiry and verification in respect of trading of penny stock. The assessment order passed by the Assessing Officer in respect of A.Y. 2015-16 is erroneous in so far as it is prejudicial to the interests of the revenue as the AO has passed the assessment order without making*

inquires or verification which should have been made during the assessment proceedings. Therefore, I intend to initiate proceedings u/s 263 of the Income Tax Act and pass a suitable order.

6. *Section 263 of the Income Tax Act 1961 states that*

“The Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation 1.-

Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner

1. the order is passed without making inquiries or verification which should have been made;

2. the order is passed allowing any relief without inquiring into the claim;

3. the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

4. the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.’’

7. In this connection, you are required to show cause as to why the

assessment may not be reframed u/s 263 of the I.T. Act, 1961. You may file your reply in the office of the undersigned along with records on 17.03.2020 3.30 P.M. at Room No. 1904, 19th Floor, E- 2 Block Dr. S.P. Mukherjee Civic Centre, Minto Road, New Delhi – 110002.”

4. As per the show cause notice, the Pr.CIT observed on the basis of perusal of case records that the assessee is engaged in share trading activities and has *inter alia* traded in 4000 shares of M/s. Channel Nine Entertainment Ltd. While the assessee has purchased shares at a meagre cost of Rs.2.5 per share, the said share were eventually sold at astronomical price of Rs.435.75 per share. It was alleged that the Assessing Officer has omitted to make proper inquiry and verifications about the profits generated on sale of such penny stock and failed to enquire into abnormal increase in prices of the shares etc. The response and explanation of the assessee in response to the show cause notice was taken note of by the Pr.CIT in its order. On consideration thereof, the Pr.CIT passed the revisional order under Section 263 of the Act r.w. Explanation 2 thereto whereby the assessment order was set aside with a direction to the Assessing Officer to make fresh assessment *denovo* after making suitable enquiries towards transactions in penny stocks and taxability of the sale consideration under Section 68 of the Act r.w. Section 115BBE of the Act as per the directions, set out in the revisional order.

5. Aggrieved by the aforesaid action of the Pr.CIT, the respective assesseees are in appeal before the Tribunal agitating the supervisory jurisdiction usurped by the Pr.CIT under Section 263 of the Act as well as the consequential order passed under Section 263 of the Act.

6. Ld. counsel for the assessee broadly reiterated the submissions

made before the Pr.CIT and submitted in furtherance that the allegation of the Pr.CIT that Assessing Officer has failed to make requisite inquiry and verification on sale of Channel Nine Entertainment Ltd. shares is factually incorrect. Elaborating the background of assessee, the ld. counsel pointed out that the assessee is MBA Finance and also passed examinations conducted by the stock exchange and the market regulator, i.e., SEBI in the field security market. The assessee is thus accomplished and has sufficient track record of investment in the equity market continuously. It was pointed out that the profit arising from sale of shares has been declared as a 'business income' in the ordinary course for the reasons of plunge taken in the stock market with regularity. It was thus submitted that the whole facts are required to be appreciated in the peculiar background of the assessee concerned. It was submitted that the relevant evidences and documents concerning the purchase and sale transaction have been duly filed before the Assessing Officer as called for. It was further submitted that the alleged abnormal increase in the price of the company, i.e., Channel Entertainment Ltd. in itself cannot be the reason for alleging transactions to be clandestine or indulgence of the assessee in any manner. The price of the shares were market oriented being listed on the stock exchange. The assessee has entered into a meager purchase of 1000 shares on 10.11.2012 and upon the issue of bonus share, the assessee owned 4000 shares post bonus. These shares were eventually sold in the stock market and the resultant profit was declared as business income. It was further pointed out that the assessment was framed under CASS. The assessee was required to explain the CASS reasons i.e. 'suspicious sale transactions in shares' (penny stock TAR in ITS). It was further contended that the Assessing Officer has made pointed inquiries and elicited replies

thereon. It was pointed out that even in the context of Section 10(38) i.e. exempt Long Term Capital Gain, the Hon'ble Delhi High Court in PCIT vs. Smt. Krishna Devi & Ors in ITA No.125/2020 judgment dated January 15, 2021 observed that quantum leap in price of share without adverse evidence would not justify addition under Section 68 r.w. Section 115BBE of the Act. The gains arising on sale of shares in the instant case were duly reported in the books of account as 'business income' and the tax were paid on normal rate. It was submitted that it is not the case where the assessee has claimed any kind of exemption from taxation on sale of shares. It is a case where the assessee has treated the income arising from impugned sale of shares as ordinary business activity, and therefore, no prejudice can be envisaged to the Revenue from such transactions. It was submitted that a non-speaking order of the Assessing Officer by itself will not give rise to the presumption of lack of inquiry. The extent and manner of inquiry is in question which cannot be ordinarily dictated by the revisional Commissioner.

7. Ld. DR for the Revenue, on the other hand, relied upon the action of the Pr.CIT. It was submitted that no worth-while inquiry was conducted by the Assessing Officer in the course of the assessment. It was submitted that mere collection of basic documents or information cannot be equated with the requisite inquiry on the contours of Section 263 of the Act r.w. Explanation-2 thereto. A reference was made to the decision of Co-ordinate Bench in *Pooja Gupta Vs. PCIT in ITA No.4057/Del/2018* where the revisional action of the Pr.CIT was endorsed by the Co-ordinate Bench. It was thus contended that for similarity of reason, no inference with the revisional order is called for.

8. We have carefully considered the rivals submissions and

perused the impugned revisional order as well as the assessment order under revision. During the assessment year, in question, the assessee has received Rs.17,43,600/- of Channel Nine Entertainment on sale of 4000 shares which is alleged to be unexplained cash credit arising from sale of penny stock in substitution of 'business income' offered by assessee.

8.1 In the matter, it is the case of the assessee that the assessment was selected for scrutiny specifically for verification of transactions undertaken by the assessee in penny stock. A detailed show cause notice under Section 142(1) was issued on 08.12.2017 alleging that capital gains arising from transaction in shares of Channel Nine Entertainment Ltd. have not been disclosed in the return and that such gains, based on report of the investigation wing Kolkata/Delhi is bogus and accommodation entry in respect of which exemption under Section 10(38) of the Act has been incorrectly claimed. The assessee was specifically show caused as to why the receipt of Rs.17,43,600/- should not be treated as unexplained cash credit. The assessee filed a reply to the aforesaid show cause notice wherein, besides furnishing necessary detailed information and documentary evidences in relation to transactions, it was also submitted that assessee has not claimed any exemption under Section 10(38) on these transactions and the income arising on sale of shares has been treated as business activity by the assessee. It is further case of the assessee that after considering the information available with the Assessing Officer and conducting necessary inquiries in the peculiar facts towards alleged bogus transactions, the assessment was framed under Section 143(3) of the Act wherein the explanation offered by the assessee were accepted in the context of the case in discharge of quasi-judicial functions.

8.2 The revisional Commissioner has issued show cause notice dated 11.03.2020 alleging that the Assessing Officer has not made proper inquiry and verification of sale and purchase of shares. It was observed by the Pr.CIT that the assessee appears to be an investor and not a trader. The Assessing Officer was ultimately directed to make assessment afresh after conducting relevant inquiries.

9. On weighing the facts in perspective, we note that educational background of the assessee gives an impression that the assessee is well versed with the functioning of the stock market and has reasonable experience in the field. Hence, the action of assessee to treat the gains arising from sale of impugned penny stock as business income appears to be unquestionable. Noticeably, the assessee has not availed any benefit under Section 10(38) of the Act thus, facially, no 'prejudice' appears to have caused to the Revenue. The Pr.CIT has attempted to realign the nature of income from business income to capital gain without giving any reasonable basis for doing so in the revisional order. The whole objective of revisional proceedings appears to be to tax the income arising on sale of impugned shares on higher rate, i.e., 60% under Section 115BBE of the Act.

10. Paradoxically, while on one hand the Pr.CIT seeks inquiry and verification in respect of transactions in penny stock whereas, on the other hand, the Pr.CIT has given a conclusive direction to the Assessing Officer to treat the complete sale transactions to be brought to tax under Section 68 of the Act and imposition of tax thereon at higher rate under Section 115BBE of the Act. In our mind, such approach of the Pr.CIT effectively nullifies the direction of the Assessing Officer to make proper inquiry. Once a finding of conclusive nature is given, the outcome of enquiry loses its

relevance. Such action of the Pr.CIT cannot be countenanced in law.

11. The assessee having offered the income arising on purchase and sale of shares as business income and duly accepted by the Assessing Officer, the realignment of income proposed in a revisional proceeding is not backed by any cogent basis and is in the realm of surmises. The assessee has paid taxes at the normal rate on such income, and therefore, no prejudice can be attributed to the interest of the Revenue merely because the higher rate of tax can be charged under Section 115BBE. The judgment of Hon'ble Delhi High Court in *Krishna Devi & Ors.* casts doubt on such treatment arising from sale of shares. Under such circumstances, startling spike, cannot be the reason, in itself, to invoke jurisdiction under Section 263 of the Act particularly, where the gains arising from sale of shares are not covered by tax concession under Section 10(38) of the Act. The case laws cited on behalf of the assessee as well as Revenue has been perused. None of the decisions are applicable when no prejudice is found to have been caused to the Revenue. The operation of Section 263 is a non starter in the absence of any prejudice show to have caused to revenue. The decision referred to on behalf of the Revenue in case of *Pooja Gupta (supra)* is in the context of different factual matrix, i.e., the assessee therein claimed exemption from tax liability under Section 10(38) of the Act causing prejudice to the revenue.

10. In the light of the delineations made, the revisional order of the Pr.CIT is set aside and quashed.

11. In the result, the appeal of the assessee is allowed.

ITA No.1809/Del/2020 (Assessment Year 2015-16)

12. The fact and issue involved in the captioned appeal is identical. Hence, the process of reasoning discussed in ITA No.1808/Del/2020 applies *mutatis mutandis* in the present case. Consequently, for the similarity of reasons, the order of the Pr.CIT is set aside and quashed.

13. In the result, the appeal in ITA No.1809/Del/2020 is allowed.

14. In the combined result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 04/05/2022.

Sd/-
[SAKTIJIT DEY]
JUDICIAL MEMBER

DATED: **04/05/2022**

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER