

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

**BEFORE SHRI AMIT SHUKLA, JM, &  
SHRI AMARJIT SINGH, AM**

आयकरअपीलसं./ I.T.A. No. 6808/Mum/2014  
(निर्धारणवर्ष / Assessment Year: 2006-07)

ACIT CC -22, R. No. 404, 4 <sup>th</sup> floor, Aayakar Bhavan, Mumbai-400 020	<b>बनाम/ Vs.</b>	Shri Murarilal Mittal, 1601, Marathon Heights, P. B. Marg Jaibharat Oil Mill, Lower Parel(W), Mumbai-400 013
स्थायीलेखासं ./जीआइआरसं ./PAN No. AHNPM8021D		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Murli Mohan, Ld. DR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Rajiv Khandelwal, Ld. AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	18.05.2022
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	18.05.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid appeal has been filed by the revenue against the impugned order dated 24.08.2014 passed by Ld. CIT(A)-39, Mumbai for the quantum appeal of assessment passed u/s 143(3) r.w.s

153A for AY 2006-07. The revenue has taken the following grounds of appeal:-

1. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of a sum of Rs. 57,86,609/- made by the AO u/s. 68 in respect of LTCGs on sale of shares as bogus."*

2. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of a sum of Rs. 2,89,330/- made by the AO u/s. on account of unaccounted expenditure towards commission paid for obtaining bogus purchase*

2. The facts in brief are that a search and seizure operations u/s 132 was conducted on 13.10.2010 in Welspun Group of cases, in which assessee was also covered. The assessee had filed his return of income for the AY 2006-07 u/s 139(1) on 31.07.2006 showing total income of Rs. 52,86,860/-. The said return of income was duly processed u/s 143(1) on 14.07.2007 accepting the return of income. Thus, on the date of search, the assessment for the AY 2006-07 stood finally concluded. Accordingly, in terms of 2<sup>nd</sup> proviso to section 153A, the assessment for the AY 2006-07 is to be reckoned as 'unabated assessment'. A notice u/s 153A was issued

on 04.08.2011 and in response, assessee declaring his total income at Rs. 88,86,856/- on 15.09.2011 which included additional income of Rs. 36 lakhs in the said return.

3. In so far as the issue raised in the grounds of appeal are that, the brief facts are that the AO on the examination of return of income and the computation of income noted that assessee has claimed Long Term Capital Gain of Rs. 57,86,609/- in respect of shares of 'Asahi Infrastructure Ltd.' and Rs. 55,306 shares of "Om Metal Ltd." as exempt. In the computation of income and submission, the assessee had given the following details of Long Term Capital Gain for the year ending 31<sup>st</sup> March 2006:-

	<i>Date</i>	<i>Pur.Qty</i>	<i>Pur Amt</i>	<i>Sale Date</i>	<i>Sale Qty</i>	<i>Sale Amt</i>	<i>PFL/Loss</i>
1	22.02.96	500	5,000	31.03.06	500	60,306	55,306
2	24.04.04	7,50,000	1,69,067	31.03.06	7,50,000	59,55,676	57,86,609
							58,41,915
1	<i>Om Metal</i>						
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2	<i>Asahi Infrastructure Ltd.</i>						
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4. Assessee also submitted the bills in respect of purchase and sale of securities, from which it is noticed that the assessee has purchased the shares from Mahasagar Securities Pvt. Ltd. With regard proof, the assessee submitted Demat account with IndusInd

Bank being Depository Participant and other documents for purchase and sale of shares, etc. Ld. AO noted that department was in possession of information that Mahasagar Securities Pvt. Ltd. was indulged in providing accommodation entries to various parties and the said fact has duly been acknowledged by said party in statement given to Income-Tax department. On the basis of such information, the assessee was asked to explain why the entire capital gain declared on the transactions of sale of shares of Asahi Infrastructure Ltd. should not be treated as bogus.

5. In response, the assessee submitted that the documents submitted prove that he has taken physical delivery of the shares, got it dematerialized and sold through Samurai Securities Pvt. Ltd., and hence it was stated that the genuineness of the transactions stood proved. AO observed that assessee had purchased the shares in physical form in three lots on 12.07.2005, 29.08.2005 and 30.08.2005 but had not furnished any evidence regarding purchase of such shares except for submitting a print out generated from Tradeplus dated 21.03.2013 and said documents are neither signed nor bear any seal of Samurai Securities Pvt. Ltd. The D-mat

statement submitted reveal that these shares were dematerialized on various dates in the year 2005 and were sold thereafter.

6. Ld. AO without any enquiry or any substantial material or information on record against the assessee, disallowed the said claim of exemption of Long Term Capital Gain after making following observations:-

*Taking all these facts into account, the alleged long term Capital gain-claimed by the assessee cannot be held to be genuine. The main factors therefore are*

- i. Shares were purchased in physical form and dematerialized within a month's time and sold thereafter.*
- ii. Payment for purchase of shares is made by adjustment of speculation profit which is also a adjustment entry.*
- iii. The modus-operandi is absolutely same in such type of bogus transactions, where after bogus purchase, the same are dematerialized*
- iv. once the purchase itself is questioned, the incidence of capital gain cannot be attracted.*
- v. During the course of search action, several beneficiaries have admitted that cash equivalent of sale receipt was given to*

*intermediaries who arranged back dated purchase invoices for which commission was paid.*

7. Accordingly, after referring to certain decisions of Tribunal, AO held that the credits on account of sale of shares of Rs. 57,86,609/- was nothing but generating artificial LTCG and added to the total income of the assessee u/s 68 of the Act.

8. Ld. CIT (A) has deleted the additions on merits after making the following observations:-

*7.3 The appellant has been heard in the matter. It is submitted by the appellant that the reasons as cited by the Assessing Officer are either irrelevant or immaterial in the context of the present case for the following reasons:*

*a) It is submitted that in paragraph 7.5 of the assessment order the Assessing Officer has observed that the appellant has got the shares of Asahi Infrastructure Ltd. dematerialized and sold the same through Samurai Securities Pvt. Ltd. In this regard appellant submitted that the basic facts as understood by the Assessing Officer are contrary to the facts of the case. He submitted that as has been stated as per letter dated 20.3.2013 filed before the Assessing Officer, the shares were dematerialized on 19.4.2005 in the DP Account of the appellant*

*with Indusind Bank Ltd. and not with Samurai Securities Pvt. Ltd as observed by the Assessing Office.*

*b) It is submitted that in paragraph 7.6 of the 'assessment order that the appellant had failed to produce the physical shares showing transfer of the shares in his name. In this regard the appellant submitted that physical shares were surrendered to Indusind Bank Ltd. alongwith with dematerialization request form dated 29.8.2005, 30.8.2005 and 31.8.2005 in which Folio Certificate nos., distinctive nos. and quantity have been very much shown. Hence the same could not be produced before the Assessing Officer.*

*c) It is submitted that in paragraph 7.6 of the assessment order, the Assessing Officer observed that the shares were purchased in physical form while the same were sold in demat form. In this regard, it is submitted that 75,000 shares were purchased on 13.4.2004 from Mahasagar Securities Pvt. Ltd. in physical form and dematerialized on 19.4.2005 and thereafter sold on 30.8.2005 i.e. after 4/months of dematerialization. Hence it is submitted that the observation, of the Assessing Officer that the shares were sold within a month's time of dematerialization is incorrect and contrary to the facts.. The appellant relies upon the order of the • Pune Tribunal in the case of **Ajay Shantilal Lalwani 145 TTJ 511(Pune)** in which it has been held that the delayed transfer of share from physical to demat cannot be a ground for denial of exemption under 68.*

*d) It is submitted that the Assessing Officer has stated that the modus operandi is the same where after bogus purchase of shares, the same are dematerialized. It is the contention of the appellant that if the purchases are bogus the question of demat does not arise; the dematerialization rather prove that the purchases are rather genuine. -*

*e) It is submitted that merely because certain beneficiaries might have submitted that cash equivalent of sale receipt was given to intermediaries who arranged back dated purchases, it is submitted that it does not mean that the appellant had also been given back cash unless the same is established with cogent material.*

*f) It is submitted merely because the shares of Asahi Infrastructure Ltd. were credited in the demat account of the appellant on 19.4.2005, the transactions can neither be termed as bogus particularly when the transaction of sale and purchase are supported by the bills of the share brokers.*

*g) It is submitted that the basic reason for making the addition is the information stated to be in the possession of the Department that Mahanagar Securities Pvt. Ltd. was indulging in providing accommodation entry to various parties. It is submitted that the said information has been mechanically applied in the hands of the appellant without independent application of mind on the issue involved in the present case. It is also submitted that neither a copy of the statement of Mahanagar Securities Pvt. Ltd.*

*was provided to the appellant nor any opportunity afforded to cross examine Mahanagar Securities Pvt. Ltd.*

*h) The appellant submitted that he had produced the following document before the Assessing Officer:*

*i) Contract and bill dated 13.04.2004 of Mahanagar Securities Pvt. Ltd., a share broker registered with SEBI under Registration No. INB-23068331/23-10777 in support of purchase of 75,000 shares of "Asahi" for Rs.1,69,066/- where STT and Service tax has been paid.*

*ii) Contract and bills dated 30.8.2005, 31.8.2005 and 1.9.2005 of Samurai Securities Pvt. Ltd., member of Stock Exchange, Mumbai, in support of sale of 75,000 shares of "Asahi" for Rs.59,55,676/- where STT and Service Tax was paid by the appellant..*

*iii) Dematerialization Request Form dated 30.3.2005 of Indusind Bank Ltd. giving therein Folio No., Share Certificate Number, Quantity of shares, the Name of the company and the Distinctive number of shares.*

*iv) Transaction statement of Indusind Bank Ltd. where 75,000 shares of "Asahi" has been dematerialized on 12.7.2005.*

*v) Transaction statement of Indusind Bank Ltd. where 7,50,000 shares of "Asahi" has been sold on 29/30/31.08.2005.*

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*7.4. I have carefully considered the facts of the case, the reason for the addition as made, by the Assessing Officer as well as the submission of the appellant. I find that the appellant has placed before the Assessing Officer the Dematerialization Request form dated 30.03.2005 of Indusind Bank Ltd. I have examined the said Request form. It is observed-that the. said form gives details of the Folio No., Share Certificate Number, Quantity of shares, the Name of the company and the Distinctive number of shares. Unless the shares in physical form are surrendered before the Depositing Participant, the said request details cannot be entered in. Subsequently the said quantity of 75,000 shares were dematted on 12.7.2005. The Transaction Statement from Indusind Bank Ltd, on record whereby 7,50,000/- shares have been sold through Samurai Securities Ltd. on 29/30/31.08.2005. The genuineness of these documents have not been doubted. The Assessing Officer has made the addition solely on the basis of the information in-his possession that M/s Mahasagar Securities Pvt. Ltd., from whom the purchases have reportedly been made have been indulging in providing accommodation entries. But it has not been established on the facts of the present case that the entries/documents as placed on record are sham/bogus. The source of credit in the books of the appellant for which addition has been made has not been doubted. The holding period of shares, as can be seen from the copies of documents on record is more than 12 months. The shares, as per the copy of the bill from Mahanagar Securities Pvt. Ltd., (placed at page 38 of PB) have been purchased on 13.4.2004. It is*

*found that sale has subsequently been made out of shares held in the Demat Account of the appellant. In the face of the said facts, I am unable to sustain the action of the Assessing Officer in treating the sale of shares as bogus and making addition under s. 68 of the Act.. Therefore this ground is allowed in favour of the appellant.*

9. Ld. DR strongly relied on the order of AO and submitted that the addition made by the AO was in possession of some information that the broker Mahanagar Securities Pvt. Ltd. was indulged in accommodation entries to various parties and therefore, the transaction undertaken by the assessee was also dubious. He thus strongly relied upon the order of the AO

10. Before us, Ld. Counsel for the assessee submitted that in this case nothing incriminating material was found during the course of search which is evident from the order of AO on the issue of LTCG. Once the impugned addition has been made without any seized material or any incriminating material found in the course of search, therefore no addition can be made within the scope of section 153A where the assessment had already stood concluded at the time of search. He further stated that Ld. CIT(A) however the same has been rejected vide para no. 9 which is against the facts as

well as in law because the income which was disclosed in the return of income filed u/s 153A was entirely on a different issue and has nothing to do with Long Term Capital Gain. Thus, the addition made by the AO cannot be sustained in law. Ld. DR on this point relied upon the order of the CIT(A).

11. We have heard the rival submissions and also perused the relevant findings given in the impugned order as noted above. We find that on the date of search i.e. 31.10.2010, the assessment for the AY 2006-07 had already attained finality and in terms of section proviso to section 153A, it was unabated assessment. Admittedly, the addition on account of LTCG on sale of shares is not based any incriminating material or documents or information found during the course of search, *albeit* it was on the basis of computation of income and the information already given in the income tax return which already stood assessed. It is now well settled law where the assessment has attained finality and stands concluded at the time of search and are not abated, then no addition can be made in absence of any incriminating material or documents found during the course of search. This proposition is well settled by the Hon'ble

Bombay High Court in the cases of; **CIT vs. Continental Warehousing Corporation, reported in (2015) 374 ITR 645; CIT vs. SKS Ispat & Power Ltd. Reported in 99 Taxman. Com 424; CIT vs. Deepak Agarwal 86 Taxman. Com 3; CIT vs. Gurinder Singh Bawa 386 ITR 483.**

12. Accordingly, the addition made by the AO u/s 68 for Rs. 57,86,609/- is unsustainable on the ground that it is beyond the scope of assessment u/s 153A. Accordingly, the ground of the appeal raised by the revenue is dismissed.

13. Since, we have already deleted the additions on the legal ground of order of Ld. CIT(A) on merits, deleting the said addition is purely academic.

14. In the result, the appeal filed by the revenue stands **dismissed.**

*Orders pronounced in the open court on 18.05.2022*

*Sd/-*  
**(Amarjit Singh)**  
**Accountant Member**

*Sd/-*  
**(Amit Shukla)**  
**Judicial Member**

मुंबई Mumbai;दिनांक Dated : 18.05.2022

*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/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**