

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD**

BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER

And

SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 364/AHD/2020

निर्धारण वर्ष/Asstt. Year:2015-2016

Purav Dahyabhai Patel, 10, Vrundavan Bungalows Part-3, Thaltej-Shilaj Road, Thaltej, Ahmedabad-380059. PAN: BEJPP7846B	Vs.	Pr. C.I.T-1, Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	Shri S.N. Divatia, A.R
Revenue by :	Shri Alok Kumar, CIT. D.R

सुनवाई की तारीख / **Date of Hearing** : **25/05/2022**

घोषणा की तारीख / **Date of Pronouncement**: **31/05/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income Tax, Ahmedabad, dated 06/03/2020 arising in the matter of revision order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-2016.

2. The assessee has raised the following grounds of appeal:

1.1 The order passed u/s.263 on 03-03-2020 for A.Y. 2015-16 by Pr.CIT-1, Abad holding that the order of regular assessment passed u/s.143(3) on 29-09-2017 accepting the LTCG on sale of shares of kailsh Auto finance Ltd as erroneous and prejudicial to the Revenue is wholly illegal, unlawful and against the principles of natural justice.

1.2 The Ld. Pr. CIT-1, Abad) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned order.

2.1 The Ld. Pr. CIT-1, Abad has grievously erred in law and on facts in holding that the order of regular assessment passed u/s 143(3) on 29-9-2017 by AO accepting the LTCG on sale of shares of Kailsh Auto Finance Ltd as erroneous and prejudicial to the Revenue. Therefore the proceedings initiated u/s 263 of the Act were illegal and unlawful.

2.2 That in the facts and circumstances of the case as well as in law, the Ld. Pr. CIT-1, Abad ought not to have held that the order of regular assessment passed u/s 143(3) on 29-9-2017 by AO accepting the LTCG on sale of shares of Kailsh Auto Finance Ltd as erroneous and prejudicial to the Revenue.

3.1 The Ld. Pr. CIT-1, Abad has erred in holding that the scrip of Kailsh Auto Finance Ltd was a penny stock in view of the report of Investigation wing so that the LTCG on sale of said shares was not genuine and the AO failed to make addition in this respect. The Pr. CIT has failed to give any reasons or material to arrive at this finding of bogus share transaction.

3.2 That in the facts and circumstances of the case as well as in law, the Ld. Pr. CIT-1, Abad ought not to have held that the scrip of Kailsh Auto Finance Ltd was a penny stock in view of the report of Investigation wing so that the LTCG on sale of said shares was not genuine and the AO failed to make addition in this respect.

3. The only issue raised by the assessee is that the learned Principal CIT-A erred in holding the assessment framed by the AO under section 143(3) of the Act as erroneous insofar prejudicial to the interest of revenue under the provisions of section 263 of the Act.

4. The facts in brief are that the assessee in the present case is an individual and deriving income from, salary, house property, capital gain, shares in partnership firm and from other sources. The assessee in the year under consideration claimed exempted long term capital gain of Rs. 64,85,621/- on account of sale of scrip of various companies including the scrip of a company namely M/s Kailash Auto Finance Ltd. The AO in the assessment framed under section 143(3) of the Act accepted the genuineness of the exempted capital gain claimed by the assessee.

5. However, the learned PCIT found that, as per the report received from the investigation wing of the Department, the scrip of M/s Kailash Auto Ltd was penny stock used for providing bogus long term capital. But the AO merely on basis of examination of certain document or accounting statement submitted by the assessee accepted the genuineness of the same without making independent inquiry to find out the true character of the transaction. Accordingly, the PCIT was of the view that long term capital gain earned by the assessee on sale of scrip of M/s Kailash Auto Ltd is bogus and not eligible for exemption/deduction under section 10(38) of the Act. However, the AO without carrying out the necessary verification on this aspect has allowed the claim of the assessee in the assessment framed under section 143(3) of the Act. Thus the assessment order was held by the learned PCIT under section 263 of the Act as erroneous insofar prejudicial to the interest of revenue.

6. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 75 and contended that all the necessary details about the purchase and sale of shares were duly furnished before the AO during assessment proceedings. The AO after verification and application of mind accepted the genuineness of the capital gain. Therefore, the assessment order cannot be held as erroneous insofar prejudicial to the interest of revenue.

7.1 The learned AR in support of his contention drew our attention on pages 6 of the paper book where the notice under section 142(1) of the Act was placed. Likewise, the learned AR also drew our attention on pages 13 to 52 of the paper book where the reply of the assessee in response to the notice issued under section 142(1) of the Act and annexures thereto were placed. Thus the learned AR

contended that it cannot be said that the assessment order is erroneous and causing prejudice to the interest of revenue in the given facts and circumstances.

8. On the contrary, the learned DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the assessment order has been passed by the AO without making inquiries or verification with respect to the deduction/exemption claimed under section 10(38) of the Act as discussed above and hence the assessment is erroneous insofar as prejudicial to the interest of the Revenue and thus requiring revision by Pr. CIT u/s 263 of the Act.

9.1 An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding with respect to the extent of inquiry. There were a number of judicial precedents by various Hon'ble High Courts in this regard.

9.2 The Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of

inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:

"12. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. ———

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. **The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure.** It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."

9.3 The Hon'ble Bombay High Court in case of **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, discussed the law on this aspect in length in the following manner:

"The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. **The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that**

there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

9.4 The Mumbai ITAT in the case of **Sh. Narayan Tatu Rane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016** examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:-

*“20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. **Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer.** Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant.”*

9.5 The Hon'ble Supreme Court in recent case of **Principal Commissioner of Income-tax 2 v. Shree Gayatri Associates*[2019] 106 taxmann.com 31 (SC)**, held that where Pr. CIT passed a revised order after making addition to assessee's income under section 69A in respect of on-money receipts, however, said order was set aside by Tribunal holding that AO had made detailed enquiries in respect of such on-money receipts and said view was also confirmed by High Court, SLP filed against decision of High Court was liable to be dismissed. The facts of this case were that pursuant to search proceedings, assessee filed its return declaring certain unaccounted income. The Assessing Officer completed assessment by making addition of said amount to assessee's income. The Principal Commissioner passed a revised order under section 263 on ground that Assessing Officer had failed to carry out proper inquiries with respect to assessee's on money receipt. In appeal, the Tribunal took a view that Assessing Officer had carried out detailed

inquiries which included assessee's on-money transactions and Tribunal, thus, set aside the revised order passed by Commissioner. The Hon'ble High Court upheld Tribunal's order. The Hon'ble Supreme Court while dismissing the SLP filed by the Department held as under:-

"We have heard learned counsel for the Revenue and perused the documents on record. In particular, the Tribunal has in the impugned judgment referred to the detailed correspondence between Assessing Officer and the assessee during the course of assessment proceedings to come to a conclusion that the Assessing Officer had carried out detailed inquiries which includes assessee's on-money transactions. It was on account of these findings that the Tribunal was prompted to reverse the order of revision. No question of law arises. Tax Appeal is dismissed"

9.6 The Supreme Court in the another recent case of **Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd[2020] 114 taxmann.com 545 (SC)**, dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"

9.7 From an analysis of the above judicial precedents, the principle which emerges is that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Assessing Officer adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law, or the AO

has completely omitted to make any enquiry altogether or the order demonstrates non-application of mind.

9.8 Now in the facts before us, in the case of the assessee the AO during the course of assessment proceedings, made enquiries on this issue and after consideration of written submissions filed by the assessee and documents / evidence placed on record, the Ld. AO framed assessment under section 143(3) accepting the return of income. This fact can be verified from the notices under section 142(1) of the Act by the AO and submission in reply of such notices.

i. Notice dated 16-05-2017:

Please give complete details of the share transactions including the exempt LTCG/STCG and establish that it is the exempt one.

Reply of the assessee vide letter dated 11-08-2017

With reference to captioned assessment proceedings, I submit as under:

- 1. Your good self has asked to submit complete details of Long Term Capital Gain on shares. In this regard I would like to state that on perusal of computation statement, your good self shall find that the assessee has earned Long Term Capital Gain amounting Rs. 64,85,621/- Detailed explanation is given for long term capital gain hereunder.*

A. Evidences in respect of purchase of shares.

Copy of share account of Sawaca Business Machine Ltd., Atlanta, Kailash Auto Finance from F.Y. 2011-12 from our books of accounts.(Annexure-1)

Copy of account of Net worth stock broking ltd in the books of the assessee for the F.Y. 2012-13. (Annexure-2)

*Copy of purchase invoices of share. It is important to note that I have purchased shares of Careful Projects Advisory Ltd from Ritudhara Vincom Pvt. Ltd. Which was subsequently merged with Kailuoh Auto Finance I,id. Screenshot evidencing [merger is also attached herewith. **(Annexure-3.)***

*Copy of relevant page of my S.B. Account of Bank of Baroda from which the payment has been made towards purchase of shares during F.Y. 2012-13. It is important to note that no payment is made for the shares of Atlanta. Those shares are [purchased against the sale proceed of Swaca. The same is levident from the ledger of broker in the books of assesses (attached herewith. **(Annexure-4)***

<i>Date</i>	<i>Cheque No.</i>	<i>Amount</i>
<i>22/03/2012</i>	<i>30</i>	<i>Rs. 40,00,000/-</i>
<i>31/03/2012</i>	<i>31</i>	<i>Rs. 47.10.149/-</i>
<i>16/03/2013</i>	<i>134724</i>	<i>Rs. 2,00,000/-</i>

(Copy of account of Net Worth Stock Broking Ltd for the F.Y. 2012-13. (Annexure-5)

*;
Evidences in respect of sale of shares during F.Y, 2014-15 relevant to **A.Y. 2015-16***

*Copy of account of Net Worth Stock Broking Ltd for the F.Y. 2014-15. (Annexure-6)
Sales bills of Net Worth Stock Broking Ltd (Annexure-7)*

Copy of relevant page of my S.B. Account in which the payment has been received towards sale of shares during F.Y. :2014-15 from Net Worth Stock Broking Ltd from its books of account (Annexure-8)

Copy of Form No. 10DB issued by Net Worth Stock Broking Ltd in respect of evidence of payment of Security Transaction Tax (STT) on transaction entered in a recognized stock exchange.(Annexure-9)

On perusal of the aforesaid details and evidences your good self will find that all the above transactions are through banking channel and traded on the floor of recognized stock exchange (BSE), through our registered broker namely Net Worth Stock Broking Ltd (a public listed company) . Further, the above transactions are STT paid transaction and hence the genuineness of the transactions stands proved.

9.9 From the above it is revealed it is not the case that the AO has not made enquiry. Indeed the Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect of exemption claimed under section 10(38) of the Act. It is not the case of the Pr. CIT that the Ld. AO did not apply his mind to the issue on hand or he had omitted to make enquiries altogether. In the instant set of facts, the Ld. AO had made enquiries and after consideration of material placed on record accepted the genuineness of the claim of the assessee. We thus find no error in the order of Ld. AO so as to justify the initiation of 263 proceedings by the Ld. Pr. CIT.

9.10 We also note that the Delhi Tribunal in the identical facts and circumstances, in the case of Vidhi Malhotra in ITA No. 93 & 94/Del/2018, where the script of M/s Kailash Auto Finance Ltd was treated as penny stock, vide order dated 8th December 2018 reported in 101 taxmann.com 361 has observed as under:

***8.** On perusal of the material placed on record, we find that in so far as purchase of shares is concerned the same has not been doubted, because AO while adding the long term capital gain has given the benefit of price paid for acquisition of shares. Shares were also purchased through account payee cheque duly reflected in the books and shown by the assessee in the earlier year. In fact assessee has purchased shares of Capital Projects Advisory Limited in*

the financial year 2011-12 and the said company was merged with M/s. Kailash Auto Finance Ltd. vide amalgamation order dated 9.5.2013 passed by Hon'ble Allahabad High Court. Reliance has been placed by the authorities below on the statement of Shri Sunil Dokania. However, in his statement he has given list of certain scrips on which he has sated that these were paper companies used for providing accommodation entries. The said statement no doubt is quite incriminating to hold that scrips of M/s. KailashAuto Finance Limited were used for purpose of accommodation entries, however such a statement cannot be the sole ground to implicate assessee and justify the additions especially when, nowhere assessee has been found to be beneficiary of any kind of accommodation entry in any inquiry by the Investigation Wing or any such material has been unearthed by the department. The assessee had duly shown the transaction in cheques right from purchase to sale of shares and all the transaction has been have been routed through DMAT account sold in the Bombay Stock Exchange as per quoted price as on that date. Before us it has also been brought on record that SEBI vide its order dated 21st September 2017 has revoked the ban on KailashAuto Finance Ltd. Para 5 of the said order reads as under :—

"Pursuant to the interim order, SEBI conducted a detailed investigation into the role of various entities in price manipulation in the scrip of KailashAuto so as to ascertain the violation of securities laws. Upon completion of investigation by SEBI, investigation did not find any adverse evidence/adverse findings in respect of violation of provisions of the PFUTP Regulations in respect of the following 244 entities (against whom directions were issued vide the interim order and/or confirmatory orders) warranting continuation of action under section 11B/r/w11 (4) of the Act. The details of the 244 entities are as follows."

And vide para 8 there is direction of revocation. Thus, SEBI also did not find any prima facie material for manipulation of price of scrip of KailashAuto Finance Limited. If AO had found out that scrips of KailashAuto Finance Limited was used by certain persons for providing accommodation entry, then he should have carried out some prima facie inquiry to find out whether assessee too was involved in routing her own unaccounted money for getting bogus long term capital on the scripts of such company. General observation about the modus operandi of long term capital gain would be of no use unless and until there is some specific information and material qua the assessee. Once purchase of the shares are not doubted and sale has been made through Bombay Stock exchange routed through DMAT account then consideration received has to be treated from amount of sale of shares whether the price has been rigged or not. One factor which has weighed heavily on the authorities below in the present case is that share price has a risen to more than 37 times. Once the SEBI has held that there is no adverse evidence or material that there was any violation of provision of PFUT regulation in respect of KailashAuto Finance Limited and restrain order on the trading has been revoked, then it follows that the share price of which has been sold for genuine quoted price and therefore, the sale proceeds has to be reckoned from sale of such shares and would be treated as explained credit or investment. Accordingly, on the facts and circumstances of the case, we hold that the long term capital gain shown by the assessee is genuine and consequently liable for exemption u/s. 10(38). Thus, appeal of the assessee is allowed.

9. *Exactly similar facts are permeating in the case of Smt. Satosh Mendiratta, wherein the assessee has shown long term capital gain of Rs. 36,59,773/- on similar scrip. Even the finding of the AO and Ld. CIT (A) are exactly the same, therefore, our finding given above will apply mutatis mutandis for this appeal also. Accordingly the appeal of the assessee is allowed.*

10. *In the result both the appeals of the assessees are allowed.*

In view of the above and after considering the facts in totality, we hold that there is no error in the assessment framed by the AO under section 143(3) causing prejudice to the interest of revenue. Thus, the revisional order passed by the learned PCIT under section 263 of the Act is not sustainable and therefore we quashed the same. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 31/05/2022 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE,
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 31/05/2022
Manish

(True Copy)