

THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "SMC" BENCH

**Before: Shri Waseem Ahmed, Accountant Member  
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 576/Ahd/2020  
Assessment Year 2015-16**

The ITO, Ward- 5(3)(1), Ahmedabad (Appellant)	Vs	Devyani Dharmendra Shah 14, Chandraprakash Society, 2-B, Apsara Theatre, Kankari, Ahmedabad-380022 PAN: AFNPS9340B (Respondent)
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**Assessee by: Shri Chetan Agarwal, A.R.  
Revenue by: Shri Atul Pandey, SR-D.R.**

Date of hearing : 10-06-2022  
Date of pronouncement : 15-06-2022

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

This is an appeal filed by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals)-5, Ahmedabad in Appeal no. CIT(A), Ahmedabad-5/10663/2017-18 vide order dated 24/09/2020 passed for the assessment year 2015-16.

2. The Revenue has raised the following grounds of appeal:-

*“(1) The Ld.CIT (A) has erred in law and on facts in allowing the claim of disallowance amounting to Rs. 18,54,800/- under section 10(38) of the I. T. Act and deleted the addition made u/s. 68 of the I.T. Act.*

*(2) Ld. CIT(A) has grossly erred in facts and in law for the reason that assessee had entered into share; transaction in the scrip Santoshima Tradelink Ltd., which merged with Sunrise Asian Limited , a penny stock company, from whom the assessee earned bogus long term capital gains. . ,*

*(3) On the facts and circumstances the ld. CIT(A) ought to have upheld the order u/s 143(3) of the Act passed by the Assessing Officer.*

*(4) It is therefore prayed that the order of the Ld. CIT(A) may be set aside and that of the order of the Assessing Officer be restored to the above extent.*

*(5) It is further prayed that the present appeal comprises the issue of organized tax evasion scam involving claim of bogus long term capital gain through penny stocks for which the CBDT vide Circular No. 23 of 2019 dated 6.9.2019 read with OM dated 16<sup>th</sup> September, 2019 exempted such cases from monetary limit for filing appeal, hence the appeal be decided oh merits.*

3. At the outset, we note that there is a delay of 5 days in filing of appeal by the Revenue. However, considering the fact that period of delay in filing of appeal is very trivial i.e. there is only a 5 day delay in filing of appeal by the Revenue, in the interests of justice, we are hereby condoning the delay in filing the appeal.

4. On merits, the brief facts of the case are that the assessee had purchased shares of M/s Conart Traders Ltd. from M/s Santoshima Trade Links through M/s Santoshima Lease Finance and Investment (India) Ltd. in the year 2011. Thereafter, due to scheme of amalgamation, as per High Court order dated 08-10-2012, Conart Traders, Santoshima Trade Links and M/s Sunrise Asian Ltd got amalgamated in M/s Sunrise Asian Ltd. and the assessee received shares of M/s Sunrise Asian Ltd. in his demat account on 24-06-2013. The Ld. Assessing Officer during the course of assessment proceedings observed that as per the findings of the Directorate of Investigation, Calcutta, it was observed that the company M/s Sunrise Asian Ltd. was a penny stock company and the sharp rise in the price of the shares of the company is not supported by any fundamentals of financial performance of the company. Accordingly, the Long-Term Capital Gains (LTCG) made by the assessee on sale of M/s Sunrise Asian Ltd. were held to be bogus gains and accordingly Ld. Assessing Officer disallowed the exemption on long-term capital gains claimed by the assessee on sale of shares of M/s Sunrise Asian Ltd., and added the total sale proceeds amounting to ₹ 18,54,800/- as unexplained cash credit u/s 68 of the Income Tax Act, 1961 (Act). While making the above additions, the Ld. Assessing Officer made the following observations:

*“18. The above detailed discussion, in the preceding paragraphs, shows that the investments made in the shares of Conart Traders (later amalgamated in Sunrise Asian), is bogus and non genuine transactions. The assessee has evaded taxes due' on such unaccounted income by taking the services of bogus accommodation entry providers and claiming bogus long term capital gains as exempt income. It is seen that the modus operandi was to purchase physical*

*shares of Conart Traders along with backdated bogus purchase bills, which showed that the shares had been purchased at very low prices. The prices of these shares were then artificially raised through circular transactions of sale and purchase of these shares—**financed through unaccounted money**. These shares were sold on the stock exchange platform at a peak, with the beneficiaries booking profit and thereby booking fictitious long-term capital gains. The genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in Sumati Dayal v. CIT(1995) 214 ITR 801 (SC) wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary evidences filed or relied upon by your appellant. That documentary evidences are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well settled and reliance is placed on the decision in the case of Durga Prasad More 82 ITR 540 (SC).*

*Having regard to the facts and circumstances of the case and in law, it is clear the assessee has not been able to conclusively prove the purchases of penny stock share of Conart Traders (later amalgamated in Sunrise Asian) and the enquiry made by the investigation wing and, have established that the assessee had arranged purchases of .artificial long term capital Gain by obtaining bogus purchase bills. As a beneficiary, the assessee was given physical shares at a very low price. Considering the above facts and in the circumstances of the case and in law, sec.68 is squarely applicable in this case. Therefore, the total sale proceeds of **Rs.18,54,800/-**, from the bogus transaction as discussed above and claimed as exemption is treated as **unexplained and unaccounted cash credit u/s 68 of the Act, which has been channelized in to the banking system. Penalty proceedings u/s. 271(l)(c) for furnishing of inaccurate particulars of Income is separately initiated.***

**[Addition: Rs.18,54,800/-]”**



that the assessee has entered into a sham transaction and has claimed a Long-Term Capital Gains on sale of penny stocks and hence the exemption claimed is bogus and hence liable to be disallowed. The Ld. Counsel for the assessee in response has placed reliance on the observations of the Ld. CIT(A) in his order and argued that Ld. CIT(A) has given a clear finding on facts in favour of the assessee. Ld. Counsel for the assessee argued that Ld. CIT(A) has clearly observed that no opportunity of cross-examination was provided to the assessee despite a specific request made before the Ld. Assessing Officer to cross examine the person on the basis of whose statement, the additions were made. The counsel for the assessee further argued that just because some stock has been held to be a penny stock, it does not mean that all investments made by even genuine investors in shares of the said company are liable to be held as bogus/sham transactions, without any evidence to prove that the assessee had entered into bogus/sham transaction. In the instant facts, the assessee had held the share for over 3 years and had only sold a part of his shareholding held in M/s Sunrise Asian Ltd. and was still continuing to hold shares of the company. Therefore, as rightly held by the Ld. CIT(A), the assessee had not entered into any bogus/sham transaction. Ld. Counsel for the assessee argued that the shares were purchased by way of cheque in the 2011 in physical form, which was afterwards amalgamated with Sunrise Asian Ltd and the shares of the latter company were received by the assessee in his demat account on 24-06-2013. The counsel for the assessee further submitted that the shares were sold through banking channel and STT has been paid on sale of shares. Therefore, in the instant facts, the transaction cannot be held to be sham/bogus.

7. We have heard the rival contentions and perused the material on record. The Assessing Officer has not doubted the purchase of shares were through banking channels. While making the additions, the Id. Assessing Officer has not brought any material how the assessee has brought its own unaccounted money for the acquisition of the shares specially when the purchase of shares was not doubted and shares have been sold on Stock Exchange. Further, the Id. Assessing Officer has not brought on record statement of any persons through whom assessee's own unaccounted money has been brought in. As stated above, the appellant has held the shares for over 3 years and it would be incorrect to treat sale of shares as bogus merely on the basis of suspicion and on account of fact that a substantial quantum of capital gains has been made by the assessee. In the present case, no material has been brought on record to suggest that purchase and sale of shares were bogus. The Id. Assessing Officer has not brought any material to support his finding that there has been collusion or connivance between the broker and the assessee for the introduction of his own unaccounted money. In the present case, despite the assessee's specific request, no opportunity of cross examination was provided to the assessee on the basis of whose statements reliance has been placed to hold that the sale of shares was sham / bogus. It would be useful at this stage to refer to some judgments which have dealt with the issue before us:

- (i) In the case of **PCIT vs. Smt. Krishna Devi, ITA No.125/2020**, the Delhi High Court vide order dated January 27, 2021 held that the fact that there was an astounding jump in the share price within two years, which is not supported by the financials, does not justify the AO's conclusion that the assessee converted

unaccounted money into fictitious exempt LTCG to evade taxes. The finding is unsupported by material on record & is purely an assumption based on conjecture. The relevant extract of the judgment is reproduced for ready reference:

*12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.*

.....

*13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.*

- (ii) The Lucknow ITAT in the case of **Achal Gupta vs. ITO (ITAT Lucknow) I.T.A. No.501/Lkw/2019** held that the documents demonstrates that the assessee had purchased shares through Brokers for which the payment was made through banking channels. The assessee had sold shares through an authorized stock broker and payment was received through banking channels after deduction of STT. The AO has not

doubted any of the documents. The only objection raised is that the scrip from which the assessee had earned Long Term Capital Gain has been held by the Investigation Wing of the Revenue to be a paper entity and that this scrip was being used for creating artificial capital gain. The objection was not found to be acceptable.

- (iii) The Mumbai ITAT in the case of **Dipesh Ramesh Vardhan vs. DCIT (ITAT Mumbai) I.T.A. No.7648/Mum/2019** held that the AO has not discharged the onus of controverting the documentary evidences furnished by the assessee and by bringing on record any cogent material to sustain the addition. The allegation of price rigging / manipulation has been levied without establishing the vital link between the assessee and other entities. The whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said party. As against this, the assessee's position that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue.
- (iv) The Delhi ITAT in the case of **Suresh Kumar Agarwal vs. ACIT, ITA No 8703/Del/2019** held that the assessee has produced contract notes, demat statements etc & discharged the onus of proving that he bought & sold the shares. The AO has

only relied upon the report of the investigation wing alleging the transaction to be bogus. The ITAT held that the AO ought to have examined a number of issues (which are enumerated in the order) and shown that the transaction is bogus. The capital gains are genuine and exempt from tax.

- (v) The Mumbai ITAT in the case of **Vijayrattan Balkrishan Mittal vs. DCIT, ITA No.3311/Mum/2019** held that the fact that a scam has taken place in some penny stocks does not mean that all transactions in penny stocks can be regarded as bogus. In deciding whether the claim is genuine or not, the authorities have to be guided by the legal evidence and not on general observations based on statements, probabilities, human behavior, modus operandi etc. The AO has to show with evidence the chain of events and live link of the assessee's involvement in the scam including that he paid cash and in return received exempt LTCG gains.

7.1 Notably in the case of **Anjana Sandeep Rathi Vs ACIT (ITAT Mumbai) in ITA. No. 4369/MUM/2018**, the ITAT Mumbai held that LTCG on sale of shares of M/s Sunrise Asian Limited was not bogus/ sham transaction. While adjudicating in favour of the assessee, observed as under:

*5. We have heard the submissions made by rival sides and have perused the orders of authorities below. The assessee in appeal has*

*assailed the findings of CIT (A) in disallowing benefit of section 10(38) of the Act on long term capital gain arising from sale of shares. The assessee during the relevant period had sold shares of M/s. Sunrise Asian Ltd. for a consideration of Rs.14,99,917/-. The authorities below held the sale transaction in aforementioned scripts as bogus and thus, made addition under section 68 of the Act. We find that similar disallowance was made in the case of Narayan R. Rathi (father-in-law of the present assessee/appellant) for the assessment year 2014-15. Narayan R. Rathi had also sold the shares of same company i.e. M/s. Sunrise Asian Ltd. The issue travelled to the Tribunal. The Co-ordinate Bench of the Tribunal in ITA No. 4811/Mum/2018 (supra) deleted the addition. The Tribunal while allowing the appeal of Narayan R. Rathi held that the principles of natural justice were violated, the benefit of cross examination was not afforded to the assessee, hence, the addition is unsustainable. The relevant extract of the finding of Tribunal are reproduced herein below:-*

*“11. The authorities below have not doubted the documentary evidence produced by the assessee to prove the genuineness of the transaction of sale and purchase of the shares in question. Further, the authorities below have not pointed out any evidence on record to hold that the assessee has obtained bogus entries in connivance with entry operators and brokers etc., in order to claim bogus LTCG. As pointed out by the Ld. counsel, the assessee was not given an opportunity to cross examine the witnesses whose statements were*

**relied upon and on the basis of their statements it was concluded that the transaction in question was a part of penny stock scam.** So, in view of the cases discussed in the foregoing paras, particularly the ratio laid down by the Hon'ble Supreme Court in the case of M/s Andaman Timber Industries (supra), we are of the considered view that the Ld. CIT (A) has wrongly confirmed the assessment order passed by the AO in violation of the principles of natural justice. Hence, the impugned order passed by the Ld CIT (A) suffers from legal infirmity. We, therefore, allow the sole ground of appeal of the assessee and set aside the impugned order passed by the Ld. CIT (A). Accordingly, we direct the AO to allow the claim of the assessee.”

6. The ld. Departmental Representative has failed to controvert the findings of Tribunal in the case of Shri Narayan R. Rathi whose case is on the same pedestal with identical set of facts. In fact a perusal of the assessment order in the case of assessee reveal that the Assessing Officer in para 8.3 has observed that 3000 shares were jointly held by the assessee and Narayan Ramachandra Rathi. The facts of present case are similar to the facts of case in the case of Narayan R. Rathi decided by the Co-ordinate Bench. No distinction in facts has been brought to our knowledge by the Department. Thus, for the parity of reasons, addition made under section 68 of the Act deserves to be deleted. Further, the Assessing Officer is directed to allow the benefit of section 10(38) of the Act to the assessee.

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

7.2 In light of the above decisions, we are of the considered view that Ld. CIT(A) has not erred in law and in facts in allowing the assessee's appeal.

8. In the result, the Revenue's appeal is dismissed.

Order pronounced in the open court on 15-06-2022

**Sd/-**  
**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 15 /06/2022**

**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