

आयकर अपीलीय अधिकरण “ए” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, PUNE

BEFORE SHRI S.S.GODARA, JM
AND SHRI DR. DIPAK P. RIPOTE, AM

आयकर अपील सं. / ITA No.2123 & 2124/PUN/2017
निर्धारण वर्ष / Assessment Year : 2013-14 & 2014-15

DCIT, Circle -5, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Rakesh M. Sharma,
S.No.8/5, Mukundnagar,
Pune Satara Road,
Pune – 411 037

PAN : ACRPS4615G

.....प्रत्यर्थी / Respondent

Assessee by : Dr. Prayag Jha & Prateek Jha
Revenue by : Shri S.P. Walimbe

सुनवाई की तारीख / Date of Hearing : 09.06.2022
घोषणा की तारीख / Date of Pronouncement : 21.07.2022

आदेश / ORDER

PER S. S. GODARA, JM :

1. These Revenue’s twin appeals ITA Nos. 2123 & 2124/PUN/2017 for A.Y. 2013-14 and 2014-15, arise against the CIT(A) - 4, Pune’s separate orders, both dated 09/05/2017 passed in case Nos. PN/CIT(A) -4/DCIT, Circle-5, Pune/126/2016-17/261 & PN/CIT(A) -4/DCIT, Circle-5, Pune/299/2016-17/ 262 and involving proceeding u/s. 143(3) of the Income Tax Act, 1961 ; in short “the Act”, respectively.

Heard both the parties. Case file perused.

2. It emerges at the outset that the Revenue's identical first and foremost substantive ground in both these appeals seeks to revive the Assessing Officer's action disallowing the assessee's claim of having derived the long term capital gains of Rs.1,64,86,847/- and Rs.5,03,99,669/- ; assessment year wise, respectively. It's case is that the CIT(A) has erred in law and on facts in reversing the assessment findings to this effect. Learned CIT-DR quotes Sumati Dayal V/s. CIT(1995) 214 ITR 801 (SC), CIT V/s Durga Prasad More (1971) ITR 540 (SC) and PCIT V/s & NRA Iron & Steel Pvt. Ltd. (2019) 412 ITR 161 (SC) that evidence(s) filed in income-tax proceedings has to be considered in the light of human probabilities after removing all blinkers. And that an assessee cannot be held to have discharged its onus of proving genuineness of his alleged capital gains merely by filing a list of documentary evidence or the evidence itself ; as the case may be.

3. Mr. Walimbe further took us to the Assessing Officer's detailed discussion inter alia taking into consideration entire modus operandi of availing of such long term capital gains entry(ies) in collusion with entry operators who had artificially rigged the scrip movement in stock exchange in the light of the concerned companies profit & loss a/c, balance sheet, net-worth, total assets & liabilities and all other relevant aspects. He further took us to page no.12 onwards in assessment order indicating the Assessing Officer's detailed discussion as well as the DIT (Investigation's report) in order

dated 31.03.2016 (for assessment year 2013-14) wherein the former had tabulated the impugned rigging of scrip prices after pinpointing very serious abnormalities therein.

4. The assessee drew a strong support from evidence filed in its detailed paper book comprising of all relevant evidence running into 109 pages as well as the CIT(A) and lower appellate discussions deleting the impugned disallowance /addition as follows :-

5.3 **DECISION;** - *I have perused the assessment order and the submission made by the appellant as above carefully. I find that the AO treated tin amount of Rs.1,64,86,847/- as appellant's unexplained cash credit u/s. 68 of the Act denying appellant's claim of the same as long term capital gains on account of sale of shares. It is seen that based on an Investigation for the Investigation Wing that, various agencies were involved in share transactions in the nature of accommodation entries and a report received by the AO in this regard, the AO found that the transaction of availing LTCG did not happen in normal mode. The AO observed a number of abnormalities in the case of the appellant. The AO found that the financial result of Anukaran Commercial Enterprises as discussed in the assessment order clearly indicated that the company was a 'shell company' (Penny Stock Company) having no future prospects and the collective of fund of Rs.15 Crores through Preferential Shares was not supported with the financial result of the company before and after issuance of the same. The AO also contended that the assessee was allotted the shares without knowing the company or the*

Directors. The AO further held that the assessee could not justify the reason behind the investment in the said company and had acted on the verbal direction of some unknown person, (which no prudence businessman would do. The AO also contended that the price rise and trading activity in the scrip were not supported with financial fundamental of the company. The Securities and Stock Exchange Board of India (SEBI) had suspended the scrip from trading on the basis of abnormalities notice. The AO contended that the assessee had traded and booked LTCG in scrip as a Penny Stock and used the same for providing bogus LTCG by fraudulent manner. The AO referred to the findings of the Investigation Wing in respect of purchaser (Exit Provider) inter-alia stating that the same clearly indicated that the paper companies were purchasing shares of the beneficiaries to provide them entries of LTCG. As against these paper companies were booking huge losses and selling such losses to prospective buyers of Short term capital loss. This indicated that the purchasers were not real traders or investors of share market, but they were part of cartel involved in accommodation entries. The AO found in the case of the appellant that the most of the selling transactions were done through Baba Bhootnath Trade & Commerce Pvt. Ltd. and the acceptance of Mr. Rajesh Kedia, Director of the said company regarding such accommodation entry provided. The AO also held that the cartel of entry providers had used legal frame work for fraudulent activities i.e. provide accommodation entry of LTCG by re-coursing to all legal steps, such as (i) the said shares were purchased and sold through Stock Exchange; (ii) the payments were routed through banks; (iii) the shares were delivered through DEMAT Accounts. It was contended by the AO in para 14.2 of the assessment order that the LTCGs were not earned by the assessee from share market as shown or primarily apparent, but was bought the entry of LTCG in lieu of cash payment and converted

the black money in to white without payment to taxes. The AO-in this connection referred to the decision of the Hon'ble Supreme Court in the case of Sumati Dayal vs Commissioner of Income Tax [214 ITR 801] stating that the said case squarely applied to the cases of Penny Stock frauds perpetrated by the assessee in connivance with the cartel. The AO in para 14.4 of the assessment order held that the financial crime are not committed at spur of the movement but they are executed as a result of well plan strategy after considering various aspect and legal obligations of all Stake holders. Hence, the paper formalities of filing required statutory return in various Departments, getting the accounts audited, routing the funds through bank channels, preparation of other documents / papers like share application forms etc., are well completed while doing such transactions. The AO contended that such completion of paper formalities itself could not justify or prove the genuineness of the transactions when the facts are to be considered in totality. The AO further went on stating that each step in the whole processed may be legally correct but when the whole chain of events as per normal procedure of share investment with human probabilities was taken in to accounts, the facts become clear and quite apparent that such investment is a part of strategy to introduce unaccounted funds in the form of share capital. The AO further made a detailed analysis giving various reasons in paras 8 to 13 of the assessment order regarding the modus operandi, investigation in his scrip, mode of acquisition of shares, sharp increase in the price, sale of shares etc. and concluded in para 14 of the order contending that the submission of the assessee was the ignorance of exit providers, the brokers and the companies in which he had invested and that he had no idea reason to believe that exit providers incurred the losses, which was not acceptable as the investments decision are always taken by the persons on sound, rational and logical grounds. The

AO, therefore, had treated amount of Long term capital gains of Rs.1,64,86,847/- as assessee's unexplained credit u/s. 68 of the Act and added the same to the income.

5.3.1 The appellant, during the appellate proceedings submitted that the appellant declared total income of Rs.5,27,41,726/- in the return of income and also income from long term capital gains on sale of shares of Rs.1,64,86,487/- and claim the same as exempt u/s. 10(38) of the Act besides other income as disclosed in the return. The appellant purchased shares of Anukaran Commercial Enterprises Pvt. Ltd. on preferential basis on the advice of one of his friends Mr. Hemkumar Tambi who was knowledgeable person in share market. The shares were allotted to the appellant through Directors and on receipts of the allotment letter from the company payment were made by account payee cheques, duly debited in appellant's bank accounts. The appellant furnish the copy of allotment letter, bank statements and ledger accounts extract of share purchase account vide page nos. 1 to 7 of the paper book filed. The appellant contended that after such allotment, he applied for transfer of the said shares in his DEMAT accounts maintained with the Citi Bank Ltd. on 1/06/2012. The appellant submitted the same vide page nos. 8 to 9 of the paper book contending that the same were already filed during assessment proceedings. It was further submitted by the appellant that the acquisition of the shares out of funds available with him in his proprietary business M/s. Star Construction was duly shown in the investment Schedule "K" of the Balance sheet and assessed accordingly, the details of which were furnished vide page nos. 59 o 61 of the paper book. It was contended by the appellant that the said shares were sold through Mittal Share Brokers Pvt. Ltd. on the floor of Bombay Stock Exchange on various dates for which the Broker had issued Contract note cum bills for sale of shares, the

copies of which were furnished by the appellant vide page nos. 11 to 18 of the paper book. The appellant contended that for the aforesaid exercises, the appellant had given the deliveries of the said shares by way of DEMAT instruction slip drawn in favour of broker who consequently transferred same to Bombay Stock Exchange. The appellant submitted the necessary evidence in this regard vide page no. 10 of the paper book. It was further contended by the appellant that after transfer of share from his DEMAT accounts, the broker Mittal Share Broker Pvt. Ltd who received the payment from the Bombay Stock Exchange had transferred the amount of sale proceed by way of RTGS in appellant's bank account no. 050810100020199, maintained with Bank of India, Swargate Branch Pune. The appellant submitted the evidence of having deposited and credited the aforesaid amount in his bank account vide page nos. 22 to 24 of the paper book. The appellant also submitted the ledger account extract of the broker as maintained in his book and also details of payment of Security Transaction Tax (STT) and also other various expenses incurred in this regard vide page nos. 20 & 21 of the paper book. The appellant also submit that the series of events as stated above very well prove that the transactions of purchase and sales of shares were genuine and beyond doubt. The details collected in the course of survey conducted by the Department in appellant's business premises have fully supported the transaction regarding the purchase and sales of shares. Copies of the contract notes for sale of shares allotment letter, DEMAT account etc., were found by the survey party during survey and collected which themselves satisfied the best testimony for the appellant's case that the purchase and sales of shares resulted into earning of income from capital gains and no incriminating documents or evidence indicating any doubt on the bona-fide share transaction could be found by the survey party. The appellant finally contended that all

the aforesaid exercises very well proved that the transactions of shares were genuine and the appellant genuinely earned the income from Long term capital gains of Rs.1,64,86,847/- and rightly the same was claimed as exempt u/s. 10(38) of the I.T. Act 1961.

5.3.1.1 The appellant thereafter refuted all the arguments and reasons given by the Assessing Officer in the assessment order. It was contended by the appellant that the AO made the addition of the LTCG amount as unexplained credit, after accepting the amount of purchase of shares, holdings of shares in DEMAT accounts, sale of delivery of shares, which themselves proves that the AO consider the purchase and sales of shares and crediting the sale proceed in the assessee's book in this regard as correct and therefore he did not treat the same as bogus/ unaccounted income, as the same cost was taken by him for calculating the Long term capital gains. It was also stated that the benefit of exemption u/s 10(38) was rightly claimed as the 3 requirements for availing of such benefit were fulfilled, as stated in the appellant's submission. It was also contended that the AO had wrongly stated that the assessee was allotted shares even without knowing the Company or the Director, though it was stated that the shares were purchased at the advice of assessee's friend Mr. Hemkumar Tambi who was expert and knowledgeable in share dealings and reputed in share market. It was also submit that the appellant knew one Mr. Anil Mittal, a representative of Anukaran Commercial Enterprises, through whom the shares were purchased and, therefore, the contention of the AO in this regard as given in the assessment order was not correct. The appellant also refuted the AO's contention that there was sharp rise in the price of share from Rs.5.93 to Rs.293.00 between the period 17/07/2013 and the trading activity in this scrip was not supported with financial fundamental of the

company, contending that the same cannot be the reason for treating genuine LTCG as accommodation because in a free market were the investor did not have any control over price, and there is no privity of contract between the buyer and seller, such a transaction and rise in share price could not be held as bogus or in-genuine. The appellant further in the detailed submission had refuted the various arguments given along with reasons by the AO for treating the income from Long term capital gains as unexplained credit U/s. 68 of the Act, thereby analyzing the AO's arguments and the reasons for refuting the same in the detailed submission quoted above, contending that in no case the reasoning given by the AO could stand in the eye of law, as the appellant beyond doubt had proved that the share transactions were genuine and there was no iota of raising any doubt on the same and the income declared by the appellant in pursuance to such purchase and sale of share as income from Long term capital gains. Since the detailed submissions refuting the AO's contention made by the appellant has been quoted above, the same are not repeated to make the appellate order lengthy.

5-3.1.2 The appellant, thereafter referring to the provisions of sec. 68 of the Act and citing a number of decisions of various Courts / ITAT's contended that it is a settled position that to treat an unexplained cash credit under the said section, the AO has to satisfied that the assessee could not prove any or all of the criteria i.e. (i) identity of the creditor, (ii) Capacity of such creditor to advance money and (iii) Genuineness of the transactions. If all the said three conditions could be proved by the assessee, the burden shifts to the revenue to prove that the amount credited belonged to the assessee and not to others. By saying so, the appellant contended that without considering the above, the AO had decided the issue against the appellant based on enquiries and statements recorded in case of

third party purely on assumption and surmises. The appellant contended that the AO's observation and findings that the unaccounted fund was deposited in the Bank account of the beneficiary before issue of cheques to the appellant, was totally wrong and baseless as the transactions of the share were on the floor of Bombay Stock Exchange on which the appellant had no control. It was also stated that the principle of natural justice of violated by the AO in making addition on the basis of outcome of the investigation in the case of third party, which had no relevance to the appellant and also without affording any opportunity to cross examination of the said third party. The appellant further cited a number of decisions as detailed in the appellant's submission quoted above contending that in all the aforesaid decisions the broker through whom the shares were purchased and sold had deposed before the Investigation Wing and had given statement that the same were mere accommodation entries or in some cases whereabouts of the brokers were not known or transactions of purchases of shares were not through registered brokers and claim was there that this transactions of off-market, but still the decisions were given by the Courts/ Tribunals holding that the transactions could not be treated as bogus or in-genuine. The appellant also had summarized the reasons given by the Courts / Tribunals in various such decisions cited, for not treating the transactions as in-genuine as below-

- i) *That no opportunity to cross examination has been given.*
- ii) *Shares has been purchased, demated and sold for which necessary bills and contract note have been issued.*
- iii) *Shares have been sold through demat account and against the sale payment has been received by account payee cheques/*

through electronically transferred in sellers bank account.

- iv) *The shares have been sold on recognized stock exchange on which Security Transaction Tax (STT) have been paid.*
- v) *When the enquiry has been made on the back of the appellant without providing any opportunity to cross examine the broker the addition made cannot be sustained as held in the decision of Kum Saumya Agarwal vs ITO (2008) 174 Taxman 60 (Agra) Mog*

5.3.1.3 The appellant finally re-iterated that the shares were purchased by him for which necessary details and evidences were furnished. The shares were sold in accordance with law and such purchases and sales were shown in the accounts. The payments were made by account payee cheques for purchase and also received by cheques for sales. The shares have been credited in the appellant's DEMAT account and was sold after more than one year there by paying Security Transaction Tax (STT). Therefore, merely because of the statement of the brokers and investigation in case of third parties, the AO without affording any cross examination of the said third party cannot treat the transactions of the appellant as bogus and in genuine. It was, therefore, submitted to delete the addition.

5.3.2 I find force in the submission and contention of the appellant. It is required to be first decided as to whether the purchases and sales of shares as made by the appellant were bogus or in-genuine. From the facts and series events as furnished by the appellant and demonstrate in the detailed submission, I cannot but agree with the appellant that the entire transactions relating to such purchases and sales of shares were genuine find that the findings were given by the AO based on the report from the Investigation Wing without appreciating and analyzing the appellant's case in

proper perspectives with the facts and series of events while adding the amount of Rs.1,64,86,847/- as unexplained cash credit u/s. 68 of the Act. The appellant beyond doubt could prove that the shares were genuinely purchase and sold and the sale proceeds were rightly claimed by tin appellant as income from long term capital gains and that too also exempt u/s. 10(38) of the Act. I agree with the reasoning and arguments offered by the appellant in the detailed submission for refuting the various reasons of the AO given in the assessment order. The appellant could demonstrate with facts and law that the AO was not right in making the addition u/s. 68 of the Act by advancing his various observations, as they were factually and legally not correct on the facts of the appellant case under consideration. The various decisions cited by the appellant in the written submission stating that under the similar facts the share transactions were held by the Hon'ble Courts / Tribunals, could not be held as in-genuine or bogus. The said cases, in my opinion, can be applied with the facts of the appellant's case under consideration. For the facts as stated by the appellant, I also hold that the income from long term capital gains has rightly been claimed as exempt u/s. 10(38) of the Act. Secondly, I am inclined to agree with the appellant's contention as regards non-applicability of the provisions of section 68 of the Act, as I find that in the case of the appellant all the three criteria of identity of the creditor, creditworthiness of the creditor and genuineness of the transaction were proved by the appellant with necessary supporting details and evidences and the appellant had rightly shifted the onus upon the AO but the AO failed to prove that any or all of the aforesaid conditions remained unfulfilled. The various decisions cited by the appellant also support the appellant's contention in this regard. In view of above, I hold that the AO was not justified in taxing the amount of Rs.1,64,86,847/- as appellant's unexplained credit u/s. 68 of the Act, denying the

appellant's claim of the same as income from Long term capital gains. The AO is directed to delete the addition. Ground nos. 1 & 3 raised by the appellant are accordingly allowed."

5. We have given our thoughtful consideration to the foregoing rival arguments and find no reason to express our agreement with either partly in entirety. It emerges first of all that the department appears to have acted on its investigations wing's report(s) allegedly unearthing a large scale nexus involving investors, promoters and entry operators who had converted black money to white in share price(s) rigging at the authorized platform of stock exchange. As against this, the taxpayer also fails to prove genuineness of his long term capital gain in question as he has simply filed heap of documentary evidence than proving all the relevant parameters of genuineness of long term capital gain. Faced with the situation, learned counsel stated very fairly that the assessee be given one more chance to prove genuineness of his alleged long term capital gains. We therefore restore this first and foremost issue back to the Assessing Officer. It is made clear that it shall be bounden duty of the assessee only to file as well as lead all the relevant evidence in support of genuineness of long term capital gains in issue in both these assessment years within three effective opportunities of hearing. Ordered accordingly. The Revenue's instant first and foremost ground in both these appeals stands accepted for statistical purposes.

6. The Revenue's second substantive ground in assessment year 2013-14' appeal, ITA 2133/pn/17 raises the issue of dividend and penny stock

addition of Rs.17,819/- treated as unexplained credits in the course of assessment as reversed in the CIT(A)'s detailed discussion. Learned counsel sought to highlight the alleged fact that the impugned dividend does not pertain to "Penny Stock" scrip(s) as it is projected at the Revenue's behest. That being the case, we are of the opinion that instant second issue also deserves to be restored back to the Assessing Officer in preceding terms. Ordered accordingly.

7. Lastly comes the Revenue's third and fourth substantive grounds in both these assessment year in identical terms that the CIT(A) has erred in law and on facts in deleting agricultural income disallowance/addition(s) of Rs.8,29,304/- & Rs.3,92,987/-; respectively. Learned counsel vehemently submitted that the assessee indeed owns agricultural lands whose revenue records had been duly produced before the lower authorities. He fails to dispute that the assessee has deposited only cash sums than having adopted banking channel qua sale of his alleged agricultural produce. Be that it may, we deem it appropriate in this factual backdrop that lumsum addition(s) of Rs.1,29,304/- and Rs.42,987/- in these impugned assessment years only, respectively deserve to be revived with a rider the same shall not be treated as a precedent regarding the issue in hand in preceding and succeeding assessment years. Ordered accordingly. The Revenue's instant corresponding subsequent ground are partly allowed in very terms. So is the outcome both these main appeal in ITA No.2133/PUN/17 and 2124/PUN/17 as no other ground has been pressed before us.

8. These Revenue's twin appeals are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the Open Court on this 21st day of July, 2022.

Sd/-
(DR.DIPAK P.RIPOTE)
लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-
(S.S. GODARA)
न्यायिक सदस्य/**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 21st July, 2022.
Ashwini

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-4, Pune.
4. The Pr.CIT-3,Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File. आदेशानुसार / BY ORDER,
// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

S.No.	Details	Date	Initials
1	Draft dictated on	09.06.2022	
2	Draft placed before author	04.07.2022	
3	Draft proposed & placed before the Second Member		
4	Draft discussed/approved by Second Member		
5	Approved Draft comes to the Sr. PS/PS		
6	Kept for pronouncement on		
7	Date of uploading of Order		
8	File sent to Bench Clerk		
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R.		
11	Date of Dispatch of order		