

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
BEFORE SHRIKULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1626/Mum/2021 (A.Y. 2014-15)

Shradha Estate Pvt. Ltd.,
3, New Bake Bihari Building,
24th Road, Khar (West),
Opp. Khar TEL EX, Mumbai-40052.

PAN: AABCS4961J

..... Appellant

Vs.

ITO-5(3)(2),
Room No. 583, Aayakar Bhavan,
M.K. Road, Mumbai-400020.

..... Respondent

| | | |
|-----------------------|---|--------------------------|
| Appellant by | : | None |
| Respondent by | : | Sh. Ashish Kumar, Sr. DR |
| Date of hearing | : | 05/07/2022 |
| Date of pronouncement | : | 03/10/2022 |

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi [hereinafter referred to as ('NFAC')] dated 19.07.2021 for the Assessment Year (AY) 2014-15. The assessee has raised the following grounds of appeal:

“(1) In law and on facts, as well as in circumstances of the appellant's case, the National Faceless Appeals Centre (NFAC) has erred in not quashing the order passed by the AO.

(2)The National Faceless Appeals Centre (NFAC) has erred in upholding that the Short-Term Capital loss disclosed are not genuine and represent undisclosed income of the Appellant and that he has resorted to prearranged method to evade taxes through short term capital loss, although the Appellant has submitted all the relevant documents to show that the purchase and sale of shares were genuine transactions. The learned AO has disallowed the short-term capital loss based on assumptions, surmises, and conjectures and without reference to the appellant of any evidence relied upon by him.

(3) The National Faceless Appeals Centre (NFAC) has erred in not observing that the Ld. AO has made the addition only based on the information received from Kolkata wing (which spells out the modus operandi), although the AO has not brought any material/evidence to prove that the Appellant in specific, has indulged in any bogus transaction, of whatsoever nature.

(4)The National Faceless Appeals Centre (NFAC) erred in confirming the following allegations levelled by Ld. AO without providing any opportunity of cross examination to your Appellant.

(5) The National Faceless Appeals Centre (NFAC) has erred in confirming the erroneous conclusions of the Ld.AO that the documents showing the genuineness of transactions i.e., cash account, bank account, purchase & sales accounts being on record has been ignored and formed opinion to conclude that assessee has indulged in penny stock transactions and is ineligible for exemption for STCL under the Income Tax Act, 1961.

(6) In law and in the facts and circumstances of the appellant's case, The National Faceless Appeals Centre (NFAC) has grossly erred in concluding that the Ld. AO has rightly disallowed short term capital loss.”

2. Brief facts of the case are that the assessee company filed its return of income on 17-09-2014 declaring total income at loss of Rs. 81,75,057/-. The case of the assessee is selected for scrutiny u/s 143(2). During the assessment proceedings following facts emerged, which are pertinent to mention and discuss

to understand the whole modus operandi, nature of transaction, basis of assessment order passed and contentions of the assessee as under:

- i) *The directorate of investigation, Kolkata carried out a country wide investigation to unearth the organised racket of generating of bogus long term capital gains (LTCG) which is exempt u/s 10(38) of the Act and short-term capital loss (STCL) which is available to be adjusted against business income.*
- ii) *These shares are transferred to the beneficiary (LTCG/STCL) at a very nominal price in the case of LTCG and at a very high price in the case in the case of STCL, mostly offline through preferential allotment or offline sale to save STT.*
- iii) *The directorate of investigation Kolkata investigated transaction in 84 such penny stock shares quoted on BSE and examined on oath a large no of brokers, directors of company that finally purchased the shares, the promoters of penny stock companies, the entry operators who managed the dummy companies involved in price rigging. The money trail of the transactions was also examined and in a large no of transactions trail right from cash deposits to the account of beneficiaries account was unearthed. As a result of investigation individuals who have taken such entry of bogus LTCG/STCL have been identified.*
- iv) *During investigation by Kolkata investigation wing statements of one Mr Anuj Agarwal and Mr Sanjay Vohra were recorded by the DDIT Investigation Kolkata. Both the persons confirmed that shares of Nikki Global Finance Ltd, S.R.K. Industries Ltd, Rutron International Ltd, Radford Global Ltd, Dhenu Buildcon and Pranax Lab and Sunrise Asian Ltd, are penny stocks company for bogus LTCG entries and STCL.*
- v) *During the assessment proceedings a show cause was issued to the signatory director of the assessee company and further a summon u/s 131 of the Act was also issued. In his reply the signatory director of the company filed a letter stating that he is residing at Dubai and has been out of India for past couple of years and his status is that of a non-resident.*
- vi) ***The assessee company purchased those shares which were originally sold before 2-3 years offline.***
- vii) *We have gone through the charts of the assessee investment in scripts and the chart of their price movement as per BSE data as discussed by the AO vide para-8 page-5,6,7,8 and 9. The assessee here is an "exit operator" for those who are taking benefits of STCL. The assessee is immediately selling out the shares which have been purchased by him having a huge capital loss. The*

period of holding of these shares are ranging from 2 months to maximum 7 months.

viii) It was also observed during the assessment proceedings that assessee was fully ignored about the fundamentals of these penny stock companies and did not have any previous experience of investing in shares. Looking at the fact as enumerated in Para (vi) and (iv) mentioned supra together with the fact as narrated in the report of the investigation wing Kolkata, revealed that the transaction was devoid of any commercial nature and fell in realm of not being bonafide.

3. Ground No-1 and 6 are general in nature hence no adjudication is required. Ground nos. 2,3 4 and 5 are interrelated to the facts of the case, hence disposed of by common finding keeping in view the facts before us and applicable judicial pronouncements of various coordinate benches of ITAT, Hon'ble High Court and Supreme Court.

4. We have gone through the file of AO, Ld. CIT (A) and various objections of the assessee raised. As discussed supra that the name of companies in which assessee invested is falling in the list of penny stock prepared by various directorates of investigation throughout the country to enlist the names of bogus companies.

5. The objection of the assessee vide Ground no 2 and 5 that the documents showing the genuineness of the transaction i.e., cash account, bank account, purchase and sell of shares account being on record has been ignored is not tenable keeping in view the fact as observed by us vide Para 2 (iv)- and 2 (vi). Assessee's involvement at such a large scale and consequently incurring a heavy loss of Rs. 81, 75,057/-. In those shares which were sold offline originally 2-3 years ago- and then buying the same in the guise of stock exchange and selling the same within duration of 1 month to 7 months (maximum) at heavy loss can't be considered in isolation. Looking at the background of the assessee company with

relevant experience and names of the companies were there in the list of dubious companies doesn't require any further opportunity to the assessee about cross examination of the persons over whom statement department is relying on and it is also not material that department hasn't provided the list of beneficiaries benefited out of transactions with dubious penny stock companies. In this regard we rely on the decision of McDowell and Co. **[1985] 22 Taxman 11 (SC)**, Sumati Dayal **[1995] 80 Taxman 89 (SC)** and Durga Prasad More **[1971] 82 ITR 540 (SC)**.

We are relying on the test of human probabilities. Assessee is not a regular investor in shares, abnormal in nature of fall in value in all the shares and identified as penny stock by the investigation wing in the price of the shares are not based on business results of the companies but rigged.

6. With an example this operation of rigging in the price of shares upward/downward can be explained herein below. Let us assume there are two types of assessee one is seeking long term capital gain, and another is seeking short term capital loss namely investor A and investor B respectively. Both the investors will contact an operator for their desired goals. Operator is a person who manages the overall affairs of the bogus LTCG/STCL. Now what he will do, he will allot shares of a Pvt. Ltd. Co. at a very nominal price which is subsequently amalgamated with a listed penny stock and the beneficiaries of LTCG will receive shares of listed penny stock in the scheme of amalgamation. Price of this penny stock co will be managed by the operator in a very tactful manner within the close circle of beneficiaries and his own entry providing companies. Once the price of the shares reached to a desire level, same will be sold to investor B who is seeking

STCL. Now the same operator will manage the price of share other way around i.e. downward. It will create STCL in the hands of investor B and so on.

7. It is pertinent to mention here that when the companies are amongst the list of bogus penny stocks and all the investors are using the same to manage their LTCG/STCL, assessee is only the genuine investor who is not aware of these facts. And being bonafide investor entered these transactions and incurred heavy loss. This theory of assessee is far away (looking at the facts of the case) from human probabilities and preponderance. Investigation Wing (IW) of the Income Tax Department has authority to carry out inquiries, survey and searches and post search inquiries. They have also power u/s 131(1A) to summon any person/authority for collecting information, for recording statement, or for calling documents. If required, they can impound such documents. The information/document so received/impounded may relate to a taxpayer in respect of which they are carrying inquiries or may relate to other taxpayers. The information/document so received/collected in respect of a taxpayer/non-taxpayer and the inference drawn by them on the basis of such inquiries may be sent to the AO under whose jurisdiction such person would reside/operate. If the information pertained to the current assessment year, the AO may utilise the same for framing assessment or where information pertains to an earlier year, then the AO may proceed to reopen the assessment u/s 148 subject to the conditions laid down u/s 147/148/149/151.

8. Following may be considered as characteristics/ingredients of actionable information-

A) It should pertain to the assessee in respect of whom reopening of assessment is contemplated.

- B) It should pertain to the assessment year in respect of which assessment is sought to be reopened. It should not pertain to an assessment year for which assessment cannot be reopened due to limitation.
- C) The information must be actionable, *i.e.*, it must have clues/hints/directions on the basis of which AO can carry out inquiries or escapement of income is inferred.
- D) It should have enough material which can be called additional.
- E) The information must show certain transactions carried out by assessee or accruing or arising of income.
- F) It must indicate or should have, *prima facie* basis that income of the assessee has escaped assessment.

9. We further relied on following judicial pronouncement to substantiate our conclusion for the matter as under:

“The AO received information from IW that assessee had received unsecured loans from five shell companies. He carried out further inquiries and found that the lender companies had no credentials to carry out transaction of huge amounts as per their income profile and had indulged in providing accommodation entries in form of unsecured loans. It was held that a discovery of fresh facts, or of new and important matters not present at time of assessment, which appeared to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance or expense, would constitute information. [Refer- Hemjay Construction Co. (P.) Ltd. v. ITO [2019] 109 taxmann.com 59/419 ITR 39 (Gujarat)]

The AO received information from IW that loan received by the assessee from EWFIL was bogus as EWFIL was a paper company and itself receiving bogus share

application money/premium from entry operators. The AO carried out verification and found that EWFIL was an entry operator and loan received by the assessee from such concern was bogus. [Refer- Jayant Security & Finance Ltd. v. Asstt. CIT [2018] 91 taxmann.com 181/254 Taxman 81 (Gujarat)]

The Courts have held that the material contained in the information from IW and collected by AO should be tangible and should have live link with the formation of belief about escapement of income. A tangible material would mean that it is sufficient, bona fide, definite, relevant and reliable. Live link would mean direct and close nexus, a proximate and immediate connection between material and formation of belief about escapement of income. The material used in the reasons recorded should have a rational connection with, or a relevant bearing on the formation of the belief and not extraneous or irrelevant [Refer- ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC)].

Delhi ITAT in the case of Sanat Kumar v. ACIT [IT Appeal No 1881 (Delhi) of 2018, dated 14th June 2019 observed that the meticulous paper work of routing the transaction through banking channel is futile because the results are altogether beyond human probabilities. Neither in the past nor in the subsequent years has assessee indulged into any such investment having huge loss/windfall. Had the assessee been so intelligent qua the intricacies of the share market, he would have definitely undertaken such risk taking activities in the past or future by making such investment in unknown stock. It is a sham transaction to convert undisclosed income into disclosed by evading tax under the garb of LTCG in connivance with entry providers.”

10. None appeared for the assessee. It is observed that the meticulous paper work of assessee along with entry operator/Share operator is of no use, until unless transactions are **real in form and not only in substance. Keeping in view the facts narrated above along with relevant judicial pronouncements as**

discussed (supra), we found no perversity in the order of Ld. CIT (A) and are not inclined to interfere with the same.

11. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 3rd day of October 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai, दिनांक / Dated: 03/10/2022
SK, Sr.PS

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai