

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND  
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)**

**ITA No. 2101/MUM/2022  
Assessment Year: 2012-13**

Ganesh Chhaganlal Jain,  
Plot No. 899 Jassawala Wadi,  
Juhu Tara Road, Juhu,  
Andheri West,  
Mumbai-400049.  
**PAN No. AANPJ 1550 D**  
**Appellant**

**Vs.**

CIT (A) NFAC,  
Delhi.  
**Respondent**

Assessee by : Mr. Pramod Kumar Parida, AR  
Revenue by : Mr. Sanyam Suresh Joshi, DR

Date of Hearing : 12/10/2022  
Date of pronouncement : 18/10/2022

**ORDER**

**PER OM PRAKASH KANT, AM**

This appeal by the assessee is directed against the order dated 21.06.2022 passed by the Ld. National Faceless Appeal Centre (NFAC), Delhi (hereinafter shall be referred as 'Ld. First Appellate Authority or FFA') for assessment year 2012-13, raising following ground:



1. *Addition of Rs.2,10,483 by disallowing the Short-term capital gain on sale of scrip - Learned First Appellate Authority (FAA) [erred in upholding the addition of accounted income (i.e. short-term capital gain of Rs.2,10,483) by the assessing officer based on the information received from the Investigation office rather relying into the merits of the case. The Appellant craves leave to add, alter or amend all or any of the above Grounds of Appeal.*

2. Briefly stated, facts of the case are that the assessee filed return of income on 31.07.2012 declaring total income of ₹48,80,170/-. The total income declared by the assessee included salary of ₹43,29,600/- speculation loss and (-)₹1,43,497/-) income from business or profession (Nil); short term capital gain (-) ₹6,97,248/- and income from other sources ₹6,65,570/-. In this manner, the assessee has set off the short term capital loss against the income under other heads and arrived at total income of ₹48,80,170/-. The return of income filed by the assessee was processed u/s 143(1) of the Income-tax Act, 1961 (in short 'the Act'). Subsequently, on receipt of information from the Directorate of Investigation, Mumbai that assessee is a beneficiary of bogus



entries of long term capital gain/short term capital loss particularly of entries in the penny stock; M/s VMS Industries Ltd. and therefore, the Assessing Officer reopened the assessment by way of issue of notice u/s 148 of the Act dated 30.03.2019. The Assessing Officer held that assessee has set off its taxable income against the bogus short term capital loss generated on sale of scrip namely M/s VMS Industries Ltd. which is a device of tax evasion. The Assessing Officer pointed out that during the search action at the premises of Shri Naresh Jain, he admitted that he was engaged in providing bogus long term capital gain to one set of taxpayers and corresponding short term/long term capital loss was provided to other set of taxpayer, which included the assessee. After detailed finding, the Ld. Assessing Officer held that the short term capital loss as unaccounted income of the assessee observing as under :

*“4.5 The essence of the scheme was to include a transaction designed to produce a gain to be claimed us 10(38) or loss under the head 'STCL' or Business Loss. At the same time another transaction was designed to*



*produce almost matching gains which was not chargeable to tax. These two separate transactions were self-concealing. Thus, the following conclusions emerge.*

- i. The scheme is a pure tax avoidance scheme without any commercial justification in so far as the making of a profit is concerned.*
- ii. The transactions are self-concealing and are designed to make neither a gain nor a loss. The tax payers would have entered into the scheme only with a view to have gain and that too to claim the same as exempt uls 10(38) of the Act.*
- iii. These transactions have no commercial purpose apart from the avoidance of tax liability.*

*4.6 In view of the above discussion, the aforesaid Short Term Capital Loss of Rs. 2, 10,483/- is held to be nothing but unaccounted income kept away from the incidence of tax. The same is hereby treated as unaccounted income chargeable to tax in the hands of assessee-company for the year under consideration and accordingly to brought to tax."*

3. On further appeal, the assessee challenged both the validity of the reassessment as well as addition on merit. The Ld. CIT(A) however, has adjudicated the issue only on the validity of the reassessment. The relevant finding of the Ld. CIT(A) is reproduced as under :



*“6.1 The appellant's case was processed u/s 143(1). Subsequently, the AO re-opened the assessment based on inputs given by the Investigation Wing, Mumbai. Relevant extracts of AO's order for re-opening are reproduced below:-*

*"In this case, the assessee has filed return of income for A. Y. 2012-13 on 31.07.2012 declaring total income at Rs. 48,80,170/-. Subsequently, intimation has been received in this case from the Directorate of Investigation, Mumbai, whereby it is intimated that a search and seizure operation was carried out on many entry and hawala operators at various locations across the country. During the course of search operation, it was found that these entry providers were involved in providing entries of bogus long term capital gains, bogus short term capital loss and bogus business loss through manipulation of stock prices of various scrips on the stock exchanges. The beneficiaries who have availed bogus entries of LTCG/STCL entries in the penny stock : M/s. VMS Industries Ltd., have been identified and the relevant information was disseminated. The assessee, Shri GANESH CHHAGANLAL JAIN, is also found to have made fraudulent transactions to the tune of Rs.2,62,054/- during F.Y. 2011-12 in the aforesaid penny scrip: VMS Industries Ltd. Since there was a reason to believe that substantial income has assessment, the case was re-opened after obtaining due administrative approval and a notice us. 148 of the IT. Act dated 30.03.2019 was issued to the assessee.*

*6.2 The appellant is essentially questioning the re-opening based on the information received from the Directorate of Investigation, Mumbai. Various judicial forums have held that re-opening based on Investigation Wing information without independent application of*



*mind by AO is invalid. In the following decisions it was held that in case incorrect, wrong and non-existing reasons are recorded by the AO for re-opening of assessment and that AO failed to verify the information received from Investigation Wing, the re-opening would be unjustified and therefore liable to be quashed.*

*a) Siemens Information System Ltd. Vs ACIT 293 ITR 548 (Bombay H.C.)*

*b) Shamshad Khan Vs ACIT 395 ITR 265 (Delhi HC)*

*c) Pr. CCIT Vs SNG Developers Ltd 404 ITR 312 (Delhi HC)*

*6.3 In this case of Pr CIT Vs Manzil Dinesh Kumar Shah, Hon'ble Gujarat High Court has held that where the original assessment was made without scrutiny, the requirement of the Assessing Officer forming the belief that income chargeable to tax has escaped assessment, would apply.*

*6.4 Taking into consideration the ratio decidandi in the cases cited supra, and looking into the factual background in which the A.O. acted, it is held that the A.O. proceeded on the right lines. AO's action cannot be faulted as he has formed a belief that income chargeable to tax had escaped assessment. It is also not a case where AO has recorded incorrect, wrong or non-existent reasons for reopening the assessment. Therefore, this ground questioning the basis of reopening on the basis of Investigation Wing information is dismissed. It follows therefore that the addition of Rs.2,10,483/- held by the AO to be unaccounted income was on the right lines."*



4. The Ld. Counsel of the assessee filed a Paper Book containing pages 1 to 58.

5. We have heard rival submission of the parties and perused the relevant material on record. We find that before us, the assessee has prayed that the Ld. CIT(A) has not decided the issue on merit and therefore, the Ld. Counsel submitted that the matter may be restored back to the file of the Ld. CIT(A) for deciding the issue on merit. The Ld. DR fairly accepted that issue on merit has not been decided by the Ld. CIT(A).

5.1 In view of the above facts, we feel it appropriate to restore the issue of adjudication on merit to the file of the Ld. CIT(A) with the direction to pass a speaking and reasoned order. It is needless to mention that the assessee shall be afforded adequate opportunity had been heard. The ground raised by the assessee is accordingly allowed for statistical purposes.



6. In the result, the appeal filed by the assessee is allowed for statistical purpose.

**Order pronounced in the open Court in 18/10/2022.**

**Sd/-  
(RAHUL CHAUDHARY)  
JUDICIAL MEMBER**

**Sd/-  
(OM PRAKASH KANT)  
ACCOUNTANT MEMBER**

Mumbai;  
Dated: 18/10/2022  
Dragon Legal/Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,  
  
(Sr. Private Secretary)  
**ITAT, Mumbai**