

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Sanjay Garg, Judicial Member
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 681/KOL/2019
Assessment Year: 2014-2015**

Harsh Keyal,.....Appellant
Flat No. 10C, 12, Roland Road,
Ballygunge, Kolkata-700020
[PAN:AGUPK1393E]
-Vs.-

Income Tax Officer,.....Respondent
Ward-8(3), Kolkata,
Aayakar Bhawan, 5th Floor, Room No. 17,
P-7, Chowringhee Square,
Kolkata-700069

Appearances by:

Shri Anil Kochar, Advocate, appeared on behalf of the assessee
Shri Vijay Kumar, Addl.CIT (Sr. DR), appeared on behalf of the Revenue

Date of concluding the hearing : 27th September, 2022
Date of Pronouncing the Order: 23rd November, 2022

O R D E R

Per Dr. Manish Borad, Accountant Member:-

This appeal filed by the assessee is directed against the order of ld. Commissioner of Income Tax (Appeals)-15, Kolkata dated 18.02.2019 for the assessment year 2014-15.

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

1. *For that the orders passed by the lower authorities are arbitrary, erroneous, without proper reasons, invalid and bad-in-law, to the extent to which they are prejudicial to the interests of the appellant.*

(2) *For that the Ld. CIT (A) erred in dismissing the appeal of the appellant on the alleged grounds without properly considering all relevant documentary evidences submitted before the lower authorities in support of earning of Long Term Capital Gains.*

- (3) For that the Ld. CIT (A) ought to have appreciated the facts on record which indicated that the appellant having filed all evidences relating to purchase and sale of shares and having earned Long Term Capital gains, the Ld. CIT (A) ought not to have dismissed the appeal on surmises and conjectures in view of the fact that the evidences adduced by the appellant in support of earning of Long Term Capital Gains have not been assailed or controverted.*
- (4) For that the appellant had earned Long Term Capital Gains amounting to Rs.1,27,71,907/- in respect of which the appellant has submitted relevant acceptable evidences before the A.O. who simply proceeded on the basis of some informations which were not verified by him and that the Ld. CIT (A) erred in dismissing the appeal of the appellant on the alleged grounds.*
- (5) For that the Ld. CIT (A) ought to have taken into consideration the fact that the A.O. passed entirely an illegal order proceeding on the basis of statements of some persons without affording any opportunity to the appellant to cross examine them.*
- (6) For that the order of assessment passed by the Ld. A.O. had been arbitrary and the Ld. CIT (A) was wrong in confirming the same.*
- (7) For that the use of statements of some persons without affording any opportunity to the appellant to cross examine is against the established law and hence the assessment framed by the A.O. ought to have been annulled by the Ld. CIT (A).*
- (8) For that the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds.*

3. Brief facts of the case are that the assessee is an individual. Income of Rs.6,74,020/- declared in the e-return filed on 20.03.2015 for assessment year 2014-15. The case was selected for scrutiny through CASS and assessment under section 143(3) of the Act was framed on 19.12.2016. In the course of assessment proceedings, the ld. Assessing Officer noticed that the assessee has claimed exempt income under section 10(38) of the Act for long term capital gain from sale of shares of Unno Industries Limited. The ld. Assessing Officer found that M/s. Unno Industries was covered under the list of 84 penny stock companies, which were found by the Directorate of Investigation, Kolkata during the course of examination of accommodation entries, wherein it was found that such penny stock companies were controlled by the syndicate members, i.e. share brokers and entry operators for providing bogus long-term capital

gain to the beneficiaries, who claims exemption under section 10(38) for evasion of tax. The ld. Assessing Officer also noticed that the prices of equity shares of Unno Industries increased drastically in a short span of time without having any sufficient financial base and also poor earning per share (EPS). The ld. Assessing Officer accordingly held the said transaction of earning long-term capital gain as sham and bogus in nature and added the same to the income of the assessee at Rs.1,27,71,907/- and assessed income at Rs.1,34,45,920/-.

4. Aggrieved, the assessee preferred appeal before the ld. CIT(Appeals), but failed to succeed as the ld. CIT(Appeals) relying on various judicial pronouncements including the judgment of the Hon'ble Supreme Court in the case of *Sumati Dayal reported in 214 ITR 801 (SC)* and *Durga Prasad More reported in 82 ITR 540 (SC)* confirmed the finding of the ld. Assessing Officer.

5. Aggrieved, the assessee is now in appeal before this Tribunal.

6. Ld. Counsel for the assessee referring to the paper book containing 45 pages stated that the transactions of long-term capital gain were genuine duly supported by Contract Note of purchase of shares, transactions statement, relevant bank account. He pleaded that the transactions being genuine, the impugned proceedings deserve to be quashed.

7. On the other hand, ld. D.R. vehemently argued supporting the order of the ld. PCIT.

8. We have heard the rival submissions and perused the relevant record placed before us. During the year, the assessee has earned long-term capital gain from sale of equity shares of M/s. Unno Industries Limited and exemption under section 10(38) of the Act has been claimed.

Directorate of Income Tax (Investigation), Kolkata unearthed a racket of penny stock companies, which are managed by entry operators and brokers, wherein share prices are rigged, abnormally high so as to provide accommodation entries in the form of bogus long-term capital gain to various beneficiaries. The investigation report mentioned the list of 84 companies, which were found to be penny stock companies and all these companies have poor financial, no regular business activity was carried out and the share prices increased abnormally with the help of entry operators and brokers. Recently Hon'ble Jurisdictional High Court in the case of *Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.)* pronounced on 14.06.2022 dealing with the similar facts and the issue relating to the penny stock companies decided against the assessee thereby confirming the addition under section 68 of the Act as well as confirming the revisionary proceedings under section 263 of the Act. The ratio laid down by the Hon'ble Jurisdictional High Court has been considered elaborately in the decision of the Coordinate Bench in the case of *Shyam Sunder Bajaj in ITA No. 2552/KOL/2018 and others vide order dated 17th October, 2022* and after placing reliance on the judgment of Hon'ble Jurisdictional High Court in the case of *Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022*, observed as under:-

"4. All the present cases were selected for scrutiny u/s. 143(3) through CASS and the issue in all of them for selection relates to 'suspicious long term capital gain on shares'. In all the above appeals, according to the ld. AO, LTCG reported by the assessee in respective return was bogus and the entire transactions were done with the objective to introduce unaccounted money of the assessee in the books by using the route of LTCG which was exempt from tax u/s 10(38) of the Act, except in one case, where the assessee has booked trading loss on transaction of shares of two Companies, which have been treated as penny stock. Thus, ld. AO held that the said LTCG/loss are fabricated/engineered transactions by the respective assessees, sale of which falls under the category of penny stocks and the same were treated as bogus which were added in the total income by treating it as unexplained cash credit u/s. 68 of the Act. Ld. AO based his decision of treating the impugned transaction of sale of shares as bogus transaction by relying on the report of Investigation Wing of the Department wherein the Investigation Wing of the Department had studied the modus operandi of rigging the prices of penny stocks and generation of capital

gain /trading loss there from. On appeal, ld. CIT(A) confirmed the action of the ld. AO. Aggrieved, assessee are in appeal before the Tribunal.

5. Recently on 14.06.2022, the Hon'ble jurisdictional High Court of Calcutta passed a judgment in the case of Swati Bajaj and others [2022] 139 taxmann.com 352 (Cal) dealing with set of cases with similar fact patterns as narrated above for the present appeals under consideration before us. Hon'ble jurisdictional High Court by taking the report of the Directorate of Investigation of the Department as the basis, gave its observations and findings, which are summarized hereunder.

5.1. There are two category of cases dealt with by the Hon'ble High Court, viz. first category being those arising out of the order of Tribunal dated 26.06.2019 in which 90 appeals filed by the assessee were allowed and second category is of those cases where1 assessee has challenged the assumption of jurisdiction by CIT under section 263 of the Act. In the present set of appeals before us, we are concerned with the first category whose relevant observations and findings by the Hon'ble High Court are noted below:

a) From the assessment order passed in the case of the assessee Smt. Swati Bajaj, we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy Director of Income Tax, Investigation Unit -II and III, Kolkata. [para 43]

b) The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such statements of violation of principles of natural justice the assessee have not made out any case. [para 65]

c) The test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted. [para 69]

d) *Test of preponderance of probabilities have to be applied and while doing so, the court cannot loose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. [para 73]*

e) *The assessee was not named in the report and when the assessee makes the claim for exemption, the onus of proof is on the assessee to prove the genuinity. [para 73]*

f) *It is incorrect to argue that the assesseees have been called upon to prove the negative in fact, it is the assesseees duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. [para 73]*

g) *The assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assesseees had phenomenal and fanciful rise in price in a short span of time. [para 75]*

h) *The exercise that was required to be done by the Tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the 'players' can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the Tribunal which exercise has not been done. [para 99]*

i) *The assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee. [para 99]*

j) *The tribunal being the last fact finding authority was required to go deeper into the issue as the matter have manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "players" can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the tribunal which exercise has not been done. [para 99]*

k) *In such factual scenario, the Assessing Officers as well as the Commissioner (Appeals) have adopted an inferential process which is found to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the Commissioner*

(Appeals) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies when the general market trend was admittedly recessive and thereafter arrived at a conclusion which is a proper conclusion. [para 99]

l) For all the above reasons, we hold that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer. [para 101]

m) In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed by the respective Assessing Orders as affirmed by the CIT(A). [para 102]

6. In the context of factual matrix of the present appeals before us narrated above, the position of law as enunciated by the Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj (supra) carrying force of binding nature on the issue under consideration for us, was confronted to the respective Id. Counsels of the assessee who appeared before us. Id. Counsels were fair enough to state that issue involved in these appeals is squarely covered against the assessee by the said decision as the fact involved are identical to that which were before the Hon'ble High Court. For cases where none appeared before us on behalf of the assessee, the relevant factual matrix was captured with the assistance of Ld. Sr. DR / CIT DR (already narrated above). Since the matter is squarely covered by the decision of Hon'ble jurisdictional High Court of Calcutta in the case of Swati Bajaj & others (supra), we have taken up these also for adjudication ex parte, qua the assessee.

7. After hearing both the sides and taking into consideration the factual matrix of the cases before us vis-à-vis the decision of Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj & others (supra), we respectfully following the said decision carrying the force of binding nature, being the jurisdictional High Court, dismiss the appeals of the assessee and restore the order of the respective Id. AO as affirmed by the respective Id. CIT(A)".

9. On perusal of the above finding of this Tribunal having considered the judgment of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others (supra), we find that the same is squarely applicable on the facts of the instant appeal and issues

raised therein and Id. Counsel for the assessee failed to controvert the same. Thus finding of Id. CIT(Appeal) is confirmed and all the grounds raised by the assessee are dismissed.

10. In the result, the appeal of the assessee is dismissed.

Order is pronounced in the open court on November 23rd, 2022

**Sd/-
(Sanjay Garg)
Judicial Member**

**Sd/-
(Manish Borad)
Accountant Member**

Kolkata, the 23rd day of November, 2022

- Copies to :*
- (1) Harsh Keyal,
Flat No. 10C, 12, Roland Road,
Ballygunge, Kolkata-700020*
 - (2) Income Tax Officer,
Ward-8(3), Kolkata,
Aayakar Bhawan, 5th Floor, Room No. 17,
P-7, Chowringhee Square, Kolkata-700069*
 - (3) Commissioner of Income Tax (Appeals)-15, Kolkata;*
 - (4) Commissioner of Income Tax- , Kolkata;*
 - (5) The Departmental Representative*
 - (6) Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.