

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No.1722/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2017-18)

DY. COMM OF INCOME TAX CENTRAL CIRCLE 5(1) MUMBAI Room NO.1928, 19 th Floor, Air India Bldg. Nariman Point, Mumbai Maharashtra,400021	बनाम/ Vs.	M/s. ARCH PHARMALABS LTD MUMBAI 3 rd Floor, Titanic Bldg, Chandivali Farm Road, Malegaon, Maharashtra 400072
स्थायीलेखासं ./जीआइआरसं ./PAN No AACCM0306Q		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Madhur Agarwal
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri. Manoj Sinha, Sr.AR.
सुनवाईकीतारीख/ Date of Hearing	:	20.10.2022
घोषणाकीतारीख / Date of Pronouncement	:	23.11.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

1. The aforesaid appeal has been filed by the Revenue against order dated 29.14.2022, passed by Ld. CIT (A) 53 Mumbai for the quantum of assessment year passed u/s 143(3) r.w.s 147 / 143(3)

for the AY 2017-2018. In the grounds OF appeal, the Revenue has raised following grounds:-

1. Whether on facts and circumstances of the case and in law, the Ld.CIT(A) erred in quashing the assessment order u/s 147 passed without appreciating the fact that the facts of the present case are different from the AY 2016-17 on which Ld.CIT(A) was relied, as in the present case the notice u/s. 148 of the Act for A.Y 2017-18 was issued before 01.04.2021 and hence the provisions u/s 148A were not applicable.?

2. Whether on facts and circumstances of the case and in law, the Ld.CIT(A) erred in quashing the assessment order u/s.147 by holding that the reopening of assessment proceedings were merely on the basis of information provided by the investigation wing without appreciating that there is nexus between the information available on record and the reasons to believe and the reasons recorded in as much as the shares of Nyssa Corporation Ltd were dealt by Shri Jain as part of penny stock manipulations."?

3. On facts and in circumstances of the case, whether the Ld. CIT(A) erred in deleting the addition of Rs.1,19,37,679/- made u/s. 68 of the Income Tax Act, 1961 being proceeds on sale of the Scrip without appreciating that the statement of various relevant persons admitting that these companies were indulged in giving accommodation entries, abnormal rise in prices over short period, cash trails in the accounts of entry operators etc.

4. *On facts and in circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,19,37,679/-granting relief without considering the ratio laid down in the decisions of Hon'ble Supreme Court in the cases of Sumati Dayal Vs. CIT (1995) 80 Taxman 89 (SC) and Durga Prasad More us. CIT (1971) 82 ITR 540 (SC) that apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities.*

2. The facts in brief are that, the Assessee had filed return of Income declaring 'nil' income on 31.10.2017. During the year the Assessee had shown transaction of sale of one script the details of which is were under:

Sr. No	Script Name	Gross Purchase	Gross Sale	Net Loss
1.	Nyssa Corporation Ltd.	85563939	11916611	-73647328 (Loss)

Thus, assessee had incurred loss on the said transaction and it is matter of record that the said loss was neither adjusted nor set off or carry forwarded to the subsequent year. Further, Net Long Term loss was not set off against any income during the year under

consideration and it has nil tax benefit. Apparently, there was no undue benefit was claimed from the said loss transaction.

3. Its matter of record that during the course of original assessment proceeding u/s 143(3), the aforesaid share transaction was duly inquired upon by the AO and assessee explained before the Assessing Officer with all the relevant details and documents filed vide later dated 04.06.2019. Prior to that, summon under u/s 133(6) was issued from DDIT investigation vide notice dated 23.05.2019 which was duly complied with and thereafter, in the scrutiny proceeding the said transaction was duly accepted and assessment order u/s 143 (3) was passed on 29.06.2019 accepting the genuineness of the transaction and accepting the return income.

4. Thereafter, the notice u/s 148 was issued on 21.04.2021 on the following reasons recorded.

"Information was received from DDIT (Inv.), Unit-7(1), and Unit-7(3), Mumbai about M/s. Arch Pharmalab Ltd., who is engaged into the trading in penny stocks with an intention to record non-genuine LTCG/STCG M/s. Arch Pharmalab Ltd. has availed financial accommodation entries for obtaining bogus long term capital gains on various shares This entry of LTCG is taken by selling the shares

of Naresh Manakchand Jain on the stock exchange and registering the proceeds arising out of the sale of shares into the books as LTCG and for implementing this scheme, shares of some Penny Stock Company are used. The shares of the penny stock company is acquired by the beneficiary of LTCG at very low prices generally through the route of preferential allotment (private placement) or off market transaction and these shares have a lock-in period of 1 year as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 However, to circumvent the provision, the operator usually records a back-date entry of the name of the beneficiaries in the share register of the penny stock company as the entire transaction is off-market. According to the information, the assessee is also one of the beneficiaries of the penny stock during the FY 2016-17 relevant to A.Y 2017-18 and the trade value of such transaction is Rs. 1,19,37,679/-"

5. In response to the notice the Assessee filed return of income on 29.04.2021 declaring nil Income and requested for copy of reasons recorded. Thereafter, the Assessee filed his detail objection before the Assessing Officer against re-opening giving the entire details and facts about the share transaction of the script **Nyssa Corporation Limited**. It was stated that, all the details of the transaction were already verified during the course of the original Assessment Proceedings vide order Dt. 26.06.2019. Thus, all these

documents were available during the course of the original assessment proceedings before the AO. Since during the course of the assessment preceding the claim of the assessee has been accepted by the Ld. AO, therefore, reopening the assessment on the same issue leads to mere "change of opinion". Accordingly, it was stated that all the income were duly reported in the ITR and there is no escapement of any income.

6. However, the Assessing Officer disposed of the objection vide order dated 22.12.2021, rejecting the Assessee's objection and thereafter the Assessing Officer proceeded to examine the details of transaction of the same script and finally made the addition of Rs. 1,19,37,3679/- u/s 68, that is, quantum of net loss incurred on the transaction of the share of Nyssa Corporation Ltd. was added.

7. The Ld. CIT (A) on the issue of validity of re-opening has discussed this issue in the following manner:-

The facts as discussed above narrates that the information was received by the AO from the Investigation Wing that the appellant company was engaged in trading in penny stock with the intention of claiming non-genuine LTCG/STCG. The appellant has taken the entry of LTCG by selling shares of Naresh Manakchand Jain at the Stock Exchange and proceeds from sale of such shares was

booked as LTCG The shares of the penny stock company were acquired by the beneficiary at a very low price through preferential allotment or off-market transaction. The reasons recorded by the AO for reopening of assessment are reproduced as under-

"Information was received from DDIT(Inv) Unit 7(3), Mumbai about M/s. Arch Pharmalab Ltd., who is engaged into the trading in penny stocks with an intention to record non-genuine LTCG/STCG M/s. Arch Pharmalab Ltd. has availed financial accommodation entries for obtaining bogus long term capital gains on various shares. This entry of LTCG is taken by selling the shares of Naresh Manakchand Jain on the stock exchange and registering the proceeds arising out of the sale of shares into the books as LTCG and for implementing this scheme, shares of some penny stock company are used. The shares of the penny stock company is acquired by the beneficiary of LTCG at very low prices generally through the route of preferential allotment (private placement) or off market transaction and these shares have a lock-in period of 1 year as per Securities and Exchange Board of India (issue of Capital and Disclosure Requirements) Regulations, 2009 However, to circumvent the provision, the operator usually records a back-date entry of the name of the beneficiaries in the share register of the penny stock company as the entire transaction is off- market. According to the information, the assessee is also one of beneficiaries of the penny stock during the FY 2015-16 relevant to A Y 2016-17 and the trade value of such transaction is Rs. 13,47,767/- "From perusal of the reasons recorded, it is seen that the AO has stated that the

appellant has sold shares of Naresh Manakchand Jain at the Stock Exchange and the sales proceeds have been claimed as LTCG. It is also mentioned in the reasons recorded by the AO that the shares of Naresh Manakchand Jain were acquired by the appellant through preferential allotment or off-market transaction and the shares were sold within a short period at a high price. The AO further noted in the assessment order that on verification and analysis of the daily trade data of M/s. Nyssa Corporation Ltd. available on the website www.bseindia.com (which is a public domain and can be accessed by anyone), it was observed by the AO that the share price of M/s. Nyssa Corporation Ltd was jacked up 10 times in a short period. It was also observed that in the initial period, the price was determined through one transaction and trading of very few shares. Further, the AO observed that rise of share price was artificially accorded by rigging of share trading by the entry operator and thus, the loss and gain was artificially generated. Therefore, the AO in the re-assessment order u/s 147 has made addition in respect of STCG from sale of shares of M/s. Nyssa Corporation Ltd.

As against the action of the AO, the appellant has submitted that the AO has merely acted upon the information provided by the Investigation Wing. The only information available with the AO at the time of reopening of assessment was that the assessee had made transaction into shares of Naresh Manakchand Jain. However, the AO has made addition in respect of shares of M/s. Nyssa Corporation Ltd. Further, the AO has not stated anything about the nature of the transaction carried out by the appellant in

the reasons accorded for reopening of the assessment. From the reasons recorded by the AO, it is seen that the AO has mentioned about the trading in shares of Naresh Manakchand Jain by the appellant. There is no whisper in the reasons recorded for reopening about trading in the shares of M/s. Nyassa Corporation Ltd. The AO has reopened the assessment in respect of the transaction of trading of shares of Naresh Manakchand Jain and the addition has been made in respect of trading in shares of M/s Nyssa Corporation Ltd. The AO has also not brought on record anything about the link or relation between Naresh Manakchand Jain and M/s. Nyssa Corporation Ltd. Thus, at the time of reopening of the assessment, the AO has not applied his mind independently and merely acted upon the information received from the Investigation Wing. Further, in case of the appellant, the order u/s. 143(3) for AY 2016-17 was passed on 24.04.2018. During the 143(3) proceedings, the AO had issued notice u/s 142(1) on 11.04.2018, in which vide Point No. 9, the AO had asked for details of purchases and sale of shares. Copies of demat account, working of STCG/LTCG, mode of acquisition of shares. Mode of payment, details of bonus/split shares, broker statements and bank statements etc. In response to that the appellant vide letter dated 23.03.2018 had submitted requisite details which included complete details of STCG in respect of sale of shares of M/s. Nyssa Corporation Ltd and Swarna Sarita Gems and LTCG in respect of Avon Organics Ltd. However, no addition has been made in respect of STCG claim made by the appellant in respect of sale of shares of M/s Nyssa Corporation Ltd. Thus, the issue related to the capital

gain was examined by the AO during the original assessment proceedings u/s. 143(3) of the Act. The appellant has also submitted that the notice u/s 148 was issued on 21.04.2021 and thus, it was issued after 31.03.2021. Therefore, the AC was to follow the new procedure for reopening of the assessment as provided u/s. 148 and 148A of the Act. No enquiry has been conducted by the AO as prescribed u/s. 148A of the Act and also the reopening of the assessment has been done beyond 3 years.

8. Thereafter, Ld. CIT(A) after referring to various judgments, held that re-opening is bad in law and he quashed the Assessment order passed u/s 147.

9. During the course of the hearing before us, we have asked the Ld. DR to get clarification from the Assessing Officer. The relevant order sheet entry dated 4th Oct 2022 reads as under;

“Ld. Counsel of the assessee pointed out that in the "reasons recorded" there is no mention about any scrip of which assessee has dealt for alleged LTCG/STCG. Intact assessee has incurred long term capital loss on sale of 'Nyssa Corporation. Ltd' which is not mention in the reasons recorded and also assessee has not claimed any set off of this loss at any point of time. Reasons recorded and finding given in the assessment order is entirely different. The Ld. DR sought time for clarification from A.O. on this point. List the matter for further hearing on 20.10.2022 as part-heard at 2:30 p.m.”

10. On 28th October, the Ld DR after verifying the assessment records submitted that the 'reasons recorded' was entirely on different information and script which is different from the addition made by the Assessing Officer in his order.

11. We have heard the rival contention and also perused the relevant material placed on record on the issue of validity of re-opening. From the bare perusal of the reasons recorded it is seen that the Assessing Officer has noted in the reasons recorded that assessee has taken accommodation entry of LTCG by selling shares of "**Naresh Manakchand Jain**" at the Stock Exchange and proceeds from sale of such shares was booked as long term capital gain. He observed that it was a penny stock company, therefore, the share were acquired to take benefit of LTCG by buying at a very low price and then, selling it at a very higher price. The entire presumption and the basis on which Assessing Officer has recorded the reasons are wholly divorced from the facts and material on record and has entertained his reasons to believe on incorrect facts and information which is evident from the reasons recorded. First of all, the Assessee has not undertaken any transaction of purchase sale and

shares of **Naresh Manakchand Jain** nor has declared any long term capital gain. The Assessee had undertaken transaction in the script of **Nyssa Corporation Ltd.** in which it has incurred loss of Rs.7,36,47,328/- and has shown sale of Rs. 1,19,60,611/- as against the purchase value of Rs. 8,55,63939/-. As stated above, the Assessee has neither set-off this net long term capital loss against any income during the year nor has adjusted this loss to be carry forwarded to subsequent years. There was no tax benefit as such to the Assessee from this transaction as has been falsely tried to be implicated by the AO. Thus, there is no co-relation between the material discussed in the reasons recorded and the material on record as well as the addition made in the assessment order.

12. Another important fact, as discussed by the Ld. CIT (A) also that, earlier the same very transaction was duly inquired upon by the Assessing Officer and Assessee had submitted all the details and explanation which has been accepted under scrutiny proceeding u/s 143(3). If the Assessment has been completed u/s 143(3) after detail scrutiny and enquiry on a particular issue, then re-opening u/s 147 on same very issue cannot be made without any tangible material coming on record having live link nexus with the

income escaping assessment. The entire substratum and premise of the AO was wrong and the material and information as discussed in the reasons recorded have no link with assessee and has nothing to do with the any transaction undertaken by the Assessee. This shows complete lack of application of mind by the Assessing Officer. There is not even whisper in the reasons recorded about dealing in shares of Nyssa Corporation Ltd. or the Assessee had taken any accommodation entry on this script. The Assessing Officer is referring to altogether different script which has not been undertaken by the Assessee at all. Now, with the clarification by the DR from the records, it is seen that there are no other reasons recorded and Assessing Officer has wrongly assumed Jurisdiction on a wrong assumption of facts. Accordingly, the aforesaid observation and finding of the Ld CIT (A) is correct and the same is affirmed and we hold that the reasons recorded by the Assessing Officer are not in accordance with the law and therefore the entire proceedings u/s has rightly been quashed by the Ld. CIT (A).

13. In the result of the Revenue Appeal is **dismissed**.

Orders pronounced in the open court on 23rd, Nov., 2022.

Sd/-

(S Rifaur Rahman)

Accountant Member

Sd/-

(Amit Shukla)

Judicial Member

मुंबई Mumbai; दिनांक Dated : 23.11.2022

Urmila.

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

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आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai