

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'SMC' BENCH
MUMBAI**

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

**ITA No.736/Mum/2022
(Assessment Year :2015-16)**

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| SHRI PRAVIN C. BOKADIA 77DR. Mahimtura Marge, 3 rd Kumbharwada, Near CP Tank, Mumbai, Maharashtra 400004 | Vs. | THE INCOME TAX OFFICER, WARD- 19(2)(5) MUMBAI. Matru Mandir, Room No.210, Tardeo Road, Mumbai Maharashtra 400007 |
| PAN/GIR No. AAQPB4778E | | |
| (Appellant) | .. | (Respondent) |

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|------------------------------|----------------------------------|
| Assessee by | Shri. Akash Kumar & Poojan Mehta |
| Revenue by | Shri. Pratap Sharma |
| Date of Hearing | 27/10/2022 |
| Date of Pronouncement | 13 /12/2022 |

ORDER

PER M.BALAGANESH (A.M.) :

1.This appeal in ITA No. 736/Mum/2022 preferred by the assessee arises out of order passed by the Learned Commissioner of Income Tax (Appeals) 49,

Mumbai, [hereinafter referred to as Id. CIT(A)] in Appeal No. ITBA/APL/S/250/2021-22/1041439146(1) dated 24.03.2022 against the order passed by the Income Tax Officer, Ward- 19(2)(5), Mumbai [hereinafter referred to as Id. AO] under section (u/s) 143(3) of the Income Tax Act [hereinafter referred to as the 'Act'] on 18.12.2017 for the Assessment Year (A.Y.) 2015-16.

2. Though the assessee has raised several grounds before us, I find that the effective issue to be issued in this appeal is as to whether the Id. CIT(A) was justified in confirming the action of the Id.AO in denying the exemption claimed u/s 10(38) of the Act in respect of long term capital gain derived from sale of shares of Lifeline Drugs and Pharma Ltd, in the facts and circumstances of the case.

3. I have heard the rival submissions and perused the materials available on record. The assessee is an individual deriving income from business, income from capital gains and income from other sources. The assessee is engaged in the business of Ferrous and Non-Ferrous metals under the trade name of M/s Champak Steel & Engineering as proprietor. The assessee is a regular investor in shares and had during the year made investment in shares of various companies during the year. He had filed his return of income for the Asst Year 2015-16 on 28/09/2015 declaring total income of Rs 6,85,440/-. In the said return, the assessee claimed exemption u/s 10(38) of the Act in respect of long term capital gain derived from sale of shares of Lifeline Drugs and Pharma Ltd. The said return was duly processed u/s 143(1) of the Act. The claim of exemption u/s 10(38) of the Act on sale of shares of Lifeline Drugs and Pharma Ltd was sought to be examined by the Id. AO in the course of assessment proceedings. The assessee submitted that he was allotted 6000 shares of Lifeline Drugs & Pharma Ltd by way of private placement of face value of Rs 10 per share at a premium of Rs 133 per share on 25/10/2013 as

per the allotment advice issued by the company. Subsequently these shares have been split into Re 1 on 19/11/2013 and hence the number of shares got converted to 60000 shares. It is not in dispute that the purchase of these shares were met out of accounted sources of the assessee and shares were duly dematted in the demat account maintained by the assessee. The said shares were held by the assessee for a period of one year by the assessee. Out of 60000 shares held by the assessee, the assessee sold 15200 shares in November and December 2014 in 5 tranches relevant to Asst Year 2015-16 at various rates for total amount of Rs 41,08,445/-. The assessee retained the remaining 44800 shares with him as on date. The assessee furnished the following documents in support of his contentions before the lower authorities :-

- a) Copy of bank statement for the Financial Year 2013-14 in support of payment made for shares purchased by the assessee.
- b) Demat account with FRR Shares and Securities Ltd.
- c) Copy of bank statement for the financial year 2014-15 in support of sale consideration of shares.
- d) Copy of contract note cum bill for sale of shares of Lifeline Drugs & Pharma Ltd.
- e) Copy of allotment letter of shares
- f) Details of long term capital gains on sale of 15200 shares of Lifeline Drugs & Pharma Ltd.

4. The Id. AO had relied on the findings of the investigation wing of Kolkata which are outlined in pages 8 to 12 of his assessment order. The main grievance of the Id. AO is that financials of the company were very poor during the relevant period ; that the company was not engaged in any substantial activities ; that the company was not having any future plans which could attract investors ; that the funds which had been raised through preferential allotment had not been used for any business expansion but were

used to advance loans and make investments ; that the whole process of preferential allotment was pre-arranged and a managed process, whereby preferential shares had been allotted to beneficiaries to enable them to book bogus capital gains on sale of shares ; rise in share price of Lifeline Drugs and Pharma Ltd is devoid of commercial principle or market factors ; that transactions are based on mutual connivance on part of assessee and operators ; that various exit providers had confirmed that they had purchased the shares of the above company for claiming bogus capital gains ; that SEBI also passed an order holding that share prices were determined artificially by manipulations ; that assessee had failed to discharge his onus cast on him ; that net worth of Lifeline Drugs and Pharma Ltd is negligible and that its share prices were artificially rigged ; that investigations prove that cash is routed through various accounts to provide these bogus long term capital gain entries. The Id. AO by making these observations proceeded to treat the sale proceeds of the shares as unexplained cash credit u/s 68 of the Act.

5. The assessee also submitted before the Id. CIT(A) that the Id. AO had given price and volume movement of shares from 01/09.2010 to 31/07/2015 in graphical form and drawn an inference that this could be only possible if the sellers and exit providers were hand in glove with each other and claimed that shares of Shree Shaleen Textiles Ltd have been used for providing entry of bogus LTCG / STCG. The assessee had objected to this as to how the name of Shree Shaleen Textiles Ltd is observed by the Id. AO which is not at all connected with the assessee herein and more so when the assessee had not even dealt with the shares of Shree Shaleen Textiles Ltd. The assessee also submitted that the Id. AO issued a show cause notice dated 12/12/2017 to the assessee as to why the sale proceeds of shares be not treated as unexplained cash credit u/s 68 of the Act. The assessee was given time to reply to the said show cause notice on or before 20/12/2017, whereas the assessment order was passed by the Id. AO on 18/12/2017 itself. This goes to prove that

the Id. AO had made up his mind to frame the addition in one way or other completely ignoring the various factual and legal contentions of the assessee. Yet another factual mistake committed by the Id. AO which was pointed out by the assessee before the Id. CIT(A) was that the Id. AO observed that the assessee had purchased shares on 03/04/2012 whereas the shares were purchased only on 25/10/2013. The Id. AO observed that assessee had purchased shares of Lifeline Drugs & Pharma Ltd for Rs 29,441/- and sold the same for Rs 51,86,621/-. Both these figures are factually incorrect. The cost of 15200 shares for the assessee was Rs 2,17,360/ and sale price was Rs 41,08,445/-. I find that each and every averments of the Id. AO were duly met by the assessee before the Id. CIT(A) in his written submissions filed before the Id. CIT(A). However, the Id. CIT(A) upheld the action of the Id. AO.

6. At the outset, I find that the documentary evidences submitted by the assessee were found to be genuine and no adverse inferences were drawn by the revenue on the same. The transactions were carried out by the assessee in the secondary market through a registered share broker at the prevailing market prices. Payments were received by the assessee by account payee cheques from the stock exchange through the registered broker. Amounts received on sale of shares were duly subjected to levy of Securities Transaction Tax (STT) at the applicable rates.

6.1. I find that no enquiries were carried out by the revenue either on the broker or with the stock exchange with regard to transactions carried out by the assessee. The revenue had merely relied on the Kolkata investigation report without linking the assessee with the various allegations leveled in the said investigation report.

6.2. I find that the revenue had not proved with any cogent evidence on record that assessee was involved in converting his unaccounted income into

exempt long term capital gains by conniving with the so called entry operators, promoters of Lifeline Drugs and Pharma Ltd and brokers who were involved in artificial price rigging of shares. No evidence is brought on record to prove that assessee was directly involved in price manipulation of the shares dealt by him in connivance with the brokers and entry operators.

6.3. It is not in dispute that the assessee had made purchase of shares by way of preferential allotment by the company for Rs 143 per share comprising of face value of Rs 10 and premium of Rs 133 per share. The entire allotment advice issued by the company to the assessee for allotment of shares proves the fact. Now the next issue that arises for my consideration is as to whether the shares that were allotted to an assessee by way of preferential allotment could be taken as a ground to declare the entire transaction as sham. In my considered opinion, the transactions could not be treated as sham merely because they are allotted to an assessee by way of preferential allotment, if the assessee had discharged his onus of proving the fact that shares purchased by him were dematerialized in the Demat account and held by the assessee till the same were sold from the Demat account of the assessee. The transaction of holding the shares are reflected in Demat account and sale of shares are through Demat account. More so , when there is no dispute regarding the purchase price of shares. The sale price of shares is determined by the market forces as the shares are sold in the open market through a registered stock broker in the recognized stock exchange after suffering STT. Our view is further fortified by the decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Jamnadevi Agarwal reported in 328 ITR 656 (Bom)*.

6.4. I find that independent enquiries were conducted by Securities and Exchange Board of India (SEBI in short) and SEBI had passed a separate order in respect of the said scrip in which assessee had dealt. In the said order, SEBI had listed out the names and PAN of various persons who were

involved in artificial price rigging of shares and the list of beneficiaries. The assessee's name or the broker through whom the assessee bought and sold the shares does not figure in the said list in the order of SEBI. Hence even SEBI does not allege any involvement of the assessee herein with the manipulation of share prices.

6.5.I find that the assessee had held the shares in the instant case for more than one year and then sold the shares in the open market at prevailing market prices. The assessee bought the shares on 25/10/2013, which falls in the investigation period carried out by SEBI as admittedly SEBI carried out investigation of this scrip for the period 10/01/2013 to 30/05/2015. The effective purchase price of shares for the assessee is Rs 14.30. Infact on perusal of the order of SEBI dated 18/07/2019, I find that the assessee had sold the shares during the period November and December 2014 wherein the average closing price of shares of Lifeline Drugs and Pharma Ltd was Rs 283 per share. Infact the same shares had gone upwards to Rs 584.35 per share as on 13/11/2013. These facts are reflected in page 18 of SEBI order dated 18/07/2019. Hence when the assessee entered this scrip, it was priced high and later the prices started falling and accordingly the assessee chose to sell the shares at an average price of Rs 270 per share. Since the price at one point in time reached the peak of Rs 584.35 per share, the assessee chose to retain 44800 shares with him with an aim to achieve greater profits in future. The demat statement of the assessee maintained with FRR Shares and Securities Ltd was filed by the Id. AR for the period 14/09/2013 to 19/07/2022 as directed by me during the course of hearing. From the said demat statement, I find that the assessee is holding 44800 shares of Lifeline Drugs & Pharma Ltd even as on 19/07/2022. This is a very crucial evidence to prove the intention of the assessee that he had entered this scrip only as a gullible investor and had eventually made huge profits due to market factors and had

also retained substantial portion of the shares still with him in order to make profits in future.

6.6. I further find that from page 9 to 11 of the SEBI order, there is a categorical finding that 5 persons were involved in price manipulation. The operative portion of the findings of SEBI order in paragraphs 27 to 29 are reproduced hereunder:-

27. In view of the above, I note that by indulging in trades that resulted in manipulation of the price of the scrip and by indulging in a trading pattern which created misleading appearance of trading in the scrip, Noticee no. 1 to 5 namely, 1) Mr. Anil Vishnu Bharti, 2) Mr. Pratik Jain, 3) Mr. Rajesh Jayantilal Savadia, 4) Ms. Akshata Majgoankar and 5) Mr. Narendra Kripashankar Mishra have violated Regulation 3 (a), (b), (c), (d) and Regulation 4(1), 4(2)(a), (e) of SEBI (PFUTP) Regulations, 2003 and, hence, in view of the above, I find the Noticees to be guilty of violating 3(a), (b), (c), (d) and Regulation 4(1), 4(2)(a) & 4(2)(e) of SEBI (PFUTP) Regulations, 2003.

ORDER & DIRECTIONS

28. I, in exercise of the powers conferred upon me under section 19 read with section 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992, hereby restrain the following Noticees from accessing the securities market and further prohibit them from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of six months, from the date of this order. During the period of restraint, the existing holding including units of mutual funds, of the Noticees shall remain frozen.

| Noticee No. | Name of the Noticees | PAN |
|--------------------|----------------------------------|------------|
| 1 | Mr. Anil Vishnu Bharti | AHWPB8347C |
| 2 | Mr. Pratik Jain | AMCPJ6859L |
| 3 | Mr. Rajesh Jayantilal Savadia | AAVPS3632H |
| 4 | Ms. Akshata Majgoankar | ASMPM0261B |
| 5 | Mr. Narendra Kripashankar Mishra | ANLPM9657K |

29. This order shall come into force with immediate effect.

6.7. From the above order of SEBI, it is very clear that SEBI, based on its investigations and replies given by various parties, had ordered to take action against certain parties on the ground that they are involved in the price

manipulation. In any case, the assessee's name or the broker, through whom assessee transacted had not figured in the said list. Hence it could be safely concluded that the assessee herein is merely a gullible investor, who had resorted to make investment in the shares of Lifeline Drugs and Pharma Ltd based on market information and had sold the shares in the secondary market in prevailing market prices. It is not the case of the revenue that assessee herein had directly sold the shares in the secondary market with clear knowledge of the name of the person to whom the said shares were sold. In secondary market transactions, the buyer and seller are not supposed to know each other unless it is a case of 'block deals'. Same is the case of the assessee herein. Admittedly, the assessee's case does not fall under the category of 'block deals'.

6.8. Hence the entire addition has been made merely by placing reliance on the Kolkata Investigation Wing report which are more general in nature and does not implicate the assessee herein in any manner whatsoever. I am unable to persuade myself to accept to the contentions of the Id. DR that Kolkata Investigation Wing had conducted a detailed enquiry with regard to the scrip dealt by the assessee herein and hence whomsoever had dealt in this scrip, would only result in bogus claim of long term capital gain exemption or bogus claim of short term capital loss. Merely because a particular scrip is identified as a penny stock by the income tax department, it does not mean all the transactions carried out in that scrip would be bogus. So many investors enter the capital market just to make it a chance by investing their surplus monies. They also end up with making investment in certain scrips (read penny stocks) based on market information and try to exit at an appropriate time the moment they make their profits. In this process, they also burn their fingers by incurring huge losses without knowing the fact that the particular scrip invested is operated by certain interested parties with an ulterior motive and once their motives are achieved, the price falls like

pack of cards and eventually make the gullible investors incur huge losses. In this background, the only logical recourse would be to place reliance on the orders passed by SEBI pointing out the malpractices by certain parties and taking action against them. Since assessee or his broker is not one of the parties who had been proceeded against by SEBI, the transaction carried out by the assessee cannot be termed as bogus.

6.9. I hold that the entire addition has been made based on mere surmise, suspicion and conjecture and by making baseless allegations against the assessee herein. Now another issue that arises is as to whether the Id. AO merely on the basis of Kolkata investigation wing report could come to a conclusion that the transactions carried out by the assessee as bogus. In my considered opinion, the Id. AO is expected to conduct independent verification of the matter before reaching to the conclusion that the transactions of the assessee are bogus. More importantly, it is bounden duty of the Id. AO to prove that the evidences furnished by the assessee to support the purchase and sale of shares as bogus. This view of mine is further fortified by the decision of *Hon'ble Delhi High Court in the case of PCIT vs Laxman Industrial Resources Ltd in ITA No. 169/2017 dated 14/03/2017*. It is well settled that the suspicion however strong could not partake the character of legal evidence. Hence the greater onus is casted on the revenue to corroborate the impugned addition by controverting the documentary evidences furnished by the assessee and by bringing on record cogent material to sustain the addition. No evidence has been brought on record to establish any link between the assessee herein either with the directors of Lifeline Drugs and Pharma Ltd or any other person named in the assessment order or in the SEBI order, as being involved in any price rigging or the exit provider. This onus is admittedly not discharged by the revenue in the instant case.

6.10. I find that the *Co-ordinate Bench of this Tribunal in the case of Mukesh Ratilal Marolia vs Additional CIT reported in 6 SOT 247 (Mum ITAT) dated 15/12/2005* had held that personal knowledge and excitement on events should not lead the Id. AO to a state of affairs where salient evidences are overlooked. When every transaction has been accounted, documented and supported, it would be very difficult to brush aside the contentions of the assessee that he had purchased shares and had sold shares and ultimately purchased a flat utilizing the sale proceeds of those shares and therefore, the co-ordinate bench chose to delete the impugned additions. I find that this tribunal decision was approved by the *Hon'ble Jurisdictional High Court in ITA No. 456 of 2007 dated 07/09/2011. It is pertinent to note that the Special Leave Petition preferred by the Revenue against this decision before the Hon'ble Supreme Court has been dismissed vide SLP No. 20146 of 2012 dated 27/01/2014.*

6.11. Further I find that the *Hon'ble Jurisdictional High Court in the case of CIT vs Shyam S Pawar reported in 54 taxmann.com 108 (Bom)*, it was held that where Demat account and contract note showed details of share transaction and the Id.AO had not proved the said transaction as bogus, the long term capital gain earned on said transaction could not be treated as unaccounted income u/s 68 of the Act. The relevant operative portion of the said judgement is reproduced below:-

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny. It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of

these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The

relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.

6.12. Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, I am not inclined to accept to the stand of the Id. CIT(A) in sustaining the impugned addition on account of denial of exemption for long term capital gains u/s 10(38) of the Act. Accordingly, the grounds raised by the assessee are allowed.

7. In the result , the appeal of the assessee is allowed.

Order pronounced on 13/12/2022 by way of proper mentioning in the notice board.

Sd/-

(M.BALAGANESH)

ACCOUNTANT MEMBER

Mumbai; Dated 13/12/2022

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.

4. CIT
5. DR, ITAT, Mumbai
6. Guard file

//True Copy//

BY ORDER,

(Asstt. Registrar)

ITAT, Mumbai