

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

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1780/Mum/2022
(Assessment Year :2014-15)**

SANKET SHAIENDRA MODY 8/A, Navjeevan Patel, Compound, 20 Nepean Sea Road, Mumbai, Maharashtra 400006	Vs.	INCOME TAX OFFICER 19(3) (2) MUMBAI. Mumbai, Maharashtra 400007
PAN/GIR No. AGIPM9686N		
(Appellant)	..	(Respondent)

Assessee by	Shri. Mohan Tandan
Revenue by	Shri. Sambhu Yadav -Sr.DR
Date of Hearing	08/12/2022
Date of Pronouncement	13/12/2022

ORDER

PER M.BALAGANESH (A.M.):

1.This appeal in ITA No. 1780/Mum/2022 preferred by the assessee arises out of order passed by the Learned Commissioner of Income Tax (Appeals) National Faceless Appeal Centre [hereinafter referred to as Id. CIT(A) NFAC] in Appeal No. ITBA/NFAC/S/250/2022-23/1043032442(1) dated 13.05.2022

against the order passed by the learned Income Tax Officer -19(3)(2), 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 27.12.2017 for the Assessment Year (A.Y.) 2014-15.

2. Though the assessee has raised several grounds before us, we 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 Sunrise Asian Ltd, in the facts and circumstances of the case. The inter connected issue involved therein is whether the Id. CIT(A) NFAC was justified in confirming the addition @ 2% of transaction amount of long term capital gain as unexplained expenditure u/s 69C of the Act in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. The assessee is an individual and is a partner in a partnership firm M/s Diashine Exports. The assessee has been investing in shares and mutual funds for a long time. He had filed his return of income for the Asst Year 2014-15 on 15/09/2014 declaring total income of Rs 13,49,500/-. 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 Sunrise Asian Ltd. The said return was duly processed u/s 143(1) of the Act. This was later sought to be reopened u/s 147 of the Act on the ground that the claim of exemption u/s 10(38) of the Act claimed by the assessee was on account of penny stock shares dealt by assessee which was held to be bogus as per the investigation report of Kolkata Income Tax Department. The validity of reopening of assessment is not in challenge before us. The claim of exemption u/s 10(38) of the Act on sale of shares of Sunrise Asian Limited was sought to be examined by the Id. AO in the course of re-assessment proceedings. The assessee submitted that he purchased 5000 shares of Sunrise Asian Ltd on

18/03/2011 @ Rs 20 per share for Rs 1,00,000/-. 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 more than 2 years by the assessee and sold for Rs 445 per share in Asst Year 2014-15 for an amount of Rs 22,24,286/-. The assessee furnished the following documents in support of his contentions before the lower authorities :-

Date	Event	Supporting Documents	Submitted Before AO during Assessment Proceeding
18.03.2011	Appellant purchased shares of sunrise Asian Ltd from Shipra Fabrics Private Ltd being an off market purchase in physical form	Debit note issued by Shipra Fabrics P Ltd. Dated 18 th March 2011	Yes on 9 th October 2017
18.03.2011	Cheque No 689555 drawn on HDFC Bank Favoring Shipra Fabrics Ltd. cleared by bankers on 19.03.2011	Copy of bank statement for the relevant transaction	Yes on 9 th October 2017
19.03.2011	Receipt issued by Shipra Fabrics Ltd. for consideration of 100000/-	Copy of Receipt	Yes on 9 th October 2017
11.09.2012	Physical Shares Credited to Demat Account of Appellant with HDFC Bank	Copy of Demat Statement for the period 01.04.2012 to 31.03.2013	Yes on 9 th October 2017
13.05.2013 to 16.05.2013	Sale of 5000 shares of Sunrise Asian Ltd on BSE platform through Fortune Equity Brokers(India) Ltd.	Copies of contract notes for sale of 5000 shares issued by Fortune Equity Brokers(India) Ltd.	Yes on 9 th October 2017
06.05.2013	Transfer of share of Sunrise Asian from HDFC demat account with Intime Equities Ltd.	Statement of Demat Account with Intime Equities Ltd. from 01.01.2011 to 31.03.2014 including the holding statement as on 31.03.2014	Yes on 9 th October 2017
15.05.2013	Debit entries of 5000 shares of Sunrise Asian Ltd.	Statement of Demat Account with Intime Equities Ltd from 01.01.2010 to 31.03.2014 including the holding statement as on 31.03.2014	Yes on 9 th October 2017
21.05.2013	Receipt of Sale Proceeds	Copy of bank statement with	Yes on 4 th December 2017

	from Fortune Equity Brokers (India) Ltd.	HDFC bank showing the receipt on	
21.05.213	Conformation of amount received on sale of shares from Fortune Equity Brokers India Ltd.	Copy of Ledger Account with Fortune Equity Brokers (India) Ltd. for the period of 01.04.2013 to 31.03.2014	Yes on 4 th December 2017

4. The Id. AO had relied on the findings of the investigation wing of Kolkata which are outlined in para 6 of his assessment order. The main grievance of the Id. AO is that rise in share price of Sunrise Asian Ltd is devoid of commercial principle or market factors ; that transactions are based on mutual connivance on part of assessee and operators ; that assessee resorted to preconceived scheme to procure bogus long term capital gains and hence the transactions are not bonafide ; that SEBI also passed an order holding that share prices were determined artificially by manipulations ; that these are close circuit transactions and are pre-structured; that assessee had failed to discharge his onus cast on him ; that net worth of Sunrise Asian 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. Since the receipt of sale proceeds was treated as bogus, the Id. AO also proceeded to add estimated commission @ 2% for arranging the said bogus transaction as unexplained expenditure u/s 69C of the Act.

5. We find that each and every averment 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). The Id. CIT(A) upheld the action of the Id. AO.

6. At the outset, we 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. We 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. We 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 Sunrise Asian 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 in off-market. Now the next issue that arises for our consideration is as to whether an off market purchase of shares could be taken as a ground to declare the entire transaction as sham. In our considered opinion, the transactions could not be treated as sham merely because they are done in off-market, 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 and sale price of shares. 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. We 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. We find that the assessee had held the shares in the instant case for more than two years and then sold the shares in the open market at prevailing market prices. The assessee bought the shares on 18/03/2011, which was prior to the investigation period carried out by SEBI as admittedly SEBI carried out investigation of this scrip for the period 16/10/2012 to 30/09/2015. Infact on perusal of the order of SEBI dated 06/09/2021, we find that the assessee had sold the shares during the period 16/10/2012 to 28/06/2013 wherein the average closing price of shares of Sunrise Asian Ltd was Rs 502.45 per share. Thereafter, the same shares had gone upwards to Rs 603.25 per share and later came down to Rs 88.80 per share. These facts are reflected in page 4 of SEBI order dated 06/09/2021. We further find that from page 40 of the SEBI order, there is a categorical finding that 46 persons were involved in price manipulation and the relevant findings of SEBI order are reproduced hereunder:-

7.10. The role played by the Noticees at Sr.No. 1 to 46 of the above table to artificially increase the price during Patch 1 needs to be seen holistically, more particularly, when all of them have followed a common, uniform but unique trading strategy to buy and sell their shares only to manipulate the market price of the scrip which they did accomplish by cumulatively contributing to the LTP of the scrip during the aforesaid period of Patch 1.

The said trading behavior of the Noticees gravely affected the normal price discovery mechanism in the securities market and resulted in the disruption of market equilibrium and integrity.

7.11. In case of market manipulation, where direct evidence may not be available, transactions as indicated above are to be tested for any manipulative intent on the basis of conduct of parties and abnormality of practices. In other words, the requirement is for proving that in a factual matrix, preponderance of probabilities indicate a fraud. In this regard, the observations of Hon'ble Supreme Court of India in SEBI vs Kishore R Ajmera (2016) 6 SCC 368 – Judgement dated February 23, 2016, are referred to , wherein it had observed: “It is a fundamental principle of law that proof of an allegation leveled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and leveled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges / allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable / prudent man would adopt to arrive at a conclusion....” In the instant proceedings, the pattern of trading by the entities listed at Sr.no. 1-46 of Table VII in the scrip of Sunrise Asian coupled with the inter se connection amongst themselves and with the Company, based on the preponderance of probability, leads me to conclude that the trades executed in said scrip were manipulative in nature.

7.12. In view of the significant positive LTP contribution by the group of connected entities (listed in Table VII) by trading amongst themselves, it is concluded that connected entities had not acted as genuine buyers (Sr. No. 1-33) or sellers (Sr.No. 34-46) and had no bona fide intention to buy/sell the shares of Sunrise Asian. Rather, the orders placed by them were laden with all the ingredients to be held as unfair and misleading, which in turn resulted in price manipulation of the scrip by contributing to the price rise, in violation of Regulations 3(a)-(d) and Regulations 4(1) 4(2)(a), (e) of PFUTP Regulations, 2003.

8. I, in exercise of the powers conferred upon me under Sections 11(1), 11(4) and Section 11B of the SEBI Act, hereby direct as under:

8.1. The following Noticees/ entities shall not access the securities market or buy , sell or otherwise deal in the securities market, either directly or indirectly, or be associated with the securities market in any manner whatsoever, for a period of one year from the date of this Order:

<u>Sl. No.</u>	<u>Noticee</u>
1	Sunrise Asian Ltd
2	Arunesh (Whole Time Director)
3	Nitesh Ranjan (Whole Time Director)

- 4 Sanjit Jha (Whole Time Director)
5 Sanjiv Kumar Mishra (Whole Time Director)
6 Mahesh Keshar Deo Joshi (Whole Time Director)

8.2. *The following Noticees/entities shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly or indirectly, or be associated with the securities market in any manner whatsoever, for a period of six months from the date of this Order:*

79 persons names were mentioned in this list in SEBI order

8.3. *This Order shall come into force with immediate effect. The obligation of the Noticees debarred in the present Order, in respect of settlement of securities, if any, purchased or sold in the cash segment of the recognized stock exchange(s) , as existing on the date of this Order, can take place irrespective of the restraint/prohibition imposed by this Order, only in respect of pending unsettled transactions, if any. Further , all open positions, if any, of the Noticees debarred in the present Order, in the F&O segment of the Stock Exchanges, are permitted to be squared off, irrespective of the restraint/prohibition imposed by this Order.*

8.4. *The instant proceedings initiated against Noticee nos. 50,69 and 70 i.e. Ramesh Gopaldas Kataria, Ramesh G.Kataria HUF and Sarojini Ramesh Kataria, vide the SCN dated July 17, 2017, shall stand abated in view of the observations at paragraph 5.3.*

8.5. *The instant proceedings initiated against Noticee no. 87 i.e. DCB Plus N Holdings LLP, vide the SCN dated July 17, 2017 , stand disposed of in view of the Settlement Order dated January 21, 2021.*

6.6. From the above order of SEBI , it is very clear that SEBI, based on its investigations and replies given by various parties, had ordered either to take action against certain parties or had discharged certain parties on the ground that they are not 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 either in the restraint list or in the discharged 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 Sunrise Asian Limited 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'.

6.7. 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. We are unable to persuade ourselves 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.

6.8. We 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 our 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 ours 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 and the directors of Sunrise Asian Limited or any other person named in the assessment order being involved in any price rigging and also the exit provider. This onus is admittedly not discharged by the revenue in the instant case.

6.9. We 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. We 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.

6.10. Further we 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.

6.11. Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, we are not inclined to accept to the stand of the Id. CIT(A) in sustaining the impugned additions on account of denial of exemption for long term capital gains u/s 10(38) of the Act and estimated commission @ 2% against the same. 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/-

(ABY T VARKEY)**JUDICIAL MEMBER**

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

BY ORDER,

//True Copy//

(Asstt.
Registrar)**ITAT, Mumbai**