

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

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

**ITA No.646/Mum/2021
(Assessment Year : 2013-14)**

SHASHI AGARWAL 201 Ugam, NS Road.9, JVPD Scheme Juhu, Villeparle- West Mumbai, Maharashtra 400049	Vs.	DY. COMMISSIONER OF INCOME TAX, CENTRAL RANGE-7 (3), MUMBAI Room No. 655, 6 th Floor, Ayakar Bhavan, M.K.Road, Church gate, Mumbai 400020
PAN/GIR No AAWPA9455B		
(Appellant)	..	(Respondent)

**(ITA No.647/Mum/2021)
(Assessment Year : 2013-14)**

ASHOK KUMAR AGARWAL & SONS(HUF) 201 Ugam, NS Road No.9. JVPD Scheme Juhu, Villeparle- West Mumbai 400049	Vs.	Dy COMMISSIONER OF INCOME TAX, CENTRAL RANGE-7(3), Room No. 655, 6 th Floor, Ayakar Bhavan, M.K. Road, Church Gate, Mumbai 400 020
PAN/GIR No. AABHA7916E		
(Appellant)	..	(Respondent)

Revenue by	Shri. Vaibhav Jain
Assessee by	Shri. Rushabh Mehta

Date of Hearing	13/12/2022
Date of Pronouncement	14/12/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M):

These appeals in ITA Nos. 646/Mum/2021 & 647/Mum/2021 for A.Ys. 2013-14 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-49, Mumbai dated 29/01/2021 & 10.02.2021, respectively (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 27.12.2017 by the Id. Dy. Commissioner of Income Tax, Central Circle 7(3) Mumbai (hereinafter referred to as Id. AO).

2. Identical issue is involved in both these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience. Both the parties before us mutually agreed that the appeal in the case of Shashi Agarwal in ITA No. 646/Mum/2021 be taken as the lead case and the decision rendered thereon would apply with equal force for the appeal in ITA No. 647/Mum/2021 also in view of identical facts, except with variance in figures.

3. The first issue raised by the assessee before us is challenging the validity of re-assessment proceedings u/s 147 of the Act.

3.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had filed her return of income for the Asst Year 2013-14 on 11/12/2013 declaring total income of Rs 9,60,280/-. The return of income was duly processed u/s 143(1) of the Act accepting the returned income. Subsequently this case was sought to be reopened by issue

of notice u/s 148 of the Act on 31/05/2016 after recording of reasons by the Id. AO. The assessee filed a letter dated 08/06/2016 filed on 10/06/2016 stating that the original return filed on 11/12/2013 may be treated as a return in response to notice u/s 148 of the Act and requested the Id. AO to provide the copy of reasons recorded for reopening the assessment. The copy of reasons recorded was communicated to the assessee on 26/08/2016. The assessee filed objections to the reasons recorded vide her letter dated 17/08/2016. The Id. AO disposed of the objections by way of a separate speaking order vide letter dated 04/09/2017. Thereafter notice u/s 143(2) and 142(1) of the Act had been issued by the Id. AO and re-assessment proceedings were further proceeded. Hence in our considered opinion, the requirements specified by the Hon'ble Supreme Court in the case of GKN Driveshafts Ltd reported in 259 ITR 19 (SC) had been duly complied with by the Id. AO in the instant case.

3.2. We find that the Id. AR vehemently relied on the decision of the Hon'ble Jurisdictional High Court in the case of Jainam Investments vs ACIT reported in 131 taxmann.com 327 (Bom HC) to drive home the point that the reasons recorded by the Id. AO did not provide any tangible material to the Id. AO which would enable him to form a belief that income of the assessee had escaped assessment. We have gone through the said decision relied upon by the Id. AR and we find that the said decision was rendered in the context where the original assessment was completed u/s 143(3) of the Act. Whereas in the present case before us, the original assessment was completed u/s 143(1) of the Act thereby making the said case factually distinguishable with the assessee's case. In our considered opinion, subsequent to the intimation issued u/s 143(1) of the Act, the Id. AO had indeed obtained information from the investigation wing that assessee was involved in certain accommodation entries by way of trading in penny stocks which had resulted in earning of exempt long term capital gains to the assessee. This information certainly

becomes a fresh and tangible material to the Id.AO to form a belief that income of the assessee had escaped assessment warranting reopening of assessment u/s 147 of the Act. We find that the Hon'ble Jurisdictional High Court in the case of Nickunj Enterprises Pvt Ltd vs CIT Mumbai in Writ Petition No. 2860 of 2012 dated 18/06/2014 reported in 229 Taxman 99 (Bom) had held that an information received by the Id. AO has a live nexus and becomes the tangible material to give rise to a reasonable belief that income had escaped assessment. Further we find that the Hon'ble Supreme Court in the case of CIT vs Rajesh Jhaveri Stock Brokers Pvt Ltd reported in 291 ITR 500 (SC) discussed the validity of reassessment when the original assessment is completed u/s 143(1) of the Act, which is similar to the case before us herein. The relevant operative portion of the said judgement is reproduced hereunder:-

16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [\[1991\] 191 ITR 662](#), for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co. (P.) Ltd. [\[1996\] 217 ITR 597 \(SC\)](#); Raymond Woollen Mills Ltd. v. ITO [\[1999\] 236 ITR 34 \(SC\)](#).

3.3. In view of the aforesaid observations, we hold that the Id. AO had rightly assumed jurisdiction to reopen the assessment u/s 147 of the Act in the

instant case. Accordingly, the ground nos. 1(a) to 1(c) raised by the assessee are dismissed.

4. On merits, 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 Luminaire Technologies Ltd, in the facts and circumstances of the case.

4.1. We have heard the rival submissions and perused the materials available on record. The assessee is an individual deriving income from salary, income from house property, income from capital gains and income from other sources. The assessee has been investing in shares regularly. She had filed her return of income for the Asst Year 2013-14 on 11/12/2013 declaring total income of Rs 9,60,280/-. 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 Luminaire Technologies 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 had already been upheld vide observations made hereinabove. The claim of exemption u/s 10(38) of the Act on sale of shares of Luminaire Technologies Ltd was sought to be examined by the Id. AO in the course of re-assessment proceedings. The assessee submitted that he purchased 50000 shares of Luminaire Technologies Ltd on 16/06/2009 @ Rs 4.35 per share for Rs 2,17,720/- and another 50000 shares on 14/07/2009 @ Rs 3.76 per share for Rs 1,88,014/-. Both these purchases were made by the assessee in the secondary market through a registered stock broker on the recognized stock exchange by

suffering Securities Transaction Tax (STT). 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 3 years by the assessee and sold in 3 tranches as under:-

on 01/08/2012 -15000 shares for Rs 39.52 per share

on 21/08/2012 – 70000 shares for Rs 39.12 per share

on 23/08/2012 – 15000 shares for Rs 39.72 per share

The total sale proceeds received by the assessee was Rs 39,27,129/- in Asst Year 2013-14 thereby resulting in long term capital gain of Rs 35,21,394/-.

4.2. The assessee furnished the following documents in support of his contentions before the lower authorities :-

- a) Copy of contract notes reflecting the transactions of both purchase and sale of shares.
- b) Copy of Bank Statements reflecting the payments made for purchase and sale proceeds received on sale of shares.
- c) Copy of Broker's ledger reflecting the transactions made by the assessee.
- d) Copy of Demat Statement reflecting the number of shares held by the assessee.
- e) Copy of reports received from BSE / NSE reflecting the prices at which transactions were made.
- f) Copy of stock transfer application from Trusted Shares & Investments Ltd (Assessee's Broker) to Vogue Commercial Co. Ltd

4.3. 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 Luminaire Technologies 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 in respect of some other scrips (not Luminaire Technologies Ltd) ; that these are close circuit transactions and are pre-structured; that net worth of Luminaire Technologies 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 undisclosed income of the assessee without mentioning under what provisions of the Act, the same is being treated as undisclosed income and correspondingly denied the claim of exemption u/s 10(38) of the Act.

4.4. 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) ignoring the contentions of the assessee, upheld the action of the Id. AO.

4.5. 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. Both purchase and sale transactions were carried out by the assessee in the secondary market through a registered share broker at the prevailing market prices. Payments were made and received by the assessee by account payee cheques to and from the stock exchange through the registered broker. Amounts paid for purchase of shares and amounts received on sale of shares were duly subjected to levy of Securities Transaction Tax (STT) at the applicable rates.

4.6. 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.

4.7. 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 Luminaire Technologies 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.

4.8. It is not in dispute that the assessee had made purchase of shares in the secondary market through a registered stock broker in Asst Year 2010-11 and had held the said shares for more than 3 years. Admittedly, these shares were duly dematted in dematerialized form soon after the purchase. In our considered opinion, the transactions could not be treated as sham when 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)*.

4.9. The Id. AR before us made a statement from the Bar that Securities and Exchange Board of India (SEBI) had not passed any independent order in the matter of Luminaire Technologies Ltd by initiating proceedings under the SEBI Regulations either on the promoters of the said company, or on the manipulators or on the assessee or on the broker through whom assessee had transacted. The broker had admittedly not been suspended from trading in

capital markets by SEBI. This statement made from the Bar by the Id. AR was not controverted by the Id. DR before us. 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 Luminaire Technologies Ltd in the secondary market based on market information and had sold the shares in the secondary market at 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'.

4.10. 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 by all the persons in the world 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. In the instant case, no such restraint order had been passed by SEBI as stated supra. 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. In this factual matrix of the case, the only logical recourse to conclude is that the assessee in the instant case had behaved like a normal investor wherein he had entered the market when the rates were below par based on market information and held those shares for more than 3 years. Later when the prices started rising, she decided to exit after making substantial profits. We hold that the assessee is only a gullible investor in the entire transactions in the capital market by duly making huge profits due to price manipulations carried out by certain outside parties. As stated earlier, the assessee had no link in any manner whatsoever with so called price manipulators, entry operators etc. No evidence also has been brought on record by the revenue in the instant case to prove such involvement of the assessee. Moreover, from the perusal of the Demat statement of the assessee kept in the paper book, we find that the assessee is a regular investor in stock market and had been holding the shares of various companies for long term capital appreciation and earning dividend thereon, wherever declared.

4.11. 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 Luminaire Technologies Ltd or any other person alleged to be operators being involved in any price rigging and also the exit provider. This onus is admittedly not discharged by the revenue in the instant case.

4.12. 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*.

4.13. 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.

4.14. 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. Accordingly, the grounds 2 and 3 raised by the assessee are allowed.

5. As stated at the beginning of this order, the decision rendered by us in the case of Smt Shashi Agarwal herein would apply with equal force for Ashok Kumar Agarwal & Sons (HUF) in ITA No. 647/Mum/2021 also, in view of identical facts, except with variance in figures and dates.

6. In the result , both the appeals of the assessee are partly allowed.

Order pronounced on 14/12/2022 by way of proper mentioning in the notice board.

Sd/-

(ABT Y VARKEY)

JUDICIAL MEMBER

Mumbai; Dated 14/12/2022

KARUNA, *sr.ps*

Sd/-

(M.BALAGANESH)

ACCOUNTANT MEMBER

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

