

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 6723/Mum/2012 (A.Y. 1992-93)
I.T.A. No. 7376/Mum/2013 (A.Y. 1993-94)

Atul C. Vyas 16, Hardayal Society 3, Garodia Nagar Ghatkopar East Mumbai-400 077. PAN : AABPV5606N (Appellant)	Vs.	ACIT, CC-31 Room No. 413 Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Dharmesh Shah
Department by	Shri Manoj Sinha
Date of Hearing	22.09.2022
Date of Pronouncement	13.12.2022

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed these appeals challenging the orders passed by learned CIT (A)-40, Mumbai and they relate to the assessment years 1992-93 and 1993-94.

2. This is second round of proceedings for the assessee before the Tribunal for these two years. In the 1st round, the Tribunal, vide its order dated 28.11.2008 passed in ITA No. 4470/Mum/96 and ITA No.3050/Mum/1999, had restored all the issues contested by the assessee to the file of learned CIT (A). Accordingly the Ld CIT(A) has passed the impugned orders, which are being challenged by the assessee.

3. The facts relating to the case are discussed in brief. The revenue carried out search & seizure operations at the premises of the assessee on 28.02.1992. The original assessment passed by the AO under section 143(3) by making various additions was challenged upto ITAT by the assessee and,

as noticed earlier, the Tribunal restored all the issues to the file of learned CIT(A). The assessee was not satisfied with the orders passed by Learned CIT(A) in the second round also and hence, the present appeals have been filed by the assessee before the Tribunal.

4. We shall 1st take up appeal filed by the assessee for assessment year 1992-93. At the time of hearing, the learned AR did not press ground numbers 1,2,3,5 & 10. These grounds are dismissed as not pressed.

5. Ground No. 4 relates to the addition of ₹ 35,000/- made on account of unexplained cash found at the residence of the assessee at the time of search. The facts are that the search team found physical cash of ₹ 99,900/- at the premises of the assessee at the time of search. The assessee explained in the statement recorded under section 132 (4) of the Act that, out of the above said cash balance, a sum of ₹ 50,000/- represented savings of various family members. Further, the assessee offered a sum of ₹ 45,000/- as his income in the return filed by him out of the above said cash. The search team had also recorded a statement from the brother of the assessee named Shri G.C Vyas, who had stated that, out of above said cash balance, a sum of ₹ 5000/- belongs to him and ₹ 15,000/- belongs to the assessee. The AO, preferred to believe the statement of assessee's brother. Accordingly, he held that the assessee has explained a sum of ₹ 20,000/- only and the assessee has offered a sum of Rs.45,000/- as his income in the return of income. Accordingly the AO assessed balance amount of Rs.35,000/- (Rs.99,900/- less Rs.20,000/- less Rs.45,000/-) as unexplained income of the assessee. The learned CIT(A) also confirmed the same.

6. We heard the parties on this issue and perused the records. We find that the AO has not considered the statement given by assessee at the time of search proceedings, wherein he has explained the sources of cash found at the time of the search. We also notice that the AO has also not given any reason for disregarding the statement given by the assessee. In the

statement, the assessee has explained that a sum of Rs.50,000/- belongs to all the family members. In the statement given by assessee's brother Shri G C Vyas, he has stated that a sum of Rs.5000/- belongs to him and further a sum of Rs.15,000/- belongs to the assessee, i.e., Shri G.C Vyas did not mention anything about the cash belonging to other family members. It cannot be said that other family members did not possess any money at all. Hence, in the facts of the case, we are of the view that the statement given by the assessee should be given credence, since the addition has been made in his hands. As per the statement given by the assessee, a sum of Rs.50,000/- belongs to other family members, meaning thereby, the balance amount of Rs.49,900/- may be considered as belonging to him. The assessee has already offered ₹ 45,000/- as his income in the return of income filed by him. Accordingly we are of the view that the assessee should be given credit for cash to the extent of ₹ 95,000/- (Rs.50,000/- + Rs.45,000/-). Hence the balance amount of ₹4,900/- can be considered as not explained. Accordingly, we are of the view that the addition could be sustained to the extent of Rs.4,900/- only. Accordingly we set aside the order passed by Learned CIT(A) on this issue and direct the AO to restrict the addition to ₹ 4,900/-.

7. Ground No. 6 and 7 relates to the addition of ₹ 86,300/- made under section 69 of the Act relating to alleged unexplained investment. The facts relating to this issue are stated in brief. In connection with the search proceedings of the assessee, the revenue carried out Survey operations u/s 133A of the Act at the premises of the employer of the assessee named Mr Kishore Janani, who was a stockbroker. During the course of survey, certain share certificates registered in the name of the assessee were found. The value of those shares was ₹ 86,300/-. Hence the assessee was asked to explain the sources for making the above said investments. It was submitted that these share certificates do not belong to the assessee and they actually belonged to the customers of the Share broker. It was explained that, as per practice followed by the broker's office, the physical share certificates

purchased by the jobbers would be registered in the name of employees till the record date. In effect, it was explained that the assessee is holding the share certificates on behalf of the jobbers/sub-brokers (customers of employers). The assessing officer did not accept above said explanations of the assessee. Accordingly, he took the view that shares belong to the assessee only and accordingly assessed the amount of Rs.86,300/- as income of the assessee. The learned CIT(A) also confirmed the same.

8. The Learned AR submitted that the assessee has all along been explaining that these shares do not belong to him. These shares actually belonged to the jobbers, viz., Mr Mahindra Jain and Mr Manoj Shah. He submitted that the assessee has also filed confirmation letter obtained from Mr Manoj Shah along with the copies of invoices issued by the broker to substantiate his explanations. The Learned A.R further submitted that he has furnished confirmation letter obtained from another employee named Mr Ramesh Darji, who has also confirmed that such a trade practice is followed by the brokers. Accordingly the Learned AR submitted that the assessee is not the owner of Share certificates, though they are registered in his name and hence the impugned addition should be deleted. In support of his contentions, the Learned AR placed reliance on the decision rendered by Honourable Gujarat High Court in the case of Ushakant Patel vs. CIT (282 ITR 553 @ 561)(Guj), wherein it was held that it was necessary to show that the investments have been made by the assessee and not recorded in the books maintained by him before making addition u/s 69 of the Act. The Learned AR also placed reliance on some other decisions wherein identical view has been expressed. Accordingly he prayed for deletion of this addition.

9. The Learned DR, on the contrary, submitted that the assessee has failed to prove that these investments do not belong to him.

10. We have heard rival contentions on this issue and perused the record. The undisputed fact is that these share certificates stand in the name of the assessee. However, we notice that the assessee has furnished

- (a) Confirmation letter obtained from Shri Manoj Shah, wherein he has confirmed that shares of three companies, viz., Aluminium Industries (100 shares), Andhra Cement (1150 shares) and Madras Cement (5 shares) belong to him.
- (b) Broker Notes for purchase and sale of shares on behalf of Shri Manoj K Shah and Shri Jain Mahendra.
- (c) Affidavit of Shri Ramesh S Darji, another employee confirming prevailing trade practice of registering shares in the name of employees.

We notice that the assessee has explained the trade practice and has also furnished materials to prove the trade practice, as per which, the impugned shares do not belong to him and he was holding them on behalf of others. Hence we are of the view that the above said explanations, in the facts and circumstances of the case, may be accepted. Further, when an asset is not belonging to the assessee, the question of assessing the same u/s 69 of the Act does not arise, as held in the case of Ushakant Patel (supra). Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.86,300/- relating to unexplained investment in shares.

11. Ground No.8 relates to the addition of Rs.3,25,000/- made u/s 69A of the Act relating to Bank deposits. The AO noticed that the family members of the assessee have given loans to Shri Harshad Mehta. It was stated that Shri Harshad Mehta had given cash to the family members and the same was used to given loans to him by way of cheque. The AO noticed that the said loans have been returned back by Shri Harshad Mehta to the family members. However, they have not withdrawn any cash from bank accounts for repaying corresponding cash to Shri Harshad Mehta. When questioned about the same, the assessee replied that there was no evidence to show that the family members have returned back cash and hence no addition could be

made on alleged repayment. In the alternative, he submitted that the family members have declared income under Amnesty Scheme, 1987 which might have been used to repay the cash. The AO did not accept the explanations of the assessee and accordingly made addition of Rs.3,25,000/-. The Ld CIT(A) also confirmed the same.

12. We heard the parties on this issue and perused the record. The transactions are in the nature of giving loans by issuing of cheques to Shri Harshad Mehta and receiving back the same by way of cheques from him. When asked about the sources for issuing cheques, the family members have replied that they have received cash from Shri Harshad Mehta and in lieu of the same, they have issued cheques to him. When loans were received back from Shri Harshad Mehta, the AO has presumed that the family members would have returned back cash to Shri Harshad Mehta. Since there was no cash withdrawal from their bank accounts for returning back cash to Shri Harshad Mehta, the AO has presumed that the said cash payment would have been made out of undisclosed sources.

13. First of all, it is not shown by the AO that these transactions have been made by the assessee, i.e., the AO himself admits that these transactions have been carried on by the family members. It is also accepted that the family members are also assessed to income tax. Hence, we do not find any reason to assess this amount in the hands of the assessee. In our view, the cause of action, if any, shall arise in the hands of family members. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition of Rs.3,25,000/-.

14. Ground No.9 relates to the addition of Rs.10,000/-, being cash deposits made into the bank account of assessee's wife Smt Heena A Vyas. The AO noticed that Smt Heena A Vyas is not assessed to income tax and hence took the view that the above said cash deposit would have been made by the assessee only. Accordingly, he assessed the above said amount of

Rs.10,000/- as income of the assessee and the Ld CIT(A) also confirmed the same.

15. Following submissions were made before us by Ld A.R:-

“The appellant submits that the Ld AO and Ld CIT(A) has failed to take cognizance of the confirmation provided by Mrs Heena A Vyas (page 91 of PB), wherein she clearly stated that two cash deposits of Rs.5000/- each were out of her past savings and does not represent cash belonging to the appellant. The appellant also submits that the Bank a/c wherein cash was deposited, was in the name of Mrs. Heena A Vyas jointly with Mrs Deepika G Vyas (brother’s wife) (Page 92 of PB) and therefore, the said cash deposit cannot be treated as appellant’s income. The appellant therefore prays that the said addition of Rs.10,000/- is incorrect and unjustified.”

We notice that the AO has made this addition on the presumption that the assessee would have made the impugned deposits of Rs.10,000/-. The AO has disregarded the submission of Smt Heena A Vyas that she has made this deposit out of her past savings. Further, it is a joint bank account and it may not be possible to presume that the assessee alone would have funded. Hence, we are of the view that the AO has made this addition only on presumption and hence the same cannot be sustained. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition of Rs.10,000/-.

16. Ground No.10 relates to the addition of brokerage income of Rs.37,000/-. In the Statement taken u/s 132(4) of the Act, the assessee had declared brokerage income of Rs.37,000/-, which is receivable from the broker Shri Kishor J Janani. However, he did not disclose the same in the return of income on the reasoning that the broker income was being disputed and denied by Shri Kishore J Janani. The AO did not accept the said explanations and accordingly assessed the above said amount of Rs.37,000/. The Ld CIT(A) also confirmed the same.

17. Before us, the Ld A.R reiterated the above said submissions made before the AO by the assessee, vide his letter dated 29-12-1994. A perusal of

the said letter would show, as per paragraph 5 of the said letter, the assessee has paid interest of Rs.4,33,450/- to Shri Kishor J Janani on the amount of outstanding amount payable to him for the shares purchased through him. On the other hand, the assessee is claiming that Shri Kishor J Janani has disputed and denied the brokerage amount payable to the assessee. We also notice that the assessee has not brought on record any other material to support his submissions. We noticed earlier that the assessee herein is one of the confidant employees of broker Shri Kishor J Janani and hence he has transferred shares belonging to others in the name of the assessee. Further, the assessee was also duly paying interest payable to Shri Kishor J Janani. All these facts would show that the assessee was having good relationship with the above said broker. Hence the explanation of the assessee that Shri Kishor J Janani has disputed and denied brokerage amount is hard to believe. The assessee has also not given any credible reason as to why the brokerage amount was denied by Shri Kishor J Janani. The responsibility of the assessee to give proper reasons is fortified for the reason that he himself has admitted that the brokerage amount of Rs.37,000/- is due from Shri Kishor J Janani. In our view, the assessee has failed to discharge this responsibility. Accordingly, we confirm this addition made by the AO.

18. Ground No.11 relates to the disallowance of claim of loss of Rs.20,17,775/-, being hedging loss claimed on sale of shares of M/s Mazda Leasing and Industries Ltd (MLIL). The facts relating to this issue are stated in brief. The assessee had purchased 16,200 shares of MLIL during September, 1991 and October 1991 on delivery basis. Subsequently, the assessee sold 5100 shares on 14.02.1992. It is the contention of the assessee that, out of the above said sale, the assessee has sold 2900 shares by way of hedging transactions. The hedging contract was closed by purchasing 1700 shares in March, 1992 and 1200 shares in April, 1992. The assessee claimed that the closing of hedging transaction by purchasing shares in March, 1992 has resulted in a loss of Rs.20,17,775/- and the same

was claimed in AY 1992-93. The hedging transaction closed in April, 1992 resulted in a loss of Rs.7,35,750/- and the same was claimed in AY 1993-94.

19. The AO did not accept the claim of hedging transactions. He observed that the assessee has sold the shares out of the stock available with him and accordingly computed capital gain. He rejected the claim of hedging stating that the shares of MLIL were not allowed for forward purchase or sale and hence the transactions undertaken by the assessee is in violation of bye laws of Stock exchange. The assessee had placed reliance on the Circular No.23D(XXXX-4) dated 12.09.1960 issued by CBR. However, the AO held that the said circular will not apply to the facts of the present case.

20. The Ld CIT(A), however, accepted the transactions as hedging/forward transactions and the loss of Rs.20,17,775/- in AY 1992-93. However, he concurred with the view expressed by the AO that the transactions are illegal in nature, since they are in violation of bye laws of Stock Exchange. With regard to the Circular No.23D(XXXX-4) relied upon by the assessee, the Ld CIT(A) held that the said circular would apply to raw material and merchandise only and not to shares. Accordingly, he confirmed the disallowance made by the AO.

21. We heard the parties on this issue and perused the record. We notice that the Ld CIT(A) has accepted the loss of Rs.20,17,775/- claimed by the assessee in principle. However, he has upheld the disallowance made by the AO on the ground that hedging transactions entered by the assessee is against bye laws of Stock Exchange and hence illegal in nature. We noticed that the Ld CIT(A) has expressed that the CBDT Circular (supra) would apply to raw material and merchandise only and not to shares. However, following portion of Circular of CBDT would show that the view so entertained by the Ld CIT(A) is not correct:-

“Point 4:- Bona fide hedging transactions by a dealer or investor in shares should be allowed provided that the hedging transactions are upto the

amount of his holdings even though these transactions may extend to other types of shares not held by him.

Board's decision:- The Board are unable to accept this suggestion. It cannot be accepted that a dealer or investor in stocks or share can enter into hedging transactions in scrips outside his holdings. The material words in clause (c) of the proviso to Explanation 2 to section 24(1) are "to guard against loss in his holdings of stocks and shares though price fluctuations". **Therefore, hedging transactions having reasonable relations to the value and volume of dealer's or the investor's holdings are excepted from the ambit of speculative transactions; but transactions in scrips outside his holdings are not."**

Hence the Circular of CBDT referred above would apply to the shares, whether it is held as dealer or investor, meaning thereby, the claim of hedging transactions entered by the assessee herein is permitted. It is also not the case of the AO/CIT(A) that the impugned transactions are not bona fide.

22. It is also held by the tax authorities that the hedging transactions entered into B type of shares are illegal. In this connection, the Ld A.R took us though the Bye laws of Stock Exchange. He invited our attention to clause 45 of the bye laws, as per which the securities (shares) are classified into following two categories:-

- (i) Cleared Securities, i.e., securities admitted to dealing on the Exchange and placed by the Governing Board on the Cleared Securities List; and
- (ii) Non-cleared Securities, i.e., securities other than Cleared Securities.

He submitted that clause 80 of the Bye laws stated that all bargains (contracts) in securities other than for the Clearing shall be settled outside the Clearing House by delivery and payment between the contracting parties in accordance with the provisions in that behalf contained in the relative Regulation. Accordingly, he submitted that the transactions entered by the assessee are in accordance with the regulations prescribed under the Bye laws of the Stock Exchange and hence they cannot be considered as illegal. In the alternative, he submitted that even if the transactions are considered

to be in violation of the Stock Exchange bye laws, yet such violation cannot result in the transaction to be illegal. He further submitted that the carry forward of the transactions were permitted during the relevant point of time and hence the assessee, who sold the shares on 04-02-1992, has rolled over the hedging transactions to March, 1992. Further, it is not a case of compulsory closure, since the assessee has started purchasing the shares on 24.3.1992 itself. Accordingly, he submitted that the loss incurred by the assessee in the hedging transactions should be allowed.

23. We agree with the submissions made by Ld A.R. Even though the tax authorities have stated that the impugned transactions are illegal, yet they have not referred to any of the provisions of Bye laws of Stock Exchange, which specifically state that, the hedging transactions in 'non-cleared securities' are illegal. Further, the broker note placed at page 103 of the paper book would show that the assessee has carried forward the hedging transactions to March, 1992 and started purchasing shares from 24th March, 1992 onwards. Hence, it cannot be said that the transactions are illegal. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

24. Ground No.12 relates to the addition of unexplained investment of Rs.9000/- made in UTI Schemes in the name of assessee's wife Mrs. Heena A Vyas. It was noticed that a sum of Rs.18,000/- found invested in the name of assessee's wife and his brother's wife. Since these members did not have independent sources of income, the AO treated Rs.18,000/- as unexplained investment in the hands of the assessee. The Ld CIT(A), however, confirmed the addition to the extent of 50%, being the investment standing in the name of assessee's wife. We notice that Smt Heena A Vyas has furnished a confirmation letter stating that the above said investment has been made out of her own savings and not out of income of the assessee herein. Considering the smallness of the amount, we are of the view, the explanations of the

assessee may be accepted. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition.

25. The ground nos. 13 to 15 relate to the addition of Rs.6,05,000/- and Rs.89,140/- relating to unexplained investments and dividend income of Rs.34,631/-. The AO noticed that the assessee has held a Bank account with Bank of India wherein it was found that dividend amounts aggregating to Rs.34,631/- were deposited. When questioned about the same, the assessee submitted that the dividend relates to the shares belonging to the broker Shri Kishor Janani, whose shares were registered in the name of the assessee, when the shares remained undelivered to the jobbers for want of payment or for any other reason. The AO did not accept the same. He took the view that the average dividend rate would be 10% and accordingly, the par value of shares was arrived by the AO at Rs.3,46,000/-. The AO further assumed that the average market value of shares would be twice the par value. Accordingly, the AO arrived at the value of investments at Rs.6,92,000/- and assessed the same in the hands of the assessee. The AO also assessed dividend income of Rs.34,631/-.

26. The Ld CIT(A), however, gave set off of amount of investments of Rs.86,300/- found in the name of the assessee earlier and accordingly confirmed the addition to the extent of Rs.6,05,000/-. The Ld CIT(A) further noticed that the assessee has received dividend income on certain shares in the succeeding year. The AO determined the value of investments pertaining to those dividends at Rs.89,140/- and accordingly enhanced the addition relating to unexplained investments. The Ld CIT(A) confirmed the addition of dividend income.

27. We heard the parties and perused the record. In the earlier paragraphs, we have accepted that there existed a trade practice to register the shares purchased by the jobbers/sub-brokers in the name of his employees of the broker till it is delivered to the buyers. The instant issue

relates to the dividend income received in the bank account of the assessee. We notice that the relevant share certificates have not been found with the assessee. Hence the AO was constrained to estimate the corresponding investment that could have been made in the shares which have yielded dividend income.

28. Under section 69 of the Act, it is necessary to show that the assessee has made investments during the relevant financial year. However, the AO has only entertained presumption that the assessee would have made investments. It is also not the case of the AO that the assessee has sold the said shares subsequently. No such evidence, in fact, was available. On the contrary, the assessee has maintained throughout that the dividend income belong to his employer Shri Kishor Janani. Hence, we are of the view that the AO could not have made the impugned addition on presumptions, that too in the absence of availability of such investments with the assessee or their subsequent sale. Accordingly, we are of the view that the additions relating to unexplained investments and dividend income in the hands of the assessee, in the facts and circumstances of the case and also considering the then prevailing trade practice, were not justified. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this addition.

29. Other grounds raised by the assessee in AY 1992-93 are general in nature.

30. We shall now take up the appeal filed by the assessee for AY 1993-94. The first issue raised in Ground no.2 relates to the disallowance of hedging loss on transactions relating to sale and subsequent purchase of shares of MLIL amounting to Rs.7,35,750/-. Identical issue was examined by us in the preceding year in the earlier paragraphs and we have held that an identical disallowance made in that year is not justified. Following the said decision, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance of Rs.7,35,750/-.

31. Ground no.3 to 5 relates to the addition of dividend income of Rs.28,835/- and addition of corresponding investment of Rs.9,67,950/-, which was enhanced by Ld CIT(A) by Rs,5,31,088/-. Identical issue was examined by us in the preceding year in the earlier paragraphs and we have deleted these additions for the reasons discussed above. Following the said decision, we set aside the orders passed by Ld CIT(A) on these issues and direct the AO to delete these additions.

32. Other grounds urged by the assessee are general in nature.

33. In the result, the appeals filed by the assessee for AY 1992-93 is partly allowed and the appeal filed for AY 1993-94 is allowed.

Order pronounced in the open court on 13.12.2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 13/12/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai