

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

BEFORE SHRI S. RIFAUZ RAHMAN, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1546/Mum./2019
(Assessment Year : 2011-12)

Dy. Commissioner of Income Tax
Central Circle-7(2), Mumbai

..... Appellant

v/s

Atul Umakant Rege
1301, Prathmesh Redency
Near Bhavans College, Andheri (West)
Mumbai 400 058 PAN – AAHPR5186R

.....Respondent

Assessee by : Shri Anil Sathe
Revenue by : Shri S. Anbuselvam

Date of Hearing – 15/11/2022

Date of Order – 20/01/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 27/12/2018, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-49, Mumbai, [*"learned CIT(A)"*], for the assessment year 2011-12.

2. In its appeal, the Revenue has raised the following ground:-

"1. Whether on the facts and the circumstances of the case, the Ld. CIT(A) was right in deleting the addition of Rs.2,19,22,836, without appreciating the fact that the loss of Rs.2,19,22,836, is out of manipulation of stocks which was done to provide bogus STCL entries to the assessee."

3. The Revenue, vide letter dated 30/09/2021, has also filed additional ground, which is reproduced below:-

"2. Without prejudice to the first grounds of appeal, on the facts and circumstances of the case, the Ld. CIT(A) erred in not disallowing the bogus loss of Rs.2,19,22,836, incurred by the assessee in trading of penny stocks, even if held as business loss by Ld. CIT(A)?"

4. The brief facts of the case emanating from the record are: The assessee is engaged in the business of share and stock broking. For the year under consideration, the assessee e-filed its return of income on 24/09/2011 declaring a total income of Rs.1,47,561/-. The return of income was initially processed under section 143(1) of the Act and the total income of the assessee was determined at Rs.32,19,675/-. Subsequently, rectification under section 154 of the Act was completed and the total income of the assessee was determined at Rs.8,19,953/-. In the appeal against the rectification order, the learned CIT(A) directed the Assessing Officer ('AO') to verify the claim of apparent from the record and allow the claim as per the provisions of the Act. Thereafter, the AO passed an order giving effect determining the total income of the assessee at Rs.1,47,561/-.

5. Pursuant to information received from the DGIT (Investigation), Kolkata, after search carried out at the premises of penny stock operators, reassessment proceedings under section 147 of the Act were initiated in the case of the assessee and notice dated 17/10/2016 under section 148 of the Act was issued. In response to the aforesaid notice, the assessee submitted that the original return of income filed for the year under consideration be

considered as a return of income filed in pursuance of the notice under section 148 of the Act. The AO provided the copy of reasons recorded for reopening the assessment as well as the statement/information on the basis of which the reassessment proceedings were initiated to the assessee. During the reassessment proceedings, it was observed that the assessee has purchased shares of NCL Research for Rs.74,82,700/- and sold the shares for Rs.15,37,500/- in the year under consideration. Accordingly, the assessee booked loss of Rs.59,45,200/- from the aforesaid transaction. Similarly, the assessee has purchased shares of M/s Shreenath for Rs.2,54,03,590/- and sold the shares for Rs.94,25,954/- in the year under consideration. Accordingly, the assessee booked a loss of Rs.1,59,77,636/-. The AO on the basis of statement recorded by the Investigation Wing of certain persons, who alleged that the aforesaid companies were mere penny stock companies, treated the entire loss of Rs.2,19,22,836/- as short-term capital loss from trading in shares and added the same to the total income of the assessee vide order dated 04/12/2017 passed under section 143(3) r/w section 147 of the Act.

6. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee, by observing as under:

"7.3. The assessee is a share broker and trading in shares is his business. A computation of income of the assessee reflects loss in share trading profit in speculation business, long term capital gain and income from other sources. There is no share capital loss shown by the assessee. The assessee has shown income from long term capital which is from the sale of residential flat and nothing from shares. In support of his contention that the losses incurred are in the normal course of business the assessee has shown certain transactions wherein trading in a particular scrip has earned him both gain and loss during the year. A perusal of the Balance sheet of the appellant shows that his investment did not include any shares. This itself shows that the assessee does

not have any investment in shares which can lead to long term/short term capital gain/capital loss. Further the Assessing Officer has relied on the statements of Mr Nawal Kishore Jalan, promoter of M/s Shreenath and Mr Pankaj Agrawal, promoter of M/s. NCL Research. No cross examination has been provided to the assessee in spite of his request. It is also his claim that Mr. Pankaj Agrawal and Mr Nawal Kishore Jalan are not associated with these companies in any way and they have not mentioned the appellant's name. The appellant has produced the contract notes, broker notes and D-mat account to the Assessing Officer. It is seen that the assessee has done all that he can to provide the necessary documentary evidences. Moreover the loss incurred by him is not on account of capital loss but a regular trading loss. The Assessing Officer has merely relied upon the information received from Kolkata Investigation Wing and did not do any investigation nor did he bring any adverse information on record to show that the assessee has contrived the losses. On the contrary the assessee has furnished all records which substantiate the losses and did not raise any suspicious or malafide intentions. The Hon'ble Bombay High Court in the case of CIT-13 vs Shyam R. Pawar 54 taxmann.com 108 held as under:

- It was 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 STPL and RMPL respectively. Out of these two, only RMPL is listed in the appraisal report and it is stated to be involved in the modus operandi. It is on this material that the Assessing Officer holds that the transactions of 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 transaction 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 assessee utilised the scheme. [Para 5]*
- The Tribunal concluded that there was something more which was required, which would connect the 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. A copy of the DMAT account, placed before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available which gave details of the transactions. The contract note is a system generated and prescribed by the stock exchange. From this material, 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 same, by 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 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 the Tribunal's order are not vitiated by any error of law apparent on the face of the records either [Para 6]*
- The appeals do not raise any substantial question of law. They are accordingly dismissed. [Para 7]"*

7.4. *The case of the assessee is much stronger in the sense that he has not traded through the Kolkata based broker but had done the trading himself as he is a share broker. All the transactions have been done through stock exchange. The assessee has not declared any capital loss. The loss incurred is on account of regular share trading Further, the Hon'ble ITAT Bombay in the case of M/s. Farrah Marker vs ITO ITA No. 3801/Mum/2011 held as under:*

"3.4.8 From the appreciation of the facts of the case, the material evidence placed on record by the assessee and in the light of the discussion of the factual and legal matrix of the case as discussed from para 3.1 to 34.7 of this order (supra), we are of the opinion that the authorities below, e. AO/CIT(A) have made the addition under section 68 of the Act merely on presumptions, suspicions and surmises in respect of penny stocks, disregarding the direct evidences placed on record and furnished by the assessee in the form of brokers contract notes for purchases and sales of the 'said shares' of M/s. Shukun Constructions Ltd., copies of the physical share certificates and her D-MAT account statement establishing the holding of the shares in her name prior to the sale thereof; confirmation of the transactions of buying and selling of the 'said shares' by the respective stock brokers, receipt of sale proceeds through banking channels, etc. As observed earlier in this order, we are of the view that the statement recorded from Shri NirajSanghvi on 31 12 2007, the day the order of assessment was passed, would have no evidentiary or corroborative value to be the basis for coming to an adverse view in the case on hand, since it was recorded behind the assessee's back, from a person who was not involved in the purchase of the said shares and also since the assessee was not afforded opportunity for rebuttal of the same and to cross-examine the said person. We are also of the view that the ratio and the factual matrix of the decisions in the cited case, i.e. JatinChhadwa (supra), Harkchand K. Gada (HUF) & others (supra) and Andaman Timber Industries (supra) would be applicable and support the case of the assessee since no adverse finding has been rendered in respect of the direct material evidence placed on record in respect of her transactions of purchase and sale of the 'said shares' of M/s. Shukun Constructions Ltd. which stand duly disclosed in her audited Balance Sheets filed with the return of income of assessment years 2004-05 and the current year under consideration In this factual and legal matrix of the case, as discussed above, we find that the addition of Rs 95,12,812/- under section 68 of the Act made and confirmed by the authorities below to be unsustainable and therefore direct the AO to delete the said addition and accept the LTCG income of Rs. 93,00,012/- shown as exempt under section 10(38) of the Act. Consequently, ground no 1 of the assessee's appeal is allowed"

Following the ratio of the above referred decisions of the jurisdictional ITAT and jurisdictional High Court, it is held that the loss incurred by the assessee is a regular trading loss incurred by the assessee in the course of business and not a manipulated share capital loss. The addition made by the Assessing Officer to the tune of Rs.2,19,22,836/- is deleted. These grounds of appeal are Allowed."

Being aggrieved, the Revenue is in appeal before us.

7. During the hearing, the learned Departmental Representative (the "learned DR") vehemently relied upon the assessment order and submitted

that the assessment in the present case was reopened on the basis of the information received from the Investigation Wing, Kolkata. The learned DR further submitted that the Investigation Wing, Kolkata carried out a detailed investigation regarding the modus operandi of companies engaged in providing bogus long-term capital gain/short-term capital loss through the transaction in penny stocks. During the said investigation, statements of various persons including stock brokers, operators, and promoters of such companies were recorded. During such investigation, the promoter of NCL Research and promoter of M/s Shreenath in their statements admitted that the aforesaid companies provide bogus short-term capital loss entry to its beneficiaries by way of transactions in penny stocks. The learned DR further submitted that various stock brokers have also accepted in the statement recorded during the aforesaid investigation that the scrips of aforesaid companies were used for providing accommodation entries of bogus long-term capital gains/short-term capital loss, which were taken into consideration by the AO in the assessment order.

8. On the contrary, the learned Authorised Representative (the "*learned AR*") submitted that the assessee is a trader in shares since the past two decades. It was further submitted that the transaction in shares of the aforesaid companies was made through the broker who is registered under SEBI. The learned AR further submitted that the copy of contract notes, broker notes, and Demat account was provided by the assessee in support of the aforesaid transactions before the lower authorities. The learned AR also submitted that during the year the assessee has earned a speculation gain of

Rs.99,42,164/-, which has been duly recorded in his books of account and the loss arising from the transaction in shares of aforesaid companies is on account of regular share trading.

9. We have considered rival submissions, perused the material available on record, and the decisions relied upon by both parties. In the present case, it is evident that the assessee is engaged in the business of shares and stocks broking. The aforesaid fact is also evident from the profit and loss account, on page 2 of the paper book, wherein the assessee has duly credited the consideration from the sale of shares and speculation gain. Further, the assessee has also debited the Demat charges, Securities Transaction Tax, loss on future shares, purchase of shares, and other charges. During the year, the assessee traded in shares of NCL Research and M/s Shreenath, on which the assessee incurred a loss of Rs.2,19,22,836/-. On the basis of information received from Investigation Wing, Kolkata, the shares of the aforesaid companies were treated as penny stocks by the Revenue and therefore the loss was disallowed. As per the assessee, he has been trading regularly in recognised stock exchanges through the brokers registered under the SEBI. As per the assessee, the aforesaid transaction was also done through a SEBI register broker, and in support of his claim, the assessee furnished contract notes, broker notes, and Demat account before lower authorities. It is evident from the record that the AO made the impugned addition merely on the basis of information received from the Investigation Wing, Kolkata without conducting any independent inquiry or doubting the evidence furnished by the assessee in support of its claim. It is also evident that the AO has not

examined or issued summons or notice under section 133(6) of the Act to the broker through whom the assessee has traded in shares of aforesaid companies. From the perusal of statements of persons, who are alleged to be the promoter of NCL Research and M/s Shreenath, forming part of the paper book on pages no. 6-25, we find no mention of the name of the aforesaid companies or the assessee. Further, there is no evidence on record that the assessee has engaged in any manipulative activities with respect to the purchase and sale of shares of aforesaid two companies. The lack of enquiry on the part of the AO and non-appreciation of facts on record is also evident from the fact that the loss incurred by the assessee as a trader of shares has been considered to be the short-term capital loss when such shares were not even held as an investment by the assessee. Therefore, in view of the above, we find no infirmity in the impugned order deleting the addition made by the AO. As a result, both the grounds raised by the Revenue are dismissed.

10. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 20/01/2023

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 20/01/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Mahesh Sonavane
Stenographer

By Order

Assistant Registrar
ITAT, Mumbai