

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 1869/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2012-13)

Shri Dinesh Singh Chhajer B-606 Shroff Apartment, Sodawala Lane, Borivali(W), Mumbai 400092	बनाम/ Vs.	Assistant Commissioner of Income Tax, Circle- 32(1) Mumbai. Room No.702, 7 th Floor, Kautilya Bhavan, C-41 to C-43, G-Block, BKC(E), Mumbai400051
स्थायीलेखासं ./जीआइआरसं ./PAN No. ABUPC6016F		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Rakesh Joshi
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Ujwal Kumar
सुनवाईकीतारीख/ Date of Hearing	:	22.12.2022
घोषणाकीतारीख / Date of Pronouncement	:	31.01.2023

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the assessee against the impugned order dated 23.06.2022, passed by National Faceless

Appeal Centre (NFAC), Delhi for quantum assessment passed 143 (3) r.w.s 147 for the AY 2012-13.

2. In various grounds of appeal the Assessee has challenged the re-opening of assessment u/s147; secondly, addition of Rs. 28,74,525/- u/s 68 by treating the sale consideration of sale of shares of “Exelon Infrastructure Limited” as alleged un explained cash credit; lastly addition of Rs. 86,236/- u/s 69 C. on notional basis by adopting commission rate of 3% for taking alleged accommodation entry.

3. The facts in briefs are that Assessee is a Chartered Accountant by qualification and a whole time engaged in investing and dealing in shares as an investor. As a regular investor and shares, his source of income is from capital gains from transactions of sale of shares treated as investment since year1995.

4. During the year consideration also Assessee has made investments in 700 of scrips and under the head ‘short term capital gain’ he has under taken transaction of more than 400 scrips. The details of which are available from pages 17-21 of the paper book. Assessee has declared short term capital gains of Rs. 24,13,932/-.

Out of these 700 scrips, Assessee had invested into 40,000/- shares of "M.P. Oils & Facts" which now name has been changed to "Exelon Infrastructure Limited" on 20.04.2011 through a broker "Nirmal Bang Securities Pvt. Ltd" on "BSE". Accordingly, Assessee paid STT and delivery was through demat account. After purchasing the shares on 20.04.2011 the Assessee sold the same on 09.06.2011 and 05.07.2011, that is, in the span of two months. This resulted into short term capital gain of Rs.1,78,073/- on this transaction of shares and taxes were paid.

5. For the AY 2012-13, Assessee declared income of Rs. 74,81,020/- in the return of income filed on 30.01.2013, which was duly process u/s 143(1). Thereafter, the Assesses case was re-opened u/s 147 and notice u/s 148 was issued on 28.02.2019 on the following reasons recorded;

"The assessee is found to have entered into the transaction in the scrip which is penny stock namely M/s M/s. Exelon Infrastructure Ltd. (Scrip code-530337) for Rs 28,74,525/- The history of transactions and trading in the scrip of shell companies has been found by the investigating agencies is to provide bogus capital gain

and loss to the beneficiary The money is routed through the account of syndicate members and benami accounts to hide the trail of money and pretending to prove that the transactions are made online on the portal of BSE & NSE The detailed analysis by the agencies has proved that the trading in these scrips are made by the syndicate members & brokers through benami trading & demat accounts to inflate the price of scrip to the desired level and thereby arriving at capital gain/loss to the beneficiaries. The assessee has made transactions in the above said scrip for Rs. 28,74,525/- Accordingly, the amount of Rs 28,74,525/- has escaped from assessment for AY 2012-13 in the assessee's case Hence, I have reasons to believe that income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year i.e., for AY 2012-13 within the meaning of section 147 of the Income-tax Act, 1961. "

6. After filling the return of income in the response to notice u/s 148 on the same income, Assessee filed objections which was disposed of by the Assessing Officer by the order dated 16.09.2019.

In the entire assessment order the Assessing Officer has referred to the information received on the basis of investigation conducted by investigation Mumbai that, M/s. "Exelon Infrastructure Limited" is a shell company and is involved in providing LTCG/STCG/STCL. Since, Assessee has also sold 40,000/- shares at Rs.28,74,525/-, therefore, the Assessee was also treated as beneficiary of such bogus STCG. He has mainly referred to the findings of the investigation wing wherein some general modus operandi has been discussed that how some of the people are taking bogus long term capital gain across the country, after buying the shares at a lower price and selling the same at very high inflated prices. Assessing Officer had also noted that Assessee has bought the shares at average price of Rs. 67.35 and has sold the same at an average price of Rs. 71.80 per share. He also noted that this company was listed in BSE and has manufacturer and wholesaler of high end gold and diamond jewellery. He also noted that very thin profits have been shown by the company and how the share price started escalating in Jun 2010 and peaked at mid 2011 and then fell from December 2011. He has made some general observation that how few people were beneficiary of such accommodation entry.

7. AO has also referred to the fact that Assessee was summoned u/s 131, wherein Assessee had attended and stated that he has invested on basis of technical analysis which he generally does for most of the scrips and has not seen the profits of the company. Accordingly, AO treated the entire amount of sale of Rs. 28,74,525/- as unexplained cash credit u/s 68. He also added notional commission at the rate of 3% is worked out of Rs. 86,236/- which Assessee might have paid to the exit providers.

8. Before the Ld. CIT (A), the Assessee gave all the factual details and evidences with regard to purchase and sale of the shares. However, the Ld. CIT (A) has simply confirmed the order of the Assessing Officer which was based on some report from investigation wing and after referring to various case laws on colorable device.

9. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as material referred to before us. From the perusal of the assessment order and the CIT (A) order, we find that both the authorities were just carried away by the information from the investigation wing that scrip of

M/s. "Exelon Infrastructure Limited" was found to be penny stock and how it was a penny stock has not been elaborated. There is no reference that at any point of time, trading of the scrip was banned by SEBI or something adverse has been found that prices of this company was rigged on manipulated. It has been informed by the Ld. Counsel that this is scrip is still listed in "Bombay Stock Exchange" (BSE) and is traded till date. Further, he submitted that no material or information has been found against the Assessee that Assessee was involved in any kind of manipulation or was found to be beneficiary of some accommodation entry by some exit provider. He further submitted that the Assessee is a regular investor since 1995 and has made investment in 700 of scrips in this year and under the head STCG alone, he has invested in more than 400 scrips and this was one of the scrips which have been doubted by the department simply based on some information from investigation wing. Thus, none of the authorities have even analyzed the facts of the case Assessee or the circumstances. It is not a case where Assessee had purchased the shares at very low price and then after one year had sold it at a very high inflated price which for earning any exempt income, albeit profit earned is for

marginal sum. Further, it is not a case of trading or investing one or two shares as is the case in the typical case of accommodation entry. Thus, the entire general observation made by the Assessing Officer and the Ld.CIT (A) is not applicable on the facts of the Assesses case.

10. On the other hand, Ld. DR, strongly relied upon the order of the Assessing Officer and the Ld. CIT(A), and submitted that once it has been found by the investigation wing at the scrips of M/s. “Exelon Infrastructure Limited” and the trading of the shares of this company was shady and also it was found that accommodation entries were provided by the exit providers in these scrips accordingly, the action of the Assessing Officer and order of the Ld.CIT(A) should be upheld.

11. We are unable to appreciate the reasoning given by the Assessing Officer, which is solely divorced from the fact of the Assessee’s case and based on some general perception and the report of the investigation wing has drawn his presumptions. It is not in dispute that, this company is traded in BSE since long and it’s a matter of fact which has not been rebutted that at no point of

time the trading of these shares were banned or it is still not traded. Assessee has bought a shares online from BSE on 20.04.2011 at an average purchase rate of Rs. 67.35 per share and was sold on 09.06.2011 and 05.07.2011 for average sale price of Rs. 71.80, that is, it was sold for small gain of Rs. 4/- within the short span of two months and thereby Assessee has earned short term capital gain of Rs. 1,78,073/- on which Assessee has paid taxes. Not only that, it is not one of the scrip in which Assessee has dealt during the year and from perusal of the details furnished in the paper book from pages 17-21, it is seen that, Assessee has under taken transaction in the short term capital gain in almost 400 different scrips, where Assessee has been purchasing shares of various companies online and selling the same in a very short duration and thereby earning short term capital loss and short term capital gain. Nowhere has it been disputed that Assessee has been regular investor in the shares and the major source of income has from investing in shares. We are unable to comprehend as to why Assessee will enter into one scrip out of 700 scrips only for gain of Rs. 4/- per share in one scrip and involve in some kind of clandestine accommodation entry, for a paltry sum of Rs.1,78,073/-.

12. Be that as maybe, there is no information or material that the Assessee was part of some beneficiary in some accommodation entry provided by an exit provider. The Assessee has purchased the shares online through a broker whose credentials have not been doubted not there is any information that this broker with whom Assessee has invested almost more than 1000s of scrips and only in one scrip, he has provided bogus entry. All the purchases sales have been online in BSE and routed through demat account. Just because, there is some information from investigation wing, it does not mean that all the investors or trader who have transacted in this scrip are beneficiaries of some accommodation entry specially when these scrips are traded in the open market at BSE and never banned by SEBI. Based on some general observation and hypothesis and presumption, addition cannot be made on the ground that, since there was some information from investigation wing about this company and therefore, the Assessee's transaction for purchase in shares are bogus and not only that entire sale proceeds of the shares have been taxed without even seeing that Assessee has made purchases out of the sources disclosed in the

books when such purchases are duly shown as investment in the books and in demat account.

13. Accordingly, on the facts of the present case we do not find that it is case where any adverse inference can be drawn. Before us, the Ld. Counsel has also filed the details of BSE data on M/s. "Exelon Infrastructure Limited" about the trading of share from the month of April 2010- June 2012 and pointed out that 100s of investors had made investment in these shares and there is no such huge manipulation of price when Assessee had made the purchase and sold them. It not a case where even a doubt can entertained about the genuineness of the transaction or the intention of the Assessee was to make some huge gain or benefit from investing and selling of the shares in a span of two months for marginal gain of Rs. 4 per shares to earn bogus short term capital gain of Rs. 1.78 lakhs on which Assessee has paid taxes at the rate applicable for STCG. Thus, the addition as made by the Assessing Officer and sustained by CIT (A) is directed to be deleted. On merits case of the Assessee is allowed.

14. The legal issue challenging the validity of re-opening u/s 147 is treated as academic. And therefore, we are not adjudication the same.

15. In the result, appeal of the Assessee is allowed.

Orders pronounced in the open court on 31st Jan, 2023.

Sd/-

Sd/-

(S Rifaur Rahman)

(Amit Shukla)

Accountant Member

Judicial Member

मुंबई Mumbai;दिनांक Dated : 31.01.2023

Mrs. Urmila

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**