

आयकर अपीलीय अधिकरण, कटक न्यायापीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य एवं श्री अरुण खोड़पिया लेखा सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

AND

SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.165 & 166/CTK/2022

(निर्धारण वर्ष / Assessment Year :2013-2014 & 2014-2015)

Hemant Kumar Agarwal, Jaunliapatty, Cuttack-753009	Vs	Addl/Joint/Deputy/ACIT/ITO, NFAC, Delhi
PAN No. :AARPA 8063 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Mohit Sheth, Advocate
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	23/02/2023
घोषणा की तारीख/Date of Pronouncement	:	23/02/2023

आदेश / O R D E R

Per Bench :

These two appeals are filed by the assessee against the separate orders of the Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, both dated 23.09.2022 for the assessment years 2013-2014 & 2014-2015.

2. It was submitted by the Id. AR that the assessee is an individual, who derives income from partnership business, house property and income from dealing in shares. It was the submission that the assessee had applied for shares in M/s AAR Infrastructure Limited and 50000 shares were allotted to the assessee at the cost of Rs.5 lakhs on 25.01.2011. Ld. AR drew our attention to page 14 of the paper book, which was the allotment letter and page 15 which was the copy of the cheque issued. It was the submission that the shares were demated and held in the demat account of the assessee in Axis Bank which was shown at page 17 of the paper book. It was the submission that on 09.12.2012

the AAR Infrastructure Ltd. merged with M/s CCL Ltd. This is by an order sanctioning the merger by the Hon'ble High Court of Delhi dated 09.02.2022. It was the submission that as against 50000 shares of M/s AAR Infrastructure held by the assessee, the assessee received 125000 shares of M/s CCL International. During the assessment year 2013-2014 the assessee had also purchased 500 shares of M/s CCL International and also sold the same and had generated short term capital loss. During the assessment year 2014-2015, the assessee had purchased 316 shares of CCL International Ltd. and had sold the same also during the assessment year 2014-2015 and had derived a short term gains. It was the submission that in respect of 1 lakh shares sold during the assessment year 2013-2014 and 25000 shares sold during the year 2014-2015, the assessee had claimed exemption u/s.10(38) of the Act. It was the submission that the AO treated the claim of assessee u/s.10(38) of the Act as ineligible by holding the transaction as a bogus transaction in respect of penny stock. It was the submission that the AO had accepted the short term capital loss in respect of the same shares purchased during the year 2013-2014 and had also accepted the short term capital gains for the assessment year 2014-2015. It was only in respect of 1 lakh shares sold by the assessee in the assessment year 2013-2014 and 25000 shares sold for the assessment year 2014-2015 that the AO treated the transaction as bogus transaction. It was the submission that the shares of AAR Infrastructure was through first allotment. The AAR Infrastructure was merged with M/s CCL International Ltd. and the assessee was

allotted shares of the CCL International Ltd. in lieu of the shares of AAR by the CCL International Ltd. It was submitted that the assessee has no control over the merger of the two companies. The assessee had sold the shares which he had received from CCL International through recognized broker, through the BSE and had also paid STT, the transactions were all through account payee cheques and the assessee had held the shares for more than 24 months whereas for the purpose of Section 10(38) of the Act, the requirement was only 12 months. It was the submission that the Id. CIT(A) also confirmed the order of the Id. AO without considering the submissions of the assessee. It was the prayer that the assessee may be held to be eligible for the exemption u/s.10(38) of the Act.

3. It was further submitted that the AO has made an estimated addition of 5% treating the same as the cost incurred by the assessee representing the commission in respect of converting black money by adopting the bogus transaction of dealing in penny stock and it was the prayer that the addition made by the AO and confirmed by the Id. CIT(A) may be deleted.

4. In reply, Id. Sr. DR vehemently supported the order of the Id. AO & Id. CIT(A). Id. Sr. DR relied on the order of the Id. CIT(A) at page 4 para 4. It was the submission of the Id. Sr. DR that this was a classic case of conversion of unaccounted money by adopting the fraudulent method of claim of deduction u/s.10(38) of the Act. It was the submission that the AO has categorically provided the details of modus operandi adopted by the assessee in such cases. It was submitted that the investigation wing of

the department at Kolkata had investigated the issue and had found that the brokers, who are doing such transaction and one such broker/operator was Mr. Dipak Patwari. Ld. Sr. DR drew our attention to page 3 of the assessment order para 4 which was the *modus operandi*. It was the submission that in assessee's case also the same *modus operandi* had been followed and the transaction has rightly been held to be bogus and accommodation entry. It was the submission that the order of the AO and CIT(A) is liable to be upheld.

5. In reply, Id. AR has relied upon the decision of the coordinate bench of the Tribunal in the case of Smt. Bimala Devi Singhania, passed in ITA No.212/CTK/2019, order dated 06.07.2022 as also the decision of the Hon'ble Delhi High Court in the case of Smt. Krishna Devi, reported in [2021] 126 taxmann.com 80 (Delhi). It was submitted that the assessee may be held to be eligible for deduction u/s.10(38) of the Act and the addition made by the AO of 5% representing the commission charges may be deleted.

6. We have considered the rival submissions. Not every case of purchase and sale of low value shares is an accommodation entry. The peculiarity in the present case is that the shares have been allotted to the assessee as early as in January, 2011. From a perusal of the assessee's demat account, it is clear that the assessee is substantially into purchase and sale of shares. A perusal of the demat account further shows that out of substantial number of shares dealt with by the assessee the average pricing of each of the shares varies between 10 and 690. The shares

dealt with by the assessee which are above the value of 100 are about 9 out of 55 different shares. Thus, the assessee is substantially into dealing in midcap and small cap shares. The shares of AAR Infrastructure which has been applied for and has been allotted on account of merger with CCL International increased in number but reduced in value. Admittedly, the assessee has no control over such merger. After nearly 2 years, the assessee has started selling the merged shares. There is no evidence produced by the revenue to show that the broker engaged by the assessee was one of the operator identified by the investigation wing at Kolkata as an entry operator. The assessee's name has also not been mentioned by any of the operators, whom the revenue has investigated and whose statements have been recorded. The assessee has not been shown to be in any way connected to any of such brokers who are the alleged operators. Just because the assessee has made a gain in its transaction in a small cap share, it cannot be blindly held to be a transaction which has been done fraudulently for claiming the exemption u/s.10(38) of the Act. Even otherwise the AO himself has accepted the short term capital loss on account of the purchase and sale of CCL International shares for the assessment year 2013-2014 of 500 shares and the short term capital gains in respect of 316 shares of M/s CCL International Ltd. for the assessment year 2014-2015. This being so, we are of the view that the assessee is entitled to the deduction u/s.10(38) of the Act and the order of the Id. AO and Id. CIT(A) are set aside. Our view also finds support from the decision of the coordinate bench of the

Tribunal in the case of Smt. Bimala Devi Singhania, referred to supra, wherein in paras 11 to 21, it has been held as follows :-

11. *At the outset, we are faced with the decision of the SMC Bench of the Delhi Tribunal in the case of Anip Rastogi & Anju Rastogi(supra). This decision admittedly is in respect of CCL International Ltd. shares and the issue has been held against the assessee therein. The addition in the case of Anip Rastogi was based on a statement recorded from the brokers and the investigation wing's report in respect of bogus claim of long term capital gain. Clearly the facts in the assessee's case are different from that of Anip Rastogi's case cited supra.*

12. *A perusal of the decision of the Hon'ble Kolkata High Court in the case of Swati Bajaj, referred to by the Id. Sr. DR, prima facie, revolves on the statement recorded from the brokers and the requirement of providing opportunity of cross examination to the assessee in respect of these said brokers whose statements have been used against the assessee therein. One peculiarity that has become evident in the decision of the Hon'ble Kolkata High Court in the case of Swati Bajaj (supra), is that the Hon'ble High Court was given to understand, wrongly, that the investigation report was available in the public domain and that was the very foundation on which the Hon'ble Kolkata High Court has proceeded on its judgment that the evidence was very much available to obtain. Unfortunately, the Hon'ble Kolkata High Court was wrongly informed. Another portion of the decision of the Hon'ble Kolkata High Court in the case of Swati Bajaj (supra) gave substantial importance insofar as in para 15 of the said order the Hon'ble Kolkata High Court relied on the decision of Kishanlal Agarwalla. The Hon'ble Kolkata High Court itself had held that no natural justice requires that there should be a kind of formal cross examination as it is a procedural justice, governed by the rules and regulations. Further it was held that so long as the party charged has a fair and reasonable opportunity, would receive, comment and criticize the evidence, statements or records on which the charges is being against him, the demand and tests of natural justice are satisfied.*

13. *As mentioned earlier, investigation report is not in the public domain and secondly the evidence which is used against the assessee clearly is not available to the assessee and the denial of providing these evidences to the assessee along with the opportunity of cross objection becomes a very foundation against the assessee in the course of assessment. It would be worthwhile referred to the decision of the Hon'ble Supreme Court in the case of M/s Andaman Timber Industries, Civil Appeal No.4228 of 2006, wherein the Hon'ble Supreme Court has categorically held that, "As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of*

cross-examination.” The Hon’ble supreme Court further went to hold that, “Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above.” In that case, the Hon’ble Supreme Court went on to hold that they were of the opinion that if the testimony of these two witnesses is discredited, there was no material with the department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice therein.

14. The Hon’ble Kolkata High Court further went on to hold that the report submitted by the investigation department cannot be thrown out on the ground urged on behalf of the assessee as the assessee had not shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination, as the assessee has not specifically intimated as to how he was prejudiced which coupled with the fact as admitted by the revenue, the statement do not incite the assessee. The Hon’ble Kolkata High Court further went on to hold that unless and until the assessee shows and proves that she/he was prejudiced on account of such report, a statement mentioning that non-furnishing of the report and non-availability of the person for cross examination cannot vitiate the proceedings. This is to be read along with the indication given by the Hon’ble Kolkata High Court that the said report is available in the public domain and it was available to the assessee and its counsel to download and examine the same and thereafter put up through defence. If the evidence is to be used against the assessee in the course of any assessment or any proceedings, the basic principle of natural justice demands and has been repeatedly upheld by the Hon’ble Supreme Court that such evidences must be put to the assessee and he should be given opportunity to rebut the same. The Hon’ble Kolkata High Court further went onto hold in para 69 of the order that the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be, what inferential process that a reasonable/prudent man would apply to arrive at a conclusion.

15. A perusal of the facts in the present case, clearly shows that there was a survey on the premises of the assessee Shri Radheshyam Singhania. In the course of such survey a statement has been recorded from him wherein he has repeatedly stated that he has done the transaction through proper channels and has claimed the exemption u/s.10(38) of the Act, but he is willing to pay

the tax on the income thereon. When filing his returns the assessee did not disclose the said income as "income from other sources" nor paid tax on it. But he claimed the exemption u/s.10(38) of the Act. The AO relied upon the statement of Radheshyam Singhania taken in the course of survey and applying the principle of preponderance of probabilities, denied assessee's claim of exemption u/s.10(38) of the Act and brought to tax the entire sale receipts. It should be mentioned here the AO did not give the benefit of even the cost of purchase to the assessee. Here we are faced with the situation that what is the validity of the statement recorded in the course of the survey. The statement of Shri Radheshyam Singhania admittedly has been recorded u/s.131(1A) of the Act. The statement admittedly has evidentiary value but it is still open to the assessee to prove that his claim of exemption u/s.10(38) of the Act is valid and once it is proved with substantial evidence, the statement recorded u/s.131(1A) will no more have the same strength or the evidentiary value. An assessee is fully entitled to produce substantial evidence to prove that the statement given by him in the course of survey is erroneous. In such situation it is for the AO to disprove the evidences so produced by the assessee. The evidences produced cannot be wished away by claiming that the assessee has offered to pay tax in the statement. An assessment is not made on the basis of statement recorded, but on the basis of the evidence available and substantiated. There can be no agreement much less any valid agreement between an AO and an assessee in respect of taxing of an income or source of income.

16. *Other than the statement recorded from Shri Radheshyam Singhania, the AO has not relied upon any other evidence, however, the assessee has produced substantial evidence in the form of the first allotment of the shares in AAR Infrastructure Ltd., the merger of AAR Infrastructure with CCL International Ltd., the sale of shares through ISE Security & Services Ltd., a SEBI authorised broker, the proof of payment of STT as also the fact that these shares were in the Demat form. Other than the statement of the assessee showing that he is willing to pay tax on the transaction, there is no shred of evidence available with the AO to presume that the transaction done by the assessee in the purchase of AAR Infrastructure shares, merger of AAR Infrastructure with CCL International Ltd. shares was a colourable device or an attempt at evading tax by using the unscrupulous methods of tax planning bordering on side of tax evasion.*

17. *The revenue has not relied upon the report of the investigation authorities from the brokers for the purpose of making the assessment. The reliance on the statement of the broker Shri Sanjay Bohra and the investigation report has been made only in the annexures to the ground of appeal filed before the Tribunal. These are clearly evidences produced by the revenue to support its stand in respect of probability and possibility of assessee having indulged in colourable device of tax evasion, fringing of the area of tax evasion. In the present case, as the addition has been made by*

the AO solely on the basis of the statement of the assessee, the question of cross examination does not arise. The assessee having retracted his statement in principle and in fact in holding on to its claim of exemption u/s.10(38) of the Act as it was supported by proper and adequate evidence cannot be found fault with.

18. *A perusal of the order of the Id. CIT(A) also shows that he has considered the fact that the transaction conducted by the assessee fell within the four corners of the requirements for claiming exemption u/s.10(38) of the Act.*

19. *The Id. Sr. DR had taken serious objection to the finding of the Id.CIT(A) that he has considered the statement of the assessee that the statement was recorded in the course of survey under duress. That issue no more survives, insofar as the statement recorded in the course of survey admittedly is not conclusive of evidence as has been held earlier.*

20. *This being so, as the statement recorded from the brokers, who have agreed to penny stock manipulation and the investigation report based thereon having not been relied upon by the Id. AO for the purpose of assessment, the decision relied on by the revenue in the case of Anip Rastogi & Anju Rastogi (supra) as also the decision of Hon'ble Kolkata High Court in the case of Swati Bajaj (supra), does not apply to the facts of the present case. In these circumstances, we find no error in the order of the Id.CIT(A), which calls for any interference and consequently, we uphold the same.*

21. *In regard to alternate claim of the Id. Sr.DR that the income should be assessed under the head "adventure in the nature of trade", we are unable to accept the contention, insofar as when all the criterion required for claim of exemption u/s.10(38) of the Act has been complied with by the assessee and no fault or error in such claim has been proved much less a falsity in the claim, the income of the assessee at to be exempt u/s.10(38) of the Act, cannot be brought to tax under the head "adventure in the nature of trade". In regard to the plea of Id.Sr. DR that two terms of Short Term Capital Gains has to be assessed also no hold merger insofar as the assessee has not sold the shares or transferred the shares of AAR Infrastructure. In far, the AAR Infrastructure merged with CCL International Ltd. When such merger itself has not considered as transferred to treat that the assessee's shareholding in AAR Infrastructure has got extinguished or has been transferred for the purpose of computing Short Term Capital Gains, will not arise. The assessee has been issued 1.25 lakhs shares of CCL International Ltd. in lieu of 50000 shares in AAR Infrastructure held by the assessee. There is no transfer as a consequence of the merger to treat the same as Short Term Capital Gains. Accordingly, we dismiss the appeal of the revenue filed in the case of Smt. Bimala Devi Singhania in ITA No.212/CTK/2019.*

7. In the above circumstances, respectfully following the decision of the coordinate bench of the Tribunal in the case of Smt. Bimala Devi Singhania, referred to supra, we direct the AO to grant the benefit of deduction u/s.10(38) of the Act as claimed by the assessee in both the appeals under consideration.

8. As we have already allowed assessee's claim for deduction u/s.10(38) of the Act, the addition made by the AO and confirmed by the Id. CIT(A) representing 5% alleged commission in both the appeals of the assessee under consideration, stands deleted.

9. In the result, both appeals of the assessee are allowed.

Order dictated and pronounced in the open court on 23/02/2023.

Sd/-

(अरुण खोड़पिया)

(ARUN KHODPIA)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / **JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 23/02/2023

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR,
ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack