

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'C' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 2251/Mum/2022 (A.Y. 2011-12)

Mrs. Pallavi Mayur Gandhi G-1202, Kamla Vihar, G-Wing Mahavir Nagar, Kandivli West Mumbai-400 067. PAN : AADPG3815E (Appellant)	Vs.	ITO-33(2)(5) Bandra Kurla Complex Bandra East Mumbai-400 051. (Respondent)
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Assessee by	Shri Akash Kumar
Department by	Shri V.K. Chaturvedi
Date of Hearing	09.02.2023
Date of Pronouncement	19.04.2023

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 10.08.2022 passed by Ld CIT(A), NFAC, Delhi and it relates to the assessment year 2011-12. The assessee is challenging the decision of Ld CIT(A) in upholding the validity of reopening of assessment u/s 148 of the Act and also in confirming the addition of Long term capital gain arising on sale of shares u/s 68 of the Act.

2. The facts relating to the case are stated in brief. The assessee herein is an individual and she filed her return of income for AY 2011-12 on 03.08.2011 declaring total income of Rs.9,37,720/-. Subsequently, the AO received information from the investigation department of the department that the Kolkatta division of Investigation directorate has undertaken investigation into the transactions carried out in shares of 84 companies and it revealed that the prices of shares of those companies have been manipulated to generate bogus long term capital gains/short term capital

losses. It was noticed that the assessee herein has sold shares of M/s Shreenath Commercial & Finance Ltd, which was identified as one of the penny stocks. The assessee had declared long term capital gains of Rs.5,18,57,339/- on such sale and claimed the same as exempt.

3. The assessee had purchased 150000 shares of Rs.10/- each at a premium of Rs.10/- per share on 23.11.2009 by way of preferential allotment of shares. The AO also noticed that SEBI has levied penalty on the above said company for manipulation of prices of shares of above said company during the period from May to July 2008. The prices were found to have increased from Rs.6.82 to Rs.57.20 during this period. The AO also further noticed that the assessee herein was identified as a suspected beneficiary of another share scrip named M/s Pine Animation Limited. Accordingly, based on the information so given by the investigation wing, the AO took the view that the long term capital gains earned by the assessee from sale of shares of M/s Shreenath Commercial & Finance Ltd is bogus in nature. Accordingly, the AO held that the long term capital gains declared by the assessee is non-genuine in nature and accordingly assessed the same as income of the assessee.

4. In the appellate proceedings, the Ld CIT(A) upheld the validity of reopening of assessment. On merits of addition, the Ld CIT(A) upheld the view taken by the AO in assessing the long term capital gains as non-genuine in nature. Aggrieved, the assessee has filed this appeal before the Tribunal.

5. The Ld A.R first explained the facts of the case. He submitted that the assessee subscribed to 150000 equity shares of Rs.10/- each at a premium of Rs.10/- per share of M/s Shreenath Commercial & Finance Ltd through preferential allotment. The aggregate amount of Rs.30.00 lakhs was paid by way of cheque on 23.11.2009. Subsequently, these shares were credited to the D-mat account of the assessee maintained with M/s HDFC Bank Ltd on

8.1.2020. Since the shares were allotted to the assessee on preferential basis, the same had lock in period of one year. In the meantime, on 28.09.2010, the shares were split by the company from Rs.10/- per share to Re1.00 per share. Accordingly, the assessee received 15,00,000/- equity shares of Re1.00 each. Though the lock in period expired on 09.12.2010, the assessee did not sell the shares immediately thereafter. The assessee has sold only a part of share holding, i.e., 11,20,000 shares between 21.01.2011 to 10.03.2011 in online BSE platform through a broker named M/s Magnum Equity Broking ltd.

6. The Ld A.R then advanced his arguments on validity of reopening of the assessment. He invited our attention to the reasons for reopening of the assessment placed at page No. 9 of the paper book and submitted that the Assessing Officer has reopened the assessment, only on the basis of the information received through ITD systems and hence it is a case of borrowed satisfaction, which is not permissible under the Act. He further contended that the AO has not understood the facts also correctly while recording the reasons, which is evidenced by the fact that the AO has stated that the assessee has sold 4 lakhs shares for a sales consideration of Rs. 5.45 crores. The actual fact is that the assessee has actually sold 11.20 lakhs shares. Accordingly learned AR submitted that the Assessing Officer has reopened the assessment on the basis of borrowed satisfaction; on the basis of inaccurate particulars and without coming to the prima facie belief that there was escapement of income. Accordingly he submitted that the reopening of the assessment is bad in law. In support of his contention learned AR placed reliance on following case laws :

- PCIT Vs. Shodiman Investments (P) Ltd. (422 ITR 337)
- CIT Vs. Sfil Stock Broking Ltd. (325 ITR 285)
- Inventors Industrial Corporation Ltd. Vs. CIT (194 ITR 548)
- Coronation Agro Industries Ltd. Vs. DCIT (390 ITR 464)

7. The learned AR then advanced his arguments on merits. He submitted that the assessee has sold 1.20 lakhs shares for a consideration of Rs. 5.45 crores and earned long term capital gains of Rs. 5.18 crores. The Learned AR submitted that the assessee has purchased shares under preferential allotment scheme, by making payment through banking channels. The shares so allotted were having lock in period of one year. Further, the shares have been dematerialized in the demat account and thereafter sold through stock exchange. All these information and the corresponding documents evidencing purchase, sales, bank account copies etc., were furnished to the Assessing Officer during the course of assessment proceedings. He submitted that the AO has not shown that any of the documents or explanations are wrong. The Assessing Officer, on the contrary, has relied upon a SEBI report in respect of Mayo group relating to an earlier period during May to July, 2008 in order to come to the conclusion that the assessee has earned bogus long term capital gain. He submitted that the assessee has not sold any single share during the above said period and hence the AO could not have placed his reliance on the above said report. The learned AR further submitted that the Assessing Officer, in paragraph 9.1 of the assessment order, has referred the name of certain exit providers and also number of shares purchased by them. The Learned AR submitted that the assessee, first for all, could not know the buyers of the shares sold by her, since the shares are being sold through online system of Stock exchange. Further the assessee has sold 11.20 lakhs shares whereas, the Exit providers mentioned by the Assessing Officer has purchased only 47,019 shares. Hence, the Assessing Officer could not have placed reliance on this information also in order to reject the transactions of the assessee.

8. The Learned AR further submitted that the Assessing Officer has placed reliance on the statements given by certain persons connected with the company M/s. Sreenath Commercial and Finance Limited. However, the Assessing Officer did not give copies of those statements to the assessee and

also did not provide opportunity to cross examine them, even though a specific request was made to the Assessing Officer in the letter dated 8.2.2017 filed before him. The Learned AR further submitted that the Assessing Officer has observed that a broker named J.M. Financial Services Pvt. Limited is involved in rigging of share price. However, the assessee has not sold the shares through the above said broker. He submitted that the assessee has sold shares through M/s. Magnum Equity Broking Limited. Hence, the said information received by the AO is also not relevant to the assessee. He further submitted that there is no allegation made against the assessee that she has participated in any price rigging in the market on the shares of above said company. Accordingly, the learned AR submitted that the tax authorities did not find fault with any of the documents furnished by the assessee in support of sales of shares and have disbelieved the transaction of sales of shares only on surmises and conjectures.

9. The Learned AR further submitted that the co-ordinate bench of ITAT, in the case of Mr. Ripu Sudan Kundra Vs. ITO (ITA No. 2792/Mum/2018 dated 5.10.2021), has considered an identical issue of sale of shares of M/s Sreenath Commercial and Finance Limited and has held that the assessment has been made purely on suspicion, surmises and conjecture without any tangible evidence brought on record and accordingly deleted the addition made by the Assessing Officer in that case. The Learned AR also placed on the decision rendered by Hon'ble Hon'ble Jurisdictional Bombay High Court in the case of PCIT Vs. Ziyauddin A. Siddique (Income Tax Appeal No. 2012 of 2017 dated 4.3.2022) and also decision rendered in the case of CIT Vs. Shyam R. Pawar (2015) 55 taxman.com 108(Bom) in support of the above said contentions.

10. The Ld D.R submitted that the assessee has challenged the reopening of assessment by filing Writ Petition before Hon'ble Bombay High Court, but withdrew it later. He submitted that AO has reopened the assessment on the

basis of information given by the investigation department that the bogus capital gains are generated through purchase and sale of penny stocks. Since the assessee has dealt in one of the penny stocks, the AO had reason to believe that there was escapement of income. Accordingly he submitted that the order passed by Ld CIT(A) on this legal issue does not call for any interference.

11. On merits, the Ld D.R submitted that the Ld CIT(A) has dealt the issue in paragraphs 4.2 to 4.7 of his order and he supported the order so passed by Ld CIT(A).

12. In the rejoinder, the Ld A.R submitted that the withdrawal of writ petition shall not act as a bar against raising the legal issue before the Tribunal.

13. We heard the rival contentions and perused the record. We noticed that the assessee has furnished all the details in support of purchase and sale of shares of M/s Shreenath Commercial & Finance Ltd and the said fact has been recorded by the AO in paragraph 2.5 of the assessment order. We noticed that the assessee has purchased the shares through preferential allotment and the said shares had lock in period of one year. The assessee has held 15,00,000 shares in the above said company and the assessee has sold 11,20,000 shares during the year under consideration almost after one year after expiry of lock in period. We notice that the assessing officer has not found fault with any of the documents furnished by the assessee in support of purchase and sale of shares. There is also no allegation made that the assessee was part of ring which indulged in the alleged price rigging. The allegation of the AO is that the assessee has availed accommodation entries by way of long term capital gains. We notice that an identical case of allegations that the assessee has availed accommodation entries for bogus capital gains was examined by the Hon'ble jurisdictional Bombay High Court

in the case of Shyam Power (supra). The decision rendered by Hon'ble Bombay High Court in the above said case is extracted below:-

“3. Mr.Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumr, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

4. Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

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.”

14. The Hon’ble Jurisdictional High Court has considered an identical issue in yet another case of PCIT vs. Ziauddin A Siddique (Income tax Appeal No. 2012 of 2017 dated 4th March, 2022) and relevant discussions made by Hon’ble Bombay High Court are extracted below:-

“2. We have considered the impugned order with the assistance of learned counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd (“RFL”) is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax (“STT”) has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against the assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgement of the Apex Court in Principal Commissioner of Income tax (Central)-1 vs. NRA Iron & Steel (P) Ltd (2019)(103 taxmann.com 48)(SC) but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

15. We notice that the identical allegation of non-genuine long term capital gains generated on sale of M/s Shreenath Commercial & Finance Ltd was examined by the co-ordinate bench in the case of Mr Ripu Sudan Kundra vs.

ITO (ITA No.2792/Mum/2018 dated 05-10-2021), wherein it was held as under:-

“We have given our anxious thought and consideration to the matter in hand. The AO has disallowed the claim of the assessee based on analysis of the information received from Directorate of Investigation as a result of enquires undertaken by the officers of the Directorate. Based on the said information received, the AO has observed a pattern in the trading in scripts of those companies that has resulted in the claim of short-term capital loss to the assessee. Such companies were seen to have little financial credentials, no profitability, and no apparent explanation for abrupt rise in prices followed by a steep fall in price of shares. Besides, there are statements of brokers/ entry providers who have accepted that they were involved in the scam of price rigging to facilitate accommodation entries to beneficiaries who have routed their unaccounted cash into the books through circuitous means. However, at the same time the assessee has produced documents to substantiate the genuineness of the transactions carried out through banking channels, through the medium of portfolio management whereby there is no contact between the buyer and the seller. The fact remains that there is direct evidence placed on record by the assessee to support the genuineness of the impugned transactions such as contract notes, share certificates, corroborative evidence indicating purchase/ sale through registered broker as juxtaposed against the findings of the AO based on the general report from Investigation and the modus operandi adopted by unscrupulous entry providers. There is no denying that there is no assessee-specific material on record of the AO to pin-point that the assessee has entered into an unholy nexus with entry providers so as to stage manage accommodation entry of STCL. The statements relied on by the AO in the nature of admissions are bereft of corroborative material to implicate the assessee herein in such scam. At the same time the material furnished by assessee to substantiate its claim remains unchallenged and uncontroverted. The purchases were neither off- market nor through preferential allotment. Besides, no copy of any report of information received was supplied to the assessee. The assessee was not confronted with any statement or material allegedly detrimental to the assessee arising or culled out of the Investigation report. Thus, the fact remains that the findings of the lower authorities are not based on evidence but on generalizations and probabilities. The AO could not place anything on record, maybe through a process of his own enquiry, to decisively prove that assessee has obtained bogus STCL through his connivance with entry operators / exit providers. No such enquiry or investigation is seen carried by the AO other than borrowing information to be used against the assessee from the general report of Investigation Directorate. The claim of the assessee appears to have been rejected more on the basis of presumption rather than evidence. The fact also remains that copies of statements used against the assessee were not provided to the assessee. It certainly has incapacitated the assessee from effectively rebutting the same and also from seeking an opportunity for cross examination. When copies of statements relied upon were not provided, when there was no opportunity

to cross examine those witnesses whose statements were relied upon by the AO to conclude that the transaction in question was part of penny scam, we have no hesitation in holding that the lower authorities erred in disallowing the claim stating that the assessee failed to provide cogent and convincing reply to the allegations raised. We observe from the record that in identical situation the Coordinate Bench of ITAT in ITA Nos. 4843 & 1228/Mum/2018 for Assessment Year 2013-14 & 2014-15 in the case of Ramprasad Agrawal Vrs. ITO (reported in [2018] 100 taxman.com 172 – Mum Trib) and Kamla Devi S. Doshi vrs. ITO reported in 88 taxmann.com 773 (Mum-Trib) decided the issue in favour of the assessee on merits. From the above decision, it is trite that denial of such crucial rights is a fatal flaw that renders the assessment order a nullity. An assessment purely based on suspicion, surmises and conjectures without any tangible evidence on record against the assessee of any connivance or collusion is unsustainable in law.”

16. In the instant case also, we noticed that the AO has simply relied upon the report of the investigation department and held that the long term capital gains declared by the assessee are not genuine. No other material was brought on record by the AO to prove that the assessee has indeed availed only accommodation entries. We noticed that the assessee has furnished all documents relating to purchase and sale of securities. The shares have entered and exited his demat account. The purchase and sale transactions have been routed through the bank accounts of the assessee. All these documentary evidences produced by the assessee have not been disproved. We also notice that the assessee has asked for opportunity of cross examination of the parties, whose statements were relied upon by the AO, but same was not provided. Hence the AO could not have placed reliance on those statements. On the conspectus of the matter, we are of the view that the decision rendered by the jurisdictional Hon'ble Bombay High Court in the above said case of Shyam R Pawar (supra) and Ziauddin A Siddique (supra) are squarely applicable to the facts of the present case. Accordingly, we set the order passed by Ld CIT(A) on the grounds raised on merits and direct the AO to delete the addition of long term capital gains.

17. The assessee has also raised a ground challenging the validity of reopening of assessment. Since we have deleted the addition on merits, this

legal ground becomes academic in nature and accordingly we leave the same open and decline to adjudicate the same.

18. In the result, the appeal filed by the assessee is allowed.

Pronounced in the open court on 19.04.2023.

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(B.R. BASAKARAN)
Accountant Member

Mumbai; Dated : 19/04/2023

Copy of the Order forwarded to :

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

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai