

IN THE INCOME TAX APPELLATE TRIBUNAL
“GUWAHATI BENCH, GUWAHATI
VIRTUAL HEARING AT KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member

I.T.A No.136/GTY/2020
Assessment year: 2014-15

Shri Komal Kumbhat.....Appellant
234, G.N.B Road,
2nd Floor,
Opposite Gauhati Club Bus
Stand-above Sarita Restaurant,
Guwahati-781003.
[PAN: AEDPK8036P]

vs.

ITO, Ward-2(1), Guwahati.....Respondent

Appearances by:

Shri H. s. Kumbhat, AR, appeared on behalf of the appellant.

Shri N. T. Sherpa, JCIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : March 14, 2023

Date of pronouncing the order : May 25, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 02.03.2020 of the Commissioner of Income Tax (Appeals)-Guwahati-1, Guwahati (hereinafter referred to as the ‘CIT(A)’) passed u/s 250 of the Income Tax Act (hereinafter referred to as the ‘Act’).

2. The assessee in this appeal through various grounds of appeal has agitated two issues i.e. (i) addition made/confirmed by the lower authorities on long-term capital gains claimed by the assessee of Rs.21,80,417/- treating the same as bogus and thereby adding the same

as unaccounted income of the assessee; (ii) disallowance of long-term capital loss of Rs.52,80,893/-.

3. **First issue** – The Assessing Officer made the impugned addition observing that the assessee has claimed long-term capital gain on the sale of scrip namely Kappac Pharma Ltd. which was recognised as a penny stock by the Securities and Exchange Board of India (SEBI). The Assessing Officer from the details furnished by the assessee noted that the assessee had been investing in shares in listed companies occasionally. The investment in listed company was not significant except the shares of Kappac Pharma because the total number of shares purchased by the assessee during past few years was 134 only. However, in the financial year 2012-13, the assessee made a significant investment, in terms of numbers of shares and also in terms of money, in Kappac Pharma Ltd., whereby, the assessee purchased 7500 shares for a consideration of Rs. 1,12,500/-. He observed that a careful observation of the above chart would show that the trend of investment prior to financial year 2012-13 (A.Y. 2013-14) was only in reputed companies and in very limited numbers. This had changed in the financial year 2012-13 and that too in a company that was almost a "Shell Company". That there was a clear-cut demarcation in the pattern of investment and gain between other reputed scripts and those of Kappac Pharma Ltd. claimed by the assessee. He, in this respect, observed that all investment in shares except investment in shares of Kappac Pharma Ltd. have been made through the Broker Shilpa Stock Broker Pvt. Ltd. registered with BSE with registration number INB011057438 through on line trade. Shares of Kappac Pharma Ltd. have been claimed to be purchased from Girish Metals Private Limited

directly without any involvement of Broker through off-market trade, that too when the shares of Kappac Pharma Ltd. were listed in Bombay Stock Exchange. Further that the assessee could not identify the source of contact with Girish Metals Private Limited. He further noted that all investment in shares except Shares of Kappac Pharma Ltd. have been directly credited in the D-mat Account of the assessee. Share of Kappac Pharma Ltd claimed to have been purchased on 22-05-2012 transferred in the name of the assessee in the Books of Kappac Pharma Ltd. in the month of October 2012 (as claimed) and has been credited in the D-mat account of the assessee only in the month of February, 2014 i.e just one month before its sale in the month of March, 2014. Further that the payment against all other purchases have been debited from the account of the assessee within a very short span of time but in case of purchase of shares of Kappac Pharma, the shares have been claimed to be acquired physically by making cash payment to some unknown person at Jaipur. In all other scripts there was no trading during last few years hence no loss or gain. But in the case of Kappac Pharma there was an abnormal gain claimed which was to the tune of 4540%. Owing to sale of 1500 shares on 21.03.2014 for a sum of Rs. 10,45,200/- and 1700 shares on 24.03.2014 for a sum of Rs. 11,98,500/- through Shilpa Stock Broker Pvt. Ltd. He further observed that on the basis of recommendations of SIT on Black Money as contained in the Third SIT Report, the SEBI has suspended the trading activities of the shares of Kappac Pharma Ltd. (Script Code 506938) w.e.f. 07.01.2015.

4. The Assessing Officer further issued summons u/s 131 of the Act to the assessee. In response to which the father of the assessee appeared before the Assessing Officer whose statement was also recorded. The

Assessing Officer, thereafter, discussed the modus operandi of booking the bogus long-term capital gains through trading in penny stock companies. The Assessing Officer further noted from the financial statement of Kappac Pharma Ltd to find out that there were no actual financial credentials of the said company to support its share movement pattern. That the investee company had NIL fixed assets, normal turnover, no profitability or any other feature that can attract the investors for their future gain. He observed that the earnings per share being NIL, it was difficult to accept that share of such company could fetch price at such a high rate. He observed that it was an absurd proposition that an investee company having Rs.12.59 book value per share was sold at Rs.697/- and more. The Assessing Officer thereafter discussed the statement of the father of the assessee and thereafter gave his conclusion on this issue as under:

“The pertinent question here is that whether the assessee's claim of Long term capital gain from the script "Kappac Pharma Ltd" is genuine or is an accommodation entry. Analysis of facts and circumstantial evidences discussed in above mentioned paragraphs like financial credentials of the script as analyzed above do not support the hike in price without the process of rigging thereby increasing the price artificially, various beneficiaries of Long Term Capital gains in script "Kappac Pharma Ltd". who have claimed off-market purchase of shares have accepted that these are accommodation entries and have made declaration under IDS 2016, many brokers and entry operators have admitted providing accommodation entries of Long Term Capital gains in the Script "Kappac Pharma Ltd" to various beneficiaries. On account of the investigation carried out by the department the trading of script has been suspended since 06" January, 2015, the trading history of the assessee does not suggest normal pattern while making investment in the script "Kappac Pharma Ltd", and the financial analysis and behavioral pattern of the assessee also do not suggest that these are genuine transactions, and most importantly these transactions yielding the Long term capital gain as claimed have not been shown in the relevant return of income filed by the assessee, all these suggest that the Long Term Capital Gain as claimed subsequently during the course of hearing of this scrutiny by the assessee is not actual one rather it is a colourful device to convert and route

unaccounted income of the assessee in the disguise of Long Term Capital gain in to accounted form without paying any tax thereon.

Considering the facts of the case as narrated above I am of the considered opinion that the assessee in order to avoid tax adopted a path knowingly with collusion of others to convert his unaccounted income camouflaged into LTCG that is exempt u/s 10(38) and his claim of Long Term Capital Gains cannot be accepted when the modus operandi of the entire transaction from investment to LTCG is supported otherwise by surrounding evidences. Reliance is placed on the judgement of Sumati Dayal v. CIT (1995) 214 ITR 801 (SC), where the Apex Court has held that the matter has to be considered in the light of human probabilities and the surrounding circumstances, and the Court had occasion to consider the principle "what is apparent is real" and held that this principle is not sacrosanct and may be overlooked if surrounding circumstances so suggest.

In view of the above and on the basis of material evidences available on record, I add back an amount of Rs. 21,80,417/- received in the bank account of the assessee claimed as Long Term Capital Gain with the total income of the assessee as unexplained investment."

5. The ld. CIT(A) confirmed the addition so made by the Assessing Officer.

6. Before us, the ld. Counsel for the assessee has submitted that the aforesaid company i.e. Kappac Pharma Ltd in which the assessee has traded was listed in Bombay Stock Exchange. That the Assessing Officer had made the addition on the basis of investigation report, whereby, the said company was declared as a shell company, whereas, no copy of the said investigation report was supplied to the assessee. Further, in the investigation report, statement of one Shri Majoj Kumar Agarwal, Director of M/s Seaside Marketing Pvt. Ltd., was recorded in which he had admitted the receipt of commission for providing long-term capital gain/loss entry to various beneficiaries and price rigging through paper companies engaged in trading of different penny stocks which included Kappac Pharma Ltd. also. The ld. Counsel has submitted that the

assessee had no link with the said Shri Majoj Kumar Agarwal. He has further submitted that the Assessing Officer has alleged that the shares were purchased from off market. However, there was no bar in purchasing shares from off market. He has further submitted that the observation of Assessing Officer that the assessee was holding 134 shares only in the last few years, however, in the F.Y 2012-13, the assessee had made significant investment and purchased 7500 shares of Kappac Pharma Ltd. was not correct. The Id. Counsel has submitted that in fact the assessee was holding 25666 shares in A.Y 2013-14 brought forward from earlier years and 30666 in A.Y 2014-15 excluding the Kappac Shares. The Id. Counsel has submitted that the observation of the Assessing Officer that of shares were purchased through broker Shilpa was also wrong as none of the shares were purchased from Shilpa Stock Brokers Pvt. Ltd. That the shares were purchased off market from one Girish Metals Pvt. Ltd. and that the Assessing Officer noted that the assessee could not identify the source of contact with Girish Metals Pvt. Ltd. However, in the statement recorded u/s 131 of the Act of the father of the assessee, it was clearly stated that the said person was introduced by shilpa stock brokers. He has further submitted that the observation of the Assessing Officer that other investments were directly credited to the demat account except Kappac Pharma Ltd. which was credited just one month before sale was also wrong as other investment was also credited after years of purchase. That so far as the allegation that the purchases in off market was made in cash, the Id. Counsel has submitted that the said Mr. Girish did not accept the cheque and further to question as to why Mr. Girish sold the shares when prices were going up, it was replied that the said Mr. Girish was in urgency to sell the shares. That in the investigation report neither the assessee nor the broker Shilpa directly or

indirectly were named. The ld. AR also relied upon various case laws and further submitted that the common decision of the Hon'ble Calcutta High Court in the case of PCIT vs Swati Bajaj reported in 446 ITR 56 was not applicable to the facts and circumstances of the case of the assessee.

7. The ld. DR, on the other hand, has relied on the decision of the Hon'ble Calcutta High Court in the case of PCIT vs Swati Bajaj (supra), wherein, the issue was decided in favour of the revenue relating to the trading in the same scrip of Kappac Pharma Ltd. He has further submitted that the said scrip was admittedly a penny stock scrip.

8. I have considered the rival contentions and gone through the record. Though in this case, the ld. AR of the assessee has canvassed the argument that the assessee had traded in the scrip of Kappac Pharma Ltd in normal course, however, the peculiar facts of this case do not suggest that the investment made by the assessee in the scrip of Kappac Pharma was in the normal course. The peculiar fact is that the said scrip was purchased by the assessee in off market from one Girish Metals Pvt. Ltd. and the payment was made through cash and not through cheque. The shares were not credited in the demat account. It was credited in the demat account just one month before the sale. There was abnormal high increase in the price to the tune of 4540%. This scrip was recognised as a penny stock by the SEBI. So far as the contention of the ld. Counsel that the Assessing Officer has referred to investigation report of the SEBI and further its copy was not supplied to the assessee is concerned, I note that the Assessing Officer in the assessment order has duly discussed about the irregularities unearthed by the department and the SEBI and has also discussed how there was price rigging, the entire discussion is part of the assessment order and the ld. Counsel could not

point out any defect in the said report discussed by the Assessing Officer. Even the Id. Counsel for the assessee has tried to find dent in the assessment order by pointing out that the Assessing Officer had noted that the assessee has purchased only 134 shares in earlier years, whereas, the assessee was having 25666 shares in A.Y 2013-14 and 30666 shares in A.Y 2014-15. I note that even it is taken that the assessee was having shares of other companies but the trading of the assessee in Kappac Pharma Ltd has its distinguished facts, such as the assessee purchased in cash in off-market transaction and further there was abnormal increase in the share price, the shares were credited in the demat account just one month before sale, the assessee has claimed none of the other shares were purchased through Shilpa Stock Brokers. However, it is own case of the assessee that the seller Girish metals Pvt. Ltd. was introduced by the broker Shilpa. If the assessee was not carrying out any transaction of shares through Shilpa Stock Brokers that it remains unexplained as to why the assessee would contact Shilpa Stock Brokers for purchasing off market shares of the penny stock company Kappac Pharma Ltd. The order of the Assessing Officer is well-elaborated order which has been confirmed by the CIT(A). I do not find any reason to interfere with the order of the lower authorities on this issue and the same is upheld.

9. **Second issue** – Vide this issue, the assessee claimed long-term capital loss of Rs.52,80,893/- on sale of flat. The assessee claimed that the said flat was allotted to the assessee on 07.06.2007 on promised payment of Rs.51,04,340/-. This allotment was revised on 01.04.2011 and the price was reduced to Rs.46,43,300/-. The assessee had taken Rs.50,00,000/- loan from Financial and Management Services Pvt. Ltd.

The loan was disbursed by the said Financial and Management Services Pvt. Ltd. by cheque which was deposited in the bank account of the assessee. The assessee had paid amount to the builder by cheque from his bank account. The assessee claimed indexation from date of allotment i.e. 07.06.2007 and thereafter claimed loss on the sale of the flat. The Assessing Officer, however, denied the claim, observing as under:

“11.4 Conclusion

It is clear that the aforesaid residential flat was neither appearing in the balance sheet of the assessee nor was present in the balance sheet of Financial & Management Services Ltd. Since the entire payment and receipt of money has been made by Financial & Management Services and except signing few deeds the assessee had no role to play in the aforesaid transaction of purchase and sale of property, the said property cannot be treated as property of the assessee. Had there been involvement of any interest of the assessee in the aforesaid property, the said property would have been shown in the balance sheet of the assessee and the Long Term Capital Loss would have been claimed in the Return of the assessee for the A.Y. 2014-15. Considering the facts of the case as narrated above I am of the considered opinion that in aforesaid transaction of property the assessee is mere a name lender and the entire transaction belong to Financial and Management Services Ltd. Hence the claim of assessee preferred during the course of hearing regarding Long Term Capital Loss amounting to Rs. 52,80,893/- cannot be accepted when the modus operandi of the entire transaction from purchase up to claim of Loss is supported otherwise by surrounding evidences. Reliance is once again placed on the judgement of Sumati Dayal v. CIT (1995) 214 ITR 801 (SC), where the Apex Court has held that the matter has to be considered in the light of human probabilities and the surrounding circumstances, and the Court had occasion to consider the principle "what is apparent is real" and held that this principle is not sacrosanct and may be overlooked if surrounding circumstances so suggest.

11.05 In view of the above and material evidences available on record, I decline to accept the claim of Long Term Capital Loss preferred by the assessee post filing of his return of Income. The assessing officer of Financial and management services Ltd. is separately being intimated about it to do the needful. The claim of TDS on account of Transaction of sale of aforesaid property amounting to Rs.58,906/- is also hereby disallowed.”

10. The ld. CIT(A) confirmed the order of the Assessing Officer on this issue.

11. Before us, the ld. AR of the assessee has submitted that the ld. CIT(A) has failed to look into the documents furnished before him. That the loan documents were furnished before the CIT(A). Further that the observation of the Assessing Officer that the assessee had not made any single payment was wrong. The ld. counsel therefore has submitted that the issue may be restored to the file of the CIT(A) to examine the relevant documents furnished by the assessee in this respect.

The ld. DR has not objected to the same.

This issue is accordingly restored to the file of the CIT(A) with a direction that the ld. CIT(A) will examine the document furnished by the assessee in support of his claim and thereafter will decide the issue afresh in accordance with law. The ld. CIT(A), if so deem fit, may also call for a remand report from the Assessing Officer to get the true picture of the facts of the case.

12. With the above observations, the appeal of the assessee is treated as partly allowed for statistical purposes.

Kolkata, the 25th May, 2023.

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य /Judicial Member

Dated: 25.05.2023.

RS

Copy of the order forwarded to:

1. Shri Komal Kumbhat
2. ITO, Ward-2(1), Guwahati
ACIT, Circle-7(2), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches