

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA No.193/Hyd/2022		
Assessment Year: 2016-17		
Vishan Raj Jain (HUF) 6-3-650, G7 6-3-650, G7, Maheswari Chambers Somajiguda Telangana-500 082 PAN : AABHV8792F	Vs.	ACIT, Central Circle-1(2) Aaykar Bhawan Opp:L.B.Stadium Basheer Bagh Hyderabad-500 004
(Appellant)		(Respondent)
Assessee by:		Shri K.C.Devdas, CA
Revenue by:		Shri K.P.R.R.Murthy, Sr.AR
Date of hearing:		04.05.2023
Date of pronouncement:		25.05.2023

ORDER

Per Shri Laliet Kumar, JM.

This appeal filed by the assessee is directed against the order dated 07.04.2022 of Learned Commissioner of Income Tax (Appeals)-11, Hyderabad relating to AY 2016-17.

2. The assessee raised the following grounds of appeal:

1. *The Hon'ble Commissioner of Income Tax (Appeals) has erred both on facts of the case and in law involved in so far as it is prejudicial to the interest of the Appellant.*
2. *The Hon'ble CIT(A) without taking into consideration the information filed before him proceeded to complete the appeal u/s.250 of the IT Act and the same is not sustainable.*
3. *The Hon'ble CIT(A) ignored the explanations given by the appellant and proceeded to confirm the income arbitrarily and such action of the Hon'ble CIT(A) has no basis and therefore the same is liable to be deleted.*
4. *The Hon'ble CIT(A) ought to have observed that the assessing officer computed income from other sources, which actually*

accrued in respect of sale of shares, which ought to have charged as long term capital gain as per the provisions of the IT Act and not as income from other sources u/s 115BBE and therefore the addition made was not sustainable.

5. *To modify the Grounds raised or to raise any other Ground(s) not raised with the permission of the Honorable Members of the Income Tax Appellate Tribunal.*

3. Facts of the case, in brief, are that the assessee is an HUF and it is also a partner in Nanesh finance corporation filed his return of income for the A.Y.2016-17 on 15.10.2016 declaring total income of Rs.42,13,030/-. During the year 2014-15 the assessee purchased 30,000 shares of M/s. Jackson Investments Ltd (face value of each share is Rs.10/-) through M/s. Badri Prasad & Sons (Stock exchange broker) on 23.04.2014. Subsequently, the face value of the shares has been brought down to Re.1 per share from Rs.10 and assessee had sold 70,000 shares through M/s. Axis Securities Ltd and received an amount of Rs. 14,82,635/- on sale of shares. The assessee treated the receipts as Long Term Capital Gains (LTCG) which is exempted from tax as per the provisions of the Sec.10(38) of the I.T.Act 1961. A search and seizure operation was carried in the case of M/s. Nanesh Finance Corporation, consequent to this operation the case has been centralized to Central Circle 1(2) Hyderabad vide order in F.No.Pr.C1T,Hyd/Juris-Local/2020-21 dated 04.02.2021. During the course of search proceedings, assessee voluntarily submitted letter to withdraw the LTCG claimed u/s. 10(38) of the Act and to offer the same to income returned without claiming exemption.

3.1 Subsequently, the case was reopened and notice u/s.148 of the Act was issued on 12.02.2021. In response to notice, assessee filed return of income on 15.03.2021 declaring total income at Rs.56,95,665/-. A notice u/s. 143(2) of the Act was issued on

10.06.2021 and notice u/s. 142(1) of the Act was issued on 11.10.2021.

3.2 While finalizing the assessment proceedings initiated u/s.147, the assessing officer ignored the LTCG as shown by the assessee and computed the income as income from other sources. Although, the Income declared by the assessee and by the AO are the same, however, the AO computed the Income by invoking the provisions of Sec 115BBE and computed the income at Rs.56,95,665/-

4. Feeling aggrieved by the order passed by the assessing officer the assessee has preferred the appeal before the CIT(A), the Ld. CIT(A) had dismissed the appeal of the assessee. The finding of the Ld. CIT(A) are as under

6. Decision:

In the instant case, the assessment was completed by holding the appellant's investment in shares of M/s .Jackson Investments Ltd (JIL) as bogus and thereby treating the amount of Rs.14,82,635/- as 'Income from Other Sources' as against appellant's claim of LTCG in response to notice u/s 148, which was earlier claimed as exempt u/s 10(38) and taxed the same as per provisions of Section 115BBE at 30% without giving benefit of slabs.

Going into facts of the case, it is seen that the appellant has purchased shares of M/s Jackson Investments Ltd and had claimed an exemption u/s. 10(38) on account of sale of shares of M/s Jackson Investments Ltd during the year under consideration. It is further observed that the appellant along with other entities of the family also had claimed similar exemption. The appellant and the other related entities purchased the shares of M/s .Jackson Investments Ltd at a face value of Rs.10/- per share and subsequently the face value was reduced to Rs.1/- per share, thus resulting 10 times more number of shares received by the appellant than what were originally purchased. The shares were sold at prices varying between Rs.11.98/- to Rs.23.52 per share, except for one appellant wherein the shares were sold at Rs.4.59 per share during AY 2017-18.

During the course of search proceedings u/s. 132 when enquired about the transactions, the appellant along with other related entities agreed to withdraw the claim u/s. 10(38) and to offer the same to income. In the return of income filed subsequently in response to notice u/s. 148, the appellant offered the same to tax as long term capital gains and withdrew the exemption u/s. 10(38).

The details of purchase of shares made by the appellant and others of M/s. Jackson Investments Limited and allotment of shares subsequent to reduction in face value are brought out as under:-

.....
 Subsequently, the shares were sold by them during AY 2016-17 and 2017-18 and the details are as under:-

.....
 It is worthwhile to note that all the above persons of the family including the appellant have been bestowed with abnormally high profits in the present year under consideration. The cumulative claim u/s. 10(38) of the appellant and the related parties cumulates to Rs, 86.58 lakhs (approx.) on an investment of Rs.5.60 lakhs, thus getting almost 1446% returns in approximately a period of two years. These persons have shown no prior investments in the share market or have any activity. From the above, it can be concluded that the appellant and the other family members are effectively acting together considering the timing of purchase and sale of these shares. All the family members investing almost at the same time and exiting also implies that these are people acting together in concert with an entry operator with regard to these transactions and it will be not be unfair to conclude that this appears to be an organised manufactured effort to have exempt income among the family members.

Further, the appellant itself has clearly admitted to withdraw' the claim of exempt income u/s 10(38), which itself proves that the entire apparatus of purchase and sale of shares was used to route the unaccounted income of the appellant.

The appellant has merely stated that the transaction has happened through banking channel and further claimed that the transactions have happened in the stock market and the appellant has been benefitted by the investment in a bonafide manner and no attribution can be made of any nature of the regard which the AO has alleged in the assessment order.

In this regard, it is to be noted that the Investigation Wing, Kolkata has identified 'M/s Jackson Investments Limited' as a penny stock operated by the Khemka group with the motive and intend to provide accommodation entries of long term capital gains which were exempt from tax.

Thus, this whole structure was to misuse and abuse the beneficial provision of law through an organized mafia kind of persons acting in concert and the appellant also is one of the participants in the said activity. The appellant has not been able to rebut the Assessing Officer's observations with any cogent justification, but for claiming banking channels.

While confirming the decision of ITAT Chandigarh Bench (SOM NATH MAINI vs. CIT, Hon'ble P &H High Court has held regarding the bonafides and genuineness of transactions to be considered while assessing an income as under-

"The assessee incurred capital loss on account of sale of gold jewellery and also had short-term capital gain of almost equal amount. The AO observed that short-term gain was not genuine inasmuch as the assessee had purchased 45,000 shares of M/s Ankur International Ltd. at varying rates from Rs. 2.06 to Rs. 3.1 per share and sold them within a short span of six-seven months at the rate varying from Rs. 47. 75 paise to Rs. 55. These Shares were purchased through a broker, Munish Arora & Co. and sold through another broker, M/s SK Sharma & Co. The AO was taken by surprise by the astronomical rise in share price of a company from Rs, 3 to Rs. 55 and started further enquiry. The

AO after enquiry made addition to the income of the assessee, which was upheld by the CIT (A) as well as by the Tribunal.

4. Learned counsel for the assessee submitted that the view taken by the Tribunal is perverse. The assessee having discharged the burden of proving the transactions of sale and purchase of the shares to be genuine, burden of proving that the said transactions were not genuine, was on the Department and in the absence of any material on record, holding the transactions to be not genuine, was not permissible. We are unable to accept the submission made. The burden of proving that income is subject to tax is on the Revenue but on the facts, to show that the transaction is genuine, burden is primarily on the assessee. The AO is to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of evidence that the transaction was genuine, cannot be conclusive .

Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected even if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. in view of the above, we are of the view that the finding recorded by the Tribunal is a finding of fact and cannot be held to be perverse No substantial question of law arises. The appeal is dismissed,"

As stated by the Hon'ble P&H High Court in the above mentioned case, mere leading the evidence that the transaction. was genuine, cannot be taken as conclusive. Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. In the present case, on account of the same, the appellant itself admitted to withdraw the claim of exempt income u/s 10(38).

Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of CIT vs P. Mohankala (15/05/2007) wherein the SC held that mere banking transactions are not sufficient to consider the transaction bonafide and observed as under-

"The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation ,. means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee, It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion. "

In this case the Hon'ble Supreme Court has reversed the decision of the Hon'ble Madras High Court and upheld the findings of the lower authorities regarding the transactions of gift received by assessee even though these were done through banking channels, to be though apparent but not be real one, In the present case also, the appellant has not justified the transactions indulged

along with other related parties of this particular scrip and the justification of such a rise as such defying the probability and financials of the scrip.

Further, in a recent decision, the Hon'ble ITAT, D Bench, Chennai, {in ITA No. 20 16/Chny 12017 dated 15.05.2018 [Mrs.Vidya Reddy Vs ITO(IT)}, held as under-

6. We heard the rival submissions and gone through relevant material. The facts found by the AO are that the assessee, an Individual settled in USA, has purchased 6000 shares of face value of Rs.10/- each @ Rs.25/- per share of M/s. Surabhi Chemicals & Investments Limited , offline , on 04.09.2012 from M/s. Akriti Advisory Services Private Limited, Mumbai when they were traded in the market @ Rs.0.26 paise. Further, as mentioned in detail in the assessment order , the financial results of the company from F.Y. 2011-12 to F.Y. 2015-16 do not show any prospective growth in the net- worth of the company to purchase share at Rs.25/-. The price of share of M/s. Surabhi Chemicals & Investments Limited was sky rocketed without having any ITA No.2016/Chny/2017 :- 7 -:

awesome profit, EBIDTA margin, EPS bonus, dividend etc. None of the parameters, which are essential for increase of price of share was present. In spite of this, if the share price is increased multi folded, then it is definitely due to artificial increase. The table in the assessment order clearly indicates that there is manipulation in trading of M/s. Surabhi Chemicals & Investments Limited, which clearly establishes that the share of the said company is a penny stock only. Further, the assessee had sold 60,000 shares of M/s. Surabhi Chemicals &. Investments Limited. The trades have been executed with mutual understanding by placing simultaneous synchronized orders. This is also evident from the chart extracted in the assessment order. Successive bidding of order placed for large volume of shares like 18000 on 28-01-2014, 18000 on 03-02- 2014, 7000 on 10-02-2014 & 9000 in Feb., 2014 indicate that buyers are in collusion. Otherwise, execution of order placed is not possible particularly when trade price is static for various trades executed. All the trades have been executed at fraction of second. All these trading patterns show that LTCG admitted by the assessee is an arranged one. The payment of Security Transaction Tax was to paint creditworthiness to the transaction and claim exemption u/s. 10(38). In view of the information provided by the Investigation Wing, Kolkatta, the recommendations of SIT on Black money etc, the AO required the assessee to prove her claim of exemption. After considering her reply etc held, inter alia, that it is clear that the assessee has manipulated the sale of shares within a short span of time in collusion with the brokers in order to earn tax free exempt long term capital gains on sale of shares u/s. 10(38) etc. It is clear from the orders of the Lower authorities that the assessee has not placed any material to prove that her transactions are genuine . She has also not placed any material to prove that her claim of exemption u/s 10 (38) is genuine and valid. Since, the right to exemption must be established by those who seek it, the onus therefore, lies on them. In order to claim the exemption from payment of income tax, the assessee had to put before the Income Tax authorities proper materials which would enable them to come to a conclusion. (35 ITR 312 (SC)). No part of the concurrent findings recorded by the AO and the Ld. CIT(A), is disputed by the assessee. Further, she has not placed any material before us to dislodge the findings recorded by the Lower authorities. Thus, the above actions of the assessee are nothing, but a premeditated, contumacious conduct, surreptitiously done for specific reasons for converting unaccounted money of the assessee under the guise of long term share transactions, that too without paying the requisite tax on the same. This is clearly in the realm of tax evasion. Hence, we do not find any reason to interfere with the order of the Ld. CIT(A). On the other hand, from the above facts and surrounding circumstances, human conduct , preponderance of probabilities etc,

the AO has clearly established that the impugned transaction is not made for an investment, ie the motive is not to derive income but to earn a profit that too by an arrangement one and it is manipulated transaction in collusion with the brokers to paint creditworthiness to the transaction and claim exemption u/s. 10(38). This is in accordance with the ratio laid by the Hon'ble Apex Court in *Sumati Dayal Vs Commissioner Of Income-Tax*, 214 ITR 801(SC), that " the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. (See : [CIT v. Durga Prasad More](#) [1971] 82 ITR 540 SC (at pages 545, 547). Further, the Hon'ble Apex Court in *Kale Khan Mohammad Hanif. Vs Commissioner of Income-Tax, M. P. And Bhopal* in 50 ITR 1 (SC) held that " it is well established that the Onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat it as taxable income see [A. Govindarajulu Mudaliar v. Commissioner of Income-tax](#) 34 ITR 807 SC. On the above facts and circumstances, it is clear that the assessee has not established her case . Though it did cross in our minds, that the assessee could be granted another opportunity to produce evidences in the form of producing the books involved in the transactions, their contemporary records, share transfer forms, the records of the company whose shares has been dealt with etc., for examination before the A.O, we are not inclined to restore this issue to the A.O as the assessee has not produced any convincing evidence to justify such re-adjudication by the A.O. In the circumstances, the assessment made by the AO and confirmed by the Ld. CIT(A) is in accordance with the ratios of the Hon'ble Apex Court (supra) and hence we dismiss all the grounds of the assessee's appeal.

The above cases are applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the circumstances and not getting influenced by the picture shown by the appellant which is colored by the use of sham devices.

The apparatus of brokers and the shares of the company were a tool for tax evasion. The company M/ s JIL is only part of the network and not the network. The appellant resorted to a readymade scheme for purchase and sale of shares which was floated by some Entry Operators. Such transactions are not genuine and natural transactions, but preconceived transactions, resulting in creation of bogus profits which are tax exempt. Such transactions are mutually self-serving to the parties to the transactions.

Thus, conclusion is drawn on the basis of above discussion that what is apparent in this case is not real, that these financial transactions were not genuine and that this entire edifice was only a colour able device used to evade tax. Moreover, the impugned transactions of shares are preordained one, not for legitimate purpose in view but for the purpose of creating 110ngenuine and artificial profits, with a view to reduce valid tax liability. Therefore, the action of the AO as stated in the assessment order that the said transactions are non-genuine/fictitious transactions. It is important to note that the appellant has withdrawn the claim u/s 10(38) and offered it as long term capital gains.

The transaction as per the appellant happened through banking

channels and the stock market network with STT being paid. These are all ingredients for claiming exemption u/ s 10(38), but when confronted, the appellant realised and withdrew its claim, but rather than offering the same as income from other sources', the appellant chose to still take a tax break by offering it at lower rates Under the head 'Long term Capital gains'. The admission of the appellant is selective and as per convenience and it is very clear that the above discussed apparatus and methodology was Used to convert the unaccounted money into capital gains and this when confronted, the appellant withdrew the claim. The issue of pressure is not valid and Sustainable, as even after the Search, there Was enough time with the appellant and the appellant withdrew its claim in response to notice u/s 148 along with the other related entities. Thus, as far as appellant is concerned, there is no dispute regarding the Usage of structure to convert the unaccounted money into a profit of share market transactions.

In view of the above admission and the discussion above, it is very clear that the transaction is not bonafide or genuine but it was to convert unaccounted money into exempt income which was later admitted by the appellant as LTCG in the return of income. This unaccounted money has to be taxed as Income from other sources and not as capital gains, as the share transactions Were sham and a structure for converting unaccounted money into share profit and thus cannot be given the benefit of concession a] rate under Long term Capital gains and the action of the Assessing Officer to tax the same as unaccounted money under the head income from other sources at the higher rate is confirmed accordingly and in agreement with the analysis and findings of the Assessing Officer in the assessment order. the addition made by the AO in the assessment order is confirmed and accordingly the ground no.2, 3 and 5 are dismissed.

The ground no.4 pertains to taxation as per Section 115BBE. as per which the said tax applicable is 30% in that year and as the same being

unaccounted money brought in to the bank as share Profit, therefore the action of the Assessing Officer is upheld accordingly and the ground no.4 is dismissed.

The ground no. 1 and 6 are general in nature and need no separate adjudication.

To Sum up the appeal is dismissed.

5. Now the assessee is in appeal before us on the grounds stated hereinabove. At the outset, the Ld.AR at submitted that the assessee had not claimed long-term capital gain in the return of income and had offered the income in ROI, however on scrutiny assessment the assessing officer has computed the income of the assessee by invoking the provision of Sec 115BBE. He also drawn our attention to the written submission filed before the Ld. CIT(A) which are to the following effect

In view of law and facts the Assessing officer erred in taxing the receipts from trading of Jackson Investments shares under section 115BBE

Regarding Assessing Officer's decision to tax capital gains income under section 11588E, it is submitted that even though the assessee is eligible to claim exemption under section 10(38), the assessee has offered pay taxes on income from capital gains and filed revised computation adopting the same, it is submitted that the assessee clearly explained the circumstances under which the offer was made. This was only to purchase peace with the department and to avoid protracted litigation. This offer cannot be used as evidence to show that the assessee was involved in bogus purchase and sale of shares, whereas all documentary evidences are clearly showing that the assessee is eligible to claim exemption under section 10(38). In this connection your kind attention is drawn to CBDT circular No. 14(XL-35) of 1955, dated 11.4.1955, it was directed that the officials of the department obliged to advise the assessee and guide them. The relevant portion of circular is reproduced as under.

"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should

[a] draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

[b] freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

In view of the above, when assessee in view to avoid protracted litigation, to purchase peace with the department, out of ignorance offered to pay taxes on long term capital gains of listed company shares, its duty of the department to guide him. Its not fair to take advantage of assessee's ignorance. This is against the guidance issued vide circular referred above.

In this context kind attention is invited to Hon'ble Supreme Court's decision in the case of *Sir Shadi Lal Sugar And General vs Commissioner Of Income Tax, Delhi* dt 31 July, 1987 reported in 168 I.T.R. 705 where in it was held that the mere fact of surrender cannot go to prove a the concealment of income by the assesses. That surrender may be taken into consideration while computing the income of the persons surrendering the income, but is not sufficient to penalise, the department has to prove certain other facts as well as to prove the concealment. The Hon'ble Punjab & Haryana High Court in the case of *Gumani Ram Siri Ram v. C.I.T. Punjab*. 85 ITR 67 held that on the facts and in the circumstances of the case the assessee could not be penalised merely because certain deposits were surrendered by the assesses, unless there was material of the record to show that the surrendered item was his income.

Further it is submitted that the sale transaction of M/s Jackson Investments Limited shares was a genuine transaction and duly reflected as investment in our balance sheet. In view of this its not correct on part of department to tax under the head other sources. In this connection reliance is placed on CBDT

circular no 6/2016, dt 29/02/2016 where in it was mentioned that in respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer.

Further reliance is placed on decision of Delhi ITAT in the case of Jatin Investments Pvt. Ltd, New ... vs Department of Income Tax on 27 May, 2015 where in it was held that that sale proceeds of investment can not be taxed under the head other sources. The relevant portion of the order is reproduced as under.

"12. We have considered the submissions of both the parties and gone through the material available on the record. In the present case, it is noticed that the assessee purchased the shares in earlier years which were shown as investment in the books of accounts and reflected in the "Asset Side" of the "Balance Sheet", out of those investments (copy which is placed at page no. 23 and 24 of the assessee's paper book), the assessee sold certain investments and accounted for the profit / loss and offered the same for taxation. In the present case, the amount in question was neither a loan or the deposit, it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AD was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AD."

The above decision has been confirmed by the Hon'ble Delhi High Court in the case of Pro CIT -5 vs. Jatin Investment Pvt. Ltd.

Further Hon'ble High Court of Gujarat in case of Commissioner of Income-tax-1 Vs. Mahesh chandra G. Vakil held that Where assessee proved genuineness of share transactions by contract notes for sale and purchase, bank statement of broker, demat account showing transfer in and out of shares, as also abstract of transactions furnished by stock exchange, Assessing Officer was not justified in treating capital gain arising from sale of shares as unexplained cash credit.

Further kind attention is invited to Hon'ble Apex court decision in 273 ITR Page 1 in D.P.Sandhu Brothers has held that " But because we have held that Section 45 cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other Section. This Court, as early as in 1957 had, in United Commercial Bank Ltd. V. Commissioner of Income Tax., West Bengal (1957) 32 ITR 688, held that the heads of income provided for in the Sections of the Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner. provided by the appropriate Section and no other. It has been further held by this Court in East India Housing and Land Development Trust Ltd. V. Commissioner of Income Tax, West Bengal (1961) 42 ITR 49 that if the income from a source falls within a specific head, the fact that it may indirectly be covered by an another head will not make the income taxable under the latter head. (See also: Commissioner of Income Tax Vs. Chugandas and Co.(1964) 55 ITR

17) Therefore, if the income is included under anyone of the heads, it cannot be brought to tax under the residuary provisions of Section 56 ... "

The Hon'ble Punjab & Haryana High Court its judgement in the case of CIT vs Jawaharlal Oswal and Others dt 29.01.2016 dismissed the Department's

appeal by holding that suspicion and doubt may be the starting point of an investigation but cannot, at the final stage of assessment, take the place of relevant facts, particularly when deeming provision is sought to be invoked.

Further it is submitted that if an income falls under more than one head, the assessee has the option of choosing for the purpose of income-tax such head which makes the burden on his shoulders lighter. This was the principle enunciated by Krishnaswami Aiyangar J. in the 'Commr. of Income-tax v. Bosetto Bros, Ltd.', ILR (1940) Mad 178 (S B) where the learned Judge stated:

"Being a taxing statute, the Income-tax Act should receive a strict construction, that is, a construction in favour of the subject, and not in favour of the Crown, if a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him With a lighter burden."

These principles were followed in several decisions.

6. The Ld. AR had also drawn our attention to the decisions of the tribunal in the following cases.

- i. Rajkumar B..Agarwal vs. DCIT [ITAt, Pune]*
- ii. Pankaj Agarwal & Son (HUF) vs. ITO [ITAt, Chennai]*
- iii. Nemichand Kothari vs. CIT (2003) Guwahati H.C. (264 ITR 254*
- iv. CIT vs. Precision Finance (P) Ltd., Kolkata H.C. (208 ITR 465)*
- v. CIT vs. Durga Prasad More (82 ITR 540) (SC)*
- vi. Sumati Dayal vs. CIT (214 ITR 801) (SC)*
- vii. Sanath Kumar vs. ACIT, New Delhi (ITAT, Delhi) (122 taxmann 75)*

7. On the other hand the DR for the revenue had submitted that the assessee was rightly charged under section 115BBE. In fact he had drawn our attention to the decision of the SMC bench of the Tribunal in the case of Sunitha Devi vide ITA No.188/Hyd/2022, order dated 30.06.2022, wherein the identical issue was decided by the bench against the assessee.

8. We have heard the rival contentions of the parties and perused the material available on record. In the present case the assessee has transacted in a penny stock whereby the prices of one particular share have been jacked-up abnormally without there being any corresponding increase in fundamentals and the

assets of the company. The coordinate bench in the case of Sunitha Devi (supra), had already examine the identical issue in the following manner:-

13. *I have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and the learned CIT (A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the assessee, in the instant case had filed the original return of income declaring total income of Rs.25,00,050/- on 15.10.2016 and had claimed exemption of Rs.8,38,953/- u/s10(38) of the I.T. Act on account of sale of 70,000 shares of M/s. Jackson Investment Ltd. I find search and seizure operation u/s 132 of the I.T. Act was conducted in the case of M/s. Nanesh Finance Corporation where the assessee was a partner and on being noticed that the assessee had used the stock exchange mechanism to route her unaccounted money, the assessee voluntarily submitted a letter stating to withdraw the LTCG claim u/s 10(38) of the I.T. Act and to offer the same as income. Subsequently, the Assessing Officer after recording the reasons issued notice u/s 148 of the Act. In response to the notice u/s 148, the assessee filed the return of income declaring total income at Rs.33,39,006/- wherein she declared the income of Rs.8,38,9512/- as long term capital gain. I find the Assessing Officer rejecting the claim of LTCG made by the assessee treated the same as income from other sources and applied the provisions of section 115BBE of the I.T. Act. I find the learned CIT (A) upheld the action of the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the learned Counsel for the assessee that without giving sufficient reasons, the Assessing Officer cannot change the head of income from LTCG to "income from other sources". IT is the alternate contention of the learned Counsel for the assessee that the addition, if any, can be made u/s 68 of the I.T. Act but the provisions of section 115BBE cannot be applied to the facts of the present case.*

14. *I do not find any force in the above arguments of the learned Counsel for the assessee. It is an admitted fact that the assessee in the original return of income had claimed the exemption u/s 10(38) of the I.T. Act on account of sale of 70000 shares of Jackson Investment Ltd. I find during the course of search when it was noticed that the assessee had used the stock exchange mechanism for routing unaccounted money by using scrips of the company, which is a penny stock company, the assessee submitted a letter withdrawing the LTCG claim u/s 10(38) of the I.T. Act and offered the same as income. Therefore, once the assessee had withdrawn her claim, now the assessee cannot claim the same as long term capital gain and the income in my opinion has to be treated as "income from other sources". If the contention of the learned Counsel for the assessee that the same is to be allowed as LTCG is accepted, then the natural corollary will be to allow the same as exempt u/s 10(38) of the I.T. Act and the very nature of the declaration will be defeated.*

14.1 *So far as the arguments of the learned Counsel for the assessee that the Assessing Officer cannot change the head of income is concerned, the same also is without any force especially when the assessee withdrew her claim of exemption u/s 10(38) of the Act and*

offered the same as income of the assessee. So far as the various decisions relied upon by the learned Counsel for the assessee are concerned, the same in my opinion are distinguishable and not applicable to the facts of the present case especially when the assessee in the instant case has herself withdrew the claim and accepted the income from sale of shares of the penny stock company as her income.

14.2 So far as the alternate argument of the learned Counsel for the assessee that the same should be added u/s 68 of the Act and the provisions of section 115BBE should not be attracted is concerned, the same in my opinion, is without any force. The Assessing Officer as well as the learned CIT (A) in this case has correctly applied the provisions of section 115BBE of the I.T. Act. Therefore, the alternate contention of the learned Counsel for the assessee does not have any force and accordingly, the same is dismissed.

9. Admittedly, the said decision delivered by the bench is applicable to facts of the present case. The AR had not been able to confront the said decision of the Tribunal and therefore, respectfully following the decision of the coordinate bench, we do not find any merit in the appeal of the assessee and accordingly the same is dismissed.

10. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Open Court on 25th May, 2023

Sd/- (RAMA KANTA PANDA) ACCOUNTANT MEMBER	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
--	--

Hyderabad, dated 25th May, 2023

Thirumalesh/sps

Copy to:

S.No	Addresses
1	Vishan Raj Jain (HUF) 6-3-650, G7 6-3-650, G7, Maheswari Chambers Somajiguda Telangana-500 082
2	ACIT, Central Circle-1(2)

	Aaykar Bhawan Opp:L.B.Stadium Basheer Bagh Hyderabad-500 004
3	Pr1.CIT(Central), Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order