

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 439/MUM/2023
(Assessment Year: 2014-15)**

Chetan Dinesh Sheth,
101, Krishna Amrut Soc,
Parvati Bhuvankharkar Ali,
Thane – 400601
[PAN: AEEPS4950H]

..... **Appellant**

ITO Ward 1(3),
Thane

Vs
..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Haridas Bhat
For the Respondent/Department : Shri Sridhar Govind Menon

Date : 16.05.2023
Conclusion of hearing : 24.05.2023
Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 25/01/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2014-15, whereby the Ld. CIT(A) had dismissed the appeal of the Assessee against the Assessment Order, dated 30/12/2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant, a salaried individual, filed return of income for the Assessment Year 2014-15, declaring total income of INR 13,87,634/.

The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has claimed exemption under Section 10(38) of the Act in respect of capital gains of INR 8,84,171/- arising from sale of shares of KDJ Holidayscapes and Resorts [formerly known as Gomati Finlease (India) Limited] [hereinafter referred to as '**KDJ**']. The Assessing Officer noted that the Appellant had purchases 3500 shares of KDJ on 09.12.2011 for a consideration of INR 1,27,963/- which were sold on 07.10.2013 for a consideration of INR 10,12,134/-. According to the Assessing Officer, there was 8 times increase in the prices of shares of KDJ within a short span of time. After examining the details of KDJ available in public domain over the internet, the Assessing Officer found that as per the information available on the website moneycontrol.com the sales turnover of KDJ reduced from 4.6 Crores as on 31.03.2013 to 3.6 Crores as on 31.03.2014. Similarly, reported net profit of KDJ reduced 0.07 Crores as on 31.03.2013, to loss of INR 0.028 Crores as on 31.03.2014. According to the Assessing Officer, as per the aforesaid financial performance the price of the shares of KDJ should have fallen. However, to the contrary there was abnormal rise in price of shares of KDJ listed on stock exchange. Taking note of the fact that KDJ was one of the penny-stock company identified in the report of Directorate of Investigation, Kolkata which had carried out nationwide investigation and unearth organized racket of generating bogus entries of Long Term Capital Gains which were exempt from tax, the Assessing Officer concluded that sale consideration of INR 10,12,134/- received on sale of shares of KDJ was unaccounted income of the Appellant, who had obtained bogus Long Term Capital Gain accommodation entry to bring back unaccounted income in the guise of exempted income. Accordingly, the Assessing Officer

completed the assessment vide order, dated 13.12.2016, passed under Section 143(3) of the Act at assessed income of INR 23,99,768/- after making addition of INR 10,12,134/- under Section 68 of the Act to the return income of INR 13,87,634/-.

3. Being aggrieved, the Appellant preferred appeal before the CIT(A) against the Assessment Order, dated 13.12.2016.
4. Before the CIT(A), the Appellant contended that during the assessment proceedings statement of the Appellant was recorded on 16.12.2016, which supported the stands of the Appellant that the Appellant had acted in a bonafide manner and the transaction of purchase/sale of shares of KDJ were genuine. The documentary evidences in support of the aforesaid which included share purchase bills, bank statement, reflecting payment to banking channel, D-mat account statement showing purchase and sale of shares through D-mat account maintained by the Appellant with Sherkhan Limited along with the contract notes and ledger Account of the Appellant with the aforesaid broker were all filed before the Assessing Officer. It was also pointed out that the transaction of purchases as well as sale of share were subjected to Securities Transaction Tax (STT) and undertaken through stock exchange. It was also contended on behalf of the Appellant that no investigation of KDJ was carried out by the Directorate of Investigation, Kolkata.
5. However, the above submissions did not find favour with the CIT(A), who dismissed the appeal and confirmed the Assessment Order. The CIT(A) observed that in the Investigation Report in the case of 'Project Bogus LTCG/STCL Through BSE Listed Penny Stocks' available in public domain [For short '**Investigation Report**'], the name of KDJ was appearing at the Sl. No. 35 of the list of BSE listed

penny-stock companies which were used for generating bogus capital gains. Once the Appellant was made aware of the aforesaid investigation report which proved that trading of shares leading to capital gains was not genuine, the onus was on the Appellant to prove that the transaction of purchase/sale of shares was genuine. The Appellant has failed to discharge its burden of proof and the Assessing Officer, on the other hand, had proved that the claim of the Appellant was incorrect through direct and circumstantial evidence. The CIT(A) concluded that share purchase/sale transactions was part of colorable device to generate fictitious capital gains with the aim to evade taxes due, and dismissed the appeal vide order dated 25.02.2023.

6. Being aggrieved, the Appellant has preferred the present appeal before the Tribunal against the order, dated 25.02.2023, passed by the CIT(A).
7. We have considered the rival submissions and perused the material on record. The Appellant is a salaried employee, who had purchased 3500 shares of KDJ on 09.12.2011 for a consideration of INR 1,27,945/-. In the statement recorded on oath by the Assessing Officer during the assessment proceedings on 16.12.2016, the Appellant had stated that the Appellant had ample knowledge regarding share and market had invested in share and stocks. The Appellant had invested in shares of KDJ on a suggestion from a friend, who was a regular investor and provided his details. The Appellant stated that he had been investing through broker SherKhan Limited over a period of last 10 years and had purchased shares of KDJ through stock exchange which were routed through the Dmat account. The purchase consideration was paid through

bank account. At the relevant time KDJ was known as Gomati Finlease (India) Limited and was engaged in the business of leasing & hire purchasing of movable and immovable properties. Considering the nature of industry KDJ was part of, the Appellant had invested in shares of KDJ looking at future prospects. The Appellant supported the aforesaid submissions with the documentary evidence which included Contract Notes issued by the broker (i.e. Sherkhan Limited) for purchase/sale of shares of KDJ, supported by the account statement. The aforesaid factual averments/statement made by the Appellant were not confronted either by the Assessing Officer or the CIT(A). The Assessing Officer and CIT(A) rejected the documentary evidence produced by the Appellant on account of two reasons – First, that KDJ was identified a penny stock in the Report and Second, that the price of shares of KDJ quoted on stock exchange increased by 8 times within a short period of time in contrast to its reported financial performance during the same period.

8. We note that while KFJ was identified as a penny stock in the Investigation Report, the period during which synchronized trading of shares took place on the stock exchange was not stated in the report. The Assessing Officer has also not identified the aforesaid period and compared the purchase price and sale price of share of KDJ as reflected in information gathered online from the website moneycontrol.com. to conclude that the transaction of purchase/sale were not genuine. However, we find that there are a number of facts/factors which suggest otherwise and support the stand of the Appellant. Firstly, the Appellant had been making investment in share on a regular basis and had maintained D-Mat account with the broker Sherkhan Limited for a long period of time. Secondly, the Appellant had narrated circumstances in which purchase was made.

He had clearly stated that he had knowledge of share market and had purchased share of KDJ on suggestion of a friend for future prospects of increase in the business/share prices of KDJ in view the industry in which KDJ operated (i.e. leasing & hire purchasing of movable and immovable asset). Thirdly, the share were purchased through stock exchange and sold through stock exchange. STT was paid on purchase as well as sale of shares. Fourthly, the payments for purchase as well as sale were through banking channel. Fifthly, the broker involved was not named in the Investigation Report and had issued Contract Note and Statement which supported the stand of the Appellant. Sixthly, the period of holding of shares was around 22 months, as the shares were purchased on 09.12.2011 and sold on 07.10.2013, which was more than the usual period of holding of around 12 to 14 months noted in the Investigation Report. We alive to the fact that one or more of the aforesaid facts/factors could be common to a synchronized trade regarded as non-genuine penny-stock transaction, and therefore, the conclusion would depend upon the facts and circumstances of each case. We are of the view that in the facts and circumstances of the present case, all the aforesaid facts/factors when are taken up together, mitigate the possibility of the Appellant undertaking synchronized trading of shares as alleged by the Revenue. Even if it is taken the aforesaid facts/factors fall short of proving that the transaction of purchase/sale was genuine in view of the Investigation Report, the same, in our view, shift the onus on the Assessing Officer to prove that transaction of purchase/sale of shares was not genuine as alleged by the Revenue. In addition to the above, we note that there is nothing on record to indicate that the Appellant, a salaried employee, had avenues to earn or had actually earned any unaccounted income; or that any unaccounted income was being routed back. In view of the aforesaid,

we hold that, both, the Assessing Officer and the CIT(A) erred in concluding that the Appellant had taken a bogus Long Term Capital Gains accommodation entry. Accordingly, we set aside the order, dated 25/01/2023, passed by the CIT(A) and delete the addition of INR 10,12,134/- made by the Assessing Officer.

9. Before parting we would like to observe that the Assessing Officer and the CITA) had placed reliance affirmed the judgment of the Hon'ble Supreme Court in the case of Durga Prasad More 82 ITR 540 (SC) and Sumati Dayal V. CIT (1995) 214 ITR 801 (SC). However, as observed by the Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax-12 v. Smt. Krishna Devi: [2021] 431 ITR 361 (Delhi)[15-01-2021], the theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by an assessee. Further, in the case before us, in our view, even the human behavior and preponderance of probabilities are tilted in the favour of the Appellant.
10. In view of the above, the present appeal is allowed.

Order pronounced on 24.05.2023.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 24.05.2023
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai