

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 7712/Mum/2019 (A.Y. 2014-15)

Smt. Asha Rajendra Gupta

Tulsi Vihar Himalaya Baug

L. J. Road, Opp. Sitaladevi

Temple, Mahim(W)

Mumbai-400 016

PAN:AAXPG2017J

..... Appellant

Vs.

ACIT-21(1)

R. No. 116, Piramal

Chamber, Lalabaug,

Mumbai-400 020

..... Respondent

Appellant by : Shri Shashank Mehta, Ld. AR
Respondent by : Shri Manoj Kumar Sihna, CIT DR

Date of hearing : 19/01/2023
Date of pronouncement : 13/04/2023

ORDER

PER GAGAN GOYAL, A.M.:

This appeal by assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals)-33, Mumbai [for short "Ld. CIT (A)"] dated 11.06.2019 u/s.

250 of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2014-15. The assessee has raised the following grounds of appeal:

1. In the facts and circumstances of the case and law, the Learned CIT (A) has erred in upholding the action of the Assessing Officer of completing the assessment u/s 143 (3) and making addition of Rs. 23,52,796/- and disallowing the LTCG claim of Rs. 22,58,796/- u/s 10(38) merely on the basis of alleged statements of third parties, without providing the copies of such statements and without providing the opportunity to cross-examine such parties, thus violating the principles of natural justice as upheld by Honourable Supreme Court in case of Andaman Timber Industries v. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006) and Kishanchand Chellaram v. CIT AIR 1980 SC 2117.

2. In the facts and circumstances of the case and in law, the Learned CIT (A) has erred in upholding the action of the Assessing Officer of holding that the transaction of the sale of shares of M/s Sunrise Asian Ltd. is bogus and sham and making addition of Rs. 23,52,796/- u/s. 68.

3. In the facts and circumstances of the case and in law, the Learned CIT (A) has erred in upholding the action of the Assessing Officer of not granting the exemption of long terms capital gain under section 10(38) of the Act on sale of listed equity shares sold through recognized stock exchange which has duly been subjected to security transaction tax (S.T.T.) on surmises, conjecture and suspicion.

4. In the facts and circumstances of the case and in law, the Learned CIT (A) has erred in upholding the action of the Assessing Officer of treating the transaction of sale of shares of M/s Sunrise Asian Ltd. as income from undisclosed sources and making addition under section 68 of the Act for the amount credited in bank account.

5. The appellant craves leave to add, alter, delete or modify all or any of the above grounds of appeal. All the above grounds are without prejudice to each other.

2. Brief facts of the case are that assessee filed its return of income on 30.03.2015 declaring total income at Rs. 1,72,10,358/-, thereafter case was selected for **scrutiny under CASS**. AO was in possession of certain information from Investigation Wing and findings of SEBI in the matter of

Sunrise Asian Ltd. Based on these reports, LTCG claimed exempt u/s. 10(38) amounting to Rs. 22,58,796/- was disallowed by the AO and treated the same as income from other sources applying the provisions of section 68 of the Act. Assessee being aggrieved with this order of AO preferred an appeal before the Ld. CIT (A). Who in turn, confirmed the order of AO.

3. Assessee being further aggrieved with the order of Ld. CIT (A) passed u/s. 250 preferred this appeal before us. We have gone through the order of the AO, order of the Ld. CIT(A), copy of SEBI final order submitted by revenue and copy of BSE notice vide page no. 42-105 of the paper book filed by revenue.

4. Ground No. 1-4 are inter-related pertain to disallowing the exemption claimed by the assessee u/s. 10(38) on sale of penny stocks. In this matter originally the assessee had purchased 1, 00,000/- equity shares of M/s. Santoshima Lease Finance & Investment (India) Ltd. on the advice of some Hariram Ji Damani for a consideration of Rs 20,00,000/- on 27-08-2011. This company was changed to M/s. Santoshima Tradelinks Ltd. Both the companies were not listed and as such both the companies were never traded at stock exchanges. M/s. Santoshima Tradelinks Ltd. subsequently merged into M/s. Sunrise Asian Ltd. (Formerly Known as Akai Asian Ltd.) Order of honourable High Court was submitted before the authorities below and before us also vides pages no. 9-14 of factual paper-book no. 1. This new entity M/s. Sunrise Asian Ltd. is a listed company. Thereafter the assessee was allotted 1, 00,000/- equity shares of M/s Sunrise Asian Ltd. consequent to the said merger.

5. Thereafter assessee got these shares dematerialise (DMAT) with (depository) on 24-06-2013 vide page no. 17 of paper-book. The assessee has total 1, 00,000/- equity shares of company M/s. Sunrise Asian Ltd. Out of these 1,

00,000/- shares assessee sold total 58,400/- shares, but sale in the relevant financial year was of 4,700/- equity shares. These shares were sold by assessee between starting from 8th of August 2013 to 4th September 2013 vide page no. 15 to 19 of the paper book.

6. It is observed by us that the profitability of the company is quite meagre since A.Y. 2008-09 to 2014-15 was reproduced at page 10 of the assessment order. Price of the share very much dependent on the earnings of the share as, price always reflects future prospects of the company in terms of its profitability, consequential dividend distribution and wealth creation for the share holders. Here in this case price of the script jumped from Rs 50 in 2011 to Rs. 615 in 2015 i.e., in a short span of almost 4 years. The investee company declared a net profit of Rs 1, 02, 01,950/- during A.Y. 2014-15 and Rs 40, 13,664/- during A.Y. 2013-14. It is further pertinent to mention that its EPS was almost negligible during the relevant period. **There is an established market practice of splitting the shares/ preferential allotment, in those cases where the demand of shares is very high. Company has tremendous brand value with strong financial credentials and floor price of shares is almost sky touched. In these cases, to make share available to every interested investor and to unleash the maximum possible value of shares, giant companies of respective industries carry such type of practice. A company with negligible investor base, negligible net worth, negligible net profits and almost 0 EPS, adopting such type of practice of preferential allotment of shares is not digestible from a lay man point of view. As there is no stamp duty involved such type of modus operandi, but operator get higher nos. of shares to operate with. This observation is against such type of transactions notwithstanding the further facts as we will discuss in this order**

later on. A bare reading of list of investors also demonstrates a specific pattern of buying the shares by lead investor and then his/her family members also in huge quantity. Assessee purchased shares of M/s. Santoshima Lease Finance & Investment (India) Ltd., amalgamation of the same with M/s. Sunrise Asian Ltd. (Formerly Known as Akai Asian Ltd.) is a common practice being adopted by the investors and operators to avoid various cost like stock exchange charges, brokerage and STT applicable on purchase and then merger of 3 or 4 companies of the same nature in one listed company (In this case M/s. Sunrise Asian Ltd. (Formerly Known as Akai Asian Ltd.)). Nowhere in the submissions of the assessee it is transpired that why initially assessee purchased shares of M/s. Santoshima Lease Finance & Investment (India) Ltd. and then its merger, and then rocketing in the price of shares. All these are abnormal phenomena not to be seen in case of genuine investment activities.

7. In all the investments made by various so-called investors this pattern of family involvement in large nos. is very common. The revenue has received a report from DGIT (Inv.), Kolkata and a report against the script and assessee from SEBI. We have considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. All the Grounds deal with addition of Rs. 23,52,796/- made by the AO as unexplained capital gains on sale of shares of M/s. Sunrise Asian Ltd. (Formerly Known as Akai Asian Ltd.).

8. Assessee claimed long term capital gain arising on sale of shares as exempted. Assessing Officer made additions on account of unexplained LTCG under section 68 and held that suspicious transactions in shares could not be

exempted under section 10(38). Since assessee had failed to prove genuineness of his share dealing transactions and in view of fact that entire transactions were stage managed with object to plough back his unaccounted income in form of fictitious long term capital gain (LTCG) and claim bogus exemption, Assessing Officer was justified in denying exemption under section 10(38) and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68.

9. The report submitted by the Investigation department could not be thrown out on the grounds urged on behalf of the assessee. The assessee have not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue; the statements do not indict the assessee. That apart, the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (Investigation) of all the States of the country. It is thereafter the concerned Assessing Officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessee *qua* the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the Assessing Officers calling upon the assessee to explain the genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the same would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was

prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessee has miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessee have been issued notices under sections 143(2) and 142(1) they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the Assessing Officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the Assessing Officer in scrutiny assessment under section 143(3). The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessee have not made out any case.

10. To prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances

surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the AO/ CIT (A) and ITAT to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrip of very little known companies. Furthermore, in all the cases, there were minimum two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrip, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted.

11. A holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, the authorities below cannot lose sight of the fact that the shares of very little known companies with in-significant business and net worth had a steep rise in the share prices within the period of little over a year. The revenue was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges

and it is only when the assessee made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail. To reiterate, the assessee was not named in the report and when the assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuineness of the transaction. Unfortunately, the assessee has been harping upon the transactions done by him and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuineness needs to be established otherwise, the assessee is lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuineness of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in section 68. Thus, the assessee cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial

burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. It is incorrect to argue that the assessee have been called upon to prove the negative in fact, it is the assessee's duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuineness and identity. The assessee cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assessee have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time.

12. Following case laws were relied up on by the assessee and revenue, in which citations relied upon by the assessee, we found not tenable on the facts of the case and applicable law, whereas case laws relied up on by the revenue are acceptable on the given facts of the case:

Decisions of Hon'ble ITAT, Mumbai:-

- 1. Dipesh Ramesh Vardhan vs. DCIT [ITA 7648/Mum/2019] [Copy enclosed]*
- 2. ITO-32(2) (1) v. M/s. Liberal Realtors LLP [ITA 449 & 450/Mum/2021]*
- 3. Shri Shripal Raj Lodha v. DCIT [ITA 619/Mum/2020]*
- 4. Narayan Ramchandra Rathi v. ITO (ITA No. 4811/MUM/2018) [Copy enclosed]*
- 5. Amin S. Tripathi v. PCIT (ITA No. 2560/MUM/2018)*
- 6. Anraj H. Shah (HUF) v. ITO (ITA No. 4514/MUM/2018) [Copy enclosed]*

7. *Anjana Sandeep Rathi v. ACIT (ITA No. 4369/MUM/2018)*

Decisions of Hon'ble ITAT, Ahmadabad:

8. *ITO 5(3)(1), Ahmadabad v. Devyani Dharmendra Shah ITA no. 576/Ahd/2020*

Decisions of Hon'ble ITAT, Jaipur:

9. *Sita Devi Agarwal v. ITO Ward 4(1) Jaipur*

ITA no. 56/JP/2022

10. *Ashok Agarwal v. ACIT Circle - 1 Jaipur ITA no. 124/JP/2020*

Decisions of Hon'ble ITAT, Indore

11. *Kumari Ayushi Nyati vs. ITO ITA No.203/Ind/2019*

12. *Smt. Manorama Devi Sharma v. ITO 3(1) Indore ITA no. 39/Ind/2019*

13. *Shri Shiv Narayan Sharma v. ACIT-3(1) Indore ITA no. 889/Ind/2018*

Case laws relied up on by the Revenue:

- i). *Sanjay Bimalchand Jain v. PCIT-1, Nagpur [2018] 89 taxmann.com 196 (Bom.)*
- ii). *Suman Poddar v. I.T.O. [2019] 112 taxmann.com 330 (SC.)*
- iii) *Sandeep Bhargava vs. ACIT (2019) 109 taxmann.com 174 (Delhi-Trib)*
- iv) *PCIT vs. Swati Bajaj (2022) 139 taxmann.com 352 (Calcutta)*

13. In view, of the above factual matrix and law on this issue pronounced by the Hon'ble Apex Court and Jurisdictional High Court we are of the considered view that the transaction of LTCG claimed exempt u/s. 10(38) by the assessee is colourable device in guise of investment in listed shares. Entire transactions were stage managed with object to plough back his unaccounted income in form of

fictitious long term capital gain (LTCG) and claim bogus exemption, Assessing Officer was justified in denying exemption under section 10(38) and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68. In the result, Ground No. 1 with its sub grounds is dismissed.

14. In the result appeal of the assessee is dismissed.

Order pronounced in the open court on 13th day of April, 2023.

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 13/04/2023

Sr. PS Dhananjay

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

BY ORDER,

//True Copy//

(Dy. / Asstt. Registrar)
ITAT, Mumbai