

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

ITA No.174/Hyd/2019		
Assessment Year: 2015-16		
Shri Venu Gopal Karwa Karimnagar PAN:AAVPK2698B (Appellant)	Vs.	Dy. C. I. T. Central Circle 1(2) Hyderabad (Respondent)
Assessee by:	Shri V Guna Sekhar Reddy, CA	
Revenue by:	Shri Jeevan Lal Lavidiya, CIT (DR)	
Date of hearing:	25/07/2023	
Date of pronouncement:	31/07/2023	

ORDER

Per R.K. Panda, Vice-President

This appeal filed by the assessee is directed against the order dated 30.10.2018 of the learned CIT (A)-11, Hyderabad, relating to A.Y.2015-16.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary, hose property and other sources. He filed his return of income on 6.3.2016 belatedly declaring taxable income at Rs.47,71,060/-. The return was selected for complete scrutiny under CASS. Accordingly statutory notices u/s 143(2) and 142(1) were issued and served on the assessee to which the AR of the assessee appeared from time to time and furnished the requisite details. One of the CASS reasons

for selection of complete scrutiny is “Suspicious sale transaction in shares and exempt long term capital gain shown in return (penny stock tab in ITS)”.

3. During the course of assesment proceedings, the Assessing Officer noted that the Directorate of Investigation, Kolkata carried out a country-wide investigation to unearth the organized racket of generating bogus entries of Long-Term Capital Gains (LTCG) which is exempt from tax u/s 10(38) of the I.T. Act. The modus operandi adopted by the operators was to make the beneficiary buy some shares of a pre-determined penny stock company controlled by them. The shares are transferred to the beneficiary at a very nominal price mostly off-line through preferential allotment of off-line sale to save STT. The beneficiary holds the share for one year, the statutory period after which the LTCG is exempt u/s 10(38) of the Act. In the meantime, the operators rig the price of the stock and gradually raise its price many times, often 500 to 1000 times. After thoroughly discussing the modes operandi adopted by various persons, the Assessing Officer noted that the assessee is one such beneficiary who has taken the entry of Rs.15,02,783/- during the impugned A.Y 2015-16. He noted that the family members of the assessee have also taken similar entries from the same source, the details of which are as under:

Name	A.Y	LTCG claimed on sale of shares of M/s. Surabhi Chemicals & Investments (P) Ltd.
Venugopal Karwa	2015-16	Rs.15,02,783
Bhagwandas Karwa	2015-16	Rs.38,92,360
Kushal Karwa	2015-16	Rs.42,38,990
Santosh Karwa	2015-16	Rs.42,41,083
Arjun Karwa	2015-16	Rs.42,76,178
Karhik Karwa	2015-16	Rs.47,75,582
Manju Karwa	2015-16	Rs.22,66,130

4. From the details furnished by the assessee, the Assessing Officer noted that the assessee has purchased and sold shares of M/s. Surabhi Chemicals & Investments (P) Ltd, the details of which are as under:

Scrip Purchased	M/s. Surabhi Chemicals & Investments (P) Ltd
No. of shares purchased	500 (these shares were split and bonus shares allotted. Total shares after split & bonus as on 1.4.2014 were 15,000)
Date of purchase	31.03.2012
Amount paid	Rs.1,00,000
Broker through whom purchased	Akriti Advisory Services (P) Ltd Mumbai
No. of shares sold	15,000
Amount received	Rs.15,33,145
Broker through whom shares sold	B. N. Rathi Securities Ltd

5. He noted that the assessee initially purchased 500 shares of M/s. Surabhi Chemicals & Investments Ltd., through M/s. Akriti Advisory Services P. Ltd., and it is a second purchase through stock exchange vide their bill dated 31.03.2012 for a consideration of Rs.1,00,000/-, Thus, each share was purchased at a cost of Rs.200/-. Later, on 14.08.2012, the company declared 9 bonus shares for every one share held by each shareholder. Accordingly, 4500 shares are received by the assessee for 500 shares held by him, Further, the company has reduced its share value of Rs. 10/- to Rs. 1/- per share by converting 1 share of Rs. 10/- into 10 shares of Rs. 1/- each. Accordingly, assessee has received 50,000 shares of RS. 1/- each for 500 shares held by him. The Assessing Officer noted an interesting part in bonus shares is that the financial credentials of M/s. Surabhi Chemicals & Investments Ltd., from financial years 2012-13 to 2014-15 are very weak in comparison with other reputed stocks. According to the Assessing Officer it is surprising

and highly unbelievable that within a short period the company had issued bonus shares in the ratio of "9 bonus shares for each one share". Therefore, he was of the opinion that the exemption claimed under sec. 10(38) on account of Long-term capital gain on sale of shares is suspicious and shows that the same is a pre-arranged one.

6. In view of the above and after considering the statement recorded u/s 131 from Sri Vishal Diwan, Sri Rahul Diwan and Sri Siddharth Diwan of Kolkata on 19.06.2015 recorded by the DDIT (Inv.) wherein they have stated that they have availed the pre-arranged bogus LTCG in the case of M/s Surabhi Chemicals & Investments (P) Ltd, the Assessing Officer disbelieved the claim of LTCG u/s 10(38) and made addition of the same by invoking the provisions of section 68 of the I.T. Act. Similarly, the Assessing Officer made addition of Rs.45,084/- being unexplained expenditure u/s 69C for arranging accommodation entry. The Assessing Officer in the assessment order also rejected the claim of the gift and made addition of Rs.14,03,490/- as income from other sources and made addition of Rs.1,00,000/- u/s 2(22)(e) of the I.T. Act, 1961. However, we are not concerned with the above 2 additions. Since the same is not in appeal before us. The Assessing Officer accordingly determined the total income of the assessee at Rs.78,22,417/-.

7. Before the learned CIT (A), the assessee challenged the additions made by the Assessing Officer of Rs.15,02,783/- u/s 68 and Rs.45,084/- u/s 69C of the I.T. Act but did not challenge the other additions. The learned CIT (A) dismissed the appeal filed by the assessee by observing as under:

5.0) I have considered the background of the case, assessment order, submissions of the assessee and the material placed before me. The scrip of M/s Surabhi Chemicals & Investment Ltd was declared as "**Penny Stock**" by SEBI. After discussing elaborately on the modus operandi adopted by the brokers for manipulating the share prices of penny stock and also the report given by SEBI in this matter, the AO concluded that the assessee has adopted the methodology of acquiring the Long Term Capital Gains to be exempted u/s 10(38) of the Act. The assessee is expressing ignorance that that he did a normal / natural trading, cannot be accepted, for the following reasons:-

- (1) The trading patterns of share brokers, statements of entry operators and the post survey inquiries conducted in penny stock companies had a very common financial and trading patterns.
- (2) The market price of shares of such companies rise to a very high level within a span of one/two years.
- (3) The trading volume of shares of penny stock companies during the period, in which manipulations are done to raise the market price, is extremely thin.
- (4) The sharp rise in the market price of the shares of these penny stock entities is not supported by fundamentals of the company or any other genuine factors. The scrip M/s Surabhi Chemicals & Investment Ltd had no reserves to allot bonus shares from financial year 2012-13 to 2014-15 and was very weak in comparison to other reputed stocks.
- 6) Most of the such penny stock companies split the face value of shares. (This is probably done to avoid the eyes of market analysts).
- 7) The volume of trade jumps manifold immediately when the market prices of shares reach at optimum level so as to result in LTCCG assured to the beneficiaries. This maximum is reading around the time when the

initial allottees have held the shares for one year or little more and, thus, their gain on sale of such shares would be eligible for exemption u/s 10(38).

- (8) Subsequently, the prices of the shares fall very sharply after the shares of LTCG beneficiaries have been off loaded through the pre-arranged transactions on the Stock Exchange Floor / Portal to the Short Term Loss seekers or dummy paper entities.
- (9) The shares of these companies are not available for purchase / sale to any person outside the syndicate. This is generally ensured by way of synchronized trading by the operators amongst themselves and by utilizing the mechanism of upper / lower circuit of the Stock Exchange.
- 10) Another important point to notice is that the appellant was a novice in trading activity of shares. This fact is clearly established from his own statement given u/s 131 before the AO, which is reproduced as under:-

Q.22 How often you are doing the trading in shares?

Ans: I am not engaged in the trading of shares.

Q.23 As per the details submitted by you for the AY 2015-16, you have got a long term capital gain of Rs.15,02,783/- and have traded in only the shares of M/s Surabhi Chemicals & Investments P. Ltd. You have not purchased any shares of other companies. Please furnish the reasons as to how you have traded only in the shares of only M/s Surabhi Chemicals & Investments P. Ltd.

Ans: I am not regularly trading in shares. Only on a tip from a close associate, I have purchased the shares of M/s Surabhi Chemicals & Investments P. Ltd. Later these shares have gone up and I have sold part of the shares held in my name.

Q.24 Do you want to say anything?

Ans: Please, consider the above facts and complete the assessment.

Thus, as could be seen from the above, it is very clear that the appellant was not having any experience or knowledge in trading the shares. Thus, it is very clear that the appellant particularly chose to invest in the above scrip because he received the tip from the market that the market price of this scrip would rise to a very high level within a span of one/two years. The appellant on his part had not tendered cogent evidence to explain as to how the share in an unknown company worth Rs.30,000/- (purchased @ Rs.2/- per share) had jumped

to Rs.15,33,145/-, in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to show as to how a share worth Rs.2/- of a little known company would jump so exorbitantly.

5.1) The appellant argued that his name has not been featured in any of the confessions made by the brokers and hence, the AO was wrong in making the addition u/s 68 just because the stock / share was under the scrutiny of SEBI and was banned from trading. The appellant's argument cannot be accepted since the total traded value of this particular scrip all over India, was Rs. 782.68 crores and the SEBI also has conducted its own enquiry and restricted the scrip from being traded. Secondly, the assessee was not regular in trading the stocks and this is the only instance where not only the appellant but also his entire family members have invested in this particular scrip and availed the benefit of long term capital gains amounting to Rs.2.52 crores. This goes to prove very clearly that the tip off which the appellant received from the market that this scrip would reach higher rate, cannot be considered as normal trading. In this context, it is very much reliable to draw attention of the Hon'ble ITAT, Delhi decision in the case of Haresh Win Chaddha Vs. DDIT, which is, as under:-

"There is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record".

5.2) The decisions rendered by Hon'ble Supreme Court in the cases of Sumati Dayal reported in (214 ITR 801) and Durga Prasad More reported in (82 ITR 540), that the matters have to be considered by applying the test of human probabilities is also clearly applicable in this case. Accordingly, the AO assessed the sale value of shares of Rs.38,92,360/-, as unexplained Cash Credit u/s 68 of the Act.

5.3) In view of the above, it is clear that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of exemption of long term capital gain u/s 10(38). Hence, the addition made by the AO u/s 68 is sustained and the relevant ground is dismissed.

6.0) The next ground relates to addition of Rs.1,16,771/- under section 69C. The AO in his assessment order has stated that as per the statement recorded from Sunil Dakanla of Kolkata, a commission of Rs.3% was charged from the beneficiaries seeking such arrangement of capital gains. Accordingly, the AO made disallowed the commission amount of Rs.1,16,771/- and added to the income returned.

6.1) The appellant contested that the AO was not justified in making addition of Rs.1,16,771/- under section 69C as the statement was given by the third party during the course of survey without any reference to assessee's name and hence the same is to be deleted.

6.2) The contention of the appellant is not acceptable since the brokers have clearly stated that they have charged 3% as commission for arranging such accommodation entries. The assessee's argument is not accepted and the addition made by the AO u/s 69C is sustained. This ground of appeal is thus dismissed.

7.0) In the result, the appeal is dismissed. //

8. Aggrieved with such order of the learned CIT (A), the assessee is in appeal before the Tribunal by raising the following grounds:

"1. The CIT (Appeals) is not justifiable in sustaining addition made by the A.O by treating the LTCG on shares as bogus and making an addition of Rs, 15,02,783/- u/s 68 based on the Investigation done by DDIT (Investigation) Kolkata on penny stocks. But for surveillance measure kept by the SEBI, investment in penny stocks cannot necessarily mean that all transactions are bogus specially when assessee maintained all documentary evidences to discharge onus of the genuineness of the transaction.

2. The CIT (Appeals) is not justifiable on sustaining the addition of Rs. 45,084/ as brokerage paid u/s 69C based on general confession made by

third party without referring to assessee's name. The CIT (Appeals) erred in guessing wildly that assessee paid brokerage @3% for arranging capital gain transaction.

3. The appellant craves leave for addition, modification, substitution or withdrawal of grounds of appeal."

9. The learned Counsel for the assessee strongly challenged the order of the learned CIT (A) in confirming the additions made by the Assessing Officer. The learned Counsel for the assessee referring to the written submission submitted that the assessee apart from trading in the shares of Surabhi Chemicals & Investments (P) Ltd has also traded in various other shares and thus is an investor. The exemption claimed on account of sale of part of shares of Surabhi Chemicals & Investments (P) Ltd which was claimed as exempt u/s 10(38) of the I.T. Act was accepted by the Assessing Officer in the order passed u/s 143(3) on 1.1.2016 for the preceding A.Y. The entire purchase was paid by cheque, reflected in the balance sheet for the financial year 2011-12 relevant to A.Y 2012-13, the shares were transferred to the credit of the Demat account of the assessee and thereafter the assessee got the bonus share in the ratio of 1:9. He submitted that when shares sold during the year were acquired in earlier years and since the Assessing Officer has not doubted the purchase of shares and claim of exemption u/s 10(38) was accepted by the Assessing Officer in the order passed u/s 143(3) on 1.1.2016 for the A.Y 2014-15 therefore, the lower authorities are not justified in disallowing the claim of deduction u/s 10(38) for the impugned A.Y.

10. Referring to the decision of the Coordinate Bench of the Tribunal in the case of Arun Kumar Goyal (HUF) vs. Income Tax Officer vide ITA No.2416/Hyd/2018, dated 29.6.2021 for the A.Y

2014-15, he submitted that the Tribunal has allowed the claim of LTCG exemption u/s 10(38) by observing that the findings of the lower authorities are purely based on assumptions and conjectures. Referring to the decision of the Coordinate Bench of the Tribunal in the case of Tarun Kumar Goyal and Arun Kumar Goyal vs. ACIT in ITA Nos. 456 to 458/Hyd/2020, dated 20.04.2021 for the A.Y 2014-15 and 2016-17, he submitted that the Tribunal here also allowed the exemption claimed u/s 10(38) under identical circumstances. Relying on various other decisions, he submitted that under identical circumstances, the various benches of the Tribunal are allowing claim of exemption u/s 10(38) in respect of sale of shares of Surabhi Chemicals & Investments (P) Ltd. He accordingly submitted that the order of the learned CIT (A) be reversed and the addition be deleted.

11. The learned DR, on the other hand, heavily relied on the order of the Assessing Officer and the learned CIT (A). Referring to the following decision, he submitted that under identical circumstances, the claim of exemption u/s 10(38) has been rejected by the Tribunal which has been upheld by the High Court and the SLP has been dismissed by the Hon'ble Supreme Court.

- i) *ITAT Delhi Bench in ITA No.1006/Del/2019 in the case of Suman Poddar.*
- ii) *Hon'ble Delhi High Court in ITA 841/2019 dated 17.9.2019 in the case of Suman Poddar*
- iii) *Hon'ble Supreme Court in the case of Suman Poddar (SLP No.26864/2019 dated 22.11.2019).*

He accordingly submitted that the order of the CIT (A) be upheld.

12. We have heard the rival arguments made by both sides, perused the orders of the Assessing Officer and the learned CIT (A) and the Paper Book filed by both sides. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case made addition of Rs.15,02,783/- u/s 68 of the I.T. Act by rejecting the claim of exemption u/s 10(38) on account of sale of 15000 shares of Surabhi Chemicals & Investments (P) Ltd on the ground that the transaction so entered into by the assessee is not genuine by recording the following:

“10. Further, the transaction is found to be not genuine in view of the following observations and facts:

(i) The financials of the penny stock M/s. Surabhi Chemicals & Investments Ltd., and movement of the price is abrupt, unrealistic and not based realistic parameters. The history of investment in shares by the assessee also generally reveals that he has not been dealing in shares on a regular basis. It has also been found that entries of LTCG have also been taken by other members of the assessee family.

(ii) The purchase of these shares were claimed to be second purchase through stock exchange and were not a first transaction through recognized Stock Exchange.

(iii) The apparent is true until and unless it is disproved. Therefore, human probabilities have also to be applied to comprehend the transactions and to see the real intention behind entering into these transactions. In the similar circumstances, the Honorable Gauhati High Court of CIT Vs Sanghamitra Bharali (361 ITR 481) had held that the capital had held that the capital gains are sham transactions entered only to give colour of genuineness and therefore, held that the capital gain arising out of these transactions cannot be believed as genuine and upheld taxing the said amount as unaccounted income brought into the books in the guise of exempted capital gains.

(iv) Even assuming that the purchase as genuine, the sales, given the high rates for such penny stocks, with no real buyers, are bogus. The evidentiary value of payment of STT cannot make a no genuine transaction, a genuine one.

(v) The scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders.”

13. Further, the Assessing Officer has made addition of Rs.45,084/- being commission paid @ 3% for arranging capital gain. We find the learned CIT (A) upheld the action of the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraph. It is the submission of the learned Counsel for the assessee that the assessee purchased 500 shares of M/s. Surabhi Chemicals & Investments (P) Ltd @ Rs.200/- per share from Akriti Advisory Services on 31.3.2012 and the payment was made by cheque. Further, the assessee was issued 9 fully paid-up bonus equity shares for every one fully paid up equity share of Rs.10/- each. The shares were subsequently split from one equity share of Rs.10/- each to 10 equity shares of Rs.1/- each. It is the submission of the learned Counsel for the assessee that during the financial year 2013-14 relevant to A.Y 2014-15 the assessee has sold 35,000 shares @ 58.70% and claimed exemption u/s 10(38) amounting to Rs.19,74,227.80 which has been accepted u/s 143(3) and therefore, denial of claim of exemption u/s 10(38) for the impugned A.Y for sale of part of the very shares is not justified. We find from the various details furnished by the assessee in the paper book that a survey u/s 133A of the I.T. Act was carried out in the case of Sri Venkatesh Granites (P) Ltd, Karimnagr and its Director including the assessee on 25.02.2014. The Assessing Officer in the order passed u/s 143(3) on 1.1.2016 for the A.Y 2014-15 has not made any addition on account of exemption claimed u/s 10(38) of the I.T. Act. A perusal of the assessment order shows that the assessee filed return of income on 31.3.2015 declaring total income of Rs.2,58,20,500/- including undisclosed income admitted during the course of survey of Rs.2,24,32,618/-. However, the order is silent on account of exemption u/s 10(38) of the I.T. Act. On being a pointed query raised by the Bench as to whether any action u/s 147 of u/s 263 has been

taken in respect of A.Y 2014-15 or not, the learned Counsel for the assessee expressed his inability to throw any light. We find the assessee during the impugned A.Y has sold a part of the shares of Surabhi Chemicals & Investments (P) Ltd and claimed exemption u/s 10(38) of the Act which was denied by the Assessing Officer and upheld by the learned CIT (A) and whereas in the preceding A.Y no such addition has been made by the Assessing Officer in the order u/s 143(3) and the learned Counsel for the assessee also could not throw any light regarding initiation of proceedings u/s 147 of 263 of the Act for the A.Y 2014-15 on the claim of exemption u/s 10(38) on account of sale of the shares of Surabhi Chemicals & Investments (P) Ltd. We further, find although the Assessing Officer at Para 3 of his order has mentioned that family members and relatives of the assessee have also taken entries from same source for claim of long-term capital gain on account of sale of shares of M/s. Surabhi Chemicals & Investments (P) Ltd, however, the order of the Assessing Officer as well as the learned CIT (A) is silent on the outcome of such claim of LTCG claimed as exempt u/s 10(38) in their hands. Therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the learned CIT (A) with a direction to adjudicate the issue afresh in the light of our above observations. Needless to say, the learned CIT (A) shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. We hold and direct accordingly.

14. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 31st July, 2023.

Sd/-

Sd/-

(LALIET KUMAR) JUDICIAL MEMBER	(R.K. PANDA) VICE-PRESIDENT
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Hyderabad, dated 31st July, 2023

Vinodan/sps

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4	DR, ITAT Hyderabad Benches
5	Guard File

By Order