

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos. 351 & 352/Ind/2022
Assessment Years:2011-12 & 2012-13

Shri Hitesh Kumar Bindal, Swastik House, 21/3, Ratlam Kothi, Indore	<u>बनाम/</u> Vs.	Dy. CIT, Tax Circle, 1(1) Indore.
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AGGPB9228H		
Assessee by	Ms.Nisha Lahoti, CA and Shri Vijay Bansal, CA	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	10.05.2023	
Date of Pronouncement	04.08.2023	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

These two appeals are filed by assessee assailing the two appeal-orders, both dated 09.09.2022 and both passed by learned Commissioner of Income-Tax, National Faceless Appeal Centre, Delhi ["Ld. CIT(A)"], which in turn arise out of assessment-orders dated 13.12.2018 and 14.12.2018 respectively for assessment years ["AY"] 2011-12 and 2012-13 passed by learned DCIT/ACIT-1(1), Indore ["Ld. AO"] u/s 147 read with section 143(3) of Income-tax Act, 1961 ["the Act"].

2. These appeals involve identical issue and the parties were represented by same Representatives; accordingly at the request of learned

Representatives these cases were heard together and are being disposed by this common order for the sake of brevity and convenience.

3. The facts leading to these appeals are such that while filing returns of income of AY 2011-12 and 2012-13 as involved in these appeals, the assessee declared exempted long-term capital gain u/s 10(38) from sale of shares of M/s KCL Infra Projects Ltd. (KCLIPL) formerly known as M/s Kadam Construction Ltd. The cases of assessee were re-opened by revenue through notices u/s 148 and the assessment were ultimately made u/s 147 read with section 143(3) wherein the AO treated the shares of KCLIPL as what is called "penny stock" and capital gain declared by assessee therefrom as managed or non-genuine. Accordingly, the AO made addition u/s 68 amounting to Rs. 9,21,930/- and Rs. 19,42,723/- (equivalent to the full value of sale consideration received by assessee) in AY 2011-12 and AY 2012-13 respectively. Aggrieved by action of AO, the assessee carried matter in first-appeal but could not succeed. Now, the assessee has come in next appeal before us.

4. Presently, the controversy to be adjudicated by us is whether or not the revenue is justified in treating the capital gain declared by assessee as non-genuine and thereby make addition u/s 68?

5. At the outset, we may briefly take note of the data of transactions resulting into the impugned capital gain. The assessee claims to have purchased 35,000 shares of KCLIPL through broker M/s Arihant Capital Markets Ltd. in the year 2007-08 for Rs. 17,57,769/-, the average cost per share was Rs. 50.22. Later those shares were split in the ratio of 1:5, thereby 35,000 shares became 1,75,000 shares thus reducing average cost to Rs. 10.04. Thereafter, as informed by Ld. AR, the assessee sold shares in tranches in four different assessment-years, namely 1,10,000 shares in AY 2010-11 (+) 13,820 shares in AY 2011-12 (+) 44,525 shares in AY 2012-13 (+) 6655 in AY 2018-19. The average sale price of shares sold in AY 2011-12 and 2012-13 under consideration was approx. Rs. 66.70 and Rs. 43.63

respectively. Ld. AR informed that the capital gain declared by assessee in AY 2010-11 and 2018-19 have been accepted by department in proceedings u/s 143(1). The disputes have been created only in AY 2011-12 and 2012-13 for which these appeals are before us.

6. Ld. AR for the assessee made following arguments and claimed that the lower-authorities have wrongly treated the capital gain declared by assessee as non-genuine:

(i) It is submitted that the transactions done by assessee are fully supported by all valid documents. The details of documents placed before lower-authorities and also filed in the Paper-Book of AY 2011-12 are as under:

	Document	Paper-Book page No.
1	Year-wise summary of purchase and sale of shares starting from financial year 2007-08 to 2017-18 (AY 2008-09 to 2018-19)	22
2	De-mat A/c	24
3	Copy of Pass Book of Union Bank of India from 13.12.2007 to 13.02.2008 from which the purchase consideration was paid	25 to 27
4	Copies of Contract Notes	31 to 34

5	Statement of date-wise purchases of shares and payment of purchase consideration	35
6	A/c Statement of Axis Bank wherein the sale-consideration was received	36 to 37

- (ii) It is submitted that the shares were not purchased on one date in one lot. The purchases were made on various dates in tranches as per following details placed at Page No. 35 of Paper-Book:

Date	Quantity	Amount
03.12.2007	5000	2,08,195
04.12.2007	2500	1,08,270
06.12.2007	2500	1,05,239
10.12.2007	3500	1,50,288
12.12.2007	2500	1,15,184
17.12.2007	2500	1,33,447
18.12.2007	7000	3,75,153
19.12.2007	3500	1,91,081

26.12.2007	2000	1,23,270
07.01.2008	4000	2,47,642
Total	35000	17,57,769

- (iii) It is submitted that the assessee made payments of purchase consideration to M/s Arihant Capital Markets Ltd. on different dates through banking channel through cheques drawn on assessee's A/c with Union Bank of India, copy of bank Pass-Book is placed at Page No. 25 to 27 of Paper-Book. The payment is neither made on one single day nor in cash. The details of payments are as under:

Date	Cheque No.	Amount
20.12.2007	141636	6,87,176
26.12.2007	141638	1,91,081
26.12.2007	141637	5,08,600
10.01.2008	141641	1,23,270
23.01.2008	141644	2,47,642
Total		17,57,769

- (iv) It is submitted that after purchase the shares were immediately credited in De-mat A/c on 31.12.2008. It is pointed out that there is a

slight time-gap of about 11 months in-between last purchase on 07.01.2008 and credit in De-mat on 31.12.2008 but that was for the reason that in those days, the dematerialization system was not popular and the persons used to maintain physical shares.

- (v) It is submitted that the even after credit of shares in De-mat A/c on 31.12.2008, the assessee did not sell shares in one lot or even in one year. The sales was made in tranches in four years during AY 2010-11, 2011-12, 2012-13 and lastly in AY 2018-19.
- (vi) It is submitted that the shares were held by assessee in De-mat A/c itself from 31.12.2008 till AY 2018-19; thus the total holding period from 31.12.2008 till AY 2018-19 is approximately 10 years. Ld. AR strongly contended that holding for a period of 10 years itself is the single most factor which rules out all allegations against assessee.
- (vii) Lastly, it is submitted that the assessee is a regular investor which is clearly evident from other shares held by assessee in De-mat A/c placed at Page No. 24 of Paper-Book. Thus, it is not a case of solitary or isolated transactions of KCLIPL only to generate bogus capital gain as alleged.

7. Per contra, Ld. DR for revenue made following contentions and claimed that the revenue has rightly treated the capital gain declared by as non-genuine:

- (i) It is submitted that the AO found that the DDIT(Investigation), in his report, established that KCLIPL is a "penny stock" that exists for providing accommodation entries to beneficiaries (Para 3.2 of assessment-order).
- (ii) It is submitted that the AO obtained data of the buyers of shares sold by assessee from Bombay Stock Exchange and observed that majority of the buyers were shell entities and some of the buyers were Indore-

based. The AO found that it cannot be a co-incidence. The AO also issued notices u/s 133(6) to buyers but some notices returned unserved; some buyers did not file any response and some buyers were clueless about the shares of KCLIPL. Therefore, the AO observed that it was a well-designed plan of assessee, entry-operators, brokers and purchasers (Para 3.5 to 3.7 of assessment-order).

- (iii) That, in the statement of Shri Mohan Jhawar, director of KCLIPL, he admitted that some operators in market were controlling and manipulating the prices of share of company (Para No. 3.8 of assessment-order).
- (iv) That the AO found that the turnover and profit of KCLIPL from year 2000 to 2005 were negligible. In the year 2005, there was a change in management of KCLIPL and by virtue of SEBI order dated 06.10.2005, Shri Mohan Jhawar and others took over the management of company (Para No. 4 of assessment-order).
- (v) That the AO analyzed price-trend of KCLIPL and found that upto June, 2009, the peak price was Rs. 12.75. Thereafter from June, 2009, the price rigging started and there was exponential rise in the price of share and in volume but there was no financial backing to support the abnormal rise (Para No. 4.1 of assessment-order).
- (vi) That based on above observations, the AO has found that in totality and on preponderance of probabilities, it emerged that the purchase and sale of shares was executed for the purpose of lending legitimacy to assessee's unaccounted income.
- (vii) Lastly, Ld. DR relied upon following decisions to strengthen the revenue's stand:
 - (a) Sumar Poddar Vs. ITO (2019) 112 taxmann.com 330 (SC)
 - (b) PCIT Vs. Swati Bajaj (2022) 139 taxmann.com 352 (Calcutta HC)

- (c) Shyam Sunder Bajaj (2022) 145 taxmann.com 315 (Kolkata ITAT)
- (d) Pooja Ajmani (2019) 106 taxmann.com 65 (Delhi ITAT)
- (e) Sanjay Kaul (2020) 114 taxmann.com 186 (Delhi ITAT)
- (f) Sandeep Bhargava (2019) 109 taxmann.com 174 (Delhi ITAT)

8. In Rejoinder, Ld. AR made following submissions/contentions:

- (i) That the assessee has filed all documents and not a single document is disputed by AO. In fact, Ld. CIT(A) has himself mentioned in Para No. 5.6 of appeal-order that the AO has not disputed documents of assessee.
- (ii) That the shares were purchased as well as sold through stock exchange. There is no off-market purchase or off-market sale.
- (iii) That the entire sale is made through platform of recognized stock exchange and the assessee has no way or means to know the buyers. Moreover, the names and information of buyers as well as notices issued to them u/s 133(6) as noted by AO in assessment-order were never confronted to assessee; those details are directly mentioned by AO in assessment-order.
- (iv) That the statement of Shri Mohan Jhanwar, director of KCLIPL are recorded at the back of assessee and no opportunity had been given to assessee to cross-examine or rebut the same. Further, there is nothing adverse in the statements.
- (v) That there is no iota of evidence to reveal that the assessee was involved in alleged price-rigging. In fact, the assessee was not aware of price-rigging, if any.

9. We have considered rival contentions of both sides and perused the orders of lower-authorities as also the documents placed in Paper-Book and copies of case-laws filed before us. On a careful consideration, we find that the assessee has produced all documents in the form of Contract notes of

purchase and sale, DP A/c and Bank Pass Books and none of those documents is disputed or rebutted by revenue. In fact, Ld. CIT(A) has himself mentioned in Para No. 5.6 of appeal-order "*I have noted that the assessee feigns ignorance about the activities or finances or price manipulations in market of companies, as recorded by the AO. **What assessee overlooks is that the existence of documentation in support of these transactions was not even disputed by the AO,** and that real issue, in the backdrop of these inputs as discussed in assessment order, is on the genuineness of the transactions."* Then, we find that the shares were purchased and sold through recognized stock-exchange and not off-market. Next we find that the purchase price was paid through A/c payee cheques and the sale consideration was also received through A/c payee cheques; there is no payment or receipt in cash. Then, we find that immediately after purchase of shares, the assessee got those shares credited in De-mat A/c (there was some time-gap of 11 months which is suitably explained by Ld. AR). Notably, the assessee was holding share in De-mat A/c for as many as 10 years from purchase till last sale and this single factor is more than enough to dislodge any allegation of revenue on assessee's transactions. Then, we also find that the assessee is having investment in other securities as well and it is not the case that the assessee has made a stray transaction of shares of KCLIPL only. Thus, there is a complete series of factors and evidences demonstrating the genuineness of assessee's transactions and not a single of them has been disputed by revenue.

10. Now, we would like to deal with some more contentions put forward on behalf of revenue. In so far as the buyers of shares sold by assessee are concerned, we find merit in the submission of Ld. AR that the entire sale was made through platform of stock-exchange where nobody knows who is buyer. Further, the AO has not provided any details of enquiries directly undertaken by him from buyers through the process of section 133(6) and the AO's noting in assessment-order came to the knowledge of assessee only after seeing the assessment-order. Same is the case of statement of Shri Mohan

Jhawar, director of KCLIPL, which were not provided or confronted to assessee. Since the enquiries from buyers u/s 133(6) and statement of Shri Mohan Jhawar are assessee-specific and heavily relied upon by AO in assessment-order, the AO was legally duty bound to provide opportunity to assessee before making them a basis to draw any conclusion. But then the AO has not done so which is against the settled judicial principle of "audi alteram partem". Another contention is based on AO's noting that the turnover and profit of KCLIPL from year 2000 to 2005 were negligible but we fail to understand how this noting is relevant to assessee's case when the assessee has made first purchase transaction itself on 03.12.2007 which is much after year 2005. In fact, this factor goes in favour of assessee for the simple reason that the AO himself admitted that in the year 2005, there was a change in management of KCLIPL and by virtue of SEBI order dated 06.10.2005, Shri Mohan Jhawar and others were given management. In stock market, change in management is considered as a turn-around story and investors tend to invest money with the expectation of good prospectus. Therefore, purchase of shares by assessee in the year 2007 after change in management gives more credence to assessee's transactions. Then, as far as price-rigging is concerned, the claim of assessee has a merit that he was neither aware nor a party to price rigging. Thus, the revenue's contentions are devoid of any merit.

11. Now we would also like to deal with the decisions relied upon by Ld. DR. The first in the sequence is *Sumar Poddar Vs. ITO (2019) 112 taxmann.com 330 (SC)* which is a case in which assessee's SLP against decision of Hon'ble Delhi High Court was dismissed. The Hon'ble Delhi High Court, in that case, held the capital gain as non-genuine taking into account certain facts, namely (i) There was astronomical hike of 4910% in the price of share in a very short period of 5 months, (ii) The assessee did not make any other dealing of shares, and (iii) The broker through whom transactions were done, was not known to assessee. In next case of *PCIT Vs. Swati Bajaj (2022) 139 taxmann.com 352 (Calcutta HC)*, the assessee purchased shares on

16.03.2012, de-matted on 29.12.2012 and sold just after completion of one year and few months when the investment in shares became eligible for claiming exemption u/s 10(38) with increase of almost 2823%. In *Shyam Sunder Bajaj (2022) 145 taxmann.com 315 (Kolkata ITAT)*, the binding decision of jurisdictional High Court in *Swati Bajaj (supra)* was followed on admission of identical facts by counsels of parties (Para No. 6 of order). In *Pooja Ajmani (2019) 106 taxmann.com 65 (Delhi ITAT)*, the assessee purchased shares on 13.09.2012, opened de-mat a/c on 15.01.2014, got shares credited therein and thereafter sold in the very next month. In *Sanjay Kaul (2020) 114 taxmann.com 186 (Delhi ITAT)*, the assessee purchased shares on 05.05.2014/23.02.2014/25.03.2014 and sold within a short-period on 15.03.2015/15.02.2015/15.03.2015 and declared long-term/short-term loss and set off the same against other income. In *Sandeep Bhargava (2019) 109 taxmann.com 174 (Delhi ITAT)*, the assessee made off-market purchase directly from the company and declared more than 100 times gain within a period of about 1 year. Thus, the vital facts of all these cases were highly glaring and demonstrated adversity in the first blush itself. But in the present case of assessee, the vital factors are such that (i) the purchase and sale both were done through stock-exchange, not off-market (ii) the payment and receipt of both purchase and sale considerations were through banking channel and not in cash, (iii) the assessee is a regular investor and holding other securities also, (iv) the shares were got dematerialized immediately and held in de-mat a/c thereafter, and (v) most importantly, the assessee has held shares for about a period of 10 years and sold in four assessment years in tranches. Thus, the vital factors of assessee's case are totally different then the facts of decisions relied upon by Ld. DR. Therefore, the said decisions are not applicable to assessee's case.

12. That brings us to conclude that the facts of present appeal, as is evident from foregoing discussion, do not reveal any problem or negativity. The revenue in such a situation cannot reply upon mere suspicious, conjecture, preponderance of probabilities or report of investigation wing of

department. In our considered view, there capital gain declared by assessee must be accepted as genuine and we do so. Accordingly, we delete the additions made by revenue-authorities. The assessee succeeds in these appeals.

13. Resultantly, these appeals of assessee are allowed.

Order pronounced in the open court on 04/08/2023.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 04.08.2023

CPU/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*