

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “SMC”, MUMBAI**

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

**ITA No.1363/M/2023
Assessment Year: 2011-12**

ITO, Ward-2(1), Thane Room No.25, B-Wing, 6 th Floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)-400 604	Vs.	Shri Jitendra Kumar Ajaypal Singh, C-202, Shubham Heights Indralok Phase-6, Opp. Global School, Bhayander (East), Thane – 401 105 PAN: AHAPP7959C
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri B. Laxmi Kanth, D.R.

Date of Hearing : 10 . 07 . 2023
Date of Pronouncement : 25 . 07 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The Revenue by filing the present appeal, sought to set aside the impugned order dated 17.02.2023 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2011-12 on the grounds inter-alia that :-

“1. On facts and In the circumstances of the case, the Id. CIT (A) erred in directing the Assessing Officer to treat the transaction relating to penny stock as genuine and ignore the findings of the AO?”

2. On facts and in the circumstances of the case, the Id. CIT(A) was erred in not appreciating the fact that capital gains claimed by the assessee are sham transactions entered only to give colour of genuineness and therefore, these transactions cannot be believed as

genuine which was upheld by the Apex Court in the case of SEBI V/S Rakhi Trading Pvt. Ltd. In Civil Appeal No. 1969 of 2011?

3. On facts and in the circumstances of the case, the Id. CIT(A) was erred in not appreciating the fact that assessee has shown his gain/loss under the head 'profit and gain from business other than speculative business' and merely relied on assessee submission that he has neither claim long term capital gain nor short term capital loss. AO has rightly added back the sales consideration being arising from factious and sham transactions in said penny stock.

4. The Order of the Id. CIT(A) may be vacated & that of the AO may be restored.

The appellant craves leave to add, amend, alter or delete any ground of the appeal.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of information received from the office of Directorate General of Income Tax (Investigation) [DGIT(Inv.)], Mumbai that M/s. Navyah Infrastructure & Telecom Services Ltd. is a penny stock of BSE with scrip code 517534 and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of extra capital gain or short term capital loss in their books of account. It was noticed that share of M/s. Navyah Infrastructure & Telecom Services Ltd. grown from Rs.39/- on 21.07.2009 to Rs.2,050/- on 05.01.2011 and dipped to Rs.47.20 on 18.07.2012. This company has no business set up to justify the sharp rise in its share price. After taking necessary approvals reopening proceedings were initiated under section 147/148 of the Income Tax Act, 1961 (for short 'the Act'). On failure of the assessee to file D-mat account and global report of share trading qua the share trading done by the assessee in the scrip of M/s. Navyah Infrastructure & Telecom Services Ltd. the Assessing Officer (AO) proceeded to make addition of Rs.1,36,575/-, the

amount of scrip of M/s. Navyah Infrastructure & Telecom Services Ltd. treated by the assessee being a penny stock and thereby framed the assessment under section 143(3) read with section 147 of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. Notice of the appeal was issued to the assessee through email as well as RPAD but notice sent through RPAD received back undelivered with the report that “addressee has shifted to some other place”. Notice was issued to the assessee on the given address as per Form 36 as well as his registered email ID. It appears that the assessee is not interested in prosecuting the present appeal. So the Bench has decided to dispose of the present appeal on the basis of material available on record and with the assistance of the Ld. D.R. for the Revenue. Moreover appeal in question is filed by the Revenue itself, whose representative is present in the court to argue the same.

5. I have heard the Ld. D.R. for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

6. The Ld. CIT(A) deleted the impugned addition made by the assessee who has duly thrashed the facts in the light of the

provisions of income tax applicable to the issue in question and returned the following findings:

“6.5 I have carefully considered the grounds of appeal raised by the assessee and submissions made in support of the same, including documentary evidence, and examined the issue under dispute in the light of the facts and circumstances of the case and relevant provisions of the statute.

6.6 As seen from the facts of the case as emanating from the impugned assessment order and the statement of facts filed by the assessee, the AO received specific information that the assessee made transactions in the shares of M/s. Nivyah Infrastructure and Telecom Services Ltd., which was identified as penny stock listed on BSE as per the investigation conducted by the Investigation Wing of the Income Tax Department, Mumbai.

6.7 Also, it was reported that the shares of the abovementioned company were traded on BSE for the purpose of introduction of unaccounted income of certain beneficiaries, including the assessee, in the form of tax exempt long term capital gain and short term capital loss. In regard to the transactions made by the assessee in the said penny stock, the AO received information from the Investigation Wing that the assessee sold shares for Rs. 1,36,575/- during the FY 2010-11 relevant to the impugned AY 2011-12.

6.8 During the course of reopened assessment proceedings, the AO called upon the assessee various details and documentary evidences, including global report of shares transactions/trading issued by the Depository Participant (DP). According to the impugned assessment order, though the assessee furnished most of the details called for, but failed to furnish global report and D-mat account. In view of this, based on the information received from Investigation Wing, the entire amount of sale consideration received towards sale of shares of M/s. Nivyah Infrastructure and Telecom Services Ltd. of Rs. 1,35,575/- was brought to tax as undisclosed income of the assessee.

6.9 During the course of appellate proceedings. it was submitted by the assessee that, during the FY 2010-11, he had traded in the shares of M/s. SV Electricals Ltd., since name changed to M/s. Nivyah Infrastructure and Telecom Services Ltd. w.e.f. 15.03.2012, and made profit of Rs. 54,740/-. Also, it was submitted by the assessee that he had transacted in various other shares such as M/s. National Minerals Ltd., M/s. Tatiya Intimate Exp, etc. and incurred a net loss of Rs. 924.83/- during the FY 2010-11 relevant to impugned AY 2011-12. As such, the assessee contended that he had suffered a loss of Rs. 924.83/- on account of share transaction during the impugned AY 2011-12.

6.10 Coming to the transactions made through M/s. Nivyah Infrastructure and Telecom Services Ltd., the assessee contended that

the AO did not consider the purchase cost and brought the entire sale consideration to tax. In this regard, the assessee enclosed copy of global report of share transactions issued by the DP M/s. IFCI Financial Service Ltd.

DECISION-II:

6.11 I have given my thoughtful consideration to the submissions made by the assessee and examined the same in the light of the documentary evidence placed on record.

6.12 At the outset, it is an admitted fact that the assessee has not claimed any tax exemption towards long term capital gain u/s. 10(38) of the Act, which was stated to be earned from trading in penny stock M/s. Nivayah Infrastructure and Telecom Services Ltd. Also, the assessee has not claimed set off of loss against taxable profits in the shape of short term capital loss stated to be incurred from trading in penny stock M/s. Nivayah Infrastructure and Telecom Services Ltd.

6.13 At this juncture, it is pertinent to note that transactions in shares of penny stock are entered into for the purpose of creating tax exempt long term capital gain for introducing unaccounted income in the books or short term capital loss meant to be adjusted against taxable profits of the assessee, as the case may be.

6.14 However, in the instant case, the AO without appreciating the factual matrix of the case that the assessee did not introduce any of his unaccounted income in the form of transactions made through penny stock M/s. Nivayah Infrastructure and Telecom Services Ltd., made the impugned addition of Rs. 1,35,575/-, being the sale value of the shares. While doing so, the AO has failed to apply his mind that every transaction in penny stock cannot be considered as bogus and non-genuine and the same should be analysed keeping in view whether the assessee has introduced unaccounted income in his books or claimed set off of loss against taxable profits.

6.15 In view of the above, after having considered the factual matrix of the case, I am of the considered opinion that AO is not justified in making the impugned addition of Rs. 1,35,575/- and, in-fact, the said addition was made arbitrarily without understanding the transactions from proper perspective and lack of application of mind. Accordingly, the AO is directed to delete the addition. Thus, the grounds of appeal raised by the assessee are allowed.”

7. Bare perusal of the impugned findings returned by the Ld. CIT(A) deleting the addition made by the AO goes to prove that the reopening in this case has been made by the AO on the

basis of his whims and fancies without applying any mind. Even no reason has been recorded nor mentioned in the assessment order showing any escapement of income to initiate the reopening rather the AO proceeded to make the addition on the basis of detail submitted by the assessee as to the share trading done by him with regard to scrip of M/s. Navyah Infrastructure & Telecom Services Ltd.

8. More particularly when the assessee has not claimed any tax exemption towards LTCG under section 10(38) of the Act nor the assessee has introduced any of his unaccounted income in the form of transactions made through penny stock of M/s. Navyah Infrastructure & Telecom Services Ltd., the entire addition made by the AO is not only on the basis of conjectures and surmises rather the AO by making the assessment order has pushed the assessee into unnecessary litigation. Even all these facts have not been considered by the Revenue Department at the time of filing the appeal because addition made by the AO is prima-facie not sustainable.

9. In view of what has been discussed above I find no illegality or perversity in the impugned findings returned by the Ld. CIT(A).

10. Resultantly, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 25.07.2023.

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 25.07.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.