

आयकर अपीलीय अधिकरण
मुंबई पीठ " एच ", मुंबई

श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " H ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं.1442 /मुं/2021 (नि.व. 2011-12)
ITA NO.1442/MUM/2021(A.Y.2011-12)
आअसं.1534 /मुं/2022 (नि.व. 2016-17)
ITA NO.1534/MUM/2022(A.Y.2016-17)

Mamta Mehta,
B-3, Bldg No.3, Saibaba Enclave,
Behind Citi Centre, Goregaon West
Mumbai 400 062.

PAN: AFXPM-6021-P

..... अपीलार्थी/Appellant

बनाम Vs.

Income Tax Officer, Ward 31(2)(3),
Kautalya Bhavan, C-41 to C-43,
G-Block, BKC, Bandra(E)
Mumbai – 400 051

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Bhupendra Shah
प्रतिवादी द्वारा/Respondent by : Shri Prakash Choughule
सुनवाई की तिथि/ Date of hearing : 14/07/2023
घोषणा की तिथि/ Date of pronouncement : 31/07/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These two appeals by the assessee are directed against the orders of
Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi

[in short 'the CIT(A)'] dated 29/07/2021, for assessment year 2011-12 and dated 31/08/2021 for the assessment year 2016-17, respectively.

2. Since, some of the issues are common in the appeals, these appeals are taken up together for adjudication and are decided by this composite order.

ITA NO.1442/MUM/2021-A.Y.2011-12:

3. Shri Bhupendra Shah appearing on behalf of the assessee narrating the facts of the case submitted that assessee is engaged in the business of investment in shares. For assessment year 2011-12 case of the assessee was reopened on the ground that the assessee is one of the beneficiaries of accommodation entries provided by Shirish C. Shah. The assessee had claimed exemption amounting to Rs.1,39,11,000/- u/s. 10(38) of the Income Tax Act, 1961 [in short 'the Act'] on long term capital gains on sale of shares of M/s. Prraneta Industries Ltd. According to the Assessing Officer the said long term capital gain is a result of bogus entities.

4. The Id. Authorized Representative of the assessee submitted that the assessee had purchased 3,00,000 shares of M/s. Prraneta Industries Ltd. (now known as Aadhaar Ventures India Ltd.) (in short "Prraneta") in the year 2009. The shares were purchased through broker B.R.Mehta & Sons, Share Stockist and Finance Brokers Pvt. Ltd. The contract-cum-bill dated 21/07/2005, vide which the shares were purchased are at pages 38 to 44 of the paper book. The said shares were purchased @ Rs.8.92 per share for an aggregate amount of Rs.26,80,600.98. The payment for purchase of shares was made to the broker vide two cheques for Rs.17,50,000/- and Rs.9,50,000/-. The Id. Authorized Representative of the assessee referred to the bank statement of the assessee

at page – 45 of the paper book to show that the said cheques were encashed on 22/07/2009 and 23/07/2009. The said shares were delivered to the assessee. The shares of “Prraneta” were sold by the assessee during the Financial Year 2010-11 relevant to the assessment year under appeal. 50000 shares were sold vide contract note dated 03/08/2010 (at page 46 of the paper book). Another trench of 2,50,000 shares were sold through Religare Securities Ltd. on 16/08/2010 for Rs.115,21,523/-. The contract note reflecting sale of 2,50,000 shares is at pages 47 and 48 of the paper book. The sale consideration was received in the bank account of assessee on 04/08/2010, Rs.22,94,119/- and on 07/08/2020, Rs.1,15,21,528/-. He referred to Demat A/c. Statement at pages 34 to 37 of the paper book to show opening and closing balance of the shares. The Id. Authorized Representative of the assessee submitted that purchase and sale of shares of “Prraneta” were through Stock Exchange on actual delivery basis. On sale of shares the assessee had paid Securities Transaction Tax(STT). It is an undisputed fact that the assessee had retained shares of “Prraneta” for more than 12 months, thus, the assessee was eligible to claim deduction on long term capital gain u/s. 10(38) of the Act. He further asserted that there is no allegation or evidence on record to show that either the assessee or the brokers through whom shares were transacted were involved in price rigging of the alleged scrip.

5. The Id. Authorized Representative of the assessee submitted that the Assessing Officer issued show cause notice dated 10/12/2018, wherein apart from raising suspicion on exemption claimed by the assessee u/s. 10(38), raised query regarding maintenance of audited books of account as according to him the turnover in respect of derivative trading exceeded the limit

prescribed u/s. 44AB of the Act. The Assessing Officer further raised query regarding claim of speculation loss of Rs.21,14,173/-. The assessee furnished a detailed reply to the said show cause notice on 20/12/2018. The said reply of the assessee is at pages 60 to 76 of the paper book. He pointed that in reply it was categorically stated that the assessee had suffered loss in Future and Option segment of equities which is a business loss u/s.43(5) of the Act and not a speculation loss as has been stated by the Assessing Officer. In any case, the assessee has not claimed carry forward of the said losses as the return was not filed within the time u/s. 139(1) of the Act. The Assessing Officer without considering the submissions of the assessee made addition of the long term capital gains on sale of shares u/s. 68 of the Act. The Assessing Officer further estimated the business income of the assessee at 8% of the total turnover on the ground that the assessee has failed to get books of accounts audited as per the provisions of section 44AB of the Act.

5,1 Aggrieved by the assessment order dated 28/12/2018, passed u/s. 143(3) r.w.s. 147 of the Act the assessee filed appeal before CIT(A), but remained unsuccessful, hence, the present appeal.

6. The Id. Authorized Representative of the assessee submitted that a perusal of the assessment order would show that the entire basis of addition treating the transaction of sale of shares as sale of penny stock is based on investigation carried out by the Director Investigation, Ahmedabad. The Assessing Officer explained modus operandi of the operators and the promoters of the penny stock company. However, in the instant case the assessee through documentary evidence has discharged her onus in proving that the transactions were genuine and delivery based, carried out at Stock

Exchange, through registered broker and the payment made for purchase and payments received on sale of shares were all through banking channel. The Assessing Officer has not provided the statement of brokers as alleged in the order for cross examination. Merely on the basis of suspicion or the statement of third party addition cannot be made. No notice u/s. 133(6) was ever issued to the brokers through whom the assessee had purchased or sold the shares to ascertain genuineness of the transaction. The Id. Authorized Representative of the assessee prayed for reversing the findings of the CIT(A).

7. Per contra, Shri Prakash Choughule representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that assessee is one of the beneficiary of accommodation entry providers. The scrip of "Prraneta" is one of the many penny stocks that were investigated by Director Investigation, Ahmedabad. The Id. Departmental Representative emphasized on the findings given in para 8.3 of the assessment order. He submitted that an analysis of the penny stock companies showed that the net worth of such companies is negligible. In fact they are all paper companies with no actual business. The share prices have been artificially rigged with the help of entry operators. The cash is routed and the shares were sold at high price to reap the benefit of tax free capital gains. The Id. Departmental Representative vehemently supporting the assessment order submitted that addition made is perfectly in order, hence, the appeal of assessee is liable to be dismissed. To support his submissions reliance is placed on the decision in the case of Sanjay Bimalchand Jain vs. PCIT, 89 taxmann.com 196 (Bom) . In respect of ground No.4 of appeal, the Id. Departmental Representative

submitted that turnover of the assessee is more than Rs.1.00 crore. The assessee was required to maintain books of account and get them audited u/s. 44AB of the Act. The assessee has failed to comply with the conditions as mandated under the provisions of the Act, therefore, Assessing Officer estimated the income by estimating net profit @8% in accordance with the provisions of the Act.

8. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the documents and the case laws cited by the respective sides in support of their submissions.

9. The assessee in appeal has raised seven grounds. In ground No.1 and 2 of appeal, the assessee has assailed validity of reopening proceedings.. The Id. Authorized Representative of the assessee stated at Bar that he is not pressing ground No.1 & 2. In view of the statement made by Id. Authorized Representative of the assessee, ground No.1 & 2 of appeal are dismissed as not pressed.

10. In ground No.3 of appeal, the assessee has assailed addition of Rs.1,38,15,648/- made u/s. 68 of the Act in respect of long term capital gain earned on sale of shares. In so far as the facts narrated by the assessee as regards time line of purchase and sale of shares, the same is not disputed. The stand of the Revenue is that the shares of "Prraneta" are penny stock as there is no actual business of the company, the said company is merely a paper company. The net worth of company is negligible as is in the case of a typical penny stock. The share price of the said company have been rigged to generate artificial capital gain to take the advantage of exemption

provided u/s. 10(38) of the Act on long term capital gain. The assessee is one of the beneficiary of such bogus transaction.

10.1. A perusal of assessment order shows that the Assessing Officer has raised suspicion on the exemption claimed u/s. 10(38) of the Act on long term capital gain as the quantum of exemption was huge. The Assessing Officer in order, based on report from Director Investigation has elaborated modus operandi of the bogus entry providers and the operators who rig prices of shares of paper companies to generate artificial capital gains/losses. The Assessing Officer has also placed reliance on the alleged statement of the operators who control and manage suspicious entities to facilitate the routing of unaccounted income of the beneficiaries and provide bogus STCG/LTCG/STCL entries in the garb of sale of shares. However, we find that the Assessing Officer while taking pains to explain modus operandi has failed to establish the connection between the unscrupulous mode of transactions and the transactions alleged to be bogus carried out by the assessee through brokers at the Stock Exchange. It is not emanating from the assessment order or the order of CIT(A) that the stock broker through whom assessee had purchased shares of "Prraneta" was one of the suspicious broker or was in any manner connected with operators/brokers involved in price rigging. No investigation was carried out by the Assessing Officer to come to the conclusion that the transaction of purchase and sale of shares by the assessee was in fact part of the dubious transaction of generating artificial long term capital gain and/or the alleged unaccounted money of the assessee was routed into the main channel. The assessment order is completely silent about the transaction of purchase and sale of shares of "Prraneta" by the

assessee on stock exchange, through the brokers, mode and source of payment for purchase of shares. The Assessing Officer in para 8.3 of the order has made generic remarks with regard to the transaction of penny stock but no specific findings has been given referring to the transaction of the purchase and sale of shares by the assessee except that the assessee purchased shares of "Prraneta" one of the alleged suspicious scrip in the category of penny stock.

11. The assessee from documentary evidences placed on record has substantiated that the assessee purchased 3,00,000 shares of "Prraneta" in a transaction at the Stock Exchange through a broker for which the payment was made from assessee's bank account in July, 2009. The purchase of shares was delivery based. The said shares were sold in August, 2010 at a Stock Exchange through a broker. The sale proceeds of the shares were directly transferred into the bank account of the assessee. No doubt, in the process the assessee has earned substantial long term capital gain aggregating to Rs.1,38,15,648/-, nevertheless conditions for invoking provisions of section 68 are not satisfied in the instant case. The assessee has been able to explain the source of credit in the books. In so far as the satisfaction of the Assessing Officer is concerned on the explanation furnished by the assessee, as we have observed earlier, the Assessing Officer has solely placed reliance on the report by Investigation Wing, Ahmedabad. The said report gives a general picture and modus operandi carried out by the dubious brokers to generate artificial capital gains/losses. There is no specific finding given by the Assessing Officer on the transactions carried out by the assessee.

12. The Id. Departmental Representative has placed reliance on the decision in the case of Sanjay Bimalchand Jain vs. PCIT (supra). At the outset it is observed that no substantial question of law arose for adjudication before the Hon'ble Court in the said case. Hence, appeal of the assessee was dismissed. Even otherwise, said case is distinguishable on facts i.e.:

(i) The assessee therein had purchased shares from two companies. The payments made for purchase of shares was in cash. (ii) The address of both companies and the signatory of both the companies was the same. (iii) The broker through whom shares of both the companies were purchased by the assessee incidentally had the same address as that of the two companies. (iv) The assessee purchased shares of the two companies @ Rs.5.5 per share and Rs.4 per share, respectively in Assessment Year 2003. Both the companies were merged into another company and the assessee received shares of new company in the ratio of 1:4; and (v) The shares of the said company were sold in June 2005 at an exorbitant rate of Rs.486.55 per share. Thus, in the peculiar set of facts, the Assessing Officer held that the transaction of purchase of share was that of penny stock and long term capital gains arising there from on which the assessee had claimed exemption u/s. 10(38) of the Act was denied. The findings of the Assessing Officer were confirmed by the CIT(A), the Tribunal and the Hon'ble High Court.

13. We find that in the instant case the Assessing Officer has not carried out his independent investigation nor has appreciated the documentary evidences furnished by the assessee. The sole basis for rejecting assessee's claim of exemption u/s.10(38) of the Act is, report from Director Investigation, Ahmadabad. We find merit in ground No.3 of appeal, hence, assessee succeeds on the same. The findings of CIT(A) on this issue are set-aside.

14. In ground No.4 of appeal, the assessee has assailed addition of business income amounting to Rs.10,52,726/- being net profit estimated at 8% of the turnover disallowing losses in Future and Options segment of equities. The Assessing Officer has treated loss in F& O segment as speculative loss. The speculative transaction has been defined in section 43(5) of the Act. In a proviso to said sub-section certain exclusions have been provided, where the transactions are not deemed to be speculative transaction. Clause (d) has been inserted in the exclusion proviso by the Finance Act 2005 w.e.f. 01/04/2006. As per clause(d), transaction in respect of trading in derivatives referred to in Securities Contract Regulation Act, 1956, section 2(ac) the trading carried out at the recognized Stock Exchange do not fall within the definition of speculative transaction. Thus, the contention of the assessee is that the assessee has suffered losses under this segment, hence, the Assessing Officer has wrongly categorized the loss as speculative loss. Another plank of argument by the assessee is that the assessee has not claimed carry forward of the losses, therefore, the Assessing Officer has erred in making addition by estimating turnover at 8%. Taking into consideration the entire facts, we deem it appropriate to restore this issue back to the file of Assessing Officer for denovo examination after affording reasonable opportunity to the assessee to make submissions, in accordance with law. Thus, ground No.4 of the appeal is allowed for statistical purpose.

15. In ground No.5 of appeal, the assessee has assailed that the additions have been made without verification u/s. 133(6) of the Act or issuing summons u/s. 131 of the Act . On merits, the additions have already been decided, therefore, no separate adjudication is required on this ground.

16. In ground No.6 of appeal, the assessee has assailed levy of interest u/s 234 and initiation of penalty u/s. 271(1)(c) and 271B of the Act. We find that the challenge to interest u/s 234 of the Act is misconceived. The provisions of section 234 deals with tax paid by deduction or advance payment. The said section was omitted by the Direct Tax Laws (Amendment) Act, 1987. In so far as ; challenge to initiation of penalty u/s. 271(1)(c) and 271B of the Act is concerned, the same is premature at this stage. The ground No.6 of appeal is dismissed, accordingly.

17. The ground No.7 of the appeal is general in nature, hence, require no separate adjudication.

18. In the result, appeal of assessee is partly allowed.

ITA NO.1534/MUM/2022-A.Y.2016-17:

19. This appeal is time barred by 221 days. The impugned order was passed on 31/08/2021 i.e. during the COVID-19 Pandemic period. The Hon'ble Apex Court taking into consideration the hardship faced by the litigants excluded the period from 15/03/2020 to 28/02/2022 for the purpose of computing limitation for filing of the appeal(Re. Cognizance of Extension of Limitation, 134 taxmann.com 307) The assessee filed appeal on 08/06/2022. The assessee has filed an application citing reasons for delay in filing of appeal beyond limitation period. Taking into consideration entire facts and in light of the principle laid down by Hon'ble Apex Court, in accepting the reasons explaining delay in filing of the appeal as a rule and refusal an exception, we accept the explanation furnished by the assessee and condone the delay in

filing of appeal. Thus, the appeal of assessee is admitted for adjudication on merits.

20. The solitary issue raised by the assessee in appeal before the CIT(A) was with respect to addition of business income by estimating profit @8% of the total turnover in respect of Future and Option transaction. The assessee remained unsuccessful before the CIT(A), hence, the present appeal. We find that the facts germane to the issue in appeal are similar to the Assessment Year 2011-12. The findings given by us while adjudicating ground No.4 in Assessment Year 2011-12 would mutatis mutandis apply to the present appeal as well. Accordingly, the solitary issue raised by the assessee is restored to the Assessing Officer with similar directions.

21. In the result, appeal of assessee is allowed for statistical purpose.

22. To sum up, appeal for Assessment Year 2011-12 is partly allowed and appeal for Assessment Year 2016-17 is allowed for statistical purpose.

Order pronounced in the open court on Monday the 31st day of July, 2023.

Sd/-

(AMARJIT SINGH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 31/07/2023

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)/Sr. Private Secretary ITAT,
Mumbai