

| आयकर अपीलीय अधिकरण न्यायपीठ, गुवाहाटी।
IN THE INCOME TAX APPELLATE TRIBUNAL
"GUWAHATI" BENCH, GUWAHATI
BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 67/GTY/2023
Assessment Year: 2014-15

M/s. Seema Holding Pvt. Ltd. 89, Muktaram Babu Street Kolkata - 700007 [PAN : AADCS5209H]	Vs	I.T.O. Ward-15(2), Kolkata [Now, ACIT, Central Circle-1, Guwahati]
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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I.T.A. No. 68/GTY/2023
Assessment Year: 2015-16

M/s. Seema Holding Pvt. Ltd. 89, Muktaram Babu Street Kolkata - 700007 [PAN : AADCS5209H]	Vs	I.T.O. Ward-15(2), Kolkata [Now, ACIT, Central Circle-1, Guwahati]
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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I.T.A. No. 69/GTY/2023
Assessment Year: 2015-16

M/s. Seema Holding Pvt. Ltd. 89, Muktaram Babu Street Kolkata - 700007 [PAN : AADCS5209H]	Vs	ACIT, Central Circle-1, Guwahati
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Soumitra Choudhary, Advocate
Revenue by :	Shri Chandan Dutta, D/R

सुनवाई की तारीख/Date of Hearing : 22/08/2023
घोषणा की तारीख /Date of Pronouncement: 01/09/2023

आदेश/ORDER

PER SHRI RAJESH KUMAR, ACCOUNTANT MEMBER :

ITA No. 67/GTY/2023 is directed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeal), Central, North-East Region, Guwahati, (hereinafter the "ld.

CIT(A)”) dt. 21/03/2023, passed u/s 250 of the Income Tax Act, 1961 (“the Act’), for Assessment Year 2014-15. ITA No. 68/GTY/2023 is directed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeal), Central, North-East Region, Guwahati, (hereinafter the “ld. CIT(A)”) dt. 27/03/2023, passed u/s 250 of the Income Tax Act, 1961 (“the Act’), for Assessment Year 2015-16. ITA No. 69/GTY/2023 is directed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeal), Central, North-East Region, Guwahati, (hereinafter the “ld. CIT(A)”) dt. 24/04/2023, passed u/s 250 of the Income Tax Act, 1961 (“the Act’), for Assessment Year 2015-16.

2. As the issues involved in all these appeals are identical, they were heard together and are being disposed off by way this common order for the sake of convenience and brevity.

3. First we take up the assessee’s appeal in ITA No. 69/GTY/2023 for Assessment Year 2015-16.

4. Though the assessee has raised as many as eleven (11) grounds of appeal, we would like to adjudicate Ground No. 3, which goes to the very root of the matter challenging the re-opening of assessment u/s 148 r.w.s. 147 of the Act. The grounds reads as follows:-

“3. For that on the facts of the case, the Ld. CIT(A) was wrong in not considering the facts that the A.O. reopening the assessment u/s 148 (r.w.s 147) initiated on 31.03.2021, although the assessment was completed u/s 143(3) on 29.12.2017 on the same set of facts after a lapse of 4 years without any concreted evidences and all material facts truly and fully disclosed at the time of original assessment u/s. 143(3), therefore, reopening u/s. 148 is erroneous, perverse and illegal.”

5. Facts in brief are that the assessee is a non-banking financial company (NBFC). The assessee filed its return of income for Assessment Year 2015-16 on 30/09/2015, declaring total income at Rs.7,47,290/-. Assessment in this case was framed u/s 143(3) of the Act vide order dt. 27/12/2017. Thereafter, the assessment was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act dt. 31/03/2021. Case of the assessee was re-opened on the ground that the assessee company has benefitted from non-genuine loss amounting to Rs. 1,09,82,096/- by entering into premeditated trading in shares on Bombay Stock Exchange (BSE) by engaging in reversal trade in illiquid stock and the same was set off against other income. The statutory notices were duly issued and served upon the assessee. The questionnaires issued, calling upon the assessee for furnishing various informations, were not complied with by the assessee. Finally, the assessment was framed u/s 147 r.w.s. 144 of the Act, vide order dt. 21/01/2022 *interalia* making additions of Rs.1,06,96,800/- on account of non-genuine loss incurred by the assessee and Rs.2,85,296/- on account of payment of brokerage/commission incurred for non-genuine loss, totaling to Rs.1,09,82,096/-.

6. Aggrieved, the assessee carried the matter in appeal before the Id. First Appellate Authority. The Id. CIT(A), dismissed the appeal of the assessee both on the legal issue as well as on merits.

7. After hearing rival contentions, perusing the material available on record, as well as the case-laws cited by both the parties, we find

that the instant Assessment Year is 2015-16 and undisputedly, in this Assessment Year assessment was framed u/s 143(3) of the Act vide order dt. 27/12/2017 and thereafter, the assessment was reopened by issuing notice on 31/03/2021, apparently after a period of four years from the end of the relevant Assessment Year. We find merit in the contentions of the Id. A/R that reopening beyond a period of four years can only be made subject to the satisfaction of the conditions laid down in the proviso to Section 147 of the Act which provides that where assessment u/s 143(3) of the Act has been framed and admittedly more than four years had elapsed, the assessment could have been reopened only if the additional condition precedent as laid down in the first proviso to section 147 of the Act namely, that the assessee had failed to disclose fully and truly all material facts necessary for assessment of income that assessment year.

8. We note that in this case original assessment was completed under Section 143(3) of the Act and such concluded assessment when sought to be reopened beyond four years, it is not only necessary for the AO to form reasonable belief that income had escaped assessment as envisaged in Section 147 of the Act but additionally he has to show that such escapement occurred as a result or consequence of assessee's failure to disclose truly and fully all facts necessary for assessment. It is to be kept in mind that the AO after obtaining information and documents from the assessee cannot supplement/supplant his conclusion about assessee's failure to disclose truly and fully material

facts, if the recorded reasons do not refer to such failure. In the circumstances, where the AO initiates the reassessment proceedings beyond four years from the end of the relevant assessment year, then the AO is duty bound to demonstrate in his reasons recorded prior to issue of notice, the failure on the assessee's part to truly and fully disclose all material facts in the course of original assessment, which in this case, after perusing the notice issued u/s 148(2) of the Act, we find that the AO has not made even a whisper to that effect, therefore, the essential condition precedent as stipulated in first proviso to section 147 of the Act has not been satisfied, therefore, the AO could not have usurped the jurisdiction without satisfying the same rendering the re-opening of assessment itself null in the eyes of law.

9. We find that the Id. CIT(A), dismissed the appeal of the assessee summarily on the legal issue of validity of re-opening of assessment by merely reproducing certain case-law and without discussing the applicability of the same to the case on hand which shows lack of **jurisprudence** on the part of the Id. CIT(A).

10. Our views are fortified by the series of the decisions as discussed hereinafter.

The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. vs. ACIT 268 ITR 332 wherein the Hon'ble our has held that the notice was clearly beyond the period of four years. The reasons recorded by the Assessing Officer nowhere stated that there was failure on the part of the assessee to disclose fully and truly all material facts necessary

for assessment for that assessment year. Hence the Assessing Officer had no jurisdiction to reopen the assessment proceedings. The notice was not valid and was liable to be quashed.

The case of the assessee finds support from the decision of the Hon'ble Apex Court in the case of *New Delhi Television Ltd. vs DCIT* ((116 *taxmann.com* 151) (SC), wherein it has been held that where the assessee has disclosed all material facts qua the issuance of convertible bonds, thus there was no failure on the part of the assessee to disclose material facts and therefore notice issued to the assessee u/s 147 of the Act after a period of 4 years has been quashed.

Similarly in the case of *CIT vs Multiplex Trading & Industrial* ((63 *taxmann.com* 170) (Delhi HC), the Hon'ble Delhi High Court has held that since the assessee has disclosed all the material facts at the time of making assessment, initiation of reassessment proceedings after expiry of four years from the end of relevant assessment year on the basis of report of investigation cannot be sustained and has to be set aside. In this case, the assessment was completed u/s 143(3) and thereafter the AO received the information from Investigation Wing that the assessee has received bogus loans in the form of accommodation entries and on that basis the case of the assessee was reopened.

In the case of *Rajivraj Ranbirsingh Choudhary vs ACIT* ((79 *taxmann.com* 152) (Guj HC) the Hon'ble Gujarat High Court has laid down the same ratio. In this case the assessment was framed u/s 143(3) of the Act and the AO accepted the loans taken by the assessee from the family members. The assessment was reopened after a period of more than 4 years on the ground that sources of loan funds were not explained.

11. In view of the above discussion and respectfully following the ratio of law laid down by the Hon'ble Bombay High Court as discussed above, we hold that the reopening is bad in law, in view of the Proviso to section 147 of the Act, as the reopening is beyond 4 years from the original assessment u/s 143(3) of the Act. As, we have discussed and decided the legal issue in favour of the assessee and the re-assessment order u/s 147 r.w.s. 144 of the Act, itself has attained nullity, the grounds on merits are only academic in nature and the same are not dealt with.

12. In the result, appeal of the assessee is allowed.

13. Now, we take up assessee's appeal in ITA No. 67/GTY/2023 for Assessment Year 2014-15.

14. The only issue raised in the various grounds of appeal is against the confirmation of disallowance of loss of Rs.2,02,55,160/- which was made by the Assessing Officer on account of bogus loss in shares. The facts in brief are that the assessee filed return of income electronically on 18/02/2015 declaring total income of Rs.5,06,674/-. The case of the assessee was selected for scrutiny through CASS and accordingly statutory notices were duly issued and served upon the assessee. During the course of assessment proceedings, the Assessing Officer received information from DIT (Inv.), Kolkata, vide letter dt. 30/06/2016, that assessee has received some accommodation entries provided by Shri Neeraj Jain to the tune of Rs.1,24,47,524/-, through proprietary concern, namely, Vinit Enterprises. The Assessing Officer

also found and observed on the basis of details filed by the assessee as well as the books of accounts produced that loss of Rs.2,02,55,160/- was incurred from the transactions made in share and accordingly showcause notice was issued to the assessee. The assessee replied to the said showcause notice by submitting that the loss incurred on the sale of shares of Rs.2,02,55,160/- was adjusted against the interest income of Rs.2,87,65,844/-. However, the Assessing Officer rejected the said loss while referring to the investigation carried out by the DIT (Inv.), which revealed a large number of persons had taken entries of huge bogus long term capital gain/short term capital gain/loss in an organised manner. Thereafter the Assessing Officer after discussing the *modus operandi* followed by these companies/operators narrated in detail how the transactions were carried out in the stock exchange and unnecessary benefits were yielded to the beneficiaries in lieu of cash. The Assessing Officer has referred to the survey carried out u/s 133A of the Act on various entities and also the statements recorded in which these operators have admitted to have engaged in the manipulation of stock exchange thereby providing accommodation entries in the form of long term capital gain/loss. Finally, the Assessing Officer issued a showcause notice to the assessee fixing the date for filing the reply on or before 05/12/2016, but the same was not complied with by the assessee and finally the Assessing Officer disallowed the said loss of Rs.2,02,55,160/- in the assessment order framed u/s 143(3) of the Act dt. 23/12/2016.

15. The Id. A/R vehemently argued before us that the assessee has filed before the authorities below, the necessary details/evidence, proving the share transactions done on the stock exchange through listed brokers. The assessee has filed copies of contract notes/DMAT accounts, bank statements to evidence that purchases were made through stock exchange and similarly, the sales were also carried out on the registered stock exchange platform. The Id. A/R submitted that when the transactions have been carried out through listed brokers, then the conclusion of the authorities below that the said loss from sale of shares was bogus and not genuine is unverified and without any substantive corroborative material. The Id. A/R submitted that the order passed by the Id. CIT(A), upholding the action of the Assessing Officer is erroneous as it has failed to follow the decisions of various judicial forums on this subject.

16. The Id. A/R in defense of his arguments relied on the decision of the Hon'ble Bombay High Court in the case of *PCIT v. Indravadan Jain, HUF (Bombay High Court) (ITA No. 454 of 2018 dt. 12-7-2023)(AY. 2005-06)*, wherein the Hon'ble Court has held that where the assessee has done these transactions of shares through registered brokers then, the loss/gain cannot be treated as bogus. The Id. A/R though admitted that the Hon'ble Jurisdictional High Court has in case of *Principal CIT Vs Swati Bajaj 446 ITR 56 (Cal)*, has decided the issue against the assessee but thereafter the Id. A/R submitted that the Hon'ble Supreme Court in the case of *Pr CIT vs. Smt. Renu Aggarwal* reported in

456 ITR 249 (SC) has dismissed the SLP filed by the revenue against the decision of Hon'ble High Court of Allahabad. The Id. A/R further stated that where there are two constructions/interpretation of law are possible, the one which is favourable to the assessee has to be followed as held by the Hon'ble Supreme Court in the case of *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192. The Id. A/R also referred and relied on the decision of the Hon'ble Orissa High Court in the case of *PCIT vs. Dipansu Mohapatra* reported in *ITA No. 11 to 19, 21 and 22 of 2022* wherein the issue of penny stock was decided in favour of the assessee. The Id. A/R finally prayed that in view of the aforesaid facts and legal position, the order passed by the Id. CIT(A) made kindly be set aside and the addition be deleted.

17. The Id. D/R while controverting the submissions of the assessee argued that the assessee has purchased and sold shares of penny stock companies. The prices were the shares were manipulated in a concerted and organised manner by a group of individuals/brokers and shell companies who were primarily engaged in providing accommodation entries to the beneficiaries in the form of long term capital gain/loss and this was revealed in the during the course of search and the investigation wing. The Id. D/R, therefore, submitted that the mere fact that the assessee has submitted the documents of sale and purchase of shares, copies of contract notes and DMAT Accounts, would not justify that the capital gain to be genuine. The Id. D/R further drew the attention of the Bench to the report of the

Investigation wing wherein methodology of doing these transactions on the stock exchange was discussed in detail. So far as the various decisions relied are concerned, the ld. D/R submitted that though the contrary decisions are available of various Hon'ble High Courts, however, the Hon'ble Calcutta High Court in the case of *Swati Bajaj (supra)* has decided the issue against the assessee under similar facts, therefore, the appeal of the assessee may kindly be dismissed by upholding the order of the ld. Assessing Officer.

18. We have heard rival contentions and perused the material available on record. It is also undisputed that these shares were purchased from the stock exchange platform through registered broker and the payment was made through cheque and similarly the sale was also effected through registered broker on stock exchange platform and payment was made through banking channel. The assessee has furnished before the AO all the requisite evidences in form of contract notes, details of payment and copy of D-mat a/c etc. to prove these transactions. We have also perused and analyzed the decisions passed by the Hon'ble Bombay High Court in the case of *PCIT v. Indravadan Jain, HUF (supra)* and Hon'ble Orissa High Court in the case of *PCIT vs. Dipansu Mohapatra (supra)*, wherein the issue has been decided in favour of the assessee. Hon'ble Bombay High Court while deciding the case has held that unless the complicity of the assessee in manipulating the shares is proved, the assessee could not be held responsible for the wrong done by the brokers or persons and

thus granted relief to the assessee. The Hon'ble Orissa High Court has held that where transactions are well documented and payments are routed through banking channels, the transactions of sale and purchases of shares cannot be doubted and thus held in favour of the assessee.

19. We have also carefully analyzed the judgment of the Hon'ble Calcutta High Court in the case of *Swati Bajaj (supra)* wherein the issue has been decided against the assessee by holding that the price of the shares were rigged and manipulated by a group of individuals and stock brokers in order to yield undue benefit in the form of bogus accommodation entries through manipulation of shares in the stock exchange and, therefore, decided the issue against the assessee.

19.1. In our opinion, where there are two constructions of the provisions of the Act are possible or available, then the construction which is favourable to the assessee has to be adopted as held in the judgment of the Hon'ble Supreme Court in the case of *CIT v. Vegetable Products Ltd. [1973] 88 ITR 192*. We have also perused the decision passed by the Hon'ble Apex Court in the case of *Pr. CIT Vs Smt Renu Aggarwal (Supra)*, the SLP filed by the revenue was dismissed by observing and as under: wherein the issue was decided affirming the decision of the Hon'ble Allahabad High Court. The Hon'ble High court has dismissed the appeal of the department that no question of law arose from the order of the tribunal affirming the order of Id. CIT(A) allowing the relief to the assessee. The Id. CIT(A) allowed the

relief to the assessee on the ground that there was no adverse comment from the stock exchange or the company whose shares were involved in the transactions and the AO quoted the facts pertaining to completely unrelated persons whose statements were recorded and assessee's name did not appear in those statements.

20. Considering this factual positional and in the light of the above discussion, we are inclined to set aside the order of the Id. CIT(A) and direct the AO to allow the setting of the loss on shares by allowing the appeal of the assessee.

21. In the result, appeal of the assessee in ITA No. 67/GTY/2023, is allowed.

22. The issue raised in ITA No. 68/GTY/2023 Assessment Year: 2015-16 by the assessee is identical to one as decided by us in ITA No. 67/GTY/2023 Assessment Year: 2014-15. Therefore our decision in ITA No. 67/GTY/2023 would, *mutatis mutandis*, apply to this appeal as well and consequently the appeals of the assessee in ITA No. 68/GTY/2023 Assessment Year: 2015-16 is allowed.

23. In the result, all these appeals filed by the assessee are allowed.

Order pronounced in the Court on 1st September, 2023.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Sd/-

**(RAJESH KUMAR)
ACCOUNTANT MEMBER**

Kolkata, Dated 01/09/2023

SC S.P.

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, गुवाहाटी /DR,ITAT, Guwahati,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Guwahati