

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डा० एस. सीतालक्ष्मी,न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 213/JPR/2023
निर्धारण वर्ष/Assessment Year : 2012-13

ITO, Ward-5(2), Jaipur.	बनाम Vs.	Smt. Shakuntala Agarwal P. No. 8, Sati Ji Ki Bagichi, M.D. Road, Jaipur..
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AIMPA 6299 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : None

राजस्व की ओरसे / Revenue by: Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing :25/05/2023

उदघोषणा की तारीख / Date of Pronouncement: 23 /08/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal filed by the Revenue is directed against order of the Id. CIT(A) dated 08-12-2023, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment year 2012-13 wherein the Revenue has raised the following grounds of appeal.

"1. Whether on the facts and in the circumstances of the case, the Id. CIT(Appeals) has justified in deleting the addition of Rs. 2,82,500/- on account of bogus LTCG.

2. Whether on the facts and in the circumstances of the case, the ld. CIT(Appeals) has justified in deleting the addition made by AO amounting to Rs. 2,82,500/- whereas the same was found penny stock during the investigation proceedings of DGIT(Inv.).

3. Whether on the facts and in the circumstances of the case, the ld. (Appeals) has justified by ignoring the statement recorded during the course of search and seizure proceedings.”

2.1 During the course of hearing, the Bench noted that none appeared on behalf of the assessee when the case was called out for hearing even though there were five opportunities were provided to the assessee. Since, there was no adjournment application filed by the assessee and on the other hand the ld. DR ready with the argument and therefore, the Bench decided to proceed in the matter ex-parte based on the materials available on record including the orders of the lower authorities.

3.1 Apropos ground No. 1 to 3 of the Revenue, brief facts of the case are that the assessee filed her return of income in ITR-1 on 28.03.2013 declaring total income at Rs. 1,47,020/- for the assessment year 2012-13 as income from House property at Rs. 53,340/- and other sources at Rs. 212/-. No LTCG/STCG has been shown in the return. On the basis of information brought on record, it is gathered that the assessee entered into sale transaction of shares of M/s VMS Industries Ltd. of Rs. 2,82,500/-. On verification of information received, it is noticed that sale of shares by the assessee was penny stock used for providing bogus long term capital

gain/bogus short term capital loss/bogus business loss and transactions pattern and price of these shares were not normal. Thus, the assessee has brought his unaccounted money in the books of accounts by way of obtaining accommodation entries to convert his undisclosed income into declared income in the books of account. It is noted from the assessment order that the assessee obtained accommodation entry to convert his undisclosed income to the extent of Rs. 2,82,500/- and has brought unaccounted money in his books of account. Therefore, proceedings u/s 147 of the Act was initiated in this case after recording reasons and getting prior approval of the competent authority. Accordingly, notice u/s 148 was issued on 30.03.2019 in response thereto, no return of income has been filed by the assessee. In this case, it is noted by the AO that specific information was received from the DIT (Inv.)-2, Mumbai that the assessee had made sales transactions in the shares of M/s. VMS Industries Ltd. amounting to Rs.2,82,500/- which was penny stock and thus assessee had brought his unaccounted income/money in the books of account by way of amount received against sales of shares of VM/s. VMS Industries Ltd. and taken accommodation entry to convert her undisclosed income into the declared income for which show cause notice and notice u/s 142(1) was issued on 31-10-2019 asking the assessee as to why sale transaction of

shares of M/s. VMS Industries Ltd. amounting to Rs.2,82,500/-may not be treated as undisclosed income by way of taking bogus long/short term capital gain in the shape of accommodation entries and the same may not be added to the total income and this show cause notice was sent through speed post whose details are narrated at para 2 and 3 of assessment order. In compliance thereof, the assessee had filed required details online and placed on record but no clarification regarding the difference in figures in both the return has been furnished i.e. to say the figures shown in the return in ITR-1 filed on 28-03-2013 are different from the return filed on 11-09-2019 which is also out of time. It is also pertinent to mention that search operation was conducted by the DIT (Investigation) in the case of Shri Naresh Jain and his associates throughout the country and it was found that they managed gain through the stock exchange bogus long term capital/short term capital gain/loss were provided to the various beneficiaries which entered into the sale transaction of shares of M/s. VMS Industries Ltd. It is also noted that the AO had considered documents/reply filed by the assessee during the course of assessment proceedings and on perusal of the details/ITR noticed that short term capital gain of Rs.1,22,301/- had been declared in the return filed on 11-09-2019 whereas the same was not shown in the original return and thus no clarification or

supporting evidence regarding transactions for sales of shares of M/s. VMS Industries Ltd. had been filed. The AO thus observed that the assessee failed to explain sales transactions of shares amounting to Rs.2,82,500/- which was penny stock scrip in the year under consideration and the assessee was provided ample opportunities to explain the accommodation entries obtained by way of sale of shares of M/s. VMS Industries Ltd. and thus in the absence of same, the AO made addition of Rs.2,82,500/- in the hands of the assessee by observing as under:-

“8. In view of above facts as discussed, it is proved that the assessee has made transactions in the scrip which is penny stock and thus the assessee has brought his unaccounted money in the books of accounts by way of taking accommodation entry to convert his undisclosed income into the declared income. Thus the sale transactions amounting to Rs.2,82,500/- is treated as undisclosed income out of undisclosed sources and added to the total income.”

3.2 In first appeal, the ld. CIT(A) has deleted the addition of Rs.2,82,500/- by observing as under:-

“ 4.1 I have considered the grounds of appeal, facts of case and submissions of the appellant. The AO, in the assessment order u/s 144 r.w.s. 147 has assessed undisclosed sale transaction of shares being the accommodation of bogus entries in the shape of Long term capital gain/Short term capital gain of Rs. 2,82,500/- in respect of penny stock transaction of sale of shares of M/s VMS Industries Ltd. It is seen from the assessment order that the appellant has filed return of income declaring a total income of Rs. 1,47,020/- on 28.03.2013 which consists of income from house property of Rs. 53,340/- and income from other sources of Rs. 212/-. The A. O reopened the assessment based on the information that the appellant has entered into penny stock transaction of sale of shares M/s VMS Industries Ltd. In response to the notice issued u/s 148, the appellant has filed return of income on

11.09.2019 declaring a total income of Rs. 1,64,430/-. In the revised return, the appellant has declared income from house property of Rs. 50,400/-, Short term capital gain of Rs. 1,22,301/- and income from other sources of Rs. 212/-. During the course of assessment proceedings, the A. O issued show cause notice asking for explanation for the difference in figures of income shown in the original return and the revised return. Also he sought explanation for not showing the STCG in the original return of income filed. The A.O has not satisfied with the explanation given by the appellant has added a sum of Rs. 2,82,500/- under the head accommodation of bogus entries of share sale transaction and Rs. 97,954/- under the head income from other sources as per original return.

4.2 The appellant has uploaded the statement of share transaction issued by the share broker M/s Maverick Share Broker Ltd. which shows the transaction undertaken by the appellant during the assessment year under consideration which includes share transaction of M/s VMS Industries Ltd and shares of other companies. The statement also shows the profit earned by the appellant of Rs. 1,22,301/-. Further, the appellant has also submitted that all the transactions are through her bank account. I have gone through the relevant documents and I am of the opinion that the share sale transaction of M/s VMS Industries Ltd. has been done during the normal course of her transaction of purchase and sale of shares as the appellant has dealt with shares of other companies like Vijaya Bank, Dena Bank, LIC. Hg, PFC, Indus Ind bank etc. Therefore, the addition made towards undisclosed sale transaction of shares by taking accommodation bogus entries in the shape of Long term capital gain/Short term capital gain of Rs. 2,82,500/- in respect of penny stock transaction of sale of shares of M/s VMS Industries Ltd. is not found to be correct. Therefore, I direct the A. O to delete the addition made in this regard of Rs. 2,82,500/-. Accordingly, the ground no. 1 raised in this appeal is allowed.”

3.3 During the course of hearing, the ld. DR relied upon the order of the AO and submitted that the ld. CIT(A) has erred in allowing relief to the assessee.

3.4 We have heard the ld. DR and perused the materials available on record including the orders of the lower authorities. In this case, the AO noted that specific information was received from the DIT (Inv.)-2, Mumbai that the assessee had made sales transactions in the shares of M/s. VMS Industries Ltd. amounting to Rs.2,82,500/- which was penny stock scrip and thus assessee had brought his unaccounted income/money in the books of

account by way of amount received against sales of shares of M/s. VMS Industries Ltd. and taken accommodation entry to convert his undisclosed income into the declared income. It is also pertinent to mention that search operation was conducted by the DIT (Investigation) in the case of Shri Naresh Jain and his associates throughout the country and it was found that in the managed way through the stock exchange broker bogus long term capital/short term capital gain/loss were provided to the various beneficiaries which entered into the sale transaction of shares of M/s. VMS Industries Ltd. It is also noted that the AO had considered documents/ reply filed by the assessee during the course of assessment proceedings and on perusal of the details/ITR noticed that short term capital gain of Rs.1,22,301/- had been declared in the return filed on 11-09-2019 whereas the same was not shown in the original return and thus no clarification or supporting evidence regarding transactions for sales of shares of M/s. VMS Industries Ltd. had been filed. The AO thus observed that the assessee failed to explain sales transactions of shares amounting to Rs.2,82,500/- which was penny stock scrip in the year under consideration and the assessee was provided ample opportunities to explain the accommodation entries obtained by way of sale of shares of M/s. VMS Industries Ltd. and thus in the absence of same, the AO made addition of Rs.2,82,500/- in the

hands of the assessee. In first appeal, the Id. CIT(A) has deleted the addition of Rs.2,82,500/-. It is noted at para 7 of the assessment order of wherein the AO mentioned that*However, the assessee failed to explain the sale transaction of shares amounting to Rsw.2,82,500/- which was penny stock scrip in the year under consideration even though the assessee has failed to opt the ample opportunity provided for explaining the accommodation entry obtained by way of sale of shares of M/s. VMS Industries Ltd. which is still remained unexplained in the absence of any explanation or supporting evidence.* However, the Id. CIT(A) at paa 4.2 noted that *the appellant has also submitted that all the transactions are through her bank account. I have gone through the relevant documents and I am of the opinion that the share sale transaction of M/s VMS Industries Ltd. has been done during the normal course of her transaction of purchase and sale of shares as the appellant has dealt with shares of other companies like Vijaya Bank, Dena Bank, LIC. Hg, PFC, Indus Ind bank etc. Therefore, the addition made towards undisclosed sale transaction of shares by taking accommodation bogus entries in the shape of Long term capital gain/Short term capital gain of Rs. 2,82,500/- in respect of penny stock transaction of sale of shares of M/s VMS Industries Ltd. is not found to be correct. Therefore, I direct the A. O to delete the addition made in this regard of Rs. 2,82,500/-. Accordingly, the ground no. 1 raised in this appeal is*

allowed.” The Bench observed from the order of the Id. CIT(A) wherein no cross examination was made from the AO as to how he made addition in the hands of the assessee. It is also noteworthy to mention that Hon’ble Calcutta High Court in the case of PCIT vs Swati Bajaj & Ors , 446 ITR 56 held that Revenue is justified in making addition in the hands of the assessee on such penny stock for which relevant observation of the Hon’ble Court is reproduced as under:-

“Income—Cash credit—Genuineness of long-term capital gains on sale of shares—Specific information was received from the Director of IT (Inv.), that the company in which the assessee purchased and sold shares is a penny stock company which is used for providing entries for bogus long-term capital gains—No fault can be attributed to the IT Department for causing an investigation and any finding rendered pursuant to such investigation could very well be a material to commence further proceedings—Said report has been prepared by the Dy. Director of IT on behalf of the Directorate of Investigation—Thus, it cannot be discredited on the basis that it was initiated by the Dy. Director of IT on his own accord—Report has identified 84 penny stock listed with the BSE which have been used for generating bogus long-term capital gains—A different approach/methodology was adopted by the Department, by commencing the investigation not from the individuals who traded with the penny stock but the investigation was started targeting the individuals who dealt with those penny stocks—This approach of the Department cannot be faulted in view of the fact that huge amounts were claimed as long-term capital gains/long-term capital loss—Statements of the stock brokers, entry operators or the directors of the various penny stock companies do not directly implicate the assessee—Thus, the assessee cannot contend that the copy of the entire report should have been furnished to him and the person from whom the statements were recorded should have been produced for cross-examination—Considering the factual scenario, no prejudice has been caused to the assessee by not furnishing the investigation report in its entirety or making the persons available for cross-examination—Moreover, nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not be in a position to take part in the inquiry which was conducted by the AO in scrutiny assessment under s. 143(3)—Since minimum of two brokers were involved in all the transactions it was very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test of preponderance of probabilities was rightly applied to ascertain as to whether there has been violation of the provisions of the Act—Admittedly, the shares of the companies which the assessee has dealt with were insignificant in value prior to their

trading—Thus, it was the assessee's duty to establish that the rise in the price of shares within a short period of time was a genuine move—It cannot be contended that the assessee's claim has to be examined only based upon the documents produced by them namely, bank details, purchase/sale documents, details of the D-Mat account etc.—Claim of long-term capital gains has been only restricted to the shares which were purchased and sold by the assessee's in penny stock companies—Therefore merely because the assessee also invested in blue-chip companies and earned profit or incurred loss cannot validate the tainted transactions—It has been established by the Department that the rise in the price of the shares was artificially done adopting manipulative practices—AO has rightly taken into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, the proximity of the time between the buy and sale operations and also the sudden and steep rise in the price of the shares of the companies when the general market trend was admittedly recessive—In the absence of any satisfactory explanation by the assessee's, the AOs were justified in making addition under s. 68.”

Hence taking into consideration the decision of Hon'ble Calcutta High Court in the case of PCIT vs Swati Bajaj & Ors. (supra) and after considering the provision of section 68, genuineness of the transaction is one of the most important ingredients to avoid addition of sum found credited in the books of the assessee. Though in this case the identity and credit worthiness of the sum found credited even if accepted yet assessee miserably failed on the point of genuineness. In view of the circumstances, we do not have any hesitation in holding that gain earned by the assessee is not genuine and thus we do not concur with the findings of the Id. CIT(A) as the Hon'ble High Court has given concrete findings in the case of Penny Stock scripts. Thus the appeal of the department is allowed.

4.0 In the result, the appeal of the department is allowed

Order pronounced in the open court on 23 /08/2023.

Sd/-
(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-
(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 23/08/2023

*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- ITO, Ward-5(2), Jaipur.
2. प्रत्यर्थी / The Respondent- Smt. Shakuntala Agarwal, Jaipur.
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 213/JPR/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar