

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, “SMC” BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

आ.अ.सं./ITA No.498/SRT/2023 (AY 2011-12)

(Hearing in Physical Court)

Income Tax Officer, Ward No.2(2)(5) Surat, Room No. 613, Aaykar Bhavan, Majura Gate, Surat-395001	Vs	Shri Gopalbhai T Patel (HUF) 2, Vaibhav Bungalow, Near Radiant High School, Surat Gymkhana Road, Surat- 395007 PAN AACHG 7284 E
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by	Shri Vinod Goyal, CA
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
अपील पंजीकरण/Appeal instituted on	20.07.2023
सुनवाई की तारीख/Date of hearing	14.09.2023
उद्घोषणा की तारीख/Date of pronouncement	18.09.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by Revenue is directed against the order of National Faceless Appeal Centre, Delhi [for short to as “NFAC/Ld. CIT(A)”] dated 25.05.2023 for assessment year 2011-12, which in turn arises from the assessment order passed under section 143(3) of Income Tax Act, 1961 (‘the Act’) on 27.12.2017. The revenue has raised the following grounds of appeal: -

“1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the bogus claim of the as u/s 10(38) of the Act without appreciating the facts that the scrip “Global Capital Marketing Pvt. Ltd” was identified as a listed penny stock on BSE used for generating bogus LTCG/STCG as per the data received from the Investigation Wing.

2. *On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition made by the Assessing Officer of Rs.7,15,679/- ignoring the fact that the stock prices of the companies are manipulated to provide the exempted long term capital gain.*

3. *On the facts and circumstances of the case and in law, the ld CIT(A) has erred in allowing the claim ignoring the judicial pronouncement by the Hon'ble Supreme Court in the case of McDowell Vs. CTO wherein it was held that "Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious method. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."*

4. *On the basis of the facts and circumstances of the case and in law, the ld. CIT(A) ought to have upheld the order of the Assessing Officer.*

5. *It is therefore prayed that the order of ld. CIT(A) may kindly be set aside that of the Assessing Officer be restored.*

6. *The appellant craves leave to add, alter, amend and/or withdraw any ground of appeal either before or during the course of hearing of the appeal."*

2. Brief facts of the case are that case of assessee for assessment year 2011-12 was re-opened on the basis of information received that assessee made transaction of Rs.7,15,679/- during the year under consideration in penny stock scrip name "Global Cap M and scrip code 530263". The Assessing Officer noted that assessee disclosed the transaction of scrip in his return of income. The Assessing Officer was of the view that there was failure on the part of assessee to disclose transaction in his income, which has escaped assessment. The Assessing Officer recorded that notice under section 133(6) issued to assessee on 15.03.2018 and no reply was received from the assessee. The Assessing Officer recorded reasons and after obtaining approval from superior officer issued notice under section 148 vide notice dated

30.03.2018. The assessee vide his letter dated 22.08.2018 requested to treat the return filed on 25.07.2011 as returned in response to notice under section 148 of the Act. The Assessing Officer further recorded that assessee filed his objection on 05.10.2018 and requested to drop the re-assessment proceedings by alleging that he has shown capital gains of Rs.3,31,781/- in his return of income, which is exempt under section 10(38). The assessee contended that there was no escapement of income in his case. The objection of assessee was disposed of by Assessing Officer vide order dated 05.10.2018. The Assessing Officer after disposing the objection, proceeded re-assessment. The assessing officer vide show cause notice dated 14.11.2018 asked assessee as to why transaction of Rs.7,15,679/- made in the scrip Global Capital Markets Ltd. having scrip code No.530263 should not be added to income of assessee.

3. In response to said show cause notice, the assessee filed his reply dated 28.11.2018. Along with the reply, the assessee furnished copy of return of income along with computation of total income for assessment year 2011-12, bank statement showing gain earned of sale of scrip, copy of D-mat account of shares, broker note of shares sold and copy of ledger account of broker, Latini Manharlal Securities Pvt. Ltd. The assessee further stated that shares were purchased in the year 2003 and sold in the year 2010, holding period more than seven years. The shares of this scrip are listed in the recognized share market. Security Transaction Tax (STT in short) paid on the said transaction. The assessee again submitted that all details including D-

mat account along with reply dated 05.09.2018. The assessee submitted that he earned Long Term Capital Gains (LTCG) on sale of such shares of Rs.3,31,781/- and Short Term Capital Loss (STCL) of Rs.14,218/-. The assessee submitted that some shares were wrongly sold through assessee's account, which was never purchased by assessee and entry of debit and credit were done on the same day. There was no sale and purchase of share other than explained by assessee. The assessee reiterated that Assessing Officer considered the sale entry twice including one which is reversed on the same date. The assessee explained that he made transaction of sale of shares in the legitimate manner and paid STT. The shares purchased through recognized Stock Exchange. The assessee also requested to supply copy of notice served under section 148, if it was served within time limit. The assessee also relied upon on various case laws.

4. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer held that he was having information that scrip of Global Capital Markets Ltd. is used for generating bogus LTCG and LTCL. The Assessing Officer recorded *modus operandi* of penny stock and held that entities involved in the transactions were either bogus or devoid of any financial capacity to make investment. The Assessing Officer treated the credit of Rs.7,15,679/- as unexplained capital in the assessment order dated 06.12.2018 passed under section 143(3) of the Act.
5. Aggrieved by the addition made in the assessment order, the assessee filed appeal before Ld. CIT(A). The case of assessee migrated before

NFAC/Ld. CIT(A). Before NFAC/Ld. CIT(A) assessee challenged the validity of re-opening and service of notice under section 147 as well as addition on merit. The assessee filed detailed written submission raising all the pleas as has been raised before Assessing Officer. The assessee explained that there was no escapement of income. The assessee has earned capital gains of Rs.3,31,781/-, which was shown in the return of income. The assessee also explained that he had purchased 4,000 shares @ Rs.5.39 per share on 27.03.2003 in his D-mat account and hold those scrips for more than seven years and sold on 23.09.2010 @ Rs.88.34/- per share through Bombay Stock Exchange (BSE) and disclosed the LTCG of Rs.3,31,781/- in his computation of total income. The assessee further reiterated that there was no escape of income and some shares of same scrips were wrongly sold from his D-mat account which was never purchased therefore, reversed entry was made on the same date. Such fact was not considered by Assessing Officer while passing assessment order that is why Assessing Officer considered sale value of Rs.7,15,679/- instead of Rs.3,53,351/-. The assessee also stated that same scrip is still allowed to be traded on BSE. The stand of Assessing Officer that it was a penny stock for providing bogus LTCG for facilitating unaccounted income was wrong.

6. The NFAC/Ld. CIT(A) after considering the submission of assessee recorded that addition is made by Assessing Officer on account of unexplained income. Thus, it was necessary to adjudicate the nature and source of sums credited in the assessee's book. The NFAC/Ld.

CIT(A) noted that assessee has explained the nature of sum credited in his account as LTCG. The assessee explained such investment in the scrip of Global Capital Markets Ltd. on 27.03.2003 through Calcutta Stock Exchange, *wherein* assessee purchased 4000 shares of scrip at an average price of Rs.5.39 per share and which were brought in D-mat form and kept in assessee's D-mat account with Surat People's Co-operative Bank Ltd. having BPID IN300845. The assessee furnished contract note, broker note and D-mat account with regard to STT was paid on the transaction. The assessee explained that shares were sold on 23.09.2010 through BSC at an average price of Rs.88.34/- per share and received Rs.3,31,781/-. The assessee furnished complete details of contract note from broker's ledger, D-mat account and bank statement. The assessee thus tried to prove the *bona fide* of nature and source of sum credit in his books though the explanation provided by assessee has not been considered by Assessing Officer. The NFAC/Ld. CIT(A) complied the Assessing Officer's reasons for making addition and his remarked regarding adjudication of issue in question and held that Assessing Officer has not confronted with any statement or relevant part of material to the assessee, which was violated the principle of natural justice. The Assessing Officer has not brought any material on record regarding turnover or profit or net worth of Global Capital Markets Ltd. It is still continuing be traded on BSE and has not been backlisted or barred by Security Exchange Board of India. The shares were purchased through Calcutta Stock Exchange on 27.03.2003 and at that time STT

Regulation has not come in vogue. The Assessing Officer has not named the broker nor brought on record any statement on record. The Assessing Officer has not discussed anything about the evidence furnished by assessee and no evidence brought on record to show that the share price movement (price manipulation) except the fact that shares of Rs.5.39 per share in 2003 which rose to Rs.88.33 per share in 2010 and therefore no adverse order of Security Exchange Board of India or BSE or Calcutta Stock Exchange on record. On the basis of such observation, NFAC/Ld. CIT(A) held that order of Assessing Officer in making addition is devoid of legal evidence and violation of principal of natural justice and allowed full relief to assessee on merit. Aggrieved by the order of NFAC/Ld. CIT(A) the Revenue has filed present appeal before Tribunal.

7. I have heard the Ld. Senior Departmental Representative (Ld.Sr-DR) for the Revenue and Ld. Authorized Representative (Ld. AR) for the assessee at length and have gone through the orders of lower authorities carefully. Ld. Sr-DR for the Revenue supported the order of Assessing Officer and submits that Assessing Officer was having definite information that assessee made transaction of Rs.7,15,679/- in penny stock of scrip of Global Capital Market Ltd. and said transaction was not disclosed by assessee in his return of income for the assessment year 2011-12 and no response was made by assessee in response to notice issued under section 133(6) of the Act. The case of assessee was re-opened after recording proper reasons and objection raised by assessee against such re-opening was considered

and rejected by a speaking order. The Ld. Sr-DR for the Revenue submits that Assessing Officer after considering the entire material and giving full opportunity to assessee made the addition of the amount credited in the bank account of assessee. The Ld. Sr-DR for the Revenue submits that scrip on the sale of share of which assessee has shown capital gains was used as a “penny stock” and the surplus earned by assessee is nothing but unexplained money routed through such transaction. To support his submission, Ld. Sr-DR for the Revenue relied upon on the following decision:

- ❖ Principal Commissioner of Income-tax vs. Swati Bajaj [2022] 139 taxmann.com 352 (Calcutta)/[2022] 288 Taxman 403 (Calcutta)/[2022] 46 ITR 56 (Cal)[14-06-2022]
- ❖ Sangeeta Devi Jhunjunwala vs. ITO Ward-70(1) New Delhi ITA No.747/Del/2022 dated 18.05.2023

8. Ld. Sr-DR for the Revenue submits that though the tax effect in the present appeal is less than the monetary limit of tax effect as per Circular No.17/2019 dated 08.08.2019 issued by Central Board of Direct Tax, however, decision is not accepted by Assessing Officer as well as Range Head and the case is being a “penny stock” is covered by exception in para-10(c) of CBDT’s Circular No.3/2018 dated 20.08.2018.
9. On the other hand, Ld. AR for the assessee supported the order of NFAC/Ld. CIT(A). Ld. AR for the assessee submits that present tax appeal is not maintainable and the tax effect involved in the present appeal is very meagre, the Revenue itself has mentioned tax effect of Rs.2,14,267/-. Even otherwise, the case does not fall under

exceptional clause as relied by Ld. Sr-DR of clause-10(c) of CBDT's Circular No.3/2018 dated 20.08.2018 such clause deals with the objection related to Audit Objection that too must be expressly accepted by Assessing Officer.

10. On merit of the addition, the Ld. AR for the assessee submits that assessee has purchased scrip through Stock Exchange in the month of March, 2003 and thereafter sold in the month of September, 2010 as assessee hold more than seven years. The Ld. AR for the assessee submits that it is far beyond imagination that a person invests for availing benefit for capital gains and wait for seven-eight years for earning surplus. The period of such a long holding itself proved the transaction as genuine. There was no material before the Assessing Officer that the scrip purchased in which assessee made investment was a part of syndicate of "penny stock". The Assessing Officer neither provided any material or any statement or report of Investigation Wing to the assessee either at the assessment stage or at the time of appellate stage or before Tribunal. The Ld. AR for the assessee submits that complete details were furnished while filing return of income under section 139 on 27.07.2011. The assessee has shown LTCG on sale of share of Rs.3,53,351/- and assessee suffered LTCL of Rs. 13,218/- thus net capital gains in the form of long term was at Rs.3,31,781/-, which was shown in computation of total income. Thus, there no violation on the part of assessee in not disclosing fully and truly all the material necessary for assessment. Even otherwise, during assessment stage, assessee furnished complete details

consisting contract note, bank statement showing debit consideration of purchase, details D-mat account with STT. The sale consideration and purchased consideration was transacted through banking channel. The sale consideration was received through banking channel and assessee furnished all details including his sub-broker. The Assessing Officer has not given any finding or his comment on such evidence. The assessing officer made addition on the basis of alleged information in his possession, which was never provided to assessee. The NFAC/Ld. CIT(A) on considering the facts in a proper manner granting relief to assessee. To support his submission, Ld. AR for the assessee relied upon the following decision

- Captive Commerce Pvt. Ltd. vs. ACIT Central Circle-26 New Delhi ITA No.2698/Del/2018 dated 09.08.2023
- ITO Vs. Sanjay Mahabir Maheshka ITA No.6168-6169/Mum/2019 dated 27.07.2023

11. The Ld. AR for the assessee submits that ITAT Mumbai Benches in the case of Sanjay Mahabir Maheshka (supra) considered the similar scrip of M/s Global Capital market Ltd., which was sold @ Rs.63/- per share on 08.09.2009 and accepted the transaction by taking view that LTCG declared by assessee cannot be doubted. The ld AR for the assessee finally submits that the assessee is liable to succeed on the issue of tax effect being less than the monetary limit as well as on merit as well.
12. I have considered the rival submissions of the parties and have gone through the orders of the lower authorities. I have also deliberated on

the various case laws relied by the parties. I find that the assessing officer made addition of Rs. 7,15,679/- solely on the basis of information available with him. Neither the source of such information is recorded in his assessment order nor such information was shared with the assessee. The assessee in his reply, specifically mentioned that Assessing Officer considered the sale entry twice including one which is reversed on the same date. Even such fact was not examined by assessing officer. The assessing officer made addition of credit without application of mind. The assessee explained that he made transaction of sale of shares in the legitimate manner and paid STT. The assessee further explained that the holding period of the shares was more than seven years and all the evidences with regard to purchase and sale of scrips was furnished. No comment on such evidence was made by assessing officer on such evidences. The assessing officer has not discussed the basic fact, whether the name of assessee was mentioned in the alleged information or the broker of the assessee was involved in price manipulation with stock exchange.

13. I find that the ld CIT(A) granted relief to the assessee buy taking view that complete details of transaction in the form of contract note from broker's ledger, D-mat account and bank statement was furnished by the assessee. The assessee proved the *bona fide* of nature and source of sum credit in his books. Such explanation provided by assessee has not been considered by Assessing Officer. Assessing Officer has not confronted with any statement or relevant part of material to the assessee, which was violated the principle of natural justice. It was

also held that the Assessing Officer has not brought any material on record regarding turnover or profit or net worth of Global Capital Markets Ltd, which is still continuing be traded on BSE and has not been backlisted or barred by Security Exchange Board of India. The shares were purchased through Calcutta Stock Exchange on 27.03.2003 and at that time STT Regulation has not come in force. I find that the Id CIT(A) while granting relief to the assessee considered entire facts and the evidence filed before him, which does not require any interference, which is affirmed.

14. So far as reliance on the case laws by Id Sr DR for the revenue. I find that the ratio of such decisions is not applicable on the facts of the present case. In PCIT Vs Swati Bajaj (supra), the Hon'ble High Court held that price was manipulated in short period of time. However, in the present case the holding period is more than seven years. There is no allegation against the brokers through whom, the assessee transacted in the impugned shares. Moreover, the material in possession of the assessing officer is neither disclosed in the assessment order nor it was provided to the assessee. Similarly, in case of Sangeeta Devi Vs ITO (supra), the assessee admitted that they are passive beneficiary. Further, in that case, there was allegation that purchase and sale of the shares were managed by entry operator. Thus, the facts of the present case are also at variance.
15. Moreover, the tax effect is also less than the monetary limit fixed by CBDT and the present case is not covered by clause 10(c) of the Circular No. 3/2018. Clause -c of para 10 of said circular deals with

audit objection. There is no material on record to show the acceptance of such audit objection. Mere mentioning of such facts in the grounds of appeal, without showing any material is not sufficient. Thus, the revenue failed on both the counts. In the result, the grounds of appeal raised by the revenue are dismissed.

16. In the result, the appeal of the Revenue is dismissed.

Order pronounced in open court on 18/09/2023.

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL MEMBER]

सूरत/Surat, Dated: 18/09/2023
Dkp. Out Sourcing Sr.P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

By order

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Senior Private Secretary/ Private
Secretary/Assistant Registrar, ITAT, Surat