

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

**BEFORE VIKAS AWASTHY (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

**I.T.A. No.2193/Mum/2023
(Assessment year 2017-18)**

Humuza Consultants 6 th Floor, Wockhardt Towers, G-Block Plot C-2, Bandra Kurla Complex Bandra (E), Mumbai-400 051 AAHFH9240E	vs	The Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Income-tax Department, Delhi.
APPELLANT		RESPONDENT

Assessee represented by	Shri J.D. Mistry a/w Mr. Hiten Chande
Department represented by	Smt. Madhumalti Ghosh, CIT DR.

Date of hearing	13-07-2023
Date of pronouncement	26-09-2023

ORDER

PER : MS PADMAVATHY S. (AM)

This appeal is against the order of the Commissioner of Income-tax (Appeals)(National Faceless Appeal Centre)(in short, ‘the CIT(A)’) dated 12/06/2023 for A.Y. 2017-18. The assessee raised grounds pertaining to the following issues:-

- i. Converting limited scrutiny to complete scrutiny- Grounds No.1 to 5)
- ii. Non admission of additional grounds by CIT(A) – Grounds No.6 to15)

- iii. Treatment of the long term capital gain on transfer of shares as unexplained cash credit under section 68 – Ground No.16 to18
- iv. Levy of tax under section 115BBE - Ground No.19
- v. Levy of interest and initiation of penalty proceedings – Ground No. 20to 22

2. The assessee is a partnership firm is engaged in the business as investment consultants, stock brokers, under writers and to invest or subscribe for purchase or otherwise acquire or sale, etc. in shares or other securities issued by company or LLP or government body, etc. The assessee filed the return of income for A.Y. 2017-18 on 28/07/2017 wherein the assessee has declared an income of Rs.68,43,07,135/- and an exempt income of Rs.39,75,96,305/- as per below breakup:-

Pariculars	Amount (INR)
<u>Income offered for tax</u>	
1. Interest income	2,53,29,565
2. Dividend income as per Section 15BBDA	65,89,77,570
Total income	68,43,07,135
<u>Exempt Income</u>	
1. Capital gains on sale of listed shares	39,65,96,306
2. Dividend income as per Section 115O read with section 10(34)	10,00,000
Total Exempt Income	39,75,96,306

3. The return of the assessee was processed under section 143(1) of the Income Tax Act (the Act) and a tax demand was raised by CPC of Rs.175,52,26,440/-. Subsequently, the case was selected for scrutiny for examination of expenses incurred for earning exempt income by issue of notice under section 143(2) dated 09.08.2018. The assessment was completed under section 143(3) where the income was assessed at Rs.461,72,35,403/- after making an addition of Rs.373,39,28,268/- as unexplained credit under section 68 of the Act. On appeal, the CIT(A)

dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

4. During the year under consideration, the assessee has credited to the P&L Account an amount of Rs.393,39,28,268/- towards profit on sale of investments, i.e. sale of listed shares of Wockhardt. The investment in shares of Wockhardt were treated as a capital asset and the assessee computed a long term capital gain on sale of such investments at Rs.39,65,96,306/-. Since these capital gains were arising from sale of long term capital asset being shares of a listed company and the sale was subject to Securities Transaction Tax (STT), the long term capital gains on sale of shares was claimed as exempt. The Assessing Officer issued a notice under section 142(1) dated 04.04.2019 calling on the assessee to provide various details including the details of investments made as on 31.03.2016 and 31.03.2017, exempt income earned during the year and the expenditure incurred to earn such exempt income. The assessee in the reply dated 12.06.2019 submitted with regard to the exempt income that the assessee had earned profit from sale of listed shares and that the profit earned from such sale is exempt under section 10(34). The Assessing Officer was of the view that the response of the assessee is evasive and incomplete and that the assessee did not furnish any documentary evidence to substantiate the earning of exempt income of profit earned from sale of listed shares cannot be claimed as exempt. There was change in the incumbent and the Assessing Officer once again sent a notice under section 142(1) dated 30.08.2019 calling on the assessee to furnish the details as called for in notice dated 04.04.2019. The Assessing Officer issued subsequent notices on 05.11.2019 and 07.12.2019. The assessee vide letter dated 17.12.2019 re-submitted the details as furnished earlier on 12.06.2019.

5. The Assessing officer after considering the submissions of the assessee held that the assessee never submitted any concrete and authentic documentary evidence to substantiate acquisition of shares, holding of shares and sale of shares and to show fund-flow for all these transactions. The Assessing Officer further held that the assessee did not submit any documentary evidence to show as to why the profit on sale of shares is exempt under any section of the Act and as per the submissions of the assessee section 10(34) under which assessee claimed the exemption deals with dividends and not profit on sale of listed shares. Accordingly, the Assessing Officer treated the entire consideration of Rs.393,39,28,268/- as unexplained income under section 68 of the Act.

6. Aggrieved, the assessee filed appeal before the CIT(A). There was a 68 days of delay in filing of appeal before the CIT(A). The assessee submitted before the CIT(A) that out of the two email ids given while filing the return of income only the email id dnarang@wockhardt.com is only functional and that the other email id taxdept@wockhardt.com was not functional. The assessee further submitted that the notices and the final order of assessment had been sent to the non-functional email id due to which the assessee was not aware that the assessment has been completed. It is only when the assessee received a call from the department regarding the outstanding demand the assessee came to know that the assessment order has been passed. It was also submitted that as soon as the assessee came to know of the assessment order immediate efforts were made to file the appeal before the CIT(A). The assessee accordingly prayed for condonation delay and admission of appeal before the CIT(A). The CIT(A) after considering the submissions condoned the delay and admitted the appeal.

7. The assessee also filed a petition for admission of additional evidence on 04.09.2020 under Rule 46A of the Income Tax Rules. The assessee submitted a detailed note about the impugned transaction along with the additional evidences before the CIT(A) the relevant extract of which is given below –

“The Appellant submits that 6,58,97,757 equally shares in Wockhardt Limited were acquired by it on 7 July 2014 by way of gift from three promoter group companies viz. Palanpur Holdings and Investment Private Limited, Dartmour holdings, Private Limited and Khorakiwala Holding and Investments Private Limited. The Appellant encloses herewith the copies of delivery instructions slips for transfer of shares from demat account of the aforesaid companies to the demat account of the Appellant as Annexure 1 (at pages 1 to 6). The Appellant also encloses herewith as Annexure 2

The Appellant further encloses herewith copy of its demat statement for the period 1 July 2014 to 7 July 2014 as Annexure 3 (at pages 15 to 16) and copy of financial statements of the Appellant as on 31 March 2015 as Annexure 4 (at pages 17 to 20) to establish that the abovementioned shares were held by the Appellant on 31 March 2015. The Appellant submits that out of the above, 54,00,000 shares were sold on the stock exchange on 23 March 2017. Copy of broker note evidencing sale of equity shares of Wockhardt Limited is enclosed as Annexure 5 (at pages 21 to 23). The Appellant submits that since the shares were held for a period of more than 12 months prior to transfer, the shares constituted long term capital asset. Further, the broker note clearly indicates that the sale of shares was subjected to STT. Copy of demat account of Humuza Consultants evidencing sale of shares of Wockhardt Limited is enclosed as Annexure 6 (at page 24). The Appellant submits that it held 6,58,97,757 equity shares in Wockhardt Limited, out of which 54,00,000 equity shares were sold by it and the assessee had a balance of 6,04,97,757 equity shares in Wockhardt Limited; The assessee also encloses herewith a copy of bank statement evidencing the receipt from sale of shares of INR 393,39,38,268 as Annexure 7 (at pages 25 to 27). The amount of consideration credited to the bank account of the assessee is exactly equal to the amount of net consideration indicated in the broker's note.

5. The Appellant prays that the additional evidence filed by it should be admitted on the following grounds: During the year under consideration, i.e. AY 2017-18, 54,00,000 shares of Wockhardt Ltd. were sold by the Appellant on Bombay Stock Exchange at the rate of Rs. 730/- per share. The Appellant received a total consideration of INR 393,39,28,267 on sale of 54,00,000 shares (after deduction of brokerage, taxes etc.). In the books of account of for the year under consideration, the aforesaid amount was credited to the Profit & Loss account since there was no cost of acquisition recorded by the Appellant in respect of those shares as the shares were received by way of gift. The equity shares of Wockhardt Ltd. were shown under the head "Investments" and, apart from the investment in preference shares of Wockhardt Hospitals Ltd., this is the only investment held by the Appellant. The Appellant filed its return of income for the assessment year 2017-18 on 28 July 2017. In the return of income, the Appellant claimed exemption under section 10(38) of the Act with respect to the transaction of sale of shares of Wockhardt Ltd., given the

transaction related to the sale of shares held as long-term capital asset and has been effected on the Stock Exchange and that the Appellant had paid STT.

8. The assessee further submitted that since the assessee was receiving the communication from the Assessing Officer in the non-functional email id, the details which are now submitted as part of additional evidence could not be submitted before the assessing officer. The assessee also submitted that it has inadvertently stated in its submissions before the Assessing Officer that the profit on sale of shares is exempt under section 10(34) of the Act, instead, the correct section of section 10(38) of the Act under which the long term capital gain is arising on sale of listed equity shares of Wockhardt Ltd which is exempt. The assessee argued before the CIT(A) that the addition made under section 68 is not correct since the assessee has provided all the details pertaining to the sale of shares except the broker note which is now submitted as part of additional evidence. The CIT(A) called for a remand report with respect to the additional evidences submitted by the assessee. The Assessing Officer in the remand report stated that the assessee could have submitted the evidences before the Assessing Officer which it failed to do in spite of being given several opportunities. The Assessing Officer further stated that the assessee wantedly did not submit the evidences during assessment proceedings and therefore new evidences are not to be admitted. The assessee in rebuttal reiterated that the evidences could not be submitted in time since the communication from Assessing Officer was sent to non functional email ids and that the assessee be given one more opportunity by admitting the additional evidence.

9. The CIT(A) did not accept the submissions of the assessee and did not admit the additional evidence by holding that –

- (i) The assessee was given ample opportunity to submit the details before the Assessing Officer and the assessee failed to do
- (ii) There is no sufficient cause that prevented the assessee from submission of evidence before the Assessing Officer
- (iii) The argument of the assessee that some emails became non-functional is devoid of reason

10. The CIT(A) dismissed the appeal by stating that –

6.9.11 Therefore, considering the totality of facts and circumstances of the case, the application for admission of additional evidence u/r 46A made by the appellant before the undersigned is hereby rejected.

6.9.12 Consequently, since the application for admission of additional evidence u/r 46A has been found to be wanting and the same has been rejected above, an adjudication on issues of merit on grounds of appeal related to addition of Rs. 393,39,28,262/- is not possible for the undersigned. In the absence of any additional fact/piece of evidence to be considered by the undersigned, the decision of the AO made at the assessment stage seems reasonable and the undersigned do not see sufficient reasons to interfere with that at this stage. Accordingly, the appeal of the appellant is dismissed.”

11. The Ld.AR submitted that the assessee's case was taken up for limited scrutiny and in this regard drew our attention to page 131 of paper book where the notice under section 143(2) dated 09/08/2018 is placed which states that limited scrutiny for verification of expenses incurred for earning exempt income. The Ld.AR further drew our attention to the notice under section 142(1) dated 04/04/2019 wherein a query was raised (query 5(b) page 137 of paper book) to submit details of exempt income earned during the year under consideration. The Ld.AR submitted that the assessee, in response to the said notice filed a reply on 12/06/2019 (page 218 of paper book) wherein the assessee had inadvertently mentioned that the profit on sale of listed shares has been claimed as exempt in

accordance with the provisions of section 10(34) of the Act. The Ld.AR further submitted that the observations of the Assessing Officer that the assessee's reply is evasive and incomplete, is not correct since the assessee has provided the necessary details as has been called for by the Assessing Officer. With regard to the AOs contention that there were several notices issued, in response to which the assessee did not reply, the Ld.AR submitted that the assessee while filing the return of income had provided 2 email addresses mainly taxdept@Wockhardt.com and dnarang@Wockhardt.com. The Ld.AR also submitted that due to non usage, the mail id, taxdept@Wockhardt.com has become inactive and that the notices issued to the said email.id could not be responded on time. The Ld.AR pointed out that wherever the notices were issued to the alternative email id, the assessee was promptly responding. In this regard our attention was drawn to the mail sent by revenue on the email id dnarang@Wockhardt.com for recovery of outstanding demand and that the assessee has responded immediately since the mail is received in the functional email id. (page 214 and 215 of paper book). Therefore, it was argued by the Id AR that it cannot be said that the assessee is intentionally delaying the response. It is submitted that there was a genuine reason as explained above for the delay in submission of details and the assessee in the petition for condonation and admission of additional evidence, had stated the facts as explained above before the CIT(A). The CIT(A), though condoned the delay for the said reason, did not accept the additional evidence filed. The Id AR further brought to our notice that the assessee has filed a writ petition before the Hon'ble Bombay High Court against the refusal to grant stay of demand raised by the revenue. In the writ the Hon'ble High Court while granting the stay also directed admission of additional evidence disposal of appeal. On merits, the Ld.AR drew our attention to the financial statement of the assessee (pages 2 & 3 of paper book)

where the shares of Wockhardt Ltd have been reflected as investments under Schedule III to evidence that the share sold during the year under consideration is part of investments and that the gain on sale of the same is a long term capital gain exempt under section 10(38). The Ld.AR, therefore, submitted that the CIT(A) is not correct in rejecting the admission of additional evidence and making addition under section 68 merely for the reason that the document evidencing the sale of shares was not furnished before the Assessing Officer.

12. The Ld.DR, on the other hand, vehemently argued that there was a substantial delay in filing the details by the assessee before the AO that the notices sent to non-functional email id cannot be quoted as the reason as the assessee could have verified from the ITBA portal. The Ld.DR further submitted that all the details called for by the assessee pertained to the exempt income and, therefore, there is no conversion of limited scrutiny to full scrutiny. The Ld.DR also submitted that the assessee claimed to have made more than one inadvertent mistake with regard to the impugned transaction i.e. The gain arising out of the sale of shares is not declared under capital gains, the section under which the exemption claim is wrongly quoted, etc. The Ld.DR, therefore submitted that there are more than one anomaly pertaining to the transaction and therefore the lower authorities were correct in treating the entire transaction as suspicious and accordingly assessing the same under section 68 of the Act.

13. We heard the parties and perused the material on record. Though both the parties presented various arguments both on the legal grounds and on merits, for the purpose of adjudication we will limit our findings with regard to non-admission of additional evidence by the CIT(A). Before proceeding further we will look at

Rule 46A of Income Tax Rules which governs the admission of additional evidence by the CIT(A) –

Production of additional evidence before the ¹[Joint Commissioner] (Appeals) and Commissioner (Appeals).

46A. (1) The appellant shall not be entitled to produce before the ¹[Joint Commissioner] (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :—

- (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or*
- (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or*
- (c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or*
- (d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

*(2) ****

*(3) ****

*(4) ****

14. The main contention with regard to non-submission of the evidence supporting the sale of shares before the Assessing Officer is that the notices were not sent to the functional email ids. In this regard we notice that the notices dated 30/08/2019, 05/11/2019 have been sent to the non-functional email id and that the assessee though there was a delay has filed the response on 17/12/2019 furnishing the details as have been called for. It is relevant to note that in the notices issued under section 142(1) the details called for, with regard income claimed as exempt,

are details of investments made as on 31.03.2016 and 31.03.2017, exempt income earned during the year and the expenditure incurred to earn such exempt income. The assessee has furnished the said details twice once on 12/06/2019 and again on 17/12/2019 when the same details were called for by the Assessing Officer due to change in incumbent. Further the assessee had filed the bank statement as evidence for earning exempt income. Now coming to the additional evidences, the assessee filed the petition under rule 46A to produce additional evidences such as copies of delivery instructions slip for transfer of shares by the transferor to the assessee, declaration before SEBI that the assessee has acquired the said shares, Demat account statements evidencing holding of shares, broker note evidencing sale of shares and payment of STT, Demat account statement evidencing sale of shares. It is noticed that the Assessing Officer in the remand report stated that the assessee was given sufficient opportunity to produce details and therefore no new evidences are to be accepted by the CIT(A). The Id AR during the course of hearing submitted that the acquisition and holding are substantiated from the financial statements where the investment is reflected and the sale is substantiated by the bank statements where the consideration received is reflected. It is further argued by the Id AR that the Assessing Officer did not call for any further details specifically with regard to the sale of shares except evidence for earning exempt income which the assessee substantiated by producing the bank statement reflecting the consideration received. We see merit in these contentions of the Id AR since at an overall level, the evidences furnished by the assessee supports that there has been an investment and that the same is sold during the year for a consideration and the Assessing Officer should have called for further details if not satisfied with evidences already furnished by the assessee. Therefore in our considered view the non-admission of additional evidence for the reason that the

assessee did not furnish the documentary evidence in spite of giving several opportunities is not correct. Before the CIT(A) the assessee filed a petition for condonation of delay and also for admission of additional evidence. The assessee in both the petitions had stated that the notices being sent to the non-functional email id as the reason for delay in filing the appeal and for delay / non-submission of details before the Assessing Officer. The CIT(A) while condoning the delay has accepted the said submissions but did not consider same reason as sufficient cause for admission of additional evidence and has in the order has given a detailed finding in this regard (refer para 6.9.5 to 6.9.8 of CIT(A)'s order). The CIT(A) also relied on the remand report of the Assessing Officer where it is mentioned that the assessee despite having the evidences at their disposal wontedly did not submit the same. We are unable to appreciate this contention since there is no reason for the assessee to withhold submitting the required the details more so when the impugned addition is significant resulting in huge demand. In this regard we are also bound to take cognizance of the fact that the Hon'ble Bombay High Court has given a direction to decide the application under rule 46A which the CIT(A) has not considered in his order. In view of these discussions we are of the view that the CIT(A) is not correct in not admitting the additional evidence while upholding the addition made by the Assessing Officer.

16. The Assessing Officer in the assessment order has mentioned that the assessee has not disclosed the sale of shares under the head capital gains in Schedule CG of the ITR. On perusal of the records, we notice that though the assessee while disclosing the business income has excluded the capital gains, had not disclosed the same under the heard capital gains and the exemption under section 10(38) separately in the return of income. The lower authorities while

denying the claim of the assessee that the gain arising is exempt under section 10(38) has not gone into the merits of the impugned transaction to examine computation of capital gains i.e. the sale consideration, period of holding, cost of acquisition etc. Further the additional evidences submitted by the assessee have also been not examined. Therefore we remand the issue back to the Assessing Officer with a direction to admit the additional evidences submitted by the assessee in connection with the sale of shares and allow the claim of exemption accordingly.

17. In result the appeal of the assessee is allowed for statistical purposes

Order pronounced in the open court on 26/09/2023.

Sd/-

sd/-

(VIKAS AWASTHY)	(PADMAVATHY S)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 26th September, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai