

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "H" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 568/Mum/2023 (A.Y. 2013-14)

Ketan Jayant Shah Shop No. 1, Datta Niwas, Gokhale Road Naupada, Thane-W Maharashtra-400 602. PAN : AOXPS3406b (Appellant)	Vs.	DCIT, Circle-1 6 th Floor, Ashar IT Park, Road No. 16Z Wagle Estate Thane Maharashtra-400 604. (Respondent)
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Assessee by	Shri K.R. Pradeep & Ms. Girija G.P.
Department by	Shri Prakash Kishinchandani
Date of Hearing	17.08.2023
Date of Pronouncement	18.09.2023

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 05.01.2023 passed by Ld CIT(A), National Faceless Appeal Centre, Delhi and it relates to the assessment year 2013-14. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the rejection of exemption claimed u/s 10(38) of the Act on long term capital gains claimed on sale of shares.

2. The facts relating to the case are stated in brief. The assessee filed its return of income for the year under consideration declaring total income of Rs.43,53,870/-. It was taken up for scrutiny by the AO. During the course of scrutiny proceedings, the AO noticed that the assessee has declared long term capital gains of Rs.11.43 crores on sale of shares of M/s Blue Circle Services Ltd and claimed the same as exempt. The AO noticed that it was identified as one of the penny stocks by the Investigation wing of Kolkatta, in which the prices of the shares have been rigged to generate bogus capital

gains/loss. Accordingly, the AO proposed to reject the exemption claimed u/s 10(38) of the Act. In this regard, the AO placed reliance on the reports of investigation wing, which have explained the modus operandi adopted in generating capital gains. With regard to M/s Blue Circle Services Ltd, the investigation wing has recorded statement from two directors of the said company, viz., Shri Dhruvanarayan Jha, Shri Jagdish Prasad Purohit, in which they have admitted that it was involved in providing accommodation entries by way of bogus billing, LTCG, bogus share capital. The AO also referred to the statement of Shri Anuj Agarwal, an entry operator, in which he has explained the methodology adopted for giving accommodation entries. Accordingly, he proposed to assess long term capital gains as income of the assessee.

3. The assessee submitted that he has purchased 150000 equity shares of M/s Blue Circle Services Ltd for a consideration of Rs.15.00 lakhs under preferential allotment on 16.3.2011 by making payment through RTGS mode. He submitted that the shares were received in physical format and they were dematerialized later in a demat account maintained with M/s LFC Security P Ltd. The above said company split the shares into shares of Re.1.00 each and accordingly, the assessee received 15,00,000/- shares of Re1.00 each in lieu of 150000 shares of Rs.10/- each. It was submitted that all the shares were sold through the broker M/s LFC Security P Ltd in Bombay stock exchange between 14th May, 2012 and 01st August, 2012. It was submitted that entire sale consideration was received by way of account payee cheques. With regard to the Statements relied upon by the AO, the assessee submitted that the said statements were taken in the year 2015, while the shares were sold prior to August, 2012. It was also contended that the said persons have not identified by the assessee to be a beneficiary. Accordingly, it was submitted that AO cannot place reliance on the said statements. It was submitted that the assessee has not sold the shares to the entry providers.

The assessee also sought an opportunity to cross examine the persons on whose statement the AO had placed reliance.

4. The AO, however, did not accept the explanations given by the assessee. He also referred to interim order passed in the case of First Financial Services Ltd, wherein SEBI had restrained trading in the shares of above said company. He also noticed that the interim report also contained name of M/s Blue Circle Securities Ltd. The AO refused to afford the cross examination by placing reliance on the decision rendered by Hon'ble Allahabad High Court in the case of Moti Lal Padampat Udyog Ltd vs. CIT (160 Taxman 233). Accordingly the AO treated the exemption of Rs.11.43 crores claimed u/s 10(38) of the Act as unexplained income of the assessee u/s 68 of the Act.

5. Before Ld CIT(A), the assessee explained the details of purchases and sale of shares. The assessee also submitted that the AO did not find fault with any of the documentary evidences furnished by the assessee. With regard to the reliance placed on three sworn statements, the assessee contended that they are general in nature and they have been recorded in the year 2015. With regard to the reliance placed on SEBI report, it was submitted that it has no relevance since the AO has discussed about another company named M/s First Financial Services Ltd. The assessee also placed reliance on the decision rendered by Mumbai bench of Tribunal in the case of Jayesh Shantilal Vira vs. ACIT (ITA Nos. 72 & 73/M/2021), wherein the addition made in respect of sale of M/s Blue Circle Services Ltd was deleted. The assessee also placed reliance on host of case laws to support his contention that the capital gain should be accepted, when no concrete information against the transactions of purchase and sale of shares are found. The assessee also contended that the AO could not have placed reliance on the statements taken from three persons without providing opportunity of cross examination and in this regard, he placed reliance on

the decision rendered by Hon'ble Supreme Court in the case of M/s Andaman Timber Industries vs. CCE, Kolkata (281 CTR 241)(SC), Kishinchand Chellaram vs. CIT (125 ITR 713)(SC).

6. The Ld CIT(A) did not accept the contentions of the assessee. He placed reliance on the decision rendered by Hon'ble Kolkata High Court in the case of PCIT vs. Swati Bajaj (IA No. GA/2/2022 in ITA/6/2022) and confirmed the order passed by the AO. The assessee is aggrieved.

7. The Ld A.R submitted that the assessee has furnished all evidences to the tax authorities to prove genuineness of purchases and sales of shares. He submitted that the shares were purchased in March, 2011 and they were sold from May, 2012 to August 2012. The AO has placed reliance on the statements taken from certain parties in the year 2015, i.e., almost three years after sale of shares and none of the persons have identified the assessee as a beneficiary. He submitted that the AO has also relied upon the SEBI's interim report in respect of another company named M/s First Financial Services Ltd and applied the same to the shares of Blue Circle Services Ltd. The AO has also not shown that the assessee was subjected to enquiry by SEBI. Accordingly, he submitted that there is no reason to suspect the share transactions carried on by the assessee. He also relied upon host of case laws in support of his contentions.

8. The Ld D.R, on the contrary, relied upon the order passed by the tax authorities. He submitted that the assessee has purchased shares through preferential allotment. The company M/s Blue Circle Services Ltd is identified as a penny stock and the SEBI has also initiated enquiries in respect of this company. The AO has taken support of statements given by the directors of above said company and the statement of a broker, who was indulging in providing accommodation entries. He also referred to the SEBI's interim report, which establish that the share transactions carried on by the

assessee are not genuine. The Ld D.R placed reliance on the decision rendered by Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj (2022)(139 taxmann.com 352)(Cal) and certain other decisions.

9. In the rejoinder, the Ld A.R submitted that the AO has made reference to the report of investigation wing with regard to the Statements recorded from three persons, SEBI report in respect of another company named First Financial Services Ltd. However, the AO has not provided an opportunity to cross examine those persons. He submitted that the AO has only drawn adverse inferences on the basis of generalized statements. He submitted that the interim order passed by SEBI in respect of shares of First Financial Services Ltd has been revoked later by SEBI. He submitted that these facts have been noted by the co-ordinate bench of Tribunal in the case of Sunita Chaudhry (ITA No.143/Mum/2022 dated 13-10-2022). Further the AO has not established that the assessee was part of the group which was manipulating the prices of shares as held by the Hon'ble jurisdictional Bombay High Court in various cases. He submitted that the decision rendered by the jurisdictional High Court is binding upon the AO and hence the decision rendered by the Hon'ble Calcutta High Court cannot be taken support of by Ld CIT(A). He submitted other decisions relied upon by the Ld D.R are not either related to purchase and sale of shares or rendered on the facts prevailing in those cases.

10. We have heard rival contentions and perused the record. We notice that the assessee has furnished all documents relating to purchase and sale of shares. It is not the case of the AO that those documents are not reliable. However, the AO has placed reliance on the report of investigation wing and also the statement recorded from two of directors of M/s Blue Circle Services Ltd and a share broker. The assessee has purchased the shares in March, 2011 and sold the shares between May, 2012 to August 2012. As pointed out by Ld A.R, the statements have been taken from the above said persons

in the year 2015 and it is not the case of the AO that those three persons have identified the assessee as one of the beneficiaries. Further, the AO has placed reliance on the interim report of SEBI in respect of another company M/s First Financial Services Ltd. However, the co-ordinate bench has noted down in another decision rendered in the case of Sunita Chaudhry (supra), wherein the Tribunal has noticed that interim report given in the case of First financial services has been revoked. The AO has not referred to SEBI report in respect of Blue Circle Services Ltd.

11. We notice that the AO has not carried out any independent examination/verification in order to prove that the purchase and sale of shares made by the assessee are not genuine. He did not examine the directors of M/s Blue Circle Services Ltd or the broker through whom the shares were purchased and sold. The assessing officer has also not shown that the assessee was part of the ring which involved in rigging of prices. Under these set of facts, we are of the view that the AO has assessed the long term capital gain as income of the assessee by rejecting the exemption u/s 10(38) of the Act only on suspicion and surmises.

12. We may also gainfully refer to the decision rendered by Hon'ble Bombay High Court in the case of Shyam Pawar (2015) 55 taxman.com 108(Bom), wherein it was held as under:-

“3. Mr. Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumr, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

4. Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He

submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, **what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny.** It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. **The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies.** The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of

Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.”

13. The Hon'ble Jurisdictional High Court has considered an identical issue in yet another case of PCIT vs. Ziauddin A Siddique (Income tax Appeal No. 2012 of 2017 dated 4th March, 2022) and relevant discussions made by Hon'ble Bombay High Court are extracted below:-

“2. We have considered the impugned order with the assistance of learned counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd (“RFL”) is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax (“STT”) has also been paid. The Assessing

Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against the assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgement of the Apex Court in Principal Commissioner of Income tax (Central)-1 vs. NRA Iron & Steel (P) Ltd (2019)(103 taxmann.com 48)(SC) but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

14. Accordingly, in the facts and circumstances of the case, we are of the view that the decision rendered by the jurisdictional Hon'ble Bombay High Court in the above said case of Shyam R Pawar (supra) and Ziauddin A Siddique (supra) shall apply, since the AO has not established that the assessee was involved in price rigging and further the AO did not find fault with any of the documents furnished by the assessee. In view of the binding decision rendered by Hon'ble Bombay High Court referred above, there is no necessity to refer to the decision rendered in the case of Swati Bajaj (supra) by Hon'ble Kolkatta High Court.

15. In view of the foregoing discussions, we are of the view that the purchase and sale of shares carried out by the assessee cannot be doubted with. Accordingly, we hold that the long term capital gain declared by the assessee on sale of shares cannot be assessed as unexplained cash credit u/s 68 of the Act. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the impugned addition made by him.

16. In the result, the appeal filed by the assessee is allowed.

Order pronounced in on 18.9.2023.

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 18/09/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS