

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 5120/DEL/2019[A.Y. 2015-16]

Shri Rakesh Kumar Gupta
8/12, Kalkaji Extension
New Delhi

Vs.

The Income Tax Officer
Ward -61(2)
New Delhi

PAN: AAHPG 4520 E

(Applicant)

(Respondent)

Assessee By : Shri P.C. Yadav, Adv
Shri Shivam Garg, Adv

Department By : Shri Vivek Kumar Upadhyay, Sr.DR

Date of Hearing : 30.10.2023

Date of Pronouncement : 03.11.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A) -20, New Delhi dated 18.03.2019 pertaining to A.Y. 2015-16.

2. The sum and substance of the grievance of the assessee is that the Id. CIT(A) erred in confirming the denial of exemption claimed u/s 10(38) of the Income-tax Act, 1961 [the Act, for short] amounting to Rs. 26,63,100/- in respect of long term capital gain earned on sale of listed equity shares.

3. Briefly stated, the facts of the case are that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown long term capital gain on sale of shares of Esteem Bio Organic Food Processing Ltd, which was claimed to be exempt u/s 10(38) of the Act.

4. Drawing support from the report of the Directorate of Investigation, Kolkata, the Assessing Officer formed a belief that the impugned long term capital gains is a result of transaction in penny stock. In coming to this conclusion, the Assessing Officer was heavily influenced by the report of the Investigation Wing, Kolkata, which has elaborately discussed the modus operandi adopted by the operators, which was to make the beneficiary buy some shares of a pre-determined penny stock company controlled by them.

5. These shares were transferred to the beneficiary at a very nominal price, mostly offline through preferential allotment or offline purchase/sale to save STT. The beneficiary holds the share for one year and as soon as the holding becomes long term, shares are sold at a rigged high price, thereby generating long term capital gain, which is subsequently claimed as exempt u/s 10(38) of the Act.

6. Based on the aforementioned observations, the Assessing Officer denied the claim of exemption u/s 10(38) of the Act and made addition of Rs. 26,63,100/- and further made addition of Rs. 1,40,655/- being hypothetical commission which the assessee must have paid for procuring long term capital gains.

7. Assessment was confirmed by the ld. CIT(A).

8. Before us, the ld. counsel for the assessee vehemently stated that, the very basis of assessment that the assessee must have purchased shares offline is wrong, in as much as, the assessee was allotted shares through IPO. It is the say of the ld. counsel for the assessee that the assessee applied for shares and paid share application money through banking channel and the assessee was

allotted 6000 shares which were credited in demat account and subsequently sold from demat account and consideration was credited in bank account of the assessee through normal banking channel.

9. The ld. counsel for the assessee further stated that though pursuant to the report of the Investigation Wing, Kolkata trading in the shares of Esteem Bio Organic Food Processing Ltd was suspended from trading by the SEBI but was subsequently resumed, but this took place several years after the assessee had sold its shares.

10. The ld. counsel for the assessee drew our attention to the decision of the coordinate bench in the case of Smt. Karuna Garg and Others and pointed out that on identical set of facts and on identical script, this Tribunal has deleted the addition and the order of the Tribunal has been affirmed by the Hon'ble High Court of Delhi in ITA No. 125/2020 order dated 15.01.2021.

11. Per contra, the ld. DR strongly supported the findings of the Assessing Officer and read the relevant operative part.

12. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that 6000 shares were allotted to the assessee who has applied in the IPO of the company Esteem Bio Food Processing Ltd. On allotment, shares were credited in the demat account of the assessee and the payments have been made through regular banking channel. Purchase of shares was subject to security transaction tax.

13. On 05.06.2014, the assessee sold the shares and received sale consideration in his bank account on 11.06.2014. Sale transaction was also subject to security transaction tax. We find that the Assessing Officer has proceeded by heavily relying upon the investigation report of the Investigation Wing, Kolkata regarding list of companies engaged in providing accommodation entries in the garb of bogus long term capital gains, modus operandi being penny stock trading through recognized stock exchanges. We find that the assessee has furnished all details but the same were rubbished by the Assessing Officer.

14. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing, Kolkata. It can be seen that the entire assessment has been

framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent evidence or source, but has merely relied upon the statement by the Investigation Wing as well as information received from the Investigation Wing, Kolkata.

15. The report of the Investigation Wing, Kolkata is much after the date of transaction when the assessee has already sold scrip. It is true that the shares of Esteem Bio Organic Food Processing Ltd were suspended from trading in stock exchange but that was from 29.06.2015, which is the date of order of the SEBI. The shares were purchased by the assessee on 05.02.2013 and sold on 05.06.2014 and these transactions have taken place much before the report of the Investigation Wing and also the order of the SEBI.

16. On identical set of facts as mentioned elsewhere, this coordinate bench in the case of Karuna Garg ITA No. 1069/DEL/2019 and Ors have considered the same shares i.e. Esteem Bio Organic Food Processing Ltd and deleted the addition which was affirmed by the Hon'ble High Court of Delhi in ITA No. 125/2020 and Ors dated 15.01.2021. The relevant observations/findings of the Hon'ble High Court read as under:

"The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITA 125/2020 and connected matters ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on *Suman Poddar v. ITO (supra)* and *Sumati Dayal v. CIT (supra)* is of no assistance. Upon examining the judgment of *Suman Poddar (supra)* at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of *Sumati Dayal v. CIT (supra)* too turns ITA 125/2020 and connected matters on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

17. On finding parity of facts, respectfully following the same, we direct the Assessing Officer to allow the exemption u/s 10(38) of the Act in respect of LTCGs and further direct the Assessing Officer to delete the hypothetical addition of Rs. 1,40,655/-.

18. In the result the appeal of the assessee in ITA No. 5120/DEL/2019 is allowed.

The order is pronounced in the open court on 03.11.2023.

Sd/-

[ASTHA CHANDRA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: NOVEMBER, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	