

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 465/JP/2023
निर्धारण वर्ष / Assessment Years : 2011-12

ITO, Jaipur	बनाम Vs.	Giriraj Khandelwal HUF B-63 Saket Colony, Adarsh Nagar, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABHG 9837 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Vishnu Khandelwal (CA)
राजस्व की ओर से / Revenue by : Smt Monisha Chaudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 26/10/2023
उदघोषणा की तारीख / Date of Pronouncement: 22/11/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by revenue is arising out of the order of the National Faceless Appeal Centre, Delhi dated 23/05/2023 [here in after (NFAC)/ Id. CIT(A)] for assessment year 2011-12 which in turn arise from the order dated 28.12.2018 passed under section 147/143(3) of the Income Tax Act, by ITO, Ward 5(3), Jaipur.

2. In this appeal, the revenue has raised following grounds: -

“1. On the facts and in the circumstances of the case, whether CIT(A) was justified in law, deleting an addition of Rs. 3,30,056/- on account of unaccounted income u/s 68 of the IT Act, 1961.

2. On the facts and in the circumstances of the case, whether CIT(A) was justified in law, deleting the addition of Rs. 3,30,056/- made by the AO whereas the same was found penny stock during the investigation proceeding of DGIT (Inv.).

3. On the facts and in the circumstances of the case, whether CIT(A) was justified in law, ignoring the statement recorded during the course of search and seizure proceeding.

4. The appellant craves leave to add, alter, amend, withdraw or insert any ground or grounds of appeal before or at the time of hearing of the appeal.”

3. Succinctly, the fact as culled out from the records is that original return of income was filed on 30.03.2012, declaring total income at Rs. 5,30,260/- for A.Y 2011-12. Later on the information was received from DDIT (Inv.), Unit 7(4), Mumbai the assessee made transactions in the shares of M/s Swarsarita Gems Ltd (formerly known as Shyam Star Gems Ltd.) (Script Code 526365) which is a penny stock company. This company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or short term capital loss in their books of accounts. It was noticed that share price of M/s Swarnsarita Gems Ltd. rose from Rs.26/- in April 2017 and peaked to Rs.180/- in September 2008. Subsequently, trade data of M/s Swarnsarita Gems Ltd. was called for from BSE and analysed. It was seen that both purchase and sale of the shares are concentrated with few persons/entities.

It is seen from the financial of the entry providers that they do not have any creditworthiness. They are either non-filers or have filed nominal return of income. Out of the list of beneficiaries who have traded in this scrip, name of the assessee was also found who has booked loss of Rs.3,30,056/-. Since, the prices of this scrip was artificially manipulated by the entry operators in collusion with the brokers to pass on bogus long term capital gain/short term capital loss to the interested parties including assessee to launder their undisclosed income or by concealing the taxable income, the assessee has also evaded taxable income of Rs.3,30,056/- by this adjustment entry. Therefore, the case of the assessee was re-opened by issuing notice u/s 148 of the IT Act, 1961 on 29.03.2018. In compliance, assessee filed his return of income in response to notice u/s 148 on 04.09.2018 declaring total income of Rs 5,30,260/-. The reasons for issuance of notice u/s 148 was supplied to the assessee vide letter dated 08.09.2018. Subsequently notice u/s 143(2) & 142(1) were issued and served upon the assessee.

3.1 During the course of the assessment proceedings, assessee furnished computation of income and other details. It is seen from the details that assessee has booked capital loss of Rs. 3,30,056/- by trading in penny

stock of Shyam Star Gems. As the assessee was one of the beneficiaries of the accommodation entries and booked capital loss of Rs. 3,30,056/-. Accordingly the same is treated as unaccounted income of the assessee brought in the grab of capital loss by obtaining accommodation entries. Therefore, the same is assessed as income of the assessee u/s 68 of the IT. Act, 1961.

4. Aggrieved from the order of the Assessing Officer, assessee preferred an appeal before the Id. CIT(A)/NFAC. A propose to the grounds so raised the relevant finding of the Id. CIT(A)/NFAC is reiterated here in below:

“This case was reopened u/s 148 of the IT Act, to examine a possible bogus loss of Rs. 3,30,056/- with respect to certain scrips. Despite the appellant claiming before the AO that the appellant had not made any of the transaction in the scrips claimed by the AO, without making any further enquiry the AO proceeded to make this addition. Since, the appellant has made the same submission in this appeal, I have no other option but to hold the addition as unwarranted. Hence appeal is allowed.”

5. Feeling dissatisfied with the order of the Id. CIT(A) the assessee has preferred this appeal on the grounds as reiterated here in above. To support the various grounds so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below:

“1. BRIEF FACTS OF THE CASE

Assessee has filed its Original ITR on 30.03.2012 declaring total income of Rs. 530260/-

Notice under section 148 on 29/03/2018 with the approval of CIT 2, Jaipur. (PB 1).

Assessee has filed ITR in compliance of Section 148, on 04/09/2018 declaring total income of Rs. 530260/-. Copy of ITR and Computation is as per (PB 2-5)

On 20/08/2018, Assessee write a letter to the A.O. and asked to provide the following:

- (a) Reasons to believe for issuing notice u/s 148
 - (b) Copy of material on which relied upon for issuing notice u/s 148
 - (c) Copy of necessary satisfaction recorded by CIT for issuing notice u/s 148
- (PB 6)

- Vide letter dated 08/09/2018, A.O. has provided copy of reasons recorded for issuing notice u/s 148. (PB 7-8).

A.O. has not provided the Copy of material on which relied upon for issuing notice u/s 148 and Copy of necessary satisfaction recorded by CIT for issuing notice u/s 148

Notice was issued on the basis of information of DDIT that assessee has booked loss of Rs.330056/- by making trading of penny stock share namely M/S SWARNSARITA GEMS LTD (Formerly known as Shyam Star Gems Ltd) (PB 7-8).

Assessee has challenged the validity of the notice vide its letter dated 13/11/2018, and again asked to provide supporting evidence and material relied upon by A.O. on issuing notice. (PB 9).

Still the Supporting evidence and material has not been provided.

On 23/12/2018, Show cause notice has been issued for making addition of Rs.330056/-. (PB 10-11)

Assessee has filed reply of the SCN vide letter dated 26/12/2018 and again stated that supporting material has not been provided (PB 12-13)

Without disposing off the objection raised on validity of the notice, A.O. has passed the assessment order and make addition of Rs.330056/- u/s 68.

Assessee has never entered into the transactions of sale and purchase of scrip M/S SWARNSARITA GEMS LTD (Formerly known as Shyam Star Gems Ltd)

Being aggrieved from the order of the A.O., assessee has filed appeal before the CIT appeals. Copy of Form 35 is as per (P B 14-16)

Assessee has submitted Bank statement, Copies of D Mat account and other details. Copy of submission before the CIT Appeal, Bank statement and D Mat account are as per (PB 17-25)

Learned CIT Appeals has allowed the Appeal and delete the Additions.

Against the order of CIT Appeal, Department has filed the Appeal before your kind honour (hon'ble tribunal).

2. WRITTEN SUBMISSION:

In the light of aforesaid facts my submission is as under:

1. The Ld. Assessing officer has erred in law on reopening the assessment based on information of DDIT (inv.) in respect of entering into transaction of shares of Swarnsarita Gems Ltd. It is respectfully submitted that assessing officer has not verified from the assessee that whether he has entered into the transactions of aforesaid scrip and issue the notice u/s 148. Therefore, the notice issued under section 148 is illegal and bad in law.

2. That the appellant has raised objection in respect of reopening of assessment vide letter dated 13.11.2018. However the learned assessing officer has made the assessment without disposing off the objections raised by the assessee. It is the settled position of law that where assessee has raised some objections in respect of reopening of assessment that assessing officer has to first disposed off the objections and assessment order can only be passed thereafter.

In the instant case, assessing officer has passed the order without disposing off the objection, therefore, the order passed by the assessing officer is illegal and bad in law and thus deserves to be quashed and set aside.

In support of aforesaid contention, we have relied upon the following Judgment:

The procedure for reassessment proceedings has been prescribed by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO 259 ITR 19 (SC). In this case it is categorically held that the reasons recorded must be provided to the assessee and the objections as made by the assessee are required to be dealt with the Assessing Officer

In the present case, other than providing the reasons recorded the Assessing Officer had not dealt with the objections though the assessee had filed their objections. Therefore, the assessment completed by the Assessing Officer without first deciding the objections against the reasons for reopening is bad in law. Since the Assessing Officer has committed an illegality in not deciding the objections against the reopening of the assessment separately and prior to the completion of the assessment. Therefore the order passed by the Assessing Officer is in violation of the decision of the Hon'ble Supreme Court in the case of GKN Drive Shaft India Ltd. (supra).

3. That during the year under consideration assessee has not entered into transactions of sell or purchase of scrip naming M/s Swarnsarita Gems Ltd (Formerly Known as shyam Star Gems Limited). This fact is evident from the D mat holding statement as at 31/03/2010 and 31/03/2011. From these statements it is clear that there was no transaction of aforesaid scrip (M/s Swarnsarita Gems Ltd).

4. That assessee has not booked any loss from the sale of shares of aforesaid scrip which is evident from the computation submitted earlier.

5. That assessing officer has wrongly stated that assessee has booked loss of Rs.330,056/- from the sale of aforesaid scrip and make the addition of Rs.330,056/- u/s 68. It is respectfully submitted that no such loss has been claimed by the assessee. It is pertinent to mention here that this fact has also been mentioned by the assessee in its reply at the time of assessment. Still the assessing officer has make the addition of Rs.330056/- on surmises and conjecture. Therefore, the order passed by the learned assessing officer is bad in law.

6. That while mentioning the aforesaid contention, assessing officer has stated that he is possessing material evidence in support of your contention that assessee has booked loss of Rs. 330056/-, however, no such material has been provided to the assessee. It is pertinent to mention here that vide our reply cum objection for issuing notice u/s 148 dated 13.11.2018 assessee has demanded the aforesaid material, but it has not yet been provided to us. Therefore, the order passed by the assessing officer is non speaking order and thus deserves to be quashed and set aside.

In view of above it is humbly requested to please dismiss the appeal filed by the Department. ”

6. The Id DR representing the revenue has relied upon the finding of Id. AO and submitted that the finding of Id. CIT(A) is without speaking order

dealing with the contentions of the Assessing Officer. The Id. DR, as regards the objection to the fact that the appeal is not maintainable he submitted that the same falls in the exemption criteria of circular of CBDT. Therefore, the appeal of the revenue is maintainable.

7. On merits, the Id. AR of the assessee submitted that the Id. CIT(A) categorically held that the assessee had not made any of the transactions in the scrip had claimed by the Id. AO without has not making any further enquiry made the additions a propose to these arguments, the Id. AR of the assessee directed to file an affidavit of the assessee. The assessee in the affidavit submitted as under:-

AFFIDAVIT

02 NOV 2023

I, **Giriraj Khandelwal**, Karta of **GIRIRAJ KHANDELWAL HUF** (PAN : AABHG9837) in the matter of Appeal No. ITA 465/JPR/2023 for the assessment year 2011-12, do hereby solemnly affirm and declare on oath as under:

1. That for the Assessment year 2011-12, I have filed my ITR on 30/03/2012 declaring total income of Rs.530260/-
2. That in compliance of notice u/s 148 for the Assessment year 2011-12, I have filed my ITR on 04/09/2018 declaring total income of Rs.530260/-
3. That during the year under consideration I was not holding Share of M/S SWARNSARITA GEMS LTD (Formerly known as Shyam Star Gems Ltd).
4. That during the year under consideration I has never entered into the transactions of sale and purchase of scrip M/S SWARNSARITA GEMS LTD (Formerly known as Shyam Star Gems Ltd).
5. That I have not booked loss on sale of aforesaid scrip, which is also evident from the Computation of total income attached in the written submission of the Appeal before ITAT.

Date: 02 NOV 2023

VERIFICATION

I, **Giriraj Khandelwal**, Karta of **GIRIRAJ KHANDELWAL HUF** do hereby verify that the aforesaid para 1 to 5 are true & correct in my personal knowledge. No material fact has been concealed. So help me God.

Date: 02 NOV 2023

ATTESTED
02-11-2023
NOTARY PUBLIC
GOVT. OF INDIA
MUMBAI (INDIA)

For Giriraj Khandelwal HUF
Giriraj Khandelwal
Karta
Signature

For Giriraj Khandelwal HUF
Giriraj Khandelwal
Karta
Signature

8. We have heard the rival contentions and perused the material placed on record. The bench noted that the Id. CIT(A) held that the assessee had not made any of the transactions in the scrip claimed by the AO. The assessee categorically submitted before us the computation of income and submitted that the assessee has not claimed any loss of Rs. 3,30,056/- for

which the addition is made by the Id. AO. The Id. DR did not controvert the affidavit filed by the assessee and finding of Id. CIT(A). Even the claim of the assessee u/s. 10(38) of long term capital gain is of the Bank of Rajasthan only. Considering the factual and non disputed facts we see no merit in the appeal of the revenue and therefore, the same is dismissed.

In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 22/11/2023.

Sd/-

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

(राठौड कमलेश जयंतभाई)

(Rathod Kamlesh Jayantbhai)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 22/11/2023

*Ganesh Kumar, PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- ITO, Jaipur
2. प्रत्यर्थी / The Respondent- Giriraj Khandelwal HUF, Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 465/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar