

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos. 155 & 156/Ind/2023
(Assessment Year: 2011-12 & 2012-13)

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| Himanshu Botadara, HUF, 17/4, Snehaltaganj, Indore. | vs. | I.T.O., 4(3), Indore. |
| (Appellant / Assessee) | | (Respondent/ Revenue) |
| PAN: AABHH0744M | | |
| Assessee by | Shri V.N. Dubey & Shri Ibrahim Kannodwala, Adv. | |
| Revenue by | Shri Ashish Porwal, Sr. DR | |
| Date of Hearing | 07.11.2023 | |
| Date of Pronouncement | 11.12.2023 | |

ORDER

Per Vijay Pal Rao, JM:

These two appeals by the assessee are directed against two separate orders of Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, both dated 22nd February, 2023, for the assessment years 2011-12 & 2012-13 respectively.

2. The assessee has raised common grounds in these two appeals involving common and identical issue except the quantum of addition made by the AO.

3. The grounds raised for the assessment year 2011-12 are reproduced as under :-

- (i) *That in the facts and circumstances of the instant case the Ld. CIT(A) has erred in upholding the action of ld. AO of initiation of re-assessment proceedings u/s 147/148 of the Income-tax Act, 1961.*
- (ii) *That Ld. CIT(A) erred in not appreciating the very fact appellant assessee u/s 44AD of the Act is not required to maintain books of accounts thus, the AO cannot have made addition u/s 68 of the Act.*
- (iii) *That in the facts and circumstances of the instant case the Ld. CIT(A) has erred in upholding the action of ld. AO in arbitrarily computing the alleged gross total income of the appellant in the sum of Rs. 7,11,889 in respect of assessment year 2012-13.*
- (iv) *That in the facts and circumstances of the instant case the Ld. CIT(A) has erred not appreciating the very fact that ld. AO has made a hypothetical addition of Rs. 2,09,239/- as unexplained cash credit within the meaning of section 68 of the Income-tax Act, 1961.*
- (v) *That on the facts and circumstances of the case the Ld. CIT(A) erred in not considering the pre-requisite for invoking the provisions of section 68 is credit in the books of accounts of assessee, if any. In the case on hand, since the appellant assessee has not entered into transaction of neither purchase of the share of M/s. Twenty First Century India Limited nor sold the same, therefore, no credit entry is found in books of accounts of appellant assessee, hence the addition u/s 68 of the Act is not tenable in absence of credit entry in the books of assessee.*
- (vi) *That on the facts and circumstances of the case the Ld. CIT(A) failed to appreciate that the appellant has never entered into the alleged share transaction in the shares of M/s. Twenty First Century India Limited during financial year 2010-11.*

- (vii) That on the facts and circumstances of the case the Ld. CIT(A) failed to appreciate that the assessment order dated 24th December, 2018, passed by the ld. AO is merely based on surmises and conjectures and against the facts and evidences on records, illegal, invalid, unreasonable and/or otherwise perverse to law.*
- (viii) That the Ld. CIT(A) failed to understand that ld. AO has made the aforementioned addition only on the basis of information received from the Kolkata Investigation Wing i.e., ad hoc and estimated basis only.*
- (ix) That the addition made by the AO and confirmed by the Ld. CIT(A) without any base, without proper efforts to find out the veracity & authenticity of information neglecting the detailed submission/evidences produced before both the lower authorities, which is unjustified and uncalled for.*

4. The assessee HUF and Proprietor of Anjay Coal Company is engaged in the business of reporting and monitoring as agencies as well as deriving income from purchase and sale of share and securities. The assessee filed its return of income for the assessment year 2011-12 on 16.12.2011 declaring total income at Rs. 5,02,650/-. Thereafter, the AO reopened the assessment by issuing a notice u/s 148 on 31st March, 2018, for assessing the income escaped assessment on account of bogus transaction of purchase and sale of shares of M/s. Twenty First Century India Limited. In response to notice u/s 148, the assessee filed return of income on 18.4.2018, declaring the same income as it was declared in the original return of income. The AO completed the assessment u/s 147 read with Section 144 of the Income-tax Act, 1961, on 24th December, 2018, whereby an addition u/s 68 of the Act was made

to the tune of Rs. 2,09,239/- being bogus long term capital gains. The assessee challenged the action of the AO before the Ld. CIT(A), and contended that the assessee has not carried out any transaction in the shares of M/s. Twenty First Century India Limited and therefore, the addition made by the AO is highly arbitrary or unjustified. The Ld. CIT(A) has rejected the contention of assessee and confirmed the addition made by the AO while passing the impugned order.

5. Before the Tribunal, the Ld. Counsel for the assessee has submitted that the AO has reopened the assessment on the basis of the information received from Kolkata Investigation Wing in respect of some bogus transaction of capital gain from the purchase and sale of shares of M/s. Twenty First Century India Limited. The AO has recorded the reasons for reopening of the assessment placed at page no.69 of the paper book without verifying the record available with the AO in the shape of the return of income filed by the assessee u/s 139 of the Income-tax Act, 1961. The Ld. Counsel for the assessee has submitted that even in the reply to the notice u/s 142(1), the assessee has denied having carried out any transaction of purchase and sale in the shares of M/s. Twenty First Century India Limited and, therefore, there is no credit entry in the books of accounts of the assessee. He has, thus, submitted that the provisions of section 68 can be invoked only when there is a credit entry in the books of accounts of the assessee. The assessee has neither claimed any exempt income on account of long term capital

gain arising from the purchase and sale of shares of M/s. Twenty First Century India Limited nor any such transaction is reflected in the Demat account or the contract notes of purchase and sale of the shares. Thus, the ld. Counsel for the assessee has submitted that the addition made by the AO u/s 68 of the Act is not tenable in the absence of credit entry in the books of accounts. The AO as well as Ld. CIT(A) has failed to appreciate that under section 68 of the Act, it is precondition that a credit entry appearing in the books of accounts of the assessee for treating the same as unexplained cash credit in the absence of proper explanation by the assessee. He has further submitted that the order passed by the AO as well as Ld. CIT(A) are contrary to the record. The assessee has filed all the relevant details in response to the notice issued by the AO. This fact of reply filed by the assessee is also reflected in the assessment order wherein the AO has accepted that the assessee filed submission through Dak and denied having any transaction of purchase and sale of shares of M/s. Twenty First Century India Limited. The Ld. Counsel for the assessee has submitted that the relevant books of accounts, bank statement in relation to these transactions was produced during the course of assessment proceedings. However, the AO has passed the order u/s 144 by ignoring the same. Thus, the ld. Counsel has submitted that the reopening of the assessment as well as the addition made by the AO are invalid when there is no credit entry in the books of the

assessee in respect of alleged transaction for purchase and sales of M/s. Twenty First Century India Limited.

6. On the other hand, the Ld. Departmental Representative has relied upon the orders of authorities below and submitted that the AO has passed an ex parte order due to non-submission of the relevant details and record by the assessee. The Ld. CIT(A) has also acknowledged this fact that in the absence of the relevant record, the AO has passed the order u/s 144 of the Act.

7. We have considered the rival submissions as well as relevant material on record. The assessee filed its return of income on 16th December, 2011, declaring total income of Rs. 5,02,650/-. In the original return of income, the assessee declared income from house property, income from business or profession, income from capital gain and income from other sources. There is no dispute that the assessee is doing trading in the shares through its Demat account the copies of which were filed by the Ld. Counsel of the assessee as directed by the bench. On going through the details of Demat account with HDFC Bank Limited and IDBI Bank Limited, we find that there is no transaction of any purchase or sale of the shares of M/s. Twenty First Century India Limited. The AO has reopened the assessment by issuing of notice u/s 148 of the Act on 31st March, 2018. The reasons recorded by the AO for reopening of the assessment placed at page no. 69 of the paper book are as under :-

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(59) (30) //ANNEXURE-A//

Name of the Assessee :- Himanshu Botadara (HUF)
Assessment year :- 2011-12
PAN :- AABHH0744M

The assessee is a HUF and filed his return of income for A.Y. 2011-12 on 16.12.2011 declaring total income of Rs. 5,02,650/-.

An Information regarding Dissemination of Beneficiaries/Bogus LTCG/STCL in the case of Penny stock "Twenty First Century (India) Limited received from Deputy Director of Income Tax (Investigation)-1, Indore via official e-mail dated 29/03/2018.

The survey actions were conducted by the Kolkata directorate on various share brokers, during the search the share brokers accepted their role in the entire scheme of providing accommodation entry of bogus LTCG/STCL in the case of Penny stock "Twenty First Century (India) Limited". From in depth analysis of penny stock involved, statement of brokers Kolkata Directorate found that the beneficiary Shri Himanshu Botadara (HUF) PAN:AABHH0744M has taken accommodation entries of pre-arranged Long Term Capital Gain of Rs. 2,09,239/- in the scrip of Twenty First century India Limited.

From the above facts, it is clear that Twenty First Century (India) Limited was engaged in the business of giving accommodation entries which are routed through the company under his control. Further, it is revealed in the enquiry that Shri Himanshu Botadara (HUF) is also one of the beneficiaries, who has received accommodation entry of Rs 2,09,239/-

In view of above it is clear that the assessee has introduced its own undisclosed money of Rs 2,09,239/- by the way of accommodation entry.

Considering all the facts and circumstances of the case as discussed above, I have therefore, reason to believe that an amount of Rs 2,09,239/- which was chargeable to tax has escaped assessment within the meaning of section 147 of the IT Act, therefore, notice u/s 148 of IT Act, 1961 is issued for assessing the case u/s 147 after obtaining approval u/s 151 from the Pr. Commissioner of Income tax-II, Indore.

(J.P. Chandravanshi)
Income tax officer -5(3) Indore

Himanshu Botadara HUF

[Signature]

Karta/Member

Thus, the AO initiated the proceedings u/s 147 on the basis of information received from Kolkata Investigation Wing regarding bogus accommodation entries for long term capital gains in penny stock of M/s. Twenty First Century India Limited of Rs. 2,09,239/-. The AO has issued notice u/s 142(1) as well as summons u/s 131 to the assessee for personal attendance and production of documents. The assessee submitted letter in the Dak and denied having any transaction of purchase and sale of the alleged shares of M/s. Twenty First Century India Limited. This fact has been recorded by the AO in para 4 of the assessment order as under :-

“4. As per the information received from Pr. DIT (Investigation) and ADIT (Investigation) and Unit-4(I), Kolkata the assessee has traded in script of Twenty First Century India Limited during the year under consideration value of Rs. 2,09,239/-. In this case the notice u/s 142(1) was issued on 11.05.2018 and 07.09.2018 but the assessee has not furnished the required documents for examination of the transaction. After that the summons u/s 131 of the Income-tax Act, 1961, was also issued on 30.11.2018 for personal attendance of the assessee and asked to produce the documents. But the karta of the assessee has not attended for the examination. He has submitted the letter through DAK and stated that the assessee has not made the transaction with Twenty First Century India Limited. It is, therefore, the undersigned has no option for passing the assessment order u/s 144 of the Income-tax Act, 1961, on the basis of material available on record. As per the information received and material available on record, the assessee has traded 646 shares for trade value of Rs. 2,09,239/-.”

Thus, the AO has acknowledged the reply filed by the assessee, however, without ascertaining the facts that whether the assessee has actually carried out any transaction in the shares of M/s.

Twenty First Century India Limited and thereby availed the benefit of bogus long-term capital gain or not passed this impugned assessment order. It is pertinent to note that the assessee has not declared any such long-term capital gain either in the return of income or reported in the books of accounts. Therefore, before making the addition on account of bogus long term capital gain u/s 68 of the Act, the AO ought to have ascertained the correct facts about the alleged transaction of accommodation entries of bogus capital gains. In the assessment order, the AO has proceeded only on the basis of the report of Investigation Wing alleging the accommodation entries of bogus capital gain of Rs. 2,09,639/-.The AO has finally made this addition in para 7.1 and 7.2 as under :-

7.1 On the basis of report as above, for the explanation the summon u/s 131 of the Income-tax Act, 1961,, was issued and served to the Karta of the assessee but he was not attended in this office. In response he has submitted the letter through DAK and stated that the assessee has not made the transaction with M/s. Twenty First Century India Limited. The assessee submitted nothing further. It is, therefore, the undersigned has no option for passing the assessment order u/s 144 of the Income-tax Act, 1961,, on the basis of material available on record. As per the information received and material available on record, the assessee has traded 646 shares for trade value of Rs. 2,09,239/-. The information received from the Investigation Wing of the Department has to be taken into

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consideration. Mere denial of the transaction by the assessee without any supporting evidence cannot be accepted.

7.2 I view of the detailed discussion above and after due verification of facts and circumstances of the case, it has been established beyond doubt that the assessee's income from long term capital gains from the sale of shares of M/s. Twenty First Century India Limited is bogus, and is an accommodation entry taken for the purposes of converting his own black money into white. Therefore, the trade value of Rs. 2,09,239/- is an unexplained cash credit as understood within the meaning of Section 68 of the Income-tax Act, 1961, and accordingly Rs. 2,09,239/- is being added to the assessee's total income under this section."

Thus, the AO has proceeded purely on the assumption that the assessee has availed the accommodation entries of bogus capital gains on account of purchase and sale of shares of M/s. Twenty First Century India Limited. This assumption of the AO is not based on the actual facts emerging from the record in the shape of books of accounts of the assessee or entries in the Bank account of the assessee. We do not find in the Dmat account of the assessee any such entries of purchase in respect of M/s. Twenty First Century India Limited nor the assessee has claimed such long term capital gain in the return of income. Therefore, when there is no credit entry in the books of accounts of the assessee, addition u/s 68 of

the Act made by the AO de-hors the essential condition of any sum found credited in the books of the assessee as contemplated u/s 68 of the Income-tax Act, 1961. The Ld. CIT(A) has upheld the addition made by the AO by referring citations of various case laws, but without giving a finding on the fact whether the alleged transaction has actually been carried out by the assessee or not. Therefore, it is manifest from the record that neither the AO nor the Ld. CIT(A) has made any attempt to ascertain the correct fact about the alleged transaction of availing accommodation entries in the shape of long term capital gain by the assessee . Once the assessee has denied the alleged transaction and it is also not found recorded in the books of accounts including the Dmat account of the assessee maintained by the Banks then the addition made by the AO is purely on the basis of assumption as reported in the communication received from the Kolkata Investigation Wing is not sustainable in law and liable to be deleted. We order accordingly.

8. For the assessment year 2012-13, an identical addition has been made by the AO for a sum of Rs.4,06,860/- u/s 68 of the Income-tax Act, 1961, based on the report of the Kolkata Investigation Wing that the assessee has availed accommodation entry of bogus long term capital gain from purchases and sales of shares of M/s. Twenty First Century India Limited.

9. Since the facts for the assessment year 2012-13 are identical and involving the same issue of availing accommodation entry of long term capital gain in the same script as it is for

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A.Y.2011-12 therefore, in view of our finding for assessment year 2011-12, the addition made by the AO for the assessment year 2012-13 is not sustainable in law and liable to be deleted. We order accordingly.

10. In the result, these two appeals filed by the assessee are allowed.

Order pronounced in the open court on 11.12.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 11.12.2023

CPU/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore