

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

**BEFORE SHRI ABY T VARKEY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 3227/Mum/2023
(Assessment Year: 2011-12)**

Subhash Damodar Annamwar 804-B Wing, Juhu Gruhaswapna Society, Gulmohar Cross Road No.4, JVPD, Vile Parle West, Mumbai - 400049 PAN : AAQPA5379J	Vs.	Income Tax Officer 34(3)(4) Kautilya Bhavan, BKC,0 Bandra East, Mumbai – 400 051
Appellant)	:	Respondent)

Appellant/Assessee by : Shri Bhupendra Shah
Revenue/Respondent by : Dr. Yogendra T. Wakare

Date of Hearing : 20.02.2024
Date of Pronouncement : 22.02.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax (Appeals) / NFAC [for short 'the CIT(A)] dated 17.05.2023 for the AY 2011-12.

2. The Assessee has raised the following grounds of appeal:

1. In the facts and circumstances of the case and in law, the learned A.O. erred passing order u / s 143(3) r.w.s. 147 merely on the basis of borrowed satisfaction, presumption and surmises

*2. In the facts and circumstances of the case and in law, the learned A.O. erred adding LTCG on sale of shares M / s SVC Resources Ltd. worth Rs * 4.08 * 0.473 / . u / s 68 claimed as exempt by the Appellant.*

- a. On the basis of suspicion and presumption*
- b. Based on third party statements*
- e. Without any proof of refund of cash*
- d. By wrongly correlating general data of listed company with the Appellant*
- e. by making only guesswork & overlooking documents and by relying upon cases not applicable in this case*
- f. By not offering the opportunity to cross-examine the brokers and without furnishing copies of statements,*

3. In the facts and circumstances of the case and in law, the learned A.O. erred in adding alleged commission paid to entry providers amounting to Rs. 12,254/- being 3% on LTCG benefit derived on an ad-hoc basis

4. In the facts and circumstances of the case and in law, the learned A.O. erred in levying interest u/s 234 & initiating penalty u/s 271[1][c]

5. In the facts and circumstances of the case and in law, the learned CIT[A] erred in confirming all above additions.

3. The Assessee is an individual having income from salary and income from other sources. The Assessee filed the return of income for AY 2011-12 on 31.3.2012 declaring a total income of Rs.1,96,250/-. The Assessing Officer (the AO) received information from Investigation Unit regarding beneficiaries of Penny Script M/s. SVC Resources Ltd., which was providing accommodation entry towards capital gain and that the assessee has during the year has sold shares in the said company for a consideration of Rs.4,08,473/-. The AO accordingly issued a notice U/s 148 of the Income Tax Act, 1961 (The Act) calling on the Assessee to file the return of income. The Assessee filed a letter requesting that the original return of income being treated as return filed in response to notice u/s/ 148 of the Act. The Assessee also filed details with regard to the share transaction such broker note, statement of DEMAT account, bank statement etc. The AO based on the various information collected by the Investigation Wing such as the financials

of the company concluded that the transaction entered into by the Assessee is not genuine stating that the inordinate increase in the share price of the is not properly supported by the financial statements. Accordingly the AO treated the entire sale consideration as addition u/s 68 of the Act. The AO also made addition u/s. 69C assuming 3% commission was paid to the accommodation entry providers amounting to Rs.12,254/-. Aggrieved, the Assessee filed appeal before the CIT(A). The CIT(A) confirmed the additions made by the AO stating that mere production of documents and contracts alone cannot prove the genuineness of the transaction and that no prudent investor would invest in a company which does not have any growth in their business. Accordingly, the CIT(A) confirmed the additions made by the AO. The Assessee is in appeal before the Tribunal against the order of the CIT(A).

4. There is a delay in filing the appeal by the assessee and the assessee filed an affidavit in this regard stating that the accountant who was looking after the affairs of the assessee has left due to which there was some communication gap about the appeal being disposed of by the CIT(A). The assessee had further submitted that once the assessee came to know of the order passed by the CIT(A) the appeal before the Tribunal was filed immediately. Accordingly the assessee had prayed that the delay be condoned.

5. Having heard both the parties and perused the material on record, we are of the view that there is a reasonable and sufficient cause for the delay in filing the appeal before the Tribunal. Therefore following the Hon'ble Supreme Court decision in the case of Collector, Land Acquisition Vs. MST.Katiji & Ors., (167 ITR 471) (SC) we condone the delay in filing the appeal and admit the appeal for adjudication.

6. The Learned Authorised Representative (the Ld. AR) submitted that the Assessee is a salaried employee and has purchased 5029 shares of M/s. SVC Resources Ltd., through online transaction. The Ld. AR further submitted that during the year under consideration, the Assessee sold 1327 shares of the said company for a consideration of Rs.4,08,473/-. The Ld. AR also submitted that merely because the script is held to be of Penny stock, the addition cannot be made in the hands of the Assessee who is an innocent investor in the said script. The Ld. AR drew our attention to the various documentary evidences with regard to the purchase, sale of the sale of the script to submit that the entire transaction was done online through DEMAT account of the Assessee and the proceeds of the entire transaction is routed through banking channels. The Ld. AR also drew our attention to the fact that the Assessee is still holding the balance shares which would prove that the Assessee has entered into the transaction as a regular investor. Accordingly, the Ld. AR submitted that the transaction entered into by the Assessee is genuine and therefore, the addition cannot be sustained under section 68.

7. The learned Departmental Representative (the Ld. DR) on the other hand relied on the order of the lower authorities.

8. We heard the parties and perused the matter on record. The Assessee through share brokers has bought 5029 shares of Pace Electronics Ltd. The name of the said company is subsequently changed to M/s.SVC Resources Ltd. Out of 5029 shares bought the Assessee sold 1377 shares on various dates during the year under consideration. The Assessee has claimed exemption under section 10(38) of the gain arising from the said transaction. The AO relied on the investigation report in which the script names M/s. SVC Resources Ltd., was held to be a Penny Stock

and accordingly, reopened the assessment of the Assessee for the reason that the Assessee has transacted in the said script. We noticed that the reason for AO to make addition in the hands of the Assessee is that the price of the script is jacked up within a short period of time and that the financial performance of the company does not support the increase in the share prices. We further, noticed that the AO though has elaborated on the modus operandi for how Penny Stock companies are used for converting cash, has not recorded any specific findings to incriminate the Assessee or to establish that the assessee in any way is involved in rigging the price of the shares. The assessee in order to support the genuineness of the transaction has submitted all the relevant documents in the form of broker bill, contract summary, bank statement, etc. (page 39 66,125,and 149 of paper book) It is also relevant to note that the lower authorities have not recorded any adverse finding with regard to the various documents submitted by the assessee. From the perusal of the broker statement with the list shares held by the assessee in various companies (page 53 of paper book) we noticed that the assessee is holding investments in various companies to the tune of Rs. 39,35,416/- which includes 9738/- shares of M/s. SVC Resources Ltd. Therefore, we see merit in the contention of the Id. AR that the assessee is a regular investor and that in his normal course of operation has sold a part of his investments made in M/s. SVC Resources Ltd. The fact that the assessee continues to hold the portion of shares also goes to substantiate the claim that assessee is a regular investor.

9. The Revenue has relied on the investigation report in which M/s. SVC Resources Ltd., is listed as a company whose script is used as penny stock but has not recorded any finding to the effect that the assessee is involved in rigging the price of the shares of SVC Resources Ltd. We in this regard notice that the Hon'ble

Bombay High Court in the case of PCIT Vs. Indrabadan Jain, HUF has considered a similar issue where it has been held that

“3. Respondent had shown sale proceeds of shares in scrip Ramkrishna Fincap Ltd. (RFL) as long term capital gain and claimed exemption under the Act. Respondent had claimed to have purchased this scrip at Rs.3.12/- per share in the year 2003 and sold the same in the year 2005 for Rs.155.04/- per share. It was A.O.’s case that investigation has revealed that the scrip was a penny stock and the capital gain declared was held to be accommodation entries. A broker Basant Periwal & Co. (the said broker) through whom these transactions have been effected had appeared and it was evident that the broker had indulged in price manipulation through synchronized and cross deal in scrip of RFL. SEBI had also passed an order regarding irregularities and synchronized trades carried out in the scrip of RFL by the said broker. In view thereof, respondent’s case was reopened under Section 148 of the Act.

4. The A.O. did not accept respondent’s claim of long term capital gain and added the same in respondent’s income under Section 68 of the Act. While allowing the appeal filed by respondent, the CIT[A] deleted the addition made under Section 68 of the Act. The CIT[A] has observed that the A.O. himself has stated that SEBI had conducted independent enquiry in the case of the said broker and in the scrip of RFL through whom respondent had made the said transaction and it was conclusively proved that it was the said broker who had inflated the price of the said scrip in RFL. The CIT[A] also did not find anything wrong in respondent doing only one transaction with the said broker in the scrip of RFL. The CIT[A] came to the conclusion that respondent brought 3000 shares of RFL, on the floor of Kolkata Stock Exchange through registered share broker. In pursuance of purchase of shares the said broker had raised invoice and purchase price was paid by cheque and respondent’s bank account has been debited. The shares were also transferred into respondent’s Demat account where it remained for more than one year. After a period of one year the shares were sold by the said broker on various dates in the Kolkata Stock Exchange. Pursuant to sale of shares the said broker had also issued contract notes cum bill for sale and these contract notes and bills were made available during the course of appellate proceedings. On the sale of shares respondent effected delivery of shares by way of Demat instructions slip and also received payment from Kolkata Stock Exchange. The cheque received was deposited in respondent’s bank account. In view thereof, the CIT[A] found there was no reason to add the capital gains as unexplained cash credit under Section

68 of the Act. The tribunal while dismissing the appeals filed by the Revenue also observed on facts that these shares were purchased by respondent on the floor of Stock Exchange and not from the said broker, deliveries were taken, contract notes were issued and shares were also sold on the floor of Stock Exchange. The ITAT therefore, in our view, rightly concluded that there was no merit in the appeal.

5. We also find no infirmity in the order passed by the ITAT and no substantial questions of law as proposed in the appeal arises.

6. Appeal dismissed.”

10. Given the facts and circumstances of the case, we are of the considered view that the ratio in the above decision is applicable in assessee's case also and therefore, following the above decision of the Hon'ble High Court, we hold that the LTCG cannot be treated as an income under section 68 of the Act and accordingly, we delete the addition made by the AO.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22-02-2024.

Sd/-
(ABY T VARKEY)
Judicial Member

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Mumbai, Dated : 22.02.2024

Mini Pawar, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai