

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

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 5729/Mum/2019
(Assessment Year: 2015-16)**

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| Shri Ramesh D. Dedhia B-81, Chinar, Rafi Ahmed Kidwai Road, Opp. Azad Nagr, Wadala (West), Mumbai-400031. PAN : AABPD9878L | Vs. | ITO, Ward-16(3)(3), Room No. 447, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020. |
| Appellant) | : | Respondent) |

Appellant/Assessee by : Shri Nishit Gandhi, CA
Revenue/Respondent by : Shri Srinivas, Sr. DR

Date of Hearing : 11.01.2024
Date of Pronouncement : 25.01.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax (Appeals)-7, Mumbai [for short 'the CIT(A)'] dated 18.07.2019 for the AY 2015-16. The assessee has raised the following grounds:

“ON NATURAL JUSTICE:

1.1 In the facts and circumstances of the case and in law the order passed by the Learned Commissioner of Income Tax (Appeals) - 7, Mumbai (the CIT(A) which in turn affirmed the order passed by the Learned Income Tax Officer - 16 (3)(S), Mumbai (the AO) is bad in law and deserves to be quashed since the

Assessment order passed by the AO is in itself void as the same is passed in gross violation of principles of Natural Justice.

ON MERITS:

2.1 In the facts and circumstances of the case and in law, the addition of Rs. 22,33,264/- made us 68 by the AO and as affirmed by the CIT(A) is bad in law and deserves to be deleted.

2.2 While affirming the said addition the Ld. CIT (A) failed to appreciate that:
(i)

The addition has been made merely on the basis of surmises and conjectures and based on some extraneous and irrelevant considerations while completely ignoring the relevant documentary evidences and material as furnished by the Appellant;

The addition is made on the basis of some uncontroverted statements of some third parties before some other Authority and in fact the said parties are not even known to the Appellant;

iii. The Appellant could not be asked to prove the negative and in fact admittedly there is no concrete evidence with the AO or even the CIT(A) on the basis of which the said addition has been made; and;

iv. Even otherwise the addition made on the basis only of some third party statements is not sustainable since the Appellant was neither come provided the material gathered at the back of the Appellant and used against him and was also not granted an opportunity to cross examine the parties whose statements were used against the Appellant in spite of specific requests in this regard.

2.3 In any case, the addition made by the AO and as affirmed by the CIT(A) deserves to be deleted since the same is made without classifying the same under any head as mandatorily required us 14 and as such the same is made without any application of mind to the facts and evidences on record in the present case.”

2. The assessee is a Chartered Accountant by profession and filed the return of income for AY 2015-16 on 27.08.2015 declaring a total income of Rs. 11,01,180/-. The case was selected for scrutiny under CASS and notice under section 143(2) of the Income Tax Act (the Act) was duly served on the assessee. During the course of assessment proceedings, the Assessing Officer (for short "AO") noticed that in

the return of income the assessee has declared Long Term Capital Gain (LTCG) of Rs. 22,33,264/- on the sale of shares of M/s Pine Animation Ltd. which has been claimed as exempt under section 10(38) of the Act. The AO held the transaction of sale of shares of Pine Animation Ltd. to be none-genuine based on report from the Kolkata Investigation Directorate. The AO treated the entire Capital Gain as an addition under section 68 stating that the assessee failed to discharge the onus of proving the genuineness of the transaction and that the price of the scrip has increased abnormally in a period of two years. Aggrieved the assessee filed the appeal before the CIT(A) who upheld the order of the AO for the same reasons. Aggrieved the assessee is in appeal before the Tribunal.

3. During the course of hearing the ld AR presented arguments on merits and submitted that if the issue is adjudicated on merits then the ground on the legal issue will not be pressed. The ld. Authorized Representative (AR) submitted that the AO has erroneously made the addition under section 68 of the Act for the reason that the assessee has provided all the relevant details with regard to the transactions and that the sale proceeds are received through a broker from Bombay Stock Exchange after paying due Securities Transaction Tax (STT). The ld. AR further submitted that the assessee has evidenced the purchase by providing the copy of purchase bills, broker note, share certificate in the name of the assessee and copy of Demat statement. The ld. AR also submitted that both the AO and the CIT(A) have not found any fault with the documents furnished by the assessee but have made the addition simply on the basis of investigation report and for the reason that there is an abnormal increase in the price of the script. Accordingly, the Ld. AR argued that the addition is based on probability and cannot substitute realty which is evidenced by the assessee through various documentary evidences. The

ld. AR submitted that the investigation report relied on by the AO does not contain anything incriminating against the assessee and that the statement of Mr. Anuj Agarwal which the AO relied also does not mention anything adverse neither about the assessee nor about the broker through whom the assessee carried out the transaction. The ld. AR further argued that merely for the reason that assessee has traded in the shares of the company whose name is mentioned in the investigation report cannot be the reason for making the addition under section 68 of the Act. The ld. AR in this regard relied on the decision of the Bombay High Court in the case of PCIT Vs. Indravadan Jain, HUF (ITA No. 454 of 2018). The ld. AR also drew our attention to the financial statements of the assessee to submit that assessee is a regular investor in various shares and that the assessee is continuing to hold some more shares of Pine Animation Ltd. The ld. AR accordingly, submitted that the assessee is a regular investor. The ld. AR further argued that the AO cannot make the addition under section 68 of the Act without linking the assessee to the findings given in the investigation report and merely for the reason that there has been a substantial increase in the share prices without recording a finding that assessee in any way is connected with the price rigging. In summary the ld. AR submitted that the assessee has discharged his onus to prove the genuineness of the transaction by providing all the documentary evidences in support of the transaction and therefore, no addition can be sustained under section 68 of the Act.

4. The ld. Departmental Representative (DR) on the other hand submitted that the AO has carried out a detailed analysis of the financial statement of Pine Animations Ltd. which goes to prove that the price increase is not based on the financial performance of the company. The ld. DR also submitted that the onus of

the assessee is not discharged merely by filing the documentary evidences pertaining to the transactions. The ld. DR also submitted that the AO had relied on the report of the investigation directorate and the statement recorded that the script of Pine Animations Ltd. is used a penny stock and accordingly, the ld. DR prayed that the order of the AO should be upheld.

5. We have heard the parties and perused the material on record. The assessee had purchased the 10,000 shares of Four K Animation Ltd. on 08.12.2012 through an off-market transaction. These shares were delivered in physical form and was dematerialized in his Demat A/c. Subsequently, the name of the company was changed to Pine Animation Ltd. and there was a shares split in the ratio of 1/10 and accordingly, the assessee got entitled to 1,00,000/- shares of Pine Animation Ltd. Out of this 1,00,000/- shares assessee sold 28,000 shares in the month of November and December 2014 for a consideration of Rs. 22,33,264/- and as per the financial statement submitted for the year ended 31.03.2015 the assessee was holding the balance 72,000/- shares. The contention of the Revenue is that as per the finding of investigation wing of Kolkata which was carried out in respect of various scripts including M/s Pine Animations Ltd. was involved in artificial booking of capital gains and loss. We noticed that the AO in his order has given a detailed report on the *modus-operandi* and how the beneficiaries are artificially booking LTCG with the operator by purchasing the scrip at a very low price and get a cheque by sales script at a very high rate in which case the price of the script is artificially rigged by the operator. The AO for the reason that the assessee has bought the shares of Pine Animation Ltd. at the low price of Rs. 3 per share and has sold the same at a price of Rs. 75 to 81 has treated the LTCG declared by the assessee as non-genuine. It is relevant to mention here that though the AO had

given a detailed finding with regard to how the price increase of Pine Animation Ltd. is not supported by the financial performance of the company, the AO has not recorded any specific finding with regard to whether the assessee is involved in rigging the price of Pine Animations Ltd. 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, share certificate, bank statement, etc.(page 22 to 28 of paper book). It is also relevant to note that the AO without commenting on any of the evidence submitted by the assessee placed reliance upon the report of the Investigation Wing, Kolkata, and the price fluctuation of shares of Pine Animations Ltd., in which the assessee has transacted. The findings of the Investigation Wing, as recorder in para 4.2 to 6.2 of the assessment order, appears to be mere general findings of the investigation, without anything specific to incriminate the assessee. Further, the Revenue has failed to establish how the findings of the Investigation wing are relevant to the assessee's case and whether the price fluctuation of shares of the entities in which the assessee has transacted is in way carried out by the assessee. The Revenue did not bring any material on record to show that the assessee was involved in such price manipulation even after purchasing and selling the shares on the stock exchange through a SEBI registered stock-broker. The AO did not examine or issue summons or notice under section 133(6) of the Act to the broker through whom the assessee has traded in shares of aforesaid company for the purpose of testing the genuineness of the transaction and that the *modus operandi* as has described is actually carried out by the assessee. We also notice that the assessee had made a very detailed submission before the AO stating that the assessee is a Chartered Accountant and is involved in regularly investing in stocks for the last 25 years. The fact that as per financial statement of the assessee for the year ended 31.03.2015, the assessee is holding

investments in various companies to the tune of Rs. 15 lakhs including 72,000/- shares of Pine Animation Ltd (page 8 of PB) substantiates the said claim of the assessee. However, we notice that the AO without finding any fault with the evidence submitted by the assessee has proceeded to treat the transaction as non-genuine and the long-term capital gains earned by the assessee as bogus for the reason that the name of scrip is part of Investigation report and there is an abnormal increase in the price within a period of 2 years. Therefore, we seen 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 Pine Animations Ltd. The fact that the assessee continues to hold the portion of shares of Pine Animations Ltd. also goes to substantiate the claim that assessee is not involved in the price manipulation of the impugned shares. On perusal of the the statements recorded from Mr. Anuj Agarwal (page 16 to 24 of PB) we notice that there is no specific mention of the names of neither the assessee nor the broker through whom the assessee carried out the transactions. We in this regard noticed 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 Perival & 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."

6. Given the facts and circumstances of the case and considering the ratio laid down in the above decision of the Hon'ble High Court, we see no merit in the order upholding the treatment of the LTCG as an income under section 68 of the Act.

Accordingly, we delete the addition made by the AO and allow the grounds raised by the assessee on merits.

7. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 25-01-2024.

Sd/-
(NARENDER KUMAR CHOUDHRY)
Judicial Member
**SK, Sr. PS*

Sd/-
(MS. PADMAVATHY S)
Accountant Member

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