

आयकर अपीलीय अधिकरण, कोलकाता पीठ “सी”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
श्री मनीष बोरडलेखा सदस्य एवं , श्री अनिकेशबनर्जी, न्यायिक सदस्यके समक्ष
[Before Shri Manish Borad, Accountant Member & Shri Anikesh Banerjee, Judicial Member]

I.T.A. No. 2622/Kol/2018
Assessment Year: 2014-15

M/s B.L. Tak and Sons (HUF) (PAN: AAEHB 2601 Q)	Vs.	ITO, Ward-34(1), Kolkata
Appellant / (अपीलार्थी)(Respondent / प्रत्यर्थी)(

Date of Hearing / सुनवाई की तिथि	31.01.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	14.03.2024
For the Appellant/ निर्धारिती की ओर से	Shri Miraj D Shah, A.R
For the Respondent/ राजस्व की ओर से	Shri Kiran Chatrapoty, JCIT, Sr. D. R

ORDER / आदेश

Per Anikesh Banerjee, Judicial Member:

The instant appeal of the assessee was filed against the order of Ld. Commissioner of Income-tax (appeals)-3, Kolkata [in brevity ld. ‘CIT(A)’] dated 14.09.2018 passed u/s 250 of the Income Tax Act, 1961 (in brevity the ‘Act’) for assessment year 2014-15. The impugned order was emanated from

the order of the Id. Income-tax Officer, Ward-34(1), Kolkata (in brevity the 'AO') passed u/s 143(3) of the Act dated 28.12.2016.

2. The assessee has taken the following grounds of appeal:

"1. That the order passed by the Ld. CIT(A) u/s 250 confirming the additions and disallowances made by Ld. AO is contrary to the law and facts of the case.

2. That the Ld. CIT(A) erred in law and facts by confirming the decision of AO without providing the copy of information to the appellant relating to M/s Unno Industries Ltd., M/s Tuni Textile Mill Ltd., M/s Nikki Global Ltd., M/s KDJ Holiday Ltd. and M/s Asianlak Capital Ltd. received from investigation wing which is against the principle of natural justice.

3. That the Ld. AO erred in law as well as in facts in applying principles of human probability for treating short term capital loss on sale of shares as bogus.

4. That the Ld. AO erred in law as well as in facts of the case by adding back the amount of STCL of Rs. 54,13,374/- incurred on sale of scrip of M/s Unno Industries Ltd, M/s Tuni Textile Mill Ltd, M/s Nikki Global Ltd, M/s KDJ Holiday Ltd. and M/s Asianlak Capital Ltd. as unexplained cash credit u/s 68 of the I.T.Act, 1961.

5. That the Ld. AO has erred in law as well as on the facts by adding unexplained towards commission given by the appellant for bogus STCL of amounting of Rs. 10,827/- u/s 69C of the Income Tax Act, 1961 on estimation and assumption basis.

6. That the appellant craves to leave, add or amend any of the grounds during the course of appellant proceedings.

3. The Registry has informed us that the appeal was filed with a delay of 4 days. The assessee submitted the condonation petition and the reason was explained that the assessee's mother was in operation, so the delay was caused for four days. The Ld. D.R had not made any objection for condoning of delay. Accordingly, we condone the delay of four days for filing the appeal.

4. Brief fact of the case is that the assessee is a Hindu Undivided Family. During the impugned assessment year, the assessee set off a loss amount of Rs. 54,19,374/-. The assessee filed the return and regularly carry on the business of share trading and investment. The Ld. A.R submitted that details of share list but only the loss from sales of share of Tuni Textile is brought forwarded from earlier years and set off in this impugned assessment year. But other losses have occurred in share trading during this financial year. The revenue has considered the losses as sham related to transaction with penny stock loss and added back to the total income of the assessee u/s 68 of the Act.
5. Aggrieved assessee filed an appeal before Ld. CIT(A). The Ld. CIT(A) upheld the assessment order. Being dissatisfied on the appellate order the assessee filed an appeal before us.
6. The Ld. A.R vehemently argued and filed paper book which is kept in the record. The Ld. A.R first invited our attention in the list of trading during this financial year which is in **APB page no. 4** is reproduced as below:

STATEMENT SHOWING PURCHASES & SALE OF EQUITY SHARES

TABLE A : DETAILS OF PURCHASES OF SHARES

NAME OF THE BROKER	SEBI REGD. NO.	ADDRESS OF THE SELLER	DATED CONTRACT NO.	DESCRIPTION OF SHARES	NOS.	RATE	VALUE
			01/04/2013	OPENING STOCK TUNI TEXTILES MILLS LTD	6000	207.04	1242240
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	01/08/2013	PURCHASES NIKKI GLOBAL FINANCE LTD	1800	817.3	1471140
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	24/12/2013	PURCHASES NIKKI GLOBAL FINANCE LTD	1100	946.66	1041330
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	07/10/2013	PURCHASES ASIANLAK CAPITAL LTD	11000	91.61	1007685
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	31/12/2013	PURCHASES UNNO INDUSTRIES LTD	27000	37.15	1003121
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	17/01/2014	PURCHASES UNNO INDUSTRIES LTD	11000	35	384984
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	09/01/2014	PURCHASES KDJ HOLIDAY LTD	10000	98.28	982765
							<u>7133265</u>

TABLE B : DETAILS OF SALES OF SHARES

NAME OF THE BROKER	SEBI REGD. NO.	ADDRESS OF THE SELLER	DATED CONTRACT NO.	DESCRIPTION OF SHARES	NOS.	RATE	VALUE
SHREE BAHUBALI INTERNATIONAL LTD	INB 010781830	12, INDIA EXCHANGE PLACE, KOLKATA- 700001	07/08/2013	SALES TUNI TEXTILES MILLS LTD	6000	4.17	25006
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	20/03/2014	SALES NIKKI GLOBAL FINANCE LTD	1800	155.56	280007
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	14/03/2014	SALES NIKKI GLOBAL FINANCE LTD	1100	180.5	198546
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	24/03/2014	SALES ASIANLAK CAPITAL LTD	11000	40.4	443387
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	25/03/2014	SALES UNNO INDUSTRIES LTD	38000	13.1	497851
ASHIKA STOCK BROKING LTD	INB 230833437	226/1, AJC BOSE ROAD, KOLKATA - 700020	24/03/2014	SALES KDJ HOLIDAY LTD	10000	26.91	269094
							<u>1713891</u>

TABLE C : DETAILS OF SHORT TERM CAPITAL LOSS (ADDITION U/S 68 OF THE IT ACT, 1961)

DESCRIPTION OF SHARES	QTY.	COST	QTY	SALES	STCG/ STCL
TUNI TEXTILES MILLS LTD	6000	1242240	6000	25006	-1217234
NIKKI GLOBAL FINANCE LTD	1800	1471140	1800	280007	-1191132
NIKKI GLOBAL FINANCE LTD	1100	1041330	1100	198546	-842784
ASIANLAK CAPITAL LTD	11000	1007685	11000	443387	-564299
UNNO INDUSTRIES LTD	38000	1388105	38000	497851	-890254
KDJ HOLIDAY LTD	10000	982765	10000	269094	-713671
					<u>-5419374</u>

The Ld. A.R further placed that there is no capital gain raised by the assessee from this sale of shares only the capital loss is generated. So the human probability will not be applicable in this transaction related to loss of capital by the assessee. The Ld. A.R further argued that the issue is duly covered by the

order of the Co-ordinate Bench of ITAT-Kolkata in the case of **Samrat Finvestors Pvt. Ltd. vs. ITO in ITA No. 840/Kol/2023 for AY 2014-15 date of pronouncement 11.01.2024**. The relevant paragraphs are duly reproduced as below:

“3. The facts qua the first issue raised by the assessee are that the assessee, during the year, has incurred loss of Rs. 3,98,50,208/- which comprised of share trading loss amounting to Rs. 2,87,07,277/- and Rs. 1,11,42,931/- in respect of loss on trading in F & O segment. The Assessing Officer observed from the details filed by the assessee that the assessee has incurred loss in seven (7) shares which were listed on the stock exchange. The list of the stocks are as follows:

<i>Sl. No.</i>	<i>Name</i>
<i>1.</i>	<i>Shree Shakeen Textile</i>
<i>2.</i>	<i>Unno Industries</i>
<i>3.</i>	<i>SRK Industries</i>
<i>4.</i>	<i>Global Infratech</i>
<i>5.</i>	<i>Comfort fincap</i>
<i>6.</i>	<i>Ashika Credit Capital</i>
<i>7.</i>	<i>Nikky Global</i>

The Ld. A.R further invited our attention in para 22 of the order. The relevant paragraph are reproduced as below:

“12. We find force in the contentions raised by the ld. counsel for the assessee. Firstly, in this case, the assessee has not claimed long-term capital gains on account of unrealistic steep rise in the share prices of these scrips traded in as was in the case of PCIT vs. Swati Bajaj &Ors (supra). The Hon’ble High Court had held, under the circumstances, that the burden was upon the assessee to explain the business prudence of investment in these scrips of the companies having negligible financial worth and thereafter of steep rise in their share price resulting into huge capital gains within a short

*span of time. The case before us is of business loss in share trading. The assessee, as observed above, has duly explained the factors and considerations which prevailed for making decision by the assessee company of purchasing in the aforesaid five scrips, which included their financial worth, the market position, their income, dividends etc. Further, it was not a case that the shares shown to have been purchased off market/privately and thereafter they were put into demat account after sufficient lapse of time from the alleged date of physical purchase and then sale of the same within a short span of time after they were accounted in the demat account, gaining high monetary capital gains. In the case of the assessee, the shares were traded on the stock exchange, the same were kept in the demat account of the assessee. There is no allegation of involvement of the assessee or even his share broker in any type of price rigging. There even does not seem any probability of meeting minds of the assessee and/or his share broker and the promoters of the companies. A very peculiar fact which is noted from the assessment order/investigation wing report is that in the list of the persons whose statement was allegedly recorded and who in their statement have admitted of price rigging, **the names of share brokers, entry operators and exit providers** have been mentioned. The facts on the file itself show that there was meeting of minds of the entry operators and the share brokers and exit providers. The price rigging was done by giving benefit to various subscribers with connivance of share brokers and the motive was to convert their unaccounted money into tax exempt long-term capital gains and for that purpose, there were certain persons chosen as exit providers who would buy shares when the share prices would be at its peak and those exit providers thereafter would suffer losses on account of fall in the price of the shares. This specific fact on the file shows that the exit providers were already chosen to execute the plan. The motive was to give the benefit of bogus long-term capital gains to various beneficiaries and to make that plan foolproof, the exit providers were already chosen with a pre-determined planning as to at what stage the beneficiaries of bogus long-term capital gains would be given exit. That perhaps was not dependent upon chance exit providers willing to book bogus short-term capital loss. Neither the name of the assessee nor of his share broker is mentioned in the list of exit providers. The circumstances of this case do not suggest of unnatural and unrealistic human conduct. The Assessing Officer in this case has not pointed out any adverse evidence against the assessee. He has simply relied upon the investigation report which is a general investigation report. The Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj & Ors (supra) has considered the said report and analysed the same vis-a-vis circumstantial evidences like the negligible financial worth of the companies whose shares were traded in, the unrealistic steep hike in the share prices as against the recessive market trend and the failure of the assessee to explain the commercial prudence for making such huge investments. The additions thus have been made on the basis of circumstantial evidences and considering the preponderance of probabilities. Hon'ble Supreme Court in Padmasundra Rao v. State of T.N. 255 ITR 147 (SC) has held that circumstantial flexibility, e.g. one additional or different fact, may make a world of difference between conclusions in two cases:*

“Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

The Hon'ble Karnataka High Court in the case of “Flipkart India (P.) Ltd. v/s Assistant Commissioner of Income-tax”, [2017] 79 taxmann.com 159 (Karnataka) has observed that considering the fact that this blind appreciation of a precedent is a frequent occurrence, in catena of cases, the Hon'ble Supreme Court has clearly opined that a judgment should not be read as a provision of law. A judgment is confined to the facts and circumstances of its own case. It is only when the facts and circumstances in two cases are similar that the ratio of the former case becomes applicable to the latter case.

As discussed above, in the absence of any direct incriminating evidence against the assessee, the distinguishable and weak circumstantial evidence, in our view, do not suggest the preponderance of probability of the assessee being involved in price rigging of the scrips or being the predetermined and pre planned beneficiary of the devised scheme, therefore, the impugned additions are not warranted in this case, and the same are accordingly ordered to be deleted.”

38. *Respectfully following the above decision of this Tribunal in the case of Raigarh Jute & Textile Mills Ltd. vs. ACIT (supra), which is squarely applicable on the facts of the instant case of assessee i.e., M/s. Gateway Financial Services Ltd., we find that the alleged loss has been incurred by the assessee in the regular course of its business. We also note that the statement of various persons recorded by the AO/investigation wing/search team in the course of other proceedings as well as the report of the Kolkata investigation wing, there is no reference to a direct evidence indicating that the transactions in question is in the nature of accommodation entry or for arranging bogus loss. Thus, the addition/disallowance made by the assessee is merely on the basis of preponderance of probabilities. Therefore, in the present case, when the statements and investigation report relied upon by the AO has not been given to the assessee for the purpose of cross-examination as well as rebuttal, we in view of the above decision are inclined to hold that the alleged loss being genuine loss from share trading incurred by the assessee in regular course of business, deserves to be allowed. Thus, impugned disallowance is uncalled for.*

44. *Thus, to conclude we hold that firstly the principles of natural justice have been violated while carrying out the assessment proceedings in the case of the assessee(s) since no opportunity for cross-examination was provided for those persons whose statements have been relied upon by the assessing officer for making the alleged additions. Secondly, there is no direct evidence referred to by the assessing officer or in the report of the investigation Wing that the assessee(s) have made arrangements with the entry operators/company owners for carrying out the alleged transactions. Thirdly, additions made by the assessing officer are merely based on a theory called preponderance of probability that in same type of cases prices are rigged up and down by the entry operators in order to provide accommodation entry to various persons in the form of Long term capital gain and*

though, the assessing authority can apply preponderance of probabilities in some cases on account of surrounding circumstances but so far as the cases on hand are concerned, we notice that firstly some observations were made by the SEBI regarding some fishy transactions carried out in case of few companies. Based on such primary information, the income tax department has carried out extensive enquiries and search and surveys in the case of various entry operators and alleged companies and based on such statements, a theory was established regarding such accommodation/bogus entries in the form of capital gains. However, since in the case of the assessee, SEBI at a later stage has intensively carried out the investigation on the facts of the assessee(s) along with other persons as referred in the order of the SEBI (extracted supra), and after a detailed investigation and examination of records exonerated, the assessee(s) from the charges levelled in the show cause notice issued to them. Therefore, when the assessee(s) have been exonerated and the charges against them have been waived and the transactions of purchase and sale of equity shares carried out by them have been found to be genuine, the theory of preponderance of probabilities is ruled out in the case of the present assessee(s). Thus, when the transactions giving rise to the long term capital gain have been found to be genuine, and as per rules and regulation of SEBI, the finding of the ld. CIT(A) deserves to be set aside and the impugned additions in case of assessee(s) in appeal before us are uncalled for."

7. The Ld. D.R vehemently argued and relied on the revenue authorities.

The Ld. D.R invited our attention in assessment order in page 15 which is reproduced as under:

"9. As discussed earlier, it is seen that the shares of such penny stocks companies where manipulation has been reported are not available of buy/sell to any ordinary investor during the period of manipulative trading. This is generally ensured by way of synchronized trading by the manipulators amongst themselves and/or by utilizing the mechanism of upper / lower circuit of the Exchange. Hence, the bogus LTCG/STCL is available only to beneficiaries who approach the syndicate of manipulators. Therefore, it is crystal clear that the plea of having embarked upon a gambling spree with regard to investments in shares of the said company, is only an afterthought on the part of the assessee to make the sham transaction appear as a legitimate deal.

10. The transactions cannot be considered genuine merely for the reason that they were carried out from the exchange platform with the involvement of the registered broker through the banking channel in a known sequence with no apparent aberrations. In this connection, the theory of preponderance of human probability as pronounced by the Hon. Apex Court in the cases of CIT v. Durga Prasad More [1971] 82 ITR 540 and Sumati Dayal vs. CIT [1995] 80 Taxman 89/214ITR 801 (SC)

is of utmost importance. The Hon'ble Supreme Court in CIT Vs. Durga Prasad More [1971] 82 ITR 540 has held that the Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. The Hon'ble Supreme Court ruled that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered , by applying the test of human probabilities.

11. *From the facts and circumstances of the case, as narrated in the preceding paragraphs, it is quite evident that the entire transaction was a pre-meditated scheme on the part of the assessee to avoid taxes in the garb of bogus long term capital loss. Accordingly, the impugned STCL on the aforesaid script to the tune of Rs. 54,13,374/- is treated as bogus Short Term Capital Loss and the same is being disallowed.*

12. *In view of the above finding, it may be logically inferred that the assessee had taken accommodation entries in the form of bogus Short Term Capital Loss. Market sources reveal that accommodation entries are normally given at brokerage charge of @ 0.2% to 0.5% of the amount involved. In the present case, total accommodation entries taken in the form of STCL was Rs. 54,13,374/-. Accordingly the rate of commission payable towards such accommodation entries is taken @ 0.2% and total commission works out to be Rs. 10,827/-. The source of expenditure of Rs. 10,827/- is remained unexplained and hence the same is added back to the total income of the assessee u/s. 69C of the Act.”*

8. We heard the rival submissions and considered the documents available in the record. We find that the assessee has made the transaction of shares and generated the loss during this financial year. The relevant documents are duly submitted before the revenue authorities and also submitted before the Bench which is reproduced as under:

i.	<i>Ledger of Broker and D-mat Holding Statement from DP showing holding of shares in assessee's D-mat account and subsequent sales</i>	<i>APB page no. 05-09</i>
ii.	<i>Bank statement showing sale consideration received thereof</i>	<i>APB page no. 10-18</i>

There is no question about the veracity of the documents submitted before the authorities. But the revenue-authority is fully relied on the preponderance of probability as per the order of Hon'ble Apex Court in the case of **Sumati Dayal vs. CIT in 214 ITR 801 (SC)** and the order of Hon'ble Calcutta High Court in the case of **PCIT vs. Swati Bajaj in IA No. GA No/2/2022 and Ors. ITAT/6/2022 & Ors. In [2022] 139 taxmann.com 352 (Cal)**. But in case of loss, there is no question of the peak increase of the share value and also the assessee is suffering the capital loss by generating the share loss. We fully relied on the order of Co-ordinate Bench in the case of **Samrat Finvestor Pvt. Ltd.** (supra) the issue is fully covered with the shares of Unno Industries and Nikky Global. The same logic is also applied for other shares also. But only the issue of Tuni Textiles, the loss is not related to impugned year. The set off of loss is brought forwarded from earlier years. We find that the entire addition is made on basis of surmises and conjectures. We accordingly set aside the appeal order and quash the addition amount of Rs. 54,13,374/-. Further the Ld. AO made an addition u/s 69C the commission @ 0.2% on the short-term capital loss of Rs. 54,13,374/- which works out to Rs. 10,827/-. The same addition is also quashed. As a result, the total addition of Rs. 54,24,201/- (Rs. 54,13,374/- + Rs. 10,827/-) is quashed.

9. In the result, the appeal filed by the assessee in **ITA No. 2622/Kol/2018** is allowed.

Order is pronounced in the open court on 18th March, 2024

Sd/-
(Manish Borad/मनीष बोरड)
Accountant Member/लेखा सदस्य

Sd/-
(Anikesh Banerjee /अनिकेश बनर्जी)
Judicial Member/न्यायिक सदस्य

Dated: 18th March, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s B.L. Tak & Sons (HUF), 27, Brabourne Road, Kolkata-700001.
2. Respondent – ITO, Ward-34(1), Kolkata
3. Ld. CIT(A)- 10, Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata