

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, AHMEDABAD**

**BEFORE SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER &
SHRI MAKARAND VASANT MAHADEOKAR, ACCOUNTANT MEMBER**

I.T.A. No.897/Ahd/2023
(Assessment Year: 2014-15)

Deputy Commissioner of Income Tax, Central Circle-1(1), Ahmedabad	Vs.	Sanjay Prataprai Mehta, 1563/A, Aashirwad, Rupani Sardarnagar Road, Gujarat-364001
[PAN No.AABPM2791D]		
(Appellant)	..	(Respondent)

Appellant by :	Shri Sudhendu Das, CIT DR
Respondent by:	Shri Tushar P Hemani, Sr. Advocate & Shri Parimalsinh B. Parmar, A.R.

Date of Hearing	17.04.2024
Date of Pronouncement	24.04.2024

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

This appeal has been filed by the Revenue against the order passed by the Ld. Commissioner of Income Tax (Appeals), (in short “Ld. CIT(A)”), passed for Assessment Year 2014-15 deleting the levy of penalty under Section 271(1)(c) of the Act.

2. The Revenue has taken the following grounds of appeal:-

“1. In the facts and on the circumstances of the case, Ld. CIT(A) erred in directing to delete the penalty levied u/s.271(1)(c) holding that the issue has been decided in favour of appellant by the Hon’ble ITAT, consequential penalty u/s.271(1)(c) levied by the Assessing Officer does not survive particularly as the decision of Hon’ble ITAT has not been accepted by the department and an appeal is being filed before Hon’ble Gujarat High Court.”

3. The brief facts of the case are that during the course of assessment proceedings, the Assessing Officer observed that the assessee in the return of income has claimed exemption of capital gains of Rs. 5,51,09,170/- under

Section 10(38) of the Act on account of sale of shares of M/s. Comfort Fincap Ltd. During the source of assessment the Assessing Officer was of the view that the company was not doing substantial business and not declaring dividend and accordingly disallowed the claim of exemption of Long Term Capital Gain on sale of impugned script for Rs. 5,51,09,170/- and added the same to the total income of the assessee.

4. In appeal, the Ld. CIT(A) sustained the quantum additions made by the Assessing Officer. However, in further appeal before ITAT the Tribunal deleted the additions (in the case of **Sanjay Prataprai Mehta in ITA No. 509/Ahd/2018**), and allowed the appeal of the assessee, with the following observations:-

“12.9 In our view, the income generated by the assessee cannot be held bogus only based on the modus operandi, generalisation, and preponderance of human probabilities. To hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stockbrokers for such an arrangement. In absence of such finding, it is not justifiable to link the fact with the finding unearthed in case of some third party or parties with the transactions carried out by the assessee. Further the case laws relied by the AO are regarding the test of human probabilities which may be of greater impact but the same cannot be used blindly without disposing off the evidence forwarded by the assessee. In simple words, there were not brought any evidence from independent enquiry to corroborate the allegation. As such, the AO has highlighted various suspicious circumstances, but no addition can be made merely on the basis of suspicious circumstances or presumption unless some cogent material evidence brought on record. In this regard, we draw support and guidance from the judgment of Hon’ble Rajasthan High Court in the case of CIT vs. Sumitra Devi reported 49taxmann.com 37 wherein it was held as under:

7. True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the Tribunal, the AO had failed to show that the material documents placed on record by the assessee like broker’s note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO, like the notice under s. 133(6) to the company having been returned unserved, delayed payment to the brokers, and dematerialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.

12.10 The controversy also arises whether a person who genuinely purchases the shares at a low price and sold at high price, therefore, he enjoyed the windfall from such scripts, can he be disallowed the benefit of tax exemption provided under section 10(38) of the Act in a situation where it is established that the share price of the company was rigged up to extend the benefit to certain parties. Justice cannot be delivered in a mechanical manner. In other words, what we see on the records available before us, sometimes we have to travel beyond it after ignoring the same. Furthermore, while delivering the justice, we have to ensure in this process that culprits should only be punished, and no innocent should be castigated. An innocent person should not suffer for the wrongdoings of the other parties. In the case on hand, admittedly there was no evidence available on record suggesting that the assessee or his broker was involved in the rigging up of the price of the script of M/s Comfort Fincap Ltd. Thus, it appears that the assessee acted in the given facts and circumstances in good faith. Furthermore, the shares were held by the assessee for almost 3 years. As such the assessee purchased the impugned shares on 15 th March 2011 and sold the same during the period 27th January to 6 th February 2014. Thus, it was not possible for the assessee to foresee the price of the script in future.

12.11 In holding so, we draw support and guidance from the judgment of Hon'ble Delhi High court in case of Pr. CIT vs. Smt. Krishna Devi reported in 126 taxmann.com 80 where it was held as under:

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCCG, which is exempt under section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This

flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained. 12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.

12.12 Respectfully following the judgment of Hon'ble Delhi High Court (Supra), we hold that in absence of any specific finding against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated as far as long-term capital gain earned on sale of share of M/s Comfort Fincap Ltd is concern.

12.13 We also note that this Tribunal in the case of Parasben Kasturchand Kochar Mehta Lodha & Co. Chartered Accountant vs. ITO bearing ITA No. 549/Ahd/2008 involving identical facts and circumstances has held as under:

7. We have gone through the relevant record and impugned order and heard both the parties. Assessee submitted that he is a customer of ICICI Bank and having demat account of ICICI Securities Ltd. and he has purchased shares through ICICI Securities Ltd. and money has been paid through banking channel. Copies of bank statement and Demat account have been submitted before the lower authorities.

8. Ld. A.R. also drawn our attention towards the statement of Edelweiss Broking Ltd. through the said company shares were sold and also shown us copy of the Contract Note and all these details were furnished before the lower authorities. The assessee has earned long term capital gain from the sale of companies share i.e. Alpha Graphic India Ltd. and Blazon Marbles.

9. In our considered opinion, in such case assessee cannot be held that he earned Long Term Capital gain through bogus company when he has discharged his onus by placing all the relevant details and some of the shares also remained in the account of the appellant after earning of the long term capital gain.

10. Ld. A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.

11. In support of its contention, ld. A.R. also cited an order of Co-ordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab Pvt. Ltd. vs. ITO wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the ld. A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee.

12.14 At this juncture, we also feel pertinent to refer the order of coordinate bench of Indore Tribunal in case of Shivnarayan Sharma & Ors bearing ITANos. 889/Ind/2018, 474,206,60,987/Ind/2019, where in identical fact and circumstances held as under:

16. Since we are adjudicating the above stated common issue on the basis of above assessee namely Shri Shivnarayan Sharma, we note that the assessee purchased 6000 equity shares of Conart Traders Ltd on 22.10.2011 at a cost of Rs.1,50,000/- . There is no restriction under the law to purchase equity shares on off line mode. Vide order dated 22.3.2013 of the Hon'ble Mumbai High Court M/s Conart Traders Limited was merged with M/s SAL and in lieu there of 6000 shares of M/s SAL were received by the assessee in its demat account. After holding the equity shares for more than 12 months since purchased on 22.10.2011, assessee sold the shares of M/s SAL during the period April 2014 to June 2014 through a registered broker and all the transactions of sale of shares took place on the recognised stock exchange. Sale consideration was received in the bank account attached with the Demat account. The detail of the persons purchasing the shares is not provided on the portal of SEBI and all the transactions of purchase and sale took place on the portal through registered brokers under the control of SEBI. M/s SAL has not been struck off as a shell company. Trading of shares of M/s SAL was permitted by SEBI. *Primefacie*, all the conditions provided u/s 10(38) of the Act seems to have been fulfilled by the assessee. 17. As regards the second issue raised is that assessee was not provided opportunity of cross examination, we observe that Ld. A.O has referred to some investigation carried out by the Department in the case of some brokers and other assessee(s) located at Kolkata and other places and there is a reference of the company M/s SAL. However it is not disputed that name of the assessee is not appearing in such report nor any evidence was found by the Ld. A.O which could indicate that assessee was also a part or connected to the alleged racket of providing accommodation entry of bogus LTCG nor any proof of any agreement between the assessee and other persons mentioned in the report has been found. So the basis of addition is primarily on the statement of third party as well as the information gathered from other sources. Perusal of the records shows that the assessee has not been provided any access to such report nor any opportunity was provided to cross examine those persons who accepted to have provided accommodation entries for the bogus LTCG, to the assessee.

18. We observe that all the above stated facts and the issue of genuineness of LTCG and failure of the Ld. A.O to provide opportunity to cross examination by the assessee with regard to the addition made u/s 68 of the Act for the sale consideration received from sale of equity shares of M/s SAL and addition for estimated brokerage expenses has been dealt by the Co-ordinate Bench of Mumbai Tribunal in the case of Dipesh Ramesh Vardhan V/s DCIT (*supra*) and the same is squarely applicable on the instant appeals.

23. We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have not found to be incorrect. The conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the equity shares held in Demat account and transactions performed on a recognized stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of Andaman Timber Industries vs. CCE 281 CTR 241 (SC) that "not allowing the assessee to cross examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected".

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Co-ordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018, 474/Ind/2019, 206/Ind/2019, 60/Ind/2019,61/Ind/2019 and 987/Ind/2019 are allowed.

12.15 It is also important to note that the addition was made by the AO based on the statements/information received from the 3rd party, but no opportunity was afforded by the revenue for the cross-examination which is against the principles of natural justice as held by the Hon'ble Apex Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006. Likewise, the Hon'ble Apex court in the case of Kishinchand Chellaram reported in 125 ITR 713 held that the income tax authorities before relying upon any material are required to provide such material to the assessee for rebuttable. The relevant observation of the Hon'ble Apex Court is extracted as under:

It is true that the proceedings under the income-tax law are not governed by the strict rules of evidence and, therefore, it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to the statements made by him.

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12.16 In the case on hand, the revenue authorities to hold the transaction carried out by the assessee as sham transaction referred and relied on material and statements of various broker or entry operator recorded or collected by the DDIT Kolkata and Mumbai. However, any material/ statement was neither provided to the assessee for his rebuttable nor any independent cogent material brought on record suggesting any live link between the material received from the DDIT and transaction carried out by the assessee on hand. Therefore, no adverse inference can be drawn against the present assessee based on such material which do not constitute admissible evidence in the light of judgment of Hon'ble Apex court.

12.17 It is also important to highlight that it is not the case that the assessee has entered into sole transaction of sale and purchase of shares in the impugned scrip of M/s Comfort Fincap Ltd only and earned exempted long-term capital. As such the assessee has made investment in shares of various private and public company which are detailed as under:

		Sanjay P. Mehta 1563/A, "AASHIRWAD" Rupani Sardarnagar Road, Bhavnagar. Investments. Group Summary 1-Apr-2013 to 31-Mar-2014 Closing Balance	
		Debit	Credit
Fixed Deposit		4,27,393.00	
LIC OF INDIA		1,14,33,554.00	
Madhav Industries Ltd.		21,21,756.00	
National Saving Certificate		28,000.00	
PPF A/c -0694568620		11,80,078.00	
Share of Priyablue Infrastructure Pvt. Ltd.		50,000.00	
Share of Priyablue Shipping Pvt. Ltd.	50,000.00		
Share of Priyablue Textile Pvt. Ltd.	50,000.00		
Share of Priya holding Pvt. Ltd.	22,200.00		
Shares of Adamji Building Premises	250.00		
Shares of Priya Blue Industries Pvt. Ltd.	3,61,53,684.00		
ULIP		15,000.00	
Grand Total			

12.18 Before parting it is also important to highlight that the learned DR at time of hearing vehemently relied upon the recent judgment of Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj & others reported in [2022] 446ITR56. However, we find that in the identical facts and circumstances Hon'ble Delhi High Court and Bombay High Court (supra) has decided the issue in favour of the assessee. Moreover, the Hon'ble Gujarat High Court in the case of PCIT Vs. Champalal Gopiram Agarwal in tax appeal No. 366 of 2023, involving identical facts and circumstances has dismissed the appeal of the Revenue at the admission stage, meaning thereby the order of the Tribunal was upheld. Thus, in view of the above discussion, we hold that the capital gain earned by the assessee cannot be held bogus merely

based on some report/ finding unearthed in case of third party/parties in the given facts and circumstances unless cogent material is brought against particular assessee on record. Therefore, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the grounds of assessee's appeal are allowed.

13. In the result, the appeal of the assessee is hereby allowed."

5. Meanwhile, the Ld. Assessing Officer levied penalty under section 271(1)(c) of the Act on the assessee, which later came to be deleted by Ld. CIT(A) on the ground that since the issue in quantum proceedings has been decided in favour of the assessee by Hon'ble ITAT in the above referred decision, consequential penalty under Section 271(1)(c) of the Act does not survive. Accordingly, the Ld. CIT(A) directed the deletion of penalty imposed by the Assessing Officer under Section 271(1)(c) of the Act.

6. The Department is in appeal before us against the aforesaid order passed by Ld. CIT(A) directing the deletion of penalty imposed by the Assessing Officer under Section 271(1)(c) of the Act. The Ld. D.R. submitted before us that the decision of Hon'ble ITAT in ITA No. 509/Ahd/2018 has been challenged by the Department by way of appeal before Hon'ble Gujarat High Court and therefore, Ld. CIT(A) has erred in deleting the penalty imposed by the Assessing Officer.

7. In response, the Ld. Counsel for the assessee submitted that since the Hon'ble ITAT in assessee's own case for the impugned assessment year has deleted the additions made by the Department in quantum proceedings vide order dated 25.07.2023 in ITA No. 509/Ahd/2018, there is no basis for sustaining levy of penalty under Section 271(1)(c) of the Act.

8. In our view, it is a well settled law that once the additions made in quantum proceedings have been deleted, then there is no question of sustaining levy of penalty under Section 271(1)(c) of the Act.

9. In the case of **CIT v Shah Alloys 35 taxmann.com 532 (Gujarat)**, the Gujarat High Court held that penalty need not be imposed when addition made, which was basis for penalty, was set aside. In the case of **CIT v Atul Ltd. 44 Taxmann.com 320 (Gujarat)**, the Gujarat High Court held where in course of appellate proceedings, revenue authorities admitted that quantum addition on account of transfer pricing difference which was basis for imposition of penalty had already been deleted, impugned penalty order based on said addition also deserved to be set aside. In the case of **CIT v Babul Harivadan Parikh 37 Taxmann.com 52 (Gujarat)**, the Gujarat High Court held that where revenue authorities passed a penalty order on basis of addition made to assessee's income under Section 69A, in view of fact that said addition had been deleted by Tribunal in quantum appeal, penalty order so passed by authorities below was also liable to be quashed. In the case of **CIT (Exemptions) v. Ahmedabad Urban Development Authority 103 taxmann.com 82 (SC)**, the Hon'ble Supreme Court held that where AO having rejected assessee claim for exemption under Sections 11 and 12, passed a penalty order under Section 271(1)(c) for raising a false claim, in view of fact that assessee succeeded in quantum appeal and, thus, High Court set aside penalty order as well, SLP filed against said decision was to be dismissed. In the case of **Roy Durlabhji 211 ITR 470 (Rajasthan)**, the High Court held that where in quantum appeal, additions had already been deleted, no penalty under Section 271(1)(c) could be levied. In the case of **CIT v. Shishpal 126 Taxman 5 (Rajasthan)**, addition was made as unexplained investment under Section 69

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and penalty was imposed under Section 271(1)(c). The aforesaid addition was deleted in quantum appeal. The High Court held that since the very foundation for imposition of penalty had become non-existent, penalty would not survive. In the case of **ITO v. Magic software Enterprises India (P.) Ltd. 101 taxmann.com 53 (Pune - Trib.)** where AO passed penalty order under Section 271(1)(c) on basis of transfer pricing adjustment made by TPO, in view of fact that assumption of jurisdiction by TPO was held invalid by Tribunal and, as a result, quantum addition was also deleted, impugned penalty order had no legs to stand and, thus, same also deserved to be set aside. In the case of **LRs Management v. DCIT 149 taxmann.com 32 (Rajkot - Trib.)**, it was held that Where quantum addition made by AO was deleted by Tribunal, there remained no basis for levy of penalty under Section 271(1)(c) of the Act.

10. In view of the facts of the instant case and the settled legal proposition on the subject that once the quantum proceedings itself have been decided in favour of the assessee, there is no scope of levy of penalty under Section 271(1)(c) of the Act, we are here by dismissing the appeal filed by the Department.

11. In the result, appeal of the Department is dismissed.

This Order pronounced in Open Court on	24/04/2024
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Sd/-
(MAKARAND VASANT MAHADEOKAR) **(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Ahmedabad; Dated 24/04/2024

TANMAY, Sr. PS

TRUE COPY

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad