

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
MISS. PADMAVATHY.S, ACCOUNTANT MEMBER

ITA No.4035/Mum/2023
(Assessment year 2015-16)

Aadesh Commodities Pvt Ltd 401, Satyam Tower, 90 Feet Road, Asha Nagar, Kandivali (E), Mumbai-400 101 PAN : AAHCA3726H	vs	National Faceless Assessment Centre, Delhi
APPELLANT		RESPONDENT

Assesseeby : Shri Jay Bhansali
Respondent by : Shri R.R. Makwana, JCIT
Date of hearing : 17/04/2024
Date of pronouncement : 24/ 04/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee was filed against the order of the National Faceless Appeal Centre, Delhi (NFAC)[for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for Assessment Year 2015-16 order dated 03/11/2023.

The impugned order was emanated from the order of the Ld.Assessing Officer, National Faceless Assessment Centre (NFAC), Delhi (in short, 'the A.O.')

passed under section 143(3) of the Act order dated 30/09/2021.

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

"1. Reopening is bad in law:

1.1. *The Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)] erred in upholding the action of the Assessing Officer [hereinafter referred to as "the AO"] in reopening the case of the appellant for reasons which are wrong, contrary to facts and position in law;*

1.2. *The CIT(A) erred in upholding the action of the AO in reopening the case of appellant without appreciating that the AO erred in not providing a copy of the necessary sanction under section 151 of the Act to reopen the case of the Appellant. The CIT(A) / AO failed to appreciate that assuming that the necessary sanction has been obtained, the same appears to be mechanical as no prudent person duly instructed in law based on the reasons recorded could sanction such invalid reopening proceedings;*

1.3. *The CIT(A) / AO failed to appreciate that it is incumbent to first dispose off the objections to reopening and wait for a period of 4 weeks thereafter before proceedings to begin reassessment proceedings. The CIT(A) / AO failed to appreciate that:*

a. *the notice under section 143(2) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 28.09.2020 passed prior to disposal of objections vide order dated 20.09.2021;*

b. *the draft assessment order dated 26.09.2021 and the assessment order under section 147 rws144B of the Act dated 30.09.2021 (hereinafter referred to as "the impugned assessment order") passed prior to the expiry of a period of 4 weeks from disposal of objections to reopening raised by the assessee; are bad in law and liable to be quashed.*

2. Addition of Rs. 62,03,535/- under section 68 of the Act:

2.1. *The CIT(A) erred in upholding the action of the action of the AO as also enhancing the addition under section 68 of the Act from a sum of Rs. 20,18,3487- to Rs. 62,03,535/- received on sale of equity shares of ACI Infocom Ltd & Tilak Finance Ltd, alleged to be penny stocks, under section 68 of the Act read with section 115BBE. The reasons given are wrong, contrary to facts of the case and against the provision of law;*

2.2. *The CIT(A) erred in not only upholding the action of the AO but enhancing the addition under section 68 of the Act to Rs. 62,03,535/-, being the sale proceeds of sale of shares of a listed companies through recognized stock exchange as even when the nature and source of the said credit were explained and proved. The reasons given are in the realm of assumption and presumption upon which no addition is sustainable;*

2.3. *The AO / CIT(A) erred in law and facts in relying on certain data, findings of the general investigation in unrelated cases and third party statements. Neither do these material establish any connection with the case of the Appellant nor was Appellant given an opportunity to cross examine those parties / information;*

2.4. *The AO / CIT(A) failed to appreciate that nowhere do the information and statements, identify the appellant as a beneficiary of the alleged accommodation entries;*

2.5. *The AO / CIT(A) erred in law and facts in treating the transaction of sale of shares of listed company as bogus and undisclosed income merely on the suspicion and assumption that the prices of the shares of listed company were manipulated and appreciation in the value was very high even when the market regulator, SEBI, has not found any manipulation or involvement of appellant;*

3. *The AO / CIT(A) failed to appreciate that the assessee has already offered the sale consideration of Rs. 62,03,535/- on sale of the alleged penny stocks as business income and taxing the same once again under section 68 of the Act has resulted in double taxation;*

4. *Without prejudice to the above, the AO / CIT(A) ought to have determined the current year business loss excluding the sale consideration of sale of the alleged penny stock aggregating to Rs. 62,03,535/- and allowed set off of such loss against the additions made under section 68 of the Act;*

5. *Without prejudice to the above, the AO / CIT(A) ought to have restricted the addition to the extent of profit / loss on sale of alleged penny stock after giving the benefit of purchase cost of such equity shares."*

6. *The above grounds/sub grounds of appeal are without prejudice to each other;"*

3. Brief facts of the case is that the assessee's case was reopened under section 148 of the Act on the ground for non-disclosure of the transaction related to shares of M/s ACI Infocom Ltd (in brevity ACI) and M/s Tilak Ventures Ltd (in short, Tilak), which are listed in BSE and Ld.AO has treated this transaction as penny stock transaction. Relying on the information received from DDIT(Inv), U-8(2), Mumbai the transaction of both these shares of the companies are treated as penny stock transaction. The assessee during the impugned assessment year had declared these scrips and transactions in the return of income and generated loss amount to Rs.4,89,840/- related to ACI and amount to Rs.1,008/- related to Tilak which had declared in the books of account of the assessee with the declared turnover. The Ld.AO had treated this income as undeclared income and proceedings under section 148 was initiated and the order was passed under section 147 with the addition of both these losses of Rs.4,89,840/- and Rs.1,008/- which works out to total amount of Rs.4,89,840/- and the receipt of Rs.15,28,508/- which is credited into the books of account of the assessee is also added in the total income of the assessee. So, the total amount of Rs.20,18,348/- was added back to the total income of the assessee. Aggrieved assessee filed appeal before the CIT(A). The assessee has challenged before Ld.CIT(A) both the legal and merit.

which are finally rejected. Being aggrieved by the order of Ld.CIT(A), assessee filed appeal before us.

4. The Ld.AR argued and filed a written submission, which are kept in the record. The Ld.AR invited our attention to assessment order page 38, para 6, which is reproduced as below: -

“6. FINDINGS:

6.1 In the instant case, the assessee company, during FY 2013-14, incurred loss in trading in the following penny scrips and the quantum of loss incurred due to trading in the penny scrips during the FY 2013-14 was seen to have been recorded by the assessee in their accounts to the tune of the following:

ACI Infocom Ltd

Particulars	Quantity	Value Rs.	Profit / Loss Rs.
Opening Stock	1001100	51,64,867/-	-
Less: Sold on 11.06.2014	1000000	46,70,000/-	(4,89,192/-)
Less: Sold on 12.06.2014	1100	5027/-	(648/-)
Closing Stock	nil	nil	
Total Loss			4,89,840/-

Tilak Ventures Ltd (intraday trading)

Particulars	Quantity	Value Rs.	Profit / Loss Rs.
Purchased on 20.11.2014		15,27,500	
Sold on 20.11.2014		15,28,508/-	1,008/-
Profit			1,008/-

6.2 On verification of various documents and data available in public domain, it is found that the Company M/s. ACI Infocom Pvt. Ltd. M/s Tilak Ventures Ltd. and its scrip have the following noted features:

i) It is evident from the shape and pattern of scrip movement of scrip M/s. ACI Inform Ltd. and M/s Tilak Ventured Ltd. available in public domain reflects the bell shape pattern. This is the typical pattern / nature of any penny scrip.

ii) Gross total income of the company M/s. ACI Infocom Ltd. for the A.Y. 2011-12 to 2014-15 is NIL and paid tax on MAT and Gross profit of M/s Tilak VenturesLtd. was Rs. Nil for AY 2011-12 to 2015-16.

iii) Total current assets of M/s. ACL Infocom Ltd. and M/s Tilak VenturesLtd. for the A.Y. 2011-12 to 2014-15 is nil and no significant business activitynoticed.

iv) Total fixed assets of the M/s. ACI Infocom Ltd. is Rs.1,64,000/-, Rs.2,19,134/-, Rs.2,08,854/-& Rs. 2,02,934/-for the A.Y. 2011-12, 2012-13, 2013-14 & 2014-15 respectively. The total fixed assets of M/s Tilak Ventures Ltd. for the AY 2014-15 and 2015-16 were Rs. 3,36,258/-and Rs.4,678/-.

6.3 Thus the investment into shares of such a company of no means is highlydubious. No person can invest their hard earned money into such company for earning of income if not otherwise arranged/manipulated.

6.4 Therefore, on above facts and circumstances that the company in whose shares the assessee has invested, are in fact dubious companies and that their Directors of this company have admitted under oath before the DDIT(Inv.)U-8(2),Mumbai that they have no logical explanation or evidential change in performance of the company which would substantiate the astronomical rise in price of the scrip ACI Infocom Ltd. and M/s Tilak Ventures Ltd. It is obvious that the trades were not done by them but by some operator. The companies are a penny scrip company and have no real business activity and its prices were artificially rigged with an intention of claiming LTCG, which is exempt from tax and STCL/business loss as suited to the persons who were indulged in such trading. There are various cases having been reported to the Department where the assessee claimed either LTCG exempt U/s.10(38) or STCL/business loss, which meant that the assessee was required to pay no tax on LTCG or lesser tax liability on other income.

6.5 In the above mentioned background it is evident that the assessee company invested in the above said scrip during the FY 2014-15 without any business prudence in order to minimize its lax liability by using NSE/BSE platform by taking benefits of the loopholes of the existing laws in this regard. The assessee made huge investment in a non-viable company which is recognized as a Penny Stock Company. This defies all commercial and financial prudence and logic. On perusal of the assessment records of the assessee, it reveals that the assessee company, during FY 2014-15, incurred the following loss/profit with a view to avail the benefits of pre-arranged business Loss.

ACI Infocom Ltd.

Particulars	Quantity	Value Rs.	Profit / Loss Rs.
Opening Stock	1001100	51,64,867/-	-
Less : Sold on 11.06.2014	1000000	46,70,00/-	(4,89,192/-)
Less : Sold on 12.06.2014	1100	5027/-	(648/-)
Closing stock	nil	nil	
		Total loss	4,89,840/-

M/s Tilak Ventures Ltd (intraday trading)

Particulars	Quantity	Value Rs.	Profit / Loss Rs.
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Purchased on 20.11.2014		15,27,500	
Sold on 20.11.2014		1,28,508/-	1,008/-
		Profit	1,008/-

6.6 So, such trading of penny shares of the assessee can be treated as colourable transactions, which are seemingly valid, but a feigned or counterfeit transaction entered into for some ulterior purposes. Motive alone cannot make unlawful what the law allows but at the same time, if it is found that there is a presence of bad faith or fraud or malafide intent in the transactions, then legal effect of the transactions are not to be considered. If the assessee's acts are not bona fide but are ambiguous, sham or make-believe it is open to question and doubt the transaction. The make-believe transactions, though seemingly legal, are not free from judicial scrutiny."

5. The Ld.AR further placed that the entire addition was made by surmises and conjectures and without finding any lacunae, the loss was added back. The assessment order page 54 para 10.2 is also reproduced as below:-

"10.2 Assessee vide his letter dated 19.02.2021 has stated that assessee is in business of trading of shares and investment in shares of ACI Infocom Ltd. and M/s Tilak Ventures Ltd. based on the market movement. Assessee was asked vide notice u/s.142(1) dated 01.09.2021 how the investment was made best on the market movement since it is very generalized reply, assessee was asked to furnish the details of market movement with rates of the shares for last two years before investment and to explain the logic behind such investment with the activities of the company whose scrip was purchased. Assessee was also requested to provide the name, address & PAN of the person who take decision on investment of such shares. Assessee was also requested to furnish if they had taken any opinion before such investment. In reply assessee has stated assessee was expecting a quick profit in buying and selling the shares hence purchased the shares. The purchase of the shares was on the best of the market movement. However, it is noted from moneycontrol.com that price of the shares of ACI Infocom Ltd. was Rs.2.63 in 24.08.2011 and noted no significant activity of the company and the price of its shares. The price of the scrip rose from Rs. 2.63 in 24.08.2011 and peaked to Rs. 21.90 in 21.02.2013 and subsequently dropped to Rs. 2.93 in 20.08.2013. The scrip price of M/s Tilak Ventures Ltd. rose from Rs. 2.21 on 27.10.2010 to Rs. 50.45 on 23.01.2012 and Rs. 9.71 on 26.07.2012 to Rs. 185.00 on 01.03.2013 and then fell back to Rs. 9.01 on 04.09.2015. Thus the claim of investment based on the market movement of such volatile scrip is totally irrational and beyond justification of any prudent business man. The claim thus not best on the market movement but based on the information from any other person like entry operators. Regarding the decision of investment into the share were taken by the directors but minutes book of the company did not reflect any such decision of the directors. In this regard, investigation report had stated that the assessee company was managed and controlled by well-known entry operator Vipul Vidur Bhatt."

6. The Id. AR further has invited our attention to the Recorded Reason of the Id.AO. The relevant paragraph is reproduced as below: -

“3. The assessee is beneficiary of share transactions of M/s. AC I Infocom Ltd and Tilak Ventures Limited during year. In this regard, the Dv. Director of Income-tax (Investigation). Unit 8(2). Mumbai informed that the assessee has made sales Transactions of shares of these scrip of M/s. AC I Infocom Ltd and Tilak Ventures Limited for the value of Rs.47,05,060/- and Rs.15,27,500/- respectively during the FY 2014-15.

5. After that the return of income of the assessee is verified and found that the assessee has business of trading-others during the year. The assessee has disclosed total credit of with turnover of Rs.52,96,87393/- in the profit & loss account including closing stock of finished goods. Further, this amount of Rs.6232560/- of transaction value of these scrip is also not reflecting in the capital gain schedule of return of income. Accordingly, it is clear that the assessee has not disclosed the transaction of Rs.6232560/- in the scrip of M/s. AC I Infocom Ltd and Tilak Ventures Limited.”

7. The Ld.AR further relied on the order of the Hon’ble **High Court of Judicature at Bombay, Nagpur Bench** in the case of **ArvindSahdeo Gupta vs IncomeTax Officer, Ward-1 & Others W.P No.4793 of 2021** judgement dated **August 8, 2023**. The observation of the Hon’ble High Court on para 11& 12are reproduced as below: -

“11] Coming to the challenge as raised to the notice issued under Section 148 of the Act of 1961, it is seen that pursuant to the notice dated 24/3/2020, reasons for re-opening the case under Section 147 of the Act of 1961 were furnished by the Assessing Officer. According to the Assessing Officer, the petitioner had made investment in the purchase of shares and had earned profit from the sale of shares. An amount of Rs.9,90,3147/- was stated to be credited to the bank account of the petitioner but he had not offered the said amount during the Financial Year 2012-13 pertaining to the Assessment Year 2013-14 for taxation. In this regard, when the objection raised by the petitioner is considered, it is seen that the said amount is towards loss suffered by the petitioner in commodity trading pertaining to the Financial Year 2011-12, Assessment Year 2012-13. The said amount was stated to be paid to M/s AA + Commodities on 31/3/2012. It thus becomes clear that the said amount relates to the Assessment Year 2012-13 and not the Assessment Year 2013-14 as indicated in the notice. Further amount of Rs.9,90,314/- has been shown as amount of loss sustained by the petitioner which was debited in his account and not credited as mentioned in the notice. The said amount was also included in the return filed by the petitioner.

12] The effect of re-opening the assessment based on wrong facts or conclusions has been considered in Tata Sons Limited (supra). It has been held that if the reasons for re-opening the assessment are based on incorrect facts or conclusions, the notice issued for re-opening cannot be sustained. A similar view has been taken in Punia Capital Pvt. Ltd. (supra) as well as in Ankita A. Choksey (supra). In paragraph 6 thereof, it has been observed that the reasons to believe that income chargeable to tax has escaped must be based on correct facts and if the facts as recorded in the reasons are not correct and the assessee points out the same in his objections then the order on objections must deal with the same and prima facie establish that the facts stated in its reasons as recorded are correct. If the Assessing Officer has proceeded on fundamentally wrong facts to form reasonable belief that income chargeable to tax has escaped assessment and the Assessing Officer while disposing of the objections does not deal with the factual position asserted by the petitioner, it would be safe to conclude that the Revenue does not dispute the facts stated by the petitioner. On such facts, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment.”

8. He further relied on the order of **Abhay Kumar Daga HUF vs ITO ITA No.,176/Jodh/2022 (Jodh. Tri)**, the observation of the Hon'ble Tribunal is as under: -

“5. The next issue is regarding exemption u/s 10(38) of the Act.

5.1 During scrutiny assessment proceeding, the AO holds the sale value of shares of M/s ACI Infocom of Rs. 14,68,750/- as manipulated transactions which was claimed to be exempt u/s 10(38) after deduction of the purchase price in respect of the Assessment Year 2013-14 and treated the exempted long term capital gains of the assessee as unexplained cash credit u/s 68 of the IT. Act, 1961.

6. In appeal, the action of AO in rejection of exemption u/s 10(38) and thereby addition so made by the AO, has been confirmed by the Ld. CIT(A) by observing that the business of ACI Infocom had been declining over the years and almost reduced to Nil which is evident from its financial statements and under such circumstances the price high recorded in the shares is extraordinary and beyond the dynamics and normal behaviors of the stock market, This is possible only when the shares prices are rigged and manipulated. Later on the shares prices has fallen down sharply and substantially. The Ld. CIT(A) has also observed that the investigation carried out by the Investigation Wing at Kolkata has already brought into light about the nefarious activities indulged in by (the brokers who work as a conduit to provide accommodation entries. It is alleged that the appellant has not been able to discharge the onus about the genuineness of the transactions. The CIT(A) also referred to the decision of CIT vs. Swati Bajaj in which it was held that the report of the Investigation department could not be thrown out on the

grounds that cross examination was not allowed. Accordingly, the addition made by the AO was upheld.

7. The Ld. Counsel submitted that the appellant had purchased 10,000 Shares of M/s ACI Infocom Ltd for Rs. 2,58,739/- on 25.08.2011 through broker Nine Star Broking Private Limited and payment was made by cheque on 27.08.2011. All these shares were sold on 25.10.2012 and 08.11.2012 for Rs. 14,62,111/- with profit of Rs. 12,03,372/- on these shares and the total long-term gain derived by the assessee had been claimed to be exempt u/s 10(38) of the Income Tax Act, 1961.

7.1 The Ld. AR contended that all these trading details reflected in broker transaction statement have been submitted during the assessment proceedings. It is submitted that the aforesaid company M/s ACI Infocom Ltd is presently traded in BSE and meeting the SEBI Compliance. The appellant drew our attention to the submission furnished before the authorities below regarding the details of long term capital gain (APB, Pg.56) and the details of payment made through cheque at the time of purchase (APB, Pg.57). The appellant further referred to the copy of broker Nine Star Commodities (APB, Pgs.59 and 61) and broker note for purchase and sale of shares (APB, Pgs. 73 to 79).”

9. The Ld.DR argued and fully relied on the order of the revenue authorities.
10. We heard the rival submissions and considered the documents available on the record. The assessee had made the transactions and generated loss through the transaction of scripts ACI and Tilak. The assessee's holding was more than 2 years. There is no such direct communication reflected in the order of the Ld.AO that the entire transaction was made a sham transaction. In the observation of recorded reasons, the Ld. AO mentioned that the transactions are undisclosed whereas during the assessment and appellate stages before the authorities were unable to substantiate that the entire transaction was not disclosed in the return. In recorded reason the Ld. AO specifically mentioned that the transacted amount is not reflected in capital gain column of return filed U/s 139 of the Act. Whereas, the assessee declared the transaction as business transaction in return, not as

capital gain. Respectfully, we rely on the order of the Hon'ble **Bombay High Court** in the case of **Arvind Sahdeo Gupta**(supra) for quashing of assessment order for wrong observation of the Id. AO. The Hon'ble **Bombay High Court** in the case of **PCIT vs. Ziauddin A Siddique (ITXA 2012of 2017)** held that where (a) the transaction of purchase and sale of shares which is alleged to be a penny stock is done through Stock Exchange or through registered broker, the payments have been made through banking channel, STT is paid and the Id. Assessing officers has not criticised the documents and (b) assessee is not involved in price rigging, the transaction is genuine.

11. And **Abhay Kumar Daga HUF vs ITO** (supra). In this case the coordinate bench of Jodhpur accepted the transaction of ACI script and allowed the long-term capital gain. The addition is not sustainable. On the other hand, in the sale transaction, assessee gathered loss. So, it is not a gain for the assessee related to penny stock transaction. In our considered view, the entire addition made by the Ld.AO is quashed. Further, the Ld.AR placed that the CIT(A) had made the enhancement of Rs.62,03,535 under section 68 of the Act. The addition made by the AO is Rs.20,18,348/-. The Ld.AR only challenged the addition of CIT(A). Though the addition of the Ld.AO is duly quashed, so the enhancement by the CIT(A) has no leg to stand, so the amount of Rs.62,03,535/- is duly deleted. The Ld.DR was not able to produce any contrary orders against the submission of the Ld.AR. So, the appeal order is duly set aside. The addition made by the AO and enhancement by the Ld.CIT(A) are deleted.

12. In the result, appeal in **ITA No.4035/Mum/2023** is allowed.

Order pronounced in the open court on 24th day of April, 2024.

Sd/-

sd/-

(PADMAVATHY. S)

(ANIKESH BANERJEE)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

Mumbai, दिनांक / Dated: 24 /04/2024

Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई /DR, ITAT, Mumbai
5. गार्ड फाइल /Guard file.

BY ORDER,

//True Copy//

(Asstt.Registrar), **ITAT, Mumbai**