

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "B" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Sandeep Singh Karhail (JM)

I.T.A. No. 296/Mum/2022 (A.Y. 2013-14)

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| Shrikant Ramesh Merchant 110/111, Crescent Mansion Gamdevi, Mumbai-400 007. PAN : AFNPM4228A (Appellant) | Vs. | ACIT-16(1) Room No. 219 Matru Mandir Bldg. Tardeo Mumbai-400 007. (Respondent) |
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| Assessee by | Shri Chintan Patel |
| Department by | Shri Ashok Kumar Ambastha |
| Date of Hearing | 18.01.2024 |
| Date of Pronouncement | 08.04.2024 |

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 24.12.2021 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and it relates to A.Y. 2013-14. The assessee is aggrieved by the decision of the learned CIT(A) in confirming the addition of Rs. 78,85,000/- relating to sale proceeds of shares added by the Assessing Officer under section 68 of the I.T. Act and also in confirming the addition of unexplained commission of Rs. 1,57,700/-.

2. This appeal was initially disposed of by the co-ordinate bench by an ex-parte order dated 28-04-2023. Subsequently, the assessee filed a miscellaneous application seeking recall of the order. The said miscellaneous application was numbered as M A No.468/Mum/2023 and the same was disposed of by the co-ordinate bench on 20-10-2023, whereby the ex-parte order was recalled. Accordingly, this appeal came to be placed before this bench again.

3. The facts relating to the issues are stated in brief. The assessee filed its original return of income for A.Y. 2013-14 on 17.1.2014 declaring a total income of Rs. 11,56,700/-. The assessee had also claimed exemption under section 10(38) of the I.T. Act amounting to Rs. 68,85,500/- in respect of long term capital gains arising on sale of shares of M/s. Shreenath Commercial & Finance Limited. The Assessing Officer received information from the investigation wing of the Kolkata that the shares of certain companies were manipulated to generate bogus long term capital gains. Such kinds of shares were termed as 'penny stocks'. The AO noticed that the investigation wing has identified shares of M/s. Shreenath Commercial & Finance Ltd. as one of such penny stock shares. Hence the AO took the view that the long term capital gains declared by the assessee is bogus in nature and accordingly reopened assessment of AY 2013-14 by issuing notice under section 148 of the Act. In the reopened assessment, the Assessing Officer referred extensively to the report given by the investigation wing with regard to the modus operandi followed by the operators to generate bogus long term capital gains. He also referred to the statement given by certain share brokers before the investigation wing, wherein they had confirmed that they were manipulating price in order to generate bogus long term capital gains. The Assessing Officer also referred to the financial statements of M/s. Shreenath Commercial & Finance Ltd., and came to the conclusion that the financial position of the company was weak and it does not justify share price quoted in the stock exchange. The Assessing Officer also noticed that the shares sold by the assessee had been purchased by certain persons, who were identified as Exit providers. Hence, the Assessing Officer asked the assessee to offer explanations with regard to various deficiencies noticed by him. However, offered explanations contending that the long term capital gains declared by him is genuine one. The AO issued summons u/s 131 of the Act to the assessee, but did not attend before the Assessing Officer. The AO also issued notices u/s 133(6) of the Act to the alleged Exit providers, but they were returned unserved. Hence, the Assessing Officer took the view that

the long term capital gains declared by the assessee is bogus in nature. Accordingly he proceeded to assess sale consideration of Rs.78,85,000/- as unexplained income of the assessee under section 68 of the Act. The Assessing Officer also took the view that the assessee would have incurred expenditure in getting bogus long term capital gains. He estimated the same at 2% of the sale consideration and accordingly added sum of Rs.1,57,700/- to the total income of the assessee as unexplained expenditure.

4. In the appellate proceedings before the learned CIT(A), the assessee submitted that the assessee is regular investor in shares. Further, it was submitted these shares were purchased and sold through stock exchange platform. It was submitted that the assessee has purchased and sold these shares in the normal course of making investment in securities. Accordingly, it was pleaded that there was no reason to suspect the genuineness of the transactions merely for the reason that the shares of M/s Shreenath Commercial and Finance Ltd have been identified as penny stock by the Investigation wing. However, the Ld CIT(A) was not convinced with the contentions of the assessee and accordingly confirmed the additions made by the AO.

5. The Learned AR submitted that the Assessing Officer has placed his reliance entirely on the report given by the investigation wing and he did not disprove any of the evidences furnished by the assessee to prove the factum of purchase and sale of shares. He submitted that the shares were purchased and sold through stock exchange. Further, the payment was made/received through banking channel in respect of purchase/sale of shares. Further, the shares have entered into/exited from the Demat account of the assessee upon purchase/sale. Further, it is not an isolated case of transaction of purchase of shares entered by the assessee, i.e., the assessee is a regular investor and is holding shares of other companies. Accordingly, he contended that the Assessing Officer could not have doubted the

genuineness of the purchase and sale of shares. In support of his contentions, the learned AR placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of PCIT Vs. Indravadan Jain, HUF (Income Tax Appeal No. 454 of 2018 dated 12.7.2023).

6. The Learned DR, on the contrary, submitted that the assessee did not attend before the Assessing Officer in response to summon issued under section 131 of the Act. Notices were issued by the Assessing Officer under section 133(6) of the Act to the exit providers have been returned back unserved. He further submitted that the some of the operators were admitted before the Kolkata investigation wing that they have been providing accommodation entries in the form of bogus long term capital gains. Further the assessee has been mainly applying for shares issued under initial public offerings and was not regularly buying shares through the stock exchange. Accordingly the learned DR submitted that the assessee has not proved the genuineness of the purchase and sale of M/s. Shreenath Commercial & Finance Limited. He further submitted that the Mumbai Bench of the Tribunal has confirmed the addition of long term capital gains in the case of Shri Hitendra C. Ghadia (ITA No. 621/Mum/2021 dated 20.3.2023).

7. In the rejoinder, learned AR submitted that the AO had made identical addition in the hands of one of the family members of the assessee named Barkha Ramesh Merchant and the Tribunal, vide its order dated 12.4.2022 passed in ITA No. 779/Mum/2020, had deleted the addition. He further submitted that the facts relating to the assessee are identical with the decision rendered by Hon'ble Bombay High Court in the case of Indravadan Jain, HUF (supra), wherein also similar disallowance made by the AO was deleted. Accordingly he prayed that the additions made by the Assessing Officer may kindly be deleted.

8. We heard rival contentions and perused the record. We notice that the assessing officer has primarily placed reliance on the report given by the Investigation wing of the Income tax department, Kolkatta in order to arrive at the conclusion that the long term capital gains reported by the assessee is bogus in nature. We notice that the investigation report prepared by Investigation wing, Kolkatta is a generalized report with regard to the modus operandi adopted in manipulation of prices of certain shares and generation of bogus capital gains. We notice that the AO has placed reliance on the said report without bringing any material on record to show that the transactions entered by the assessee were found to be a part of manipulated transactions, i.e., it was not proved that the assessee has carried out the transactions of purchase and sale of shares in connivance with the people who were involved in the alleged rigging of prices. The Ld A.R also submitted that the regulator of stock market SEBI has not conducted any enquiry against the assessee.

9. We notice that the assessee has furnished reply to the notice issued by the AO and the AO could not find any adverse features from the said reply. Further, the AO also could not disprove the share transactions by bringing any material on record. We also notice that the assessee has

(a) purchased and sold these shares by paying consideration through banking channels and through stock exchange platform.

(b) the shares were received and issued through the Demat account of the assessee.

We notice that the assessee is a regular investor in shares. Further, the AO has not found any defect/deficiencies in the evidences furnished by the assessee with regard to purchase and sale of shares. Further, the AO has not brought on record any material to show that the assessee was part of the group which involved in the manipulation of prices of shares. We notice that the shares were purchase in an earlier year and the said purchase has not been suspected by the AO. Hence, there is no reason to suspect the purchase and sale of shares undertaken by the assessee.

10. The Ld D.R placed his reliance on certain case laws to contend that addition relating to penny stock transactions has been confirmed in those cases. There should not be any dispute that the purchase and sale of shares reported by the assessee is a factual matter and each of the case has to be examined on the basis of facts prevailing therein. In respect of decision rendered by co-ordinate Mumbai benches, we notice that they did not refer to the jurisdictional Bombay High Court decisions.

11. We noticed earlier that the AO did not establish any link between the assessee and the reports of investigation wing. At this stage, we may refer to the decision rendered by Hon'ble Supreme Court in the case of Adamine Construction P Ltd (99 taxman 45), wherein, while dismissing the appeal of Revenue, the Hon'ble Supreme Court has referred to the following observations made by Hon'ble Delhi High Court:-

“What is evident is that the AO went by only the report received and did not make the necessary further enquiries – such as into the bank accounts or other particulars available with him but rather received the entire findings on the report, which cannot be considered as primary material. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO.”

Further, the facts available in the present case are that the shares were purchased and sold through the stock exchange platform. In the case of PCIT vs. Indravadan Jain HUF (ITA No.454 of 2018 dated 12th July, 2023), the Hon'ble Bombay High Court held as under:-

“....The CIT(A) came to the conclusion that respondent bought 3000 shares of RFL, on the floor of Kolkatta 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 Kolkatta 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 instruction slips and also received payment from Kolkatta 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.”

The facts available in the instant case are similar to the above said case. Accordingly, following above said decision, we hold that, in the facts and circumstances of the instant case, there is no reason to suspect the genuineness of purchase and sale of shares of M/s Shreenath Commercial and Finance Ltd. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of sale proceeds of shares made. Since the above said addition is deleted, the addition relating to alleged expenses in procuring bogus long term capital gain is also liable to be deleted. We order accordingly.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 08.04.2024.

Sd/-
(Sandeep Singh Karhail)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 08/04/2024

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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