

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI**

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

**ITA No. 6345/DEL/2019
Asstt. Yr: 2014-15**

Kapil Chhabra, C/o Kaushal Kapoor & Co., Kothiwal Nagar, Station Road, Moradabad-244001. PAN: ACUPC0752F	<u>Vs</u>	DCIT, Circle-2, Moradabad.
APPELLANT		RESPONDENT
Assessee represented by	None	
Department represented by	Shri Sandeep Kr. Mishra, Sr. DR	
Date of hearing	31.01.2024	
Date of pronouncement	29.04.2024	

ORDER

PER M. BALAGANESH, AM:

The captioned appeal, preferred the assessee, is directed against the order of learned Commissioner of Income-tax (Appeals), Moradabad, arising out of the order dated 31.12.2016, u/s 143(3) of the Income-tax Act, 1961, passed by the DCIT-I, Moradabad, pertaining to the assessment year 2014-15.

The assessee has raised following grounds of appeal:

"1. That the Commissioner of Income Tax (Appeals) (CTT(A)) erred on facts and in law in confirming addition made by the assessing officer in the assessment order passed under section 143(3) of the Income Tax Act, 1961 ('the Act')

2. That the CIT(A) erred on facts and in law in upholding the action of the assessing officer in denying exemption of long term capital gain (LTCG) of Rs.49,52,385 on sale of equity shares of Eco Friendly Food Processing Park

Limited claimed by the appellant under section 10(38) and making addition of sale consideration of Rs.52,44,182 under section 68 of the Act alleging the same to be bogus in nature.

3. That the CIT(A) erred on facts and in law in upholding the action of the assessing officer in making aforesaid addition alleging that the appellant had obtained 'accommodation entry' in form of bogus LTCC through 'penny stock companies' solely on the basis of information received from the Investigation Wing without any independent application of mind by the assessing officer.

*4. That the C*Pi(A) erred on facts and in law in confirming the addition made by the assessing officer on the basis on 'preponderance of probability' in supersession to the law of evidence.*

5. That the CIT(A) erred on facts and in law for not appreciating that aforesaid addition was made merely on the basis of presumptions, conjectures & surmises and no documentary evidence was brought on record by the assessing officer before making such addition.

6. That the CIT(A) further erred on facts and in law in not appreciating that the appellant was legally entitled to claim exemption under section 10(38) of the Act qua aforesaid LTCC inasmuch as period of holding of shares was long term in nature and the same were sold by the appellant through recognized stock exchange on which Securities Transaction Tax ('STT') was also paid.

7. That the CT(A) erred on facts and in law in not appreciating that all details and documentary evidences qua sale of shares were furnished before the assessing officer and no document was produced by the assessing officer to controvert such information/ evidences.

8. Without prejudice to above, the CIT(A) erred on facts and in law in upholding the action of the assessing officer in making addition under section 68 of the Act without appreciating that addition under that section was not sustainable in law.

9. The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal at or before the time of hearing."

2. None appeared on behalf of the assessee despite issuance of notice on several occasions. We find from the order-sheet noting, the assessee had not bothered to secure his presence on 7.7.2022; 3.1.2023; 5.4.2023; 1.6.2023; 31.7.2023; 1.8.2023; 21.9.2023; and 31.1.2024. Since sufficient opportunities were given to the assessee by this tribunal, the Bench felt it desirable not to wait for the presence of the assessee or

his authorized representative and proceed to dispose of this appeal on hearing the learned DR and based on materials available on record.

3. The assessee filed his return of income for A.Y. 2014-15 on 30.11.2014 declaring total income of Rs. 28,86,490/-. The assessee claimed exemption u/s 10(38) of the Act in respect of sale of shares for the long term capital gains of Rs. 49,52,385/- arising out of sale of shares of M/s Eco Friendly Food Processing Park Limited. This scrip was considered by the Department as a penny stock based on Kolkata Investigation Wing report and the assessment was completed by treating the entire sale proceeds of shares of Rs. 52,44,182/- as unexplained cash credit u/s 68 of the Act, considering the entire transactions as bogus.

4. The learned CIT(A) after considering the submissions of the assessee made before him, upheld the action of the learned AO by observing as under:

"3.1 During the assessment proceedings, the AO noticed that the assessee had claimed exemption of Rs. 49,52,385/- being LTCG u/s 10(38). The assessee had purchased shares of M/s Eco Friendly Food Ltd at a very low price and sold it off during the year under consideration at abnormally high price thus having Long Term capital gains of Rs. 49,52,385/-. The AO stated that he had received an investigation report of Pr. DIT, Inv. Kolkata, which had carried out a detailed investigation into the LTCG racket carried out by the syndicate of operator throughout the country. He carried out his own independent inquiries and arrived at the conclusion that the assessee had routed his own unaccounted money through this channel and hence the total sale consideration was added in the hands of the assessee u/s 68.

3.2 The appellant has submitted that the payments were made through cheques for purchase of shares, purchase and sale was made through Recognized Stock Exchange, STT was paid and the sale proceeds were credited in the account through online. He stated that under such circumstances, the addition u/s 68 was unwarranted and should be deleted. He also relied upon several judgments.

3.3 I have heard the counsel and perused the submissions. I have also gone through the assessment order. The fact of the case is that the AO found that

information was gathered by the Department that a scheme was hatched by various players to obtain/provide accommodation entries to bogus LTCG through manipulation of stock market. The basic aim of the scheme was to route the unaccounted money to LTCG beneficiaries into their account/books in the garb of long term capital gains. The entry of LTCG was taken by selling the shares on the stock exchange and registration the proceeds arising out of the sale of shares in the books as LTCG. For implementing this scheme, shares of some penny stock companies were used. Penny stocks are those stocks which trade at very low price and whose market capitalization is very low. The low price of the penny stocks makes manipulation of the share price very easy.

3.4 The Hon'ble Delhi High Court in the latest decision dated 08.03.2019 in the case of Udit Kalra ITA 220/2019 & CM No. 10774/2019 dismissed the appeal of the assessee on the similar issue. The Hon'ble Court very specifically stated as under:

"What is intriguing is that the company (M/s Kappac Pharma Ltd) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicion of the revenue."

3.5 The above case was referred to the Hon'ble High Court from the judgement of Hon'ble ITAT Delhi in ITA No. 6717/DEL/2017 dated 08.01.2019. The Hon'ble Tribunal held as under:

"I have heard both the parties and perused the records especially the impugned order. I find that the assessee is an individual and the amount of cash credit Rs. 27,68,457/-. However, on perusing the assessment order, I find that there was a specific information that assessee has indulged in non-genuine and bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Kappac Pharma Ltd., a Mumbai based company. It is noticed that the purchase transaction has been done off market in physical form by paying cash. The assessee has purchased the share M/s Kappac Pharma Ltd. in physical form and thereafter, the same have been converted into electronic mode. The purchase payments were made in cash and not through the normal banking channel therefore the same were nonverifiable from the authentic supporting details such as bank account/documents. Assessee is not a regular investor in shares. The assessee has failed to furnish the proof of source for the purchase transactions. Thus, the entire transactions are against human probability. Also considering the findings of the investigation Wing, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the nature of transaction entered

into by the assessee the LTCG of Rs. 27,20,457/- claimed exempt u/s. 10(38) of the Act by the assessee cannot be allowed and the amount of Rs. 27,68,457/- received back as sales proceeds on sale of shares was required to be added back towards his taxable income under section 68 of the Act. The above amount of Rs. 27,68,457/- was deemed as income of the assessee u/s. 68 of the Act, over and above, the income already declared in ITR during AY 2014-15. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 is squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee is on distinguished facts, hence, not applicable in the instant case. The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above disc the considered opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee."

3.6 Further, the Hon'ble Delhi High Court in the case of NDR Promoters Pvt. Ltd. Dated 17.01.2019 (ITA 49/2018) has made a thread bare analysis of section 68 of the Income Tax Act, 1961. The Hon'ble Court has mentioned that there are two sets of judgments related to section 68 and both sets have their own facts. In one set of cases, assessee has produced necessary documents and no further inquiries are conducted by the Department. In second set of cases, inquiries have been conducted by the AO and the requirements of identity, genuineness and creditworthiness have to be tested not superficially but in depth, having regard to human probabilities and normal course of human conduct. The relevant portion of this judgment is reproduced below for the sake of convenience:

13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of cases are those where there was

evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

14. Certificate of incorporation, PAN number etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor. It is in this context, the Supreme Court in CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC) had observed:-

"Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

15. Summarizing the legal position in Nova Promoters and Finlease (P) Ltd.(supra), and highlighting the legal effect of section 68 of the Act, the Division Bench has held as under:-

"32. The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the

books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. In A. Govindarajulu Mudaliar v CIT, (1958) 34 ITR 807, this argument advanced by the assessee was rejected by the Supreme Court. Venkatarama Iyer, J., speaking for the court observed as under (@ page 810): -

"Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."

(emphasis supplied)

Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing

Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference."

3.7 The Hon'ble High Court further stated that the AO has not kept quiet and had made inquiries and also queried the respondent assessee to examine the issue of genuineness of transactions. The tribunal unfortunately did not examine that aspect and ignored the factual position.

3.8 The Apex Court has delivered a landmark judgment in the case of NRA Iron & Steel Pvt. Ltd. Vide order dated 05.03.2019. The issue in this case was with respect to the onus of proof in respect of Share capital/premium credited in the books of account of the assessee company, which was added u/s 68 of the Income Tax Act, 1961. The Hon'ble Apex Court enumerated the following principles:

11. *The principles which emerge where sums of money are credited as Share Capital/Premium are:*

i. *The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*

ii. *The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*

iii. *If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.*

In such a case the assessee would not have discharged the primary onus contemplated by section 68 of the Act.

3.9 *The Hon'ble Apex court also held as under: 14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee.*

3.10 *In the present case, the AO has carried out detailed investigation. He has not kept quiet and after having received the investigation report from Directorate of Investigation, Kolkata, he has made extensive inquiries. After investigation, he has mentioned the facts in the assessment order which are as under:*

i. *The appellant, is engaged in business of real-estate and not a regular investor in shares.*

ii. *Nature of transaction looks suspicious from the manner in which it has been conducted i.e. the abnormal appreciation in the value of shares.*

iii. *The shares in which the assessee has invested have been identified as penny stock by the Investigation Wing of the Income Tax Department.*

iv. *The fact about rigging in share price was confirmed by SEBI also.*

3.11 *The appellant has mentioned that the report of Investigation Wing was general and did not concern with his case. No allegation is made against him in the report. This plea of the appellant is not acceptable because the Directorate of Investigation has carried out a detailed probe into a nation wide scam. Scrips have been identified, which have been used for conversion of the black money. Therefore, even if, the specific name is not listed anywhere, the action of AO is justified based on the human conduct and preponderance of probabilities.*

3.12 *Also, it has been held by Hon'ble Apex Court in the Durga Prasad Mor and Sumati Dayal that the test of human probabilities has also to be applied by the authorities below. In the case of Sumati Dayal 214 ITR 801, it was held that during the year 1970 - 71 (pertaining to the assessment year 1971-72) between April 6, 1970, and March 20, 1971, the appellant claims to have won in horse race a total amount of Rs * 0.3 * 0.11 * 0.831 /. on 13 occasions out of which ten winnings were from jackpots and three were from treble events. Similarly in the year 1971-72, the appellant won races on two occasions and both times the winning were from a jackpot. These receipts were tested on the touch stone of human probability and it was found that apparent was not real. That it was contrary to statistical theory and experience of the frequencies and probabilities. The exceptional luck enjoyed by the appellant was held to be beyond preponderance of probability. Hence the Hon'ble Apex Court has affirmed the view that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds. When the present case is examined on the touch stone of above case law, it is clear that these transactions of the appellant can by no stretch of imagination be considered as investment transactions. They are only make believe transaction. Hence I do not find any infirmity in the AO taxing the receipt in this regard.*

3.13 *In view of the above discussion, it is apparent that lots of inquiries have been made by the AO and substantial material is collected by him. The following particular facts, which have been gathered by the AO are relevant for this case.*

i. *The assessee is not a regular investor. However, she has invested in the scrip i.e. M/s Eco Friendly Food Ltd and hit the jackpot in the same. This is*

quite abnormal in view of the test of human probabilities laid down by Hon'ble Apex Court in the case of Durga Prasad Mor and Sumati Dayal.

ii. The investigation report of the Income Tax Department suggests that the scrip i.e. M/s Eco Friendly Food Ltd was pertaining to the paper companies, which were used for manipulation of shares in the LTCG Scam.

iii. Unrealistic rise in the share price of M/s Eco Friendly Food Ltd as mentioned in the assessment order.

iv. Poor financial health of the companies as mentioned by the AO in the assessment order.

3.14 In view of the above facts, it is clear that the claim of LTCG o Rs. 49,52,385/- on the alleged sale of shares is basically accommodation entry from the entry operator. The appellant is involved in the scam o accommodation entry and there is no merit in his submission that the sal consideration has been received through banking channel and shares were sold in stock exchange. The shares in which he has invested belong to pape companies. Their financial position is extremely poor and they do not seem to be carrying out a regular business. The exponential rise in their share prise is nothing else but a manipulation by the syndicate of operators involved in the scam. In the present case, the appellant's explanation that the said receipt is on account of investment in shares, whereby shares of unknown company have jumped in no time has been totally rejected by the AO. The appellant has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for the sale price of these shares. The fantastic sale price realization is not at all humanly probable, as there is no economic or financial basis that a share of little known company would jump so high. In these circumstances, I do not find any infirmity in the order of the AO. Also, the case laws on which appellant has relied have different set of facts. In view of the facts discussed in earlier paras, I am of the considered view that the AO was justified to disallow the claim of long term capital gain of Rs.49,52,385/- and to treat the total sale consideration as income from undisclosed sources.

4.0 In the result, the appeal is dismissed."

5. The assessee has not controverted the aforesaid findings of the learned CIT(A) by cogent evidences. Hence, we do not deem it fit to interfere in the order of the

learned CIT(A) in peculiar facts and circumstances of the instant case. Accordingly, the grounds raised by the assessee are hereby dismissed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in open court on 29.04.2024.

Sd/-
(YOGESH KUMAR US)
JUDICIAL MEMBER

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated:29.04.2024.

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI