

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No. 4060/MUM/2023
(Assessment Year : 2015-16)**

Anil Chothmal Patodia HUF, 1401-B, Valencia, Hiranandani Gardens, Powai, Powar lit S.O, Mumbai 400076	Vs.	National Faceless Appeal Centre, Delhi, ITO, Ward – 41(1)(1), Kautilya Bhawan, Mumbai
PAN/GIR No. AAHA4542B		
(Appellant)		(Respondent)

Assessee by	Shri. Neelkanth Khandelwal
Revenue by	Shri. Manoj Kumar Sinha
Date of Hearing	24 /04 /2023
Date of Pronouncement	30/04/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The appeal has been filed by the assessee against order dated 28/09/2023 passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3) r.w.s. 147 for the A.Y.2015-16.

2. In the grounds of appeal assessee has challenged the validity of reopening u/s.147 and the addition of

Rs.3,36,70,000/- made on account of unexplained investment u/s.69. The relevant grounds read as under:-

1. *The Learned Assessing Officer ('AO') erred in assuming jurisdiction under section 147 of the Income-tax Act, 1961 (the 'Act') to reassess the income for AY 2015-16 without having complied with the jurisdictional safeguards mandated in section 147 of the Act.*

The AO erred in assuming jurisdiction without having any valid reason to believe that income chargeable to tax had escaped assessment and recorded his reasons merely on surmises and conjectures. The AO has incorrectly alleged that the Appellant had earned bogus long term capital gains of Rs. Rs.1,18,39,977/- when in fact that Appellant had earned a loss of Rs. 1,52,551/- on the sale of share of EINS Edutech Limited (Apalya Creations Ltd.).

Accordingly, it is submitted that the notice issued under section 148 dated 13-09- 2016 was issued without jurisdiction and consequentially, the assessment order dated 22-12-2017, based on such a notice is also bad in law and liable to be set aside.

2. *The Ld. National Faceless Appeal Centre is not justified in upholding the decision of the AO in making an addition of Rs. 3,36,70,000/- as being Unexplained Investments of the Appellant under section 69 of the Income Tax Act, 1961.*

2. We have heard both the parties on the validity of reopening u/s.147 / 148.

3. The brief facts qua the legal issue are that assessee had filed its return of income for A.Y.2015-16 declaring total income of Rs.2,63,520/- on 31/03/2016. The same was duly processed u/s. 143(1) and return of income was accepted. Thereafter, assessee's case has been reopened u/s.147 after recording the following reasons:-

"1. The return of income was filed by the assessee on 31.03.2016 declaring total income of Rs.2,63,520/-.

2. The Kolkata Investigation Directorate had undertaken investigation into 84 penny stock companies and given detailed findings indicating bogus LTCG/STCG entries claimed by large number of beneficiaries. The modus operandi involving operators, intermediaries and the beneficiaries has been detailed in the Investigation report prepared by the Kolkata Directorate.

3. The investigation conducted by the Kolkata Investigation Directorate reveals that the trading in sales penny stock was manipulated affair to generate entries of bogus Long Term Capital Gain facilitating tax evasion by a large number of persons. The assessee is one such person who has availed accommodation entries of bogus LTCG. The above manipulations are corroborated by the strong statements of various persons, recorded during the said investigation.

4. Information received from KOLKATA Investigation Directorate, that assessee has obtained accommodation entries of bogus Long Term capital Gain through trading in EINS Edutech Ltd., one of the Penny stock company for sales consideration of Rs.3,35,51,000/- and claimed Long Term Capital Gain of Rs:1,18,39,977, as exempt income. The assessee's income is not subject to scrutiny assessment u/s.143(3) of the Act, for the year under consideration and I have reasons to believe that the income of the assessee has escaped assessment within the meaning of Explanation (b) of Sec. 147 of the I.T. Act.

4. The ld. AO noted that assessee had shown long term capital gain of Rs.1,18,39,977/- in the return of income on sale of shares of **M/s. Bhageria Dye Chem Ltd.**, and has shown short term capital loss of Rs.1,52,551/- on sale of shares of **EINS Edutech Ltd.**, He further submitted that the transaction of short

term capital loss on sale of shares of EINS Edutech Ltd., of Rs.1,52,551/- has not been reported in the return of income. The assessee had purchased 7,00,000 shares offline of EINS Edutech Ltd., and had sold the same as per the following details:-

STCL on sale of shares

Scrip Name : EINS EDUTECH LIMITED-APLAYA CREATIONS					
	Buy		Sell		
Date of purchase/sale	Quantity	Amount	Quantity	Amount	Gain/loss
16.03.2015	5,00,000	2,40,50,000			
17.03.2015	2,00,000	96,20,000			
18.03.2015			3,00,000	1,43,38,147	
19.03.2015			3,00,000	1,43,43,142	
20.03.2017			1,00,000	48,36,159	
	7,00,000	3,36,70,000	7,00,000	3,35,17,444.8	(1,52,551)

5. The ld. AO doubted the payment made for purchase for the shares of EINS Edutech Ltd., which was not submitted by the assessee. Therefore, according to him, the source of making investment in these shares could not be established which has been added by him u/s.69. While coming to this conclusion, he has referred to statement of Karta assessee HUF which he has recorded in the course of assessment proceedings and noted that Karta had no idea of this short term capital loss earned from the share and EINS Edutech Ltd., is one of the 84 penny stocks in which investigation was carried out and found that these shares were used for accommodation entries for bogus long term capital gain / short term capital gain and short term capital loss and assessee could not furnish the payment proof and corresponding banking entries and accordingly, he treated the amount of Rs. 3,36,70,000/- cost of purchase of shares as unexplained

investment. The ld. CIT (A) has confirmed the order of the ld. AO holding that assessee could not explain the source of investment observing as under:-

“10. During the course of appeal, several notices were issued. On every occasion, the appellant filed the same reply that was furnished before CIT (A)-38, Mumbai discussed above. This was only submitted in their reply dated 11.09.2023.

11. In view of the above, it is unambiguously proved that the appellant did not have any known source of income for investing a sum of Rs.3,36,70,000/- on 16.03.2015 & 17.03.2015 for purchase of shares of M/s. Aplaya Creations (Eins Edutech Ltd.). The investigations carried out by the Investigation Wing of Kolkata and subsequent assessment made by the AO established that except the receipt of Rs.3,35,17,449/-, the appellant did not give any other evidence in support of the investment of Rs.3,36,70,000/-. Hence, the action of the AO is upheld. The grounds taken are dismissed.

12. As a result, the appeal is dismissed.”

6. Before us, ld. Counsel for the assessee drew our attention on the ‘reasons recorded’ and submitted that the reasons specified above are from the general investigation conducted by Kolkata Investigation Directorate and information revealed that the trading in sales of penny stock were manipulated affair to generate entries of bogus Long Term Capital Gain. Now based on such information AO records his satisfaction that assessee has earned long term capital gain through EINS Edutech Ltd., which is one of the penny stock for a sale consideration of Rs.3,35,51,000/- on which assessee had claimed long term capital gain of Rs. 1,18,39,977/- as exempt. He submitted that assessee has not earned any long term capital gain in trading of

EINS Edutech Ltd. nor has claimed such in return of income, as the same has been earned on entirely different scrip, viz., Bhageria Dye Chem Ltd., which transaction has been duly accepted by the ld. AO. The assessee had earned short term capital loss of Rs.1,52,551/- in trading of EINS Edutech Ltd., which was not claimed in the return of income, because assessee had filed belated return and could not have been claimed the benefit of short term capital loss. Nowhere in the reasons there is any whisper about source of investment in the purchase of shares of EINS Edutech Ltd., The reasons have been taken on an entirely different ground and the assessment has been framed entirely on a different reasoning. Thus, the very foundation of jurisdiction of the ld. AO is incorrect and accordingly, the proceeding of reopening u/s.147 itself is invalid.

7. On the other hand, ld. DR submitted that here in this case there is no dispute that assessee had sold the shares of EINS Edutech Ltd., at Rs.3,35,51,000/-. This figure is matching with the transaction undertaken by the assessee, albeit, assessee has not earned any long term capital gain as mentioned in the reasons recorded. Thus, information *per se* that assessee has traded in a penny stock itself goes to show that it was a shady transaction and when during the course of assessment proceeding ld. AO enquired upon the shares, the assessee could not explain source of the investment or rationale behind purchasing of the shares and selling the same within two days at a loss. Thus, the ld. AO was within the jurisdiction for reopening the case based on such information, as at the time of reopening

only prima facie belief has to be seen and not the established fact.

8. We have heard rival submissions and perused the material on record for the reopening of the case. Now from the bare perusal of the 'reasons recorded' as incorporated supra, we find that first paragraph is about general finding of Kolkata Investigation Directorate in 84 penny stock companies and modus operandi. The second paragraph mentioned that assessee is one such person who has taken accommodation entry of bogus long term gain. However, there is no bogus long term gain in so far as on the scrip of EINS Edutech Ltd., which has been mentioned in the information. The ld. AO after receiving the information has not even applied his mind or has verified the records, whether assessee has claimed any kind of bogus long term capital gain in sale of shares of EINS Edutech Ltd., which is an allegation made in third para that assessee had obtained long term entry of bogus long term capital gain in trading of these shares. The assessee had duly disclosed the long term capital gain of Rs.1,18,39,977 on sale of different scrip, Bhageria Dye Chem Ltd altogether which is neither a penny stock nor any finding has been given by the ld. AO on this scrip. Thus, very premise on which ld. AO has assumed the jurisdiction and material information on record has no live link nexus with the income escaping assessment. The reasons mentions trading in EINS Edutech Ltd., for a consideration of Rs.3,35,51,000/- on which assessee has earned long term capital gain of Rs.1,18,39,977/- which has been claimed as exempt income,

which fact itself is incorrect. Further, it has been brought on record that assessee has earned short term capital loss of Rs.1,52,500/- as these shares were purchased on 16/03/2015 & 17/03/2015 and were sold on 18/03/2015 & 19/03/2015. The said short term capital loss has not been set off against any income or has been carried forward by the assessee. So there was no benefit to the assessee on this transaction which can lead to any inference that assessee must have engaged in some clandestine bogus entry for some benefit.

9. Now in the assessment proceedings, the ld. AO is taxing the source of investment in the purchase of the shares of EINS Edutech Ltd., which assessee has contended that it had settled the payment subsequently as these shares were booked through a broker and were sold within two days and purchase consideration has been settled after the sale subsequently. Be that as may be, there is no co-relation between the reasons recorded and the addition which has been made by the ld. AO. If ld. AO had such a belief during the course of assessment proceedings, he could have recorded the reasons on investment made in the purchase of shares for sums aggregating to Rs.3,36,70,000/-. Thus, there is no link between the information and the reasons recorded and the assessment which has been made by the ld. AO. It is *sine-qua-non* that for reopening the assessment, AO should have reason to believe that income chargeable to tax has escaped assessment and such reason to belief should be based on material and information having live link nexus or direct nexus with the income escaping assessment,

which here in this case is purely lacking. In fact the reasons have been recorded on a wrong premise and on a wrong information and ld. AO has not even applied his mind on such information or verified the records before issuing notice u/s.148. Such reasons cannot be sustained or give jurisdiction to the ld. AO to reopen the case and accordingly, we hold that the entire reopening is bad in law and consequently entire assessment proceeding is quashed.

10 . In the result, appeal of the assessee is allowed on legal grounds.

Order pronounced on 30th April, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Mumbai; Dated 30/04/2024
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai