

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE JUSTICE (RETD.) C V BHADANG, HON'BLE PRESIDENT &
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

**ITA NO.3779/MUM/2023
Assessment Year 2014-15**

Surendrakumar Balkishandas Agarwal,
545, Panchratna,
Mama Parmanand Marg,
Opera House, Mumbai - 400 004.
PAN:AABPA-7889-C

- Appellant

Vs.

Commissioner of Income Tax (Appeals)-NFAC/
Income Tax Officer, Ward-19(3)(1),
Matru Mandir,
Mumbai.

- Respondent

Appellant by : Shri Neelkanth Khandelwal
Respondent by : Shri Manoj Kumar Singh

Date of Hearing : 05/03/2024
Date of Pronouncement : 29/04/2024

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER :

The assessee has filed this appeal challenging the order dated 06-10-2023 passed by Ld CIT(A), NFAC, Delhi and it relates to the assessment year 2014-15. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the rejection of exemption claimed u/s 10(38) of the Act in respect of long term capital gains declared by the assessee and accordingly assessing the same as unexplained cash credit u/s 68 of the Act.

2. The facts relating to the case are stated in brief. The original return of income filed by the assessee was accepted in the assessment order passed u/s 143(3) of the Act. In the original return of income, the assessee had declared long term capital gain of Rs.5.11 crores on sale of shares of

Surabhi chemicals and Investments Ltd and claimed the same as exempt u/s 10(38) of the Act and it was accepted by the AO. Subsequently, the Directorate of Investigation, Kolkatta carried out detailed investigation and identified certain companies as penny stock companies, whose share prices were manipulated in order to generate bogus capital gains/capital losses. The shares of M/s Surabhi chemicals and investments Ltd was identified as one of the penny stocks by the investigation wing. Based on this information, the AO reopened the assessment of the year under consideration on the reasoning that the long term capital gains declared by the assessee is bogus in nature.

3. Before the AO, the assessee submitted that he is a senior citizen and is investing in shares of various companies for the past 20 years. It was stated that the investment portfolio of the assessee has grown up over the years and now the cost of portfolio stands at around 14 crores as on 1.4.2013. He submitted that he keeps receiving information about various shares from Investment groups/circle. Besides, he also makes his own studies and accordingly makes investments. He submitted that he received information from an Investment group/circle that a private placement offer of M/s Surabhi Chemicals and Investments Ltd has been floated and its prospects are good. Accordingly, he applied for one lakh equity shares of Rs.10/- each of above said company at a premium of Rs.5/- per share. He submitted that the purchase consideration of Rs.15.00 lakhs was paid through banking channels, i.e., funds were transferred through RTGS from the bank account of the assessee. He further submitted that one lakh shares were allotted on 01-01-2013 and were credited to his demat account maintained with M/s Samurai Securities Ltd. Thereafter, the face value of shares was split from Rs.10/- to Re 1.00 on 13.4.2013. Accordingly, the assessee received ten lakhs shares as against one lakh shares held by him and the new shares were also credited to his demat account. The assessee furnished copies of share application form, share allotment letter, demat statements, copy of bank statements in support of the purchases of shares.

4. The assessee further submitted that he sold 6,75,500 shares from January 2014 to March, 2014 for an aggregate consideration of Rs.5,27,31,751/- through the broker M/s Samurai Securities P Ltd in BSE platform. In that process, the assessee realized long term capital gains of Rs.5,17,18,501/- on which STT was also paid. The shares were delivered to the market from the demat account of the assessee. In support of sales, the assessee furnished contract notes, demat account statements, ledger account obtained from M/s Samurai Securities P Ltd, copy of bank statements. It was submitted that all his other investments are also kept in the very same demat account maintained with M/s Samurai Securities P Ltd. Accordingly, it was submitted that the transactions were carried on by him in a routine manner and hence there is no reason to suspect the genuineness of long term capital gains declared by him.

5. However, the AO referred to the report given by the investigation wing of Kolkatta, wherein the financials of the above said company were given. Besides the above, the investigation wing had given copies of sworn statements taken from certain persons and in those statements; they had admitted the fact of manipulating the prices of shares. The price movement chart of shares of penny stock companies was also showing erratic movement of prices. With regard to the Investigation report relied upon by the AO, the assessee submitted that none of the persons who had given statements has implicated the assessee as one of the beneficiaries of the manipulation of prices. In this regard, the assessee also referred to the statement given by a broker of Kolkatta Stock Exchange named Bal Kishan Sikaria, wherein he has categorically stated that he does not know Shri Surendra Kumar Agarwal personally. The assessee had also requested the AO to share the documents/evidences on which reliance was placed by him. Since the AO sought to rely upon the statements given by certain persons, the assessee also asked for an opportunity of cross examining those persons. According to Ld A.R, the above requests of assessee were not acceded to.

6. The assessing officer did not accept the evidences and other explanations furnished by the assessee. He primarily relied upon the investigation report, wherein various brokers had admitted that they have manipulated the prices of shares of M/s Surabhi Chemicals & Investments Ltd. He also observed that the fundamentals of the above said company were weak and the same did not justify the market price of its shares. The share price movement was also found to be erratic. Further, seven broking houses had admitted that they were manipulating the prices of shares of the above said company. Accordingly, the AO took the view that the assessee has managed to obtain long term capital gains. The AO also placed reliance on certain case laws in this regard. Accordingly, the AO rejected the claim for exemption u/s 10(38) of the Act and Accordingly the AO held that the long term capital gain of Rs.5,17,18,501/- pertaining to M/s Surabhi Chemicals & Investments Ltd as bogus. It is pertinent to note that the assessee had suffered long term capital loss of Rs.6,20,115/- on sale of some other shares and accordingly set off the same against the long term capital gain. Accordingly, the assessee had declared net long term capital gain of Rs.5,10,98,387/-. The AO assessed the net long term capital gain of Rs.5,10,98,387/- declared by the assessee as unexplained cash credit.

7. The Ld CIT(A) also placed heavy reliance on the report given by the investigation wing. The Ld CIT(A) took the view that the unusual rise in the prices of shares of unknown companies is against the preponderance of probabilities. The Ld CIT(A) also placed reliance on the decision rendered by Hon'ble Kolkatta High Court in the case of PCIT vs. Swati Bajaj (2022)(138 taxmann.com 352)(Kol), wherein the claim of earning of long term capital gain on sale of shares of M/s Surabhi Chemicals & Investments Ltd was rejected. Accordingly, the Ld CIT(A) dismissed the appeal of the assessee.

8. The Ld A.R submitted that the assessee is a senior citizen and is a regular investor in shares. He has been investing in shares for the past several years. Based on the information received from his investors circle,

the assessee came to know of the equity shares offered by M/s Surabhi Chemicals & Investment Ltd on preferential basis. He submitted that the assessee applied for the shares of Rs.10/- each at a price of Rs.15/- each, which included premium of Rs.5/- per share. The purchase consideration was paid through banking channel. Subsequently, the shares were allotted to the assessee and they were credited in his demat account maintained with M/s Samurai Securities P Ltd. Later on, the face value of shares was reduced to Re1.00 per share and hence the assessee got 10 lakh shares. Out of the above, the assessee has sold 6,75,500 shares during the year relevant to AY 2014-15 in the platform of the Bombay Stock Exchange through the above said share broker. Balance quantity of shares were held by the assessee as on 31.3.2014. The sale consideration has been received by way of account payee cheque. He submitted that the assessee has furnished all the required documents to prove the purchase and sale of shares. He submitted that the Assessing Officer did not find any deficiency/defect in the documents so furnished by the assessee. He submitted that the assessee is an ordinary investor in shares and it was not shown that the assessee was a part of the group, which was involved in the alleged prices rigging of the shares. Accordingly he submitted that the tax authorities are not justified in disbelieving the transactions of shares carried on by the assessee. In support of his submission, he placed reliance on the following decisions :

- i) PCIT Vs. Indravadan Jain HUF (ITA No. 454 of 2018)(Bom)
- ii) PCIT Vs. Ziauddin A. Siddiquie (ITA No. 2012 of 2017) (Bom)
- iii) CIT Vs. Shyam R. Pawar (54 taxmann.com 108)(Bom)
- iv) CIT Vs. Smt. Jamnadevi Agrawal (20 taxmann.com 529 (Bom)
- v) Pr. PCIT Vs. Smt. Krishna Devi (126 Taxmann.com 80 (Del)

The Ld A.R submitted that the assessee had incurred loss on sale of other shares and had set off the same against the long term capital gains earned on sale of M/s Surabhi chemicals & Investments Ltd. The AO has allowed

the set off so claimed by the assessee and assessed the balance amount of capital gains only as unexplained income. He submitted that the AO could not have taken contrary stand, after allowing set off of loss incurred on sale of other shares. He further submitted that the broker of the assessee M/s Samurai securities Ltd has not been identified as a tainted broker. No enquiry against the assessee or the above said share broker was conducted by SEBI. Accordingly, he submitted that there is no reason to suspect the long term capital gains declared by the assessee.

9. On the contrary, the learned DR heavily placed reliance on the order passed by the Assessing Officer. He submitted that the Assessing Officer has conducted inquiries with the assessee and the assessee could not clarify the reasons for investing in shares of M/s Surabhi Chemicals and Investment Ltd, when its fundamentals are not strong. The financial performance and fundamentals of these companies would show that the price rise was not commensurate with the financial performance/fundamentals of the company. The same would lead to the conclusion that there was rigging in the price of these shares. Accordingly, the learned DR submitted that the transactions of purchase and sale of shares are preconceived and artificially structured with the sole intention to general bogus long term capital gains. He submitted that the AO has erroneously allowed set off of long term capital loss incurred on sale of other shares and it is curable defect. He further submitted that the Ld CIT(A) has relied upon the decision rendered by Hon'ble Kolkatta High Court in the case of Swati Bajaj (supra) and has also held that the share price movement was beyond the scope of human probabilities. The Ld DR also placed his reliance on the decision rendered by the co-ordinate bench in the case of Shri Hitendra G Ghadia (ITA No.621/Mum/2021 dated 20-03-2023, wherein the long term capital gain on sale of penny stock was held to be bogus in nature. Accordingly he contended that the order passed by the learned CIT(A) should be confirmed.

10. In the rejoinder, the Ld A.R submitted that the assessee had purchased shares in the earlier year and the same has been accepted as genuine. Further, the AO has consciously allowed set off of long term capital loss incurred on sale of other shares against the long term capital gain earned on sale of shares of M/s Surabhi Chemicals & Investment Ltd. Hence it cannot be considered to be a curable defect. He further submitted that the decision was rendered by Hon'ble Kolkata High Court in the case of Swati Bajaj on the basis of facts available in that case. However, the decisions rendered by Hon'ble Bombay High Court are binding on the assessee, as per which the AO should show that the assessee was part of the group which were manipulating the prices or he should find any defect/deficiency in the documents furnished by the assessee. He also submitted that the decision rendered in the case of Shri Hitendra G Ghadia (supra) is also based on facts of that case and it did not consider the decisions rendered by Hon'ble Bombay High Court.

11. 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 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 by the brokers to manipulate the prices of certain shares to suit their requirement in generating bogus capital gains/capital losses. 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 submitted that the SEBI, who is regulator of stock market operations, have not conducted any enquiry either

with the assessee or with the broker through whom the transactions of purchase and sale were effected. Accordingly, it was stated by Ld A.R that the transactions carried on by the assessee were not subjected to scrutiny by SEBI at all.

12. From the record we notice that the assessee is a regular investor. The assessee has also stated that the investments have been made by him over the years in various shares and their cost itself has reached to the level of Rs.14.00 crores. Thus, the impugned transactions are not isolated transactions of purchase and sale, meaning thereby, the assessee has purchased shares of M/s Surabhi Chemicals and Investments Ltd in the ordinary course of making investments. We also notice that the assessee has

- (a) purchased these shares by paying consideration through banking channels and relevant documents for purchase have been furnished.
- (b) The shares were received and kept in the Demat account.
- (c) sold the shares through stock exchange platform
- (d) received the sale consideration through banking channels.

Thus, the shares have entered and exited the demat account of the assessee. Under these set of facts, we are of the view that the genuineness of the transactions of purchase and sale of shares can be doubted with, only if the AO could bring some other evidences to disprove the documents furnished by the assessee. We notice that the AO himself has not found any defect/deficiencies in the evidences furnished by the assessee. Further, the AO has not brought on record any material to show that the assessee was part of the group that were manipulating the prices of shares. Under these set of facts, we are of the view that there is no reason to suspect the purchase and sale of shares undertaken by the assessee.

13. We may now refer to certain decisions rendered by Hon'ble Bombay High Court on identical issue. In the case of Shyam Pawar (supra), the Hon'ble Bombay High Court has observed as under:-

“3. Mr.Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumar, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

4. Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

*5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, **what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny.** It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121*

of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. **The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies.** The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Suresh kumar that the Tribunal misdirected itself and in

law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.”

14. We may now refer to the decision rendered by Hon’ble Jurisdictional High Court in the case of PCIT vs. Ziauddin A Siddique (Income tax Appeal No. 2012 of 2017 dated 4th March, 2022) and relevant discussions made by Hon’ble Bombay High Court are extracted below:-

“2. We have considered the impugned order with the assistance of learned counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd (“RFL”) is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax (“STT”) has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against the assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgement of the Apex Court in Principal Commissioner of Income tax (Central)-1 vs. NRA Iron & Steel (P) Ltd (2019)(103 taxmann.com 48)(SC) but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.”

In the case of CIT vs. Jamnadevi Agarwal (supra), the Hon’ble Bombay High Court held that the transactions of purchase and sale of shares cannot be

considered to be bogus, when the documentary evidences furnished by the assessee establish genuineness of the claim. In the case of PCIT vs. Indravadan Jain (HUF) (supra), the broker through whom, the assessee had carried out the transactions have been alleged to have been indulged in price manipulations and the SEBI had also passed an order regarding irregularities and synchronized trades carried out in the shares by the said broker. However, the evidences furnished by the assessee with regard to purchase and sale of shares were not doubted. Under these set of facts, 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.”

In the instant case also, we noticed that the evidences furnished by the assessee to prove the purchase and sale of shares, payment made/received, entry/exit of shares in the demat account of the assessee etc., were not doubted with.

15. In the case of PCIT vs. Smt Krishna Devi (supra), the Hon'ble Delhi High Court has noticed that the reasoning given by the AO to disbelieve the capital gains declared by the assessee, viz., astronomical increase in the price of shares, weak fundamentals of the relevant companies are based on

mere conjectures. Accordingly, the Hon'ble Delhi High Court affirmed the decision rendered by ITAT in deleting the addition of capital gains.

16. Accordingly, in the facts and circumstances of the case, we are of the view that the decisions rendered by the jurisdictional Hon'ble Bombay High Court in the cases cited above shall apply to the present case, since the AO has not established that the assessee was involved in price rigging and further the AO did not find fault with any of the documents furnished by the assessee. The Ld D.R placed reliance on the decision rendered by Hon'ble Kolkatta High Court in the case of Swati Bajaj (supra). However, we have followed the principles laid down by the jurisdictional Hon'ble Bombay High Court in deciding the issue. With regard to the decision rendered by the co-ordinate bench in the case of Shri Hitendra G Ghadia (supra), we may observe that the revenue did not show parity of facts and further, we notice that the co-ordinate bench did not refer to the binding decisions of Hon'ble Bombay High Court. Hence, we are of the view that the revenue could not place reliance on both the decisions referred above.

17. In view of the foregoing discussions, we hold that the long term capital gain earned on sale of shares cannot be assessed as unexplained cash credit u/s 68 of the Act. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the impugned additions made by him.

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

Order pronounced in the open court on 29 April, 2024.

Sd/-

[Justice (Retd) C V Bhadang]
President

Mumbai, Date : 29 April, 2024

VM.

Sd/-

(B.R. Baskaran)
Accountant Member

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The PCIT/CIT concerned
- 4) The D.R, "G" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai