

**THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 668/KOL/2022
Assessment Year: 2014-2015**

***Winsher Commercial Pvt. Limited,.....Appellant
C/o. Subash Agarwal & Associates,
Advocates,
Siddha Gibson,
1, Gibson Lane, Suite 213, 2nd Floor,
Kolkata-700069
[PAN:AAACW3125H]***

-Vs.-

***Income Tax Officer,.....Respondent
Ward-14(2), Kolkata,
[Presently DCIT, Circle-11(1), Kolkata],
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069
Appearances by:***

*Shri Siddharth Agarwal, Advocate, appeared on behalf of
the assessee*

*Shri B.K. Singh, JCIT, Sr. D.R., appeared on behalf of
the Revenue*

**Date of concluding the hearing : March 21, 2024
Date of pronouncing the order : May 13, 2024**

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax (Appeals), National

Faceless Appeal Centre (NFAC), Delhi dated 23.09.2022 passed for A.Y. 2014-15.

2. The assessee has taken three grounds of appeal, out of which Ground No. 3 is a general ground, which does not call for recording of any finding.

3. Under Grounds No. 1 & 2, the assessee has pleaded that the ld. CIT(Appeals) has erred in confirming the addition of Rs.63,60,401/-, which was added by the ld. Assessing Officer with the aid of Section 68 of the Income Tax Act.

4. Brief facts of the case are that the assessee is a Non-Banking Financial Company. It is engaged in the business of share trading/investment at its own as well as providing consultancy services to its clients. It has filed its return of income for A.Y. 2014-15 on 14.10.2014 declaring 'NIL' income. The case of the assessee was selected for scrutiny assessment and notices under sections 143(2) and 142(1) were issued and served upon the assessee. In response to such notices, Shri Rajesh Jain, FCA appeared on behalf of the assessee. The ld. Assessing Officer has observed that the Director of Income Tax (Investigation), Kolkata carried out search and seizure operations to various brokers and entry operators. It recorded their statements and one of the persons is Shri Pankaj Agarwal, who has deposed on oath. The ld. DIT(Investigation) has transmitted the material information exhibiting that certain individual companies have shown capital gain and claimed exemption under section 10(38) of the Income Tax Act. Such gains

were manipulated by entry operators. Copy of the show-cause notice has been reproduced by the ld. Assessing Officer on page no. 1 of the assessment order. The ld. Assessing Officer thereafter reproduced the information given by the ld. DIT(Investigation) and observed that the assessee is also one of the beneficiaries, who allegedly taken the entry of Rs.63,60,401/-. After a detailed analysis, ld. Assessing Officer has added this amount under section 68 of the Income Tax Act.

5. Dissatisfied with the assessment order, the assessee carried the matter in appeal. The assessee has filed detailed written submissions, which have been reproduced by the ld. CIT(Appeals) from pages no. 2 to 20 of the impugned order. The ld. CIT(Appeals) thereafter recorded the findings on pages no. 22 to 25. The ld. 1st Appellate Authority after page no. 25 upto 28 reproduced various case laws. Therefore, we deem it appropriate to take note of the finding of the ld. CIT(Appeals) from paragraphs no. 5 to 5.3, which read as under:-

“5. Ground No. 1: In the ground No. 1, the appellant has. challenged that on facts and circumstances of the case and in law, the Ld. AO has erred in making addition by treating the trade value on account of sale of equity shares amounting to Rs. 63,60,401/-as unexplained, without properly appreciating the fact that the source and genuineness of the said transaction was established on assessment records with the support of related documentary evidences.

5.1. The AO found that the appellant had shown Loss of Rs.1,11,13,111/- from share transaction. As per ITS data it was seen that the appellant had purchased shares of CRESSANDA SOL of Rs.41,31,229/- and LUMINAI TECH of Rs.1,02,80,410/- and sold the share of LUMINAI TECH of Rs.41,12.957/- CCL INTER of Rs.17,29,944/- and sold the shares of BLUE CIRCLE for an amount of Rs. 5,17,500/-. The Principal Director of Income Tax (Investigation), Kolkata, Aayakar Bhawan, (Annex), P-13

Chowringhee Square Kol - 69 vide its letter No. F.No.75A/2015-16/257-273 dt. 27.04.2015 had observed the Accommodation Entry of Bogus LTCG/STCG, penny stock script used in LTCG scam. In LTCG investigation done by the Kolkata or Other Directorates, the approach was to investigate the Individuals through those concerns which were identified as the penny stocks and the beneficiaries. They first identified the penny stocks and then started investigating the individuals who dealt with in them. The Principal Director of Income Tax (Investigation), Kolkata made several search & seizure operations on various Brokers and entry Operators and their statements were recorded on oath. Shri Pankaj Agarwal in his sworn statement has confirmed that unaccounted money was transferred by way of sale proceeds. As a result, some of BSE/CSE listed penny stocks were identified, which have been used for generating bogus LTCG. The SEBI vide order No. WTM/KMA/ND/415/2011 dated 12.03.2014 had suspended the; trading of shares (Penny Stock) w.e.f. 21.03.2014 due to non-compliance of Listing agreement. The AO has observed that the appellant was one of the beneficiary who has allegedly taken the entry of Rs.63,60,401/-. The name of CCL INTER, LUMINAI TECH and BLUE CIRCLE are the listed companies, which is/are directly or indirectly owned by operators and whose share prices have been apparently manipulated by the syndicate of operators. The appellant had shown credit of Rs.63,60,401/- as sale proceeds of shares of CCL INTER, LUMINAI TECH and BLUE: CIRCLE. The AO after considering the record, the actual source of this credit as explained by the appellant observed that the sale proceeds of shares were not satisfactory, and also false. Based on the above findings and the corroborative admission by the Directors/Brokers before the Investigation Wing and taking into account the surrounding circumstances of the case and also considering the aspect of human probability in investing heavily in such a script, the AO concluded that the loss was bogus and the amount of Rs.63,60,401/- was added back to the total income of the appellant, as unexplained cash credit.

5.2. The appellant has argued that all the transactions were through banks; all the details of purchases together with the contract notes issued by the broker were available ledger copy of the broker in the books of accounts: demat statement; Appellant's ledger in the books of broker; and the relevant bank statements evidencing all the payment made by us to the broker through our bank account, were available and produced. The appellant has also- argued that the appellant has always accounted the transactions in the; listed equity shares under the head profit and gain from business and profession and accounted the same as purchase/sale and closing stock. The appellant has relied upon various judicial pronouncement made by the Hon'ble Apex Court and number of High Courts and Income Tax Appellate Tribunal.

5.3. *The contention of the Appellant, the case laws relied upon in the statement of facts, the grounds of appeal, the submissions made, the arguments in the VC and submissions after the VC have been considered. With regard to the issue of Penny Stock, recently the Delhi High Court has in the case of SANJAY KAUL VERSUS PRINCIPAL COMMISSIONER OF INCOME TAX DELHI [2020] 119 taxmann.com 470 (Delhi)[2020] 274 Taxman 301 (Delhi)/[2020] 427 ITR 63 (Delhi)[29-07-2020]; while dismissing the appeal of the assessee, the High Court has held that the principle of natural justice is not absolute and the assessee cannot claim it as a matter of right in all the cases. In the instant case, the AO made an addition under Section 68 read with 115BBE and Rs. 3,06,908/- under section 69C of the Act. The CIT(A) upheld the addition made by AO and the ITAT too rejected the appeal although agreed that addition for STCL cannot be made u/s 68. However, it observed that mentioning the wrong section in assessment order would not render the entire assessment as null and void as the AO. Hence, Appellant approached Delhi High Court. The basic question before the Delhi High Court was whether the assessee had proved the genuineness of the transaction. The appellant also contested that he was never provided with the material on which the department relied nor provided cross examination of the persons who rendered the statements which was the basis of treating the transaction as bogus. The appellant raised the following broad arguments to suggest that the transaction was genuine.*

1. There is no nexus between the buying and selling brokers since the appellant carried out transactions through registered brokers.

2. The Appellant has discharged its onus and substantiated the claim of STCL arising out of sale of impugned transaction by sufficient documentary evidence filed before the AO, CIT(A) and ITAT.

3. The authorities did not rebut or contradicted the documents produced before them by the Appellant.

4. The ITAT held that Section 68 is not applicable, since it was a case of cash debit and not cash credit, the burden of proof was on the revenue to sustain the addition by leading cogent evidence.

5. The income-tax department failed to gather and produce any credible material in support of treatment of STCL as bogus and therefore, the order of ITAT upholding the additions is unsustainable.

The High Court dealt with the various arguments of the assesses while dismissing all the contentions. The Court observed that the AO had explained in detail the general modus operandi of accommodation entry by way of bogus capital gain/loss. For the said purpose the AO had relied upon the report of the Investigation wing.

The AO had also mentioned and highlighted the statement of the persons who claimed to have provided bogus capital gain/loss entries as recorded by the Investigation wing.

The companies were not having any significant/real business as seen from their financial statement. The price movement of the shares was also found to be unrealistic by the AO. The volume transacted in the impugned script was also very low. There was no history of dividend pay-out by those companies. It was pointed out that the assessee could not explain why it invested in such a script without knowing the financial performance of the company.

The Delhi High Court dismissed the argument of the assessee and held that the addition was not made solely on the basis of the statement of the persons who control the business of providing accommodation entry but have been corroborated with the material, surrounding circumstance and preponderance of probability.

The High Court: has referred to its earlier decision against which an SLP was dismissed by Supreme Court in case of Suman Poddar ITA No. 841/2019 wherein it has observing that there is consistent finding of fact by the Tribunal after analysing the balance sheet and profit and loss statement of Cressanda Solution Ltd which shows that there is astronomical increase in the share price of the said company. It was also observed that the said company is identified by the Bombay Stock Exchange as penny stock used for obtaining bogus long-term capital gain and no evidence of actual sale except contract notes issued by the share broker were produced by the assessee to prove the genuineness of the transaction. Thus, the said transaction was treated as bogus.

On the issue of principle of natural justice the High Court observed that though the right to cross examination of the witness is a legal and statutory right it is not a part of natural justice. The High Court relied upon the SC ruling in case of Andaman Timbers Industries Vs Commissioner of Central excise, Kolkata -II 2016 (15) SCC 785 wherein the Apex Court has held that

‘The principles of natural justice do not require formal cross-examination. Formal cross- examination is a part of procedural justice. It is governed by the rules of evidence and is the creation of the Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that, the revenue cannot rely on any evidence which has not been subjected to cross-examination. However, if a witness has given a directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature”.

6. Ld. Counsel for the assessee, at the very outset, submitted that basically the assessee is a Trader as well as Non-Banking Financial Company, which provides services to its clients in making investment. He further submitted that there are three scrips considered by the ld. Assessing Officer and held that transactions in these three scrips are to be treated as bogus and any gain claimed by the assessee was not to be allowed as exempt under section 10(38) of the Income Tax Act. He took us through the details that one of the scrips is Blue Circle Services Limited not purchased by the assessee, rather it was purchased and sold on the direction of its clients, namely Goodlife Financial Consultants Pvt. Limited, the details of such transactions are reflected at page 87 of the paper book. He also placed on record the contract note on page 88 of the paper book. Thus, on the strength of these details, he submitted that scrips, which are purchased on behalf of the client and sold, could not be considered in the hands of the assessee and no addition is to be made.

7. With regard to the remaining two scrips, the assessee has not treated them in the investment portfolio, rather included in the stock-in-trade and any profit/loss occurred on the transactions of these two shares have been offered for taxation. Therefore, the sale consideration could not be treated as a bogus cash credit of the assessee. He further pointed out that in the immediately preceding year 2014-15 i.e. A.Y. 2013-14, an identical issue has been considered by the ld. CIT(Appeals), whereby ld. 1st Appellate Authority has made a detailed analysis of the issue whether in case of a consultancy, addition can be made on account of any gain earned by the client by a consultant.

8. On the other hand, ld. D.R. relied upon the order of revenue authorities and submitted that no such plea was taken.

9. We have duly considered the rival contentions and gone through the record carefully. A perusal of the submissions made by the assessee before the ld. 1st Appellate authority are concerned, we find that efforts at the end of the assessee was to justify earning of alleged capital gain. The operative force at its argument is towards that direction. This alternative submission raised before the Tribunal is not discernable specifically either before the ld. Assessing Officer or before the ld. CIT(Appeals). However, considering the fact that it is going to effect ultimately taxability of the assessee. We deem it appropriate to set aside this issue for a limited purpose to the ld. 1st Appellate Authority with a direction that ld. CIT(Appeals) should examine the claim of the

assessee in this new line of argument. The ld. CIT(Appeals) will also take into consideration the order of ld. CIT(Appeals) passed in A.Y. 2013-14 in this regard.

10. With the above observation, this appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 13/05/2024.

Sd/-

Sd/-

(Rajesh Kumar)
Accountant Member

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 13th day of May, 2024

*Copies to :(1) Winsher Commercial Pvt. Limited,
C/o. Subash Agarwal & Associates,
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1, Gibson Lane, Suite 213, 2nd Floor,
Kolkata-700069*

*(2) Income Tax Officer (Exemption),
Ward-14(2), Kolkata,
[Presently DCIT, Circle-11(1), Kolkata],
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069*

*(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC), Delhi;*

(4) CIT- , Kolkata

(5) The Departmental Representative;

(6) Guard File

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.