

**आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA**

**श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष**  
**Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member**

**I.T.A. No.672/Kol/2023**  
**Assessment Year : 2015-16**

**Nalini Kejriwal.....Appellant**  
**7, Lyons Range, Dalhousie,**  
**Kolkata – 1.**  
**[PAN: AJOPK0890K]**

**vs.**

**ITO, Ward-35(2), Kolkata..... Respondent**

**Appearances by:**

Shri Ravi Tulsiyan, AR, appeared on behalf of the appellant.

Shri Umakanta Dhrupati, Addl. CIT-Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : March 14, 2024

Date of pronouncing the order : May 20, 2024

**आदेश / ORDER**

**संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:**

The present appeal has been preferred by the assessee against the order dated 11.05.2023 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT(A)'] u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee in this appeal has taken the following grounds of appeal:

*“1a) That, on the facts and in the circumstances of the case, the Ld. C.I.T.(A) erred in confirming the addition of Rs. 1,01,98,784/- being profit earned from sale of shares of M/s. GCM Securities Ltd. as unexplained cash credit u/s. 68 of the Act without considering the explanation with supporting evidences filed by the appellant in a proper perspective.*

*b) That, the Ld. C.I.T.(A) further erred in not considering that despite details provided and the fact that no Long Term Capital Gain was claimed in respect of the impugned transaction of sale of shares of M/s.*

GCM Securities Ltd., the A.O. placing sole reliance on the information received from DIT(Inv), Kolkata held that the entire transaction is bogus.

c) That, the Ld. C.I.T.(A) erred in not considering that the entire profit of Rs.1,01,98,784/- earned from sale of alleged shares of M/s. GCM Securities Ltd. had already been offered to tax under the head "income from other sources" and as such, further addition of the said sum by invoking sec.68 of the Income Tax Act, 1961, will only lead to double taxation of the same income.

d) That, on the facts and in the circumstances of the case, the ld. C.I.T(A) further erred in not considering that in view of Explanation 2 to section 5 of the Income Tax Act, 1961, the same amount of income cannot be brought to tax twice.

2. That, the Ld. C.IT.(A) erred in confirming the addition of Rs.2,47,898/- u/s.69C of the Act on the alleged presumption that commission of 2.5 was paid by the appellant for creating bogus Long Term Capital Gain, in spite of the fact that no such practice had been resorted to by the appellant nor any such alleged Long Term Capital Gain had been claimed by the assessee.

3a) That, on the facts and in the circumstances of the case, the Ld. C.I.T(A) erred in upholding the disallowance of Rs.91,23,904/- on account of bad debt written off loss incidental to business without considering the facts on record that the trading was carried out in normal course of business and it is only after realizing that the balance receivable is irrecoverable pursuant to scam detected in the NSEL exchange that the same was written off by the appellant during the relevant financial year.

b) That, the Ld. C.I.T.(A) further erred in upholding the disallowance of the claim of bad debt written off/ loss incidental to business amounting to Rs.91,23,904/- alleging the loss to be capital in nature.

c) That, the Ld. C.I.T.(A) erred in not considering the letter dated 02/12/2013 sent by NSEL to all the aggrieved investors which includes the appellant, as reproduced in the assessment order itself, wherein it was specifically mentioned that the amount not recoverable from NSEL should be written off in the books of accounts of the investor i.e Profit and Loss account should be debited with bad debts and simultaneously the debtors should be credited by the same account.

4. That, as the order of Ld. C.I.T.(A) on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief(s) as prayed for.

5. That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds."

3. Ground Nos.1(a) to 1(d) – The assessee through these grounds of appeal has agitated the confirmation of addition of Rs.1,01,98,784/- made by the Assessing Officer in respect of profits earned by the assessee on sale of shares.

3.1 At the outset, the ld. counsel for the assessee has submitted that the assessee has traded in shares of M/s GCM Securities Ltd. That the said scrip has not ever been declared by the Security Exchange Board of India (SEBI) as a penny stock company. That the assessee was bona fide purchaser of the said shares and that the long-term capital gain ('LTCG') earned by the assessee were genuine and not bogus. The ld. counsel has further submitted that however since it has come to the knowledge of the assessee that the department was treating the shares of the said M/s GCM Securities Ltd. as a penny stock company, therefore, to avoid any type of litigation/penalty or any other harassment or any consequences, the assessee suo moto offered the profits earned on the sale of shares as 'income from other sources' and paid the due taxes. However, the Assessing Officer during the assessment proceedings held that the said gains were not genuine and again added the said amount into the income of the assessee u/s 68 of the Act. The ld. counsel has further submitted that the assessment year involved is A.Y 2015-16 and as per the provisions of section 115BBE as applicable for the assessment year under consideration, even on any addition made u/s 68 of the Act, the applicable rate of tax was @ 30%. He has submitted that the assessee has already offered the said income as 'income from other sources' in the return of income, which was taxable @ 30%. The assessee has claimed set off of losses in respect of Rs.91,23,904/- on account of bad debt written off and paid the due taxes on the remaining amount. The ld. counsel has further submitted that even prior to 01.04.2017, there was no bar to set off of losses

against the income assessed u/s 68 of the Act. The ld. counsel, therefore, has made two-fold submissions. Firstly, that the stocks of the scrips of M/s GCM Securities Ltd. was not declared as a penny stock by the SEBI. Secondly, even otherwise, the assessee has not claimed any exempt income on account of LTCG, rather suo moto offered the profits on the sale of the said scrip as 'income from other sources'. The assessee after claiming of set off of losses has paid due taxes as per law. That any further addition made by the Assessing Officer of the same amount amounts to double addition.

3.2 The ld. DR, on the other hand, has relied upon the findings of the lower authorities.

3.3 We have considered the rival submissions. Without going into the controversy as to whether the shares of M/s GCM Securities Ltd. were penny stock or whether the assessee was bona fide purchaser of the said shares, the assessee himself has offered the income from the sale of the said shares under the head 'income from other sources'. At this stage, the short question before us is as to whether the same income can be taxed twice? Since, the assessee has offered the said gains/income as 'income from other sources' and the slab of tax u/s 68 is the same at which the assessee has offered the said income after set off of losses and even for the year under consideration, there was no bar to set off losses against income assessed even u/s 68 of the Act, therefore, the Assessing Officer, in our view, is not justified in making double addition of the same amount. The addition, therefore, on this count, is ordered to be deleted.

4. Ground No.2 – The assessee vide Ground No.2 has contested the addition of Rs.2,47,898/- made by the Assessing Officer on the assumption that the assessee might have paid some commission to

earn bogus LTCG. This addition, in our view, has been made by the Assessing Officer only on the assumption that the assessee has dealt in penny stock company to earn bogus LTCG and therefore, the assessee might have paid some commission, which has been estimated by the Assessing Officer at Rs.2,47,898/-. In view of the peculiar facts of this case, since we have not gone into the question as to whether the shares of M/s GCM Securities Ltd. were penny stock and therefore, the addition made by the Assessing Officer only on assumption basis relating to the payment of commission, in our view, is not sustainable and the same is accordingly ordered to be deleted.

5. Ground No.3 – Vide Ground No.3, the assessee has agitated against the action of the lower authorities in disallowing the loss on account of bad debt written off/loss incidental to business activity of the assessee.

5.1 The ld. counsel for the assessee in this respect has made the following submissions:

*“The assessee is engaged in trading on various platforms of stock exchanges viz. NSE, BSE etc. for shares and securities and National Spot Exchange Ltd., NCDEX, MCX etc. for Commodities under Derivative segment.*

*Having engaged in trading through various exchanges, the assessee during the FY 2012-13 entered into transaction of commodities under derivative segment with National Spot Exchange Ltd. through recognized member - M/s. Blue Crest Commodities Pvt. Ltd. and earned profit of Rs.10,51,511/- which was accordingly offered as income from derivative trading. Further, during the FY 2012-13, the assessee entered into few forward transactions in the month of February and March 2013 which was due to square up in the month of April-May 2013, i.e. during the subsequent FY 2013-14. Reference is invited here to the chart, enclosed at pg. 19 of the P/b, giving details of the transactions entered into through M/s.Blue Crest Commodities Pvt. Ltd. during the FY 2012-13. In this connection, the assessee paid a sum of Rs.1,08,49,886.98 to the broker (i.e. Ms. Blue Crest Commodities Pu. Ltd) to pay to NSEL as per the contract. It may be noted here that the said amount was duly*

*accounted as receivable as shall be evident from perusal of the Balance Sheet for the FY 2012-13, enclosed at pg. 21 of the Pb.*

*Subsequently, during the FY 2013-14, a scam was detected and the activities and business of NSEL was barred by the Government of India.*

*At this juncture, attention is invited to a brief history of NSEL.*

*NSEL was conceptualized in the year 2004. It was set up as a company incorporated under the Companies Act, 1956 on 18 May 2005 with its registered office in the State of Maharashtra. NSEI was incorporated by MCX and the nominees of FTIL. NSEL commenced live trading on October 15, 2008 and was the first commodity spot exchange of the country. In order to boost volume, the three exchanges NSEL, NSPOT, and National AFMC were allowed to conduct forward trading in one-day contracts.*

*Soon, NSEL became the country's first ever electronic commodity exchange for 'spot delivery' of contracts, including agricultural products.*

*However, the exchange was blamed to take as long as 25 to 35 days to settle some contracts, whereas, the permitted time period to do so was up to 11 days. Against the regulations, short-selling, to0, was allowed in many cases. The then regulator, Forward Market Commission (FMC), then intervened and asked NSEL to wind down existing contracts. This ended in payment default on existing contracts.*

*The crisis came to light when the physical commodities were found short of the quantity on record. Warehouse receipts were not backed by any physical commodities. When investors claimed commodities worth their money, the borrowers could not provide them, as goods were way short in the warehouses. This is how the most controversial scam of the commodities market was born. The scam first seemed like a fraud conducted by the promoters and key employees. However as the investigation gained pace, large brokers and financial players came under the radar.*

*Coming back to the facts of the assessee's case, in view of the above-discussed scam in NSEL, although, the contracts with the assessee expired in April - May 2013, the amount due was not received from NSEL through the broker and therefore, the same became receivable. It may be seen from a perusal of the ledger account of the assessee as appearing in the books of the broker, Blue Crest Commodities (P) Ltd. for the FY 2013-14 (enclosed at pages 23-37 of the P/b), that a sum of Rs.16,87,870.18 was received /out of which Rs.13,32,000/- was received in bank and balance adjusted against other purchase and sale transaction in derivatives] from the broker during the FY 2013-14 and the remaining sum of Rs.91,62,016.80 was reflected as receivable in the Balance Sheet for the FY 2013-14. Refer ledger A/c of Blue Crest Commodities (P) Ltd. for the FY 2013-14 as appearing in the books of the assessee, enclosed*

at pg. 38 of the P/b and Balance Sheet for the FY 2013-14, enclosed at pg. 39 of the P/b.

In the meantime, after the scam, NSEL, vide its Notification dated 02/12/2013 [as reproduced at page 13-14 of the assessment order dated 29/12/2017] addressed all its victims (which includes the assessee) and issued clarifications for treatment of amounts not recoverable from NSEL. It was specifically mentioned in the said Notification that outstanding amount from NSEL should be classified as "Debtors" in the Balance Sheet so as to qualify for deduction u/s.36 of the Act. As can be seen from perusal of the same, it was mentioned particularly that amount not recoverable from NSEL should be written off in the books of accounts of the investor, i.e. Profit & Loss account should be debited with "Bad Debts" and simultaneously Debtors should be credited by the same amount.

In view of the above specific instruction, finally, after receiving only a sum of Rs.38,113.17 from the broker during the relevant FY 2014-15, the balance sum receivable of Rs.91,23,903/-, being irrevocable, was treated as loss incidental to business and was written off by the assessee in her Profit & Loss A/c.

At this juncture, attention is invited to the fact that it is an accepted principle of law that losses, other than capital losses, that arise out of and are incidental to the trade must be necessarily deducted in the ascertainment of the profits of a trade.

The above ratio finds force from the decision of the Hon'ble Supreme Court in the case of *Ramchandrar Shivnarayan v. Commissioner of Income-tax* reported in [1978] 111 ITR 263 (SC), wherein it was held that,

*If there is a direct and proximate nexus between the business operation and the loss or it is incidental to it, then the loss is deductible, as, without the business operation and doing all that is incidental to it, no profit can be earned. It is in that sense that from a commercial standard such a loss is considered to be a trading one and becomes deductible from the total income*

Reliance here is further placed on the decision of the Hon'ble Delhi High Court in the case of *Commissioner of Income Tax vs. New Delhi Hotels Ltd.* [(2012) 345 ITR 0001]:

*In this case, the assessee company was the promoter and developer of New Delhi House and Mercantile House at New Delhi. The assessee is also the promoter and developer of Heritage City at Gurgaon, in respect of which the profit has been shown under the head "business or profession". During the year 1990-91, the assessee company entered into an agreement with M/s. Gulmohar Estate Ltd for the purchase of three properties at Garden Estate,*

Gurgaon for the total consideration of Rs.44,28,000/- as per the agreement dated 27.07.1990. The assessee made the total payment to M/s Gulmohar Estate Ltd. in the year 1990-91. In spite of making full payment, no physical possession was handed over by the purchaser to the assessee. Since no physical possession was received by the assessee, the property proposed to be purchased by the assessee were not shown as stock in trade in the books of assessee as per the normal accounting practice. The assessee had debited the amount of Rs.44,28,000/- in the books of accounts and shown under the head "loans and advances". Thereafter, in the year 2003-04, M/s. Gulmohar Estate Ltd. locked their offices and it was found that the property purchased by the assessee were fraudulently sold to some other people also. District town and Country Planner, Haryana gave a public notice canceling the licence of Garden Estate of M/s. Gulmohar Estate Ltd. The assessee, therefore, taken a decision to write off the entire amount as business loss. It is also an admitted position that the possession of the flats agreed to be purchased by the assessee was not given to the assessee and, thus, the transfer of flats within the meaning of Income Tax Act was not completed. Therefore, it is a case where amount was paid in advance for purchase of property. The assessee is in the line of business or real estate as discussed above. It can, therefore, be reasonably be presumed or a reasonable inference can be drawn that the assessee intended to purchase the property in the course of original business carried on by it or at best it can be said that the assessee purchased the property for residences of its employees including directors. Even if it is presumed that the assessee intended to purchase the three flats for use of its employees and directors, the amount so advanced to M/s. Gulmohar Estate Pvt. Ltd would be considered to be made as incidental to the business carried on by the assessee.

In the said case, the Hon'ble High Court held as under:

*"The reasoning given by the tribunal is factual in nature. It cannot be said that the findings recorded by the tribunal are unreasonable or perverse.*

*7. In view of the aforesaid factual findings recorded by the tribunal, the answer to the question has to be in affirmative, i.e. in favour of the assessee and against the Revenue."*

However, both the AO and the Ld. CIT(A), disallowed the above-said claim of the assessee alleging that the same was made in contravention to provisions of sec.36(2) of the Act and that the assessee had not disclosed the impugned transactions in the returns filed. Further, it was

*alleged that the assessee neither verified the unsettled transactions from NSEL nor confirmed the same from the broker.*

*In this regard, it may be noted that there is no denying the fact that the profit derived from derivative trading with NSEL, as entered through the broker, Blue Crest Commodities (P) Ltd. was duly disclosed as income in the books of the assessee and accordingly, was offered for taxation. Again, there is no denying the fact that a scam occurred in NSEL pursuant to which the activities and business of NSEL were barred by the Government of India. As a result, the amount outstanding from NSEL became irrecoverable and was written off by the assessee during the relevant financial year as loss incidental to business. It is pertinent to note here that the said action was taken pursuant to the Notification dated 02/12/2013 issued by NSEL to all its victims, which includes the assessee and which fact was even accepted by the Ld.AO, as maybe evident from the assessment order.*

*Under such circumstances, undoubtedly, the above claim of write-off of outstanding balance of Rs.91,23,903/- standing in the books of the assessee against the broker, Blue Crest Commodities (P) Ltd., is perfectly within the four corners of law.*

*As regards the allegation of the impugned claim being made in contravention to provisions of sec.36(2) of the Act, it is submitted that the assessee has claimed write-off of the outstanding balance u/s.37 of the Act being loss incidental to business and not w/s.36(2) of the Act, as alleged by the AO and the Ld. CIT(A).*

*Further, the allegation that the assessee has not disclosed the transactions from NSEL in her return filed is also not correct as the outstanding amount standing against the broker, Blue Crest Commodities (P) Ltd., duly appeared in the assessee's books during the FYs 2012-13 & 2013-2014.*

*The allegation of non-verification of unsettled transactions from NSEL and non-confirmation of the same from the broker is also baseless as it is the broker who is dealing directly with NSEL and thus, any verification from NSEL can be done by the broker only. The assessee has correctly written off the amount appearing outstanding against the broker in her accounts during the relevant financial year pursuant to the Notification issued by NSEL.*

*As such, in view of the above, it is urged most respectfully to kindly allow the claim of write-off to the tune of Rs.91,23,903/- on account of loss incidental to business against business income and direct the Ld.AO to set off the same against the income offered from trading in the impugned shares of M/s. GCM Securities.”*

5.2 In view of the above submissions of the ld. AR, which could not be rebutted by the ld. DR, it is clear that the assessee has offered the aforesaid loss during the course of his business in derivative segment since the amount was paid by the assessee and commodity was not delivered to the assessee due to some scam in the NSEL and the amount was treated as bad debt written off. Therefore, the assessee was justified in claiming the same as loss on account of bad debt written off. As observed above, for the assessment year under consideration there is no bar to set off of losses against income even assessed u/s 68 of the Act. In view of this, the impugned addition made by the Assessing Officer is not sustainable and the same is ordered to be deleted.

6. In the result, the appeal of the assessee stands allowed.

***Kolkata, the 20<sup>th</sup> May, 2024.***

Sd/-  
[गिरीश अग्रवाल /Girish Agrawal]  
लेखा सदस्य/Accountant Member

Sd/-  
[संजय गर्ग /Sanjay Garg]  
न्यायिक सदस्य/Judicial Member

Dated: 20.05.2024.

RS

*Copy of the order forwarded to:*

1. Nalini Kejriwal
2. ITO, Ward-35(2), Kolkata
3. CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches