

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "D" Bench, Mumbai.

Before Shri Vikas Awasthy (Judicial Member)
& Shri Amarjit Singh (Accountant Member)

I.T.A. No. 2300/Mum/2023 (A.Y. 2013-14)

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| Rekha Nilesh Shah B-2001 2002 Thyme Garden, Grove Phase 2 Chikuwadi, Kant Park Borivali West Mumbai-400 092. PAN : AAPPS3012H (Appellant) | Vs. | ITO, Ward- 32(3)(2) Kautilya Bhavan Bandra Kurla Complex, Bandra East Mumbai-400 051. (Respondent) |
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| Assessee by | Shri Bhupendra Shah |
| Department by | Shri Ashok Kumar Ambastha -Sr. DR |
| Date of Hearing | 15.03.2024 |
| Date of Pronouncement | 17.05.2024 |

O R D E R

Per Vikas Awasthy (JM) :-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [in short 'the CIT(A)'] dated 26.05.2023, for Assessment Year 2013-14.

2. The assessee in appeal has assailed the order of CIT(A) on three counts:-

- i) Upholding validity of reopening of assessment under section 148 of the Income Tax Act, 1961 (in short 'the Act').
- ii) Addition under section 68 of the Act in respect of sale of shares of M/s. Blazon Marbles Ltd. holding it to be penny stock.
- iii) Confirming addition of Rs. 15,49,389/- under section 69 of the Act in respect of purchase of flat by the assessee in joint name with her husband.

3. Shri Bhupendra Shah appearing on behalf of the assessee submitted that the Assessing Officer has reopened assessment under section 147 of the Act vide notice dated 27.1.2017. A perusal of the reasons for reopening would clearly show that the assessment for assessment year 2013-14 has been reopened merely on borrowed satisfaction. It is a well settled law that for reopening of assessment, the Assessing Officer has to record his own satisfaction, reopening on the basis of borrowed satisfaction is unsustainable. The Assessing Officer merely relied on the information received from the investigation wing and some statements of third parties. Copy of the statements on which the Assessing Officer has placed reliance for reopening the assessment were not provided to the assessee though a specific request for the same was made while filing objections against reopening of assessment. The objections of the assessee against the reopening were rejected in mechanical manner by the Assessing Officer vide order dated 24.1.2017. The learned AR thus prayed for holding notice issued under section 148 of the Act as bad in law.

3.1 In respect of ground No. 2 of appeal challenging addition of Rs. 32,88,063/- under section 68 of the Act holding sale of shares of Blazon Marbles Ltd. as penny stock, the learned AR narrating facts of the case submitted that the assessee had purchased equity shares of M/s. Shubham Granites Ltd. off market on 11.3.2011 at the rate of Rs. 1.75 per share. Subsequently, shares of Shubham Granites Ltd. were listed on the stock exchange in April 2011 and the name of company was changed to Blazon Marbles Ltd. After listing of shares on stock exchange, the shares were split in the ratio of 1:5. As against 20,000 shares; 50,000 shares were allotted to the assessee in October/November, 2011. Initially, physical shares certificate were issued to the assessee by Shubham Granites Ltd. Subsequently, shares were dematerialized and were held by the assessee in demat account. He referred to the copy of physical share certificates at page 18 & 19 of the paper

book and the copy of demat account statement at page No. 20 of the paper book. He submitted that for purchase of shares payment was made through bank. To support his submissions he referred to the copy of bank pass book at page No 22 & 23 of the paper book. Thereafter, 15,000 shares were sold by the assessee through share broker on various dates between 28th April to 29th May 2012. The copies of contract notes are at page No. 25 to 27 of the paper book. The assessee had paid STT on sale of shares. The sale proceeds were directly received in the bank account of the assessee. The learned AR referred to the bank statement indicating amount received from sale of shares at page No. 24, 24A and 25 of the paper book. The assessee had sold shares on three different dates in the price band of Rs. 228 to 211 per share. Thus, total consideration of Rs. 32,88,063/- was received on sale of shares. Closing balance of the shares in demat account of the assessee is 25,000. A copy of statement of holding is at page No. 33 of the paper book. He further submitted that the shares were sold through broker. There is no allegation by the department that the broker is tainted or has been debarred by the Stock Exchange for his involvement in any nefarious activity. The addition has been made merely on the basis of presumption and surmises. The assessee was not afforded opportunity to cross examine the third party on whose statement reliance was placed to reopen the assessment. The authorities below have failed to take note of the fact that for purchase and sale of shares, all payments have been routed through the bank and there is no involvement of any cash component. The sale of shares was online in stock exchange and assessee had paid STT at the time of sale of shares. The learned AR placed reliance on the decision in the case of Shri Yogesh P. Thakkar Vs. DCIT in ITA No. 1605/Mum/2021 decided on 3.2.2023. The learned AR asserted that the facts in the case of the assessee are identical to the case of Shri Yogesh Thakkar (supra). In the said case the assessee had purchased equity shares of Blazon Marbles Ltd. having face value of Rs. 10/- per share. The shares were subsequently split into five shares having face value of Rs. 2/- per

share. The Assessing Officer held sale of shares of Blazon Marbles Ltd. as penny stock and made addition of sales proceeds of shares as unexplained cash credit under section 68 of the Act. The Tribunal deleted the addition by reversing the findings of AO/CIT(A) in denying exemption under section 10(38) of the Act on sale of shares of Balzon Marbles Ltd.

3.2. In respect of ground No. 3 relating to addition under section 69 of the Act, learned AR submitted that the addition is a result of arithmetic mistake. The assessee has already filed an application under section 154 of the Act dated 6.2.2018 before the Assessing Officer for rectification of mistake. The Assessing Officer has not disposed of said application till date. He prayed for direction to the Assessing Officer to decide the said application.

4. Per contra Shri Ashok Kumar Ambastha representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee. The learned DR submitted that the assessee had filed objections before the Assessing Officer against reopening of assessment. The objections of the assessee were disposed of by the Assessing Officer by passing a speaking order. The assessee accepted the order rejecting objections of the assessee. Thereafter, the assessee has not challenged the same before Hon'ble High Court in writ petition. Now, the assessee cannot agitate the issue of reopening of assessment before the Tribunal.

4.1 In respect of Ground No. 2 of appeal, the learned DR submitted that the assessee had purchased shares offline from one Shri Chirag Dinesh Kumar Shah and had sold the shares on stock exchange to the same person. The Assessing Officer had made detailed inquiries and has made categorical observations regarding purchase and sale of shares. He further submitted that the assessee was unable to give any plausible reason for making investment in equity shares of a company which is not actually carrying out any business activity and has negligible net worth. He further pointed that

the assessee could not explain the reason for sudden spike in value of shares of a company without there being any valid reason.

5. Rebutting the submissions made on behalf of the department, the learned AR of assessee submitted that it is true that the assessee had not filed writ petition against rejection of assessee's objections on reopening of the assessment, but that does not create any estoppel against the assessee not to challenge validity of reopening of assessment in appeal before the Tribunal. As regards other submissions the learned AR reiterated his stand as taken before the CIT(A).

6. We have heard the submissions made by the rival sides and have examined the orders of the authorities below. In ground No. 1 of appeal the assessee has assailed validity of reopening of assessment. The primary argument of assessee is, that the assessment has been reopened on the basis of borrowed satisfaction, therefore, the reopening is bad in law. A perusal of the reasons for reopening at page No. 3 of the paper book shows that information was received by the Assessing Officer from Investigation Wing regarding assessee obtaining bogus entries from trading in penny stocks. A further perusal of the reasons show that the Assessing Officer after receiving information made preliminary verification and investigation. The Assessing Officer after his own independent investigation came to the conclusion regarding assessee's involvement in trading of shares of Balzon Marbles Ltd., a penny stock. Thus, it is not a case where the Assessing Officer merely on the basis of information received from investigation wing reopened the assessment. We find no merit in ground No. 1 of appeal challenging validity of reopening of assessment. Hence, ground 1 of appeal is dismissed being devoid of any merit.

7. In ground No. 2 of appeal, the assessee has assailed addition of Rs. 32,82,063/- under section 68 of the Act after rejecting assessee's claim of

long term capital gains exemption under section 10(38) of the Act on sale of shares of Blazon Marbles Limited. The assessee has challenged the aforesaid addition primarily on the ground that the addition has been made on suspicion and presumption, third party statement, without any proof of cash trail and without affording opportunity of cross examination. The assessee in order to discharge its onus and to prove genuineness of the transaction, has placed on record a copy of demat account statement, contract note to show sale of shares through stock exchange, bank statement to substantiate purchase and sale of shares through banking channel. The contention of the assessee is that on sale shares the assessee has paid STT and since transactions of purchase and sale of shares have been made through banking channel, assessee's claim of exemption under section 10(38) on sale of shares as long term capital gain should be allowed.

8. Before proceeding further, here we would like to observe that on examination of assessment order we find that nowhere the Assessing Officer has mentioned or has taken any cue from any statement from third party. The Assessing Officer made his independent investigation and has recorded statement of the assessee also. The addition has been made under section 68 of the Act disallowing assessee's claim of exemption under section 10(38) of the Act solely on his own findings. Therefore aforesaid objection raised by the assessee are devoid of merit.

9. It is an undisputed fact that the assessee had purchased 20,000 shares of Blazon Marbles Ltd. off market on 11.3.2011. The said shares were purchased by the assessee from Shri Chirag Dinesh Kumar Shah. Undoubtedly, payment for purchases of 35,000 equity shares was made by cheque. Subsequently, when the shares were listed on Bombay Stock Exchange in April, 2011, shares were split in ratio 1:5. The assessee was allotted 50,000 shares, against 20,000 shares purchased by her . The shares

purchased by assessee @ 1.75 per share were sold at Rs. 211 to Rs. 228/- per share in April/May 2012. It is relevant to note that though the assessee had sold shares of Blazon Marbles Ltd. online through broker but the substantial shares were sold to by Shri Chirag Dinesh Kumar Shah i.e. the person from whom the assessee had originally purchased shares off market. This shows that there was live nexus between purchase and sale of shares. The assessee has not denied the fact of sale of shares of Blazon Marbles Limited to Shri Chirag Dinesh Kumar Shah. Thus, purchase of shares off-line and sale of shares on-line to same person raises reasonable suspicion of transaction being pre-arranged.

10. In the instant case, the shares were purchased off market at a price of Rs. 1.75 per share. After listing of shares, shares were split and were sold at an exorbitant rate of Rs. 228 per share. No plausible reason was given by the assessee for sudden spike in the price of shares within a short during of little over 12 months. The shares were purchased and sold to the same person. All these facts on record shows that assessee with a motive to earn long term capital gains on penny stocks had entered into this dubious transaction of purchase of penny stock to claim the benefit of exemption under section 10(38) of the Act on long term capital gain arising from sale of penny stock. The assessee could not prove genuineness of the transaction of purchase and sale of penny stock. Hence, we uphold the action of Assessing Officer making addition under section 68 of the Act.

11. The assessee has placed reliance on the decision in the case of Yogesh P. Thakkar (supra). We find that said decision is distinguishable on fact and does not support the cause of assessee. Thus, in light of our above findings Ground No. 2 of appeal is dismissed.

12. In Ground No. 3 of appeal, assessee has assailed addition of Rs. 15,49,389/-under section 69 of the Act, sustained by the CIT(A). Short contention of the assessee with regard to this ground is that the said addition is a result of arithmetic error. The assessee has already made an application dated 6.2.2018 before the Assessing Officer seeking rectification under section 154 of the Act. The said application has not been decided by the Assessing Officer so far. The Assessing Officer is directed to dispose of the said application of assessee in a time bound manner, in accordance with law preferably within a period of six months from the date of receipt of this order. Thus, Ground No. 3 of appeal is allowed for statistical purposes.

13. In the result, appeal of assessee is partly allowed for statistical purposes.

Order pronounced in the open court on Friday the 17th Day of May, 2024.

Sd/-
(Amrjit Singh)
Accountant Member

Sd/-
(Vikas Awasthy)
Judicial Member

Mumbai.; Dated : 17/05/2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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