

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIALMEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.3320/MUM/2023
Assessment Year: 2012-13

Income Tax Officer – 42(1)(2), Mumbai	Dheeraj Babulal Shah 23/A-12, Akash CHSL, Jalawal Nagar, Ashok Nagar, Kandivali (East), Mumbai – 400101 (PAN: ARWPS1458D)
(Appellant)	(Respondent)

Present for:

Assessee : Shri Rajkumar Singh, CA
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 30.04.2024
Date of Pronouncement : 27.05.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order no. ITBA/NFAC/S/250/2023-24/1054531875(1), dated 24.07.2023 passed against the assessment order by National Faceless Appeal Centre (NFAC), Delhi u/s.147 r.w.s. 263 of the Income-tax Act(hereinafter referred to as the “Act”), dated 30/03/2022 for AY 2012-13.

2. Grounds taken by the Revenue are reproduced as under:

“1. Whether on the facts and in the circumstances of the case and in law, The Hon'ble ITAT has erred in deleting the addition made by the AO u/s 69 of

the Act, 1961 of Rs. 68,496,111/- on account of unexplained credit u/s 69 of the Income Tax Act, 1961 being purchase of shares of M/s Essar(India) Ltd?

2. Whether on the facts and in the circumstances of the case and in law, The Hon'ble ITAT has also erred in deleting the addition made by the AO u/s 69A of the Act, 1961 of Rs. 14,598/- on account of unexplained credit u/s 69A of the Income Tax Act, 1961 under the head income from other source being bogus LTCG/STCL on the sale of penny scrip of 'Shri Nath'?

3. Whether on the facts and in the circumstances of the case and in law, The Hon'ble ITAT has also erred in deleting the addition made by the AO u/s 69C of the Act, 1961 of Rs. 13,70,214/- on account of unexplained credit u/s 69C of the Income Tax Act, 1961 being unexplained expenditure?

4. The department has not accepted the decision of Hon'ble ITAT in ITA No.886/Mum/2021 dated 12.12.2022 on which Ld.CIT(A) relied upon and preferred further appeal to Hon'ble Bombay High Court. Therefore, to keep the matter alive this appeal is being filed.

3. Brief facts of the case as culled out from records are that assessee is a software management consultant as well as holds directorship. He filed his regular return of income on 31.08.2012 reporting total income at Rs.1,83,630/-. Case of the assessee was re-opened by issuing notice u/s. 148, dated 26.03.2019. Based on information from the investigation wing of the Department that, the assessee had transacted in certain shares characterised by the Department as penny scrips. After necessary investigation and examination, this re-assessment proceeding was completed vide order u/s. 143(3) r.w.s.147 dated 20.12.2019. In this re-assessment, short term capital loss of Rs.3,533/- and sale proceeds of the scrips, namely, Tilak Finance and Rockon Finance of Rs.4,02,584/- were added as un-explained cash credit to arrive at assessed total income of Rs.5,89,750/-. This was contested by the assessee before the ld. CIT(A). During the pendency of this appeal, assessee opted to settle the dispute under 'The Direct Tax Vivad se Vishwas Act, 2020', for which final certificate in form no.5 was issued.

4. Subsequently, case of the assessee was taken up for revisionary proceedings u/s.263 of the Act by the ld. PCIT by issuing a show

cause notice dated 20.03.2021 by alleging that AO did not carry out requisite inquiry about the dealing of shares by the assessee of Essar India Ltd. and Shreenath Commercial and Finance Ltd., which according to him are penny scrips. The re-assessment order was thus held as being erroneous and prejudicial to the interest of Revenue u/s.263 of the Act.

5. In the revisionary proceedings, on the first issue relating to Essar India Ltd., assessee submitted before the Id. PCIT that shares of Essar India were purchased in the earlier year i.e., Assessment Year 2011-12 and that no transaction of any sale or purchase of the said scrips took place in the year under consideration. Except dematerialization of the said scrip during the year under consideration from physical mode of holding the shares to electronic mode of holding, no transaction took place.

6. In respect of the second issue relating to scrip of Shreenath, it was submitted that short term capital gain of Rs.13,692/- on the said scrip had already been offered in the return filed for the year. It was further submitted that sale and purchase of the said scrip took place on the registered platform of the Stock Exchange at quoted rates on the respective dates through SEBI registered stock broker Mangal Keshav Securities Ltd. against whom there are no complaints or allegations of any nature either by SEBI or any other law enforcement agency or the investigation wing of the Department for any manipulation or price rigging. It was also submitted that the said broker had not been alleged by any law enforcement agency being part of any cartel or group engaged in providing accommodation entries for transactions in shares and securities. Assessee had also submitted that the transaction in the said scrip was subjected to STT levy and all the details and evidences supporting the transaction were furnished in the course re-assessment proceedings also. Consideration of sale and

purchase for the said scrip had been routed through normal banking channel and no addition can be made without backing of any shred of evidence, more particularly when name of the assessee does not appear in any report as beneficiary of the alleged scrip transaction.

7. After considering the submissions of the assessee, revisionary order dated 31.03.2021 was passed by the ld. PCIT u/s.263 of the Act, setting aside the re-assessment order 20.12.2019. Assessee went in appeal before the Co-ordinate bench of ITAT, Mumbai against the revisionary order vide appeal in ITA No.886/Mum/2021. While this appeal was pending, ld. AO initiated the assessment proceedings to give effect to the order passed u/s.263 of the Act. Assessee reiterated its aforesaid submissions before the ld. AO, along with furnishing documentary evidences. Lately, the appeal of the assessee against the revisionary order u/s. 263 was disposed off, vide order dated 12.12.2022. In the said order, in respect of the scrip of Essar India, it was held that initiation of revisionary proceedings on this issue by the ld. PCIT was not proper, since assessee had neither purchased nor sold shares of this scrip during the concerned assessment year.

7.1. The relevant finding from the said order in para 10 is reproduced as under:

“Considered the rival submissions and material placed on record, we observe that Ld. Pr.CIT while verifying the assessment records for the A.Y. 2012-13 under consideration found that the assessment was reopened in order to verify the alleged penny stock transactions based on the investigation report from DGIT (Investigation), Kolkata. The Assessing Officer has verified the alleged bogus share transactions relating to other scrips and however, found that there is no proper verification carried on specifically in the scrips namely "Essar India" and "Shri Nath". After considering the submissions of both sides, we observe that the transaction relating to "Essar India", assessee has purchased the above said scrips on 18.03.2011 (4, 97, 430) shares at the cost of ₹.10 and subsequently on 21.02.2012 the face value of the shares was split from face value of ₹.10 to ₹.1 on 21.02.2012. Accordingly, the total original holding of the assessee of the above mentioned shares of 4,97,430 shares become 49,74,300 shares at the original cost of investment of ₹.49,74,300/- From the above we observe that the assessee has made the investment in the A.Y. 2011-12 and in this assessment year assessee neither purchased nor sold these scrips during this assessment year, except there is a change in the number of shares held by

the assessee apart from that there is no financial transactions involved in this scrip. This could be the major reason for the Assessing Officer not to carried out any investigation or enquiry in this scrip. Since there is no impact or any involvement of financials, therefore it is not proper on the part of the Ld. Pr.CIT merely observed that there is no enquiry in this scrip in this assessment year without bringing any finding in his order with regard his own findings. Ld. Pr.CIT cannot merely initiate the proceedings without actually bringing on record any findings with regard to how it is prejudicial to the interest of the Revenue. Accordingly, in our considered view the initiation of proceedings on this aspect is not proper.”

7.2. Considering the above findings by the Co-ordinate Bench of ITAT, Mumbai, Id. CIT(A) deleted the addition made by the Assessing Officer in the effect giving assessment order passed pursuant to revisionary order u/s. 263.

8. Perusing the findings of the Co-ordinate Bench extracted above in respect of shares of the scrip Essar India, whereby factual finding is given about no sale or purchase took place in the relevant year, we do not find any reason to interfere with the finding arrived at by the Id. CIT(A). We, accordingly delete the addition so made in respect of shares of Essar India.

9. On the second issue relating to shares of scrip Shreenath, the Co-ordinate Bench in its order (supra) has upheld the revisionary proceedings. The Assessing Officer while giving effect to the revisionary order, has observed that assessee has facilitated accommodation entry to bring in his own unaccounted income in the guise of longterm gain or short term loss. Since the assessee had failed to furnish the details in respect of parties from whom, he has purchased or sold the shares, the Assessing Officer made an addition of Rs.14,598/- u/s. 69A of the Act as income from other sources. In the appeal before the Id. CIT(A), the above stated submissions and explanations were once again furnished. Considering the same, it was observed that assessee had disclosed short term capital gain from the sale of shares of Shreenath in the return filed by the assessee. The

addition made was deleted by holding that purchase of these shares is genuine.

10. On the above stated issue, we have heard the rival contentions and perused the material on record. Admittedly, it is a fact that short term capital gain on sale of shares of Shreenath has been reported in the regular return filed by the assessee. The transaction for purchase and sale of these shares were undertaken on the stock exchange platform through the SEBI registered broker on which STT was levied and the consideration was routed through normal banking channel. The entire flow of this transaction is corroborated by relevant documentary evidences placed on record. Assessee had purchased the shares of Shreenath on 14.03.2011 for Rs.14,598/- and the same were sold on 13.04.2011 for an amount of Rs.28,290/- resulting into short term capital gain of Rs.13,692/-. Ld. Assessing Officer had made the addition of Rs.14,598/- which pertains to cost of purchase of these shares. While making the addition, there are no discrepancies pointed out by the Assessing Officer in the documents and the details furnished by the assessee. At any stage of the present case, Revenue has not brought on record any material linking the assessee with any such dubious transactions relating to accommodation entry, price rigging or exit providers.

11. On a perusal of the record, it is discernible that ld. Assessing Officer had proceeded on the basis of analysis of the financials of Shreenath Commercial. According to him, jump in the share prices of the aforesaid company is not justified. He has relied upon the search and survey operations conducted by the investigation wing of the Department at various locations in respect of penny stocks which sets out the modus operandi adopted in the business of providing entries for bogus capital gains. The conclusion drawn by the ld. Assessing Officer is un-supported by any cogent material on record. The finding

arrived at by the Id. Assessing Officer is thus purely an assumption based on conjectures and surmises. There is nothing on record to demonstrate that all possible measures were undertaken to examine and enquire into the transaction for which the Act provides for multiple enabling provisions. Reliance placed by him on the report of the investigation wing without further corroboration based on cogent material does not justify the conclusion that the impugned transaction is bogus, sham and part of racket of accommodation entries. In absence of any such material, enquiry and examination, the addition made pertaining to purchase component of the impugned transaction cannot be sustained. Accordingly, addition made in this respect of Rs.14,598/- is deleted.

12. For the aforesaid finding, we find force which is of binding nature, from the decisions of Hon'ble Jurisdictional High Court of Bombay in the following cases:

i) Pr. CIT v. Ziauddin A Siddique [Income-tax Appeal No. 2012 of 2017, dated 4-3-2022] held as under:-

"1. The following question of law is proposed:

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs. 1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was demated and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the amount of LTCG of Rs. 1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

2. We have considered the impugned order with the assistance of the 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 the 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 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 judgment of the Apex Court in *Principal Commissioner of Income-tax (Central)-1 v. NRA Iron & Steel (P.) Ltd.* 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.

6. The appeal is devoid of merits and it is dismissed with no order as to costs."

ii) PCIT vs. Indravadan Jain HUF [2023] 156 taxmann.com 605 (Bombay) wherein it was held:

"Where shares were purchased by assessee on floor of stock exchange and not from broker, payment was made through banking channel, deliveries were taken in DEMAT account where shares remained for more than one year, contract notes were issued and shares were also sold on stock exchange, there was no reason to add capital gains as unexplained cash credit under section 68"

iii) CIT vs. Shyam R. Pawar [2015] 54 taxmann.com 108 (Bombay) wherein it was held:

"Where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income under section 68"

13. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 27 May, 2024

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 27 May, 2024

MP, Sr.P.S.

Copy to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai