

**IN THE INCOME-TAX APPELLATE TRIBUNAL “SMC” BENCH,
MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL
MEMBER**

&

SMT. RENU JAUHRI, ACCOUNTANT MEMBER

**ITA No. 151/Mum/2024
(A.Y. 2011-12)**

Rupesh Dhirajlal Shah Flat No. 6, 1 st Floor, Methdoot Building, Gulmohar Cross Road No. 6, Nr. Lahiri House, JVPD Scheme, Vileparle West, Mumbai-400049	Vs.	Assessing IT Officer-Ward 22(3)(1) Piramal Chamber, Lalbaug, Parel, Mumbai-400012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAFPS9285G		
Appellant	..	Respondent

Appellant by :	Shri Sanjay Shah
Respondent by :	Shri Nagnath Pasale

Date of Hearing	30.05.2024
Date of Pronouncement	25.06.2024

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order of the Learned Commissioner of Income-tax (Appeals), Mumbai-34/National Faceless Appeal Centre, Delhi [hereinafter referred to as “CIT(A)”] dated 18.11.2023 passed u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as “Act”] for Assessment Year [A.Y.] 2011-12.

2. The assessee has raised following grounds of appeal:



“1. Ld. Commissioner of Income Tax (Appeals) erred in dismissing the appeal filed by the Appellant on the plea that reason for delay in filing an appeal is not acceptable.

Appellant submits that in view of facts and circumstances of the case, as well as in law, there was delay in filing an appeal of 2 days i.e. 22.02.2019-20.02.2019 and reason for which was duly explained by the appellant in Form 35 at the time of filing an appeal and also, he had filed letter dated 02.11.2021 in response to deficiency letter issued by the Ld. Commissioner of Income Tax (Appeals), NFAC for the said purpose.

Appellant submits that in view of facts and circumstances of the case, as well as in law, order of Ld. Commissioner of Income Tax (Appeals) ought to have condoned delay of 2 days in filing of appeal in the interest of equity and natural justice

Appellant accordingly submits that in view of facts and circumstances of the case as well as in law Learned Commissioner of Income Tax (Appeals) erred in dismissing the appeal filed by the appellant on the plea that reason for delay in filing an appeal is not acceptable.

Appellant accordingly submits that in view of facts and circumstances of the case as well as in law order of Learned Commissioner of Income Tax (Appeals) is biased and unjust and deserves to be quashed.

2. Ld. Commissioner of Income Tax (Appeals) erred in hurriedly passing Order u/s 250 of the Act, without disposing off Adjournment application filed by the Appellant.

Appellant submits that in view of facts and circumstances of the case, as well as in law, Ld. Commissioner of Income Tax (Appeals) ought to have disposed off adjournment application filed by the Appellant on 08.11.2023 before passing Order u/s 250 of the Act dated 18.11.2023.

Appellant submits that in view of facts and circumstances of the case, as well as in law, Ld. Commissioner of Income Tax (Appeals) failed to



consider the fact that the adjournment application was duly filed by the appellant on 08.11.2023.

Appellant submits that in view of facts and circumstances of the case, as well as in law, order passed u/s 250 of the Act by Ld. Commissioner of Income Tax (Appeals), without disposing off Adjournment request filed by the Appellant is bad in law and deserves to be quashed.

3. Ld. Commissioner of Income Tax (Appeals) erred in confirming the order of the Ld. AO in making addition to the total income of Rs. 18,19,089/- u/s 68 of the Act on account of transaction in shares, namely M/s. VAS Infrastructure Ltd, entered in to by the appellant.

Appellant submits that in view of facts and circumstances of the case, as well as in law, said addition of Rs.18,19,089/- u/s 68 of the Act is bad in law and deserves to be deleted.

4. Ld. Commissioner of Income Tax (Appeals) erred in confirming the order of the Ld. AO in making addition of Rs. 54,573/- u/s 69C of the Income Tax Act, 1961, being cash commission @3% allegedly paid by the Appellant for allegedly providing so-called capital gains to various parties.

Appellant submits that in view of facts and circumstances of the case as well as in law, said addition of Rs. 54,573/- u/s 69C of the Act is bad in law and deserves to be deleted.

5. Ld. Commissioner of Income Tax Appeals) erred in ignoring the fact that Learned AO erred in not providing copies of material used by him against Appellant.

Appellant submits that in view of facts and circumstances of the case as well as in law Learned AO ought to have provided Copies of Material received by him from Investigation Department, which is used by Learned AO against Appellant while framing the assessment in the interest of equity and natural justice even though the same was specifically asked vide letter dated 1 November 2018 during the course of Assessment proceedings.



Appellant submits that in view of facts and circumstances of the case, as well as in law, order of Ld. Commissioner of Income Tax (Appeals) is bad in law and deserves to be quashed.

6. Ld. Commissioner of Income Tax (Appeals) erred in ignoring the fact that the Ld. AO erred in making addition of Rs. 18,19,089/- to the Total Income of the Appellant as unexplained cash credits u/s 68 of the Act, which is in contradiction of Show Cause Notice dated 06.12.2018 issued during the course of assessment proceedings which proposed additions of Sale proceeds of Shares to the tune of Rs. 9,00,679/- u/s 68 of the Act.

Appellant submits that in view of facts and circumstances of the case as well as in law the amount of additions to the total income which was proposed in show cause notice and amount of additions made in the Assessment Order u/s 143 r.w.s. 147 of the Act cannot be different as Appellant ought to be given opportunity for each issue separately in show cause notice before additions can be made to Total income on any issue.

Appellant further submits that in view of facts and circumstances of the case as well as in law order passed u/s 143(3) r.w.s 147 of the Act on one amount i.e. Rs 18,19,089/ which is completely different from amount proposed in show cause notice i.e. Rs 9,00,679/-, is bad in law and deserves to be quashed. Accordingly, Order of CIT(A) confirming the additions made by Ld. AO is also bad in law and deserves to be quashed.

7. Ld. Commissioner of Income Tax (Appeals) erred in ignoring the fact that the Ld. AO erred in overlooking and ignoring explanation and information together with documentary evidences filed by the appellant during the course of reassessment proceedings, while passing Order u/s 143(3) r.w.s. 147 of the Act.

Appellant submits that in view of the facts and circumstances of the case as well as in law, Order passed u/s 143(3) r.w.s 147 of the Act,



overlooking and ignoring explanation and information together with documentary evidences, filed by Appellant during the course of reassessment Proceedings, is bad in law and accordingly, Order of CIT(A) confirming the additions made by Ld. AO is also bad in law and deserves to be quashed.

8. Ld. Commissioner of Income Tax (Appeals) erred confirming the order of the Ld. Assessing Officer u/s 143(3) r.w.s 147 of the Act thereby upholding the action of reopening of Assessment by Ld. AO.

Appellant submits that in view of the facts and circumstances of the case as well as in law, the action of the Ld. AO in reopening of assessment by issuing notice u/s 148 of the Act is bad in law and accordingly, consequential order passed u/s 143(3) r.w.s 147 of the Act is also bad in law.

Appellant submits that in view of facts and circumstances of the case, as well as in law, order of Ld. Commissioner of Income Tax (Appeals) is bad in law and deserves to be quashed.

9. Ld. Commissioner of Income Tax (Appeals) erred in ignoring the fact that the reopening of Appellant's case by the Ld. AO was itself based on incorrect facts/information as reflected in reasons for reopening of assessment.

Appellant submits that in view of facts and circumstances of the case, as well as in law, that during the year under consideration appellant had incurred a loss of Rs 82,157.92/- from the script named "VAS Infrastructure Ltd", whereas, information received from DDIT (Inv), on the basis of which Appellant Case was reopened, pertains to LTCG claimed by alleged beneficiaries and thereby claiming exemptions u/s 10(38) of the Act.

Appellant submits that in view of facts and circumstances of the case, as well as in law, during the year under consideration appellant had sold 19,633/- shares of VAS Infrastructure Limited for Rs. 18,19,089/-



whereas, Ld. AO alleged that appellant had sold shares of said shares of Rs 9,00,679/-.

Appellant submits that in view of facts and circumstances of the case, as well as in law, action of Ld. AO of reopening the assessment and making additions of Rs 18,73,662/- to the Total Income of the appellant based on such incorrect facts/information and order of Ld. Commissioner of Income Tax (Appeals) confirming the said additions is bad in law and deserves to be quashed.

Each of the above grounds of appeal is without prejudice to one another.”

3. Brief facts of the case are that the assessee had not filed its return of income for AY 2011-12. Information was received from the Investigation Wing on 27.03.2018 alleging that M/s. VAS Infrastructure Ltd. is a penny stock scrip which has been used by beneficiaries to launder money. Since, the assessee had sold the shares of M/s. VAS Infrastructure Ltd. for the year under consideration to the tune of Rs. 9,00,679/-, a notice u/s 148 of the Act was issued on 30.03.2018 by the AO after recording reasons. In response, return declaring nil income was filed by the assessee on 13.10.2018. The objections against reasons for reopening were filed by the assessee on 01.11.2018 which were disposed off by the AO on 20.11.2018. During the course of hearing, written submissions were filed by the assessee from which the AO observed that 19633 shares of VAS Infrastructure Ltd. had been sold by the assessee for Rs. 18,19,089/- incurring a net loss of Rs. 82,157/-. After considering the details filed by the assessee and based on outcome of investigation done by the



Investigation Wing of the department, the AO held the sale proceeds of Rs. 18,19,089/- as unexplained cash credit u/s 68 of the Act and completed the assessment at a total income of Rs. 18,73,662/-, after further adding commission @3% for non-genuine capital loss u/s 69C of the Act.

4. The assessee preferred an appeal against the assessment order dated 30.12.2018 which was filed on 22.02.2019. The Ld. CIT(A) vide Para 1 of the impugned order condoned the delay in filing of appeal. In all, two notices were issued by the CIT(A) to the assessee, in response to which no reply was furnished, hence the appeal was dismissed. The CIT(A) discussed the order of the AO in details and found the addition made by the AO to be justified, however, he further observed as under: -

“10. In the result, the appeal is dismissed. Reason for delay are not acceptable, accordingly there arises no occasion to condone the delay.”

5. Aggrieved with the said order, the assessee is in appeal before us. In a nutshell, there are four grounds of appeal of the assessee. First ground is that the Ld. CIT(A) erred in dismissing the appeal on the plea that reason for delay in filing an appeal is not acceptable. Secondly, the assessee's adjournment application dated 08.11.2011 was not disposed of before passing order u/s 250 dated 18.11.2023. Thirdly, the AO had proposed in show cause notice for reopening of assessment an amount of Rs. 9,00,679/- whereas the order was passed on a different amount of Rs. 18,19,089/- and therefore the reopening



was wrongly upheld by the Ld. CIT(A). Lastly, the addition u/s 68 even otherwise deserved to be deleted on merits.

6. We have heard the rival submissions. Ld. AR has relied upon the following decisions of coordinate benches and Gujarat High Court in support of his submissions:

- a. Naveen Kishor Mohnot v/s Income Tax Officer- 25(3)(5) ITA No. 325/Mum/2023 dated 05.04.2023
- b. ITO 22(2)(1) Mumbai v/s Kamlesh Mohandas Lakhwani, ITA No. 253/Mum/2023 and CO No. 28/Mum/2023 dated 07.08.2023.
- c. Anoop Kumar Gupta v/s ACIT Circle 07 New Delhi, ITA No. 454/Del/2020 dated 05.10.2023.
- d. PCIT v/s Mamta Rajivkumar Agarwal (2023) 295 taxmann.com 512 (Gujarat)
- e. Naz Shazia, Moradabad v/s ITO Ward-1(1), ITA No. 1831/Del/2023 dated 18.01.2024.

7. Considering the facts of the case and various decisions, we decide as under:

- a. The AO, after receiving of information in respect of M/s. VAS Infrastructure Ltd. from the Investigation Wing, had reason to issue notice u/s 148 of the Act. The objections filed by the assessee were duly disposed of by the AO vide order dated



20.11.2018. As such the assessee's ground against reopening is rejected.

b. The assessee during the course of proceedings had submitted requisite documents showing that he had made transactions in the shares of M/s. VAS Infrastructures Ltd. as well as various other companies through M/s. Angel Broking Pvt. Ltd.. Copies of brokers ledger, bank statements reflecting relevant entries as well as summary reports reflecting scrip wise and date wise transactions of the assessee have been furnished. The assessee had incurred net loss of Rs. 82,157/- in dealing with the scrip of M/s. VAS Infrastructure Ltd.. Since the transactions are through a registered broker on a recognize stock exchange, the AO's contention that the assessee has manipulated transactions and made bogus profit/loss is not justified. In this regard, few of the decisions of the co-ordinate bench relied upon by the Ld. AR are squarely applicable to the facts of the case in hand:

i. In **Naveen Kishor Mohnot v/s Income Tax Officer- 25(3)(5)** (supra) it has been held as under:

“.....the assessee has purchased scrip of M/s. VAS Infrastructure Ltd. and subsequently sold the same within the same year from the recognized stock exchange and also through authorized agent - all these transactions were through banking channels only and in that process assessee

has suffered loss. The AO mechanically applied the information received from the Investigation Wing and proceeded to disallow the loss claimed by the assessee as well as proceeded to make sale proceeds as undisclosed income.....

Thus, we are inclined to delete the addition made by the AO u/s 68 of the Act and direct the AO to allow the short term capital loss claimed by the assessee incurred during the year.”

ii. Similarly, in **ITO 22(2)(1) Mumbai v/s Kamlesh Mohandas Lakhwani** (supra) it was observed as under:

“.....the assessee has not made any offline purchases and there was no LTCG and only a short rotational transaction resulting in short term capital gain (STCG for short) and short term capital loss (STCL for short) and that too a nominal loss – HELD THAT:- the assessee has furnished all the supporting documents to substantiate genuinity of the said transactions. It is also evident that the assessee has not only invested in the scrip of M/s. VAS Infrastructure Ltd. but has also made investment of huge sum in other scrips as well. The fact that the assessee has not made any off line purchases and has not claimed LTCG but has merely incurred a nominal loss in our view, cannot be case of doubtful investment in penny stock.”

In view of the facts of the case and following the decisions of the co-ordinate benches, specifically related to trading in shares of M/s. VAS Infrastructure, we hereby delete the addition of sale



ITA No. 151/Mum/2024
A.Y. 2011-12
Rupesh Dirajlal Shah

proceeds of Rs. 18,19,089/- as unexplained cash credit u/s 68 of the Act.

c. Consequently, addition u/s 69C on account of cash commission @3% for the non-genuine transactions is also deleted.

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

Order pronounced in the open court on 25.06.2024.

Sd/-

Sd/-

NARENDER KUMAR CHOUDHRY

RENU JAUHRI

(JUDICIAL MEMBER)

(ACCOUNTANT MEMBER)

Place: Mumbai

Date 25.06.2024

ANIKET SINGH RAJPUT/STENO

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

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आयकर अपीलीय अधिकरण/ ITAT, Bench,
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