

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA Nos.751 & 752/Del/2023
Assessment Years: 2015-16 & 2016-17

Cresta Fund Limited Mauritius, 4 th Floor, Les Cascades, Edith Cavell Street, Port Louis, Mauritius PAN :AADCC2634	Vs.	DCIT, Circle -1(2)(1), Intl. Taxation, New Delhi
(Appellant)		(Respondent)

Assessee by	Ms. Rachna Aggarwal, CA
Department by	Sh. Vijay B Vasanta, CIT(DR)

Date of hearing	13.06.2024
Date of pronouncement	27.06.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeals by the assessee are against the final assessment orders passed for the assessment years 2015-16 and 2016-17 in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The grounds raised by the assessee in both the appeals are, more or less, identical.

3. Since, the issues arising in both the appeals are identical, for ease of reference, we propose to take up ITA No. 751/Del/2023 as the lead matter.

4. In ground no. 1, the assessee has challenged the validity of reopening of assessment under section 147 of the Act. However, at the time of hearing, learned counsel appearing for the assessee, on instructions, did not press this ground. Accordingly, ground no. 1 is dismissed as not pressed.

5. Insofar as ground no. 2 is concerned, the issue arising for consideration is disallowance of assessee's claim of set off of long term capital loss arising out of sale of shares.

6. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Mauritius and is a tax resident of Mauritius. As accepted by the departmental authorities, the assessee holds a valid Tax Residency Certificate (TRC) and is also registered with Security and Exchange Board of India (SEBI) as a Foreign Portfolio Investor (FPI) in accordance with SEBI (FPI) Regulations. As per information received from the Investigation Wing of the Department, the Assessing Officer noticed that in the financial years 2015-15 and 2015-16, the assessee had carried

out bogus transactions to book bogus long term capital loss on account of equity/derivative trading. Based on such information, the Assessing Officer reopened the assessment under section 147 of the Act. In response to the notice issued under section 148 of the Act, the assessee filed its return of income on 28.05.2021 declaring income of Rs.1,60,400/-.

7. In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish details of share transaction, particularly, regarding sale of shares of Odyssey Corporation Ltd. From the details furnished by the assessee, he noticed that shares of Odyssey Corporation Ltd. were purchased by the assessee in financial years 2010-11 and 2011-12 on the floor of stock exchange. Whereas, sales were effected in financial years 2014-15 and 2015-16, also on floor of the exchange. The Assessing Officer observed that as per the analysis of the trading pattern of shares of Odyssey Corporation Ltd., it was found that share price was manipulated and bogus profits and losses have been booked in the name of clients/beneficiaries by trading in the scrip. After seeking further response from the assessee on the investigation conducted by the Investigation Wing of the

Department, the Assessing Officer ultimately concluded that the transactions relating to sale of shares of Odyssey Corporation Ltd. are manipulated, hence, bogus. As alleged by the Assessing Officer, only very few counterparties have picked up major shares of Odyssey Corporation Ltd. during various financial years against which huge profits/losses were generated. He further noted that there are common counterparties who have purchased the shares of the scrip across the clients.

8. Thus, from the aforesaid facts, he concluded that the clients were pre-arranged to punch matching order for purchase of the shares sold by the above clients. He also observed that profiling of the major entities was also done for checking of details of the parties. Thus, ultimately, the Assessing Officer concluded that the share price of the scrip has been manipulated and bogus profits and losses have been booked in the names of clients/beneficiaries by trading in the scrip. Holding that the assessee is one of the beneficiaries of such bogus trading in scrip of Odyssey Corporation Ltd. the Assessing Officer disallowed the long term capital loss claimed by the assessee, while framing the draft assessment order. Against the draft assessment order so passed,

the assessee raised objections before learned DRP. While disposing of the objections, learned DRP, in principle, agreed with the Assessing Officer that the analysis of trading pattern in the scrips of Odyssey Corporation Ltd. gives an impression that there has been manipulation by certain entities/parties, which are trading in the shares. However, learned DRP went in to hold that the Assessing Officer has not specifically discussed the trading in these scrips by the assessee or what has been the nature and extent of manipulation in shares of Odyssey Corporation Ltd. to book artificial/bogus capital losses. Learned DRP also observed that the Assessing Officer has not discussed the relevant provisions of IT Law/DTAA to bring home the applicable provisions under which the said claim of set off of capital losses by the assessee is disallowable. Accordingly, learned DRP directed the Assessing Officer to specifically highlight the manipulation in transactions in the shares of Odyssey Corporation Ltd. by the assessee and also discuss the relevant provisions of law under which the claims of the assessee are disallowable. Learned DRP also directed the Assessing Officer to pass a speaking order on the

issue. The operative portion of learned DRP's direction is reproduced hereunder for better clarity:

“4.2.6 The analysis of the trading pattern in the scrips of M/s. Odyssey Corporation Limited gives a clear impression that there has been an element of manipulation by certain entities/parties trading in these shares who acted in concert to book manipulated/bogus profit and losses in the names of client and beneficiaries. The AO has been able to profile the trading pattern of certain parties and brought out the irregularity/abnormality in the trading behavior in respect of the above scrips. However the AO has not specifically discussed the trading in these scrips by the assessee company or what has been the nature and extent of manipulation in shares of Odyssey Corporation Ltd. to book artificial/bogus capital losses. The AO has also not discussed the relevant provisions of the IT law/DTAA to bring home the applicable provisions under which the said claim of losses by the assessee are disallowable. The mere pointing out of anomalies is not sufficient to fix liabilities or disallow claims under IT Law/DTAA. While there is clear indication of manipulation in the penny stocks of Odyssey Corporation Ltd. by certain client and beneficiaries, the AO is directed to specifically highlight the manipulation in transactions in the shares of the above company by the assessee and also discuss the relevant provisions of the law under which the claims of the assessee are disallowable. The AO will pass a speaking order in this regard without providing any further opportunity to the assessee. Ground number 4 is accordingly disposed of.”

9. However, while framing the final assessment order, the Assessing Officer reiterated his earlier decision of disallowance of assessee's claim of set off of long term capital loss.

10. Before us, learned counsel appearing for the assessee submitted that the Assessing Officer has failed to implement the directions of learned DRP. Drawing our attention to the final assessment order, she submitted that the Assessing Officer has not discussed how the assessee was involved in manipulating the

price of shares of Odyssey Corporation Ltd. to book bogus capital loss. She further submitted that the Assessing Officer has also failed to discuss the relevant provisions of the IT Act/DTAA under which the claim of set off of capital loss is disallowable.

11. Learned Departmental Representative submitted that since it is the case of the assessee that the Assessing Officer has not implemented the directions of learned DRP, the issue may be restored back to the Assessing Officer for fresh adjudication.

12. We have considered rival submissions and perused the materials on record. Insofar as the primary facts are concerned, there is no dispute that the assessee is a tax resident of Mauritius holding a valid TRC. It is also a fact that the assessee is registered with SEBI as FPI and in terms with and on the strength of such registration with SEBI, the assessee has carried out investment and trading activities in shares and securities in India. Based on investigation carried out by the Investigation Wing of the Department the Assessing Officer has concluded that the price of scrips of Odyssey Corporation Ltd. has been manipulated by certain persons/entities to help certain buyers/sellers of shares to either book profit or loss. Thus, he has ultimately concluded

that the transactions in shares of the particular company, being bogus in nature, the long term capital gain derived from such transaction is also bogus. He has disallowed assessee's claim of set off of long term capital loss. However, the observations made by learned DRP clearly demonstrates that while concluding that the assessee has booked bogus long term capital loss, hence, set off is not allowable, the Assessing Officer has not specifically discussed to what extent the assessee is involved in the manipulation in share price of Odyssey Corporation Ltd. so as to book bogus capital loss.

13. Learned DRP has further observed that the Assessing Officer has not discussed the relevant provisions of the IT Act/DTAA to bring home the applicable provisions under which assessee's claim of set off of capital loss can be disallowed. In fact, while directing the Assessing Officer to examine the issue again, learned DRP has made it clear that the Assessing Officer has to specifically highlight the manipulated transactions in the shares of Odyssey Corporation Ltd. by the assessee through a speaking order. As against the aforesaid directions of learned DRP, the

observations of the Assessing Officer while upholding the disallowance in the final assessment order are as under:

“As per the DRP directions for Ground no.4, following observations are being made: -

1. The bogus capital loss on the share transaction of the company M/s Odyssey Corporation Ltd. is being disallowed as per the provisions of Section 48 r.w.s.112(1)(c)(ii) of the IT Act, 1961.

2. Further, with respect to the assessee's manipulation of shares of M/s Odyssey Corporation Ltd, it is claimed by the assessee that the shares were purchased in FY 2010-11 and FY 2011-12 on the floor of the stock exchange and the sales were made in FY 2014-15 and 2015-16 of the same. Further, as highlighted that the shares of the scrip of the M/s Odyssey Corporation Ltd. was manipulated in the above time frame. So. it can be said quite evidently that the assessee is also beneficiary of the same manipulation. And hence, the bogus loss needs to be disallowed.

8. Accordingly the set-off claimed by the assessee of capital loss of Rs. 1,59,59,283/- is being disallowed by treating the same as bogus capital loss.”

14. From the aforesaid observations of the Assessing Officer, it is quite evident that he has neither discussed the extent of involvement of the assessee in manipulation of share price of Odyssey Corporation Ltd by the assessee. He has also failed to discuss the relevant provisions of IT Act/DTAA under which assessee's claim of set off of loss is disallowable. The conclusion drawn by the Assessing Officer while disallowing assessee's claim lacks reasoning and under no circumstances can be considered to be a speaking order. Thus, it is manifest, the Assessing Officer failed to implement the directions of learned DRP. Whether the assessee is directly involved in manipulation of price of shares of

Odyssey Corporation Ltd. is a purely factual issue and has to be established on the basis of inquiry. Neither at the draft assessment stage, nor while passing the final assessment order, the Assessing Officer has established the nature and extent of assessee's involvement in manipulating the price of scrips of Odyssey Corporation Ltd. He has failed to discuss the relevant statutory provisions or the provisions of the DTAA under which he can disallow assessee's claim of set of loss, despite clear directions of learned DRP.

15. Thus, it is a clear case of non-implementation of directions of learned DRP in letter and spirit, which the Assessing Officer is duty bound to implement, in terms of section 144C(13) of the Act. Since, the primary facts relating to allowability or otherwise of assessee's claim of long term capital loss out of sale of shares have not been established on record, we are inclined to restore the issue to the file of the Assessing Officer for de novo adjudication after providing reasonable opportunity of being heard to the assessee. Ground no. II is allowed for statistical purposes. The appeal is partly allowed for statistical purposes.

16. Our decisions above would apply mutatis mutandis to ITA No. 752/Del/2023.

17. In the result, both the appeals are partly allowed for statistical purposes.

Order pronounced in the open court on 27th June, 2024

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 27th June, 2024.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi