

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI

**BEFORE MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.3131/MUM/2023
Assessment Year: 2014-15**

Income Tax Officer, Ward – 24(3)(1), Mumbai	Vs.	Rama Rajiv Jagdale, B/2203, Oberoi Springs, Link Road, Andheri (West), Mumbai – 400053 (PAN :ACSPJ0091Q)
(Appellant)		(Respondent)

Present for:

Assessee : Shri Haridas Bhat, CA
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 26.06.2024
Date of Pronouncement : 08.08.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC), New Delhi vide order no. ITBA/NFAC/S/250/2023-24/1054419820(1), dated 18.07.2023, passed against the assessment order by the Income Tax Officer, Ward – 24(3)(5), Mumbai, u/s. 143(3) r.w.s. 147 of the Income-tax Act (hereinafter referred to as the “Act”), dated 26.12.2017 for Assessment Year 2014-15.

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

1. *"On the facts and the circumstances of the case and in law the Ld. CIT(A) on ground no.1 & 2 has not appreciated the facts of the case and modus operandi as a detailed investigation has been carried out by the Investigation Wing in the scrip of M/s. Surbhi Chemicals and Investments Ltd where the assessee name has been surfaced and a detailed finding has been given by the Investigation Wing."*

2. *"On the facts and the circumstances of the case and in law the LD. CIT (A) has not appreciated the facts that in such penny scrip, trading transactions of purchase and sales are not effected for commercial purpose but to create artificial gains and complete the cycle of circular trading with a view to evade taxes."*

3. *"On the facts and the circumstances of the case and in law the LD. CIT (A) erred in getting the facts that transaction of shares of such penny scrip are not governed by market factors prevalent at relevant time rather transactions are product of design and mutual connivance on part of assessee and operators."*

4. *"On the facts and the circumstances of the case and in law the LD. CIT (A) erred in deleting the addition of Rs. 62,45,275/- made u/s.68 of the I.T. Act, 1961 being sale proceeds of the Scrip and Rs. 1,87,358/- made u/s. 69C of the I.T. Act, 1961 without appreciating that statement of various relevant person admitting that these companies were indulged in giving accommodation entries, abnormal rise in price over short period, cash trails in the accounts of operators etc."*

5. *"On the facts and the circumstances of the case and in law, the Ld.CIT(A) erred in ignoring the decisions in the case of Sumati Dayal v. CIT 214 ITR-80, CIT v. Durga Prasad More 82 ITR-540 (S.C.), SLP. No. 26864/2019 Suman Poddar v. Income Tax Officer (S.C.) and PCIT v. Swati Bajaj (2022)139 Taxmann.com352(Calcutta H.C) and coming to a conclusion only on the basis of the arguments advanced by the assessee."*

6. *This appeal is being filed as it is covered under the exception provided in CBDT's Circular No.23 of 2019 dated 06.09.2019."*

2.1. Grounds taken are in respect of deletion of addition made under section 68 by denying exemption claimed under section 10(38) of the Act for the sale proceeds of listed equity shares alleged as penny stock amounting to ₹ 62,45,275/- on the scrip Surbhi Chemicals & Investments Ltd. and for addition of ₹ 1,87,358/- under section 69C as unexplained expenditure towards commission estimated @ 3% on the sale proceeds of the said alleged scrip.

3. Brief facts of the case are that assessee filed her return of income on 31.03.2016 reporting total income at ₹ 8,61,890/-. Case of the assessee was taken up for reassessment by issuing notice u/s.148 of the Act, dated 28.09.2016 based on information from the Investigation Wing of the Department that she had transacted in certain shares characterised by the Department as penny scrip. After necessary investigation and examination, said assessment proceeding was completed by passing order under section 143(3) r.w.s. 147 dated 26.12.2017. In this assessment, ld. Assessing Officer enquired about the capital gain on sale of shares of Surbhi Chemicals & Investments Ltd. claimed as exempt under section 10(38) of the Act. Assessee furnished necessary details in this respect.

3.1. Assessee had purchased 1000 shares of Surbhi Chemicals & Investments Ltd. on 27.02.2012 in physical form in offline mode through a broker Akrit Advisory Services Pvt. Ltd. Subsequently the shares were sent for dematerialisation (DMAT) and were dematerialised on 20.07.2012. Company later issued bonus shares in the ratio of 9:1 for which assessee received 9000 shares leading to her holding to 10,000 shares. Further, shares were split of face value of Rs.10/- each into 10 shares of face value Re.1/- each, i.e., in the ratio of 1:10. Thus, assessee received 1,00,000 shares of face value of Re.1/- each on 10.04.2013. Assessee sold these shares during the year on the platform of Bombay Stock Exchange (BSE) through SEBI registered broker. This entire factual matrix is presented by the chart reproduced below:

<i>Date of purchase/sale</i>	<i>Buy</i>			<i>Sell</i>			<i>Gain</i>
	<i>Quantity</i>	<i>Rate</i>	<i>Amount</i>	<i>Quantity</i>	<i>Rate</i>	<i>Amount</i>	
17.02.2012	1000	250	2,50,000	100000		62,45,275	59,76,790
(bonus shares issued in the ratio of 9:1)	9000						
Shares subdivided into Rs.10 to 1	90,000						
	1,00,000			100000			

3.2. Case of the assessee was taken up for reassessment on the basis of investigation by the DDIT (Inv.), Kolkata. In the course of assessment, Ld. Assessing Officer called for details and explanations in respect of the transaction of sale of shares on which exemption has been claimed under section 10(38) on account of long-term capital gain earned by the assessee. To corroborate the facts, assessee furnished the relevant documentary evidences which are placed on record in the paper book before us, containing 70 pages, which includes:

- i. Copy of relevant bank statement highlighting purchase transaction in case of Surbhi Chemicals Investments Ltd.
- ii. Copy of Purchase bill in case of Surbhi Chemicals & Investments Ltd.
- iii. Copy of Letter relating transfer of shares in case of Surbhi Chemicals & investments ltd.
- iv. Copy of Share transfer form in case of Surbhi Chemicals & Investments Ltd.
- v. Copy of ten shares certificates in case of Surbhi Chemicals & Investments Lid with distinctive numbers 789801-790800.
- vi. Copy of Demat statement for DP 1D: IN302679 showing one Lakh shares in case of Surbhi Chemicals & Investments Ltd.

- vii. Copy of Sale bills in case of Surbhi Chemicals & Investments Ltd.
- viii. Copy of relevant bank statement highlighting sale transactions in case of Surbhi Chemicals & Investments

3.3. The chronology of events and transaction of purchase and sale as explained by the assessee is tabulated below:

<i>Dates</i>	<i>Events</i>
07.02.2012	Assessee saw an ad in the newspaper from Akriti Advisory dealing in unlisted shares
17.02.2012	Assessee made off-market purchase of 1000 shares of Surabhi Chemicals and Investments Ltd
22.06.2012	Physical Transfer of shares happened.
18.07.2012	Requested for dematerialization of shares
20.07.2012	Dematerialization request accepted: Shares appearing in demat
30.07.2012	Bonus Shares were issued in ratio of 9:1, i.e. 9000 shares were issued against the 1000 held. Total shares held = 10,000
10.04.2013	Shares split happened from Rs. 10/- to Rs. 1/-. Now the assessee held 1,00,000 shares.
18.10.2013	Sale of 15000 Shares @57.25
23.10.2013	Sale of 20000 Shares @ 57.40
13.12.2013	Sale of 16000 Shares @58.60
02.01.2014	Sale of 16000 Shares @58.30
09.01.2014	Sale of 15000 Shares @63.25
29.01.2014	Sale of 11000 Shares @80.15
13.02.2014	Sale of 3500 Shares @ 77.25
03.03.2014	Sale of 3500 Shares @76.50

3.4. In the course of assessment, statement of assessee was recorded by the Ld. Assessing Officer to verify the genuineness of the share transactions. In the said statement, assessee had given the details relating to the share transactions undertaken by her. Ld. Assessing Officer also issued notices under section 133(6) to the purchaser of the

shares sold by the assessing, referred to as “exit providers” which according to him remained un-complied. Ld. Assessing Officer also referred to statement of various persons who according to him were running the racket of providing accommodation entries by manipulating the share prices of alleged penny scrip of the Surbhi Chemicals & Investments. Ld. Assessing Officer noted that statement of these various persons were recorded during the course of survey/search operations undertaken by the DDIT (Inv.), Kolkata and Mumbai to state that they had provided accommodation entries in the alleged penny scrip.

4. Ld. Assessing Officer, after considering the submissions made by the assessee, arrived at the adverse conclusion by observing that there is unusual rise in the price of the shares sold by the assessee which has been investigated by the Investigation Wing of the Department to establish that cash has been routed from various accounts to provide accommodation to the assessee and that assessee had failed to discharge her bonus to prove the unusual rise and fall of share prices. Ld. Assessing Officer placed heavy reliance on the doctrine of preponderance of human probability to hold that the assessee is indulged in bogus and dubious share transactions since she had not been able to adduce cogent evidences in this regard.

4.1. It is worth noting that before drawing adverse conclusion, ld. Assessing Officer deliberated on the general modus operandi of such transactions as well as background of the investigation carried out by the wing, without pinpointing anything specific towards assessee, in this regard.

4.2. Ld. Assessing Officer, thus completed the assessment by making an addition u/s 68 of the Act towards entire sale consideration of Rs.

62,45,275/- received by the assessee on the transaction of sale of shares in the aforesaid scrip. Ld. Assessing Officer also estimated unexplained expenditure towards commission @ 3% of the sale proceeds to make an addition of Rs.1,87,358/- u/s. 69C of the Act. Aggrieved, assessee went in appeal before the ld. CIT(A), who deleted the same. While doing so, he noted in para-5.14 about ld. Assessing Officer not carrying out findings which are specific to the assessee and also not providing opportunity for cross examination which is against the principles of natural justice. Aggrieved, assessee is in appeal before the Tribunal.

5. In the course of hearing, ld. Sr.DR had placed reliance on the order of ld. Assessing Officer and referred to adjudication orders passed by SEBI and asserted that the share transactions undertaken by the assessee are of tainted scrips which were investigated and subjected to penalties.

5.1. Before us, ld. Counsel for the assessee has reiterated the submissions made before the authorities below. He has also placed on record all the relevant documents and evidences in the form of paper book, details of which are already noted above, backed by judicial precedents of the Hon'ble jurisdictional High Court of Bombay. The submissions so made are not reiterated to avoid duplicity. Ld. Counsel for the assessee has placed on record his rebuttal and clarifications on the orders of SEBI referred by ld. Sr. DR. According to the ld. Counsel, SEBI had not issued any notice to the assessee and had not framed any charges against her.

6. We note that transactions for purchase was undertaken in an off-line mode which is an acceptable mode and that of the sale of the

aforesaid 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 these transactions is corroborated by relevant documentary evidences placed on record. While making the addition, there are no discrepancies pointed out by the Assessing Officer in the documents and the details furnished by the assessee. Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the assessee. These evidences furnished have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. At any stage of the present case, Revenue has not brought on record any material about participation of the assessee with any such dubious transactions relating to accommodation entry, price rigging or exit providers. To our mind, Ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details furnished in his office. Once the assessee has produced documentary evidence to establish the veracity of his claim, the burden would shift on the Revenue to establish its case.

7. On the perusal of records, it is discernible that ld. Assessing Officer had proceeded on the basis of analysis of the financials of the company. According to him, sharp movement in the share prices of the aforesaid scrip 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 alleged penny stock 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 of implicating the assessee is un-supported by any cogent material on record. The finding arrived at by the ld. Assessing Officer is thus purely

an assumption based on conjectures and surmises. In our thoughtful considerations to the facts and circumstances of the case, it is not in controversy that assessee has discharged her burden by submitting the relevant documents, details of which are already extracted above, forming part of the paper book.

7.1. For our observations and findings, we place reliance on the decision in the case of CIT vs. Jamnadevi Agrawal [2012] 20 taxmann.com 529 (Bom), wherein it was held that transactions of purchase and sale of shares cannot be considered to be bogus, when the documentary evidences furnished by the assessee establish genuineness of the claim. We also draw our force from the decision of Hon'ble High Court of Delhi in the case of PCIT v. Krishna Devi [2021] 126 taxmann.com 80 (Del) wherein the Hon'ble Court noticed that the reasoning given by the Assessing Officer to disbelieve the capital gain declared by the assessee, viz. astronomical increase in the price of shares, weak fundamentals of the relevant companies are based on mere conjectures.

7.2. Reliance placed by the Id. Assessing Officer on the report of 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. It does not prove that the assessee has carried out the impugned transactions of purchase and sale of shares in connivance with the people who were involved in the alleged rigging of share prices. In absence of any such material, enquiry and examination, the addition made pertaining to receipt of sale consideration of the impugned transaction cannot be sustained. In our considered view, Id. Assessing Officer has not established that the assessee was involved in price rigging.

8. We note that Id. Assessing Officer has observed about the so called purchasers of shares sold by the assessee who have not been identified even though notices were issued u/s.133(6) of the Act. In this context, it is worth noting that impugned share sale transactions undertaken by the assessee are on the online digital trading platform of stock exchange of BSE which is a regulated market under the aegis of a regulator viz. SEBI. There is nothing on record from the market regulator SEBI for the relevant period which establishes the 'tainted' status of the scrip involved in the present case, so as to hold the share sale transactions as bogus/accommodation entry as alleged by the Id. AO. It is also important to note that the operations and *modus operandi* of this regulated market does not in any way provide for any mechanism by which assessee can bring forth the identity of the buyers of his shares and their creditworthiness. Further, sale proceeds are received through the stock market process into the pre-identified bank account of the seller i.e., the assessee which cannot be tainted as 'unexplained or unaccounted or undisclosed' money for the addition made u/s. 68 by the Id. Assessing Officer.

8.1. Section 68 of the Act essentially requires the assessee to explain the nature and source of the sum credited in his books of account to the satisfaction of the Id. Assessing Officer. Time and again, Hon'ble Courts have held the requirement of establishing the identity and creditworthiness of the party and genuineness of the transaction to meet the said requirements of section 68. In the present set of facts, as already stated above, operations and *modus operandi* of the regulated stock markets (BSE) does not in any way provide for any mechanism by which assessee can bring forth the identity of the buyers of his shares and their creditworthiness. Meeting this requirement is an act of

impossibility of performance expected from the assessee for the transaction executed on SEBI regulated, digitally operated stock exchange. For the third limb of genuineness of the transaction, sale proceeds are received through the stock exchange process into the pre-identified bank account of the seller i.e., the assessee. Further, it is not a case of mere book entry where a possibility of tainting it as bogus or sham exists but it is a case where actual movement of dematerialised shares has taken place from the DMAT account of the assessee. In our considered view, assessee cannot be put to the rigors of section 68 in respect of sale proceeds received for sale of shares on the stock exchange (BSE) and gain arising thereon.

9. Further, assessee is a regular investor since year 2001 with investment in shares of other companies as affirmed by her in the statement recorded by the ld. Assessing Officer in the course of impugned assessment. From the perusal of the statement of assessee recorded by the ld. Assessing Officer during the course of assessment, it is demonstrated that he is a long-term investor and is aware of his DMAT account, brokers through whom transactions were undertaken, shares in which he had invested and stock market operations. He produced all the relevant documentary evidences in the assessment proceedings before the ld. Assessing Officer in support of his deposition in the statement recorded.

9.1. From all of this, we notice that assessee has –

- a. purchased the shares under accepted off-line mode by making payment through banking channel.
- b. dematerialized the shares purchased by credit to the DMAT account and part of it were later sold out of the holding.

- c. sold the shares on the platform of recognised stock exchange on the then prevailing prices.
- d. received the sale proceeds through stock market process in his bank account.

10. We note that ld. Assessing Officer has not brought on record any material to show that assessee was part of any group which was involved in the manipulation of share prices. Suspicion by the ld. Assessing Officer on the purchase and sale of shares is baseless. We also note that ld. Assessing Officer did not allow the assessee to cross examination the parties whose statements were relied upon by him for drawing the adverse conclusion. Such an approach adopted by ld. Assessing Officer is not in compliance with the provisions of section 142(3) of the Act which is a statutory mandatory procedural requirement for making a valid assessment. We note that the required compliance with section 142(3) has not been met.

11. As already noted above, ld. Assessing Officer has referred to the theory of preponderance of probability which according to us is applied to weigh the evidence of either side and draw a conclusion in favour of a party which has more favourable factor in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of fact that might go against the assessee. Once nothing has been proved against the assessee with the aid of any direct material, nothing can be implicated against the assessee on the presumption or suspicion, howsoever, strong it might appear to be true.

12. For our observations and to arrive at the findings, we find force of binding nature from the decisions of Hon'ble High Court of Bombay being a jurisdictional High Court:

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 DMATed 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 (Bom) 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 DMAT 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 (Bom) 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 course of hearing before us, Ld. Sr. DR placed reliance on various judicial precedents including that of Hon'ble High Court of Calcutta in the case of Swati Bajaj & others v. PCIT [2022] 446 ITR 56 (Cal) and also in the case of PCIT vs. Usha Devi Modi [2023] 151 taxmann.com 199 (Calcutta). Reliance was also placed on decision of Coordinate Bench of ITAT, Pune and Mumbai in the case of Abhishek Ashok Lohade vs. ITO in ITA No.816/Pun/2018, dated 22.11.2022, in Archana Rajendra Malu vs. ITO [2023] 155 taxmann.com 625 (Pune) and in the case of Sant Kumar Maliram Tola vs. ITO in ITA No.1092/Mum/2023, dated 19.02.2024.

13.1. However, we note that there are several decisions of Hon'ble Jurisdictional High Court as stated supra which are in favour of the assessee. Ld. Counsel had also placed on record the decision of Coordinate Bench of ITAT, Mumbai in the case of Chirag TejPrakash Dangi vs. ITO in ITA No.3256/Mum/2022, dated 20.02.2024 wherein the decision was held in favour of assessee in respect of long term capital gain earned by him on the same scrip, i.e. Surbhi Chemicals & Investments Ltd. as in the present case for which the claim of exemption

u/s. 10(38) was allowed. Accordingly, the same would prevail on the issue before this Tribunal in the present case. Further, decision of the Hon'ble Non-Jurisdictional High Court carries only a persuasive value. The law is very well settled by the Hon'ble Supreme Court in the case of Union of India vs Kamalakshi Finance Corporation Ltd reported in 55 ELT 43 (1991) that the decision of Hon'ble Jurisdictional High Court would have higher precedence value on the Tribunal than the decision of Hon'ble Non-Jurisdictional High Court. Hon'ble Supreme Court emphasised therein that the orders of Tribunal should be followed by the authorities falling within its jurisdiction so that judicial discipline would be maintained in order to give effect to orders of the higher appellate authorities. The Hon'ble Apex Court has observed that utmost regard must be had by the adjudicating authorities and the appellate authorities to the requirement of judicial discipline.

13.2. Respectfully following the same, we deem it fit and appropriate to follow the decisions of Hon'ble Jurisdictional High Court of Bombay referred supra which carries force of binding nature, wherein the impugned issue is decided in favour of the assessee. Moreover, when there are conflicting decisions of various High Courts on the same issue, the Hon'ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 (SC) had held that construction that is favourable to the assessee should be adopted. Hence by following this principle, reliance placed by ld. Sr. DR on the above referred decisions do not hold their fort. Further in the present case, we find that assessee has duly established the nature and source of credit representing sale proceeds of shares of Surbhi Chemicals & Investments Ltd.

14. Considering the totality of facts and circumstances of the case, factual matrix and submissions of parties narrated as well as

discussion and observations made herein above, we uphold the finding arrived at by the ld. CIT(A) and accordingly delete the addition made u/s 68 towards proceeds of sale of listed shares of Surbhi Chemicals & Investments Ltd. which gave rise to Long Term Capital Gain on the said sale, claimed exempt by the assessee u/s 10(38). Accordingly, grounds taken by the Revenue in this respect are dismissed.

15. Addition made by the ld. Assessing Officer on estimate basis towards commission for arranging alleged artificial capital gains @ 3% amounting to Rs. 1,87,358/- is consequential to the addition made towards receipt of sale proceeds of alleged penny stock. Since we have deleted the said addition towards sale proceeds of alleged penny stock in terms of above stated observations and findings, this consequential addition of commission has no foundation to stand. Accordingly, the same is deleted. Grounds taken by the Revenue in this respect are dismissed.

16. In the result, appeal of the Revenue is dismissed.

Order is pronounced in the open court on 08 August, 2024

Sd/-
(Kavitha Rajagopal)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 08 August, 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