

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

Before Shri Prashant Maharishi (AM)

I.T.A. No. 466/Mum/2024 (A.Y. 2013-14)

Rajen Harshadrai Sanghavi 3, Garden View Apartment Dr. Ambedkar Road Mulund West, Mumbai-400 080 PAN : AAIPS5226J (Appellant)	Vs.	ITO 26(3)(1) Kautilya Bhavan Bandra Kurla Complex, Bandra East, Mumbai 400 051. (Respondent)
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Assessee by	Shri Mehul Shah
Department by	Shri R.R. Makwana
Date of Hearing	12.06.2024
Date of Pronouncement	12.08.2024

ORDER

1. This appeal is filed by the assessee/appellant against the appellate order passed by Commissioner Of Income Tax, Appeal being Additional Cit/Joint Commissioner Of Income Tax (A) – 2, Siliguri (the learned CIT – A) for assessment year 2013 – 14 dated 7/12/2023 wherein the appeal filed by the assessee against the assessment order dated 21/12/2019 passed by THE INCOME TAX OFFICER , Ward 26 (3) (1), Mumbai (the learned AO) under section 143 (3) read with section 147 of The Income Tax Act, 1961 (the act) wherein claim of exemption under section 10 (38) of the act of Rs. 1,657,645/- was denied, was dismissed.
2. Assessee is aggrieved and is in appeal before us against the assessment order denying the exemption under section 10 (38) of the act.
3. The brief fact of the case shows that assessee is an individual filed return of income declaring income of Rs. 269,000/- assessee has claimed exemption of long-term capital gain of Rs. 16,57,545/-. ROI

was filed on 25/10/2013. Subsequently it was found that an information is received from director of income tax (investigation), Pune vide letter that a complaint was received in case of one of the companies wherein after enquiry it has been established that company is a penny stock company and has been used by operators for providing long-term capital gain to various beneficiaries.

4. As during the financial year 2012 - 13 the assessee has made transaction of Rs. 1,664,125/- for sale purchase of the penny stock and hence this amount of penny stock gain is required to be disallowed and added back to the total income of the assessee on account of the cash credit under section 68 of the income tax act.
5. Therefore, the learned assessing officer recorded the reasons and issued notice under section 148 of the act. The reasons recorded were provided to the assessee. Thereafter notices under section 143 (2) and 142 (1) of the acts were issued. It was submitted that there is no speculation business undertaken by the assessee and share trading is only for investment purposes and no other business motive is involved and this can be seen by the fact that there is no regular transaction.
6. However, the learned assessing officer based on the investigation report, analyze the profile of the company and found that the financials does not justify the price as well as the genuineness of the capital gain earned by the assessee and is not proved so due to volume, stock exchange data etc. Accordingly, the show cause notice was issued to the assessee once again the assessee stated that the information is completely wrong, and assessee has traded in and earned profit in the above company which is genuine. The learned assessing officer did not consider the above explanation as in the opinion of the learned assessing officer, the assessee could not prove the genuineness of the transaction. Accordingly, the assessment order under section 143 (3) read with section 147 of the act was passed determining total income of the assessee at Rs. 1,945,560/-.

7. Aggrieved the assessee preferred an appeal before the learned CIT – A wherein the action of the learned assessing officer was confirmed, and the addition made under section 68 of the income tax act on account of denial of benefit of section 10 (38) of the act was confirmed.
8. Therefore, the assessee is in appeal before us. Before us the learned authorized representative submitted that Issue is squarely covered in favour of the assessee by the decision of the coordinate benches by following decisions:-
 - i. ITA number 5609/M/2019 for assessment year 2014 – 15
Ashok Jasraj Jain HUF
 - ii. ITA number 3381/del/2017 for assessment year 2013 – 14 in
case of Mr. Sanjeev Jain
 - iii. ITA number 3 to 56/M/2022 four assessment year 2014 – 15 in
case of Chirag Tej Prakash Dangi
 - iv. Decision of the honourable Bombay High Court in case of income
tax appeal number 2012 2017 dated 4 March 2022 in case of
Ziauddin A Siddiqui
9. Thus, the ld AR submitted that issue is squarely covered in favour of the assessee on the merits of the case.
10. However, he also challenged reopening of the assessment submitting that the learned assessing officer has recorded wrong facts in paragraph number 1 of the assessment order stating that assessee has earned long-term capital gain of Rs. 21,628,193 under section 10 (38) of the act. There is no such capital gain earned by the assessee. He referred to his ROI to show that facts are incorrect. He further referred to the reasons recorded wherein it has been stated that reopening has been made beyond the period of four years and there is no mention that there is any failure on part of the assessee. He submitted that even if there is no assessment made u/s 143 (3) of the Act , this condition will prevail. He further stated that in paragraph

number [3] the learned assessing officer has mentioned the information about the different person and not the assessee. He submits that when the information is received by the learned assessing officer, he is to make minimum enquiry, which he has failed to do so. In fact, he submits that the learned assessing officer has recorded the fact of somebody else and not the assessee in the body of the order and the reasons recorded are also without making any independent enquiry and therefore same is invalid.

11. The learned departmental representative vehemently submitted that there is no requirement of stating that the failure is on account of the assessee in disclosing fully and truly the relevant facts of the income because in this case the return of income is not picked up for scrutiny. It was submitted that though the facts mentioned in the assessment order are not matching with the return of income and the reasons recorded, but in substance assessee has obtained the benefit of long-term capital gain which is fictitious and therefore the addition is made by reopening of assessment. There is no infirmity in the order of the learned lower authorities.
12. We have carefully considered the rival contention and perused the orders of the learned lower authorities.
13. In this case,
 - i. The learned assessing officer has mentioned that assessee has filed return of income for assessment year 2013 – 14 on 25/10/2013 declaring income of Rs 269,000. Income includes house property, business income, capital gain and income from other sources. Income with full exemption includes long-term capital gain of Rs. 21,628,193/- under section 10 (38) of income tax act 1961.
 - ii. As soon as the information is received, the case of the assessee was reopened by issue of notice under section

148 of the act dated 29/3/2019 with prior approval of The Principal Commissioner Of Income Tax, 29, Mumbai wherein it has been mentioned that the assessee has made of Rs. 1,664,125/- for sale/purchase of the sale of penny stock and hence this amount of Rs. 1,664,125/- needs to be disallowed and added back to the total income of the assessee on account of the cash credit under section 68 of the act.

- iii. Therefore, whatever is the figures mentioned by the learned assessing officer on examination of the return of income and whatever is the information recorded by the AO in the reasons for reopening are not matching.
- iv. Further in paragraph number three the assessee is referring about revision of returns by the assessee. Assessee has not at all revised his return of income.
- v. AO further states that the copy of reasons recorded for reopening of the assessment is served to the assessee on 30/7/2019. No such reasons are served on the assessee.
- vi. Naturally the learned assessing officer did not carry out any inquiry about the information received with respect to the assessee with respect to the return of income filed.
- vii. Further the fact shows that the assessee purchased 17,000 shares of TCL technologies Ltd from an individual on 26/11/2010 at the rate of Rs. 3 per share. During the year the assessee has sold 11,500 shares for Rs. 1,657,645/-. However, in the assessment order the learned assessing officer states that the assessee has claimed exemption of long-term capital gain of Rs. 21,628,193 under section 10 (38) of the act.
- viii. Further in paragraph number 12 the assessing officer himself states that as per the details available in this case

for assessment year 2013 – 14 the assessee has traded in the shares of this company for Rs. 3,371,330/-.

- ix. there is a contradiction between the reasons recorded by the learned assessing officer, the facts recorded of the return of income in the assessment order, actual return filed by the assessee and facts recorded in the assessment order itself. Thus naturally there is no live link established by the Id AO for reopening of the assessment.
- x. Even the assessing officer at the time of reopening of the assessment when he recorded the reasons, was not sure whether the assessee has sold the shares or assessee has purchased the shares and how the amount is required to be added under section 68 of the income tax act. Therefore, this reason itself is contradictory.

14. In view of this we do not find that the reasons recorded by the learned assessing officer justified the reopening of the assessment. Accordingly, the reopening of the assessment is quashed.
15. As we have already quashed the reopening of the assessment, we do not deal with the judicial precedent cited before us as well as the issue on the merits of the case.
16. In the result appeal of the assessee is allowed and reassessment order is quashed.

Order pronounced in the open court on 12th August 2024.

Sd/-
(Prashant Maharishi)
Accountant Member

Mumbai : 12 .08.2024

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//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai