

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3959/Mum./2023

(Assessment Year : 2013-14)

Aadesh Commodities Pvt Ltd

401, Satyam Tower, 90 Feet Road,
Asha Nagar, Kandivali (E),
Mumbai-400101
PAN – AAHCA3726H

..... Appellant

v/s

**National Faceless Assessment
Centre, Delhi**

..... Respondent

Assessee by : Shri Jay Bhansali

Revenue by : Shri Harmesh Lal

Date of Hearing -03/06/2024

Date of Order - 19/08/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 18/10/2023, passed u/s 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2013-14.

2. In its appeal, the assessee has raised the following grounds: -

"1. Reopening is bad in law:

1.1. The Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)] erred in upholding the action of the Assessing Officer (hereinafter referred to as "the AO") in reopening the case of the appellant for reasons which are wrong, contrary to facts and position in law;

1.2 The CIT(A) erred in upholding the action of the AO in reopening the case off appellant without appreciating that the AO erred in not providing a copy of the necessary sanction under section 151 of the Act to reopen the case of the Appellant. The CIT(A)/AO failed to appreciate that assuming that the necessary sanction has been obtained, the same appears to be mechanical as no prudent person duly instructed in law based on the reasons recorded could sanction such invalid reopening proceedings;

1.3 The CIT(A)/AO failed to appreciate that it is incumbent to first dispose off the objections to reopening and wait for a period of 4 weeks thereafter before proceedings to begin reassessment proceedings. The CIT(A)/AO failed to appreciate that the notice under section 143(2) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 28.09.2020 and the draft order dated 26.09.2021 passed prior to disposal of objections vide order dated 29.09.2021 are bad in law. Consequently, the assessment order under section 147 r.w.s 144B of the Act dated 30.09.2021 (hereinafter referred to as "the impugned assessment order") is liable to be quashed;

2. Addition of Rs. 1,32,65,571/- under section 68 of the Act:

2.1 The CIT(A) erred in upholding the action of the action of the AO in taxing the sale consideration of Rs. 1,32,65,571/- received on sale of equity shares of ACI Infocom Ltd and Nyssa Corporation Ltd, alleged to be penny stocks, under section 68 of the Act read with section 115BBE. The reasons given are wrong, contrary to facts of the case and against the provision of law;

2.2 The CIT(A) erred in upholding the action of the AO in making an addition of Rs. 1,32,65,571/- under section 68 of the Act, being the sale proceeds of sale of shares of a listed companies through recognized stock exchange even when the nature and source of the said credit were explained and proved. The reasons given are in the realm of assumption and presumption upon which no addition is sustainable;

2.3 The AO / CIT(A) erred in law and facts in relying on certain data, findings of the general investigation in unrelated cases and third party statements. Neither do these material establish any connection with the case of the Appellant nor was Appellant given an opportunity to cross examine those parties / information;

2.4 The AO/CIT(A) failed to appreciate that nowhere do the information and statements, identify the appellant as a beneficiary of the alleged accommodation entries;

2.5 The AO / CIT(A) erred in law and facts in treating the transaction of sale of shares of listed company as bogus and undisclosed income merely on the suspicion and assumption that the prices of the shares of listed company were manipulated and appreciation in the value was very high even when the market regulator, SEBI, has not found any manipulation or involvement of appellant;

3 The AO / CIT(A) failed to appreciate that the assessee has already offered the sale consideration of Rs. 1,32,65,571/- on sale of the alleged penny stocks as

business income and taxing the same once again under section 68 of the Act has resulted in double taxation;

4. Without prejudice to the above, the AO / CIT(A) ought to have determined the current year business loss at Rs. 1,32,65,571/- and allowed set off of such loss against the addition made under section 68 of the Act;

5. Without prejudice to the above, the AO / CIT(A) ought to have restricted the addition to the extent of Rs. 15,08,339/- i.e the profit on sale of alleged penny stock after giving the benefit of purchase cost of such equity shares.

6. The above grounds/sub grounds of appeal are without prejudice to each other”

3. The brief facts of the case are that the assessee is engaged in the business of trading and investment in shares. For the year under consideration, the assessee filed its return of income on 30/09/2013 declaring a total loss of Rs.54,269. The return filed by the assessee was selected for scrutiny, and vide order dated 30/03/2016 passed under section 143(3) of the Act total income of the assessee was assessed at Rs. Nil. Subsequently, on the basis of the information received from DDIT (Inv.), Unit-8(2), Mumbai that scrips of NYSSA Corporation Ltd and M/s ACI Infocom Ltd were used by a syndicate of persons for providing accommodation entries of bogus long-term capital gains/bogus short-term capital loss/bogus business loss of entries to various beneficiaries, and the assessee is one of the beneficiary, who has received sales value of Rs.1,03,29,744 from the sale of scrip of NYSSA Corporation Ltd and Rs.29,66,102 from the sale of scrip of M/s ACI Infocom Ltd., proceedings under section 147 of the Act were initiated and notice dated 18/03/2020 under section 148 of the Act was issued and served on the assessee. In the reasons recorded for reopening the assessment, the Assessing Officer (“AO”) recorded the reason to believe that the assessee has received bogus gain by trading in scrip of NYSSA Corporation Ltd and M/s ACI

Infocom Ltd., and thus the income to an extent of Rs.1,32,95,846 has escaped assessment. The reasons recorded for reopening the assessment are reproduced hereunder for reference: -

"REASON FOR REOPENING UNDER SECTION 147 OF THE INCOME TAX ACT. 1961

The assessee company e-filed its return on 30/09/2013 declaring loss of Rs.54,269/. Thereafter the case was selected for scrutiny and assessment was completed u/s 143(3) on 30/03/2016 with total income nil.

2. Subsequently, information is received in email on 28/03/2019 and 09/12/2019 from DGIT(Inv). Mumbai that a search and seizure action were carried out on Shri Naresh Jain and his associates throughout the country by the Directorate of Income Tax (Investigation) 2, Mumbai on 19.03.2019 which concluded on 21.03.2019. The search action covered the syndicate of persons who were acting in collusion and executing managed transactions on the stock exchange thus generating bogus long-term capital gains bogus short-term capital loss/ bogus business loss entries for various beneficiaries. The Basic premise in this regard is that there is no liquidity in these stocks. The equity in these scrip is closely held in connivance with promoters and through various proxies and any market transaction is on account of pre-arranged transactions. The seven scrip, which have been identified, are as below: -

<i>Sl No.</i>	<i>Script Code</i>	<i>Name</i>
<i>1.</i>	<i>504378</i>	<i>NYSSA Corporation Ltd.</i>
<i>2.</i>	<i>505343</i>	<i>Monotype India Ltd.</i>
<i>3.</i>	<i>508860</i>	<i>Diamant Infrastructure Limited</i>
<i>4.</i>	<i>511672</i>	<i>Scan Steels Limited</i>
<i>5.</i>	<i>523810</i>	<i>Divine Multimedia (India) Ltd.</i>
<i>6.</i>	<i>531866</i>	<i>Aagam Capital Ltd.</i>
<i>7.</i>	<i>533427</i>	<i>VMS Industries Ltd.</i>

3. Shri Naresh M. Jain used these scrip to facilitate introduction of unaccounted income of beneficiaries in the form of exempt Long-Term Capital Gain or Short-Term Capital Loss of business loss in their books of account. Shri Naresh M. Jain and his associates have categorically accepted in his statement that he has used these scrip for providing accommodation entries.

4. As per the list of beneficiary forwarded along with the information, the assessee is the beneficiary of such accommodation entry in the scrip of NYSSA Corporation Ltd and has received sale value of Rs. 1.03,29,744/-during the FY 2012-13.

5. Information has also been received from Dy. Director of Income-tax (Investigation), Unit 8(2), Mumbai vide email dated 07/07/2019. As per this information, the investigation wing of the income tax department conducted enquiries in the scrip of penny stock, M/s ACI Infocom-Ltd-and-found that the scrip of M/s ACI Infocom Ltd is a penny stock, listed in BSE and this company has been used to facilitate introduction of unaccounted income of members of

beneficiaries in the form of exempt capital gain or short term capital loss in the their books of account. It is also informed that share price of M/s ACI Infocom Ltd. rose from Rs. 2.63/- in 24.08.2011 and peaked to Rs 21.90 in 21.02.2013 Subsequently the share price was dropped to Rs. 2:93 in 20.08.2013.

6. The assessee is beneficiary of share transactions of M/s. ACI Infocom Ltd during year. In this regard, the Dy. Director of Income-tax (Investigation), Unit 8(2), Mumbai informed that the assessee has made sales transactions of shares of this scrip for the value of Rs. 29,66,102/- during the FY 2012-13.

7. The above fresh facts, found after assessment proceedings u/s 143(3), prove that the assessee company received accommodation entry of Rs. 1,32,95,846/- on the transactions of penny scrip of NYSSA Corporation Ltd and ACI Infocom Ltd during the FY 2012-13 relevant to AY 2013-14. This fact was not disclosed by the assessee during the course of assessment proceedings u/s 143(3) of the Act. Accordingly, it is failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

8. In view of the above, I have reason to believe that the assessee has received bogus gain of Rs. 1,32,95,846/-by trading the scrip of NYSSA Corporation Ltd and ACI Infocom Ltd as its undisclosed income, Accordingly, income of Rs. 1,32,95,846/- chargeable to tax has escaped assessment for AY 2013-14 within the meaning of section 147 of the Income Tax Act 1961. Hence, the case of the assessee is required to be re-opened by issue of notice u/s 148 of the Income Tax Act, 1961 after approval u/s 151(1) of the Act as it falls beyond four years from the end of the Assessment Year."

4. The AO vide order dated 30/09/2021 passed under section 147 read with section 144B of the Act after placing reliance upon the Investigation Wing's report concluded that during the year under consideration, the assessee earned profit from trading in penny stocks of NYSSA Corporation Ltd and M/s ACI Infocom Ltd, and the investment into shares of these companies of no means is highly dubious. The AO treated the transaction to be a colourable transaction and made the addition of the entire receipts from the transaction in shares of NYSSA Corporation Ltd and M/s ACI Infocom Ltd to the tune of Rs.1,32,65,671 under section 68 read with section 115BBE of the Act.

5. The learned CIT(A), vide impugned order, upheld the addition made by the AO, and held that the unaccounted income was never in any portion of the

books of accounts of the assessee, and moreover it is not the case where the assessee has shown the said transaction as part of its business turnover, but had offered the same for long term capital gains. Being aggrieved, the assessee is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. As per the assessee, it is a trader in shares, and for the year under consideration sold part of the opening stock of shares of M/s ACI Infocom Ltd for a consideration of Rs.15,92,503, resulting in a profit of Rs.9,57,269. Further, during the year, the assessee again sold shares of M/s ACI Infocom Ltd for a consideration of Rs.13,69,150, which resulted in a profit of Rs.7952. As per the assessee, the proceeds of the sale of shares of M/s ACI Infocom Ltd were credited to the profit and loss account and duly offered for tax as business income. Further, during the year, the assessee sold the entire opening stock of 84,000 shares of NYSSA Corporation Ltd for a consideration of Rs.1,03,03,918, which resulted in a profit of Rs.5,43,118. Similarly, the assessee credited the sales consideration on the sale of shares of NYSSA Corporation Ltd to the profit and loss account and offered the same to tax as business income. Therefore, it is the plea of the assessee that from the sale of shares of NYSSA Corporation Ltd and M/s ACI Infocom Ltd, during the year under consideration, it has earned profit which was offered to tax as business income.

7. From the perusal of the financial statement of audited financial statements of the assessee for the financial year 2012-13, forming part of the paper book from pages 4-19, we find that the assessee declared a total

turnover of Rs.11,74,47,670, which comprises revenue from operations of Rs.11,69,17,854. From Note 12 of the financial statement, we find that the aforesaid revenue from operations arises from the sale of shares. Further, from Note No. 7, we find that only the investment in shares of Sunteck Reality Ltd has been declared as non-current investments by the assessee. From the copy of the return of income along with computation of income for the assessment year 2013-14, forming part of the paper book from pages 1-3, we find that the assessee has claimed exemption of long-term capital gains amounting to Rs.54,269 under section 10(38) of the Act.

8. From the careful perusal of afore-noted details, it is discernible that the assessee did not consider shares of NYSSA Corporation Ltd and M/s ACI Infocom Ltd as its investments, and rather considered the same as its stock-in-trade, being the trader in shares. Further, the assessee has recorded in the financial statements returned for the year under consideration the profit earned from the sale of shares of NYSSA Corporation Ltd and M/s ACI Infocom Ltd and offered the same to tax. Therefore, we find no merits in reopening of assessment in the case of the assessee for the year under consideration on the basis that the assessee has received bogus gains by trading in scrips of NYSSA Corporation Ltd and M/s ACI Infocom Ltd, which was not disclosed, and thus the income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. Therefore, the entire observation/basis of the assessment is factually incorrect, since the assessment has been reopened on the wrong facts. Thus, the impugned assessment order deserves to be quashed.

9. As is evident from the record, the assessee has included the sale consideration of Rs. 29,61,653 from the sale of shares of M/s ACI Infocom Ltd and sale consideration of Rs.1,03,03,918 from the sale of shares of NYSSA Corporation Ltd in its profit and loss account for the year under consideration. Further, the assessee has paid the tax on the profit earned from the aforesaid transaction. However, while concluding the assessment, the AO again made an addition of Rs.1,32,65,571 under section 68 read with section 115BBE of the Act. In our considered opinion, even if the total receipt amounting to Rs.1,32,65,571 is treated as unexplained cash credit, the AO is required to reduce the said amount from the income side and then proceed further to make an addition under section 68 of the Act. As noted elsewhere, the assessee filed its return of income declaring a total loss of Rs.54,269, and if total profit from sale of shares of NYSSA Corporation Ltd and M/s ACI Infocom Ltd amounting to Rs.15,08,339 (Rs.9,65,221 + Rs.5,43,118) is reduced on account of reduction of total receipts from the income side, the same will increase the loss of the assessee, which is required to be set off with the addition made under section 68 of the Act. Therefore, resulting in the entire exercise being tax-neutral. This position is supported by the CBDT's Circular No. 11 of 2019, wherein it was clarified that up to the assessment year 2016-17, the losses can be set off from the additions made under section 68 of the Act. Even the learned CIT(A) has not disputed the same, as is evident from paragraph 6.2 of the impugned order.

10. Considering the facts of the case from the factual as well as a legal perspective, we do not find any merit in the impugned addition made under

section 68 read with section 115BBE of the Act. Accordingly, we are of the considered view that the learned CIT(A) has erred in confirming the same, and therefore, the impugned order is set aside. The AO is directed to delete the impugned addition.

11. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 19/08/2024

Sd/-
NARENDRA KUMAR BILLAIYA
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 19/08/2024

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai