

| आयकरअपीलीयअधिकरणन्यायपीठ,मुंबई|
IN THE INCOME TAX APPELLATE TRIBUNAL
“(SMC)” BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

I.T.A. No.1039/Mum/2024
(Assessment Year:2014-15)

Nirav Shailendra Mody, 8/A Navjeevan Patel Compound, 20 Napean Sea Road, Mumbai [PAN: AAFPM3474R]	Vs	ITO, 19(2)(4), Mumbai
--	----	--

अपीलार्थी/ (Appellant)		प्रत्स्त्री/ (Respondent)
-------------------------------	--	----------------------------------

Assessee by :	Shri Mohan Tandon
Revenue by :	Shri R. R. Makwana, Sr. DR

सुनवाई की तारीख/**Date of Hearing** :05.09.2024
घोषणा की तारीख /**Date of Pronouncement:09.09.2024**

आदेश/O R D E R

PERNARENDRA KUMAR BILLAIYA, AM

This appeal by the assessee is preferred against the order dated 10.01.2024 of Id. NFAC, Delhi pertaining to Assessment Year 2014-15.

2. The grievance of the assessee reads as under:-

“1. On the facts and in the circumstances of the case the Ld. CIT(A) NFAC has grossly erred in confirming the addition of Rs. 2235160/- made in the assessment completed u/s 143(3) by the AO by disallowing long term capital gain income claimed exempt u/s 10(38) by taxing the entire sale proceeds from sale of shares, as unexplained income u/s 68 of the IT Act 1961, without any basis and with the sole purpose to make additions without bringing on record any corroborative material found during the course of assessment proceedings, and also by completely ignoring the well established law that no addition can be made solely on the basis of statements recorded on oath during the course of survey conducted just on the basis of information received from Investigation Wing of Income Tax, Kolkata, without making its own independent enquiry and efforts.

Thus, the additions made solely on the basis of such retracted statements deserve to be deleted.

1.1 That, the Ld. CIT (A) NFAC has grossly erred in confirming the addition made in the assessment completed u/s 143(3) solely on the basis of statements of Shri Anil Agarwal recorded by I.T. Officials after giving summons u/s 131 of the I.T. Act 1961 during the course of search operations carried out on the entry providers and survey conducted on the broking houses in Kolkata, by the Income Tax Officials. And also no opportunity of cross examining Shri Anil Agarwal was provided. Thus, the assessment order deserves to be held bad in law and the additions made there under deserve to be deleted.

2. On the facts and in the circumstances of the case the Ld. CIT(A) NFAC has grossly erred in confirming the disallowance of claim of long term capital gain claimed exempt u/s 10(38) amounting to Rs. 2147685/-, as unexplained income u/s 68 of the I. T. Act 1961, as the provisions of section 68 are applicable only when the assessee is maintaining books of accounts and in the present case assessee is a partner in a firm and having income from other sources only. Thus, the additions confirmed by the Ld. CIT (A) NFAC by applying the provision of section 68 is bad in law and deserves to be deleted.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) NFAC has grossly erred in making addition of Rs. 44703/- U/s 69C on presumptions and assumptions @ 2.00% of transaction amount of long- term capital gain, without any basis and without establishing the as to how the amount has been paid to the broker. Thus additions made without any basis just on presumptions and assumptions is bad in law and deserves to be deleted.

4. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal."

3. Briefly stated the facts of the case are that the assessee filed his return of income on 15.09.2014 declaring income of Rs. 7,24,390/-. The return was processed u/s 143(1) of the Act. Later on, on the basis of information received from the Directorate of Income Tax (Investigation), Kolkata stating that the investigation carried out by the department has proved that a scheme was hatched by various players to obtain/ provide

accommodation entries bogus long term capital gain (LTCG) through manipulation of stock market.

4. On perusal of the record of the assessee the AO found that the assessee has return LTCG on sale of shares of Sunrise Asian and has claimed exemption u/s 10(38) of the Act. Drawing support from the report of the Investigation Wing, Kolkata the AO treated the long term capital gain of Rs. 21,47,685/- as bogus and rejecting the claim u/s 10(38) of the Act. The AO made addition of Rs. 22,35,160/- and made further addition of Rs. 44703/- being 2% commission paid to the entry operators.

5. The assessee carried the matter before the Id. CIT(A) but without any success. Before us at the very outset the counsel pointed out that on identical set of facts the coordinate bench in the case of the brother of the assessee has deleted the impugned addition. The counsel supplied the copy of the order of the coordinate bench. Per contra the Id. DR strongly supported the findings of the AO but could not bring any distinguishing decision in favour of the revenue.

6. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contention of the counsel on identical set of facts and on identical transactions in identical scrip the coordinate bench had considered the identical issue in the case Sanket Shailendra Modi in ITA No. 1780/Mum/2022. The relevant finding reads as under:-

“6. At the outset, we find that the documentary evidences submitted by the assessee were found to be genuine and no adverse inferences were drawn by the revenue on the same. The transactions were carried out by the assessee in the

6.7. Hence the entire addition has been made merely by placing reliance on the Kolkata Investigation Wing report which are more general in nature and does not implicate the assessee herein in any manner whatsoever. We are unable to persuade ourselves to accept to the contentions of the Id. DR that Kolkata Investigation Wing had conducted a detailed enquiry with regard to the scrip dealt by the assessee herein and hence whomsoever had dealt in this scrip, would only result in bogus claim of long term capital gain exemption or bogus claim of short term capital loss. Merely because a particular scrip is identified as a penny stock by the income tax department, it does not mean all the transactions carried out in that scrip would be bogus. So many investors enter the capital market just to make it a chance by investing their surplus monies. They also end up with making investment in certain scrips (read penny stocks) based on market information and try to exit at an appropriate time the moment they make their profits. In this process, they also burn their fingers by incurring huge losses without knowing the fact that the particular scrip invested is operated by certain interested parties with an ulterior motive and once their motives are achieved, the price falls like pack of cards and eventually make the gullible investors incur huge losses. In this background, the only logical recourse would be to place reliance on the orders passed by SEBI pointing out the malpractices by certain parties and taking action against them. Since assessee or his broker is not one of the parties who had been proceeded against by SEBI, the transaction carried out by the assessee cannot be termed as bogus.

6.8. We hold that the entire addition has been made based on mere surmise, suspicion and conjecture and by making baseless allegations against the assessee herein. Now another issue that arises is as to whether the Id. AO merely on the basis of Kolkata investigation wing report could come to a conclusion that the transactions carried out by the assessee as bogus. In our considered opinion, the Id. AO is expected to conduct independent verification of the matter before reaching to the conclusion that the transactions of the assessee are bogus. More importantly, it is bounden duty of the Id. AO to prove that the evidences furnished by the assessee to support the purchase and sale of shares as bogus. This view of ours is further fortified by the decision of Hon'ble Delhi High Court in the case of PCIT vs Laxman Industrial Resources Ltd in ITA No. 169/2017 dated 14/03/2017. It is well settled that the suspicion however strong could not partake the character of legal evidence. Hence the greater onus is casted on the revenue to corroborate the impugned addition by controverting the documentary evidences furnished by the assessee and by bringing on record cogent material to sustain the addition. No evidence has been brought on record to establish any link between the assessee herein and the directors of Sunrise Asian Limited or any other person named in the assessment order being involved in any price rigging and also the exit provider. This onus is admittedly not discharged by the revenue in the instant case.

XX

6.11. *Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, we are not inclined to accept to the stand of the Id. CIT(A) in sustaining the impugned additions on account of denial of exemption for long term capital gains u/s 10(38) of the Act and estimated commission @ 2% against the same. Accordingly, the grounds raised by the assessee are allowed."*

7. While coming to the above conclusion the coordinate bench has considered the following facts :-

Date	Event	Supporting documents	Submitted before AO during assessment proceeding
18.03.2011	Appellant purchased shares of sunrise Asian Ltd from Shipra Fabrics Private Ltd being an off market purchase in physical form	Debit note issued by Shipra Fabrics P Ltd dated 18 th March 2011	Yes on 9 th October 2017
18.03.2011	Cheque No 689555 drawn on HDFC Bank Favoring Shipra Fabrics Ltd. cleared by bankers on 19.03.2011	Copy of bank statement for the relevant transactions	Yes on 9 th October 2017
19.03.2011	Receipt issued by Shipra C Fabrics Ltd. for consideration of 100000/-	Copy of receipt	Yes on 9 th October 2017
11.09.2012	Physical Shares Credited to Demat Account of Appellant with HDFC Bank	Copy of Demat statement for the period 01.04.2012 to 31.03.2013	Yes on 9 th October 2017
13.05.2013 to 16.05.2013	Sale of 5000 shares of Sunrise Asian Ltd on BSE platform through Fortune	Copies of contract notes for sale of 5000 shares issued by Fortune Equity Brokers(India) Ltd.	Yes on 9 th October 2017
06.06.2013	Transfer of share of Sunrise Asian from HDFC demat account with intime equities Ltd	Statement of Demat Account at with Intime Equities Ltd. es from 01.01.2011 to 31.03.2014 including the holding statement as on 31.03.2014	Yes on 9 th October 2017
15.05.2013	Debit entries of 5000 shares of Sunrise Asian Ltd	Statement of Demat Account with Intime Equities from 01.01.2010 Ltd to 31.03.2014	Yes on 9 th October 2017

		including the holding statement as on 31.03.2014	
21.05.2013	Receipt of sale proceeds from Fortune Equity Brokers (India) Ltd	Copy of bank statement with HDFC bank showing the receipt on	
21.05.2013	Conformation of amount received on sale of shares from Fortune Equity Brokers (Inc India Ltd.	Copy of Ledger Account with Fortune Equity Brokers (India) Ltd. for the period of 01.04.2013 to 31.03.2014	Yes on 4 th December 2017

8. The parity of facts can be seen from the following chart of facts in the case of the assessee:-

Date	Event	Supporting documents	Submitted before AO during assessment proceedings
18/3/2011	Appellant Purchased Shares of Sunrise Asian Ltd from Shipra Fabrics Private Limited being an Off Market Purchase in Physical Form	Debit Note Issued by Shipra Fabrics P Ltd Dated 18th March 2011	Yes on 09 th October 2017
18/3/2011	Cheque No 689576 drawn on HDFC Bank Favoring Shipra Fabrics P Ltd cleared by bankers on 19/03/2011	Copy of Bank Statement for the relevant transaction	Yes on 09 th October 2017
19/3/2011	Receipt Issued by Shipra Fabrics P Ltd for consideration of Rs 100000/-	Copy of receipt	Yes on 09 th October 2017
27/06/2011	Physical Shares Credited to Demat Account of Appellant with Bank Of India	Copy of Demat statement for the period 1-1-2011 to 31-3-2013	Yes on 09 th October 2017
16/05/2013	Transfer of Shares of Sunrise Asian from BOI Demat Account to demat account with intime equities	Statement of demat Account with Intime Equities Ltd from 1- 1-2011 to 31-3- 2014 including the holding statement as on 31-3-2014	Yes on 09 th October 2017
21/05/2013 to 28/05/2013	Sale of 5000 shares of Sunrise Asian Ltd on BSE Platform through Fortune Equity Brokers (India) Ltd	Copies of Contract notes for sale of 5000 shares issued by Fortune Equity Brokers (India) Ltd	Yes on 09 th October 2017
23/05/2013 to 28/05/2013	Debit entries of 5000 shares of SunriseAsian Ltd	Statement of demat Account with Intime	Yes on 09 th October 2017

30/05/2013		Equities Ltd from 1- 1- 2011 to 31-3- 2014 including the holding statement as on 31-3- 2014	
21/05/2013	Receipt of Sale proceeds from Fortune Equity Brokers (India) Ltd	Copy of Bank statement with HDFC bank Showing the receipt on	Yes on 22 nd December 2017
21/05/2013	Confirmation of amount received on sale of shares from Fortune Equity Brokers India Ltd.	Copy of Ledger Account with Fortune Equity Brokers India Ltd for the period 1/4/2013 to 31/03/2014	Yes on 22 nd December 2017

9. On finding parity of facts respectfully following the decision of the coordinate bench (supra) we direct the AO to delete the impugned addition and allow the claim of the assessee u/s 10(38) of the Act.

10. Appeal is allowed.

Order pronounced in the Court on 9th September, 2024 at Mumbai.

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated: 09/09/2024
**AK KEDT, Sr. PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीयप्रतिनिधि , आयकरअपीलीयअधिकरण, मुंबई/DR,ITAT, Mumbai,
6. गार्ड फाई/Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai