

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 286/JP/2024
निर्धारण वर्ष / Assessment Year : 2011-12

Smt. Lakshmi Agarwal 201, Sumangal Apartment, Near Kavantia Hospital, Shastri Nagar, Jaipur	बनाम Vs.	The ITO Ward 4(5) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGXPA 1347 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal, CA
राजस्व की ओर से / Revenue by: Mrs. Monisha Choudhary, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 10/07/2024
उदघोषणा की तारीख / Date of Pronouncement: 11 /09/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the ld. CIT(A) dated 11-01-2024, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment year 2011-12 raising following ground of appeal.

- “1. The ld. CIT(A) has erred on facts and in law in upholding the validity of order passed by AO u/s 147 of I.T. Act.
2. The ld. CIT(A) has erred on facts and in law in confirming the addition made by AO u/s 68 of the Act by

holding that gain of Rs.10,05,000/- on sale of shares of Comfort Intech Ltd. is bogus by making various incorrect and irrelevant observations and ignoring the fact that the assessee has incurred loss in the share trading. He has further erred in not allowing set off of the gain against the loss incurred in other shares.

3. The Id. CIT(A) has erred on facts and in law in confirming addition made by AO u/s 69C of the Act by holding that the assessee has paid Rs.84,300/- being 6% of the sale proceeds of the shares as commission.

2.1 The Ground No. 1 of the assessee relates to challenging the validity of the order passed by the AO u/s 147 of the Act. In this regard, the Id. AR of the assessee relied upon the written submission to support this ground and the same is reproduced hereunder:-

‘1. At the outset it is submitted that there is contradiction in the reasons recorded at Page 1-3 of the assessment order and the reasons provided to the assessee in course of the assessment proceedings. In the assessment order AO has stated that information is received from DDIT Investigation, Kolkata whereas in the reasons provided to the assessee it is stated that an enquiry report along with annexures has been received from DCIT, Central Circle-3(4) Mumbai where it is informed that M/s Comfort Intech Ltd. is a penny stock company listed on BSE and trading in this script is highly suspicious and assessee is one of the beneficiaries who has traded in this script. Thus, it is clear that AO has not even applied his mind as to whether the information is received from DDIT Investigation, Kolkata or from DCIT, Central Circle-3(4) Mumbai. Hence, the order passed u/s 147 is illegal and bad in law at the very threshold.

2. From the plain reading of the reasons recorded it can be noted that notice u/s 148 is issued solely on the basis of enquiry report received from DCIT, Central Circle-3(4) Mumbai. The AO has not made any enquiry of his own to come to a belief that income has escaped assessment. The AO in the reasons recorded at Para11(4) (**PB 10**) has himself admitted that no enquiry is necessary before recording satisfaction for issuance of notice since the information is specific. Thus the reasons recorded for re-opening is on borrowed satisfaction and not on any satisfaction by the AO. The

SMT. LAKSHMI AGARWAL VS ITO, WARD 4(5), JAIPUR

primarily condition for initiating action u/s 147 is that the AO must have reason to believe that any income chargeable to tax has escaped assessment. From recording of reasons it is evident that only basis for reopening the assessment is the information received from DCIT, Central Circle-3(4) Mumbai. This shows that AO has mechanically and blindly acted upon the enquiry report received from Central Circle, Mumbai without applying his own mind or without causing any enquiry at his end to arrive at believe that income of the assessee has escaped assessment. Hence, reopening of assessment is illegal and bad in law. For this purpose reliance is placed on the following cases:-

Smt. Anshita Vimal Jain Vs. ITO (2023) 199 ITD 168 (Surat) (Trib.)

Where AO merely on basis of information received from Investigation wing, Mumbai with reference to search carried out in case of one 'GJ' reopened assessment on ground that assessee had taken accommodation entries of bogus purchase bills from 'GJ', since AO had not recorded his own satisfaction and had not made any effort to examine and to discuss material received from Investigation wing, reassessment so made was to be quashed.

Pioneer Town Planners Pvt. Ltd. Vs. DCIT (2018) 170 DTR 237 (Del.) (Trib.)

AO having formed the belief that assessee's income has escaped assessment only on the basis of some material received from the Investigation Wing without making any effort to examine and discuss the material received from the Investigation Wing and without application of the mind to the same, it follows that he initiated the reassessment proceedings on the basis of borrowed satisfaction without application of his own mind and therefore, reassessment proceedings and all consequent proceedings and orders including impugned reassessment are bad in law and not sustainable.

Deepraj Hospital Pvt. Ltd. Vs. ITO (2018) 65 ITR 663 (Agra) (Trib.)

If the reopening is based on information received from the investigation dept., the reasons must show that the AO independently applied his mind to the information and formed his own opinion. The AO in the reasons has just stated the information received and his conclusion about the alleged escapement of income. As to what the AO did with the information made available to him is not discernible from the reasons. The reasons must also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO thereon as also the conclusions thereof. Further where the reasons make a reference to any document, such document and / or relevant portion thereof must be enclosed along with the reasons. Therefore, reasons recorded by the AO are found to be not in accordance with law. Consequently, the reassessment

SMT. LAKSHMI AGARWAL VS ITO, WARD 4(5), JAIPUR

proceedings, culminating in the order under appeal, are also not sustainable in the eye of law and they too are cancelled. Nothing further survives for adjudication. In the absence of the link between the information available with AO and formation of belief by AO for reassessment, reassessment proceedings are not valid.

Smt. Sunita Jain Vs. ITO (2017) 49 CCH 0330 (Ahd.) (Trib.)

The Hon'ble ITAT after relying on the decision of Gujarat High Court in case of Harikishan Sunderlal Virmani Vs. DCIT, quashed the assessment framed u/s 147. The Hon'ble High Court in its case held that the material on the basis of which the AO seeks to assume the jurisdiction under section 147 of the Act is the information received from the external source viz. the Principal Director of Income Tax (Investigation), Ahmadabad. It cannot be disputed that on the basis of the information received from another agency, there cannot be any reassessment proceedings. However, after considering the information/ material received from other source, AO is required to consider the material on record in case of the assessee and thereafter is required to form an independent opinion on the basis of the material on record that the income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment for the verification.

PCIT Vs. RMG Polyvinyl (I) Ltd. (2017) 249 Taxman 610 (Del.) (HC)

Where information was received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by AO, said information could not be said to be tangible material per se and thus, reassessment on said basis was not justified.

M/s Devansh Exports Vs. ACIT (2019) 176 DTR 17 (Kol.) (Trib.)

The information given by DIT(Inv.) can only be a basis to ignite/ trigger "reason to suspect". The AO has to carry out further examination to convert the "reason to suspect" into "reason to believe". If the AO acts on borrowed satisfaction and without application of mind, the reopening is void.

Balaji Health Care Pvt. Ltd. Vs. ITO (2019) 55 CCH 0168 (Jaipur) (Trib.)

The AO cannot reopen without establishing prima facie that assessee's own money has been routed back in form of share capital. While he can rely on the report of the Investigation Wing, he has to carry out further examination and analysis in order to establish the nexus between the material and formation of belief that income has escaped assessment. In absence thereof, the assumption of jurisdiction u/s 147 has no legal basis and resultant reassessment proceedings deserve to be set-aside.

3. The Ld. CIT(A) has relied on certain decisions but these decisions are not applicable on the facts of the assessee. In the first decision of Gujarat High Court it was held that there are no fetters on the AO carrying out preliminary enquiries even before issuance of notice of re-opening in order to collect information on the basis of which he may form a belief that income chargeable to tax has escaped assessment. Thus in this case AO carried out preliminary enquiries which is not in the present case of the assessee. In the second & third decision of Gujarat High Court it is held that in Writ Jurisdiction it is not open for the court to go into factual aspects raised by the assessee and therefore these decisions are not applicable. In the fourth decision AO received information from Investigation Wing that two well-known entry operators of the country provided bogus entries to various beneficiaries but in the present case the reasons recorded do not specify name of any broker through whom alleged accommodation entry has been taken. The fifth decision of Delhi High Court is in a different context where it directed the ITAT to hear the revenue's appeal on its merit and render the decision in accordance with law. The sixth decision of Delhi High Court is in context of re-opening within four years where assessment is made u/s 143(3) which is not in the present case.

In view of above, order passed u/s 147 in consequence to the reasons recorded u/s 148 is illegal and bad in law and the same be quashed.”

2.2 On the other hand, the Id. DR supported the order passed by the Revenue Authorities and also the judgments. It was submitted by the Id. DR that the assessee was having tangible information received from DDIT (Investigation), Calcutta that M/s. Comfort Intech Ltd. is penny stock and the assessee being one of the beneficiaries who had taken accommodation entries of STCG in shares of this company whereby shares purchased for Rs.4.00 lacs was sold for Rs.14.05 lacs in a short span of time. Since the assessee company being one of the beneficiaries, therefore, on the basis of tangible materials the proceedings for reopening were initiated and concluded after adopting due procedure. The Id. DR thus requested to dismiss the Ground No. 1 raised by the assessee.

2.3 The Bench has heard both the parties and perused the materials available on record including the judgements cited by the respective parties. Before I come to the merit of the present case, it is necessary for the Bench to evaluate the orders passed by the Revenue Authorities while adjudicating this ground. Although, the Id CIT(A) has deal with this ground in Para No. 5 to para 5.6 yet the operative portion is contained in para 5.3 to 5.6 of his order and the same is reproduced as under:-

“5.3 The reassessment order and the contentions of the appellant have been considered carefully. It has been observed that the appellant did not raise any objection to the assumption of jurisdiction u/s 147 by the AO during the course of reassessment proceedings. AO has applied his mind independently after verification of the records of the appellant in the database that the appellant did not file original return of income and that no original scrutiny proceedings was carried out as well as there is cogent material in the form of information received from the Investigation Wing to form the belief that income has escaped assessment as the appellant had failed to furnish true and material facts fully in the Return of Income. The reliance placed by the appellant has carefully gone through. However, the same is not squarely applicable to the facts of the case. In the case relied upon by the appellant. the appellant has filed return of income as well as original assessment proceedings were carried out and thereafter, on the basis of the audit objection, the case was reopened while in the present case, the facts are different as in the instant case, no original return of income and assessment proceedings were carried out and thereafter, the AO had information received from within the Department which was based on various inquiries and investigation and on the basis of this, the case of the appellant has been reopened. In this regard, reliance is placed on the following judgement in which the reopening

based on information received from within the Department is held as valid:-

i) Decision of the Hon'ble Gujarat High Court in the case of Aishwarya Dyeing Mills Pvt. Limited V/s DCIT 94 taxmann.com 430 wherein it is held as under:

"Section 68, read with section 147 of the Income-tax Act, 1961- Cash credit (Share capital)-Assessment year 2010-11-For relevant year, assessee filed its return declaring certain taxable income Assessing Officer completed assessment under section 143(3) Subsequently, Assessing Officer reopened assessment proceedings on basis of information received from Investigation wing of Department that assessee-company had accepted share capital/share premium from various entries/parties which had been proved to be shell companies based on investigation conducted by Department- Assessee filed instant petition challenging validity of reassessment proceedings taking a plea that instead of information supplied to Assessing Officer by Investigation Wing of Department, he sought such information to reopen assessment which was not permissible - Whether there are no fetters on Assessing Officer carrying out preliminary inquires even before issuance of notice of reopening in order to collect information on basis of which he may either form a belief that income chargeable to tax had escaped assessment or abandon any further inquiry, upon being satisfied that no such belief could be formed-Held, yes-Whether, therefore, objection raised by assessee was to be rejected Held yes Whether further, in view of fact that Assessing Officer had specific and definite information at his command to form a belief that income chargeable to tax had escaped assessment validity of impugned reassessment proceedings was to be upheld Hold, yes (Paras 16 and 22) favour of revenue

ii) Decision of the Hon'ble Gujarat High Court in the case of MSK Real Estate Pvt. Limited 95 taxmann.com 241 which has also held as under:

"Section 68, read with section 147 of the Income-tax Act, 1961- Cash credits (Share capdal) Assessment year 2010-11 For

relevant year a company did not file its return - Subsequently, a search was carried out in case of M group of companies-in course of search certain documents were seized showing that assessee had received share application money and share premium from various companies Investigation Wing of department provided information that those companies were paper/shell companies involved in providing accommodation entries in form of share capital share premium unsecured loans etc -On basis of aforesaid information, Assessing Officer initiated reassessment proceedings in case of assessee -Assessee raised objection to reassessment proceedings on ground that entire share application and share premium money was received by assessee on or before 31-3-2009 and thus, no taxing event took place during assessment year in question-Assessing Officer rejected assessee's objection on the grounds, firstly, transaction would be completed only upon allotment of shares and secondly, a part of amount was received in relevant assessment year- Assessee filed instant petition challenging validity of reassessment proceedings-Whether in writ jurisdiction, it was not open for court to go into factual aspects raised by assessee and thus, validity of reassessment proceedings was to be upheld-Held, yes (Para 9) [in favour of revenue]”

iii) Further, the Hon'ble Gujarat High Court in the case of Kottenz India Manufacturing Pvt. Limited Vs DCIT 95 taxmann.com 291 has held as under:-

Section 68. read with section 147 of the income-tax Act, 1961- Cash credits (Share capital)-Assessment year: 2010-11-For relevant year, assessee filed its return declaring certain taxable income – Return was processed under section 143(1)- Subsequently Assessing Officer received information from Investigation Wing that a company was involved in providing accommodation entries to various companies in form of share capital and share premium and assessee was one of such beneficiaries -On basis of said information Assessing Officer initiated reassessment proceedings Assessee raised an objection that it had not received any amount as share capital or share

premium from said company - Assessing Officer, however, rejected assessee's objection - Whether on facts, it was not open for Court in writ proceedings to undertake any factual inquiry in respect of objection raised by assessee - Held, yes Whether, therefore, validity of reassessment proceedings deserved to be upheld - Held, yes [Para 8] [In favour of revenue)

iv) Furthermore, Hon'ble Gujarat High Court in the case of Peass Industrial Engineers Pvt. Limited V/s DCIT 73 taxmann.com 185 has also held as under:

Section 68 read with section 147, of the Income-tax Act, 1961- Cash credit (Bogus entres) - Assessment year 2011-12 Whether what is required at stage of issuing notice under section 148 is a reason to believe and not establish fact of escapement of income and therefore, looking to the scope of section 147 as also sections 148 to 152 even if scrutiny assessment has been undertaken if substantial new material is found in form of information on basis of which assessing authority can form a belief that income of petitioner has escaped assessment it is always open for assessing authority to reopen assessment - Held, yes - Whether therefore where after scrutiny assessment Assessing Officer received information from investigation wing that two well known entry operators of country provided bogus entries to various beneficiaries, and assessee was one of such beneficiary, Assessing Officer was justified in reopening assessment Held, yes [Para 12] [in favour of revenue

In another case the Hon'ble High Court of Delhi in the case of Pr. CIT-7 vs. Paramount Communication P. Ltd. reported in (2017) 79 Taxmann.com 409 (Delhi) has held that the information received from Directorate of Revenue Intelligence (DRI) was tangible material to reopen the case as per the provision of section 147 of the Act. In that case the assessment was reopened on the basis of information received from DRI The assessments were quashed by the ITAT by holding that the reasons recorded were insufficient. The Hon'ble Court held the following

8. As far as AY 2004-05 is concerned, this Court is of the opinion that in the reference to the bogus purchase made by the assessee from M/s Kashish Impex Pvt. Ltd and the information received for the period 17.09.2002 to 20.05.2005 and the amount of bogus purchase for the period under consideration amounted to Rs. 164 crores was entirely based upon the information received from the Directorate of Revenue Intelligence (DRI) Regional Unit at Jaipur. This in turn was based upon information given by the Central Excise Department. While it is true that the court is conscious that the reassessment notice should not have been routinely issued at the same time the nature of power is wide enough that when there an escapement of income and the Revenue has information ruling that this escapement is also relatable to suppression of material facts (which could include false claims), the power to reopen concluded assessment can validly be exercised. The consideration which ought to weigh with the Revenue and are considered valid are the existence of tangible material or information in the light of the judgment in CIT v. Kelvinator of India (2010) 320 ITR 561 (SC)

9. Having regard to the contents of the notice for AY 2003-04, the court a unable to agree with the findings of the ITAT it constitutes reference to tangible material "outside the record, i.e. information based upon the investigation of the Commissioner of Central Excise with respect to the purchases made by the assesses. However, as far as the second issue a concerned, the Court is of the opinion that even the rectified order does not address the issues squarely. Thus, argued such arguments could be validly raised. At the same time the court notices that for both AYs 2004-05 and 2005-06, the note discloses the source of the information, i.e. DRI Local Unit at Jaipur, sending information based upon the Commissioner of Central Excise's investigations. To require the Revenue to disclose further details regarding the nature of documents or contents thereof would be virtually rewriting the conditions in section 147 After all Section 147 merely authorizes the issuance of notice to reopen with conditions. If the Court were to dictate the manner and contents of what is to be written, the statutory

SMT. LAKSHMI AGARWAL VS ITO, WARD 4(5), JAIPUR

conditions would be added as it were in this context d needs to be emphasized that the court would interpret the statute as they stand in their own terms, but at the same time being conscious of the rights of the citizens So viewed, Kelvinator of India (supra) strikes just balance To add further conditions to the nature of discussion/ reasons that the officer authorizing the notice would have to discuss in the note or decision would be beyond the purview of the Courts and would not be justified. For the above reasons, this Court is of the opinion that the impugned order and the consequential order of 05.01.17 cannot be sustained They are accordingly set aside The question of law urged by the Revenue is answered in its favour The parties are directed to be present before the ITAT on 06.03.2017 The ITAT shall proceed to hear the Revenue's appeals on its merits and render decision in accordance with law. All rights and contentions of the parties with respect to the merits are reserved''

SLP against this order was dismissed by the Hon'ble Supreme Court on July 14, 2017 as reported in (2017) 84 Taxmann.com 300 (SC)

5.4 Further, it is to mention that in the case at hand, NO original assessment completed u/s. 143(1) or u/s. 143(3) of the Act and the requirement of fresh tangible material is not a condition precedent for assuming jurisdiction u/s.147 as no return of income has been filed by the appellant u/s. 139(1) of the Act or in response to notice u/s 148 of the Act. This view has also been held by the Hon'ble High Court of Delhi in the case of Indu Lata Rangwala Vs DCIT (2017) 80 Taxmann.com 102 (Delhi) wherein it was held

"Whereas in a case where the initial assessment order is under section 143(3), and sought to be reopened within four years from the expiry of the relevant assessment year, the Assessing Officer has to base his reasons to believe that income has escaped assessment on some fresh tangible material that provides the nexus or link to the formation of such belief, in a case where the initial return is processed under section 143(1)

of the Act and an intimation is sent to the assessee, the reopening of such assessment no doubt requires the Assessing Officer to form reasons to believe that income has escaped assessment but such reasons do not require any fresh tangible material

5.5 In other words, where reopening is sought of an assessment in a situation where the initial return is processed under section 143(1) of the Act, the Assessing Officer can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the Assessing Officer to come across some fresh tangible material to form reasons to believe that income has escaped assessment."

5.6 In view of the afore-stated position of law as also held by the various Hon'ble Courts in the judgments cited hereinabove. it is abundantly clear that the information received from the Investigation Wing is tangible material for assuming jurisdiction under the provisions of section 147 of the Act. It is not in dispute that appellant has traded in penny Stock scrip viz. Comfort Intech Ltd. and obtained accommodation entry in the form of Short Term Capital Gain. Even if it is not treated as accommodation entry, the appellant has earned STCG of Rs. 10,05,000/-, he ought to have offered the same as STCG and paid taxes thereon. Therefore, the appellant is non-filer and assumption of jurisdiction u/s. 148 of the Act is valid.

2.4 After having gone through the entire findings recorded by the Id. CIT(A) and also considering the submissions of both the parties, I found at the very outset after analyzing the entire material available on record that the assessee had not raised any such objection regarding assumption of jurisdiction u/s 147 of the Act before the AO during the course of reassessment proceedings. Only after evaluating and verifying the records in data base, it was found and noticed by the AO that the

assessee had not filed her return of income. Therefore, under these circumstances, no original scrutiny proceedings had taken place. On the other hand, in my view an information received by the AO from Investigation Wing is enough to form the belief that income has escaped assessment more particularly under the circumstances when the assessee had failed to furnish true and material facts in her return of income. The facts of the present case are altogether different from the facts of the case relied upon by the assessee. In the present case, the information received by the AO is from within the Department which is further based on various enquiries and investigation. Therefore, in such circumstances the AO and the Id CIT(A) while correctly relying upon the facts had rightly concluded that it is abundantly clear that the information received from the Investigation Wing is tangible material for assuming jurisdiction under the provisions of Section. It is not in dispute that the assessee had traded in penny stock scrip viz Comfort Intech Ltd. and obtained accommodation entry in the form of Short Term Capital Gain. Even if assuming the said company M/s. Comfort Intech Ltd is not treated as penny stock company then the assessee who had earned short term capital gain of Rs.10.05 lacs was under the obligation to have offered the same as short term capital gain and paid taxes thereon. After analyzing the entire record, I am of the view that the AO had cogent material in the form of information/ material gathered by the Department during various enquiries and investigations. Further, it is an

admitted fact that the assessee had not filed her original return of income and therefore no original scrutiny assessment had been carried out in the present case which shows that no information in respect of transaction was carried or verified. Therefore in my view the said facts are enough for the AO to form the belief that income of the assessee has escaped assessment. The ld CIT(A) has rightly relied upon the decision of Hon'ble Gujarat High Court in the case of :-

1. Aishwarya Dyeing Mills (P) Ltd. vs DCIT 94 Taxmann.com 430
2. MSK Real Estate Pvt.. Ltd 95 Taxmann.com 241
3. Knottenz India Mfg. (P) Ltd vs DCIT 95 Taxmann.com 291
4. Peass Industrial Engineers Pvt.Ltd vs DCIR 73 Taxmann.com 185
5. Pr. CIT – 7 vs Paramount Communication (P) Ltd. (2017) 79 Taxmann.com 409 (Delhi)

Therefore, in my view the ld CIT(A) has passed the well reasoned order while dismissing the Ground No. 1 and no interference is required in the order of the ld. CIT(A). Thus Ground No. 1 of the assessee is dismissed.

3.1 In Ground NO. 2 & 3, the assessee is aggrieved that the ld. CIT(A) has erred in upholding the addition u/s 68 and u/s 69C of the Act on the sale of shares Comfort Inech Ltd. and on account payment of commission on sale proceeds.

3.2 Brief facts of the case are that the AO observed that assessee has purchased 1,00,000 shares on 17.08.2010 (Correct date is 15.07.2010) (**PB 27**) of Comfort

Intech Ltd. for Rs.4,00,000/- and the same were sold within a period of less than one month for Rs.14,05,000/-. Accordingly, the AO on the basis of investigation conducted by the DDIT Investigation, Kolkata that it is a penny stock company made certain observations at Page 4 to 13 of the order. The assessee explained that she sold the shares on 17.08.2010 in BSE Ltd. through Share Broker M/s Aanand Rathi Securities Ltd. which cannot be disbelieved. However AO made addition of Rs.10,05,000/- u/s 68 of the Act by treating it as unexplained cash credit. He further made addition of Rs.84,300/- u/s 69C of the Act on account of alleged commission paid @ 6% of the sale value of shares of Comfort Intech Ltd.

3.3 In first appeal, the Ld. CIT(A) at Page 17 to 29 of its order after referring to the various decisions including that in case of Swati Bajaj held that pre-ponderance of probabilities is against the assessee and thus dismissed the ground of the assessee.

3.4 During the course of hearing, the ld. filed the following written submission praying therein to delete the addition confirmed by the ld.CIT(A).

1. It is submitted that assessee invested in 10,000 shares of Rs. 1 each at a premium of Rs. 3 each in the right issue (**PB 14**). The payment of Rs.4,00,000/- was made on 15.07.2010 (**PB 27**) directly to the company. The purchase of shares is not disputed by the lower authorities in as much as he has allowed the deduction of cost of acquisition of the shares.

2. Thereafter, assessee sold these shares through SEBI registered share broker i.e. M/s Anand Rathi Securities Ltd. vide contract note dt.17.08.2010 for Rs.14,05,000/- but after brokerage and other charges the net amount received is Rs.13,99,744/- which is credited in her account by

SMT. LAKSHMI AGARWAL VS ITO, WARD 4(5), JAIPUR

Anand Rathi Shares and Stock Brokers Ltd. on that date (**PB 33**) on which STT was paid. Copy of contract note is **enclosed**. On sale of these shares assessee earned short term capital gain of Rs.9,99,744/- (wrongly taken by the AO at Rs.10,05,000/-). However, since assessee incurred loss of Rs.32,87,005/- in future and option trade carried through M/s Anand Rathi Shares and Stock Brokers Ltd., the gain on sale of shares of Comfort Intech Ltd. is to be adjusted against the loss and thus no income has arrived to the assessee on sale of these shares.

3. From the above documentary evidences it can be noted that assessee has discharged her onus to prove the genuineness of purchase of shares and the genuineness of sale of shares. The lower authorities except for relying on the report of investigation wing and the financial statement of Comfort Intech Ltd. have not brought on record any evidence that the assessee has paid cash against the amount received from sale of shares.

4. Before the Ld. CIT(A) assessee filed the submission and relied on various case laws, However, the Ld. CIT(A) has not controverted the facts and relied on the decision of Kolkata High Court in case of Swati Bajaj, decision of Bangalore ITAT in case of Smt. MK Rajeshwari and decision of ITAT Chennai Bench in case of Mrs. Vidya Reddy by not appreciating that the facts of the assessee's case is entirely different than the facts of these cases in as much as assessee is regularly trading in shares through Anand Rathi Shares and Stock Brokers Ltd. both in NSE & BSE in delivery segment and also in derivatives segment. Thus assessee has genuinely purchased and sold the shares of Comfort Intech Ltd.

5. As stated above, the transaction entered into by the assessee and the gain arising therefrom is completely genuine. Thus, the assumption of AO that assessee had paid commission of 6% of the sale value of shares of M/s Comfort Intech Ltd. is incorrect and has been made simply on the basis of surmises, conjectures, assumptions and presumptions. There is no material available on record to show any such payment. In fact assessee paid brokerage of Rs.3,000/- on sale of these shares to M/s Anand Rathi Shares and Stock Brokers Ltd as evident from the contract note which is deducted from the sale value of the shares and therefore the addition of Rs.84,300/- made on account of undisclosed commission u/s 69C be deleted.

In view of above, addition confirmed by Ld. CIT(A) be directed to be deleted.’’

3.5 On the other hand, the ld. DR supported the orders passed by the Revenue Authorities and also relied upon following case laws.

(1)[2022] 139 taxmann.com 352(Calcutta) HIGH COURT OF CALCUTTA Principal Commissioner of Income-tax V. Swati Bajaj

(2) [2019] 112 taxmann .com 330 (SC) SUPREME COURT OF INDIA Suman Poddar v Income Tax Officer

(3) [2022] 139 taxmann. Com 406(Rajasthan) HIGH COURT OF RAJASTHAN Jawar lal Lunia v. Union of India.

(4) [2023] Income Tax Appellate Tribunal, Jaipur Benches" SMC" ITO Ward-5(2) Jarpur Vs. Shakuntala Agarwal

(5) [2023] 149 Taxmann. Com 104(Ahmedabad-ITAT) ITAT Ahemdabad SMC Atmiben Alipitkumar Doshi v. Income-tax officer.

(6)[2023] In the INCOME TAX APPELLATE TRIBUNAL" 8" BENCH, AHMEDABAD, Hemil Subhashbhal Shah Samarpan v. DCIT, Ward-5(3)(1)

(7) [2023] 151 Taxmann. Com 367(Raipur-Trib.) In the ITAT RAIPUR BENCH SMC 7 Rahul Gupta (HUF) v. Assistant Commissioner of Income-tax

(8) [2021] 129 taxmann.com 119(Gujarat) HIGH COURT OF GUJARAT Nishant vilaskumar parekh v. Income-tax officer, Ward-113)

3.6 The Bench has heard both the parties and perused the materials available on record including the judgements cited by the respective parties. Before, I adjudicate the merits of these grounds, it is necessary in my view to evaluate the

order passed by the ld. CIT(A) who has dealt with the ground No. 2 & 3 in para 6.4 to 6.13 and Ground No. 3 in para 7 to 7.2..

“ 6.4 I have carefully considered the submission of the appellant and also contents of the assessment order and the case laws relied upon by the appellant. While going through the written submission furnished during the course of the present appellate proceedings, it is noticed that the appellant has reiterated the same set of contentions which was put forth during the course of the assessment proceedings. The appellant has contended that the shares were purchased, demat and sold for which necessary bills were issued, shares were sold through demat a/c and against sales payment was received by account payee cheque and shares were sold on recognized stock exchange on which STT was paid. From this, one can say that the transaction is verifiable. However, here, it is important to mention that it is very naive to believe that the transactions entered into through banking channel proves creditworthiness, identity and genuineness of the transactions. Necessarily accommodation entries are an exercise of introducing unaccounted money or reducing profit by buying exempt LTC gain / loss to avoid the legitimate tax liability and therefore, to give it a colour of genuinity. The documentary and circumstantial evidences collected by the AO and the human conduct and probabilities in this case stare at the face of the appellant as to why it invested in those companies which did not have a proven track record of financial soundness. Therefore, a higher burden lies on the appellant to establish the genuineness of the transaction under consideration. Here, the appellant has miserably failed to do so. The appellant has reiterated the same set of arguments and evidences before the present proceedings also which were cast upon before the AO during the course of assessment proceedings. The appellant has not been able to provide any reasonable, cogent and valid evidences/arguments/contentions advanced by it in the instant appeal to counter the AO's decision as contained in the Order passed u/s. 147/144 of the Act dated 28.12.2018. On the contrary, there is enough material on record to negate the claim

of genuineness of these transactions. Genuineness of the transaction is to be examined in the light of ground realities and that is precisely what the AO has done. Therefore, it has been rightly held by the AO that the transaction of purchasing the shares of M/s. Comfort Intech Ltd. with a low price and further selling the shares within a short period at a very high price, without any enquiry and knowing the Financial credentials of the company, was sham, bogus, not genuine and with an intention to buy an accommodation entry of exempt STCG to evade the legitimate tax liability ultimately. It is held that the aforesaid transactions of purchase of penny stock shares for lesser amount and the sale of the shares for higher amount fell within the ambit of adventure in the nature of trade and the assessee had profited which comes under the ambit of business income. Further, the findings of the A.O. are in line with those of the Investigation report of the Investigation Wing

6.5 The appellant has relied on several decisions in favour of the assessee but there are also decisions in favour of the revenue on the same issue. Though the same pertains to exempt LTCG, however, the same are equally applicable in the case of STCG also. In such cases, the purchase of shares have been in lesser price and the assessee has sold the shares within a short period with a huge price. The latest decision of the Calcutta High Court in the case of PCIT v. Swati Bajaj & Others which is in favour of the Revenue is discussed as under

S. 68 Cash Credits-Penny Stock-Capital gains-Shares with increased value of about 2823%-Genuineness of price hike to be established-Onus on the assessee-Order of Tribunal is reversed- Addition as cash credit is affirmed-Revision is held to be valid [S.S. 10(38), 45, 263]

The assessee had purchased 50,000 shares of the Surabhi Chemicals and investment Lid for Rs.1,00,000 on 16.03.2012 and 14.08.2012. Soon after the expiry of the period to become eligible for long term capital gains, the assessee sold those shares for Rs. 29.23 500 shares were effected during the period from 04.12.2013 to 07.12.2013 and the long term capital gains

(LTCG) was computed for Rs. 28,23,500 The assessee claimed the capital gains as exempt u/s 10(38) of the Act. The Assessing officer held that within a short span to time of 17 to 21 months, the Assessee managed to sell the shares with increased value of about 2823% that to when the general market trend was recessive Relying on the import of investigation wing the Assessing Officer denied the exemption and assessed the receipt us 68 of the Act. The CIT(A) dismissed the appeal of the Assesse. . On appeal the income-tax Appellate Tribunal passed a common order in 90 appeals pertaining to penny stocks favouring the assesseees. Revenue has filed appeals before the High Court. Hon'ble High Court held that the onus is on the assessee to establish the genuineness of the price hike. Merely demonstrating the financials of the company, volume of trade, transactions through banking channels inter alia will not suffice. The assessee has to prove that the price of the share was not manipulated. Hon'ble High Court also held that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer and equally the Tribunal committed error both on law and fact in interfering with the assumption of jurisdiction by the Commissioner under section 263 of the Act (arising out of ITA No. 2623/Kol/2018 dated 20-06-2019 (SMC) (A.TY. 2014-15 (ITA No. 6 of 2022 dated June 14, 2022). PCIT vs Swati Bajaj and Ors (Cal.)(HC),

6.6.....

6.7 From the perusal of the assessment order, I find that the genesis of the issue commenced from an information received from the Investigation Wing of the Department. The information speaks of the types of penny stock companies, the entities involved in the transaction, the transaction involves a pictorial representation as to how the share prices raised to astronomical level which according to the Department is used by the operators for booking bogus LTCG/STCG. Thus, the moot question would be if the information is the starting point for considering as to how the claim of LTCG/STCG by the assessee was genuine for which it should be considered as to

whether the assessing officer has committed any error of law, error of jurisdiction or error on facts, leading to the assessment being held to be not sustainable. One of the arguments of the appellant is that it had not been provided cross examination. However, on perusal of the submission of the appellant filed during the course of the present proceedings, it is found that the appellant has not provided any documentary evidences which shows that it had asked before the AO and the AO did not provide opportunity of cross-examination of the same. Hence, in the absence of any reasonable, cogent and valid evidences, this contention of the appellant is liable to be rejected. Despite this, the question would be as to whether the non-compliance of the above would render the assessment bad in law. In State Bank of Patiala and Others Versus S.K. Sharma, the Hon'ble Supreme Court pointed out that violation of any and every procedural provision cannot be said to automatically vitiate the domestic enquiry held against the delinquent employee or the order passed by the disciplinary authority except in cases falling under no notice, no opportunity and no hearing categories. Further it was held that if no prejudice is established to have resulted from such violation of procedural provisions no interference is called for, against the ultimate orders. Therefore, the appellant had to specifically point out as to how it was prejudiced on account of non-providing of opportunity of cross-examination in its entirety, would cause prejudice to it. It may be that the information states that the investigation has not commenced from the individuals but it has commenced who had dealt with the penny stocks, concept of working backwards. This is a very significant factor to be remembered. Therefore, there has been absolute anonymity of the assessee in the process of investigation. The endeavour of the department is to examine the "modus operandi adopted and in that process now seek to identify the assesseees who have benefited on account of such "modus operandi" Therefore, considering the factual scenario, no prejudice has been established to the appellant by not providing of opportunity of cross-examination in its entirety nor making the persons available for cross examination.

6.8 Unless and until the assessee shows and proves that the appellant was prejudiced on account of such report/ statement

mere mentioning that non-availability of the person for cross examination cannot vitiate the proceedings. The appellant has miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In the present case, the appellant had been issued notices under Sections 143(2) and 142(1) of the Act, it had been directed to furnish the documents, it had complied with the directions, appeared before the assessing officer or represented by Advocates/Chartered Accountant, elaborate legal submissions had been made and thereafter, the assessment has been completed. Nothing prevented the appellant from mentioning that unless and until the cross examination is provided, it would not in a position to take part in the inquiry which is being conducted by the AO in scrutiny assessment under Section 147 of the Act. Therefore, merely by mentioning that no opportunity of cross-examination was provided can in no manner advance the case of the appellant.

6.9 Now, coming to the merits of the case, in the present case, the assesseees have been harping upon the transactions done by it and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assesseees are lawfully bound to prove the huge STCG claims to be genuine. In other words there is information and data available of unreasonable rise in the price of the shares of the penny stock companies over a short period of time, the genuinity of such steep rise in the prices of shares needs to be established and the onus was on the appellant to do so as mandated in Section 68 of the Act. Thus, the assesseees cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading, If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently, they are entitled to claim STCG on their transaction, Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. The

appellant cannot be heard to say that their claim has to be examined only based upon the documents produced by it namely bank details/statements, the purchase/sell documents, the details of the D-Mat Account, etc. The appellant has lost sight of an important fact that when a claim is made for STCG, the onus is on the assessee to prove that credit worthiness of the company whose shares he had dealt with the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

6.10 Wealth of information and facts were on record which is the outcome of the investigation on the companies, stock brokers, entry operators etc. Based on those foundational facts the department has adopted the concept of "working backward" leading to the appellant. While at that relevant stage, the sounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over. were all taken into consideration to negative the claim for exception made by the appellant. Therefore, the department was fully justified in taking note of the prevailing circumstances to decide against the appellant

6.11 In the instant case, after describing the general modus operandi of accommodation entry by way of bogus capital gain, the AO has highlighted the investigation conducted in such penny stock and providing of bogus capital gain entries, modus operandi involved, lack of financial fundamentals of the company of which shares the appellant has traded, price movement, jack up of share price of the company Comfort Intech Ltd. etc. The appellant was then asked to justify the Investment in the relevant shares. The AO has pointed out that the said company is not having any significant/real business as seen from the financial statement of that company The price movement of the shares was also found to be unrealistic. The AO has particularly pointed out that price movement of the relevant transacted by the assessee, were not matching with movement of the share market in general and movement of the

other scrips. The AO also pointed out that the appellant could not explain, why it invested in such scrip without knowing the financial performance of the company. The relevant analysis has been reproduced by the AO in the assessment order. The conclusion of AO has already been reproduced by us in brief facts of the case.

6.12 Evidences put forth by Revenue regarding entry operation fairly leads to conclusion that appellant is one of beneficiaries of accommodation entry receipts in form of short term capital gains. The appellant has failed to prove that share transactions are genuine and could not furnish evidences regarding sale of shares except copies of bank statements, demat a/c, statement highlighting the transactions. This cannot be case of intelligent investment or simple and straight case of tax planning to gain benefit of short term capital gains earnings about 351% over a short period of only a month is beyond human probability and defies business logic of any business enterprises dealing with share transactions. Even net worth of company is not known to appellant. All these facts give credence to unreliability of entire transaction of shares giving rise to such capital gains ratio laid down by Hon'ble Supreme Court in case of Sumati Dayal vs. CIT case. Though the appellant has received amount by way of account payee cheques, transactions cannot be treated as genuine in presence of overwhelming evidences put forward by Revenue fact that in spite of earning such steep profits, the appellant never ventured to involve himself in any other transaction which broker cannot be mere coincidence of lack of interest. Reliance is place on judgment in case of Nipun Builders and Developers Pvt. Ltd. where it was held that it is duty of Tribunal to scratch surface and probe documentary evidence in depth, in light of conduct of appellant and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not. Similarly bank statements, demat a/c, statement, STT paid, broker's statement provided by appellant to prove genuineness of transaction cannot be considered in view of judgment of Hon'ble Court in case of Pratham Telecom India Pvt. Ltd. wherein it was stated that bank statement, etc. is not sufficient enough to discharge

burden. Regarding failure to accord opportunity of cross examination we rely on judgment of Prem Castings Pvt. Ltd. Similarly tribunal in case of Udit Kalra ITA No 6717/Del/2017 for assessment year 2014-15 has categorically held that when there was specific confirmation with Revenue that appellant has indulged in non-genuine and bogus capital gains obtained from transactions of purchase and sale of shares, it can be good reason to treat transactions as bogus.

6.13 Hence, considering the facts of the assessee's case and the preponderance of probabilities is against the assessee, the entire capital gain demand has to be treated as fictitious and bogus more particularly when the appellant has not furnished cogent evidence to explain how the shares in an unknown company jumped up in no time and such fantastic sale price was not at all possible when there was no economic or financial basis to justify the price rise and therefore affirms the order passed by the assessing officer. Thus, in view of the above facts and discussion, the ground no.1 of the appeal is dismissed.

7 The next ground no.2 is against addition of Rs.84,300/- made towards commission expenses 6% of the STCG claimed of Rs.14.05.000/- treating the same as unexplained expenditure u/s 69C of the Act. The Assessing Officer has brought out the facts in detail in the assessment order dated 28.12.2018. On this issue, the appellant vide his submission dated 27.02.2021 has contended that he has paid brokerage to Share Broker Anand Rathi which is evident from bills submitted. The appellant has further contended that no other evidence has been provided by the AO regarding alleged commission payments.

7.1 It is noticed that the AO has made the impugned addition of Rs. 84,300/- on the basis of the outcome of the inquiries and investigation carried out by the Investigation Wing of the Department that commission @ 6% has been charged for providing / arranging capital gain and in the instant case, the STCG claimed has been treated as income of the appellant as unexplained cash credit u/s 68 of the Act. The appellant in the submission before the present proceedings has contended that

he has paid brokerage to Share Broker Anand Rathi which is evident from bills submitted and no other evidence has been provided by the AO regarding alleged commission payments.

7.2 The appellant's submission is general in nature. Further, as discussed in the foregoing paras, it is found that the appellant had made investment in unknown company of which the details were not known to it. The AO has found that though the shares were purchased by the assessee at much lesser amount, the assessee sold the shares at much higher amount within a short period. The assessee had not tendered cogent evidences to explain as to how the shares in an unknown company worth such less value had jumped to much higher amount in no time. Therefore, the AO has held that the transaction of sale and purchase of shares of penny stock company is mere an arrangement to claim LTCG/STCG. The AO has recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of LTCG/STCG. The findings recorded by the AO are pure findings of facts based on a proper appreciation of the material on record. In view of this, it cannot be said that the impugned addition made is merely on suspicion and surmises only. Therefore, I am unable to interfere with the action of the Assessing Officer. Therefore, this ground of appeal raised by the appellant in the present appeal is dismissed.’’

After having gone through the orders passed by the Revenue Authorities and also going through the written submissions and oral submissions made by the assessee. It is noticed from the orders of the Revenue who has acted on the basis of information and data available of unreasonable rise in the prices of shares of penny stock companies over a short period of time. The genuinely of such steep rise in the prices of shares was needed to be established and thus the onus was on the

assessee to do so as mandated in Section 68 of the Act. It is an admitted fact that the assessee purchased the shares of Comfort Intech Ltd. for Rs.4.00 lacs and the same were sold at Rs.14.05 lacs within a period of less than one month and accordingly the AO on the basis of the investigation conducted by the DDIT (Inv.) Kolkata to the effect that Comfort Intech Ltd is a penny stock company had initiated the proceedings against the assessee being the beneficiary. However, on the contrary, the assessee had explained that assessee had sold the shares in on 17-08-2010 in BSE Ltd. through share brokers M/s. Anand Rathi Securities Ltd. . Thus the transactions carried out by the assessee cannot be disbelieved. It is noted that the assessee does not and cannot dispute the fact that the shares of the company which the assessee dealt with were insignificant in value prior to the trading. If such is the situation then in that eventuality, it is the assessee who has to establish that price rise was genuine and consequently entitled to claim STCG on the transactions, unless and until the initial burden casts upon the assessee to discharge the onus does not shift to the Revenue to prove otherwise in my view, the assessee cannot be heard to say that her claim has to be examined only based upon the documents produced by the her namely bank details/ statements, purchase/ sales documents, details of demat account etc. It is settled law that when the claim is made for STCG then the onus is on the assessee to prove the creditworthiness of the company whose shares were dealt with. The genuineness of

price rise of shares is alarming in the present case within a short span of time.

Therefore, in such circumstances unless and until the assessee discharges the burden of proof and then the addition made by AO cannot be faulted. As regards the issue of addition of Rs.84,300/- u/s 69C, the Bench has also taken into consideration the order of the AO as to the confirming the addition of Rs.84,300/- u/s 69C of the Act which has been confirmed by the ld. CIT(A) by observing as under:-

7.2 The appellant's submission is general in nature. Further, as discussed in the foregoing paras, it is found that the appellant had made investment in unknown company of which the details were not known to it. The AO has found that though the shares were purchased by the assessee at much lesser amount, the assessee sold the shares at much higher amount within a short period. The assessee had not tendered cogent evidences to explain as to how the shares in an unknown company worth such less value had jumped to much higher amount in no time. Therefore, the AO has held that the transaction of sale and purchase of shares of penny stock company is mere an arrangement to claim LTCG/STCG. The AO has recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of LTCG/STCG. The findings recorded by the AO are pure findings of facts based on a proper appreciation of the material on record. In view of this, it cannot be said that the impugned addition made is merely on suspicion and surmises only. Therefore, I am unable to interfere with the action of the Assessing Officer. Therefore, this ground of appeal raised by the appellant in the present appeal is dismissed.’

The Bench has also taken into consideration facts of the case of the assessee as well as the orders of the lower authorities wherein the Bench does not find any infirmity in the order of the Id. CIT(A) who has elaborately discussed the issue as to the penny stock of Comfort Intech Ltd. Thus, the Ground No 2 and 3 of the assessee are dismissed.

3.0 In the result, the appeal of the assessee is dismissed with no orders as to costs.

Order pronounced in the open court on 11/09/2024.

Sd/-

(संदीप गोसाईं)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 11 /09/2024

*Mishra

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

1. The Appellant- Smt. Lakshmi Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- The ITO, Ward- 4(5), Jaipur
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No.286/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar