

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRIGIRISH AGRAWAL, ACCOUNTANT MEMBER

I.T.A No.3646/Mum/2024
(Assessment Year : 2014-15)

Haresh Dilip Vora A/15, Narendra Apartment, 2 nd Floor, Sarojini Road, Vile Parle (West), Mumbai-400 056 PAN: AADPV1458Q	vs	The ITO, Ward 25(2)(4),Mumbai [At Present jurisdiction with the ITO, Ward 34(2)(1), Mumbai] Kautilya Bhavan, B.K.C., Mumbai- 400 051
APPELLANT		RESPONDENT

Assessee by : ShriNishit Gandhi
Respondent by : ShriP.D. Chougule (Addl. CIT) SRDR

Date of hearing : 05/09/2024
Date of pronouncement : 10/ 09/2024

ORDER

PER ANIKESH BANERJEE, J.M:

The instant appeal of the assessee was filed against the order of the Learned National Faceless Appeal Centre (NFAC), Delhi (hereafter called 'Ld. CIT(A)'), passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for assessment year 2014-15, date of order 21/05/2024. The impugned order was emanated from the order of the Ld.Income-tax Officer, Ward-25(2)(4), Mumbai, passed under section 143(3), date of order 16/12/2016.

2. The assessee has taken the following grounds:-

“1. ON NATURAL JUSTICE:

1.1 in the facts and circumstances of the case and in law the order passed by the Learned Commissioner of Income Tax (Appeals) National Faceless Appeal. Centre (NFAC) [‘the Ld. CIT(A)’] which in turn affirmed the order passed by the Learned Income Tax Officer-Wd 25(2)(4) Mumbai (the AO) making huge addition to the Returned Income is bad in law and deserves to be quashed since the Assessment order passed by the AO is in itself void having been passed in gross violation of principles of Natural Justice

1.2 In the facts and circumstances of the case and in law the order passed by the Ld. CIT(A) deserves to be quashed for being passed in gross violation of principles of natural justice and also being based on extraneous considerations while ignoring the relevant, material, considerations and submissions made by the Appellant.

2. ON VALIDITY OF THE PROCEEDINGS

2.1 in the facts and circumstances of the case and in law, the Assessment order passed by the Ld. AO and affirmed by the Ld. CIT(A) is bad in law, void and deserves to be quashed since the same is passed in violation of the extant law and judicial precedents in this regard.

3. ON MERITS

3.1 in the facts and circumstances of the case, and in law the Ld. CIT(A) erred in confirming the action of the Ld. AD in making an addition of Rs.47.51,164/- under section 68 of the Act thereby denying the claim for 2

exemption under section 10(38) on sale of shares of Sunrise Asian Ltd(Sun Asian) as made by the Appellant in its return of Income which was listed in BSE under "A" Group category at the relevant time.

3.2 While doing so the Ld. CIT(A) failed to appreciate that

The Appellant had correctly claimed the long term Capital gains on sale of equity shares through recognized stock exchange after paying the due Securities Transactions Tax (STT) thereon,

The Appellant had fulfilled all the necessary conditions to claim exemption u/s 10(38) of the Act and therefore the action of the Ld AO in adding the said exempt capital gains u/s 68 cannot be countenanced:

in The Ld. AO has himself accepted the purchase of the said shares by the Appellant as well as the sales made and therefore there cannot a doubt or dispute as regards the capital gains made pursuant to the same;

IV. The addition made by the Ld. AO as confirmed by the Ld. CIT(A) is based on assumptions, presumptions, surmises, conjectures, based on irrelevant and extraneous considerations while ignoring the relevant material, evidences and considerations;

The addition is made and the exemption is denied simply on mere hearsay, without providing an opportunity to rebut the statements of third parties relied on by the Ld. AO as also without an opportunity to cross examine the parties despite specific requests and despite acknowledging in the order that the said requests were made by the Appellant, 3.3 In the facts and circumstances of the case and in law the additions made by the Ld. AO deserves to be deleted in toto

4.1. In the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the action of the Ld. AO in making an addition of Rs.50,061/- being alleged commission at 1% on the sale of shares and treating the same as unexplained expenditure u/s 69C of the Act without appreciating that the said addition is based purely on assumptions and surmises and is therefore unsustainable in law.

4.2 In the facts and circumstances of the case and in law, the addition of Rs.50061/- made u/s 69C of the Act be deleted.

5. Without prejudice to the above, the Ld. AO erred in making an addition u/s 68 & 69C without stating any provision of the Act under which the same could be considered as income and without classifying the same under a specific head as mandated u/s 14 of the Act.

6. The Appellant craves leave to add, amend, alter, delete or modify any or all the above grounds of Appeal”

3. The brief fact of the case is that the assessee has earned Long Term Capital Gain (in short LTCG) amount of Rs. 47,51,164/- on sale of shares of “Sunrise Asian

Ltd” during the impugned assessment year which has been claimed as exempt u/s 10(38) of the Act. The facts related to the issue are that the assessee had purchased 10,000 shares off market of “SantoshimaTradelinks Ltd”, an unlisted company at Rs.25/- per share from M/s. P. Saji Textiles Ltd. and the payment of Rs.2,50,000/- was made in advance on 29/09/2011 vide cheque number 214328 of The Kapol Co-operative Bank Ltd, Vile Parle West Branch. M/s. P. Saji Textiles Ltd. issued the debit note dated 17/11/2011 and the shares were transferred in the assessee's name on 20.11.2011. Application for dematerialization of these shares was made on 08.10.2012 and the shares were dematerialized on 29/10/2012 in Demat. By the order dated 08.10.2012 of Hon'ble High Court of BOMBAY, “SantoshimaTradelinks Ltd” was amalgamated with “Sunrise Asian Ltd” and the assessee had been allotted 10000 shares of “Sunrise Asian Ltd” in 1:1 ratio on 26.06.2013 in Demat Account. Finally, the shares were sold with a consideration amount of Rs.50,06,180/-. In the assessment , the cost of the shares was deducted and the profit of LTCG amount to Rs.47,51,164/- was added back under section 68 of the Act and 1% of the value of transaction of Rs.50,06,180/- comes to Rs.50,061/-, was added back under section 69C of the Act related to transaction of bogus LTCG. The aggrieved assessee filed an appeal before the Id. CIT(A). The Id.CIT(A) upheld the assessment order. Being aggrieved, the assessee filed an appeal before us.

4. The Ld.AR argued and filed a written submission which is kept in the record (APB). In argument, the Ld.AR placed that the section 68 is wrongly applied as, admittedly, the nature and source are duly explained inasmuch as the nature of the credit is the amount received on sale of shares and the source is through the

broker from the Bombay Stock Exchange on account of such sale of shares after paying due securities transaction tax (STT) thereon.

4.1. The Id. AR argued that the Ld. AO has not pointed out any such flaw in the claim of exemption U/s 10(38) of the Act whether the assessee fulfilled the conditions stipulated U/s 10(38) of the Act. He further stated that the purchase is evidenced by copy of purchase bill, broker note, share certificates transferred in the name of the assessee and copy of Demat statement. The same was provided to the AO and has not been doubted. In fact, the Id. AO has repeatedly admitted the fact of purchase.

4.2. The sale is evidenced and explained by sale bills, broker notes and the amount on sale is reflected in the bank statements. STT is paid on the transactions as mentioned in Form 10DB. These details and evidence were filed with Id. AO and thereafter again with the Ld. CIT(A) on his direction.

4.3. He argued that the Id. AO as well as the Id. CIT(A) have not found any fault with the documents furnished by the assessee. In such a scenario without refuting the said evidence furnished, the addition cannot be made simply on the basis of an investigation report not even directly linked to the assessee. The addition is on the basis of assumption & unsustainable in law.

4.4. The Id. AR mentioned though the Id. AO has in his show cause notice placed general reliance on the investigation reports, however, the assessee or his broker are nowhere mentioned in the said Investigation reports. Here, the enquiry was conducted behind the back of the assessee. Further, there is no enquiry/investigation/adverse reporting by SEBI or BSE on the assessee or its broker. This fact was even brought to the notice of the AO which has been conveniently ignored by letter dated 19.08.2016 filed with Id. AO.

4.5. The purchases of the assessee have not been doubted and in fact accepted in assessment of earlier years. Further, off-market purchases are not prohibited and in any case the purchases are not doubted. The Id. AR respectfully relied on order of coordinate bench of **ITAT Mumbai-G** bench in the **Smt. Geeta Khare v/s ACIT-Cir-3, Kalyan, ITA No. 4267/Mum/2018**, date of pronouncement-**29/05/2019**. The addition in this case is made simply on the basis of statements of some third persons without linking the same to the assessee and hence not sustainable. The Id. AR respectfully relied on CIT v/s Shyam R. Pawar (2015) 229 Taxman 256 (Bombay).

5. We find that the assessee has discharged his onus by submitting all relevant documents before the Id.CIT(A) and Id.AO. The date-wise submission of the documents is reproduced as below:-

I

IN THE HON'BE INCOME TAX APPELLATE TRIBUNAL, MUMBAI

'E' BENCH

HARESH DILIP VORA

ITA NO. 3646 / MUM / 2024

A.Y. 2014-15

FACTS:

Date	Particulars	Remarks / Observations	Enclosed here	Filed with AO	Filed with CIT(A)
17.11.2011	Purchase of 10000 Shares of M/S Santoshima Tradelinks Limited.	Copy Of Purchase Bill, Bank Statement of Assessee Evidencing the Purchase of Shares [At Rs. 25 Per Share], Transfer Letter, Share Certificate, Dematerialization Form, Demat Statement.	Yes (pgs. 1 to 6)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
		ITR -V Acknowledgement Copy & ITR, Computation, Balance Sheet for A.Y. 2013-14.	Yes (pgs. 7 to 10)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
03.10.2012	Converted into 10000 shares of Sunrise Asian Limited	Amalgamation Notice of Santoshima Tradelinks Limited with Sunrise Asian Limited with Mumbai High Court Order Dated – 03.10.2012.	Yes (pg. 11 to 42)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
17.07.2013 to 03.09.2013	Sale of 10000 shares of Sunrise Asian Limited	Broker India Advantage Sale Bill, Demat Statement, Broker Ledger, Global Report, Bank Statement of funds received.	Yes (pg. 43 to 58)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
01.10.2014		Bombay Stock Exchange Notice of Sunrise Asian Limited Moving from Group 'B' to Group 'A' Dated - 01.10.2014.	Yes (pg. 59 to 61)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024

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II

Date	Particulars	Remarks / Observations	Enclosed here	Filed with AO	Filed with CIT(A)
		ITR -V Acknowledgement Copy & ITR, Computation, Balance Sheet, Capital Account, Long Term Working and shares held list for A.Y. 2014-15.	Yes (pg. 62 to 67)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
19.08.2016	Submission	ITO Submission	Yes (pg. 68 to 76)	Yes Dated – 19.08.2016	Yes Dated – 22.04.2024
10.10.2016		Facts & Explanation in respect of LTCG to officer.	Yes (pg. 77 to 79)	Yes Dated – 10.10.2016	Yes Dated – 22.04.2024
14.12.2016		Reply to show cause	Yes (pg. 80 to 84)	Yes Dated – 14.12.2016	Yes Dated – 22.04.2024
16.12.2016		ITO Income Tax Computation After Order	Yes (pg. 85 to 86)	Yes Dated – 16.12.2016	Yes Dated – 22.04.2024
22.04.2024		CIT Appeal	Yes (pg. 87 to 93)	N/A	Yes Dated – 22.04.2024
22.04.2024		Submission & acknowledgement to CIT	Yes (pg. 125 to 155)	N/A	Yes Dated – 22.04.2024
21.05.2024		CIT Order Dated 21.05.2024	Yes (pg. 94 to 124)	N/A	N/A

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6. The Id.DR vehemently argued and fully relied on the order of the revenue authorities. The Id. DR has not at all produced any contrary evidence to refute the evidence and transactions of the assessee.

7. We heard the rival submissions and considered the documents available in the record. The Id.AR respectfully relied on the order of the Hon'ble **Gujarat High Court** in the case of **PCIT-1 vs DivyabenPratulchandra Parmar 2024(1) TMI 800** date of order **02-01-2024** and Hon'ble Gujarat High Court held that where the ITAT, Ahmedabad Bench has allowed the exemption under section 10(38) for dealing with the shares of "Sunrise Asian Ltd", in which the assessee also dealt in this impugned assessment year. The Hon'ble Gujarat High Court has upheld the order of the ITAT and after detailed discussion, the scrip "Sunrise Asian Ltd" is duly accepted for transaction and claiming of deduction under section 10(38) of the Act. The assessee in both appeal and assessment stages discharged its onus by submitting all the purchase and sale documents. He revenue was not able to bring any such fact whether the assessee is directly involved in rigging of the share scrips and there is no such evidence that the SEBI has taken coercive action against "Sunrise Asian Ltd".

7.1. For our observations and to arrive at the findings, we respectfully relied on the decisions of Hon'ble **High Court of Bombay** being a jurisdictional High Court: **Pr. CIT v. Ziauddin A Siddique [Income-tax Appeal No. 2012 of 2017, dated 4-3-2022]** held as under: -

"1. The following question of law is proposed: "Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs. 1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was DMATed and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the

financials and, therefore, the amount of LTCG of Rs. 1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

2. We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd. ("RFL") is done through stock exchange and through the registered Stockbrokers. The payments have been made through banking channels and even Security Transaction Tax ("STT") has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal."

4. Mr. Walve placed reliance on a judgment of the Apex Court in Principal Commissioner of Income-tax (Central)-1 v. NRA Iron & Steel (P.) Ltd. but that does not help the revenue in as much as the facts in that case were entirely different. 5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law. 6. The appeal is devoid of merits and it is dismissed with no order as to costs."

the order of the Hon'ble **Bombay High Court** in the case of **CIT vs Shyam R Pawar 229 Taxman 256 (Bom)**. The relevant paragraph is reproduced as below: -

"6. It is in that regard that we find that Mr.Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. the present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of

share transaction. The contract notes in Form-A two brokers were available and which gave details of the transactions. The contract note is a system gene and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was mere accommodation of cash and enabling it to be converted into accounted or regular payment-discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. Bi Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares bogus/sham. The details received from Stock Exchange have been relied upon and for the purpose faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus; then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either."

7. As/a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs."

Hon'ble Delhi High Court in the case of **Pr.CIT vs Smt. Krishna Devi 431 ITR 361 (Del)**. The relevant paragraph is enclosed here with: -

"12. Mr. Hossain's submissions relating to the spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by them. Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with (he Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar case (supra) and Sumati Dayal case (supra) is of no assistance. Upon examining the judgment of Suman Poddar case (supra) at length, we find

that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee (herein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13.The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come (o the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.”

7.2. The Id. CIT(A) in impugned appeal order respectfully relied on the order of Hon'ble **Calcutta High Court** in the case of **CIT vs Swati Bajaj[2022] 446 ITR 56 (Calcutta)** where on same set of facts related taxability of LTCG on sale of shares considered as manipulated penny stock & the action of the Id. AO is confirmed. But the related to scrip “Sunrise Asian Ltd” the assessee is covered by the order of the Hon'ble Gujrat High Court. Accordingly, the same would prevail on the issue before this Bench. In the present case, the decision of the Hon'ble Non-Jurisdictional High Court carries only an influence. The law is very well settled by the Hon'ble Supreme Court in the case of **Union of India vs Kamalakshi Finance Corporation Ltd** reported in **55 ELT 43 (1991)** that the decision of Hon'ble Jurisdictional High Court would have higher precedence value on the Tribunal than the decision of Hon'ble Non-Jurisdictional High Court.

Considering the impugned assessment order, the Id. AO has not provided any evidence even worth a name that assessee's own money has been routed back to him. There is no nexus with the assessee with price rigging and no adverse

observation from stock exchange. The addition simply on third party statement is uncalled for. We respectfully relied on the order of Hon'ble **Supreme Court** in **PCIT vs Smt. Renu Aggarwal [2023] 456 ITR 249 (SC)**.

We respectfully rely on the orders of the Hon'ble Apex Court, Jurisdictional High Court and Coordinate Bench of ITAT Mumbai which has similar in the factual matrix with the impugned issue. The grounds of appeal of the assessee are upheld. We set aside the impugned appeal order. The additions amount to Rs. Rs.47,51,164/- U/s 68 of the Act and amount to Rs.50,061/- U/s 69C are quashed.

8. In the result, the appeal of the assessee bearing **ITA No.3646/Mum/21024** is allowed.

Order pronounced in the open court on 10th day of September, 2024.

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER
Mumbai, दिनांक/Dated: 10/09/2024
Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), ITAT, Mumbai