

IN THE INCOME TAX APPELLATE TRIBUNAL
"H (SMC)" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 2842/Mum/2024
(Assessment Year : 2012-13)

ITO, Ward-22(1)(6),
Mumbai - 400012
Maharashtra

..... Appellant

v/s

Jalpa Nitesh Shriwardhankar,
2/4 Himalaya Building,
109, Worli Sea Face,
Worli Mumbai -400018
Maharashtra
PAN - BAFPS1446C

..... Respondent

Assessee by : Shri Tejveer Singh, Adv.
Revenue by : Shri Sushil Bhagwat Shendge, Sr.DR

Date of Hearing - 26/08/2024

Date of Order - 16/10/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 20/03/2024 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Addl./Joint Commissioner of Income Tax (Appeals)-6, Kolkata [*"learned Addl./Joint CIT(A)"*], for the assessment year 2012-13.

2. In this appeal, the Revenue has raised the following grounds: -

"1. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition of Rs. 6,67,770/- as unexplained cash credit made by the AO without appreciating the facts of the case and modus operandi as a detailed investigation has been carried out by the Investigation Wing in the scrip M/s. Exelon Infrastructure Ltd. where the assessee name has been surfaced and a detailed finding has been given by the Investigation Wing.

2. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made by the AO without appreciating the facts that in such penny scrip, trading transactions of purchase and sales are not affected for commercial purpose but to create artificial Gain/loss and complete the cycle of circular trading with a view to evade taxes.

3. On the facts and the circumstance of the case and in law the Ld. CIT(A) erred in not appreciating the fact that transaction of shares of such penny scrip are not governed by market factors prevalent at relevant time rather transactions are product of design and mutual connivance on part of assessee and operators.

4. On the facts and the circumstance of the case and in law the Ld. CIT(A) erred in not appreciating the fact of the case and modus operandi as detailed investigation has been carried out by the investigation wing and confirming that the scrip is utilized-by entry operators for providing accommodation entries under the garb of Long Term Capital Gain/Short Term Capital Gain Loss by manipulating/rigging up the share price.

5. On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in not appreciating the facts that no prudent person would have entered into this transaction of penny stock and trade value of such transaction is Rs. 6,67,770/- Hence, it was held that the transactions in shares of M/s. Exelon Infrastructure Ltd. have been carried out by the assessee in normal course of business and not with any intention of specific undue gain.

6. On the facts and circumstance of the case and in law the order of the Ld. CIT(A) suffers from perversity as it ignores the facts brought on record establishing manipulation of share prices of M/s. Exelon Infrastructure Ltd. as part of colourable device to generate fictitious Long Term Capital Gain/ Short Term Capital Loss with the aim to evade taxes due.

7. On the facts and circumstance of the case and in law the Learned Id. CII(A) erred in deleting the addition of 6,67,770/- being commission us 69C of the Act overlooking the fact that the entire transactions were stage managed with the object to facilitate the assessee to plough back its unaccounted income in the form of fictitious Long Term Capital Gain/ Short Term Capital Loss/Gain.

8. On the facts and the circumstances of the case and in law, Ld. CIT(A) erred in ignoring the decisions in Sumati Dayal v. CIT 214 1TR80 and CIT v. Durga Prasad More 82 ITR540 (S.C.) and coming to a conclusion only on the basis of the arguments advanced by the assessee.

9. *The appellant prays that the order of the National Faceless Appeal Centre (NFAC), Delhi on the above grounds be reversed and that of the AO be restored."*

3. The solitary issue raised by the Revenue in its appeal pertains to the deletion of the addition made on account of alleged penny stock transactions.

4. We have considered the submissions of both sides and perused the material available on record. The brief facts of the case are that the assessee is an individual and derived income from salary. For the year under consideration, the assessee filed her return of income on 28/07/2012 declaring a total income of Rs. 1,10,360. The return filed by the assessee was processed under section 143(1) of the Act. Subsequently, information was received from the DDIT (Investigation), Unit-6(2), Mumbai that the assessee has traded in the scrip "*Exelon Infrastructure Ltd.*" which is a penny stock listed on BSE. As per the information received, the price of shares of Exelon Infrastructure Ltd. was rigged to gain huge profits/losses through manipulated affairs. Based on the information mentioned above, the notice under section 148 was issued on 26/03/2019 and proceedings under section 147 of the Act were initiated. In response to the notice under section 148 of the Act, the assessee filed the return of income on 16/04/2019 declaring a total income of Rs.1,10,360. In response to the statutory notices issued under section 142(1) of the Act, the assessee filed the copy of the contract note for the FY 2011-12 duly certified by the broker and highlighted transactions of sale and purchase of shares of Exelon Infrastructure Ltd. The Assessing Officer ("AO") vide order dated

02/12/2019 passed under section 143(3) read with section 147 of the Act after referring to the findings of investigations made by the Investigation Wing concluded that the value of trade consideration of Rs.6,48,320 for the shares of Exelon Infrastructure Ltd. is accommodation entry which is nothing but the return of amount in lieu of cash that the assessee would have paid to the hawala operators. Accordingly, the AO held that the sum of Rs.6,48,320 represents the value of cash which has been laundered in the form of bogus sale of shares, which represents unexplained cash credit under section 68 of the Act. Further, the AO also made an addition on account of payment of commission @3% under section 69C of the Act on the basis that the assessee paid the commission for the accommodation entries.

5. The learned CIT(A), vide impugned order, allowed the appeal filed by the assessee, observing as follows: -

"I have gone through assessment order passed by assessing officer(AO) and detail submission made by appellant.

The fact of the case is that AO had held that appellant had transacted in penny stock so as to claim bogus LTCG/LTCLoss, therefore added Rs.6,48,320/- under section 68 of the Income Tax Act, 1961. However, appellant had stated that he had no idea of shares he had transacted were penny stock. He had transacted through BSE only. Further, he had no intention of claiming any bogus LTCG. Rather, in all scripts (penny stock as per AO) he had transacted had not earned a single penny but incurred losses from sale of scrip viz. M/s. Exelon Infrastructure Ltd.

Appellant had stated that :

"The Ld. AO did failed to consider that the assessee has never claimed any exempt Long Term Capital Gain u/s. 10(38) in its return of income rather short term capital loss incurred from sale of such share. It can be clearly seen that the appellant has sold the said shares within 2 days from the date of purchase of the said shares. Further, a loss has arisen from the above share transactions. We have attached herewith the acknowledgement of the income tax return and the computation for ready reference. Reference can be made to the case law of Mahavir Jhanwar wherein there were similar transactions and the disallowance under

section 68 of the income tax act was being contemplated by the Income Tax Tribunal. Detailed extract has been attached herewith. After hearing both sides, I find that in a number of cases this bench of the Tribunal and Jurisdictional Calcutta High Court has held that, decision in all such case s should be based on evidence and not on generalization, human probabilities, suspicion, and conjectures. In all cases additions were deleted."

I have gone through the assessment order passed by AO. The main objective of penny stock scam was to obtain LTCG which was an exempt income u/s 10(38), by fraudulent manipulation of share prices in a recognized stock exchange. If a person has not claimed LTCG, rather losses in trading then there is no way disallowances can be made in lieu of penny stock.

In the instant case, appellant had not claimed any bogus LTCG from trading of penny stock rather incurred losses by trading from shares of scrip viz. M/s. Exelon Infrastructure Ltd. Therefore, addition made by AO is not correct."

Being aggrieved, the Revenue is in appeal before us.

6. As per the assessee she sold the shares within 2 days from the date of purchase of the shares of Exelon Infrastructure Ltd. and incurred loss from the above share transaction. We find that in support of her claim, the assessee submitted a copy of the contract notes and broker statement during the assessment proceedings. Thus, as per the assessee, the entire transaction was only through the stock exchange and she never claimed any exempt long-term capital gains under section 10(38) of the Act rather short-term capital loss was incurred from the sale of shares. However, it is evident from the record that apart from relying on the findings of the Investigation Wing, the AO neither examined any of the aforementioned submissions of the assessee nor brought on record any material contrary to the claim of the assessee. It is also pertinent to note that the impugned addition is the total trade value of the scrip sold by the assessee instead of the amount of short-term capital loss incurred by the assessee. In the present case, the assessee

only has salary income in the year under consideration, therefore it also cannot be alleged that the short-term capital loss was a result of manipulation of share prices and the same was planned to be set off against the capital gains. Therefore, in the peculiar facts and circumstances of the present case, we are of the considered opinion that the additions made by the AO under section 68 and section 69C of the Act were rightly deleted by the learned CIT(A). Accordingly, we find no infirmity in the impugned order and the same is upheld. Hence, the grounds raised by the Revenue are dismissed.

7. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 16/10/2024

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER
MUMBAI, DATED: 16/10/2024
Prabhat

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

Copy of the order forwarded to:

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

By Order

Assistant Registrar
ITAT, Mumbai