

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

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER**

**ITA No.199/M/2024
Assessment Year: 2015-16**

Mr. Kishore Bachubhai Mujat B-2403, Shreeji Heights, Plot No.1, 1A, 1C Sector 46A, Palm Beach Road, Nerul (W), Navi Mumbai-Thane, Nerul Node-3 Maharashtra - 400706 PAN: AJQPM6363F	Vs.	Income Tax Officer Ward 28(2)(3) Government of India, Ministry of Finance, Income Tax Department, Income Tax Officer Ward 28(2)(3), Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Khushiram Jadhvani, Adv
Revenue by : Shri P. D. Chougule (Addl. CIT) Sr. DR

Date of Hearing : 12.09.2024
Date of Pronouncement : 23.10.2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 26.10.2023, impugned herein, passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2015-16.

2. In this case, the Assessee had declared its total income of Rs.23,91,110/- by filing its return of income on 31.03.2017, which was subsequently reopened u/s 147 of the Act after recording reasons for reopening on 17.03.2017 mainly on the ground that the Assessee has taken bogus Long Term Capital Gains (LTCG) and consequently notice u/s 148 of the Act dated 28.03.2017 was issued. The Assessee in response to the same filed its return of income on 31.03.2017. Thereafter other statutory notices were issued in response to which the Assessee filed the relevant details and documents.

3. On perusing the return and details and documents filed by the Assessee, it was seen by the Assessing Officer (AO) that the Assessee has shown LTCG of Rs. 89,96,533/- on sale of shares of M/s. PS IT Infra Ltd. & M/s. Zodiac Ventures Ltd.. As per AIR information, the trade value of shares of M/s. PS IT Infra Ltd. is Rs.63,88,650/- and as per copy of return the sale value of M/s.Zodiac Ventures Ltd. is mounting to Rs.28,20,121/-, totaling to Rs.92,08,771/-. As per working of LTCG attached with the return of income, the Assessee has shown LTCG of Rs.89,96,533/- on sale of shares of such companies during the assessment year under consideration and has claimed the same as exempt u/s 10(38) of the Act.

3.1 The AO therefore in order to verify the transactions carried out by the Assessee show caused the Assessee to provide the relevant documents and further recorded the statement of the Assessee. Thereafter the AO by considering *“the reply of the Assessee and the mode of acquisition of shares, sale of shares, unusual rise in prices, findings of the investigation wing, analysis of transactions, ignorance of the Assessee about shares and penny stock companies, financial analysis of penny stock companies and order of SEBI/BSE dated 24.08.2017 whereby as a surveillance measures trading in the securities of M/s. Zodiac Ventures Ltd. was suspended w.e.f. 27.08.2015”*, ultimately disallowed the claim of the Assessee u/s 10(38) of the Act and consequently made the addition of

Rs.92,08,771/- u/s 68 of the Act and Rs.2,67,363/- being commission as determined by the AO @ 5% of the total consideration received which comes to Rs.4,60,439/- - Rs.1,93,075/- (purchased price of the alleged shares) and added the same to the total income of the Assessee u/s 69 of the Act.

4. The Assessee, being aggrieved, challenged the said additions before the Ld. Commissioner on various grounds of appeal vis-à-vis :

- (i) *the assessment order passed by the AO is illegal, void ab-initio and bad in law as the notice issued u/s 148 is unsigned,*
- (ii) *further approval has not been taken from Joint CIT as mandated u/s 151(2) of the Act.*
- (iii) *the original copy of reasons recorded was not provided,*
- (iv) *further reasons recorded supplied does not mention any sanction from any competent authority.*
- (v) *No independent enquiry was carried out by the AO.*
- (vi) *There is no mention of any investigation report received from Kolkata Investigation Wing, therefore the AO cannot place reliance on this report.*
- (vii) *The evidences furnished by the Assessee remained uncontroverted by the AO.*
- (viii) *The primary and secondary evidences submitted by the Assessee has neither been considered nor controverted by the AO.*
- (ix) *Further, there is no mention of Assessee's name in the report prepared by the Investigation Wing, Kolkata.*
- (x) *There is no involvement of the Assessee as per this report. So, there is no live link between the information available with the AO and the reasons for reopening.*

4.1 The Assessee in support of its claim also relied on various judgments.

5. The Ld. Commissioner though considered all aspects of the case, such as legal issues raised by the Assessee and ultimately affirmed the impugned assessment order on legal points by dismissing the legal grounds raised by the Assessee. However, on merit also affirmed the aforesaid additions mainly relying on the judgment passed by the Hon'ble Kolkata High Court in the case of Swati Bajaj IA No.GA/2/2022 & in ITAT/6/2022 & ors. and by holding as under:

"5.2. Ground 2

Vide this Ground the Appellant has challenged the action of AO in making addition of Rs. 9208771/-u/s 68. In this regard, the Appellant has submitted he has met all the conditions for claiming exemption u/s 10(38) of the Act. The Appellant has further submitted that the AO has not refuted or found faults with any of the evidences submitted in the course of the assessment proceedings and therefore, the AO has erred in invoking provisions of section 68 of the Act.

I have considered the submissions of the Appellant. I find that on the same set of facts, the Hon'ble Kolkata High Court in the case of Swati Bajaj (supra) has upheld the addition made u/s 68 of the Act and denying exemption claimed u/s 10(38). The Hon'ble Court has observed that if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. The Hon'ble further observed that the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assessees had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted. As regards the details/documents submitted by the assessee in the course of assessment proceedings, the Hon'ble Court has observed that the assessee cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assessee have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time.

Thus, respectfully following the decision of Hon'ble Kolkata High Court in the case of Swati Bajaj, I hold that the AO has correctly made the additions u/s 68 of the Act and is justified in denying the exemption claimed by the Appellant u/s 10(38) of the Act.

5.3. Grounds 4, 5 and 7

The Appellant has challenged the validity of the assessment order on the grounds that opportunity of cross examination was not provided and, thus, there has been violation of principles of natural justice. In this regard, I again place my on the decision of Hon'ble Kolkata High Court in the case of Swati Bajaj (supra) wherein on identical facts the Hon'ble Court held that assessment order passed without providing opportunity to cross examine does not vitiate/invalidate the same. The Hon'ble Court has, thus, observed at para61 that;

"61. Having noted the above legal position, it goes without saying there is no vested right for the assessee to cross examine the persons who have not deposed anything against the assessee. The investigation report proceeds on a different perspective commencing from a different point and this has led to the enquiry being conducted by the assessing officer calling upon the assessee to prove the genuineness of the claim of LTCG."

Thus, respectfully following the decision of Hon'ble Kolkata High Court in the case of Swati Bajaj (supra), I hold that non-providing the Appellant opportunity for cross examination does not vitiate/invalidate the assessment order in any manner Grounds are, thus, dismissed.

5.4. Ground 6

Vide this Ground the Appellant has challenged the action of the AO in denying the claim of exemption u/s 10(38) of the Act. In this regard, the Appellant has mainly submitted that the AO has not refuted any of the evidences furnished by the Appellant in the course of assessment proceedings. The Appellant has placed reliance on various provisions of Indian Evidences Act, 1872. The Appellant has also placed reliance on some case laws.

I considered the submissions made by the Appellant. I find that this issue has again been considered by Hon'ble Kolkata High Court in the case of Swati Bajaj (supra). The Hon'ble Court has observed on the issue that the assesses cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assesses have lost sight of

an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. The Hon'ble Court has further observed that the provisions of the Evidence Act are not applicable but the Assessing Officer being a quasi-judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the balance of equity, fairness of justice and the principle of preponderance of probabilities apply. The Hon'ble Court has further observed that if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuineness of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. Therefore, the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assessee had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

Thus, respectfully following the decision Hon'ble Kolkata High Court in the case of Swati Bajaj (supra), involving exactly the same facts, I uphold the action of AO in denying the exemption claimed by the Appellant u/s 10(38) of the Act. Ground is, thus, dismissed.

5.5. Ground 8

Vide this Ground, the Appellant has challenged the action of AO in making addition of Rs.2,67,363/- as commission income on estimation basis. The Appellant has submitted that this income has been estimated without any evidence. In this regard, it is suffice to say that since I have already held that the Appellant has taken accommodation entry in the guise of LTCL, it is natural that the Appellant had to pay some commission to the hawala operator for arranging such accommodation entry. It is an age-old established practice for which any additional evidence is not required. It is common sense that for availing any accommodation entry, the beneficiary has to pay certain commission to the hawala operator. Thus, in my considered opinion, the AO has rightly estimated the commission income of Rs.2,67,363/- and has added the same u/s 69 of the Act. The Ground is, thus, dismissed."

6. The Assessee, being aggrieved, is in appeal before us.

7. We have heard the parties and perused the material available on record. The Assessee had purchased following shares:

Sl. No.	Name of the company	Purchase Price	Date of purchase	Date of sale	Sale Price	Number of shares purchased
1.	M/s. PS IT Infra Ltd.	Rs.2,34,000/-	14.07.2012	77500 shares @ Rs.532/- per share (from 19.11.2014 to 26.11.2014)	Rs.6388650	23400 initially the shares were of M/s. Crescent Digital Technologies Ltd. which subsequently amalgamated with M/s. Parag Shilpa Investment Ltd. Due to sub division of shares into ratio 1:10 on 05.09.2014 the shares were increased from 23400 to 2134000
2.	M/s. Zodiac Ventures Ltd.	Rs.11,25,000/-	27.02.2013	26.09.2014 to 05.12.2014 the Assessee sold 39625 number of shares between average price rate i.e. Rs.48.08% to Rs.87.12 and consequently earned the amount of Rs.282012/-	Rs.2698546	37500 shares @ Rs.30 per share. The shares were split into 1:10 ratio and the Assessee received the 375000 shares having face value of Rs.1 each.

7.1 It is not in controversy that the Assessee after purchasing the shares dematerialized the same and subsequently sold the same on recognized stock exchange platform. It is also not in controversy that the

Assessee carried out the transactions of purchase and sale through banking channel/cheques. It is also not in controversy that the Assessee before the authorities below has duly submitted the relevant documents such as copy of bank statements in order to show sale and purchase of shares, copy of share transfer form, copy of amalgamation of M/s. Crescent Digital Technologies Ltd. with M/s. PS IT Infra Ltd., copy of application of dematerialization of shares, copy of Dmat statement showing dematerialization of the shares, copy of letter intimating splitting of shares issued of M/s. PS IT Infra Ltd., copy of Dmat statement before/after splitting of shares, copy of contract notes in each of the shares, copy of highlighting bank statements incorporating the share transactions evidence related to selling shares of M/s. Zodiac Ventures Ltd., copy of letter intimating splitting of shares issued by M/s. Zodiac Ventures Ltd., copy of statement before sub-division of shares, copy of form 10DB evidencing payment of STT as mandatory requirement of section 10(38) of the Act, copy of chart showing details of data, quantity, sale of shares. It is admitted fact that both the authorities below have not doubted the aforesaid documents but doubted the transactions carried out mainly on the basis of the investigation carried out by the Investigation Wing and mode of acquisition of the shares and unusual rise in the price, ignorance of the Assessee about shares and penny stock companies, financial analysis of the penny stock companies and order of the SEBI/BSE dated 24.08.2017. Admittedly in the SEBI report/order no role has been assigned to the Assessee and even otherwise the Assessee has not played any role in the rigging of the shares, as it simply made the investment as a casual investor. It is also a fact that as on today the Assessee is holding **162500** shares of M/s. PS IT Infra Ltd. and **335375** shares of M/s. Zodiac Ventures Ltd. which strengthens the genuineness of the claim of the Assessee. Further, as on today, as per screenshot of money control website of the aforesaid scrips, the said companies/scrips are still currently listed on stock exchange and the SEBI by passing subsequent order dated 09.01.2019 revoke the suspension

of M/s. Zodiac Ventures Ltd. which was made vide order dated 24.08.2017. On the aforesaid facts and circumstances analyzations made above we are of the considered view that the Assessee has discharged its onus cast upon him u/s 68 of the Act and therefore the addition in hand is un-sustainable.

7.2 The Jurisdictional High Court in various cases including in the case of Pr. CIT-3 vs. Ziauddin A Siddique in Income Tax Appeal No.2012 of 2017 decided on 04.03.2022 has also dealt with the identical issue as involved in the instant case, where the AO though considered the documents submitted by the Assessee in support of its claim qua sale and purchase of shares however, not criticized the same and there was no allegation against the Assessee that he has participated in any price rigging of the scrips involved. For ready reference, the decision of the Hon'ble High Court is reproduced herein below:

“JUDGEMENT

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 demated 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, 19617"

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 Stock Brokers. 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 vs. NRA Iron & Steel (P.) Ltd. 2019 (103) taxmann.com 48 (SC). 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.”

7.3 Even the Hon'ble Jurisdictional High Court in the case of PCIT31, Mumbai vs. Indra Indravadan Jain HUF (ITA No.454 of 2018 decided on 12.07.2023) almost on the similar facts and circumstances as involved in this case, affirmed the deletion of the identical addition made by the AO on account of alleged bogus claim u/s 10(38) of the Act, by holding as under:

"4. The A.O. did not accept respondent's claim of long-term capital gain and added the same in respondent's income under Section 68 of the Act. While allowing the appeal filed by respondent, the CIT[A] deleted the addition made under Section 68 of the Act. The CIT[A] has observed that the A.O. himself has stated that SEBI had conducted independent enquiry in the case of the said broker and in the scrip of RFL through whom respondent had made the said transaction and it was conclusively proved that it was the said broker who had inflated the price of the said scrip in RFL. The CIT(A) also did not find anything wrong in respondent doing only one transaction with the said broker in the scrip of RFI. The CIT[A] came to the conclusion that respondent brought 3000 shares of RFI, on the floor of Kolkata Stock Exchange through registered share broker. In pursuance of purchase of shares the said broker had raised invoice and purchase price was paid by cheque and respondent's bank account has been debited. The shares were also transferred into respondent's Demat account where it remained for

more than one year. After a period of one year the shares were sold by the said broker on various dates in the Kolkata Stock Exchange. Pursuant to sale of shares the said broker had also issued contract notes cum bill for sale and these contract notes and bills were made available during the course of appellate proceedings. On the sale of shares respondent effected delivery of shares by way of Demat instructions slip and also received payment from Kolkata Stock Exchange. The cheque received was deposited in respondent's bank account. In view thereof, the CIT[A] found there was no reason to add the capital gains as unexplained cash credit under Section 68 of the Act. The tribunal while dismissing the appeals filed by the Revenue also observed on facts that these shares were purchased by respondent on the floor of Stock Exchange and not from the said broker, deliveries were taken, contract notes were issued and shares were also sold on the floor of Stock Exchange. The ITAT therefore, in our view, rightly concluded that there was no merit in the appeal.

5. We also find no infirmity in the order passed by the ITAT and no substantial questions of law as proposed in the appeal arises."

7.4 We further observe that the Hon'ble Apex Court in the case of Pr. CIT vs. Renu Agarwal (2023) 456 ITR 249(SC) has dismissed the SLP against the judgment passed in ITA No.44 of 2022 on 06.07.2022 by the Hon'ble Allahabad High Court, wherein the Hon'ble High Court has also dealt with the identical issue as involved in the instant case and ultimately affirmed the deletion of identical addition allegedly made on penny stock, by holding as under:

"Judgment

Heard Sri Krishna Agarawal, learned counsel for the appellant.

This appeal under section 260A of the Income-tax Act, 1961 has been filed challenging the order dated January 17, 2022, passed by the Income- tax Appellate Tribunal, Lucknow Bench 'SMC' Lucknow in I. T. A No. 205 of 2020 (assessment year 2014-15).

The basic question involved in the present appeal is with regard to deletion of some amount which was added by the Assessing Officer on the allegation of penny stock.

The appeal of the respondent-assessee was allowed against the assess- ment order. The appeal filed by the assessee was allowed by the Com- missioner (Appeals) Against the appellate order the Revenue had filed the aforesaid income-tax appeal which has been dismissed by the Income-tax Appellate Tribunal. After detailed discussion, the Income-tax Appellate Tribunal has recorded the following findings of fact:

“The above findings recorded by the learned Commissioner (Appeals) are quite exhaustive whereby he has discussed the basis on which the Assessing Officer had made the additions. While allowing relief to the assessee, the learned Commissioner (Appeals) has specifically held that there is no adverse comment in the form of general and specific statement by the principal officer of the stock exchange or by the company whose shares were involved in these transactions and he held that the Assessing Officer only quoted the facts pertaining to various completely unrelated persons whose statements were recorded and on the basis of unfounded presumptions. He further held that the name of the appellants were neither quoted by any of such persons nor any material relating to the assessee was found at any place where investigation was done by the Investigation Wing The learned Commissioner (Appeals) relying on various orders of the Lucknow Benches and other Benches has allowed relief to the asses- see by placing reliance on the evidence filed by the assessee before the Assessing Officer. I do not find any adversity in the order of the learned Commissioner (Appeals) specifically keeping in view the fact that the Lucknow Benches in a number of cases after relying on the judgment of the hon'ble Delhi High Court in the case of Krishna Devi had allowed relief to various assessees.”

The concurrent findings of fact have been recorded by the first appellate authority and the Income-tax Appellate Tribunal Thus, no substantial question of law is involved in the present appeal. The matter is concluded by findings of fact.

For the reasons aforestated, we do not find any good reason to entertain this appeal. Consequently, it is dismissed.”

7.5 On the aforesaid analyzations and respectfully following the dictum laid down by the Hon'ble High Court, we are inclined to delete the additions under consideration; hence, the same are deleted.

8. Now coming to the various legal grounds raised by the Assessee, as we have deleted the additions under consideration, hence, are inclined not to delve into these issues, as adjudication of the same would prove futile exercise.

9. Consequently, the appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 23.10.2024.

Sd/-
(RATNESH NANDAN SAHAY)
ACCOUNTANT MEMBER

Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.