

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

**SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 3122/MUM/2024
(Assessment Year: 2012-13)**

Nita Padamchand Agarwal

706, 5/6, Manish Tower, Manish Nagar,
Andheri (West), Mumbai – 400058
Maharashtra
[PAN:AAIPA4389E]

..... **Appellant**

Vs

**Income Tax Officer Ward 24(3)(2),
Mumbai**

Income Tax Office, Piramal Chambers,
Lalbaug, Mumbai – 400012 Maharashtra

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri M. M. Golvala
Shri Darshit Naik
For the Respondent/Department : Shri Rajesh Pardeshi

Date

Conclusion of hearing : 07.08.2024
Pronouncement of order : 05.11.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present the Assessee has challenged the order, dated 25/04/2024, passed by the National Faceless Appeal Centre (NFAC), Delhi, [hereinafter referred to as the '**CIT(A)**'] whereby the Ld. CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 25/12/2019, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 [hereinafter referred to as '**the Act**'] for the Assessment Year 2012-13.
2. The Appellant has raised following grounds of appeal :

"This appeal is against the order passed under Section.250 by

Commissioner of Income Tax (Appeal), Mumbai dated 25th April 2024, and relates to the Assessment Year 2012-13."

- "1. The Assessing Officer erred in assuming jurisdiction under Section 147, when the jurisdictional conditions were not satisfied.*
- 2. The Assessing Officer erred in assuming jurisdiction u/s 147, without having any 'reason to believe' that income has escaped assessment.*
- 3. The Assessing Officer erred in assuming jurisdiction u/s 147, as the reassessment proceedings were initiated on the basis of change of opinion.*
- 4. The Assessing officer erred in assuming jurisdiction u/s147, in the absence of tangible material.*
- 5. The Assessing officer erred in assuming jurisdiction u/s 147 as in the present case there is neither any material available, nor any live link with the belief as per the reasons recorded.*
- 6. The Appellant submits that both the lower authorities erred in fact and in law while making addition of Rs.19,59,104/- u/s 68 of the Act by holding that the assessee had traded in shares of M/s. Scan Steels Limited which was a 'penny stock' as per information received from the Investigation Wing.*
- 7. The Lower Authorities erred in invoking the provisions of Section 68 of the Act.*
- 8. Without prejudice to Ground numbers 6 & 7, the Appellant submits that the addition cannot exceed Rs.73,982/- in any view of the matter.*
- 9. The Lower Authorities erred in not granting the opportunity of cross examination to the assessee despite her request for the same.*
- 10. The Lower Authorities erred in doubly taxing Rs.19,59,104/-.*
- 11. The Assessing Officer erred in holding that the due date for filing return in the assessee's case when she was subject to tax audit, was July 31, 2012, without granting any opportunity to be heard, which was in gross violation of the principles of*

natural justice.

12. *Both the lower authorities erred in misreading and misinterpreting the provisions of section 139 of the Act and holding that the Appellant's claim of loss of Rs.84,72,319/- was invalid and further erred in denying carry forward of the same."*

3. The relevant facts in brief are that the Assessee filed original return of income for the Assessment Year 2012-2013 on 27/09/2012. It is stated that on account of mistake in relation to the valuation of closing stock, the Assessee obtained a revised tax audit report and filed a revised return on 30/10/2013. In the original return of income the Assessee had declared income of INR.7,31,540/- which was revised to net loss of INR.74,74,510/- [*Business Loss of INR.84,72,319/- reduced by the Income from Other sources of INR.9,97,805/-*] in the revised return.
- 3.1. The case of the Assessee was selected for regular scrutiny and Assessment under Section 143(3) of the Act was framed on the Assessee vide Assessment Order, dated 26/03/2015, accepting the returned income.
- 3.2. Subsequently, notice under Section 148 of the Act was issued to the Assessee on 31/03/2019 in initiating re-assessment proceeding under Section 147 of the Act on the basis of information received from the Deputy Director of Income Tax (Investigation) - Unit 7(1), Mumbai to the effect that the Assessee had traded in penny stock script of M/s Scan Steel Limited (earlier known as Clarus Finance & Securities Limited) during the previous year, relevant to the Assessment Year 2012-13. As per the reasons recorded for reopening the assessment, the Assessing Officer was had formed a belief that income of INR.19,59,104/-, being the consideration received by the Assessee on sale of shares of Clarus Finance & Securities Limited (post merger known as Scan Steel Limited)

[hereinafter referred to as 'the **Shares**'], had escaped assessment on account of failure on the part of the Assessee to disclose fully and truly all material facts. The Assessee filed Letter, dated 03/05/2019 before the Assessing Officer objecting to initiation of the re-assessment proceeding. The Assessing Officer rejected the objections raised by the Assessee vide order, dated 16/05/2019. Thereafter, the Assessing Officer proceeded with the re-assessment proceedings, which culminated into passing of the Assessment Order, dated 25/12/2019, under Section 143(3) read with Section 147 of the Act, whereby the Assessing Officer made an addition of aforesaid amount of INR.19,59,104/- in the hands of the Assessee under Section 68 of the Act holding the same to be unexplained cash credit.

- 3.3. Being aggrieved the Assessee preferred appeal before the CIT(A) challenging the validity of the re-assessment proceedings as well as addition made by the Assessing Officer under Section 68 of the Act on merits. Before the CIT(A) it was contended on behalf of the Assessee that regular scrutiny assessment was framed on the Assessee under Section 143(3) of the Act and that there was no failure on the part of the Assessee to disclose truly and fully all material facts necessary for framing assessment on the Assessee. The Assessee was engaged in the business of trading in shares on regular basis and had duly disclosed the transaction in consideration in the financial statements and during the assessment proceedings. The sale consideration of INR.19,59,104/- arising from sale of the Share formed part of figure of INR.10,57,22,755/- credited to the Profit & Loss Account for the relevant previous year under the head 'Sale of Shares'. The Net Loss of INR.73,982/- arising on account of sale of the Shares formed part of loss of INR.84,72,319/- disclosed in the Profit & Loss Account. The purchase and sale transactions under consideration were undertaken through a SEBI Registered

Stock Broker [i.e., Bonanza portfolio Limited]. In response to notice issued under Section 133(6) of the Act by the then Assessing Officer during the original assessment proceedings, the aforesaid Stock Broker had confirmed the transaction and had furnished a copy of global report on trades undertaken by the Assessee. The Assessee had also filed copy of ledger accounts, bank statements and other documents during the assessment proceedings to support the genuineness of the purchase/sale transactions. Therefore, it was contended that primary facts and supporting evidence was disclosed by the Assessee during the original scrutiny assessment proceedings. After undertaking detailed verification, the then Assessing Officer had accepted the return filed by the Assessee and had passed Assessment Order, dated 26/03/2015, under Section 143(3) of the Act accepting the returned loss. There was no fresh tangible material available with the Assessing Officer to form belief that income had escaped assessment and that the reassessment proceedings were initiated on account of mere change of opinion. Without prejudice to the aforesaid, it was also contended that there was no live nexus or link between the formation of belief and the information said to have been received from the Investigation Wing. However, the CIT(A) was not convinced and therefore, the CIT(A) upheld validity of reassessment proceedings. Further, the CIT(A) agreed with the Assessing Officer and confirmed with the addition made under Section 68 of the Act on merits by placing reliance on judicial precedents. The CIT(A) also concluded that the Assessee was not entitled to carry forward the business loss. Thus, vide order dated 25/04/2024, the CIT(A) disposed off the appeal as partly allowed.

4. Being aggrieved, the Assessee has preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 2 above.

5. We have heard both the sides and given thoughtful consideration to the rival submissions. We have also perused the orders passed by the authorities below and the material on record.
- 5.1. On perusal of the Profit & Loss Account for the relevant previous year we find that the Assessee had disclosed revenues from 'Sale of Shares' of INR.10,57,22,755/- and Net Loss from the Year as INR.84,72,319/-. As per the computation of income filed by the Assessee along with the revised return of income, the Assessee had disclosed business loss of INR 84,72,319/- out of which the Assessee had claimed carry forward of business loss of INR 74,74,514/- after setting off current year business loss with Income from Other Sources of INR.9,97,805/-. Thus, during the relevant previous year the Assessee had claimed to have incurred business loss of INR.73,982/- on account of sale of the Shares. Therefore, to this extent the averments made by the Assessee are factually correct. In the tax audit report, it has been clearly stated that the Assessee is engaged in trading of shares securities, futures & options etc. From the income tax return and the computation of income it is clear that the Assessee has not claimed to have earned any long/short term capital gain or loss.
- 5.2. There is no dispute to the fact that the case of the Assessee was selected for regular scrutiny and therein specific queries relating to capital gains income and business income earned by the Assessee during the relevant previous year were raised by the then Assessing Officer. In response to notice, dated 16/04/2014, issued under Section 142(1) of the Act, the Assessee had filed reply letter dated 26/07/2014, and 22/08/2014, providing copy of return along with financial statements, tax audit report, details of bank accounts and bank statements or pass books. Thereafter, vide reply letter dated 04/09/2014, filed in response to the notice dated 22/08/2014, the

Assessee had explained the nature of trading activity undertaken, and had filed a copy of Global Statement of trades issued by SEBI Registered Stock Broker [i.e., Bonanza Portfolio Ltd.] wherein in the share transactions under consideration were also reflected. Thereafter, vide letter dated 28/01/2015, the Assessee also filed copy of statement of Bonanza Portfolio Ltd for the relevant previous year for purchase and sale of shares, date-wise and settlement-wise. The Assessee also filed letter, dated 18/03/2015, furnishing the statement giving details of speculative profit/loss. It was communicated to the Assessing Officer that Bonanza Portfolio Ltd had responded to notice issued under Section 133(6) of the Act and a copy of their response was also placed on record. After examining the aforesaid information/details furnished by the Assessee during the regular assessment proceedings, the then Assessing Officer accepted the return filed by the Assessee and passed Assessment Order, dated 26/03/2015, under Section 143(3) of the Act.

- 5.3. Subsequently, reassessment proceedings were initiated in the case of the Assessee after the expiry of four years from the end of the relevant assessment year (AY 2012-13) by issuance of notice, dated 31/03/2019, under Section 148 of the Act. The reasons recorded for initiating re-assessment proceedings under Section 147 of the Act read as under:

"Brief details of assessee - It is seen from the 360 degree profile of ITBA portal of department that NITA PADAMCHAND AGARWAL PAN AAIPA4389E has filed return of income for A.Y.2012-13 on 30/10/2013 declaring total income of Rs.(-)74,74,514/-.

Brief details of information received by Assessing Officer - Information in the case of the assessee was received on official mail - id from O/o Dy. Director of Income-tax (Inv.), Unit 7(1), Mumbai on 28/03/2019 on official e-mail that during F.Y.2011-12, assessee has traded in Penny Stock Scrip M/s. Scan Steels Ltd. Trade during the F.Y.2011-12 is as under:-

<i>Beneficiary Name</i>	<i>Beneficiary PAN</i>	<i>Total Sale Value</i>	<i>Scrip Name</i>
<i>Nita Padamchand Agarwal</i>	<i>AAIPA4389E</i>	<i>1959104</i>	<i>M/s.Scan Steel Ltd.</i>

*It is also informed that in an enquiry made in the case of M/s Scan Steels Ltd. is a shell company and from analysis of financials of the company, it is established that the scrip My Scan Steels Ltd. is a penny scrip and has been used by operators/entry-exist providers to provide **exempt LTCG/Short Term Capital Loss/Business Loss for the purpose of bringing uncounted cash in the books of accounts or to create fictitious losses to avoid paying due taxes on the income***

*3. Analysis of Information received - During the period under consideration the assessee has traded in penny stock scrip to avail exempt LTCG/Short Term Capital Loss/Business Loss for the purpose of bringing uncounted cash in books of accounts or to create fictitious losses to avoid paying due taxes on the income. **Hence, the income element in the above transaction in penny stock script remains undisclosed and the same are required to be considered in computing total income of the assessee.***

4. Basis of forming reason to believe - In this case, the assessee has traded in penny stock scrip as mentioned in para 2, to avail LTCG/ Short Term Capital Loss/Business Loss for the purpose of bringing unaccounted cash in books of accounts or to create fictitious losses to avoid paying due taxes on the income. Thus, the income element in respect of above transaction in penny stock script remains undisclosed and the same are required to be considered in computing total income of the assessee. In view of the above, and by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary thereto in his return of income. I have reasons to believe that the income to the extent of INR.19,59,104/- chargeable to tax in the hands of the assessee has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. A notice u/s. 147 r.w.s. 147 of the Income Tax Act, 1961. A notice u/s. 148 r.w.s. 147 of the Act, is being proposed to be issued to assess such income and also any other income chargeable to tax which has escaped assessment, which comes to my notice subsequently in the course of assessment proceedings for A.Y.2011-12." (Emphasis Supplied)

- 5.4. We note that as per reasons recorded, the information from the investigation wing was received on 28/03/2019 and notice under Section 148 was issued on 31/03/2019. On reading of the reasons recorded for reopening the assessment as a whole, we find that the Assessing Officer has proceeded on general understanding without taking into consideration the relevant facts already forming part of

the record. In paragraph 2 of reasons recorded, the Assessing Officer has stated that the script has been used to provide 'LTCG/Short Term Capital Loss/Business Loss'. On perusal of the reasons recorded, we find that in paragraph 3 of the reasons recorded the Assessing Officer had, on analysis of the information, concluded that the 'income element' in the penny stock transactions under consideration had remained undisclosed. The aforesaid conclusion drawn by the Assessing Officer is factually incorrect. The Assessee had disclosed the loss suffered on account of Sale of Shares in the financial statements. Further, while recording the basis of forming belief in paragraph 4 of the reasons recorded, the Assessing Officer has recorded that income of INR.19,59,104/- has escaped assessment. It is admitted position that INR. 19,59,104/- is the consideration received by the Assessee from sale of the Share and not the profit element. Further, the Assessee had suffered business loss and therefore, the issue of any income element arising from the transaction remaining undisclosed does not arise. In our view, while forming the aforesaid belief the Assessing Officer has failed to consider the fact that the Assessee is engaged in the business of trading in shares and has not earned any exempt capital gains income from the sale transactions under consideration. Further, even if the aforesaid amount is considered to be income of the Assessee, the current year losses were sufficient to set off the said income. The Revenue has also failed to establish how the Assessee booking business loss from the transaction under consideration would be able to introduce unaccounted cash into her books of accounts. Also, in the facts of the present case the Assessee was already incurring business losses in the current year and therefore, for the relevant assessment year the benefit of set off of alleged bogus business loss with other income was also not available to the Assessee. These aspects have also not been considered by the Assessing Officer. While in paragraph 5 of the

reasons recorded, the Assessing Officer has referred to the documents/details filed during the original assessment proceedings, the Assessing Officer has taken shelter of Explanation 1 to Section 147 of the Act to conclude that the information was so imbedded in the material/document furnished by the Assessee that the same could not have been discovered by the Assessing Officer even after due diligence. Therefore, according to Assessing Officer, the disclosure by the Assessee cannot be regarded as true and full. We do not find any merit in the aforesaid stand taken by the Assessing Officer. The primary contention of the Assessee was that the Assessee was engaged in the business of trading had duly disclosed the transaction as well as loss arising there from in the financial statements, return of income and computation of income. While filing objections to re-opening of assessment vide letter dated 03/05/2019, the Assessee had specifically stated as aforesaid. However, the objections raised by the Assessee were rejected. We note that even in the Assessment Order, dated 25/12/2019, passed under Section 143(3) read with Section 147 of the Act, the Assessing Officer has proceeded on incorrect understanding that the Assessee has earned capital gains income. While recording the modus operandi in paragraph 6 of the aforesaid Assessment Order, dated 25/12/2019, the Assessing Officer has not made any mention of 'business loss' and has referred to the report of the investigation wing in relation to bogus penny stock transaction resulting capital gains income. Even the judicial precedents cited by the Assessing Officer pertain to cases where the assesses had claimed benefit of exemption under Section 10(38) of the Act in respect of long term capital gains earned from transaction in shares of companies identified as penny stock by the Investigation Wing. Therefore, the same would not apply to the facts of the present case. Further, even otherwise, in the present case purchase/sale of the Shares transactions took place through SEBI registered stock-broker on the

floor of the stock-exchange and the same cannot be treated at par with preferential allotment made by a private limited company. We note that in paragraph 8.2 of the Assessment Order, dated 25/12/2019, passed under Section 143(3) read with Section 147 of the Act the Assessing Officer has again recorded as under:

*"8.2. From the above facts and analysis it is appears that the scrip M/s. Scan Steel Ltd. has been used to provide **bogus Long Term Capital Gains** to various beneficiaries. In view of the above, it is concluded that trading in penny stock of M/s. Scan Steels Ltd. during F.Y.2011-12 were pre-arranged method adopted by assessee to evade taxes and launder money." (Emphasis Supplied)*

- 5.5. The above clearly shows that the Assessing Officer has proceeded on incorrect understating of facts.
- 5.6. We also note that the above Assessment Order, dated 25/12/2019, is silent about any inquiry/verification conducted by the Assessing Officer. The documents/details furnished by the Assessee (which include reply to 133(6) notice sent by the stock broker, global trade statement, bank statement showing receipt/payments etc) have been brushed aside without bringing on record any material to challenge/doubt their veracity. In the Assessment Order, dated 25/12/2019, there is no mention of the alleged entry/exit providers and/or script operators, the period over which of quoted prices were manipulated and the benefit drawn by the Assessee. The Assessing Officer has drawn inference from a report from investigation wing related to bogus long long/short term capital gains transaction to initiate reassessment proceedings against the Assessee without considering the nature of business of the Assessee and the inquiries conducted during the regular scrutiny assessment

proceedings. The sole basis of initiating the reassessment proceedings and making addition in the hands of the Assessee is the fact that the Assessee had sold the shares of a company identified as a penny stock by the investigation wing. In our view, the approach adopted by the Assessing Officer cannot be countenanced.

5.7. Keeping view the aforesaid, we hold that in the facts and circumstances of the present case, neither the initiation of reassessment proceedings nor the addition made by the Assessing Officer on merits can be sustained. Accordingly, we quash the notice dated 31/03/2019, issued under Section 148 of the Act as well as the Assessment Order, dated 25/12/2019, passed under Section 143(3) read with Section 147 of the Act. Accordingly, the Assessment Order, dated 26/03/2015, passed under Section 143(3) of the Act is reinstated. Thus, Ground No. 1 to 7 raised by the Assessee are allowed and therefore, Ground No. 8 to 12 raised by the Assessee are dismissed as having been rendered infructuous. Our view is in line with and drawn strength from the judgments of the Hon'ble Bombay High Court in the case of Gateway Leasing P. Ltd. Vs. ACIT [426 ITR 228] (Bom), Rita Rajkumar Singh Vs. ACIT [287 Taxman 413] (Bom) and Infinity.com Financial Sec. Ltd. Vs. ACIT [137 taxmann.com 503] (Bom) cited on behalf of the Assessee during the course of hearing.

5.8. Before parting we would like to observe that the CIT(A) had, while rejecting the contentions of the Assessee, relied upon a number of judicial precedents to support the addition made by the Assessing Officer under Section 68 of the Act. However, the same have no application to the facts of the present case. The CIT(A) has also approved of the approach adopted by the Assessing Officer of drawing inference from proximate cause and surrounding

circumstances without taking into consideration the relevant facts. The CIT(A) has noted that there was sudden and steep rise in the price of shares when general market trend was admittedly recessive and that the Assessee had failed to provide explanation for steep rise in price of shares. We find no basis for the aforesaid observation made by the CIT(A) as the Assessing Officer has not made any reference to quoted prices of the Shares. After referring to reasons recorded and the general modus operandi stated in the report of the investigation wing, the Assessing Officer has added the sale consideration in the hands of the Assessee under Section 68 of the Act holding the same as unexplained income. The basic underlying facts that the Assessee has booked business loss in the case at hand has escaped the attention of the CIT(A) leading to incorrect factual observation and conclusion.

6. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 05.11.2024.

Sd/-
(Narendra Kumar Billaiya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 05.11.2024
Milan,LDC

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण , मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai