

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

**BEFORE JUSTICE (RETD.) SHRI C.V. BHADANG, PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No. 5410/Mum/2024
Assessment Year : 2015-16

Income Tax Officer Ward-20(1)(1), Room No. 303, 3 rd Floor, Piramal Chamber, Lalbaugh, Parel, Mumbai.	vs.	Divesh Ashok Bafna, 302, C-Wing, 3 rd Floor, Arihant Apartment, Dr. D.B. Marg, Mumbai Central, Mumbai. PAN : ATAPB9065D
(Appellant)		(Respondent)

For Assessee :	Shri Neelkanth Khandelwal,
For Revenue :	Shri R.R. Makwana, Sr.DR

Date of Hearing :	05-12-2024
Date of Pronouncement :	05-12-2024

ORDER

PER B.R. BASKARAN, A.M :

The Revenue has filed this appeal challenging the order dated 22-08-2024 passed by the Ld.CIT(A)-NFAC, Delhi and it relates to the Assessment Year (AY.) 2015-16. The Revenue is aggrieved by the decision of the Ld.CIT(A) in deleting the addition of Rs. 62,27,200/- relating to sale value of shares added by the Assessing Officer (AO) u/s. 68 of the Income Tax Act, 1961 ('the Act') and also in confirming the addition of unexplained commission of Rs. 1,24,544/-.

2. The facts relating to the issues are stated in brief. The assessee filed its original return of income for the AY. 2015-16 on 18-12-2015 declaring a total income of Rs. 5,77,780/-. The assessee had also claimed exemption u/s.10(38) of the Act of long term capital gains amounting to Rs. 61,02,662/- arising on sale of shares of M/s. Greencrest Financial Services Limited. The AO received information from the Investigation Wing of Kolkata that the shares of certain companies were manipulated to generate bogus long term capital gains. Such kind of shares were termed as 'penny stocks'. The AO noticed that the Investigation Wing has identified shares of M/s. Greencrest Financial Services Ltd., as one of such penny stock shares. Hence, the AO took the view that the long term capital gains declared by the assessee is bogus in nature.

3. In the assessment order, the AO referred extensively to the report given by the Investigation Wing with regard to the modus operandi followed by the operators to generate bogus long term capital gains. The AO also referred to the financial statements of above said company and came to the conclusion that the financial position of the company was weak and it does not justify share price quoted in the stock exchange. The AO also noticed that the shares sold by the assessee had been purchased by certain persons, who were identified as Exit providers. The AO also issued notices u/s 133(6) of the Act to the alleged Exit providers, but they were returned un-served. The AO issued summons u/s 131 of the Act to the assessee and recorded a statement from him. The assessee submitted that he had purchased the shares of above said company on the basis of market information and sold later. He submitted that he did not look into fundamentals and financial position of the company. Hence, the AO took the view that the long term capital gains declared by the assessee is bogus in nature. Accordingly, he proceeded to assess sale value of shares amounting to Rs.62,27,200/- as unexplained income of the assessee u/s.

68 of the Act. The AO also took the view that the assessee would have incurred expenditure in getting bogus long term capital gains. He estimated the same at Rs.1,24,544/- and added the same to the total income of the assessee as unexplained expenditure.

4. In the appellate proceedings, the Ld.CIT(A) deleted both the additions and hence, the Revenue has filed this appeal.

5. The Ld.DR submitted that the assessee had purchased the shares of M/s Greencrest Financial Services Ltd., in off market transaction. The said company has been identified as one of the penny stock companies by the Investigation wing. He submitted that the prices of shares of these types of companies are not commensurate with the financials and fundamentals of those companies. The prices of shares of these companies were manipulated by a group of people and some of the brokers have admitted that they were doing so in order to generate bogus capital gains. Accordingly, he submitted that the assessee has also availed bogus long term capital gains and accordingly, the AO has rightly assessed the sale value of shares as un-explained cash credit. He further submitted that these kinds of accommodation entries are obtained on payment of commission and hence the AO has assessed the commission expenses also. Accordingly, he submitted that the Ld.CIT(A) was not justified in deleting both the additions.

6. The Ld.AR, on the contrary, submitted that the assessee is a regular investor in shares and hence, it is not a case of isolated transaction of purchase and sale of shares. He submitted that the assessee purchased 10000 shares of M/s Marigold Glass Industries Ltd., @ Rs.10/- per share on 21-02-2012 in the off market from M/s.Octopus Infotel P Ltd. The share certificates were received in physical format. Subsequently, the name of the company was changed to M/s Greencrest Financial Services

Ltd., and all the 10000 shares were dematerialized on 22-01-2013 in the demat account maintained with HDFC Bank Ltd. Later, the face value of shares was split from Rs.10/- per share to Re1.00 per share. Accordingly, the assessee received 1,00,000 shares in the demat account on 07-06-2014 in the place of 10000 shares. All the above said 1,00,000 shares were sold in August 2014 and September 2014 for an aggregate amount of Rs.62,02,662/-, which resulted in long term capital gains of Rs.61,02,662/-. (We notice that the AO has taken the sale value of shares at Rs.62,27,200/- and accordingly made the addition). He submitted that the assessee has furnished all the evidences relating to purchases and sale of shares. The AO did not find fault with any of those documents. He submitted that the AO did not carry on any independent enquiry with regard to the transactions carried on by the assessee. He submitted that the AO has simply placed reliance on the generalised investigation report given by the Investigation Wing, without pointing out as to how it is related to the assessee. He submitted that the AO has not proved that the assessee was part of the group that was manipulating the prices of shares. He submitted that the purchase consideration was paid through banking channels and the sale consideration has been received through banks only. The shares were sold through stock exchange platform. Accordingly, he submitted that the long term capital gains declared by the assessee should not be doubted with. He further submitted that the Ld.CIT(A) has granted relief, following the decisions rendered by the Tribunal in various cases involving identical issues. He further submitted that assessee's mother Smt. Sheela Ashok Bafna had also purchased these shares and the AO made identical additions in her hands also. He submitted that the Co-ordinate Bench of Tribunal, vide its order dated 08-04-2024 passed in ITA No.02/Mum/2023, has deleted identical additions made in her hands.

Accordingly, he submitted that the order passed by the Ld.CIT(A) does not call for any interference.

7. We heard rival contentions and perused the record. We notice that the assessee's mother, Smt. Sheela Ashok Bafna had also purchased and sold shares of M/s Greencrest Financial Services Ltd., and declared long term capital gains of Rs.61,02,308/-. The AO assessed the entire sale consideration of Rs.61,02,308/- as unexplained cash credit u/s 68 of the Act. The Co-ordinate Bench, vide its order dated 08-04-2024 passed in ITA No.02/Mum/2023 deleted the addition. Relevant observations made by the Co-ordinate Bench in the above said case are extracted below:-

“5. Thus, we note that the assessee has submitted the primary documents to prove purchase/allotment of shares of M/s. Marigold i.e share certificate (page 87 to 102 of PB), bank statement highlighting the payment made for purchase of shares (page 79 of PB), demat statement (supra) etc. To prove the event of sale of shares of M/s. Greencrest (earlier known as M/s. Marigold) assessee had filed primary evidences like Broker's ledger (page 52 & 53 of PB), Contract notes issued by the broker (page 59 to 74 of PB), bank statement highlighting the sales consideration (page 45 to 47 of PB) and STT remitted on such sales. Thus we find that assessee has filed the primary/relevant documents to prove the purchase and holding of shares for the statutory period by dematerializing it; and sale of shares took place through BSE through the recognized broker M/s. HDFC Securities Pvt. Ltd. And that the consideration for purchase/sale of shares happened through banking channel and STT has been duly remitted on sale of shares in question. Thus, we find that assessee has fulfilled the conditions necessary for making the claim of LTCG as exempt u/s 10(38) of the Act; and it is not the case of AO that there is any infirmity/deficiencies in the relevant/primary documents filed by the assessee as noted (supra). Thus, we find that assessee has discharged her burden to prove the LTCG claim on sale of shares of M/s. Marigold (now known as M/s. Greencrest) and the AO has failed to rebut/produce contrary material/evidence to counter/question the veracity of the primary documents produced by assessee (supra) in order to dis-prove her claim.

.....

7. We find that the main plea of the assessee before us and the Ld. CIT(A) was that addition made by AO u/s 68 of the Act was not legally sustainable in the light of the fact that assessee has discharged the burden of proving the genuineness of her claim regarding LTCG on sale of share of M/s. Greencrest (earlier known as M/s. Marigold) by submitting primary documents to substantiate the claim (LTCG). The assessee in order to prove the transaction which led her to claim the LTCG/exemption u/s 10(38) of the Act had proved the events of allotment/purchase of M/s. Marigold shares, dematerialization of shares, and thereafter shares were sold through Bombay Stock A.Y. 2015-16 Sheela Ashok Bafna Exchange Electronic Platform. Therefore, according to Ld. AR, since assessee proved that she has fulfilled all conditions for making claim of LTCG/exemption u/s 10(38) of the Act, the same could not have been denied by AO without first finding any infirmity in the primary documents filed by assessee which in this case has been undisputed by AO. And it was pointed out by the Ld. AR that AO have not leveled any allegation/infirmity about the primary documents produced by the assessee to prove the purchase and sale of shares of M/s. Marigold. Further, according to Ld. AR, the AO/Ld. CIT(A) has not been able to show that cash transaction was there in the assessee's claim. According to Ld. AR, the AO erred in relying on the 3rd party statements without allowing assessee to cross-examine them. We note that AO failed to show from the purported material which he relies upon in the assessment order (like investigation report of the Investigation Wing of Department, Financials, statements of stock-brokers/entry operator, submission of assessee etc) that assessee was participant/recipient in the organized racket of generating bogus entries of LTCG and involved herself in the 'modus operandi' as discussed by him at para 6 of the assessment order. According to Ld. AR, unless the AO is able to point out from the investigation report/statement of stock brokers/entry operators and spell out the role of assessee/broker as a wrong-doer or participant in the racket (as stated in the report of investigation wing) the impugned action of AO/Ld. CIT(A), in the light of the un-impeached primary documents has to fail.

8. We find that AO during the assessment proceedings has asked the assessee to prove the claim of LTCG of Rs.61,02,308/- from sale of shares of M/s. Greencrest (earlier known as M/s. Marigold). And pursuant to such a direction, the assessee had filed the primary documents as discussed at para 4 to 5 (supra) to prove the purchase of shares of M/s. Marigold (now known as M/s. Greencrest Financial Services Ltd) and the same is not repeated for sake of brevity. Thus, we find that assessee had filed primary documents found placed at page 86 to 102 of the PB, which shows that assessee had applied/allotted the shares of M/s. Marigold (later known as M/s. Greencrest Financial Services Ltd on 21.02.2012 and sold the shares

of M/s. Greencrest (between 06th Aug, 2014 to 04th Sep, 2014.) through Bombay Stock Exchange through broker M/s. HDFC Securities Pvt. Ltd. and STT paid on the sale transaction. Thus, sale of shares cannot be held as bogus. The share certificate of M/s. Marigold (renamed as M/s. Greencrest) allotted to assessee proves the allotment of shares; and demat statement of holding of shares with M/s. HDFC Bank Ltd proves that shares of M/s. Marigold/ Greencrest was held by the assessee from allotment to sale of the same. Thus, when shares were allotted; and later sold through BSE (after remitting STT); and consideration having passed through proper banking channel (both allotment/sales), the LTCG claim of assessee on sale of shares of M/s. Marigold/M/s. Greencrest cannot be disallowed, unless there is any contrary material brought on record to show that it was a bogus claim. Merely on the basis of general investigation report (report of A.Y. 2015-16 Sheela Ashok Bafna investigation wing of Department/Kolkata) wherein there is no whisper of any wrongdoing by assessee or her broker or assessee's involvement in modus-operandi as stated therein the investigation report of Kolkata or SEBI report, no adverse view is legally sustainable. We find that Kolkata Investigation Report discussed by AO at para 6 onwards nowhere alleges any wrongdoing of assessee or her brokers; and we have gone through the copy of the SEBI order dated 29th June 2022, wherein the SEBI conducted enquiry into the trading of shares of M/s. Greencrest Financial Services Ltd & role of its director Shri Sunil Parekh and Shri Aditya Parakh and some allottees (total proceedings against 18 persons/entities refer page no. 01 of SEBI order) wherein SEBI was concerned about transactions taking places during two patches (Patch-1 from May 10th, 2013 to June 04, 2014 and Patch-II from June 05th, 2014 to Dec 04th ,2014). After investigation, the SEBI didn't impose any penalty against the company M/s. Greencrest, and its two directors and another allottee Shri Ravindra Kumar Grover; and SEBI imposed penalty for 14 persons/entities (refer Page no. 45 to 47 of SEBI order). Thus, we find that there was no allegation/penalty imposed on assessee or her broker or even against the company M/s. Grencrest. Therefore, no adverse view can be drawn against the assessee on her claim of LTCG on sale of shares of M/s. Greencrest. Thus, we find that the general report/statements relied upon by AO in no way can be said to incriminate assessee being part of modus-operandi to do any illegal acts. As noted, the AO has been influenced by the investigation report A.Y. 2015-16 Sheela Ashok Bafna submitted by the Investigation Wing of Department functioning at Kolkata. It is true that some unscrupulous entry operators had devised methods/modus-operandi to beneficiaries to facilitate laundering their black money to white through pre-planned receipt in the form of bogus LTCG, loan etc. But from perusal of the discussion of AO, we find it to be general in nature and there is nothing in the discussion to link/connect the assessee somehow with the modus-operandi of the Investigation Wing or Report. Since there is neither any

evidence/material to incriminate the assessee in the investigation report nor any material to suggest assessee/broker being part of the nefarious conspiracy or abetment, such a report of investigation wing cannot be of any aid to the revenue and thus AO/Ld CIT(A) erred in placing reliance on such report to draw adverse inference against assessee.”

7.1. Thereafter, the Co-ordinate Bench took support of the various decisions rendered by Tribunal and the Hon'ble High Courts. Some of the decisions referred to by the Co-ordinate Bench are:-

- (a) Shri Yogesh P Thakkar (ITA No.1612/Mum/2021 dated 03-02-23);
- (b) Shyam Pawar (220 Taxman 256)(Bom);
- (c) DCIT vs. Mukesh R Moralia (6 SOT 247)(Mum);
- (d) CIT vs. Jamna Devi Agarwal (328 ITR 656)(Bom);
- (e) PCIT vs. Ziauddin A Siddique (ITA No. 2012 of 2017 dated 04-03-2022)
- (f) PCIT vs. Gaurav Bagaria (453 ITR 513)(Raj)

Finally, the Co-ordinate Bench concluded as under:-

“28. For the various reasons discussed in the foregoing and following the judgments cited above, more particularly of the binding jurisdictional High Court in the cases of Shyam Pawar (supra), Ziauddin A Siddique (supra), Mukesh R Marolia (supra) & Jamna Devi Agarwal (supra), we direct AO to delete the addition of Rs.62,02,308/- made u/s 68 of the Act. And we direct the AO to allow the LTCG/exemption claimed by assessee u/s 10(38) of the Act on sale of shares of M/s Greencrest Financial Services Ltd.”

8. We notice that the facts of the assessee's mother's case decided by the Co-ordinate Bench are identical with the facts of the present case. We also notice that the decision rendered by the Ld.CIT(A) conforms to the above said decision of the Co-ordinate Bench. Accordingly, following the above said decision, we uphold the order of the Ld.CIT(A) in deleting the

addition of sale value of shares made u/s 68 of the Act. In that view of the matter, the estimated commission expenses added by the AO u/s 69C of the Act is also rightly deleted by the Ld.CIT(A). Accordingly, we uphold the order passed by the Ld.CIT(A).

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 05-12-2024

Sd/-

(JUSTICE (RETD.) C.V. BHADANG)
PRESIDENT

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai,

Date: 05-12-2024

TNMM

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "D" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai