

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : F : NEW DELHI

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.752/Del/2024
Assessment Year: 2015-16

Reena Kumari,
C-435, First Floor,
Defence Colony,
New Delhi – 110 024.

Vs Income Tax Officer,
Ward-54(4),
New Delhi.

PAN: ABCPS0078F

(Appellant)

(Respondent)

| | |
|-----------------------|---|
| Assessee by | : Shri R.S. Ahuja, CA & Shri Pushpdeep Singh, Advocate |
| Revenue by | : Ms Harpreet Kaur Hansra, Sr. DR |
| Date of Hearing | : 26.11.2024 |
| Date of Pronouncement | : 20.12.2024 |

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 15.01.2024 of the National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.CIT(A), Delhi-18/10172/2017-18 arising out of the appeal before it against the order dated 30.12.2017 passed u/s 143(3) of the Income Tax Act, 1961

(hereinafter referred to as 'the Act') by the ITO, Ward 54(4), Delhi (hereinafter referred to as the Ld. AO).

2. On hearing both the sides, the necessary facts required to be on record are that the assessee's return of income of Rs.10,31,940/- was selected for complete scrutiny on the basis of suspicious sale transaction in shares and exempt long-term capital gain shown in the return arising out of alleged penny stocks. The AO examined the transactions of the assessee in two groups: the first being HPC Bioscience Ltd. (HPC) and the second M/s Sunstar Realty Development Ltd. (SRDL) from which the assessee had earned long-term capital gain (LTCG) of Rs.5,16,89,108/- and Rs.1,81,75,146/- respectively totaling to Rs.6,98,64,254/- which was claimed as exempt income u/s 10(38) of the Act. The AO examined the transactions in the light of the investigation conducted by the Directorate of Investigation, Kolkata and taking into consideration certain orders of the Security and Exchange Board of India (SEBI). Statement of the assessee was also recorded u/s 131 of the Act wherein she had explained the reasons for investment as ordinary investor. The AO, on the basis of surrounding circumstances, human conduct and preponderance of probabilities surrounding the transaction and after taking into consideration the general principles of tainted transactions in penny stocks and scheme of LTCG, made the addition u/s 68 of the Act in regard to the returns holding that the LTCG transaction was not genuine and was a sham transaction. The AO held that the transaction is

bogus and sham and by way of accommodation entries. An addition was also made on account of commission paid for getting the accommodation entry to the extent of 2% of the total receipts u/s 69C of the Act.

2.1 The assessee went in appeal and amongst other grounds on merits had also raised a ground of incorrect application of section 68 instead of section 69A of the Act. Then, a ground was taken that assessment order has not been passed and served in the period of limitation as per section 153(1) of the Act as the copy of the assessment order was dispatched on 1st January, 2018. These two issues are decided against the assessee.

2.2 Further, the assessee had also justified the investment and the income. The CIT(A) was not convinced and sustained the assessment order on the basis of the ratios of various decisions sustaining the inferential approach adopted by the AO and concluded as follows:-

“17. Similar to the cases narrated above, the arrangement appears to be too convenient for the cause of the appellant. Manifestly, the impugned transaction defies logic and all rationale. Thus, considering such position of law and facts of the case, these grounds are decided against the appellant.

18. Now, let me consider grounds of appeal at 1(k) and 2 regarding addition made u/s 69C of the Act on account of undisclosed commission paid for arrangement of impugned bogus LTCG. Here, it is imperative to consider that what ushers in such an outcome (LTCG) is an arrangement of chain of events meticulously interwoven to achieve certain premeditated objectives. This can never happen without a cost. In view of the report by the Directorate of Investigation about modus operandi behind providing the accommodation entry for long term capital gain, it was held by the AO that the element of commission on account of providing accommodations entries is taxable in the hands of the beneficiary, being in the nature of

unexplained expenditure or expenditure from undisclosed sources. Accordingly, the impugned addition was made by the Ld. AO u/s 69C of the Act. This addition also lives up to the concept "matching principle", being added in the year in which impugned gains were reported.

18.1. Admittedly the share transactions were manipulated through entry provider, stockbrokers in order to obtain fraudulent income by rigging share prices and selling them in order to justify the unaccounted income of the assessee and for all these activities the broker is making all the negotiations and arrangements and, therefore, there is no doubt that such transactions involve money to be paid to entry provider for such fraudulent capital gains. Hence, addition of Rs. 14,35,145/- @ 2% of bogus gains of Rs. 7,17,57,254/- is held to be reasonable and I do not find any infirmity with the findings of the AO. Therefore, the order of the AO is accordingly upheld.”

3. The assessee is in appeal raising the following grounds:-

“1. That on the facts and circumstances of the case the learned A.O. and CIT(A) erred in:-

2 (a) Issuing the assessment order after the expiry of limitation period i.e., after 21 months from the end of the assessment year in which the income was first assessable, which, as per the provisions of section 153 of the Act makes it invalid? The assessment order with notice of demand was dispatched on 01.01.2018 vide speed post number ED671492976IN by the office of Id. Assessing Officer. Since, the last date for issuing the assessment order was 31.12.2017, but it was dispatched on 01.01.2018 therefore the Assessment Order is barred by limitation and is invalid.

(b) Changing the section under which addition was made by the ITO under section 68 to section 69A of the Income Tax Act 1961. No formal notice has been issued by the CIT(A) for the purpose. (c) Making an addition of Rs.7,17,57,254/- under Sec. 68 which was returned as LTCG U/s 10 (38) of the Act.

3 (d) Wrongly treating capital gain on sale of Long Term Equity Shares of a Listed Company as Income from Other Sources.

(e) Treating a transaction in ordinary course of investment of purchase and sale of shares as colourable device. The addition is made merely on the basis of a general information received from Kolkata Investigation Directorate and on the basis of probability and surmises that the scripts of M/s HPC Biosciences Limited and M/s Sunstar Realty Development Limited are Penny Stock and are without independently applying his mind and investigating. The Ld. Assessing officer has not brought any material

or evidence on record to falsify the claim of the Appellant or hold that the share transaction was bogus.

4 (f) Treating the transaction of purchase and sale of shares listed on recognized stock exchange through a registered stock broker in respect of which appellant has already submitted copy of all the bills. Contract notes, depository statements, bank statements, etc, in support of transaction and which are enough evidence to support her bonafide as manipulative, merely based on the fact that prices of shares of M/s HPC Biosciences Limited and M/s Sunstar Realty Development Limited rose substantially during the period of holding of around 21 months before these are being sold.

5 (g) Drawing adverse inference against the Appellant on account of non-compliance by M/s Sunstar Realty Development Limited, HPC Biosciences Limited and M/s AMS Power Tronics Pvt. Ltd to notices issued U/s 133(6), instead of exercising the power of enforcing their attendance.

6 (h) Ignoring the SEBI order dated 06.09.2017, wherein SEBI has revoked the interim order passed dated 29.06.2015 under sections 11 and 11B of the Securities and Exchange Board of India Act. 1992 and section 12A of the securities contracts (regulation) Act, 1956 in the matter of dealings in the shares of M/s HPC Biosciences Limited saying that "since, the prima facie findings are not observed in the investigation reports in respect to aforementioned 216 entities, the directions issued earlier vide interim orders need not be continued and hence need to be revoked. The name of the appellant is appearing at serial no. 31 in the list of aforesaid 216 entities.

7 (i) Ignoring the contention of the Appellant that the prices of securities traded on recognized stock exchanges are always market driven and move on in a very transparent manner under the control and monitoring of regulator and also Appellant was acting in ordinary course of Investment which is clear from her records and the fact that the shares were sold by him through the stock exchange and through recognized brokers. (j) Relying on the statement of brokers, Script operators and intermediaries and treating the transactions as non-of the same and neither allowed to cross examine the said parties despite request made by the appellant in its letter to the ITO dated 22.12.2017. This is a clear case of violation of the principle of natural justice.

8 (k) Making an addition of Rs. 14,35,145/-, calculated on presumption basis that 2% commission paid to arrange colourable LTCCG, as unexplained expenditure U/s 69C while ignoring the factual matrix and genuineness of LTCCG

9. II. Without Prejudice to above stated Grounds, the addition of Rs. 14,35,145/- is also bad in law as this addition was made without taking into consideration the concept of Source and Application of Funds. III. The Appellant craves leave to add, alter or amend the grounds of appeal at or before the hearing.”

4. Heard and perused the record. The main issues involved is alleged bogus long term capital gains claimed by the Assessee in the following scrips:

| S. No. | Scrip | LTCG Claimed |
|--------|---|---------------|
| 1. | HPC Biosciences Limited. (Scrip Code 535217) (“HPC”) | 5,16,89,108/- |
| 2. | Sunstar Realty Development Limited (“SRDL”) | 1,81,75,146/- |

4.1 Ld. AR has submitted that the Revenue authorities have made the addition u/s 68 of the Act invoking the principle of human probabilities and suspicious surrounding only and on the basis of weak financials of these companies, SEBI Proceedings, Investigation wing, Kolkata, report and statement of Shri Sumit Kumar, the director of AMS Power Tronics Ltd. and have not commented on the evidences/information provided by the Assessee to substantiate its case.

5. As with regard to the contention that wrong section is invoked to make the addition it was submitted by the Id. AR that A.O. has made the addition u/s 68 in the Assessment Order, whereas in the remand proceedings, he specifically asked CIT(A) to consider the additions u/s 69A. However, CIT (A), in Para 9.7 sustained addition u/s 68 only:

5.1 As with regard to this issue we are of the considered view that there is no ambiguity which established the non-application of mind by the lower authorities and vitiates the additions made. Mentioning a wrong section by the AO is not fatal. In a case where income is chargeable under the deeming income provisions the transactions can be overlapping. There is no doubt that for alleged bogus LTCG, additions can be made u/s 68 of the Act, and for that reasons the order of CIT(A) requires no interference.

6. Then as with regard to the allegation of the assessee that the A.O has relied upon certain statements and documents while making the impugned additions in the assessment but they were not provided to the Assessee neither an opportunity of cross examination was afforded to the Assessee. We find that the ground was raised before CIT (A), who in remand proceedings, directed the A.O to provide the relevant documents to the Assessee and give an opportunity to cross examine. It is a matter of record that the A.O. accepted that the relevant material was not provided to the Assessee during the Assessment and then the A.O. in his remand report has mentioned that he sent all the statement by post to the Assessee on the Address mentioned in the ITR for AY 2018-19. In this regard, it is submitted by the Id. AR that the address of the Assessee was changed and the same was updated in PAN records. Same is certainly established by copy of return available on Page 60-61 of the Paperbook and the said documents should have been sent on the address as per PAN records with

NSDL. Then we find that AO forwarded these documents to CIT(A) along with Remand Report with the observations that these documents relied by AO could not be provided to the assessee yet CIT (A) failed to share these documents with the Assessee during appellate proceedings. Thus no doubt certain principle of natural law are violated but we have to examine the issue on merits and then consider that how far absence of this opportunity cross examination of witness or non provision of documents was prejudicial to the assessee.

7. As with regard to the merits of case Id. AR submitted that the Assessee was not a part of any sham transaction which is also evident by the investigations conducted by the Securities and Exchange Board of India. According to Id. AR, the Assessee was specifically given a clean chit in that investigation.

8. Now as matter of fact the Assessee acquired 100000 (One Lakh) Pre-IPO Equity Shares of HPC Biosciences Limited @10/- per share for Rs. 10,00,000/- (Rupees Ten Lakh Only) on 04.02.2013 from AMS Powertronics Private Limited vide account payee Cheque No. 540577 dated 04.02.2013 drawn on Punjab National Bank and got the shares transferred in her name on 16.02.2013. The said shares were lodged for dematerialization and were dematerialized on 16.03.2014 with NSDL. The company's IPO was listed on BSE SME Segment on 19.03.2013 at an issue price of Rs. 35/- which opened at Rs. 37.25/- and closed at 39.10/- . The Assessee sold these shares starting from 27.03.2014 to

11.07.2014 at around Rs. 540 to Rs. 569 however, the price even went up to Rs. 735.90/-.

8.1 The claim of Assessee is that she invested in these shares owing to the luring future plans of the company which was in the sector of Organic farming and horticulture activities. The Assessee was guided by her son, Jagat Singh and sub broker, Mr. Subodh Kumar Jain that growing consumer's concerns on food safety, health and environment in recent decade has resulted increased demand for organic food across the world. Awareness and knowledge has become a crucial factor in changing the attitude and behavior of consumers towards organic foods, which in turn drives the growth in the organic food market. Considering the health benefits of organically produced food, and knowledge of the damage done to the environment by conventional, intensive farming methods and tremendous growth in market of organic food over the past decade.

9. We find, and as rightly pointed by the Id.DR also that heavy reliance is placed by the Assessing officer on Kolkata Investigation Report, Weak Financials of the Company, SEBI Orders, Orders of different courts in other cases. The Assessing Officer mentioned upon general modus operandi as alleged by the Kolkata Investigation Report in the cases where bogus LTCG is claimed. The A.O has drawn a negative inference from the fact that the M/s. Sunstar Realty Development Limited, HPC Biosciences Limited and AMS

Powertronics Limited have not complied with the notices issued under section 133(6) of the Act.

9.1 Ld. AR has submitted that non-compliance by any third party over which the Assessee is not having any control, cannot be used against the Assessee. It is pertinent to mention herein that the Assessee was also served with notice under section 131 of the Act, to which proper compliance was made, and the statement of the Assessee was duly recorded which is there on page number 6 to 11 of the Assessment Order. Ld. AR referred to relevant questions to suggest that due explanation was given about reasons for investment.

10. Now we find that most vital piece of material on record are the SEBI orders as the same have substantial bearing on the issue about transaction in a share being suspicious or otherwise tainted. What is established is that by SEBI order 29.06.2015, Para 50 page 401, direction were passed against the assessee restraining her from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions, name of the Assessee is at point 64 page number 404. Then by SEBI Order dated 17.02.2016 [Page No. 208 to 217 of PB], directions passed in Order dated 29.06.2015 were confirmed and the name of the Assessee is at Serial Number 40 at Page 215 of the Paperbook. It is pertinent to note that this Order was passed as the Assessee failed to file its objections before the SEBI. Then by SEBI Order dated 25.08.2016 [Page No. 261-367 of PB], is the confirmatory

order against the remaining 107 entities. However, vide SEBI Order dated 06.09.2017 [Page No. 48 to 58 of PB; Relevant Para 3 & 4 at Page Number 53 of PB], the directions passed against the Assessee vide Order dated 29.06.2015 and confirmed vide Order dated 17.02.2016 were revoked after a detailed investigation by the SEBI. Assessee's name is at serial number 31, Page number 54. Relevant Para is reproduced herein below:

“3. The directions issued vide the ad interim ex parte order dated June 29, 2015 read with Corrigendum Order dated January 04, 2016 were confirmed vide orders dated February 17,2016. June 14,2016, August 25,2016, October 27,2016 and June 15, 2017 except for certain specific reliefs provided to certain entities.

4. Subsequent to the interim orders, an Investigation was carried out to look into the role of debarred entities in price manipulation and IPO manipulation of the scrips. Upon completion of investigation, violation of provisions of SEBI Act. 1992 (SEBI Act) and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (PFUTP Regulations) are not observed in respect of following 216 entities against whom directions were issued vide the interim orders. The details of the entities against whom the prima facie findings are not observed in the Investigation report are as under:”

11. Further what is relevant is the SEBI Order dated 22.12.2020 [Page No. 218-260 of PB], by which SEBI has drawn conclusion about the nature of irregularities in subscription of the IPO of HPC Biosciences Limited wherein it was found that 29.03% of the allotment in the IPO was to the entities funded by the Funding group. We find substance in the contention of Ld. AR that these proceedings have nothing to do with the Assessee, these are independent proceedings against the HPC Biosciences Limited and other entities for violation of SEBI regulations. No conclusion was drawn that the scrip was

traded as a penny stock and the investors had in any way been privy to transactions giving rise to bogus appreciation and gains.

12. Now coming to investment and LTCG in Sunstar Realty Development Ltd. The Assessing Officer made the addition for the reason that the company was not having healthy financials. However, AO himself has noted that this company was having a positive book value and is a profit making company. There is substance in the contention of Id. AR that nothing conclusive was brought on record by the Ld. A.O against the Assessee rendering the trades placed as sham. Ld. CIT (A) in para 11.1 of his Order at Page 22 recorded that the AO has delved deep and findings of the SEBI in the cases of HPC Biosciences and Sunstar Realty Development Limited have been elaborately discussed in the Assessment Order. However, there was no SEBI investigation Order in the matter of Sunstar Realty Development Limited at the time of Assessment. SEBI passed an order dated 19.03.2021 [Page No. 448-494 of the Paperbook] wherein it has found price manipulations in this scrip. It is pertinent to mention that the said investigation was for the period of 26.11.2013 to 03.06.2015 [Refer Page 449 Para 1]. In Para 2 of the same, this period is divided into 5 patches, and in this investigation only Patch 3 [23.10.2014 to 15.12.2014] and Patch 5 [01.01.2015 to 03.06.2015] were examined wherein it was, inter alia, noticed that the price of the scrip of the Company was manipulated. It is pertinent to note that the Assessee sold its shares of Sunstar Realty

Development Limited from 10.04.2014 to 08.07.2014 [Refer Page Number 18 of the Paperbook], Therefore, virtually there is no finding, direct or indirect, by the SEBI against the Assessee.

13. After taking into consideration the orders of the ld. tax authorities below, we are of the considered view that the ld. AO has primarily gone on the broad parameters of analyzing transactions of bogus LTCG claims. The conclusions were more outcome of the Investigation Wing report and the SEBI orders than anything specific discovered by any independent investigation or enquiry of the AO, except for recording statements of assessee u/s 131 of the Act and of one Shri Sumit Kumar, the director of AMS Power Tronics Ltd.. The assessee has been faulted by questioning the reasons for investments which is not an appropriate manner to discharge the burden on the AO for establishing that the assessee has taken recourse to invest only for generating an exempt LTCG. The statement of Shri Sumit Kumar, the director of AMS Power Tronics Ltd. from whom the assessee has bought the shares was relied heavily without the assessee being given an opportunity to cross-examine. Pertinent to mention is that even the CIT(A) failed to give the assessee the opportunity in spite of the assessing officer referring the matter in that context to the CIT(A). Non-provision of statement and absence of opportunity for cross-examination is sufficient to draw an adverse inference and setting aside the conclusions drawn out of the statement of Shri Sumit Kumar. The AO has discredited the

explanation of the assessee being general in nature. However, the findings and reasoning of the AO are patently very general. No doubt, the test of preponderance of probability would be applicable, but, that would be on the basis of some evidence indicating that some colorable device was used for introduction of unaccounted money through the LTCG Claim. The financials of the two scrips or the movement in the prices are indeed relevant, but, cannot alone be relied for considering the investment to be motivated for preparing false LTCG claim.

14. The Id. counsel for the assessee has rightly relied the fact that for AY 2013-14 in case of another assessee Jagat Singh, proceedings u/s 148A(d) of the Act were initiated for making inquiry arising out of investments in Sunstar Realty Development Ltd. scrip and the assessment was completed by order dated 11.01.2023 without any variation. The Id. counsel has also sufficiently distinguished the facts of the case of Sangeeta Devi Jhunjhunwala vs. ITO in ITA No.747/Del/2022 relied by the Id.CIT(A) in the case of HPC Biosciences Ltd. scrip. In that case, that assessee was preferential allottee who was allowed bonus shares on the same date. Furthermore, we also find that the coordinate Bench while dealing with the case of Sangeeta Devi Jhunjhunwala (supra) did not have benefit of the fact that of SEBI proceedings and directions wherein the assessee was exonerated from any alleged act of manipulation of the prices for achieving LTCG, like the assessee before us. In that case, even after issuing

notices u/s 131 of the Act, that assessee had failed to appear while in the case before us the assessee appeared and deposed on oath the reasons and circumstances for making the investments. We are of the considered view that when an assessee deposes on oath giving explanation of the reasons and circumstances for investment, the same cannot be brushed aside on the basis of general principles of the modus operandi of bogus LTCG claims.

15. In the light of the aforesaid, we are inclined to accept the grounds of appeal of the assessee holding that ld. tax authorities below have fallen in error in considering the LTCG claim of the assessee from the two disputed scrips as bogus claim. **The appeal of the assessee is allowed** with consequences to follow.

Order pronounced in the open court on 20.12.2024.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 20th December, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi