

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

**BEFORE SMT BEENA PILLAI, JM &
MS PADMAVATHY S, AM**

I.T.A. No. 2710/Mum/2024
(Assessment Year: 2013-14)

I.T.A. No. 2732/Mum/2024
(Assessment Year: 2014-15)

Leman Diversified Fund C/o V.B. Desai Financial Services Ltd., Cama Building, 1 st Floor, 24/26 Dalal Street, Fort, Mumbai-400001 PAN : AABCL8363M	Vs.	ACIT (IT) Circle-3(1)(2), Room No. X, 16 th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	Respondent)

Appellant / Assessee by : Shri Dhaval Jariwala, AR

Revenue / Respondent by : Shri Krishna Kumar, Sr. DR

Date of Hearing : 09.01.2025

Date of Pronouncement : 14.01.2025

ORDER

Per Padmavathy S, AM:

These appeals by the assessee are against the separate final order of assessment passed under section 147 r.w.s 144C(13) of the Income Tax Act, 1961 (the Act) by the Asstt. Commissioner of Income Tax (International Tax) Circle-3(1)(2), (in short "the AO") both dated 14.03.2024 for Assessment Years (AY)

2013-14 & 2014-15. The assessee raised following identical grounds of appeal for both AY 2013-14 & 2014-15 –

“1. The AO had erred in initiating reassessment proceedings without following the procedure prescribed in Section 148A of the Income-tax Act, 1961 (Act). The appellant prays that such reassessment proceedings should be treated as bad in law.

2. The AO had erred in initiating reassessment proceedings by issuing a notice under Section 148 of the Act beyond the period of limitation prescribed in Section 149 of the Act. The appellant prays that such reassessment proceedings should be treated as bad in law.

3. The AO had erred in initiating reassessment proceedings simply based on the information received from DDIT (Inv), Unit 5(1), Delhi, through insight portal that the share price of Transgene Biotek Ltd was manipulated, alleging that the appellant had undertaken short selling of equity shares of Transgene Biotek Ltd, without bringing any cogent material on record in relation thereto. The appellant prays that such reassessment proceedings should be treated as bad in law

4. The AO had erred in passing a draft assessment order proposing to assess the sale value of equity shares of Transgene Biotek Ltd as unexplained cash credit as per the provisions of Section 68 of the Act without issuing any show-cause notice invoking the provisions of Section 68 of the Act. The appellant prays that such draft assessment order passed should be treated as bad in law.

5. The AD had erred in assessing the sale value of equity shares of Transgene Biotek Ltd as unexplained cash credit as per the provisions of Section 68 of the Act without any application of mind. The appellant prays that such assessment should be deleted and should not be upheld.

6. The AO had erred in not considering the provisions of the India-Mauritius tax treaty while assessing the sale value of equity shares of Transgene Biotek Ltd as unexplained cash credit as per the provisions of Section 68 of the Act. The appellant prays that the provisions of the India-Mauritius tax treaty should be considered while making the assessment as residency of the appellant was not questioned.”

2. We will first consider the appeal for AY 2013-14 for the purpose of adjudication. The assessee is a non-resident company incorporated in Mauritius

and registered as Foreign Portfolio Investor (FTI) under Securities and Exchange Board of India (SEBI). The assessee filed the return of income for AY 2013-14 on 28.09.2013 declaring net income of Rs. Nil. The AO received information from DDIT(Inv.) that assessee is one of the beneficiaries of the scrip named Transgene Biotek Ltd. where the assessee has carried out short selling to the tune of Rs. 11,21,79,982/-. Accordingly the AO issued a notice under section 148 of the Act on 28.06.2021. Subsequently, as per the directions of the Hon'ble Supreme Court in the case of Union of India v. Ashish Agrawal & Ors., [2022 SCC On Line SC 543] the notice was converted as notice issued under section 148A of the Act. Subsequently, the AO passed an order under section 148A(d) of the Act on 28.07.2022 and a notice under section 148 was issued on the same date. The AO passed the draft assessment order under section 147 r.w.s. 144C(1) on 31.05.2023 wherein he has made an addition of Rs. 11,21,79,982/- under section 68 treating the sale consideration of the scrip M/s Transgene Biotek Ltd. as unexplained cash credit. The assessee filed its objections before the DRP who confirmed the addition made by the AO. The assessee is in appeal against the final order of assessment passed by the AO as per the directions of the DRP.

3. The ld. AR during the course of hearing presented arguments with regard to the legal contention that the notice issued by the AO under section 148 of the Act is barred by limitation. The ld. AR also presented arguments on merits stating that the reasons recorded for reopening the assessment is based on incorrect understanding of the facts in assessee's case. The ld. AR submitted that the reasons recorded for reopening is that there is short selling of the scrip M/s Transgene Biotek Ltd. whereas there is no short selling. The ld. AR submitted that the assessee has purchased Global Depository Receipts (GDR) of M/s Transgene Biotek Ltd. on various dates during Financial Year (FY) 2010-11 and FY 2011-12.

The Id. AR further submitted that these GDRs have been converted to equity shares during the FY relevant to AY 2013-14 & 2014-15 and have been sold during the said AYs. The Id. AR presented the below table containing details of purchase of GDRs and the conversion of the same into equity.

Details of GDRs of Transgene Biotek Ltd purchased				
Date of purchase	No of GDRs bought	Value (USD)	Name of counterparty	Date on which payment was made
07 March 2011	2,17,400	20,00,080.00	Bank of New York Mellon	Refer Bank statement attached on page no. 1
05 April 2011	5,00,000	46,00,000.00	Bank of New York Mellon	Refer Bank statement attached on page no. 2
13 April 2011	3,04,269	29,20,982.40	Bank of New York Mellon	Refer Bank statement attached on page no. 2
14 October 2011	30,285	2,11,995.00	Bank of New York Mellon	Refer Bank statement attached on page no. 3
09 November 2011	8,33,334	58,33,338.00	Bank of New York Mellon	Refer Bank statement attached on page no. 4

Details of GDRs of Transgene Biotek Ltd converted			
Trade date	Number of GDRs converted	Number of equity shares received	Refer
10 April 2012	75,000	7,50,000	DEMAT statement from NSDL on page no. 31. Please note that there was a change in the depository participant of Leman Diversified Fund from the Hongkong and Shanghai Banking Corp Ltd to Deutsche Bank. Out of 7,50,000 equity shares received upon conversion, 50,000 equity shares were sold on 17 April 2012. Thus, the DEMAT statement evidences only transfer of 7,00,000 equity shares from the Hongkong and Shanghai Banking Corp Ltd to Deutsche Bank.
09 July 2012	2,75,000	27,50,000	Conversion statement attached on page no. 7 and DEMAT statement from NSDL attached on page no. 31
07 September 2012	2,80,000	28,00,000	Conversion statement attached on page no. 8 and DEMAT statement from NSDL attached on page no. 33
12 September 2012	85,000	8,50,000	Conversion statement attached on page no. 8 and DEMAT statement from NSDL attached on page no. 33
14 September 2012	2,25,000	22,50,000	Conversion statement attached on page no. 8 and DEMAT statement from NSDL attached on page no. 33
08 November 2012	2,25,000	22,50,000	DEMAT statement from NSDL on page no. 34
20 November 2012	25,500	2,55,000	Conversion statement attached on page no. 9 and DEMAT statement from NSDL attached on page no. 34
19 December 2012	27,000	2,70,000	Conversion statement attached on page no. 11 and DEMAT statement from NSDL attached on page no. 34
09 January 2013	2,63,000	26,30,000	Conversion statement attached on page no. 12 and DEMAT statement from NSDL attached on page no. 35
11 March 2013	70,000	7,00,000	Conversion statement attached on page no. 13 and DEMAT statement from NSDL attached on page no. 35
07 June 2013	70,000	7,00,000	DEMAT statement from NSDL on page no. 43

4. The Id. AR took the bench through the copy of bank statements (page 1 to 6 of PB), copy of conversion statements evidencing conversion of GDRs into equity shares (page 7 to 13 of PB) and copy of Demat statements from NSDL reflecting the equity shares of M/s Transgene Biotek Ltd. received upon conversion of GDRs. The Id. AR also drew our attention to the statement of income (page 46 of the PB) where the Short Term Capital Loss (STCL) arising out of the sale of GDRs converted as equity was not carried forward. Accordingly, the Id. AR submitted that the reasons basis which the reopening is done is incorrect since there is no short selling towards the sale of equity shares of M/s Transgene Biotek

Ltd. and therefore the AO is not correct in treating the transactions unexplained as credit under section 68 of the Act. The Id AR also presented argued that the addition cannot be made under section 68 of the Act in assessee's case where the nature and the source have been clearly evidenced by the assessee.

5. The Id. DR on the other hand relied on the order of the AO and the directions of the DRP.

6. We heard the parties and perused the material on record. For the purpose of adjudication we will first consider the issue on merits. The AO based on the information received from DDIT(Inv.) that there are some short selling i.e. number of shares sold by the parties is greater than the overall quantity bought by them pointing out that the parties have undertaken off market transaction as well. The AO alleged that the assessee company has performed short selling to the tune of Rs. 11,21,78,982/- by trading in shares of M/s Transgene Biotek Ltd. Though there was no representation before the AO at the time of passing the draft assessment order, the assessee made detailed submissions while raising objections before the DRP. We notice that the DRP called for a remand report from the AO with regard to the details submitted before the DRP (page 73 to 76 of DRP order). The DRP upheld the addition made by the AO in the draft assessment order for the reason that the assessee has not produced any evidence for purchase of GDRs and based on the investigation done by SEBI M/s Transgene Biotek Ltd. levying penalty. From the perusal of the details furnished by the assessee before the lower authorities it is clear that the assessee has purchased the GDRs of M/s Transgene Biotek Ltd. on various dates from 07.03.2011 to 09.11.2011 and the bank statements substantiate the payments made towards the said purchase. Further from statement of Standard Bank, the merchant banker of the assessee the

transactions of conversion of GDRs into equity between 10.04.2012 to 07.06.2013 are substantiated. Further, the Demat statement of NSDL reflects the receipt of equity shares upon conversion of GDR and the subsequent sale of shares of M/s Transgene Biotek Ltd. From the perusal of all these evidences we are inclined to agree to the contention of the assessee that there is no short selling of the equity shares of M/s Transgene Biotek Ltd. and that assessee has sold the shares out of conversion of GDRs. It is also relevant to note that the assessee in the statement of computation has shown the STCL on GDRs as not carried forward in accordance with the Treaty provisions between India and Mauritius. Therefore, no benefit is availed by the assessee under the provisions of the Act with regard to the impugned transactions. Since it has been well established based on evidences that there is no short selling with regard to the equity shares of M/s Transgene Biotek Ltd., the reopening under section 148 solely based on the reason that assessee has made short sale is not correct. The DRP while confirming the addition made by the AO has placed reliance on the various findings in the SEBI report, however from the perusal of the same, we notice that the name of the assessee is not reflected in the SEBI report and that the entire finding with regard to the alleged bogus transactions carried out by the Directors of M/s Transgene Biotek Ltd. Therefore, there is merit in the submission of the ld. AR that assessee cannot be held to be a beneficiary of the bogus transactions without bringing any material evidences linking the assessee to the alleged bogus transactions carried out by the Directors of M/s Transgene Biotek Ltd. In view of discussions and considering the materials placed on record in our considered view the addition made by the AO under section 68 of the Act for the reason that there is short selling of shares of M/s Transgene Biotek Ltd. is not sustainable. Accordingly, we direct the AO to delete the addition made in this regard.

7. The AO made similar additions for AY 2014-15 also towards short selling of equity shares of M/s Transgene Biotek Ltd. From the perusal of records we notice that the assessee has carried out the sale of equity shares out of the shares converted from GDRs during the AY 2014-15. Further the ld. AR during the course hearing, took us through the documentary evidences such as bank statements, Demat account, etc., pertaining to AY 2014-15 to substantiate that there has been a conversion of GDR into equity which is sold during the year under consideration. We also notice that the assessee has not carried forward the Long Term as well as the Short Term Capital Loss arising out the impugned transactions and accordingly no benefit under the Act is availed by the assessee. From the perusal of these facts it is clear that the facts pertaining to AY 2014-15 are identical to the facts in AY 2013-14. We have while adjudicating a similar issue for AY 2013-14 have already held that there is no short selling and accordingly the addition made by the AO under section 68 of the Act does not survive. Since the facts pertaining to the year under consideration and the findings of the AO/DRP are identical we are of the view that our decision for AY 2013-14 is mutatis mutandis applicable for AY 2014-15 also. Accordingly we direct the AO to delete the addition made for AY 2014-15 also in this regard.

8. In view of our decision on the impugned issue based on the merits for both AY 2013-14 & 2014-15, the arguments of the ld. AR on the notice under section 148 being time barred have become academic and left open.

9. The assessee also filed additional ground raising legal contentions with regard to faceless mechanism prescribed in section 151A not being followed and notice under section 148 being issued without DIN. In the light of the said legal

issues being sub judice before the Hon'ble Supreme Court the Id AR during the course of hearing, did not press for admission of additional ground.

10. In result, appeals of the assessee for AY 2013-14 & 2-014-15 are partly allowed.

Order pronounced in the open court on 14-01-2025.

Sd/-
(BEENA PILLAI)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai