

आयकर अपीलीय अधिकरण "I" न्यायपीठ मुंबई में।

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

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1078/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Manjari P. Shah, 302, Abich Apartments, Sarojini Naidu Road, Mulund (West), Mumbai - 400 080.	बनाम/ v.	Asst. Commissioner of Income Tax; Range 23(2), C-10, Pratyaksha Kar Bhavan, Bandra Kurla Complex, Bandra East, Mumbai - 400 051.
स्थायी लेखा सं./PAN : ANQPS5900A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Mr. Milind V. Sahasrabudhe
Revenue by :	Mrs. N.V. Nadkarni, DR

सुनवाई की तारीख / **Date of Hearing** : 24-01-2017

घोषणा की तारीख / **Date of Pronouncement** : 22-02-2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 1078/Mum/2012, is directed against the appellate order dated 26-12-2011 passed by the learned Commissioner of Income Tax (Appeals)- 33, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 15th December, 2010 passed by learned Assessing Officer (Hereinafter called " the AO") u/s 143(3) of the Income-tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“Being aggrieved by the order of the learned Commissioner of Income Tax (Appeals) 33, Mumbai [hereinafter referred to as Ld. CIT (A)], the Appellants submit the following grounds for your sympathetic consideration; which it is prayed may be considered without prejudice to each other.

1. On the facts and circumstances of the case the The Id. Assistant Commissioner of Income Tax erred in adding in adding in income 2% of alleged unexplained entries, in light of the fact that STT Certificate issued by stock exchange itself supports stand of the appellants that the relevant transactions, if any, are not entered into by the appellants.”

3. The brief facts of the case are that the assessee is engaged in the business of share trading. Information was extracted by the AO through Annual Information Report that the assessee has entered into share transactions to the tune of Rs. 20,10,44,369/- through Bombay Stock Exchange(BSE) on various dates. The assessee was asked to explain the sources of purchases/sale of these shares through bank entries. The assessee explained the transactions to a large extent but could not explain many transactions. The assessee had denied to have entered into, in the following share transactions:-

Transaction date	Amount (Rs.)
28.12.2007	26,78,338
	27,81,144
	15,60,675
	14,91,183
	72,46,260
27.12.2007	71,20,008
	14,47,000
2.1.2008	45,78,280
	10,78,010

	21,44,303
4.1.2008	19,97,248
7.1.2008	66,64,353 5,68,134
8.1.2008	36,19,980 39,39,390
10.1.2008	75,40,524 77,26,908
20.2.2008	7,58,640
11.3.2008	11,40,961 7,12,190
Total	7,52,65,347

The assessee vide her letter dated 30-11-2010 denied the above transactions. The contents of the letter are as under:-

“

DECLARATION

I, Mrs. Manjiri P.Shah, having PAN :ANQPS5900A residing 302, Abich Apts., Sarojini Naidu Road, Mulund (W), Mumbai – 400080, in my capacity as individual, I hereby solemnly affirm as under:

1. The Income Tax Authorities have issued notice under Section 143(2) and Section 142(1) of the Income-tax Act, 1961 for the A. Y.2008-09 for the purpose of scrutiny assessment.
2. During the course of assessment proceedings, the Ld. Assessing Officer asked for the clarification as regards entries "ITS Details" generated in the Income Tax database (ITD) dated 23.8.2010 containing 11 pages and 85 entries.
3. In response to the said demand for clarification of entries appearing in the said "ITS details". I have submitted the clarification in respect of all entries except 18 entries which to be best of my knowledge, are not my transactions. The said fact was duly communicated vide letter dated 23.8.2010 of MAY & Co., CAs my authorized AR.
4. Upon the said intimation as regards mismatch of 18 entries, the Ld. Assessing Officer has reportedly issued letter to BSE Ltd as regards such mismatch and reply thereof from BSE Ltd. is reportedly awaited.
5. During the course of proceedings, I have again reiterated the fact that the said mismatch transactions are not my transactions. In

support thereof, I have submitted the ledger copies in respect to all transactions/ daywise and scripwise details of share trading during the F. Y.2007-08 as a matter of further evidence vide letter of my AR dated 23.8.2010. The profit/loss from share trading is fully disclosed in my income-tax return.

6. This declaration is filed with the Ld. Assessing Officer for the purpose of clarification in respect of unmatched AIR entries as mentioned in para 3.

Solemnly confirmed as above this 30th day of November, 2010."

The A.O. in order to reconfirm these transactions through BSE wrote to BSE , wherein in response the BSE vide letter dated 22.11.2010 submitted that complete trade details of the assessee were mentioned in Annexure-I for all the quarters respectively which were submitted to ACIT, Mumbai vide letters dated 18.09.2007, 08.12.2007, 1.2.2008 and 15.5.2008. The BSE also stated that details of copies of accounts / certificate, details of cheques etc. are not available with BSE as it does not enter into any transaction directly with the investors. The AO observed that the BSE has directly confirmed the said transactions , which the assessee is denying out-rightly. The A.O. deputed Ward Inspector to verify the reported transactions who confirmed the transactions after verification. The A.O. observed that it is incumbent upon the assessee to reconcile the transactions with BSE and it is not for the Revenue to reconcile the same. The AO observed that no attempt has been made by the assessee to reconcile the same and mere denial by the assessee does not absolve the assessee from her responsibility. The A.O. observed that the amounts mentioned in AIR do not indicate whether the amounts mentioned therein relate to purchase or sale of shares . The A.O. observed that the assessee has purchased shares of Rs. 24,14,51,096/- and sold the shares of Rs. 24,28,98,229/- as recorded in books of accounts maintained by the assessee, thereby the assessee earned profit of Rs. 14,47,132/- which comes to a profit ratio of 0.59%. The A.O. brought to tax the unrecorded transaction of Rs. 7,52,65,347/- by applying profit ratio of 2% on unrecorded

transactions, which comes to Rs. 15,05,306/- which was brought to tax by the AO as income of the assessee vide assessment order dated 15.12.2010 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 15.12.2010 passed by the A.O. u/s 143(3) of the Act, the assessee filed first appeal before the ld. CIT(A) and made the following submissions :-

“It is humbly submitted that from these very statements in the assessment order it is clear that the very base for additions is very very vague and non verifiable from the view point of your appellants. It is humbly submitted that additions are based on totally vague figures reported by stock exchange which can contain errors. The fact that AIR information gathered contains many errors due to various reasons as well established fact with many assessments taking place where the appellants establish the said information to be erroneous. In the instant case your appellants have been denied opportunity to establish the statement filed by the stock exchange as erroneous because stock exchange has simply refused even to re-verify the records or to give information on trial. It is humbly submitted that the alleged transactions cannot be without money trail and would also be linked to some DEMAT account etc., which information if available can go to prove claim of your appellant to be correct. But simple denial on part of stock exchange to reverify records puts your appellant in a scene where she has no means to prove her position because the addition has been made on the basis of totally vague information. Although our subsequent submissions will establish claim of our client to be correct; it is humbly submitted that fairness of additions sans establishing money trail based on such non verified statements is unjust and addition needs to be set aside on that ground itself.

05. Without prejudice, inspite of all odds against on even conceiving method to establish claims of our client to be correct; we hereby submit the following irrefutable evidence for your kind consideration in the matter. Attention is invited to Securities Transaction Tax certificate issued by the Stock Exchange (Exhibit A) to your appellants. Admittedly this certificate pertains to

Securities Transaction Tax charges on all the transactions entered into by your appellants in the relevant year.

06. We also submit herewith the statement showing total of STT charged as per bills of brokers (Exhibit B), it may be noted that Total STT as per this statement matches with total of STT as per certificate issued by the stock exchange. This would imply that even as per stock exchange the only transactions that have been entered into by our client are those that are reflected in the bills of broker because there can not be any transaction conducted on Stock Exchange without levy of STT.

07. This establishes a fact that there is error in the transaction report as may be submitted to the Income Tax Department by the stock exchange because admittedly there can be no error in STT charging and payment by Stock Exchange.

08. It is humbly submitted that in light of the said irrefutable evidence, the addition, which is solely based on the presumption of accuracy of stock exchange report which itself is very vague and without any money or transaction trails, needs to be set aside as the appellants have fairly established the fact of inconsistency in Stock Exchange reports.

09. It is also humbly submitted without prejudice that even the estimate of profit on alleged transactions has been placed at much higher levels of 2% vis a vis admitted average profit margin of 0.59% on the transactions.

10. In light of the fact that appellants are really constrained on figuring out way to deal with allegations which are based on thin air like statements sans any details. it is humbly submitted that if these submissions are perceived to be not adequate on any count; the fact may be disclosed to appellants and further fair opportunity be granted to deal with any apprehensions left in the matter and to submit any additional evidences as may be necessary."

The ld. CIT(A) after going through the submissions of the assessee, confirmed the additions made by the A.O. in his assessment order dated 15.12.2010 , vide appellate order dated 26.12.2011 by holding as under:-

“3.4. I have gone through the same. The appellant has stated that since these transactions are not her transactions, they cannot be treated as her receipt and accordingly cannot be taxed in her hands. Since these information was received by the A.O. from AIR enquiry which appellant has denied during the assessment proceedings also (as it is seen that an affidavit to that effect was filed by the appellant and which forms part of the assessment order also) , the appellant was asked to furnish a copy of audit report filed along with return of income for instant assessment year i.e. 2008-09 . From the same it has come to notice that the gross turnover in Annexure A of Audit Report in form no. 3Cd says as under:

Refer Note-1”

3.5. I have seen the details given in 'Note-1' which shows script wise quantity for purchases as well as sales for the year 2007 - 08. The purchased quantity is 903020 for total amount of Rs. 24,14,51,096.11 and they have been sold for Rs.24,28,98,229/- resulting into the trade profit of Rs. 14,47,132.91. I have also seen from the written submissions that the appellant has filed Form No. 10-DB under Rule 20AB as evidence of payment of security transaction tax for claiming the STT of Rs. 2,56,963/- which was charged by Bombay Stock Exchange Ltd. on the total value of transactions entered during the F.Y. 2007-08 relevant to A.Y. 2008-09 reflected at Rs. 32,94,49,013.30. Since the appellant has claimed rebate of STT for Rs. 2,56,963/- (for which ground No. 2 was taken in appeal and has now being withdrawn for the reason that same has already been given effect to by the A.O. by passing order u/s. 154 dt. 28.1.2011), it is clear that STT of Rs. 2,56,963/- was paid on total turnover of Rs. 32,94,49,013.30 by the appellant. This is undisputed fact for which appellant has claimed by way of ground No. 2 in appeal also and which has been accepted and given effect to by the A.O. also by giving effect to vide order u/s. 154 dated 28.01.2011. Now having claimed rebate for STT paid of Rs. 2,56,963/- as per this very certificate which was filed by the appellant in Form No. 10DB, now the appellant cannot deny the volume of transaction reflected in that very certificate at Rs. 32,94,49,013.30.

Here in appeal by taking ground No. 1, the appellant is asking the rebate u/s. 88E for STT of Rs. 2,56,963/- on one hand, but is denying that total transactions are not of the volume reflected in same certificate at Rs. 32,94,49,013.30. The appellant in his

trading account has shown sale of shares at Rs. 24,28,98,229/- and has shown purchases at Rs. 24,14,51,096/- on the other hand. Against this, the AIR information reflects transaction amounting to Rs. 20,10,44,369 out of which transactions for the amount of Rs.7,52,65,347/- have not been owned up by the appellant. If sale transactions reflected by the appellant are not owned up transactions though obtained from AIR enquiry of Rs.7,52,65,347/-, the total comes to Rs. 31,81,63,576/-, which is very close to the volume of transactions reflected in Form 10DB where the STT of Rs. 2,56,963/ - has been charged on transaction amounting to Rs. 32,94,49,013.30. In other words, the total of these two figure i.e total of sale proceeds shown by appellant at Rs. 24,28,98,229/- together with not accepted transactions worth Rs. 7,52,65,347/-, i.e. total Rs. 31,81,63,576/- can be reconciled with the transactions amounting to Rs. 32,94,49,013.30 shown in certificate in Form No. 10DB furnished by her only as evidence of payment of security transaction tax.

3.6 Thus on one hand, I am in agreement with the appellant that there was no need to estimate profit on the transactions worth Rs.7,52,65,347/-, not owned up by her, at the same time I am not in agreement with the claim made by the appellant that having availed the rebate of Rs. 2,56,963/- as STT paid still she can claim that turnover is not Rs. 32,94,49,013.30 but only Rs. 24,28,98,229 which she has reflected in her trading account.

Now as the STT of Rs. 2,56,963/- has already been given effect to by passing the order u/s. 154 the value of transactions of Rs. 32,94,49,013.30 has to be considered in the hands of appellant as the sale receipts. In view of this, the A.O. is not left with any discretion to estimate the profit which he has done by taking it at 2% over the entire unaccepted transaction amount of Rs. 7,52,65,347/- as he has to the appellant to reconcile her sales shown at Rs. 24,28,98,229 with the figures reflected in the Form No. 10DB under Rule 20AB at Rs. 32,94,49,013.30. In absence of reconciliation entire gap between these two figures has to be taken as income in the hands of the appellant and while doing the same, there is no need to estimate the profit. Thus total receipts which are already reflected in Form 10DB in the transaction of Rs. 32,94,49,013.30 have to be considered for rebate given of STT paid and given effect to as per the certificate at Rs. 2,56,963/-. In view of this, the ground no. 1 is dismissed.

Thus, the ld. CIT(A) dismissed the appeal filed by the assessee and upheld the additions made in the assessment order dated 15.12.2010 passed by the AO u/s 143(3) of the Act, vide appellate order dated 26.12.2011.

5. Aggrieved by the appellate order dated 26.12.2011 passed by the ld. CIT(A), the assessee filed second appeal before the Tribunal.

6 The ld. Counsel for the assessee submitted that the addition has been made by the A.O. based upon the AIR information. The learned counsel for the assessee submitted that no addition can be made based upon the AIR information. It was submitted that bank statements were submitted as well certificate from BSE was produced wherein details of STT paid was reflected. Thus , no addition can be made based upon AIR information was the contention of learned counsel for the assessee. The assessee relied upon various case laws which are placed in paper book filed by the assessee with the tribunal to contend that additions based on AIR information is not sustainable.

7. The ld. D.R. on the other hand submitted that the assessee failed to reconcile the transactions as reported in AIR information and also confirmed by BSE . It was submitted that even during the proceedings before the ld. CIT(A), the assessee failed to reconcile the transactions as reported by BSE for AIR information and the books of accounts maintained by the assessee , hence, the ld. CIT(A) was quite right in confirming the assessment order passed by the A.O. u/s 143(3) of the Act was the contention of learned DR before the tribunal. The learned DR relied upon the orders of the authorities below.

8. We have heard rival contentions and also perused the material available on record including the case laws relied upon. We have observed that the assessee is engaged in the business of share trading. The assessee is dealing in shares through Bombay Stock Exchange. The assessee has reported turnover of Rs. 24,28,98,229/- as per Books of accounts maintained by the assessee. The assessee has also reported to have purchased shares of Rs. 24,14,51,096/- as per books of accounts maintained by the assessee. It is also observed that the Bombay Stock Exchange has vide AIR information reported to the Revenue that the assessee had entered into total value of transactions reflected at Rs. 32,94,49,013.30 for the previous year relevant to impugned assessment year 2008-09. BSE has reaffirmed and reconfirmed the said traded transactions of Rs. 32,94,49,013.30 of the assessee vide letter dated 22.11.2010. The assessee has filed form no 10DB under Rule 20AB of Income-tax Rules, 1962 wherein total traded transactions admitted by the assessee is Rs. 32,94,49,013.30 against which STT paid reflected is Rs. 2,56,963/- (paper book/page 1) . The assessee had claimed STT rebate of Rs. 2,56,963/- on the total traded transactions of Rs. 32,94,49,013.30 which is an admitted and undisputed position between rival parties . The AO had passed order dated 28.1.2011 u/s 154 of the Act for giving rebate of Rs. 2,56,963/- towards STT on total traded transactions of Rs. 32,94,49,013.30 , which order of the AO was accepted by the assessee and ground of appeal filed before the learned CIT(A) w.r.t. this issue was withdrawn by the assessee. There were un-recorded and un-reconciled traded transaction of Rs. 7,52,65,347/- alleged to be entered by the assessee as per certificate from BSE vis-à-vis books of accounts maintained by the assessee. The assessee has denied to have entered into such transactions but while claiming STT rebate , the assessee has admitted to have entered into these un-reported and un-reconciled transactions of Rs. 7,52,65,347/- . It is also observed that the BSE vide its letter dated 22-11-2010 has also re-confirmed these traded share transactions to the tune of Rs. 7,52,65,347/- which had been denied by the

assessee to have not been entered into. The AIR information relied upon by the AO was generated out of transactions recorded in BSE which was reported to Revenue by BSE . It was incumbent upon the assessee to reconcile the same and more so when STT rebate of Rs. 2,56,963/- is claimed by the assessee on trade transactions to the tune of Rs. 32,94,49,013.30 reported by BSE through AIR information , and not against the recorded trade transactions of Rs.24,28,98,229/- as recorded in books of accounts maintained by the assessee. The case laws relied upon by the assessee are distinguishable and hence cannot be relied upon so as to the extent of quashing the additions made by the authorities below as in the instant case the assessee had herself admitted to have paid STT of Rs. 2,56,963/- on total traded transactions of Rs. 32,94,49,013.30 . The assessee is contending even before us that the assessee had purchased the shares worth Rs. 24,14,51,096/- and sold the shares of Rs. 24,28,98,229/- for which assessee had filed copies of contracts notes in paper book filed before the tribunal . The AO has brought to tax total un-reconciled and un-recorded traded transactions to the tune of Rs. 7,52,65,347/- wherein profit of 2% was estimated as income of the assessee to the tune of Rs.15,05,306/- which was brought to tax vide assessment order dated 15.12.2010 passed by the AO u/s 143(3) of the Act , which was later confirmed/sustained by learned CIT(A) vide his appellate order dated 26.12.2011. Thus, we in principle agree with the reasoning given by the learned CIT(A) in his appellate order dated 26.12.2011 while sustaining the assessment order dated 15.12.2010 passed by the AO u/s 143(3) of the Act that AIR information cannot be simply brushed aside and onus is on the assessee to have reconciled the same instead of merely denying the same. It was incumbent on the assessee herself to have taken-up with BSE directly to clarify as to how un-recorded transaction of Rs. 7,52,65,347/- was reflected against her name in BSE portal . No such efforts seems to have been made by the assessee which is brought on record except simple denial by the assessee which is not sufficient to discharge the burden

cast on the assessee. But at the same time, we have also observed that the assessee has earned net profit of 0.59% on the undisputed traded transactions recorded in the books of accounts maintained by the assessee, which net profit ratio of 0.59% on recorded transactions was accepted by Revenue while framing assessment order dated 15.12.2010 passed by the AO u/s 143(3) of the Act of 1961. In our view the end of substantial and complete justice will be met in the instant appeal keeping in view peculiar facts of the case, if un-recorded transaction in the books of accounts which is reported by BSE to have been entered by the assessee to the tune of Rs. 7,52,65,347/- is also brought to tax by estimating net profit @ 0.59% on Rs.7,52,65,347/-, wherein income is sustained/confirmed in the hands of the assessee to the tune of Rs. 4,44,066/- and rest of the addition stand deleted. We order accordingly.

9. In the result, appeal filed by the assessee in ITA No. 1078/Mum/2012 for assessment year 2008-09 is partly allowed .

Order pronounced in the open court on 22nd February, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22-02-2017 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 22-02-2017।

व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "I" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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