

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं /I.TA No. 5099/Mum/2009

(निर्धारण वर्ष / Assessment Year: 2006-07

Shri Sunay S. Mehta, C/o Dimexon Diamonds Ltd., 804, Raheja Chambers, 213, Nariman Point, Mumbai-400 021	बनाम/ Vs.	The DCIT, Cent. Cir.5, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AIZPM 8292P		

आयकर अपील सं /I.TA No. 5100/Mum/2009

(निर्धारण वर्ष / Assessment Year: 2006-07

Shri Samit S. Mehta, C/o Dimexon Diamonds Ltd., 804, Raheja Chambers, 213, Nariman Point, Mumbai-400 021	बनाम/ Vs.	The DCIT, Cent. Cir.5, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AIZPM 8293N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Assessee by:	Shri Chetan Karia
प्रत्यर्थी की ओर से/Revenue by:	Shri Manjunatha Swamy

सुनवाई की तारीख / Date of Hearing :05.07.2016

घोषणा की तारीख /Date of Pronouncement :21.09.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

These two appeals are filed by the assesseees against the order of the Ld. CIT(A)-Central II, Mumbai dated 19.06.2009 pertaining to

assessment year 2006-07 arising out of the order passed u/s. 143(3) r.w. section 153A of the Act by the Assessing Officer.

2. Except for the figures, common grounds were raised by the assesseees in these appeals as under:

“On the facts and circumstances of the case and in law:

1. The learned CIT (Appeals), erred in confirming the finding of the Assessing Officer in not considering the gains on the sale of shares of Rs. 9,654,563 as long term capital gains and thereby also confirming the consequent denial of exemption u/s 10(38) of the Income- tax Act, 1961.

2. The learned CIT (A) erred in confirming the finding of the Assessing Officer that the purchase of the shares can be considered only on the date of dematerialization and therefore the holding period becoming less than 12 months hence, the capital loss of Rs. 187,083 (10,176,159 - 10,363,242) be treated as short term capital loss.

3. The learned CIT (A) further erred in holding that the purchase value of the shares sold be taken at the average of high and low price of the shares traded on the NSE and BSE on the date of dematerialization viz. RS.10,363,242 and treating the same as unexplained investment in the shares.

4. Without prejudice to above, the appellant has made investment in shares in earlier year which were duly reflected in the books of account of the appellant, hence the addition of Rs. 10,363,242 unexplained investment for the year under consideration may be deleted”.

3. Brief facts are that return of income was filed declaring Long Term Capital gain of Rs. 96,54,563/- and Rs. 69,91,699/- by Shri Sunay S. Mehta and Shri Samit S. Mehta respectively for the Assessment Year 2006-07 and claimed exemption from capital gains u/s. 10(38) of the Act. In the course of the assessment proceedings,

the assesseees were required by Assessing Officer to produce details regarding the transactions of shares namely:

1. Copy of Demat Account reflecting purchase and sale of shares.
2. Broker's Note showing the purchase of these shares
3. Broker's Note showing the sales of these shares
4. Statement of Bank Accounts which shows the payment made to the Broker towards the purchases of shares and receipts from the sale of shares.

3.1. The assesseees furnished the following documents before the Assessing Officer.

1. Copies of contract notes issued by the broker Alliance Intermediaries and Network Pvt. for the purchase of above mentioned shares.
2. Copies of contract notes issued by the broker Ajmera Associates Pvt. Ltd. for the sale of above mentioned shares.
3. Copy of ledger account of Alliance Intermediaries and Network Pvt. Ltd. in the books of assessee
4. Statement of demat account held with Ajmera Associates Pvt. Ltd.

3.2. Further information was required by the Assessing Officer to verify the assessee's claim of purchase of shares and issued summons to the Director of Alliance Intermediaries & Network Pvt. Ltd. (AINPL). However, the Director failed to furnish any reply. The assessee was asked to produce the Director and the assessee also failed to produce the Director before Assessing Officer. The

Assessing Officer made enquiries with National Stock Exchange and Mumbai Stock Exchange with regard to sale of the said shares and noticed from the Demat account with the assessee with Ajmera Associates Pvt. Ltd.,(AAPL) that the said shares were not dematerialized after the purchase but were dematerialized immediately before the date of their sale. Therefore, show cause notice was issued to the assessee stating that the shares were not dematerialized at the time of purchase but were dematerialized either on the same day of sale or two or three days immediately before the sale. Therefore, the said shares are to be treated as Short Term Capital assets and the capital gains derived from the sale of shares are to be treated as Short term capital gain.

3.3. The assessee furnished reply objecting to the Assessing Officer's proposal and gave a detailed explanation stating that the shares purchased were held for more than 12 months before their sale, the capital gains be treated as Long Term Capital gain and exempt u/s. 10(38) as the STT was paid on the shares sold. Subsequently, the Assessing Officer recorded a statement u/s. 131 of the Act from one Mr. Mukesh Chokshi, Director of AINPL wherein he has denied business transactions with these persons therefore the Assessing Officer concluded that the assessee had no transactions with AINPL. He was of the view that the ledger account showing the transactions with AINPL is not genuine, the contract/broker's note produced by the assessee was also not genuine. The shares were not dematerialized after the purchase and they were dematerialized only on the day of sale or 2 to 3 days before the sale, therefore, the Assessing Officer treated the transaction as sham. According to him

entire amount brought into the books of the assessee under capital gain was unaccounted income and is liable to tax u/s. 68 of the Act. Thus, the entire sale proceeds brought into the books as receipts on account of sale of shares were treated as unaccounted income by the Assessing Officer u/s. 68 of the Act.

3.4. Alternatively, the Assessing Officer was of the opinion that since assessee has shown receipts from the sale, there may be purchase of shares on or before the sale, therefore, gain would become Short term capital gain. He was of the view that the purchase if at all it can be considered only on the date of dematerialization in the demat account and the price of the shares on the date of dematerialization is the purchase price. The Assessing Officer was of the view that purchases made by the assessee on those dates were not accounted in the books of accounts, it has to be treated as unaccounted purchases therefore should be treated as unexplained investment in shares.

4. The assessee preferred an appeal before the Ld. CIT(A) and the CIT(A) after considering the evidences furnished by the assessee concluded that the transactions of all these shares sold by the assessee through the registered broker Ajmera Associates are genuine, the transactions were routed through Stock Exchange and the Securities Transaction Tax in respect of all these shares sold were also paid as per the provisions of law. The Ld. CIT(A) held that the contract note for the sale of impugned shares from AAPL are genuine, the payments were routed through banking channels from the reputed broker i.e. AINPL who is also regularly assessed to tax. He

also observed that neither any seized materials were found in the course of search u/s. 132(1) nor any statement on oath u/s. 132(4) was recorded on this issue or any disclosure was made. Further, the corresponding brokerage income earned on the sale of these listed shares have been accepted by the department and charged to tax and therefore the Ld. CIT(A) held that the sale proceeds cannot be disbelieved. Thus, he deleted the addition made u/s. 68 of the Act holding that it is not sustainable in the facts and circumstances and in the light of various decisions. However, he sustained the alternative contention of the Assessing Officer that the addition should be made under Short term capital gain/unexplained investment observing that the evidences collected by the Assessing Officer are sufficient to hold that the impugned listed shares were not dematerialized on or after the alleged date of purchases and assesseees have not furnished sufficient evidences to establish that the impugned shares were genuinely purchased on the specified date from AINPL.

5. The Ld. Counsel for the assessee submits that assesseees have purchased shares from AINPL and the said shares were sold through Ajmera Associates (AAPL) and declared long term capital gain and this was claimed exempt u/s. 10(38) of the Act. The Ld. Counsel for the assessee submits that the addition was solely made based on the statement of Shri Mukesh Chokshi who denied the transaction of purchase of shares with AINPL in which is one of the Directors. The Ld. Counsel for the assessee further submits that when the assesseees have produced the copies of contract notes issued by the broker AINPL for purchase of above mentioned shares, copies of the ledger account of AINPL, the books of the assesseees, the statement given by

Shri Mukesh Chokshi that there were no business transactions with the assessee should not be believed. Referring to question No. 9 which was the question posed by the assessee to Shri Mukesh Chokshi while cross examination, the Ld. Counsel for the assessee submits that when it was questioned that there was balance receivable from AINPL in respect of transaction of shares of assessee and this was settled and no cheques were paid and assessee received the credit for the shares, he simply answered that since his accounts are on the receipt basis, no entries have been passed in his books of account. The Ld. Counsel for the assessee submits that the answer given by Shri Mukesh Chokshi is an evasive answer and he has not denied that the amount receivable from AINPL was adjusted against purchase of shares.

6. The Ld. Counsel for the assessee further referring to page-16 of the Paper book submits that this is the ledger account with AINPL showing the profit earned from speculation of shares and the Assessing Officer in fact assessed this speculation profits in the Assessment Year 2005-06 thereby accepting the transactions with AINPL as genuine. He further submits that the profit on speculative transactions earned during the Assessment Year 2005-06 was utilized for investment in shares purchased during Assessment Year 2006-07 and therefore the authorities below are not justified in holding that the purchase of share transactions from AINPL are not genuine and not justified in treating them as unexplained investment.

7. The Ld. Counsel for the assessee further invited our attention to the decision of the Co-ordinate Bench in the case of Shri Jafferli K.