

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI JASON P. BOAZ, AM AND SHRI SANDEEP GOSAIN, JM**

आयकर अपील सं./ I.T.A. No. 2401/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2003-04)

Smt. Veenaben M. Chauhan 4/78, Bit Chawl, Dr. Ambedkar Road, Parel, Mumbai - 400012.	बनाम/ Vs.	Income Tax Officer Ward 17(3)(4), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AEDPC 6117R		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Satish R. Mody
प्रत्यर्थी की ओर से/Respondent by	:	Shri G.M. Doss

सुनवाई की तारीख / Date of Hearing	:	21/01/2016
घोषणा की तारीख / Date of Pronouncement	:	26/08/2016

आदेश / ORDER

Per Sandeep Gosain, J. M.:

The Present Appeal has been filed by the Assessee against the order of Commissioner of Income Tax (Appeals)-16, dated 10.12.2012 for A.Y. 2003-04 on the grounds of appeal mentioned hereinbelow.

The learned Commissioner of Income Tax (appeal) has erred in disallowing Rs.594044.00/- against principle of natural justice.

Your Appellant submit that the addition of Rs.594044.00/- is without considering the facts and circumstances of the case.

The learned commissioner of income tax (appeals) has erred in confirming reopening the assessment u/s.147 again the principle of natural justice.

Your appellant submit that the original assessment was completed u/s.143(3) and the issue of long term capital gain has been considered while completing the assessment u/s.143(3) your appellant further submit that there are not new facts on the basis of which the assessment was reopen

Your appellant the refore prays for your honour to delete the addition made by the income tax office & to cancel the reopening of assessment reopen u/s.147

Your appellant reserves right to add, alter or modify any of the grounds of appeal.”

2. The brief facts of the case are that the appellant filed its return on 17.02.2004 declaring an income of Rs.71,340/- and the order u/s.143(3) was passed assessing total income at Rs.71,340/-. Thereafter, the case was reopened u/s.147 of the Act by the AO on the ground that the search and seizure operation u/s.132 was conducted on 25.11.2009 by DIT (Investigation)

Mumbai at M/s. Mahasagar Securities Pvt. Ltd. (now M/s. Alag Securities Pvt. Ltd.) and its group concerns as they were found engaged in fraudulent billing activities and business of providing bogus speculation profit/ loss, short term / long term capital gains/ loss, commodities profit / loss on commodity trading (through MCX) and had been continuing this business for many years. During the search, datas from the above companies were extracted. The name of Smt. Veenaben M. Chouhan is among the beneficiaries of M/s. Mahasagar Securities Pvt. Ltd. Accordingly, assessment was reopened u/s.147 by issue of notice u/s.148 of the Act. After issuing notice and seeking reply of the assessee, the order u/s. 143(3) read with section 147 of the Income Tax Act was passed by AO thereby making additions by holding that an amount of Rs.5,04,040/- shown to have been received by the assessee on sale of shares of Buniyad Chemical Ltd, during the year under consideration by treating as 'unexplained cash credit' u/s.68 of the Act and accordingly the said amount was added to the total income of the assessee as undisclosed expenditure u/s.69C of the Act.

3. Aggrieved by the order of the AO, assessee preferred an appeal before CIT(A) and the CIT(A) after considering the case of the assessee dismissed the appeal of the Assessee.

4. Aggrieved by the order of CIT(A), the assessee filed the present appeal before us on the grounds mentioned herein above.

5. Before we come to the merits of the case, we have decided to deal with the grounds raised by Assessee regarding challenging the validity of reopening of assessment u/s.147 of the Income Tax Act.

6. The learned AR appearing on behalf of the assessee submitted that Hon'ble Co-ordinate Bench of ITAT on identical facts in the case of M/s. Yamuna Estate Pvt. Ltd in ITA No.2672/M/2012 for A.Y. 2003-04 has already dealt with similar issue and since the facts are identical, therefore, the learned AR relied upon the order of the Hon'ble Co-ordinate Bench. We looked into the order of the Co-ordinate Bench in ITA No.2672/M/2012, the operative paragraph while dealing with the issue in reopening is reproduced below:

“We further find that the issue of reopening of the assessment in the circumstances as that of the case of the assessee is squarely covered by various other decisions of the Tribunal in the cases of other persons whose name also figured during the search action in the group companies of Shri Mukesh Chokshi.

The co-ordinate bench of the Tribunal in the case of "Smt. Jyoti D. Shah" ITA No. 1843/M/2012 decided on 18.12.14, in almost identical facts, while adjudicating the issue of reopening on the basis of statement of Shri Mukesh Chokshi and further on the basis of details obtained during the search by the investigation wing, has held that under the circumstances the AO was having sufficient reason to believe that there was an escapement of income and accordingly he was justified in reopening the assessment order under section 147 of the Act. The relevant findings of the Tribunal relating to the issue of

reopening in the case of "Smt. Jyoti D. Shah" (supra) for the sake of convenience are reproduced as under:

"3. Rival contentions have been heard and record perused. There was a search undertaken in the case of M/s Mahasagar Securities P.Ltd. and its group companies including M/s.Gold Star Finvest .Ltd. on 25.11.2009. A statement of Shri Mukesh Chokshi, Director of M/ s. Mahasagar Securities P.Ltd. was recorded during the search wherein Mukesh Chokshi had explained in detail the modus of operation of the accommodation entries racket being run by him by floating some 34 companies and admitted to be in business of providing the bogus accommodation entries. Further enquiries by the Investigation Wing also confirmed that many of the subbroking companies floated by Shri Mukesh Chokshi actually did not carry out the transactions through the main' brokers for whom they were claiming to be sub-brokers and all the bills raised by them were illegal, unauthorized and against the provisions of the SCRA Act, 1956. On the basis of the details obtained during the search by the investigation wing, it was noted that the assessee also had made sales and purchases of shares of M/s Buniyad Chemicals Ltd through M/s. Gold Star Finvest P.Ltd which had provided the accommodation entries. M/s Buniyad Chemicals Ltd as well as M/ s. Gold Star Finvest P.Ltd were floated by Mukesh Chokshi only. Since it was admitted by Mukesh Chokshi that he was providing accommodation entries only through its various companies, accordingly a notice u/s. 148 was issued after recording the reasons.

4. As per the reasons recorded, we found that the AO was having sufficient reasons to believe that there was an escapement of income, accordingly, he was justified in reopening the assessment u/s.147 of the Act. Hence, the ground No.1 raised by the assessee is dismissed."

8. In the case in hand, the reopening was made on the basis of information regarding receipt of accommodation entries provided by the group companies of Shri Mukesh Chokshi and further oil basis of statement of Shri Mukesh Chokshi. The facts being identical to that of the case of "Snit. Jyoti D. Shah" (supra) this issue is accordingly decided against the assessee.

7. After perusal of the aforementioned order and hearing the arguments of both the parties, we are of the considered view that since the facts of the present case are identical to the facts of the aforementioned case. As in the aforementioned case, the reopening was made on the basis of information regarding receipt of accommodation entries provided by the group companies of Shri

Mukesh M. Chokshi and Shri Jayesh K. Sampat and further on the basis of statement of Shri Mukesh M. Chokshi. Since the facts being identical to that of present case, therefore, while maintaining judicial consistency and following the precedents which is applicable *mutatis mutandis* in the case of the assessee. We also decide this issue against the assessee and uphold order of reopening.

8. Other grounds raised by the assessee relates to the validity of additions made by AO and confirmed by CIT u/s.69C are concerned, in this connection learned AR appearing on behalf of the assessee submitted that Hon'ble Co-ordinate Bench of ITAT on identical facts in the case of M/s. Yamuna Estate Pvt. Ltd in ITA No.2672/M/2012 for A.Y. 2003-04 has already dealt with similar issue and since the facts are identical, therefore, the learned AR relied upon the order of the Hon'ble Co-ordinate Bench. We have perused the order of the Co-ordinate Bench in ITA No.2672/M/2012, the operative paragraph while dealing with the issue of additions is reproduced below:

“9. So far as the validity of the additions oil are concerned, we find

that in series of Tribunal decisions in various cases wherein on similar statement of Shri Mukesh Chokshi, the cases were reopened and additions were made. In all those cases, the Tribunal has decided the issue of long term capital gain in favour of the assessee holding that the said statement of Shri Mukesh Chokshi was a general statement and could not be corroborated by any material evidence. Some of the decisions in this respect are as following :

1. *Kataria Ketan Ishwarlal Vs. ITO - TA No.4304/M/2007 decided on 30.04. 20 10.*
2. *ACIT Vs. Shri Ravindrakumar Toshniwal TA No.5302/M/2008 decided on 24.02.2010*
3. *ITO Vs. Truptic Shah - TA No. 1442/M/2010 decided on 29.04.2011*
4. *Smt. Manjulaben L. Shah Vs. ITO - PTA No.3112/M/2014 decided on 31. 10. 14*
5. *M/s SDB Estate private ltd. vs. ITO PTA No. 584/M/2015 decided on 15.04. 20 15*

10. We find that the facts of the above stated cases were all most identical to that of the assessee. In the case of "Kataria Ketan Ishwarlal Vs. ITO" (supra), the transactions were carried out through the same broker i.e. M/s Gold Star Finvest Pvt. Ltd. The Tribunal allowed the appeal of the assessee observing as under:

"6.1 We have considered the rival submissions made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. From the copy of the share certificate, Demat account, share transfer form filed in the Paper Book, we find the assessee has purchased 9500 shares of Kushal Software Ltd. from M/s. Handful Investors Pvt. Ltd. We find the Assessing Officer treated the sale of such shares by the assessee through M/s. Gold Star Finvest Pvt. Ltd. as bogus on the ground that Mr. Choksi and his broking company were engaged in giving false share transaction bills. However, from the copy of the statement of Mr. Choksi, a copy of which is filed in the Paper Book, we find Mr. Choksi has not specifically mentioned the name of the assessee for obtaining benefit on sale of such bogus shares. The learned DR also could not point out from the statement of Shri Choksi that he has taken the name of the assessee for obtaining any benefit on issue of such bogus bills. Considering the totality of the facts of the case and considering the fact that the assessee had purchased the shares which were duly transferred to the Dernas account, and, in absence of any allegation against the assessee by Mr. Choksi it cannot be said that the sale of the shares is bogus. In this view of the matter, we hold that the sale transaction entered into by the assessee is genuine transaction. Since the Assessing Officer has not disputed regarding the purchase of house property and since the assessee fulfils the conditions for treating the profit on sale of such shares as long term capital gain and fulfilled the conditions for allowability of deduction u/s. 54F, therefore, we set aside the order of the 01(A) and direct the Assessing Officer to allow the claim of the assessee. This ground by the assessee is accordingly allowed.

7. In the result, the appeal filed by the assessee is partly allowed."

11. Further in the case of "ACIT Vs. Shri Ravi ndrakumar Toshniwal"

(supra), the share profit was earned from the sale of shares. The Tribunal has allowed the claim of the assessee observing as under:

"11. Having heard both the parties and having considered their rival contentions, we find that the AO has treated the said transactions as bogus transactions on the ground that-

- a) The sale transactions were not on the floor of the ASEL but were off market transactions;*
- b) The address of the M/s Buniyad Chemical Ltd. and M/s Talent Infoway Ltd. was the same and the contact person for M/s Buniyad Chemical Ltd. on the floor of ASEL was Shri Mukesh Chokshi.*
- c) Mr. Mukesh Chokshi had stated that the sale proceeds have been paid to the assessee through the funds provided by the assessee.*

12. As regards point (a) above, we find that the issue is covered by the decision of the Tribunal in the case of Mukesh R. Marolia wherein it has been held that off market transaction is not a unlawful activity and there is no relevdnce in seeking details of share transaction from stock exchange when the sale was not on stock exchange and relying upon it for making addition.

13. As regards points (b) & (c) above, we find that the assessee has filed relevant documentary evidence before the AO but the AO has failed to consider the same. The CIT[AJ] in his order has considered the said evidence and has come to the conclusion that the share transactions are genuine. However, as held by the Tribunal in the case of Rajinidevi A. Chowdhary [cited supra], which is on similar set of facts, the AO could have verified from the Registrar of companies as to whether the shares have been transferred and the names of the shareholders in whose names shares have been transferred. The decision of the Tribunal in the case of Rajinidevi A. Chowdhary has also been upheld by the jurisdictional High Court as taken note of by this Tribunal in the case of Shri Pinakin L. Shah [cited supra], to which one of us i.e. the Judicial Member, is a party. In these facts and circumstances of the case, we do not see any reason to interfere with the order of the CIT[A] and the same is upheld.

14 In the result, revenue's appeal is dismissed."

12. In the case of the assessee before us, the AO has not pointed out about any direct or material evidence against the assessee to hold that the share transactions were not genuine. The assessee had furnished before the AO all the necessary details and evidences relating to the share transactions in question. The AO did not raise any query or doubt about the genuineness of the details and evidences submitted by the Assessee. The AO has made additions oil basis of general statement of Mr. Chokshi

made before the investigation wing. The name of the assessee did not appear specifically in any of the statements of Mr. Chokshi. The assessee was not provided opportunity to confront Mr. Chokshi in relation to transactions related to the assessee. The assessee before the CIT(A) has also submitted the confirmation of Sh. Mukesh Chokshi about the share transactions done through his share broking company. The AO in the remand proceedings, however, insisted to produce said Mr. Chokshi for examination as a witness before him. The assessee though could request Mr. Chokshi to appear before the AO, however had no authority or power to force Mr. Chokshi to appear before the AO. On the other hand, the AO u/s 131 of the Act has been given powers as are vested in a civil court to summon and enforce the attendance of witnesses or to compel the production of records before him. Hence under such circumstances, merely because the assessee could not produce Mr. Chokshi before the AO, that itself is not a sufficient ground for the confirmation of the additions. If the AO required the presence of Mr. Chokshi before him, he could have exercised his powers under the Act to secure the presence of Mr. Chokshi before him. Even the Ld. AO, in his remand report, has not controverted the evidences filed by the assessee.

In view of the above discussion of the matter and also respectfully following the above noted decisions of the co-ordinate benches of the Tribunal, we hold that additions made by the AO u/s 68 are not warranted in this case and are accordingly ordered to be deleted.”

9. Since the facts being identical to that of present case as in the present case also the additions were made on the general statement of Mukesh Chokshi which was never corroborated by any material evidence and in the series of decisions of Tribunal the issue of Long Term Capital Gain was decided in favour of respective assessee, therefore, while maintaining judicial consistency and following the precedents which is applicable *mutatis mutandis* in the case of the assessee. We also decide this issue in favour of the assessee.

10. We are of the considered opinion that in view of our above discussion and while respectfully following the decision of the Hon'ble Co-ordinate Bench of this Tribunal, we hold that the addition made by the AO u/s.69C are not warranted in this case and are accordingly ordered to be deleted.

11. Last ground of appeal raised by the assessee is general in nature, therefore, does not require any adjudication.

12. In the result, the appeal of the assessee is allowed in part.

Order pronounced in the open court on 26th August, 2016

Sd/-
(Jason P. Boaz)

लेखा सदस्य / Accountant Member

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :26.08.2016

P.K.K., Sr.P.S.

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)
4. आयकर आयुक्त / CIT – concerned

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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