

आयकर अपीलीय अधिकरण, 'ए' (SMC) न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' (SMC) BENCH : CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखासदस्य एवं श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष
BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER AND
SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.1287/CHNY/2018.
निर्धारण वर्ष /Assessment year : 2014-2015.

Deepak Bhattad (HUF)
C/o. M/s. Patwa Associates,
No.10, Badriah Garden Street,
Chennai 600 001.

Vs. The Income Tax Officer.
Non Corporate Ward 11(3)
Chennai.

[PAN AADHD 9104K]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. D. Anand, Advocate.
प्रत्यर्थी की ओर से /Respondent by : Shri. B. Sagadevan, JCIT.

सुनवाई की तारीख/Date of Hearing : 19-09-2018
घोषणा की तारीख /Date of Pronouncement : 19-09-2018

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the assessee, which is directed against an order dated 26.02.2018 of Id. Commissioner of Income Tax (Appeals)-13, Chennai, it is aggrieved on denial of exemption of long term capital gains of ₹30,22,256/-, arising on transfer of shares claimed

u/s.10(38) of the Income Tax Act, 1961 (in short "the Act") and treating such a sum of ₹30,97,256/- as unexplained income u/s.68 of the Act.

2. Ld. Counsel for the assessee submitted that assessee had sold 5,000 shares of one M/s. Kappac Pharm Ltd for a consideration of ₹30,97,256/- and earned long term capital gains of ₹30,22,256/- arising from such sale, which was claimed as exempt u/s.10(38) of the Act. As per the Id. Authorised Representative, the lower authorities disbelieved the sale of the shares, relying on reports of Directorate of Income Tax (Investigation) Kolkata and Delhi, which mentioned that M/s. Kappac Pharm Ltd was a penny stock company. As per the Id. Authorised Representative, assessee had initially purchased 5,000 shares of that M/s. Kappac Pharm Ltd for ₹75,000/-.Contention of the Id. Authorised Representative was that purchase of these shares was genuine though it was done off market. The sale of these shares were done, as per the Id. Authorised Representative, through recognized stock exchange and ought not have been disbelieved. Contention of the Id. Authorised Representative was that statements recorded from various persons were relied on by the lower authorities for disbelieving the transactions and coming to a conclusion that prices of M/s. Kappac Pharm Ltd were jacked up artificially and assessee had made claim a bogus claim of long term capital gains. Ld. Authorised Representative submitted that these statements, nor the reports of the Investigation Wing of the Department

were put to the assessee. Relying on the decision of Co-ordinate Bench in the cases of *Vimalchand Gulabchand vs. ITO*, *Praveen Chand vs. ITO*, *Gatraj Jain & Sons (HUF) vs. ITO* and *Mahendra Kumar Bhandari vs. ITO* (ITA Nos.2003/17, 1721/2017, 2293/17 and 2748/2017 dated 06.04.2018), Id. Authorised Representative submitted that in similar cases where there was a claim for exemption of long term capital gains on sale of equity shares, the Tribunal had given directions to the Id. Assessing Officer for reconsidering the issue adhering to the rules of natural justice.

3. Per contra, Id. Departmental Representative strongly supporting the orders of the authorities below submitted that there were sufficient and more reasons for lower authorities to disbelieve the transactions claimed by the assessee in the equity shares of M/s. Kappac Pharm Ltd. As per the Id. Departmental Representative, assessee could not produce any evidence to show how he indentified these shares for making an off market purchase. Id. Departmental Representative also placed reliance on a decision of Co-ordinate Bench in the case of *Shri Heerachand Kanunga vs. ITO* (ITA Nos.2786 & 2787/Chny/2017, datd 03.05.2018).

4. We have considered the rival contentions and perused the orders of the authorities below. It is not disputed that long term capital

gains claimed by the assessee as exempt u/s.10(38) of the Act arose on account of sale of equity shares of M/s. Kappac Pharm Ltd. It is also not disputed that the assessee had initially acquired these shares through an off-market transaction. In similar cases of *Vimalchand Gulabchand*, *Praveen Chand*, *Gatraj Jain & Sons (HUF)* and *Mahendra Kumar Bhandari (supra)* where also assessee had claimed exemption u/s.10(38) of the Act on sale of shares, this Tribunal had held as under at para 13 to 16 of its order dated 6.04.2018.

"13. I have considered the rival contentions and perused the orders of the authorities below. The Id. Assessing Officer as well as Ld.CIT(A) had relied on SEBI order dated 29.03.2016, in the case of M/s.Kailash Auto Finance Ltd.. It is true that in the above order, there is a detailed analysis of modus operandi adopted by about eleven numbers of companies, inter alia including M/s.Kailash Auto Finance Ltd. It also mentions how M/s.Kailash Auto Finance Ltd., had built up a huge share premium within a short time of its incorporation. SEBI had also analysed the financials of M/s.CPAN and M/s.PML, which were merged with M/s.Kailash Auto Finance Ltd., and found that there was disproportionate issue of bonus shares by these two companies. Apart from the SEBI report, lower authorities had also relied on a statement obtained from Mr.Sunil Dokania on 12.06.2015 and the report of Investigation Wing of the Department. What I can discern from the orders of the lower authorities is that the statement given by Mr.Sunil Dokania, nor the report of the Investigation Wing relied on by the Assessing Officer, was made available to the assessee, during the course of assessment proceedings. Since these went against the assessee, rules of natural justice require that assessee is given an opportunity to explain what was mentioned in such statement and if necessary, an opportunity to examine Mr.Sunil Dokania. I also find that the AO had not enquired

how the assessee had become aware of the availability of the equity shares of M/s.Panchshul Marketing Ltd., when the said company was not listed and entitled. The finding of the Id. Assessing Officer that the financials of M/s.Kailash Auto Finance Ltd., were not strong enough for justifying the high value of its share is also not supported by sufficient empirical data.

14. Now, coming to the argument of the Id.A.R that assessment having been done pursuant to a search, ought have been u/s.153A to 153D of the Act and not u/s.143(3), I am afraid I cannot toe this line of reasoning. Relevant para in the assessment order relied by the Id.A.R, for buttressing this argument reproduced at para eleven above, hardly suggest that the assessment done on the assessee was pursuant to a search. Just because an investigation was done by the investigation Department of the Department, based on some leads they might have had, reports of which were used against the assessee, would not ipso facto mean that the assessment was pursuant to any search. There is nothing whatsoever on record to suggest that the assessment was based on materials unearthed during a search.

15. However, as already mentioned by me, rules of justice do require that the reports of investigation wing, relied on by the Id. Assessing Officer, as well as the statement recorded from Mr.Sunil Dokania are put to the assessee and its explanation sought, before deciding whether these are relevant in the assessment of the assessee. I also find the SEBI through its order dated 21.09.2017(supra) did vacate its interim exparte order dated 29th March, 2016 restraining 244 entities, inter alia including M/s.Kailash Auto Finance Ltd., from buying, selling or dealing in securities.

16. In the facts and circumstances of the case, I am of the opinion that the question whether the transactions claimed by the assessee, as giving rise to the long term capital gains exempt from tax u/s.10(38) of the Act, were real or sham, requires a re-visit by the Id. Assessing Officer. I set aside the orders of the lower authorities and remit the issue back to the file of the Id. Assessing Officer for consideration afresh in accordance with".

5. In the case of *Heerachand Kanunga (supra)* relied on by the Id.

Departmental Representative, Co-ordinate Bench had held as under:-

"9. A perusal of the facts in the present case admittedly given room for suspicion. However, assessments are not to be done on the basis of mere suspicion. It has to be supported by facts and the facts are unfortunately not forthcoming in the Assessment Order, in the order of the Ld.CIT(A) nor from the side of the assessee. The main foundation of the assessment in the present case is the statement of one Shri Ashok Kumar Kayan who has admitted to have provided bogus Long Term Capital Gains to his clients. The said Shri Ashok Kumar Kayan also allegedly seems to have provided the assessee's name and PAN as one of the beneficiaries. However, this statement given by Shri Ashok Kumar Kayan cannot be the foundation for the purpose of assessment in so far as Shri Ashok Kumar Kayan has not been provided to the assessee for cross-examination. In the absence of opportunity of cross-examination, the statement remains mere information and such information cannot be foundation for assessment.

10. Admittedly, the assessee has claimed to have purchased 15000 shares from M/s.BPL @ Rs.20/- per share totaling into Rs.3,00,000/-. The assessee claims to have paid cash for the purchase of these shares. The primary question would be as to where the purchase was done? If the purchase has been done in Kolkata, how was the cash transferred? When did the assessee received the share certificates and the share transfer forms? How did the assessee overcome the provisions of Sec.40A(3)? Was there adequate cash availability in the books of the assessee on 24.04.2008? Did the assessee travelled to Kolkata? How was the transaction done? Who applied for the demating of the shares? When were they demated? When were the shares transferred to the demat account of the assessee? To whom were the shares sold during the Assessment Years 2010-11 & 2011-12? When were the cheques received by the assessee? From whom did the assessee received the cheques? Was there any cash deposit immediately prior to the issuing of the cheque from the bank account of the purchaser of the shares of the assessee?

11. A perusal of the Assessment Order at Para No.7.1 shows that in the Written Submissions, the assessee states that he has purchased 15000 shares of M/s.BPL from M/s.ABPL, Kolkata. However, in Para No.8.3, it is mentioned that the assessee in good faith has purchased the shares of M/s.BPL from a sub-broker in his friends circle. What is the true nature of the transaction? From whom did the assessee actually purchase the shares? Did the assessee take possession of the shares in its physical form? In Para No.8.1 of the Assessment Order, it is mentioned that the assessee is an investor and has been regularly trading in shares. If this is so, does the demat account show such transactions being done by the assessee or is this the only one of transaction. Thus, clearly the facts required for adjudicating the appeals are not forthcoming. There is no evidence whatsoever to show that the assessee has held the shares for more than 12 months. This is because assuming that the demat has been done and the shares of M/s.BPL has come into the assessee's demat account and has immediately flown out. Then the factum of the possession of the shares for more than 12 months have to be proved by the assessee. This is also not forthcoming. In reply to a specific query, as the date of the demat of shares, it was submitted by the Ld.AR that the demat was done on various dates. Then the question rises as to why there is so much of difference in the dates of demating when 15000 shares have been purchased together on 24.04.2008. No details in respect of M/s.BPL company is known, what is the product of the company which had lead to the share value of the company to go up from Rs.20/- to Rs.352/- in a period of two years. This would clearly be a case where the share value of the company was hitting the circuit breaker of the stock exchange on a daily basis and obviously it would have drawn attention. This being so, as the facts are not coming out of the Assessment Order nor the order of the Ld.CIT(A) nor from the side of the assessee, we are of the view that the issues in this appeal must be restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity to substantiate its case and we do so.

12. The statement recorded by the Revenue from Shri Ashok Kumar Kayan cannot be used as an evidence against the assessee in so far as the statement has not been given to the assessee nor has Shri Ashok Kumar Kayan been provided to the assessee for cross-examination. However, the assessee shall prove the transaction of the Long Term Capital Gains in respect of

which the assessee has claimed the exemption u/s.10(38) by providing all such evidences as required by the AO to substantiate the claim as also by producing the persons through whom the assessee has undertaken the transaction of the purchase and sale of the shares which would include the sub-broker, friend and the broker through whom the transaction has been done, before the AO for examination”.

6. The fact situation here, is similar to the above two cases decided by the Co-ordinate Bench. We are therefore of the opinion that the transactions claimed by the assessee whether real or sham, requires a revisit by the Id. Assessing Officer. Similar directions as given in the cases of *Vimalchand Gulabchand, Praveen Chand, Gatraj Jain & Sons (HUF)* and *Mahendra Kumar Bhandari (supra)*, read alongwith the directions given in the case of *Heerachand Kanunga (supra)* are given herealso. Useful reference may be made to the law laid down by Hon'ble Apex Court in the case of *CIT vs. Sunita Dhadda, SLP (Civil) No.9432/2018, dated 28.03.2018*, while affirming a judgment of Hon'ble Rajasthan High Court in the case of *CIT vs.Smt. Sunita Dhadda*, where the importance of providing an opportunity to cross examine the witness has been stressed. Their lordship held that this was an important constituent of natural justice. Only after all the steps required under law is complete, it can be ascertained whether claim of capital gains was bogus or not. We therefore set aside the orders of the lower authorities and remit the issue back to the file of the Id. Assessing Officer for consideration afresh in accordance with law.

7. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on Wednesday, the 19th day of September, 2018, at Chennai.

Sd/-

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:- 19th September, 2018.

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |