

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 265 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE SONIA GOKANI****and****HONOURABLE MS. JUSTICE NISHA M. THAKORE**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

THE PRINCIPAL COMMISSIONER OF INCOME TAX**Versus****DENISHA RAJENDRA KESHWANI****Appearance:****M R BHATT & CO.(5953) WITH LD.ADV.MR.KARAN SANGHANI for the Appellant(s) No. 1****for the Opponent(s) No. 1****CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI****and****HONOURABLE MS. JUSTICE NISHA M. THAKORE****Date : 22/11/2021****ORAL JUDGMENT****(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)****1. Aggrieved by the order dated 14.08.2019**

passed by the Income Tax Appellate Tribunal 'the ITAT' hereinafter) the appellant raises the following substantial question of law for the determination of this Court.

“Whether the Appellate Tribunal is justified in law and on facts in disposing the appeal of the revenue on account of low tax effect without deciding the appeal on merits even when the issue under appeal was claimed of bogus LTCG on penny stock for which no monetary limits were applicable?”

2. The search and survey action was carried out at the residence and offices of Mr.S.C.Shah and at the residence of his key employees and associates on 09.04.2013. It was noticed that Mr.S.C.Shah was engaged in providing accommodation entries of share capital, share premium, share application money, unsecured loans, long term capital gain, etc. wherein the cash received by him

from various persons. For providing accommodation entries, Shri S.C.Shah created an infrastructure of 212 companies which were used for layering of funds and purchase and sale of shares.

2.1 Mr.S.C.Shah admitted the factum of facilitating the conversion of unaccounted funds received in cash from the beneficiaries into long term capital gain by transacting in shares of various listed companies managed and controlled by him.

2.2 The Assessing Officer was of the view that the shares of Praneta Industries Limited were used for providing various types of accommodation entries i.e. long term capital gain, short term capital gain as well as the trading loss. Therefore, the trading and the shares were considered as

sham transactions and the additions were made of Rs.93,95,042/- on account of the bogus long term capital gain.

3. Aggrieved by the assessment order, the Assessee preferred an appeal before the CIT (Appeals) which deleted the additions by holding that these transactions cannot be treated as sham transactions and allowed the appeal.

4. The Department challenged it before the ITAT the order of the CIT (Appeals). The Appeal came to be dismissed by the Tribunal of the Department on the low tax effect since the tax effect was to the tune of Rs.28,31,997/- and the prescribed monetary limit of Rs.50 Lakh for filing an appeal before the Tribunal. The Tribunal at the same time had given a liberty to the

Department to seek recall of dismissal of appeal if the matter falls within the exceptions.

5. The appellant is before this Court seeking to question the Tribunal's order which according to the appellant, has overlooked the fact that the Assessee had claimed the bogus LTCG through penny stock and hence, it falls under the exception carved out in Circular No.23 of 2019 dated 06.09.2019 and OM dated 16.09.2019 which provided that the monetary limit for filing an appeal shall not apply to the cases where Assessee claimed bogus LTCG/LTCL through penny stock. Therefore, the aforementioned question of law before this Court.

6. We have heard the learned senior

advocate, Mr.Manish Bhatt assisted by the learned advocate, Mr.Karan Sanghani.

7. This Court in Special Civil Application No.7520 of 2021 has dealt with the very issue in detail and dismissed the said petition on 26.06.2021, which has not been thereafter challenged further. Yet another petition being Special Civil Application No.8621 of 2021 has also been along the line of Special Civil Application No.7520 of 2021 concluded.

7.1 Apt would be to refer to the relevant findings and observations of the Court.

“4. In order to appreciate the submissions made by the learned Senior Advocate, Mr. M.R.Bhatt it would be beneficial to reproduce the circular dated 06.09.2019 and Office Memorandum dated 16.09.2019:

Circular No. 23 of 2019.

F. No. 279/Misc./ M-93/2018-ITJ(Pt.)

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

Judicial Section

New Delhi, 6th September 2019

Subject: Exception to monetary limits for filing appeals specified in any Circular issued under Section 268A of the Income Tax Act, 1961-reg.

Reference is invited to the Circulars issued from time to time by Central Board of Direct Taxes (the Board) under Section 268A of the Income Tax Act, 1961(the Act), for laying down monetary limits and other conditions for filing of departmental appeals before Income Tax Appellate Tribunal (ITAT), High Courts and SLPs/appeals before Supreme Court.

2. Several references have been received by the Board that in large number of cases where organised tax evasion scam is noticed through bogus Long Term Capital Gain (LTCG)/Short Term Capital Loss (STCL) on penny stocks and department is unable to pursue the cases in higher judicial fora on account of

enhanced monetary limits. It has been reported that in large number of cases, ITATs and High Court have recognized the unique modus operandi involved in such scam and have passed judgements in favour of the revenue. However, in cases where some appellate fora have not given due considerations to position of law or facts investigated by the department there is no remedy available with the department for filing further appeal in view of the prescribed monetary limits.

3. In this context, Board has decided that notwithstanding anything contained in any circular issued u/s 268A specifying monetary limits for filing of departmental appeals before Income Tax Appellate Tribunal (ITAT), High Courts and SLPs/appeals before Supreme Court, appeals may be filed on merits as an exception to said circular, where Board, by way of special order direct filing of appeal on merit in cases involved in organised tax evasion activity.

(Neetika Bansal)

Director (ITJ) CBDT, New Delhi.

OFFICE MEMORANDUM

F.No. 279/Misc./M-93/ 2018-ITJ(Pt.)

Government of India

*Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
New Delhi, Dated: 10th September, 2019*

OFFICE MEMORANDUM

Subject:- Special order of Board exempting cases involving bogus Long Term Capital Gains (LTCG)/ Short Term Capital Loss (STCL) through penny stocks from monetary limits specified in any Circular issued under Section 268A of the Income Tax Act, 1961-reg.

The undersigned is directed to refer to Circular No. 23 of 2019 dated 6th September, 2019 and to say that by virtue of powers of the Central Board of Direct Taxes u/s. 268A of Income Tax Act, 1961, the monetary limits fixed for filing appeals before ITAT/HC and SLPs/ appeals before Supreme Court shall not apply in case of assesses claiming bogus LTCG/STCL through penny stocks and appeals/ SLPs in such cases shall be filed on merits.

*(Abhishek Gautam)
DCIT(OSD)(ITJ-1),
CBDT, New Delhi. “*

5. The petitioner-original applicant having filed the Miscellaneous Application before the Tribunal under Section 254(2) of the said Act for rectifying the mistake apparent from the record, it would be also beneficial to reproduce the relevant part of Section 254(2) of the said Act.

*“254. Orders of Appellate Tribunal (1) *** (2) The Appellate Tribunal may, at any time within six years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer”*

6. So far as the facts of the case are concerned, the Appeal filed by the petitioner before the Tribunal against the order passed by the CIT(Appeals) was dismissed by the Appellate Tribunal by a common order passed on 14.08.2019, in view of the CBDT circular dated 08.08.2019. Admittedly, at the relevant time when the Tribunal passed the order dated 14.08.2019, neither the Circular No. 23 of 2019 dated 06.09.2019 nor the Office Memorandum No.

279 dated 16.09.2019 was in existence. Apart from the fact that the said circular and the Office Memorandum being not in existence and therefore not taken into consideration by the Tribunal while disposing all the Appeals could not be said to be a mistake apparent from the record as contemplated under sub-section (2) of Section 254 of the said Act, the Court also does not find any substance in the submission of Mr. Bhatt that the Tribunal should have recalled the order dated 14.08.2019 in view of the said Circular dated 06.09.2019 and the Office Memorandum dated 16.09.2019, which had retrospective effect. The Court at this juncture does not think it appropriate to deal with the facts of the case, as the main issue that falls for consideration before this Court in the present petition would be, as to whether the Circular dated 06.09.2019 and the Office Memorandum dated 16.09.2019 had any retrospective effect as sought to be submitted by learned Advocate Mr. Bhatt.

7. From the bare reading of the Circular dated 06.09.2019, it appears that the CBDT had decided that notwithstanding anything contained in any Circular issued under Section 268A specifying monetary limits for filing of departmental appeals before the Income

Tax Appellate Tribunal (ITAT), High Courts and SLPs/ Appeals before the Supreme Court, appeals may be filed on merits as the exception to the said Circular, where the Board by way of special order direct filing of appeals on merits in cases involved in organized tax evasion activity. The Office Memorandum dated 16.09.2019 was issued pursuant to the said circular dated 06.09.2019 stating inter alia that by virtue of the powers of CBDT under Section 268A of the Income Tax Act, the monetary limits fixed for filing appeals before ITAT/High Court and SLPs/Appeals before Supreme Court shall not lie in case of assessee claiming bogus LTCG/STCL through penny stocks and appeals/ SLPs in such cases appeals shall be filed on merits. There is nothing to suggest in the said Circular/ Office Memorandum that they shall have retrospective effect. On the contrary, from the language employed in the said Circular dated 06.09.2019, it clearly transpires that the appeals may be filed on merits as an exception to the other Circulars issued earlier, where the Board by way of special order direct filing of Appeals on merits in the cases involved in organized tax evasion activity. Therefore, by virtue of the said Circular dated 06.09.2019, the appeals could be filed on merits, irrespective of the monetary limits fixed in earlier

cases, if the Board passes special order for filing appeals in cases involving tax evasion activity. The said Circular speaks about the Appeals that may be filed with the special order of the Board in future, and hence could not be construed to have retrospective effect. The Tribunal interpreting the said Circular/ Office Memorandum in the impugned order has rightly observed that in respect of each case or category of cases whether an appeal should be filed in view of the Circular dated 06.09.2019 or not shall be decided by the Board by way of special order, and thus a specific requirement of issuance of special order by CBDT is a must. The Tribunal therefore has rightly held that the CBDT Circular No. 23/2019 dated 06.09.2019 should be read along with the Office Memorandum dated 16.09.2019, in respect of the appeals to be filed pursuant to such special orders of CBDT and shall apply to all the appeals filed on or after 16.09.2019 by the revenue, where the tax effect may be low but the appeal could still be filed by the revenue on merits.

8. The appeals including the appeal in case of the respondent, which were disposed of by the Tribunal vide the common order dated 14.08.2019 could not be said to have been filed pursuant to the special order

of the CBDT in view of the Circular dated 06.09.2019 read with the Office Memorandum dated 16.09.2019, and therefore it could not be said that the Tribunal had committed any mistake apparent from the record, which would require rectification as envisaged in Section 254(2) of the said Act.

9. In that view of the matter, the Court does not find any illegality or infirmity in the impugned order dated 09.09.2020 passed by the Tribunal dismissing the Miscellaneous Application filed by the petitioner. The petition being devoid of merits is dismissed in limine.”

8. Here also the issue being identical, this appeal merits no consideration and is dismissed accordingly.

THE HIGH COURT
OF GUJARAT

WEB COPY

Sd/-
(SONIA GOKANI, J)

Sd/-
(NISHA M. THAKORE, J)

M.M.MIRZA