

आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“G” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.7354/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

Income tax Officer-4(3)(3) Room No.637, 6th Floor Aaykar Bhawan, Mumbai-400 020.	बनाम/ Vs.	Shri Sajjan Kumar Bajoria 384-B, Dabholkarwadi, 3rd Floor Kalbadevi, Mumbai-400 002.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AIEPB-2732-L		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./ I.T.A. No.7355/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2014-15)

Income tax Officer-4(3)(3) Room No.637, 6th Floor Aaykar Bhawan, Mumbai-400 020.	बनाम/ Vs.	Smt. Sushila Devi Bajoria 384-B, Dabholkarwadi, 3rd Floor Kalbadevi, Mumbai-400 002.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AIEPB-2731-K		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Hariom Tulsiyani – Ld. AR
Revenue by	:	Shri T.S. Khalsa- Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	07/01/2021
घोषणा की तारीख / Date of Pronouncement	:	20/01/2021

आदेश / ORDER

Per Bench

1. Aforesaid appeals by revenue for Assessment Years 2013-14 & 2014-15 in case of different assessee contest separate order of learned first appellate authority. However, the facts as well as

issues are identical in both the appeals and it is admitted position that adjudication in any of the appeal would equally apply to other appeal also. Accordingly, we proceed to adjudicate ITA No.7354/Mum/2017 which assails the order of Ld. Commissioner of Income Tax (Appeals)-9, Mumbai [CIT(A)], Appeal No.CIT(A)-9/ITO-4(3)(3)/125/16-17 dated 03/10/2017 wherein the assessee is aggrieved by confirmation of certain addition u/s 68 since the claim made u/s 10(38) towards sale of shares was denied.

2. We have carefully heard the rival submissions, perused orders of lower authorities and gone through documents and written submissions as placed in the paper-book. The judicial precedents as cited during the course of hearing have duly been deliberated upon. Our adjudication to the appeal would be as given in succeeding paragraphs.

Assessment Proceedings

3.1 An assessment has been framed against assessee for the year under consideration u/s 143(3) on 22/03/2016 wherein the assessee has been saddled with certain addition u/s 68 in view of the fact that Long-Term Capital Gain (LTCG) earned on sale of certain shares of an entity namely M/s Quest Financial Services Limited (QFSL) was declared as bogus and the same was added to the income of the assessee as unexplained cash credit u/s 68.

3.2 The allegation of Ld. AO would stem from the fact that pursuant to enquiry conducted by investigation wing, Kolkata in the case of a person namely Shri Prakash Jajodia, it transpired that

Shri Prakash Jajodia, with the help of number of dummy entities, provided bogus LTCG to various beneficiaries against commission. The shares were stated to be sold by the assessee through an entity namely M/s Anumati Stock Broking Private Limited (ASBPL) which was allegedly promoted by Shri Prakash Jajodia.

3.3 In response to notice issued by investigation wing, Shri Prakash Jajodia admitted to have accepted cash from various beneficiaries and deposited the same in various dummy companies by creating artificial layering which was finally used to buy shares from the beneficiaries including assessee to provide bogus LTCG. All these dummy companies were stated to be managed and controlled by Shri Prakash Jajodia and his associates. Based on these findings, it was alleged by Ld.AO that the assessee introduced his own money in the garb of LTCG and accordingly, issued a show-cause notice to the assessee during the course of assessment proceedings to substantiate these transactions.

3.4 The fact are that the assessee had purchased 4000 shares of an entity namely M/s Pran Jeevan Distributors Pvt. Ltd. (PDPL) on 19/07/2010 at a price of Rs.500/- per share from M/s Fairdeal Vincom Private Limited, allegedly another bogus entity. Admittedly, the payment was made through banking channels. However, subsequently M/s PDPL got merged with M/s QFSL during September, 2011 with the approval of Hon'ble High Court at Calcutta and existing shares of M/s PDPL got exchanged with new shares of M/s QFSL. These shares were ultimately sold by the assessee through recognized stock exchange in online mechanism

between 22/01/2013 to 07/03/2013 giving rise to LTCG in the hands of the assessee.

3.5 The assessee defended the genuineness of the transactions by submitting that the investment were made in ordinary course and the share were sold through recognized stock exchange in online mechanism. The sale consideration was received through banking channels. All the conditions as prescribed u/s 10(38) were duly fulfilled by the assessee. The assessee also denied having met Shri Prakash Jajodia at any time and denied having made any cash payment to any of his entities. The attention was drawn to the fact that the assessee was habitual investor engaged in trading of shares since past several years.

In support of impugned transactions, copies of purchase bill issued by M/s Fairdeal Vincom Private Limited, bank statement, sale contract notes issued by M/s ASBPL as well as demat statements were submitted. The sale consideration was shown to have been received through banking channels. A plea was raised that no addition could be made solely on the basis of statement of any unknown person without giving any opportunity of cross examination. At the same time, the assessee demanded cross-examination of persons making adverse statement against the assessee. Another plea was that since sale transactions took place through recognized stock exchange in online mechanism and proceeds were received through normal banking channels, the source of credit was fully explained and no addition could be made as unexplained cash credit u/s 68 since assessee had established the identity of the payer as well as genuineness of the transactions.

3.6 However, primarily going by the findings of investigation wing, Ld. AO rejected the submissions thus made by the assessee by alleging that the entire transaction was camouflaged in the guise of LTCG. The shares of a non-descript dummy company was purchased without verifying the financial strength, nature of business, its profitability & credentials etc. Finally, the sale consideration thus received was treated as assessee's undisclosed income and added as unexplained cash credit u/s 68 while computing the total income.

Proceedings before Ld. CIT(A)

4.1 Aggrieved as aforesaid, the assessee contested the impugned addition before Ld. CIT(A) and inter-alia, reiterated that the gains so earned were genuine and the same could not be treated as bogus merely on the basis of third-party statements particularly when no opportunity of cross-examination was provided to the assessee. Reliance was placed on various judicial pronouncements in support of various pleas, which have already been extracted in the impugned order and not repeated here to avoid duplication.

4.2 The Ld. CIT(A) observed that the assessee was regular investor in equity market as evident from its Balance Sheet for past several years. The transactions of purchase and sale of shares were backed by requisite documentary evidences and all the conditions as prescribed u/s 10(38) were duly fulfilled by the assessee. The purchase of shares in earlier years was accepted and not held to be bogus. The documentary evidences as furnished by the assessee were not found to be false or fabricated, in any

manner. Since the shares were sold in online mechanism through recognized stock exchange, there was no privity of contract between the assessee and buyer of these shares.

4.3 It was also observed that Ld. AO, during the course of assessment proceedings, had taken a detailed statement on oath from the assessee wherein Ld. AO could not disprove his contentions and did not find anything adverse with regard to the impugned capital gains but this fact was conveniently ignored by Ld. AO while framing the assessment. The purchase as well as sale of shares was sufficiently documented and supported by a number of evidences in the form of share purchase bill, bank statement evidencing movement of funds through banking channels, demat statement evidencing movement of shares and sale contract notes. The sale transactions were subjected to Securities Transaction Tax (STT). None of these evidences could be controverted by Ld. AO.

4.4 Proceeding further, another finding was that investigation report as well as recorded statements as forwarded by DIT (Investigation) did not specifically name the assessee as beneficiary of such transactions. Therefore, the inference drawn by Ld. AO solely on the basis of said reports and statement of Shri Prakash Jajodia could not form basis for treating the LTCG as bogus. The Ld.AO failed to conduct any independent investigation to point out defects in the evidences furnished by the assessee. No adverse inference could be draw with respect to the genuineness of the transactions merely because the addresses of several entities were common.

4.5 Another observation was that the statement made by Shri Prakash Jajodia u/s 133A during the course of survey proceedings would have no evidentiary value unless corroborated with cogent material and the same could not form the basis of addition in case of third-parties as held by Hon'ble Apex Court in **CIT V/s S.Khader Khan 300 ITR 157** as well as Hon'ble Bombay High Court in **CIT Vs Ashish International (ITA No. 4299 of 2009 dated 22/02/2011)**. No opportunity of cross-examination of persons making adverse statement against the assessee was ever provided to the assessee. Further, the statement made by Shri Prakash Jajodia did not refer to any exchange of cash between the assessee and any of his entities. Therefore, the said transactions could not be treated as bogus transactions in terms of decision of Mumbai Tribunal in **Shyam R.Pawar V/s DCIT (ITA No. 5585/Mum2011 dated 04/05/2012)**. The appeal filed by the department against the said order stood dismissed by Hon'ble Bombay High Court which is reported at 54 Taxmann.com 108. Similar was the decision of Mumbai Tribunal in **Mukesh Marolia V/s CIT (6 SOT 247)** Mumbai which was first approved by Hon'ble Bombay High Court and thereafter SLP filed by the department against the same stood dismissed by Hon'ble Apex Court by way of CA No.20146/2012 dated 27/01/2014. Similar was the ratio of various other decisions as elaborated in the impugned order. In the above background, the additions made by Ld. AO were deleted which has given rise to revenue's appeal before us.

Our Adjudication

5. We have carefully considered the factual matrix as enumerated in the preceding paragraphs and gone through the orders of lower authorities. We find that the purchase as well as sale transactions undertaken by the assessee were duly backed by sufficient documentary evidences in the shape of purchase bills, bank statements, demats statements and sale contract notes. The sales transactions have taken place in online mechanism through recognized stock exchange wherein the identity of the buyer would not be known and there would be no privity of contract between the assessee and prospective buyers of shares. The funds have moved in and out through banking channels. Similarly the shares have moved in and out of assessee's demat statement. All these evidences remain uncontroverted and no defect has been found in the same. It is another undisputed fact that the assessee was a habitual investor of shares for past several years. The purchase of shares in earlier year was duly reflected in its Balance Sheet which was accepted by the revenue. Apparently, all the conditions as prescribed u/s 10(38) have duly been fulfilled by the assessee.

6. On the other hand, the whole basis of disregarding these transactions is the findings rendered by investigation wing merely on the basis of statement of Shri Prakash Jajodia. Firstly, this statement was made u/s 133A during survey operations which would have no evidentiary value unless backed by cogent corroborative material on record. Secondly, the opportunity to cross-examine the persons making adverse statement was never provided to the assessee despite specific request of the assessee.

Another uncontroverted finding is that the assessee was not named either in investigation report or in the statement made by Shri Prakash Jajodia. There is no admission or finding that any cash got exchanged between the assessee and any of the alleged bogus entities of Shri Prakash Jajodia. It is trite law that no additions could be made merely on the basis of suspicion, conjectures or surmise. The addition thus made purely on the basis of third-party statement recorded at the back of the assessee could not be sustained in the eyes of law unless the same are confronted to the assessee and the same are backed by any corroborative material.

The Hon'ble Apex Court in **M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006)** held that not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected.

The proposition that additions merely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law stem from the decision of Hon'ble Supreme Court in **Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151)** wherein it was held that the suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in **Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271)**.

In view of the forgoing, it could very well be said that onus casted upon Ld. AO to corroborate the impugned additions by controverting the documentary evidences furnished by the

assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged. The whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said parties. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue.

7. The case law of **SEBI V/s Kishore R. Ajmera (6 SCC 368)** as relied upon by Ld. Sr. DR during the course of hearing has been rendered in the context of penalty imposed on brokers who were found to be indulging in circular trading. However, the facts are different here since the allegations of Ld. AO are not backed by any cogent material to establish the role of the assessee in manipulating the share prices. Similarly, the decision of Hon'ble Apex Court in **SEBI V/s Rakhi Trading Pvt. Ltd. (CA No. 1969 of 2011)** deal with a situation wherein there was allegation of non-genuine transactions carried out by traders and brokers, which is not the case here. Both these case laws are in different factual context and hence, not applicable to the facts of the present case.

8. Keeping in view all these factors, we are of the considered opinion that the additions thus made by Ld. AO had no legs to stand and therefore, the same has rightly been deleted by Ld. CIT(A). Finding no reason to interfere in the impugned order, we dismiss the appeal.

ITA No. 7355/Mum/2017, AY 2014-15

9. As stated earlier, the facts as well as issues are *pari-materia* the same for this assessee. An assessment was framed u/s 143(3)

on 28/12/2016 wherein the exemption claimed u/s 10(38) was denied and sale proceeds of shares were considered as unexplained cash credit u/s 68. However, upon further appeal, the additions were deleted by Ld. first appellate authority vide order dated 04/10/2017 on similar logic and reasoning. Aggrieved, the revenue is in further appeal before us with similar grounds of appeal. Facts as well as issues being pari-materia the same as in preceding appeal, our findings as well as adjudication therein shall *mutatis-mutandis* apply to this appeal also. Consequently, the appeal stand dismissed.

Conclusion

10. Both the appeals stand dismissed.

Order pronounced on 20th January, 2021.

Sd/-
(Mahavir Singh)
उपाध्यक्ष / **Vice President**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 20/01/2021
Sr.PS, JaisyVarghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.