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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 08.12.2022*

+ **ITA 519/2022**

PR. COMMISSIONER OF INCOME TAX -12Appellant

Through: Mr Zoheb Hossain, Sr. Standing
Counsel with Mr Vipul Agrawal,
Advocate.

versus

SMT. BINDU GARG

.....Respondent

Through: None.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE MINI PUSHKARNA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 52863/2022[Application filed on behalf of the appellant
seeking condonation of delay in refiling the appeal]

1. For the reasons given in the application, the delay of 175 days in
refiling the appeal is condoned.

2. The application is disposed of in the aforesaid terms.

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3. This appeal is directed against the order dated 06.08.2019 passed by
the Income Tax Appellate Tribunal [hereinafter referred to as "Tribunal"] in
ITA No. 1168/Del/2019.

4. The Tribunal *via* the said order disposed of not only the appeals of the
respondent/assessee in the instant case, but also the appeals preferred by two
other assesseees i.e., Ms Karuna Garg and Ms Krishna Devi.

5. In the case of the respondent/assessee i.e., Smt. Bindu Garg, the allegation is that she bought shares of M/s Rander Corporation Ltd. and M/s Esteem Bio Food Proceeding Ltd.

5.1 These shares were, according to the appellant/revenue, sold and the assessee registered a long-term capital gain amounting to Rs. 39,78,101/-. The entire transaction, according to the appellant/revenue, was a sham, brought to light by the Investigation Report of DIT (Inv.) Kolkata unit.

6. The Tribunal *via* the impugned order has noted, that the assessing officer has not applied his mind, and has merely relied upon the Investigation Report.

6.1 According to the Tribunal, as to whether or not the assessee was aware of the fact that the shares of the aforementioned companies which had been bought were through penny stocks, was an issue of fact.

7. It also appears from the record, that SEBI had carried out investigations against 239 persons.

7.1 The Tribunal records, that the names of the aforementioned companies were not in the list of the said 239 persons. Paragraphs 19 to 26 bring out these core facts. For the sake of convenience, the same are set forth hereinafter:

“19. We have carefully considered the orders of the authorities below and the relevant documentary evidences brought on record in the form of paper book in the light of Rule 18 (6) of FIAT Rules. Whether or not a person has discharged the burden cast upon A him by the provisions of section 68 of the IT Act is always a question of fact. All that has to be seen by us is whether the appellant has discharged the initial onus cast upon him by the provisions of section 68 of the IT Act.

20. There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been

routed from de-mat account and the consideration has been received through banking channels.

21. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings.

22. Section 142 of the Act contains the provisions relating to enquiry before assessment.

23. It is provided u/s. 142. (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and reaffirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry.

24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The ex parte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio. Organic Food Processing Ltd - a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also.

25. As mentioned elsewhere the brokers of the assessee namely ISG

Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase /sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void.”

8. According to us, these being findings of fact, they cannot be interfered by us.

9. We are also informed, that the appellant/revenue had preferred appeals against the very same order in the case of Ms Karuna Garg and Ms Krishna Devi.

9.1 These appeals were numbered as ITA 477/2022 and ITA 125/2020. ITA 477/2022 was dismissed by a coordinate bench on 23.11.2022, while ITA 125/2020 was dismissed by this Court on 15.01.2021.

10. Given this position, we are not inclined to interfere with the impugned order.

11. The appeal is accordingly dismissed.
12. The registry will dispatch a copy of the order passed today to the respondent/assessee *via* all modes, including e-mail.

RAJIV SHAKDHER, J

MINI PUSHKARNA, J

DECEMBER 8, 2022 / tr

[Click here to check corrigendum, if any](#)

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