

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 9358/DEL/2019
[Assessment Year: 2015-16]

Smt Ritu Jain
11, Babar Lane,
Bengali Market, New Delhi

Vs. The A.C.I.T
Central Circle -53(1)
New Delhi

PAN: AAMPJ 9586 C

[Appellant]

[Respondent]

Date of Hearing : 01.12.2020
Date of Pronouncement : 04.12.2020

Assessee by : Shri S.K. Tulsian, Adv
Shri Lakshay Budhiraja
Ms. Bhoomija Verma, Adv

Revenue by : Shri Atiqu Ahmed, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the
Commissioner of Income Tax [Appeals] - 35, New Delhi dated
03.10.2019 pertaining to Assessment Year 2015-16.

2. The grievance of the assessee relates to the addition made u/s 68 of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] by treating the long term capital gain as not genuine and treating the entire sale receipts as income u/s 115BBE of the Act amounting to Rs. 6,12,44,000/- and is further aggrieved by the addition of Rs. 12,24,880/- being 2% as commission paid on the alleged bogus long term capital gain.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

4. Facts emanating from the assessment order show that the assessee E-filed his return of income on 31.08.2015 declaring an income of Rs. 80,61,390/-. The return was processed u/s 143(1) of the Act. Subsequently, return was

selected for scrutiny assessment and, accordingly, statutory notices were issued and served upon the assessee.

5. The main reason for selecting the return for complete scrutiny was in respect of the alleged suspicious sale transactions in shares of Lifeline Drugs and Pharma Ltd [LDPL], which generated exempted long term capital gains to the assessee.

6. Smt Ritu Jain purchased these shares offline from Saikat Tradelink Private Limited, with its office in Kolkata, in exchange of shares of Kadamb Construction Limited, whereby Rs 2200000/- claimed as sale consideration on sale of shares of Kadamb Construction was deducted by Rs 5,00,000/- for which the shares of Lifeline drugs and pharma were transferred to the assessee. Remaining Rs 17,00,000/- were transferred to the bank account and the assessee has claimed to have paid the balance consideration of Rs 10000 in cash, because the assessee has bought 5100 shares at Rs 100 per share.

7. Supporting documentary evidences were furnished during the assessment proceedings itself. The Assessing Officer disbelieved the transaction of sale of shares of LDPL and was of the firm belief that the steep rise in share price was jacked up by a cartel of brokers to allow benefit of long term capital gains to various persons.

8. Heavily drawing support from the report of the Investigation Wing, Kolkata, the Assessing Officer formed a belief that the long term capital gain earned by the assessee through entry providers is not genuine and the assessee has deliberately got involved in this process, in order to book his unaccounted income in his books of account, without paying any taxes. The Assessing Officer observed that steep rise in share price of LDPL has no reason as the company has no profits and no significant business activity.

9. The Assessing Officer further observed that there was no reason why there should have been splitting of shares. The Assessing Officer thereby referred to the general observations in respect of entry providers and their modus

operandi and came to the conclusion that the rise in share price was unreasonable, mode of acquisition of shares was questionable and findings of the INV- Wing, Kolkata proved that the associated brokers/entry operators and beneficiaries had worked out an arrangement, in which shares were acquired by the assessee, their share prices were rigged and then with the help of entry operators, routing cash, shares were sold at high price to arrive at tax free capital gains.

10. After referring to the general observations and investigation report and the modus operandi of the entry operators, the Assessing Officer came to the conclusion that the assessee has failed to discharge his onus cast upon him by provisions of section 68 of the Act and made addition of Rs. 6,12,44,000/-.

11. The Assessing Officer further observed that the beneficiaries of such transactions pay some commission to the entry providers and assuming that the assessee must have paid 2% commission, made further addition of Rs. 12,24,880/.

12. The assessee strongly agitated the matter before the Id. CIT(A) but without any success.

13. At the very outset, we have to state that whether the assessee has discharged his onus cast upon him by provisions of section 68 of the Act or not is purely a question of facts. On this premise, we will now examine and explain the facts.

14. The undisputed fact is that the assessee is a habitual investor. In F.Y. 2011-12, the assessee had opening investment of Rs. 11,82,74,033/- on which in that year, the assessee had earned a short term capital gains of Rs. 84,23,576/- and long term capital loss of Rs. 68,07,984/-. The closing value of the investment was Rs. 21,03,07,800/-. These facts are available at pages 49 and 50 of the paper book. In F.Y. 2011-12, shares of LDPL can be seen.

15. In F.Y. 2012-13, the assessee had opening investment of Rs. 21,03,07,800/- and in this year, the assessee incurred short term capital loss of Rs. 79,94,343/- and long term capital gain of Rs. 9,68,98,102/-. The closing value of

investment was Rs. 15,44,00,816/- . These facts are available at pages 51 to 52 of the paper book.

16. In F.Y. 2013-14, the opening value investment was Rs. 15,44,00,816/- and in this year, the assessee earned short term capital gains of Rs. 31,18,233/- and long term capital gains of Rs. 4,19,97,518/-. The closing value of investment was Rs. 11,23,68,646/-. These facts are available at pages 53 to 54 of the paper book.

17. Now coming to the investments situation of the year under consideration, i.e. F.Y. 2014-15, opening value investment was Rs. 11,23,68,646/-and during the year, the assessee earned short term capital gain of Rs. 79,72,770/- and long term capital gain of Rs. 6,22,54,482/-. The closing value of investment was Rs. 8,44,05,861/-. These facts are available at pages 55 and 56 of the paper book.

18. It can be seen that during the F.Y. 2014-15, the assessee has earned short term capital gain of Rs. 79.72 lakhs and long term capital gain of Rs. 6.22 crores. However, the Assessing Officer chose only one

scrip out of several, and came to the conclusion that the long term capital gain on sale of shares of LDPL is bogus. However, the Assessing Officer accepted the transactions in respect of short term capital gain and balance long term capital gain.

19. A perusal of the assessment order clearly shows that nowhere the Assessing Officer has made any adverse comment in respect of habitual investments made by the assessee. On the contrary, he has accepted all the transactions other than those of LDPL.

20. Section 142(2) provides 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 and u/s 142(3) it is provided that the assessee shall be given an opportunity of being heard in respect of any material gathered on the basis of any enquiry under sub section (2) and in section 143(3) of the Act it is provided that after hearing such evidence, as the assessee may produce and such other evidence as the Assessing Officer may require on specified points and after taking into account all relevant material which he has gathered, the Assessing Officer shall

make an assessment on the total income or loss of the assessee.

21. A conspectus reading of all these relevant provisions of the Act show that initial burden is upon the assessee to justify his returned income and if some evidences have been gathered by the Assessing Officer, it is the duty of the Assessing Officer to confront those evidences to the assessee and seek explanation from him.

22. In the instant case, in justification of his return of income, the assessee furnished all the necessary documentary evidences to discharge the initial burden cast upon him. The Assessing Officer simply rubbished all the documentary evidences by referring to the general observations and modus operandi of the entry operators and further supporting his observations by report of the Investigation Wing.

23. It would not be out of place to mention here that LDPL, now known as Arihant Multi Commercial Ltd, is not a paper company nor a shell company. In F.Y. 2013-14, the Revenue from operations were at Rs. 40,85,02,313/- and total assets were at Rs. 32,79,07,684/- which included investment, trade receivables, cash and cash equivalent,

short term loans and advances and tangible assets. The share capital and reserves and surplus were at Rs. 3,62,40,000/- and Rs. 17,65,16,912/- respectively. Trade payables were at Rs. 10,80,74,165/-.

24. These financials go to show that LDPL is not a shell company. SEBI has suspended trading in shares of LDPL w.e.f 28.08.2015 whereas the assessee has sold shares from May 2014 to December 2014, many months before suspension of the scrip. It is not the case of the Assessing Officer, nor there is any evidence on record to show that SEBI has declared all transactions done in scrip of LDPL prior to the suspension as null and void. It is a matter of fact that SEBI looks into irregular movements in share prices and warns investors against any such unusual increase in share price. No such warning was issued by SEBI. The Assessing Officer has failed to produce any material/evidence to dislodge or controvert the genuineness of conclusive documentary evidences produced by the assessee in support of his claim considering the fact that he is a genuine investor and is from past many years, as explained elsewhere.

25. Surprisingly, neither the assessee nor his brokers are named as illegitimate beneficiaries to bogus long term capital gain in any of the alleged statements of the operators/broker or reports/orders of the SEBI or the Investigation Wing. In our considered view, additions made by the Assessing Officer and confirmed by the Id. CIT(A) are heavily guided by surmises, conjectures and presumptions and, therefore, have no legs to stand on.

26. It would not be out of place to refer to the decision of the Hon'ble Supreme Court in the case of *Adamine Construction Pvt Ltd 99 Taxmann 45* wherein the Hon'ble Supreme Court, while dismissing the appeal, made the following observations:

"What is evident is that the AO went by only the report received and did not make the necessary further enquiries - such as into the bank accounts or other particulars available with him but rather received the entire findings on the report, which cannot be considered as primary material. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO."

27. In the case of Odeon Builders Pvt Ltd 110 Taxmann.com 64, the Hon'ble Supreme Court while dismissing the review petition, held as under:

"However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs.19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the Id. CIT(A) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent

disallowance resulting in addition to income made for Rs.19,39,60,866/-, is directed to be deleted."

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5 th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT.

5. In these circumstances, the Review Petitions are dismissed."

28. On identical set of facts, the coordinate bench in the case of Deepak Nagar 73 ITR [Trib] 74 has allowed the appeal of the assessee. The relevant findings of the coordinate bench read as under:

"22. For the sake of repetition, 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 INV Wing as well as information received from the INV

Wing. It is apparent from the assessment order that the Assessing Officer has not conducted any independent and separate enquiry in this case of the assessee. Even the statement recorded by the INV Wing has not been got confirmed or corroborated by the person during the assessment proceedings. The Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the INV Wing is required to be corroborated and reasserted/reaffirmed during the assessment proceedings by examining the concerned persons who can affirm the statements already recorded by any other authority of the department.

23. There is no dispute that the statement which was relied upon by the Assessing Officer was not recorded by the Assessing Officer in the assessment proceedings but it was pre existing statement recorded by the INV 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 evidence to disprove the evidences produced by the assessee.

24. Our above view is fortified by the decision of the Hon'ble Delhi High Court in the case of Fair Invest Ltd 357 ITR 146. The relevant findings of the Hon'ble Jurisdictional High Court of Delhi read as under:

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under [Section 131](#) summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of [Section 68](#)."

25. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore, the judicial decisions relied upon by the Id. DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand. We, accordingly, direct the Assessing Officer to accept the LTCG of Rs. 11,93,55,564/- declared as such.

26. Since we have accepted the genuineness of the LTCG, we do not find any merit in the consequential addition of Rs. 6,05,312/- and the same is also directed to be deleted."

29. The Id. DR placed strong reliance on the orders of the authorities below.

30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge is purely a question of fact. We, accordingly, direct the Assessing Officer to accept the long term capital gain on sale of shares of LDPL declared as such.

31. Since we have accepted the genuineness of long term capital gain, we do not find any merit in the consequential addition of Rs. 12,24,480/- and the same is also directed to be deleted.

32. On identical set of facts, this Tribunal has decided the appeal in the case of Shri Anoop Jain, who is husband of the present appellant in ITA No. 6703/DEL/2019 in favour of the assessee and against the revenue. Facts are mutatis mutandis,.

33. In the result, the appeal filed by the assessee in ITA No. 9358/DEL/2019 is allowed.

The order is pronounced in the open court on 04.12.2020.

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Sd/-

**(N. K. BILLAIYA)
ACCOUNTANT MEMBER**

Dated: 04th December, 2020.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	