

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

INCOME TAX APPEAL NO. 18/2017

(SANJAY BIMALCHAND JAIN L/H SHANTIDEVI BIMALCHAND JAIN **VERSUS** THE PR.
COMMISSIONER OF INCOME TAX-I, NAGPUR & ANOTHER)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri A.B. Patil, counsel for the appellant.

CORAM : SMT. VASANTI A NAIK AND
MRS. SWAPNA JOSHI, JJ.

DATE : APRIL 10, 2017.

By this income tax appeal, the appellant-assessee challenges the orders of the Assessing Officer, the Commissioner of Income Tax as also the Income Tax Appellate Tribunal holding that the assessee had traded in shares and the income was liable to be taxed as 'business' income.

The assessee had on the advice of an income tax consultant purchased shares of two penny stock Kolkata based companies i.e., 8000 shares at the rate of Rs.5.50 per share on 08.08.2003 and 4000 shares at the rate of Rs.4/- per share on 05.08.2003 from Syncom Marketing Pvt. Ltd. and of Skyzoom Distributors Pvt. Ltd. the payments were made by the assessee in cash for acquisition of shares of both the companies. The address of both the companies was interestingly, the same. The authorized signatory of both the companies was also the same person. The purchase of shares of both the companies was done by the assessee through Global Stock and Securities Ltd and the address of the said broker was incidently the address of the two companies. Both the companies intimated the assessee on 07.04.2004

regarding the merger of the companies with another company, viz. Khoobsurat Limited, Kolkata and the assessee received the shares of the new company in the ratio of 1:4 of the number of shares of the previous two companies held by the assessee. The assessee sold 2200 shares at an exorbitant rate of Rs.486.55 per share on 07.06.2005 and 800 shares on 20.06.2005 at the rate of Rs.485.65. The shares were sold through another broker, viz. Ashish Stock Broking Private Limited. The proceeds from the aforesaid sale transaction were directly credited by the broker in the Savings Bank Account of the assessee in the Union Bank of India. The assessing officer did not accept the case of the assessee that she was entitled to exemption under Section 10(38) of the Income Tax Act. The assessing officer held that the aforesaid transactions of purchase of two penny stock shares for Rs.60,000/-, the merger of the companies with a new company and the sale of the shares for Rs.11,58,930/- fell within the ambit of adventure in the nature of trade and the assessee had profited by Rs.13,98,930/-. The assessing officer, therefore, brought the aforesaid amount to tax under the head 'business income'.

Being aggrieved by the order of the assessing officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The appeal filed by the assessee was dismissed and so was the subsequent appeal filed by the assessee against the order of the Commissioner of Income Tax (Appeals) before the Income Tax Appellate Tribunal.

On hearing the learned counsel for the assessee and on a perusal of the orders of the income tax authorities, it appears that there is no scope for interference with the said

orders in this appeal. By referring to the aforesaid facts, which are narrated in the earlier part of this order, the authorities found that the assessee had made investment in two unknown companies of which the details were not known to her. It was held that the transaction of sale and purchase of shares of two penny stock companies, the merger of the two companies with another company, viz. Khoobsurat Limited did not qualify an investment and rather it was an adventure in the nature of trade. It was held by all the authorities that the motive of the investment made by the assessee was not to derive income but to earn profit. Both the brokers, i.e. the broker through whom the assessee purchased the shares and the broker through whom the shares were sold, were located at Kolkata and the assessee did not have an inkling as to what was going on in the whole transaction except paying a sum of Rs.65,000/- in cash for the purchase of shares of the two penny stock companies. The authorities found that though the shares were purchased by the assessee at Rs.5.50 Ps. Per share and Rs.4/- per share from the two companies in the year 2003, the assessee was able to sell the shares just within a years time at Rs.486.55 Ps and Rs.485.65 Ps per share. The broker through whom the shares were sold by the assessee did not respond to the assessing officer's letter seeking the names, addresses and the bank accounts of the persons that had purchased the shares sold by the assessee. The authorities have recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. While so observing, the authorities held that the assessee had not tendered cogent evidence to explain as to

how the shares in an unknown company worth Rs.5/- had jumped to Rs.485/- in no time. The Income Tax Appellate Tribunal held that the fantastic sale price was not at all possible as there was no economic or financial basis as to how a share worth Rs.5/- of a little known company would jump from Rs.5/- to Rs.485/-. The findings recorded by the authorities are pure findings of facts based on a proper appreciation of the material on record. While recording the said findings, the authorities have followed the tests laid down by the Hon'ble Supreme Court and this Court in several decisions. The findings do not give rise to any substantial question of law. The judgments reported in **(2012) 20 Taxman.com 529 (Bombay) (CIT Versus Jamnadevi Agrawal)**, **(1957) 31 ITR 294 (Bombay) (Puranmal Radhakishan Versus CIT)**, **(1970) 77 ITR 253 (SC) (Raja Bahadur Versus CIT)** and **(2015) 235 Taxman 1 (Bom) (CIT Versus Smt.Datta M. Shah)** and relied on by the learned counsel for the assessee are distinguishable on facts and cannot be applied to the case in hand.

Since no substantial question of law arises in this appeal, the appeal is dismissed with no order as to costs.

JUDGE

JUDGE

APTE

IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER.

(S.M.C.)

I.T.A. No. 61/Nag/2013.
Assessment Year : 2006-07.

Shri Sanjay Bimalchand Jain,
L/H of Smt. Shantidevi
Bimalchand Jain, Nagpur.
PAN AAXPJ0416E.
Appellant.

The Income-tax Officer,
Ward-4(2), Nagpur.
Vs.
Respondent.

Appellant by : Shri C.J. Thakar/
Shri S.C. Thakar.
Respondent by : Shri A.R., Ninawe.

Date of Hearing : 05-07-2016
Date of Pronouncement : 18th July, 2016

ORDER

This appeal by the assessee is directed against the order of learned CIT(Appeals) dated 08-11-2012 and pertains to assessment year 2006-07. The grounds of appeal read as under :

1. On the facts and circumstances of the case and material on record learned A.O. and C.I.T.(A) erred in holding that the assessee was a trader in shares and not an investor and consequently erred in taxing long term capital gain on sale of share as business income.
2. The finding of learned CIT(A) in treating the isolated transaction of purchase of shares in 2003 and sale thereof in 2006 resulting in long term capital gain of Rs.13,99,648/- as business profit is not only contrary to evidence and material on record but is also perverse.
2. In this case the assessee is an individual. The AO observed that she derived long term capital gain of Rs.13,99,648/- and has claimed exemption u/s

10(38) on sale of shares of Khoobsurat Ltd. The AO summarised the facts of long term capital gain derived by the assessee as under :

- (i) The assessee is a senior citizen lady who had been deriving income from other sources mostly interest income from parties bond etc.
- (ii) On advice of her Income Tax Counsel Late Shri Hemant Surjan, Advocate, she purchased shares of two penny stock Kolkata based companies – 8000 shares of Syncom Marketing Pvt. Ltd. (SMPL) @ Rs. 5.50 per share on 08-08-2003 and 4000 shares of Skyzoom Distributors P. Ltd. (SZDPL) @ Rs.4/- per share on 05-08-2003. Payments were made in cash for acquisition of shares of both the companies.
- (iii) Interestingly, address of both the companies was the same i.e. 8, Ganesh Chandra Avenue, Calcutta-200 013.
- (iv) Authorized signatory of both the companies was also the same person.
- (v) Purchase of shares of both the companies was done through Globle Stock and Securities Ltd., 8, Ganesh Chandra Avenue, Calcutta. Here again, the address of the broker was also the same as that of the address of the two companies.
- (vi) Both the companies intimated the assessee on 07-04-2004 regarding transfer of shares and merger of the two companies with another company namely Khoobsurat Ltd., Kolkata and that after the merger, the assessee received the shares of the new company in the ratio of 1 : 4 of the number of shares of previous two companies hold by the assessee.
- (vii) On 22-04-2004, the new company Khoobsurat Limited informed the assessee for issuance of shares in lieu of earlier shares and issued share certificates of 3000 shares (2000 shares in lieu of SMPL and 1000 shares in lieu of SZDPL) of Khoobsurat Ltd.
- (viii) The assessee sold 2200 shares at an exorbitant rate of @ Rs.486.55 per share on 07-06-2005 amounting to Rs.10,70,410/- and 800 shares on 20-06-2005 @ Rs. 485.65 amounting to Rs.3,88,520/-. The shares were sold through another broker namely Ashish Stock Broking Pvt. Ltd.

- (ix) Sale proceeds of the first sale transaction (07-06-2005) and the second sale transaction (20-06-2005) were credited directly by the above broker in the S.B. Account No. 10473 of Union Bank of India, Gandhibagh, Nagpur of the assessee on 15-06-2005 and 07-07-2005 respectively.
- (x) In the whole transactions the assessee made Long Term Capital Gain of Rs.13,99,648/- and claimed exemption from tax u/s 10(38) of the Income Tax Act.

3. After further elaboration, examination, investigation and query enquiring the AO held as under :

“9. On the basis of material on record and enquiries and investigation done in this case, I am not inclined to accept the contentions of the assessee that income arising from shares of the company Khoobsurat Limited should be treated as Capital Gain for the following reasons :

- (i) The initial purchased shares were non-trading shares and the assessee has invested her hard earned money in the shares of the company whose address and any other details of the company were not known to her and it was done solely on the suggestion of one of her son's friend's suggestion in anticipation of huge profits. This was also stated by the assessee's son in his statement that the intention at the time of purchase was to earn huge profit.
- (ii) The assessee had made investment in two un-known companies whose details were not known to the assessee. Considering the above, the transaction of sale and purchase of two penny stock shares and then subsequent merger with another company Khoobsurat Limited does not qualify to be called as a capital investment rather, these transactions are an adventure in the nature of trade.
- (iii) This also come to conclude that the motive of the assessee's investment in the two penny stock companies was not to derive income by way dividend etc. rather, to earn profit.
- (iv) Both the brokers, the one through whom the shares were purchased and the other through whom it were sold were located at Calcutta and the assessee had absolutely not any knowledge what was going on in the whole transaction except paying Rs.65,000/- in cash to her legal advisor. Also the cash purchases are not to be relied upon.
- (v) The company in question whose shares wee sold was not having healthy financial position. And despite not being a dividend paying

company and suffering huge losses its shares were quoted at around Rs.500/- per share.

- (vi) The broker company through which the shares were sold did not respond to my letter and name and address, bank account of the person who had purchased the shares sold by the assessee was not furnished and further verification and investigation could not be made.

10. U/s. 2(13) of the Income Tax Act the word 'Business' is defined and it include any trade. Commerce or maintenance o any adventure or concern in the nature of trade, commerce or manufacture. In the instant case the transaction of purchase of two penny stock shares for Rs.60,000/- and then merger with a new company and its subsequent sale for Rs.11,58,930/- falls within the ambit of adventure in the nature of trade. In view of the above, the profit of Rs.13,98,930/- (Rs.14,58,930 – Rs.60,000) is brought to tax under the head **business income.**”

4. Against the above order, the assessee appealed before the learned CIT(Appeals). The learned CIT(Appeals) affirmed the AO's action holding as under :

“4.9 As regards the intention of the assessee, it has been held by various Hon'ble Courts that the intention of the assessee at the time of purchase of asset is the most important criteria to decide whether the same were purchases as trading assets or were bought as an investment. Only because the shares have been disclosed in the Balance Sheet as an investment would not determine or prove.

that the shares were purchased as a capital asset, since it is well settled law that entries in the books of accounts are not determinative of the true nature of the transactions. Further,

assessee's contention, that he has taken delivery of shares and, hence, the profits should be assessed as capital gains cannot be accepted since this cannot be, and is not the criteria for determining the nature of income. To determine the nature of the transactions or whether the assessee has acted as a trader or investor, what will have to be examined is as to how he has dealt overall with his assets after the purchases and how he has acquired the said assets.

A trader buys for the purpose of reselling at a profit. He does not wait for capital appreciation. He tends to sell the shares immediately after the purchases, even at a loss, if the factors so demand, so that he can utilize his capital and rotate it in the business. To purchase shares and then to wait for appreciation in their value in the long term is the classic example of an Investor. In Trishul Investment Ltd., reported in 305 ITR 434 (Mad), the Hon'ble Madras High Court has held that the rest to decide whether an activity was in the nature of investment or an adventure in the nature of trade has a very thin line of demarcation. It held that "even a single instance of transaction can be regarded as business

and even multiple transactions sometime are deemed as investments. So, the criteria, for deciding whether it is investment or business is that the intention of the assessee, viz. whether assessee's real intention is to invest or the intention was in the nature of trade."

4.10 An examination of the details of transaction filed by the assessee in respect of the shares on which he has claimed capital gains reveals that the overall impression that can be gathered is that the assessee has dealt with the shares as a trader and not as an Investor.

4.12 The assessee's reliance on a large number of judicial decisions would not come to his rescue since these were rendered in light of the facts present in these individual cases and it is settled position of law that whether a person is a trader or an investor is a mixed question of facts and law. Hence, it is the facts present in the

case of the assessee which would be relevant for deciding whether he is to be treated as an investor or a trader in respect of the activity in question. In the case of Mahendra C. Shah ITA No. 6239/Mum/2008 and 4932/Mumj2009 also, it has been held by the Hon'ble Mumbai Tribunal that whether the surplus on the sale of shares is to be assessed as capital gains (short term or long term) as claimed by the assessee or as business income as claimed by the Assessing Officer is a question of fact to be decided according to the cumulative effect of several facts and circumstances of the case.

4.13 The contention of the assessee that the shares were being reflected in the Balance Sheet as investments would not be determinative of the true nature of the transactions when the intention of the assessee in dealing with the shares itself shows that the shares have been dealt with as trading assets and not as investments.

4.16 In view of the aforesaid reasons, I am of the opinion that the assessee was a trader and not an investor in the shares in respect of which he has claimed short term capital gains and which is the subject matter of the appeal. Hence, the profits are to be assessed under the head "Profits & Gains of Business & Profession" and not under the head "Capital Gains". Therefore, the action of the A.O. of treating the profit of RS.43,96,794/- as business income is upheld."

5. Against the above order, the assessee is in appeal before the ITAT.
6. I have heard both the counsel and perused the records. The facts of the case clearly indicate that the assessee has indulged in penny stock transaction.

The assessee is a senior citizen. On purported advice of an Income-tax Consultant, she purchased shares of two penny stock Calcutta based companies at Rs.5.50 per share and Rs.4/- per share respectively in 2003. Both the companies had no standing and the AO found their existence of dubious characters. Both purportedly merged with other company, namely, Khoobsurat Ltd. and the assessee received shares in Khoobsurat Ltd. in lieu of her shares in earlier companies. The assessee was able to sell the shares at the price of Rs.486.55 and R.485.65 respectively in 2005. The purchase by the assessee of shares of two unknown companies whose details were not at all known by the assessee can by no stretch of imagination be said to be an investment transaction. The company whose shares rose from Rs.5/- to Rs.485/- within extremely short span has no worthwhile position and balance sheet and is not at all dividend paying company. The broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee. In these circumstances it is a clear case where the assessee had indulged in bogus and dubious share transaction meant to account for the bogus and undisclosed income in the garb of long term capital gain.

7. In this regard I may gainfully refer to the decision of Hon'ble jurisdictional High Court in the case of Major Metals Ltd. vs. Union of India and others in Writ Petition No. 397 of 2011 vide order dated 22nd February, 2012. The Hon'ble jurisdictional High Court in this case has held that a company cannot command disproportionate and huge share premium and such receipt of bogus share application money even though through banking channel can be held to be assessee's undisclosed income received in the garb of unjustified share application money. In the present case I find that there is no justification whatsoever that the shares of an unknown company of Rs.5/- can be sold within two years time at Rs.485/- without there being any reason on

record. This unexplained spurt in the value of unknown company shares is beyond preponderance of probability. It has been held by Hon'ble Apex Court in the case of Durga Prasad Mor and Sumati Dayal that the test of human probabilities have also to be applied by the authorities below. In the case of Sumati Dayal 214 ITR 801, it was held that during the year 1970-71 (pertaining to the assessment year 1971-72) between April 6, 1970, and March 20, 1971, the appellant claims to have won in horse race a total amount of Rs.3,11,831/- on 13 occasions out of which ten winnings were from jackpots and three were from treble events. Similarly in the year 1971-72, the appellant won races on two occasions and both times the winning were from a jackpot. These receipts were tested on the touch stone of human probability and it was found that apparent was not real. That it was contrary to statistical theory and experience of the frequencies and probabilities. The exceptional luck enjoyed by the assessee was held to be beyond preponderance of probability. Hence the Hon'ble Apex Court has affirmed the view that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

8. When the present case is examined on the touch stone of above case law, it is clear that these transactions of the assessee can by no stretch of imagination be considered as investment transactions. They are only make believe transaction. Hence I do not find any infirmity in the revenue taxing the receipt in this regard.

9. The entire amount of the so called receipt of share sales could well also be treated as unexplained credit u/s 68 of the I.T. Act as it has all the ingredients of attracting the rigours of the said section. Section 68 of the I.T. Act provides that where any sum is found credited in the books of the assessee maintained for any previous year and the assessee offers no explanation about

the nature and source thereof or the explanation offered by him is not in the opinion of the AO satisfactory, the sum so credited may be charged to income-tax as income of the assessee of that year. In the present case the assessee's explanation that the said receipt is on account of investment in shares whereby share of Rs.5/- of unknown company has jumped to Rs.485/- in no time has been totally rejected by the authorities below. The assessee has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for the sale price of these shares. The so called purchaser of these shares has not been identified despite efforts of the AO. The broker company through which shares were sold did not respond to queries in this regard. Hence the fantastic sale price realisation is not at all humanly probably, as there is no economic or financial basis, that a share of little known company would jump from Rs. 5/- to 485/-, In these circumstances, I do not find any infirmity in the orders of the authorities below. Accordingly I affirm the same and decide the issue against the assessee.

10. In the result, this appeal filed by the assessee stands dismissed.

Order pronounced in the Open Court on this 18th day of July,2016.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 18th July, 2016.

FIT FOR PUBLICATION IN THE
INCOME TAX TRIBUNAL DECISIONS.

ACCOUNTANT MEMBER.

Copy forwarded to :
1. Shri Sanjay Bimalchand Jain, 276, East Wardhaman Nagar, Near Railway Crossing, Nagpur.
2. I.T.O. Ward-4(2), Nagpur.
3. C.I.T.- II, Nagpur.
4. CIT(Appeals), -I, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.