

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ “एफ” मुंबई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI**

**BEFORE HON’BLE S/SHRI D. MANMOHAN , VICE-PRESIDENT  
AND B.R.BASKARAN (AM)**

सर्वश्री , डी. मन्नमोहन, उपाध्यक्ष एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.6858/Mum/2011

(निर्धारण वर्ष / Assessment Year : 2006-07)

Usha Chandresh Shah, 52, Laxmi Niwas CHS, Flat No.15, 3 <sup>rd</sup> floor, 9 <sup>th</sup> Road, Khar (W), Mumbai-400052.	<b>बनाम/ Vs.</b>	Income Tax Officer 19(1)(2), Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./जीआइआर सं./ <b>PAN/GIRNo.:</b> AURPS1402K		

अपीलार्थी ओर से / Appellant by :	Shri Mandar Vaidya
प्रत्यर्थी की ओर से/Respondent by:	Shri Sambit Mishra

सुनवाई की तारीख / Date of Hearing : 23.7.2014

घोषणा की तारीख /Date of Pronouncement : 26.9.2014.

**आदेश / O R D E R**

**Per B.R.BASKARAN, Accountant Member:**

The appeal filed by the assessee is directed against the order dated 23.08.2011 passed by Ld CIT(A)-22, Mumbai and it relates to the assessment year 2006-07. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the assessment of sale value of shares of Rs.7,53,061/- as Cash Credits u/s 68 of the Act instead of treating the same as Long term Capital Gains.

2. The facts relating to the issue under consideration are that the assessee declared Long term Capital Gain of Rs.7,53,061/- on sale of Shares of “M/s Prime Capital Market Ltd” and claimed the same as exempt. The assessee claimed that she had purchased 2700 shares of the above said company at a rate of Rs.5.17 per share on 13.5.2004 in off-market transactions through a broker named M/s

D.K.Khandelwal & Co in physical form. The total cost of purchase was Rs.13,959/-. It was submitted that they were converted into D-mat form, i.e., they were credited to the D-mat account of the assessee on 18-07-2005. Subsequently all the shares were sold by the assessee on 01-09-2005 through another broker named Sanju Kabra at a rate of Rs.279.50 per share, i.e., at a sales value of Rs.7,53,061/-. When the assessing officer made enquiries with Kolkatta Stock Exchange, they reported that the transactions entered by the assessee with M/s D.K.Khandelwal & Co (purchase transaction) were not executed through them either in physical or D-mat form.

3. The AO conducted enquiries with M/s D.K.Khandelwal & Co and the said concern confirmed the sale of shares to the assessee in physical form. However, it expressed its inability to furnish a copy of bill or copy of contract note citing the reason of computer problem. Surprisingly, the said concern could provide the Contract note number and the distinctive numbers of shares in its reply given to the AO. The above said broker also expressed its inability to produce the books of accounts. With regard to the payment made for purchase of shares, the above said broker stated that the assessee made a speculation profit earlier and the same was adjusted against the amount due from the assessee for purchase of above said shares. The balance amount of Rs.324/- was received from the assessee by way of cash.

4. Thereafter the AO made enquiries with the Company, i.e., M/s Prime Capital Markets Ltd and the said company confirmed that the assessee has purchased 2700 shares in physical mode from M/s Brightsun Merchants Pvt Ltd and the same was dematerialized on 18.07.2005 through DP M/s Indiabulls Securities Ltd. However, the company expressed its inability to find out the name and address of the person to whom the shares were sold by the assessee. The AO then sent notices to M/s Brightsun Merchants Pvt Ltd from whom the assessee had purchased the impugned shares, but the said notice was returned unserved with the remark "Not Known".

5. The AO made further enquiries with the assessee. The AO further noticed that the scrips of M/s Prime Capital Markets Ltd was declared as "Penny Stock"

by SEBI and the SEBI has indicted the broker "Sanju Kabra" for manipulating the share prices of penny stocks. It is pertinent to note that the assessee had sold the shares through Sanju Kabra only. After discussing elaborately on the modus operandi adopted by the brokers for manipulating the share prices of penny stock and also the report given by SEBI in this matter, the AO concluded that the assessee has adopted the methodology of acquiring the Long Term Capital Gains in order to convert her black money into white. The AO also placed reliance on the decision rendered by Chandigarh bench of Tribunal in the case of Somnath Mani reported in 100 TTJ 917, the decision rendered by Hon'ble Supreme Court in the case of McDowell & Co.Ltd reported in 154 ITR 148, the decision rendered Mumbai bench of Tribunal in the case of Housing Development and Finance Corpn Ltd (ITA No.2913/Mum/1995 dated 12.9.2005). The AO also placed reliance on the decision rendered by Hon'ble Supreme Court in the cases of Sumati Dayal reported in 214 ITR 801 and Durga Prasad More reported in 82 ITR 540, wherein it was held that the matters have to be considered by applying the test of human probabilities. Accordingly, the AO assessed the Sale value of shares of Rs.7,53,061/- as unexplained Cash Credit u/s 68 of the Act.

6. The Ld CIT(A) also confirmed the addition by placing reliance on the decisions rendered by Hon'ble Supreme Court in the cases of Sumati Dayal and Durga Prasad More (referred supra) and further holding that the transactions of the assessee in shares of Prime Capital Market were not genuine. Aggrieved, the assessee has filed this appeal before us.

7. The Id Counsel appearing for the assessee submitted that the transactions of purchase and sale of shares are duly supported by the relevant documents. He also placed reliance on the decision rendered by Pune bench of Tribunal in the case of Shri Avinash Kantilal Jain in ITA No.980/PN/10 and ITA No.1049/PN/10 dated 31.10.2012, wherein the long term capital gains earned by the assessee therein from purchase and sale of Prime Capital Markets Ltd was held to be genuine. In the above said case, the Tribunal, by placing reliance on the decision of Umacharan Shaw Processes Vs. CIT 337 ITR 271, has held that the suspicion, howsoever strong, cannot take the place of legal proof. The Ld A.R also placed reliance on the decision dated 04-05-2012 rendered by Mumbai

bench in the case of Mr. Shyam R Pawar in ITA No.5585/Mum/2011, 5620, 5621 & 5622/Mum/2011 wherein the Long term Capital gains realized by the assessee therein on sale of shares of Prime Capital Markets Ltd was accepted by the Tribunal. The Ld A.R further placed reliance on the decision rendered by the Hon'ble jurisdictional High Court in the case of CIT Vs. Smt. Jamnadevi Agrawal (2010)(328 ITR 656), wherein the Hon'ble High Court has upheld the view taken by the Tribunal that the transactions were genuine. In the case considered by the High Court, the assessee therein had purchased the shares of M/s Authentic Investments and Finance Ltd at the rate of 0.98 per share and sold them at the rate of Rs.33.81 per share. The Hon'ble High Court had held that the reliance placed by the Revenue on the decision of the apex Court in the case of Sumati Dayal (1995)(214 ITR 801) was wholly misplaced. The Ld A.R also placed reliance on the decision rendered by the Hon'ble Bombay High Court in the case of CIT Vs. Shri Mukesh Ratilal Marolia in Income Tax Appeal No.456 of 2007 dated 07-09-2011. He also placed reliance on some more decisions rendered on similar lines.

8. On the contrary, the Ld D.R submitted that the assessee has failed to show that the purchase of shares was a genuine transaction. The Ld D.R submitted that the assessee could not produce copies of Share certificates or the copies of Share transfer forms. The transaction of purchase was claimed to have been paid through the speculation profit, meaning thereby, the purchase of shares were not routed through bank. The Ld D.R pointed out that the purchase was not routed through Stock Exchange, when the off market transaction had lost significance after the year 2000. The Ld D.R submitted that the reasons for appreciation of prices of shares of M/s Prime Capital Markets Ltd at an astronomical level were also not explained. In fact, the shares of the above said company was named as "Penny Stock" and the broker through whom the assessee has claimed to have sold the shares has been indicted for manipulating the shares of penny stock shares. The Ld D.R invited our attention to the copies of Contract notes relating to purchase of shares made through M/s D.K. Khandelwal & Co., which are placed at pages 8 & 9 of the paper book. He submitted that the said contract notes are dated 13.5.2004 and 7.5.2004, but

the paper on which the said contract notes were printed contains the date as 9/04 meaning September, 2004, i.e., the paper itself was manufactured in September 2004. Accordingly, the Ld D.R submitted that the contract notes are fabricated ones.

9. We have heard the rival contentions and perused the record. The pertinent points are that the assessee has claimed to have purchased the impugned shares through Off market transaction. The purchase price was not paid by cheque, but it was claimed to have been adjusted against the speculation profit claimed to have been made by the assessee. The small difference of Rs.324/- was claimed to have been paid by way of cash. It is also pertinent to note that the alleged Speculation transaction carried out earlier to the purchase of shares of Prime Capital Markets Ltd was also claimed to have been carried in off market transaction. Another important point is that the assessee did not possess copies of Share certificates or copies of Share transfer forms. The broker M/s Khandelwal & Co., has expressed its inability to furnish copies of contract notes available with it and also failed to furnish its books of account to substantiate the transactions of purchase of shares by the assessee. Since the impugned transaction was an off market transaction, the purchase transaction could not be confirmed by the Kolkatta Stock exchange. The said shares were earlier held by M/s Brightsun Merchants (P) Ltd and the assessee had purchased the shares from them. The notice issued to M/s Brightsun Merchants (P) Ltd was returned unserved by the postal authorities with the remark "unknown". In this regard, the assessee had replied that the name of the company was wrongly mentioned by the AO as M/s Brightsuns (P) Ltd and hence the notice got returned. But there is not comment about the address, meaning thereby, the AO had issued notice to the correct address only and hence the slight variation in the name of the company would not normally make any difference. Hence the fact that the notice was returned back only shows that the seller of the shares could not be identified. All these discussions would show that the purchase transaction could not be cross verified by the assessing officer.

10. One more point to be noted here is that the speculation transactions can be entered only on payment of margin money. But the details of said payment are not available. With regard to the query raised by the AO relating to Margin money, the broker M/s D.K. Khandelwal & Co has replied in the context of purchase of shares of M/s Prime Capital markets Ltd and not in the context of speculation transactions. Thus, it is seen that the question of keeping margin money for speculation transactions remains unanswered both by the assessee as well as by the Share broker cited above. Further the speculation transaction is also claimed to be an off market transaction, which further casts shadow of doubt over the claim put forth by the assessee.

11. Though the assessee has claimed to have purchased the shares in physical format in May, 2004, she chose to D-Mat the same only in June 2005, just two months prior to its sale. The shares were sold through a share broker named Sanju Kabra, who is indicted by SEBI for rigging the prices of penny stock shares. It is pertinent to note that the share prices of M/s Prime Capital Markets Ltd went from Rs.5.17 (May, 2004) to Rs.279.50 (Sep., 2005). The assessee could not furnish any reasons or at-least stock market news to support the abnormal increase in the prices of the above said shares. The financial statements of the above said company were also not produced. Though M/s Prime Capital Markets Ltd has confirmed the entries in its books of account with regard to the purchases made by the assessee, it could not identify the name of purchaser to whom the shares were sold by the assessee.

12. We have already seen that the tax authorities have applied the test of human probabilities explained by the Hon'ble Supreme Court in the cases of Sumati Dayal and Durga Prasad More (supra) to disbelieve the claim of Long term Capital gains put forth by the assessee. We notice that the test of human probabilities was not applied by the co-ordinate benches of Tribunal in the case of Shri Avinash Kantilal Jain (supra) and Mr. Shyam R Pawar (supra). Hence, in our view, the assessee cannot take support from the above said decisions. We further notice that the Id CIT(A) has placed reliance on the decision dated 04.1.2011 rendered by ITAT Delhi in the case of Haresh Win Chaddha Vs. DDIT, wherein the Tribunal has expressed the view that there is no presumption in law

that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record.

13. In the case of Smt. Jamnadevi Agrawal (supra), the Hon'ble Bombay High Court has upheld the order of Tribunal on the reasoning that no fault can be found with the findings recorded by the Tribunal. A perusal of the above said order would show that the revenue in the above said case had contended that the assessee in the group have purchased and sold shares of similar companies through the same broker. Further the purchase prices and sale prices were supported by producing the evidences to show that the said transactions were undertaken at the rates prevailing on the respective dates. Under these set of facts, the High Court held that the findings given by the Tribunal cannot be found fault with and further held that the decision rendered by Hon'ble Supreme Court in the case of Sumati Dayal (supra) was not applicable. In the case of Shri Mukesh Ratilal Marolia (Supra), the Hon'ble Bombay high Court has observed that the assessee has furnished copies of Share certificates to show that the shares were in fact transferred to the name of the assessee before it. Further there was no allegation that the prices of shares purchased by the assessee in the case before High Court were manipulated.

14. However, in the instant case, the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of M/s Prime Capital Markets Ltd was declared as "Penny Stock" by SEBI and the broker Sanju Kabra, through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. Hence, in our view, the tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee.

15. We notice that the Mumbai D bench has considered an identical issue in the case of Shri Ramesh Kumar D Jain in ITA No.3192/Mum/2010 relating to assessment year 2006-07. The Tribunal, vide its order dated 15-06-2011, rejected the claim of making speculation gains on the reasoning that speculation transactions could not have been entered into by the assessee therein without paying margin money to the broker. Accordingly, the claim of purchase of shares was rejected by the Tribunal and consequently the claim of sale of shares was also rejected. It is pertinent to note that, in the decisions relied upon by the assessee, the claim of speculation profits was not considered by the Tribunal. In yet another case of Shri Araving M Kariya considered by "A" bench of Mumbai ITAT, the test of human probabilities was applied to reject the claim of profit realized on sale of penny stocks. There should not be any dispute that the onus to produce necessary evidences to convincingly show that the shares were purchased and sold at the prices claimed always lies upon the assessee. Our view finds support from the decision rendered by Hon'ble Guwahati High Court in the case of CIT Vs. Smt. Jasvinder Kaur (357 ITR 638).

16. In view of the foregoing discussions, we are of the view that the decisions relied upon by the assessee cannot be taken support of by the assessee for the reasons discussed supra. Accordingly, we are of the view that the Ld CIT(A) was justified in confirming the order of the assessing officer by applying the test of human probabilities.

17. In the result, the appeal filed by the assessee is dismissed.

The above order was pronounced in the open court on 26th Sept, 2014.

घोषणा खुले न्यायालय में दिनांक: 26th Sept , 2014 को की गई ।

Sd

sd

(डी. मन्मोहन/**D. MANMOHAN**)

(बी.आर. बास्करन,/ **B.R. BASKARAN**)

उपाध्यक्ष /**VICE- PRESIDENT**

लेखा सदस्य/**ACCOUNTANT MEMBER**

मुंबई Mumbai: 26th Sept ,2014.

व.नि.स./ *SRL* , Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai