

आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ

Income-tax Appellate Tribunal "E" Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./I.T.A./6494/Mum/2014, निर्धारण वर्ष /Assessment Year: 2005-06

Shri Sunil Prakash 703-A, Lakshchandi Apartment Krishna Vatika Marg, Gokuldharm Goregaon(E), Mumbai-400 063 PAN:AKIPP 6393 F	Vs.	ACIT -15(2) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Vishwas Mundhe-DR

Assessee by: Shri Aditya Ajgaonkar-AR

सुनवाई की तारीख / **Date of Hearing: 02.01.2017**

घोषणा की तारीख / **Date of Pronouncement: 08.03.2017**

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dt.27.08.2014, of the CIT(A)-26, Mumbai the assessee has filed the present appeal. Assessee, an individual, filed his return of income on 29.10.2005, declaring total income of Rs.18.10 lakhs. On 25.3.2011, after recoding the reasons for re-opening the AO issued a notice u/s.148 of the Act. He completed the assessment u/s.143(3) r.w.s.148 of the Act on 22.12.2011, determining his income at Rs.18,10,960/-.

Brief Facts :

Effective Ground of appeal is about treating the income from Short Term Capital Gain (STCG) of Rs.6.05 lakhs, as undisclosed income under the head income from other sources and the enhancement of the addition.

A search and seizure action u/s.132 of the Act was carried out in case of M/s. Mahasagar Securities Pvt.Ltd.(MSPL). Mukesh M. Chokshi.(MMC) and Jayesh K. Sampat(JKS) were the Directors of the Mahasagar Group, one of the main companies of the group was M/s. Alliance Intermediaries and Network Pvt. Ltd. (Alliance). It was observed by the AO that MMC and Group concerns were engaged in the business of issuing fraudulent bills and providing bogus speculation profit/losses, that he had entered into transaction with Alliance to the tune of Rs.26.31 lakhs, that it had purchased shares of Karuna Cable Ltd. (KCL) through Alliance. The AO issued a show cause notice to the assessee on 07.12.2011 in that regard. In its reply, the assessee said that the shares were transferred through D-mat Account,

that he had sold shares through stock exchange, that share transactions entered into were genuine, that he had paid money/received money through banking channels. The AO observed that the assessee had taken delivery of shares through off market and sold the shares through market, that he could manage the transaction through 'touch and go' technique. He asked the assessee as to why STCG should not be treated as undisclosed income of the assessee u/s.68 of the Act. In its reply the assessee argued that in the statements of MMC his name was not appearing. He asked for cross examination of MMC. As per the AO the DDIT (Inv.) had sent a list of persons who had purchased bogus bills or had claimed bogus profit/loss, that in that list name of the assessee was appearing. The AO issued summons u/s. 131 of the Act to MMC but he did not appear. Considering the 'circumstantial evidences' and 'human probability', the AO held that the transactions entered in by the assessee were not 100% genuine. Accordingly, he held that STCG of Rs.6.05 lakhs shown in the books of account was to be treated as undisclosed credit/income of the assessee u/s.68 of the Act.

4. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, the assessee challenged the re-opening stating that there was no tangible material to issue notice u/s.148 of the Act, that the assessee was not allowed cross examination of MMC.

After considering the assessment order and submission of the assessee, the FAA held that the assessee had not produced any evidence to establish that cross examination of MMC was requested for, that no prejudice was caused to the assessee if opportunity of cross examination was not given, that Mukesh Chokshi had provided accommodation entries to large number of people, that the assessee was not justified in seeking the opportunity for cross examining MMC. Referring to the case of Kanwar Natwar Singh of Hon'ble Supreme Court and other cases he held that the argument of cross examination was raised with the sole object of obstructing the process of law, that the evidence available on record was sufficient to support the stand taken by the AO. With regard to the STCG, the FAA observed that the assessee had furnished copies of DMAT statement in support of purchase & sale of shares, that he had relied upon the cases of Prashant Joshi (324ITR154); Baijnath Agarwal (40SOT475); Jaffer Ali K Rattansay (53SOT220). He held that MMC and the associate group concerns were providing bogus accommodation entries. He referred to statements recorded by the Officers of Investigation Wing during search proceedings. He observed that sale and transfer of shares were shown but purchases were not substantiated, that the sources of funds for purchases remained undisclosed, that the assessee had not made any genuine purchases of shares of

KCL,that the purchase of shares of KCL was through Alliance,that assessee had sold the shares through other broker, that he could not have purchased the shares from Alliance, that the sales of shares was beyond doubt,that the genuineness of the transaction was not proved, that the D-mat statement produced by assessee showed that shares had been transferred from Alliance, that it was an accommodation entry.The FAA issued notice for enhancing the income and to treat it as unexplained cash credit.Finally, he held that sale proceeds of shares sold by the assessee amounting to Rs.32.34 lakhs,was to be treated as unexplained cash credit and that same was to be assessed in his hands under the head 'income from other sources'.

5.Before us,it was argued that the shares were purchased and sold through DMAT account, that payments made for purchase was through banking channels, that the FAA himself had not doubted the sale of shares, that he had added the entire sale proceeds to the income of the assessee,that the assessee had asked for cross examination of MMC.He referred to the case of Smt. Ananya Singh (ITA/6493/Mum/2014-AY 2005-06 dt.11.03.15) and stated that facts of both the cases are identical,that in that matter also the assessee had purchased shares of KCL, that the FAA enhanced the addition to Rs.12.27 lakhs as against addition of Rs.2.08 lakhs made by the AO.The Departmental Representative(DR)supported the order of the FAA.

6.We have heard the rival submissions and perused the material before us.We find that the assessee had purchased 1.74 lakhs shares of KCL for Rs.26.29 lakhs through Alliance,that he sold those shares for Rs.32.34 lakhs -through another broker,that he had shown profit of Rs.6.05 lakhs under the head capital gains,that transaction was through D mat account,that payment for purchasing the shares and the sales proceeds were made through banking channels, that the AO had treated the transaction as business income as against STCG, claimed by the assessee,that during the appellate proceedings,the FAA made enhanced the income of the assessee,.We find that notice u/s. 148,in the matter was issued after four year and in the reasons recorded the AO has not mentioned as to how the failure on part of the assessee to disclose fully and truly the material facts led to under assessment and resultant escapement of income.Only on this ground the appeal filed by the assessee can be allowed.

But,we would like to discuss the merits of the case also.The AO had relied upon the statement of MMC to make the addition.Thus,we had witness of the AO.It was his duty to provide the copy of the statement of MMC to the assessee and to afford the opportunity to cross examine him.The AO on request of the assessee had issued a summon to MMC,but he did not appear.Therefore,we do not understand how the FAA has observed that the assessee

did not make any specific request for cross examination of MMC. It is also very strange that the FAA, being a judicial authority, has held that non providing opportunity of cross examination would not vitiate the assessment proceedings. If the AO/assessee wants to rely upon the statements of someone it is their duty to prove the truthfulness of such statements. Filing of affidavits/cross examination of the person making assertion can be means of verifying the genuineness of the statements. There can be other means also. But, the basic principles remain the same—person relying upon statement of someone has to prove it and especially when it is challenged by another party. We have not come across the statement of MMC where he has included the name of the assessee to whom he or the group concerns had issue fictitious bills or bills for claiming non-genuine profit/ loss. MMC has given a general statement disclosing broader outline of the transactions entered into by him and the group entities. He had never stated that all the transactions entered into by group were non genuine. His statement was a good lead to take the investigation further and make specific queries. But it was not done. Now, we are left with the general statement of MMC on one side and on the other side are the facts like payment/receipt of share transaction value through banking channels, transfer of shares in and from the D-mat account, FAA's finding that the sale was not in doubt, non observation of principle of natural justice by not providing cross examination of MMC. If all these facts and circumstances are weighed in the scale of reasoning, it would tilt in favour of the assessee. We are of the opinion that there was no justification on part of the FAA to direct the AO to tax the entire sale proceed of shares in the hands of the assessee during the year under consideration. Similarly, the AO was not justified to hold the STCG as business transaction. The assessee was not dealing in the shares and securities and the shares of KCL were held by him as investment and not as stock in trade. Here, we would like to refer to the case of Smt. Ananya Singh (supra). We find that the facts of that case are identical to the facts of the case under consideration. The order of Ananya Singh (supra), reads as under :

“2. Rival contentions have been heard and perused material on record. The facts in brief are that a search and seizure action u/s. 132 of the I.T. Act 1961 was conducted by the investigation wing of the income tax department, in the case of M/s. Mahasagar Securities Pvt. Ltd. on 25.11.2009. Shri Mukesh M. Choksi and Shri Jayesh K. Sampat were the director of M/s. Mahasagar securities Pvt. Ltd and its related group of 34 odd companies out of which the prominent are being M/s. Alliance intermediaries and net work Pvt. Ltd, M/s. Mihir Agencies Pvt. Ltd, M/s. Gold Star finvest Pvt. Ltd, M/s. Richmond Securities Pvt. Ltd. etc all run by Shri. Mukesh M Chokshi, were found to be engaged in bogus billing activities and in the business of providing bogus speculation profit/loss, commodities, Profit/loss on commodity trading (Through MCX) and had been continuing this business for many years. The list of clients who have taken entries from these companies was extracted from the computer data seized from M/s. Mahasagar Securities Pvt. Ltd office and has been found to consist of many beneficiaries

have taken bogus capital gain/ speculative profit/ bogus capital loss accommodation entries/bills in F.Y. 2003- 04 and 2004-05. The AO observed that after going through the information, it was found that assessee Smt. Ananya Singh has entered into transactions to the extent of Rs.10,16,166/- with M/s. Alliance intermediaries and Net work Pvt. Ltd during the F.Y.2004-05 relevant to A.Y. 2005-06. The assessee had purchased shares of Karuna Cable Ltd.

3. Search action u/s 132 of the Income-tax, 1961 was also carried on Mukesh Chokhi, Director of M/s Alliacne Intermediary Pvt. Ltd, wherein he has accepted that he was indulged in profiting bogus billing and bogus gain and loss through stock exchange and commodity exchange. In the ledger account of M/s. Alliance Intermediary Pvt. Ltd, assessee's name was reflected, this was also informed to the assessee in the reasons of re-opening. The assessee has submitted that assessee had paid/received money through Bank account, the shares were transferred through de-mate account and assessee had sold the shares through stock exchange the transitions entered by assessee was genuine.

4. In view of the above discussion the AO brought to tax the short term capital gain of Rs.2,08,693/- earned by the assessee and which had been brought in the books of the assessee. Accordingly the AO made an addition of Rs.2,08,693/- u/s.68 of the I.T. Act.

5. By the impugned order, the Ld. CIT(A) held that the sale proceeds of shares received by the assessee amounting to Rs.12,27,623/- was unexplained cash credit. The CIT(A), therefore, directed the AO to assess Rs.12,27,623/- as income from other sources from the bogus shares transaction. The income assessed by AO was accordingly enhanced.

6. Against above order of Ld. CIT(A), assessee is in further appeal before us.

7. The Ld. AR submitted that assessee genuinely purchase the shares, our attention was invited to the copies of purchase bills and contract notes of Karuna Cables Ltd. places at pages 8-17 of the paper book. Our attention was also invited to the copy of ledger account for the period from 1/4/2004 to 31/3/2005 and 1/4/2005 to 31/3/2006 in the books of the assessee and confirmation of broker Alliance Intermediaries and Network Pvt. Ltd., as placed at pages 18-20 of the paper book. The Ld. AR also highlighted copy of demat statement of ICICI bank and copies of Sale Bills and Contract Notes for sale of shares of Karuna Cables Ltd. to substantiate its claim for genuine purchase and sale. Assessee invited our attention to the ledger account copy of the broker Ramjidas Nagarmal Cons. P. Ltd. in the books of the assessee for the period from 1/4/2004 to 31/3/2005. Copy of the Bank Statement of ICICI Bank showing payment and receipt in respect of purchase and sale of shares.

8. In view of the above documentary evidences, it was contended by Ld. AR that the assessee purchased 67,200 shares of Karuna Cables Limited from M/s. Alliance Intermediaries & Network Ltd. (Alliance) for Rs.10,15,405/-. The said shares were sold through stock exchange platform where by transaction was subjected to STT and the assessee earned a profit of Rs.2,08,693/- from these transactions. The assessee claimed such profit as Short Term Capital Gain (STCG) taxable @10% u/s.11A of the Income Tax Act,1961.

9. As per the Ld. AR there is not even single evidence with the AO which points out that transaction in question is not genuine. The Ld. AO made its own presumption and held that transaction apparent is not real without any basis.

10. On the other hand, Ld. DR relied on the facts recorded by the Lower Authorities in their respective order.

11. We have considered rival contentions and carefully gone through the orders of Authorities below and also perused the details of purchase and sales filed by the assessee with regard shares of Karuna Cables Ltd.. We found that during the year assessee has purchased 67.200 shares of Karuna Cables Ltd. from Alliance at market rate for Rs.10,15,405/-. Copies of

contract notes and bills issued by Alliance towards purchase of shares were placed on page 12-17 of compilation. Copy of ledger account for the broker M/s. Alliance Intermediaries & Network Ltd. in the books of the appellant for the period from 01.04.2004 to 31.03.2005 and 01.04.2005 to 31.03.2006 alongwith its confirmation of accounts was also placed at pages 18-20 of compilation. Bank statement of the assessee whereby the payments made to the broker have duly been reflected, were also enclosed in the paper book.

12. We also found that the above share were credited in the demat Account of the assessee held with ICICI Bank, copy of demat statement was placed on page 21-22 of compilation. A reference to the same would show that the shares of Karuna Cables were received in the demat Account of the assessee on purchase and then transferred to the DP account of the assessee maintained with the broker Rajidas Nagarmal Consultants Pvt. Ltd. through whom sales have been effected on the stock exchange platform. We also found that in the instant case, only purchase has been effected from Alliance, whereas sale has been effected through another broker i.e. M/s. Ramjidas Nagarmal Consultants Pvt. Ltd. who has no connection with Mr. Mukesh Chokshi and there is nothing on record which suggests that M/s. Ramjidas Nagarmal Consultants Pvt. Ltd. has issued bogus bills to the assessee or above sale transaction is not genuine. With regard to the statement of Mr. Mukesh Chokshi recorded, it was contended by Ld. AR that in the statement of Mr. Mukesh Chokshi, the assessee was not named. Further, during the course of assessment proceedings, the assessee had requested the ld. AO to allow an opportunity to cross examine Mr. Mukesh Chokshi. However the Ld. AO could not make available Mr. Mukesh Chokshi for cross examination.

13. Ld. AR brought our attention to the decision of coordinate bench of the Tribunal in the cases of Mrs. Rasila N. Gada & ors. decided in ITA No.1773/Mum/2010 & other connected appeals, vide consolidated order dated 8-8-2012, wherein in almost identical facts and in relation to the additions made on the basis of the statement of said Mr. Mukesh Choksi, the Tribunal has the action of the CIT(A) in deleting the additions by observing as under :-

"5.1. After perusing the material available we are of the opinion that considering the facts and circumstances of the case, the order passed by the FAA does not suffer from any legal infirmity. Hon'ble Bombay High Court in the case of Sharada Credit and Mukesh R Marolia has upheld the orders of the ITAT, Mumbai. In those cases it has been held that shares purchased/sold in the off market cannot be considered illegal transactions. We find that the AO had not afforded opportunity of cross-examination of Shri Mukesh Choksi to the assessee. It is noteworthy that Sh. Choksi had not named the assessee in his statements as the beneficiary who had availed bogus entries. We have noticed that the assessee had shown the investment in shares in the balancesheet of the earlier assessment year and her return of income was accepted by the Department. We are of the opinion that once sales/purchase of shares is accompanied by this kind of evidences the genuineness of the said transactions cannot be doubted. Nonpayment of SIT cannot be and should not be basis for making addition of the section 68 of the Act. FAA has categorically held that all the necessary details about purchase and sale of shares were made available to the AO during assessment proceedings. We have perused the case laws relied upon by the AR. In the case of Mukesh R Marolia (supra) Hon'ble jurisdictional High Court has held as under:

" On further Appeal, the ITAT by the impugned order allowed the claim of the Assessee by recording that the purchase of shares during the year 1999-2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the

effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

Similarly, the sale of the said shares for Rs.1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine. In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs. 1, 41, 08, 484/-represented unexplained investment under Section 69 of the Income Tax Act, 1961 cannot be faulted."

We are of the opinion that the facts of the case of Mukesh R Marolia are similar to the facts of the cases under consideration. Respectfully following the orders of the Hon'ble High Court and the coordinating benches of the Tribunal we hold that purchase and sale of shares by the assessee was a genuine transaction, and hence, addition made by the AO cannot be endorsed. Upholding the orders of the FAA , we dismiss the appeals filed by the AO. "

Facts of the present case are being identical to the above case and also in view of our observations made above, the impugned additions in this case are not called for and the same are accordingly ordered to be deleted. "

Considering the above and reversing the order of the FAA,we decide the effective ground of appeal in favour of the assessee,as his order cannot be endorsed legally or factually.

As a result,appeal filed by the assessee stands allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है।

Order pronounced in the open court on 8th March, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 8 मार्च, 2017 को की गई।

Sd/-

Sd/-

(पवनसिंह /Pawan Singh)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 08.03.2017.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR " E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ई खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.