

IN THE INCOME TAX APPELLATE TRIBUNAL, "C" BENCH, KOLKATA

Before : **Shri M. Balaganesh, Accountant Member, and
Shri S.S. Viswanethra Ravi, Judicial Member**

I.T.A Nos. 714 to 718/Kol/2011
A.Ys 2001-02 to 2005-06

D.C.I.T, C.C-I, Kolkata
(Appellant)

Vs.

Sunita Khemka
PAN: AFMPK2702G
(Respondent)

For the Appellant/Department: Shri Sanjit Kr. Das, JCIT,ld.DR
For the Respondent/ Assessee: Shri Manish Tiwari, FCA, ld.AR

Date of Hearing: 14-10-2015

Date of Pronouncement: 28-10-2015

ORDER

SHRI M.BALAGANESH, AM

These appeals of the revenue arise out of the order of the Learned CITA in Appeal No. 530/CC-I/CIT(A)/C-III/06-07 dated 21.2.2011, Appeal No. 526/CC-I/CIT(A)/C-III/06-07 dated 21.2.2011, Appeal No. 527/CC-I/CIT(A)/C-III/06-07 dated 21.2.2011, Appeal No. 531/CC-I/CIT(A)/C-III/06-07 dated 21.2.2011 and Appeal No. 532/CC-I/CIT(A)/C-III/06-07 dated 21.2.2011 for the Asst Years 2001-02 to 2005-06 respectively against the orders of assessment framed u/s 153A read with section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The only issue to be decided in these appeals are that whether the assessee is eligible to claim long term capital gains on sale of shares during Asst Years 2001-02 to 2004-05 at a concessional rate of 10% and exemption u/s 10(38) for Asst Year 2005-06 in respect of sale transactions routed through recognized stock exchange.

3. The brief facts of this issue is that the assessee sold the shares of M/s Emkay Consultant Ltd (Listed in Kolkata Stock Exchange) and declared capital gains of Rs.

18,37,287/- for Asst Year 2001-02 ; sold shares of M/s Commitment Finance Ltd (Listed in Kolkata Stock Exchange) and declared capital gains of Rs. 19,24,910/- for Asst Year 2002-03 ; sold shares of M/s Emkay Consultant Ltd (Listed in Kolkata Stock Exchange) and declared capital gains of Rs. 15,67,901/- for Asst Year 2003-04 ; sold shares of M/s Commitment Finance Ltd (Listed in Kolkata Stock Exchange) and declared capital gains of Rs. 16,58,020/- for Asst Year 2004-05 and sold shares of M/s Limtex Investment Ltd (Listed in Kolkata Stock Exchange) and declared capital gains of Rs. 13,16,420/- for Asst Year 2005-06. The assessee had submitted the details of purchase and sale of the shares in aforesaid companies before the Learned AO and stated that the payment has been made to the stock brokers through account payee cheque from the disclosed bank accounts. Admittedly, these shares were held as an Investment including the other shares by the assessee. During the course of assessment proceedings, the details of contract notes for purchase and sale of shares were duly filed by the assessee. The entire sale consideration for sale of these shares were received by the assessee from the stock brokers through account payee cheques. The assessee had also duly paid the Securities Transaction Tax (STT) during Asst Year 2005-06 at the time of sale of shares. The Learned AO doubted the computation of capital gains on sale of the aforesaid shares by stating that the shares of said companies could not have been sold at the prevailing market rates as per the Calcutta Stock Exchange and treated the long term capital gains as bogus and held that it is only assessee's own unaccounted money that had surfaced in the form of long term capital gains with the connivance of the brokers and accordingly brought to tax under the normal provisions of the Act instead of concessional rate of tax applicable to long term capital gains. On first appeal, the assessee pleaded that there was a search and seizure operation conducted u/s 132 of the Act on Aparna Group of cases which includes assessee herein, wherein, no incriminating materials with regard to the subject mentioned issue before us was found by the search party. The Learned CITA duly appreciated the contentions of the assessee and rejected the contentions of the Learned AO in this regard by placing reliance on the decision of this tribunal wherein addition made towards similar grounds of share transactions in the hands of the assessee's husband Shri.Anil Khemka were deleted in ITA Nos. 901 to 905 / Kol / 2009 dated 28.1.2010 for the Asst Years 2001-02 to 2005-06. Aggrieved, the revenue is in appeal before us on the following grounds:-

Grounds of Appeal for the A.Y 2001-02

1. *In the facts and circumstances of the case and in law, the ld.CIT(A) has erred in directing the AO to treat the long term capital gain of Rs.18,37,287/- earned out of selling the shares of M/s. Emkay consultants Ltd as such as shown by the assessee and tax it as per applicable concessional rate without proper consideration of the entire facts and without proper appreciation of the evidences and arguments put forth in the assessment order that the said income was nothing but assessee's own unaccounted money introduced in the form of long term capital gain with connivance of the brokers.*
2. *The department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.*

Grounds of Appeal for the A.Y 2002-03

1. *In the facts and circumstances of the case and in law, the ld.CIT(A) has erred in directing the AO to treat the long term capital gain of Rs.19,24,910/- earned out of selling the shares of M/s. Commitment Finance Ltd as such as shown by the assessee and tax it as per applicable concessional rate without proper consideration of the entire facts and without proper appreciation of the evidences and arguments put forth in the assessment order that the said income was nothing but assessee's own unaccounted money introduced in the form of long term capital gain with connivance of the brokers.*
2. *The department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.*

Grounds of Appeal for the A.Y 2003-04

1. *In the facts and circumstances of the case and in law, the ld.CIT(A) has erred in directing the AO to treat the long term capital gain of Rs.15,67,901/- earned out of selling the shares of M/s. Emkay consultants Ltd as such as shown by the assessee and tax it as per applicable concessional rate without proper consideration of the entire facts and without proper appreciation of the evidences and arguments put forth in the assessment order that the said income was nothing but assessee's own unaccounted money introduced in the form of long term capital gain with connivance of the brokers.*
2. *The department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.*

Grounds of Appeal for the A.Y 2004-05

1. *In the facts and circumstances of the case and in law, the ld.CIT(A) has erred in directing the AO to treat the long term capital gain of Rs.16,58,020/- earned out of selling the shares of M/s. Commitment Finance*

Ltd as such as shown by the assessee and tax in as per applicable concessional rate without proper consideration of the entire facts and without proper appreciation of the evidences and arguments put forth in the assessment order that the said income was nothing but assessee's own unaccounted money introduced in the form of long term capital gain with connivance of the brokers.

2. *The department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.*

Grounds of Appeal for the A.Y 2005-06

1. *In the facts and circumstances of the case and in law, the ld.CIT(A) has erred in directing the AO to treat the long term capital gain of Rs.13,46,420/- earned out of selling the shares of M/s.Limtex Investment Ltd as such as shown by the assessee and allow exemption u/s.10(38) of the I.T Act without proper consideration of the entire facts and without proper appreciation of the evidences and arguments put forth in the assessment order that the said income was nothing but assessee's own unaccounted money introduced in the form of long term capital gain with connivance of the brokers.*
2. *The department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.*

4. Shri Sanjit Kr.Das, JCIT, Sr. DR argued on behalf of the revenue and Shri.Manish Tiwari, FCA, the Learned AR argued on behalf of the assessee.

5. As the issues involved in all these years are identical in nature, they are taken up together and disposed off by this common order for the sake of convenience and brevity.

6. We have heard the Learned AR and find that the Learned CITA had relied on the decision of this tribunal rendered in the case of husband of the assessee. The operative portion of the Learned CITA order is reproduced herein below:-

Para 6 to 6.4 of the ld.CIT(A)'s order

"6. I have carefully considered the submissions of the appellant and the assessment orders. I have also carefully perused the assessment orders in respect of Sri Anil Kr. Khemka and the order of the ITAT in the case of Sri Anil kr. Khemka. I find that there is an uncanny resemblance between the assessment orders passed in the case of the appellant and in the case of Sri Anil Kr. Khemka-

- (1) *All those orders are passed by the same AO on the same date;*
- (2) *The assessment orders are identically drafted. Identical reasons have been given by the AO and even the wordings are identical;*
- (3) *The name of the shares on which long term capital gain has been claimed are identical in each of the assessment years;*
- (4) *The names of the brokers through which the transactions have been made are also identical.*

6.1 *Hon'ble ITAT, Kolkata in its order dated 21.01.2010 (supra) in the case of Shri Anil Khemka has made the following observation:*

“In all these assessment years, the assessee has valued all the shares at cost and offering the income of trade of these shares either as short-term capital gains or long term capital gains as the case may be. It is further observed that the shares at which the assessee has purchased/sold are authenticated by the quotations of the Stock Exchange and the transactions are routed through the bank accounts and properly recorded in the respective companies. Keeping in view of the facts and circumstances of the case, we find no justification in treating the said transactions as bogus by the AO nor treating the same as business in the nature of adventure in the nature of trade by the ld.CIT(A) is not justifiable. Therefore, we set aside the orders of the revenue authorities on this issue and direct the AO to treat the long term capital gains as claimed by the assessee. Hence, the ground nos.1 and 2 raised by the assessee are allowed.”

6.2 *The appellant has submitted all the original contract notes of sale and purchase, copies of the bills, bank statements in respect of the purchase and sale of shares. All payments were made and received through account payee cheques drawn by the concerned Stock Brokers of Calcutta Stock Exchange and duly recorded in the bank accounts and regular Books-of-A/cs. All the shares sold were transferred through Demat Account or handed over physically to concerned brokers. The price at which the shares have been sold is also published in the daily Quotation issued by the Calcutta Stock Exchange. The shares sold after 1st October'04 pertains to the assessment year 2005-06. Security Transaction tax has been deducted from the sale proceeds.*

6.3 *The decisions of the Hon'ble Calcutta High Court in the case of CIT-Vs- Carbo Industrial Holdings Ltd (244 ITR 422) and CIT –Vs- Emerald Commercial Ltd (250 ITR 549) are also relevant to the issue where the Hon'ble Court has held that where the payments are made by Account Payee Cheques and the existence of the brokers is not disputed the assessee cannot be punished for the default of the brokers and share transactions cannot be held to be bogus. The Hon'ble ITAT, Kolkata in the case of Rajkumar Agarwal (ITA 1330/Kol/2007 dated 10/08/07) has held that when purchase and sale of shares were supported by proper Contract Notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares*

were purchased and sold through recognised broker and the sale considerations were received by Account Payee Cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.

6.4 In the assessment orders under consideration the AO has not considered any of these facts. He has treated the transactions as bogus only on the basis of the suspicion that the difference in purchase and sale price of these shares are unusually high. It is a settled law that assessment cannot be made on the basis of suspicion or surmise. The AO has not brought any material on record to support his finding that there has been collusion/connivance between the broker and the appellant for the introduction of its unaccounted money. In view of the decisions of Hon'ble Kolkata High Court and Hon'ble ITAT, Kolkata discussed supra, and also respectfully following the decision of Hon'ble ITAT, Kolkata dated 28.01.2010 in ITA No.901-905, Kol 2009 in the case of Sri Anil Kr. Khemka (husband of the appellant) I hold that the AO is not justified in treating the long term capital gain as bogus. I direct the AO to treat the long term capital gain as claimed by the appellant and tax them at the rates applicable for assessment years 2001-02 to 2003-04 and for assessment year 2005-06 exemption u/s. 10(38) should be allowed."

6.1 In view of the aforesaid clear findings of the Learned CITA and respectfully following the co-ordinate bench decision of this tribunal in the case of assessee's husband on the similar facts and circumstances, we are not inclined to interfere with the order of the Learned CITA and accordingly, the grounds raised by the revenue are dismissed.

7. In the result, the appeals of the revenue are dismissed.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 28 / 10/2015

Sd/-
(S.S. Viswanethra Ravi, Judicial Member)
Date 28 /10/2015

Sd/-
(M. Balaganesh, Accountant Member)

Copy of the order forwarded to:

- 1.. The Appellant/Department: DCIT CC-I, 18 Rabindra Sarani, Kolkata-1.
- 2 The Respondent/Assessee-Smt. Sunita Khemka 15/1/A Loudon St, Kol-17.
- 3 /The CIT,
/
- 4.. The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar

** PRADIP SPS