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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 220/2019 & CM No. 10774/2019

UDIT KALRA

..... Appellant

Through : Mr. Rajesh Mahna, Mr. Manu
Giri, Mr. Ramanand Roy, Mr.
Rohit Sharma and Mr. Dev Raj
Sharma, Advs.

versus

ITO WARD-50(1)

..... Respondent

Through : Mr. Zoheb Hossain, Sr.
Standing Counsel with
Mr. Deepak Anand, Jr. Standing
Counsel for Revenue.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% **08.03.2019**

The assessee is aggrieved by the concurrent findings of the tax authorities – including the lower appellate authorities rejecting its claim for a long term capital gain reported by it, to the tune of Rs.13,33,956/- and Rs.14,34,501/- in respect of 4,000 shares of M/s Kappac Pharma Ltd. The assessee held those shares for approximately 19 months; the acquisition price was Rs.12/- per share whereas the market price of the shares at the time of their sale, was Rs.720/-. It is contended that the assessee was not granted fair opportunity.

Mr. Rajesh Mahna, learned counsel appearing for the assessee relied upon the orders of the co-ordinate Bench of the tribunal, in respect of the same company i.e. M/s Kappac Pharma Ltd., and

pointed out that the tax authority's approach in this case was entirely erroneous and inconsistent.

The main thrust of the assessee's argument is that he was denied the right to cross-examination of the two individuals whose statements led to the inquiry and ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal.

This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent – A.O., CIT(A) and the ITAT have all consistently rendered adverse findings – what is intriguing is that the company (M/s Kappac Pharma Ltd.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal.

This appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

MARCH 08, 2019

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**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI 'SMC' BENCH, NEW DELHI**

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 6717/DEL/2017
[Assessment Year: 2014-15]

UDIT KALRA,
C/O DEV RAJ SHARMA,
ADVOCATE,
TA-327, 2ND FLOOR,
TUGHLAKABAD EXTN.,
MAIN OKHLA ROAD,
NEW DELHI – 110 019
(PAN: CDHPK9311E)
[Appellant]

Vs. ITO, WARD-50(1),
CIVIC CENTRE,
NEW DELHI – 2

[RESPONDENT]

Assessee by: Sh. Dev Raj Sharma, Adv.
Revenue by : Shri SL Anuragi, Sr. DR.

ORDER

This appeal by the assessee is preferred against the order of the Ld. Commissioner of Income Tax [Appeals]-17, New Delhi dated 25.8.2017 pertaining to assessment year 2014-15 on the following grounds:-

- i) That on the facts and in the circumstances of the case, the order passed by the Ld. CIT(A) is bad, both in the eye of law and on the facts.
- ii) The Ld. CIT(A) has erred in law and on facts in upholding the order passed by the

Assessing Authority and confirming the additions.

- iii) The Ld. CIT(A) has erred in law and on facts in not appreciating the fact that additions to the income of the assessee were made purely on presumptions on conjecture and surmises and therefore deserve to be deleted.
- iv) The Ld. CIT(A) has erred in law and on facts in disallowing deduction claimed by the assessee u/s. 10(38) of the Income Tax Act for Rs. 27,20,457/-. The Ld. CIT(A) as well as AO has failed to appreciate that for claiming the benefit of exemption u/s. 10(38) of the Act three requirement needs to be fulfilled.
 - (a) First the share should be held for more than 1 year.
 - (b) Secondly it should be listed and sold on recognised stock exchange and
 - (c) Thirdly on the said sale necessary security transaction tax (STT) has been paid.

A perusal of the bills of purchase and sale shows that the shares have been held for more than 1 year, the same has been sold on recognised stock exchange and necessary STT has been paid to Govt. Treasury and therefore the exemption u/s. 10(38) of the Act cannot be denied in the circumstances of the case.

5. The Ld. CIT(A) and the AO has erred in law and on facts in not confronting the assessee with the material and statement used against him in the assessment order. On this ground also the additions made by the AO deserve to be deleted. It is submitted that the assessee was supplied with the copy of the statement of Mr. Alok Harlalka but was ever given opportunity to cross examine said Mr. Alok Harlalka inspite of his specific request. Surprisingly the AO has concluded the assessment relying on the statement of some Sri Jai Kishan Poddar instead of Mr. Alok Harlalka.

6. The appellant craves leave to add, amend or alter any or more grounds of appeal either before or at the time of the hearing of the appeal.

2. Brief facts of the case are that assessee filed his return of income on 25.7.2014 declaring a total income of Rs. 7,71,040/-. The case of the assessee was selected for scrutiny through CASS in order to examine "suspicion long term capital gain on shares (inputs from investigation wing)". Notice u/s. 143(2) of the Income Tax Act, 1961 (in short "Act") was issued on 18.9.2015. Consequent on transfer of jurisdiction, the further notice u/s. 143(2) of the Act was issued to the assessee on various dates and again notice u/s. 142(1) issued for hearing on 27.5.2016. In compliance to the same the A.R. for the assessee appeared from time to time and furnished the information called for. During the year under consideration, the assessee has declared income earned from Long Term Capital Gain of Rs. 27,20,457/- on sale of shares during the year which has been claimed exempt u/s. 10(38) of the Act. AO held that the transactions was bogus or sham and nothing but a racket of accommodation entries, by way of long term capital gain exempt from tax, the amount of capital gains of Rs. 27,20,457/- claimed as LTCG exempt from tax was held to be not genuine and addition as made of the total cash credit of Rs. 27,20,457/- to the returned income of the assessee as per the provisions of section 68 of the Act and provision of section 115BBE of the Act are also applied and this amount is taxed @ 30% and accordingly, assessed the income of

the assessee at Rs. 35,39,500/- vide order dated 28.12.2016 passed u/s. 143(3) of the Act. Against the assessment order, the Assessee appealed before the Ld. CIT(A) who vide his impugned order dated 25.8.20187 has dismissed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), assessee appealed before the Tribunal.

3. During the hearing, Ld. counsel for the assessee has submitted that the addition in dispute was made and confirmed purely on presumptions, conjecture and surmises and therefore, deserve to be deleted. He further submitted that the authorities below have failed in disallowing deduction claimed by the assessee u/s. 10(38) of the Act for Rs. 27,20,457/-. He further submitted that the lower authorities also failed to appreciate that for claiming the benefit of exemption u/s. 10(38) of the Act three requirement needs to be fulfilled i.e. first the share should be held for more than 1 year, secondly it should be listed and sold on recognised stock exchange and thirdly on the said sale necessary security transaction tax (STT) has been paid. He further stated that in this case a perusal of the bills of purchase and sale shows that the shares have been held for more than 1 year, the same has been sold on recognised stock exchange and necessary STT has been paid to Govt. Treasury and therefore the exemption u/s. 10(38) of the Act cannot be denied in

the circumstances of the case. Hence, he requested to cancel the orders of the authorities below and allow the appeal of the assessee. In support of his contention, he filed a Paper Book containing pages 1 to 91 in which he has attached the copy of written submissions/arguments; show cause notice dated 19.12.2016 issued by the AO; reply dated 26.12.2016 of the assessee to the shows cause notice dated 19.12.2016; copy of the bank statement of Axis Bank, East Patel Nagar, New Delhi; copy of judgment of High Court of Gujarat in case of CIT vs. Himani M. Valik (2013) 10 taxmann.com 326 (Gujarat); copy of judgment of Rajasthan High Court in case of CIT vs. Smt. Sumitra Devi in ITA No. 54/2012; copy of judgment of ITAT, Mumbai in case of ACIT vs. Shri Indravadan Jain ITA No. 4861/Mum/2014; copy of the judgement of Mumbai High Court in case of CIT vs. Shri Mukesh Ratilal Marolia, ITA no. 456/Mum/2007; decision of ITAT, Agra in case of Km. Saumya Agarwal vs. ITO (2008) 174 Taxman 60 (Agra); copy of ITAT decision in case of Meenu Goel vs. ITO in ITA No. 6235/Del/2017 and Judgement of Hon'ble High Court of Punjab and Haryana in the case of Pr. CIT vs. Prem Pal Gandhi and Pr. CIT vs. Hitesh Gandhi in ITA 18 of 2017 dated 16.2.2017.

4. On the other hand, Ld. DR relied upon the orders of the authorities below. He further stated that assessee has not substantiated his claim before the revenue authorities. He submitted that the purchase transaction has been done off market in physical form by paying cash and assessee has purchased the shares M/s Kappac Pharma Ltd. in physical

form and thereafter, the same have been converted into electronic mode and SEBI guidelines have been not adopted. It was further submitted that the purchase payments were made in cash and not through the normal banking channel therefore the same were non verifiable from the authentic supporting details such as bank accounts/documents. The assessee is not a regular investor in shares. Assessee has failed to furnish the proof of source for the purchase transactions. Thus, the entire transactions are against human probability. He further stated that the case laws relied upon by the AO as well as Ld. CIT(A) may be read as his arguments including the decision of the Hon'ble Supreme Court of India in the case of Mc Dowell and Company Limited, 154 ITR 148.

5. I have heard both the parties and perused the records especially the impugned order. I find that the assessee is an individual and the amount of cash credit Rs. 27,68,457/-. However, on perusing the assessment order, I find that there was a specific information that assessee has indulged in non-genuine and bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Kappac Pharma Ltd., a Mumbai based company. It is noticed that the purchase transaction has been done off market in physical form by paying cash. The assessee has purchased the share M/s Kappac Pharma Ltd. in physical form and thereafter, the same have been converted into electronic mode. The purchase payments were made in cash and not through the normal banking channel therefore the same were non-verifiable from the authentic supporting details such as bank account/

documents. Assessee is not a regular investor in shares. The assessee has failed to furnish the proof of source for the purchase transactions. Thus, the entire transactions are against human probability. Also considering the findings of the Investigation Wing, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the nature of transaction entered into by the assessee the LTCG of Rs. 27,20,457/- claimed exempt u/s. 10(38) of the Act by the assessee cannot be allowed and the amount of Rs. 27,68,457/- received back as sales proceeds on sale of shares was required to be added back towards his taxable income under section 68 of the Act. The above amount of Rs. 27,68,457/- was deemed as income of the assessee u/s. 68 of the Act, over and above, the income already declared in ITR during AY 2014-15. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 is squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above discussions, I am of the considered

opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee.

6. In the result, the Appeal of the Assessee is dismissed.

The order pronounced on 08.01.2019.

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 08-01-2019

SR BHATNAGAR

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi