

आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No.4906/Mum/2011

(निर्धारण वर्ष / Assessment Year: 2006-07)

ITO-19(3)(4), Room No. 304, 3 rd Floor, Piramal Chamber, Lal Baug, Mumbai	बनाम/ Vs.	Shamim M. Bharwani Noor-E-Rehman, 5 th Floor, B. J. Road, Bandra, Mumbai(W)-400 050
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACPG 8674 N		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Neil Philip
प्रत्यर्थी की ओर से/Respondent by	:	Shri Keshav B. Bhujle
सुनवाई की तारीख / Date of Hearing	:	12.01.2015
घोषणा की तारीख / Date of Pronouncement	:	27.03.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-30, Mumbai ('CIT(A)' for short) dated 18.04.2011, allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2006-07 vide order dated 29.12.2008.

2. The sole issue arising in the instant appeal is the maintainability or otherwise in law of the addition by way of unexplained cash credit u/s.68 of the Act in the sum of Rs.12,14,932/-, rejecting the assessee's explanation of the same as representing the sale

proceeds of equity shares, since deleted by the Id. CIT(A), so that the Revenue is in appeal.

3. The basis of the disallowance of the assessee's claim by the Assessing Officer (AO) was the facts and circumstances of the case. The assessee, not a registered client of the broker, Suresh Kumar Somani, from whom the shares (2500 in number) in a company, Emerald Commercial Ltd. (ECL), were stated to have been purchased on 06.05.2004. The purchase was in cash, so that it was not verifiable, at least in-so-far as to its time, which is of essence. Further, the said transaction was not through the stock exchange, so that the same was not registered with it. In fact, the first trade in the said shares on the Calcutta Stock Exchange, with which the assessee's broker, S.K. Somani, was registered, was only on 03.03.2005, i.e., 10 months after the date of the assessee's purchase. The shares were in a nondescript company, with no financial and/or physical assets of value or reported earnings. The shares, purchased at an average rate of Rs.21.70 per share in May 2004, went up to as much as from Rs.465 to Rs.489 in July, 2005, i.e., just over years' time. Each of these incidents matched with that which could be expected in a case of a transaction in a penny stock, the *modus operandi* of the transactions in which was also listed by the AO. Accordingly, relying on the decisions by the apex court in the case of *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC); *Durga Prasad More* reported in 82 ITR 540 (SC) and *Mc. Dowell & Co. Ltd.* 154 ITR 148 (SC), besides by the Tribunal in the case of *Asst. CIT vs. Som Nath Mani* [2006] 100 TTJ 917 (Chd), he assessed the impugned credit of Rs.12.15 lacs as unexplained income u/s. 68 of the Act. In appeal, the assessee however found favour with the Id. CIT(A). The purchase of shares was through a contract note issued by a registered broker, duly accounted for in his books of account, and could not be doubted merely because it was not through the online trading system of the stock exchange. The broker was in fact called for and examined by the AO. The shares were dematerialized in due course of time. The purchase price stood proved by the fact that the shares were transacted on the stock exchange on 06.05.2005 at Rs.21.70 per share, i.e., the same rate at which the assessee had purchased them in May,

2004. The sale proceeds were received per account payee cheque/s, duly deposited in the assessee's bank account, and not withdrawn in cash. Security transaction tax (STT) was paid on the impugned sale transaction/s, proved with documentary evidences and, accordingly, all the conditions of section 10(38), conferring exemption to the gains arising on the sale or transfer of shares, were fulfilled. The assessee's claim being allowed thus, the Revenue is in appeal before us.

4. We have heard the parties, and perused the material on record.

4.1 As shall be evident from the foregoing narration of events, the primary facts (and figures) of the case are not in dispute, which (dispute) arises principally on account of the different inferences drawn from the same set of primary facts by the two Revenue authorities. The issue is, thus, essentially factual, revolving or centering around as to which of the two inferential findings are maintainable in law, i.e., in view of the surrounding facts and circumstances of the case. The Revenue's principal and the only charge is *qua* the genuineness of the transaction/s, and which has been acceded to by the first appellate authority in view of the documentary evidences furnished by the assessee in support of his claims. That genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in *Sumati Dayal* (supra), relied upon by the Revenue, wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary evidences filed or relied upon by the assessee-appellant. That documentary evidences are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well settled, and for which the Revenue relies on the decision in the case of *Durga Prasad More* (supra). What is relevant, more so where the genuineness of the transaction is in issue, is the truth of the document/s furnished in substantiation, as well as the substance of the transaction and not its form, and which is to be determined on the basis of and on the conspectus of the entirety of the facts and circumstances of the case.

The issue before us is whether the documents furnished by the assessee, including averments made by him, or even his broker, satisfy the test of preponderance of human probabilities. In our view if the assessee has reasonably explained the 'intriguing' facts and circumstances as pointed by the AO, and on the strength of which the genuineness is assailed by him, and which further agree with that observed in the case of a penny stock company, no case for treating the transaction as not genuine shall arise. The onus u/s.68 though is on the assessee, so that his explanation would, however, require being substantiated or proved. The case law in the matter is legion, and toward which we may, if only for the sake of completeness of our order, advert to the some of the celebrated decisions by the apex court in the matter:

A. Govinda Rajulu Mudaliar v. CIT [1958] 34 ITR 807 (SC);
Sreelekha Banerjee & Others v. CIT [1963] 49 ITR 112 (SC);
Kalekhan Mohammed Hanif v. CIT [1963] 50 ITR 1(SC);
CIT v. Durga Prasad More [1971] 82 ITR 540 (SC);
CIT v. Biju Patnaik [1986] 160 ITR 674 (SC);
Sumati Dayal v. CIT [1995] 214 ITR 801 (SC); and
CIT vs. P. Mohanakala & Others [2007] 291 ITR 278 (SC)

We may further clarify that in proceeding with the matter, we have circumscribed the entire material on record.

4.2 The assessee, to begin with, has nowhere explained as why the shares were purchased in cash, the source of which is ascribed to cash-in-hand, and not to any contemporaneous evidence, as cash withdrawn from bank on that or nearby dates. *How was the cash, one may ask, transmitted from Mumbai, where the assessee is resident, to Kolkata, where the purchase stands made, and the broker, to whom it is paid, located?*

4.3 Then, again, why was the transaction not carried through a recognized stock exchange (SE), mandatory in law, even as it was done through its registered member. This becomes relevant and significant for more than one reason. Firstly, it proves the time of the transaction, which is of essence inasmuch as it determines the holding period of the shares/asset, with reference to which, where over 12 months, exemption from tax to gains arising on transfer is granted by law per s.10(38) read with other relevant defining

provisions of the Act. The first appellate authority has in this regard mentioned the settlement number of the transaction as D-2005326. The same, even as stated by the A.O. (refer para 4.8 of the assessment order), is the number of the contract note issued by the broker. The settlement, where the transaction is carried through the SE, which is admittedly not the case, is between the brokers or the members of the SE and, accordingly, only a net amount is payable or receivable by a particular broker for a particular period, called the settlement period, which extends to generally one week or a fortnight, and which is to or from the SE, which aggregates the financial impact, i.e., the net result of all the transactions amongst all the brokers for the settlement period, acting as a collecting/disbursing agency. A single amount is thus either payable or receivable by each broker to or from the SE for a particular period, which is again numbered (i.e., as settlement number), and serves to settle the financial obligations to or claims on all the other members of the exchange, i.e., of each broker, for that period. This is of course accompanied by giving and taking delivery of the shares, either in physical form or by issuing or accepting delivery, which in either case is remitted by the member to his clients, for on behalf of the whom he acts, charging a fee called brokerage/commission, for his services. The whole purport of the forgoing note on the trading process is to clarify that the settlement only signifies a settlement between the brokers, carried out through the exchange acting as a nodal agency, so that the purchase transaction/s under reference may not be so construed inasmuch the same is admittedly off the market (exchange), which stands established by the Revenue through the communication per its letter to the AO in response to a notice u/s.133(6) by the Calcutta Stock Exchange. This aspect is in fact not disputed by the assessee. The same may not necessarily imply that the transaction is not genuine or not undertaken at the relevant time, but then the same would have to be shown with reference to some corroborative, external evidence. The contract note/bill by the broker is only an 'internal voucher', i.e., by person who is a party to the transaction and, thus, acting in cohesion, if not in collusion. It is after all a document generated by him, so that its truth, in the context of paper companies, the 'selling' of 'gains' and 'losses' in which the brokers, as operators, play a significant role,

cannot therefore be decided with reference thereto or the statement by the broker, a related party. This, however, would be so only where there are strong factors or circumstances which cause serious doubt about the transaction. *For example, how one may ask, were the shares transmitted to the assessee, located at Mumbai, who would have signed the transfer form?*

The broker or the assessee nowhere states the reason for carrying out the transaction in the manner done, i.e., off the market, which is not ordinarily permissible, and is subject to some legal constraints under Securities Contracts (Regulation) Act, 1956. Rather, how could he deal with the assessee, who is not his client! Then, again, why was it paid for in cash, for which there is no evidence, and neither has the broker been shown to accept cash in the ordinary course of his business. Why, for the persons trading therein, this would be an impediment to claim the cost of shares traded in, in view of the *non obstante* clause of s. 40A(3). The brokers are in fact required to maintain separate bank account for the funds received from or on behalf of the clients, so that the same do not merge with that of the broker himself. What is equally important is the date on which the shares were dematerialized. This is as no transaction could be carried out in listed shares, i.e., in the physical form, where the shares stand dematerialized by the company. Why were the shares sent for dematerialization only in May 2005, i.e., after a delay of over a year, having been dematerialized only on 12.07.2005 (PB pg.10), i.e., days prior to their sale on 22.07.2005. That is, assuming that the shares were actually purchased and delivered to the assessee in May, 2004. Rather, as it would appear to us, the dematerialization of the shares coincides with the spiraling price of the scrip, so that an orchestration of the 'events' is apparent. The shares, even assuming a valid purchase, thus, would be close to the date/s of dematerialization. The assessee states of having reported its purchase (of shares) on 06.05.2004, per his balance-sheet as at 31.03.2005, enclosing it along with his return of income for A.Y.2005-06 (PB pgs. 15, 16). The return of income, however, is filed only on 28.10.2005, which is even subsequent to the sale of shares on 12.07.2005, so that the said reporting of the transaction, which of course does not bear the date of purchase, is to no moment. The assessee relies on a communication

from the company dated 17.05.2004 (PB pg. 2) to show that the shares were lodged for transfer with the company immediately upon purchase on 06.05.2004, evidencing, thus, the validity of the purchase date. In this regard, we may firstly clarify that proving purchase as genuine; the Revenue doubting the price rise and, thus the gain, would therefore only make out a case for the exclusion of a part (Rs. 54,250/-) of the impugned sum of Rs.12.15 lacs, which represents the entire sale proceeds of the shares. It needs to be appreciated that what is essentially under cloud, and being seriously doubted as to the genuineness, is the gain stated to arise on the transaction. It is the gain which is abnormal, i.e., both *qua* the scrip; its' trading and, thus, its quantum, and unexplained, besides being tax exempt, and which is independent of its purchase. The purchase of shares of a little known company of the face value of Rs.10/- each at Rs.21-22 would even otherwise hardly raise any eyebrow or doubt. The purchase gets doubted examined only for the reason that it represents a part of the overall transaction, which is considered by the Revenue as an artifice. In other words, proving the purchase would by itself not prove the transaction of gain, which stands impugned and, further, being at a minor sum has little bearing in the matter. In fact, the A.O. states precisely this (refer para 4.9(a) of his order), that even assuming the purchase as genuine, the sales, given the high rates for such penny stocks, with no real buyers, are bogus. Coming to the assessee's contention on merits, the letter dated 17.05.2004 supra inspires little confidence. It does not specify the name of the authorized signatory, the sign being otherwise not visible. It bears no serial number, even as it represents a communication, which a company or its secretarial department is required to make in the regular course of its business. It further does not bear any indication of the manner in which it is conveyed to the assessee, i.e., by hand, per post - ordinary or registered; per courier, etc., which is, again, a norm, besides establishing its date. Such remittances are generally through registered post, so that it would constitute evidence with the company for having delivered the shares, which are even otherwise valuable documents. The incidental question that arises is the date when the shares were dematerialized by the company. This is as it clearly shows that the shares, issued only on 31.03.2004, being remitted to the transferee in the physical form on 17.05.2004, were not

converted into the D-mat form till then. This is relevant as the trading on the exchange, which only would make the share a listed share, gain on which is exempt u/s.10(38), could as per the guidelines only be in the D-mat form. No wonder, the trading on the exchange in the said scrip commences only on 03.03.2005. The assessee speaks of having deposited STT, but, then, the question is whether the said payment would make a non-genuine transaction, genuine.

4.4 Further on, why, and on what basis, the assessee, a teacher by profession as well as a partner in a partnership, with no documented or reported experience in trading in shares or investment therein - his balance sheet as on 31.03.2005 reflecting no investment in shares except the 2500 shares in ECL (besides another for a meager amount of Rs.2100), pick the said shares, i.e., selected the said scrip for investment, and which in fact stood issued only days earlier on 31.03.2004. The company reportedly has no standing either in the industry or in the market (i.e., for the goods or services it presumably deals in), or even in the trading circles, i.e., for shares. That apart, no material to establish its business activity, viz. its annual reports, or of the companies under the same management/industry, etc., to exhibit its credentials in any manner, stands adduced by the assessee at any stage of the proceedings. Continuing further, how and on what basis, a share trading in the range of Rs.21/- to Rs. 22/- in May 2005, witness a rise to Rs.465 to Rs.490 inside a couple of months - the assessee's sale, at Rs.487/- apiece, being on 22.07.2005. This is amazing by any standard, and which has not been explained in any manner, i.e., assuming it to be not a case of price manipulation, which is the *modus operandi* adopted for reflecting prices on the SE. *Who, one may ask, are the purchasers of such shares, i.e., in a nondescript company at such high prices; no information qua which stands furnished at any stage, even as it is they who have apparently brought the shares, supplying the credit to the assessee, which is being questioned and examined as to its genuineness u/s. 68 of the Act.* All this definitely casts serious doubts on the genuineness of the sale price and, thus, the ensuing gain. This, in fact, is a classical feature of a penny stock, the price zooming for no apparent, economic or even technical,

reasons. One could understand where the same is in sympathy with the market sentiment or some industry-wise favourable development, even as the share ostensibly trades, i.e., going by the market quote, at over 22 times its price obtaining two months earlier, implying, by correspondence, a jump in the market index to the same or similar extent, i.e., 2200%, over the same period, which is both unheard of - work as it does to, a growth rate of 13200% p.a., and, of course, not shown. There is again no whisper and, consequently, no information on record of the particular industry/s in which, if any, the said company operates, or its financials, much less future prospects, the information on all of which gets factored into and captured in what is called 'price', representing an equilibrium of the supply and demand forces. In fact, each of the other incidences, i.e., for a penny stock company, are exhibited in the present case, as pointed out by the AO per paras 4.8 and 4.9 of his order, as under:

- a). the scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders. The purchases are off market purchases, and not reported on the exchange;
- b). the purchase/s is back dated, i.e., per a back dated contract note, paid for in cash, so that there is no trail;
- c). the purchases are in the physical form, and dematerialized only subsequently; generally long after the purchase date, being back dated and, further, close to the date of sale; and
- d). the investee is a penny stock company, with no credentials, and the sale rates artificially hiked, with no real buyers, so that the inference of the sales being bogus, is unmistakable.

4.5 The assessee was show caused on all these parameters, seven in number, listed at para 4.11 (page 7) of the assessment order, to no satisfactory reply by the assessee and, in fact, at any stage. There is in fact no reply to the AO (refer para 4.14 (i) of the assessment order), whose satisfaction the law mandates, so that the purview of the appellate authority is as to whether the AO in being not satisfied had acted reasonably, i.e., given the assessee's explanation, including the materials/evidences furnished in support, or not. The AO, accordingly, treated the impugned transaction as not satisfactorily explained,

and added the same u/s.68 of the Act. Reliance was placed by him on the decisions by the tribunal in the case of *Somnath Mani* (supra), also reproducing there-from, as well as in the case of *Housing Development and Finance Corporation Ltd.* (ITA No.2913/Mum/1995 dated 12.09.2005), rendered applying the first principles and the legal propositions enunciated by the apex court per the decisions cited by the AO (supra). The tribunal in the case of *Ziauddin A. Siddique* (in ITA Nos. 4699 and 4700/Mum/2011 and others dated 25.04.2014) issued a finding of fact, of course on the basis of the material on record, as to circular trading, in case of a penny stock company, Eltrol Ltd., exposing or validating the *modus operandi* as stated to be adopted in the case of such stocks – the price, *de-hors* any fundamentals or other factors, of paper companies being raked up on the Exchange, so as to yield ‘gain’, and then again, equally without basis, grounded to yield ‘loss’, both of which, i.e., ‘gain’ and ‘loss’, find ready ‘customers’ or ‘takers’. The purpose is to evade tax or to yield some tax benefit. True, this has not been established in the present case, but the features are strikingly same, with the impugned transaction bearing the same incidents, so that odds are loaded heavily against the genuineness of the transaction. The onus to establish the same, it is to be borne in mind, is on the assessee. The Id. CIT(A) has dismissed the same as merely suspicions. We are, however, unable to, for the reasons afore-stated, persuade ourselves to agree with him, each of the several incidents and, therefore, the questions arising, that impugn the genuineness in the present case, are based on admitted and undisputed facts. The issue, as clarified at the beginning of the discussion, being the validity of the inferential findings - there being a difference between the two Revenue authorities. We find the observations by the AO as valid and relevant, to no satisfactory answer or explanation by the assessee, i.e., to the questions, incidents or the phenomenon observed. Dismissing the same as mere suspicions, as does the Id. CIT(A), is, to our mind, glossing over the many attendant facts and incidents, the most vital, and on which we observe complete silence or absence of any explanation, is the absence of any credentials of the investee-company. The Id. CIT(A) picks up one incident or aspect of the transaction at a time to note of it being backed by documentary evidence/s and, therefore, genuine. The approach is fallacious.

Firstly, documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported 'facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i.e., in the absence of credible and independent evidences. For a scrip to trade at nearly 50 times its' face value, only a few months after its issue, only implies, if not price manipulation, trail blazing performance and/or great business prospects (with of course proven management record, so as to be able to translate that into reality), while even as much as the company's business or industry or future program (all of which would be in public domain), is conspicuous by its absence, i.e., even years after the transaction/s. The company is, by all counts, a paper company, and its share transactions, managed. We, accordingly, reversing the findings of the first appellate authority, confirm the assessment of the impugned sum u/s.68 of the Act. We decide accordingly.

4.6 The assessee has relied on several case laws. As would be apparent from the forgoing, abundant case law has been relied upon by the both sides. The issue is not of the application of any particular case law. The legal propositions being well settled, each case rests on its own facts. Our decision, likewise, and as would also be apparent, is guided solely by the facts and circumstances of the instant case, including the assessee's explanation in respect thereof. The reliance on case law, the facts of none of which were gone through at the time of hearing, even as the issue is principally factual, would thus be of no assistance to the assessee's case. We may though clarify that the Revenue having invoked the provision of s. 68, the burden to prove the credit transaction/s and, thus, its genuineness, is on the assessee. It is therefore not necessary or incumbent on the Revenue to, i.e., for the purpose of application of sec.68, to either disprove or exhibit the transaction as sham or bogus, and its obligation only extends to show that the

genuineness of the impugned credit transaction is doubtful or has not been satisfactorily proved by the assessee.

5. In the result, the Revenue's appeal is dismissed.

परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on March 27, 2015

Sd/-

(Joginder Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 27.03.2015

नि.स./Patel, PS

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai