

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"SMC" BENCH, MUMBAI

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI RAMLAL NEGI, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 4618/MUM/2018
निर्धारण वर्ष/Asstt. Year: 2001-2002

Cheryl J. Patel, B/27, Clifton Society, Near Centaur Hotel, Juhu, Mumbai-400049. PAN: AACPP6413A	Vs.	D.C.I.T., Central Circle-2(3), Mumbai.
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(Applicant)	(Respondent)
Assessee by :	Shri V. Chandrasekhar & Shri Harshad Shah, A.Rs
Revenue by :	Shri Akhtar H. Ansari, Sr.D.R

सुनवाई की तारीख/Date of Hearing : 05/11/2019
घोषणा की तारीख /Date of Pronouncement: 08/11/2019

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-48, Mumbai dated 28/05/2018, (in short "Ld.CIT(A)") arising in the matter of assessment order passed under s. 143(3) r.w.s. 254 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dt. 29/09/2017 relevant to the Assessment Year 2001-2002.

The assessee has raised the following grounds of appeal:

1.0. *The Learned Commissioner of Income Tax (Appeals) ('the Ld CIT (A)') erred in upholding the order of the Learned Assessing Officer (the Ld AO) without taking into consideration the fact that the Ld AO failed to follow the direction of the Honorable ITAT to verify the Assessment records AY 2007-08 for the claim of the Appellant that the alleged sale of Tripex Overseas shares were considered in AY 2007-08.*

1.1. *The Ld CIT-(A) failed to appreciate the fact that the Ld AO erred in making an addition on account of alleged sale of shares of Tripex Overseas Ltd being presumed by the Ld AO, even after there was factual indication in the Assessment Order Para-7.2 at Page-5 in Table-C at last column "Gross Sale of Subject Shares being amount credited in Bank Account" as NIL, which evidenced that there was neither receipt nor credit of the alleged sale in this Assessment Year.*

1.2. *The Ld CIT-(A) failed to appreciate the fact that the Ld AO erred in making an addition on account of alleged sale of shares of Tripex Overseas Ltd being presumed by the Ld AO, even after there was factual indication in the Assessment Order Para-7.2 at Page-5 in Table-C at column "Nos. of Shares" is Blank, which evidenced that there was no such alleged sale in this Assessment Year.*

1.3. *The Ld CIT-(A) failed to appreciate the fact that the Ld AO has made the addition on account of the alleged sale of shares on the basis of it being "highly possible", which indicates presumptions and assumptions made by the Ld AO and not following the direction by Hon ITAT to verify the records of AY- 2007-08 while making the addition in the two Assesment Years, which are six years apart, without recognizing the fact that the same amounts to double taxation, which is against the principles of natural justice.*

1.4. *The Ld CIT(A) erred in not considering the Appellant submission that in fact it is "highly impossible" that the Sale Value of two different scripts i.e. Shares of ATh Intrl and Tripex Overseas, be same to the last rupee i.e. Rs.3,86,192/-.*

1.5. *The Ld CIT(A) erred in upholding the Order of Ld AO by not appreciating the clinching fact being there was only one receipt and credit in Bank Account of the Appellant by cheque deposit of Rs.3,86, 192/- from sale of Shares, which was debited as cheque was returned / bounced and same was re-deposited and re-credited.*

1.6. *The Ld CIT-(A) failed to appreciate the fact the Ld AO has incorrectly stated in the Assessment Order that the Appellant failed to furnish the details required to re-verify the said claim, even when the Appellant had submitted all the details as per Appellant's letter duly acknowledged on 18.09.2017 and had co-operated with the Ld AO during*

the re-verification of the said claim, which was also submitted before Ld CIT(A) along with the written submission dated 07.05.2018.

1.7. The Id CIT-(A) failed to appreciate the fact that the Ld AO made an addition on account of 5% fee on alleged above disputed sale of shares, even though there was neither receipt nor credit or any other evidence for the same to be a part of this Assessment Year.

1.8. The Ld CIT-(A) failed to appreciate that the Ld AO can't initiate Penalty proceeding u/s-271 (1)(c) in the Order giving effect passed u/s-i 43(3) r.w.s.254.

1.9. The Appellant prays that it may be allowed to add, alter or amend the above grounds of appeal and to make detailed submissions at the time of appeal.

2. The assessee has raised as many as 9 grounds of appeal but the effective issue involved is that the Ld. CIT (A) erred in confirming the addition made by the AO on account of sale of shares under the head capital gain.

3. Before dealing with the issue raised by the assessee in the grounds of appeal, it is pertinent to note the brief history of the case which goes as under:

3.1 The facts in brief are that the assessee in the present case is an individual and engaged in the business of manufacturing & sale of food flavors. It is the 3rd round of appeal before us. The ITAT on the earlier occasion has restored the issue to the file of the AO in MA No. 212 & 213/MUM/2015 arising out of ITS Nos. 5539/MUM/2012 & 7526/MUM/2013 vide order dated 16-03-2016 with the direction as detailed under:

3. We have considered the rival contentions and carefully gone through the order of the Tribunal as well as the other materials placed before us. It appears that Tripex Overseas Ltd. shares were purchased in A.Y 2006-07 and were sold in A.Y 2007-08, therefore, sale proceeds of the shares should be brought to tax net in A.Y 2007-08 and not in A.Y 2001-02. To rectify the mistake apparent from the record, we direct the AO to verify

the order passed by him for A.Y 2007-08 to ensure that there is an addition on account of sale of shares of Tripex Overseas Ltd. and if he finds that the sale proceeds of shares of Tripex Overseas Ltd. had already been taxed in A.Y 2007-08, the same should not be again added in A.Y 2001-02 under consideration. We direct accordingly.

4. In the result, the Miscellaneous application filed by the assessee is allowed in part for statistical purposes.

MA NO. 213/Mum/2015

5. As the facts in A.Y 2001-02 (ITA No. 7526/Mum/2013) are pari materia to the facts in A.Y 2001-02 (ITA No. 5539/Mum/2012), following the same reasoning given hereinabove, we direct the AO to verify the assessment records for A.Y 2007-08 and decide accordingly.

*6. In result, both the Miscellaneous applications filed by the assessee are allowed in part for statistical purposes.
Order pronounced in the open court on 16th March, 2016.*

From the above, it is clear that the ITAT directed the AO to look into the following facts:

- i. Whether there is an addition on account of sale of shares of Tripex Overseas Ltd. (for short TOL) in the AY 2007-08.
- ii. If yes, then the same should not be taxed in the AY 2001-02 i.e. the year under consideration.

4. The AO in consequence to the direction of the ITAT issued the notice to the assessee for adjudicating the dispute under section 143(2)/ 142(1) of the Act. The assessee in response to such notice appeared before the AO and filed the necessary details.

4.1 However, the AO dismissed the claim of the assessee by observing as under:

- i. The assessee failed to file the bank statement showing the payment and receipt for the purchase and sale of shares of TOL.

Therefore, there is a possibility that the sale of shares of TOL in the year under consideration viz a viz in AY 20007-08 were different.

- ii. The assessee has not declared the sale of shares of M/s ATN International Ltd. resulting bogus long-term capital gain of 3,64,422.00.

In view of the above, the AO added the long-term capital gain in the order framed under section 143(3) read with section 254 of the Act vide dated 29-09-2017.

5. Aggrieved assessee preferred an appeal to the Ld. CIT (A) who confirmed the order of the AO by observing as under:

In the impugned order u/s.143(3) r.w.s 254 to exclude the direction of ITAT in MA order has asked for certain details as mentioned in para 5 of the assessment order. However, assessee failed to furnish the details before the AO as mentioned in para 5.1 of the order. The AO wanted to verify the details of shares of Triplex Overseas Ltd. so as to verify whether the shares sold in A.Y. 2007-08 were same or different from those sold out in A.Y. 2001-02. It was a simple verification of facts. Since there is sale of these shares in both the years, the claim of assessee has to be verified with the details of specific shares. Such findings of the facts are in no way contrary to the directions of ITAT. ITAT, as a highest fact findings authority had directed the AO to verify the facts and then take a decision. The failure on the part of the assessee to submit any details to AO and the submission of similar arguments during the appellate proceedings is against the overall purport of ITAT order. Since the entire issue is related to verifying the duplicity of sale of same shares being brought to tax in two years, the same has to be verified before reaching a final conclusion. In the absence of details filed by the assessee before the AO as well as in the appeal proceedings, it is to be concluded that there is no fault in the order of AO and the appeal of assessee is, therefore, not valid and hence dismissed.

6. Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

7. The Ld. AR before us filed a paper book containing pages 1 to 41 and submitted that the assessee never had the shares of TOL in the year under consideration. Therefore, there is no question of selling such shares in the year under consideration. The ld. AR further submitted that the shares of TOL were sold in the AY 2007-08 and the gain has already been taxed.

8. On the other hand, the Ld. DR placed reliance on the order of authorities below by reiterating the contentions contained in their respective orders.

9. We have heard the rival contentions of both the parties and perused the materials available on record. It is the 3rd round of litigation before us which is emanating from the order of the ITAT as discussed above. On perusal of the direction of ITAT, the AO was to verify whether the assessee has sold the shares of TOL in the assessment year under consideration or in the AY 2007-08. In this regard we find that

- i. There was the addition to the total income of the assessee on account of the sale of shares of TOL in the AY 2007-08 as evident from the order under section 143(3) r.w.s.153A of the Act dated 16-12-2011 enclosed on pages 12 to 21 of the paper book.
- iii. The transactions for the purchase and sale of shares of TOL for the AY 2007-08 are supported based on the contract note cum bill for purchase & sale which are placed on pages 27-28 of the paper book.

9.1 Indeed the assessee has not filed the copy of the bank statement for the AY 2007-08 depicting the purchase & sale of shares of TOL as desired by the Authorities below. However, none of the authorities below has pointed out any defect in the submission filed by the assessee in the paper book listed above.

Besides the above, we also note that there was single deposit in the bank account of the assessee for Rs. 3,86,192.00 in the AY 2001-02 representing the sale proceeds of shares but the same was reflected twice as the impugned cheque bearing no. 765816 was dishonored in the first time as evident from the copy of the bank statement placed on page 29 of the PB. However, the AO has wrongly considered the deposits of cheque twice against the sale of shares which is contrary to the facts available on record. This fact can be verified from the bank statement placed in the paper book. Thus we hold that the authorities below have made the addition for the sale of shares of TOL on wrong assumption of facts. On a question to the Id. DR about the source of information for the sale of shares of TOL in the AY 2001-02 (under consideration), he failed to bring anything on record contrary to the arguments advanced by the Id. AR for the assessee.

9.2 We also find that the authorities below were in possession of the information about the brokers involved in the sale and purchase of shares but none of them has taken any confirmation from them.

9.3 We also note that there was no ambiguity in the direction of the ITAT as discussed above to verify the purchase and sale of shares of TOL but the AO in his assessment order has held that the assessee has not declared the sale of shares of M/s ATN International Ltd. resulting bogus long-term capital

gain of 3,64,422.00 though there was no such direction in the order of the ITAT.

9.4 Therefore, we are of the view that the authorities below have exceeded the direction issued by the ITAT which is unwanted. In this regard we draw guidance and support from judgment of Hon'ble Supreme Court in case Union of India and others vs. Kamlakshi Finance Corporation Ltd reported in AIR 1992 SC 711 where it was held as under

"The High Court has, in our view, rightly criticized this conduct of the Asstt. Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of the authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, Revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Asstt. Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Asstt. Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is 'not acceptable' to the Department in itself and objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws. "

9.5 We also draw support from Hon'ble Delhi High Court in case of Sub inspector Roop Lal vs. Lt. Governor Delhi in CASE NO.:Appeal (civil) 5363-64 of 1997 vide order dated 14/12/1999 where it was held as under:

"We are indeed sorry to note the attitude of the Tribunal in this case which,, after noticing the earlier judgment of a coordinate bench and, after noticing the judgment of this Court, has still thought, it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to I ha (sic) declaration of law involved in this case. Because of this approach of the latter bench of the Tribunal in this case, a lot of valuable time of the Court is wasted and parties to this case have been put to consideration hardship."

In view of the above and after considering the facts in totality, we are not convinced with the findings of the Ld. CIT (A) and accordingly direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

10. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 08/11/2019 at Mumbai.

**-Sd-
(RAMLAL NEGI)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated: 08/11/2019

Manish, PS