

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"D" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
MS. SUCHITRA RAGHUNATH KAMBLE, HON'BLE JUDICIAL MEMBER**

ITA NO. 6387/MUM/2019 (A.Y: 2015-16)

Shri Mukesh Bhoormal Jain 9/23, Kotwala Niwas 3 rd Khetwadi Mumbai - 400004 PAN: AAAPJ7585K	v.	Income Tax Officer – 19(2)(3) Room No. 218 Matru Mandir, Tardev Road Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by	:	Shri Vimal Punmiya
Department by	:	Ms. Neha Thakur
Date of Hearing	:	21.12.2021
Date of Pronouncement	:	23.12.2021

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)–30, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 18.07.2019 for the A.Y.2015-16.

2. Brief facts of the case are that, the assessee is an individual filed his return of income on 24.09.2015 for the A.Y. 2015-16 declaring total

income of ₹. Nil/-. The return was processed u/s 143(1) of the Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny under CASS and notice u/s. 143(2) and 142(1) of the Act. Assessing Officer observed that assessee purchased 20000 Equity Shares of each of Premiere Capital Services Ltd in an off market transaction through preferential allotment (@ 75 % per share) with one-year lock in period on 04.09.2012 and lock in release on 04.09.2013 and split from ₹.10.00 to ₹.1.00 paid up on 21.03.2014 for a consideration of ₹.15,00,000/-. The payment for the purchase was made by cheque. Quantity of shares increased from 20000 shares to 2,00,000 shares on 21.03.2014 due to stock split. Demat of the said purchase was credited for 80,800 shares on 23.07.2014. The price per share was ₹75/ inclusive of premium of ₹.65/- The assessee sold 2,00,000 Equity shares of Premiere Capital Services Ltd from 23.05.2014 to 25.11.2014 for a gross consideration of ₹.5,49,04,773/- (@ ₹.211.00 to 273.60 per share) on BSE and consideration was received by cheque.

3. Assessing Officer observed that the scrip in which assessee traded was proved to be insignificant, bogus, without business fundamentals and required the assessee to prove the genuineness of the same. In reply assessee vide letter dated 11.12.2017 submitted that the long term capital

gain generated was genuine stating the details of section 10(38) of the Act. Not convinced with the submissions of the assessee, the Assessing Officer added the sale proceeds of ₹.5,49,04,773/- u/s 68 of the Act, to the taxable income of the assessee. Assessment u/s 143(3) of the Act was completed on 28.12.2017 determining income at ₹.5,65,51,920/- by making addition of ₹.5,49,04,773/- u/s. 68 of the Act and ₹.16,47,143/- u/s. 69 of the Act towards the commission paid to entry provider. Aggrieved assessee preferred appeal before the Ld.CIT(A) and Ld.CIT(A) sustained the addition made by the Assessing Officer. Aggrieved assessee preferred appeal before us raising following grounds in its appeal: -

“(1) The learned Commissioner of Income (Appeal) erred in treating addition under section 68 of Rs 5,49,04,773/- on sale of Quoted shares of Premiere Capital Services Limited by relying on various third party documents and statement of third parties.

(2) The learned Commissioner of Income (Appeal) Tax erred in notional addition under section 69C of Rs.16,47,143/- being purported cash commission paid by assessee for taking accommodation entry under the garb of LTCG on sale of shares of Premiere Capital Services Limited.”.

4. At the time of hearing, Ld. AR of the assessee submitted that facts in this case are exactly identical to the case of Shri Amit Mafatlal Shah in ITA.No. 5793/Mum/2019 dated 20.04.2020 who is the cousin of the assessee. In the case of Shri Amit Mafatlal Shah the ITAT has passed

favorable order and Ld. AR filed the copy of the order and also he filed a comparative chart on facts of the both cases and filed the list of case laws in support of the assessee's case which is reproduced below for the sake of clarity: -

Sr.No	AMIT MAFATLAL SHAH	MUKESH BHOORMAL JAIN
1.	Name of Share: Premier Capital Services Ltd	Name of Share: Premier Capital Services Ltd
2.	Preferential allotment on 04/09/2012	Preferential allotment on 04/09/2012
3.	Payment was made through account payee cheque (HDFC Bank)	Payment was made through account payee cheque (Bank of Maharashtra)
4.	20,000 Shares allotted	20,000 Shares allotted
5.	Demat A/c : Standard Chartered	Demat A/c : Unique Stock Bro Pvt Ltd
6.	2,00,000 Shares on Split	2,00,000 Shares on Split
7.	Sold 1,24,050 Shares after holding more than 12 months	Sold 2,00,000 Shares after holding more than 12 months
8.	Selling Price per share Rs. 277 /-	Selling Price per share Rs. 275 /-
9.	Broker Company: PPJ Shroff Securities Pvt Ltd	Broker Company: FRR Shares and Securities Ltd
10.	Receipts deposited in Bank of Baroda	Receipts deposited in Bank of Maharashtra
11.	Broker Located in MUMBAI	Broker Located in MUMBAI
12.	No Cross Examination Allowed	No Cross Examination Allowed
13.	No Papers of seized material of other Kolkata Parties were given	No Papers of seized material of other Kolkata Parties were given
14.	Shares sold through NSE/BSE by brokers	Shares sold through NSE/BSE through brokers

Other points

1. Shares were held for 19 months - Long Term Capital Gain
2. Cross Examination not conducted (Point No 7 Page No 4 of Written Submission)
3. Hon'ble Supreme Court, High Court and Tribunal Judgements in favour of assessee. (List of 60 Judgements enclosed)

4. Addition on the basis of information not disclosed to the appellant.
5. Suspicion cannot take place as evidence.
6. Income assessed without evidence is bad in law.
7. Income cannot be assessed on mere statement basis there has to be some evidences.
8. Addition cannot be made on assumptions, presumptions, surmises and conjectures.
9. Company has an Active Status under Registrar of Company and Income Tax even till date and the Shares are even quoted in NSE/BSE at Rs. 70/- per share."

5. On the other hand, Ld. DR relied on the orders of the Authorities below.

6. Considered the rival submissions and material placed on record, on identical facts in the case of Shri Amit Mafatlal Shah *v.* ACIT in ITA.No.5793/Mum/2019 dated 20.01.2020, the Coordinate Bench following various judicial pronouncements deleted the addition made by the Assessing Officer observing as under: -

"12. After examining the facts of the case and the orders of the authorities below, we note that assessee has filed all the necessary evidences as stated above before the AO as well as before the Ld. CIT(A). However, no further enquiry was carried out by the AO or by Ld. CIT(A) but merely relied on the report of the investigation wing and statements of certain individuals recorded during the course of search who have stated that they were engaged in providing accommodation entries for LTCG/LTCL in various shares which are called penny stocks. However, these information were never provided

to the assessee. Similarly, no cross examination was allowed by the AO to the assessee during the assessment proceedings. In other words, the AO has merely relied on the investigation report and did not try to collect further evidences by conducting further investigation to prove that the assessee own funds have changed hands. Under these circumstances, we are not in a position to subscribe to the conclusion by the authorities below. The case of the assessee is squarely covered by a series of decisions referred and relied by the Ld. A.R. during the course of hearing as reproduced hereinabove a few of which are discussed below:-

In the case of CIT vs. Mukesh Ratilal Marolia (supra). In this case, the issue is whether the amount received by the assessee on sale of shares can be treated as unexplained investment under section 69 of the Act. The Tribunal deleted the addition by allowing the appeal of the assessee by holding that the purchase of shares were duly recorded in the books of accounts and the source of funds is also explained and the shares were in fact transferred in the name of the assessee and thus the purchases of the assessee can not be fault with. Similarly, the sale of shares was effected can not be disputed because the amount received by the assessee is not in dispute and it is not the case of the Revenue that shares are still lying with the assessee or amount received by the assessee on sale of shares is more than the declared value by the assessee. Under these circumstances, the Hon'ble High Court has held that AO is not justified in holding that sale proceeds of Rs.1,41,08,484/- represented unexplained investment under section 69 of the Act and thus the order of the Tribunal was upheld by the Hon'ble High Court. The Hon'ble Supreme Court also dismissed the appeal of the Revenue filed against the Hon'ble Bombay High Court order.

Similarly, in the case of CIT vs. Mrs. Kesar A. Gada (supra) the ITAT deleted the addition by holding that the transaction of purchase and sale of shares made by the assessee were genuine and no addition under section 68 was called for by relying on the decision of Hon'ble Bombay High Court in the case of CIT vs. Mukesh Ratilal Marolia (2005) 12 TMI 457 ITAT, Mumbai. The High Court also dismissed the appeal of

the Revenue by holding that no substantial question of law arises for reconsideration.

In the case of CIT vs. Sham R Pawar (supra) the Hon'ble Bombay High Court has decided the issue against the Revenue by upholding the order of ITAT wherein the Tribunal has held that the assessee has declared the capital gain on sale of shares and mere observation of the AO that transactions were done through brokers at Kolkata and the performance of the concerned company was not satisfactory as it would not justify the increase in share prices and thus held the transaction as bogus as assessee converted his own unaccounted money into accounted income and thus made the addition under section 68 of the Act. The Tribunal deleted the addition by observing that D-Mat account and contract notes showed the details of shares, transactions and Revenue stopped enquiry at particular point and did not carry forward it to discharge the basic onus and High Court has upheld the order of ITAT.

Ramprasad Agarwal vs. ITO (supra) wherein assessee has produced all the relevant records to show the allotment of shares by the company on payment of consideration by cheque and subsequent dematerialization of shares in the D-mat account. The Tribunal reversed the order of AO wherein the AO has made addition by not allowing cross examination to the assessee and also not providing the information to the assessee which were used against the assessee while making addition. The tribunal followed the decision of coordinate bench in the case of Meghraj Singh Shekhawat Vs DCIT ITA No. 444/JP/2017 AY 2013-14 and 2014- 15 which in turn has followed apex court decision in the case of M/s. Andaman Timber Industries vs. CCE Civil Appeal No.4228 of 2006.

In the case of Fara Marker vs. ITO (supra) the similar issue has been decided under the similar set of facts by holding that the long term capital gain is genuine as the assessee has fully discharged its onus and AO has not done any further verification.

In the case of Kamaladevi vs. Doshi vs. ITO the similar issue has been decided by the Tribunal in favour of the assessee by observing and holding as under:

"14. We have given a thoughtful consideration to the facts of the case and are of the considered view that the assessee had placed on record substantial documentary evidence to substantiate the genuineness and veracity of the purchase and sale of 10,200 shares of M/s Talent Infoways Ltd., viz. copy of the Contract note, dated. 15.04.2004 evidencing the purchase of shares; Copy of the contract note, dated. 06.04.2004 as regards the speculation income, and the copy of the cash receipt for Rs. 168/-; Copy of her account in the books of account of M/s MSPL; Copy of the letter from M/s Talent Infoways Ltd., dated. 29.05.2004, therein confirming the transfer of shares; Copy of the contract notes for sale of shares in the months of September and October, 2005; Copy of the bank statement evidencing receipt of payment for sale of shares; Copy of STT paid statements on the shares of M/s Talent Infoways Ltd ; Copy of its account as appearing in the books of account of M/s Alliance Intermediateries & Network Pvt. Ltd. evidencing the sale of the shares of M/s Talent Infoways Ltd.; Copy of delivery instructions of shares to the depository for dematerialization of the shares; and Copy of the return of income alongwith the computation of income for A.Y. 2005-06, which revealed the speculation income of Rs. 15,975/-, and the fact of purchase of 10,200 shares of M/s Talent Infoways Ltd, alongwith the source of purchase. We find that the aforesaid substantial documentary evidence placed on record by the assessee, which as a matter of fact supported the entire chain of events of purchase and sale of 10,200 shares of M/s Talent Infoways Ltd. by the assessee, was however never rebutted by the A.O on the basis of any concrete and irrebutable evidence which could go to inescapably disprove the genuineness of the said documents which were brought on record by the assessee We find that the A.O had rather chosen to merely rely on the stand alone statement of Sh. Mukesh Choksi (supra) and taking the same as gospel truth, had therein drawn adverse inferences in the hands of the assessee by merely referring to the said

statement of Sh. Mukesh Choksi (supra). We though do not approve of the reliance placed by the A.O on the stand alone statement of Sh. Mukesh Choksi (supra) for drawing of adverse inferences in respect of the share transactions carried out by the assessee during the year under consideration, but rather find that even no cross examination of Sh. Mukesh Choksi (supra), whose statement was so heavily being relied upon by the A.O, was ever provided to the assessee. We find that the failure on the part of the A.O to provide cross examination of the person, relying on whose statement adverse inferences are drawn in the hands of the assessee goes to the very root of the validity of such adverse inferences drawn in the hands of the assessee, had been looked into by the Hon'ble High Court of Bombay in the case of: CIT-13 Vs. M/s Ashish International (ITA No 4299 P a g e | 26 of 2009; dated. 22.02.2011), wherein the order of the Tribunal was affirmed by the Hon'ble High Court. We thus in the backdrop of our aforesaid observations, are neither able to persuade ourselves to subscribe to the adverse inferences drawn by the lower authorities in respect of the share transactions of the assessee by referring to the stand alone statement of Sh. Mukesh Choksi, as the same as observed by us hereinabove, suffer from serious infirmities, and as such cannot be summarily accepted, nor are able to dislodge the genuineness of the purchase and sale of shares of the aforesaid 10,200 shares of M/s Talent Infoways Ltd., which we find had been duly substantiated by the assessee on the basis of material made available on record, which we find had not been dislodged by the lower authorities. We thus in the backdrop of the totality of the facts of the case are unable to find ourselves to be in agreement with the view arrived at by the lower authorities. We thus set aside the order of the CIT(A), and delete both of the additions of Rs. 9,36,164/- and Rs. 46,808/- made by the A.O, which thereafter were sustained by the CIT(A). The appeal of the assessee is allowed."

13. We have also gone through other decisions cited by the Ld. A.R. and observed that the case of the assessee is squarely covered by the various decisions. We therefore respectfully following the same set aside the order of CIT(A) and direct the AO to delete the addition

of Rs.3,43,62,880/- under section 68 of the Act. Ground No.1 & 2 are allowed.

14. The issue raised in ground no.3 is against the confirmation of addition of Rs.6,87,257/- by CIT(A) as made by the AO towards arranging this purchase and sale of shares by applying 2% on the total value of transactions. The ground No.3 is consequential to ground no.1 & 2 which have been allowed in favour of the assessee (supra). Accordingly, the addition made under this ground of Rs.6,87,257/- is ordered to be deleted. Ground is allowed.”

7. As the facts are exactly identical and the grounds raised by the assessee in this case are also similar. Respectfully following the above said decision of the Tribunal, we direct the Assessing Officer to delete the addition made u/s.68 and u/s. 69 of the Act. Accordingly, grounds raised by the assessee are allowed.

8. In the net result, appeal filed by the assessee is allowed.

Order pronounced on 23.12.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(SUCHITRA RAGHUNATH KAMBLE)
JUDICIAL MEMBER

Mumbai / Dated 23.12.2021
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum