

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, PUNE

**SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

ITA No. 77/PUN/2019 : A.Y. 2015-16

Sarika A. Sanap
Plot No. A-2, N-4, CIDCO,
Aurangabad
PAN: COCPS 5314 F

Appellant

Vs.

The Asstt. Commissioner of Income-tax,
Circle 3, Aurangabad

Respondent

Appellant by : None
Respondent by : Shri M.G. Jasnani
Date of Hearing : 08-08-2022
Date of Pronouncement : 16-08-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

This appeal preferred by the assessee emanates from order of the Id. Commissioner of Income Tax (Appeals)- 2, Aurangabad dated 13-11-2018 for A.Y. 2015-16 as per the grounds of appeal on record.

2. At the time of hearing, none appeared for the assessee nor any adjournment petition was filed on record. On perusal of order sheet, it is found that this case has been adjourned many times for non-appearance of the assessee and the assessee cannot be allowed to take advantage of the process of law for his own wilful default. Therefore, the submissions of the Id. D.R recorded and the orders of the subordinate authorities perused and considered and the case is heard on merits.

3. The facts of the case are it is seen that during the year under consideration, the assessee has traded in shares and has earned long term capital gain on such transactions, which has been claimed to be taxable @ 10%. The assessee submitted details of scrips traded during the year. From the same, it was seen that it included script of M/s. Mahavir Advanced

Remedies Ltd (hereinafter referred to as 'Mahavir') which have been identified by the Investigation Wing of the Income-tax Department as tainted script utilised for the purpose of providing LTCG accommodation entries. Brief details of the transactions are as under:

i) The assessee had purchased number of 50,000 shares of M/s. Indo American Advanced Pharmaceuticals Ltd. for consideration of Rs. 2,50,000/-. The name of M/s. Indo American Advanced Pharmaceuticals Ltd. was subsequently changed to M/s. Mahavir Advanced Remedies Ltd. Out of these, she had sold part shares of both companies during F.Y. 2014-15 for consideration of Rs. 1,32,48,347/- on which he had earned long term capital gain of Rs. 1,30,13,347/-. The assessee has earned LTCG gain of Rs. 1,30,13,347/- on these transactions which are claimed to be taxable @ 10%.

ii) Subsequently, during the course of assessment proceedings, the assessee has made a fresh claim that the LTCG income earned from the transactions mentioned above may be treated as exempt income u/s 10(38) of the Act. However, the same is not tenable in view of ratio laid by the Hon'ble Apex court in the case of Goetze (India) Ltd. Vs. CIT (284 ITR 323).

4. Further, information was received from the Investigation Wing at Aurangabad that summons u/s 131 of the Act were issued to Sh. Amit Bhaskarrao Sanap as per information received from Investigation Directorate of Kolkata with regard to modus operandi of rigging of shares and escalation of share prices in a pre-arranged way determined at various levels of operators. Accordingly, Sh. Amit Bhaskarrao Sanap attended and his statement on oath u/s 131 of the Act was recorded. In the statement, the assessee agreed to pay taxes on the LTCG claimed amounting to Rs. 1,30,13,347/- on behalf of his wife Mrs. Sarika Amit Sanap. However, later assessee retracted from the same.

4. The Id. D.R further brought to our notice para 9 in the assessment order and submitted that this is a case of penny stock and the modus operation has been well explained by the A.O. At para 12.5 of his order, the A.O categorically mentioned that it is evident that the assessee earned huge long term capital gains from the transactions which she claimed as exempt from taxation u/s 10 clause (38) of the Act. This entire edifice was absolutely a colourable device to give the colour of genuineness of these transactions to which she was successful in bringing back her own unaccounted cash into her books without the need to pay any taxes. Hon'ble Supreme Court in the case of McDowell & Co. Ltd. Vs. CTO (1985) 154 ITR 148 (SC) has given a strong verdict against any such arrangements by stating that "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 resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges." In view of Hon'ble Apex Court verdict, this entire arrangement was held as a mere colourable device devised with the aforementioned objectives. Finally, at para 16.1 the A.O held as follows:

"16.1 Considering the findings of the Investigation wing of Income-tax Department, findings of SEBI & inquiries conducted in the case of brokers, operators and the entry providers and the nature of transaction entered into by the assessee the LTCG of Rs. 1,30,13,347/- claimed exempt us 10(38) of the Act by the assessee cannot be allowed and the amount of Rs. 1,30,13,347/- received back as sales proceeds on sale of shares is required to be added back towards her taxable income under section 68 of the Act.

16.2 *The section 68 of the Income-tax Act reads as under:*

"68. Cash credits – Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the ITO, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

This section contemplates fulfilment of three conditions namely identity of the creditor, genuineness of the transaction and the creditworthiness, before considering the explanation of assessee and with regard to source of any money found credited in the books of the assessee. A plain reading of section 68 would indicate that when any money is found to be credited in the books of the assessee it is for the assessee to prove the identity of the creditor, genuineness of the transaction and the creditworthiness.

16.3 *The detailed analysis of evidences available on record clears any iota of doubt about the spurious nature of such transactions and it is also supported by decisions of various judicial authorities quoted above. Further, the assessee has failed to produce any basis of taxability of such LTCG income @ 10%. Therefore,*

the LTCG income earned to the extent of Rs. 1,30,13,347/- is treated as bogus and the same is added as cash credit u/s 68 of the Act to the total income of the assessee. Initiate penalty proceedings u/s 271(1)(c) of the Act for furnishing of concealment of income.”

5. The Id. CIT(A) vide para 5 of his order made a detailed analyses of the facts involved in this case as follows:

5. I have duly considered the submissions of the appellant. The brief facts of the case ~ that the appellant an individual, is engaged in the business of construction. The appellant had filed her return of income for AY 2015-16 on 29.09.2015 declaring total income at Rs.1,34,02,160/- on account of long term capital gain and interest income. In the return of income, the appellant had paid tax @10% in respect of long term capital gain of Rs.1,30,13,347/- on sale of quoted securities on which STT was duly paid. Prior to filing of return of income, the DDIT (Inv.), Aurangabad had issued summons U/s 131 of the Income Tax Act to the husband of the appellant and his statement was recorded on oath on 02.09.2015. The appellant had originally claimed the long term capital gain of Rs.1,30,13,347/- as exempt U/s 10(38) of the Income Tax Act in respect of sale of shares of M/s. Mahavir Advanced Remedies Ltd. However during the course of interrogation before the DDIT (Inv.), Aurangabad, the husband of the appellant agreed to withdraw the claim of exemption U/s 10(38) of the Income Tax Act in reply to question no.13 of his statement. On going through the statement of the husband of the appellant, it is seen that there was no mention of payment of taxes U/s 112 of the Income Tax Act. The allegation of the appellant that her husband was advised by the DDIT (Inv.), Aurangabad that there was not much difference if the income on account of sale of shares was offered to tax U/s 112 of the Act, is not borne out from the records. Similarly there is nothing on record to suggest that the husband of the appellant was under strain and pressure and therefore agreed to withdraw the claim of exemption U/s 10(38) of the Income Tax Act. It has been alleged that the appellant in order to avoid further litigation had filed her return of income declaring long term capital gain as taxable though it was exempt U/s 10(38) of the Income Tax Act but this allegation has remained unsubstantiated. During the course of assessment proceedings, the appellant requested the AO to allow exemption u/s 10(38) to her. However the AO did not pay any heed to the request of the appellant. The AO found out that the appellant had purchased 50,000 shares of M/s. Indo American Advance Pharmaceuticals Ltd. on 21.06.2012 from M/s. Virendra Distributors for a purchase consideration of Rs.2,50,000/-. The said shares were also dematerialized in the Demat account of the appellant in February & March, 2013. Later on, there was a change in the name of the existing company viz. Indo American Advance Pharmaceuticals Ltd. to Mahavir Advanced Remedies Ltd. w.e.f. 07.06.2013. During the year under reference, the appellant had sold 47,000 shares of Mahavir Advanced Remedies Ltd. between 17.06.2014 and 11.12.2014 for a sale consideration of Rs.1,32,48,345/-. After claiming cost of acquisition, the net long term capital gain was worked out at Rs.1,30,13,347/- and same was claimed exempt u/s 10(38) of the Act. The AO held that since the husband of the appellant had admitted to withdraw the claim of exemption U/s 10(38) before the DDIT(Inv.), Aurangabad and the long term capital gains had been offered to tax @10% in the return of income, therefore she could not claim the income to be exempt V/s 10(38) of the Act in light of decision of Hon'ble Apex Court in the case of Goetze (India) Ltd. Vs. CIT (284 ITR 323). In this background, the AO was of the opinion that it was not understood as to why the appellant had invested in the shares of Mahavir Advanced Remedies Ltd., a company which was neither a large cap nor a mid cap scrip. The AO also found out that purchase and sale of shares of Mahavir Advanced Remedies Ltd., was a predetermined action leading to booking of long term capital gain by way of dubious methods. There was a steep increase in the share price as well as trading volume in the case of Mahavir Advanced Remedies Ltd. The share price of Mahavir Advanced Remedies Ltd. was rigged/manipulated from Rs.7 per share in June, 2013 to Rs.365/- in August, 2014. Thus the share price of Mahavir Advanced Remedies Ltd. was jacked up by 52 times within 3 months in spite of the fact that such price movement was not backed up by fundamentals of Mahavir Advanced Remedies Ltd. and its financial credibility. The financials of said

company were tabulated by the AO on page 8 of the assessment order. In this case, the suspected entities linked up to Mahavir Advanced Remedies Ltd. artificially created artificial demand against the supplies from the shareholders. Thus the shareholders, directors/promoters of Mahavir Advanced Remedies Ltd. and suspected entities were hand in glove with each other. The entire modus operandi of selling shares then bringing the connected entities to provide exit was a scheme devised to deceive the authorities by laundering black money and raking in tax-free profits. In light of above facts, the Investigation Wing of Income Tax Department, Kolkata, keeping in mind various information/details gathered, carried out a countrywide investigation to unearth the organized racket of generating bogus entries of long term capital gain which was exempt from tax. The Directorate of Investigation, Kolkata had carried out investigation in 84 penny stock shares coated on BSE. During the investigation, it also recorded statements of concerned persons/directors of said companies U/s 131 of the Act whereby it was established that the shares of said companies were rigged up/manipulated for generating huge profit or losses, as per the requirements of the clients. The operator also controlled numerous paper/bogus companies which were utilized for rotation of cash given by the beneficiaries who desired bogus long term capital gain. Keeping this nexus in mind and proving the same, the Directorate of Income Tax (Inv.) , Kolkata prepared a cash trail for showing that how the mechanism worked for the syndicate of providing long term capital gain/short term capital loss. For preparing this cash trail, the Investigation Wing, Kolkata followed the money movement from undisclosed proprietorship accounts where cash was being deposited mostly to the lamakharchi companies who were registered as clients with the share brokers. Undisclosed and unaccounted cash got deposited into the bank accounts of proprietorship concerns and from there; it got transferred to client companies who existed on paper only. From the bank account of lamakharchi client company, money was transferred to the beneficiaries via share broker's account. Almost all the proprietorship accounts where cash was deposited never filed their return of income tax. Moreover they tended to close such accounts very often, so that they could evade any STR/FIU/income Tax Authorities. If one went through the KYCs of such proprietorship accounts, it could be seen that they were opened in the name of dummy persons who were either employees or relatives of entry operators. The Investigation Wing, Kolkata had gone to even the registered offices of many such cash depositing firms, but as expected such persons/firms were not found existing. Almost all such bank accounts were opened with fake addresses. The role of banking authorities was also highly questionable. Same was also true in the case of Paper/Jamakharchi/bogus clients. Though they were registered as a client with share brokers and the brokers maintained KYC for such bogus clients also yet these clients did not exist at their given registered address. In many cases, it was found that such client companies were missing or existing nowhere. Even the person of share broker could not find its clients. When share brokers were confronted with this, they either accepted that such clients were bogus or they failed to give any reasonable explanation."

6. Thereafter at para 15.1, the Id. CIT(A) gave a specific finding after examination of the facts in this case. That it was not in dispute that during the course of interrogation before DDIT (Inv), Aurangabad on 02-09-2015, the husband of the assessee had admitted on oath on behalf of his wife in reply to question No. 13 that he was withdrawing her claim of exemption u/s 10(38) in respect of sale of shares of Mahavir Advanced Remedies Ltd. and was ready to pay taxes on the same. However, in the return of income for A.Y. 2015-16 filed

on 25-09-2015 the assessee paid the taxes u/s 112 @ 10% only. Notwithstanding the above events, the assessee also sought exemption u/s 10 clause (38) in respect of sale of shares during the course of assessment proceedings. In spite of any change in the facts and circumstances and without any fresh evidence/material, the assessee had retracted from the disclosure made by her husband. The contract notes, purchase bills, banks statements showing payment and receipts were very much available with the assessee at the time of recording of the statement of her husband before DDIT (Inv), Aurangabad. The assessee has thus miserably failed to show that such offer of withdrawal of claim of exemption u/s 10 clause (38) of the Act was given by her husband under threat/coercion and mistaken belief of facts. Thus, retraction of the assessee is in nature of an after-thought only just to evade taxes.

7. Furthermore, in the order of the Id. CIT(A) he had held that increase in the share price of Mahavir Advanced Remedies Ltd. was not backed up by any fundamentals and these were merely rigged. The movement of the price was abrupt and unrealistic and same was not based on any parameters. In fact, the Bangalore Tribunal in ITA No. 1723/Bang/2018 dated 12-10-2018 for A.Y. 2015-16 in a case involving long term capital gain in the scrip of Mahavir Advance Remedies Ltd., has decided in favour of the revenue on the ground that the said company was a penny stock and its trading volume/share prices had been rigged by the entry providers. The Id. CIT(A) also relied on the decision of Hon'ble Supreme Court in the case of Lachminarayan Madan Lal Vs. CIT (86 ITR 439) (SC) wherein it was held even if there was an agreement between the assessee and its agents for payments of certain amounts, assuming there was such payment, that did not bind the Income-tax Officer to hold that the payment was made exclusively and wholly for the purposes of the assessee's business.

8. In the present case, the assessee has also not brought any material on record to show that the commission agents had procured any orders for the assessee. That it was further contended the production of bills or payments have been made by the account payee cheque again by itself shows that the commission agents had procured order for the assessee. However, mere payment by account payee cheque is not sacrosanct and it will not make otherwise non-genuine transaction genuine as held by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance Pvt. Ltd. (194) 208 ITR 465 (Cal). That on examination of facts, the Id. CIT(A) opined that there is no doubt about the modus operandi of penny stock in general and about the facts that the assessee is a beneficiary of bogus LTCG on penny stock, the Id. CIT(A) further examined as follows:

"The AO carefully examined the findings of the investigation wing who has investigated the scam of penny stock and the dubious schemes through which unaccounted money of the beneficiaries moves into the books of accounts in the garb of long term capital gain. This entry of long term capital gain is taken by selling the shares on the exchange and registering the proceeds arising out of sale of shares into books as long term capital gain (LTCG). For implementing this scheme, shares of penny stock companies were used. The same modus is adopted for providing accommodation entries of being bogus logs. It was further observed that in this scheme, shares of penny stock exchange are acquired by the beneficiaries of the LTCG at very low price through the route of preferential allotment (private placement) and off market transactions. These shares have a lock-in-period of one year as per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. Another route to acquire the shares is through Amalgamation or merger. In this route, the beneficiaries of LTCG are allotted shares of a private limited company which is subsequently amalgamated with a listed penny stock and the beneficiaries receive shares of the listed penny stock in exchange of the shares of private limited company. The modus operandi of conversion of unaccounted money in long-term capital gain was examined by the AO before coming to the conclusion. The AO has also examined the balance sheets of Mahavir Advanced Remedies Ltd., and the balance sheet and profit and loss account for the last 3 years was extracted in the assessment order.

7. The AO has also examined the price value statements quoted on the stock exchange and noticed that there was abnormal price rise by the overall percentage increase in sensex during the period when the shares stock phenomenal price rise and has made the following observation:

"(v) This abnormal price rise is also highlighted by the overall percentage increase in the Sensex during the period when the shares saw phenomenal price rise. Normally, the Sensex is a benchmark of the of the average price movement in any share. Most of the stocks which have good market capitalization and are majorly held by public tend to follow the price movement of the Sensex. The deviation in price movement vis-a-vis Sensex is usually guided by the fundamentals of the company and the behavior of individual investors. When the price increase in the shares of M/s. Mahavir Advanced Remedies Ltd. is compared with the

movement in the Sensex, it is seen that there is no correlation. While Sensex is deviating only marginally, the price of the are moving M/s. Mahavir Advanced Remedies Ltd. abnormally. Hence, it is clear that the price of M/s. Mahavir Advanced Remedies Ltd. have moved in absolute disregard to the general market sentiments. From the perusal of above chart as well as the trading data of the scrip which was collected from the BSE, it is evident that during the period of price rigging, the volume of the shares traded as well as number of trades on each trading day was very low. Now the interesting factor to be noted here is that on all these days, there has been a constant rise in the price of the shares. A close look reveals that on most trading day; the percentage increase in price is in the range of 3% to 4 %. This percentage price rise on each day was just short of 5% which was the circuit limit for price rise as per the exchange guidelines in respect of T type scrips. On some trading days, the percentage increase in price is in the range of 1.90% to 1.99% which again was just short of percentage increase of 2% which was the circuit limit for price rise as per the exchange guidelines in respect of T type scrips. On some trading days, the percentage increase in price is in the range of 1.90% to 1.99% which again was just short of percentage increase of 2% which was the circuit limit for price rise as per the exchange guidelines on those trading days. Thus, it is seen that the price of these shares have seen phenomenal rise and have been constantly traded near the circuit limit so as to avail maximum price rise without hitting and triggering the circuit limit and thereby avoid surveillance by the Stock Exchange Regulator. This continuous price rise has been achieved over a very thin volume and almost a single trade per day. During this period of price rise, no corporate announcement has been made by M/s. Mahavir Advanced Remedies Ltd. which would have made a positive impact on the shares and which could support this phenomenal increase in price. Thus, the sharp rise in the price of the scrip was not supported by its fundamentals or any other genuine factor. The above discussion clearly establishes the fact that the price of the shares of M/s. Mahavir Advanced Remedies Ltd. were rigged in a pre-planned systematic manner by conducting limited trades and with miniscule volume.”

9. That as it is evident from the findings of the Id. CIT(A) in view of information provided by Investigation Wing, Calcutta, the recommendations of Special Investigation Team (SIT) on black money etc., the Assessee was required to prove her claim of exemption. After considering her reply, the Id. CIT(A) held that it is clear that the assessee has manipulated the sale of shares within a short span time in collusion with brokers in order to earn tax free exempt long term capital gain on the sale of shares u/s 10 clause (38) of the Act. The assessee has also not placed on record any material to prove that the claim of exemption u/s 10(38) was genuine.

10. Further, we find the Hon'ble Calcutta High Court in a recent judgment delivered on 14-06-2022 in the case of Pr. CIT Vs. Swati Bajaj and others in ITAT No. 06 of 2022 came heavily upon fraudulent transactions being carried out in the form of shell companies and has strongly held against the assessee

and in favour of the revenue observing that this modus operandi in taking undue advantage of the legal procedure and provisions of the Act should not be permitted in the greater interest of the country as a whole. The Hon'ble Calcutta High court on analysing the facts on the issue regarding the entire process adopted by these assesseees in order to fraudulently gain and take advantage and for non-payment of due taxes has been specifically held to be unwarranted, illegal and bad in law by the Hon'ble High court.

11. Having gone through the entire case records and the decisions of the subordinate authorities on the issue, we hold that the action of the assessee is nothing but pre-motivated and deliberate conduct done for converting the unaccounted money of the assessee under the guise of long term share transaction and that too without paying requisite tax on the same. This clearly amounts to tax evasion. In the present case also, it was beyond preponderance of probabilities that the fantastic sale price of a little known shares i.e. Mahavir Advanced Remedies Ltd., without any economic or financial basis to increase from Rs. 5/- to Rs. 282/- per share. The above increase is 56 times which is evident from the fact that by investing Rs. 2,35,000/- (out of 50,000 shares 47,000 shares were sold) the assessee has got Rs. 1,32,48,345/- in a span of 28 months. There is no doubt that the capital gain was manipulated and bogus and was done to claim exemption u/s 10(38) of the Act. We therefore, do not find any reason to interfere with the findings of the Id. CIT(A) and the same is upheld.

12. In the result, assessee's appeal is dismissed.

Order pronounced in the open Court on this 16th day of August, 2022

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, the 16th August, 2022
Ankam

Copy of the Order forwarded to

1. The Appellant.
2. The Respondent.
3. The CCIT Nasik
4. The CIT(A)-2 Aurangabad
5. D.R. ITAT 'B' Bench
5. Guard File

BY ORDER,

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Sr. Private Secretary
ITAT, Pune.

1	Draft dictated on	08-08-2022	Sr.PS/PS
2	Draft placed before author	11-08-2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	16-08-2022	Sr.PS/PS
7	Date of uploading of order	16-08-2022	Sr.PS/PS
8	File sent to Bench Clerk	16-08-2022	Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		