

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
" SMC" BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.1788/AHD/2019  
निर्धारण वर्ष/Asstt. Year:2013-2014

Income Tax Officer, Ward-1(2)(3), Ahmedabad.	Vs.	Smt. Mamta Rajivkumar Agarwal, 2 <sup>nd</sup> Floor, Krishna Mension, Kalupur Ghee Bazar, Kalupur, Ahmedabad-380001.  <b>PAN: AAWPA5720F</b>
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<b>(Applicant)</b>		<b>(Respondent)</b>
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Revenue by :	Shri M.K. Patel, A.R
Assessee by :	Shri Atul Pandey, Sr. D.R

सुनवाई की तारीख / **Date of Hearing** : **27/09/2022**  
घोषणा की तारीख / **Date of Pronouncement**: **11/11/2022**

**आदेश/ORDER**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-10, Ahmedabad, dated 18/09/2019 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-14.

2. The Revenue has raised the following grounds of appeal:

1. *The CIT(A) has erred in law and in the facts and in circumstances of the case by deleting the addition of Rs.39,37,423/- being bogus LTCG claimed u/s.10(38) of the Act.*

2. *The CIT(A) has erred in law and in the facts and in circumstances of the case by deleting the disallowance of Rs.1,50,000/- being wrong claim of housing loan interest payment as the same was not paid by the assessee from her own account.*

3. *It is, therefore, prayed that the order of the Id.CIT(A) may be set aside and that of the Assessing Officer be restored.*

3. The first issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 39,37,423/- made by the AO representing bogus long term capital gain.

4. The facts in brief are that the assessee is an individual and deriving income from business and profession and also derived income from investment in shares and from other sources. The assessee for the year under consideration declared taxable income of Rs. 5,86,980/- and also declared exempted long term capital gain under section 10(38) of the Act for Rs. 39,37,423/- only. The AO during the assessment proceeding observed that the assessee as on 8<sup>th</sup> March 2011 purchased 40,000 share of M/s Shree Nath Commercial & Finance Ltd. through Network Stock Broking Ltd at price of Rs. 22.25 per share at a total investment of Rs. 8,94,323/- only. Subsequently i.e. as on 22<sup>nd</sup> March 2011, M/s Shree Nath Commercial & Finance Ltd allotted bonus share to its shareholder in the ratio of 1:1 per share. Accordingly the assessee gets 40000 bonus shares of M/s Shree Nath Commercial & Finance Ltd. After lock-in-period of 1 year, the assessee sold 25,000 shares on 8<sup>th</sup> October 2012 @ of 38.39 per share and remaining 55,000/- share were sold during 4<sup>th</sup> December to 14<sup>th</sup> December 2012 at the price ranging between Rs. 69.3 to 71.39 per share. In the process, the assessee earned long term capital gain before STT at Rs. 39,44,687/- and net LTCG after STT at Rs. 39,37,423/- which was claimed as exempted income under section 10(38) of the Act. The AO on perusal of D-Mat account also observed that the assessee during the year has not made investment or entered into any transaction of other scrip except the sale of scrip of

M/s Shree Nath Commercial & Finance Ltd. Likewise, from the year 2005 to 2012, the assessee has not entered into such huge transaction of shares. Therefore, the AO to verify the genuineness of transaction of impugned shares summoned the assessee under section 131 of the Act.

5. In response to summon, the husband of the assessee namely Shri Rajiv Aggarwal appeared before the AO and recorded his statement. Shri Rajiv Aggarwal stated that the transaction of sale and purchase of share was carried out by him on behalf of his wife i.e. assessee. It was further stated that he heard in group discussion that the impugned company was to allot bonus shares, therefore he decided to make investment in the share of the impugned company. However, he denied to have any knowledge about the nature of business and financial performance of the impugned company.

6. Nevertheless, the AO was of the view that the way price of share of impugned company increased in short span of time without having financial base and the fact that the shares were acquired at low price, kept as it is for lock-in-period of 1 year and thereafter, sold when there was sudden increase in price. The entire flow of transaction or event are similar to modus operandi of penny stock. Thus, the AO vide show cause notice dated 23<sup>rd</sup> March 2016 proposed to treat the LTCG as bogus, but the assessee failed make reply to the said show cause notice .

6.1 Therefore, the AO in absence of the reply or explanation from the assessee about the fact why investment has been made in loss making company and how the price of shares increased in such short time span, treated the exempted LTCG claimed by the assessee as bogus and added the same to the total income of the assessee as income from other sources.

7. The aggrieved assessee preferred an appeal to the learned CIT(A).

8. The assessee before the learned CIT(A) submitted that the investment was made based on the information gathered in group discussion with friend that the impugned company was going to allot bonus shares. The shares were purchased through broker on the recognized stock exchange and payment for the same was made through banking channel. The share were duly dematerialized with the D-mat account. When the price increased, the shares were sold through stock exchange on different date and proceeds of the same received in bank account after paying STT. Hence, the transaction of purchase and sale are duly supported by the documentary evidences. The AO merely on basis of assumption alleged that the transaction are in the nature of penny stock. There was no finding or information available with the AO suggesting that the impugned scrip was a penny stock. Therefore, the action of the AO treating the long term capital gain as bogus without having corroborative material or information required to be quashed. The learned CIT(A) after considering the facts in totality deleted the addition made by the AO by observing as under:

*2.2 I have considered the facts of the case assessment order in also the submission made by the appellant. I find that AO has made the addition by considering the script as penny stock. AO has stated the appellant has not given reason for purchase of shares and also the price of share has increased very steeply during a short period and has also fallen down quickly. AO has also stated that this company has no credential and the sale rates are hiked artificially with no real buyers so that the inference of sale being bogus is correct. I find that the appellant has duly submitted all the documents with regards to purchase and sale of shares which includes copy of bills of purchases, copy of broker account, copy of bills for sale, copy of bank statement. I find that the appellant has purchased the shares-through proper recognized broker and has also paid STT at the time of purchase. The **share purchased on 8/03/2011** have entered the **demat a/c on 11/03/2011**. The payment of purchases of Rs.894323/- have been **made through cheque**, therefore the purchases are genuine and verifiable that the shares kept in demat a/c for more than a year and **have being sold on 04/12/2012**. The payment has also being received in bank and STT has also been paid on sales. All these evidences are independent, credible therefore, cannot be ignored. When the payment for purchase of shares itself has been done through banking channel, the same cannot be manipulated by anyone subsequently. Similarly, the shares were in demat account **since 11/03/2011** and were held for a period of more than 12 months before they are sold on the platform of recognized stock exchange. The appellant is not in anyway directly or indirectly related to management of Shreenath Finance & Commercial. The AR pointed out that how department can consider each and every transaction in the shares of so called penny stock, ignoring the evidences which are acceptable as per Indian Evidence Act. As per fact on record, the timeline of transaction is logical and beyond suspicion. In my opinion, the transaction is genuine and rejection of the same by the AO is nothing but executive overreach. Appellant has relied upon various case laws which also supports her contention. I therefore treat the transaction as genuine and direct the AO to delete the addition of Rs 39,37,426/-. The ground no. 1 of appeal is **allowed***

9. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before me.

10. Both the learned DR and the learned AR before me vehemently supported the order of the authorities below as favourable to them.

11. I have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the long term capital gain declared by the assessee on sale of shares of M/s Shree Nath Commercial & Finance Ltd. for ₹ 39,37,423/- was treated as bogus and manipulated, leading to the addition by the AO as income from other source. The view of the AO was based on certain factors which have been elaborated in the preceding paragraph. However, the Id. CIT-A, subsequently, was pleased to delete the addition made by the AO, holding the impugned long term capital gain as genuine.

11.1 The 1<sup>st</sup> controversy arises before us whether the name of the script M/s Shree Nath Commercial & Finance Ltd. is appearing in the investigation report carried out by investigation wing of income tax department or during any proceeding carried out by the Revenue or other agencies. In this regard, we note that the allegation by the AO has not made any reference to any such report, information or finding except merely a bald statement recorded in the assessment order. The dominant basis of treating the impugned long-term capital gain as bogus was based on assumption of the AO that the transaction carried out by the assessee are similar to modus operandi of penny stock. As such, it was the onus upon the AO to bring such facts on record before making the allegation against the assessee. In the present case the learned CIT-A after detailed verification has reached to the conclusion that the transaction carried out by the assessee was genuine and based on the documentary evidence. At the time of hearing, the learned DR has not brought any iota of evidence against the finding of the learned CIT-A. At the same time, we also

note that there was no allegation against the broker through whom the assessee has purchased and sold the impugned script. What has been adopted by the AO for making the addition was the modus operandi. To our understanding, the mere modus operandi cannot be the basis of making the addition or treating the capital gain as bogus until and unless it is supported by the material documents. On analyzing the facts of the present case, we note that the AO on one hand has alleged that the entire transaction was bogus but on the other hand the AO himself has allowed the cost of acquisition against the sale of shares, meaning thereby, the purchase of the shares has been admitted as genuine. The transactions of purchase and sales go hand in hand. In simple words, sales is not possible without having the purchases. Thus, once purchases have been admitted as genuine, then corresponding sales cannot be doubted until and unless some adverse materials are brought on record. As such, we note that the AO in the present case has taken a contradictory stand. On one hand, the AO is treating the entire transaction as a sham transaction and on the other hand he is allowing the benefit of the cost of acquisition for the shares while determining the bogus long-term capital gain. Thus, it is construed that the contradictory stand has been taken by the AO.

11.2 It was also alleged by the AO that the price of the share of M/s Shree Nath Commercial & Finance Ltd. increased in a short period of time which is not commensurate to the financial performance of the company. The rise in the price of the scripts of a company, having no financial base/business activity/profitability certainly gives rise to the doubt about such increase in the price. But in our considered view, this cannot be a sole criteria for reaching to the conclusion that the bogus long-term capital gain was generated which is exempted under section 10(38) of the Act. Such observation during the assessment proceedings provides reasons to investigate the matter in detail and the same cannot take the place of the evidence. But in the case on hand, there was no finding that the enquiry conducted either by the SEBI or the stock exchange with respect to rigging up of share price of M/s Shree Nath Commercial & Finance Ltd. Similarly, there was no

finding with subsequent market price of the impugned scrip. We also note that there was no dispute raised by the Revenue with respect to the following facts:

1. Shares were purchased through broker on recognized stock exchange.
2. Purchase consideration of share was made through cheque.
3. Share was duly dematerialized in D-mat account.
4. Shares were sold through stock exchange after the payment of STT. The transactions have been confirmed by brokers.
5. The payments were received through ECS in the D-mat account.
6. Inflow of shares are reflected in D-mat account. Shares are transferred through D-mat account and buyer are not known to the assessee.
7. There is no evidence that the assessee has paid cash to the buyer or the broker or any other entry provider for booking LTCG and share were purchased by the determined buyer.

11.3 In our view, the income generated by the assessee cannot be held bogus only on the basis of the modus operandi, generalisation, and assumptions of certain facts. In order to hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stock brokers for such an arrangements. In the absence of such finding, no adverse inference can be drawn against the assessee.

11.4 Now the controversy also arises whether a person who genuinely purchases the shares at a low price and sold at high price, therefore, he enjoyed the windfall from such scripts, can he be disallowed the benefit of tax exemption provided under section 10(38) of the Act in a situation where it is established that the share price of the company was rigged up to extend the benefit to certain parties. In this regard, we note that Justice cannot be delivered in a mechanical manner. In other words, what we see on the records available before us, sometime we have to travel beyond it after ignoring the same. Furthermore, while delivering the justice, we have to ensure in this process that culprits should only be punished and no innocent should

be castigated. An innocent person should not suffer for the wrongdoings of the other parties. In the case on hand, admittedly there was no evidence available on record suggesting that the assessee or his broker was involved in the rigging up of the price of the script of M/s Shree Nath Commercial & Finance Ltd.. Thus, it appears that the assessee acted in the given facts and circumstances in good-faith. In holding so we draw support and guidance from the judgment of Hon'ble Delhi High court in case of Pr. CIT vs. Smt. Krishna Devi reported in 126 taxmann.com 80 where it was held as under:

*11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between*



*the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.*

*12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.*

11.5 Respectfully following the judgment of Hon'ble Delhi High Court (*Supra*), we hold that in absence of any specific finding against the assessee, the assessee cannot be held to be guilty or linked to the wrong acts merely on basis of surmises and assumptions. In view of the above discussion, we hold that the capital gain earned by the assessee cannot be held bogus merely on the basis of some assumption of the AO unless cogent material is brought on record. Therefore, we don't find any reason to disturb the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the grounds of Revenue's appeal is hereby dismissed.

**12. The next** issue raised by the Revenue is that the learned CIT(A) erred in deleting the disallowances of deduction claimed by the assessee under section 24 of the Act representing housing loan interest for Rs. 1.5 lakh.

13. The AO during the assessment proceeding found that the assessee has claimed deduction on housing loan interest of Rs. 1.5 lakh under section 24(1)(vi). However, the payment of the same was made from the account of her husband. Thus the AO disallowed the same and added to the total income of the assessee

14. On appeal by the assessee the learned CIT(A) deleted the disallowances made by the AO by observing as under:

*3.2 I have considered the facts of the case the assessment order and appellant submission. I find that the AO has disallowed the housing loan interest of Rs 1,50,000/-. I find that the appellant has taken the loan of Rs 1,64,00,000/- from IndusInd bank in the joint name. The*

*name of Mamta Rajeev Agarwal is in the co-borrower, means the loan has been taken in the joint name of Rajeev Agarwal and Mamta Agarwal. Section 24(1) also uses the word interest payable meaning thereby that the interest can be paid from any account and the only condition is interest should be payable on such capital borrowed from bank etc. Here, the AO has herself stated that the interest has been paid from the account of her husband Rajeev Agarwal. As per 7/12 evidence on record, the investment has also been done in the name of Mamta Rajiv Agarwal/Rajiv Govindram Agarwal and the amount has also been borrowed jointly by husband and wife. The payment is found genuine and the fact of payment of interest cannot be denied.*

*To my mind, once the interest has been paid, the deduction is allowable and the technicality raised by AO is not very important I have perused the subsection (b) of section 24 and conclude that incident of interest payment on borrowed capital which has been utilized for acquisition of asset, is of prime importance for allowability of the impugned claim. The payment source has been fully explained by the appellant. The interest payment has come through the account of husband which is not illegal. At the most, it could be considered as gift from husband to wife and will not have any tax implication. This argument can easily be taken by the appellant at any stage. But certainly the deduction to the appellant cannot be denied. Consequently, I direct the AO to delete the disallowance of Rs 1,50,000/- and issue revised demand notice and challan*

15. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before me.

16. Both the learned DR and the learned AR before me vehemently supported the order of the authorities below as favourable to them.

17. I have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that the assessee has purchased the house property along with the husband jointly and likewise the money was borrowed by the assessee along with husband jointly. Likewise, there is no ambiguity to the fact that the payment of interest for the housing loan was paid by the husband of the assessee alone. In other words, the payment towards the interest for the housing loan was not made by the assessee in the present case. Thus the question arises whether the assessee is eligible for the deduction of the interest cost incurred on the housing loan of which the payment was made by her husband. In this regard, we have referred to the provisions of section 24(b) of the Act which reads as under:

**24.** *Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely:—*

(a) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

<sup>14</sup>(b) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital:

17.1 On perusal of the above provisions, we note that there is no mention about the payment of the interest cost on the housing loan. In other words, it is not necessary to make the payment by the assessee on the money borrowed by him for acquiring the housing loan. What is necessary is this that the money should have been borrowed by the assessee for the purchase of the property on which the interest is payable. As far as, borrowing and the interest thereon is concerned, there is no dispute that the interest-bearing fund has been used by the assessee for acquiring the house property. Thus, to our understanding, the provisions of section 24(b) of the Act have been duly complied with as source of payment for the interest is known i.e. the husband of the assessee. Accordingly, we are of the view that the assessee cannot be denied the benefit of deduction with respect to the interest expenses provided under the provisions of section 24(b) of the Act. Hence, the ground of appeal of the assessee is allowed.

18. In the result, the appeal filed by the assessee is **allowed**.

**Order pronounced in the Court on 11/11/2022 at Ahmedabad.**

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

Ahmedabad; Dated  
*Manish*  
(True Copy)  
11/11/2022