

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"I" BENCH, MUMBAI**

**BEFORE SHRI G.S. PANNU, PRESIDENT AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.437/Mum./2021**

(Assessment Year : 2009-10)

Income Tax Officer  
International Taxation  
Ward-3(1)(1), Mumbai

..... Appellant

v/s

Nirmal Kotecha  
601, Sukha Castle, Bhandarkar Road  
Opp. HDFC Bank, Matunga (Central)  
Mumbai 400 019 PAN – AEZPK2016H

.....Respondent

C.O. no.157/Mum./2021

(Arising out of ITA no.437/Mum./2021)

(Assessment Year : 2009-10)

Nirmal N. Kotecha  
601, Sukha Castle, Bhandarkar Road  
Opp. HDFC Bank, Matunga (Central)  
Mumbai 400 019 PAN – AEZPK2016H

..... Cross Objector  
(Original Respondent)

v/s

Income Tax Officer  
International Taxation  
Ward-3(1)(1), Mumbai

.....Respondent  
(Original Appellant)

Assessee by : Shri Hiro Rai a/w  
Ms. Kinjal Bhuta

Revenue by : Shri Amit Kumar Soni

Date of Hearing – 20/12/2022

Date of Order – 07/02/2023

## **ORDER**

### **PER BENCH**

The present appeal by the Revenue and cross objection by the assessee have been filed challenging the impugned order dated 17/09/2020, passed under section 250 of the Income Tax Act, 1961 ("***the Act***") by the learned Commissioner of Income Tax (Appeals)-57, Mumbai, [***learned CIT(A)***], for the assessment year 2009-10.

2. In this appeal, the Revenue has raised the following grounds: -

*"1. Whether on the facts and in the circumstances of the case, the La CIT(A) wax justified in restricted the addition of Rs.51,71,57,172 to the extent of Rs.32,50,881 by treating Business Income as Long-Term Capital Gain and exempted u/s 10(38) of the Income Tax Act, 1961.*

*2. Whether on the facts and circumstances of the case and in law, the L CIT(A) failed to appreciate the fact that the huge profit claimed to have been earned through the sale of the alleged shares of M/s. Pyramid Saimira Ltd has been claimed as exempt income and no tax has been paid thereon, and that SEBI's enquiry into the price rigging in the shares of M/s. Pyramid Saimira Ltd had led to an order holding the promoter of rigging the share prices.*

*3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) restrict the addition made by A.O despite it being perverse and bad in law since it completely ignored the facts and circumstantial evidences gathered and examined by the Assessing Officer which led him to conclude that the income of the assessee was business income and not Long-Term Capital Gain.*

*4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that the purchase and sale activity of the assessee in respect of shares of M/s. Pyramid Saimira seems to be no genuine and the SEBI passed the order against the company holding that the there was issue of price rigging in the said shares.*

3. The brief facts of the case as emanating from the record are: The assessee is an individual engaged in the business of dealing in securities and

investments. The assessee filed his return of income on 30/09/2009 declaring a total loss of Rs.4,70,83,126. The return of income filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, it was observed that the assessee is engaged in the business of trading in shares and has shown a loss from trading in shares at Rs.4,74,61,406. The assessee has also disclosed a short-term capital loss of Rs.42,41,290. The assessee has claimed exemption under section 10(38) of the Act in respect of long-term capital gain of Rs.52,14,98,464. During the assessment proceedings, the complete details of long-term capital gain were called upon. From the details submitted by the assessee, it was observed that such long-term capital gain was earned from the following 3 scrips:

<i>Sr. No.</i>	<i>Name of the scrip</i>	<i>LTCG(Rs.)</i>
<i>1.</i>	<i>Dhanush Technologies Ltd</i>	<i>(-) 2,00,66,244</i>
<i>2.</i>	<i>Poman Taramet</i>	<i>36,59,780</i>
<i>3.</i>	<i>Pyramid Saimira Theatre Ltd (PSTL)</i>	<i>53,79,04,928</i>
	<i>Total</i>	<i>52,14,19,464</i>

4. The Assessing Officer ("**AO**") **noted that** the Securities and Exchange Board of India ("**SEBI**") **has found** the assessee to have manipulated the share price of PSTL with ulterior motives and has banned the assessee from doing any trading in the stock markets. Accordingly, the AO issued show cause notice to the assessee as to why the entire long-term capital gains be not taxed as income from business or profession on the basis that the assessee was engaged in the trading in shares of PSTL and made a profit on the transaction without earning any dividend or received a meagre dividend. In

reply to the aforesaid notice, the assessee submitted that the SEBI order has not taken finality and certain adjudication process is still going on between the assessee and the SEBI. The assessee further submitted that it is maintaining two separate portfolios, (i) investment portfolio and (ii) trading portfolio. The assessee submitted that the scrip on which long-term capital gain was earned was held as an investment and therefore the resulting profit on the sale is a capital gain and thus may be assessed as such. The assessee also submitted that in the preceding assessment years, the claim of capital gains on similar scrip by the assessee has been accepted. The AO vide assessment order dated 29/12/2011 passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that **in view of SEBI's order the long-term capital gain from the sale of PSTL shares cannot be allowed as exempted under section 10(38) of the Act as it is the business activity of the assessee or at best an adventure in the nature of the business which needs to be taxed at maximum marginal rate.** The AO further noted that the capital gain of Rs.53.37 crore in the scrip also includes sales of Rs.34.23 crore on 30,70,000 equity shares of PSTL transferred to CMD of PSTL and the entire transaction has been carried out only through book entries. The AO held that the transaction whereby the assessee earned a profit of Rs.34.23 crore and claimed the same as exempt is a colourable device and thus exemption under section 10(38) of the Act cannot be availed. The AO also noted that the assessee has sold and purchased the shares of PSTL at frequent intervals within a short span of time only with a view to earn a profit, which is not the characteristic of an investor. The AO further held that the shares of PSTL were

used as security with the brokers in order to avail the loans for running the business and the other shares kept as security with the brokers at various points of time are held as stock in trade by the assessee. It was further held that PSTL has not announced a single dividend for shareholders throughout its history and the assessee was the single largest shareholder from the pre-IPO stage and was also a board member and a promoter of the company. Therefore, it was in his interest that the company announces a dividend so that the assessee could gain on the dividend income. However, no such dividend was ever declared by the company. The AO also noted that the assessee has 24 trading accounts which are only possible for a trader and not for an investor. Further, there is no separate DEMAT account for investment and trading. Further, the money has been borrowed for which purpose there is no demarcation about the use. Accordingly, the AO came to the conclusion that the capital gains or loss claimed by the assessee, be it long-term or short-term, is his business income. Thus, the long-term capital gain of Rs.52,14,98,464 on the sale of shares of PSTL was treated as business income by the AO and taxed accordingly.

5. In further appeal, the learned CIT(A) vide impugned order, inter-alia, held that the nature of income from any asset depends on the use of the asset and not on the fact as to the purpose it is used as security. The learned CIT(A) also took into consideration the fact that the assessee maintains 2 sets of portfolios and the shares in question were forming part of the investment portfolio. Accordingly, the learned CIT(A) came to the conclusion that shares of PSTL were held by the assessee as an investment. On the basis that the SEBI

has debarred the assessee from buying, selling, or otherwise dealing in securities for 14 years and has imposed a fine of Rs.32,50,882 (equal to the amount of unlawful gain), the learned CIT(A) directed that the profit to the extent of unlawful gain of Rs.32,50,882 can only be held as income from the unlawful activity and no expenditure is to be allowed against the same. The balance profit earned from the sale of PSTL shares was treated as long-term capital gain by the learned CIT(A) eligible for exemption under section 10(38) of the Act. Being aggrieved, the Revenue is in appeal before us.

6. During the hearing, the learned Departmental Representative (***"learned DR"***) vehemently relied upon the order passed by the AO and submitted that the SEBI has found the assessee to be involved in the fraudulent practice of manipulating the price of PSTL shares. The learned DR by referring to various other findings in the assessment order submitted that the gains arising in the hands of the assessee from the sale of PSTL shares are in the nature of the business income of the assessee.

7. **On the contrary, the learned Authorised Representative (*"learned AR"*)** submitted that the order passed by the SEBI was challenged before Securities Appellate Tribunal, which dismissed the assessee's appeal and the matter is now pending before the Hon'ble Supreme Court. The learned AR by referring to the extracts of the SEBI order, annexed with the impugned order, submitted that the SEBI has found the assessee to have earned an unlawful gain of Rs.32,50,882 only. The learned AR submitted that the alleged unlawful gain has been paid to the SEBI. By referring to the relevant schedule of balance

sheets, annexed to the impugned order, the learned AR submitted that the shares of PSTL were held as an investment. The learned AR also placed reliance upon certain judicial pronouncements and CBDT circular No. 6 of 2016 dated 29/02/2016. It was further submitted that in the preceding assessment years, the same shares were treated as an investment and there is no change in facts this year.

8. We have considered the rival submissions and perused the material available on record. In this appeal, the grievance of the Revenue is against the **restriction of addition by treating '*business income*' as '*long-term capital gain*'**. As evident from the record, the SEBI, pursuant to the investigation, passed an order dated 23/04/2009 declaring the assessee to be involved in the price manipulating **of PSTL's shares** and barred the assessee from buying, selling or otherwise dealing in securities, directly or indirectly or being associated with the securities market in any manner whatsoever for a period of 14 years. The SEBI computed the unlawful gain of Rs.32,15,882, earned by the assessee by considering the price of the day prior to the alleged manipulation. The SEBI found that the whole plot of price manipulation involving the forgery of SEBI letters was for the purpose of enabling the assessee to sell the shares in the market at artificially raised prices. The AO, inter-alia, on the basis of the order passed by the SEBI, came to the conclusion that the sale of PSTL shares is the business activity of the assessee and therefore exemption under section 10(38) of the Act cannot be allowed. In support of the aforesaid conclusion, the AO also alleged that (i) the capital gains on the sale of shares of PSTL also include sales made to the CMD of the company, wherein the transaction was

carried out only through book entries; (ii) share transaction of high magnitude took place in a short span of time; (iii) shares were used as security for availing the loan from the brokers; (iv) shares of other companies kept as security with the brokers are held as stock in trade by the assessee; (v) no dividend received from shares of PSTL; (vi) assessee has 24 trading account which is possible only for a trader, not for an investor; and (vii) no separate DEMAT account for investment and trading.

9. In the present case, it is evident from the record that the assessee has been found to be involved in manipulating the prices of shares of PSTL by the SEBI. However, even thereafter the AO merely taxed the gains arising from the share transaction as business income. As is evident from the record, the AO never alleged in the present case that since the gains have arisen from the manipulative transaction of rigging the price by issuing the forged letter of SEBI, therefore, the entire long-term capital gain, claimed as exempt by the assessee from the transaction in shares of PSTL, is not genuine and thus added the same to the total income of the assessee. On the other hand, in the present case, the AO only sought to tax the gains by treating the same as business income by considering various factors as noted above. Thus, the AO has based its order on the issue of treatment of long-term capital gain as ***'business income'***. **As per the assessee, he has two portfolios, (i) investment portfolio, and (ii) trading portfolio, and the shares of PSTL were always held under the investment portfolio.** We find that the said fact is also evident from the relevant extracts of Schedule-4 to the balance sheet and profit and loss account, annexed to the impugned order, wherein PSTL is appearing under the



head '*investment*'. Further, from the details of the share transaction of PSTL scrip, on page 9 of the assessment order, it is evident that after purchasing the shares on 27/03/2006, the assessee held the shares for a period of more than 2 years before its sale in the year 2008. Further, nothing contrary has been brought on record to controvert the findings of the learned CIT(A) that these shares have been shown as an investment and the same were treated as an investment by the Revenue, in the preceding years. On these facts and circumstances, we find no infirmity in the findings of the learned CIT(A) in treating the profit earned from the sale of PSTL shares as a long-term capital gain. Since the SEBI has computed the unlawful gain of Rs.32,50,882 from the price manipulation of shares of PSTL, the learned CIT(A) restricted the addition to the aforesaid amount by treating the same as income from unlawful activity. Thus, in view of the above, we find no infirmity in the impugned order passed by the learned CIT(A). As a result, all the grounds raised by the Revenue are dismissed.

10. In the result, the appeal by the Revenue is dismissed.

11. As we have dismissed the appeal filed by the Revenue, the cross-objection filed by the assessee becomes infructuous and is accordingly dismissed.

Order pronounced in the open Court on 07/02/2023

**Sd/-**  
**G.S. PANNU**  
**PRESIDENT**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 07/02/2023**

*Copy of the order forwarded to:*

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai