

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'H': NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
Ms. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.860/DEL/2020
[Assessment Year: 2009-10]

Trak Services (P) Limited, B-19, Defence Colony, New Delhi-110024	Vs	Income Tax Officer, Ward-16(3), C.R. Building, New Delhi-110001
PAN-AAACT0911A		
Appellant		Respondent

Appellant by	Sh. Ajay Wadhwa, Adv. & Ms. Ragini Handa, Adv.
Respondent by	Sh. Amit Katoch, Sr. DR

Date of Hearing	07.08.2023
Date of Pronouncement	14.08.2023

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of the Ld. CIT(A)-33, New Delhi, dated 12.02.2020 pertaining to Assessment Year 2009-10.

2. The grounds of appeal reads as under:-

"1. That on the facts and circumstances of the case and in law, the order dated 12.02.2020 passed by the Ld. Commissioner of Income-tax (Appeals) ("CIT (A)") is erroneous and bad in law.

2. The Ld. CIT(A) has erred in law and on facts in sustaining the addition of Rs.1,07,66,220/- made by the Ld. AO on account of increase in sale consideration of Shares."

3. Brief facts of the case are that the assessee company has declared Long Term Capital Gain (In short LTCG) of Rs. 13134996/- from the transfer of 1538460 shares of M/s Axis IT&T Ltd. sold on 28/4/2008. The

assessee company has declared the sale price of these shares at Rs. 13.50 per share on the date of transfer. However, the rate of share of M/s Axis IT&T Ltd. as on 28/4/2008(date of transfer) is Rs. 20.50 per share, since it a quoted share. The transfer of these shares was on off market transaction. The assessee was asked as to why the shares value on the date of transfer be not taken at Rs. 20.5 per share. To this, the assessee pleaded that in this case 61% of the shareholders of Ms Axis AT&T Ltd. came together and decided to sell their holdings to one party. A written agreement to this effect was executed on 11/1/2008. Since there is a bar for sale of shares in the stock exchange as per which only 5% of the shares, could be transacted in a single day. However, this plea does not hold water as this was an off-market transaction and hence there was no bar to transfer any number of shares as one liked.

4. The AO further noted that it is not clear as to how the assessee has calculated or adopted the value of shares of this company at Rs.13.50 per shares as on 28/4/2008 when the transfer actually took place. That the value of a share has got to be adopted on the date of transfer, since that is the only relevant date when the capital gain accrues. That the assessee has itself admitted the date of sale as 28/4/2008 since it has been shown in the year under consideration. That there is no dispute with regard to the fact that the price of share of this company as on 28/4/2008 was Rs.20.50 per share. In view of the above, AO held that full value of consideration in respect of this transaction is adopted at Rs. 50.50 per share & the sale value of 1538460 shares would work on to Rs.

3,15,38,430/-. The assessee has declared the full value of consideration at Rs. 20769210/- and hence the AO made addition of Rs.1,07,69,220/-.

5. Upon assessee's appeal, the Ld. CIT(A) confirmed the action of the Assessing Officer.

6. Against this order, the assessee is in appeal before the Tribunal. We have heard both the parties and perused the records.

7. The Ld. Counsel for the assessee submitted that original return was filed on 18.03.2009 and revised return filed on 17.09.2010 declaring loss of Rs.16,68,409/-. After taking sale consideration of Rs.2,07,69,210/- (Rs.13.5/- per share) as per date of agreement, the assessee declared long term capital gain on sale of listed share of M/s Axis IT&T Limited. The assessee further referred to page 50 to 103 of the paper book and submitted that the shares purchase agreement dated 11.01.2008, where 60.69% shares holders came together and agreed to sell their holding to one party at an agreed rate of Rs.13.5/- per share. All conditions mentioned in agreement were complied with and the agreement was in accordance with the terms of Regulation 22(16) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The assessee further submitted that all corporate, regulatory and statutory approvals, consents given by the stock exchanges on which the Company is listed and acknowledgement from SEBI in respect of the transaction were to be obtained by the seller and delivered to the purchaser. A public announcement and offer to purchase minimum of 20% of voting capital of the company from all the shareholders was required to be made by the

Purchaser in accordance with SEBI and only after the conclusion of the open offer, the purchase price, share certificates, share transfer forms, etc was to be released in favour of the seller. Subsequent to this, resolution was to be passed to approve the transfer, necessary filings were to be made with the Registrar of Companies. The assessee further submitted that the advance of Rs.40,13,824/- and balance payment of Rs.1,62,88,660/- was received on 24/01/2008 and 29/04/2008 respectively after deducting transaction fee. The assessee vide letter dated 04/01/2011 has also filed the ledger of the purchaser in books. The assessee referred to the paper book page 109 where it was mentioned that the share price of M/s Axis IT&T Limited was Rs.11.21/- per share on the date of signing the term sheet i.e. on 30/11/2007 and showing share price from the website moneycontrol.com. The assessee submitted a chart showing “payment as per agreement to sell” and “payment as per bank statement” which reads as under:-

<u>Payment as per Agreement to sell</u>	<u>Payment as per bank statement</u>
Advance within 7 working days - 20% of the purchaser price pursuant to set off of transaction fee -i.e. Rs.40,13,824/- refer pg. 56,57,76	Rs.40,13,824 on 24 Jan. 2008 refer Pg 104
1 st Instalment within 7 working days -10% of the purchaser price i.e. Rs.20,76,921 refer Pg 56,57,76	Rs.1,62,88,660 on 29 th April 2008 refer Pg 104
On date of conclusion of open offer-remainder after set off of transaction fee-Rs.1,42,11,739 Pg. 56,57,76 of PBK	

8. The Ld. Counsel for the assessee further relied upon following propositions:-

[I] Full value of consideration used in section 48 does not have any reference to market value but only to consideration referred to in sale deeds as sale price of assets which have been transferred

- i. Commissioner of Income tax vs Gillanders Arbuthnot & Co. [1973] 87 ITR 407 (SC)
- ii. Commissioner of Income tax vs George Henderson and Co. Ltd. [1967] 66 ITR 622 (SC)
- iii. K.P. Varghese vs Income Tax Officer [1981] 131 ITR 597 (SC)
- iv. Commissioner of Income tax vs Smt. Nilofer I. Singh [2009] 309 ITR 233 (Delhi)
- v. Dev Kumar Jain vs Income Tax Officer [2009] 309 ITR 240 (Delhi)
- vi. Arjun Malhotra vs Commissioner of Income Tax {2018} 403 ITR 354 (Del)
- vii. Anurag Jain.In re [2005] 277 ITR 1 (AAR) Delhi
- viii. Principal Commissioner of Income-tax-2, Chandigarh V. Quark Media House India (P.) Ltd. [2017] 391 ITR 145 (Punjab & Haryana)
- ix. Commissioner of Income-tax v. Rikadas Dhuraj [1976] 103 IT 111 (Madras)
- x. Commissioner of Income-tax v. P. Suryanarayana [1973] 88IT321 (MAD.)
- xi. Commissioner of Income-tax v. Smt. Nandini Nopany [1998] 230 IT 679 (Calcutta)
- xii. Commissioner of Income-tax v. Texspin Engg, & Mfg. Works [2003] 263 IT 345 (Bombay)
- xiii. Moral Trading & Investment Ltd. v. Deputy Commissioner of Income-tax [2011] 7 ITR(T) 548 (Delhi)

[II] An agreement always has to be taken to be correct if assessee has acted bonfide upon it and unless AO has brought evidence on record that it is fraudulent

- i. D.S. Bist & sons v. Commissioner of Income Tax [1984] 149 ITR 276 (Delhi)

- ii. Industrial Development Corpn. Of Orissa Ltd. vs Commissioner of Income tax [2004] 268 ITR 130 (Orissa)
- iii. CIT vs George Williamson (Assam) Ltd. [2004] 265 ITR 626 (Gauhati)
- iv. JCIT vs Mansurpur Sugai Mills Ltd. [2006] 8 SOT 365 (Delhi)
- v. Comecon Overseas Pvt. Ltd. Vs. DCIT 120061 8 SOT 82. (Delhi)
- vi. Assistant Commissioner of Income-tax vs. Vishnu Apartments (PJ Ltd. (2020] 183 ITD 63 (Delhi - Trib.)
- vii. Smt. Savita Bhasin v. Income Tax Officer, Ward-53(5) Civic Center, New Delhi (2020] 84 ITR(T) 602 (Delhi - Trib.)
- viii. Enpro India Ltd. (2000] 113 Taxman 132 (Delhi) (Mag.)[12-07-2000]
- ix. Premier Housing & Industrial Enterprises [2008] 24 SOT 236 (Chennai ITAT)

[III] AO cannot step in the shoes of businessman and decide as to how affairs of business were to be run and wasteful or excessive expenditure was to be curtailed

- i. S.A. Builders Ltd. vs CIT [2007] 288 ITR 1 (SC)
- ii. Woollen Mfg. Vs CIT [1969] 72 ITR 612 (SC)
- iii. CIT vs Dalmia Cement (P.) Ltd. [2002] 254 ITR 377 (Delhi)
- iv. CIT vs Oracle India (P.) Ltd. 11 taxmann.com 139
- v. DCIT vs Manish Buildwell (P.) Ltd. [2011] 142 TTJ 749 (Delhi-Trib.)
- vi. DCIT vs Sophisticated Marbles and Granite Industries [2010] 3 ITR (T) 220 (Delhi)

9. Ld. DR relied upon the orders of the authorities below and requested to uphold the same.

10. After hearing the rival contentions and after perusing the case laws cited by the Ld. AR, we find that after taking sale consideration of Rs. 2,07,69,210/- (Rs. 13.5/- per share) as per date of agreement, the assessee declared long term capital gain on sale of listed share of M/s

Axis IT&T Limited and as per the sale purchase agreement dated 11.01.2008, 60.69% shares holders came together and agreed to sell their holding to one party at an agreed rate of Rs. 13.5/- per share and all the conditions mentioned in agreement were complied in accordance with SEBI Regulations. In the agreement, it was also mentioned that there are no related party transactions. The advance of Rs. 40,13,824/- and balance payment of Rs. 1,62,88,660/- was received on 24.1.2008 and 29.4.2008 respectively after deducting transaction fee and the ledger of the purchaser in the books of the assessee was also filed vide letter dated 4.11.2011. The share price of M/s Axis IT&T Limited was Rs. 11.21/- per share on the date of signing the term sheet on 30.11.2007 showing share price from the website moneycontrol.com. We note that the payments were made as per agreement to sell and the same is verifiable from the bank statements. In view thereof, it is crystal clear that the transaction was an off market transaction of listed shares held by the assessee as an investment in its balance sheet and assessee has entered into a share purchase agreement on 11.01.2008 and the transfer of shares actually took place on 28.4.2008 and consideration of the shares was taken Rs. 13.50 per share i.e. the price prevailing on the date of share purchase agreement. As per clause B of the aforesaid agreement the sellers are inter alia the owners of 12,113,184 fully paid up equity shares, representing 60.69% of the issued, subscribed and paid up equity shares capital of the company as more fully specified in Annexure-A. Further they have an absolute right to sell the shares, free from all liens, charges and encumbrances. Therefore, it is established that the adoption of value

by the Assessing Officer as on the date of transfer was only a hypothetical value i.e. the price as on 28.4.2008. Hence, the resulting addition of Rs. 10769220/- is not tenable. We note that it is settled law that full value of consideration used in section 48 does not have any reference to market value but only to consideration referred to in sale deeds as sale price of assets which have been transferred, as laid down by the Hon'ble Supreme Court of India in the case of CIT vs. Gillanders Arbuthnot & Co. (1973) 87 ITR 407 (SC) wherein, it has been held as under:-

“....In the instant case, the Tribunal had held that the ‘agreement for sale’ entered into between the assessee-firm and the ‘company’ was a genuine transaction as the same evidenced a sale. This was essentially a finding of fact. The High Court had affirmed that finding. In that view, it could not be accepted that the transaction in question was exchange and not a sale, or it was merely a readjustment.

Clause(1) of the agreement in specific terms said that ‘the existing partner shall sell and the company shall purchase the shares and securities for a sum of rupees seventy-five lakhs’. Clause (3) of that agreement merely provided a mode of satisfaction of the sale price. The sale price fixed by the parties for the shares and the securities sold was Rs. 75 lakhs and nothing more. It could be that because of the allotment of the shares of the company in satisfaction of the sale price, the assessee-firm got certain benefits but that does not convert the sale into an exchange.

Under section 12B(2), the amount of capital gains has to be computed after making certain deductions from the full value of the consideration for which the sale is made. What exactly is the meaning of the expression 'full value of the consideration for which sale is made'? Is it the consideration agreed to be paid or is it the market value of the consideration? In the case of sale for a price, there is no question of any market value unlike in the case of an exchange. Therefore, in cases of sales to which the first proviso to sub-section (2) of section 12B is not attracted, all that we have to see is what is consideration bargained for. To the facts of the instant case, the first proviso was not attract. The price bargained for the sale of the shares and securities was only rupees twenty-five-lakhs.

The full value of the sale price received by the assessee was only rupees seventy-five lakhs. That being so, the capital gains made by the company were Rs. 27,04,772/- as held by the High Court.

The case was decided partly in favour of the assessee."

10.1 It is settled law that an agreement always has to be taken to be correct if the assessee has acted in bonafide manner, unless AO has brought evidence on record that it is fraudulent. In this case the Revenue has not been able to establish malafide on the part of the assessee. Besides above, we note that decision of the Hon'ble Supreme Court of India in the case of SA Builders Ltd. Vs. CIT (2007) 288 ITR 1 (SC), wherein, it has been held that AO cannot step in the shoes of the businessman and decide as to how affairs of business were to be run and wasteful or excessive expenditure was to be curtailed is very much

applicable in the case of the assessee, as the lower authorities have ignored the principle as laid down by the Apex Court, as aforesaid.

11. Keeping in view of the aforesaid discussions and on the anvil of the decisions of the Apex Court, as aforesaid, we are of the considered opinion that the lower authorities have been completely wrong in making and sustaining the addition of Rs. 1,07,66,220/- on account of increase in sale consideration of shares, which needs to be deleted. We hold and direct accordingly.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 14th August, 2023.

Sd/-

[ASTHA CHANDRA]
JUDICIAL MEMBER

Sd/-

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Delhi 14.08.2023.

Shekhar/SRB

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi