

आयकर अपीलीय अधिकरण
कोलकाता 'एसएमसी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

श्री राजपाल यादव, उपाध्यक्ष
एवं
श्री रकेश मिश्रा, लेखा सदस्य
के समक्ष

Before

SRI RAJPAL YADAV, VICE PRESIDENT
&
SRI RAKESH MISHRA, ACCOUNTANT MEMBER

I.T.A. No.: 1589/KOL/2024
Assessment Year: 2011-12

Uttam Das.....Appellant
[PAN: AFRPD 4834 P]

Vs.

ITO, Ward-2(3), Kolkata.....Respondent

Appearances:

Assessee represented by: *Yash Baid C.A. and Shreyansh Kothari C.A.*

Department represented by: *Manas Mondal, Addl. CIT, DR.*

Date of concluding the hearing : August 29th, 2024

Date of pronouncing the order : November 19th, 2024

ORDER

Per Rakesh Mishra, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short 'AY') 2011-12 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the 'Act') by Id. Commissioner of Income-tax (Appeals)-NFAC, Delhi [in short Id. 'CIT(A)'] dated 27.06.2024 arising out of the assessment order framed u/s 144/147 of the Act dated 20.12.2018.

1.1. The brief facts of the case of the appellant are that the assessee had filed the return of income for AY 2011-12 declaring total income of Rs. 7,85,146/- which was processed u/s 143(1) of the Act. Subsequently, the case

was reopened by issuing notice u/s 148 of the Act on the basis of information received from the Investigation Wing, Kolkata in respect of penny stock transactions. The investigation had revealed that the trading in the said penny stock was a manipulated affair to generate entries of bogus LTCG facilitating tax evasion by large number of persons. It was informed that the appellant had made transaction of 10,000 shares in the scrip of Global Capital Markets Ltd. and became a beneficiary to the tune of Rs. 1,77,391/-. Since the assessee did not respond to the notices issued u/s 148, 142(1) & 144 of the Act, the assessment was completed u/s 144 read with Section 147 of the Act by making an addition of Rs. 1,77,391/- as bogus transaction. Aggrieved with the assessment order, the assessee had appeared before the ld. CIT(A) and the assessee filed written submission in the course of hearing. It was contended before the ld. CIT(A) that the assessee furnished the reply by India Post as well as by hand directly on 21.12.2018 before the ld. AO. Further notice received on 20.12.2018 requiring to file the reply on or before 19.12.2018 at 12:45 PM was also responded but the reply was not considered. Before the ld. CIT(A) the assessee could not succeed and has preferred appeal before this Tribunal.

2. Rival contentions were heard and submissions made have been considered. The ld. CIT(A) has reproduced the show cause notice issued to the assessee by the Assessing Officer (hereinafter referred to as ld. 'AO') and has also stated the contention raised by the assessee. The relevant para 5.1 is extracted as under:

“In the SCN issued to assesses on 14.12.2018 the Assessing Officer has stated as under:

“As per information received from PMO & Investigation wing, Kolkata, M/s Global Capital Markets Ltd with script codes 530263 is a penny stock listed on BSE. The company catalyzed to facilitate introduction of unaccounted Income of members of Rs. 19,07,850/- on account of arranged manipulation in the above-mentioned penny stock”.

The assesses from day one when received notice for re-opening was first issued on 31.03.2018 electronically responded on 28.04.2018 asking for the reasons recorded for re-opening the matter to proceed further. But after repeated communication also, the same was not supplied till 21.11.2018.

And finally, on 22.11.2018 the same was issued mentioning the reasons for reopening being information of Investigation Department Report. But no such report was supplied to assessee and the Assessing Officer has not made any enquiry on the basis of that report to find the fact whether at all there was any transaction by assessee and the manner how the assessee became beneficiary of the amount of Rs.1,77,391/-. Moreover this figure of Rs. 1,77,391/- was mentioned as Rs. 19,07,850/- in the SCN.

In fact, during the FY 2010-11 the assessee did not had any Long-Term Capital Gain or Short-Term Capital Loss in the scrip of Global Capital Market Ltd and thus the allegation in respect of Exempt Capital Gain or Short-Term Capital Loss does not stand.

The only transaction that the assessee had in the scrip of Global Capital Market Ltd was that of purchase of 5,000 shares on 28.03.2011 and again 5000 shares on 29.03.2011. The same may be verified from the Contract Note issued by the broker - Motilal Oswal (Page No. 25-26). The said shares were not sold during the FY 2010-11 and the assessee had 10,000 shares as on 31.03.2011. The same can be verified from the DP holding statement as on 31.03.2011 (Page No. 27). Further as the shares of Global Securities were not sold during the FY 2010-11 there can be no question of LTCG or STCL.”

2.1. The assessee further contended before the Id. CIT(A) that the Id. AO was carried away by the report of the Investigation Wing, Kolkata and the entire assessment has been framed by the Id. AO without conducting any enquiry from the relevant parties or independent source or evidence and he has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. Neither any independent and separate enquiry has been conducted in the case of the assessee nor the statement recorded by the Investigation Wing has been confirmed or corroborated by the person during the assessment proceeding. The assessee relied upon the judgment of Hon'ble Delhi High Court in the case of *Synfonia Tradelinks Pvt. Ltd. vs. ITO* in W.P.(C) 12544/2018 wherein the Hon'ble Court has held as under:

“...The reasons which lead to the formation of opinion or belief that the assessee's income chargeable to tax has escaped assessment should be inextricably connected. In other words, the reasons for the formation of opinion should have a rational connection with the formation of the belief that there has been an escapement of income chargeable to tax (See: ITO v Lakhmani Mewal Das, 19763 SCO 757)”

2.2. The finding of ld. CIT(A) is as under for confirming the addition of Rs. 1,77,391/- as bogus transaction:

“5.2 I have gone through the facts of the case, assessment order and submissions made by the appellant. The entire argument of the appellant and the judicial pronouncements relied upon by the appellant supporting his contentions are carefully gone through. It is observed that during the assessment proceedings, the Assessing Officer has noted that within a short span to time the appellant managed to sell the shares with increased value of acquisition. It appears that there were several such transactions which led to an investigation being commenced by the Directorate of Income Tax Investigation, Kolkata. The modus operandi has been set out in the report, the types of penny stocks companies, the entities involved in the transactions, the different stages of the transactions, the merger method. The report further states that BSE listed penny stocks have been identified after which several search and survey operations were conducted in office premises of share broking entities who have accepted that they were actively involved in bogus LTCL/STCL scam. Surveys were also conducted in the office premises of many accommodation entry providers and their statements were recorded in which they have admitted their role in the scam. This led to recording statements from the share brokers who have accepted that the said cash has been used for providing accommodation entries of bogus LTCG. In the same report, the scrip of M/s Global Capital Markets Limited has been identified as penny stock and being used for generating the bogus LTCG. In view of this, I am of the considerable opinion that the action of Assessing Officer in making addition of Rs.1,77,391/- as bogus transaction is appropriate and I find no fault in the assessment order.”

2.3. Further reliance has been placed by the ld. CIT(A) on the decision of Hon'ble Calcutta High Court in the case of *Pr. CIT vs Swati Bajaj* reported in [2022] 446 ITR 56 (Cal) wherein the Hon'ble Court has held that *“the onus is on the assessee to establish the genuineness of the price hike. Merely demonstrating the financials of the company, volume of trade, transactions through banking channels, inter alia, will not suffice. The assessee has to prove that the price of the share was not manipulated.”*

2.4. Further reliance has also been placed on the judgment of Hon'ble Delhi High Court in the case of *Suman Poddar vs. ITO* which was later upheld by the Hon'ble Supreme Court. Ld. CIT(A) held that on the basis of the judicial pronouncements, he was of the considered view that the transaction in scrip was colourable device in guise of investment in listed shares and accordingly,

the addition made on account of bogus transaction in penny stock amounting to Rs. 1,77,391/- was confirmed and the appeal was dismissed.

3. Before us, the only effective ground of appeal is regarding the addition of Rs. 1,77,391/-. It was stated before us that the return of income was filed on 15.07.2011 showing total income of Rs. 7,85,146/- and as regards ground no. 2 relating to bogus LTCG, it was stated that the assessee had not even sold the shares during the year and the required contract notes etc. were put up before the Id. CIT(A) and the same also find a mention on page 25 of the paperbook. The submissions made in this regard are as under:

"The Ld. AO has passed his order u/s 144/147 of the Act (Page No. 20-24) alleging that the assessee is a beneficiary of ₹1,77,391/- in respect of transaction undertaken in the scrip of Global Capital Markets Limited (Scrip Code - 530263). The Ld. AO also alleged that the transaction has been to accommodate bogus LTCG entry and to evade taxes in the pretext of claiming LTCG.

However, in reality, during the FY 2010-11 the assessee did not had any Long-Term Capital Gain or Short-Term Capital Loss in the scrip of Global Capital Market Limited and thus the allegation in respect of Exempt Capital Gain or Short-Term Capital Loss is baseless and devoid of any application of mind.

The only transaction that the assessee had in the scrip of Global Capital Markets Limited was that of purchase of 5,000 shares on 28.03.2011 and another 5000 shares on 29.03.2011. The same may be verified from the Contract Note issued by the broker - Motilal Oswal attached herewith vide Page No. 37-38. The said shares were not at all sold during the FY 2010-11 and the assessee held 10,000 shares as on 31.03.2011 in his Demat Account. The same can be verified from the Demat Holding Statement as on 31.03.2011 attached herewith vide Page No. 39. Since the shares of Global Capital Markets Limited were not sold during the FY 2010-11 there can be no question of LTCG or STCL.

However, in the Assessment Order dated 20.12.2018 the Ld. AO has wrongly concluded as follows:

"The Assessee is unable to discharge its onus to explain the transaction of Rs 1,77,391/- for which re-assessment is being conducted. On such basis the amount of Rs. 1,77,391/- is deemed to be the bogus transaction and added back to the total Income of the assessee. It may be noted that the manner of payment received by the account payee cheque or through RTGS is not sacrosanct and this cannot make a bogus transaction as genuine one."

Further, the Ld. CIT (Appeals) also failed to take note of the facts that the shares of Global Capital Markets Limited has not been sold by the assessee during the impugned period. The order passed by the Ld. CIT (Appeals) was based on preconceived notions and surmises. 9 out of 12 pages of the order of the Ld. CIT (Appeals) has been used to reproduce the assessment order and written submission of the assessee and only 1 para has been used for conclusion. The same is being reproduced below:

"5.2 I have gone through the facts of the case, assessment order and submissions made by the appellant. The entire argument of the appellant and the judicial pronouncements relied upon by the appellant supporting his contentions are carefully gone through. It is observed that during the assessment proceedings, the Assessing Officer has noted that within a short span to time the appellant managed to sell the shares with increased value of acquisition. It appears that there were several such transactions which led to an investigation being commenced by the Directorate of Income Tax Investigation, Kolkata. The modus operandi has been set out in the report, the types of penny stocks companies, the entities involved in the transactions, the different stages of the transactions, the merger method. The report further states that BSE listed penny stocks have been identified after which several search and survey operations were conducted in office premises of share broking entities who have accepted that they were actively involved in bogus LTCL/STCL scam. Surveys were also conducted in the office premises of many accommodation entry providers and their statements were recorded in which they have admitted their role in the scam. This led to recording statements from the share brokers who have accepted that the said cash has been used for providing accommodation entries of bogus LTCG. In the same report, the scrip of M/s Global Capital Markets Limited has been identified as penny stock and being used for generating the bogus LTCG. In view of this, I am of the considerable opinion that the action of Assessing Officer in making addition of Rs.1,77,391/- as bogus transaction is appropriate and I find no fault in the assessment order."

Thus, on the basis of the fact that there was no sale of shares of Global Capital Markets Limited by the assessee during the impugned period, the addition made by the Ld. AO of ₹1,77,391/- by terming the assessee as a beneficiary in the so-called penny stock scam is baseless and liable to be struck down."

3.1. The contract note in relation to purchase of 5,000 shares on 28.03.2011 was enclosed at page 37-38 of the paperbook. The said contract note was issued by Motilal Oswal Securities Ltd. for purchase of 5,000 shares on 28.03.2011 of Global Capital Markets Ltd. for Rs. 1/- each and another 5,000

shares on 29.03.2011. The shares were purchased @ 19.95/- for 10,000 numbers at Rs. 1,99,500/-.

3.2. At page no. 39 of the paperbook, Demat Holding Statement as on 31.03.2011 shows 10,000 shares in the account of the assessee on 31.03.2011. The assessee contended that these shares were sold in 2015 for a sum of Rs. 1.87 Lakh which was treated by the ld. AO as bogus transaction during the AY 2011-12. The ld. DR could not controvert the submissions made by the assessee in this regard.

4. We have considered the submissions made and find that the shares were purchased in the FY 2010-11 relevant for AY 2011-12 through Motilal Oswal Investment Services and securities transaction tax and service tax along with other charges were paid to the broker. The assessee has relied upon the decision of *Smt. Sudha Loyalka vs. ITO* in *ITA No. 399/DEL/2017* order dated 18.07.2018 in support of the claim that since the shares were not sold during the FY 2010-11 and nothing has been brought on record in support of the claim of the sale of the same, therefore, the same could not be treated as bogus transaction relating to sale of shares in the AY 2011-12 and the assessee succeeds and ground no. 2 of the appeal is allowed as the alleged transaction of sale did not take place during the previous year relevant to AY 2011-12.

5. Ground nos. 3, 4 & 5 relate to not mentioning the Section under which the addition was made and the ld. AO failing to issue notice u/s 143(2) of the Act and failing to serve the proper show cause notice on the assessee thus, making the order passed defective. Similarly, ground no. 6 relates to the ld. AO not supplying the copy of the report of Investigation Wing/PMO based upon which the proceeding was initiated. However, since relief has been granted on merit as the transaction did not pertain to the year under consideration, therefore, these grounds become merely academic in nature and do not require any separate adjudication.

6. Ground no. 7 relates to incorrect credit of TDS of Rs. 81,500/-. The ld. AO is directed to verify the same and the assessee is also directed to furnish

necessary evidences for the same before the ld. AO who shall allow the credit in accordance with law as this ground of appeal has not been adjudicated upon by the ld. CIT(A). The same was specifically raised as ground no. 12 (additional ground) before him.

7. Ground nos. 1 & 8 are general in nature which do not require any separate adjudication.

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

Order pronounced in the open Court on 19th November, 2024.

Sd/-
[Rajpal Yadav]
Vice-President

Sd/-
[Rakesh Mishra]
Accountant Member

Dated: 19.11.2024

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Uttam Deducted at source, 135, Netaji Subhas Road, 1st Floor, Kolkata, West Bengal, 700001.**
- 2. ITO, Ward-2(3), Kolkata.**
- CIT(A)-NFAC, Delhi.
- CIT-
- CIT(DR), Kolkata Benches, Kolkata.
- Guard File.

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By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata