

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.744/Ind/2013
Assessment Year: 2009-10

JCIT, Range-3 Indore	बनम/ Vs.	Shri Amandeep Singh Bhatia 8/5, BCC House, Manoramaganj, Indore
(Appellant / Revenue)		(Respondent / Assessee)
PAN: AGOPB 3205 E		
Revenue by	Shri Ashish Porwal, Sr. DR	
Assessee by	Shri Harsh Vijayvargiya, AR	
Date of Hearing		06.02.2023
Date of Pronouncement		28.04.2023

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 25.10.2013 passed by learned Commissioner of Income-Tax (Appeals)-I, Indore ["Ld. CIT(A)"], which in turn arises out of assessment-order dated 30.11.2011 passed by learned Addl. CIT, Range-3, Indore ["Ld. AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2009-10, the revenue has filed this appeal on following grounds:

"1. On the facts and in the circumstances of the case, the Ld. CIT (A) erred in deleting the addition of Rs. 2,48,02,084/- made by the AO by holding that the same long Term Capital Gain whereas it was income from other sources.

1.1 On the facts and in the circumstances of the case the Ld. CIT (A) was not justified in deleting the addition by observing that the shares were sold through Shri Sunil Kumar Jhunjhunwala against whom no action was taken by SEBI because the Ld. CIT(A) failed to appreciate the fact that shares were purchased from a broker who was penalized by SEBI for malpractices with mala fide intention.

1.2 On the facts and in the circumstances of the case the Ld. CIT(A) was not justified in deleting the addition by observing that the broker through whom the shares were sold was not tainted because it was not the broker but the company who made manipulation to get its share prices go high artificially.

1.3 On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in deleting the addition whereas the same authority confirmed the additions on the same issue in the assessment year 2005-06 and 2006-07.

1.4 On the facts and in the circumstances of the case, the Ld. CIT(A) was further not justified in deleting the addition by placing reliance on certain case laws because the facts of the case laws relied upon by the Ld. CIT(A) were entirely different from the facts of the instant case in as much as in those cases the brokers were neither tainted nor any penalty was imposed on them by SEBI whereas in the case under reference the broker was tainted and penalty was also imposed by SEBI.

2. It is therefore, prayed that the order of the Ld. CIT (A) may be set aside and the order of the AO may please be restored.”

2. Heard the learned Representatives of both sides and case records perused.

3. Briefly stated the facts are such that the assessee-individual filed his return of income of relevant AY 2009-10 on 18.09.2009 declaring a total income of Rs. 54,64,570/- from salary, other sources and dividend. In the return so filed, the assessee also declared a long-term capital gain of Rs. 2,48,02,084/- exempted u/s 10(38) of the act, earned from sale of 88,550 equity shares of 21st Century Finance Ltd. The assessee claimed to have purchased the impugned shares for Rs. 7,70,856/- in the year 2004-05; sold the same for Rs. 2,55,72,940/- in the year 2008-09 and thereby earned the capital gain of Rs. 2,48,02,084/-. The case was selected for scrutiny and the statutory notices u/s 143(2) and 142(1) were issued from time to time. The AO confronted the assessee on the capital gain declared in return, in response to which the assessee submitted details/documents. However, the AO was not satisfied and finally did not accept the exempted gain declared by

assessee. Hence, the AO made an addition of Rs. 2,48,02,084/- as income from other sources and taxed accordingly. Being aggrieved, the assessee carried the matter in first-appeal and succeeded. Now, the revenue has come in this appeal assailing the order of first-appeal.

4. The revenue is aggrieved by the action of CIT(A) in deleting the addition made by AO and this is the only grievance raised in various grounds of appeal.

5. Ld. DR representing the revenue carried us to the orders of lower-authorities and made strong contentions. He submitted that the AO has rejected the exempted capital gain declared by assessee for two reasons, namely (i) The case-history of assessee is such that in earlier AY 2005-06 and 2006-07, then AO had rejected similar claim of capital gain made by assessee from shares of 21st Century Finance Ltd. and such action of AO was upheld in first-appeal.; (ii) The broker (Shri Shyam Lal Sultania) through whom the assessee had done transactions was penalized by SEBI for the period 09.06.2004 to 25.02.2005 and the assessee has purchased shares through that broker during that period only. He submitted that mere holding of shares in demat a/c and doing transactions through a/c payee cheque do not make the transactions genuine. Ld. DR placed reliance on (i) *CIT Vs. Durga Prasad More 82 ITR 540 (SC)*, (ii) *Sumati Dayal Vs. CIT 214 ITR 801 (SC)*, (iii) *CIT Vs. P. Mohankala (2007) 291 ITR 278 (SC)*. Ld. DR also placed a heavy reliance on the decision of Kolkata High Court in ***Pr. CIT Vs. Swati Bajaj IT Appeal No. 6 of 2021, dated 14.06.2022.***

6. Replying to above, Ld. AR representing the assessee raised several contentions. He submitted that during assessment-proceeding, the assessee filed all kinds of documentary evidences which are possible to prove the genuineness of capital gain, namely (i) a statement giving complete details of the transactions, (ii) photocopies of purchase bills, sales bills and contract notes, (iii) copy of demat a/c with Indusind Bank, (iv) Bank statement, and (v) A/c copies of brokers. He submitted that the shares were purchased in

September, 2004 to October, 2004 online through recognized stock exchange and purchase price was paid through account payee cheques. He submitted that the shares were sold online during current year through recognized stock exchange and sale consideration was also received through A/c payee cheques. He submitted that immediately after purchase, the assessee got the shares credited into Demat A/c with Induind Bank and they were kept as such in that Demat A/c for a period as long as 4 years and thereafter only sold. He submitted that the assessee has sold a part of the holding and that even after sale, the assessee continued to hold remained holding in Demat A/c. He submitted that there is no iota of negative features like “purchase/sale through off-market”, “purchase/sale in cash”, “short-holding of just above 1 year to claim long-term”, “holding in demat a/c for just a few days immediately before sale”, etc. in the present case. Regarding penal action taken by SEBI on broker, Ld. AR attacked the AO’s action by submitting that the assessee purchased shares through Shri Shyam Lal Sultania [“Shyam” for short] and that too in the year 2004-05. Thereafter, there was no role of Shyam because the sale was made in the year 2008-09 (relevant to AY 2009-10 under consideration) through another broker named Sunil Kumar Jhunjhunwala [“Sunil” for short]. Ld. AR submitted that penalty was imposed on Shyam and not on Sunil. He submitted that the AO has also made a direct verification from Sunil u/s 133(6) for his own satisfaction, in response to which Sunil had confirmed the sale-transactions having been executed by him. Ld. AR strongly contended that the capital gain is earned by assessee at the time of sale and at that point of time, there is no role whatsoever of Shyam. Regarding assessee’s history of AY 2005-06 and 2006-07, Ld. AR pointed out that it is true that addition made by AO was upheld in first appeal by CIT(A) but, however, the matter did not stop at that stage. Thereafter, the assessee carried matter in appeal to **ITAT, Indore Bench in IT(SS)A No. 112 to 115/Ind/2011 order dated 18.05.2016** (copy of the order is placed in Paper-Book) wherein the Co-Ordinate Bench reversed the action of lower-authorities and deleted the addition. Ld. AR drew our attention to various pages of order, especially to the concluding Para No. 38

thereof. With these submissions, Ld. AR contended that in the present case, the AO has wrongly made addition on mere surmise and conjecture; the CIT(A) has rightly deleted the addition. Ld. AR prayed us to uphold the order of CIT(A).

7. In rejoinder, Ld. DR submitted that the order of Co-ordinate Bench in **IT(SS)A No. 112 to 115/Ind/2011 (supra)** was rendered before decision of **Hon'ble Kolkata High Court in Swati Bajaj (supra)**.

8. We have considered rival submissions of both sides and perused the material held on record including the orders of lower-authorities. First of all, from the first appellate order, we find that the CIT(A) has granted relief to the assessee by following observations and findings:

"6. I have gone through the grounds of appeal, the assessment order and submissions of the appellant.

6.1.1] The AO while passing the assessment order, taxed the amount of long term capital gain of Rs 2,48,02,084/- as income from other sources and added the same to the taxable income of the appellant. The AO has heavily relied on the finding of the SEBI with reference to the broker through which the appellant had purchased shares and also placed reliance on the order of my predecessor as passed in the Assessment Years 2005-06 and 2006-07.

6.1.2] Shares of M/s Twenty First Century (India) Ltd. were actually purchased by the appellant in the month of Sept and Oct. 2004 and immediately transferred in the D-MAT account of the assessee maintained with Indusind Bank. The AO himself on inner Page No 12 to 14 of the assessment order, reproduced the transactions executed through D-MAT account. Hence, date of purchase of and holding of these shares with the appellant was not in dispute by the AO also The AO disbelieved the Long-Term Capital Gain by holding that the broker through which these shares were purchased was engaged in the manipulation of the price of the shares on the basis of order of the SEBI dated 11-08-2009 passed in the case of broker Shri Shyam Lal Sultania. Though an order imposing penalty of Rs. 5 Lakh on this broker was passed on 11.08.2009, but it was imposed for the period of inspection from 09.06.2004 to 25.02.2005. Even for this period the SEBI order dated 11.08.2009 says as follows on page 12, para 35 of the aforesaid order:-

"It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of the default of notice."

6.1.3] After observing the aforesaid finding they have imposed a penalty of Rs. 5 Lacs on the noticee, i.e. Shri Shyamlal Sultania. Hence it is very clear from SEBI order that though SEBI noticed some manipulation and significant

increase in share price of M/s Twenty First Century (India) Ltd. during the period of investigation from 09.06.2004 to 25.02.2005. But they were unable to quantify such figure of disproportional gains by certain groups and consequential losses to other parties. SEBI has therefore left the matter at his point and has neither cancelled the transactions nor cancelled the licence of this broker. Therefore, the SEBI findings were relatable to AY 2005-06 (Period 09.06.2004 to 25.02.2005) and in that year also SEBI has neither questioned purchases nor cancelled or reversed the same but they have questioned substantial rise in price of those shares within that period. Hence it is absolutely clear that findings of SEBI does not dislodge the fact of purchase of shares of aforesaid company (Twenty First Century India Ltd.) which are traded through Calcutta Stock Exchange and duly credited in D-Mat account of appellant.

6.1.4] It is noteworthy that in the current assessment year, i.e., AY 2009-10 the only transaction that took place was the sale of 88550 shares of M/s Twenty First Century India Ltd., which has yielded capital gain. Further, such transaction of sale has not taken place through broker Shri Shyamlal Sultania but through broker Sunil Kumar Jhunjunwala against whom there is no action of SEBI. There is no cogent reason therefore to doubt the sale of such shares when there is no finding that appellant has surreptitiously introduced his unaccounted money in bank account, in lieu of aforesaid sales.

6.1.5] The findings of SEBI for AY 2005-06 could not be imported to AY 2009-10 under consideration when there are no adverse findings by SEBI for transactions of this scrip in AY 2009-10. Similarly only SEBI is authorized to take cognizance of facts of price rigging in a particular scrip vis-a-vis the financial performance of that company. But no adverse comments of SEBI are available on record for this scrip for the year under consideration.

6.1.6] The assessing Officer in his order has stated that quotation of these shares on the date of sale were not filed. Quotation of this scrip for AY 2009-10 in Calcutta Stock Exchange are available on Internet and were submitted by appellant and they were checked on random basis and found to tally with price of sale shown in sale bills submitted by appellant.

6.1.7] Appellant has submitted date wise statement of purchase & sale of shares, copy of bills in respect of purchase & sale of shares, copy of D-mat a/c with Indusind bank, copy of account of appellant in books of broker Sunil Kumar Jhunjunwala and copy of bank statement of appellant in which sale consideration was deposited. Noting adverse was found by AO in any of these details.

6.1.8] The appellant in the year under consideration with the available documents justified the amount of long-term capital gain as genuine and proper. Hon'ble Mumbai Bench of ITAT in the case of Ashok Bhatt [HUF], Mumbai [Appeal No ITA No 6909/Mum/2008 dated 31-10-2011] has discussed the similar issue in respect of same scripts M/s Twenty First Century (India) Limited after considering the order of the SEBI and accepted the amount of profit on sale of shares as genuine long term capital gain. The decisions of Hon'ble Mumbai Bench in the case of Kamlesh C Gupta [Appeal No ITA No 2804/Mum/2011 dated 08-08-12], Smt. Hamida J Rattonsey [Appeal No ITA No 5069/Mum/ 2009 dated 01-08-2012], decision of Hon'ble Jurisdictional

Bench of ITAT in the case of Smt Arzoo Anand [Appeal No ITA No 113/Ind/2009 dated 14-12-2009] [14 ITJ 604] and decision of the Hon'ble Jurisdictional High Court in the case of Smt. Arzoo Anand also support the case of the appellant. On the facts of the present case and as discussed in the foregoing paras, I am of the considered view that the AO was not justified in denying the claim of the appellant and making addition of Rs. 2,48,02,084/- as unaccounted cash credit u/s 68 of the Income Tax Act. The AO is hereby directed to delete such addition made on account of Long-Term Capital Gain. This ground of appeal is allowed."

9. On perusal of same, we find that the CIT(A) has made several meritorious, objective and extensive findings; only then and thereafter he has accepted assessee's claim and granted relief. Now, we sum up our findings/conclusions:

- (i) The assessee has submitted all details and documentary evidences in support of purchase, sales and holding of impugned shares. The AO has not found any infirmity in those documents.
- (ii) The shares were purchased and sold online through recognized stock-exchange. The purchase price was paid through A/c payee cheques and the sale consideration was also received through A/c payee cheques. Immediately after purchase, the shares were credited to assessee's demat A/c and they were held therein for a period as long as 4 years before sale. The assessee is holding Demat a/c through Indusind Bank which is a prominent independent banker. It is an undisputed fact that the assessee has sold only part of the holding and even after such sale, continued to hold remaining quantity which were carried to subsequent year. The AO has not identified any iota of negativity in these factors.
- (iii) Regarding the penal action taken by SEBI, we note that the said action was taken against Shyam through whom the assessee purchased shares in the year 2004-05. Thereafter, Shyam does not have any role. It is on record that the assessee sold shares through Sunil and there is no penal action against Sunil. It is also a fact that the AO made a direct verification from Sunil u/s 133(6) wherein he confirmed the sale

of shares having been made by assessee through him. Thus, the factum of sale of shares through Sunil is unquestionably proved and that too without any blame. Regarding purchase of shares, we take note of an important fact from Point No. 5 / Page No. 14 of assessment-order that the investment made by assessee at the time of purchase of impugned shares was accepted by department while framing assessment of assessee u/s 153A/143(3) of AY 2005-06. When it so, the purchase is also unquestionably accepted by tax authorities. That brings us to conclude very simply that both sale and purchase are very much established/accepted. At the cost of repetition, we may also add that during entire period of 4 years from purchase to sale, the assessee had held the impugned shares in Demat A/c with Indusind Bank. Thus, no adverse conclusion can be taken on the basis of mere imposition of penalty by SEBI on Shyam who had no role except purchase of shares in the year 2004-05.

- (iv) Regarding case history of assessee, we have perused the order of Co-ordinate Bench in assessee's own case in **IT(SS)A No. 112 to 115/Ind/2011 (supra)** and are very in very much agreement with Ld. AR that the identical addition made by lower-authorities in earlier years was deleted by Hon'ble Co-ordinate Bench. Regarding contention of Ld. DR that the said order was passed before decision of Hon'ble Kolkata High Court in **Swati Bajaj (supra)** we observe that the facts of present appeal, as is evident from foregoing discussion, are so strong that we do not find any fallacy in the transactions done by assessee. Had there been any factor indicating that the assessee has involved in generating bogus capital gain, we would have certainly taken a different view. But this is not so in present case. Therefore, we are of the considered view that the decision of Swati Bajaj is not applicable to present case.

10. Thus, for the discussion made above and reasons stated therein, we finally conclude that the Ld. CIT(A) was very much justified in deleting the addition made by AO. We approve his action. The revenue fails in this appeal.

11. Before parting, we would like to make a specific note that there is a plethora of decisions by Hon'ble courts/benches of ITAT on what is called "penny stock" in favour of assessee as well as revenue. But every case has its own set of facts/evidences and there cannot be a single view in all cases. The present case has its own set of facts/evidences and it cannot be used as indicating something universal applicable to every situation.

12. Resultantly, this appeal of Revenue is dismissed.

<i>Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 28/04/2023.</i>
<i>Order pronounced in the open court on / /2023.</i>

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 28.04 .2023

Patel/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the fair order is placed before the Dictating Member for pronouncement	
5.	Date on which the file goes to the Bench Clerk	
6.	Date on which the file goes to the Head Clerk	
7.	Date on which the file goes to the Assistant Registrar for signature on the order	
8.	Date of dispatch of the Order	