

IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.143/Mum./2022

(Assessment Year : 2013-14)

Sunita Chaudhry
34, Quay Street, Darukhana
Byculla, Mumbai 400 010
PAN – ACLPC7278D

..... Appellant

v/s

Income Tax Officer
Ward-18(3)(4), Mumbai

.....Respondent

Assessee by : Shri Vimalchand Punmiya

Revenue by : Shri Ajay Singh

Date of Hearing – 08/09/2022

Date of Order – 13/10/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 03/01/2022, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment year 2013-14.

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

"On the facts, in the circumstances of the case and in law, the learned Commissioner of Income Tax - Appeals [Ld. C.I.T. (A)] has erred in

upholding the impugned assessment order passed by the learned assessing officer (Ld. A.O) without having any lawful jurisdiction as

a. there were no cogent reasons to believe that the Income had escaped assessment and accordingly the provisions of section 147 & 148 were not applicable to the case,

b. the objections raised by & on behalf of the appellant were not dealt with by the Ld. A.O and procedure laid down by the supreme court in case of G KN Drive Shaft (India) Ltd (259 ITR 19) was not followed before assuming the jurisdiction u/s. 147,

c. there was no tangible material before the Ld A.O for reopening the assessment and the assessment was re-opened on the basis of borrowed satisfaction and

d. the Ld. A.O. had failed to appreciate that the SEBI had given a clean cheat to the appellant, therefore, the reasons for re-opening had failed.

2. Without prejudice to the objections to the reopening of assessment, impugned assessment order is illegal, invalid and void-ab-initio as the same was passed by the Ld. A.O. without giving the appellant proper opportunity of being heard as the statements of various persons relied upon by the Ld. A.O. and Ld. CIT(A) while making and sustaining the assessment were not provided to the appellant and no opportunity to controvert the same was given to the appellant and also, both the authorities have failed to appreciate that the said statements were irrelevant to the facts of the case.

3. On the facts, in the circumstances of the case and in law, the Ld. CIT(A) has erred in sustaining the addition of Long-Term Capital Gain (LTCG) of Rs. 84,45,050/- which is exempt u/s 10(38), however, the Ld. A.O. had disallowed the exemption available u/s 10(38) by considering the said income to be Unexplained Investment/ Income from other sources merely on the basis of assumptions and presumptions without considering the relevant facts available on records and arbitrarily relying on the irrelevant facts.

The appellant therefore prays your honour to be kind enough to:

- i. Admit the appeal and grant stay against the recovery of demand,*
- ii. Set aside the order of A.O.,*
- iii. Delete all illegal additions and disallowances made by A.O.,*
- iv. Grant justice."*

3. The grievance of the assessee is against addition made by treating the long term capital gains earned by the assessee as from a penny stock transaction pursuant to reassessment proceedings.

4. The brief facts of the case, as emanating from the record, are: The assessee is an individual and has filed the return of income on 28/10/2013 declaring total income of Rs. 13,92,790. The assessee has shown income from speculation business and income from other sources. The return of income filed by the assessee was processed under section 143 (1) of the Act. Pursuant to the information received from Directorate of Investigation that assessee is a beneficiary of an organised racket of generating bogus entries of long term capital gains in penny stocks, notice under section 148 of the Act was issued initiating reassessment proceedings in the case of the assessee. In response to the notice, assessee filed the return of income and requested to provide the reasons recorded for initiating reassessment proceedings. After receipt of reasons, assessee filed detailed objections before the Assessing Officer („AO“) against the initiation of reassessment proceedings. The AO rejected the objections filed by the assessee and issued notice under section 143(2) of the Act along with questionnaire for furnishing the details. The AO vide order dated 27/12/2017 passed under section 143(3) r/w section 147 of the Act after, inter-alia, referring to information gathered and collected from the investigation wing pertaining to survey action conducted in the case of company, i.e. First Financial Services Ltd, in whose shares assessee had transacted, statement recorded of other beneficiaries, findings of Securities and Exchange Board of India („SEBI“) vide various interim orders in case of First Financial Services Ltd, statement of assessee recorded pursuant to summons issued under section 131 of the Act came to the conclusion that sale price received by the assessee is an accommodation entry, which has been

laundered in the form of bogus profit on sale of shares. Accordingly, sum of Rs. 84,45,050 being long term capital gains claimed by the assessee was treated as unexplained investment made by the assessee in cash to obtain the equivalent amount as bogus profit on sale of shares and was added to the total income of the assessee. Further, the AO made an addition of Rs. 22,712, being the commission charged by the brokers @ 0.25% for providing accommodation entry, on the basis that the payment would have been made in cash by the assessee over and above the total sale value of Rs. 90,85,050.

5. The learned CIT(A) vide impugned order dated 03/01/2022 dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative („learned AR,„) submitted that the SEBI vide order dated 06/09/2017, inter-alia, has revoked its earlier interim directions against 91 entities including the assessee upon completion of the investigation. The learned AR further submitted that the said fact was not only brought to the notice of the AO by the assessee in her objections against reopening of assessment, but was also specifically mentioned by the assessee in her submissions before the learned CIT(A). However, the addition made by the AO was upheld by the learned CIT(A) without considering this relevant fact, which goes on to prove that capital gains earned by the assessee is not due to any price manipulation in scrips of First Financial Services Ltd.

7. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

8. We have considered the rival submissions and perused the material available on record. During the year, assessee earned long term capital gains of Rs 84,45,050 on sale of shares and same was claimed as exempt under section 10 (38) of the Act. The return of income filed by the assessee was processed under section 143 (1) of the Act. However, subsequent to the information received from Directorate of Investigation that assessee is one of the beneficiaries of bogus penny stock transaction, reassessment proceedings were initiated and notice under section 148 of the Act was issued. The reasons recorded by the AO for initiating the proceedings under section 147 of the Act are as under:

"In this case, the assessee has filed its return of income for A.Y declaring total income of Rs. 15,02,790/-.

Information has been received from the Directorate of Investigation that an organized racket of generating bogus entries of LTCG in Penny Stocks have been unearthed as a result of investigation carried out throughout the country. The assessee, Sunita Chaudhry having PAN: ACLPC7278D, who is assessed in this charge has also availed of such an entry On query from AIR (ITS detail) of the assessee, it is seen that an amount of Rs 90,85,050/- has been reflected under the head of Penny Stock transaction.

The Directorate of Investigation has made available various confessional statements of entities involved in the transactions for generating such bogus claims of LTCG. I have also examined these evidence vis-à-vis the return of income of the assessee. After appraisal of these material on record, there is enough reason to believe that not only the claim of exemption under section 10(38) by the assessee is prima facie bogus but also by making such bogus claim, the assessee has clearly failed to disclose all material facts for determination of income. In fact in this case, the assessee seems to have fabricated evidence in order to mislead the revenue to believe the apparent as real.

In the light of the above, the income has escaped assessment to the extent of Rs. 90,85,050/- for A.Y. 2013-14. The above needs to be verified and cross checked with the documentation and accounts of the assessee.

On the basis of this information, I have therefore, reason to believe that income more than Rs.1,00,000/- has escaped assessment. This is therefore, a fit case for issue of notice u/s 148 of the Income Tax Act, 1961."

9. Objecting to the initiation of reassessment proceedings, assessee filed her submissions vide letter dated 23/10/2017, which forms part of the paper book from page no.14-18. However, the AO vide order dated 27/10/2017, rejected the objections filed by the assessee by observing as under:

"2. The assessee has raised the following objections with regard to reopening proceedings initiated u/s 148:

The assessing officer has forms his opinion with regard to income escaped assessment merely on the basis of information received from the office of DDIT (Inv.), Mumbai. There were no efforts on the part of Assessing Officer to form any independent belief whether income chargeable to tax has escaped assessment. Reopening merely on the basis of information provided by other person or officer.

3. The objections raised by the assessee are duly considered but not acceptable due to the following reasons:

With regard to objection as mentioned above in para 2, the reasons recorded by the AO have all material for reason to believe that the assessee has escape income for AY 2013-14. The notice u/s 148 of the I.T. Act was issued after taking necessary approval from higher authority. The Income Tax Department has conducted search action with strong evidences. The assessee generating bogus entries of LTCG in Penny stocks. The assessing officer based on the information formed an independent opinion that the assessee had taken accommodation entries and had reasons to believe that the assessee's income chargeable to tax for AY 2013-14 has escaped assessment. Hence, an independent belief is formed as a result of new facts that emerged in this case.

4. With the above remarks, the objection raised by the assessee is hereby dismissed. You are required henceforth to comply with the notices issued."

10. Pursuant thereto, reassessment proceedings in the case of the assessee was completed and entire long term capital gain claimed by the assessee was

added to the total income of the assessee by treating the same as unexplained investment made by the assessee in cash to obtain equivalent amount as bogus profit on sale of shares. As noted above, while making the impugned addition, the AO, inter-alia, referred to the interim orders passed by the SEBI in case of First Financial Services Ltd.

11. We find that SEBI vide interim order dated 19/12/2014 and 11/08/2015, inter-alia, restrained 154 entities, including the assessee, from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions, pending investigation in the script of in case of First Financial Services Ltd. The directions issued vide aforesaid interim orders were, inter-alia, confirmed vide subsequent orders passed by SEBI. Subsequent to the interim orders, SEBI carried out an investigation to look into the role of debar entities in price manipulation in scrips of First Financial Services Ltd. Vide interim order dated 06/09/2017, the earlier interim orders were modified by SEBI and 91 entities including the assessee against whom directions were issued vide aforesaid interim orders were found to be not in violation of provisions of SEBI Act, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities) Market Regulations, 2003. Accordingly, SEBI vide aforesaid interim order dated 06/09/2017, revoked the directions issued vide earlier interim orders in exercise of powers conferred under section 19 of SEBI Act, 1992 read with section 11, 11(4) and 11B thereof, with immediate effect. The interim order dated 06/09/2017 also forms part of the paper book at page 295 – 302.

12. We find that despite the aforesaid interim order dated 06/09/2017 passed by SEBI being specifically mentioned by the assessee in her objections before the AO as well as in her submission before the learned CIT(A), the impugned addition was sustained. Since, the very transaction of the assessee in the scrips of First Financial Services Ltd, which resulted in long term capital gains to the assessee, has been found to be not violative of provisions of relevant Act and Rules by the SEBI upon necessary investigation and even the initial restraint order was revoked vide interim order dated 06/09/2017, therefore, we find no basis in sustaining the impugned addition made by the AO by treating the said transaction to be a penny stock transaction resulting in bogus long term capital gains. Accordingly, we direct the AO to delete the impugned addition of Rs. 84,45,050. Further, since the other addition of Rs. 22,712 by AO is also consequent to the aforesaid impugned addition, therefore, the said addition is also directed to be deleted.

13. As, relief has granted to the assessee on the merits itself, therefore, the grounds pertaining to invocation of reassessment proceedings under section 147 of the Act are rendered academic in nature in the present case.

14. In the result, appeal by the assessee is allowed.

Order pronounced in the open Court on 13/10/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 13/10/2022

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