

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI
BEFORE SHRI R.C. SHARMA, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ I.T.A. No. 6248/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2003-04)

Shri Kamlesh Mundra A-101, Manek Smruti, Nehru Road, Vile Parle (East), Mumbai-400 057.	बनाम/ Vs.	ITO, Ward-19(2)(3), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAGPM 6981L		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Rakesh Joshi
प्रत्यर्थी की ओर से/Respondent by	:	Shri Manoj Kumar

सुनवाई की तारीख / Date of Hearing	:	31/12/2015
घोषणा की तारीख / Date of Pronouncement	:	04/03/2016

आदेश / ORDER

Per Sandeep Gosain, J. M.:

The Present Appeal has been filed by the Assessee against the order of Commissioner of Income Tax (Appeals)- 30, dated 03.08.2012 for A.Y. 2003-04 on the following grounds of appeal.

1. *“Based on the facts and circumstances of the case, as well as in law, the Learned CIT(A) has erred in confirming the action of the Leaned Assessing Officer in reopening the case u/s 148 of the Income Tax Act, 1961, on the basis of the statement of a third party, without considering the merit of the case.*
2. *Having regard to the facts and circumstances of the case, as well as the law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in treating Long Term Capital Gain of Rs.2,72,550/- as Income from Other Sources.*
3. *The learned CIT(A) has erred in confirming the action of the Leaned Assessing Officer in not granting the set off of Long Term Capital Loss amounting to Rs.2,84,814/-without considering the facts and circumstances of the given case.*
4. *The Appellant pleads leave to add, amend, alter, or delete the said grounds of appeal.”*

2. The brief facts of the case are that the return of income declaring total income of Rs.3,30,754/- was filed on 27.08.2003. The return was processed under section 143(1)(a)of the Act. The case was subsequently reopened under section

147 and a notice under section 148 was issued on 30.03.2010 after duly recording the reasons for the same. Later on the case was selected for scrutiny and notice under section 143 (2) was issued and served on the assessee. Necessity details were called upon from the assessee and after considering the details, the AO hold that since the assessee could not offer any explanation to the nature of transactions, sources of investment, mode of investment etc. Hence in the absence of any further details, the assessing officer computed the amount of Rs. 2,78,750/- as unexplained credits under section 68 of the Income tax Act and therefore added the same in the total income of the assessee.

3. Aggrieved by the order of the AO, assessee filed the appeal before CIT(A) and the CIT(A) after considering the case dismissed the appeal vide its order dated 03.08.2012.

4. Aggrieved by the order of CIT(A) the assessee filed the present appeal before us on the grounds mentioned herein above.

4. At the very outset, ld. AR appearing on behalf of assessee submitted at par that he did not want to press ground no. 1 and 3 therefore considering the request of ld. AR we dismiss ground no. 1 and 3 as not pressed.

Ground No.2

5. Ld. AR representing the assessee submitted that the AO has made additions only on the basis of information received from DDIT (investigation) Bombay in respect of search action conducted on M/s. Mahanagar Securities (Now M/s. Alag Securities Pvt. Ltd.) and group companies. It was further submitted that the entire action of AO is based on the statement of Shri Mukesh Chokshi who claimed to be mentor and the main person in the M/s. Mahanagar Securities Group Companies It was further submitted that the assessee has claimed long term capital gain on the share transaction of M/s. Buniyad Chemicals and M/s. Jay Kay Dee Industries Ltd and since both the afore mentioned companies were controlled by Shri Mukesh Chokshi therefore, the AO while believing the statement of Shri Mukesh Chokshi had held that the transaction of assessee with M/s. Buniyad Chemicals and M/s. Jay Kay Dee Industries Limited are bogus, therefore, the AO has erroneously made the additions on the basis of the statement of Shri Mukesh Chokshi . Ld. AR also drawn our attention to the paper book which contains copy of bill for purchase of shares, copy of intimation by company for dematerialisation of shares in the name of assessee, copy of bill for sale of shares etc., and on the basis of afore mentioned documents it was submitted by the ld. AR that it is simply a case of legal purchases of shares in physical form dematerialized and then sold in recognized stock

exchange. It was further submitted that M/s. Buniyad Chemicals and M/s. Jay Kay Dee Industries Limited are registered companies and the activities and administration of the registered companies are governed by Companies Act in India. Ld. AR also drawn our attention to the judgement rendered by ITAT 'Mumbai' Bench in ITA No. 1175/Mum/2012 and ITA No. 1176/Mum/2012 wherein the Hon'ble ITAT has dealt with the similar situation and decided in favour of assessee. On the other hand ld. DR relied upon the orders passed by AO as well as CIT(A).

6. We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the lower authorities and after considering the same, we have observed that the co-ordinate Bench of ITAT 'Mumbai' has already dealt with the similar issue in ITA No. 1175/Mum/2012 and ITA No. 1176/Mum/2012 where in also the assessee's in those cases have dealt with the share transaction with the same companies. We referred the operative para of ITA No. 1175/Mum/2012 titled "Smt. Durgadevi Mudra vs. ITO" and the same is reproduced here in below:

"I have heard the parties and perused the record. The Ld. Counsel submits that in respect of the 'Shares Scam' alleged to be involved by Shri Mukesh Chokshi actions were taken against many persons disallowing their claim in respect of long-term capital gain and short-

term capital gain. He submits that on identical set of facts the issue has been considered by the Tribunal. The Ld. Counsel filed the copies of the Tribunal decision by way of compilation as under:

- i) Mukesh R. Marolia vs. Addl. CIT -6 SOT 247*
- ii) Rajnudevi Chowdhary vs. ITO -ITA 6455/M/2007(Bom)*
- iii) ITO vs. Truptic Shah -ITA 6455/M/2007(Bom)*
- iv) Chandrakant Babulal Shah -ITA 6108/M/2009(Bom)*
- v) ACIT vs. Shri Ravindrakumar Thshinwal -ITA5302/M/2008(Bom)*

5. He, therefore, pleaded for accepting the claim of the assessee in respect of long-term capital gain. I have also heard the Ld. D.R.

6. I find that in the present case, the assessee has produced the bills showing the purchase of the shares. The assessee also proved that the shares were sold through the share broker and he produced the proof for the same. The identical situation has been considered by the ITAT 'C' Bench, Mumbai in the case of Chandrakant Babulal Shah (supra). The operative part of the order of the Tribunal is as under:

'7. We have considered the submissions of the rival parties and examined the record. The case relied upon by the learned Counsel are not directly applicable to the facts of the case as in those cases the sale proceeds are treated as undisclosed income denying the entire transaction as such,

whereas, in the present case, the Assessing Officer did not treat the sale of shares as bogus. He has only examined the purchase of shares and doubted the date of purchase. But in the computation he has given benefit to the same cost of purchase of shares and taxed the long term capital gain offered as short term capital gain only. As far as the date of purchase is concerned, the evidence on record indicate that the assessee had indeed earned speculation profit by sale of APTECH shares which the Assessing Officer has not doubted. Further the assessee also suffered speculation loss as stated above in February, 2001 and debit and credit entries pertaining to same broker were shown in the balance sheet in the return filed for the AY 2001-2002 in August, 2001. There is also a mention of purchasing of shares of the company in the return. It is also on record that the said company vide letter dated 30-6-2000 had transferred the shares in the name of the assessee with the folio No. 15021 and certificate Nos. 105744 to 105848. The Assessing Officer neither questioned the said company nor disproved the transfer of share certificates by 30/6/2000. The only basis for arriving at the conclusion that the transaction is not genuine is on the basis of the statement given by Mr. Mukesh Chokshi on 20-6-2004/20-6-2002 before the DDIT (Inv.) with reference to certain transactions undertaken by Mr. Mukesh Chokshi and his group of companies, mainly Gold Finvest Pvt. Ltd. Richmond Securities and Alembic Securities, which are dealing in interconnected stock exchange/ NSC. Most of the enquiries pertains to the transactions in interconnected stock exchange and sale of shares In the company viz., Rashel Agro Tech Ltd. The enquiry in the said group of companies was with reference. to the issuance of bogus , purchase and sale bills and accommodating various parties in earning the capital gains. However, as submitted by the learned Counsel, the assessee's

name is not figuring in the transactions which were originally enquired by the DDIT (Inv.) on 26-4-2002. Even though the modus operandi was explained and stated that they were getting 0.5% commission in arranging the transactions, nothing was concluded against the assessee in the said statement. The Assessing Officer in the course of assessment again recorded the statement under section 131 on 9-11-2006 in which question No. 4 and 5 which are extracted in the assessment order itself. The main reliance is on question No. 5 which is as under:

"Q.5 : Please give the details of bills of profit issued by your company as stated above. Ans: These bills numbers Bills No. CC/2000/16/12501 dt.18-4-2000 which shows that B.87610.85 payable to Shri Chandrakant D. shah. There is another Bill No. CC/2001/07/164 (N) dt.20/2/2001 in which Rs.89602 was receivable by Shri Chandrakant B. Shah. These bills are issued showing fictitious profit and therefore the purchase are not substantiated by genuine payments."

"8. This statement was relied upon by the Assessing Officer to state that the purchase bills are issued showing fictitious profit. However, the assessee was not given an opportunity to cross examine Mr. Mukesh Chokshi and when an opportunity was given and assessee was present Mr. Mukesh Chokshi was not available. The only basis for this above statement is that the payments are not made immediately but even statement itself indicate that they were capital gains earned by the assessee as speculation profits and in question No. 4 in the statement Mr. Mukesh Chokshi admits the purchase of 10500 shares of Rashel Agro Tech, Ltd. made out of adjusted share profits and therefore confirmed that this is an 'adjustment transaction). In view of this

statement in question Nos. 4 and 5) we are unable to understand how the transactions becomes a bogus one. There is no evidence except this oral statement which is also not submitted for cross-examination to prove/disprove the transaction. Whereas the assessee furnished transaction details) the bank accounts) purchase and sale of other listed companies) speculation profit and loss and also evidence in the form of balance sheet filed much before the said shares were sold. The sale of shares was undertaken in December 2001 whereas the return for AY 2001-2002 was filed by August 2001 itself indicating the purchase of shares and outstanding amounts to M/ s. Golden Finvest Ltd in the statements. In view of the documentary evidence in favour of the assessee, we are unable to accept the contention of the Assessing Officer based on the statement which is also un- supported by any other evidence to deny the benefit of purchase of shares by the assessee on 8-4-2000. Not only that the Assessing Officer has also gave credit for the same amount of purchase of shares at cost and did not treat the sale proceeds as bogus/unaccounted income. The only action taken by the Assessing Officer is to deny the assessee the benefit of long term capital gain and subsequent deduction under section 54EC of the Act as the assessee invested the capital gains in REC Bonds. We do not see any reason to agree with the findings of the' Assessing Officer and also the findings of the CIT (A). In fact, the CIT (A) has went ahead in treating the entire transaction as bogus and confirmed the action of the Assessing Officer while holding "this will be more for an unexplained receipt of money of the appellant. Hence, Assessing Officer had rightly added the amount by and the action of the Assessing Officer in making this addition is confirmed treating it as STCG)). In arriving at this conclusion, the CIT (A) presumed that assessee could have paid full payment of 16 lakhs by

way of cash which was not the case of the Assessing Officer either. There is no evidence even to presume these observations of the CIT (A) as stated above.

7. The facts are identical in this case as in the case of Chandrakant Babulal shah (supra). I hold that the assessee has proved the genuineness of the share transactions and there is no justification to disallow the claim of the assessee in respect of the long-term capital gain. I, accordingly, direct the A.O. to allow the same. Accordingly, ground no.2 is allowed. Assessee's appeal is partly allowed.”

In addition we have also analyse the orders passed in ITA No. 1176/Mum/2012 titled “Shri Mahesh Mundra vs. ITO” the operative para is reproduced here in below:

“I have heard the parties. In this case also the assessee has declared the long-term capital gain in respect of the sale of the shares of M/ s. Buniyad Chemicals Ltd. It was claimed that the shares were sold through M/ s. Goldstar Finvest Pvt. Ltd. There was investigation against Shri Mukesh Chokshi who was the mentor and the main person in the entire shares' 'Scam'. The facts are identical as in the case of Smt. Durgadevi Mundra in ITA No.1175/M/2012. Hence, to avoid the repetition of the facts and for the sake of brevity, I adopt the facts mentioned in the case of Smt. Durgadevi Mundra as well as the reasons.

In this case also the A.O. assessed capital gain declared by the assessee as 'income from other sources'. I, therefore, following my reasons and decision in the case of Smt. Durgadevi Mundra (supra) allow ground no.2 in this appeal also and direct the A.O. to assess the long-term capital gain declared by the assessee as such and accept the same.”

7. After analyzing the afore mentioned orders, we found that the issue contained in the present case are similar to the issues of afore mentioned cases. Therefore, keeping in view the principles of judicial consistency and while respectfully following the judgements passed by the co-ordinate bench, We also hold that in the present case by virtue of independent documents as referred in paper book the assessee has proved the genuineness of the share transaction and there was no justification to disallow the claim of the assessee in respect of long term capital gain merely on the basis of information received from DDIT which is based on admission of Shri Mukesh Chokshi. Therefore accordingly, we direct the AO to assess the long term capital gain declared by assessee as such and accept the same.

Ground no. 4 is general in nature and needs no separate adjudication in view of the decision on above grounds.

8. In the result, the Assessee's appeal is allowed.

Order pronounced in the open court on 4th March, 2016

Sd/-
(R.C. Sharma)

लेखा सदस्य / Accountant Member

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :04.03.2016

Ps. Ashwini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai