

आयकर अपील[ी]य अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" B " BENCH, AHMEDABAD

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI TR SENTHIL KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 83/AHD/2022

निर्धारण वर्ष/Asstt. Year: 2013-2014

Darshan Shivilal Thakkar, 15, Bansidhar Co-op. Society, Vasna, Ahmedabad-380007. PAN: AEBPT1751J	Vs.	P.C.I.T-1, Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	Shri Vartik Chokshi, with Shri Dhrunal Bhatt, A.Rs
Revenue by :	Shri Durga Dutt, CIT.D.R

सुनवाई की तारीख/**Date of Hearing** : **21/06/2023**
घोषणा की तारीख/**Date of Pronouncement**: **30/06/2023**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned PCIT, Ahmedabad, arising in the matter of assessment order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-2014.

2. The only issue raised by the assessee is that the learned PCIT erred in holding the assessment framed under section 143(3) of the Act as erroneous

insofar prejudicial to the interest of revenue and directing to make addition of Rs. 1,68,34,500.00 under the provisions of section 68 of the Act.

3. The necessary facts are that the assessee in the present case is an individual and has filed his return of income declaring income from the source of finance, house property, salary, and other sources. The assessment was framed under section 143(3) of the Act wherein an addition of Rs. 2,50,680.00 was made to the total income of the assessee on account of the disallowance of interest expenses.

3.1 However, the learned PCIT on examination of the assessment records found that the assessee has shown long-term capital gain of Rs. 1,57,91,326.00 which was claimed as exempted under section 10(38) of the Act. According to the learned PCIT, the impugned long-term capital gain shown by the assessee was arising from the sale purchase of the script of a penny stock company namely NCL RESEARCH. Thus, the learned PCIT directed the AO to make the addition to the total income of the assessee for an amount of ₹ 1,68,34,500.00 under the provisions of section 68 of the Act. The relevant extract of the order of the learned PCIT is extracted below:

The majority of the cases reported above have been decided by various Courts and Tribunals (other than the Kolkata Bench of ITAT) and around the period of decision rendered in the case of Hon'ble ITAT, Kolkata in the case of Minu Gupta on 12.12.2018 and after examining the facts of each case, still rendered their decision in favour of the Revenue.

11. In view of the above facts & judicial decisions relied upon, it is held that the share transactions done by the assessee are sham, bogus and managed transactions as it fails the test of 'preponderance of human probabilities'. Accordingly, the capital gain of Rs. 1,57,97,326/- shown by the assessee in the ROI for the year under consideration is not found to be genuine. Therefore, Rs. 1,68,34,500/- being share consideration received from the bogus sale of shares which is treated as unexplained and unaccounted cash receipts which has been channelized through book entries and banking system is required be added back to the total income of the assessee u/s 68 r.w.s. 115BBE of the Act. The AO is also directed to initiate the penalty proceedings u/s 271(c) of the Act for concealment of income by the assessee.

4. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

5. The learned AR before us filed paper book running from pages 1 to 61 and contended that the assessment has been framed by the AO after necessary application of mind and thereafter the AO has taken one of the plausible views. Therefore, the assessment cannot be held as erroneous insofar as judicial to the interest of revenue.

6. Furthermore, all the necessary enquiries from the brokers and the stock exchange were carried out which confirmed the transaction for the sale purchase of the shares.

7. On the other hand, the learned DR before us vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. It is the 2nd round of litigation before us. The ITAT on the earlier occasion has set aside the issue to the file of the learned PCIT for fresh adjudication with the direction in ITA No. 1139/AHD/2018 vide order dated 31 January 2019. The relevant extract of the order of the ITAT is reproduced as under:

9. We have gone through the relevant record and impugned order. As we can see, that Id. A.O. has made detailed and comprehensive enquiry with regard to NCL ITA Research Ltd, share, assessee has filed Contract Note and shares were purchased through broker via BSE payments have been made through banking channel and held for around two years in the demat account of the assessee and long term capital gain was claimed by the assessee.

10. We consider that the assessee could not appear before the Id. Pr. CIT. Therefore in the interest of justice, we consider it to appropriate that one more opportunity of hearing should be granted to the assessee.

11. We would like to make it clear that before passing any order, Id. Pr. CIT may also be consider the order passed by the Kolkata ITAT in ITA No. 731/Kol/2018 in the case of Smt. Minu Gupta vs. ITO (Kolkata).

12. In the light of the aforesaid facts and circumstances, we restore this case the file of Pr.CIT for deciding de novo after examination of details to be submitted by the assessee and after affording adequate opportunity of being heard."

8.1 It is pertinent to note that the Kolkata ITAT in the case of Smt. Minu Gupta Vs. ITO in ITA No. 731/Kol/2018 has decided the issue in favour of the assessee with respect to the script i.e. NCL RESEARCH which is also in dispute before us. As per the direction of the ITAT, the learned PCIT was expected to decide the issue in the light of the principles/ ratio laid down by the Kolkata ITAT in the case of Smt. Minu Gupta. Admittedly, the learned PCIT has distinguished the facts of the case of Smt. Minu Gupta by observing as under:

6.2 The undersigned has gone through the facts of the above case viz-a-viz the case in hand and it is found that facts are clearly distinguishable. In the case of Mini Gupta, the trade of sale of shares were having unique trade number and trade time whereas in this case, the trade numbers are in chronological manner and trade of both the seller & buyer parties exactly matches.

8.2 On the analysis of the observation made by the learned PCIT, we note that the learned PCIT has distinguished the facts of the present case viz a viz the facts of the case of Smt. Minu Gupta on account of having unique trade number and trade time. However, the learned PCIT did not point out any defect in the contentions raised by the assessee which is extracted as under:

After verification of the same, the notices u/s 133(6) of the Act were issued to those share brokers through whom the said share transactions were carried out by the assessee and also to Bombay Stock Exchange (BSE) on 14.03.2022. In response, M/s Kunvarji Finstock Pvt Ltd vide its reply dated 17.03.2022 (received through mail on 21.03.2022) has confirmed that the assessee has purchased 11,000 shares of NCL Research Ltd. on 29.03.2011 @ Rs. 91.23 (with taxes and brokerage) per share and the same was deposited in his demat account No. 1204840000224254 with CDSL and sold out 6,500 shares on 23.03.2013 @ Rs. 1515.40 (after deducting taxes and brokerage) which was also reflected in his said demat account. Similarly, M/s Jainam Share Consultant Pvt Ltd vide its reply dated 17.03.2022 (received through mail on 17.03 2022) has also confirmed that the assessee has sold 4,500 shares @Rs 1548.34 (after deducting taxes and brokerage) 19.03.2013 and the same was reflected in the pool account of the broker. In addition to this, the BSE Ltd. has also confirmed the above transactions through mail vide e-mail dated 22.03.2022 and has also provided all the details regarding the said share transactions carried out by the assessee. On perusal of details submitted by the assessee, it is found that the assessee has paid Rs. 10,00,000/- to M/s Kunvarji Finstock Pvt Ltd on 29.03.2011 through his bank account No. 01220102750 with Kalapur Commercial Co-operative Bank against the purchase value of Rs. 10,05,124/-. The assessee has received Rs. 98,37,820.91/- on 26.03.2013 from M/s Kunvarji Finstock Pvt. Ltd for sale of 6,500 shares of NCL Research Ltd. which were deposited in the same bank account. Similarly, the assessee has received Rs.69,58,694/- on 22.03.2013 from M/s Jainam Share

Explanation for transaction reported vide Transaction code 502-National/Malty Commodity Exchange – Contract of Rs.10 lacs or more for sale or purchase in the Exchange.

In respect of transaction reported from Sr.no.1 to 10 of Transaction code 502, the assessee submits the following:

<i>Sr.No.</i>	<i>Transaction Amount</i>	<i>Transaction Date</i>	<i>Remark</i>
<i>1.</i>	<i>15,51,000</i>	<i>19/03/2013</i>	<i>The sale transaction are in respect of sale of 4500 shares of NCL Research. A statement giving the detailed particulars of purchase, sale and Long term capital gain offered in respect of sale of shares of NCL Research is attached herewith vide Annexure-1. Further a contract for purchase of shares of NCL research is attached herewith vide Annexure Lastly the assessee submit herewith contract note for sale transaction reported from sr. no. 1 to 4 and 10 vide Annexure -3. With this the assessee state that all share sale transactions were considered in his return of income and accordingly leaves no scope for any adverse inference.</i>
<i>2.</i>	<i>7,41,378</i>	<i>19/03/2013</i>	
<i>3.</i>	<i>38,72,500</i>	<i>19/03/2013</i>	
<i>4.</i>	<i>2,32,650</i>	<i>19/03/2013</i>	
<i>10.</i>	<i>3,87,750</i>	<i>19/03/2013</i>	
<i>5</i>	<i>7,50,880</i>	<i>22/03/2013</i>	<i>The sale transaction is in respect of sale of 6500 shares of NCL Research A statement giving the detailed particulars of purchase, sale and Long term capital gain offered in respect of sale of shares of NCL Research is attached herewith vide Annexure 1. Further a contract for - purchase of shares of NCL research is attached herewith vide Annexure - 2 Lastly the assessee submit herewith contract note for sale transaction reported from sr. no. 5 to 9 vide Annexure - 4 With this the assessee state that all share sale transactions were duly considered in his return of income and accordingly leaves no scope for any adverse inference.</i>
<i>6</i>	<i>2,66,000</i>	<i>22/03/2013</i>	
<i>7</i>	<i>24,32,000</i>	<i>22/03/2013</i>	
<i>8</i>	<i>30,30,000</i>	<i>22/03/2013</i>	
<i>9</i>	<i>30,30,000</i>	<i>22/03/2013</i>	

8.6 In view of the above, we hold that the AO during the original assessment proceedings has taken one of the possible views while framing the assessment under the provisions of section 143(3) of the Act. It is the settled position of law

that any plausible view taken by the AO during the assessment proceedings cannot render the assessment order as erroneous insofar judicial to the interest of revenue. In holding so we draw support and guidance from the judgement of Hon'ble HIGH COURT OF KARNATAKA in the case of Embassy Brindavan Developers v. Commissioner of Income-tax reported in 145 taxmann.com 527 where it was held as under:

16. In the order under section 263 of the IT Act, the Commissioner has recorded that the Assessing Officer has wrongly treated the land as 'Capital asset'. It is further recorded in para 14 that assessee's transaction was a solitary transaction and no construction of building nor any development activity was made. This factual finding that the transaction was a solitary transaction and no development activity was made, is in consonance with the facts recorded by the Assessing Officer. The only difference is, the Assessing Officer has taken a view that for any purchase or sale of a land, assessee is liable to pay the capital gains tax and the Commissioner has taken a different view. In view of the authority in Malabar Industrial Company Limited, merely because two plausible views are available and the Assessing Officer has taken one view, the jurisdiction under section 263 of the IT Act cannot be exercised. In view of the above, we are of the considered view that invoking section 263 of the IT Act in the facts and circumstances of the case was erroneous.

8.7 In view of the above and after considering the facts in total, we are of the view that there is no infirmity in the assessment order requiring the revision under the provisions of section 263 of the Act. Accordingly, we quash the order framed under section 263 of the Act. Hence, the ground of appeal of the assessee is hereby allowed.

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

Order pronounced in the Court on 30/06/2023 at Ahmedabad.

**Sd/-
(T.R SENTHIL KUMAR)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)
Ahmedabad; Dated 30/06/2023
Manish