

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 6382/Del/2019
(Assessment Year: 2013-14)
Sh. Sunil Ghorawat, Vs. ACIT,
G-73, 2nd Floor, Lajpat Circle-9(2),
Nagar-1, New Delhi New Delhi
(Appellant) (Respondent)

PAN: ACSPG7932M

Assessee by :	Dr. Rakesh Gupta, Adv Shri Somil Agarwal, Adv Shri Shrey Jain, Adv
Revenue by:	Shri Anuj Garg, Sr. DR
Date of Hearing	03/10/2023
Date of pronouncement	20/12/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No. 6382/Del/2019 arises out of the order of the Commissioner of Income Tax (Appeals)-34, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. 109/16-17, A.Y. 2013-14 dated 31.05.2019 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 28.03.2016 by the Assessing Officer, ACIT, Circle-9(2), New Delhi (hereinafter referred to as 'Id. AO').
2. Ground Nos. 1 and 2 are challenging the action of the Id CIT(A) in confirming the disallowance made by the Id AO on account of short term capital loss on sale of listed company shares in the sum of Rs. 14,86,214/-.
3. We have heard the rival submissions and perused the materials available on record. The assessee is an individual and had filed his return of income for AY 2013-14 on 23.09.2013 declaring total income of Rs. 2,90,60,970/-. The assessee

has earned income under the head salary from M/s. Fontus Water Ltd and had derived income from house property, income from business and profession, income from capital gain and income from other sources. The Id AO observed that the assessee has claimed short term capital loss of Rs. 92,91,495/- during the year under consideration and sought for complete details of the same from the assessee, which were duly furnished. Out of the total short term capital loss of Rs. 92,91,495/-, the Id AO disputed only the short term capital loss of Rs. 14,86,214/- arising on sale of shares of M/s. Blue Circle Services Ltd on the ground that the said scrip has been classified as penny stock by the Investigation Wing of Income Tax Department and observed that the price have been artificially rigged by way of upward trend and downward trend by prearranged transaction in connivance with certain entry operators.

4. It would be relevant to address the primary and basic facts first. The assessee purchased 50,000 shares of M/s. Blue Circle Services Ltd on 29.01.2013 for Rs. 19,65,961/- in the open market through a registered broker in recognized stock exchange. The assessee furnished the copy of contract note dated 29.01.2013 issued by Registered Broker before the Id AO. The assessee sold the said shares on 22.03.2013 in the open market through a registered broker in a recognized stock exchange for Rs. 4,79,747/- after duly having suffered Securities Transaction Tax (STT) thereon. The assessee furnished the contract note issued by the registered broker for effecting the sale of shares in the open market on behalf of the assessee. Both the purchase and sale transactions were carried out by the assessee through M/s. Anurity Multi Broking Pvt. Ltd which is a registered share broker duly registered with SEBI. The purchase consideration for the shares was paid by the assessee to such registered broker through regular banking channels. The sale consideration for the shares sold by the assessee was received by the assessee from such registered broker through regular banking channels.

5. The assessee apart from making investment in the shares of M/s. Blue Circle Services Ltd had also made several investments in shares of various scrips which are evidenced from pages 7 to 11 of the Paper Book. The total investment held by the assessee as on 31.03.2013 in shares alone works to Rs.

1,33,83,183.63 being cost price and investment in mutual fund works out to Rs. 53,99,233.82 reflected at cost price. It is not in dispute that the shares of M/s. Blue Circle Services Ltd are listed in Bombay Stock Exchange. It is not in dispute that the broker through whom the assessee transacted i.e. M/s. Anurity Multi Broking Pvt Ltd is a member of Bombay Stock Exchange and a registered share broker with SEBI. It is not disputed that the shares bought by the assessee in the open market were duly dematerialized and credited in the Demat account of the assessee. Similarly when the shares are sold, the same has been duly reduced in the Demat account holding statement. Hence, the transparency in the accounting of purchase and sales transaction cannot be doubted at all. All the transactions are duly reflected through regular banking channels.

6. The statements were recorded from 7 parties namely : 1. Mr. Amit Sarsogi, 2. Suraj Jhunjhunwala, 3. Sanjay Vora, 4. Anuj Agarwal, 5. Bikash Surekha, 6. Pradip Jain and 7. Vidyoot Sarkar by DDIT Investigation (Unit-1, Gurgaon). The main crux of the revenue's case is that these parties are involved in artificial price rigging for the share of M/s. Blue Circle Services Ltd as a prearranged transaction and had been involved in providing tax exempt long term capital gains for certain beneficiaries and granting bogus short term capital loss for certain beneficiaries. It is not in dispute that none of the aforesaid statements recorded from 7 parties were even provided to the assessee for his rebuttal and no opportunity of cross examination provided thereon to the assessee. The assessee on his part had sought for cross examination of the parties vide letters dated 14.03.2016 and 21.03.2016 before the Id AO. We find that the Id DDIT Investigation, Unit-1, Gurgaon had passed on an information to the Id AO of the assessee by merely stating that the assessee had dealt in the shares of M/s. Blue Circle Services Ltd which was purportedly a tainted scrip and that 7 parties mentioned above were involved in artificial price rigging. These papers are enclosed at pages 12 to 15 of the PB. It is only a mere passing of information by the Investigation Wing to the Id AO having jurisdiction over the assessee for necessary action, if found necessary, in the hands of the assessee. But the Id. AO took the said information as sacrosanct and proceeded to disbelieve the claim of short term capital loss of Rs.

14,86,214/- on the shares of M/s. Blue Circle Services Ltd of the assessee ignoring the entire submissions and factual matrix of the assessee. It is pertinent to note that in the information passed on by the DDIT Investigation, Unit-1 Gurgaon, there is absolutely no mention that the 7 persons mentioned herein above had even remotely/ suggested the names of the assessee or his broker M/s Anurity Multi Broking Pvt. Ltd and that those 7 persons in connivance with the assessee and his broker had sold the shares to earn bogus short term capital loss to the assessee. Hence, neither the assessee's name nor his broker's name had been mentioned in the information that has been passed on by the Investigation Wing to the Id AO. The Id AO at least should have made some preliminary enquiry with the broker and also the stock exchange with regard to the statements given by those 7 persons above, to understand the fact and also ascertain as to whether the assessee per se was involved in artificial price rigging in connivance with entry operators for buying bogus short term capital loss. This was admittedly not done by the Id AO and the AO merely relied on the information passed on by the Investigation Wing and had taken the same as sacrosanct and final. When there is absolutely no mention about the name of the assessee and his broker on the information passed on by the Investigation Wing, how the transaction carried out by the assessee in the open market in the recognized stock exchange be doubted by the revenue. It was also pointed out by the assessee before the lower authorities that the price in the secondary market/ open market of shares of listed company are dependent on market forces of demand and supply and not based on fundamentals of the company and its financial position reflected in the balance sheet. It was pertinent that the capital market reacts to various situations prevailing across the globe and there are numerous shares whose prices show upward trend or downward trend gets freezed upto 20% or more on a single day for various reasons. One more pertinent fact to be noted in the behavior of the assessee in the instant case is that the assessee claimed total short term capital loss of Rs. 91,92,495/- on sale of various shares. But the revenue had disputed the short term capital loss on sale of shares of M/s. Blue Circle Services Ltd alone. This fact goes to prove that the Id AO had merely taken the statement recorded by the DDIT Investigation Unit-1 Gurgaon from 7 parties mentioned (supra) and the

information passed on by the Investigation Wing as sacrosanct without making any enquiry from his side qua the assessee. The other short term capital losses incurred by the assessee on sale of shares were also driven by the same market forces of demand and supply which has been accepted by the revenue. From the side of the assessee, all the relevant documents to prove the genuineness of the purchase, genuineness of the sales payment routed through banking channel, contract notes for purchase and sales issued by registered share broker, payment of STT for purchase as well as on sales and shares getting credited in the Demat Account at the time of purchase and debited in the Demat account at the time of sales were duly furnished by the assessee. Hence, no fault could be attributed on the behavior of the assessee when the assessee had duly discharged his onus.

7. Merely because a particular scrip has been identified as penny stock by the income tax department, it does not mean that all the transactions carried out in that scrip by all the parties across the globe would be taxed. So many investors like the assessee enter the capital market just to make it a chance by investing their surplus monies. They also end up with making investment in certain scrips such as Blue Circle Services Ltd based on market information and try to exist at an appropriate time the moment they make their profits. In this process, they also burn their fingers by incurring loss without knowing the fact that the particular scrip is operated by certain interested parties with an ulterior motive and once this ulterior motives are achieved the price falls like pack of cards and eventually make the gullible investors like the assessee herein incur huge loss. Hence, the assessee could be considered as a mere gullible investor. No evidence has been brought out by the revenue in the instant case to link the assessee and its share broker with any of the entry operators or 7 persons mentioned supra to prove that they were either involved in the artificial price rigging of shares or certain entry operators and 7 persons mentioned supra were acting at the behest of the assessee or its broker.

8. We find the entire approach of the revenue was based on mere suspicion. It is sell settled that this suspicion however strong could not partake the character of legal evidence. Hence the greater onus is casted on the revenue to corroborate

the impugned disallowance by controverting the documentary evidences furnished by the assessee and bringing on record cogent material to sustain the disallowance. No such attempt has even been made by the revenue in the instant case.

9. We find the Hon'ble Bombay High Court in the case of CIT Vs. Shyam R. Pawar reported in 54 taxmann.com 108 had held that where Demat account and contract note showed details of share transactions and the Id AO had not proved said transaction as bogus, capital gain earned on such transaction could not be treated as unaccounted income u/s 68 of the Act. Further, the Hon'ble Jurisdictional High Court in the case of PCIT Vs. Krishna Devi and others reported in 126 taxmann.com 80 has also addressed the very same issue of long term capital gain / short term capital loss on sale of listed company shares qua the penny stock and had held as under:-

“10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s

*Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. **The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.***

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar case (supra) and Sumati Dayal case (supra) is of no assistance. Upon examining the judgment of Suman Poddar case (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the

factual matrix at hand. Similarly, the case of Sumati Dayal (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

15. Accordingly, the present appeals are dismissed.”

(emphasis supplied by us)

10. Further, there is absolutely no mention of SEBI's interference in the said scrip by stating that assessee or his broker was suspended from the capital market due to their connivance action with some tainted parties for artificial rigging of price of share of M/s. Blue Circle Services Ltd.

11. In view of the aforesaid observations, we have no hesitation in deleting the disallowance of short term capital loss of Rs. 14,86,214/- on sale of shares claimed by the assessee. Accordingly, ground nos. 1 and 2 raised by the assessee are allowed.

12. Ground Nos. 3 and 4 raised by the assessee are challenging the disallowance made u/s 40(a)(ia) of the Act on account of payment of consultancy charges for the sum of Rs. 33,616/-.

13. We have heard the rival submissions and perused the materials available on record. It is not in dispute that the assessee has made payment of consultancy charges to M/s. Samssara Capital Technology of Rs. 33,616/- during the year and claimed the same as deduction. The Id AO observed that the since no deduction of tax at source was made on such payment, the assessee would be invited with the disallowance u/s 40(a)(ia) of the Act. This action was confirmed by the Id CIT(A). The Id AR before us correctly drew our attention to the Circular issued by CBDT vide No. 1/2014 dated 13.01.2014 wherein, it has been categorically mentioned that the assessee would be liable to deduct tax at source only if the payment exceeds Rs. 30,000/- in terms of 194J of the Act and that for the purpose of

reckoning such limit of Rs. 30,000/-, the service tax portion should be excluded. This fact has been categorically made clear by CBDT itself in its circular. In the instant case, the consultancy charges excluding service tax was exactly Rs. 30,000/- and did not exceed Rs. 30,000/-. Hence, as per the provisions of section 194J of the Act read with CBDT circular, we hold that the assessee is not obligated to deduct tax at source. Hence, no disallowance u/s 40(a)(ia) of the Act could not be made. Accordingly, the ground Nos. 3 and 4 raised by the assessee are allowed.

14. Ground No. 5 raised by the assessee is consequential in nature and does not require any specific adjudication.

15. Ground No. 6 is general in nature and does not require any specific adjudication.

16. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 20th December, 2023.

-Sd/-
(Anubhav Sharma)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 20/12/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

