IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

INCOME TAX APPEAL NO. 83/2013.

The Commissioner of Income Tax-III, Nagpur.

-**VERSUS-**

M/s. Shree Datta Fertilizers and Chemicals Pvt. Ltd. Amravati.

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders

CORAM : B.P.DHARMADHIKARI & S.B.SHUKRE, JJ.

DATE : MARCH 24, 2015.

Heard Shri Anand Parchure, learned Counsel for the appellant and Shri K.P. Dewani, learned Counsel for respondent.

2] About 2 lakh shares were purchased by the assessee in November, 2003 and duly reflected in accounts. The said investments is also mentioned in the next year. Thereafter those shares are resold and consideration received therefor is Rs. 1,62,55,270/-. Assessment Officer denied exemption under Section 10[38] of the Income Tax Act, 1961 and made addition of Rs. 1,58,45,758/-. This addition was set aside by the CIT Appeals and the said order of CIT Appeals is maintained by the ITAT.

3] Shri Parchure, learned Counsel for appellant invites our attention to findings recorded by the Assessment Officer, particularly, to show that there was difference in client codes, broker was not registered and there was significant diversion in pay-in and pay-out date, which has fluctuated T+ 2 norms. The broker from whom transactions were made, was also not found genuine and he was made inactive.

4] At this stage, Shri Parchure, learned Counsel submits that there was a survey under Section 133A on 22.02.2007, and assessee thereafter declared additional income of Rs. 85 lacs, which was included as an excess stock in the closing stock.

5] In the background of specific findings recorded by the Assessment Officer, he submits that CIT (Appeals) has by ignoring the said material, reached to findings which are contrary to records and ITAT has mechanically confirmed the same. He therefore, submits that substantial questions of law as framed vide Question Nos. “a” and “d' below arise for consideration :

"(a) Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the assessee was eligible for claiming of exemption under Section 10[38] of the I.T. Act, 1961 ?

(d) Whether on the given circumstances and the law the Hon'ble ITAT has erred in not treating the income as arising from the speculation business considering that assessee is not a finance company and in light of provisions of Section 73 and in light of decision of jurisdictional High Court in the case of Lokmat Newspapers Pvt. Ltd. Reported in 322 ITR 43, such income is income from speculation business."

6] Learned Counsel for assessee submits that survey under Section 133 A has got no bearing in so far as this appeal is concerned. There was a single transaction carried properly through Demat Account and assessee has received payment through account payee cheque. The investment made in 2003 was shown in books of account which were accepted and the consideration after sale is also reflected in books of account. The Assessment Officer did not consider the entire material on record, and therefore, reached incorrect findings. Those findings are not accepted by CIT and this exercise is then throughly looked into by the ITAT. ITAT though reproduces the findings of CIT, has also applied independently its mind. Accordingly ingredients of Section 10[38] has been looked properly and thereafter the addition has been set aside.

7] The fact that investment was made in the year 2003 and it was reflected in the books of account is, not in dispute. The investment as also mentioned in next accounting year, is also not in dispute. Receipt of sale consideration through account payee cheque is also not in dispute.

8] It is in this background, that the CIT has considered the controversy. It found that Section 10[38] was added by Finance Act No. 2/2004 and the shares were purchased before that by the assessee. In so far as the variation in the clients code is concerned, it found that it is internal procedure of the broker. The shares were sold by the assessee through broker Shri Basant Periwal & Company and he is found to be duly registered with SEBI as per contract note. The transaction is found through Demat account with Anand Rathi Security Limited. There is a specific finding by the CIT that observations of Assessment Officer based on findings of Investigation Wing at Kolkatta are contrary to evidence on record.

9] This application of mind was questioned by the Revenue before the ITAT. ITAT has found that period of holding of shares was in excess of 12 months and shares were sold at recognized stock exchange, therefore, requisite conditions for grant of exemption were fulfilled. The ITAT has made reference to findings reached by CIT at length. The contention of appellants are reproduced by ITAT in paragraph no.3 and thereafter, in paragraph no.4 it has found that the broker had confirmed the transaction of sale to be genuine. Necessary tax was also paid on shares and the same were sold at prevailing market rate at Kolkatta. This finding is not assailed before us.

10] It is, therefore, obvious that facts on record are looked into by the CIT as also by the ITAT. Though as compared with the total price fetched by shares i.e. of Rs. 1,62,55,270/- the profit margin of Rs. 1,58,45,758/- appears to be on much higher side, the appellant has not brought on record the market price prevalent at Kolkatta Stock Exchange at the time of sale.

11] Hence, merely because shares have been sold at a very high price, that by itself may not dis-entitle exemption under Section 10[38]. There is no dispute that this is the only transaction on record. No substantial questions of law therefore, arise in the matter for consideration. Appeal is, therefore, dismissed. No costs.

JUDGE **JUDGE**

Rgd.