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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 95/2021

PR COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing Counsel along with Ms. Easha and Ms. Hemlata Rawat, Jr. Standing Counsels.

Versus

VIPIN JAIN ..... Respondent

Through: Mr. Rohit Tiwari, Ms. Tanya, Ms. Shivani and Mr. J. Kumar, Advs.

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\+ ITA 174/2022

ASST. COMMISSIONER FOR INCOME TAX CIRCLE -60(1) ..... Appellant

Through: Mr. Gaurav Gupta, Sr. Standing Counsel along with Mr. Shivendra Singh, Jr. Standing Counsel.

Versus

SAVITA JAIN ..... Respondent

Through: Mr. Rohit Tiwari, Ms. Tanya, Ms. Shivani and Mr. J. Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% **12.03.2024**

PER: PURUSHAINDRA KUMAR KAURAV, J.

1. These are two appeals which raise identical issues and therefore, the same are being decided by this common order. For the sake of convenience, the facts are taken from ITA No.95/2021. These appeals have been preferred by the Revenue impugning the orders of the Income Tax Appellate Tribunal [**"ITAT"**] dated 16.03.2020 and 07.12.2020 in ITA No.95/2021 and ITA No.174/2022, respectively, whereby, the addition made by the Assessing Officer [**"AO"**] under Section 68 of the Income Tax Act, 1961 [**"Act"**] has been deleted for the Assessment Year [**"AY"**] 2015-16.

2. As per the facts of the present case, on 15.11.2013, the respondent-assessee had purchased 62,800 shares in Alps Motor Finance Limited [**"the Company"**] at the rate of Rs.2 per share from a person namely, Sh. Vishal Yadav and the total consideration amounting to Rs.1,25,600/- in that regard was paid by the respondent-assessee in cash. After a considerable period of time, on 30.07.2014, the respondent-assessee sold 17,500 shares at the rate of Rs.430 each through a broker i.e., Century Finvest Pvt. Ltd. During the period between 07.08.2014 to 13.10.2014, the remaining shares were also sold by the respondent-assessee at the rate of Rs.55 per share and the said transaction was also facilitated by the same broker. The payments for both the sale transactions appear to have been made using the banking channels.

3. Thereafter, on 26.08.2015, the respondent-assessee filed his Income Tax Return [**"ITR"**], declaring his income to the tune of

Rs.24,29,280/-. In the said ITR, the respondent-assessee also claimed an exemption under Section 10(38) of the Act on the ground of Long-Term Capital Gains [**"LTCG"**] on sale of the aforementioned shares. The case of the respondent-assessee was selected for the purpose of scrutiny and a notice under Section 143(2) of the Act was duly issued to the respondent-assessee.

4. Consequent thereto, an assessment order under Section 143(3) of the Act was passed by the Revenue making the following additions in the income of the respondent-assessee: -

i. An addition of Rs.3,18,92,584/- was made on account of LTCG on sale receipt of shares during the concerned AY in his capital account. According to the Revenue, the said income was a result of a bogus transaction and therefore, it felt into the category of unexplained cash credit under Section 68 of the Act.

ii. An addition of Rs.1,25,600/- was made on account of expenditure incurred on purchase of 62,800 equity shares in the Company at the rate of Rs.2 each as the same was considered to be an expenditure towards commission charged under Section 69C of the Act for providing the arranged capital gain.

5. Being aggrieved by the additions made by the AO, the respondent-assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [**"CIT (A)"**]. However, the same was dismissed *vide* order dated 11.12.2018. While confirming the additions made by the AO, CIT (A) held that the respondent-assessee has converted the unaccounted income into capital gains in a bogus manner to show the income on the pretext of LTCG.

6. The said order of the CIT (A) was challenged by the respondent-assessee before the ITAT, whereby, the additions made by

the AO and confirmed by the CIT (A), were deleted. Therefore, being aggrieved by the said deletion, the Revenue has challenged the order of the ITAT in the instant appeals.

7. Learned counsel appearing on behalf of the Revenue submitted that since the respondent-assessee had failed to prove the genuineness of the transaction, the additions made by the AO under Section 68 of the Act cannot be said to be erroneous. According to him, in the cases pertaining to the said Section, the inferences need to be drawn on the basis of the human probabilities. He, therefore, submitted that there is no infirmity in the order of the AO, which has legitimately drawn conclusions based on the following considerations: -

i. The shares were purchased by the respondent-assessee *via* cash transaction and sold merely within a period of one year and two months, after a skyrocketing increase in the price of the shares.

ii. The Company lacked financial credibility.

iii. The opening of the respondent-assesse's account with the broker was an arrangement to claim exemption in LTCG.

iv. The statement of Sh. Bikash Surekha, who ran the entities which also purchased the shares of the Company, suggested that these entities were used to provide accommodation entry for bogus LTCG.

8. Learned counsel further submitted that the ITAT has failed to appreciate the concurrent findings of the AO and the CIT (A), more importantly the independent enquiry conducted by the AO, and has erroneously rejected the aforesaid considerations of the AO.

9. Learned counsel appearing for the respondent-assessee, while opposing the submissions made by the learned counsel for the Revenue, submitted that the present appeal does not raise any

substantial question of law. He contended that the issues raised by the Revenue are completely factual in nature and do not warrant any consideration at all.

10. He submitted that the Revenue has inappropriately placed reliance on the statements of two brokers and Mr. Bikash Surekha as they do not allude to the respondent-assessee and thus, there is no direct link with the respondent-assessee's case. According to him, no effective enquiry has been carried out by the AO *qua* the respondent-assessee, rather it has chosen to attribute a general *modus operandi* observed in cases unrelated to the respondent-assessee.

11. We have heard the learned counsel appearing for the parties and perused the record.

12. It is seen from the facts of the present case that it was the astronomical increase in the price of the shares purchased by the respondent-assessee which has, *inter alia* led to the additions in the income for the concerned AY under Section 68 of the Act. Admittedly, the purchase and sale of shares and the source of credit therein is not in doubt at all. In fact, the concerned amounts have been considered to be added by the AO on account of preponderance of probabilities and human behaviour.

13. A perusal of the impugned order of the ITAT would indicate that the additions in question have also been based on the statement of a person namely, Mr. Bikash Surekha. However, the ITAT has concluded that the said statement neither has any direct or indirect connection with the respondent-assessee nor does the same mentions that his entities have provided accommodation entries in the Company. In any case, it is also discernible from the said order that no opportunity of hearing was extended to the respondent-assessee at any

relevant point of time to cross-examine the person in question if any claim adverse to the interests of the respondent-assessee was made.

14. The ITAT order further records that there was no material which could signify that either the Company was suspended, or its shares were barred from trading or the price of the scrip of company was manipulated for the purpose of providing accommodation entry. It has been held by the ITAT that purchases made in the earlier years regarding the shares also remained undisputed and the exhaustive list containing the concerned individuals or companies indulged in malpractices pertaining to LTCG, which has been heavily relied upon by the Revenue, does not mention the given transaction of the respondent-assessee. Notably, it is seen from the impugned order that the AO has failed to corroborate its conclusions on the basis of any cogent material available on record before forming an opinion that the sale transaction was sham and a pre-planned arrangement to claim exemption under the guise of LTCG.

15. An upshot of the above findings of the ITAT, coupled with the fact that no irregularity was highlighted by the Securities and Exchange Board of India pertaining to the transaction of the scrips of the Company, would lead us to the conclusion that there is nothing adverse against the respondent-assessee which could establish a fictitious LTCG to claim exemption at the behest of the respondent-assessee. Rather, the arguments put forth by the Revenue are mere findings of fact.

16. In any case, the issues raised by the Revenue in the present appeals already stand covered by the decision of this Court in the case of **PCIT v. Krishna Devi** [2021 SCC OnLine Del 563], wherein, under similar facts and circumstances, it was held that the

preponderance of probabilities cannot be a ground to reject the evidence put forth by the parties. The relevant paragraphs of the said decision read as under: -

> "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 pre-planned 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 v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (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 v. CIT (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."

[Emphasis supplied]

17. The view taken in the case of *Smt. Krishna Devi (supra)* was subsequently followed in another decision of this Court in **PCIT v. Karuna Garg** [2022 SCC OnLine Del 4079].

18. In view of the aforesaid, we find that the present appeals do not raise any substantial question of law.

19. Consequently, we do not find any reason to interfere with the decision of the ITAT and thus, the appeals stand dismissed. Pending application(s), if any, are also disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 12, 2024/p/shs