

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH,
NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER, AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 8142/DEL/2018
[Assessment Year: 2015-16]

Shri Tapas Kumar Mallick
D - 96, Freedom Fighter Enclave
West Delhi - 110068.

Vs.

The A.C.I.T.
Circle 32(1)
New Delhi

PAN: AEQPM 2677 B

[Appellant]

[Respondent]

Date of Hearing : 15.03.2021
Date of Pronouncement : 19.03.2021

Assessee by : Shri Rakesh Gupta, Adv
Shri Somil Agarwal, Adv

Revenue by : Shri Prakash Dubey, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A) - 11, New Delhi dated 06.11.2018 pertaining to A.Y 2015-16.

2. The grievance of the assessee is two-fold - firstly, the assessee is aggrieved by the addition of Rs. 2,10,23,848/- u/s 68 of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] thereby denying the claim of exemption u/s 10(38) of the Act and, secondly, the assessee is aggrieved by the addition of Rs. 14 lakhs u/s 69 of the Act as unexplained investment.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

4. Briefly stated, the facts of the case are that the assessee purchased 40000 equity shares through Initial Public Offer [IPO] of HPC Bioscience Ltd on 15.03.2013 and this fact is evident from the Demat account with Axis Bank Ltd exhibited at page 4 of the paper book. Payment was made on 16.03.2013 which is evident from the Statement of Account with Axis Bank exhibited at page 6 of the paper book.

5. At the very outset, we have to state that the purchase of 40000 equity shares through IPO of HPC Bioscience Ltd was in F.Y. 2012-13 relevant to A.Y 2013-14. Therefore, in our considered opinion, since the transaction pertained to A.Y 2013-14 and not 2015-16 which is the year under consideration, no addition can be made u/s 69C of the Act for the year under consideration. Accordingly, addition of Rs. 14 lakhs is directed to be deleted.

6. As mentioned elsewhere, out of 40000 equity shares which were purchased in F.Y. 2012-13, 39000 equity shares were sold during the year under consideration for a sale consideration of Rs. 2,10,23,848/-, the sales of shares are evident from the Demat Statements, and after deducting cost of acquisition of Rs. 14 lakhs, long term capital gain was declared at Rs. 1,96,23,848/-. This long term capital gain was claimed to be exempt u/s 10(38) of the Act.

7. During the course of scrutiny assessment proceedings and drawing support from the outcome of investigation by SEBI as well as the Income tax department, the Assessing Officer formed a belief that the share prices of HPC Biosciences Ltd were rigged by a cartel.

8. The Assessing Officer supported his belief by observing as under:

6.4 It has further been noticed in the SEBI order dated 29.06.2015 that connection/relations can be established on the basis of factors including the common addresses, common directors/shareholders, etc. SEBI further relied on the order of Hon'ble SAT stating that in the screen based trading, manipulation or fraudulent intent can be inferred from various factors such as conduct of the party, pattern of transactions, etc. SEBI has held that in this case, the entities of trading group created the demand against the supply from the preferential allottees/pre-IPO transferees, thus violating the principle of price discovery and keeping aside, the purpose of the market.

6.5 Thus, on the basis of the above-said observations, it was opined in the SEBI order that the transactions in the said scrips were conducted with a premeditated understanding, plan, device or artifice, whereby the above-said companies have provided the platform to the Trading Group entities to manipulate the price/volume of the scrips so as to provide profitable exit to preferential allottees and pre-IPO transferees.

9. We find that from pages 2 to 16, the Assessing Officer has discussed the Ad-Interim Order of the SEBI dated 29.06.2015 in order No. WTM/RKA/ISD/54/2015. Referring to various judicial decisions, the Assessing Officer came to the conclusion that the assessee has introduced/credited capital by an amount of Rs. 1,96,23,848/- during the year in his books, the source of which he explained as proceeds from these share sale transactions and since the explanation offered by the assessee in respect of source of this capital introduced being share sale transactions, has been held to be not satisfactory, section 68 of the Act is squarely applicable and accordingly, made an addition of Rs. 2,10,23,848/- u/s 68 of the Act.

10. The findings of the Assessing Officer were confirmed by the Id. CIT(A).

11. We have carefully perused the ex parte Ad-Interim order of SEBI mentioned hereinabove. We have also the benefit of SEBI order No. No. WTM/RKA/ISD/07/2015 dated 04.01.2016 which is the corrigendum to the order dated 29.06.2015. We have gone through SEBI order No. WTM/RKA/ISD/163/2016 dated 27.10.2016 and No. WTM/SR/SEBI/EFD-DRA2/70/09/2017 dated 06.09.2017, all such orders are part of the Paper Book.

12. A perusal of all these orders shows that all the orders are primarily concerned with the activities of four entities involved in pre IPO activities, issuance of IPO, listing of IPO and trading of shares of four companies, namely:

- i) Eco Friendly Food Processing Limited
- ii) Esteem Bio Organic Food Processing Limited
- iii) Channel Nine Entertainment Limited and
- iv) HPC Biosciences Limited (This company is in dispute in this

appeal)

13. The Ad-Interim order dated 29.06.2015 has categorised the four entities into the following categories:

- i) Preferential Allottees
- ii) Pre IPO Transferees
- iii) Funding Group
- iv) Trading Group

14. A list of Preferential Allottees in the Scrip of HPC is exhibited at pages 12 to 16 of the Paper Book. A list of Pre IPO Transferees in the Scrip of HPC is exhibited at pages 17 to 21 of the Paper Book. A list of Funding Group is exhibited at page 21 of the Paper Book and list of Trading Group is exhibited at pages 22 and 23 of the Paper Book.

15. All the names have PAN and quantity bought by the persons. We find that the name of the appellant is not in the list mentioned hereinabove. We further find that subsequent to the interim orders, investigation was carried out to look into the role of debarred entities in price manipulation and IPO manipulation of the scrips [in which the appellant's name does not appear]. Violation of provisions of SEBI Act,

1992 and SEBI [Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market] Regulations, 2003 were not observed in respect of 216 entities against whom directions were issued vide the interim orders. List of such names are exhibited at pages 31 to 35 of the paper book. Accordingly, the Ad-Interim Order was revoked on these 216 entities.

16. The entire assessment order is based upon the Ad-Interim order of the SEBI mentioned elsewhere wherein the appellant's name does not find place. It would not be out of place to refer to the two judgments of the coordinate bench in the case of Shri Sandeep Bhargava ITA No. 420/DEL/2019 and M/s Mayank Jain [HUF] ITA No. 1230/DEL/2019 which have been heavily relied upon by the Id. DR. In both these cases, the coordinate bench has decided the appeal in favour of the Revenue and against the assessee on finding their names in the list of entities debarred in SEBI's order. Since the appellant's name does not find place in the list of entities debarred by SEBI, these judgments relied upon by the Id. DR are clearly distinguishable on facts.

17. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing and the exparte Ad-Interim order of the SEBI. It can be seen that the entire assessment order has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the SEBI order without conducting any independent and separate enquiry in the case of the appellant.

18. It is provided u/s 142(2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary.

19. Similar facts were considered by the coordinate bench in the case of Smt. Karuna Garg ITA No. 1069 & 2772/DEL/2019, Smt Bindu Garg in ITA No. 1168 & 1169/DEL/2019, Smt Krishna Devi in ITA No. 1070/DEL/2019 and Har Dev Sahai Gupta in ITA No. 1264/DEL/2019. In these cases, the quarrel was in respect of scrip of M/s Esteem Bio Organic Food Processing Ltd, which is one of the four companies whose names are mentioned at Para 12 of this order.

20. In these cases also since the exparte interim order of the SEBI dated 29.06.2015 has named 239 persons and names of the appellants did not find place in the said lists and on the given facts, all these appeals were decided in favour of the assessee and against the revenue and order of the coordinate bench has been upheld by the Hon'ble High Court of Delhi in ITA No. 125/2020, 130/2020 and 131/2020 vide order dated 15.01.2021. The relevant findings of the Hon'ble High Court of Delhi 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.

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

21. In our considered view, whether the assessee has discharged his onus cast upon him by provisions of section 68 of the Act or not is purely a question of fact and considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act. As mentioned elsewhere, the discharge of onus is purely a question of fact, the judicial decisions relied upon by the ld. DR would do no good on the peculiar plethora of evidences in respect of facts in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand except the decision of the coordinate bench discussed elsewhere because the same exparte Ad-Interim order of SEBI was considered and facts are mutatis mutandis same. We, accordingly, direct the Assessing Officer to accept the long term capital gain declared as such and delete the addition of Rs. 2,10,23,848/-.

22. Before parting, the ld. DR has supported his submissions by supplying print outs of the Metropolitan Stock Exchange and The Economic Times Markets, which we find that he must have searched from Google network wherein the ld. DR pointed out that SEBI now

vide order dated WTM/SM/VD/D3/9896/2020-21 dated 22.12.2020 has issued the following directions:

'Noticee nos. 2 and 3 (promoters of the Company) are directed to make a public offer through a merchant banker to acquire shares of the Company from public shareholders by paying them the value determined by the valuer in the manner prescribed in Regulation 23 of the SEBI (Delisting of Equity Shares) Regulations, 2009 and acquire the shares offered in response to the public offer, within three months from the date of this Order.

ii. BSE to facilitate valuation of shares to be purchased as directed at (i) above, and compulsorily delist the Company, if the public shareholding reduces below the minimum level in view of aforesaid purchase.

iii. The Noticee no. 1 is hereby restrained from accessing the securities market by issuing prospectus, offer document or advertisement soliciting money from the public in any manner for a period of 8 years.

iv. Noticee no. 2 and 3 are hereby restrained from holding post of director, any managerial position or associating themselves in any capacity with any listed public company and with any public company which intends to raise money from the public, or with any intermediary registered with SEBI for a period of 3 years.

- v. The Noticees, as mentioned below are hereby restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in any manner whatsoever manner, for the period specified in their respective columns:

Sr. No.	Name of the Noticee	PAN	Debarred vide interim order	Period of debarment
1	HPC Biosciences Ltd^—	AABCH6762Q	Yes	Till date of this order
Sr. No.	Name of the Noticee	PAN	Debarred vide interim	Period of debarment
2	Shri. Tarun Chauhan	AGXPC3049G	Yes	Till date of this order
3	Ms. Madhu Anand	AXTPA8813F	Yes	Till date of this order
4	Goldline International Finvest Ltd.	AACCG6377M	Yes	Till date of this order
5	Shri. Madhukar Dubey & its Proprietorship firm viz. N V Sales Corporation, Magnum Industrial	AIJPD7329J	Yes	Till date of this order
6	Shri. Satendra Kumar & its Proprietorship firm viz. Nisha Traders	AWWPK8525E	Yes	Till date of this order
7	Avisha Credit Capital Pvt. Ltd	AAACA5715D	Yes	Till date of this order
8	Shri. Sumit Kumar & its Proprietorship firm viz. Durga Prasad & Co.	ARUPK1589P	Yes	Till date of this order
9	Shri. Raj Kumar & its Proprietorship firm viz. Bright Securities	BNBPK2681L	No	1 Year
	Shri. Prakash Gupta & its			Till date

10	Proprietorship firm viz. Shiv Traders	ARVPG7849R	Yes	of this order
11	AMS Powertronic Pvt. Ltd	AAECA8718H	Yes	Till date of this order



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

23. This SEBI order is dated 22.12.2020 whereas the transactions which have been considered in this appeal took place in F.Y. 2014-15 and therefore, restrain after a gap of more than 5 years would do no good to the Revenue. This order has restrained named noticees from accessing security market by issuing prospectus, offer document or advertisement soliciting money from the public in any manner for a period of 8 years. Obviously, this restraint is prospective.

24. In the result, the appeal filed by the assessee in ITA No. 8142/DEL/2018 is allowed.

The order is pronounced in the open court on 19.03.2021.

Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Dated: 19th March, 2021.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	