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**(2014) 02 RAJ CK 0144**  
**In the Rajasthan High Court**  
**Case No : IT Appeal No. 54 of 2012**

Commissioner of Income Tax

APPELLANT

Vs

Sumitra Devi

RESPONDENT

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**Date of Decision :** 24-02-2014

**Acts Referred:**

Income Tax Act, 1961 — Section 10(38), 133(6), 260A, 68

**Citation :** (2014) 268 CTR 351

**Hon'ble Judges :** Pratap Krishna Lohra, J;Dinesh Maheshwari, J

**Bench :** Division Bench

**Advocate :** K.K. Bissa, Advocate for the Appellant

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## Judgement

1. By way of this appeal under s. 260A of the IT Act, 1961 ("the Act"), the Revenue seeks to question the order dt. 15th Dec, 2011, passed by the income tax Appellate Tribunal, Jodhpur Bench, Jodhpur ("the Tribunal") in ITA No. 490/Jd/2009 [reported as (2012) 145 TTJ 26 ] relating to the asst. yr. 2006-07 whereby, the Tribunal has dismissed its appeal after finding justified the order dt. 2nd June, 2009 passed by the Commissioner of income tax (Appeals), Udaipur ["the CIT(A)"] deleting the additions made by the AO in the assessment order dt. 31st Dec, 2008 to the tune of Rs. 37,77,847 towards the transactions of purchase and sale of shares and another Rs. 1,88,890 towards the alleged undisclosed commission paid in cash. Put in brief, the relevant facts and background aspects of the matter are that the respondent-assessee's total income, as shown in the return of income for the asst. yr. 2006-07, consisted of the income from salary, long-term capital gain ("LTCG"), interest and other income. In the computation, assessee had shown LTCG to the tune of Rs. 37,77,847 from the sale of shares; and it was also shown that commission was paid to the broker to the tune of Rs. 1,88,890. LTCG was claimed as exempt under s. 10(38) of the Act. The AO, however, observed that the companies, whose shares were allegedly dealt with, were not very well-known and it was entirely unlikely that there was a huge rise in the prices of their shares in a very

short span of time. The AO, ultimately, treated this huge rise in the price as being of manipulation by the stock broker and, while treating the transaction as sham, proceeded to make the additions in the income of the assessee.

2. Aggrieved by the assessment order so passed on 31st Dec, 2008, the respondent-assessee preferred an appeal that was considered and allowed by the CIT(A) by the impugned order dt. 2nd June, 2009. The CIT(A), inter alia, noted that the same issue had been decided in favour of the appellant for the asst. yr. 2004-05 by the appellate order dt. 21st Feb., 2007 in Appeal No. 458 of 2006-07. The CIT(A) took note of the transactions and observed that the appellant had furnished the requisite evidence; and payment of purchase consideration was made from out of the available cash balance with the appellant, as was appearing in the cash flow statements. The CIT(A) also observed that the shares were sold by the appellant for consideration through the named stock broker/s and the appellant had furnished all the evidence like broker's note, contract note, extract of cash book, balance-sheet, share certificate etc., which were in possession, to establish the genuineness of transactions. The CIT(A) found that the AO had failed to bring any evidence in rebuttal nor was it proved that the documents produced by the assessee were false, fabricated or fictitious. After thorough and detailed consideration of the matter, the CIT(A) found that the AO proceeded only on presumptions but without any basis; and held that the AO was not justified in making additions under s. 68 of the Act. The detailed consideration of CIT(A) on the principal issue could be usefully reproduced as under :

I have considered the facts of the case and submissions of the learned Authorised Representative and found that similar issue was decided in the case of the appellant for the asst. yr. 2004-05 in favour of the appellant vide appellate order dt. 21st Feb., 2007 in appeal No. 458 of 2006-07. The appellant has shown capital gain of Rs. 37,77,847 on sale of shares between the period 8th April, 2005 to 5th Aug., 2005. The purchase and sale of shares is as under:

Purchase

Sale :

10. The shares purchased were of M/s. V.K. Singhania. The transaction was effected through a broker namely M/s. M. Bhiwaniwala & Co. The transaction of purchase and sale of shares were executed at prevailing marking rate. The identity of broker was beyond doubt as he was a SEBI registered broker. These shares were acquired in physical form and the appellant received certificates bearing share certificate Nos. and distinctive Nos. of shares mentioned above. Prior to their sale, these shares were dematerialized with Stock Holding Corporation of India Ltd. The dematerialized shares were held in appellant's demat account with ICICI Bank, Udaipur. The payment of purchase consideration were made in cash out of available cash balance with the appellant which is evident from the cash flow statement furnished before me as well as furnished

before the AO also. These shares were sold by the appellant for a consideration of Rs. 37,77,847 through stock brokers M/s. M. Bhiwantiwala & Co. 95,453 and Ahilya Commercial (P) Ltd. Kolkatta and the appellant earned long term capital gain of Rs. 36,60,435.

11. The appellant furnished all evidences i.e. broker note, contract note, relevant extract of cash book, balance sheet as on 31st March, 2005 and 31st March, 2006, copy of share certificate etc. which were in his possession to establish genuineness of purchase and sale of shares. The AO failed to bring any evidence to show either back dating of purchases or collusion between the broker and the company. The AO also failed to bring any evidence to show that the appellant paid unaccounted cash to the brokers in order to receive sale proceeds of shares by cheques. In the light of the above undisputed facts, the following presumptions, on the basis of which the AO concluded that the entire transaction of purchase and sale of shares was a sham transaction and an accommodation entry given by the broker in the form of sale proceeds of shares in lieu of cash, have to be considered. The AO further failed either to show that a large number of documents like broker note, contract note, relevant extract of cash book, copy of share certificate, de-mat statement etc. filed by the appellant were false, fabricated or fictitious or to rebut appellant's claim regarding purchase of shares. Rather the broker confirmed the entire transaction. The reliance placed by the AO on facts like notice under s. 133(6) issued to the company being returned unserved, delayed payment to the broker, discrepancies in the name of seller as per broker and as per endorsement of the share certificate, certificate for 5,300, 1,200 and 6,000 enquiry shares being received from the companies, dematerialization of shares just before sale etc. would alert an AO and arouse his suspicion for a detailed examination and verification but these facts alone, in the absence of anything else could not negate the impugned transaction in the face of overwhelming evidences produced by the appellant. Moreover the AO did not confront the appellant about the result of his enquiry. The ratio of the judgment of Punjab & Haryana High Court in the case of Chiranji Lal Steel Rolling Mills Vs. Commissioner of Income Tax, is squarely applicable to the facts of the appellant's case. Thus the presumption of the AO was without any basis.

12. As regards the presumption of the AO that the appellant paid cash in lieu of accommodation entry given by the broker in the form of sale proceeds of shares, the AO squarely failed to bring any evidence on record to show that the sale transaction was fictitious and the appellant paid cash to broker for obtaining cheques in the form of sale proceeds of shares. While the appellant produced broker notes in support of sale proceeds and could show that proceeds were received by account payee cheques and deposited in the appellant's bank account, the AO could not show anything to rebut the evidences produced by the appellant. Thus, this presumption of the AO was without any basis.

13. From the above discussion, it is quite evident that the AO failed to show that the transaction for purchase and sale of shares was bogus and the appellant paid

cash to the broker for availing accommodation entry in the form of sale proceeds of shares. Suspicion, strange coincidences and grave doubts, howsoever strong it may be, cannot take place of legal proof. Therefore, the AO erred in treating the entire transaction of long term capital gains as a sham transaction and bring it to tax as unexplained cash credit under s. 68 of the IT Act, 1961.

14. As regards various judgments relied upon by the AO, the ratio of these decisions would have been applied, had the AO been able to establish that the transaction for purchase and sale of shares was fabricated, false and fictitious. However, the AO did not bring any evidence on record to establish non-genuineness of the impugned transaction. Moreover, the learned Authorised Representative of the appellant elaborately distinguished these judgments. In view of the above I hold that the purchase of equity shares was not bogus and genuine and the profit from sale of shares was assessable as long term capital gain and not as unexplained cash credit under s. 68 of the Act. Therefore, the amount of Rs. 16,73,142 cannot be treated as cash credit under s. 68 of the Act. The stand taken by the AO is not justified and, therefore, rejected. The appeal is allowed on this ground. Since the issue involved in this case is fully covered by the decision in the case of the appellant for asst. yr. 2006-07, I hold that the AO was not justified in making the addition under s. 68 of the Act as against capital gain declared by the appellant. The addition is deleted. The appeal is allowed on this ground.

3. In appeal by the Revenue against the aforesaid order of CIT(A), the Tribunal found the finding on facts not suffering from any infirmity; and proceeded to affirm the same by the impugned order dt. 15th Dec, 2011 while observing, inter alia, as under:

13. After considering the submissions and perusing the material on record, we find no infirmity in the finding of learned CIT(A). The learned CIT(A) has examined the issue in threadbare and found that purchase of shares as well as sale of shares are genuine. The purchase of shares were made through Shri V.K. Singhania, Renu Poddar and Ballabh Das Daga. The shares were purchased in earlier years and were sold during the year under consideration. The shares were sold through another broker i.e. M/s. M. Bhiwantiwala & Co., M/s. Ahilya Commercial (P) Ltd. All the purchase and sale of shares were dematized in regular course of transaction. Confirmation of purchase of shares through brokers were filed. All the shares are of listed companies. The shares were credited to de-mat account of the assessee and thereafter on sale of those shares the account of the assessee was debited through de-mat account. Therefore, there is no question of doubting the genuineness of transactions. There is no evidence that assessee has not purchased the shares in earlier year. They have been shown in the balance sheet and the balance sheet of earlier year has been accepted. The assessee has filed broker note, contract note, relevant extract of cash book, balance sheet as on 31st March, 2005 and 31st March, 2006, copy of share certificate etc. and all these details established that the

assessee was in possession of respective shares. The objection of the AO was that notice issued under s. 133(6) were returned back and payment to broker was delayed and there were certain discrepancies in the name of sellers as broker and as per endorsement in the share certificate. Clarification in respect of these deficiencies were filed before the AO which were filed before learned CIT(A) also. They were not appreciated by the AO but were appreciated by learned CIT(A) and then only the learned CIT(A) found that all the transactions of purchase and sale of shares are genuine. It was also not the case of the Department that assessee repaid the sale consideration in hand. There is no such evidence on record. Therefore, inference drawn by the AO, in our considered view was not correct by holding that the share transaction are bogus. The learned CIT(A) was justified in holding that share transactions were genuine. Accordingly we confirm the finding of learned CIT(A) as they are finding of fact and remained uncontroverted.

14. Deletion of addition of Rs. 1,88,890 is also confirmed as the AO made this addition on the basis that the transaction of sale of shares are only accommodation entry and assessee must have paid some commission to the broker. We have already held that transaction of purchase and sale of shares were genuine, therefore, we hold that this addition was rightly deleted by learned CIT(A).

15. In the result, appeal of the Department is dismissed.

4. Seeking to question the orders so passed by the CIT(A) and the Tribunal, it is contended on behalf of the appellant-Revenue that the Tribunal was not justified in confirming the deletion of the additions while ignoring the discrepancies pointed out by the AO. It is submitted that the assessee cannot use dubious method of tax planning to bring the money in the books; and colourable devices cannot be considered to be of legitimate tax planning. The decision of the Hon"ble Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, has been relied upon. It is submitted that truthfulness could not have been assumed on the self-serving recitals in the documents referred by a party. The AO, according to the appellant, recorded the finding after being satisfied that the referred transactions were sham and were of the accommodation entries provided by the broker in lieu of cash; and the fact is clearly seen from the phenomenal growth rates of shares within short span of time without any strong fundamentals.

5. Having given thoughtful consideration to the submissions made and having examined the record, we are clearly of the view that no substantial question of law is involved; and this appeal does not merit admission.

6. True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the Tribunal, the AO had failed to show that the material documents placed

on record by the assessee like broker's note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO, like the notice under s. 133(6) to the company having been returned unserved, delayed payment to the brokers, and dematerialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.

7. In an overall view of the matter, the finding as recorded by the appellate authorities after a thorough consideration of the material on record that the transaction of purchase and sale of shares could not be treated as non-genuine, remains a justified finding on facts; and we are unable to find any substantial question of law worth consideration in this case.

8. There cannot be any doubt about the basic principles in McDowell's case (supra) that the tax planning could be legitimate only when it is within the framework of law; and that colourable devices cannot be the part of tax planning; and further that avoidance of payment of tax by dubious methods is never countenanced. However, the decision in McDowell's case (supra) operates on an entirely different fact-situation; and has no application to the present case. Therein, the liability of sales-tax was sought to be avoided with reference to the invoicing by the manufacturer of liquor to the buyers, who themselves made the payment of excise duty, though the same was payable by the manufacturer. The Hon'ble Supreme Court affirmed the order of the High Court wherein it was held that excise duty, which was payable by the appellant but had been paid by the buyers under an amicable arrangement, was actually a part of turnover of the appellant and was, therefore, liable to be included for determining the appellant's liability for sales-tax under the A.P. General Sales-tax Act, 1957. In the present case, as noticed, the fact-situation remains entirely different and the question is about the genuineness of the transactions which have been accepted by the appellate authorities after examining the record and on relevant considerations. In an overall analysis, in our view, the findings as concurrently recorded by the CIT(A) and the Tribunal, that addition under s. 68 of the Act was not sustainable, remain essentially in the realm of appreciation of evidence. The appellate authorities have returned the finding of fact in favour of the assessee after due appreciation of evidence on record, on relevant considerations, and on sound reasonings. The finding neither appears suffering from any perversity nor is of such nature that cannot be reached at all. Hence, no substantial question of law is involved in this appeal.

In the result, the appeal fails and is, therefore, dismissed.