
(2012) 12 AHC CK 0029
In the Allahabad High Court
Case No : IT Appeal No. 560 of 2009

Commissioner of Income Tax	Vs	APPELLANT
Udit Narain Agrawal		RESPONDENT

Date of Decision : 12-12-2012

Acts Referred:

Income Tax Act, 1961 — Section 131, 133(6), 68

Citation : (2013) 255 CTR 102

Hon'ble Judges : Ram Surat Ram (Maurya), J; R.K. Agrawal, J

Bench : Division Bench

Advocate : Shambhu Chopra, for the Revenue, for the Appellant; Krishna Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

1. The present appeal has been filed against the order dt. 12th Aug., 2009 passed by the Tribunal, Agra Bench, Agra. The CIT, Agra had proposed the following two questions said to be the substantial questions of law arising out of the order of the Tribunal:

1. Whether the Hon'ble Tribunal was legally correct in confirming the findings of CIT(A) holding that the sale of share transaction as genuine ignoring the facts that statement of sub-broker Shri Bharat Yadav wherein he had admitted that no actual share transaction was taken place and the bills/contract notes along with draft issued to the beneficiaries in lieu of their own money?

2. Whether the Hon'ble Tribunal was legally correct in holding that the sale transactions as genuine ignoring the fact that the assessee could not discharge his onus to prove the genuineness of the share transaction as per requirement of s. 68 of the IT Act, 1961?

Briefly stated the facts giving rise to the present appeal are as follows:

The appeal relates to the asst. yr. 2004-05. The assessee-opposite party is an

"individual". He filed return of income on 31st March, 2005 declaring income of Rs. 34,97,761. The case was selected for scrutiny and the income from long-term capital gain amounting to Rs. 17,54,237 on sale of 19,000 shares of Focus Industrial Resources through broker M/s. MKM Finsec, Delhi was investigated. It transpired that the shares were purchased on 8th July, 2002 for Rs. 1,90,000 and sold on 14th Aug., 2003 for Rs. 19,54,948. The resultant gain was treated by the assessee as long-term capital gains. The AO examined him and was of the view that as the broker had not given details and furnished documents the transaction appeared to be fake, therefore, disallowed the plea of long-term capital gains and added the differential amount of Rs. 17,54,237 as "income from other sources". The matter was carried in appeal before CIT(A). who vide order dt. 27th Feb., 2008 accepted the plea of the assessee and deleted the addition. The Revenue's appeal before the Tribunal has failed.

2. We have heard Sri Shambhu Chopra, learned senior standing counsel, appearing for the Revenue and Sri Krishna Agrawal, learned counsel appearing for the respondent-assessee.

3. Sri Chopra submitted that the CIT(A) as also the Tribunal had erred in law in deleting the addition as much as the broker had not produced any documentary evidence to support the claim set up by the assessee regarding sale of the shares in question.

4. We have given our thoughtful consideration to the plea and we find that the CIT(A) while deleting the addition has held as follows:

2.5. I have considered the facts of the case, assessment record, submission of Authorised Representative and position of law, in my opinion, appellant deserves to succeed. At the time of making assessment, the AO on the basis that the appellant could not furnish any evidence to prove that the shares were actually transferred from his name and there was no actual sale of shares and the money allegedly received as sale consideration of shares was in fact appellant's own money which was routed through the help of some unscrupulous person and hence made an addition of Rs. 19,51,038 as income from undisclosed and unexplained sources under s. 68 of IT Act. On the other hand during the course of assessment as well as appellate proceedings the Authorised Representative's of the appellant filed written submissions along with documents and vehemently opposed the AO's action inviting attention to the facts of the case, the main points which have not been properly considered by the AO or have been totally ignored which are as under:

(i) The shares were applied and allotted directly from the company Focus Industrial Resources Ltd. who is registered with RoC and copy of master data details as per records of RoC were filed.

(ii) The payment of the share application money was made through account payee demand draft prepared from appellant's bank account.

(iii) The shares allotted were transferred to demat account No. DEL/CL4/16179378 with Stock Holding Corporation of India Ltd. having DP ID No. IN301127.

(iv) The shares of the company listed with Delhi Stock Exchange.

(v) The shares of Focus industrial Resources Ltd. were sold through share broker MKM Finsec (P) Ltd., 301, Dhaka Chamber 2068/39 Naiwal, Karol Bagh. New Delhi-10005.

(vi) The details of sale are on record. The details of number of shares and their sale rate are on record.

(vii) The shares of the company were sold through delivery instruction of the depository account with Stock Holding Corporation of India Ltd. and were transferred to Abhipra Capita Ltd. In this case even the name of buyer and his ID number in which the shares of the appellant were transferred were also filed. Thus the objection of the AO that the detail of purchase and sale of shares is not made available is not correct.

(viii) The sale consideration of these shares was received through account payee demand drafts duly ascertained by the AO independently to have been issued from the bank account of the broker.

(ix) During the course of assessment proceedings, the following evidences were brought on record:

(a) Copy of share broker bill.

(b) Copy of the contract note.

(c) Copy of demat account statement with Stock Holding Corporation of India Ltd. which clearly shows that the shares were transferred from the name of appellant after its sale.

(d) Copy of ledger account of the appellant in the books of share broker.

(f) Copy of bank statement of appellant with Bank of India, Agra.

(x) Further during the course of assessment proceedings, it is seen that notices under s. 133(6)/131 were issued to the share broker were complied with. This fact seen along with the evidences as referred in para (ix) above duly prove the existence of the share broker along with the transaction with the assessee. The AO has wrongly compared that onus of the assessee is the same as required in respect of cash credit entries. The Hon''ble Jodhpur Tribunal had the occasion to consider a case in respect of similar type of share transaction. The decision is reported in (2007) 13 SOT 61 wherein the Hon''ble Bench held that the share transaction was not bogus. The Hon''ble Bench confirmed the order of CIT(A) who held that assessee has filed the requisite evidence to establish the genuineness of share transaction and merely because share broker could not report the transaction to stock exchange, it could not be said that the share

transaction was bogus. The Hon"ble Bench further held that the burden of proving a transaction is always on the person asserting it to be bogus and this burden has to be strictly discharged by adducing legal evidences of a character which would either directly prove the fact of bogusness or establish circumstances unerringly and reasonably raising an inference to that effect. The Bench held that there was no evidence except speculation that this profit was not from the sale of shares. The AO had failed to establish his case and to discharge the requisite burden cast on him.

(xi) In this case as rightly pointed out by the Authorised Representative, there is no evidence on record as referred in assessment order, to prove that the proceeds received against sale of shares represent appellant's undisclosed income. Hon"ble apex Court in the case of *Kishinchand Chellaram Vs. Commissioner of Income Tax, Bombay City II, Bombay*, has held "that the burden is on the Department to prove that the money belongs to the assessee by bringing proper evidence on record and the assessee could not be excepted to call the concerned person in evidence to help the Department to discharge the burden that lay upon it". Similar view has been expressed by the Hon"ble Allahabad High Court in the case of *Commissioner of Income Tax Vs. Daya Chand Jain Vaidya*, .

(xii) The Authorised Representative of the appellant has also strongly emphasized on the peculiar fact that after the allotment of shares, the same were transferred to demat account, remained in denial account during the period of holding and transferred to the demat account of the buyer, itself proves the genuineness of the purchase/sale transaction of shares having regard to the relevant provisions contained in the Depository Act. The transaction made through demat account is in itself an evidence to prove the genuineness of share transaction. Merely because the sale of shares fetched a handsome price, which price is supported by official quotation issued by Magadh Stock Exchange, therefore, there cannot be any reason to doubt the genuineness of the sale transaction of the shares. It is settled position of law by the decisions in 26 ITR 776 (SC) (sic), *Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa*, , *COMMISSIONER OF Income Tax, WEST BENGAL Vs. EAST COAST COMMERCIAL CO. LTD.*, and (2004) 89 TTJ (Mumbai) 24: (2004) 1 SOT 90 (Mumbai) (supra) that suspicion howsoever strong can not take place of the character of evidence. In this case it is seen that appellant brought on record all plausible evidences as is expected in these transactions, however, the AO has not brought any material on record to disprove the evidences as adduced by the appellant. The Hon"ble Supreme Court in the case of *Smt. Srilekha Banerjee and Others Vs. Commissioner of Income Tax, Bihar and Orissa*, has held Before the Department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The Department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof. The AO has based his conclusion on unfounded presumptions and surmises. This also

cannot be approved. Reliance is placed to the Hon''ble Supreme Court decision in the case of Umacharan Shaw and Bros. Vs. Commissioner of Income Tax, West Bengal, .

2.7. Thus, in view of above facts and circumstances of the case, it is well established by the appellant regarding genuineness of share transaction and he has sufficiently discharged the onus cast upon him. AO's action is not well founded in position of law in adding entire amount of sale of shares as income from undisclosed and unexplained sources under s. 68 of IT Act. Therefore, I am deleting the entire amount of Rs. 19,51,038. However, the AO is directed to assess the long-term capital gains of Rs. 17,54,237 as shown by the appellant.

The Tribunal has upheld the finding. It had held that the assessee was in possession of the shares in question and had sold the said shares in course of ordinary transaction of sale of shares at stock exchange and if the broker did not file any evidence since the same were seized by the Revenue Department, there is no fault with the assessee. From the aforesaid facts it is clear that the shares in question were allotted to the assessee in the public issue which were held in demat account of Stock Holding Corporation of India Ltd. The shares were transferred to Abhipra Capital Ltd. The sale consideration was received by demand draft. Therefore, the transaction in question cannot be said to be fake and is a genuine transaction. The Tribunal has not committed any error in upholding the order of CIT(A) on this point.

The appeal fails and is dismissed.