

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.816/PUN/2018
निर्धारण वर्ष / Assessment Year : 2014-15

Abhishek Ashok Lohade, 15, Subharda Hsg. Soc., Opp. Circle Cinema, Ashok Stambh, Nashik-422001. PAN : ACEPL6296R	Vs.	ITO, Ward-1(5), Nashik.
Appellant		Respondent

Assessee by : None
Revenue by : Shri Ramnath P Murkunde

Date of hearing : 14.11.2022
Date of pronouncement : 22.11.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the order of Id. Commissioner of Income Tax (Appeals)-1, Nashik [‘the CIT(A)’] dated 21.03.2018 for the assessment year 2014-15.

2. Briefly, the facts of the case are that the appellant is an individual deriving income from the execution of contracts etc. The return of income for the assessment year 2014-15 was filed on 31.03.2015 disclosing total income of Rs.3,13,680/-. Against the said return of income, the assessment was completed by the Income Tax Officer, Ward-1(5), Nashik (‘the Assessing Officer’) vide order dated 28.12.2016 passed u/s 143(3) of the Income Tax Act, 1961

(‘the Act’) at total income of Rs.55,15,180/-. While doing so, the Assessing Officer denied the claim for exemption of capital gains u/s 10(38) of the Act amounting to Rs.50,49,171/- by holding that the transactions of purchase of shares of SRK Industries Ltd. and subsequent sale is nothing but a bogus transaction by relying upon the investigation report by the Investigation Wing of the Department and the Securities & Exchange Board of India (SEBI). The Assessing Officer had also analyzed the modus operandi adopted by the appellant as set out in para 11 of the assessment order. For the sake of brevity, the modus operandi is discussed as under :

The appellant was also provided the copy of statements recorded by the Investigation Wing of the Department, Calcutta from Shri Devesh Upadhyaya and Shri Akash Agrawal who are directors of the M/s. Mobixa Distributors Pvt. Ltd. alleged to be involved in providing accommodation entries bogus long term capital gains by adopting modus operandi as set out in para 11 of the assessment order. During the course of assessment proceedings, the appellant had failed to substantiate that the transactions of purchase and sales of shares is genuine one. In the circumstances, the Assessing Officer brought to tax the sale proceeds of the shares as unexplained cash credit and completed the assessment.

3. Being aggrieved by the order of assessment, an appeal was filed before the ld. CIT(A) contending that the assessee had proved the genuineness of the transactions of purchase and sales of shares. However, the ld. CIT(A) had confirmed the action of the Assessing Officer invoking the doctrine of test of human probability.

4. Being aggrieved by the decision of the ld. CIT(A), the appellant is in appeal before us in the present appeal.

5. When the matter was called on for hearing, none appeared on behalf of the appellant-assessee despite due service of notice of hearing. In-fact, an adjournment petition was filed in the name of one Mr. Abhay Avachat, Chartered Accountant citing that he was unable to argue the matter since he was hospitalized because of chest pains, high BP and hypertension etc., not supported by any doctor's certificate.

6. Since the issue in the present appeal is no more *res integra*, covered by several judicial precedents as well as one of the recent decision of the Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj, 446 ITR 56 (Calcutta), we proceed to dispose of the same after hearing the ld. Sr. DR even in the absence of assessee.

7. The ld. Sr. DR placed reliance on the order of the ld. CIT(A) submits that in view of the decision of the Hon'ble Calcutta High

Court in the case of Swati Bajaj (supra), the order of the Id. CIT(A) be upheld.

8. We heard the Id. Sr. DR and perused the material on record. The issue in the present appeal relates to whether or not the claim for exemption of capital gains u/s 10(38) of the Act is genuine. The material facts to be noted herein are as under :

During the course of assessment proceedings, the Assessing Officer noticed that the appellant had indulged in suspicious “suspicious transaction relating to long term capital gains on sale of shares” and relating to claim of appellant for exemption of Rs.51,32,174/- u/s 10(38) and sale of shares of M/s SRK Industries Limited. The appellant purchased 6500 shares of Transcend Commerce Limited (hereinafter TCL) @ Rs.10 per share for an amount of Rs.65,000/- on 29.10.2012 from Shubhmangal Sales Pvt. Ltd, which is Kolkata based broker. The bill does not bear any serial number, SEBI approval number and registration number of the broker, (page no. 26 of the Paper book dated 19.12.2017). The payment of Rs.65,000/- was made on 29.10.2012 from IDBI Bank A/c. The TCL subsequently amalgamated with M/s SRK Limited (herein after SRK) and the appellant was issued 14430 shares of SRK Ltd. on 22.03.2013. The company further sub divided the equity from Rs.10/- to Rs.5/- and the shares with the assessee

increased to 28860. The entire shares were sold on 23.12.2013 for an amount of Rs.51,32,174/- resulting in capital gain of Rs.50,67,174/-, which was claimed exempt u/s 10(38) of the Act. The case of the Assessing Officer is that the appellant is a beneficiary of accommodation entries or long term capital gains from Calcutta Entry Provider, namely, Mr. Anil Khemka of Devshyam Stock Broking P. Ltd.. The Investigation Wing of the Income Tax Department, Calcutta had conducted search and seizure operations on the said entry provider and recorded the statement on 30.03.2015 wherein it is stated that he had admitted to have provided the accommodation entries in respect of scripts as per list which includes the company M/s. SRK Limited. He further stated to have been admitted that the companies controlled by him one paper companies which were used for giving accommodation entries and list of the companies was also provided and the said companies were managed/operated by dummy directors, namely, S/Shri Sanjay Parakh, Anil Agarwal, Akash Agarwal and Devesh Upadhyaya. The investigation report dated 27.04.2015 of the Income Tax Department was available in the public domain and also narrated the modus operandi adopted for the purpose of claiming the bogus long term capital gains. During the course of assessment proceedings, the Assessing Officer had called upon to

substantiate the genuineness of the transactions of purchase and sale of shares in the light of the findings as set out in para 14 at page 8 and 9 of the assessment order. The Assessing Officer also furnished the copies of the statement recorded from entry providers as well as the directors of the dummy company. It is born on record that despite the adequate opportunity afforded to the appellant, the appellant had failed to rebut the findings of the Assessing Officer. In the circumstances, the Assessing Officer made addition of sale proceeds of the shares invoking the provisions of section 68 of the Act.

Even on appeal before the Id. CIT(A), the conclusion reached by the Assessing Officer was confirmed invoking the doctrine of human probabilities placing reliance on the decision of the Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT, 214 ITR 801 (SC) and CIT vs. Durga Prasad More, 82 ITR 540 (SC). This finding of the Id. CIT(A) confirming the action of the Assessing Officer is under challenge before us contenting that the appellant had discharged the onus of proving the genuineness of transactions of capital gains in respect of exemption u/s 10(38) of the Act. In a case involving identical facts of the case, the Hon'ble Calcutta High Court after making reference to the decisions of Hon'ble Madras High Court in the case of CIT vs. Manish D. Jain, 120 taxmann.com

180 (Mad.) and PCIT vs. Prabha Jain, 439 ITR 304 (Mad.) had confirmed the action of the Assessing Officer by holding that the Assessing Officer had cogently brought out the factual scenario to establish machinations of fraudulent, manipulative and deceptive dealings and how the stock exchanges system was misused to generate bogus LTCG.

9. There is yet one more reason as to why we are inclined to confirm the addition made by Assessing Officer, in view of the well settled principle of law that fraud vitiates everything and even principle of natural justice have no application and such transaction is *void ab initio*. The Hon'ble Supreme Court in the case of Friends Trading Co. vs. Union of India in Civil Appeal No.5608 of 2011 vide order dated 23.09.2022 held in the context of availment of alleged forged DEPB under the Customs Act, wherein, it was found DEPB licenses were forged and it was held that the exemption benefit availed on such forged DEPB are *void ab initio* on the principle that fraud vitiates everything and the period of limitation was held to have no application and the Department was held to be justified in invoking the extended period of limitation and the fact that whether the beneficiary had no knowledge of about the fraud/forged and fake DEPB licenses have no bearing the imposition of custom duty. The ratio of judgement is squarely

applicable to the transaction under consideration before us. Further, the application of principle of the fraud under judicial Acts was considered by the Hon'ble Supreme Court in the case of Smt. Badami (Deceased) By her L.R. vs. Bhali in Civil Appeal No.1723 of 2008 dated 22.05.2012, wherein, the Hon'ble Apex Court held as follows :

“20. In S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others [AIR 1994 SC 853] this court commenced the verdict with the following words:-

““Fraud-avoids all judicial acts, ecclesiastical or temporal” observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree

- by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

21. In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposite party.

22. In Smt. Shrist Dhawan v. M/s. Shaw Brothers [AIR 1992 SC 1555] it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in Roshan Deen v. Preeti Lal [AIR 2002 SC 33], Ram Preeti Yadav v. U. P. Board of High School and Intermediate Education and other [(2003) 8 SC 311] and Ram Chandra Singh v. Savitri Devi and others [(2003) 8 SCC 319].

23. In State of Andhra Pradesh and another v. T. Suryachandra Rao [AIR 2005 SC 3110] after referring to the earlier decision this court observed as follows:-

“In Lazaurs Estate Ltd. v. Beasley [(1956) 1 QB 702] Lord Denning observed at pages 712 & 713, “No judgment of a Court, no order of a Minister can be allowed to stand if it has

been obtained by fraud. Fraud unravels everything.” In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. ”

24. Yet in another decision Hamza Haji v. State of Kerala & Anr. [AIR 2006 SC 3028] it has been held that no court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.”

10. In the present case also, the appellant deliberately withheld the information from the Assessing Officer as well as the Id. CIT(A) which is within exclusive knowledge of appellant to establish the genuineness of transactions of purchase of shares of that company. It is nothing but a fraud played by the appellant against the Assessing Officer as well as the Id. CIT(A) who are quasi judicial authorities employed for execution of the provisions of the Income Tax Act. Therefore, the principle of fraud can be squarely applied to the facts of the present case and principles of natural justice have no application. Applying the said doctrine, we have no hesitation to hold that the transaction of purchase and sale of shares of SRK Industries under consideration before us is *void ab-initio*, this is nothing but sham, make believe and colourful device adopted with excellent paper work with intention bringing the undisclosed income into books of account. Accordingly, we confirm the orders

of the Assessing Officer as well as the Id. CIT(A) and find no merits in the appeal preferred by the assessee before us.

11. In the result, the appeal filed by the assessee stands dismissed.

Order pronounced on this 22nd day of November, 2022.

Sd/-
(S. S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 22nd November, 2022.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Nashik.
4. The Pr. CIT-1, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.