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

Date of Decision: 15.01.2021

\+ **ITA 125/2020**

PRINCIPAL COMMISSIONER OF INCOME TAX -12 … Appellant
Through: Mr. Zoheb Hossain, Senior Standing Counsel.

Versus

SMT. KRISHNA DEVI … Respondent
Through: None.

\+ **ITA 130/2020**

PRINCIPAL COMMISSIONER OF INCOME TAX -12 … Appellant
Through: Mr. Zoheb Hossain, Senior Standing Counsel.

Versus

HARDEV SAHAI GUPTA (GARG) … Respondent
Through: None.

\+ **ITA 131/2020**

PRINCIPAL COMMISSIONER OF INCOME TAX -12 … Appellant
Through: Mr. Zoheb Hossain, Senior Standing Counsel.

Versus

SMT. BINDU GARG … Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral)

CM APPL. 6933/2020 (for condonation of delay in re-filing)
CM APPL. 7056/2020 (for condonation of delay in re-filing)
CM APPL. 7057/2020 (for condonation of delay in re-filing)

1. For the reasons stated in the applications, the delay of 11 days in re-filing ITA 125/2020 and the delay of 13 days in re-filing ITA 130/2020 & ITA 131/2020, is condoned.

2. The applications stand disposed of.

ITA 125/2020, ITA 130/2020 & ITA 131/2020

3. The present appeals under Section 260A of the Income Tax Act, 1961 [*hereinafter referred to as the* '***Act***'] are directed against the common order dated 6th August, 2019 [*hereinafter referred to as the* '***Impugned Order***'] passed in ITA No. 1069/DEL/2019 (for AY 2014-15), 2772/DEL/2019 (for AY 2015-16) and other appeals for the same AYs, by the Income Tax Appellate Tribunal [*hereinafter referred to as the* '***ITAT***']. However, the Impugned Order records the factual position only in respect of ITA No. 1069/DEL/2019.

4. The Revenue urges identical questions of law in all the afore-noted appeals with the only difference being the figures relating to the additions made under Section 68 read with Section 115BBE of the Act. Accordingly, the same are being decided by way of this common order.

5. It is not in dispute, as noted in the Impugned Order, that the factual background in all the three appeals is quite similar. However, for the sake of convenience, the facts in respect of ITA 125/2020 are being noted and discussed elaborately. Briefly stated, the Respondent-Assessee is an individual who has derived income from interest on loan, FDR, NSC and bank interest under the head of 'income from other sources' in respect of A.Y. 2015-16. She filed her return of income, declaring total income of Rs.

13,96,116/-. After claiming deduction of Rs. 1,60,000/- under Chapter VI-A, the total taxable income of Respondent was declared to be Rs. 12,36,120/-. The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the AO noticed that for the relevant year under consideration, the Respondent had claimed exempted income of Rs. 96,75,939/- as receipts from Long Term Capital Gain [*hereinafter referred to as* '***LTCG***'] under Section 10(38) of the Act. He *inter alia* concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of Rs. 1,09,12,060/-, making an addition of Rs. 96,75,939/- under Section 68 read with 115BBE of the Act on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited. The appeal before the CIT(A) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying taxes. Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted *vide* the Impugned Order, relevant portion whereof reads as under:

> *"21. A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment 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 statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings.*
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> *xx xx xx*

23. 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. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and affirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry.

24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find any place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Qrganic food Processing Ltd – a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also.

25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of the fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void.

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30. 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, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case 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."

6. Aggrieved by the aforesaid findings, the Revenue has filed the instant appeals contending that, notwithstanding the tax effect in the appeals falling below the threshold prescribed under Circular No. 23 dated 6th September, 2019, the appeals are maintainable in view of the Office Memorandum dated 16th September, 2019 issued by the CBDT, which clarifies that the monetary limits prescribed in the aforementioned circular shall not apply where an assessee is claiming bogus LTCG through penny stocks, and the appeals be heard on merits.

7. Mr. Zoheb Hossain, learned senior standing counsel for the revenue (Appellant herein), contends that the learned ITAT has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity. He submits that there are certain germane factual errors,

inasmuch as the learned ITAT has wrongly recorded that there was no independent enquiry conducted by the AO, when in fact the AO had issued notices to the companies in question under Section 133(6) of the Act. He points out that the observations recorded in para 25 of the Impugned Order are factually incorrect, and in conflict with para 4 of the order of the CIT(A) dated 24th December, 2018 which reads as follows:

> *"4. Even the broker through whom the shares were dematerialized and sold i.e. SMC Global Securities Ltd. was also a part of the scam. This is a Delhi based broker whose regional office was also surveyed. The sub brokers were also surveyed and also statements recorded which confirmed the payment of cash commission by the beneficiaries for being part of the syndicate."*

8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in ***Suman Poddar v. ITO***, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in ***Sumati Dayal v. CIT,*** (1995) Supp. (2) SCC 453.

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips.

10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

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.

15. Accordingly, the present appeals are dismissed.

SANJEEV NARULA, J

RAJIV SAHAI ENDLAW, J

JANUARY 15, 2021
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