

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member]

I.T.A. No. 2474/Kol/2018
Assessment Year: 2014-15

Mahavir Jhanwar.....Appellant
[PAN :ACTPJ 9228 JJ]

ITO, Ward 35(4), Kolkata.....Respondent

Appearances by:

Shri Suraj J Jhanwar, CA, appeared on behalf of the appellant

Shri Robin Choudhury, Addl. CIT DR, appearing on behalf of the Respondent.

Date of concluding the hearing : January 09, 2019

Date of pronouncing the order : February 01,2019

O R D E R

Per J. Sudhakar Reddy :-

This appeal is filed by the assessee and is directed against the order of the ld. Commissioner of Income Tax (Appeals) - 10, Kolkata (hereinafter the 'ld. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dated 18/05/2018.

2. The sole issue that arises for my adjudication is whether the Assessing Officer was right in rejecting the claim of the assessee that he had earned Long Term Capital Gains on purchase and sale of the shares of M/s Unno Industries. The AO based on a general report and modus operandi adopted generally and on general observations has concluded that the assessee has claimed bogus long term capital gain. He made an addition of the entire sale proceeds of the shares as income and rejected the claim of exemption made u/s 10(38) of the Act. The evidence produced by the assessee in support of the genuineness of the transaction was rejected.

3. The assessee carried the matter in appeal and the ld. CIT(A), Kolkata, had upheld the addition. The ld. CIT(A) has in his order relied upon "circumstantial evidence" and "human probabilities" to uphold the findings of the AO. He also relied on the so called "rules of suspicious transaction". No direct material was found to controvert the evidence filed by the assessee, in support of the genuineness of the transactions. In other words, the overwhelming evidence filed by the assessee remains unchallenged and

uncontroverted. The entire conclusions drawn by the revenue authorities, are based on a common report of the Director of Investigation, Kolkata, which was general in nature and not specific to any assessee. The assessee was not confronted with any statement or material alleged to be the basis of the report of the Investigation Wing of the department and which were the basis on which conclusion were drawn against the assessee. Copy of the report was also not given.

4. The Id. D/R, submitted that the transaction was not genuine. He argued that the entire capital gain was stage managed by a few operators and investors. He relied on the order of Id. Assessing Officer and argued that the same be upheld. He relied on the order of the Chennai 'A' Bench of the Tribunal in the case of *M/s. Pankaj Agarwal & Sons (HUF) vs. ITO in ITA No. 1413 to 1420/CHNY/2018; order dt. 06/12/2018*, for the proposition that such capital gains have to be brought to tax. He also relied on the judgment of the Hon'ble Bombay High Court in the case of *Sanjay Bimalchand Jain vs. Principal Commissioner of Income-tax-1, Nagpur; [2018] 89 taxmann.com 196 (Bombay)* and the decision of the *Smt. M.K. Rajeshwari vs. ITO; ITA No.1723/Bng/2018; Assessment Year 2015-16, order dt. 12/10/2018*.

5. After hearing both sides, I find that in a number of cases this bench of the Tribunal and Jurisdictional Calcutta High Court has consistently held that, decision in all such cases should be based on evidence and not on generalisation, human probabilities, suspicion, conjectures and surmises. In all cases additions were deleted. Some of the cases were, detailed finding have been given on this issue, are listed below:-

Sl.No	ITA Nos.	Name of the Assessee	Date of order /Judgment
1.	ITA No.714 to 718/Kol/2011 ITAT, Kolkata	DICT vs. Sunita Khemka	28.10.2015
2	214 ITR 244 Calcutta High Court	CIT vs. Carbo Industrial Holdings Ltd.	-
3.	250 ITR 539	CIT vs. Emerald Commercial Ltd.	23.03.2001
4.	ITA No.1236-	Manish Kumar Baid vs. ACIT	18.08.2017

	1237/KOI/2017		
5.	ITA No.569/Kol/2017	Gautam Pincha	15.11.2017
6	ITA No.443/Kol/2017	Kiran Kothari HUF	15.11.2017
7	ITA No.2281/Kol/2017	Navneet Agarwal vs. ITO	20.07.2018
8	ITA No.456 of 2007 Bombay High Court	CIT vs. Shri Mukesh Ratilal Marolia	07.09.2011
9	ITA No.95 of 2017 (O&M)	PCIT vs. Prem Pal Gandhi	18.01.2018
10	ITA No.1089/Kol/2018	Sanjay Mehta	28.09.2018

6. Regarding the case laws relied upon by the Id. Departmental Representative, I find that, in the case of *M/s. Pankaj Agarwal & Sons (HUF)*(supra), the issue was decided against the assessee for the reason that, the assessee could not justify his claim as genuine by producing evidence and was only arguing for the matter to be set aside to the lower authorities on the ground of natural justice. As similar arguments were not raised before the lower authorities by the assessee, the ITAT rejected these arguments. In the case on hand, all evidences were produced by the assessee. In the case of *Sanjay Bimalchand Jain*, legal heir of Santi Devi Bimalchand Jain, the Hon'ble High Court upheld the stand of the Revenue that the transaction in question is an adventure in nature of trade and the profit of the transactions is assessable under the head of 'Business Income'. In the case on hand, the Id. Assessing Officer has not assessed this amount as 'Business Income'. In any event, I am bound to follow the judgment of the Jurisdictional High Court in this matter. I find that the assessee has filed all necessary evidences in support of the transactions. Some of these evidences are (a) evidence of purchase of shares, (b) evidence of payment for purchase of shares made by way of account payee cheque, copy of bank statements, (c) copy of balance sheet disclosing investments, (d) copy of demat statement reflecting purchase, (e) copy of merger order passed by the High Court , (f) copy of allotment of shares on merger, (g) evidence of sale of shares through the stock exchange, (h) copy of demat statement showing the sale of shares, (i) copy of bank statement reflecting sale receipts, (j) copy of brokers ledger, (k) copy of Contract Notes etc.

7. The proposition of law laid down in these case laws by the Jurisdictional High Court as well as by the ITAT Kolkata on these issues are in favour of the assessee. These are squarely applicable to the facts of the case. The Id. Departmental Representative, though not leaving his ground, could not controvert the claim of the Id. Counsel for the assessee that the issue in question is covered by the above cited decisions of the Hon'ble Jurisdictional Calcutta High Court and the ITAT. I am bound to follow the same.

8. In view of the above discussion I delete the addition made u/s 68 of the Act, on account of Long Term Capital Gains.

9. In the result, appeal of the assessee is allowed.

Kolkata, the 1st day of February, 2019.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 01.02.2019
(RS, Sr. PS)

Copy of the order forwarded to:

1. Mahavir Jhanwar, C/o Jhanwar & Co., 566, Marshall House, 25, Strand Road, Kol-1.

2. ITO, Ward-35(4), Kolkata, 110, Shantipally, Kol-17.

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches