

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” Bench, Mumbai**

**Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No. 5553/Mum/2018
(Assessment Year: 2014-15)**

Mr. Bansilal I. Jain
Shop No.-1, Ratandeeep Bldg,
Sector – 9, Vashi,
Navi Mumbai – 400703

Pr. CIT-28
Room No. 301, 3rd Floor,
Tower No.6, Vashi Railway
Station Complex, Vashi,
Navi Mumbai – 400703

PAN – AAHPJ9866C

(Appellant)

(Respondent)

Appellant by: Shri Vallabh Parmar, A.R
Respondent by: Shri Purushottam Tripuri, CIT D.R

Date of Hearing: 17.12.2020
Date of Pronouncement: 04.01.2021

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the Principal Commissioner of Income Tax-28, Mumbai (hereinafter referred to as “Pr. CIT”) under Sec. 263 of the Income Tax Act, 1961 (for short „Act”) dated 27.02.2018 for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. On facts and circumstances of the case and in law Ld. Pr. CIT erred in setting aside the order of AO u/s 143(3) dated 30-06-2016 and directing the AO to pass fresh assessment order in accordance with the law.
2. On facts and circumstances of the case and-in law Ld. Pr. CIT erred in setting aside the order of AO u/s 143(3) dated 30-06-2016 and directing the AO to pass fresh assessment order in accordance with the law and at the same time directing the AO to disallow exemption of Rs.58,56,466/- u/s 10(38) LTCEG on Sale of shares of NYSSACORP thus directions are contradictory.

3. On facts and circumstances of the case and in law Ld. Pr.CIT erred in giving finding that appellant has voluntarily disclosed income of Rs 40,67,350/- on account of LTCG on same issue in A.Y. 2013-14, without appreciating the fact that voluntary disclosure of LTCG was sale of shares of UNISYS SOFTWARE in A.Y. 2013-14 and not shares of 'NYSSACORP' which were sold during the year, thus scrip were different.
4. On facts and circumstances of the case and in law Ld. Pr. CIT erred in holding that order of AO u/s 143(3) is erroneous in so far as it is prejudicial to the interest of revenue without appreciating the fact that issue of taxability of LTCG on sale of shares of NYSSACORP was fully examined by AO at the time of assessment proceedings and only after examining such issue AO satisfied himself that same is exempt and accordingly passed order u/s 143(3).
5. On facts and circumstances of the case and in law Ld. Pr. CIT erred in holding that order of AO u/s 143(3) is erroneous in so far as it is prejudicial to the interest of revenue without appreciating the fact that shares of NYSSACORP were genuinely purchased in A.Y. 2013-14 and such purchases were not disputed in A.Y. 2013-14 in scrutiny assessment order and further there are no allegations by SEBI or investigation wing of Income Tax that transactions in these shares are not genuine
6. The appellant craves, to consider each of the above ground of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal.”

2 Briefly stated, the assessee who is engaged in the business of trading in gold jewellery had e-filed his return of income for A.Y 2014-15 on 25.09.2014, declaring a total income of Rs.11,40,230/-. The return of income filed by the assessee was initially processed as such under Sec. 143(1) of the Act. Subsequently, the income of the assessee was assessed by the A.O vide his order passed under Sec. 143(3) dated 30.06.2016 at Rs.12,35,940/-.

3. After culmination of the assessment proceedings the Pr. CIT called for the assessment records of the assessee. It was observed by the Pr. CIT that the assessee had claimed to have purchased 500 shares of M/s Ravinay Trading Corporation Ltd. (Nyssacorp) on 07.08.2012 for Rs.9,03,759.35, which after a lapse of one year were sold by him on different dates with a resultant profit of Rs.59,48,750/-, as under:

Name	Date of purchase	Qty	Purchase cost	Sales date	Qty	Amount	Profit	LTCG/STCG
Nyssacorp	07.08.2012	50000	903759	30.10.2013	10000	1367853.31		
				12.11.2013	10000	1342937.94		
				10.12.2013	7738	1064270.14		
				12.12.2013	2454	340946.25		
				13.12.2013	10000	1871890.03		

				16.12.2013	5000	698166.91		
				17.12.2013	4500	623960.89		
				19.12.2013	308	42484.26	5948750.65	LTCG

4. On a perusal of the contract notes dated 09.06.2016 it was gathered by the Pr.CIT that the assessed had sold the aforesaid shares at a time when the company had declared a loss of Rs.1.43 crore in the third quarter. Apropos the assessee's claim of LTCG of Rs.58,56,466/- on sale of the aforesaid shares as exempt under Sec.10(38) of the Act, the Pr. CIT was of the view that the A.O while framing the assessment had accepted the same without making any verification as regards the genuineness/correctness of the purchase/sale transactions under consideration. Holding a conviction that the failure on the part of the A.O in allowing the assessee's claim of exemption under Sec.10(38) without making any verification as regards the genuineness and correctness of the aforesaid share transactions had rendered the assessment order passed by him as erroneous insofar it was prejudicial to the interest of the revenue the Pr. CIT issued a „Show cause“ notice (for short „SCN“) dated 12.09.2017 therein calling upon the assessee to explain as to why the assessment order passed by the A.O may not be revised. In reply, it was submitted by the assessee that he had in the course of the assessment proceedings furnished the requisite details and documents as were called for by the A.O. As regards the purchase/sale of shares carried out during the year under consideration it was the claim of the assessee that the documents substantiating the genuineness and veracity of the aforesaid transactions viz. purchase bills of shares, sale bills of shares, copy of demat account, copy of the assessee's account with the broker viz. India Infoline Ltd., copy of return of income and balance sheet were duly filed in the course of the assessment proceedings. Apart from that, it was the claim of the assessee that the aforesaid share transaction of purchase and sale of shares was carried out by his broker viz. India Infoline Ltd. through recognized stock exchange. It was the claim of the assessee that as the A.O while framing the assessment had only after vetting the aforesaid share transactions to his satisfaction accepted

the same, therefore, the Pr. CIT was divested of his jurisdiction to revise the assessment order u/s 263 of the Act.

5. After deliberating on the contentions advanced by the assessee the Pr.CIT was however not persuaded to subscribe to the same. Observing, that the A.O while framing the assessment had failed to verify the genuineness /correctness of the aforesaid share transactions and had summarily allowed the assessee's claim of exemption of Rs. 58,56,466/- under Sec.10(38), the Pr. CIT was of the view that the assessment order passed by him u/s 143(3), dated 30.06.2016 was rendered as erroneous insofar it was prejudicial to the interest of the revenue within the meaning of Sec.263 of the Act. In order to support his aforesaid conviction support was drawn by the Pr. CIT from the fact the assessee in the immediately preceding year i.e A.Y 2013-14 had voluntarily disclosed an income of Rs.40,67,350/- on account of LTCG and had paid taxes thereon. Accordingly, the Pr. CIT being of the view that the A.O while framing the assessment had failed to carry out necessary verifications as regards the authenticity of the aforesaid share transactions therein „set aside“ the assessment order with a direction to the A.O to frame a fresh assessment order in accordance with law after affording an opportunity of being heard to the assessee. At the same time, the Pr. CIT also directed the A.O to disallow the assessee's claim of exemption of LTCG of Rs.58,56,466/- raised under Sec. 10(38) of the Act.

6. Aggrieved, the assessee has assailed the order passed by the Pr. CIT under Sec. 263, dated 27.02.2018 in appeal before us. At the very outset of the hearing of the appeal it was submitted by the Id. Authorized Representative (for short „A.R“) for the assessee that the present appeal involved a delay of 142 days. Explaining the reasons leading to the delay in filing of the present appeal it was submitted by the Id. A.R that the same had occasioned, for the reason, that the impugned order passed by the Pr.CIT u/s 263, dated 27.02.2018 was though served upon the assessee's employee viz. Mr. Jitesh Chauhan, however, the latter forgot to deliver the same to the

assessee. It was stated by the Id. A.R that the impugned order was handed over by the employee i.e Mr. Jitesh Chauhan to the assessee only on 28.09.2018. It was submitted by the Id. A.R that after receiving the impugned order the assessee immediately delivered the same to his tax consultant and involving no further loss of time filed the present appeal on 01.10.2018. In the backdrop of the aforesaid facts it was submitted by the Id. A.R that as the delay involved in filing of the present appeal had occurred on account of a bonafide reason, therefore, the same may be condoned. In order to dispel any doubts as regards the aforesaid factual position so projected before us the Id. A.R took us through the „affidavits“ of the assessee i.e Shri Bansilal C.Jain and that of the latter's employee i.e Shri. Jitesh Chauhan.

7. Per contra, the Id. Departmental Representative (for short „D.R“) did not object to the seeking of condonation of delay in filing of the present appeal by the assessee.

8. We have heard the authorized representatives for both the parties and perused the material available on record. In our considered view the fact that the delay in filing of the present appeal had occasioned on account of failure on the part of the assessee's employee viz. Shri Jitesh Chauhan who had inadvertently failed to timely deliver the impugned order to the assessee is substantiated from the aforesaid „affidavits“ to which our attention had been drawn by the Id. A.R. In fact, the assessee's employee viz. Sh. Jitesh Chauhan had in his „affidavit“ categorically admitted that the delay in delivering the impugned order was on account of an inadvertent lapse on his part. In our considered view the delay in filing of the present appeal does not smack of any malafide or lackadaisical approach on the part of the assessee but is backed by an inadvertent lapse on the part of his employee. In the backdrop of the aforesaid facts we are of a strong conviction that as there is a justifiable reason explaining the delay of 142 days involved in filing of the present appeal by the assessee, therefore, the same merits to be condoned. Accordingly, we

condone the delay of 142 days involved in filing of the present appeal by the assessee.

9. Adverting to the merits of the appeal the Id. A.R took us through the relevant facts of the case. It was averred by the Id. A.R that the A.O while framing the assessment had called for the requisite documents pertaining to purchase/sale of shares of M/s Ravinay Trading Corporation Limited (Nyssacorp) and had only after perusing the same to his satisfaction accepted the assessee's claim of exemption of Rs. 58,56,466/- raised under Sec. 10(38) of the Act. In order to buttress his aforesaid claim the Id. A.R took us through the relevant pages of the assessee's paper book (for short "APB"). In order to support his claim that documents evidencing the aforesaid share transactions were filed by the assessee in the course of the assessment proceedings the Id. A.R took us through the copies of the contract notes and the demat account which were there before the A.O. On being queried as to whether the A.O while framing the assessment had called for any details as regards the aforesaid share transactions the Id. A.R took us through a notice issued under Sec. 142(1), dated 11.04.2016. It was stated by the Id. A.R that pursuant to a query raised by the A.O as regards the addition made to the assessee's „capital account for the year under consideration documents in support of the aforesaid share transactions were placed on his record. As regards the view taken by the Pr. CIT that a similar issue was involved in the case of the assessee for the immediately preceding year i.e A.Y 2013-14, it was submitted by the Id. A.R that the said observation of the revisional authority was absolutely incorrect and in fact out of context. It was submitted by the Id. A.R that in A.Y 2013-14 the assessee had sold shares of Unisys Software. It was submitted by the Id. A.R that as Unisys Software was subjected to certain investigations by SEBI, therefore, the assessee only in order to buy peace of mind had offered LTCG on sale of shares of the said company under the IDS scheme. It was averred by the Id. A.R that the Pr.CIT was in error in drawing adverse inferences on the basis of the aforesaid transaction which had no nexus with the sale of shares by the assessee

during the year under consideration. Adverting to the additional ground of appeal that was raised by the assessee, it was submitted by the Id. A.R that the very basis for revising of the assessment order was divorced from the basis on which the assessment order was initially sought to be revised by the Pr. CIT vide his SCN dated 12.09.2017. It was submitted by the Id. A.R that de hors affording of any opportunity of being heard to the assessee as regards the issue on which the assessment order had been „set aside“ by the revisional authority, the order passed by the Pr. CIT could not be sustained and was liable to be struck down on the said count itself. It was further submitted by the Id. A.R that the Pr. CIT had exceeded his jurisdiction under Sec. 263 and only for the purpose of substituting his view as against that arrived at by the A.O had taken recourse to the proceedings under Sec. 263 of the Act. Apart from that, it was averred by the Id. A.R that merely because the assessment order did not contain an elaborate discussion as regards the verifications that were carried out by the A.O in respect of the share transactions under consideration, the same, thus, would by no means justify invocation of the provisions of Sec. 263 of the Act. In order to support his aforesaid contention the Id. A.R relied on the judgment of the Hon^{ble} High Court of Bombay in the case of CIT Vs. Gabriel India Ltd. (1993) 263 ITR 108 (Bom). Further, relying on the order of the ITAT, Mumbai Benches “A”, Mumbai in Ambuja Cements Vs. CIT (LTU), Mumbai, ITA No. 3568/Mum/2016, dated 10.11.2017 it was submitted by the Id. A.R that a revisional authority remained under a statutory obligation for allowing the assessee an opportunity to explain as to why the assessment may not be held to be erroneous insofar it was prejudicial to the interest of the revenue on the ground on which the order was sought to be revised. In the backdrop of his aforesaid contentions it was submitted by the Id. A.R that the order passed by the Pr. CIT under Sec. 263 could not be sustained and was liable to be vacated.

10. Per contra, the Id. D.R relied on the order passed by the Pr.CIT under Sec. 263, dated 27.02.2018. It was averred by the Id. D.R that as the Pr. CIT

had sought to revise the order passed by the A.O under Sec. 143(3), dated 30.06.2016 on multiple grounds, therefore, no infirmity did emerge from the „setting aside“ of the assessment framed by the A.O on the basis of one of the aforesaid issues. As regards the observations recorded by the Pr.CIT in respect of the voluntary disclosure of income i.e LTCG by the assessee in A.Y. 2013-14, it was submitted by the Id. D.R that the Pr.CIT by referring to the past conduct of the assessee had only tried to supplement his conviction that considering the same the A.O ought to have been more vigilant while verifying the authenticity of the assessee“s claim for exemption raised under Sec. 10(38) during the year under consideration. Adverting to the notice issued by the A.O under Sec. 142(1), dated 11.04.2016 it was submitted by the Id. D.R that no query as regards the aforesaid share transactions was ever raised by the A.O. It was stated by the Id. D.R that though the assessee is stated to have filed certain documents as regards the aforesaid share transactions, however, the A.O had at no stage during the course of the assessment proceedings carried out any verification as regards the genuineness and correctness of such transactions. On the basis of the aforesaid contentions it was averred by the Id. D.R that no infirmity did emerge from the order passed by the Pr.CIT under Sec.263 of the Act.

11. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record as well as the judicial pronouncements pressed into service by the counsel for the assessee appellant. As is discernible from the records the assessee had claimed to have purchased 5000 shares of M/s Ravinay Trading Corpn. Ltd. (Nyssacorp) on 07.08.2012 for Rs.9,03,759.35, which thereafter are stated to have been sold after a time gap of one year on different dates i.e 30.10.2013 to 19.12.2013 with a resultant profit of Rs.59,48,750/-. LTCG arising on the sale of the aforesaid shares was claimed by the assessee in his return of income as exempt u/s 10(38) of the Act. On a perusal of the records, we find, that the A.O in the course of the assessment proceedings had neither queried the assessee as regards the aforesaid share

transactions nor carried out any verifications pertaining to the same on his own. In fact, we find that though the assessee in reply to the notice issued under Sec. 142(1), dated 11.04.2016 had in pursuance to a query raised by the A.O as regards the additions in his „capital account“ filed the contract notes and demat statements along with the copies of his bank statements but the A.O had not thought it apt to verify the genuineness and correctness of the said transactions on the basis of which LTCG of Rs. 58,56,466/- was claimed as exempt u/s 10(38) of the Act. Neither is there anything available on record nor any material has been placed before us which would reveal that the A.O had carried out any verification as regards the genuineness/correctness of the assessee’s claim for exemption of Rs. 58,56,466/- under Sec. 10(38) of the Act. As regards the observation of the Pr. CIT that the assessee had voluntarily disclosed a similarly placed LTCG of Rs. 40,67,350/- in the immediately preceding year i.e A.Y.2013-14 and paid taxes on the same, we concur with the contention of the Id. DR that by referring to the said transaction the Pr. CIT had only tried to fortify his view that considering the past conduct of the assessee the A.O ought to have carefully verified the genuineness of the assessee’s claim for exemption of LTCG on sale of shares u/s 10(38) as was raised during the year under consideration. We are not at all impressed by the claim of the Id. A.R that though the Pr. CIT vide his SCN, dated 12.09.2017 had sought to revise the assessment order in context of the LTCG of Rs. 58,56,466/- pertaining to purchase/sale of shares of M/s Ravinay Trading Corpn. Ltd. (Nyssacorp) that was claimed by the assessee as exempt under Sec. 10(38), but then, considering the fact that the assessee had voluntarily disclosed LTCG of Rs.40,67,350/- in A.Y. 2013-14 he had directed the A.O to conduct proper inquiries, investigations and examination. As observed by us hereinabove, the reference by the Pr. CIT to the voluntary disclosure of LTCG of Rs.40,67,350/- on sale of shares and payment of taxes on the same in A.Y. 2013-14 was only in order to support his conviction that considering the past conduct of the assessee the A.O ought to have been more careful and should have thoroughly verified the genuineness of the

share transactions and the resultant claim for exemption of LTCG raised by the assessee u/s 10(38) during the year in question.

12. On a perusal of the orders of the lower authorities, we find, that as the A.O had failed to verify the genuineness and correctness of the aforesaid share transactions and had rather summarily accepted the assessee's claim for exemption of LTCG of Rs.58,56,466/- under Sec.10(38), therefore, the Pr. CIT remaining well within the realm of his jurisdiction as contemplated in the „Explanation 2(a)“ to Sec. 263 of the Act had rightly „set aside“ the assessment order with a direction to the A.O to frame the same afresh after affording an opportunity of being heard to the assessee. At this stage, we may herein observe that the Pr.CIT while directing as hereinabove, had however, inadvertently directed the A.O to disallow the assessee's claim of exemption of LTCG of Rs.58,56,466/- under Sec. 10(38) of the Act. As the aforesaid direction of the Pr. CIT clearly militates against his direction to the A.O to pass a fresh assessment order in accordance with law after affording an opportunity of being heard to the assessee, therefore, to the said extent the same cannot be sustained and is expunged from the impugned order.

13. In the backdrop of our aforesaid observations we herein uphold the order passed by the Pr.C T under Sec. 263, dated 27.02.2018, though subject to the modification stated hereinabove.

14. Resultantly, the appeal filed by the assessee is partly allowed in terms of our aforesaid observation.

Order pronounced in the open court on 04.01.2021

Sd/-
M. Balaganesh
(ACCOUNTANT MEMBER)

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 04.01.2021
PS: Rohit

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "B" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai

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