

**IN THE INCOME TAX APPELLATE TRIBUNAL ‘I’ BENCH, MUMBAI  
BEFORE SHRI AMARJIT SINGH, AM AND MS. KAVITHA RAJAGOPAL, JM**

ITA No. 3261/Mum/2023  
(Assessment Year: 2020-21)

M/s. Elara India Opportunities Fund Limited C/o. Sudit K Pareksh & CO., LLP 2002, Urmi Estate-Tower A, 20 <sup>th</sup> Floor, 95, Ganpatrao Kadam Marg, Lower Parel (W), Mumbai-400 013	Vs.	Dy. CIT (International Taxation)- 2(2)(1) Mumbai-400 021
PAN/GIR No. AABCE 6307 N		
<b>(Assessee)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	Shri Rahul Sarda
<b>Respondent by</b>	:	Shri Anil Sant
<b>Date of Hearing</b>	:	20.03.2024
<b>Date of Pronouncement</b>	:	13.06.2024

**ORDER**

**Per Kavitha Rajagopal, JM:**

The assessee in the present appeal is challenging the final assessment order dated 05.07.2023 of the Id. Assessing Officer ('A.O.' for short) passed in pursuance of the direction of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP' for short) relevant to Assessment Year (A.Y. for short) 2020-21.

2. The solitary issue in this appeal is the addition made u/s. 68 of the Act on the sale of shares of M/s. International Conveyors Ltd. amounting to Rs.6,64,96,351/- to be an 'unexplained source of investment' made by the assessee along with the other consequential grounds. The assessee has also raised the additional grounds which are connected to be regular grounds and are, therefore, admitted for adjudication.

3. Briefly stated the assessee is a portfolio investor registered with Securities and Exchange Board of India (SEBI) and is a tax resident of Mauritius. The assessee had filed its return of income declaring total income at Rs.6,59,33,460/-. The assessee's case was selected for scrutiny for the reason that the Id. A.O. observed that the assessee has shown long term capital gain by trading in stock of M/s. International Conveyors Ltd. (ICL for short) where the assessee had sold 22,41,929 shares for a sale consideration of Rs.6,64,96,351/- and had claimed Rs.79,37,345/- as 'exempt income' as per the DTAA between India and Mauritius. The Id. A.O. held the same to be a penny stock script and had made an addition of the impugned amount and had determined the total income at Rs.13,24,29,811/-. The Id. A.O. had passed the draft assessment order dated 26.09.2022 and subsequent to which the assessee had filed its objection before the Hon'ble DRP which was then disposed off and pursuant to the direction of the Hon'ble DRP, the Id. A.O. passed the final assessment order dated 05.07.2023.

4. The assessee is in appeal before us, challenging the final assessment order.

5. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that the assessee is a foreign portfolio investor which has been investing in India since 2006 onwards. The Id. AR then stated that the assessee had acquired 65 lacs shares of M/s. International Conveyors Ltd. from 2008 to 2009 and has been holding these shares for more than 10 years. The assessee had sold 22,41,929 shares for a consideration of Rs.6,64,96,351/- at an average price of Rs.29.66 per share and further to this the Id. AR stated that the assessee during the year under consideration has not only sold the shares of ICL but had sold a total shares of value amounting to

Rs.293,08,21,323/- in which the sale of the impugned order constitute only 2.27% of the total sale value. The Id. AR also contended that being a tax resident of Mauritius, the assessee was exempt to the capital gain income as per Indo-Mauritius DTAA substantiating that there was no necessity of the assessee to get into the bogus transaction. The Id. AR brought our attention to the audited financials, the share holding pattern of ICL and stated that the said scrip is not a penny stock as alleged by the department.

6. The learned Departmental Representative ('Id. DR' for short), on the other hand, controverted the said facts and stated that these are not genuine transactions and are merely to route unaccounted money as exempt LTCG by money laundering. The Id. DR further stated that the increase in the price is unrealistic which has not been factually substantiated by the assessee. The Id. DR relied on a catena of decisions in support of the revenue.

7. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee during the year under consideration had entered into the transaction of sale of shares in the scrip of M/s. International Conveyors Ltd. aggregating to Rs.6,64,96,351/- which the Id. A.O. contends to be an accommodation entry for the purpose of availing bogus long term gain, the assessee being one of the beneficiary of such transaction. The Id. A.O. has held that the share price of the said script has been manipulated for the purpose of availing bogus profits and losses. The assessee is said to have sold 22,42,922 shares of International Conveyors Ltd. thereby offering a capital gain of Rs.79,37,345/- which has been claimed as 'exempt' as per the DTAA between India and Mauritius. The assessee in its reply to the Id. A.O. has stated

that it had directly subscribed to 3,25,000 warrants of M/s. International Conveyors Ltd. at the issue price of Rs.238/- in the year 2008 directly from the company for which a total consideration of Rs.7,73,50,000/- was paid where the assessee had paid 10% of the said consideration amounting to Rs.77,35,000/- immediately and the balance was payable after the conversion of the warrants and had subsequently converted the same into shares in 2009 which was sold only during A.Y. 2020-21. The assessee is said to have furnished the bank details of the said payment along with FIRC copy issued to M/s. International Conveyors Ltd. for receipt of funds against preferential allotment of warrants. The assessee further stated that the said scrip was listed on Bombay Stock Exchange (BSE) and also subsequently got listed on NSE also. The assessee contended that the assessee has invested/transacted in several other scrips during the year under consideration which aggregates to Rs.293,08,21,323/- in which only 2.27% of the total sale value is that of the alleged scrip which is held to be a penny stock by the lower authorities. The assessee has stated that it had provided the contract notes, the bank account details showing the purchase and sale consideration which was routed through the bank account in India and further to that the LTCG was claimed as 'exempt' as per Article 13(3) of the India-Mauritius tax treaty. The assessee has also given the details of the financials of M/s. International Conveyors Ltd. which is said to be in the business of manufacture and marketing of PVC fire resistant antistatic conveyor belting since 1978 having its factory at two locations with around 78 employees and the reserves and surplus being approximately 152 crores. The assessee has furnished the annual report of ICL for FY 18-19 and FY 19-20. The ld. A.O. have failed to consider the submission of the assessee for the reason that the company in whose share the assessee has invested has not given any

return on net worth, the rate of growth on operating margin was not consistent, the debts during the financial year has increased by 56% whereas, the total sales was the same, the operating cash flow had increased substantially compared to the earlier years inspite of huge investments made by the company along with the various other factors. The Id. A.O. held the same to be a penny stock, thereby making an addition of the investment made by the assessee in the said script as 'unexplained source' u/s. 68 of the Act.

8. The assessee raised its objection before the Hon'ble DRP that section 68 of the Act could not be applicable to a non resident where the assessee was benefited by Indo-Mauritius DTAA as per section 90 of the Act and the same was disposed off against the assessee by stating that section 115BBE of the Act or section 68 of the Act was applicable to the assessee in case where Mauritius had no such tax on deemed income. The Hon'ble DRP further stated that the unexplained income was very much taxable in India as per Article 22 of the protocol dated 10.12.2016 where the other income/residuary income is taxable in India. It further held that incase of irregularity/money laundering, section 68 would be applicable even to a non resident and not the Articles of DTAA.

9. In the above factual matrix of the case, it is to be noted that the assessee being a tax resident of Mauritius has acquired the shares and has been holding the same for almost 10 years from the date of acquisition which was during the year under consideration was purchased by M/s. Team India Managers Ltd. The contention of the Id. A.O. that the movement of the price of shares is abrupt and unrealistic, is not acceptable for the reason that the price per share was Rs.11.90 at the time of acquisition and has increased to Rs.29.66 over a period of 10 years, is according to us a reasonable increase

in the price of the share unlike in most of the penny stock cases where the price of the shares sky rockets manifolds within a short span of time. We also have noticed that the assessee has substantiated the financials of M/s. ICL where it is inferred that the said company is merely not a bogus entity having dummy directors. Pertinently, the Id. A.O. has merely relied on the fact that inspite of increase in the debt, the sales of the said company has not increased proportionately. The assessee being a SEBI registered FPI is engaged in the investment in various companies out of which the assessee earns income and is also the only source of income for the assessee. The Id. A.O. has failed to substantiate how the assessee is involved with Shri Naresh Jain alleged to be an accommodation entry provider who has even otherwise not specifically mentioned the assessee to be the beneficiary of accommodation entry and the scrip of ICL to be a penny stock. The Id. AR has placed reliance on the decision of the Hon'ble High Court of Gujarat in the case of *Pr. CIT vs. Jagat Pravinbhai Sarabhai* [2022] 142 taxmann.com 247 (Guj) where it has been held that the shares were retained for more than 10 years and sold after a long time which infer that the investment was not bogus and the scrip was held to be not a penny stock. It was also held that such investments are not merely for the purpose of earning exempt income but is a genuine transaction. The Id. AR also relied on the decision of Hon'ble High Court of Gujarat in the case of *Pr. CIT vs. Sangeeta Ben Jagdish Shah* wherein it was held that where the assessee had given the complete details of the transaction, the same cannot be held to be a 'bogus transaction'. The Id. AR had also relied on the decision Hon'ble High Court of Gujarat in the case of *Mamta Rajivkumar Agarwal* [2023] 155 taxmann.com 549 (Guj) where on identical facts the

Hon'ble High Court held that the transaction in particular scrip was not a penny stock.

The relevant extract of the said decision is cited hereunder for ease of reference:

**3.3** *The Tribunal confirmed the findings of the CIT(A) insofar as, it held in favour of the assessee. Findings of the Tribunal indicate that the assumption of the AO that the transaction carried out by the assessee are similar to the modus operandi of penny stock was misplaced. The Tribunal on facts observed thus:*

*"11.1.....On analyzing the facts of the present case, we note that the AO on one hand has alleged that the entire transaction was bogus but on the other hand the AO himself has allowed the cost of acquisition against the sale of shares, meaning thereby, the purchase of the shares has been admitted as genuine. The transactions of purchase and sales go hand in hand. In simple words, sales is not possible without having the purchases. Thus, once purchases has been admitted as genuine, then corresponding sales cannot be doubted until and unless some adverse materials are brought on record. As such, we note that the AO in the present case has taken contradictory stand. On one hand, the AO is treating the entire transaction as sham transaction and on the other hand he's allowing the benefit of the cost of acquisition for the shares while determining the bogus long term capital gain....*

*11.2 It was alleged by the AO that the price of the share of M/s Shree Nath Commercial & Finance Ltd., increased in a short period of time which is not in commensurate to the financial performance of the company. The rise in the price of the scripts of a company, having no financial base/business activity/profatibility certainly gives rise to the doubt about such increase in the price. But in our considered view, this cannot be a sole criteria for reaching to the conclusion that the bogus long-term capital gain was generated which is exempted under section 10(38) of the Act. Such observation during the assessment proceedings provides reasons to investigate the matter in detail and the same cannot take the place of the evidence. But in the case on hand, there was no finding that the enquiry conducted either by the SEBI or the stock exchange with respect to rigging up of share price of M/s Shree Nath Commercial & Finance Ltd. Similarly, there was no finding with subsequent market price of the impugned scrip. We also note that there was no dispute raised by the Revenue with respect to the following facts:*

- 1. Shares were purchased through broker on recognized stock exchange.*
- 2. Purchase consideration of share was made through cheque.*
- 3. Share was duly dematerialized in D-mat account.*
- 4. Shares were sold through stock exchange after the payment of STT. The transactions have been confirmed by brokers.*
- 5. The payments were received through ECS in the D-mat account.*
- 6. Inflow of shares are reflected in D-mat account. Shares are transferred through D-mat account and buyer are not known to the assessee.*
- 7. There is no evidence that the assessee has paid cash to the buyer or the broker or any other entry provider for booking LTCG and share were purchased by the determined buyer."*

**4** *Hence, the Tribunal held, and in our opinion rightly so that there was no evidence available on record suggesting that the assessee or his broker was involved in rigging up of the price of the script of M/s Shree Nath Commercial & Finance Ltd. The assessee had acted in good faith. The Tribunal, therefore, correctly held that the Assessing Officer had acted only on assumption which was misconceived. The CIT(A) order dismissing the revenue's appeal was confirmed.*

10. In the above facts and circumstances of the case, we deem it fit to allow the grounds of appeal filed by the assessee by holding that the transaction made by the assessee in the scrip of ICL is a genuine transaction and, therefore, direct the ld. A.O. to delete the addition made u/s. 68 of the Act r.w.s 115BB of the Act.

11. In the result, the appeal filed by the assessee is allowed.

*Order pronounced in the open court on 13.06.2024*

Sd/-

(Amarjit Singh)  
Accountant Member

Mumbai; Dated : 13.06.2024  
Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)  
Judicial Member

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai