

**IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH,
RAIPUR**

**BEFORE : SHRI N.S.SAINI, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.21/BIL/2013
(Assessment Year :2006-2007)**

DCIT-1(1), Raipur	vs	Late Shri Vijay Pal Singh, Through L/H Smt. Vimlesh Kumari Singh, Prop.M/s Manohar Engineering & M/s Sharda Engineering, Baikunth, District – Raipur
PAN No. : AHJPS 0124 K		
(Appellant)	..	Respondent

Revenue by : Mrs. Shital Verma, DR
Assessee by : Shri K.P.Dewani, AR

**Date of Hearing : 10/01/2018
Date of Pronouncement 15/01/2018**

आदेश / O R D E R

Per Shri N.S.Saini, AM:

This is an appeal filed by the Revenue against the order of the CIT(A), Raipur, dated 08.02.2013 for the assessment year 2006-2007.

2. The Revenue has raised the following grounds :-

“1. *Whether in law and on facts & circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.1,98,28,636/- made by the AO by treating Long Term Capital Gain as income from undisclosed sources.*”

3. Brief facts of the case are that the AO observed that the shares on sale of which LTCG of Rs.1.95,39,611/- was shown and exemption u/s.10(38) of the Act was claimed were held barely for little more than one year to qualify the same as long term capital asset. The cost of the shares was Rs.2,69,400/- and sale consideration was Rs.1,98,28,636/-. He

observed that several assessees of Raipur have shown LTCG on sale of penny stocks like the assessee and on enquiry in the case Shri P.K. Agrawal & Co, broker, it was found that the transaction were of dubious nature. It was further held that scrips were not of reputed companies and there cannot be appreciation of 18-20 times in the prices of such scrips. The AO held that that the assessee has converted his unaccounted income into white income through LTCG and in this process has paid tax at 10% against the normal rate of tax.

4. In appeal before the CIT(A), the AR of the assessee contended that the action of AO is not justified. The AO has formed the opinion on the basis of general enquiries conducted in different cases of Raipur where the transactions relate to some other shares and were carried out through some other broker. named, Shri P.K. Agarwal & Co. The assessee has purchased and sold shares of Multiplus Resources Ltd., which is listed in the Calcutta Stock Exchange. The assessee filed all the necessary details of the transactions, such as contract notes for purchase and sales, copy of letter of transfer of the shares in the assessee's name, copy of share certificate, copy of ledger account, statement of transactions issued by the NSDL and Demat Account, details Security Transaction Tax paid, rate quotations on the date of purchase and sales and detailed address of the brokers, etc. The assessee has also contended that shares were sold after 18 months and not after 13 months as held by the AO. The sale proceeds were received through account payee cheques. It was contended that deviations referred in the assessment order relate to one

Shri P.K. Agrawal of M/s. P.K. Agrawal & Co and their associate, named Shri Parmod Sharma and they are in no way connected with the assessee. Therefore, it was not correct to draw adverse inference in the assessee's case on the basis of general enquiry and findings made in some other cases. The A.O. has neither brought forth any evidence to connect the assessee with those brokers, nor had he supplied the details or allowed cross-examination of the said persons, whose statements were strongly used for taking adverse action in the assessee's case. The transactions were made through Calcutta Stock Exchange, which is a registered Stock Exchange that is answerable to the Government and other regulating bodies such as SEBI etc. Under such circumstances, the conclusions made without allowing cross-examination of Shri P.K.Agrawal are not correct. The assessee has further stated that details of the enquiry reportedly conducted in the case of brokers, Shri Prakash Nahata & Co. and Shri Murarilal Goenka were not supplied to the assessee. According to the assessee, the transactions, being genuine, as they are recorded in the books of accounts/bank account in the normal course of business, the addition made on the basis of incorrect inferences drawn by the A.O. is not correct. The assessee relied on the following judicial pronouncements:-

- i) CIT vs. Anupam Kapoor (2008) 299 ITR 179 (P&H);
- ii) ACIT vs. Kamal Kumar S. Agrawal (Indl.) and Ors. (2010) 133 TTJ (Nag) 818

5. The CIT(A) called for a remand report from the AO, wherein the AO observed that the assessment order in this case was framed keeping in

view the inquiry conducted by the Investigation Wing of the Department at Kolkata regarding phenomenal increase in the prices of non-descript shares on which LTCG was shown by the assessees without paying any tax and the assessee is one of them. The inquiries of the Investigation Wing at Kolkata have more than established that there was a systematic manipulation of the share prices in Kolkata Stock Exchange and unaccounted cash of numerous assessees was used through series of transactions to jack up the prices of shares of paper companies to arrange huge Long Term Capital Gain. These facts have come into light in the survey conducted in the case of M/s. P. K. Agrawal & Co. She has also referred to the inquiry conducted in the case of share brokers. Shri Prakash Chand Nahta & Co. and Shri Murarilal Goenka, Kolkata which was discussed in the assessment order. She had also stated that SEBI has suspended the certificate of registration of the broker on 15.12.2003 and on this basis, she has supported the A.O's action.

6. The assessee in his comment on the remand report contended that the A.O. has simply repeated the observations of the A.O. made in the assessment order in her remand report. She has not disputed the correctness of the evidences such as contract notes for purchase and sales; transfer of the shares in the assessee's name; share certificate; dematerialization of the shares; payment of Security Transaction Tax; the prevailing rates on the transaction dates, etc. All that the A.O. has emphasized is that some malpractice of artificially jacking up of the prices of some shares was detected during survey in the case of M/s.PK

Agrawal & Co., Stock Brokers of Kolkata and in the assessee's case also, it was alleged that same modus operandi was followed. The suspension of Registration Certificate by SEBI was in the case of Shri P.K.Agrawal and not in the case of Shri Murarilal Goenka. The A.O. did not consider the fact that the present assessee did not purchase the shares through Shri P.K.Agrawal. The shares purchased and sold by the assessee. i.e., Multiplus Resources Ltd., are different. It was further contended that the shares of Multiplus Resources Ltd. are still listed with the Kolkata Stock Exchange and trading of the share is still continuing. Copy of present status report as on 1st Dec. 2012 generated from the website of Kolkata Stock Exchange has been filed. Regarding the brokers. the assessee has contended that broker Shri Murarilal Goenka has replied to the summons issued by the Investigation Wing but details of the reply and why the same was not found acceptable were not given. The assessee has given the complete address of Prakash Nahata Co.. which is a registered member of the Calcutta Stock Exchange and the legal heir's late husband has made the transactions with the said broker and she cannot be made answerable in this regard. It was contended that as per the decision of Hon'ble Supreme Court in the case of Mahendra Mills Ltd. vs. P.B.Desai, [1975] 99 ITR 135 (SC), precedents need to be applied with due care. The assessee has also reproduced the following observations of the Hn'ble Apex Court to support his stand :-

"In our opinion, there is no room for any such apprehension. It must be remembered that a decision is a precedent on its own facts. Each case presents its own features. The income-tax authorities and

Tribunals are supposed to apply the ratio of a decision to the facts of particular cases with due care.....”

7. Finally, the assessee has contended that the issue is covered by the decisions of Hon'ble Jurisdictional Tribunal in the case of ACIT-1(1) vs Vrindra Kumar Agrawal in ITA No.19/BLPR/2011 (A.Yr.2005-06) dated 08.02.2012, ACIT vs Smt. Lata Agrawal ITA No.466/Nag/08, ACIT vs Vishnu Kumar Agrawal ITA No.427/Nag/08.

8. The CIT(A) after considering the submissions of the assessee deleted the addition made by the AO.

9. Ld. DR has relied on the order of Assessing Officer.

10. On the other hand, Id. AR supported the order of CIT(A) and relied on the following decisions :-

- i) ITO Vs. Ravindra Sanghai (HUF), ITA No.698//Kol/2010, vide order dated 22.05.2012;
- ii) ITO Vs. Khalil M. Bharwani (2015) 45 CCH 0275 (MumbaiTrib)
- iii) ACIT Vs. Shri Ranjitsingh D. Bindra, ITA No.5534/Mum/2010, order dated 13.03.2013; and
- iv) CIT Vs. Kamal Kumar Agrawal, ITA No.67 of 2010, order dated 23.09.2010.

11. We have heard rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the assessee has shown long term capital gain of Rs.1,95,39,611/- and claimed exemption u/s.10(38) of the Act on the shares of M/s Multiplus Resources Ltd. purchased for Rs.2,69,400/-, which was sold for Rs.1,98,28,636/-. The AO observed that the assessee has shown long term capital gain on sale of penny stocks like several other assesseees of Raipur and on enquiry in case of Shri P.K.Agrawal and company broker it

was found that the transaction has been of dubious nature. The shares were not of reputed companies and there cannot be appreciation of 18 to 20 times in the price of such scrips. He opined that the assessee has controverted his unaccounted income into white income through long term capital gain and in this process has paid the tax at 10% against the normal rate of tax.

12. On appeal, the CIT(A) deleted the addition by observing as under :-

4.4) I have gone through the observations of the AO and submissions of the appellant. Prima facie, the AO had incorporated in the body of the assessment order the enquiries caused by the ADIT(Inv), Unit-I1(1), Kolkata, who has issued summons to the brokers. The summons issued to the broker. Shri Murarilal Goenka was replied by way of filing requisite documents and the ADIT did not make any adverse comments thereon. However, it was stated that the summons issued to Prakash Nahata & Co. was not served. As submitted by the appellant, the said broker is a registered broker with Calcutta Stock Exchange and, therefore. the appellant cannot be held responsible for non-service of summons nor can any adverse view be taken on this basis. Thus, the AO has made the addition mainly on the basis of results of inquiry conducted in some cases of Raipur assesseees by the Investigation Wing of IT Department. Kolkata, who have made the transactions through M/s.P.K. Agrawal & Co. Stock Broker. As per reply given by the said broker recorded at page No.10 of the assessment order, the shares dealt in by him relate to the following companies:-

- (a) M/s. LIMTFX Investment Ltd..*
- (h) M/s. M.P. Investment Ltd.*
- (c) M/s. Kayveear Vyapaar Ltd.*
- (d) M/s. PSI Holdings Ltd.*
- (e) M/s. Ramkrishna Finvest Ltd.*
- (f) M/s. Konark Commerce Ltd*
- (g) M/s. Blue Prints Ltd.*

(h) M/s. Sangotri Construction Ltd.

Thus, the appellant has neither dealt in the shares of the above companies nor through the above share broker. Therefore, the outcome of inquiry in those cases cannot be blindly applied to his case. Therefore, the action of treating LTCG as income from undisclosed sources on the basis of general inquiries conducted in some other cases cannot be approved. Admittedly, the sales were made through registered stock exchange after payment of security transactions tax. there is no dispute regarding correctness of the evidences such as contract notes; transfer of the shares in the appellant's name; share certificate; dematerialization of the shares; prevailing, rates on the date of transactions; etc. The appellant has established that the shares Multiplus Resources Ltd. are still listed for trading. In the case of Shri Vishnu Kumar Agrawal, Bhilai (supra), the Hon'ble jurisdictional Tribunal has observed as under.

“After hearing the rival submissions and carefully the material available on record and keeping in view of the, facts that without bringing out any material on record to prove the share transaction of the assessee bogus, the claim of the assessee in respect of LTCG cannot be termed as bogus, which the AO has done in this case. We also find that in this case the assessee has produced before the AO the copy of ledger with purchase details, copy of bill issued by broker, copy of share certificates, letter of Stanley Securities. regarding transfer of shares, copy of request slip for dematerialization of shares into assessee's Demant Account with IDBI Bank, copies of contract notes. copy of delivery slip and copy of bank account reflecting credit of sale proceeds. We also find that the Id. CIT(A) has passed a very speaking and justified order directing the AO to treat Rs.27,22.370/- as LTCG on share transactions. For sake of convince, we reproduce the relevant portion of his order as under.

3.12 The Hon.ble Punjab and Haryana High Court has sustained the order of Tribunal wherein it has been held that purchase contract note, contract note for sales, distinctive number of share

purchased and sold copy of share certificate and the quotation of shares on the date of purchase and sales were sufficient material to show that the transaction was not bogus but a genuine transaction. Following the judgment of CIT vs Anupam Kapoor 212 CTR 491 (P&H), I am of the considered opinion the LTCG transaction was not bogus but a genuine transaction. The AO is therefore, directed to treat Rs.27,22,370/- as LTCG on share transactions. The Ground No. 1 is allowed"

In view of the above, We find no infirmity in the order of the Id. CIT(A) and the same is hereby upheld. Therefore, the ground of appeal of the revenue is dismissed. In the result, the appeal of revenue is dismissed

The appellant has paid Security Transaction Tax on sale of shares, which were held for more than one year. Therefore, the capital gain arising on sale of such shares qualifies for exemption U/s. 10(38) of the Act. In this view of the matter and considering circumstances of the case and the settled legal position, I am of the considered opinion that the addition made by the AO is not sustainable, hence, the same is deleted. These grounds of appeals are allowed."

13. We find the Hon'ble Punjab and Haryana High Court in the case of CIT vs. Anupam Kapoor (2008) 299 ITR 179 (P&H), has held as under :-

"The assessee's case was reopened on receipt of an intimation from the Deputy Director of Income-tax (Investigation) stating that the long-term capital gain declared by the assessee was false and the transaction was not genuine. In response to a notice under section 148 of the Income-tax Act, 1961, the assessee submitted his reply and furnished evidence in support of his claim of long-term capital gain. The Assessing Officer held that the assessee failed to lead evidence to support his claim of long-term capital gain and considered the amount of Rs.1,74,552 as unexplained credit and it was added in the income of the assessee. The Commissioner (Appeals) deleted the addition holding that the Assessing Officer had not discharged his onus and there was no material or evidence

*with the Assessing Officer to come to the conclusion that the transaction shown by the assessee was a bogus transaction. The Commissioner (Appeals) took the view that if a company was not available at the given address, it could not conclusively prove that the company was non-existent. The Tribunal took into consideration that the Assessing Officer had not dealt with all the documents placed before him and had simply presumed that the transaction was bogus and held that the purchase contract note, contract note for sales, distinctive numbers of shares purchased and sold, copy of the share certificates and the quotation of shares on the date of purchase and sale were sufficient material to show that the transaction was not bogus but a genuine transaction. On appeal : **Held**, dismissing the appeal, that there was no material before the Assessing Officer, which could have led to a conclusion that the transaction was a device to camouflage activities to defraud the Revenue. No such presumption could be drawn by the Assessing Officer merely on surmises and conjectures. The Tribunal took into consideration that it was only on the basis of a presumption that the Assessing Officer concluded that the assessee had paid cash and purchased the cheque. In the absence of any cogent material in this regard, having been placed on record, the Assessing Officer could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the Assessing Officer. Therefore, the Assessing Officer could not have added the income, which was rightly deleted by the Commissioner (Appeals) as well as the Tribunal.*

14. The Nagpur Bench of the Tribunal in the case of ACIT vs. Kamal Kumar S. Agrawal (Indl.) and Ors. (2010) 133 TTJ (Nag) 818, has held as under :-

“The assessee earned capital gains during the period covered by s. 153A proceedings. It is also noted that all such transactions have been taken into consideration while filing the returns for these years in the normal course and the Department has also accepted the

nature of such transactions. It is very important to note that no incriminating material has been found during the course of search which could have cast doubt on the genuineness of the transactions or could have indicated that it was a case of assessee's own undisclosed money utilized in the execution of such transactions. Voluminous documentary evidences have been filed by the assessee to prove its claim which support the genuineness of the transaction. However, the AO has utilized the statements of the persons who were not cross-examined by the assessee. Hence, as per the settled judicial principle, such statements cannot be given any weightage. When there arises a question of appreciation of documentary evidences, then, a holistic view has to be taken and in the present case majority of the brokers have supported the claims of the assessee and surprisingly some of them have not been approached by the AO at all. Thus, on appreciation of documentary evidences submitted by the assessee, the genuineness of the transactions appears to be established. As regards the aspect of off market transactions, it is noted that neither these are illegal nor prohibited and only some of the compliances have to be made by the brokers. As regard the aspect of such compliances, it is not the case that all the off market transactions have not been reported by the concerned brokers to the stock exchange as per rules and even otherwise, any failure on the part of the brokers in doing such compliance cannot make the contract between the assessee and the broker illegal or void as the broker may face the consequences for his default under relevant statute. It is also noted that all the transactions are not off market transactions, hence, the AO's approach to pick and choose only such instances which are favourable to him cannot justify such addition. The Departmental Representative has also argued that there were differences in the information as per contract notes and as per information received from the stock exchange which fact is also not material because when some off market transactions have not been reported to the stock exchange, how such contract notes can be matched with the records of stock exchange. Economic

consequences as a result of off market transactions or otherwise have taken place and, therefore, such transactions cannot be treated as sham merely for some discrepancies or for the view of the AO in regard to genuineness of these transactions. The Revenue has also relied on the decisions of SEBI involving some scrips. The role of SEBI is different and the orders passed by them have different objectives such as orderly conduct of share markets and investor protection and, therefore, such order cannot be conclusive as regards the genuineness of the transactions. In this regard, it would not be out of place to mention that stock market operations are subject to different regulations and the interest of general public is protected by prohibiting the market intermediaries from indulging in unfair trade practices. The order of the SEBI relied on by the Revenue is mainly on the aspect of price rigging in such manner. Hence, the same cannot be of any assistance to the cause of the Revenue. Thus, on the basis of appreciation of facts and circumstances of the case as a whole and considering the documentary evidences on record, the share transactions cannot be considered as ingenuine/sham and, therefore, the sale proceeds of such share transactions cannot be taxed under s. 68.—Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124 : (1995) 214 ITR 801 (SC) and McDowell & Co. Ltd. vs. CTO (1985) 47 CTR (SC) 126 : (1985) 154 ITR 148 (SC) distinguished.”

15. The Kolkata Bench of the Tribunal in the case of ITO Vs. Ravindra Sanghai (HUF), ITA No.698//Kol/2010, vide order dated 22.05.2012, wherein the shares of Multiplus Resources Ltd. in question for earning of Long Term Capital Gain and shares held as under:-

“2. The only issue in respect of ITA No. 698/K/2010 of revenue is against order of CIT(A) treating the sale of shares for Long Term Capital Gains (LTCG) instead of assessed by AO as "Income from other Sources". For this, revenue has raised following ground no. 1:

"1.The Ld. CIT(A)-XX, Kol. Has erred on fact and in law for not considering the A.O's observations on the issue of LTCG for

sale of shares, penny stock which are barred from Trading by SEBI and Calcutta Stock Exchange and duly reported with reasons on addition on account of Capital Gain from Penny Stock."

3. The brief facts leading to the above issue are that assessee has shown LTCG of Rs.11,34,213/- on sale of 7000 equity shares of Multiplus Resources and 15000 shares of South Indian Bank and credited to the capital account of the assessee. The AO while going through the capital account of assessee noted this fact and observed that the assessee has not discharged the initial onus of proving the identity, creditworthiness and genuineness of transaction. According to AO, there is no proper evidence brought on record to prove the genuineness of transaction as claimed to have been made by the assessee. According to AO, Calcutta Stock Exchange Ltd. (CSE) also negated transactions. The AO also referred the issue that the trading of shares in the above stated company was barred/suspended by CSE and SEBI after SEBI detected malpractices in the said shares. According to AO, the assessee has made purchases through S. B. Bhutra & Co. in the scrip through Shri Narayan Rajkumar Mercantiles Ltd. But according to CSE vide letter dated 18.12.2007 the following transactions were reported:

<i>Name of the scrip</i>	<i>Name of member/broker</i>	<i>Date of transaction</i>
<i>Multiplus Resources Ltd.</i>	<i>KCA Stock Broking Private Ltd.</i>	<i>01.12.2004</i>
<i>Multiplus Resources Ltd.</i>	<i>KCA Stock Broking Private Ltd.</i>	<i>29.11.2004</i>

The broker vide letter dated 10.11.2007 confirmed the following facts:

"1. The said client, Sri Rabindra Sanghai (HUF) purchased through us 10000 shares of Shree Narayan Raj Kumar Mercantiles Ltd. On 03.08.2004 @ 3.52 i.e. for Rs.35,200/-. The payment of the said amount was made in cash on 05.08.2004.

2. Our ID No. is 0516.

3. Nature and quantity of the transaction is stated in Para 3. The trade was made through delivery and not speculative in nature. The delivery was made through DP.

4. Photocopy of Contract Note Enclosed herewith. The Demat account no. is 10466543 with 11 & F S Ltd.

5. As there is no bank transaction, copy of bank account is not applicable.

6. No margin money. No interest applicable on margin money.

7. The said transaction was off-market and no intimation was given to CSEA."

But the AO was of the view that the Penny Stocks are barred from trading by SEBI and CSE.

According to AO, the assessee has not informed the purchase of shares and according to him it is mandatory to inform, in case the transaction is off-market and in cash. The AO has not doubted the genuineness of sale on which assessee has earned capital gains. However, the AO treated the entire sale proceeds as income from undisclosed sources and assessed the same. Aggrieved, assessee preferred appeal before CIT(A), who after considering the submissions of the assessee and assessment order and various case laws deleted the disallowance by giving following finding in para 4.3 as under:

"4.3. I have perused the assessment order and considered the submission of the appellant. I have also considered the material and evidence on record and the various legal pronouncements relied upon by the appellant. The appellant has produced all documentary evidences to establish the genuineness of the transactions. The transactions of purchase and sale are supported by contract notes issued by the brokers. The purchase of shares are credited, and, similarly, the sales of shares are debited in the demat account of the appellant. The payments are received through banking channel. The various legal pronouncements, relied upon by the appellant, also support its contentions. In view of the above, it is held that the capital gain shown by the appellant on sale of shares is genuine and the AO was not justified in adding the sale proceeds as income from undisclosed sources. The addition of Rs.11,34,213/- is deleted. Ground no. 2&3 are allowed."

Aggrieved, now revenue is in appeal before us.

4. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee has filed all necessary details and documentary evidence qua purchases made from Stock brokers including copies of contract notes issued by broker. The assessee has also filed details of share credited in Demat account of assessee. This fact has not denied by Ld. Sr. DR during the course of hearing before us. No doubt the payments are made by cash as noted by AO in his assessment order qua the purchase of these shares but sale is supported by bank statement. We find that the payments are received through banking channels and assessee's claim of LTCG cannot be disturbed by the fact that some of the companies were indulged in malpractices at CSE and SEBI. When a query was raised to Ld. Sr. DR whether this particular scrip is put to scanner or not, Ld. DR could not reply and could not confirm that these transactions were under SEBI scanner. In such circumstances, we have no alternative except to uphold the order of CIT(A) and this appeal of revenue is dismissed."

16. The Mumbai Bench of the Tribunal in the case of ITO Vs. Khalil M. Bharwani, (2015) 45 CCH 0275 (Mumbai Trib), wherein it was held as under :-

"5. In sum and substance the claim of assessee has been that it had purchased 10,000 shares of Emerald Commercial Ltd. through the broker Badri Prasad & Sons vide Bill No. CK012/20053226 dated 06.05.2004 which shares were purchased in physical form which were submitted to the Company for transferring in its name, which the company transferred by its letter dated 17.07.2004, which were later on submitted on 12.08.2005 for demat in the Demat Account of the assessee with HSBC Bank and later on the shares were sold through the online trading system of the Calcutta Stock Exchange through the Broker Murarilal Goenka and M/s. Shivam Stock Broking Pvt. Ltd. and each and every details of sale of shares were duly furnished in assessment proceedings. Hence, in the view of the assessee, the transactions giving rise to LTCG on sale of shares of `45,43,362/- is fully supported by all the necessary evidences mentioned above and therefore Assessing Officer was not justified to tax the entire sale proceeds on sale of shares as unexplained cash credit under section 68 of the Act.

6. The CIT(A), after going through the submissions on behalf of assessee accepted the contentions of assessee and granted relief as prayed. Same has been opposed before us on behalf of Revenue. The learned D.R., inter alia, submitted that CIT(A) erred in holding that long term capital gain received by assessee in the scrip Emerald Commercial Ltd. was genuine transaction. CIT(A) should have appreciated the fact that assessee could not prove the source of funds while purchasing the said shares. No return was filed during the year in which the shares were purchased and the same were purchased through cash. Physical delivery of shares has taken place. Calcutta Stock Exchange had denied executing purchase. In this background the CIT(A) failed to note that shares of M/s.Badri Prasad and Sons stock broker who has been penalized

by SEBI for indulging in penny stock transaction during the year 2005 which is relevant to the current year under consideration. So the CIT(A) erred in holding that the transaction was genuine without appreciating the fact that broker M/s. Badri Prasad and Sons through whom assessee has claimed to have purchased the shares has clearly denied the executing of any share transaction of M/s. Emerald Commercial Ltd. on 06.05.2004, the date on which assessee has claimed to have purchased 10,000 shares. Purchase transactions are out of cash in hand which was on account of gift received by assessee from his relatives. Purchase of shares was off bolt and such purchases are not reflected in the stock exchange. In this background the learned D.R requested to set aside the order CIT(A) and to restore that of Assessing Officer. On the other hand the learned A.R. for the assessee supported the order of the CIT(A).

7. After going through the rival submissions and material on record we find that Assessing Officer rejected the claim of long term capital gain on shares and brought the same to tax as unexplained cash credit under section 68 of the Act. The stand of the assessee has been that the impugned receipt is on account of sale of shares which shares were duly purchased more than one year ago and were held thereafter continuously by assessee and therefore the gain on sale of such shares is to be held as long term capital gain exempt under section 10(38) of the Act. We find that assessee has purchased the shares through off market deal and therefore such transaction for purchase of shares by the assessee ought not to have been registered with the Calcutta Stock Exchange. Secondly, the Voucher for shares sold to the assessee issued by M/s Badri Prasad & Sons, broker of the Calcutta Stock Exchange has not been found as bogus or fabricated documents.

8. Assessee duly received physical delivery of 10,000 shares by way of 20 share certificates of 500 shares each of the company Emerald Commercial Ltd. and such shares were duly transferred in

the name of the assessee by letter of the company dated 17.07.2004 which aspect is also not found incorrect or manipulated. The physical shares received by assessee duly transferred in his name were thereafter demated by delivering them to HSBC, the demat Account holder and after demating the shares have continued to remain in the Demat A/c of assessee which aspect is also independently verified from the Demat Statement of assessee with HSBC.

9. The 4000 demated shares were thereafter sold through the Broker Shivam Stock Broking Pvt. Ltd. of the Calcutta Stock Exchange through online trading system and the balance shares numbering 6000 were duly sold through the Broker Murarilal Goenka of Calcutta Stock Exchange through online trading system. The Sales Bills/Contract filed by assessee for sale of the shares has not been disbelieved or disputed by Assessing Officer in any manner. The sale proceeds received on sale of shares have been duly received by 'A/c payee cheque' from the Brokers which were duly deposited in the bank account of assessee. This aspect has also not been disputed by Revenue authorities. Hence in this way, the whole transaction of purchase and sale of shares giving rise to long term capital gain has been duly explained step by step and supported by adequate and reliable evidence. The observations of Assessing Officer have been that since the shares were purchased in cash, the same cannot be verified. Since no return of income was filed by assessee for the A.Y.2005-06, it was not possible to verify the cash in hand of Rs.3,45,602/-. According to Assessing Officer the cash in hand is not substantiated. In this regard the stand of the assessee has been that assessee was given a gift of Rs.1,01,000/- by his father Shri Mohamed All Bharwani on 26.5.2003 and by his elder brother Shri Munir M. Bharwani of Rs.1,28,000/- on 26.5.2003 being on the occasion of assessee's birthday. Assessee has stated that in the returns of income for the A.Y.2004-05, in the case of his father and brother, the gifts in question have been duly reflected. Copies of the relevant returns of

income alongwith capital accounts have been furnished before CIT(A) at relevant point of time and in this background it was the stand of the assessee that because of these gifts from the aforesaid two persons that there was so much cash in hand with the assessee. This fact has not been looked into by the Assessing Officer at relevant point of time.

10. The observation of the Assessing Officer that the transaction is not genuine and is engineered with a sole intention to show long term capital gain which is liable to a lower rate or income tax is because of (i) off market transaction, (ii) the payment for transaction is through cash (iii) physical delivery of shares has been given (iv) Kolkata Stock Exchange has denied having executed any transaction in the script i.e. Emerald Commercial Ltd. (v) shares were dematted in the month of August 2005 i.e. after more than one year of date of purchase (vi) shares were bought and sold in Kolkata has been duly rebutted and refuted by tendering sufficient evidence and therefore Assessing Officer Assessing Officer can only provoke a suspicion, much less a belief about the transaction. The suspicion of Assessing Officer cannot clinch the transaction against assessee. In view of the above CIT(A) was justified in holding that long term capital gain earned by assessee of `47,60,462/- should be treated as such and not taxed as income from undisclosed sources. Accordingly the decision of the CIT(A) need no interference from our side. We uphold the same.”

17. The Mumbai Bench of the Tribunal in the case of ACIT Vs. Shri Ranjitsingh D Bindra, ITA No.5534/Mum/2010, vide order dated 13.03.2013, has held as under :-

“3. The solitary common issue raised by the revenue in both the appeals is regarding the Long term capital gains treated by the Assessing Officer as undisclosed cash credit and deleted by the CIT(A). The common ground raised by the revenue is as under:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to treat the income as long term capital gains amounting to Rs.29,09,675/- instead of income from undisclosed sources as considered by the AO without appreciating the facts and detailed investigation of the case."

Before us the learned DR has submitted that the Assessing Officer has made an investigation and found that the assessee was first given speculation profit and against this profit the purchase cost of the shares of Blue Chip India Ltd was adjusted. This adjustment of purchasing of shares clearly indicates the modus operandi that was being followed regarding purchase of penny stocks. The assessee has claimed to have purchased the shares from Prince Securities whereas the shares were sold to Prakash Nahata & Co., stock and share brokers having their office at Kolkata. The transaction of purchase was off market, which was not reported on the recognized stock exchange i.e. Bombay Stock Exchange. The transaction was arranged in such a way that no consideration was paid by the assessee except a nominal amount and major part of the consideration was allegedly adjusted against speculation profit. The Assessing Officer has pointed out that Prince Securities have not transacted in shares of Blue Chip India Ltd. for any other client except the transaction in question. It does not have any demat account. The assessee stated to have purchased the shares in the month of April 2002 whereas the shares were demated in August 2002 and October 2003 i.e. almost one and half years after the alleged purchase. There is no explanation in this regard as to why the assessee demated the shares just before the alleged sale of the shares. The transaction of sale of shares in Kolkata Stock Exchange without any explanation is not a normal human behaviour, when the assessee is having account with sub-broker in Mumbai. The Assessing Officer received the information from Bombay Stock Exchange that the shares of Blue Chip India Ltd., was not traded on the Stock Exchange on the dates given by the

assessee. Thus, the learned DR has submitted that the facts and circumstances of the case clearly shows that the assessee has manipulated the accommodation entries of Long term capital gains against his own undisclosed income. He has relied upon the decision of the Chandigarh Bench of this Tribunal in the case of CIT v. Som Nath Maini 100 TTJ 917 (Chd.)

4. On the other hand, the learned AR of the assessee submitted that the transaction of purchase is duly supported by the documentary evidence. He has referred the bills issued by Prince Securities in respect of the purchase of shares of Blue Chip India Ltd., at pages 72 to 77 of the paper-book. The payment was partly made through cash vide receipt dated 10.04.2002 placed at page 76 of the paper- book. He has also referred to the ledger account of Prince Securities showing the transaction of purchase of shares. The learned AR has further submitted that Prince Securities has also given the confirmation memo in respect of the speculation profit arising from the transaction in the shares of Geometric Solutions and Hinduja Finance Ltd. The assessee applied for transfer of the shares to Blue Chip India Ltd., and received the communication dated 17.08.2002 and 31.08.2002 whereby the shares were transferred with distinctive numbers and certificate memos in the name of the assessee. Subsequently, the shares were demated in the Demat account of the assessee, which shows that the assessee was holding the shares and, therefore, the transaction cannot be said to be bogus. The learned AR has further submitted that the shares were sold through Prakash Nahata & Co., who is a broker of Kolkata Stock Exchange. Sales bill in respect of the sale transactions were produced before the authorities below, as placed at pages 88 to 110 of the paper-book. M/s. Prakash Nahata & Co. has also confirmed the transaction of sale vide letter dated 24.11.2006 in response to the notice issued by the Assessing Officer u/s. 133(6) of the Income Tax Act. The learned AR has further submitted that the sale consideration was received through banking channel and, therefore, it cannot be doubted. He has

referred to the return of income for A.Y. 2003-04 and submitted that the shares of Blue Chip India Ltd., were shown in the balance sheet attached therein and, therefore, the assessee has duly disclosed the transaction of purchase. In support of his contention he has relied upon the following cases:

- i. Mukesh R Morolia Vs. ACIT - (2006) 6 SOT 247
- ii. Chandrakant Babulal Shah Vs. ITO in ITA No. 6108/Mum/2009 dated 15.12.2010.
- iii. CIT Vs. Jamnadevi Agarwal 328 ITR 656

He has further submitted that similar issue has been decided in favour of the assessee in all these decisions. In the case of Jamnadevi Agarwal, the Hon'ble High Court has held that even the statement of stock broker's denial of transaction was proved to be wrong by producing documentary evidence to the effect that the shares sold by the assessee were in consonance with the market price. He has further submitted that the decision in the case of Som Nath Maini (supra), relied upon by the Assessing Officer is not applicable to the facts of the case in hand because in the said case the Tribunal has found that the records of the broker was not available and shares remained in the name of the assessee even long time after the sale of shares therefore, the transaction does not stand the test of probability, whereas in the case of the assessee there is no such lack of availability of record or defect in the transaction of sale. He has supported the order of the CIT(A).

5. We have considered the rival submissions as well as the relevant material on record. The assessee claimed to have purchased 70,000 shares of Blue Chip India Ltd., in the month of April 2002 as under:

Purchased on 10.04.02	37,000 shares	for Rs.20,350
Purchased on 12.04.02	37,000 shares	for Rs.18,150

The assessee purchased total 70,000 shares of Blue Chip India Ltd. for a total consideration of Rs.38,500 at average cost of 55 paise per share. These shares were claimed to have been sold on

various dates from September 2003 November 2003. The details of sale are given by the Assessing Officer in para 5.4.3 as under:

Date of sale	Quantity of shares	Amount of sale proceeds	Date on delivery was given by the assessee	Date of payment to assessee	Amount
10.09.03	7,000	376950	<u>11.09.03</u> 7000	17.09.03	76950
20.10.03	1,500	61725	<u>20.10.03</u> 1500	03.11.03	366475
21.10.03	2,500	101000	<u>22.10.03</u> 2500	10.11.03	284200
22.10.03	2,500	101000	<u>23.10.03</u> 2500	10.11.03	295875
23.10.03	2,500	102750	<u>27.10.03</u> 2500	12.11.03	376175
28.10.03	7,500	295875	<u>29.10.03</u> 12000	18.11.03	310000
29.10.03	7,000	284200	<u>31.10.03</u> 9500	18.11.03	500000
30.10.03	9,500	386175	<u>01.11.03</u> 15000	03.12.03	428500
05.11.03	10,000	395500	<u>11.11.03</u> 17500	-	-
07.11.03	10,000	414500	-	-	-
13.11.03	10,000	428500	-	-	-

The Assessing Officer doubted the transaction mainly on the ground that the shares were purchased as penny stocks at low price of 55 paise per share and the same were claimed to have been sold at Rs.40 per share and thereby the assessee has shown Long term capital gains of Rs.29,09,675. According to him it is not a genuine transaction because the assessee has converted its undisclosed income as Long term capital gains. The Assessing Officer has examined the assessee as well as called for various information by issue of notice u/s. 133(6) to the stock broker through which the assessee has purchased shares as well as from the stock broker to whom the assessee has sold the shares. It is evident that both the stock brokers have confirmed the transaction of purchase as well as sale. Apart from the confirmation, the assessee has also produced relevant documentary evidence in support of the transaction of purchase and sale. There is no dispute as regards the shares were demated in the demat account of the assessee and, thereafter sold

to M/s. Prakash Nahata & Co. The Assessing Officer has not given any finding that the prevailing price of the shares on the alleged date of purchase was more than what has been claimed by the assessee. Therefore, there is no finding or dispute on the point of prevailing price at the time of purchase or at the time of sale of shares. The Assessing Officer has doubted the modus operandi and alleged that by this transaction the assessee has converted his undisclosed income as Long term capital gains by accommodation entries. It is pertinent to note that the transaction of holding of shares has been duly shown in the balance sheet attached with the return of income for the A.Y. 2003-04 as the same is placed at page 178 of the paper-book. The CIT(A) after considering all the relevant facts and material has given his findings in para 11 of the order, which is as under:

"11. I have carefully gone through the assessment order, the submissions made by the A.R and the facts of the case and various case laws relied upon. It is evident from the submissions made and the evidence for purchase and sale of shares of M/s. BlueChip India Ltd., produced before me that

a) The appellant has purchased 7000 shares of M/s. BlueChip India Ltd. from M/s. Prince Securities Ltd. and the bills/confirmations in respect of such purchases have been duly filed before me

b) The source for the purchase is profit earned in the transaction of Hinduja Finance & Geometric Software and the balance amount has been paid by cash

c) The shares were received by the appellant in physical form and the shares were duly transferred in the name of the appellant by letter of the company dtd. 17.8.2002 & 31.8.2002. Share transfer letter from Bluechip India Ltd with distinctive numbers, certificate numbers and folio nos were also submitted evidencing the transfer of shares in the name of the appellant.

d) *The shares which were transferred in the name of the appellant were later on demated on 15.7.03, 24.7.03 & 24.7.03. Copies of demat conversion slips in this respect were filed before me.*

e) *In the Demat A/c filed with me, namely for the month of July, 2003 the above 70,000 shares were duly found in the list of demat shares along with other shares*

f) *The above shares were sold through the Calcutta stock Exchange broker namely Prakash Nahata & Co. And the various contracts notes/bills in respect of sales made have been filed with me.*

g) *After the sales were made, the shares were duly given delivery by demat slip No.246061 dt.11.11.03, No.21550 dt 1.11.03, No.215539 dt. 31.10.03, No.215538 dt.29.10.03, No.215537 dt.29.10.03, No.215536 dt.27.10.03, No.215535 dt. 22.10.03, No.215534 dt. 22.10.03, No.215533 dt. 20.10.03, No.215531 dt. 10.9.03*

h) *The appellant in his statement recorded u/s. 131 has confirmed the transaction both of purchase and sale of shares.*

i) *The shares purchased of Bluechip have been duly shown in the balance sheet filed with the Department for the year ending 31- 03- 2003 i.e. in the year in which the shares were purchased.*

j) *The price at which the shares were purchased and later on sold are the prices of the shares prevailing at the material time of the transaction and this aspect of the matter is independently confirmed by the details obtained from the Bombay Stock Exchange.*

In my view when the appellant has himself categorically submitted that the transaction entered into by him were off market, there is no reason why it could not be believed especially in view of the fact that the necessary evidence required to support a transaction is duly submitted in the assessment proceedings and also before me. There is no law which prohibits off market transactions in respect of shares which are otherwise listed in the stock exchange.

On the facts and in the circumstances the observation of the AO that the transaction is not genuine and is engineered with a sole intention to show LTCG which is liable to lower rate of income tax is because of (i) off market transaction, (ii) the payment for transaction is partly though cash (iii) physical delivery of shares has been given, (iv) Prince securities from whom the shares were purchased has not dealt with in this shares except for the appellant., (v) Prince Securities did not have any demat a/c, (vi) shares of Bluechip Ltd were demated after long time of 16 months. (vii) shares were brought in Mumbai and sold in Calcutta, (viii) shares of Bluechip were not traded on BSE on the dates on which the appellant has done the transactions, (ix) sale consideration was received after a week from the date of sale, (x) the replies of the appellant in the statement recorded u/s. 131 were evasive (xi) the appellant has not shown the purchase of shares in the balance sheet as on 31.3.2003 has been duly refuted by tendering sufficient evidence and, therefore, in my view the disbelief of the AO can only provoke a suspicion, much less a belief about the transaction and in my view, the suspicion of the AO cannot clinch the transaction against the appellant.

The various case laws relied upon by the AO viz. Of the ITAT, Chandigarh A Bench in the case of Somnath Mani reported 100 TTJ 917, the Supreme Court decision in Mcdowell & Co. Ltd. 154 ITR 148 & Supreme Court decision in the case of Azad Bachao Andolan reported in 263 ITR 706 has been duly emphasized by the AO while bringing to tax LTCG as unexplained income. Therefore, in my considered view, the long term capital gains earned by the appellant of Rs.29,09,675 should be taxed as such and not as income from undisclosed sources. The grounds of appeal are allowed."

It is clear from the finding of the CIT(A) that the shares of Blue Chip India Ltd. were duly shown in the balance sheet filed with the return of income for the A.Y. 2003-04 and, therefore, the assessee has discharged his onus to prove the holding of the shares and in the

absence of any contrary evidence brought by the Assessing Officer on record, it cannot be said that the transaction of purchase shown by the assessee is not genuine. In the case of CIT Vs. Jamnadevi Agarwal (supra), the Hon'ble jurisdictional High Court while dealing with similar issue has observed and held as under:

"We see no merit in the above contentions. The fact that the assessees in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim.

From the documents produced before us, which were also in the possession of the Assessing Officer, it is seen that the shares in question were in fact purchased by the assessees on the respective dates and the company has confirmed to have handed over the shares purchased by the assessees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assessees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assessees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions.

The statement of Pradeep Kumar Daga that the transactions with the Haldiram group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assessees were in consonance with the market price. On a perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought to our notice that the findings recorded by the Tribunal are contrary to the documentary evidence on record.

The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assessees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assessees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assessees. No fault can be found with the above finding recorded by the Tribunal.

Reliance placed by the counsel for the Revenue on the decision of the apex court in the case of Sumati Dayal [1995] 214 ITR 801 is wholly misplaced. In that case, the assessee therein had claimed income from horse races and the finding of fact recorded was that the assessee therein had not participated in races, but purchased winning tickets after the race with the unaccounted money. In the present case, the documentary evidence clearly shows that the transactions were at the rate prevailing in the stock market and there was no question of introducing unaccounted money by the assessees. Thus, the decision relied upon by the counsel for the Revenue is wholly distinguishable on the facts.

For all the aforesaid reasons, we hold that the decision of the Tribunal is based on findings of fact. No substantial question of law arises from the order of the Tribunal. Accordingly, all these appeals are dismissed. No order as to costs."

Thus, it is clear that when the assessee has produced all the relevant evidence in support of the claim which has not been proved to be false, then the claim of the assessee cannot be denied. As far as the decision of the Chandigarh Bench of this Tribunal is concerned the same is not applicable in the facts of present case when there is no such glaring contradiction as pointed out by the Tribunal in the said case regarding the shares remained in the name of the assessee even long after the sale of the shares and non-availability of information. In the case in hand, the sale transaction

has been duly executed through demat account and, therefore, there is no ambiguity or doubt about the transaction of sale.”

18. The Hon'ble Bombay High Court in the case of CIT Vs. Kamal Kumar Agrawal, ITA No.67 of 2010, vide order dated 23.09.2010, has held as under:-

“11) We see no merit in the above contentions. The fact that the assesseees in the group have purchased and sold shares of similar Companies through the same Broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim.

12) From the documents produced before us, which were also in possession of the Assessing Officer, it is seen that the shares in question were in fact purchased by the assesseees on the respective dates and the Company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off market transactions cannot be a ground to treat the transactions as sham transactions.

13) The statement of Pradeep Kumar Daga that the transactions with the Haldiram Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine.

Nothing is brought to our notice that the findings recorded by the Tribunal are contrary to the documentary evidence on record.

14) The Tribunal has further recorded a finding of fact that the cash credits in the Bank Accounts of some of the buyers of shares cannot be linked to the assessees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assessees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' Bank Accounts cannot be attributed to the assessees. No fault can be found with the above finding recorded by the Tribunal.

15) Reliance placed by the Counsel for the revenue on the decision of the Apex Court in the case of Sumati Dayal (supra) is wholly misplaced. In that case, the assessee therein had claimed income from horse races and the finding of fact recorded was that the assessee therein had not participated in races, but purchased winning tickets after the race with the unaccounted money. In the present case, the documentary evidence clearly shows that the transactions were at the rate prevailing in the Stock Market and there was no question of introducing unaccounted money by the assessees. Thus, the decision relied upon by the Counsel for the revenue is wholly distinguishable on facts.

16) For all the aforesaid reasons, we hold that the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal. Accordingly, all these appeals are dismissed. No order as to costs”

19. No specific mistake in the order of CIT(A) could be pointed out by the DR. It is a settled position of law that suspicion alone cannot be the basis for making an addition in an assessment. Suspicion cannot take place of proof. In the instant case, we find no material could be brought on record by the Revenue to impeach the related transactions. In view of the

facts of the instant case and the decisions discussed hereinabove, we do not find any infirmity in the order of CIT(A). Therefore, the appeal of the Revenue is dismissed.

20. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on this 15/01/2018.

Sd/-
(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Raipur; दिनांक Dated 15/01/2018

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Raipur / DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)
Income Tax Appellate Tribunal, Raipur