

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.No.389/Del./2018
Assessment Year 2014-2015

Smt. Sunita Khemka, 5A/4B, Ansari Road, Darya Ganj, New Delhi PIN 110 002. PAN ABGPK4707P	VS	The ACIT, CC-15, Jhw. Extension, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Raj Kumar, C.A. & Shri Sumit Goel, C.A.
For Revenue :	Shri S.L. Anuragi, Sr. D.R.

Date of Hearing :	12.07.2018
Date of Pronouncement :	02.08.2018

ORDER

This appeal by assessee has been directed against the order of the Ld. CIT(A)-XXVI, New Delhi, dated 28.12.2017, for the A.Y. 2014-2015 on the following grounds :

- 1. That under the facts and circumstances, both the lower authorities erred in law as well as on merits in assessing the declared LTCG of Rs.47,16,264/- on sale of shares*

as unaccounted income and further erred in not allowing the exemption u/s. 10 (38) as claimed.

2. That in the absence of confronting with the adverse material used against the assessee and in the absence of providing cross-examination of persons whose statements have been recorded on the back of the assessee, no cognizence of such material an statements should had been taken.”

2. Briefly, the facts of the case are that assessee filed her return of income for assessment year under appeal on 30.07.2014 declaring total income of Rs. NIL. This case was taken up for scrutiny under CASS with main reason for selection being to examine the source of suspicious long term capital gain claimed exempt from taxation under section 10(38). During the assessment proceedings, it was noticed that the assessee has claimed Long Term Capital Gains of Rs.46,63,728/- on sale of shares of following companies.

Name of the Company	Sale Price	Purchase Price	Transfer Expenses	Exempt U/s. 10(38).
HPC Biosciences Ltd.	23,23,548/-	25,000/-	---	22,99,548/-
Esteem Bio Organic & Food Processing Ltd.,	25,66,716/-	1,50,000/-	---	24,16,716/-
			Total	47,16,264/-

2.1. The A.O. issued show cause notice and asked the assessee to furnish supporting documents and to explain such an exponential rise in the price of shares in merely 13-14 months that too without any positive indication in the basic fundamentals or earnings of the companies in which assessee have made investment and asked the assessee as to why the same be not added to the income of the assessee. Copy of the show cause notice issued to the assessee is reproduced in the assessment order in which A.O. has also noted that assessee has furnished bank account statement, Demat account and broker's note to strengthen the claim of long term capital gains. The A.O. however, proposed that it is an arranged transaction through penny stock companies

who rigged the price of shares. The A.O. referred to some report of the SEBI order and statements of certain persons i.e., Mr. Somain Choudhary and Mr. Sanjay Vora etc. The assessee replied each and every query of the A.O. supported by documentary evidence to show that assessee entered into genuine transaction and that none of the enquiries conducted at the back of the assessee are relevant to assessee and have also have not been confronted to assessee. Therefore, no additions should be made. The A.O. however, did not accept the contention of assessee and held that the claim of long term capital gains is prima facie bogus. A.O. accordingly made addition of Rs.47,16,264/-. The Ld. CIT(A) on the same reasoning as given by the A.O. based on investigation conducted by the Income Tax Department and Order of SEBI, confirmed the addition and dismissed the appeal of assessee.

3. The Learned Counsel for the Assessee has reiterated the submissions made before the authorities below and

submitted that the assessee sold the shares of two companies above for which long term capital gains was earned and claimed exemption under section 10(38) of the I.T. Act. In the case of HPC, shares were purchased directly from company in preceding A.Y. 2013-2014 on preferential allotment. Purchases was not doubted in preceding A.Y. 2013-2014. Purchases were through banking channel. He has filed copy of the share application form in the paper book with letter from HPC for allotment of 2500 shares along with intimation of allotment of bonus shares supported by bank statement showing payment of purchase cost. Similarly, sale was proved through documents i.e., broker note for sale of 1200 shares by ISF (Broker) dated 19.03.2014 and similarly sold shares through the same broker on 20.03.2014 and 21.03.2014. The transaction statement for sale of shares through Demat account are filed in the paper book which is supported by ledger account in the book of the broker and bank statements showing credit of sale proceeds. Learned Counsel for the Assessee further submitted that in the case of M/s. Esteem Bio Organic & Food Processing Ltd., these

shares were directly purchased from company in preceding A.Y. 2013-2014 in IPO. Purchases is not doubted which is through banking channel. The purchase is proved through share application form of IPO, copy of the cheque issued for IPO allotment, allotment letter, copy of Demat account showing IPO and bank statement showing payment of Rs.1,50,000/- The sales stand proved through broker note dated 06.03.2014, 07.03.2014 and 10.03.2014. The transaction statement for sale of shares through Demat account supported by ledger account in books of broker and bank statement showing credit of sale proceeds, all the documents are filed in the paper book. Learned Counsel for the Assessee submitted that shares have been purchased through banking channel and through Demat account through broker/recognized stock exchange. Sales are subjected to STT. Sales have been made after retaining the same for a period of more than 12 months. All the shares are of listed company registered in stock exchange. The purchase and sales are at prevailing market price. Learned Counsel for the Assessee submitted that all these documentary evidences have

not been disputed by the authorities below and no enquiry have been made for the same. Therefore, assessee entered into genuine share transaction and also proved conditions of Section 10(38) of the I.T. Act. The findings of the authorities below are without basis and without justification. The report of the SEBI cannot be taken as evidence to prove the transaction as non-genuine. In the interim SEBI report dated 29.06.2015, name of the assessee was not included in the list of dubious entities and also large number of persons which were included in the report dated 29.06.2015 were given clean chit by SEBI vide interim report dated 06.09.2017. Thus, the assessee was never listed by SEBI as doubtful person. The report of the Investigation Wing, Kolkata is not relevant to the case of the assessee. A.O. referred to statements of Mr. Somain Choudhary and Mr. Sanjay Vora with whom assessee has no transaction. Their statements are not subjected to cross-examine, therefore, cannot be read in evidence against the assessee. The objections of the A.O. are incorrect. Learned Counsel for the Assessee in

support of the above contention relied upon the following decisions :

- (i) Pr. CIT vs. Prempal Gandhi – ITA.No.95 of 2017 dated 18.01.2018 (P & H) (HC).
- (ii) Pr. CIT vs. Shri Hitesh Gandhi – ITA.No.18 of 2017 dated 16.02.2017 (P & H) (HC)
- (iii) Meenu Goel vs. ITO – ITA.No.6235/Del./2017 dated 19.03.2018 (ITAT) (Delhi, SMC-Bench)
- (iv) Chander Prakash vs. ITO – ITA.No.6880/Del./2017 dated 12.03.2018 (ITAT) (Delhi SMC-Bench)
- (v) ITO vs. Arvind Kumar Jain HUF – ITA.No.4862/Mum/2014 dated 18.09.2017 (ITAT) (Mum. H-Bench).
- (vi) Prakash Chand Bhutoria vs. ITO – ITA.No.2394/Kol./2017 dated 27.06.2018 (ITAT) (Kolkata, SMC-Bench).

4. On the other hand, Ld. D.R. relied upon the orders of the authorities below.

5. I have considered the rival submissions and perused the material available on record. On the identical issue and identical facts, the ITAT, Delhi, SMC-Bench in the case of Smt. Shikha Dhawan, Gurgaon vs. ITO, Ward-4(2), Gurgaon in

ITA.No.3035/Del./2018 for the A.Y. 2014-2015 vide Order dated 27.06.2018 allowed the appeal of assessee. The order is reproduced as under :

“This appeal by the assessee has been directed against the order of Ld. CIT(A)-1, Gurgaon dated 09.03.2018 for AY 2014-15 on the following grounds:-

1. “That the learned Commissioner of Income Tax (Appeals) 1, Gurgaon has further grossly erred both in law and, on facts in denying the claim of exemption of long term capital gain of Rs. 19,39,357/- on sale of shares sold on recognized stock exchange and, eligible for exemption u/s 10(38) of the Act and bringing to tax as unexplained credit u/s 68 of the Act.

2. That learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in making an addition of Rs. 19,51,357/- being sale consideration on sale of shares listed on recognized stock exchange as unexplained credit u/s 68 of the Act. “

2.1. That while sustaining the aforesaid addition and denying the exemption learned Commissioner of Income Tax (Appeals) has failed to appreciate that, appellant was owner of equity shares of a listed company which had been held by it for a period exceeding 12 months and the same were sold on recognized

stock exchange after payment of STT, resulting into a long term capital gain and therefore the long term capital gain accrued to the assessee on transfer of long term 'capital asset' was not includible in total income of the assessee in view of section 10(38) of the Act.

2.2. That the learned Commissioner of Income Tax (Appeals) has failed to appreciate the evidence tendered by the appellant to support the claim of sale of shares and hence, findings mechanically recorded on borrowed inference in disregard of evidence and based on irrelevant and extraneous considerations are misconceived and, misplaced.

2.3 That the learned Commissioner of Income Tax (Appeals) has confirmed the above addition and denied exemption without confronting the material/investigation to appellant and also providing cross examination of the parties on whose statements reliance has been placed in impugned order of assessment and therefore order so made is in disregard of principles of natural justice is vitiated.

2.4 That further more the learned Commissioner of Income Tax (Appeals) has sustained the addition on mere speculation, generalized statements, theoretical assumptions and allegations and assertions, without there being any supporting evidence and is therefore not in accordance with law.

2.5 That learned Commissioner of Income Tax (Appeals) has failed to appreciate that once the broker of the assessee M/s Indus Portfolio (P) Ltd. had neither denied and nor disputed the genuineness of transaction, the conclusion arrived in the order is highly whimsical, arbitrary, illogical and wholly untenable.

2.6 That the learned Commissioner of Income Tax (Appeals) while sustaining the above addition has arbitrarily and, mechanically rejected the explanation and evidence tendered by the appellant and made the addition and denied exemption by drawing subjective, premeditated and preconceived inferences therefore the same is not sustainable.

2.7 That the finding of the learned Commissioner of Income Tax (Appeals) that the appellant did not divulge the name of the person who advised her to buy the shares of MIs. Turbo Tech Engineering Ltd. and appellant did not have basic knowledge of share trading are irrelevant considerations either to bring to tax long term capital gain under section 68 of the Act or deny claim of exemption under section 10(38) of the Act and therefore, the addition made and confirmed is invalid.

2.8 That various adverse findings and conclusions recorded by the learned Commissioner of Income Tax (Appeals) are

factually incorrect and contrary to record, legally misconceived and untenable.

2.9 That the learned Commissioner of Income Tax (Appeals) has erred in concluding without any basis that assessee has introduced his unaccounted income in the form of long term capital gain by manipulating the penny stock.

3 That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in not allowing depreciation of cost incurred on purchase of shares and sold by the appellant in the next year.

It is therefore, prayed that it be held that exemption denied and addition made and sustained by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and appeal of the appellant be allowed.”

2. I have heard Ld. Representatives of both the parties and perused the findings of the authorities below. In all the grounds of appeal, the assessee challenged the addition of Rs.19,51,357/- u/s 68 of the Income Tax Act, 1961 (in short “Act”).

3. *Brief facts of the case are that return declaring income of Rs. 5,31,370/- was filed on 18.11.2014. In this return the assessee had claimed long term capital gains of Rs.19,39,557/- as exempt u/s 10(38) of the IT Act. The Assessing Officer referred to the investigation carried out by the Directorate of Investigation, Kolkata to unearth the organized racket of generating bogus entries of long term capital gains which is exempt from tax. After discussing the modus of such racket of generating of bogus entries, the Assessing Officer pointed out that the Directorate of Investigation, Kolkata investigated transactions in 84 penny stock shares quoted on BSE and examined on oath a large number of brokers, promoters and entry operators. As a result of this investigations, large number of individuals had been identified who had taken such accommodation entries and a number of such individual had surrendered the accommodation entry for taxation purposes. The Assessing Officer pointed out that the assessee was also beneficiary of the accommodation*

entries. In this regard the Assessing Officer pointed out the following facts:-

"8. The assessee is one such beneficiary who has taken the entry of Rs. 19,39,357/- during the assessment year 2014-15 under consideration along with other so many persons. Thus the facts of this case, therefore, should not be viewed in isolation but as one of the beneficiary in the larger aforementioned scheme.

8.1. During the course of assessment proceedings, the AR of the assessee furnished written submissions enclosing copies of computation bank statements and furnished the details of long term capital gain. The assessee purchased the 10,000 shares of M/s Turbo Tech Engineering Ltd. off market on 22.11.2011 from M/s Shree Ji Broking Pvt. Ltd., who was the original allottee of the shares for a total sale consideration of Rs.20,000/- -i.e. Rs.2 per share. Payment was made by the assessee to M/s Shree Ji Braking Pvt. Ltd in cash on 24.11.2011 and the shares were got transferred in her name 28.11.2011. Later on out of these 6000 shares were sold on 30.07.2013 and 31.07.2013 (500+5500=6000) through the broker M/s Indus Portfolio Pvt. Ltd, for a total sale consideration of Rs. 19,53,372/-

8.2. On going through the information made available prima facie it is found that the assessee indulged in bogus Long Term Capital Gain and claimed the above amount as exempt u/s. 10(38) of the Act, 1961. It is also found that the above scrip M/s. Turbo Tech Pvt. Limited, which the assessee purchased, was involved in providing bogus accommodation entries in the shape of bogus Long Term Capital Gains. "

3.1. All these facts were brought to the notice of the assessee by the Assessing Officer in the show cause dated 19/12/2016 and the appellant was asked to explain why transactions may not be held to be accommodation entry. The Assessing Officer also referred to the Investigation conducted by the Investigation Wing Kolkata and particularly referred to the statements of Sh.Anil Kumar Khemka recorded u/s 131 of the Act wherein it was stated by these persons that M/s Turbo Tech Ltd was used for the purpose of providing accommodation entries. After considering the facts of the case and the submissions of the assessee, the Assessing Officer held that the transaction

*was a accommodation entry and in this regard observed as
under:-*

"9.1. The assessee sold the shares on 30.07.2013 & 31.07.2013 (500+5500=6000) through the broker M/s Indus Portfolio Pvt. Ltd, for a total sale consideration of Rs.19,53,372/- for which the shares were dematerialized only on 11.06.2013. It is thus evident that just a few days prior to the date of sale, these shares are dematerialized though these are said to have been purchased on 22.11.2011. The transaction entered into by the assessee does not authenticate long term capital gain in view of the fact that these physical shares were purchased through off market and these shares were dematerialized only just a few days prior to the date of sale.

10. The assessee has shown credit of Rs.19,51,357/- in his bank account as sale proceeds of shares. As is evident from the investigation the actual source of this credit is the unaccounted cash of the assessee. The assessee was asked to explain the source of this credit. The explanation offered that it is sale proceeds of shares are found to be not only unsatisfactory but false. The assessee has been confronted with all the evidence

gathered and the issues mentioned in the foregoing paragraphs. The explanation of the assessee is general in nature that as the transaction is through Stock Exchange and the payment is by cheque, the transactions should be treated as genuine. The background of the scheme given in the beginning of the 'order clearly shows that both the requirements are in built in the scheme and does not ipso facto prove genuineness of transaction. The SEBI after thorough investigation has certified that such transactions are rigged and are carried out to convert Black money into white. That being so, the credit in the bank account of the assessee cannot be treated as explained and is therefore, liable to be added under section 68 of the Act. The evidence gathered has to be evaluated in the background of what the Hon'ble Supreme Court referred to as the test of preponderance of human probability judged on the basis of surrounding circumstances. That there was a scheme is not in doubt and that the assessee is a beneficiary is also an admitted fact. The onus was therefore, on the assessee to prove that either there was no such scheme and even if there was one, the benefit to the assessee was as a result of genuine transaction. The assessee has miserably failed to discharge this onus and therefore, the only inescapable

conclusion is that like thousand other individuals the assessee has also taken entry of bogus LTCG by paying unaccounted income.

10.1. It is true that in cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year; the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. To reiterate, the burden of proof, cast upon the assessee to prove that the claim of long term capital gain as exempt u/s 10(38), is not discharged in the instant case. "

3.2. *The Assessing Officer referred to all the aforesaid facts and held that LTCG amounting to Rs. 19,39,357/- was unaccounted income of the assessee and added the same to the total income of the assessee u/s 68*

of the IT Act. The Assessing Officer further held that the tax on these additions would be charged as per section 115BBE of the IT Act.

4. The assessee challenged the addition before Ld.CIT(A) and filed a written submission which is reproduced in the appellate order which reads as under:-

1. “While assessing the income of the appellant, Ld. AO completely ignored the facts of the case and the documents/evidences filed by the appellant. Appellant purchased shares, get the shares dematerialized, sold the shares on recognized stock exchange, paid STT and received amount through banking channel from the broker. Copy of bills of purchase of shares; copy of Share certificates, copy of share transfer form, copy of bank statement, copy of Demat account, and copy of account from the broker M/s Indus Portfolio P. Ltd are enclosed herewith.

2. Ld. AO has mentioned several persons in his assessment order including Sh. Anil Khemka, Sh. Sanjay Vohra, Bidyoot Sarkar and Sh. Nikhil Jain on which Income tax survey were conducted by the department. In this regard, it is to submit that the appellant has no direct or indirect relation with any of

these persons or with the Director/Promoters of the company M/s Turbotech Engineering Ltd. or any of their subsidiary or associate companies or concerns. Appellant never dealt with them and the Ld. AO also fails to provide any evidence which establishes any kind of relationship, between the appellant and these persons. Broker of the appellant is M/s Indus Portfolio P. Ltd and the Ld AO could not mention any evidence or material which shows that my broker is involved in any kind of manipulation of shares.

Ld. AO also didn't confront copies of statement recorded of Sh. Anil Khemka, Sh. Sanjay Vohra, Bidyoot Sarkar and Sh. Nikhil Jain to the appellant during assessment proceedings and enclosed copies of their statement in the assessment order only. This is done by the Ld. AO in clear violation of the provisions of law by not confronting the material to the appellant and by not giving any adequate opportunity to the appellant to defend his case. Since the statements were not confronted to the appellant, appellant was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly to our case.

3. Statements of four persons incorporated by the Ld. AO in assessment order are incomplete. Ld. AO has

incorporated only a part of statement in the assessment order according to his choice, which is again against the basic principles of law.

4. Ld. AO has also enclosed copy of some order of SEBI. This order also was never confronted to the appellant during assessment proceedings. Moreover, the order which is not very legible, seems to be passed in year 2015, whereas the appellant had purchased the shares in year 2011 and sold them in year 2013. It was evident from this document only that no action has been taken by the SEBI against the company during the period when the appellant holds the shares.

5. Documents incorporated by the Ld. AO in the assessment order at Page 20 to 22 are not at all legible. Therefore appellant is not in a position to comment on these documents.

6. Ld. AO has raised objection regarding the cash purchase of shares and that shares were dematerialize few days back only from the date of sale. In this regard, it is to submit that there is no law which prohibits the purchase of shares in cash. Appellant filed copy of bills of purchase, copy of share certificates and transfer forms etc. before Ld. AO and no adverse inference could be drawn only because the shares were purchased in cash. Regarding Demat of shares, it is to submit

that it is the option of the buyer of shares to keep the shares either in Demat form or in paper form. Merely because the shares were get Demat by the appellant at a later stage, no adverse inference could be drawn.

7. Ld. AO has no evidence in his favour to prove that the transaction of purchase and sales of shares is bogus and he is proceeding only on suspicion, conjectures and surmises. Ld. AO has failed to prove any material on record which proves that the transaction on the Recognised Stock Exchange is manipulated and bogus.

8. Increase and decrease in market rates of shares on stock exchange always based on market forces and are determined on the basis of so many factors. It is not within the power of appellant to manipulate the rates of shares on stock exchange. Merely because there is, a sharp increase in the rates of shares, no adverse inference could be drawn only on the basis of mere suspicion and in absence of any direct or cogent evidence.

9. Ld AO has alleged in his assessment order that the appellant was not produced before him for recording of statement. In this regard, it is to submit that the appellant had delivered a baby few time back only and she was not in a

position to appear before the Ld. AO due to her medical condition. We had made this request before the Ld AO also along with medical certificate and requested him to pass the assessment order on the basis of documents/information available on record.

10. Case laws relied upon by the Ld AO are distinguishable on the facts and circumstances of the present appeal and hence are not applicable.

11. Appellant's case is covered by following judgements:

Hitesh Gandhi, ITA No. 180 of 2017(P & H High Court)

Prem Pal Gandhi, ITA No. 95 of 2017 (P&H High Court)

Carbo Industria! Holdings Ltd. 244 ITR 422 (Cal)

Himani M Vakil, 41 taxmann.com 425 (Guj)

Mukesh Ratilal Marolia, ITA No. 456 of 2007 (Bombay High Court)

Smt. Jamnadevi Agrawal 328 ITR 656 (Bom)

Ashish International, ITA No. 4299 of 2009 (Bombay High Court)

Farrah Marker, ITAT Mumbai Bench in ITA No. 3801/Mum/2011

Sunil Prakash, ITAT Mumbai Bench in ITA No. 6494/Mum/2014

Pardeep Kumar Aggarwal 159 ITD 54 (Chandigarh)

Sri Dolarrai Hemani, ITAT Kolkata Bench in ITA No. 19/Kol/2014

Indravadan Jain HUF, ITAT Mumbai Bench in ITA No. 4861/Mum/2014

Kamla Devi S Doshi, ITAT Mumbai Bench in ITA No. 1957/Mum/2015

Surya Prakash Toshniwal, ITAT Kolkata Bench in ITA No. 1213/Kol/2016

Sunita Jain, ITAT Ahmedabad Bench in ITA No. 501 & 502/Ahd/2016 Pratik Suryakant Shah, 77 taxmann.com 260 (Ahmedabad-Trib)

Copy of all these judgements are enclosed herewith.

12. Ld. AO also erred in' making addition u/s 68 of the Act, although the impugned addition should not be made under this section. As per the requirement of law, appellant need not to maintain any books of accounts and in absence of books of accounts, no addition could be made U/S 68 of the Act.

13. That the GOA No.5 is regarding issuance of notice u/s 143(2), which was issued by the ITO, Ward-27(4), New Delhi. ITO, Ward-27(4), New Delhi has no jurisdiction over the case of the appellant and hence notice issued was without jurisdiction and invalid.

In view of above submission, it is prayed that all the additions made may kindly be deleted & the appeal of the appellant may kindly be allowed & oblige.”

5. *Ld.CIT(A) considering the explanation of the assessee and material on record, not only confirmed the addition of Rs.19,39,357/- but also enhanced the same addition to 19,51,357/- Thus, the appeal of the assessee has been dismissed with enhancement. The findings of Ld. CIT(A) in para 3.5 to 3.18 is reproduced as under:-*

3.5. “I have carefully considered the appellant's submissions. Before going to the merits of the issue at hand it may be relevant to look into the general modus operandi adopted by the persons who indulge in converting their unaccounted cash to accounted form through the route of capital gains. With the exemption reduction in tax on capital gains on shares, there is rampant practice of routing the unaccounted cash in the form of long term capital gains and claiming the same as exempt/ concessional tax rate. The general modus operandi adopted by such type of persons is as under:

(i) With the collusion of broker, shares are purchased of an unknown company with dubious background for miniscule consideration. For this purpose, the broker issues a fake brokerage note.

(ii) The companies in which shares are traded are usually in league with the broker and the broker undertakes off-market transactions to accommodate the appellant.

(iii) After a year, the shares are sold back by the buyer.

(iv) In the meantime, the shares prices are rigged by the concerned broker/company to an abnormally high level.

(v) The shares are sold by the buyer and sale consideration is received. The sale consideration is in fact first paid by the buyer in cash to the broker. This cash consideration which is- introduced in a banking channel by routing through a number of accounts, finally reaches the accounts of the broker. With this amount, the broker pays the consideration to the buyer.

(vi) Thus the buyer's own cash is introduced and comes back in the form of long term capital gain thereby claiming concessional tax rate.

(vii) The scrip invested is an obscure one in most cases. It is merely Shell Company with no activities whatsoever.

(viii) The buyer himself is normally unaware of the financial performance of the company in which he has invested.

(ix) The shares are purchased at lower rates and sold at higher rates through the series of off-market transactions created by the broker with vested interest. The share prices are artificially rigged through off market transactions. This hike is not supported by the fundamentals of the company.

3.6. To fully appreciate the issue at hand it is relevant to take notice of these commonly known notorious facts about the modus operandi of converting the unaccounted funds through willing dubious entities. Reference in this regard can also be made to the following decisions:-

(a) *CWT v, Rohtas Industries Limited*, 67 ITR 283 (SC), wherein it was held that-

"In the absence of any direct evidence, a judicial or quasi-judicial Tribunal can base its conclusions on the basis of what are known as notorious facts

bearing in mind the principles of Section 144 of the Evidence Act."

(b) *Attar Singh Gurmukh Singh v. ITD*,^{191 ITR 667 (SC)}, wherein, while interpreting the provisions of Section 40A(3), it was held that-

"In interpreting a taxing statute, the court cannot be oblivious of the proliferation of black money which is under circulation in our country."

3.7. It may now be relevant to refer to the various facts which emerge from the assessment order-and the submission of the appellant which are as under:-

- i) The appellant purchased 10,000 shares of M/s Turbo Tech Ltd for an amount of Rs. 20,000/-.
- ii) The shares were purchased in off market transaction from M/s Shree Ji Broking Pvt Ltd.
- iii) The shares were purchased in the name of the Appellant on 22.11.2011.
- iv) Payment for these shares was claimed to have been made on 24.11.2011 by cash i.e. two days after the shares were purchased.

v) The shares were dematerialised just before the sale of shares.

vi) The shares were sold on in July 2013 for an amount of Rs. 19,53,372/-.

3.8. Further, from the details gathered by the AO during the course of assessment proceedings following facts emerge:-

i) During the course of proceedings u/s 131(1) of the IT Act before the Investigation Wing Sh. Anil Kumar Khemka stated that his brokerage company was being used for providing accommodation entries in various scrips and M/s Turbo Tech Ltd was once such scrip.

ii) The financials of the penny stock M/s Turbo Tech Ltd. and movement of the price is abrupt, unrealistic and not based upon any realistic parameters. The history of investment in shares made by the appellant also generally reveals that she has not been dealing in shares on a regular basis. It has also been found that entries of LTCG have also been taken by other members of the family of the appellant.

- iii) The purchase of these shares were claimed to be through off market deals and not through Stock Exchange and the shares were not entered in D'mat account even upto one week before they were actually sold and the sale is through stock exchange. The appellant furnished the account copy of the D'mat account wherein it was observed that the said shares were D'materialized only a month before they were actually sold. The date of dematerialization is only on 11.06.2013 and the shares were sold during the period from 30.07.2013 to 31.07.2013.
- iv) The appellant is unable to furnish any other proof for purchase of shares except the bill issued by the broker.
- v) The relevant columns in the purchase bill i.e. order No., Trade No., and Trade Time are left Blank.
- vi) No Proof/source of payment for purchase of these shares was brought on record. The payment was claimed to have been made in cash.
- vii) The purchase of the shares cannot be verified from the Calcutta Stock Exchange since the vital columns in the said broker bill such as Order No, Trade No. & Trade Time was left blank.

3.9. As per appellant's own version, the shares were purchased M/s Shree Ji Broking Pvt Ltd on 22.11.2011 directly in cash and not through recognized stock exchange. Moreover, as per the documents on record the shares were purchased in the name of appellant on 22.11.2011 whereas the payment of the same as made only on 24.11.2011. Thus as per the facts on record the shares were purchased in the name of the appellant even before the payment was made. Further, from all the aforesaid facts, it is evident that the meager investment of Rs. 6,000 made by the appellant on 22.11.2011 went up to more than Rs.19 lakhs within a period of 24 months. Such a steep rise in value of investment is not within the realm of human probability. In these circumstances, it is evident that the transaction was as an arranged affair between the appellant and the accommodation entries providers and this fact has been duly admitted by Sh. Anil Kumar Khemka and Nikhil Jain referred to above. From the facts discussed above it is evident that M/s Turbo Tech Ltd was being used for the purpose of providing entry of long term capital gains by the entry providers and the transaction of sale and purchase of shares M/s Turbo Tech Ltd was not genuine transaction.

3.10. From the facts on record it is also evident that the appellant is not a regular investor in shares. Hence, it is quite surprising as to how she earned a phenomenal return of almost 50 times within a short span of period which is extremely unusual. This being the case, it is apparent that the appellant has entered into a sham transaction with the full knowledge of it, so as to convert unaccounted money into accounted money in the guise of capital gains.

3.11. The apparent is true until and unless it is disproved. Here in the instant case, the Managing Director and other Director Shri Nikhil Jain & Shri Anil Kumar Khemka on 02.06.2015 & 30.03.2015 of Abhinandan Stock Broking Pvt. Ltd. & Devshyam Stock Broking Pvt.ltd, had categorically stated that they were involved in providing accommodation entries regarding sale and purchase of shares through his companies. Therefore, human probabilities have also to be applied to comprehend the transactions and to see the real intention behind entering into these transactions. In similar circumstances, the honourable Gauhati High Court of CIT Vs Sanghamitra Bharali (361 ITR 481) had held that the capital gains are sham transactions entered only to give colour of

genuineness and therefore, held that the capital gain arising out of these transactions cannot be believed as genuine and upheld taxing the said amount as unaccounted income brought into books in the guise of exempted capital gains.

3.12. The Assessing Officer has referred to the issue of the organized racket of generating bogus entries of long term capital gains which is exempt from tax and has discussed the modus operandi of this operation in para 7.1, para 7.2 and para 7.3 of the assessment order. The Assessing Officer has held that the facts in the appellant's case show that the amount of capital gains generated in the transaction within a short span are beyond human probability. I agree with this observation of the Assessing Officer. These types of companies function in the capital market whose sale price is manipulated to astronomical height only to create the artificial transaction in the form of capital gain. Surrounding circumstances differ from the normal share market transactions in which they are ordinarily carried out. Taking all the steps together, final conclusion does not accord with the human probabilities. The Hon'ble Supreme Court in the case of CIT v. Durga Prasad More 82 ITR 540 held as under:

"It is a story that does not accord with human probabilities. It is strange that High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found and in our opinion, rightly that the decisions remains that the consideration for the sale proceeded from the assessee and therefore, it must be assumed to be his money. "

3.13. Generally, it is expected that apparent is real but it is not sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine. It is highly improbable that share price of a non-descript company can go up by almost 50 times, in a short span of time. The taxing authorities are not required to put on blinkers while looking at the documents produced before them. They are entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents. Mere receipt by cheque does not render a transaction genuine. Capital gain tax was created to operate in a real world and not that of make belief. Facts of the case only lead to the inference that these transactions are not genuine. Similar view has been held by the Hon'ble

Jurisdictional Punjab & Haryana High Court in the case of Balbir Chand Maini V/s CIT 340 ITR 161 (P&H) 247 CTR 468 (P&H) and the Case of Som Nath Maini V/s CIT 306 ITR 484 (P&H).

3.14. Reference in this regard may also be made to the following case laws.-

- I. Sanjay Bimal Chand Jain L/h of Shanti Devi Bimal Chand Jain V/s CIT ITA No. 18/2017 (Mumbai High Court Nagpur Bench)
- II. Ratnakar M. Pujari V/s ITD ITA No. 995/Mum/2012 (res) dated 03/08/2016
- III. Kamalchand Nathimal Lunia V/s ITO in ITA No. 436/Ahd./2013 (ITAT Ahmedabad)
- IV. Sh. Sanjay Ashok Jain in ITA No. 4185/Mum/2015 and ITA No. 4186/Mum/2015 (ITAT Mumbai)
- V. Santlal Gupta in ITA No. 2802 (Mum/20B (ITAT Mumbai) Kantadevi Gupta in ITA No. 2829/Mum/2016
- VI. Sudhir Balraj Jumani HUF ITA No. 1570/Ahd/2012 (ITA Ahd.)
- VII. Disha N. Dalwani ITA No. 6398/Mum/2012 ITAT Mumbai.

VIII Zakrullah Choudhary, Pimpri V/s ACIT in ITA No. 669/PN/2012 DATED 18/02/2014.

3.15. Keeping in view the aforesaid factual and legal position, the addition made by the Assessing Officer is confirmed. These grounds of appeal are dismissed.

3.16. During the course of appellate proceedings it was noted that the actual sale proceeds received by the appellant during the year was Rs. 19,51,357/- against which the appellant had claimed cost of acquisitions of Rs. 12,000/- and shown the amount of Rs.19,39,357/- as LTCG. In view of the fact that the transaction was accommodation entry, the whole of sale proceeds amounting to Rs. 19,51,357/- should have been added to the total income of the appellant. Accordingly, Notice u/s 251 of the IT Act dated 26.02.2018 was issued to the appellant and was asked to explain why the purchase cost of Rs. 12,000/- allowed by the AO as deduction may not be added to the total income and the income may not be enhanced accordingly. No reply has been filed by the appellant.

3.17. With regard to the facts of this issue it is evident that the appellant has received Rs. 19,51,357/- as accommodation entry during the year. Any expenditure

claimed to have been incurred in the earlier years is therefore not genuine and cannot be claimed and allowed as expenditure during the current year. The addition made by AO is accordingly enhanced to Rs.19,51,357/-.

3.18. In the result the appeal of the appellant is dismissed with enhancement as above.”

6. Ld. Counsel for the assessee reiterated the submissions made before the authorities below and submitted that an inquiry conducted in the cases of other assessees and statements referred to by the AO in the assessment order have not been confronted to the assessee. The assessee has not been named by any of these persons for indulging in taking accommodation entries. He has, therefore, submitted that such evidence cannot be read in evidence against the assessee and relied upon the decision of the Hon'ble Supreme Court in the case of Kishan Chand Chela Ram 125 ITR 713 (SC). He has submitted that for claiming exemption u/s 10(38) of the Act, the assessee shall have to prove twin conditions i.e. the income arise from the

transfer of long term capital asset and being equity share in a company where the transfer of sale of such equity share is entered into on or after the date of which Chapter-VII of the Finance Act, 2004 comes into force and such transaction is chargeable to security transaction tax under that Chapter. In the case of the assessee, both twin conditions are satisfied. He has filed copy of the shares certificate with transfer form, copy of debit note issued by Shreeji Broking (P) Ltd., copy of cash receipt of Shreeji Broking (P) Ltd., copy of ledger account of Indus Portfolio (P) Ltd., copy of form for evidence for payment of securities transaction tax on transaction entered in a recognized stock exchange and copy of the bank statement of the assessee in the Paper Book. He has further submitted that on identical facts, ITAT SMC Bench, Delhi in the case of Meenu Goel vs ITO in ITA No.6235/Del/2017 for AY 2014-15 vide order dated 19.03.2018 relying upon the decision of Hon'ble Punjab & Haryana High Court in the case of Pr.CIT vs Prem Pal Gandhi in ITA No.95-2017 vide order dated 18.01.2018,

allowed the claim of the assessee. The findings of the Tribunal in para 6 to 8 are reproduced as under:-

6. "I have heard both the parties and perused the relevant records available with me, especially the orders of the revenue authorities and the case law cited by both the parties. I note that assessee has earned Long Term Capital Gain amounting to Rs. 18,46,600/- during the financial year 2013-14 and the same has been claimed exempt under Section 10(38) of Income Tax Act, 1961. The assessee had purchased of 45,000/- shares of Unisys Software Holding Industries Ltd amounting Rs. 9,38,600/- at a premium of Rs. 20.85 per share in physical form. Out of the aforesaid 45000/- Shares assessee sold of 8000 Shares only i.e. 17.77%. Thus, the major part of the Shares i.e. 82.33% are still in the hand of the assessee. In my view the the assessee just wanted to enter into the transaction to earn exempted capital gain, but the assessee did not sell all the share 45000 shares instead of sale of a part i.e. 8000 shares only when that time was the best price ever. All the transaction were made through account payee cheque / banking channel and assessee had purchased share in financial year 2009-10 and sold the same in the financial year 2013-14 resulting in Long Term Capital Gain. The assessee has submitted

various documentary evidences to prove the genuineness of the transaction of sale and purchase of shares which includes a copy of purchase bill dated 22.02.2010; a copy of share transfer form in the favour of the assessee; Copy of bank statement highlighting the payment made against the share purchased; Transaction statement of the stock broker i.e. Pace Stock Broking Services (P) Ltd., account; copy of bank statement in which sale proceed from the sale of shares received; copy of calculation of long term capital gain, which was not faulted by the AO. However, the lower authorities have not considered the aforesaid documents and rejected all the claims made by the assessee by relying on the report of the Investigation Wing and thereby made the addition, which is not sustainable in the eyes of law. I further find that the AO has given detailed explanation in the order regarding the modus operandi of bogus LTCG scheme but failed to substantiate how the assessee fell in the purview of the same without bringing any material on record and proving that the assessee was directly involved in the so called bogus transaction. I further note that the addition in dispute made by the AO and upheld by the Ld. CIT(A) u/s 68 as unexplained credit instead of long term capital gain as claimed by the assessee,

however, the source identity and genuineness of the transaction having been established by documentary evidences and there is no case for making addition u/s 68 of the Act, hence, the same deserve to be deleted. I note that in most of the case laws of the Hon'ble High Courts referred by the Ld. DR the reason on the basis of addition was confirmed was that the assessee had not tendered cogent evidence with regard to share transaction, however, in the present the case assessee has submitted all the documents / evidences, therefore, the case laws relied by the Ld. DR are based on distinguished facts and circumstances, hence, the said case laws are not applicable in the present case. However, in my considered opinion, the issue in dispute is squarely covered by the various decisions of the ITAT and the Hon'ble High Courts including the recent decision dated 18.1.2018 of the Hon'ble High Court i.e. Hon'ble High Court of Punjab & Haryana in the case of PCIT (Central), Ludhiana vs. Prem Pal Gandhi passed in ITA No. 95 of 2017.

Decision dated 18.1.2018 of the Hon'ble High Court of Punjab & Haryana in the case of PCIT (Central), Ludhiana vs. Prem Pal Gandhi passed in ITA No. 95 of 2017 wherein it has been held as under:-

- “2. The following questions of law have been raised:-
- (i) Whether on the facts and in the circumstances of the case, the Hon’ble Income Tax Appellate Tribunal has erred in upholding the order of the CIT(A) deleting the addition of Rs. 4,11,77,474/- made by the AO on account of sham share transactions ignoring an important aspect that the transaction of shares showing their purchase price at Rs. 11,00,000/- and sale consideration at Rs. 4,23,45,295/- within a period of less than two years / purchases of shares made in cash not cheque that too before shares got dematerialized / worth of the company at the time of purchase / sale of shares not proved- All suggest non-genuineness of the said transaction?
 - (ii) Whether on the facts and in the circumstances of the case, the Hon’ble Income Tax Appellate Tribunal has erred in law in upholding the order of the CIT(A) deleting the addition of Rs. 4,11,77,474/- made by the AO on account of sham share transactions, whereas the CIT(A) himself had held that the assessee had not been

able to substantiate the source of investment of Rs. 11,00,000/- in the said shares purchased during the financial year 2005-06 and the AO was directed to reopen the case of the assessee for the assessment year 2006-07 on this issue?

- (iii) Whether the Hon'ble ITAT has erred in ignoring an important aspect that in such cases of sham transactions of shares showing abnormal hike in their value, where the facts themselves speak loud and clear, the AO is justified to even draw an inference from the attendant circumstances?
- (iv) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal has erred in law in upholding the order of the CIT(A) deleting the addition of Rs. 12,59,000/- made by the AO on the basis of seized document on the grounds that the AO has not pointed out as to how the figures of Rs. 12.59 lacs has been worked out ignoring the fact that the assessee himself in his reply to the AO had tried to explain the source of the receipts of Rs. 12,59,000/- instead of

challenging the working out of the said figure by the AO?

3. The first three questions of law raised in this appeal are covered against the appellant by an order and judgment of a Division Bench of this Court dated 16.02.2017 in ITA-18-2017 titled as The Pr. Commissioner of Income Tax (Central), Ludhiana vs. Sh. Hitesh Gandhi, Bhatti Colony, Chandigarh Road, Nawanshahar.

4. The issue in short is this : The assessee purchased shares of a company during the assessment year 2006-07 at Rs. 11/- and sold the same in the assessment year 2008-09 at Rs. 400/- per share. In the above case, namely, ITA 18-2017 also the assessee had purchased and sold the shares in the same assessment years. The AO in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also the CIT(Appeals) and the Tribunal held that the AO had not produced any evidence whatsoever in support of the suspicion. On the other

hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner.

5. In these circumstances, following the judgment in ITA-18-2017, it must be held that there is no substantial question of law in the present appeal.

6. Question (iv) has been dealt with in detail by the CIT(A) and the Tribunal. Firstly, the documents on which the AO relied upon the appeal were not put to the Assessee during the assessment proceedings. The CIT(A) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises.

7. In the circumstances, the appeal is dismissed.”

7. Keeping in view of the facts and circumstances of the case as explained above and respectfully following the precedent, as aforesaid, the addition amounting Rs. 18,46,600/- made by the AO and confirmed by the Ld. CIT(A) is hereby deleted and ground raised by the assessee is allowed.

8. In the result, the appeal of the assessee is allowed.”

6.1. *He has, therefore, submitted that the issue is covered in favour of the assessee by above decision. The assessee entered into genuine transaction, therefore, no addition u/s 68 of the Act be made against the assessee.*

7. *On the other hand, Ld. Sr. DR relied upon the orders of the authorities below.*

8. *I have heard the rival submissions and perused the material available on record. The assessee placed sufficient documentary evidences before the AO which are copy of the shares certificates with transfer form, copy of debit note issued by Shreeji Broking (P) Ltd.,*

copy of cash receipt of Shreeji Broking (P) Ltd., copy of the account statement of the assessee in the books of the broker, copy of ledger account of Indus Portfolio (P) Ltd., copy of evidence for payment of securities transaction tax and copy of the bank statement of the assessee to show that the assessee had entered into genuine transaction of purchase of share which were later on sold through the broker on recognized stock exchange after payment of STT. The claim of the assessee for sale of shares has been supported by the documentary evidences which have not been rebutted by the authorities below. Whatever inquiry was conducted in the cases of other parties and statement recorded of several persons namely Sh. Anil Khemka, Sh. Sanjay Vohra and Sh. Bidyoot Sarkar as referred in the assessment order and the report of the Investigation Wing were not confronted to the assessee and above statements were also not subject to cross-examination on behalf of the assessee.

Therefore, such evidences cannot be read in evidence against the assessee. The order of the SEBI was also not confronted to the assessee. AO did not mention any such fact in assessment order. More so in those reports and statements, the name of the assessee has not been referred to. Ld. Counsel for the assessee, therefore, rightly contended that the twin conditions of section 10(38) of the Act have been satisfied in the case of the assessee. The assessee has been able to prove that she has entered into the genuine transaction of purchase and sale of shares and the sale consideration is received from broker through banking channel. The brokers have not denied the transaction with the assessee. The assessee rooted the transaction of sale of shares through recognized stock exchange after making payment of STT. In similar circumstances, ITAT SMC Bench, Delhi in the case of Meenu Goel vs ITO (supra) following the decision of Jurisdictional Hon'ble P&H High Court in

the case of Pr.CIT vs Prem Pal Gandhi (supra) deleted the similar addition. Therefore, the issue is covered in favour of the assessee by the order of ITAT, Delhi Bench in the case of Meenu Goel vs ITO (supra) followed by judgement of Jurisdictional P&H High Court which is binding. There is no other material available on record to rebut the claim of the assessee of exemption claimed u/s 10(38) of the Act.

9. Keeping in view of the above discussion and the material on record, in the light of the order of the Tribunal in the case of Meenu Goel vs ITO (supra), I set aside the orders of the authorities below and delete the addition of Rs.19,51,357/-. The appeal of the assessee is, accordingly, allowed.

10. In the result, the appeal of the assessee is allowed.”

6. Learned Counsel for the Assessee has taken me to various documents in the paper book as referred to above which

specifically prove the purchase of shares made by assessee genuinely which were also sold genuinely. The transactions were carried through Demat account and banking channel on which STT has been paid by assessee. The report of the SEBI was not adverse in nature against the assessee because name of the assessee did not appear therein for conducting dubious transaction. The report of the Investigation Wing and other material was not confronted to assessee, therefore, the same cannot be read in evidence against the assessee. More so, the general enquiry conducted about modus operandi without verifying bogus long term capital gains could be indicated to take action against some of the assesseees. A specific query and material against the assessee should have been brought on record to put assessee under liability. However, in the present case, the entire documentary evidence on record have not been disputed by the authorities below and there is no rebuttal to the explanation of assessee. No adverse material have been brought on record against the assessee. Further, no proper enquiry have been conducted by the A.O. on the documentary evidences filed

by assessee. Whatever statements have been referred to in the order were general in nature with whom assessee did not have any transaction. Learned Counsel for the Assessee heavily relied upon the order of ITAT, Delhi in the case of Meenu Goel vs. ITO (supra) and Judgment of Punjab & Haryana High Court in the case of Pr. CIT vs. Prempal Gandhi (supra). Both the decisions have been considered in the case of Smt. Shikha Dhawan vs. ITO (supra) reproduced above. Considering the totality of the facts and circumstances of the case and following the reasons for decision in the case of Smt. Shikha Dhawan vs. ITO (supra), I hold that assessee has entered into genuine transaction of sale and purchase and therefore, satisfied the conditions of Section 10(38) of the I.T. Act. The assessee is entitled for exemption under the same provision. I, accordingly, set aside the orders of the authorities below and delete the addition of Rs.47,66,264/- Appeal of assessee is allowed.

7. In the result, Appeal of assessee is allowed.

Order pronounced in the open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 02nd August, 2018

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.