

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील सं / ITA Nos.404 & 473/PUN/2017

निर्धारण वर्ष / Assessment year : 2003-04

Jayna Enterprises Private Limited,
Shah Khandelwal Jain & Associates,
Chartered Accountants,
Level 3, Business Bay, Plot No.84,
Wellesley Road, Near RTO.,
Pune – 411 001.

..... अपीलार्थी /
Appellant

PAN : AAACJ4653K.

बनाम v/s

The Asst. Commissioner of Income Tax,
Circle – 10, Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Rishabh Gujarathi.

Revenue by : Shri M.K. Verma.

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| सुनवाई की तारीख / Date of Hearing : 18.12.2018 | घोषणा की तारीख / Date of Pronouncement: 15.03.2019 |
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. These two appeals filed by the assessee are emanating out of separate orders of the Commissioner of Income Tax – (Appeals) – 9, Pune and Commissioner of Income Tax (Appeals) -6, Pune, both dated 30.11.2016 for the assessment year 2003-04.

2. Before us, at the outset, both the parties submitted that the facts and issues involved in both the appeals are identical except for the amounts involved and therefore the submissions made by them while arguing one appeal would be equally applicable to the other appeal also

and thus, both the appeals can be heard together. In view of the aforesaid submissions of both the parties, we, for the sake of convenience, proceed to dispose of both the appeals by a consolidated order but however, proceed with narrating the facts in ITA No.404/PUN/2017 for A.Y. 2003-04.

3. The relevant facts as culled out from the material on record are as under :-

Assessee is a company stated to be engaged in the business of trading of chemicals. Assessee had filed its return of income for A.Y 2003-04 on 05.11.2003 declaring total income of Rs.32,47,460/-. A search and seizure operations were conducted in the Punjabi Group of cases on 17.03.2006. Assessee is stated to be a part of the Panjabi Group. Thereafter, notice u/s 153A of the Act was issued in all the cases including the assessee to which all the assesses in the Group including the assessee stated that the return of income filed originally be treated as return of income in response to notice u/s 153A of the Act. Thereafter, the case was taken up for scrutiny.

During the course of search and post search inquiries it was noticed that the assessee group had claimed long term capital gain on account of purchase and sale of certain shares during A.Y 2002-03, A.Y 2003-04 and A.Y 2005-06. It was found that Shri Moti Punjabi undertook all investment/financial related decisions with respect to the entire group. Apart from the evidences found during the search, Shri Moti Panjabi admitted the transactions in penny stock and offered to declare the income of Rs.1,57,31,579/- in the hands of respective family members but the same was not adhered to while filing the return of income.

In the case of the assessee, AO on the basis of evidences gathered during the course of search and post search inquiries, concluded that brokers had issued bogus contract notes/bills and accommodation entries were provided for the purpose of benefitting the assesses by booking long term capital gains. He also concluded that as a matter of practice in share dealings, no broker would do such transactions free of cost. In the case of the assessee the total sale proceeds credited on account of the sale of shares in the books/bank account for the year under consideration was to the tune of Rs.32,95,750/-. He made its addition. AO also made addition of 6% of the sale proceeds on account of commission on such amount. The aggregate aforesaid amount was added as undisclosed income of the assessee in the order dated 28.12.2007 framed u/s 153A r.w.s 143(3) of the Act. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 28.02.2011 confirmed the action of AO. Aggrieved by the order of CIT(A), assessee carried the matter before Tribunal. Tribunal vide order dated 31.10.2012 in ITA No.659/PUN/2011 restored the issue regarding the dispute regarding the purchase of shares to the file of AO with certain directions. Pursuant to the directions of ITAT, AO vide order dated 28.03.2014 in the order passed u/s 143(3) rws 254 of the Act made addition of Rs.34,93,495/- on account of fictitious sale of shares and fictitious capital gains inclusive of brokerage and commission of 6%. Aggrieved by the order of AO, assessee once again carried the matter before Ld.CIT(A), who vide order dated 30.11.2016 (in appeal No.PN/CIT(A)-V/ACIT, Cir-10/251/2014-15) dismissed the appeal of the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now before us in 2nd round and has raised the following grounds :

“1. On facts and circumstances prevailing in the case and as per provisions of law and scheme of the Act, it be held that the addition made to the income of the appellant on account of alleged accommodation entry of Rs.32,95,750/- & addition of Rs.1,97,745/- being impugned commission thereon is improper unjustified and contrary to the provisions of the law & facts prevailing in the case It further be held that appellant is eligible to claim exemption of long term capital gain & addition of impugned commission is not sustainable The disallowance / addition made by the AO and that confirmed by the Hon'ble CIT(A) be deleted. The appellant be granted Just & proper relief in this respect.

2. On facts and circumstances prevailing In the case and as per provisions & scheme of the Act it be held that the AO as well as the first appellate authority erred in concluding that the Hon'ble ITAT never accepted the genuineness of transactions of sale of shares entered Into by the appellant Assessment order passed by the AO on this score and that confirmed by the first appellate authority deserves to be set aside The appellant be granted Just and proper relief in this respect.

3. On facts and circumstances prevailing in the case and as per provisions & scheme of the Act it further be held that the AO travelled beyond her jurisdiction against the specific directions of the ITAT It further be held that the order passed by the AO against ITAT directions is perverse The order passed by the AO is in contravention to the specific directions of the ITAT and is not as per the rules of judicial discipline and the same needs to be set aside on this score The disallowance l addition made by the AO and that confirmed by the Hon'ble CIT(A) be deleted The appellant be granted Just and proper relief in this respect.”

4. All the grounds being interconnected, they are considered together.

4.1. Ld.A.R. submitted that there is delay of 5 days and 3 days in filing the appeals, respectively. Considering the smallness of delay, the appeals are admitted.

5. Before us, at the outset, Ld.AR submitted that the issue in the present appeal is covered in favour of the assessee by the consolidated order of the tribunal dated 30.11.2018 in the Assessee's group case. He also placed on record the copy of the aforesaid order. He therefore submitted that in view of the decision of the Tribunal in assessee's own group of cases, the issue be decided in favour of the Assessee. Ld.DR on the other hand did not controvert the submissions made by Ld.AR but however supported the order of lower authorities.

6. We have heard the rival submissions and perused the material on record. The issue in the present appeal is with respect to addition made on account of alleged bogus sale of shares which the assessee had claimed as long term capital gains. We find that in the group of cases to which the assessee belongs, on identical facts similar addition made on account of same search was made in the hands of various assessee's of the group. The co-ordinate Bench of the Tribunal vide order dated 30.11.2018 has decided the issue in favour of the assessee. The relevant findings of the Tribunal reads as under :

“14. Before me, ld. AR explained that he represents all the bunch of 23 appeals under consideration. He explained the aforesaid facts of the case and submitted that the appeals under consideration need to be decided without sending back the appeals to the file of the Assessing Officer again. He already adjudicated the issue in favour of the assessee alongwith the directions of the Tribunal. The data needed for verifying the issue linked to the distinctive numbers, was also examined by Assessing Officer/CIT(A). The CIT(A) although attended to this issue as seen in para 7.1.1 extracted above, he went tangent to the mode of the Assessing Officer. In this regard, ld. AR submitted that on similar issue the other cases of the Panjabi group are adjudicated in favour of the assessee vide Moti U. Panjabi, ITA No.626/PN/2011 dated 10.10.2014 for assessment year 2003-04 (Para 19). The fact that the appeal for assessment year 2002-03 was decided to follow the facts of appeal for assessment year 2003-04 was also informed (ITA No.1679/PUN/2015 dated 02.11.2018). Ld. AR also filed series of decision of the Tribunal in support of the claim of expenditure u/s 10(38) of the Act in respect of LTCG.

15. Further, ld. AR filed **written submission** considering the facts and issues arising out of appeal in case of Rajkumar Ram Punjabi listed at sl. no.7 on the tile page. Sl. no.17 relates to this case in the order on the first round. For the sake of completeness of the order, the portion relating to the 'submission' is extracted in the following paragraphs :-

“3.1. Para 43 of the ITAT order which restored the issue to the file of the AO is relevant in this case. In the said Para Hon'ble ITAT has concluded that "the sale of shares from the DEMAT account has not been proved to be false. The dispute is only regarding the purchase of the shares. Since the assessee was not able to satisfy the revenue authorities with the distinctive number of the original shares which were subsequently dematerialised and sold, the lower authorities had doubted the genuineness of the transactions. Ld counsel for the assessee is in a position to demonstrate before the AO that the consolidated share certificates received on purchase of the shares in physical form were subsequently splitted into smaller denomination and the splitted shares were sent for dematerialisation and the shares bearing the same distinctive numbers were later sold. In other words the distinctive numbers

were later sold. In other words, the distinctive number of the shares sold and the shares purchased are the same. Therefore we deem it proper to restore the issue to the file of the AO with the direction to give an opportunity to the assessee to substantiate with evidence to his satisfaction that the assessee has in fact sent the consolidated share certificates to the respective companies for splitting and the distinctive numbers of such splitted share certificates which has gone to the DEMAT account and subsequently sold are the same." On apparent reading of this para it transpires that the Hon'ble ITAT has accepted that the share transactions are genuine. The crux of the matter is that the Hon'ble ITAT had restored the issue to the **file of the AO for the limited verification of matching the distinctive number of shares purchased and sold are one and the same and the period of holding the shares from the date of purchase in physical form to the date of sale of shares in DEMAT form is more than a year.**

3.2. However, the Ld AO travelled beyond his jurisdiction in assessing the appellant again holding that the transaction entered into by the appellant is bogus. Whereas, the Hon'ble ITAT has already stated that the transaction is genuine and what needs to be only checked is whether the shares sold and those purchased are same.

3.3. The case of the appellant is squarely covered by the decision of the Hon'ble Pune ITAT in case of Shri Moti Panjabi (ITA No. 626/PN/2011) for AY 2003-04. The Hon'ble Pune ITAT deleted the addition made for AY 2003-04 on the basis of the third party evidences in the form of Dematerialisation request form of Cosmos Co-op Bank Ltd and Letter from investee-company confirming split/consolidation of shares held in physical form.

3.4. Appellant submitted **all the documents, including the third party evidences to prove that the appellant has purchased the shares in physical form, then the shares got split/consolidated**, then got Dematerialised and subsequently sold in the year in which it has been assessed by the AO. The documents provided by the appellant are not disputed by the Ld AO at any stage of proceedings. In such a situation, the transactions entered into by the appellant should not be treated as bogus, relying on the decision of the Hon'ble Bombay High Court in case of CIT vs Shyam R Pawar 54 taxmann.com 108 (Bom) PB pg 1 to 5. Further period of holding should be reckoned from the date of purchase of shares and not from DMAT of shares. For this proposition we place our reliance on the decision of Shri Jafferli K Rattonsej Vs DCIT (ITA 5068/MUM/2009)(ITAT Mumbai) PB pg 6 to 20 and also in case of Shri Moti Panjabi (Ay 2003-04) in ITA no.626/PN/2011.

3.5. The case of appellant is also similar to the case of ITO vs Ram Krishna Ghosh 142 ITD 544 (ITAT Kolkata) PB pg 21-23 wherein it has been held that once the AO has accepted the transaction as genuine, it cannot be open to him to alter the date of purchases and once this date remains unchallenged, there is no basis for hearing the capital gains as short term capital gains. In the case of appellant as well, the Hon'ble ITAT as well as AO (as stated by him in his written submissions in Para 34 of the first ITAT order which restored the matter back and in his miscellaneous application made before the Hon'ble ITAT) has accepted the fact that the transactions of sale are genuine.

Therefore, the case of department now stating that the transactions are not genuine and taxed u/s 68 of the Act is wrong.

4. Without prejudice submissions (Relevant to Ground no.2 & 3 of the appeal form):

4.1. The Ld AO has relied upon the replies received from the stock exchange stating that no transactions were carried out by the appellant group on the stock exchange. Further, the AO has stated that even the broker has denied any trading of the above scrip in the name of appellant group persons. Appellant did ask for cross examination of the above statements/ evidences which has not been provided by the Ld AO at any stage of the proceedings. Failure to do so vitiates the assessment proceedings. For this proposition we place our reliance on the following decision: *Sunil Prakash vs ACIT (ITAT Mumbai) ITA 6494/MUM/2014 PB pg 24-30.*

4.2. We further rely on the case of *Navneet Agarwal, Legal heir of Late Kiran Agarwal Vs ITO (ITA 2281/KOL/2017) (ITAT Kolkata) PB pg 31-57* wherein it has been held that the chain of events and the live link of the assessee's action giving his involvement in the bogus transactions should be established. The allegation by the department imply that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Opportunity of cross examination of the statements relied upon by the Revenue should be provided to the assessee. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. In the absence of the all the above actions, the act of the AO in treating the LTCG as bogus transaction cannot be held as valid.

4.3. We also place reliance on the judgment of *Arun Kumar Vs ACIT ITA no.457/Del/2018 (ITAT Delhi) PB pg 58-96* wherein the court held that it cannot be inferred that the assessee has manipulated the share price merely because it moved up sharply. The AO has to produce material / evidence to show that the assessee/ brokers did price rigging / manipulation of shares. The AO must also show that the relevant evidence produced by the assessee in the form of bills, contract notes, demat statement, bank account, etc. to prove the genuineness of the transactions are false or fictitious or bogus.”

16. From the above written submissions, the case of the AR is that the issue under consideration constitutes a covered case by the decision of the Co-ordinate Bench of the Tribunal in the case of *Shri Moti Punjabi (supra)* where the Tribunal deleted the additions on the strength of series of the orders of the Tribunal on one side and the binding judgment in the case of *Shyam R. Pawar (supra)* on the other. In the said written submission, the summary of facts are given in para 1.1 to 1.15 by the assessee.

17. On following the written submissions of the assessee (*supra*), I find that the Assessing Officer failed to discharge the onus by way of collecting any incriminating evidence against the assessee to prove the non-genuineness of the purchase transaction of shares. According to Assessing Officer, I find that there is no case for revenue as the issue stands covered both on facts and in law.

18. *Per contra*, ld. DR for the Revenue relied heavily on the orders of the Assessing Officer/CIT(A). Ld. DR has nothing to state when a query relating to non-compliance to the directions of the Tribunal in the first round is raised by me. Ld. DR also filed written submissions dated 31.10.2018. It merely narrates the aforesaid events. The stand of the Revenue is summoned up in para 9 and 10 of the written submission by the Revenue. For the sake of completeness, the said paragraphs are extracted as under :-

“9. The above appeals are yet to be decided by the Hon’ble Bombay High Court but there is every possibility that the Hon’ble Court may decide these cases by following its preceding judgment already passed by it in one of the case of assessee group as discussed above. From the verdict of Hon’ble High Court given in the case of *Shri Moti U. Panjabi*, it is ascertained that the Hon’ble High Court has clearly noted that the Tribunal has restored the issue to the Assessing Officer for fresh decision after considering the evidence placed before him. Thus, the above mentioned observation made by the Hon’ble High Court, being a superior judicial authority should prevail over the decisions of the Hon’ble Tribunal given in the group cases. Therefore, it is binding upon the AO to follow the views taken by the Hon’ble Bombay High Court and as such, AO is required to take fresh decision on the basis of facts and evidences placed before him rather than to make limited enquires as contended in the order of Hon’ble ITAT, Pune.

10. Therefore, taking into consideration all the above facts, the assessee group were failed to discharge their onus lies on them and have not been able to furnish any fresh evidence regarding genuineness of transactions with respect to purchase/sales of shares, hence the AO correctly passed order u/s 143(3) r.w.s. 254 in all the cases by making addition of the entire amount of sales proceeds shown in the books of assesseees for respective AYs and also added the component of commission @ 6% (being the market rate prevailed during the year under consideration) on total sale consideration. Considering this factual position, it is requested that the addition made by the AO in these group cases may kindly be upheld.”

19. **Legal Propositions** : Further, I also perused the ratios of various decisions placed before me. I find them relevant to extract the settled legal proposition on this issue. For the sake of completeness, the conclusion/ratio/held portion of all the binding citations are extracted as follows :-

1. CIT vs. Shyam R. Pawar, 54 taxmann.com 108 (Bom)

Conclusion : Where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income under section 68.

2. Shri Jafferli K Rattsonsey vs. DCIT (ITA No.5068/MUM/2009)

Finding : 9.6 In view of the above judicial decisions the statement of Mr. Mukesh Choksi cannot be a deciding factor for rejecting the genuineness of the purchase of shares by the assessee especially when all other supporting evidences filed by the assessee were neither proved to be false or untrue. We further find merit in the submission of the ld. counsel for the assessee that the dematerialization of shares from physical holding is a lengthy process and takes considerable time. Therefore, when there is no dispute to the dematerialization of shares before the date of sale, therefore, the shares were purchased much prior to the date of sale.

9.7 The CBDT Circular No. 704 dtd. 28.4.1995 states that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. The CBDT Circular No. 768 dtd. 24.6.1998 was issued to clarify the determination of date of transfer and the period of holding of securities held in demat form. It has been stated there in that earlier Circular No. 704 issued by the CBDT relating to the "date of transfer" and "period of holding" does not change even when securities are held in the dematerialized form. Therefore in view of the above two circulars of CBDT it is clear that in case of securities the "date of purchase" has to be taken from the broker's note/contract note and the period of holding is also to be reckoned from the "date of purchase" and not from the "date of dematerialization". Since the holding period of the shares as per the broker's note and its subsequent sale after dematerialization is more than 12 months, therefore, the shares become long term capital asset and the assessee's claim of long term capital gain is correct. In this view of the matter we set aside the order of the Id. CIT(A) and **direct the A.O. to accept the long term capital gain declared by the assessee.** We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed.

3. ITO vs. Ram Krishna Ghosh, 142 ITD 544

Conclusion : Merely because shares purchased by assessee were transferred to his demat account on a later date, date of transfer to demat account could not be taken as date of purchase.

4. Sunil Prakash vs. ACIT (ITA No.6494/MUM/2014)

Finding : We have perused the case laws relied upon by the AR. In the case of Mukesh R Marolia (supra) Hon'ble jurisdictional High Court has held as under:

" On further Appeal, the ITAT by the impugned order allowed the claim of the Assessee by recording that the purchase of shares during the year 1999-2000 and 2000- 2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted. Similarly, the sale of the said shares for Rs.1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine. In these circumstances,

the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs.1,41,08,484/-represented unexplained investment under Section 69 of the Income Tax Act, 1961 cannot be faulted."

We are of the opinion that the facts of the case of Mukesh R Marolia are similar to the facts of the cases under consideration. Respectfully following the orders of the **Hon'ble High Court and the coordinating benches of the Tribunal we hold that purchase and sale of shares by the assessee was a genuine transaction, and hence, addition made by the AO cannot be endorsed.** Upholding the orders of the FAA , we dismiss the appeals filed by the AO.

" Facts of the present case are being identical to the above case and also in view of our observations made above, the impugned additions in this case are not called for and the same are accordingly ordered to be deleted. "

Considering the above and reversing the order of the FAA, we decide the effective ground of appeal in favour of the assessee, as his order cannot be endorsed legally or factually.

As a result, appeal filed by the assessee stands allowed.

5. Navneet Agarwal, Legal heir of Late Kiran Agarwal vs. ITO (ITA No.2281/KOL/2017)

Finding : 10.

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20. Applying the proposition of law as laid down in the above-mentioned judgements to the facts of this case we are bound to consider and rely on the evidence produced by the assessee in support of its claim and base our decision on such evidence and not on suspicion or preponderance of probabilities. **No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares** and hence exempt from income tax.

21. Under these circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question.

6. Arun Kumar vs. ACIT (ITA No.457/Del/2018)

Finding : 7.

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8. In view of aforesaid judgments/orders passed by the Hon'ble High Courts as well as the Tribunal, I have no hesitation to hold that neither AO nor CIT-A has been able to controvert assessee's copious evidences filed in present case which clearly supports the case of assessee qua LTCG claimed as exempt u/s 10(38) of the Act on sale of shares of M/s Kappac Pharma Limited and so issue framed by me above needs to be answered in favor of appellant /assessee. So **addition made on a/c of LTCG /s**

68 read with section 115BEE is deleted. So grounds relating to addition u/s 68 are allowed.

Decision of the Tribunal in this Second Round

20. I examined the ground no.1 relating to the non-compliance to the directions of the Tribunal in the first round. In this regard, I perused the said order of the Assessing Officer in the second round vide his order dated 27.03.2014 and find the Assessing Officer merely repeated the additions without having any regard for the said directions of the Tribunal. Even the CIT(A) is not bothered to appreciate the ratio of the judgement in this very case from the jurisdictional High Court (supra) when upheld the genuineness of the claim or transactions in principle. I have already extracted the relevant paragraphs from the judgement in this order above. It is the finding of the Hon'ble High Court that the purchase transactions/the claim of exempt LTCG constitutes genuine one the nexus of distinctive numbers of shares purchased and shares sold is established. Otherwise, Assessing Officer did not find any discrepancy qua the distinctive numbers of the shares purchased and sold in both the rounds before him. No adverse finding in this regard is on the records and of course, Assessing Officer's order is silent in this regard. On the contrary, the CIT(A) examined this issue relating to the Tribunal's directions and however, dismissed the appeal of the assessee giving some other unconnected reasoning. In my view, the CIT(A) also has wrongly assumed jurisdiction by travelling beyond the direction of the Tribunal. From this point of view, I find it is a clear case of non-compliance of Assessing Officer/CIT(A) to the direction of the Tribunal. DR's request for grant of one more round i.e. third round before the Assessing Officer is not correct. Accordingly, resisting the requirement of remanding one more time, the ground no.2 allowed in favour of the assessee.

21. Further, on merits too, I perused the order of the Tribunal in the case of Moti U. Punjabi (supra) for the assessment year 2002-03 and find the contents of para 19 is relevant for extraction hereunder :-

"19. We have considered the rival submissions on this aspect. The only point that is being addressed by us is the period for which, assessee has held the shares of Media Matrix prior to its sale. As per the CIT(A), the period is to be counted from the date of D-MAT of such shares by the assessee. Pertinently, the claim of the assessee was that such shares were purchased by him by way of physical delivery in the month of July, 2001 and therefore, the period of holding should start from July, 2001. The CIT(A) considered the date of D-MAT of the shares as the starting point of the period of holding because according to him, the shares purported to have been purchased in physical form could not correlated by the assessee with the shares put in D-MAT account. In our considered opinion, the documents of the Depository i.e. Cosmos Co-operative Bank Ltd. furnished by the assessee supports his assertion that the shares put into the D-MAT account bear the same distinctive numbers as were canvassed to have been purchased in physical form. Notably, **distinctive number of shares is confirmed by the investee company vide its communication dated 04.08.2001, a copy of which is placed at page 6 of the Paper Book.** Notably, the aforesaid document is a third party evidence and was found in the course of search with assessee, an assertion which is not been negated by the Revenue before us. Therefore, the aforesaid evidence cannot be simply brushed aside without there being any material to discard it. In this context, from

perusal of assessment order, we find that there is nothing to suggest that the said confirmation by the investee company has been found to be suffering from any infirmity.”

22. *From the above, it is evident in this case also that there is no discrepancy recorded by the Assessing Officer in the matter of nexus of distinctive numbers of the shares purchased and sold in consolidation, later split up and subsequent sale of the same. Same is the fact undisputed by Revenue before me in this second round of the proceedings. The claim of exemption of LTCG in the case of Moti U. Punjabi (supra) stand allowed on the facts similar to that of the present set of 23 appeals of the assesseees.*

23. *The direction of the Tribunal in all these 23 appeals under consideration given in the first round of the proceedings before the Tribunal, are identical. Accordingly, the Assessing Officer is under obligation to treat the transactions genuine after verifying the nexus of distinctive numbers of shares purchased and shares sold. Otherwise, the issue of genuineness was already decided by the Hon'ble High Court of Bombay and the Tribunal holding the transaction as genuine. The Hon'ble High Court did not admit the appeal of the Revenue on the above decision as well as decision of remanding the issue to the file of Assessing Officer. Ignoring the said decision of the Tribunal, the Assessing Officer proceeded to repeat the addition which is absolutely unacceptable and unsustainable in law. The CIT(A) also failed to appreciate the said ratio of the Bombay High Court judgement in the same case although he made reference to the issue relating to the distinctive numbers of shares by exceeding jurisdiction. As stated earlier, the CIT(A) confirmed the addition of the Assessing Officer in the second round for some other reasons relating to the evidence which should not have been done by the CIT(A) in view of existence of the jurisdictional High Court judgement. Further, I also narrated the fact about the decision of the Tribunal regarding the genuineness of purchase and sale of capital gain in the case of Moti U. Panjabi (supra) for the assessment year 2003-04. Similar issue relevant for assessment year 2002-03 stands remanded to the file of the Assessing Officer for applying the said decision in own case relevant for the assessment year 2003-04. Thus, the core issues now stand decided by the Tribunal in the case Moti U. Panjabi (supra). Relevant portion of the said order are extracted in above paragraphs of this order. As I have upheld the genuineness of the claim of LTCG, the issue raised relating to the claim of commission has to be allowed in favour of the assessee. The grounds raised by the assessee i.e. Ramchand Udharam Panjabi are allowed.*

24. *In the result, the appeal of the assessee is allowed.*

Rest of the 22 Appeals – Reg.

25. *There are 23 appeals under consideration and the details are already tabulated in the cause title of this order. The issues and facts relating to the appeal of Shri Ramchand Udharam Panjabi (ITA No.2676/PUN/2017) were considered and the appeal is now allowed in favour of the assessee relying on the decision of this Tribunal in the case of Moti U. Panjabi (supra). The appeal of this assessee for the assessment year 2003-04 was decided by this Bench and the appeal for assessment year 2002-03 was also allowed for statistical purposes to follow the decision of the Tribunal in assessment year 2003-04. Thus, I have held on facts and also in view of the legal proposition discussed in detailed in the preceding paragraphs of this order. I have held that the transactions of purchase and sale of shares and consequential profits earned out of the sale transactions have come to arise long term capital*

gains are held to be genuine. Upholding the assessee's claim u/s 10(38) of the Act, I rely heavily on the jurisdictional High Court judgement in the case of Jayana Enterprises Pvt. Ltd. (supra), which is also a part of the group. The decision of the Bombay High Court in the case of Jayana Enterprises Pvt. Ltd. (supra) is in sync with the jurisdictional Tribunal in case of Moti. U. Punjabi for the assessment year 2003-04.

26. On perusal of the orders of the Assessing Officer and the CIT(A) in these 22 appeals, I find the facts are identical, the alleged penny scrips overlaps and the transactions are identical. Therefore, the above ratio of judgements have application to the facts of these bunch of appeals. Therefore, in my opinion, the issue raised in the grounds by this group of 22 appeals stands covered and the same is allowed in favour of the assessee. Accordingly, the grounds raised by the assesseees in these appeals are allowed."

7. Before us, Revenue has not pointed out as to how the decision in the case of assessee's group would not be applicable to the present case of the assessee. We therefore following the same reasoning and for similar reasons hold that no addition can be made in the hands of the assessee and **thus, the grounds of the assessee are allowed.**

8. **In the result, the appeal of assessee in ITA No.404/PUN/2017 is allowed.**

9. Now we take up assessee's appeal in ITA No.473/PUN/2017 for A.Y. 2003-04.

10. The grounds raised by the assessee in ITA No.473/PUN/2017 reads as under :

"1. On the facts and circumstances prevailing in the case and as per the provisions of law and scheme of the Act, it be held that the assessment proceedings u/s 143(3) get abated on the initiation of search in case of the appellant on 17th March, 2006. The order passed by the Ld AO u/s 143(3) of the Act on 30th March, 2006 after the initiation of the search and confirmed by the Hon'ble CIT(A) is invalid and not in accordance with the provisions of the law. The said order be set aside and the appellant be granted just and proper relief in this regard.

2. Without prejudice to the above, on facts and circumstances prevailing in the case and as per provisions of law and scheme of the Act, it be held that the addition made to the income of the appellant on account of interest free advances given to sister concerns amounting to Rs.6,750/- is improper, unjustified and contrary to the provisions of the law & facts prevailing in the

case The disallowance/ addition made by the AO and that confirmed by the Hon'ble CIT(A) be deleted The appellant be granted just & proper relief in this respect.

3. Without prejudice to Ground No.1, on facts and circumstances prevailing in the case and as per provisions of law and scheme of the Act, it be held that the addition made to the income of the appellant on account of cessation of trading liabilities amounting to Rs.25,401/- is improper, unjustified and contrary to the provisions of the law & facts prevailing in the case. The disallowance/ addition made by the AO and that confirmed by the Hon'ble CIT(A) be deleted. The appellant be granted just & proper relief in this respect.

4. Without prejudice to Ground No.1, on facts and circumstances prevailing In the case and as per provisions of law and scheme of the Act, it be held that the addition made to the income of the appellant on a protective basis on account of alleged accommodation entry of Rs.32,45,100/- is improper, unjustified and contrary to the provisions of the law & facts prevailing in the case It further be held that appellant is eligible to claim exemption of long term capital gain & addition of impugned commission is not sustainable. The disallowance/ addition made by the AO and that confirmed by the Hon'ble CIT(A) be deleted. The appellant be granted just & proper relief in this respect.”

11. Ld AR submitted that a search u/s 132 of the Act was carried out in the case of the assessee on 17.03.2006. AO passed the order for AY 2003-04 u/s 143(3) of the Act on 30.03.2006 i.e. after the initiation of search. He submitted that as per second proviso to Sec. 153A of the Act, the assessments pending as on the initiation of search in relation to the assessment years falling within the six assessment years preceding the assessment year relevant to the previous year in which the search is conducted gets abated. He therefore submitted that the assessment order which was pending on the date of search got abated and therefore is invalid. Ld DR did not controvert the submissions made by Ld AR but however supported the order of lower authorities.

12. We have heard the rival submissions and perused the material on record. In the present case it is an undisputed fact that search u/s 132 of the Act was carried out in the case of assessee on 17.03.2006 and the assessment order for A.Y 2003-04 was passed on 30.03.2006 i.e. after

the initiation of search. Thus, on the date of search the assessment was pending. In such a situation, as far as pending assessment is concerned, the jurisdiction to make the original assessment and the assessment under section 153A of the Act merges into one. We therefore hold that the assessment order passed by the AO on 30th March 2006 for AY 2003-04 u/s 143(3) of the Act after the initiation of search is invalid. **Thus, the ground of assessee is allowed.**

13. In the result, the appeal of the assessee in ITA No.473/PUN/2017 is allowed.

14. To sum up, both the appeals of assessee are allowed.

Order pronounced on 15th day of March, 2019.

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| Sd/- (SUSHMA CHOWLA) न्यायिक सदस्य / JUDICIAL MEMBER | Sd/- (ANIL CHATURVEDI) लेखा सदस्य / ACCOUNTANT MEMBER |
|--|---|

पुणे Pune; दिनांक Dated : 15th March, 2019.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A) – 6 and 9, Pune.
4. Pr.CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण "बी" / DR, ITAT, "बी" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

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वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.