

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI A.T.VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1330/Kol/2014

(निर्धारणवर्ष / Assessment Year:2007-08)

DCIT, Circle-4, Kolkata	Vs.	M/s R.K. Commercial Ltd.
		41, Chowringhee Road, Kolkata-700001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCR 2036 D		
(Assessee)	..	(Revenue)

Assessee by : Shri A. K. Nayak, CIT DR

Respondent by : Shri J.P. Khaitan, Advocate & Shri Sujoy Sen, Advocate

सुनवाईकीतारीख/ Date of Hearing : 10/04/2019

घोषणाकीतारीख/Date of Pronouncement : 04/06/2019

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to assessment year 2007-08, is directed against an order passed by the learned Commissioner of Income Tax (Appeals)-IV, Kolkata (in short the ld. 'CIT(A)'], which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the 'Act') dated 31/12/2009.

2. The appeal filed by the Revenue for Assessment Year 2007-08, is barred by limitation by 15 days. The Revenue has moved a petition requesting the Bench to condone the delay.We heard both the parties on this preliminary issue. Having

regard to the reasons given in the petition, we condone the delay and admit the appeal for hearing.

3. Grounds of appeal raised by the Revenue are as follows:

(i) That on the facts and circumstances of the case, the ld. CIT(A) has erred in deleting the addition made u/s 68 of the IT Act ignoring the fact that the alleged sale of shares of "Dehra Dun Tea Co. Ltd." took place at a price of Rs. 15,611/- per share and the trading was not through the Stock Market and that the market price of the scrip as confirmed by the SEBI stood at Rs. 4.20/- per share as quoted 18 months before the date of transaction.

(ii) And that there was no intention on the part of both buyer and seller to determine the market condition of demand and supply in spite of availability of proper mechanism.

(iii) And that the prices of each shares were sold at 3717% of the last quoted price of it in the open market and the buyer or seller did not go through the mechanism of classifying those shares as is normally done before trading in inactive shares.

(iv) That the assessee craves for leave to add, delete or modify any of the grounds of appeal before or at the time of hearing.

4. Brief facts qua the issue are that the assessee company filed its return of income for the assessment year 2007-08, on 08/11/2007 declaring a total income of Rs. 13,27,30,800/-. The return was duly processed u/s 143(1) of the Income Tax Act. The case was later selected for scrutiny as per CASS. Consequently, notice u/s 143(2) and notice u/s 142(1) of the I.T. Act were issued and served on the assessee. In the course of assessment proceedings, books of accounts along with requisite details and supporting documents were produced and examined. During the assessment year under consideration, the assessee by way of sale of shares in "Dehra Dun Tea Co. Ltd." a company listed in the Calcutta Stock Exchange, reported long term capital gain of Rs. 12,89,60,745/- by entering into off market transaction through plain agreement. The assessee was holding 8240 shares of "Dehra Dun Tea Co. Ltd." which was required for a total sum of Rs. 47,077/-, and which makes the cost price of share at Rs.5.71 per share. The said shares was claimed to be sold to one "Logical Buildwell Pvt. Ltd." for a total sum of Rs.

12,86,34,640/- through a plain agreement. That makes the sale price of shares at Rs. 15,611/- per share.

5. The assessing officer, in order to examine the genuineness of the transaction and capital gain declared, sent notices u/s 133(6) of the Act to Calcutta Stock Exchange, where the said shares was claimed to be listed. In response to the same the Calcutta Stock Exchange refused to accept the said transaction as there was no record in support of the same. Further as per said Exchange, the last traded price of the said scrip was Rs.4.20 per share purportedly around 18 months before the date of the alleged transaction. The AO noticed that the shares were therefore not traded in the Stock Exchange where it was listed and the fact that the said shares were sold in an offline transaction, not following the guidelines of reporting to the Calcutta Stock Exchange, clearly demonstrates that there was no intention of determination of proper price between the buyer and the seller through open market conditions of demand and supply. The said shares were sold at a price which was 3,717% of the last traded price as per information supplied by the Calcutta Stock Exchange. Even in shares not traded in the Stock Exchange there is a mechanism of classifying those shares as inactive shares and a ceiling is capped on the price movement which again by any stretch of calculation cannot arrive at the sale price of Rs. 15,611/- per share, as reported by the assessee and to cover it, all the said transaction was not, as mandatorily required reported to the Calcutta Stock Exchange to hide the bogusness of the said transaction. The entire facts goes to show that the said transaction was through organized connivance between the buyers and the sellers to convert their undisclosed income into white, in total disregard to free pricing objective with which shares are listed in the Stock Exchange.

6. Considering the above facts and circumstances of the case, the assessing officer computed the long term capital gain by applying the last traded price in the Stock Exchange i.e. Rs.4.20 per share and that remaining amount was treated as “undisclosed income” as per Section 68 of the I.T. Act, as under

Cost price of 8240 shares @ Rs 5.71 per share	:	Rs	47,077/-
Less: Sale price @ Rs 4.20 per share for 8240 shares as per CSE	:	Rs	34,608/-
Net long term capital loss	:	Rs	12,469/-
Less: Long term capital gain declared	:	Rs	12,85,87,563/-
Undisclosed income u/s 68	:	Rs	12,86,00,032/-
In the end	:	Rs	12,86,00,032/-

Before making the addition of Rs.12,86,00,032/-, the assessee was given sufficient opportunities by serving show cause letters by AO, but no plausible explanation could be put forward by assessee to disprove the above. Therefore, assessing officer made addition under section 68 of the Act to the tune of Rs. 12,86,00,032/-.

7. Aggrieved by the stand so taken by the Assessing Officer, the Assessee carried the matter in appeal before the Ld. CIT(A) who has deleted the addition. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

8. The Id. DR for the Revenue submitted before us that assessee has sold shares one to one basis and not through the Calcutta Stock Exchange, where the said shares was claimed to be listed. The last published price in the Stock exchange was at Rs.4.20 per share whereas assessee sold the shares at Rs.15,611/- per share. In response to notice U/s 133(6) of the Act, the Calcutta Stock Exchange replied to assessing officer stating that for the said transaction there was no record. Further as per said Exchange, the last traded price of the said scrip was Rs.4.20 per share purportedly around 18 months before the date of the alleged transaction. The AO noticed that the shares were therefore not traded in the Stock Exchange where it was listed and the fact that the said shares were sold in an offline transaction, not following the guidelines of reporting to the Calcutta Stock Exchange, which clearly demonstrates that there was no intention of determination of proper price between the buyer and the seller through open market conditions of demand and supply. The said shares were sold at a price which was 3,717% of the last traded price. Even in shares not traded in the Stock Exchange there is a mechanism of classifying those shares as inactive shares and a ceiling is capped on the price

movement which again by any stretch of calculation cannot arrive at the sale price of Rs. 15,611/- per share, as reported by the assessee. The entire facts goes to show that the said transaction was through organized connivance between the buyers and the sellers to convert their undisclosed income into white. Therefore, the Id. DR for the Revenue submitted before us that addition made by AO should be sustained.

9. Ld. Counsel for the assessee, Shri J.P. Khaitan begins by pointing out that the shares of 'Dehra Dun Tea Co. Ltd' was acquired @ 15,611/- per share by the acquirer i.e. M/s Logical Buildwell Pvt. Ltd. (now known as M/s Loam Realtors Pvt. Ltd.) vide agreement dated 10.7.2006. The entire transaction was off market transaction and was based on the intrinsic value of the shares for the assets held by the company. The whole of the consideration was deposited by the acquirer company in an Escrow Account with HSBC. Since the shares of the said company were listed on Calcutta Stock Exchange hence in terms and Regulation of SEBI (Substantial Acquisition of Shares and Takeover) regulation 1997, the acquirer company i.e. M/s Logical Buildwell Pvt. Ltd. (now known as M/s Loam Realtors Pvt. Ltd.) was required by SEBI to acquire shares of other shareholders in accordance with such SEBI Regulations up to 20% at Rs.15,611/-. Accordingly, the acquirer company made public announcement in newspapers to purchase up to 20% of the remaining shares at the negotiated price of Rs.15,611/- per share. After publication of the open offer to the shareholders, the merchant Bankers applied to SEBI for their approval and SEBI after giving direction and changes approved the Letter of Offer. Subsequently, the acquirer company made in the open offer and the acquirer made a public announcement published in the newspaper dated 25.9.2006. Accordingly, the acquirer company acquired the remaining 20% shares @ 15,611/- per share only through the transparent process of public offer and the shares were acquired from other than related concerns also at Rs.15,611/- per share. The Counsel submitted a copy of Balance Sheet of M/s Logical Buildwell Pvt. Ltd. to substantiate the fact that the shares as held by the acquirer company were averaging at Rs.15,621/- per share only to strengthen the fact that the balance shares as were purchased from the acquirer from the balance shareholders were

around the same price at which they were purchased from the assessee and its related concerns. The Id Counsel also submitted that such shares were valued based on the land held in the company whose market value was based on Registered Valuer's Report at around Rs. 137 crores and this fact was brought to the knowledge of SEBI as well. The Id Counsel also submitted that merely because the transaction was conducted off market, the addition could not be made merely on the basis of an enquiry made from Stock Exchange, and thus the Counsel submitted that the entire addition has been merely based on suspicion without there being any enquiry having been conducted from the acquirer company. The Ld Counsel also submitted that the purchaser of the share of the above named Company i.e. Dehradun Tea Co. Ltd., namely, Logica Buildwell (P) Ltd. [now known as Loam Realtors (P) Ltd.] has purchased the shares from other persons as well @ Rs.15611/- per share and to substantiate the same the assessee has submitted a copy of Balance Sheet of the said purchaser. Further, the assessee has taken a plea in his submission that the transaction of purchase of such shares by M/s. Logical Buildwell (P) Ltd has been accepted by the same I.T.O. and the assessee has also submitted a copy of assessment order of such person [i.e. Mr. Mudit Kumar -PAN - AFWPK2452F]. Thus, it seems that on the same issue the same assessing officer has taken two different views, which is not acceptable. Therefore, order passed by the Id CIT(A) should be sustained.

10. We have heard both the parties and perused the material available on record. We note that that grounds raised by the Revenue in the instant appeal relate to the addition of Rs.12,86,00,032/- made by the A.O. on account of sale of shares u/s 68 of the Act after holding it as the undisclosed income of the assessee. The assessee company is a NBFC company and also holds shares of 'Dehra doon Tea Company Ltd', (hereinafter referred as DTCL). The assessee company held a total of 8,240 shares of DTCL along with other related concerns which together held 53.38% of the total shares of DTCL, vide an agreement dated 10.07.2006, the assessee along with such other related concerns agreed to sell such 53.38% equity shares @ 15,611/- per equity share in off market transaction and not through Calcutta Stock Exchange where the shares were listed. Consequently, the assessee considered

such sale price of the said shares in its computation of income under the head capital gain and reported a total long term capital gain of Rs.12,85,87,563/-. The A.O. in the course of assessment proceedings sent notices to Calcutta Stock Exchange where the said shares were listed and the said Stock Exchange reported the last traded price of the said scrip at Rs. 4.20 per share around 18 months before the date of alleged transaction. The A.O. in its order alleged that the said transaction was a bogus transaction between the buyer and seller to convert their undisclosed income into white money. Consequently, the A.O. treated the sale price of said shares at only Rs. 4.20 per share and considering the difference of the cost price of Rs. 5.71 and such sale price (as considered by A.O.) of Rs. 4.20 per share considered at Rs. 12,469/- as a net long-term capital loss and treated the balance amount towards the said consideration being Rs.12,86,00,032/- as undisclosed income u/s 68 of the Act.

11. Before us, Id Counsel for the assessee, produced the following evidences, documents and explanation to substantiate its claim that transaction done by the assessee is bona fide. These evidences and documents are as follows:

- (1) Copy of share Purchase Agreement dated 10.07.2006 entered into by the assessee with the acquirer (pb 1 to 11)
- (2) Copy of ESCROW Agreement dated 10th July, 2006(pb 102 to 178).
- (3) Copy of Addendum to the Escrow Agreement (pb 179 to 218).
- (4) Copy of Press Publication of "Open Offer" to other shareholders as published in Financial Express dated 13.07.2006 of Calcutta offering acquisition of balance 20% of Shares from other shareholders at Rs.15,611/- per share (pb 219).
- (5) Copy of letter dated 14th Sept. 2006 issued by SEBI (pb 220 to 222).

(6) Copy of Press Publication of corrigendum to Public announcement dt. 13th July, 2006, issued by Enam Financial Consultants Pvt. Ltd. in The Financial Express, Monday, the 25th Sept. 2006 as 'manager to the offer' on behalf of LongicalBuildwell Pvt. Ltd(pb 223)

(7) Copies of letters dated 16.12.2009 and 23.12.2009 from the A.O. during the assessment proceedings.

(8) Copies of assessee's letters dated 21.11.2009, 19.12.2009 and 29.12.2009. The letters dated 19.12.2009 and 29.12.2009 were sent to the A.O in reply to his letters dated 16.12.2009 and 23.12.2009 (pb 227 to 233).

(9) Copy of letter dated 27.7.2006 issued by Enam Financial Consultants Pvt. Ltd. to the Calcutta Stock Exchange Association Ltd(pb 234).

(10) Copy of letter dated 17.10.2006 given by Dehradun Tea Co. Ltd. to the Calcutta Stock Exchange Asson. Ltd. regarding share price (pb 235).

(11) Valuation Report of the property of Dehra Dun Tea Co. Ltd. dated. 7th July, 2006 signed by M/s Vishva Mitra Kain of Krishna Consultants Govt. registered and approved valuer (pb 236).

(12) Copy of letter of offer issued by the purchaser to other shareholders for acquiring 20% of the balance shares in accordance with SEBI take over regulations since 2000 approved by SEBI at Rs.15,611/- per share (pb 239 to 293).

(13) Copy of the Audited Account of the assessee company for the year ended 31.03.2007 (pb 294 to 291).

(14) Copy of order sheet dated 23.11.2009 showing,"Sri S. C. Soni appeared today and filed the Publication of open offer published in Financial Express on 13.7.2006 wherein the open offer was given by Logical Buildwell Pvt. Ltd.

(Purchaser) for acquisition of shares of Dehradun Tea Co. Ltd. @ 15611/- per shares to other shareholders (holding balance 46.62% of stake). He stated the said offer is approved by the SEBI. This document was produced to justify the sale of shares of the above Co. by "A" @ 15611/- on the basis of written agreement entered into between the Purchaser "Logical Buildwell Pvt, Ltd." and the 'A' & others on 10.7.2006 in which 'A' and other sold 53.38% of stake. As regards the taxation @ 10% on Capital Gain on said transaction Sri Soni stated that since the shares was listed in Calcutta Stock Exchange the Capital Gain is taxed @ 10% even though the transaction is not executed / routed through the exchange. The same is noted."

(15) Certificate of Incorporation dated 14.03.2006 of M/s Logical Buildwell Pvt. Ltd. and Certificate dated 01.09.2007 regarding change of name from M/s Logical Buildwell Pvt. Ltd. to M/s Loam Realtors Pvt. Ltd (pb292).

(16) Copies of Audited Account of the acquirer / purchaser company for the years ended 31.03.2007 and 31.03.2008 together with relevant Schedules, from a perusal of which it is seen that the paid-up capital and reserve and surplus of the acquirer company amounted to Rs. 1,17,19,00,000/-. A perusal of the Balance Sheet of the acquirer / purchaser company for the year ended 31.03.2007 shows that they had made an investment of Rs.1,16,92,81,350/- towards acquisition of shares and a look to Schedule-3 of the Audited accounts for the year ended 31.03.2007 clearly indicates that the said acquirer/purchaser company had acquired 74,850 equity shares of Dehra Dun Tea Co. Ltd. for a consideration of Rs.1,16,92,81,350/- which works out to Rs.15,621.66 per share and it was explained that the said sum of Rs. 15,621.66 included some other charges of Rs. 10/- per share incurred by acquirer company and thus even from the accounts of the acquirer company such shares acquired by them had been duly reflected @ 15,611/- per share (pb294 to 300).

(17) A copy of letter dated 09.01.2007 from HSBC Bank which certifies that the amount in Escrow account was paid to shareholders and the shares were handed over to the acquirer and this letter is signed by sellers as well as acquirer company

and the entire sale proceeds of shares as per purchase agreement had been credited by the bank to the account of assessee on materialization of the deal and in support of the same copy of Bank Statement was enclosed (pb 309 to 310).

All the aforesaid documents and evidences were made available to the A.O. also were filed before the Bench in course of hearing of the appeal. We note that during the appellate proceedings all these documents /enclosures were forwarded to A.O. for submitting the remand report. The A.O. in his Remand Report has simply reiterated what had been written in the assessment order. The A.O. has nowhere doubted the veracity and or the truthfulness of the aforesaid documents filed. With help of these plethora documents, the Id Counsel claimed that assessee's transaction is genuine. For that we rely on the judgment of the Coordinate Bench of Kolkata in the case of *Acchyalal Shaw v. ITO* (2009) 121 TTJ (Kol) 695, wherein it was held as follows:

"Income-Cash credit-Genuineness of share transactions-Assessee having shown capital gains from sale of shares in off-market transactions which transactions were confirmed by share brokers, A.O. was not justified in making addition of the amount of capital gains under sec. 68 on mere suspicion and enquiry from stock exchange-In off-market transactions in shares, any enquiry from the stock exchange will not yield result in favour of Revenue-Revenue has to see whether the sale has been effected or not as per the documents and as per the acceptance and admission of the respective stock brokers.

*Held: In off-market transactions, any enquiry from the stock exchange will not yield result in favour of the Revenue. The Revenue has to see whether the sale has been effected or not as per the documents and as per the acceptance and admission of the respective stock brokers. As it has been assertively argued by the Authorized Representative that both the stock brokers had not denied transactions and the capital gain has been shown, the A.O. Simply by casting doubt for alleged purchase of house property for Rs.11,00,000/- cannot treat the same as cash credit. Suspicion cannot replace the real evidential documents. Simply by arguing it to be a case of manipulation the Revenue is not supposed to succeed in their contention without proper evidence. *Mukesh R. Marolia vs. Addl. CIT* (2005) 6 SOT 245 (Mumbai), *Asstt. CIT vs. Claridges Investments & Finances (P) Ltd.* (2007) 18 SOT 390 (Mumbai), *CIT vs. Vipin Batra* (2007) 212 CTR(Del) 557: (2007) 293 ITR 389 (Del), *CIT vs. Korlay Trading Co. Ltd.* (1999) 152 CTR (Cal) and *Anup Kumar Jayaswal (I.T.A. Nos. 1678&1679/Kol/2004) relied on.*"*

12. We note that the shares of 'Dehra Dun Tea Co. Ltd' was acquired @ 15,611/- per share by the acquirer i.e. M/s Logical Buildwell Pvt. Ltd. (now known as M/s Loam Realtors Pvt. Ltd.) vide agreement dated 10.7.2006. The entire transaction was off market transaction and was based on the intrinsic value of the shares for the assets held by the company. The whole of the consideration was deposited by the acquirer company in an Escrow Account with HSBC. Since the shares of the said company were listed on Calcutta Stock Exchange hence in terms and Regulation of SEBI (Substantial Acquisition of Shares and Takeover) regulation 1997, the acquirer company i.e. M/s Logical Buildwell Pvt. Ltd. (now known as M/s Loam Realtors Pvt. Ltd.) was required by SEBI to acquire shares of other shareholders in accordance with such SEBI Regulations upto 20% at Rs.15,611/-. Accordingly, the acquirer company made public announcement in newspapers to purchase up to 20% of the remaining shares at the negotiated price of Rs.15,611/- per share. After publication of the open offer to the shareholders, the merchant Bankers applied to SEBI for their approval and SEBI after giving direction and changes, approved the Letter of Offer. Subsequently, the acquirer company made in the open offer and the acquirer made a public announcement published in the newspaper dated 25.9.2006. Accordingly, the acquirer company acquired the remaining 20% shares @ 15,611/- per share only through the transparent process of public offer and the shares were acquired from other than related concerns also at Rs.15,611/- per share. The assessee submitted that such shares were valued based on the land held in the company whose market value was based on Registered Valuer's Report at around Rs. 137 crores and this fact was brought to the knowledge of SEBI as well.

We note that the revenue in one of the related concerns has accepted the transaction and hence the same may be followed in the case of the assessee as well. The assessee has submitted that the purchaser of the share of the above named Company i.e. Dehradun Tea Co. Ltd., namely, Logica Buildwell (P) Ltd. [now known as Loam Realtors (P) Ltd.] has purchased the shares from other persons as well @ Rs.15611/- per share and to substantiate the same the assessee has submitted a copy of Balance Sheet of the said purchaser. Further, the assessee

has taken a plea in his submission that the transaction of purchase of such shares by M/s. Logical Buildwell (P) Ltd has been accepted by the same IT.O. and the assessee has also submitted a copy of assessment order of such person [i.e. Mr. Mudit Kumar -PAN - AFWPK2452F]. Thus, on the same issue the same assessing officer cannot take two different views.

13. We note that the transaction of sale and purchase of shares was not done through the Kolkata Stock Exchange where M/s. Dehra doon Tea Company Ltd (DTCL) was listed. Therefore, Id AO was of the view that the entire sale was done through off line transaction so as to bypass the proper mechanism for market determination of the price of shares. On this issue, it may be clarified that a transaction of shares cannot be construed to be bogus or sham just because it does not take place through a stock exchange. It is entirely between two parties to come to an understanding of sale and purchase of shares as long as the SEBI guidelines are followed. In the instant case, the acquirer had intended to purchase the entire 53.38% of equity shares (i.e. 54,450 shares) held by the promoters and naturally this will attract the provisions of SEBI (Substantial Acquisition & Takeover) Regulations, 1997. As the acquisition by M/s. Logical Buildwell (P) Ltd. would result in the acquiring of 15% or more of shares or voting rights in M/s DTCL, it had to make a Public Offer for a further acquisition of 20% or more of shares at the same price as being offered to the promoters. Therefore, the purchaser separately applied for and received from the SEBI permission to acquire further 20% shares from the public through letter dated 14/09/2006 for 20,400 shares. The A.O. in his Remand Report has not understood that purchase of shares from the promoters and purchase of shares from the public are two different issues altogether. While purchase from the promoters of 54,450 shares was on the basis of an agreement between the buyer and the seller dated 10/07/2006, such an agreement consequent further purchase of 20% shares from the public i.e. 20,400 shares after seeking permission from the SEBI. It is also material to point out here that the purchase of shares from the promoters and the public have been done at the same price which is Rs.15,611/- per share. So it cannot be said that the promoters have benefited from the transaction of sale of shares more than the public as each of them have received Rs.15,611/- per share as the sale value. Nor

has the A.O. pointed out any violation of the SEBI guidelines of takeover. The A.O. has also concluded that the Balance Sheet of M/s. Logical Buildwell (P) Ltd. for A.Y. 2007-08 has no details available as far as the purchase price of shares is concerned. This statement of the A.O. is not based on facts. In the Balance Sheet of the said Company for the year ending 31/03/2007 under 'Schedule 3 : 'Investments' shows the holding of 74,850 equity shares of M/s. DTCL for a total value of Rs. 116,92,81,350/-. The average value per share comes to Rs.15,621/- which is also the price of transaction of shares from the promoters and the public holding the shares of M/s. DTCL. We note that these issues were duly brought to the knowledge of the A.O. by the assessee through letters dated 19/12/2009 and 29/12/2009 (pb227 to 233) but AO did not acknowledge this in his assessment order.

14. We note that in the Assessment Order, the A.O. has alleged that although 18 months before the sale of shares, the shares of M/s. DTCL were transacted for only Rs. 4.20 per share, these were sold at Rs.15,611/- per share by the promoters reflecting an appreciation of 3,717 % in the price of shares. The A.O. has further stated that such appreciation could not have been achieved in the process of normal trading through a stock exchange (Capping Mechanism), the assessee, therefore, through "Organised Connivance" sold the shares through an agreement and thereby converted black money into white. The assessee had explained this to the A.O. through letter dated 29/12/2009 by stating as below :

"Regarding the last traded price (about 18 months previous to the date of transaction) we may state that the shares of the company were thinly and infrequently traded in the stock exchange and hence the price did not reflect the true market price or net worth of the company. The Dehra Dun Tea Company's main asset was the land which it owned in a prime urban area of Dehra Dun. The value of this property was approx Rs.137 crores (against the book value of Rs. 0.30 crores) as per valuation report dated 07.07.2006 of an approved chartered engineer, government Registered Valuer, M/s Krishna Consultant is enclosed) as per circle rate but actual market value was higher than this. The value per share as per the Valuation Report works out to Rs.13,431.37 per share. The total share capital of Dehra Dun Tea Co. Ltd. is Rs. 10,20,000/- and it has a surplus of Rs. 8.25 crores. In addition to above there are other assets also in Dehra Tea Co.

Ltd. which has been considered for fixing the price of Rs. 15,611/-. This justifies the valuation of Rs. 15,611/- per share. We may state that we have duly informed the Calcutta Stock Exchange about the deal.

The company has not declared any dividend in the last 5 years to conserve the resources of the company.

We are furnishing herewith the following:

i) Valuation Report of the property of Dehra Dun Tea Co. Ltd. dated 7 July 2006 signed by M/s. Vishva Mitra Kain, of Krishna Consultants Govt registered and approved valuer.

ii) Net worth of the company as on the date of sale will be as per Audited financial Statement. The Audited financial statement of the company for the last 5 years attached.

iii) Copy of letter of offer issued by the purchaser to other shareholders for acquiring 20% of the balance shares in, accordance with SEBI take over regulations since 2000 approved by SEBI

Hope you will find the above in order. In case you require any further details, please let us know so that we can furnish the same. "

We note that the A.O. in his Assessment Order has not acknowledged this letter dated 29/12/2009 nor the existence of a Valuation Report. At the remand stage, the A.O. has stated that the Valuation Report is for the land and not for the shares. The A.R. of the assessee in his counter reply to the Remand Report has stated as follow:

"Your goodself may kindly appreciate that the acquisition was as per negotiation between the "Promoter Group" and the acquirer had valued the shares @ Rs.15,611/- per share. The price of such shares was also duly intimated to the Calcutta Stock Exchange Association Ltd. vide assessee letter dated 17.10.2006 wherein the valuer's report valuing the land at around Rs.137.00 crores was duly intimated. It may kindly be appreciated that intrinsic value of shares is determined only by the value of assets and liabilities of the company. It may not be out of place to mention that acquirer has also purchased the shares in open public offer from other public shareholders at such rate i.e. Rs. 15,611/- per share only."

We note that M/s DTCL, as on the date of sale had only a marginal production of tea in terms of the installed capacity. Because of change in climatic condition of Dehradun it was no longer possible to produce tea commercially. Hence, the

purchaser was not taking over a tea estate in order to run it commercially. Instead, it was aiming to unlock the intrinsic value of the property located in Dehradun and which as per the registered valuer was worth Rs. 137 crores. In addition, M/s DTCL also had a surplus fund of Rs. 8.25 crores and some other assets. A seller will most naturally like to get the best value of its assets and this is what M/s DTCL did.

15. We note that the transaction which has been concluded within four corners of Law cannot be treated as colorable device unless the revenue brings any material to prove such an allegation. In the case of assessee, the transaction was conducted at the intrinsic value of the assets held in the company and for which Stock Exchange and SEBI were duly intimated/informed. Further the acquirer had acquired shares from promoter group at the same price at which the balance 20% shares had been acquired by the buyer from the open market as per SEBI rules and this fact was also substantiated from the audited accounts of the acquirer on 31.03.2007. It is pertinent to observe that it has been held in number of judgments of Apex Court that the assessee is free to structure a transaction within the four corners of Law and the only condition being that it should not violate any law or statutory provision. For this we rely of the following judgments.

(a).Azadi BachaoAndolon (2003) 132 Taxman 373 (SC):The important portion of the extract of the judgment is given below:

“We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents. Though the words Isham and device were loosely used in connection with the incorporation under the Maurities Law, we deem it fit to enter a caveat here. These words are not intended to be used as magic mantras or catch all phrases to defeat or nullify the effect of a legal situation”.

(b).Vodafone International Holdings B. V. (2002) 204 Taxman 408 (SC)- In this case the Hon`ble Supreme Court reversed the decision of Bombay High Court and held that the Indian Tax Authorities did not have territorial jurisdiction to tax the offshore transaction and, therefore, Vodafone was not liable to withhold Indian taxes. The SC had reiterated the look at principle enunciated in case of W.T.

Ramsay Ltd. vs. Inland Revenue Commissioners (1982) AC 300, in which it was held that the Revenue or the court must look at a document or transaction in context to which it properly belongs. It has to look at the legal nature of the transaction and while doing so, it has to look at the entire transaction as a whole and not adopt a dissecting approach. Further the SC went on to hold that where a structure has existed for a considerable length of time and where the Court is satisfied that the transaction satisfies all the parameters of participation in investment then in such a case, the court need not go into questions such a de facto control vs. legal control, legal rights vs. practical rights, etc., in the context of determining taxability.

(c).**Videocon International Ltd. (STRP No. 4 of 2000. Karnataka High Court)**- The Hon`ble Karnataka High court observed in the aforesaid case (only important extracts) as follows:

“From the aforesaid discussion, it is clear that there is no inconsistency or deviation in the approach to the interpretation of the taxation law in England, America as well as India. It is now well settled that a citizen is entitled to arrange his affairs as not to attract taxes imposed by the State, so far as he can do so within the law. Every man is entitled to order his affairs in such a manner that the tax planning under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so to secure the said result, his ingenuity is to be respected and he cannot be compelled to pay an increased tax. He may legitimately claim the advantages of any express terms or of any omissions that he can find in his favour in taxing statutes. His legal right so to dispose of his capital and least amount of tax is fully recognized. The legal right of tax payer to decrease the amount altogether to avoid them by means which the law permits, cannot be doubted. The basic proposition underlying this taxation law is that any taxpayer is entitled so as to order his affairs in such a manner as to see that his liability to tax is as low as possible. If the taxpayer is in a position to carry through transaction in tow alternative ways-one of which will result in liability to tax and the other of which will not result in liability to tax and the other of which will not is at liberty to choose the latter of any specific tax avoidance provision. The fact that the motive for a transaction may be to avoid tax does not invalidate it, unless a particular enactment so provides. Every person is entitled to so arrange his affairs as to avoid taxation, but the arrangement should be real & genuine and not sham or make-believe.

A tax payer may resort to device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon consideration of morality but on the operation of the Income-tax Act. Colourable devices cannot be part or of tax planning. A tax saving motivation does not justify the taxing authorities or the courts is nullifying or disregarding a taxpayers

otherwise proper and bonafide choice among courses of action legislative injunction in taxing. Statute may not, except on peril of penalty, be violated, but it may lawfully be circumvented. Tax planning may be legitimate, provided it is within the framework of law. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act, it is not possible to assume as intention or governing purpose of the statute more than what is stated in the plain language.”

16. The Apex Court in *Shreelekha Banerjee vs. CIT* (1963) 49 ITR 112 (SC) explained that if the explanation given by assessee shows that the receipt is not of income nature, Department cannot "convert good proof into no proof" or otherwise act unreasonably and reject it. It has been held by different courts that the explanation given by the Assessee cannot be rejected arbitrary or capriciously without sufficient ground, on suspicion or on imaginary or irrelevant grounds.

In *CIT vs. Orissa Corporation Pvt. Ltd.* (1986) 159 ITR 78(SC) the Apex Court held that where the assessee furnishes full details regarding creditors, it is upto the Department to pursue the matter further.

As stated earlier also all the aforesaid evidences were duly made available to the A.O. at the time of assessment and before CIT(A) also at the appeal stage and all these were forwarded by CIT(A) to the A.O. for submitting the remand report but in the Remand Report the A.O. simply reiterated what had been said in the Assessment Order. **In this case, as will appear from the aforesaid details and documents filed, the price at which the shares were sold had been not only intimated to the SEBI but even to Calcutta Stock Exchange both by the Acquirer and Seller. It is an accepted fact that whenever share in the Stock Exchange are sold as off market transaction, it is sold at the intrinsic value of shares and that is what has happened in this case.** In *Lalchand Bhagat Ambica Ram vs. CIT* (1959) 37 ITR 288(SC), the Supreme Court disapproved the practice of making additions in the assessment on mere suspicion and surmise or by taking note of the notorious practices in trade circles. At Page-299 of the ITR, it was observed as follows:

“Adverting to the various probabilities which weighed with ITO we may observe that the notoriety for smuggling foodgrains and other commodities to Bengal by country boats acquired by Sahibganj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the assessee could not be tarred with the same

brush as every Arhatdar and gain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf.”

In view of the aforesaid facts and circumstances and the sale having taken place at the price duly approved by the SEBI, no adverse inference can be drawn against the assessee company simply on assumptions and presumptions and mere suspicion.

17. We note that that the A.O. proceeded to treat part of sale proceed of the shares as income from undisclosed sources, simply on the ground that quoted value of the share was very low although such quotation was much earlier to the date of sale. In this case it cannot be ignored that the entire sale consideration money was deposited by the acquirer company in an Escrow Account with HSBC and such amount remained in Escrow Account for quite a long period of time till the acquirer company further acquired 20% shares from the open market at the same prices of Rs.15,611/-per share at which the present assessee company along with other promoters had agreed to sell the shares to acquirer company @ Rs.15,611/- per share. In view of the aforesaid observations, the said transaction as shown by the assessee cannot be considered as bogus or sham transaction in any manner.

We note that Coordinate Bench of ITAT Kolkata in the case of Sri Dolarrai Hemani, ITA No. 19/Kol/2014, for A.Y. 2005-06, on identical facts, deleted the addition observing the followings:

“2.9. We have heard the rival submissions and perused the materials available on record including the paper book comprising of pages 1 to 32 filed by the assessee containing the relevant documents on the subject mentioned issue. At the outset, we find that the ld DR made a bald statement that the subject mentioned transaction was part of penny stock scam that cropped up in Kolkata in connivance with CSE ,wherein some brokers and certain scrip were suspended by SEBI, for which he sought time to produce evidence in this regard. In the subsequent hearing, the ld DR did not advance any argument by producing any evidence to prove his bald allegation on the subject mentioned transaction. In these circumstances, we find that the bald allegation raised by the ld DR that this transaction is part of the scam is hereby dismissed and rejected and we proceed to hear this case and the issue before us based on the materials available on record. We also find that it was never the case of the lower authorities that the subject mentioned transaction was part of any scam that cropped up in Kolkata. We find that the document relied upon by the revenue in terms of MCA data which is reflected in the annual report of G.K.Consultants Ltd (being a listed company) that trading of that share had happened in BSE in Oct and Nov 2004 at Rs. 6.60 and Rs 8.40 respectively. Apart

from these two months, no trading had happened in BSE with respect to the subject mentioned scrip. Hence it could be safely concluded that this scrip was thinly traded in BSE and accordingly the assessee brought the shares from CSE where it was traded, through a registered share broker in Kolkata. We also find that the allegation of the ld AO that no other shares were held in the demat account opened with Citibank vide account no. 10398306 is factually incorrect as the assessee was holding the shares of other two reputed companies namely Reliance Industries Ltd and Organo Ltd also in the said demat account.

2.9.1. We find that the assessee had duly submitted the following documents :-

- a) Contract note for purchase of shares in off market for which payment was made in cash. This is not in dispute as the issue before us is only on the treatment of sale consideration of sale of shares as to whether the same is to be considered as LTCG or unexplained cash credit.
- b) Contract Note for sale of shares through a registered stock broker with CSE.
- c) Demat account reflecting the inflow of shares in demat account and outflow thereon pursuant to sale, which is the subject matter of dispute before us.
- d) Payment of sale consideration received by the assessee through account payee cheque.
- e) Shares were duly transferred from the demat account of the assessee to the demat account of the broker and thereafter to the ultimate buyer of the shares through a recognized stock exchange.
- f) STT had been duly suffered on the sale transaction in the sum of Rs. 493/-.
- g) The Broker had confirmed the purchase and sale transactions before the ld AO by furnishing a letter in writing in response to summons issued to him u/s 131 of the Act.

2.9.2. We find that just because the broker does not appear before the ld AO in response to the summons u/s 131 of the Act , but had furnished the requisite details called for thereon, it cannot be automatically concluded that the transaction of the assessee with that broker as bogus and sham and assessee cannot be faulted with for the same. The statute provides unfettered powers to the ld AO for taking action for non-appearance of a person in response to summons u/s 131 of the Act which could have been exercised by the ld AO in the instant case instead of drawing an adverse inference on the transactions of the assessee. In this regard, we find that the reliance placed by the ld AR on the decision of the Hon'ble Calcutta High Court in the case of CIT vs Cargo Industrial Holdings Ltd reported in (2001) 244 ITR 422 (Cal) is very well founded wherein it was held that :-

“Perusal of the details furnished revealed that the purchase and sale of the shares could not be accepted as having been transacted on the same date. Payment by account payee cheques had not been disputed. Merely because some broker failed to appear, the assessee should not be punished for the default of a broker, and also on mere suspicion the assessee’s claim should not be denied.”

Similarly in another decision of the Hon'ble Calcutta High Court in the case of CIT vs Emerald Commercial Ltd reported in (2002) 120 Taxman 282 dated 23.3.2001, it was held that :-

“Admittedly the details of purchase and sale of shares were furnished. The payment and receipt were by account payee cheque. The identity of seller and purchaser was not in dispute. The disallowance was basically made on the ground that the assessee failed to produce the brokers for verification of

the transaction. Following the view on a similar issue in the case of CIT vs Carbo Industrial Holdings Ltd (2000) 244 ITR 422 (Cal) , non-production of the share broker by the assessee did not disentitle it for claim of loss in a genuine transaction of shares, thus, the Tribunal's finding was based on material and not perverse. The findings of the ITO and the Commissioner (Appeals) were based on presumption."

2.9.3. *We find that the revenue had made a remark that the subject mentioned shares of G.K.Consultants Ltd were bought by the assessee in off market which is against the rules framed by SEBI and others. We find from the Bye Laws of CSE placed on record in the paper book , that the said Bye Laws (vide Bye Law No. 9) permit purchase and sale of shares in off market. In any case, this is not relevant in as much as the issue before us is not on the purchase of shares but only the treatment of sale consideration received on sale of those shares.*

2.9.4. *We find that on verification by the ld AO with the Calcutta Stock Exchange Ltd regarding the purchase and sale of shares of G.K.Consultants Ltd by the assessee through the broker Mr Rajendra Prasad Shah, CSE had confirmed the fact that the share purchase and sale transactions of assessee had happened through the broker Mr Rajendra Prasad Shah on the said date but had only stated there was no trade vide Trade No. 1586. This alone would not automatically make the entire transaction as sham and bogus when other documents as stated supra prove the contrary.*

2.9.5. *We find that the similar issue had been adjudicated by the co-ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos. 714 to 718/Kol/2011 dated 28.10.2015 and in the case of ITO vs Rajkumar Agarwal in ITA No. 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that when purchase and sale of shares were supported by proper contract notes , deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG. We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money.*

2.9.6. *In view of the aforesaid facts and findings and the judicial precedents relied upon , we have no hesitation in directing the ld AO to accept the claim of exemption of LTCG of the assessee arising out of sale of shares of G.K.Consultants Ltd and accordingly allow the ground raised by the assessee in this regard."*

18. We note that on identical facts, the Coordinate Bench of ITAT Kolkata in the case of Surya Prakash Toshniwal -HUF, in ITA No.1213/Kol/2016, for A.Y.2005-06, held as follows:

"11. We have heard the rival contentions and perused the materials available on record. In the present case the assessee has shown income from long term capital gain for Rs.14,46,529.00 which was claimed as exempted income under section 10(38) of the

Act. However, the assessing officer treated the same as income from other sources by holding such income as bogus and from undisclosed sources which was routed in the disguise of long term capital gain. The addition made by the AO was also upheld by the learned CIT(A). Now the issues before us arises for our adjudication so as to whether the long term capital gain income claimed by the assessee is bogus income in the aforesaid facts and circumstances. In the case on hand admittedly the shares were sold by the assessee after paying the Security Transaction Tax (STT). Similarly the purchase price of the shares and the sale price of the shares were reflecting on the Calcutta stock exchange as evident from page number 19 and 20 of the paper book. It is also not in dispute that the purchase and sale of the shares were routed through account payee cheques. The learned AR in support of his claim has also produced the contract notes for the purchase and sale of the shares which are placed on pages 12 and 13 of the paper book. However we find that in spite of having all the aforesaid information the lower authorities have held the long term capital gain as bogus and from undisclosed sources on the basis of certain facts as revealed under :

1. The assessee in the present case is a HUF and the transaction was routed for both purchase and sale of the shares through an individual broker who happened to be the Karta of assessee i.e. HUF.
2. The shares were sold to M/s Ahilaya Commercial Private Limited (for short ACPL) but the financial statements of the company were not filed to the stock exchange. The assessee also failed to furnish the necessary details of ACPL to establish the genuineness of the transactions except that the transactions were routed through account payee cheques.
3. The SEBI has also directed to M/s ACPL not to carry out any transaction of purchase and sale of securities in any manner either directly or indirectly.
4. The assessee has also failed to submit the net worth of M/s RFL and ACPL to justify the amount of capital gain earned during the year.

On the analysis of the above facts we find that the lower authorities have not brought on record any concrete evidence for disallowing the long term capital gain of the assessee. The AO should have issued notices and summons to M/s RFL and ACPL under section 133(6) and 131 of the Act for the production of the necessary financial information before rejecting the claim of the assessee. We find that all the necessary information which were available with the assessee had been brought on record by the assessee before the lower authorities. In case ACPL has not filed the financial statements with the stock exchange then the assessee for the fault of ACPL cannot be held guilty under the income tax proceedings. The assessee in the instant case has made the transactions for the sale and purchase of the shares through a valid stock broker who was in existence at the relevant time with the stock exchange and this fact has not been doubted by the lower authorities. In view of the above we hold that the lower authorities had not brought on record sufficient reasons for disallowing the claim of the assessee. In this connection we rely in the case of CIT versus Carbo Industrial Holdings Limited reported in 116taxman159 where the Hon'ble jurisdictional High Court has held as under :

“If the share broker, even after issue of summons does not appear, for that reason, the claim of the assessee should not be denied, specially in the cases when the existence of broker is not in dispute, nor the payment is in dispute. Merely because some broker failed to appear, assessee should not be punished for the default of a broker and on mere suspicion the claim of assessee should not be denied.”

Similarly we also find guidance and support from the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. Emerald Commercial Ltd. reported in 120 taxman 282 whereby it was observed as under :

“Business income—Business loss—Loss on sale of shares—Details of purchase and sale of shares furnished—Payment and receipts were through account payee cheque—Identity of seller and purchaser not disputed—Claim for loss could not be disallowed on the mere ground that the assessee failed to produce the brokers for verification of the transaction—Finding of the Tribunal that the loss incurred by the assessee in the share dealings is genuine and is allowable was based on material and was not perverse—CIT vs. Carbo Industrial Holdings Ltd. (2000) 161 CTR (Cal) 282 : (2000) 244 ITR 422 (Cal) followed”

Respectfully following the aforesaid judgments we find that the proposition laid down by the Hon'ble Courts are applicable to the instant case on hand. The addition was made by the lower authorities on several grounds as discussed above but on analysis of the facts we find that there was no fault on the part of the assessee. Therefore we are inclined to reverse the order of lower authorities. Hence this ground of appeal of the assessee is allowed.

19. To conclude: When the transaction which has been concluded within four corners of Law cannot be treated as colorable device unless the revenue brings any material to prove such an allegation. In this case, as will appear from the aforesaid details and documents filed, the price at which the shares were sold had been not only intimated to the SEBI but even to Calcutta Stock Exchange both by the Acquirer and Seller. It is an accepted fact that whenever share in the Stock Exchange are sold as off market transaction, it is sold at the intrinsic value of shares and that is what has happened in this assessee's case under consideration. When purchase and sale of shares were supported by proper contract notes, deliveries of shares were received, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG. We find that in the instant case, the addition has been made only on the basis of the suspicion. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the Purchaser and the assessee for the introduction of its unaccounted money.

In view of the aforesaid facts and circumstances and the sale having taken place at the price duly approved by the SEBI, no adverse inference can be drawn against the assessee company simply on assumptions and presumptions and mere suspicion. Therefore, the addition made U/s 68, as income from undisclosed source

was rightly deleted by the Id CIT(A).That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid addition. His order on this addition is therefore, upheld and the grounds of appeal of the Revenue are dismissed.

20. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 04.06.2019

Sd/-
(A.T.VARKEY)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 04/06/2019

(SB, Sr.PS)

Copy of the order forwarded to:

1. DCIT, Circle-4, Kolkata
2. M/s R.K Commercial Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches