

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No. 6480/Del/2017
Asstt. Year: 2014-15

Swati Luthra, 41, D.B. Gupta Road, Karol Bagh, New Delhi – 110 005	Vs.	ITO, Ward-51(5) New Delhi.
(Appellant)		(Respondent)

ITA No. 6481/Del/2017
Asstt. Year: 2014-15

Shruti Luthra 41, D.B. Gupta Road, Karol Bagh, New Delhi – 110 005	Vs.	ITO, Ward-51(5) New Delhi.
(Appellant)		(Respondent)

ITA No. 6482/Del/2017
Asstt. Year 2014-15

Namrata Sehgal Luthra 41, D.B. Gupta Road, Karol Bagh, New Delhi – 110 005	Vs.	ITO, Ward-51(5) New Delhi.
(Appellant)		(Respondent)

ITA No. 6483/Del/2017
Asstt. Year 2014-15

Ms. Asha Luthra, 41, D.B. Gupta Road Karol Bagh, New Delhi 110 005	Vs.	ITO, Ward-51(5), New Delhi
(Appellant)		(Respondent)

Assessee by:	Shri Salil Agarwal, Adv., Shri Shailesh Gupta, CA Shri Madhur Agarwal, Adv.
Department by :	Shri S.S. Rana, CIT(DR) and Shri F.R. Meena, Sr. DR
Date of Hearing	14/05/2019
Date of pronouncement	28/06/2019

ORDER

PER AMIT SHUKLA, J.M

The aforesaid appeals have been filed by the above named assesseees against separate impugned orders of even date 06.09.2017 in case of Swati Luthra, Namrata Sehgal Luthra and Shruti Luthra and order dated 22.09.2017 in the case of Asha Luthra), passed by Id. CIT (Appeals) – 17, New Delhi for the quantum of assessment passed u/s 143(3) for the Assessment Year 2014-15. Since the issues involved in all the aforesaid assessee's appeals are common arising out of identical set of, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. We will first take up the appeal in the case of Swati Luthra in ITA No. 6480/Del/2017 and the finding given therein will apply mutatis mutandis in other appeals also.

3. In the grounds of appeal, the assessee has challenged the disallowance of exemption claimed on account of long term capital gains from sale of shares of companies, M/s Turbo Tech Engineering Ltd. of Rs. 20,55,146/-; and M/s Esteem Bio Organic Food Processing Ltd. (Rs. 23,00,616/- (public limited companies listed on recognized stock exchange) and similar disallowances with respect to same scrips have been made in the cases of Shruti Luthra, Namrata Sehgal Luthra and Asha Luthra. Though the assessee had raised various grounds before us, the only effective issue involved in this appeal is as to whether the Id. CIT (A) was justified in confirming the addition made as alleged unexplained cash credit u/s 68 read with section 115BBE of the I.T. Act, 1961 by treating Long Term Capital Gain (LTCG) derived from sale of shares of companies M/s Turbo Tech Engineering Ltd. (Rs. 20,55,146/-) and M/s Esteem Bio Organic Food Processing Ltd. (Rs. 23,00,616/-) on the facts and in circumstances of the case.

4. The brief facts are that the assessee filed her return of income for the AY 2014-15 on 31.07.2014 declaring total income of Rs. 16,01,720/-, wherein she had declared income from salary, house property and other sources and also income from investing in shares. The assessee claimed exempt income u/s 10 (38) of the Act in respect of long term capital gain derived from sale of listed company's shares of companies M/s Turbo Tech Engineering Ltd.

(Rs. 20, 55, 146/-) and M/s Esteem Bio Organic Food Processing Ltd. (Rs. 23, 00, 616/-) where securities transaction tax was duly suffered by assessee. The sales of shares were effected in the stock exchange through a registered share broker after paying STT. Accordingly, the assessee had claimed long term capital gain as exempt under section 10 (38) in the return of income to the tune of Rs. 20,55,146- and Rs. 23,00,616/-. The assessee during the course of assessment proceedings had submitted all the relevant evidences for purchase of shares made in cash by the assessee, along with sale contract notes together with bank statements and Demat statements before the Id AO evidencing the entire transaction of sale of shares being routed through regular disclosed bank statement of the assessee. The aforesaid details and documents as submitted by assessee before the authorities below are tabulated along with page nos. of paper book as submitted before us:-

Details of long term capital gain claimed as exempt under section 10(38) on account of sale of scrip of M/s Turbotech Engineering Ltd.

Particulars	Swati Luthra	Shruti Luthra	Namrata Sehgal Luthra	Asha Luthra
Date of Investment	27.12.2011	27.12.2011	27.12.2011	27.12.2011
No. of Shares purchased	10000	10000	10000	10000
Purchase price per	Rs. 2 per share	Rs. 2 per	Rs. 2 per	Rs. 2 per share

share		share	share	
Total purchase consideration paid	Rs. 20, 000/-	Rs. 20, 000/-	Rs. 20, 000/-	Rs. 20, 000/-
Date of shares sold	23.07.2013 (3000 shares), 03.09.2013 (3000 shares) and 10.09.2013 (4000 shares)	06.09.2013 (10000 shares)	19.10.2013 (10000 shares)	24.09.2013
Sale Price per share	Rs. 314.88, Rs. 151.25 and Rs. 164.189 per share	Rs. 276.70 per share	Rs. 178. 85 per share	Rs. 182.60 per share
Total sale consideration	Rs. 20,55,146/-	Rs. 27,67,036/-	Rs.17,88,463/-	Rs.18,25,780/-
Long Term Capital Gain declared	Rs. 20,35,146/-	Rs. 27,47,036/-	Rs.17,68,463/-	Rs.18,02, 780/-

DOCUMENTARY EVIDENCES SUBMITTED BEFORE AO AND CIT(A):

Share Purchase Documents	Pg 15 to 17 of PB	Since the issues involved in all the appeals are identical and documents submitted are also same, thus, Ms. Swati Luthra's (ITA No. 6480/Del/2017) case may be taken as lead case and the issue may be decided accordingly.
Share Certificate	Pg 18 of PB	
Share Transfer Form	Pg 19 to 21 of PB	
Contract Note issued by DP	Pg 24 to 27 of PB	
Assessee's bank statement	Pg 28 to 29 of PB	
DP statement	Pg 30 to 32 of PB	

Details of long term capital gain claimed as exempt under section 10(38) on account of sale of scrip of M/s Esteem Bio Organic Food Processing Ltd.

Particulars	Swati Luthra	Shruti Luthra	Namrata Sehgal Luthra	Asha Luthra
Date of Investment	20.02.2013	20.02.2013	20.02.2013	-
No. of Shares purchased	6000	6000	6000	-
Purchase price per share	Rs. 25 per share	Rs. 25 per share	Rs. 25 per share	-
Total purchase consideration	Rs. 1,50,000/-	Rs. 1,50,000/-	Rs. 1,50,000/-	-
Date of shares sold	25.02.2014 (2400 shares), 26.02.2014 (2400 shares) and 03.03.2014 (1200 shares)	14.03.2014 (6000 shares)	26.03.2014 (4800 shares)	-
Sale Price per share	Rs. 376.22, Rs. 383.62 and Rs. 397.50 per share	Rs. 424.154 per share	Rs. 487.50 per share	-
Total sale consideration	Rs.23,00,616/-	Rs.25, 44, 924/-	Rs 23,39,976/-	-
Long Term Capital Gain declared	Rs.21,50,616/-	Rs.23,94,924/-	Rs 22,19,976/-	-

DOCUMENTARY EVIDENCES SUBMITTED BEFORE AO AND CIT(A):		
IPO form	Pg 33 to 40 of PB	Since the issues involved in all the appeals are identical and documents submitted are also same, thus, Ms. Swati Luthra's (ITA No. 6480/Del/2017) case may be taken as lead case and the issue may be decided accordingly.
Allotment Advice along with share price	Pg 41-42 of PB	
Photocopy of Cheque paid	Pg 43 of PB	
Contract Note	Pg 45 to 47 of PB	
Bank statement of assessee	Pg 48 to 52 of PB	
DP statement	Pg 53 of PB	

5. The Assessing officer in the impugned assessment order dated 14.12.2016 observed that the share prices of both the aforesaid scrips sky rocketed without having any financial strength. The parameters which are essential for increase in price of shares are not present. In absence of sound financial results it can be concluded that the increase is due to artificial increase. The trend observed of M/s Esteem Bio and M/s Trubotech again lead to a conclusion that prices of the shares were artificially hiked to create non-genuine LTCG to the beneficiaries. The Assessing Officer also observed that statements were also recorded by the investigation Wing in other cases of various brokers, operators and entry providers, who accepted that both M/s Esteem Bio and M/s Turbotech are Penny Stock companies and the scrips have been used to provide bogus LTCG to various

beneficiaries. Reliance was placed on various statements, like of Sh. Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar, which were all recorded before DDIT (Inv), Kolkata, wherein, the aforesaid persons had admitted that the scrip of M/s Esteem Bio and M/s Turbotech were used to provide bogus LTCG to various beneficiaries. Thereafter, the Assessing Officer after explaining the modus operandi of bogus LTCG held that the transactions of the assessee were sham transactions and the LTCG so declared of a sum of Rs. 41,85,762/- was nothing but unexplained Cash Credit under section 68 of the Act to be taxed @ 30% under section 115BBE of the Income Tax Act, 1961 in the hands of the assessee.

6. In the first appeal, the Ld. Commissioner of Income Tax (Appeals) confirmed the order of the AO by observing that the documents submitted as evidence to prove the genuineness of the transaction are make believe documents to cover up the true nature of the transactions, as it is revealed that the purchase and sale of shares are arranged transactions to create bogus profit in the garb of LTCG by well-organized network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or a commission.

7. Before us, Ld. Counsel for the assessee, Mr. Salil Aggarwal submitted that the assessee has filed before the AO and CIT(A) various documentary evidences in order to substantiate the genuineness of the LTCG so declared during the impugned

assessment year and no defect, error or any flaw in these evidences has been pointed by the AO as well the Commissioner of Income Tax (Appeals) and thus, he contended that the entire addition needs to be deleted on the ground of lack of investigation/ enquiry and also due to failure to provide any fallacy in the documentary evidences so submitted by assessee and on the aforesaid proposition reliance was placed on the judgments of jurisdictional High Court in the case of **CIT vs Fair Finvest Ltd. reported in 357 ITR 147** and **PCIT vs Laxman Industrial Resources Ltd. reported in 397 ITR 106**.The said documents so submitted by assessee are tabulated as under:

For scrip of M/s Turbotech Engineering Ltd.

Share Purchase Documents	Pg 15 to 17 of PB
Share Certificate	Pg 18 of PB
Share Transfer Form	Pg 19 to 21 of PB
Contract Note issued by DP	Pg 24 to 27 of PB
Assessee's bank statement	Pg 28 to 29 of PB
DP statement	Pg 30 to 32 of PB

For scrip of M/s Esteem Bio Organic Food Processing Ltd.

IPO form	Pg 33 to 40 of PB
Allotment Advice along with share price	Pg 41 to 42 of PB
Photocopy of Cheque paid	Pg 43 of PB

Contract Note	Pg 45 to 47 of PB
Bank statement of assessee	Pg 48 to 52 of PB
DP statement	Pg 53 of PB

8. The Id Counsel further submitted that the reasons given by AO as well as the Commissioner of Income Tax (Appeals) that increase in the price of M/s Esteem and M/s Turbotech was without any backing of the Financial Results is immaterial as the assessee had sold the shares on recognized stock exchange through a recognized stock broker and the prices of shares duly listed on stock exchange are not in control of assessee and nor any such allegation has surfaced on record that the assessee is involved in price manipulation of aforesaid scrips. He further submitted that reliance placed by AO on the interim order of SEBI, wherein, trading in securities of M/s Esteem Bio and M/s Turbotech were suspended temporarily is misconceived, as vide Adjudication Orders dated 06.09.2017 in the case of M/s Esteem Bio and 25.11.2014 in the case of M/s Turbotech, SEBI has found no irregularities in the trading of such scrips nor it has found its directors involved in any price rigging (said orders were placed in the paper book at pages 3 to 13 and 14 to 18 of PB – II) and thus, the reliance placed by AO on interim order of SEBI is uncalled for and unjustified. It was further argued that the AO has relied on various statements of alleged entry operators which have surfaced directly in the order of assessment and were never confronted by Id AO during the course of assessment

proceedings. Further, in the first appeal filed by assessee against the said order of assessment, the said issue of cross examination was raised before Id. CIT (A) which was never provided to the assessee. Thus, it was submitted that as the statements of alleged entry operators have never been confronted to the assessee and they have also not been produced for cross examination, even though specific request for the same was made by assessee before Id CIT (A), the assessment so made and addition so sustained is vitiated in law and addition so made is liable to be deleted as such. Reliance was placed on following judgments in support of the aforesaid proposition:

- (i) KishinchandChellaram vs. CIT. [1980] 125 ITR 713 (SC)
- (ii) CIT vs Ashwani Gupta. 322 ITR 396 (Del)
- (iii) Andaman Timber Industries vs CCE (SC) reported in 127 DTR 241.

9. Ld. Counsel further relied on various case laws on the proposition that once the shares are sold through stock exchange and sufficient documentary evidences have been produced in order to support the genuineness of the LTCG claimed as exempt under section 10(38), hence, addition cannot be made in the hands of assessee without rebutting the documentary evidences and without conducting investigation to discard the said documents. The case laws so relied by assessee are tabulated below:

Particulars

Copy of judgment of Hon'ble Punjab and Haryana High Court in the case of PCIT vs Prem Pal Gandhi

in ITA No. 95/2017 dated 18.01.2018.

Copy of judgment of Hon'ble Punjab and Haryana High Court in the case of PCIT vs Hitesh Gandhi in ITA No. 18/2017 dated 16.02.2017.

Copy of judgment of Hon'ble Bombay High Court in the case of CIT v. Shyam R. Pawar reported in 229 Taxman 256 dated 10.12.2014.

Copy of judgment of Hon'ble Bombay High Court in the case of CIT CIT v. Smt. Jamnadevi Agrawal reported in 328 ITR 656 dated 23.09.2010.

Copy of judgment of Hon'ble Gujarat High Court in the case of CIT vs. Maheshchandra G. Vakil reported in 220 Taxman 166 (Magz) dated 25.09.2012.

Copy of judgment of Hon'ble Rajasthan High Court in the case of CIT vs. Smt Sumitra Devi reported in 229 Taxman 67 dated 24.02.2014.

Copy of judgment of Hon'ble Allahabad High Court in the case of CIT vs. Anirudh Narayan Agrawal reported in 219 Taxman 126 dated 16.01.2013.

Copy of order of Hon'ble ITAT Raipur in the case of DCIT vs Rakesh Saraogi & Sons (HUF) in ITA No. 93 to 99/RPR/2014 dated 16.04.2018.

Copy of order of Hon'ble ITAT Mumbai in the case of ITO vs M/s Arvind Kumar Jain (HUF) in ITA No. 4862/Mum/2014 dated 18.09.2017.

Copy of order of Hon'ble ITAT Jaipur in the case of Sh. Pramod Jain vs ITO in ITA No. 368/Jp/2017 dated 31.01.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Shobhit Goel (HUF) in ITA No. 2021/Del/2018 dated

25.09.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Smt. Sunita Khemka vs ACIT in ITA No. 389/Del/2018 dated 02.08.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Chander Prakash vs ITO in ITA No. 6880/Del/2017 dated 12.03.2018.

Copy of order of Hon'ble ITAT Kolkata in the case of Prakash Chand Bhutoria vs ITO in ITA No. 2394/Kol/2017 dated 27.06.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Mukta Gupta vs ITO in ITA No. 2766/Del/2018 dated 26.11.2018.

Copy of order of Hon'ble ITAT Kolkata in the case of Mahavir Jhanwar vs ITO in ITA No. 2474/Kol/2018 dated 01.02.2019.

Copy of order of Hon'ble ITAT Delhi in the case of Sh. Rajev Agarwal & sons vs ITO in ITA No. 872/Del/2018 dated 21.01.2019.

Copy of order of Hon'ble ITAT Delhi in the case of Sanjeev Jain vs ITO in ITA No. 3381/Del/2017 dated 15.01.2019.

Copy of order of Hon'ble ITAT Delhi in the case of Smt. Jyoti Gupta vs ITO in ITA No. 3510/Del/2018 dated 06.11.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Vidhi Malhotra vs ITO in ITA No. 93/Del/2018 dated 20.12.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Smt. Simi Verma vs ITO in ITA No. 3387/Del/2018 dated 06.11.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Smt. Shikha Dhawan vs ITO in ITA No. 3035/Del/2018 dated 27.06.2018.

Copy of order of Hon'ble ITAT Delhi in the case of Sh. Amitabh Bansal vs ITO in ITA No. 7802/Del/2018 dated 11.02.2019.

Copy of order of Hon'ble ITAT Kolkata in the case of Ms. Swati Mall vs ITO in ITA No. 2423/ Kol/2017 dated 07.12.2018.

10. On the other hand, the DR relied on the orders of the lower authorities and filed a written note dated 14.05.2019, which contained list of case laws to be relied by Revenue, wherein, reliance was placed on judgment of Hon'ble High Court of Delhi in the case of **Udit Kalra vs ITO in ITA No. 220/2019**.

11. In rejoinder, the ld Counsel submitted his arguments, which can be summarized as below:

- (i) That the ld DR has failed to rebut the case laws so cited by assessee – appellant and also, the SEBI orders, wherein, the companies M/s Esteem Bio and M/s Turbotech have been absolved and no wrong doings have been found in the working of said companies.
- (ii) That further, the reliance placed by ld DR on the order of Udit Kalra vs ITO (Delhi High Court) in ITA No. 220/2019 is again misplaced, as first of all no question of law was formulated by Hon'ble High Court of Delhi in the said case and thus, the same is only dismissal in limine and on this proposition reliance is placed on the judgment of Hon'ble

Supreme Court in the case of CIT vs Rashtradoot (HUF) reported in 412 ITR 17.

- (iii) That further, even on facts, the said order in the case of Udit Kalra vs ITO is distinguishable. As, the interim order of SEBI in the case of both the companies have been cooled down by subsequent orders of SEBI. Thus, the case of Udit Kalra vs ITO relied by ld. DR is clearly distinguishable on facts and is not applicable to the facts of assessee. Rather the case laws so relied by assessee are directly applicable to the facts of assessee which have not been rebutted by ld DR.

12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. We find that the transactions of the assessee of purchase of shares of M/s Esteem Bio and M/s Turbotech., holding of the shares for more than one year and the sale of shares through a registered share broker in a recognized Stock Exchange and payment of Securities Transaction Tax thereon, all were supported by documentary evidences which were placed before the lower authorities. The Revenue could not point out any specific defect with regards to the documents so submitted by assessee. In our considered view, effect of a transaction which is supported by documentary evidences cannot be brushed aside on suspicion or probabilities without pointing out any defect therein.

13. In the instant case, the Assessing Officer himself observed that the movement in price of shares of M/s Esteem Bio and M/s

Turbotech were without any backing of financial performance of the said companies. In our considered view, the above factor at best was a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. Further, we also find from record that Ld. AO also didn't confront copies of statements recorded by Investigation Wing, Kolkata of Sh, Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar to the appellant during assessment proceedings and merely extracted copies of their statement in the assessment order only. The Ld. AO has not confronted any material to the assessee nor provided any adequate opportunity to the assessee to defend her case. Since the statements were not confronted to the assessee, she was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly to all the persons who have brought the scrips in the entire country. Thus, under these circumstances, atleast some inquiry should have done from these persons, whether they have provided any entry to the assessee, if the request for cross examination was not possible at that stage. Cross examination of a person in whose basis any adverse inference is drawn, then it cannot be primary evidence or material to nail the assessee and simply based on the statement no addition can be made. This has been held so by various courts, and also by Hon'ble Apex Court in the

case of M/s Andaman Timber Industries vs. CCE (SC) reported in 127 DTR 241 has held as follows:

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and

wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

14. That the Id DR during the course of hearing placed heavy reliance on judgment of Hon’ble High Court of Delhi in the case of **Udit Kalra vs ITO** in ITA No. 220/2019. Relevant extracts of said judgment are extracted as below:

“The assessee is aggrieved by the concurrent findings of the tax authorities – including the lower appellate authorities rejecting its claim for a long term capital gain reported by it, to the tune of Rs.13,33,956/- and Rs.14,34,501/- in respect of 4,000 shares of M/s Kappac Pharma Ltd. The assessee held those shares for approximately 19 months; the acquisition price was Rs.12/- per share whereas the market price of the shares at the time of their sale, was Rs.720/-. It is contended that the assessee was not granted fair opportunity.

Mr. Rajesh Mahna, learned counsel appearing for the assessee relied upon the orders of the co-ordinate Bench of the tribunal, in respect of the same company i.e. M/s Kappac Pharma Ltd., and pointed out that the tax authority’s approach in this case was entirely erroneous and inconsistent.

The main thrust of the assessee’s argument is that he was denied the right to cross-examination of the two individuals whose statements led to the inquiry and ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal.

This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent – A.O., CIT(A) and the ITAT have all consistently rendered adverse findings – what is intriguing is that the company (M/s Kappac Pharma Ltd.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company’s shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal.

This appeal is accordingly dismissed.”

15. On going through the aforesaid judgment, we find that no question of law was formulated by Hon'ble High Court of Delhi in the said case and there is only dismissal of appeal in limine and the Hon'ble High Court found that the issue involved is a question of fact as held by Hon'ble Apex Court in **Kunhayyammed vs State of Kerala reported in 245 ITR 360** and also in **CIT vs. Rashtradoot (HUF) reported in 412 ITR 17**. Even on merits and facts, the said judgment in the case of Udit Kalra vs ITO (supra) is distinguishable as in that case the scrips of the company were delisted on stock exchange, whereas, in the instant case, the interim order of SEBI in the cases of M/s Esteem Bio and M/s Turbotech have been cooled down by subsequent order of SEBI placed by assessee in its paper book. Thus, the case of Udit Kalra vs ITO relied by ld. DR is clearly distinguishable on facts and is not applicable to the facts of assessee. Thus, we hold that the case of assessee is factually and materially distinguishable from the facts of the case of Udit Kalra vs ITO so relied by ld DR.

16. We further find that Ld. AO has also mentioned about some order of SEBI. This order also was never confronted to the appellant during assessment proceedings. Moreover, the said order seems to be passed in year 2015, whereas the appellant had purchased the shares in year 2011 and 2013 and sold them in year 2014. It was evident from this document only that no action has been taken by the SEBI against the company during the period when the appellant holds the shares. Thus, even otherwise, we find that the order of SEBI so relied by ld. AO and CIT (A) is not applicable for the transactions under consideration.

In any case as stated above, the SEBI in its subsequent decision has absolved most of the companies including the companies whose scrips are under suspicion, as they were not found to be rigging the price. This fact alone vitiates the case of revenue.

17. We also find that the Ld. AO has raised objection regarding the cash purchase of shares and that shares were dematerialized few days back only from the date of sale. There is no law which prohibits the purchase of shares in cash, however in the present case, assessee had filed copies of bills of purchase, copy of share certificates and transfer forms etc. before Ld. AO and no adverse inference could be drawn only because the shares were purchased in cash. Regarding Demat of shares, we hold that it is the option of the buyer of shares to keep the shares either in Demat form or in paper form. Merely because the shares were dematted at a later stage, no adverse inference could be drawn. The Learned Counsel for the Assessee has taken us through various documents filed in the paper book as referred to above which specifically prove the purchase of shares made by assessee genuinely which were also sold genuinely. The transactions were carried through Demat account and banking channel on which STT has been paid by assessee. The report of the SEBI was not adverse in nature against the assessee because name of the assessee did not appear therein for conducting dubious transaction. The report of the Investigation Wing and other material was neither confronted to assessee nor there was any inquiry from where it transpired that assessee was beneficiary of any bogus long-term capital gain; therefore, the same cannot be read in evidence against the assessee. A specific material against

the assessee should have been brought on record to put assessee under liability. However, in the present case, the entire documentary evidence on record has not been disputed by the authorities below and there is no rebuttal to the explanation of assessee. No other adverse materials have been brought on record against the assessee. Further, no proper enquiry has been conducted by the A.O. on the documentary evidences filed by assessee. Whatever statements have been referred to in the order was general in nature with whom assessee did not have any transaction. Considering the totality of the facts and circumstances of the case, we hold that assessee has entered into genuine transaction of sale and purchase of shares and therefore, satisfied the conditions of Section 10(38) of the I.T. Act. The assessee is entitled for exemption under the same provision. We accordingly, set aside the orders of the authorities below and delete the addition of Rs. 41,85,762/-. Appeal of assessee is allowed.

18. The facts of the cases of other assessee's are similar to the facts involved in the case of the present assessee i.e. Smt. Swati Luthra, therefore, our findings given in respect of the appeal in ITA No. 6480/Del/2017 shall apply to the other appeals of different assessees with the same force in ITA Nos. 6481 to 6483/Del/2017.

19. In the result, the appeal of all the above four assessees, namely, Smt. Swati Luthra, Smt. Shruti Luthra, Smt. Namata Sehgal Luthra and Smt. Asha Luthra bearing ITA No. 6480 to 6483/Del/2017 are allowed.

Pronounced in the open court on 28th June, 2019.

sd/-

(L.P. SAHU)
ACCOUNTANT MEMBER

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 28/06/2019

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi