

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

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

ITA No. 1132/Del/2018
Asstt. Year: 2014-15

Seema Tayal B-184, B-Block, Surajmal Vihar, Delhi – 110 092 PAN AAFPT5907N	Vs.	ITO, Ward-3(2) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Salil Agarwal, Adv. Shri Shailesh Gupta, Adv.
Department by :	Shri S.S. Rana, CIT (DR)
Date of Hearing	28/05/2019
Date of pronouncement	28/06/2019

ORDER

PER AMIT SHUKLA, J.M

The aforesaid appeal has been filed by the assessee against the impugned order dated 19.12.2017, passed Ld. Commissioner of Income Tax (Appeals) – 1, New Delhi for the quantum of assessment for the Assessment Year 2014-15.

2. Though the assessee had raised various grounds before us, the only effective issue involved in this appeal is, whether the ld.

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 M/s Trinity Trade Link Ltd. (TTL in short) (since merged with M/s Sharp Trading & Finance Ltd.) (STFL in short) of a sum of Rs. 1,93,56,813/- on the facts and in circumstances of the case. The interconnected issue involved is, whether the Id CIT (A) was justified in confirming the addition made towards unexplained expenditure on commission of a sum of Rs. 3,87,136/- since the long term capital gain was treated as non – genuine on the facts and in circumstances of the case.

3. The brief facts qua the issue involved are that the assessee filed her return of income for the AY 2014-15 on 31.07.2014 declaring total income of Rs. 11,56,260/-. The assessee had declared income from salary, house property, income from other sources and also 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 M/s Trinity Tradelink Ltd. (in short TTL, as name of STFL was changed to TTL w.e.f. 28.04.2014) where securities transaction tax was duly paid by the assessee. As culled out from the records, the assessee had purchased 20,000 shares of TTL on 25.03.2012 on allotment made by the company at par value of Rs. 10 per share. The assessee was issued share certificates numbering 0005208 to 0005211. The assessee made payment of Rs. 2,00,000/- vide cheque no. 114782 dated 25.03.2012, drawn on HDFC Bank, Preet Vihar, New Delhi. The cheque of Rs. 2,00,000/- issued by assessee got cleared in her bank on

28.04.2012. Later this company TTL was merged with STFL as per order of Hon'ble Bombay High Court dated 10.01.2014; and pursuant to this merger the assessee was allotted 20,000 shares of STFL in lieu of holding shares of TTL (however, name of STFL was again changed to TTL w.e.f 28.04.2014). The assessee had sold the aforesaid shares in AY 2014-15 on various dates during the period from 11.03.2014 to 21.03.2014. The sale of shares was affected through Bombay stock exchange through a registered share broker after duly suffering STT. Hence, on this background, assessee had claimed long term capital gain as exempt under section 10 (38) in the return of income to the tune of Rs. 1,93,56, 813/-. The assessee in the course of assessment proceedings submitted complete set of evidences of purchase of shares made by the assessee along with sale contract notes together with bank statements and Demat statements before the AO evidencing the entire transaction being routed through regular disclosed bank statement of the assessee. The aforesaid details as submitted by assessee before lower authorities are tabulated as under:

Particulars	
Date of Investment	25.03.2012
No. of Shares purchased	20000
Purchase price per share	Rs. 10 per share

Total purchase consideration paid	Rs. 2, 00, 000/-
Date of shares sold	11.03.2014 (6000 shares) 14.03.2014 (600 shares) 18.03.2014 (300 shares) 20.03.2014 (5000 shares) 20.03.2014 (5700 shares) 22.03.2014 (2400 shares)
Sale Price per share	Rs. 970.10 Rs. 988.10 Rs. 985.30 Rs. 985.40 Rs. 985.40 Rs. 978.60
Total sale consideration	Rs. 1, 95, 56, 813/-
Long Term Capital Gain declared	Rs. 1, 93, 56, 813/-

DOCUMENTS SUBMITTED BEFORE AO AND CIT(A) IN ORDER
TO SUBSTANTIATE THE LONG TERM CAPITAL GAIN OF A SUM
OF Rs. 1,93,56,813/-

Particulars	Pg No. of PB - I
Copy of shares purchased, sold and calculation of long term capital gain.	125
Copy of contract note of SEBI registered with BSE broker along with proof of payment of STT.	126-132
Copy of NSDL de-mat account transaction statement.	133
Copy of Dematerialization Request Form.	134
Copy of letter from Trinity Trade Link Ltd. for transfer of shares.	135
Copy of shares certificate at the time of purchase.	136-139
Copy of bill regarding purchase of shares.	140
Copy of Assessee's bank statement showing payment regarding purchase and sale of shares.	141-142
Copy of information about merger of M/s Trinity Trade Link Ltd.	143-144

4. The Assessing officer in the impugned assessment order dated 29.12.2016 has observed that the share price of TTL sky rocketed without having any financial result. The parameters which are essential for increase in price of share are not present. In absence of sound financial results it can be concluded that the increase is due to artificial increase. Further, the trend observed of TTL again lead to a conclusion that prices of the shares of TTL were artificially hiked to create non-genuine LTCG to the beneficiaries.

4.1 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 TTL is a Penny Stock company and the scrip has been used to provide bogus LTCG to various beneficiaries. Reliance was placed by the Assessing Officer on the statement of Sri Vikrant Kayan, which was recorded on 09.06.2014 before DDIT (Inv), Kolkata in which he had admitted that the scrip of TTL was used to provide bogus LTCG to various beneficiaries. Thereafter, the Assessing Officer after explaining the modus operandi of bogus LTCG held that the transaction of the assessee was a sham transaction and the LTCG so declared of a sum of Rs. 1,93,56,813/- 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.

5. In the first appeal filed by the assessee, the 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.

6. Before us, the Ld Counsel for the assessee, Mr. Salil Aggarwal submitted that the assessee had 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 were tabulated as under:

Particulars	Pg No. of PB - I
Copy of shares purchased, sold and calculation of long term capital gain.	125
Copy of contract note of SEBI registered with BSE broker along with proof of payment of STT.	126-132
Copy of NSDL de-mat account transaction statement.	133
Copy of Dematerialization Request Form.	134
Copy of letter from Trinity Trade Link Ltd. for transfer of shares.	135
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Copy of information about merger of M/s Trinity Trade Link Ltd.	143-144
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7. 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 TTL was without any backing of the Financial Results is factually incorrect, as the said company TTL is a growing company having turnovers of Rs. 117.39 crores (AY 2014-15); Rs. 150.59 crores (AY 2015-16); Rs 154.88 crores (AY 2016-17); and Rs. 146.23 crores (AY 2017-18). He submitted that the TTL is a dividend paying company and the financial statements of said company are available in public domain, which have also been placed at Pages 325 to 370 of PB-II. He further submitted that reliance placed by AO on the interim order of SEBI, wherein, trading in securities of TTL were suspended temporarily is misconceived, as vide Adjudication Order dated 31.10.2018, SEBI has found no irregularities in the trading of shares of TTL, nor it has found its directors involved in any price rigging (said order is placed at pages 305 to 324 of PB – II) and thus, the reliance placed by AO on interim order of SEBI is uncalled for and unjustified.

8. It was further argued by Id. Counsel that the AO has relied on the statement of Sh. Vikrant Kayan who was examined by DDIT (Inv), Kolkata with whom the assessee did not have any transaction. Further, the statement of Sh. Vikrant Kayan was provided to the assessee at the fag end of assessment, i.e., on 27.12.2016 at 6 pm and immediately thereafter, the assessee

vide its reply dated 28.12.2016 sought for the cross examination of Sh. Vikrant Kayan, which was not provided to the assessee. That further, the said issue of cross examination was also raised before Id. CIT (A) vide submission dated 02.08.2017 (Pg 87 to 90 of PB – I), which was accepted by Id CIT (A), after which, the matter was remanded to the file of AO for providing opportunity of cross examination to the assessee (Pg 91 of PB – I). However, Id AO vide his remand report dated 15.11.2017 showed his inability to summon Sh. Vikrant Kayan and requested Id CIT (A) to issue commission and ensure presence of Sh. Vikrant Kayan (Pg 92 to 94 of PB – I). However, the Id. CIT (A) once accepted that the assessee need be given an opportunity of cross examination of the so called alleged entry operator, makes a summersault and records in his order that the AO was not required to allow the appellant the opportunity to cross examine (Pg 27 of CIT (A) order). Thus, it was submitted that as the alleged entry operator has not been produced for cross examination, even though specific request for the same was made by assessee before Id. AO and CIT (A), as such, the assessment so made 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) Kishinchand Chellaram 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.

He 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:

- 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 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.
- Copy of final adjudication order dated 31.10.2018 passed by SEBI in the matter of M/s Trinity Tradelinks Ltd.
- Copy of financial statements of M/s Trinity Tradelinks Ltd. for the financial year 2013-14 available in public domain.
- Copy of relevant extracts of financial statements of M/s Trinity Tradelinks Ltd. for the financial year 2014-15 available in public domain.

- Copy of relevant extracts of financial statements of M/s Trinity Tradelinks Ltd. for the financial year 2015-16 available in public domain.
- Copy of relevant extracts of financial statements of M/s Trinity Tradelinks Ltd. for the financial year 2016-17 available in public domain.

9. On the other hand, the Ld. CIT DR relied on the orders of the lower authorities and filed written submissions dated 16.05.2019, wherein, his main plank of arguments were as under:

- (i) The assessee purchased and sold shares of TTL. In statement of Sh. Vikrant Kayan, Managing Director of TTL, he admitted that he was mainly engaged in facilitating accommodation in the form of providing bogus billing, share capital, unsecured loan and LTCG to some companies. He has also provided LTCG in Trinity Tradelink Ltd. to various clients.
- (ii) The transaction has not been made through Dmat account.
- (iii) Summon u/s 133(6) were issued to M/s Trustline Securities Ltd, broker, but there was no compliance.
- (iv) Action was initiated by SEBI in the case of TTL which has not been revoked.
- (v) The assessee has not been able to explain the source of cash of Rs. 2,00,000/- for purchase of shares.
- (vi) The assessee has not invested in shares before or after these transactions.

- (vii) Investigation report along with statement was duly confronted to the assessee. The assessee has failed to show that it asked for cross examination.
- (viii) Heavy reliance was placed by him on judgment of Hon'ble Delhi High Court in the case of **Udit Kalra vs. ITO in ITA No. 220/2019**.

10. A specific query was raised by this Bench, with regards to statement referred in the order of assessment of Sh. Vikrant Kayan, wherein, relevant portion of statement of Sh. Vikrant Kayan has been extracted by ld. AO in his order at pages 3 and 4. It was specifically enquired by the Bench as to whether, department is in possession of “Annexure A and B”, as has been mentioned by Sh. Vikrant Kayan in the said statement, wherein he has mentioned about beneficiaries. For this purpose, the matter was kept part heard. On 28.05.2019, the ld. CIT DR produced a report from AO dated 20.05.2019, wherein two Annexure, “A and B” were produced before the Bench. The ld. CIT DR though accepted that in ‘Annexure – B’, the name of assessee is absent but is not relevant as far as the case of assessee is concerned. However, ‘Annexure – A’ contains the name of assessee, at page no. 13 of the said annexure. His main plant of his argument was that, since the name of assessee is appearing in Annexure – A, this proves that assessee was beneficiary of accommodation entry from Sh. Vikrant Kayan and as such, the order so passed by ld CIT (A) need be sustained in the instant case. Further, he had placed heavy reliance on the judgment of Hon'ble Jurisdictional High Court in the case of Udit Kalra (supra).

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

- (i) That the Id. DR is factually incorrect on various aspects, as firstly, the transaction of assessee is duly through DMAT and all the said documentary evidences are placed at pages 126 to 134 of PB-I.
- (ii) That secondly, notice u/s 133(6) issued to M/s Trustline Securities Ltd. was duly complied as can be seen from page 6 of AO's order and thus, the submission of Id. DR that the share broker failed to comply is factually incorrect and contrary to material available on record.
- (iii) Further, the submission of Id. DR that the assessee has not been able to establish the source of cash of Rs. 2,00,000/- for purchase of shares is again factually incorrect, as the shares were purchased through account payee cheque (see bank statement at page 141 of PB-I) and even in the statement of assessee recorded during the course of assessment proceedings, it was stated by the assessee that the payment for purchase of shares of TTL have been made through account payee cheque, which has also not been disputed by AO.
- (iv) That the Id DR is again factually incorrect in stating that no cross examination was demanded by assessee, rather, the statement of Sh. Vikrant Kayan was provided to the assessee at the fag end of assessment i.e. on 27.12.2016 at 6 pm and immediately thereafter, assessee vide reply dated 28.12.2016 sought for the cross examination of Sh. Vikrant Kayan, which was not provided to the assessee. That

further, the said issue of cross examination was also raised before Id CIT (A) vide submission dated 02.08.2017 (Pg 87 to 90 of PB-I), which was accepted by Id CIT (A), wherein, the matter was remanded to the file of AO for providing opportunity of cross examination to the assessee (Pg 91 of PB-I). However, Id. AO vide its remand report dated 15.11.2017 showed his inability to summon Sh. Vikrant Kayan and requested Id. CIT (A) to issue commission and ensure presence of Sh. Vikrant Kayan (Pg 92 to 94 of PB-I). That this fact of request for cross – examination also finds mention in the order of assessment at page 10. Thus, the Id. DR is factually incorrect.

- (v) The Id. DR has failed to rebut the case laws so cited by assessee – appellant and also, the SEBI order so dated 31.10.2018, wherein, the company TTL has been absolved and no wrong doings have been found in the working of said company.
- (vi) That further, the reliance placed by Id 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 Delhi High Court 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.**
- (vii) Even on facts, the said order in the case of Udit Kalra vs. ITO is distinguishable as in that case the company was into consistent losses, whereas, the scrip in which assessee has

dealt is a high turnover and dividend paying company. That further, the interim order of SEBI in the case of TTL has been cooled down by subsequent order of SEBI. Thus, the growth in prices of TTL was backed by sound financials and as such, 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.

- (viii) As far as, “Annexure A and B” so submitted by ld CIT DR, he submitted that ld DR has himself admitted that ‘Annexure B’ is not relevant to the case of assessee, as nowhere, the name of assessee is appearing in the said annexure. However, a perusal of Annexure – A, reveals that it is nothing but the list of shareholders as 07.02.2014 of STFL/ TTL. A close perusal of the said annexure will show that name of Sh. Vikrant Kayan is also appearing in the same at page 1. Thus, the submission of assessee was that the said annexure merely contains the list of shareholding as why will Vikrant Kayan mention his own name in the list of beneficiaries of accommodation entries. Rather, on reading of the said annexure, it becomes clear that the same is not containing the list of beneficiaries; it merely contains the list of shareholding, which is also available in public domain as TTL is a listed company. Thus, Annexure – A so relied by ld. DR rather supports the case of assessee, as the same shows at page 13 that assessee was a genuine

investor in TTL and was holding 0.08% of shareholding of TTL.

Decision

12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. We find that the transaction of the assessee of purchase of shares of M/s Trinity Trade Link Ltd. (TTL), holding of the shares for more than one year and the sale of shares is through a registered share broker in a recognized Stock Exchange and after payment of Securities Transaction Tax thereon. Besides this, the purchase and sale were supported by documentary evidences which were placed before the lower authorities. Nowhere, the Revenue has pointed out any specific defect or shortcoming with regards to the documents so submitted by assessee. The effect of a transaction which is duly supported by documentary evidences cannot be brushed aside at the threshold, merely on suspicion or probabilities without pointing out any defect therein or carrying out any inquiry to disprove the evidences adduced.

13. In the instant case, the Assessing Officer has observed that the movement in price of shares of TTL was without any backing of financial performance of that company. In our view, the above factor at the best is a triggering point or cause for careful scrutiny and inquiry of the transaction by the Assessing Officer. But this factor alone cannot be conclusive to hold that transactions were sham. The rise and fall of 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. As pointed out by the Ld. Counsel, the financials of TTL are available in public domain which has also been filed before us and from perusal of the same; we find that the said company has a steady growth and is showing high turnover company and has been duly declaring dividends. The financial statements from AY 2014-15 to AY 2017-18 have been placed by Id Counsel in the PB II at pages 325 to 370, which further proves the fact that TTL is not a penny stock or a loss making company, rather the said company has high turnover ranging from Rs. 117 crores to Rs. 154 crores. Thus, we hold that the finding of Id. AO and CIT (A) that the prices of the company TTL are not backed by its financial statements is factually incorrect and is contrary to material available on record.

14. Further, the authorities below and Ld. CIT DR have also drawn heavy support from the investigation report of the Kolkata Investigation Wing and the statement of Sh. Vikrant Kayan. On going through the record, we find that the statement of Sh. Vikrant Kayan was provided to the assessee at the fag end of assessment, i.e., on 27.12.2016 and immediately thereafter the assessee vide reply dated 28.12.2016 had sought for the cross examination of Sh. Vikrant Kayan, which could not be provided to the assessee. The said issue of cross examination was also raised before Id CIT (A) vide submission dated 02.08.2017, which was accepted by Id CIT (A), wherein, the matter was remanded to the file of AO for providing opportunity of cross examination to the assessee. However, Id. AO in his remand report dated

15.11.2017 showed his inability to summon Sh. Vikrant Kayan and requested ld. CIT (A) to issue commission and ensure presence of Sh. Vikrant Kayan. The ld. CIT (A) thereafter, did not issue commission nor provided any opportunity of cross examination of the so called alleged entry operator to the assessee. Rather, we find that the ld. CIT (A) at page 27 of his order records that there is no requirement to provide cross examination of Sh. Vikrant Kayan to assessee. Thus, after going through the record, we have no hesitation in holding that it was incumbent upon the learned AO/ CIT (A) to have provided opportunity to cross examine the person or atleast issued commission to Revenue Authorities at Kolkata to summon and specifically inquire about assessee, because heavy reliance has been placed on the statement. It is more so in the present case, because in the statement, there is no mention about the assessee. It is an elementary principle of law that, if any adverse inference is drawn against the assessee based on statement of a third party and no opportunity is provided to cross examine, then such a statement loses its credibility as primary evidence. On this point, before us Ld. Counsel has relied upon by various courts, including that of judgment of 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.”

15. Even, otherwise on a specific query raised by the Bench, with regards to statement referred in the order of assessment of Sh. Vikrant Kayan, wherein, relevant portion of statement of Sh. Vikrant Kayan has been extracted by ld AO in his order at pages 3 and 4, it was specifically enquired by us, as to whether, department is in possession of “Annexure A and B”, as has been mentioned by Sh. Vikrant Kayan in the said statement. The ld. DR in response had produced a report from AO dated 20.05.2019, wherein, two Annexure “A and B” were produced before the Bench. As discussed above, in ‘Annexure-B’, which contains various names, the name of assessee is absent. Thus,

'Annexure -B' is not relevant in so far as the case of assessee is concerned. However, 'Annexure- A' does contain the name of assessee at page no. 13 of the said annexure. After going through both the annexure so supplied by ld. DR and on perusal of 'Annexure- A', we find that it is nothing but the list of shareholders as on 07.02.2014 of STFL/ TTL. Further, on deep scrutiny of 'Annexure - A', we find that, name of Sh. Vikrant Kayan is also appearing in the same at page no. 1. A person will not give accommodation entry to his own self. This annexure makes it very clear that, it is nothing but a list of shareholders. As there is no mention of cheque numbers or details of any cash received or details of commission received with respect to alleged accommodation entry. On a query raised by the Bench as to why Vikrant Kayan will mention his own name in the list of beneficiaries of accommodation entries, the ld. DR was not able to provide a suitable answer. Thus, reading and scrutiny of the said annexure, makes it clear that the same is not containing the list of beneficiaries, it just contains the list of shareholding, which is also available in public domain as TTL is a listed company. Thus, here we tend to agree with the submission of ld. AR that Annexure - A so relied by ld DR rather supports the case of assessee, as the same shows at page no. 13 that assessee was a genuine investor in TTL and was holding 0.08% of shareholding of TTL. Even if it can be said that Annexure B might be list of beneficiaries, then, there is no mention about the assessee in that list. Thus, we find that nowhere, the lower authorities or ld DR have been able to substantiate their allegation that the assessee is beneficiary of alleged accommodation entries from

TTL. Rather, the documents so supplied by Revenue, supports the case of assessee and corroborates the fact that the assessee was a genuine investor and as a consequence of long term capital gain so declared is also genuine.

16. That the Id CIT DR during the course of hearing had 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 for sake of ready reference are extracted 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.”

17. That 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. Thus, the judgment of the Hon'ble High Court has to be seen if similar facts are permeating in the present appeal also and if there is difference on facts, then the judgment cannot be applied. In the judgment of 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**, the Hon'ble Apex Court have held that if the High Court has not admitted the question of law, and has dismissed the appeal, then it is a case of dismissal *in liminie*. Even on merits and facts, the judgment of Udit Kalra vs ITO (supra) is distinguishable as in that case the company was into consistent losses, whereas, the scrip in which assessee has dealt is a growing and high turnover

company and dividend paying company. As TTL was having turnovers of Rs. 117.39 crores (AY 2014-15); Rs.150.59 crores (AY 2015-16); Rs 154.88 crores (AY 2016-17); and Rs. 146. 23 crores (AY 2017-18). The financial statements of said company are available in public domain, which have also been placed at Pages 325 to 370 of PB- II by assessee. That further, the interim order of SEBI in the case of TTL banning trading has been uplifted and cooled down by subsequent order of SEBI vide order dated 31.10.2018 placed before us at Pages 305 to 324 of PB- II by assessee. Thus, the growth in prices of TTL was backed by sound financials and as such, 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.

18. Lastly, we deem it appropriate to consider the written submission dated 16.05.2019, so furnished by ld. CIT DR, Wherein, he has raised various submissions. The first submission of ld DR is that the transaction of assessee was not through DMAT is factually incorrect as we notice that the same is duly through DMAT, the documentary evidences for the same have been placed by assessee placed at pages 126 to 134 of PB – I. That secondly, the submission of ld DR that notice u/s 133(6) issued to M/s Trustline Securities Ltd. was not complied is again contrary to record as the same was duly complied as is also mentioned by AO at page 6 of the order. That further, the submission of ld DR that the assessee has not been able to prove

the source of cash of Rs. 2,00,000/- for purchase of shares is again factually incorrect, as the shares were purchased through account payee cheque, the bank statement has been placed by assessee at page 141 of PB – I and moreover, we find that the purchase has also been accepted by AO in the order of assessment and there is no dispute regarding the genuineness of purchase of shares of TTL. That further, we also find that the Id. DR is again factually incorrect in stating that no cross examination was demanded by assessee, whereas, we have found from record that cross examination was demanded on various occasions by assessee before AO and CIT (A). This fact of request for cross examination also finds mention in the order of assessment at page 10.

19. On the above facts and circumstances, we find that the transaction of the assessee of deriving long term capital gains of Rs. 1, 93, 56, 813/- by selling shares of M/s Trinity Tradelink Ltd. was treated as bogus by the Revenue only on the basis of suspicion and probability and without finding any defect in the various documentary evidences filed by the assessee and further, the finding recorded by Id CIT (A) on page 26 of his order that the addition has been made on independent analysis of the documents, is contrary to material available on record. As on perusal of the order of assessment, we find that no independent inquiry was made with regards to alleged entry operator Sh. Vikrant Kayan. Whereas, the sole basis of making the impugned addition was statement of Sh. Vikrant Kayan, which too was recorded behind the back of assessee by DIT (Inv) Kolkata and the statement alone cannot be the conclusive evidence to nail the

assessee and hence needs to be excluded for consideration as the said person has not been allowed cross examination by assessee, even though various requests were made by assessee. As such, the transaction of the assessee was duly supported by relevant documentary evidences without there being any rebuttal by lower authorities; the addition made by the Assessing Officer of Rs. 1,93,56,813/- by treating the LTCG as bogus is unsustainable. In view of our above finding, we, therefore, delete the addition of Rs.1,93, 56,813/-.

20. As we find the transaction of long term capital gains of Rs.1,93,56,813/- derived by the assessee as genuine and as such, further addition of Rs. 3,87,136/- made by the Assessing Officer on account of alleged commission is consequential and is also liable to be deleted and accordingly, the same is also hereby deleted.

21. In the result, the appeal of the assessee is allowed.

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

Sd/-

(L.P. SAHU)
ACCOUNTANT MEMBER

Dated: 28/06/2019

Veena

Copy forwarded to

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

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, New Delhi