

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.1069 /DEL/2019
Assessment Year: 2014-15

Smt. Karuna Garg 343, Neelkanth Apartment Plot No.49, Sector-13, Rohini, Delhi-110085 PAN No.AALPG1948E	Vs	Income Tax Officer Ward - 39 (4) New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.2772/DEL/2019
Assessment Year: 2015-16

Smt. Karuna Garg 343, Neelkanth Apartment Plot No.49, Sector-13, Rohini, Delhi-110085 PAN No.AALPG1948E	Vs	Income Tax Officer Ward - 39 (4) New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.1168/DEL/2019
Assessment Year: 2014-15

Bindu Garg D-47, Indraprastha Apartments, Sector-14, Rohini, New Delhi-110085 PAN No.AEFPG0635N	Vs	Income Tax Officer Ward – 39 (4) New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.1169/DEL/2019
Assessment Year: 2015-16

Bindu Garg D-47, Indraprastha Apartments, Sector-14, Rohini, New Delhi-110085 PAN No.AEFPG0635N	Vs	Income Tax Officer Ward – 39 (4) New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.1070/DEL/2019
Assessment Year: 2015-16

Krishna Devi D-47, Indraprastha Apartments, Sector-14, Rohini, New Delhi-110085 PAN No.ABRPD0875E	Vs	Income Tax Officer Ward – 38 (3) New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.1264/DEL/2019
Assessment Year: 2015-16

Hardev Sahai Gupta (Garg), D-47, Indraprastha Apartment, Sector-14, Rohini-110085 PAN No.AAHPG1190N	Vs	Income Tax Officer Ward – 39 (4) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Kapil Goel, Advocate
Respondent by	Ms. Rinku Singh, Sr. DR

Date of hearing:	31/07/2019
Date of Pronouncement:	06/08/2019

ORDER**PER N. K. BILLAIYA, AM:**

Captioned appeals are by different appellants preferred against the separate orders of the CIT(A) for A. Y. 2014-15 and 2015-16.

2. Representatives of both the sides agreed that the under lying facts in the dispute are identical in the case of all the aforementioned appellants. On such concession we heard the representatives on the facts of ITA No.1069/Del/2019 for A. Y.2014-15.

FACTS

3. The appellant purchased shares of following companies:-
 1. M/s. Esteem Bio Organic Food Processing Ltd. – 6,000 shares on 11.02.2013
 2. M/s. Randers Corporation Ltd. – 3500 shares on 20.11.2012
4. The shares were purchased online through two brokers namely ISF Securities and SMC Global Securities stationed at New Delhi.
5. Shares of M/s. Esteem Bio Organic Food Processing Ltd. which were purchased on 11.02.2013 were dematerialized on the same date as per the de-mat statement exhibited at page 5 of the paper book. The purchase consideration paid to ISF Securities Limited was also paid on the same date i.e. on 11.02.2013 which is evident from the bank statement of HDFC bank which is at page 4 of the paper book. Shares of M/s. Rander Corporation

Ltd. purchased on 20.11.2012 were kept in the common pool account with SMC Global Securities Limited which is evident from page 6 of the paper book. The purchase consideration was paid on 23.11.2012 which is evident from the bank statement of HDFC bank exhibited at page 3 of the paper book.

6. Shares of M/s. Esteem Bio Organic Food Processing Ltd. were sold on different dates namely 22.02.2014 1200 shares, 28.02.2014 1200 shares, 04.03.2014 2400 shares and on 06.03.2014 1200 shares. The sale transactions were done through the de-mat account via online trading.

7. The 3500 shares of M/s. Rander Corporation Limited were split in the ratio of 1:10 and 3500 shares purchased by the assessee became 35000 shares. 35000 shares were sold on 03.02.2014. The transaction was done through de-mat account via online trading.

8. The return of income was electronically filed which was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee. During the course of assessment proceedings the Assessing Officer noticed that the assessee has shown long term capital gain of Rs.4051874/- from sale of shares and has claimed the same as exempted u/s. 10 (38) of the Act.

ASSESSING OFFICER'S OBSERVATION

9. The Assessing Officer proceeded by heavily relying upon the investigation report of Pr. DIT (Investigation) Calcutta unit

regarding list of companies engaged in providing accommodation entries in the garb of bogus long term capital gain modus operandi involving the penny stocks trading through recognized stock exchanges. The Assessing Officer observed that the assessee was one among the beneficiaries in the list by accepting bogus long term capital gain entries through stock brokers trading in circular, penny stocks. The Assessing Officer further observed that the assessee has traded the script where funds were received from Kolkata based company and operated by entry operators.

10. To verify the aforementioned transactions reported by the assessee, the Assessing Officer asked the assessee to furnish all details including bank statement, share brokers note, ledger account copies, share certificates, and all documentary evidences in support of purchase and sale of shares and mode of payment and receipts of proceeds.

11. The assessee furnished the required details but the Assessing Officer rubbished the same observing that the assessee has meticulously framed chronologically order to claim exemption u/s.10 (38) of the Act.

12. The Assessing Officer observed that the claim of the assessee is unverifiable and representative of introduction of assessee's unaccounted money infused in the share transaction. According to the Assessing Officer the alleged transactions of purchase and sale of shares were not real but a sham transaction. The Assessing Officer observed that the modus operandi generally followed in such transactions was followed by

the assessee's stock broker enabling the assessee to introduce his unaccounted money in his books in the garb of long term capital gains according to the Assessing Officer the input of the investigation report of investigation wing Calcutta strengthen the theory of sham transaction in the following manner :-

(a) The share broker involved admitted that they had received cash from the beneficiaries including the assessee and the same was returned in the form of sale proceeds of shares after paying STT.

(b) The admission of the entry providers revealed that share sale transaction were nothing but accommodation entries wherein cheques were issued in lieu of cash.

(c) The stock broker had resorted to money laundering activities by using "Penny Stock". The share prices of the penny stocks were artificially inflated by the stock brokers so that capital gain could be introduced in the books of accounts unaccounted money by converting black money into white in the books of accounts and claimed exempt u/s. 10 (38) of the Act.

13. Once again drawing full support from the report of the Investigation Wing Calcutta the Assessing Officer was of the firm belief that provisions of section 68 of the Act squarely apply.

14. In view of his strong belief the Assessing Officer issued summons u/s.131 of the Act to the assessee to record his statement on oath about the veracity of procurement of accommodation entry. The assessee appeared whose statement was recorded on 16.12.2016. Thereafter the Assessing Officer issued a show cause notice to the assessee asking to explain on

all the points raised in the show cause to establish the genuineness of its income shown on account of LTCG on sale of penny stock of M/s. Esteem Bio Organic Food Processing Ltd and M/s. Rander Corporation Limited. The show cause notice runs into 30 pages and starts from para 8 of the Assessment Order to para 21 of the Assessment Order. The show cause notice incorporate all the statements recorded by the Investigation Wing, Calcutta. The Assessing Officer further observed that the brokers in the Calcutta Exchange dealing with the scripts have also admitted of rigging the shares and providing accommodation entries to the beneficiaries including the assessee in the form of LTCG. According to the Assessing Officer the unusual transactions of shares purchased and exempt gains create doubt of the genuineness on the purchases of share transaction specifically when the purchases is from the company where major share manipulation transactions were unearthed by the Income Tax Department.

15. Further drawing support from one of the statements recorded by the Investigation Wing, Calcutta, the Assessing Officer was convinced that the assessee must have paid commission @ 7% to the broker who arranged capital gains.

16. The Assessing Officer drawing support from the report of the Investigation Wing, Calcutta and further referring to various judicial decisions finally came to the conclusion that the assessee has entered into colourable device for avoidance of tax and the receipt of Rs.44,65,717/- is the nothing but unexplained cash credit u/s 68 of the Act to be taxed u/s. 115 BBE of the Act and

made addition of Rs.44,65,717/- u/s. 68 of the Act and Rs.283631/- u/s. 69C as unexplained expenditure.

17. Assessee carried the matter before the CIT(A) but without any success.

18. The CIT(A) was convinced with the findings of the Assessing Officer and confirmed the assessment holding as under :-

“5.5 As can be seen from the magnitude, volume and surgical precision of the entire operation, it was an exercise which was targeted to introduce unaccounted money into the books ,that too without paying taxes, by abusing the exemption provisions u/s 10(38) of the statute, to circumvent the law of the land, evade taxes and deprive the exchequer of its rightful due. The plethora of cases quoted by the AO all lend support to his decision, especially in such scam ridden cases, wherein it is essential to pierce the veil of legitimacy and innocence/ ignorance and look behind the charade woven to evade taxes. On the other hand, after due consideration of arguments put forth by the appellant, it is held that the Ld. AR has not been able to controvert/ successfully distinguish the judicial pronouncements quoted by the AO. Accordingly, the addition of Rs. 44,65,717/- u/s 68 of the IT Act r. w. s. 115 BBE made by the AO, is confirmed.

“5.6 AO has made an addition of 7% of total long term capital gains earned (Rs. 40,51,874/-) amounting to Rs.2,83,631/- as expenditure incurred out of books to obtain such entry. While the appellant claims

it to be a genuine transaction and the addition being presumptive, it is a well known fact, that there are no free lunches in the business world. As has been brought out in various reports, there were multiple operators/ parties. Statement recorded of some of the operators categorically confirmed under statement on oath, that commission was charged at varying rates from 1 to 7%. Accordingly, the addition of Rs. Rs.2,83,631/- (7% of Rs. 40,51,874/-) u/s 69C of the IT Act, is hereby confirmed.”

DECISION

19. We have carefully considered the orders of the authorities below and the relevant documentary evidences brought on record in the form of paper book in the light of Rule 18 (6) of ITAT Rules. Whether or not a person has discharged the burden cast upon him by the provisions of section 68 of the IT Act is always a question of fact. All that has to be seen by us is whether the appellant has discharged the initial onus cast upon him by the provisions of section 68 of the IT Act.

20. There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels.

21. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings.

22. Section 142 of the Act contains the provisions relating to enquiry before assessment.

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and reaffirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire

assessment order and the order of the first Appellate Authority are devoid of any such enquiry.

24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic Food Processing Ltd - a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also.

25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even

considered examining the brokers of the appellants. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void.

27. Our above view is fortified by the decision of the Hon'ble Delhi High Court in the case of Fair Invest Limited reported in 357 ITR 146. The relevant findings of the Hon'ble Jurisdictional High court of Delhi read as under :-

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(/Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed

*with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the **absence** of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68."*

28. The DR heavily relied upon the judgment of Hon'ble High Court of Delhi in the case of Udit Kalra Vs. ITO in ITA No.220/2019. We have carefully perused the order of the Hon'ble High Court and on going through the said judgment we find that no question of law was formulated by the Hon'ble High Court of

Delhi in the said case and there is only dismissal of appeal in limine as the Hon'ble High Court found that the issue involved is a question of fact.

29. As mentioned elsewhere the shares of M/s. Esteem Bio Organic Food Processing Ltd were suspended from trading in the stock exchange but that was from 29.06.2015 which is date of the order of the SEBI. The shares of two companies were purchased by the assessee in the month of February 2013 and November, 2012 which were sold in the month of February/ March 2014 and these transactions took place much before the report of the Investigation Wing and also before the order of the SEBI.

30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand.

31. We accordingly direct the Assessing Officer to accept the long term capital gains declared as such.

32. As mentioned elsewhere the facts of all the appellants are identical, the companies whose shares have been purchased / sold giving rise to long term capital gain are same, though the quantum may differ. For our detailed discussion here in above,

the appeals of all the appellants are allowed with the direction to accept the long term capital gain declared as such.

33. Since we have accepted the long term capital gains we do not find any merit in the additions on account of alleged payment of commission to the brokers and, therefore, additions made on this account is also directed to be deleted.

34. In the result, all the appeals filed by the different assessee's are allowed.

Order pronounced in the open court on 06.08.2019.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

NEHA

Date:- 06.08.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	06.08.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	