

THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ravish Sood (JM)

I.T.A. No. 1088/Mum/2019 (Assessment Year 2014-15)

Shri Ramchandran Ananthan Pothi 513, Laxmi Plaza Laxmi Industrial Estate Andheri West Mumbai- 400 053. PAN : AACPP8620K (Appellant)	Vs.	ACIT – 24(3) Room No. 413 6 th Floor Piramal Chambers Lalbaug, Parel Mumbai-400 012. (Respondent)
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Assessee by	Shri Naresh Jain & Ms. Arati Debnath
Department by	Shri D.G. Pansari
Date of Hearing	18.6.2019
Date of Pronouncement	11.9.2019

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 28.1.2019 and pertains to A.Y. 2014-15.

2. The issue raised in appeal reads as under :-

- 1) That on the facts and circumstances of the case and in law learned CIT(A) erred in rejecting claim of long term capital gain amounting to Rs. 64,25,672/- and denying exemption u/s. 10(38) of the I.T. Act, 1961.
- 2) That on the facts and circumstances of the case, learned CIT(A) has erred in arbitrarily disallowing commission amounting to Rs. 1,92,770 u/s. 69C.

3. Brief facts of the case are as under :-

Facts of the case leading to the disallowance can be gainfully inferred from the Assessing Officer's order which follows :-

“In this case, the return of income was e-filed on 13.11.2014 declaring total income of Rs.1,82,92,510/- The return of income was processed u/s. 143(1) of the IT Act, 1961. Thereafter, the case has been selected for scrutiny under CASS and accordingly, notice u/s. 143(2) dtd. 31.08.2015 was issued and served on the assessee. Subsequently, notices u/s. 142(1) has been issued to the assessee. On perusal of the return of income filed by the assessee, it is seen that the assessee has claimed the long term capital gain on sale of shares of M/s. Kailash Auto Finance Ltd. of which sale value of 1,65,000 shares amounts to Rs.64,25,672/-. The abovementioned shares are of a company which has been identified as a penny stock company by the Directorate of Investigation, Department of Income tax the shares of which have been used in a pre arranged manner to provide accommodation Long term Capital Gain/business Loss by manipulating share prices by controlled sale and purchase transactions. It is seen from the assessee's case records that his return of income does not show any substantial trading activity or investment in shares of listed companies. The prime business of the assessee is trading and export of aluminum caps and he also derives salary income from a related company in the same line of business. As such the assessee's move to acquire the shares of M/s. Panchshul Marketing ltd. (Later merged with M/s. Kailash Auto Finance Ltd) seems like a predetermined move which had the sole aim to bring back unaccounted money. The fact that the purchase of shares @ 1- that too in such a huge quantity (5,00,000) was made when the company had no proven financial results is an indicator to the events that occurred in the future.

The assessee vide show-cause dtd. 13.12.2016 was asked to clarify this point. The assessee vide reply 21-12-2016 has stated that he had made investment in this and a couple of other companies on the advice from a business acquaintance who had promised big business to the assessee. However, he also states that the fact that the assessee is not a regular trader in shares does not make his non genuine. From the bank statement furnished by the assessee, it is seen that the consideration was debited dtd. 05.10.2012 for

5,00,000 shares which have been purchased offline from M/s. Needful Vincom Pvt. Ltd, Kolkata. It is seen that 5,00,000 shares of M/s. Panchshul : Ltd. have been sold to the assessee for Rs.1 per share.

Farther the company in which the assessee has invested Rs.5,00,000/- does not even exist at its red office- The notice u/s. 133(6) sent to be company for information has been unserved. The assessee had utterly failed to explain as which concerned directors/key management personnel of M/s. Needful Vincom Pvt. Ltd he contacted for purchase of shares, since the shares had been acquired through private placement. The assessee's contention that the deal was arranged through one of his business acquaintance is also unacceptable as the assessee does not even remember the name of this acquaintance on the purported advice of whom the assessee invested such a huge amount in an unknown company. It is seen that M/s. Needful Vincom Pvt. Ltd has sold 5,00,000 shares to the assessee on 05.10.2012 & in return the assessee has sold 1,50,000 shares in FY 2013-14. Normal returns on savings are 7.80% for FY 2012-13 and 18.70% for FY 2013-14 for BSE/Sensex. It is seen that the assessee earned 3800% of returns on investments whereas investments like Sensex, gold, and other riskier investments too returned far below the strong performance of M/s. Kailash Auto Finance Ltd. without having any supporting financial results. The assessee had no reply to this.

Statement of Sri Sunil Dokania was recorded by DDIT-Unit 1(2) Kolkata on 12.06.2015. In his statement he has elaborately explained the modus operandi & admitted that M/s. Kailash Auto Finance Ltd. is a penny stock company & that he, alongwith Sri B L Agarwal & Sri Vimal Lohati has provided bogus LTCG to various beneficiaries. In answer to various questions he has clearly admitted his business of entry providing issue of dummy directors, control over layering companies, modus operandi of getting LTCG. It would be worthwhile to mention that one Shri Jyothi Vardhan Sonthalia, one of the beneficiaries in Shri Sunil Dokania's statement dtd. 12.06.2015 has admitted

that the LTCG earned by them by selling scrips of M/s. Kailash Auto Finance Ltd is not genuine & they are ready to pay the taxes. He has also admitted that cash was paid to Sri Vimal Lohati & B L Agarwal for arranging the LTCG on sale of M/s. Kailash Auto Finance Ltd. scrip. Thus, the statement of Shri Sunil Dokania has been confirmed by a beneficiary & not merely another entry operator. The assessee contented that the statement had not been provided to them and that cross examination had not been offered. The relevant extracts of the statement had already been provided to the assessee vide show cause dtd. 13.12.2016. further, the entire statements were provided vide letter dtd. 23.12.2016. As for the cross examination the same was offered vide order sheet noting dtd. 21.12.2016 and again vide letter dtd. 23.12.2016. As on date of order there has been no communication from the assessee regarding availing of cross examination. Thus, the assessee can be deemed to have waived off his right to cross examination.

From the assessee's statement recorded u/s. 131 dtd. 13.12.2016 it is clear that the assessee invested a substantial amount in this company without any due diligence. The assessee was unaware of even basic financial or managerial credentials of the company. His explanation as to how he came to purchase the shares of this unknown company that too through private placement is incredible. The assessee has stated that an unnamed acquaintance of his supplier insisted that he should invest in this company and that it was a stroke of luck that he has gotten this amount of capital gain. The Apex Court held that after considering surrounding circumstances and applying the test of human probabilities the inference of whether the transaction was genuine or not, could be drawn, based on preponderance of probability. For this reason, the AO has no hesitation in holding it as unexplained credit and the amount of Rs.64,25,672/- is hereby assessed u/s. 68 of the Income tax Act, 1961.

From the statement of Sri Sunil Dokania, in the answer to Q No. 25 it is observed that commission @ 3% has been charged for providing arranged capital gains to various parties. It is evident that such an arrangement of

bogus LTCG would not have been done free of cost. In the absence of any other estimation, the reply of Shri Sunil Dokania may be considered as a reasonable amount of commission. The assessee had no reply to this. Hence, an amount of Rs.1,92,770/- i.e. 3% of Rs.64,25,672/- is hereby assessed u/s. 69C of the IT Act, 1961.”

Upon assessee’s appeal learned CIT(A) elaborately considered the issue. Learned CIT(A) found the transaction to be totally bogus. He placed reliance upon Hon'ble Jurisdictional High Court decision in the case of Sanjay Bimal Chand Jain and accordingly he confirmed the addition. We may gainfully refer to the elaborate order of learned CIT(A) in this regard as under :-

I have carefully considered the facts of the case, contentions of the appellant, facts and circumstances of the case and the views held by the AO in the assessment order. I have also considered judicial pronouncements relied upon by the appellant and the other judicial pronouncements from Hon'ble Supreme Court and High Courts which have immense relevance in the facts of this case. The findings of investigations made by various Directorates, statements recorded during the assessment proceedings have been taken into account. Following are my findings: -

i) Shares Purchase: The appellant purchased 5,00,000 shares of M/s Panchshul Marketing Ltd. (amalgamated with M/s Kailash Auto Ltd.) off market from M/s Needful Vincom Pvt. Ltd., a Kolkata Based company, on 05.10.2012 for 5,00,000/- at Rs. 1/- per share from the company. This company was only 2 years old having a profit of Rs. 20,000. Normal return of investment of the appellant for FY 2012-13 was 7.80% for and FY 2013-14 was 18.70%. The fact is that the appellant earned unrealistic huge percentage of return i.e. 3800% on investment, when sensex/gold return were far behind the strong performance of M/s Panchshul Marketing Ltd. Without having any supporting financial results itself, is evidence to show that the LTCG earned by the assessee is not a genuine. The appellant or the penny stock company has not given any logic for such splitting considering the market price/market capitalization or liquidity of the shares, which were trading at the exchanges.

ii) Shares sale& windfall gains: The appellant sold the 1,50,000 equity shares in FY 2013-14, thus resulting into long term capital gain of Rs. 15,70,1737-, the increase in the price was almost 100 times the price at the time of purchase. As discussed above, the rise in share prices is not holding to any commercial principles and market factors. The Department has recorded the statement of various persons, including Shri Sunil Dholakia, who admitted on oath that he has provided accommodation entries for availing LTCG, and all the directors of the Kailash Auto Ltd were dummy

directors controlled by him. He has also admitted that M/s Kailash Auto Ltd is a penny stock company. Shri Vimal Lohati and B.L. Agarwal was directly involved with him in indulging in share trading and sale & purchase of companies, etc. They have accepted that the prices of the shares were rigged to provide benefits to a number of persons like the appellant on commission basis. This establishes the fact that prices of the shares were jacked up which the appellant was well aware of and accordingly he placed the sale order on exchange through his brokers. In the capital market, people do invest obviously for earning money through investment in the stocks of various companies. While investing, every person definitely looks into the balance sheet and other financials of the company and that is why volume of a particular stock whose balance sheet are naturally healthy are very high as compared to the volume of the penny stocks like M/s Panchshul Marketing Ltd., in which the appellant claimed to have made investment. Further, the number of trades in a particular day in case of a penny stock is very limited as compared to other stocks whose balance sheet and financials are healthy. This type of activity of price rigging is normally possible only in such type of stocks where the volume is less and number of traders are very few.

iii) Investigation wing results: The findings of the Directorate of Investigation of Kolkata have established that in his statement including Shri Sunil Dholakia who is director of a few stock holding, categorically accepted that M/s. Kailash Auto Ltd. was a penny stock company whose aim was to provide entry of bogus LTCG by various means. Further, search and seizure operation u/s 132 of the IT Act conducted nationwide in the case of Shri Sunil Dholakia revealed his confession about the modus operandi adopted by him and the related concerns which acted as entry operators and Shri Anil Kedia, in his statement, has stated that M/s Kailash Auto Ltd is the scrip being controlled by them and used for providing accommodation entry of LTCG. The modus operandi explained by them clearly states that the penny stock share of the companies like M/s Kailash Auto Ltd and others were used for providing bogus LTCG or STCG. The broker and other directors have also accepted that under the guise of transactions in shares of M/s Kailash Auto Ltd, bogus LTCG entries were provided. Moreover, Mr. Ajay Kedia, in his statement has stated that M/s Kailash Auto Ltd is a shell company managed by Shri Sajjan Kumar Jain. It would be worthwhile to mention that one looking to the facts and circumstances mentioned above, I do not have any doubt that the appellant is one of the beneficiaries notwithstanding his name did not find a place in the statement recorded by the Investigation Wing, as claimed. T

iv) Transactions analysis: Facts revealed that such trading transactions of purchase and sale of shares have been effected not only for commercial purpose but to create artificial gains, with a view to evade taxes –

- i) The purchases are made off market at a higher price, while the shares were available at a very nominal rate on stock exchanges.
- ii) Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were products of design and mutual connivance on part of appellant and the operators.

- iii) The appellant resorted to a preconceived scheme to procure long-term capital gains by way of price difference in share transactions not supported by market factors.
- iv) Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence, impugned long term capital gain cannot be termed as genuine.
- v) Analysis of M/s Kailash Auto Ltd is found that while the net worth of M/s Kailash Auto Ltd was 58.14 crore in March 2014, capital work in progress was Rs Nil. The company had turnover of Rs 20.41 crore, raw material cost Rs. 0 crore, power and fuel cost Nil, employee's cost was Rs.0.04 Crore, selling and administrative expenses of Nil with excise duty of Rs Nil. Total income in March 2014 was Rs. 25.75 crore and net profit before tax was Rs 1.22 crore earning per share was Rs. 0.01.
- viii) Preconceived & structured transactions find that on examination : the transactions entered into by the appellant involve series of preconceived steps, the performance of each depends upon the other being carried out. The true nature of such share transactions Jacked commercial contents, being artificially structured transactions, entered into with the sole intent, to evade taxes As an Appellate Authority, the undersigned cannot simply accept the statement of the appellant after When any attempt is .knowing all these facts and unrealistic jump in the share prices made by an being appellant to evade tax by using the capital market as a tool and .provisions of the Income Tax Act are misused it is the duty of every person to find out the real intension behind the transactions undertaken by the appellant. The Madras High Court held that it is the duty of the Court that every case where Hon'ble Madras High Court to get behind the smoke, ingenuity is expended to avoid taking welfare legislation .screen and discover true state of the affairs.

4.1.1 The facts and circumstances of the case, as recorded above, clearly suggest that the revenue cannot take or accept such make-believe transactions, as presented by the appellant. Truth or genuineness of such transactions must prevail over the smoke screen, created by way of pre-meditated series of steps taken by the appellant, with, a view to imparting a colour of genuineness and character of commercial nature, to such share transactions. Needless to say that one has to look at the whole transactions and a series of steps taken to accomplish such share transactions, in an integrated manner, with a view to ascertaining the true nature and character of such purchase and sale of shares.

4.1.2 I also find that the instant case is similar to the decision of Hon'ble Bombay High Court in the case of Sanjoy Binial Chand Jain L/H Shantidevi Binialchand Jain vs Pr.CIT-1, Nagpur & Others in ITA no.18/2017 where similar issues was involved. The fact of the case was that the assessee had purchased shares of two penny stock Kolkata based companies

i.e., 8000 shares @ Rs.5.50 per share on 08.08.2003 and 4000 shares at the rate of Rs.4/- per share on 05.08.2003 from Syncom Marketing Pvt. Ltd. and Skyzoom Distributors Pvt. Ltd. the payments were made by the assessee in cash for acquisition of shares of both the companies. Both the companies intimated the assessee on 07.04.2004 regarding the merger of the companies with another company viz., Khoobsurat Limited, and the assessee received the share of the new company in the ratio of 1:4 of the number of shares of the previous two companies held by the assessee. The assessee sold 2200 shares at an exorbitant rate of Rs.486.55 per share on 07.06.2005 and 800 shares on 20.06.2005 @ Rs.485.65. The shares were sold through another broker, M/s Ashish Stock Broking Private Limited. The proceeds from the aforesaid sale transaction were directly credited by the broker in the Saving Bank Account of the assessee in the Union Bank of India. The Assessing Officer did not accept the case of the assessee that she was entitled to exemption under section 10(38) of the Income Tax Act. The Assessing Officer held that the aforesaid transactions of purchase of two penny stock shares for Rs. 60,000/-, the merger of the companies with a new company and the sale of the shares for Rs. 11,58,930/- fell within the ambit of adventure in the nature of trade and the assessee had profited by Rs. 13,98,9307-. The Assessing Officer, therefore, brought the aforesaid amount to tax under the head 'business income'.

4.1.3 After appreciation of the above facts, Hon'ble Jurisdictional High Court has held that the authorities below have recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long 'term capital gain'. According to the Hon'ble Court, the authorities below held that the assessee had not tendered cogent evidence to explain as to how the shares in an unknown company worth Rs.5/- had jumped to Rs. 485/- in no time. The Income Tax Appellate held that the fantastic sale price was not at all possible as there was no economic or financial basis as to how a share worth Rs.5/- of a little known company would jump from Rs. 5/- to Rs. 485/-. The findings recorded by the authorities are pure findings of the facts based on a proper appreciation of the material on record. While recording the said findings, the authorities have followed the tests laid down by the Hon'ble Supreme Court and this Court in several decisions. The findings do not give rise to any substantial question of law. The judgments reported in (2012)20 Taxman.com 529 (Bombay) (CIT Versus Jamnadevi Agrawal), (1957) 31 ITR 294 (Bombay) Puranmal Radhakishan Versus CIT), (1970) 77 ITR 2.53 (SC) (Raja Bahadur Versus CIT) and (2015) 235 Taxman 1 (Bom) (CIT Versus Smt. Dana M. Shah) and relied on by the learned counsel for the assessee are distinguishable on facts and cannot be applied to the case in hand. Since no substantial question of law arises in this appeal, the appeal is dismissed by the Hon'ble Court.

As stated above, since the issue involved in the above stated judgment is similar to that raised in the present case, the decision of the jurisdictional High Court is binding on the lower authorities.

4.1.4 Reliance is also placed on the following judicial pronouncements :

- (a) Hon'ble SC in case of Sumati Dayal vs CIT has held that:

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See Parimiseti Seetharamamma (supra) at P. 5361. But, in view of Section 68. of the Act, where any sum is found credited in the books of, -the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie, evidence against the assessee. viz., the receipt of money, and if he fails to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature."

- (b) Hon'ble Supreme Court in case of Kanwar Natvar Singh in their order dated 5th October 2010, in Civil Appeal No.8601 of 2010 arising out of Special Leave Petition (C) No. 10553 of 2008 and in Civil Appeal No.8602 of 2010 arising out of Special Leave Petition (C) No. 10554 of 2008, on the issue of cross examination of the witness has held as under: -

"36. On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the Adjudicating Authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a notice. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very object of the Act. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework Hegde J. speaking for the Supreme Court propounded.

4.1.5 It is further observed that shares, as in the instant case, in which the appellant has claimed to have made a deal, have been identified as penny shares by the Investigation Wing of the Department because rates of these shares are not based on business results of the companies but same are fluctuated by insider's trading from negligible value to very high price and vice versa without any reason or basis, solely to accommodate or generate bogus capital gain or loss. In the instant case, all the above features are present in the transaction of shares made by the appellant. As discussed above, M/s Kailash Auto Ltd was caught by the Investigation Wing of the Income Tax Department in providing accommodation entries. In this respect, it is also pertinent to mention that even appellant has failed to adduce any

plausible reason for unexpected escalation in the price of this scrip and the unnatural gain occurred to him through these transactions. As noted by the AO, this was an off-market deal. There could be no real value attached to this scrip. In the case of Ratnakar M. Pujari Vs. ITO (ITAT Mumbai) Appeal Number: J.T.A. No.99S/Mum/2012, Date of Judgement/Order : 03.08.2016, Assessment Year 2006-07 the issue of penny stock has been considered by the Hon'ble ITAT in detail and it was held that transactions in such penny stock could not be held as genuine transactions.

4.1.6 On the basis of above mentioned observations, I find the reliance of the AO on the following judgments of Hon'ble Supreme Court is in order:

- (i) McDowell & Co. Ltd. v. CIT [1985] 154 ITR 148/22 Taxman 11.
- (ii) Union of India & Ors. Vs. Playworld Electronics (P) Ltd. & Anr. (1990) 184 ITR 308 (SC),
- (iii) Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. [1986] 157 ITR 77 (SC),
- (iv) CIT v. Durga Prasad More (1971) 82 ITR 540

4.1.7 Apart from that in Mid East Port Folio Management Ltd. Vs. CIT (2003) 81 TTJ (Mum)(SB)37, it was held that McDowell is more of an approach to the facts of a particular case than any inviolable rule laid down regarding tax evasion. It is a call to the Courts and Tribunals to expose subterfuges, colourable devices and dubious methods in tax cases. It is a caution administered that lawful dues to the state cannot be withheld under schemes acquired off-the-shelf or through transactions that have no commercial or economic value or by taking certain preordained steps which are calculated to cancel out each other. The approach in such cases must be to take the entire transaction or arrangement as a whole and see if it makes any economic or commercial sense without attaching weight to the steps that go to make up the scheme, each of which may be legally valid. The genuineness of the arrangement has to be viewed not in relation to every step taken. McDowell therefore, did not depart from what has already been laid down by the Supreme Court earlier except that the law regarding tax evasion was restated in much stronger expressions such as "dubious device", subterfuge, colourable transaction", etc. The judgment did not permit the Income Tax Authorities to rewrite or make a new contract for the parties nor did it say that they could not go behind the documentation in an attempt to find out the real intention of the parties. If the real intention of the parties is discovered to be something different from the intention professed in the document, the Income Tax Authorities are at liberty to brand the same as a subterfuge or a dubious device or a colourable transaction. An identical issue arose in the case of ICICI Ltd. in respect of boiler purchased from and leased back to Gujarat Electricity Board (GEB) and therefore the same was also referred to the Special Bench and the ICICI Ltd., was added as an appellant. While discussing the judgment of the Supreme Court, in the case of McDowell and Co. Ltd. (supra), the Tribunal (SB) had, inter alia, noted that the Courts and Tribunals had to expose subterfuges, colourable device, and

dubious methods in tax cases, that the lawful dues to the State cannot be withheld through schemes of subterfuge, a colourable device, and a dubious method, that the approach in such cases must be to take the entire arrangement as a whole and see if it makes an economic or commercial sense without attaching weight to the steps that go to make up the arrangement or the scheme, each of which may be legally valid, that the genuineness of the arrangement has to be viewed not in relation to every step taken to achieve the result but in relation to the final result, that one has to look at the truth of the transaction (and if permissible) by going behind the facade of documentation or the series of steps taken, that the Courts (and Tribunals) always have the freedom to 'go behind' the documents to find out the real intention of the party, that the rule presupposes that in a given case the real intention of the parties to a document/transaction/arrangement could be different from what it appears from it ex facie, that the Court must normally proceed on the basis of the professed intention, but if that is under doubt or is disputed or is challenged, then its power to find out the real intention of the parties by ignoring the apparent has to be and has always been conceded, that in cases of make believe arrangement or a subterfuge or a dubious or a colourable device adopted, the Court will be merely removing the facade to expose the real intention of the parties cleverly cloaked and if that intention is discovered to be the evasion of taxes, it cannot be given effect to merely because all the steps taken as component parts of the arrangements are legally correct or valid, that the right of the parties to enter into transactions according to their free will and choice has always been protected, the only rider being that both the professed intention and the real intention should be the same, that all commercial arrangements and documents or transactions have to be given effect to even though they result in a deduction of the tax liability, provided that they are genuine, bonafide and not colourable transaction.

4.1.8 At the same time, it is observed that the judicial pronouncements relied upon by the appellant does not help the case of the appellant in view of aforesaid views and observations of the Hon'ble Supreme Court and Jurisdictional High Court, which is binding in nature.

4.1.9 The Order of the Whole Time Director of SEBI vide order SEBI/WTM/MPB/EFD-1 -DRA-1V/32/2017 dated 21/09/2017 states that M/s Kailash Auto Ltd made preferential allotment of its share from 17th January 2013 after which each share was split After the release of compulsory lock in period the price and volume of the scrip increased substantially on account of trading amongst the preferential allottees and M/s Kailash Auto Ltd group entities and most of the allottees were provided exit at high price. By virtue of the same it was alleged that M/s Kailash Auto Ltd and persons in charge of its affairs created preferential allotment of shares as a mode to provide fictitious LTCG to its preferential allottees so as to convert their unaccounted income into accounted one. This order revoked the earlier order dated 29.03.2016 and confirmatory Order dtd 15.06.2016, 30.09.2016, 21.10.2016, 27.10.2016 and 13.07.2017 which prohibited many entities, one of which is the appellant from accessing the securities market or dealing in securities. However, vide this order the proceedings of SEBI continue against M/s Kailash Auto Ltd. In this regard,

it must be noted that the irregular proceedings and violations suspected by the SEBI is as per SEBFs guidelines and domain which is at large length different from the area and focus of Income tax operations. While the Departments focus is on tax evasion and the dubious methods employed by tax evaders, one of which is taking accommodation entries through bogus share transactions and claiming the whole earnings as exempt under LTCG, SEBI seeks to regulate the Share markets etc through control and prevention of misuse of the procedures. A revocation of suspension from trading in securities is not the same as a clean chit given by the Department in an assessment proceedings. Hence, the SEBI findings can at best be only indicative for the purposes of the AO.

4.1.10 In view of the discussion made in the preceding paragraphs, I am of the considered opinion that if viewed in the light of observations made by Hon'ble Courts in the aforementioned cases and the facts and circumstances as discussed above, the dealing in shares by the appellant in above scrip has to be taken as dealing in penny stocks which was in the form of accommodation entries. Hence, the action of the AO in treating entire sale consideration of the scrip of M/s Kailash Auto Ltd including commission of 3percent of transaction value, as unexplained cash credit and unexplained expenditure within the meaning of section 68 and 69C respectively, is in order and needs no interference. The order of the Id. AO is accordingly upheld and the addition of Rs. 64,25,672/- and Rs. 1,92,770/- is confirmed. Thus, the Grounds of Appeal nos. 1 and 2 raised by appellant are Dismissed.

Against this order assessee is in appeal before us.

We have heard both the counsel and perused the records. Learned Counsel of the assessee submitted that the assessee has submitted all the necessary documentary records. He submitted that in these circumstances the disallowance is based upon surmise and conjecture. He submitted that the decision of Hon'ble Jurisdictional High Court relied upon by learned CIT(A) is not applicable on the facts of the case. Learned Counsel of the assessee placed reliance upon several Tribunal decisions for the proposition that the disallowance is not required in view of the documentary evidence submitted.

Per contra learned Departmental Representative submitted that the decision of Hon'ble Jurisdictional High Court in the case of Sanjay Bimal Chand Jain is fully applicable on the facts of the case. He submitted that in no time shares of a little known company has jumped enormously without any economic or financial justification. He submitted that precisely on this plank the Hon'ble Jurisdictional High Court has upheld the Tribunal order in the case of Sanay

Bimal Chand Jain (supra). Hence learned Departmental Representative submitted that the order of the authorities below should be upheld.

6. Against this order assessee is in appeal before the ITAT.

7. We have heard both the counsel and perused the records. Upon careful consideration we find that it is the claim of the assessee that he has earned the gain in this case where the share price of a little-known company has jumped 3800% in no time and that all documentary records are available. But there is no economic or financial justification for such astonishing jump. In identical situation wherein the enormous jump in share price in very little time without any economic or financial justification was confirmed by the ITA, the same was duly confirmed by the honourable jurisdictional High Court in the case of Sanjay B. Jain (supra). The jurisdictional High Court had observed that ITAT has rightly applied the tests provided by the honourable jurisdictional High Court and the honourable Supreme Court in this regard. We find that the ratio from this case law is fully applicable on the facts of this case which undisputedly show that there is an enormous jump in no time of the share of little-known company. This is a classic case of penny stock transaction. Such conversion of unaccounted money through dubious method is not permitted on the touchstone of Hon'ble Supreme Court decision in the case of CIT Vs. Durga Prasad More 82 ITR 540, and Sumati Dayal Vs. CIT (1995 SCC Supl. (2) 453 vide order dated 28.3.1995). Hon'ble Apex Court had occasion to dwell upon such dubious transaction through manipulation of stock prices in the case of Securities and Exchange Board of India Vs. Rakhi Trading Pvt. Ltd. (Civil Appeal Nos. 3174-3177 of 2011, Civil Appeal No. 3180 of 2011 and Civil Appeal No. 1969 of 2011 vide order dated 8.2.2018). The Hon'ble Supreme Court observed as under :-

“42. In this case it was also held that in the absence of direct proof of meeting of minds elsewhere in synchronised transactions, the test should be one of preponderance of (2016) 6 SCC 368 probabilities as far as adjudication of civil liability arising out of the violation of the Act or the provision of the Regulations is concerned.

46. Considering the reversal transactions, quantity, price and time and sale, parties being persistent in number of such trade transactions with huge price variations, it will be too naïve to hold that the transactions are through screen-based trading and hence anonymous. Such conclusion would be overlooking the prior meeting of minds involving synchronization of buy and sell order and not negotiated deals as per the board's circular. The impugned transactions are manipulative/deceptive device to create a desired loss and/or profit. Such synchronized trading is violative of transparent norms of trading in securities. If the findings of SAT are to be sustained, it would have serious repercussions undermining the integrity of the market and the impugned order of SAT is liable to be set aside. On the above additional reasoning also, I agree with the conclusion allowing the appeal preferred by SEBI against the traders. I also agree with the conclusion dismissing the appeal preferred by the SEBI against the brokers.”

8. In our considered opinion the ratio emanating from the above case law is also applicable on the facts of this case. In this view of the matter considering the entire conspectus of the case and relying upon the precedents as above. We do not find any infirmity in the order of learned CIT(A). Accordingly we confirm the same.

9. In the result this appeal filed by the assessee stands dismissed

Order has been pronounced in the Court on 11.9.2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 11/9/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS