

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. No.3212/Del/2018
Assessment Year: 2014-15**

**Ms Manvi Khandelwal,
3408, Gali Bajrang Bali,
Chawari Bazar, New Delhi.
PAN: AFYPG5452R
(Appellant)**

**vs Income-tax Officer,
Ward - 46(4), New Delhi.

(Respondent)**

**Assessee by: Shri K. Sampath, Advocate
Shri V. Rajakumar, Advocate
Department by: Smt. Rinku Singh, Sr.DR**

**Date of Hearing: 29.08.2019
Date of Pronouncement: 26.11.2019**

ORDER

PER K. NARASIMHA CHARY, JM

Aggrieved by the order dated 26.3.2018 passed by the Commissioner of Income-tax (Appeals)-16, New Delhi ("CIT(A) for the Assessment Year 2014-15, Ms Manvi Khandelwal ("the assessee") preferred this appeal.

2. Brief facts of the case, as could be culled out from the record, are that the assessee is an individual and has been deriving income from business of trading and commission and from other sources. For the Assessment Year 2014-15, he had filed his return of income on 8/1/2015 declaring an income of Rs.3,26,210/-. The case was picked up for scrutiny

under CASS for the reason of “Suspicious Long Term Capital Gain (LTCG) on sale of shares (inputs from investigation wing)”.

3. During the course of assessment, learned Assessing Officer noticed that the assessee has claimed Long Term Capital Gain exempt under section 10(38) of the Income Tax Act, 1961 (“the Act”) on sale of the shares of M/s Kappac Pharma Ltd at Rs.84,38,907/-, less the cost of acquisition at Rs.1,32,000/-and thereby deriving Long Term Capital Gain (LTCG) at Rs.83,06,907/-. Learned Assessing Officer called for and perused the share transfer form, debit note, demat account statement from the depository participant etc submitted by the assessee in support of their claim for exemption under section 10(38) of the Act and observed that the assessee had earned a return of approximately 6300% over a very short period of just over 12 months and the facts required a deeper study of the price movements and share market behaviour of the entities involved in the trade. of the scrip as the share price movement and the profit earned by the beneficiaries were beyond human probabilities.

4. Taking clue from this astronomical proportion in the earnings of the assessee from the scrip M/s Kappac Pharma Ltd, learned Assessing Officer verified the trading history of the assessee and the financials of M/s Kappac Pharma Ltd and also took into consideration the attendant circumstances like the report from the investigation wing, Kolkata, SEBI’s surveillance measures, the details of trade data of exit providers etc and reached a conclusion that the share price movement and the sale purchase transactions were not genuine, were the result of meticulously planned circular trading and the entities involved in these were part of

this exercise in an effort to create a documentary evidence for a pre-planned scheme for converting unaccounted money into tax-exempt income, as has been corroborated by the confession by the brokers, operators and exit providers.

5. Learned Assessing Officer also considered the statement of the assessee on both and recorded on 16/12/2016 and opined that the huge capital gains earned by the assessee within a short period of time by investing in a penny stock whose fundamentals had no support for the premium it commanded was neither the result of a coincidence nor of genuine investment activity, but were created through a well planned and executed scheme in which the company, the brokers and the buyers and sellers of the Scrips worked in tandem to achieve the predetermined objectives. Learned Assessing Officer referred to a catena of case law and finally by order dated 29/12/2016 held that the amount of Rs.84,38,907/- credited by the assessee out of the purported receipts on account of sale of M/s Kappac Pharma Ltd during the financial year 2013-14, namely, Assessment Year 2014-15 was his income and remained unexplained cash credit under section 68 of the Act. He accordingly brought a sum of Rs.89,92,852/- to tax and assessed the total income of the assessee at Rs.93,19,062/-.

6. Aggrieved by the said addition of Rs.89,92,852/-, assessee preferred an appeal before the Ld. CIT(A) and contended that the assessee is an honest taxpayer for the past several years and has never indulged in any type of malpractice and when she purchased the shares there was no investigation on this company, even when the shares were sold there was no such investigation on the company or the brokers and,

therefore, the purchase of shares by the assessee was in good faith. It is also her case that when the share price was increased she sold them away in open market on recognised Mumbai stock exchange to book the profits, and the payment was received through brokers only. It was further contended by the assessee that the statements of the persons, recorded by the Investigation Wing of Kolkata was admitted without affording an opportunity of cross-examination to the assessee and therefore it cannot be said that the M/s Kappac Pharma Ltd is a penny stock company and has been used to provide bogus LTCG.

7. Assessee's further contention before the Ld. CIT(A) was that copies of all the documents to substantiate the genuineness of the transaction relating to the purchase and subsequent sale of shares leading to LTCG were submitted and there was no reason for the learned Assessing Officer not to believe the same. Further, contention of the assessee was that the long term capital gains cannot be treated as bogus merely because some investigation with regard to certain company and broker or investigation was carried out by the Directorate of Investigation, Kolkata.

8. Ld. CIT(A) considered all the contentions of the assessee in a very detailed way and by way of the impugned order reached the conclusion that the assessee had failed to discharge his burden to prove his case; whereas the learned Assessing Officer had proved that the claim of the assessee was incorrect as is corroborated by the enquiry conducted by SEBI and further investigation carried out by the Directorate of Investigation which was thoroughly analysed by the learned Assessing Officer to reach a conclusion that the assessee had introduced bogus

LTCG in its books of accounts by routing his own unaccounted income through tax evasion scheme. Ld. CIT(A) also referred to the decision of the Hon'ble Apex Court in the case of CIT vs. Durga Prasad More (1972) 82 ITR 540, SumatiDayal vs. CIT 214 ITR 801 (SC). On an appraisal of the material available on record and in the light of the contentions raised by the assessee and also the settled case law, Ld. CIT(A) reached a conclusion that the objective facts, evidence adduced, presumptions of fact based on the common human experience in life and surrounding circumstances would establish that the share transactions leading to LTCG by the assessee are Sham transactions entered into for the purpose of evading tax and the learned Assessing Officer had rightly added the sum of Rs.84,38,907/-as undisclosed income of the assessee.

9. Felt aggrieved by the findings of the authorities below, assessee preferred this appeal contending that the assessee is an innocent investor in M/s Kappac Pharma Ltd and never has it been said by the Department against the assessee that she indulged in any type of malpractice in any of the past several years. Ld. AR also raised so many questions before us which were wise before the Assessing Officer in the letter dated 22/12/2016 and submitted that the Revenue does not possess any material evidence on record to disprove the evidence produced by the assessee, in the absence of which it is not open for the Revenue to consider the intent of the assessee is mala fide acting under surmises and conjectures or on presumptions not supported by evidence. It is also further contended that when the assessee had duly paid the consideration on purchase of shares against the valid receipts, shares were duly transferred to the assessee's name, shares duly deposited to

demat account, shares were duly and legally transferred to the buyer through valid transfer dates, consideration received through account payee cheque and STT paid, is not understandable how the learned Assessing Officer treated the transaction as a bogus one.

10. It is further contended that the M/s Kappac Pharma Ltd never denied the assessee is a genuine shareholder of the company and no documentary proof was gathered by the investigating agencies against the assessee nor any documentary evidence, phone calls, witnesses or any material was discovered by the Revenue to suggest that the impugned transaction is a bogus transaction and the conclusions reached by the authorities below would only amount to punishing the innocent people leaving the entry operators, accommodation entry providers, share brokers etc and none of these people did say anything against the assessee that the assessee had taken LTCG as an accommodation entry and that the transaction made by her is not a genuine one.

11. According to the Ld. AR, the assessee had been investing in shares quite for a long time and has been duly declaring all her profits in the return of income, and the assessee had been taking the decisions on the advice of her father in law, who was regularly dealing in sharemarket and not as a professional share trader who would understand the nitty-gritty of the sharemarket. Ld. AR placed reliance on the decision of the Tribunal in Smt. Karuna Garg vs. ITO in ITA No. 1069/del/2018 and batch of appeals disposed of by a common order dated 06/08/2019 wherein it was held that no question of law was permitted 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. He also placed reliance on the decision of the Tribunal in the case of Himanshu Chaudhary vs. ITO in ITA No.7772/Del/2017 disposed of by order dated 27/11/2018. He also placed reliance on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CIT in Civil Appeal No.4228 of 2006 in support of his argument that the assessment proceedings are vitiated for not giving an opportunity to the assessee to cross examine the persons whose statements were recorded by the investigation team and referred to by the assessing officer in his order.

12. Per contra, it is the submission of the Ld. DR that the very basis for picking up this case for scrutiny was "suspicious Long Term Capital Gain on sale of shares (inputs from investigation wing)" and during the verification of facts it was found that the assessee has earned a return of approximately 6300% over a very short period of just over 12 months, which ignited the curiosity of the Assessing Officer to delve deeper into the facts of the case by examining the financials of M/s Kappac Pharma Ltd in the light of SEBI surveillance measures and also the trading data of the exit providers. She submitted that the statements recorded by the investigation wing Kolkata are not the sole basis for the assessing officer to reach any definite conclusion to hold that the share trader transaction by the assessee is a bogus one. It is the independent investigation done by the learned Assessing Officer as is revealed in the assessment order that led to the conclusions reached by the Assessing Officer and, therefore, no prejudice is caused to the assessee by not affording an opportunity to her to cross examine the persons whose statements were recorded by the Investigation Wing, Kolkata. She submitted that the

Assessing Officer did the best he can do and his conclusions are firmly entrenched into the record and therefore there is no infirmity that could be culled out from the orders of the authorities below so as to invite any interference by this Tribunal.

13. Ld. DR placed reliance on the decisions of the Tribunal in the case of Pooja Ajmani vs. ITO in ITA No. 5714 /Del/ 2018 by order dated 25/04/2019, Udit Kalra vs. ITO in ITA No. 6717/del/2017 by order dated 8/1/2019 and upheld by the Hon'ble jurisdictional High Court in ITA No. 220/2019 by order dated 8/3/2019, Sanat Kumar vs. ACIT in ITA No. 1881/Del/2018 by order dated 14/6/2019 and submitted that under similar circumstances this Tribunal held that since M/s Kappac Pharma Ltd has no sound financial status to inspire confidence in the mind of an honest investor to put their hard earned money with an intention to earn any profits, such a transaction cannot be inferred to be a genuine one.

14. We have gone through the record in the light of the submissions made on either side. It is an undisputed fact that the assessee purchased the shares of M/s Kappac Pharma Ltd on 25.6.2012 off-line and by making cash payment at the rate of Rs. 11 per-share through one M/s Vishal Reality Management Ltd by making a total payment of Rs.1,32,000/-for acquiring 12,000 equity shares. It is also not in dispute that the assessee sold these 12,000 shares of M/s Kappac Pharma Ltd at Rs.750/-for a consideration of Rs.83,06,907/-through Bombay stock exchange within a period just over 12 months to realise a return of approximately 6300%. It is only this transaction of realising long term capital gains that triggered the selection of case for scrutiny under CASS for the reason of, suspicious Long Term Capital Gain (LTCG) on sale of

shares (inputs from investigation wing)". On this event, being triggered, learned Assessing Officer looked into the facts involved in this matter.

15. Learned Assessing Officer verified the trading activity or investment in shares of the assessee in the shares of listed companies and also the financials of M/s Kappac Pharma Ltd and also the trading history of the shares of M/s Kappac Pharma Ltd. Learned Assessing Officer also verified the trade data pertaining to the exit providers in respect of the M/s Kappac Pharma Ltd to the assessee. On a careful analysis of all this material, then the assessing officer proceeded to call out the modus operandi adopted by the assessee which is akin to the modus operandi of bogus LTCG shares as is indicated by the Director of Investigations, Kolkata who carried out a countrywide investigation to under the organised racket of generating bogus entries of Long Term Capital Gain (LTCG) which is exempt from tax. On a comparison of the facts and circumstances involved in these matters, learned Assessing Officer reached the conclusion that the modus operandi adopted by the operators was to make the beneficiaries by some shares of predetermined penny stock company controlled by them and the modus operandi adopted by the assessee is fitting in the order of the things. Learned Assessing Officer therefore reached a conclusion that the transaction of deriving Long Term Capital Gain (LTCG)'s by the assessee is a bogus one.

16. It is pertinent to note that the assessee does not dispute any of the facts stated in the immediately preceding paragraph. It remains an admitted fact that having purchased 12,000 shares of M/s Kappac Pharma Ltd at Rs. 11/-share, the assessee sold the same at Rs.750/-per

share within a span of 12 months and realised the capital gains to the tune of Rs.83,06,907/-and precisely this event triggered the suspicion to the Revenue authorities prompting them to conduct a deeper scrutiny of the transaction. It is not as though the learned Assessing Officer jumped to any conclusion merely by referring to some report of the investigation wing of income tax Department at Kolkata which carried out a countrywide investigation to under the organised racket of generating bogus entries of Long Term Capital Gain (LTCG) which is exempt from tax.

17. Assessment order clearly shows that the learned Assessing Officer examined the return of income and found that it does not show substantial trading activity or investment in shares of listed shares and the purchase of shares in a huge quantity was made when the company had no proven financial results which were an indicator to the future events. As a matter of fact, learned Assessing Officer found that the assessee, though a novice in share market without any substantial trade transaction in the earlier years or in the subsequent years, that too without finding the financial results of M/s Kappac Pharma Ltd are so splendid to inspire the assessee to believe that there is a chance of lucrative gains at the stage of purchase of such shares, invested the money to the tune of Rs.1,32,000/-. Naturally this fact triggered suspicion in the mind of the learned Assessing Officer, causing him to enquire into the financials of M/s Kappac Pharma Ltd.

18. Assessment order further clearly indicates that the learned Assessing Officer delved deeper into the financials of M/s Kappac Pharma Ltd for the financial years 2009-10 to 2013-14 and found that this company had constantly been incurring losses. From the annual reports

of this company, learned Assessing Officer deduced that the assessee had purchased the shares of M/s Kappac Pharma Ltd, even though M/s Kappac Pharma Ltd had incurred losses consistently, and, therefore, strongly indicating that the purchase of these shares is a predetermined action leading to subsequent pat to acquire bogus LTCG. The findings of the learned Assessing Officer are amply corroborated by the figures in respect of the increase of share and trading volumes of M/s Kappac Pharma Ltd also Balance Sheet figures for all these years.

19. Learned Assessing Officer further take note of the fact that the trading in the shares of M/s Kappac Pharma Ltd was suspended w.e.f. 07/01/2015 by BSE as a surveillance measure pursuant to the directions issued by SEBI. It is also important to note that the learned Assessing Officer verified the trade data pertaining to the sellers of shares of M/s Kappac Pharma Ltd and found that there were three parties, namely, Abhinna Vyapar Private limited, Eash Vyapaar Private limited, and Prerna Vyapaar Private limited who purchased the shares from the assessee and provided her the exit entries. Further, on verification of the annual income and return filing details of these three entities, by obtaining the inputs from the investigation wing of the income tax Department, it was found that these three entities were non-taxpayers with the income below the taxable limits; that the financial capacity of these three entities is not at all commensurate with the huge investment made by them in purchase of this particular scrip; and, therefore, based on the inputs from the investigation wing, it was evident that these buyers were mere accommodation entry providers who indulged in these transactions on behalf of the scheme operators for exchange of commission.

20. It is at this juncture, learned Assessing Officer referred to the details of the modus operandi of bogus LTCG schemes, in the background of investigation carried out by the investigation wing of the income tax Department, Kolkata who carried out a countrywide investigation to under the organised racket of generating bogus entries of Long Term Capital Gain (LTCG), which is exempt from tax, and found that the modus operandi adopted by the operators was to make the beneficiary buy some shares of predetermined penny stock company shares controlled by them with the initial transfer of shares in the name of the beneficiary on off market transaction basis or online transaction basis and thereafter, issue preferential shares at a nominal rates or issue of bonus shares even though there is hardly any profit or business activity in these companies; that the beneficiary, usually an individual, holds the shares for one year, the statutory period after which LTCG is exempt under section 10(38) of the Act; in the meantime, the operator register the prices of the stock and gradually rise its price many times, offered 500 to 1000 times; that this is done through low-volume transaction indulged in by the dummies of the operator at a predetermined price; that when the price reaches the desired level the beneficiary who bought the shares at a nominal price, is made to sell it to a dummy Company of the operator; and that for this, unaccounted cash is provided by the beneficiary which is routed through in a few layers of paper companies by the operator and finally is parked with the dummy paper company that will buy the shares. Having gone through this, learned Assessing Officer thought that his findings on the verification of the assessee's transaction are well corroborated and, therefore, reached a different conclusion as to the nature of the transaction done by the assessee.

21. Though the assessee raised so many questions in the letter dated 22/12/2016, it remains unanswered as to what inspired the assessee to invest so much amount in a company whose financial results are not so splendid awe-inspiring and there are no chances of lucrative gains at the time when such shares were purchased. It is not open for the assessee to raise such questions which are exclusively in her personal knowledge, and it is not possible for the learned Assessing Officer to know what transpired in the mind of the assessee to make such an investment. What the assessee did was something improbable for novice investor without any substantial share transaction in earlier subsequent years. Generally the investment takes place with the motive of profit earning, and what was the hope of the assessee is exclusively known to her and to none else. When the transaction created a reasonable doubt, it is for the assessee to clarify the circumstances which prompted her to make such an investment. The satisfaction of the assessee in respect of the prospects of earning profits by such an investment is a psychological fact and within her exclusive and personal knowledge. Unless and until, the assessee comes out with an explanation that there was reason for her to make such an investment and the circumstances under which such an investment was made, out of her personal knowledge, learned Assessing Officer has no reason not to pursue the reasonable doubt he had in respect of the transaction which he analysed in the light of the attendant circumstances like the financials of the company and the transaction data of the exit providers. Without doing so, she cannot shift the burden to the learned Assessing Officer. As rightly observed by the learned Assessing Officer, law does not put the onus of collecting the reasons which are in the personal knowledge of the assessee, for the investment

of the assessee without much experience in investment in such companies as that of M/s Kappac Pharma Ltd, that too in the circumstances which do not inspire her confidence of deriving any benefits from such investment. It is an impossible burden which the assessee seeks to put on the learned Assessing Officer.

22. On a careful scrutiny of the assessment order and the impugned order passed by the Ld. CIT(A), as a matter of fact, we find that the share transaction done by the assessee is surrounded by a thick cloud of suspicion which the assessee failed to dispel. Since the learned Assessing Officer did not rely on the investigation report of the Kolkata wing of income tax Department to reach the conclusion as to the nature of transaction, and on the other hand, his findings are firmly entrenched into the facts he culled out during the assessment proceedings and derived from the analysis of the financials of M/s Kappac Pharma Ltd and also other circumstances, we are of the considered opinion that the assessee cannot place reliance on the decision of the Hon'ble Apex Court in the case of Andaman Timber Industries (supra).

23. It is pertinent to note that the facts in the case of Udit Kalra (supra) are similar to the facts of the case on hand. The Tribunal held that when there was a specific information that the assessee had indulged in nongenuine and bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Kappac Pharma Ltd, a Mumbai-based company, it was noticed that the purchase transaction was done off-market in physical form or paying cash, the assessee purchased the shares of M/s Kappac Pharma Ltd in physical form and thereafter the same were converted into electronic form, the purchase payment was

made in cash and not through the normal banking channel, therefore, the same were not verifiable from the authentic supporting details such as bank account/documents, and the assessee failed to furnish the source for the purchase transactions - such a transaction is against human possibility. The Tribunal applied the ratio of Hon'ble Supreme Court in the case of McDowell & Co Ltd., 154 ITR 148 of the Act to reach a conclusion that the transaction, meticulously planned and framed, is without the framework of law and a colourable device, which cannot be part of tax planning and it would be wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods.

24. The findings of the Tribunal are favoured by the Hon'ble jurisdictional and are confirmed in ITA No.220/2019 on the file of the Hon'ble Delhi High Court by order dated 8/3/2019, wherein the Hon'ble High Court held that the company (M/s Kappac Pharma Ltd, which was even directed to be delisted from the stock exchange) had meagre resources and in fact reported consistent losses and in the circumstances, the astronomical growth of the value of company's share naturally excited the suspicion of the Revenue. Hon'ble High Court declined to interfere with the findings of the Tribunal and dismissed the appeal.

25. In the case of Sanat Kumar (supra), a coordinate Bench of this Tribunal dealt with a similar situation, and made an observation that though the assessee meticulously completed the paperwork by routing his entire investments through banking channel, when the result of an altogether beyond human properties, what is apparent in making

investment is not really and the examination of the entire transaction falsifies the same.

26. Having regard to all these facts and circumstances of the case in this matter, we are of the considered opinion that the conduct of the assessee who is a novice, in investing in the stocks of a company whose financial results are not brilliant and where there is no apparent chance of lucrative gains at the time when such an investment was made - raises reasonable doubt to suspect the bona fides of the transaction and in the absence of any satisfactory explanation offered by the assessee on the vital points raised by the learned Assessing Officer, it is not possible to brush aside the orders of the authorities below. Both the authorities below have the cogent reasons for reaching the conclusions and we find it difficult to interfere with the same. With this view of the matter, we dismiss the grounds of.

27. In the result appeal of the assessee is dismissed.

Order pronounced in the Open Court on 26th November, 2019.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: **26th November, 2019.**

VJ

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI