

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)  
"SMC" BENCH, MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

**ITA NO. 7227/MUM/2018 (A.Y:2009-10)**

Mrs. Shantaben Anraj Shah 15, Keshav Bhavan 1 <sup>st</sup> Pariswada Lane Mumbai - 400004  <b>PAN: AAPPS5081C</b>	v.	Income Tax Officer – 19(3)(3) Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 5009/MUM/2019 (A.Y:2009-10)**

Shri Vimal Pravin Shah 3/A, 114-E, R.K. Wadi Building 1 <sup>st</sup> Pariswada Lane S.V.P. Road, Mumbai - 400004  <b>PAN: AWAPS4695R</b>	v.	Income Tax Officer – 19(3)(5) Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 4990/MUM/2018 (A.Y:2009-10)**

Shri Parasmal Asmalji Mehta M/s. Kobe Steel (India) 450, Pathe Bapurao Marg Loatwala Building Near Sindhi Gally Mumbai-400004  <b>PAN: AAKPJ0600R</b>	v.	Income Tax Officer – 19(2)(5) Room No. 210, 2 <sup>nd</sup> Floor Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 3998/MUM/2019 (A.Y:2008-09)**

Shri Mahendra S. Shah 22, Alaknanda, 6 <sup>th</sup> Floor Dr. Deshmukh Lane V.P. Road, Mumbai - 400004  <b>PAN: AAPPS0995R</b>	v.	Income Tax Officer – 19(2)(3) Room No. 218, 2 <sup>nd</sup> Floor Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 4927/MUM/2019 (A.Y:2014-15)**

Shri Vivek Anraj shah (HUF) 1 <sup>st</sup> Floor, Vastal Building 6 <sup>th</sup> Khetwadi Lane S.V.P. Road, Mumbai - 400004  <b>PAN: AAGHV9339B</b>	v.	Income Tax Officer – 19(3)(5) Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 4928/MUM/2019 (A.Y:2009-10)**

Shri Pravin H. Shah (HUF) 3/A, 114/D, R.K. Wadi Building 1 <sup>st</sup> Pariswada Lane S.V.P. Road, Mumbai - 400004  <b>PAN: AAFPS5944Q</b>	v.	Income Tax Officer – 19(2)(5) Matru Mandir, Tardev Road Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri Khandelwal</b>
<b>Department by</b>	<b>:</b>	<b>Shri Sanjay J. Sethi</b>
<b>Date of Hearing</b>	<b>:</b>	<b>21.01.2021</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>05.02.2021</b>

**ORDER****PER C.N. PRASAD (JM)**

1. All these appeals are filed by different assessees of same group for various Assessment Years against different orders of the Learned Commissioner of Income Tax (Appeals), Mumbai [hereinafter in short "Ld.CIT(A)"] in sustaining the addition made by the Assessing Officer in respect of purchase and sale of shares as non-genuine transaction u/s.68/69C of the Act and also disallowance of commission on purchase and sale of shares.

2. In all these cases except Shri Vivek Anraj Shah (HUF) the assessments were reopened by issue of notice u/s. 148 of the Act based on the information received from the office of DIT(Inv.), Kolkata. In the case of Shri Vivek Anraj Shah (HUF) the assessment was completed u/s.143(3) of the Act and even in this case the Assessing Officer relied on the information received from the office of DIT(Inv.), Kolkata and completed the assessment treating the purchase and sale of shares as non-genuine. Consequent to enquiries, investigations carried out on various stock brokers in Kolkata and also search and seizure action conducted in various companies including M/s. Mahasagar Securities Ltd. Investigation Department found that the brokers/companies were

indulged in issuing accommodation entries in respect of short term/long term capital gain, speculation business etc. Based on this information assessments were completed u/s. 143(3)/ 147 of the Act treating the purchase and sale of shares as non-genuine thereby denying assessee's claim for short term capital gain as exempt u/s. 10(38) of the Act and in some cases the investment by the assessee in shares was doubted and the same was brought to tax u/s. 69 of the Act as unexplained investment.

**3.** On appeal the Ld.CIT(A) confirmed the action of the Assessing Officer in denying the exemption claimed u/s. 10(38) of the Act on sale of shares and also in bringing to tax the purchase consideration as unexplained investment u/s. 69 of the Act. Further, the Ld.CIT(A) also directed the Assessing Officer to disallow commission @2% of the sale consideration received and also on the purchase consideration paid by the assessee.

**4.** Ld. Counsel for the assessee referring to the appeal in the case of Ms. Shantaben Anraj Shah submitted that Assessing Officer made addition of ₹.12,10,065/- u/s. 68 of the Act being sale consideration, sale of shares of M/s. Blue Print Securities Ltd., where the assessee in her return claimed the capital gain arising on sale of such shares as exemption u/s. 10(38)

of the Act. It is also submitted that Assessing Officer made an addition of ₹.24,201/- u/s. 69C of the Act being commission @2% of the ₹.12,10,065/-. It is submitted that Ld.CIT(A) upheld the action of the Assessing Officer as regards the addition u/s. 68 of the Act and also the addition made u/s. 69C of the Act in respect of the commission. Learned Counsel for the assessee submitted that this position is common in all other appeals. Learned Counsel for the assessee submitted that in the present appeals assessee challenged the order of the Ld.CIT(A) on both the grounds i.e. addition u/s. 68 as well as u/s. 69 of the Act and also challenged the reopening of assessment.

**5.** Learned Counsel for the assessee submitted that in so far as challenging reopening of assessment u/s. 147 of the Act is concerned the ground is not pressed. Thus, in view of the above submission of the Ld. Counsel for the assessee the ground raised by the assessee challenging reopening of assessment is dismissed as not pressed.

**6.** During the course of hearing Ld. Counsel for the assessee relied on various documentary evidences as regards purchase and sale of shares which were filed before both the Assessing Officer as well as the Ld.CIT(A). Further the Ld. Counsel for the assessee referring to letter

dated 22.12.2016 filed with the Assessing Officer in the course of the assessment proceedings submitted that the assessee has requested for statements and also for providing cross examination of the persons whose statements on oath the Assessing Officer is relied upon for making the additions u/s. 68 and u/s. 69 of the Act. Ld. Counsel for the assessee further submitted that in spite of request made by the assessee for providing the statements and the cross examination neither the statements nor cross examination has been given to the assessee. Learned Counsel for the assessee submitted that in all these appeals this position is same. It is submitted that in all these appeals the Assessing Officer neither provided the statements on which reliance is placed for making addition nor provided any cross-examination of the persons who made the statements. Therefore, it is submitted that having not given the cross examination more so when specifically asked by the assessee the addition made by the Assessing Officer as confirmed by the Ld.CIT(A) ought to be deleted. Ld. Counsel for the assessee placed reliance on the following decisions in respect of the above contention: -

- (a) *Kishinchand Chellaram [125 ITR 713 (SC)]*
- (b) *Andaman Timber-Civil Appeal no 4228 of 2006 (SC) dated 02.09.2015*
- (c) *Shyam Pawar [54 Taxmann.com 108 (Bom HC)]*
- (d) *Anraj Shah HUF in ITA No 4514/Mum/2018 (family matter) of the same group*
- (e) *Mukesh B Sharma in ITA No 6249Mum/2018*

**7.** Ld. Counsel for the assessee placing reliance on the judgement of the Hon'ble Supreme Court in the case of Kishinchand Chellaram (supra) and also the decision of the Andaman Timber (supra) submitted that the Hon'ble Supreme Court held that if the addition is made relying on the statement of a third party and cross examination of the said party is not given to the assessee then such statement ought to be ignored and without that the assessment is baseless.

**8.** Ld. Counsel for the assessee also further relied on the decisions of Shyam R. Pawar [54 Taxmann.com 108 (Bom HC)], Anraj Hiralal Shah (HUF) in ITA No 4514/Mum/2018 dated 16.07.2019 and Arvind Asmal Mehta in ITA no 2799/Mum/2015 dated 29.02.2019 and referring to the Paper Book filed it is submitted that the assessee in the course of the assessment proceedings furnished all the necessary documentary evidences in respect of sale and purchase of the transactions. In the case of Ms. Shantaben Anraj Shah it is submitted that the following evidences were furnished: -

<b><i>Sr.</i></b>	<b><i>Particulars</i></b>
<i>1</i>	<i>Acknowledgement evidencing filing of return of income together with computation of total income and statement of capital account for Assessment Year 2009-10</i>
<i>2</i>	<i>Contract note dated 23.08.2005 evidencing purchase of shares</i>
<i>3</i>	<i>Ledger account of the appellant in the books of Messrs Shubhlaxmi Steel for the year ended 31st March. 2006</i>

<b>Sr.</b>	<b>Particulars</b>
4	<i>Settlement bills (2 nos) dated 25.09.2008 and 26.09.2008 evidencing sale of shares</i>
5	<i>Demat statement of the period 01.04.2004 to 31.03.2013</i>
6	<i>Bank passbook for the period 23.01.2008 to 01.10.2008</i>
7	<i>Acknowledgement evidencing filing of return of income together with computation of total income and statement of capital account for Assessment Year 2006-07.</i>

**9.** Referring to the documents Ld. Counsel for the assessee submitted that assessee has provided all the necessary documents to prove that the purchase and sale of shares are genuine. Learned Counsel for the assessee submitted that in all the appeals the assessee has provided all the necessary documents to prove that the purchase and sale of shares are genuine. Further the Assessing Officer mainly relied on the statements recorded from third parties, whose statements were never provided nor any cross examination was provided to rebut the statements. Therefore, it is submitted that even on merits addition should not have been made as the assessee has discharged its initial burden of proving the transactions as genuine.

**10.** On the other hand, the Ld. DR vehemently supported the orders of the Assessing Officer and the Ld.CIT(A). Ld. DR submitted that one has to see the circumstantial evidences and the investigations carried out by the DIT (Inv.), Kolkata proves that these transactions were provided by

brokers are only accommodation entries for commission and the transactions are not genuine.

**11.** Heard both sides, perused the orders of the Authorities below and various documents filed before the Assessing Officer and the Ld.CIT(A) and more particularly the letter dated 22.12.2016 referred to above wherein the assessee requested for cross examine the party. In the letter filled by the assessee before the Assessing Officer in reply to show-cause notice assessee has requested to provide the statements on whose the Assessing Officer was placing reliance and also to provide cross-examination of the parties and the relevant portion of the letter is as under: -

*"In response to same I would like to request you to give copy of such information received by you as stated above.*

*Further you have mention above that "Directorate Kolkata have revealed that many persons have accommodation entries bogus Long Term Capital Gain (L TCG) from operator"*

*In response to same I would request you to give me the statement revealing my name in that many persons list.*

*You have mention as "The name of scrip M/s. Bine Prints Securities Ltd. in which you have transacted during the year consideration is appearing in the list of Penny Stock companies, which have been used for generating bogus LTTCG"*

*Kindly provide us the page/pages in the list of beneficiaries where my name has been mention.*

*After we received the copy of beneficiaries list & Statement recorded on oath on perusal of the same we request for an opportunity to cross-examine the said party.*

*I would like to state that sale consideration received on account of sale of share of M/s. Sunrise Asian Ltd. is genuine & should not be added to my total income.*

*To substantiate the above we have to state the following:*

- > The purchase contract note is already submitted in the earlier letter.*
- > The Sale Contract notes is already submitted in the earlier letter.*
- > The payment received for the said transaction is done through Bank which is disclosed source of investment. The Bank statements has already been submitted to you in earlier letter.*
  - > The D-mat Statement is already submitted in earlier letter.*
  - > Sale of share is through recognize stock exchange*
  - > Sale consideration for sale of share is received by account payee cheque.*
  - > S.T.T has been duly charged in the contract note penny stock brokers.*

*Further we state that the share sold are genuine and there is no lapse on the part of the assessee and no accommodation entries have been passed by the assessee.*

*We have submitted sufficient documentary evidences to substantiate that the Share Sold through the above party are genuine.*

*There is no material on record to suggest that the transactions entered into by the assessee were bogus either in the terms of sale in the terms of rates at which these shares were sold. Rather assessee has filed evidence to show that these shares were sold for a price which were prevalent in the market and payments received through banking channel. These shares were also credited & debited*

*in the D-mat account the relevant documentary evidence has been filed duly the assessment proceeding.*

*We have to state that just on the basis of statement under oath and declaration given by operators or brokers, it cannot be concluded that the transactions are accommodation entries. Further no documentary evidence are given to us for the alleged transactions.*

*Based on the above facts we request you not to treat sale consideration of Rs. 12,10,065/- should not be treated as unexplained cash credit u/s. 68 of the I.T. Act and the same cannot be; treated as sham transaction and hence sale consideration cannot be treated as bogus LTCG.*

*You have mention in show cause "Further, as there was collusion with the broker/ operator to arrange the said transaction, so explain as to why accommodation charges @2% of the sale consideration of share sold not he added hack to the income u/s. 69C of the Income tax Act 1961. "*

*In response to the above I would like to state that kindly give us the details of the operator brokers wherein details of accommodation charges are available in my name. Further kindly give us the Xerox copy of the proof wherein distinctly my name is mention*

*Lastly request for opportunity to cross-examine of the said operator/brokers & such other person on which you have relied for the above matter.*

*Based on the above facts & No concrete/specific details from your end the propose addition u/s. 68 of Rs.12,10,165/- & u/s. 69C of 2% of sales consideration is not justifiable & bad in law."*

**12.** It is not in dispute that that the transaction of purchase and sale of shares was treated as non-genuine based on the statements recorded during the course of the investigations made by the DIT(Inv.), Kolkata and also in the survey proceedings in certain companies. It is also not in

dispute that the statements of the third parties on whose statements the Assessing Officer placed reliance for making the addition not furnished nor the request of the assessee for providing cross examination was adhered to. I found that the cross examination of the party on whose statement the Assessing Officer is relied upon has not been given to the assessee and the decision of the Hon'ble Supreme Court referred to above squarely applies to the facts of the assessee's cases. The question as to whether the assessment order can be sustained in the absence of providing cross examination to the assessee especially when the additions/disallowance were made based on the statements recorded in the case of third parties and in the light of the judgment of the Andaman Timber Industries v. CCE (supra) has been considered on identical facts by the Ahmadabad Bench in the case of Smt. Sunita Jain & Smt Rachna Sachin Jain v. ITO in ITA.No. 501 & 502/AHD/2016 dated 09.03.2017 and the Ahmadabad bench held as under: -

*"11. For the sake of completeness of the adjudication, even on merits of the case, the additions do not survive. A perusal of the orders of the authorities below shows that the claim of capital gains was denied by the revenue authorities on the strength of the statement of Shri Mukesh M. Choksi and the materials found from the third party i.e. books etc. in the case of M/s. Mahasagar Securities group and Mukesh M. Choksi. The revenue authorities were of the strong belief Shri Mukesh M. Choksi was providing accommodations entries by issuing bogus bills of share purchases of companies which were not listed on the stock exchanges and,*

*therefore, the capital gains discussed by the assessee are the outcome of fraudulent transactions and cannot be accepted as such. Accordingly, the gains were treated as undisclosed income of the assessee.*

12. *The Id. Counsel for the assessee(s) vehemently stated that denial of cross examination and relying on a third party's statement without affording any opportunity to the assessee(s) and also by not providing the copy of the statement has vitiated the entire assessment order. It is the say of the Counsel that denial of natural justice cannot be considered in framing the assessment order. The Counsel for the assessee continued by stating that the shares were purchased through brokers and the same were also sold through brokers. If the brokers turned out to be scamster, the assessee cannot be held responsible for the same.*

13. *Per contra, the DR strongly supported the findings of the Revenue Authorities. It is the say of the DR that the assessment is not merely based upon the statement of Shri Mukesh Choksi, but also on the fact that the entire transactions of the assessee were bogus.*

14. *The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-*

*"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."*

15. *The Hon'ble Apex Court held as under:-*

*"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 extraction the appellant wanted from them.*

*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*

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

16. *On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed."*

The Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE (supra) held that when the assessment was made on the basis of the statements recorded from third parties and those statements were not provided nor cross examination was given to the assessee, the Assessment Order made based on those statements is bad in law.

**13.** Facts and circumstances being identical respectfully following the decision of the Hon'ble Supreme Court, I hold that the assessment order passed u/s. 143(3)/147 of the Act by the Assessing Officer is bad in law and has to be quashed as the Assessing Officer has failed to provide the copies of statements on which he relied on for making assessments and also for not providing cross examination of those persons inspite of

specific request made by the assessee. Thus, I quash the assessment orders passed u/s. 143(3)/147 of the Act on this ground.

**14.** Since facts being identical in all other appeals the decision taken above shall apply mutatis-mutandis to all other appeals. Accordingly, the assessment orders passed u/s.143(3)/147 of the Act are quashed.

**15.** In the result, appeals of the assesseees are allowed.

Order pronounced on 05.02.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**  
Mumbai / Dated 05/02/2021  
Giridhar, Sr.PS

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**