

अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER  
AND  
MIS MADHUMITA ROY, JUDICIAL MEMBER**

**ITA No.149/Ind/2019  
Assessment Year:2014-15**

Shri Manoj Yadav GF-Shekhar Residency 2 <sup>nd</sup> Floor, Flat No.204, Sch, No.54 Indore (Appellant)	<u>बनाम/</u> Vs.	ACIT Circle 5(1) Indore  (Respondent )
P.A. No.AAGPY5452J		

Appellant by	Shri Girish Agrawal, Mis. Nisha Lahoti & Shri Vijay Bansal, ARs
Revenue by	Shri Harshit Bari, Sr. DR
<b>Date of Hearing:</b>	<b>13.04.2021</b>
<b>Date of Pronouncement:</b>	<b>25.05.2021</b>

**आदेश / O R D E R**

**PER MANISH BORAD, A.M:**

The above captioned appeal filed at the instance of assessee pertaining to Assessment Year 2014-15 is directed against the order of Commissioner of Income Tax (Appeals)-II (in short 'Ld.CIT'], Indore dated 26.12.2018 which is arising out of the order u/s

143(3) of the Income Tax Act 1961(In short the 'Act') dated 16.12.2016, framed by ACIT-5(1), Indore.

2. The assessee has raised following grounds of appeal:

- “1. That the order passed by Ld. CIT(A) is bad in law and on facts.
2. That the Ld. CIT(A) has erred in confirming the addition of Rs.97,49,239/- under section 68, which is quite unjust, illegal and against the facts of the case.
3. That the Ld. CIT(A) has erred in holding that the genuine income of Long Term Capital Gain exempted u/s 10(38) of Rs.97,49,239/- is a sham transaction, by applying test of human probability, without any evidence against the assessee, which is quite unjust, illegal and against the facts of the case.
4. That the Ld. CIT(A) has erred in holding the decision of Hon'ble Delhi Bench of I.T.A.T. in case of Shikha Dhawan (Appeal No.ITATNo.3035/Del/2018) wherein the similar transaction of Turbotech Engineering is considered as genuine, which is quite unjust, illegal and against the facts of the case.
5. That the Ld. CIT(A) has erred in wrong applying the decision of Hon'ble Supreme Court in case of the assessee wherein the facts of the case of the assessee is altogether different, which is quite unjust, illegal and against the facts of the case.
6. That the Ld. CIT(A) has erred in holding the script as “penny stock”, whereas no such word has been defined under the Income Tax Act or under any law for the time being in force, which is quite unjust, illegal and against the facts of the case.
7. That the Ld. CIT(A) has erred in holding that the capital gain earned by the assessee, based on some inquiries but not on the assessee, is bogus and/or managed affairs, which is quite unjust, illegal and against the facts of the case.
8. That the Ld. CIT(A) has erred in not providing the copy of the report of the investigation wing and further not providing any opportunity to cross examine the persons mentioned in the report, which is quite unjust, illegal and against the facts of the case.
9. Appellant craves to leave, add, amend, alter or modify of any ground before final date of hearing. “

Additional Ground:

On the facts and in the circumstances of the case and in law, Ld. AO erred in the alternative treatment of the Long Term Capital Gain of Rs.99,78,000/- as adventure in the nature of trade.

3. Brief facts of the case as culled out from the records are that the assessee is an individual earning income from salary and other sources. Return of income for A.Y. 2014-15 e-filed on 30.09.2014 showing income at Rs.3,44,99,798/-. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. During the course of assessment proceedings Ld. AO observed that the assessee had earned income from sale of 22000 equity shares of Turbotech Engineering Limited sold at a sale consideration of Rs.99,78,000/- and were purchased during the F.Y. 2012-13 at Rs.2,75,964/-. Assessee in support of the claim of exempt income u/s 10(38) of the Act filed various documents including contract note for purchase and sale and DMAT account. However, the Ld. AO based on its observation of the financial statements of Turbotech Engineering Limited (in short TEL) and the statement given by the assessee, came to a conclusion that the assessee had no knowledge about Turbotech Engineering Limited and purchased it on advice of a person whose name is not known. Share prices of 'TEL' increased abnormally which were not supported by gross sales/net profit/financial strength of the company. He, therefore, concluded that 'TEL' is a 'penny stock' company and assessee has managed bogus Long Term Capital Gain(LTCG) to evade tax. Ld. AO accordingly added the sale value of equity shares at Rs.99,78,000/- as addition u/s 68 of the Act for unexplained cash credit. Income assessed at Rs.4,44,77,800/-.

4. Aggrieved assessee preferred an appeal before the Ld. CIT(A) but failed to succeed. Ld. CIT(A) confirmed the view of the Ld. Assessing Officer placing reliance on various decisions holding that the assessee had indulged into bogus LTCG by way of taking accommodation entry and had earned excessive return within a short span of period which is extremely unusual. Ld. CIT(A) further held the transaction as “sham” as it cannot stand the test of human probability.

5. Now the assessee is in appeal before the Tribunal. Ld. counsel for the assessee filed written submissions dated 12<sup>th</sup> April 2021 running from pages 1 to 27 which also referred to various judgments and decisions. It was also submitted that the issue raised in the instant appeal is squarely covered by the decision of Coordinate Bench, Delhi in the case of *Swati Luthra [2020] 115 taxmann.com 167 dated 28<sup>th</sup> June 2019(Trib-Delhi)*. Reliance was also placed on the ratio laid down by Hon'ble Delhi High Court in the case of *Krishna Devi ITANo.125/2020 & Ors dated 15.01.2021(Delhi-HC)*.

6. The crux of the argument of the Ld. counsel for the assessee are that the additions made by the Ld. AO are vague and based merely on surmises and conjectures. No report or statement recorded under oath of the third party has been made available to the assessee which is gross violation of principles of natural justice. The term listed ‘penny stock’ has mentioned by the Ld. AO has not been defined under the law. No evidence has been brought on record to

establish that the assessee is involved in rigging of the prices, having acquaintance with any 'operator' or any connection to promoter/director/key management of TEL. Further TEL is neither included in the list of shell companies nor has been struck down from the records of Registrar of Company. Documentary evidences filed by the assessee have not been found to be incorrect. Transaction of purchase of shares has been accepted and no doubt has been raised. The assessee is regularly dealing in equity shares. All the conditions provided in section 10(38) of the Act for claiming exemption of LTCG have been duly fulfilled and lastly it was submitted that provisions of section 68 of the Act are not applicable on the impugned transactions of sale of equity shares of TEL effected on a recognized stock exchange, as identity is not disputed, creditworthiness is proved and the transaction is genuine being effected through DEMAT account and registered broker.

7. With regard to the additional ground raised through application dated 01.01.2021 submitting that the assessee is not engaged in the business of share, as the assessee is mainly engaged in the capacity of a director in the company and transactions of purchase and sale of equity shares are done occasionally.

List of decisions relied are reproduced below:

1. *Sona Builders* – [2001] 119 Taxman 430 – dated 24.07.2001 (SC)
2. *Krishna Devi* – ITA No. 125 of 2020 dated 15.01.2021 (Delhi HC)
3. *Uttamchand Jain* – [2009] 182 taxman 243 – dated 02.07.2009 (Bombay HC)
4. *Swati Luthra* – [2020] 115 taxmann.com 167 – dated 28.06.2019 I.T.A.T., Delhi)
5. *Lalchand Bhagat Ambica Ram* [1959] 37 ITR 288 (SC)

6. *Shakti Hardware Collections Private Limited – ITA No. 6301/MUM/2014 (I.T.A.T. Mumbai)*
7. *Achal Gupta – ITA No. 501/LKW/2019 – dated 16.12.2020 (I.T.A.T., Lucknow)*
8. *Aditya Mundra – ITA No. 632/IND/2019 dated 13.01.2021 (I.T.A.T., Indore)*
9. *Shweta Agrawal – ITA No. 280/IND/2019 dated 21.12.2020 (I.T.A.T., Indore)*
10. *GTC Industries Limited – [2017] 80 taxmann.com 284 dated 07.03.2017 – (I.T.A.T., Mumbai (SB))*
11. *Riaz Munshi – ITA no. 8314/DEL/2018 dated 11.03.2020 (I.T.A.T., Delhi)*
12. *Dipesh Ramesh Vardhan – ITA No. 7648/Ind/2019 dated 11.08.2020 (I.T.A.T., Mumbai)*
13. *Anoop Jain – [2020] 114 taxmann.com 550 – dated 10.01.2020 (I.T.A.T., Delhi)*
14. *Vijay Ratan Mittal – ITA No. 3429 of 2019 dated 01.10.2019 (I.T.A.T., Mumbai)*
15. *Karuna Garg – [2019] 109 taxmann.com 403 – dated 06.08.2019 – (I.T.A.T., Delhi)*
16. *Vidhi Malhotra – [2019] 101 taxmann.com 361 – dated 20.12.2018 (I.T.A.T., Delhi)*
17. *Saurabh Mittal – ITA No. 16 of 2018 – dated 29.08.2018 (I.T.A.T., Jaipur)*
18. *Pramod Kumar Lodha – [2018] 100 taxmann.com 8 dated 16.07.2018 (I.T.A.T., Jaipur)*
19. *Rungta Properties – ITA No. 105 of 2016 dated 08.05.2017 (Calcutta HC)*
20. *M/s. Alpine Investments – ITA No. 620 of 2018 – dated 26.08.2008 (Calcutta HC)*

8. Per contra Ld. DR vehemently argued supporting the orders of both the lower authorities and by the decisions relied by Ld. Assessing Officer and ld. CIT(A) in the impugned order.

9. We have heard rival contentions and perused the records placed before us and carefully gone through the written submissions filed by the Ld. counsel for the assessee and the judgment referred and relied by both parties. Though the assessee has raised 9 grounds of

appeal and one additional ground but all refers to a single issue about the genuineness of claim of Long Term Capital Gain as exempt income u/s 10(38) of the Act arising from sale of 22000 equity shares of 'Turbotech Engineering Limited.

10. The assessee has contended throughout this proceedings before lower authorities and before us that it is a genuine transaction of purchase and sale of equity shares through registered brokers and sale affected on recognized stock exchange and transfer of shares made from DMAT account.

11. On the other hand, Revenue is contending that the alleged transaction is sham and assessee has managed bogus LTCG by way of accommodation entry. 'TEL' is a penny stock company and the abnormal rise in share prices is not supported by financial results that are controlled through operators and share brokers.

12. We note that the assessee purchased 22000 equity shares of 'TEL' from registered share broker namely Pragati Shares and Stock Services Limited Mumbai having SEBI REGN No. INB241426817 at cost of Rs.2,75,964/-. The source of investment is not in dispute as the assessee is having regular source of income from salary and income of Rs.20,35,020/- was disclosed in the return for A.Y. 2012-

13. These shares were held in the pool account of the broker which were subsequently transferred to the DEMAT Account in name of assessee maintained with Arihant Capital Markets Limited. After holding the shares for more than 12 months the assessee sold these

equity shares through the broker Arihand Capital Markets Limited having SEBI No. INB/INF230783938. The shares of 'TEL' are listed on Bombay Stock Exchange. During the F.Y. 2013-14, 22,000 shares were sold in parts and contract notes are placed at page 12 to 22 of the paper book. Gross sale value is Rs.99,78,000/-. The net long term capital gain comes to Rs.97,02,036/-. Source of sale consideration is not in dispute as it came through a registered broker directly in the bank account of assessee and sale effected on portal of Registered Stock Exchange where identity of Buyer and Seller is not disclosed.

13. We further note that both the lower authorities had not disputed any of the documents mentioned above i.e. a contract note at the time of purchase and sale, DEMAT account, financial ledger, share prices appearing on the portal of Bombay Stock Exchange as on the date of purchase/sale. Rather than disputing any of the documents Ld. AO made a general observation about searche u/s 132 and survey u/s 133A of the Act conducted by the department on various brokers of stock exchange and companies.

14. Ld. AO discussed about the scheme hatched by various players to obtain/provide accommodation entry of bogus LTCG through manipulation of stock market. Ld. AO also referred to the particulars of profit and loss account of various years of 'TEL' to show that there is hardly any income in the year of sale of shares and it shows that the market capitalization is very small and no business has been done during last five years. Ld. AO also observed that the company did not

have any earnings and has shown loss during the period and these documents clearly shows that company does not have the potential nor fundamental to fetch such huge price.

15. We also note that Ld. AO has not referred to any specific report of the investigation wing in which the name of assessee is appearing or any connection of the assessee with the broker/promoters of the company is established. No such report was made available to the assessee in order to provide opportunity to cross examine. The only common thing is the name of company 'TEL'.

16. We find that the above stated facts are *verbatim* similar to the facts dealt by Coordinate Bench Delhi in the case of *Swati Luthra (supra)* and the issue also remains the same about the genuineness of claim of LTCG u/s 10(38) of the Act and whether 'TEL' is a 'Penny Stock' company. We find that the Coordinate Bench Delhi in the case of *Swati Luthra (supra)*, after examining the facts of the case and the settled judicial precedent allowed the appeal in favour of the assessee and claim of LTCG u/s 10(38) of the Act from TEL was held to be genuine, thus, holding that TEL is not a 'penny stock' company observing as follows:

*12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. We find that the transactions of the assessee of purchase of shares of M/s Esteem Bio and M/s Turbotech., holding of the shares for more than one year and the sale of shares through a registered share broker in a recognized Stock Exchange and payment of Securities Transaction Tax thereon, all were supported by documentary evidences which were placed before the lower authorities. The Revenue could not point out any specific defect with regards to the documents so submitted by assessee. In our considered view, effect of a transaction which is supported by documentary evidences cannot be brushed aside on suspicion or probabilities without pointing out any defect therein.*

13. In the instant case, the Assessing Officer himself observed that the movement in price of shares of M/s Esteem Bio and M/s Turbotech were without any backing of financial performance of the said companies. In our considered view, the above factor at best was a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. Further, we also find from record that Ld. AO also didn't confront copies of statements recorded by Investigation Wing, Kolkata of Sh, Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar to the appellant during assessment proceedings and merely extracted copies of their statement in the assessment order only. The Ld. AO has not confronted any material to the assessee nor provided any adequate opportunity to the assessee to defend her case. Since the statements were not confronted to the assessee, she was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly to all the persons who have brought the scrips in the entire country. Thus, under these circumstances, atleast some inquiry should have done from these persons, whether they have provided any entry to the assessee, if the request for cross examination was not possible at that stage. Cross examination of a person in whose basis any adverse inference is drawn, then it cannot be primary evidence or material to nail the assessee and simply based on the statement no addition can be made. This has been held so by various courts, and also by Hon'ble Apex Court in the case of *M/s Andaman Timber Industries vs. CCE (SC)* reported in 127 DTR 241 has held as follows:

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is

concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

14. That the ld DR during the course of hearing placed heavy reliance on judgment of Hon'ble High Court of Delhi in the case of [Udit Kalra vs ITO](#) in ITA No. 220/2019. Relevant extracts of said judgment are extracted as below:

"The assessee is aggrieved by the concurrent findings of the tax authorities - including the lower appellate authorities rejecting its claim for a long term capital gain reported by it, to the tune of Rs.13,33,956/- and Rs.14,34,501/- in respect of 4,000 shares of M/s Kappac Pharma Ltd. The assessee held those shares for approximately 19 months; the acquisition price was Rs.12/- per share whereas the market price of the shares at the time of their sale, was Rs.720/-. It is contended that the assessee was not granted fair opportunity.

*Mr. Rajesh Mahna, learned counsel appearing for the assessee relied upon the orders of the co-ordinate Bench of the tribunal, in respect of the same company i.e. M/s Kappac Pharma Ltd., and pointed out that the tax authority's approach in this case was entirely erroneous and inconsistent.*

*The main thrust of the assessee's argument is that he was denied the right to cross-examination of the two individuals whose statements led to the inquiry and ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal. This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent - A.O., CIT(A) and the ITAT have all consistently rendered adverse findings - what is intriguing is that the company (M/s Kappac Pharma Ltd.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal.*

*This appeal is accordingly dismissed."*

*15. On going through the aforesaid judgment, we find that no question of law was formulated by Hon'ble High Court of Delhi in the said case and there is only dismissal of appeal in limine and the Hon'ble High Court found that the issue involved is a question of fact as held by Hon'ble Apex Court in *Kunhayammed vs State of Kerala* reported in 245 ITR 360 and also in *CIT vs. Rashtradoot (HUF)* reported in 412 ITR 17. Even on merits and facts, the said judgment in the case of *Udit Kalra vs ITO* (supra) is distinguishable as in that case the scrips of the company were delisted on stock exchange, whereas, in the instant case, the interim order of SEBI in the cases of *M/s Esteem Bio* and *M/s Turbotech* have been cooled down by subsequent order of SEBI placed by assessees in its paper book. Thus, the case of *Udit Kalra vs ITO* relied by ld. DR is clearly distinguishable on facts and is not applicable to the facts of assessee. Thus, we hold that the case of assessee is factually and materially distinguishable from the facts of the case of *Udit Kalra vs ITO* so relied by ld DR.*

*16. We further find that Ld. AO has also mentioned about some order of SEBI. This order also was never confronted to the appellant during assessment proceedings. Moreover, the said order seems to be passed in year 2015, whereas the appellant had purchased the shares in year 2011*

and 2013 and sold them in year 2014. It was evident from this document only that no action has been taken by the SEBI against the company during the period when the appellant holds the shares. Thus, even otherwise, we find that the order of SEBI so relied by Id. AO and CIT (A) is not applicable for the transactions under consideration.

In any case as stated above, the SEBI in its subsequent decision has absolved most of the companies including the companies whose scrips are under suspicion, as they were nor found to be rigging the price. This fact alone vitiates the case of revenue.

17. We also find that the Ld. AO has raised objection regarding the cash purchase of shares and that shares were dematerialized few days back only from the date of sale. There is no law which prohibits the purchase of shares in cash, however in the present case, assessee had filed copies of bills of purchase, copy of share certificates and transfer forms etc. before Ld. AO and no adverse inference could be drawn only because the shares were purchased in cash. Regarding Demat of shares, we hold that it is the option of the buyer of shares to keep the shares either in Demat form or in paper form. Merely because the shares were dematted at a later stage, no adverse inference could be drawn. The Learned Counsel for the Assessee has taken us through various documents filed in the paper book as referred to above which specifically prove the purchase of shares made by assessee genuinely which were also sold genuinely. The transactions were carried through Demat account and banking channel on which STT has been paid by assessee. The report of the SEBI was not adverse in nature against the assessee because name of the assessee did not appear therein for conducting dubious transaction. The report of the Investigation Wing and other material was neither confronted to assessee nor there was any inquiry from where it transpired that assessee was beneficiary of any bogus long-term capital gain; therefore, the same cannot be read in evidence against the assessee. A specific material against the assessee should have been brought on record to put assessee under liability. However, in the present case, the entire documentary evidence on record has not been disputed by the authorities below and there is no rebuttal to the explanation of assessee. No other adverse materials have been brought on record against the assessee. Further, no proper enquiry has been conducted by the A.O. on the documentary evidences filed by assessee. Whatever statements have been referred to in the order was general in nature with whom assessee did not have any transaction. Considering the totality of the facts and circumstances of the case, we hold that assessee has entered into genuine transaction of sale and purchase of shares and therefore, satisfied the conditions of [Section 10\(38\)](#) of the I.T. Act. The assessee is entitled for exemption under the same provision. We

accordingly, set aside the orders of the authorities below and delete the addition of Rs. 41,85,762/-. Appeal of assessee is allowed.

18. The facts of the cases of other assessee's are similar to the facts involved in the case of the present assessee i.e. Smt. Swati Luthra, therefore, our findings given in respect of the appeal in ITA No. 6480/Del/2017 shall apply to the other appeals of different assessees with the same force in ITA Nos. 6481 to 6483/Del/2017.

19. In the result, the appeal of all the above four assessees, namely, Smt. Swati Luthra, Smt. Shruti Luthra, Smt. Namata Sehgal Luthra and Smt. Asha Luthra bearing ITA No. 6480 to 6483/Del/2017 are allowed.

17. We further find that ratio laid down by Hon'ble High Court of Delhi in the case of *Pr. CIT vs. Smt. Krishna Devi (Supra)* is also favourable to the assessee. As in the case of assessee also there was no evidence produced by the Ld. AO to show that there was an agreement between assessee and any other party which are alleged to be involved in providing accommodation entry. The relevant finding of Hon'ble Court dismissing the revenue's appeal is reproduced below:

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi,

*Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "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." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.*

*12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard*

*to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.*

*13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.*

*14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.*

*15. Accordingly, the present appeals are dismissed.*

18. We, therefore, respectfully following the ratio laid down by Hon'ble High Court of Delhi in the case of *Krishna Devi (supra)* and the decision of Coordinate Bench in the case of *Swati Luthra (supra)* which is squarely applicable on the facts and issues raised before us, are of the considered view that the claim of LTCG u/s 10(38) of the Act at Rs. 97,02,036/- from sale of equity shares of Terbotech Engineering Limited is genuine and the assessee is entitled to claim the benefit. Thus, no addition at Rs.99,78,000/- was called for u/s 68 of the Act for unexplained cash credit. We, further hold that the assessee is regularly dealing in equity shares as an investor

and as its main source of income salary and other from other sources and the frequency of transactions in purchase and sale of shares is less, it cannot be held to be carrying on business of purchase/sale of shares as an adventure in nature of trade.

19. In the result, all the grounds raised by the assessee are allowed and appeal filed by the assessee through ITANo. 149/Ind/2019 is decided in favour of the assessee and against the revenue.

Order was pronounced as per Rule 34 of the I.T.A.T. Rules 1963 on 25.05. 2021

Sd/-  
(MADHUMITA ROY)  
JUDICIAL MEMBER

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 25/05/2021

*Patel/PS*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Assistant Registrar, Indore**