

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL,**  
**INDORE BENCH, INDORE**  
**HON'BLE MANISH BORAD, ACCOUNTANT MEMBER**  
**AND**  
**BEFORE HON'BLE MADHUMITA ROY, JUDICIAL**  
**MEMBER**

ITA No.7/Ind/2019

Assessment Year 2014-15

Radheyshyam Khandelwal : Appellant  
659, Sneh Nagar,  
Near ILVA College, Indore  
PAN ATVPK8556H

V/s

ACIT-4(1),

Indore : Respondent

ITA No.8/Ind/2019

Assessment Year 2014-15

Mohanlal Khandelwal : Appellant  
659, Sneh Nagar,  
Near ILVA College, Indore  
PAN ACBPK8243N

V/s

ITO-4(1),

Indore : Respondent

ITA No.29/Ind/2019

Assessment Year 2014-15

Suresh Khandelwal : Appellant  
659, Sneh Nagar,

Near ILVA College, Indore  
PAN ACWPK7412J

V/s

ACIT-4(1),

Indore

: Respondent

ITA No.30/Ind/2019

Assessment Year 2014-15

Rukmani Khandelwal

: Appellant

659, Sneh Nagar,

Near ILVA College, Indore

PAN ACWPK7410L

V/s

ACIT-4(3),

Indore

: Respondent

ITA No.113/Ind/2019

Assessment Year 2014-15

Smt.Sandhya Khandelwal

: Appellant

659, Sneh Nagar,

Near ILVA College, Indore

PAN ACWPK7411M

V/s

ACIT-4(3),

Indore

: Respondent

Revenue by	Shri Harshit Bari, Sr.DR
Assessee by	S/Shri Ashish Goyal & N.D. Patwa, ARs
Date of Hearing	07.04.2021
Date of Pronouncement	25.06.2021

**ORDER**

**PER BENCH:-**

The bunch of appeals filed by the assessee(s) are directed against separate orders of different dates passed by the Ld. CIT(A)-II, Indore u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “The Act”) confirming the addition made by the Ld. A.O upon disallowing exemption u/s 10(38) of the Act towards Long Term Capital Gain on the listed equity shares treating it as income from undisclosed sources. Since all the appeals relate to the same issue arising out of the identical set of facts, these are heard analogously and are being disposed by a common order for the sake of convenience.

2. ITA No.7/Ind/2019 is taken as the lead case. The brief facts relating to the case is this that the assessee has filed his return of income declaring total income at Rs.18,22,130/- on 30.9.2014 showing it income from Salary, House property, Business and income from share trading. The assessed claimed exemption u/s 10(38) of the Act of Rs.20,46,018/- for Long Term Capital Gain derived from sale of listed company’s share namely M/s Turbo Tech

Engineering Ltd not chargeable to tax. The assessee has purchased 5000 shares of M/s Turbo Tech Engineering Pvt Ltd through stock broker M/s Shah Space Manager Pvt. Ltd, Vadodara (Gujarat). After the purchase of shares the same was dematted. The sale of shares were effected in the stock exchange through registered share broker after deducting expenses of Brokerage, STT and transaction charges on 23.05.2013 at Rs.23,14,492.40. Such shares were purchased on 22.11.2011 and sold on 23.05.2013 upon holding the same for a period more than 12 months and on that basis the assessee claimed deduction u/s 10(38) of the Act under Long Term Capital Gain. Ultimately the Ld. A.O came to a conclusion that the transaction was managed by the assessee in a planned manner through accommodation entries and these transactions are mostly in lieu of cash of equal amount and commission charged over and above at certain fixed percentage for providing such accommodation entries alleging the scrip of M/s Turbo Tech Engineering Pvt. Ltd was a penny stock scrip used to manipulation to ensure to earn the exempt Long Term Capital Gain. Thus, the claim of Long Term Capital Gain exemption is bogus; in

fact no real capital gain have been earned by the assessee as the observation made by Ld. A.O, rather the same has been introduced from undisclosed sources. Ultimately the exemption on account of Long Term Capital Gain to the tune of Rs.23,25,000/- on the said alleged penny stock was not accepted and added to the total income of the assessee u/s 68 of the Act on the alleged grounds of income from undisclosed sources. The Ld. A.O further increased the brokerage and commission @3% of the transaction at Rs.69,750/- alleging managing of the transaction of Long Term Capital Gain u/s 68 of the Act. These Additions were further been confirmed by Ld. CIT(A)-II, Indore. Hence, the instant appeal before us.

3. At the time of hearing of the instant appeal Ld. Counsel for the assessee submitted before us as follows:-

1) The Genuineness of transaction was sought to be proved before the Revenue with help of following evidences:-

- (i) Statement of Long Term Capital Gain.
- (ii) Debit note for purchase of shares of Turbo Tech Engineering Limited.
- (iii) Physical Share Transfer form evidencing shares of Turbo Tech Engineering Limited in assessee's name.

- (iv) Receipt and other evidences of Shah Space Managers P Ltd.
- (v) Broker receipt for sale of shares.
- (vi) Return filed for A.Y. 2013-14 on 30.07.2013
- (vii) List of Investment as on 31.03.2013
- (viii) Return filed for A.Y. 2012-13 on 30.07.2012, List of Investment as on 31.03.2012.

It is relevant to mention that the above documents have already been annexed to the Paper Book as filed before us.

2. That simply because purchase was in cash, do not justify the act of Ld AO and Ld CIT(A) in treating the same as unexplained cash credit u/s 68 of the IT Act when the assessee has been able to discharge its primary onus effectively and satisfactorily. The Revenue could not establish live link between cash deposited by the assessee in form of long term capital gain.

4. The Revenue's allegation that investigation was carried out by various authorities and SEBI and that it was concluded that prices of the scrip has been whooping due to insider trading does not apply to the assessee. Even if the company indulge itself into money laundering and other illegal activities, the assessee cannot be held responsible for the hike in share price. The amount of capital

acquired by assessee is too less in relation to overall share capital of the company M/s Turbo tech Engineering Ltd, also appellant has no right or control over the operations as also contended by the Ld. AR.

5. As regards the allegation in respect of artificial rigging up of the price of shares, it was submitted that the Id. A.O. did not provide any documentary evidence of a live link and direct relation to such alleged rigging of prices with the appellant. Hence, no adverse inference could be drawn against the appellant in this regard.

6. The long term capital gain on sale of shares is in compliance with law in all respect and is also eligible for exemption u/s 10(38), the assessee has genuinely derived long term capital gain from sale of equity shares through recognized stock exchange after due payment of security transaction tax.

7. It is further submitted that for claiming exemption u/s 10(38) of the Act, the Appellant shall has to prove twin conditions i.e. the income arises from the transfer of long term capital asset and being

equity share in a company where the transfer of sale of such equity share is entered into on or after the date of which Chapter-VII of the Finance Act, 2004 comes into force and such transaction is chargeable to security transaction tax under that Chapter.

8. In the present case, both twin conditions are satisfied. The appellant has purchased the 5000 shares through broker Shah Space Manager Pvt. Ltd, Vadodra and sold the shares holding the same for more than 12 months and therefore it is long term capital asset and the shares are equity shares of M/s Turbo tech Engineering Ltd. Before the authorities below the appellant filed the copy of the shares transfer form, copy of contract note issued by Anand Rathi Shares and Stock Brokers, copy of form evidencing payment of securities transaction tax on transaction entered in a recognized stock exchange, as submitted by Ld. AR. Needless to mention that those documents are filed before us by way of a Paper Book.

9. It is further submitted that the share price is always determined by the market mechanism at any given point of time

because there is a robust system of the stock exchange which is transparent, open and equitable, and the appellant has also sold the shares on such a platform at a price which was a reflection of the market price derived through the interplay of the forces of market demand and supply and are determined on the basis of many factors. It is not within the power of appellant to manipulate the rates of shares on stock exchange. Merely because there is, a sharp increase in the rates of shares, no adverse inference could be drawn only on the basis of mere suspicion in absence of any direct or cogent evidence.

10. The Ld. Counsel appearing for the assessee further submitted that the appellant has transacted in the shares of M/s Turbo Tech Engineering Ltd." in the normal course of investment like millions of investors do in the stock market. Therefore, the question of alleged conversion of unaccounted money in the form of alleged bogus long term capital gain with the help of many alleged connected parties through price rigging and price manipulations does not arise.

11. It was further submitted by the Ld. AR that the addition in

respect of 3% of total transaction of Rs. 23,25,000/- amounting to Rs. 69,750/- as undisclosed commission income" u/s 68 of the Income tax Act is totally baseless and without any evidence. It is purely based in the Ld AO's assumption.

12. In this regard the Ld. AR relied upon the judgment passed by Hon'ble ITAT Pune Bench passed in the matter of Smt. *Smita P. Patil* [2015]55 taxman.com 346 (Pune -Trib.).

13. In support of the case made out by the assessee the Ld. AR relied upon the following judgments :-

(i) ITAT Delhi Bench in the case of Swati Luthra (2020) 115 taxmann.com 167 (Delhi Trib.)

(ii) ITAT Indore Bench in the case of Arzoo Anand (2017) 3 ITJ Online 181 (Trib. – Indore)

(iii) Delhi High Court in the case of Smt. Krishna Devi ITA 125/220

(iv) ITAT Delhi Bench in the case of Meenu Goel [2018] 94 taxmann.com 158

14. The Ld. DR raised objection of the cash purchase of shares

and that the shares were dematted subsequent to such purchase. He further relied upon the order passed by Delhi High Court in the matter of Udit Kalra Vs ITO passed on 8.3.2019 in ITA No.220/19. In effect he relied upon the order passed by the authorities below.

15. We have heard the rival submissions made by the respective parties. We have also perused the relevant materials available on record. It appears from the order passed by the Ld. A.O that he has been guided by the report of the Investigation team in respect of bogus transactions of capital gain. However, nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the appellant was in collusion with them. No finding specifically against the appellant has been made in the Investigation team the report whereof is available before us and this cannot be any ground for holding the appellant guilty or linked to the wrong facts of the persons investigated.

16. In the instant case, the appellant is not connected with M/s Turbo Tech Engineering Ltd. or their promoters, directors or any

other person who exercised any control over M/s Turbo tech Engineering Ltd or any so-called entry operator. As a matter of fact, no element is available showing that the appellant has indulged in any such questionable activity or has been part of the modus operandi as alleged by the Ld. A.O.

17. It is further apparent from Page 36 of the Paper Book filed before us that the appellant earned Long Term Capital Gain in ICI CI Bank, transactions whereof has not been doubted.

18. No independent Enquiry from concerned parties to transaction has also been made by the Ld. A.O as it appears from the records.

19. We find that this scrips of M/s Turbo Tech Engineering Pvt. Ltd has been held to be any penny stock scrips and particularly on the basis of that scrips the revenue has proceeded against the assessee and ultimately disallowed the claim made u/s 10(38) towards Long Term Capital Gain. However in this aspect we have considered the judgment passed by the Hon'ble ITAT, Delhi Bench in the case of *Swati Luthra Vs ITO* reported in (2020) 115 taxmann.com 167 (Delhi-Trib) where the scrips of this particular

M/s. Turbo Tech Engineering Ltd. was the actual subject matter.

The relevant portion thereof is as follows:-

4. The brief facts are that the assessee filed her return of income for the AY 2014-15 on 31.07.2014 declaring total income of Rs. 16,01,720/-, wherein she had declared income from salary, house property and other sources and also income from investing in shares. The assessee claimed exempt income u/s 10 (38) of the Act in respect of long term capital gain derived from sale of listed company's shares of companies M/s Turbo Tech Engineering Ltd. 4 (Rs. 20, 55, 146/-) and M/s Esteem Bio Organic Food Processing Ltd. (Rs. 23, 00, 616/-) where securities transaction tax was duly suffered by assessee. The sales of shares were affected in the stock exchange through a registered share broker after paying STT. Accordingly, the assessee had claimed long term capital gain as exempt under section 10 (38) in the return of income to the tune of Rs. 20,55,146- and Rs. 23,00,616/-. The assessee during the course of assessment proceedings had submitted all the relevant evidences for purchase of shares made in cash by the assessee, along with sale contract notes together with bank statements and Demat statements before the ld AO evidencing the entire transaction of sale of shares being routed through regular disclosed bank statement of the assessee. The aforesaid details and documents as submitted by assessee before the authorities below are tabulated along with page nos. of paper book as submitted before us:-

*Details of long term capital gain claimed as exempt under section 10(38) on account of sale of scrip of M/s Turbotech Engineering Ltd.*

Particulars	Swati Luthra	Shruti Luthra	Namrata Sehgal Luthra	Asha Luthra
Date of	27.12.2011	27.12.2011	27.12.2011	27.12.2011
Investment				
No. of Shares				

*Radheyshyam Khandelwal & Ors*  
*ITA No.7,8,29,30,& 113/Ind/2019*

<i>purchased</i>	10000	10000	10000	10000
<i>Purchase price</i>				
<i>per share</i>	Rs. 2 per	Rs. 2 per	Rs. 2 per	Rs. 2 per share
<i>Total purchase consideration</i>				
<i>paid</i>	Rs. 20, 000/-	Rs. 20, 000/-	Rs. 20, 000/-	Rs. 20, 000/-
<i>Date of shares sold</i>	23.07.2013 (3000 shares), 03.09.2013 (3000 shares) and 10.09.2013 (4000 shares)	06.09.2013 (10000 shares)	19.10.2013 (10000 shares)	24.09.2013
<i>Sale Price</i>				
<i>per share</i>	Rs. 314.88, Rs. 151.25 and Rs.164.189 per share	Rs. 276.70 per share	Rs. 178. 85 per share	Rs. 182.60 per share
<i>Total sale consideration</i>	Rs. 20,55,146/-	Rs. 27,67,036/-	Rs.17,88,463/ - -	Rs.18,25,780/-
<i>Long Term Capital Gain</i>				
<i>Declared</i>	Rs. 20,35,146/-	Rs. 27,47,036/-	Rs.17,68,463/-	Rs.18,02, 780/-

*DOCUMENTARY EVIDENCES SUBMITTED BEFORE AO AND CIT(A):*

<i>Share Purchase</i>	
<i>Documents</i>	<i>Pg 15 to 17 of PB</i>
<i>Share Certificate</i>	<i>Pg 18 of PB</i>
<i>Share Transfer</i>	<i>Pg 19 to 21 of PB</i>
	<i>Since the issues involved in all the appeals are identical and documents submitted are also same, thus, Ms. Swati Luthra's (ITA No. 6480/Del/2017) case may be taken as lead case and the issue may be decided accordingly.</i>
<i>Form</i>	
<i>Contract Note</i>	
	<i>issued by DP Pg 24 to 27 of PB</i>
<i>Assessee's bank statement</i>	<i>Pg 28 to 29 of PB DP statement Pg 30 to 32 of PB 6</i>

*Radheyshyam Khandelwal & Ors*  
*ITA No.7,8,29,30,& 113/Ind/2019*

*Details of long term capital gain claimed as exempt under section 10(38) on account of sale of scrip of M/s Esteem Bio Organic Food Processing Ltd.*

<i>Particulars</i>	<i>Swati Luthra</i>	<i>Shruti Luthra Namrata</i>	<i>Sehgal Luthra</i>	<i>Asha Luthra</i>
<i>Date of Investment</i>	<i>20.02.2013</i>	<i>20.02.2013</i>	<i>20.02.2013</i>	<i>-</i>
<i>No. of Shares purchased</i>	<i>6000</i>	<i>6000</i>	<i>6000</i>	<i>-</i>
<i>Purchase price per share</i>	<i>Rs. 25 per share</i>	<i>Rs. 25 per share</i>	<i>Rs. 25 per share</i>	<i>-</i>
<i>Total purchase consideration</i>	<i>Rs. 1,50,000/-</i>	<i>Rs. 1,50,000/-</i>	<i>Rs. 1,50,000/-</i>	<i>-</i>
<i>Date of shares sold</i>	<i>25.02.2014 (2400 shares), 26.02.2014 (2400 shares) and 03.03.2014 (1200 shares)</i>	<i>14.03.2014 6000 shares)</i>	<i>(26.03.2014 4800 shares)</i>	<i>-</i>
<i>Sale Price per share</i>	<i>Rs. 376.22, Rs. 383.62 and Rs. 397.50 per share</i>	<i>Rs. 424.154 per share</i>	<i>Rs. 487.50 per share</i>	<i>-</i>
<i>Total sale consideration</i>	<i>Rs.23,00,616/-</i>	<i>Rs.25, 44, 924/</i>	<i>Rs 23,39,976/-</i>	<i>-</i>
<i>Long Term Capital Gain declared</i>	<i>Rs.21,50,616/-</i>	<i>Rs.23,94,924/-</i>	<i>Rs 22,19,976/-</i>	<i>-</i>
<i>7 DOCUMENTARY EVIDENCES SUBMITTED BEFORE AO AND CIT(A):</i>				
<i>IPO form</i>	<i>Pg 33 to 40 of PB</i>	<i>Since the issues involved in all the appeals are identical and documents submitted are also same, thus, Ms. Swati Luthra's (ITA No. 6480/Del/2017) case may be taken as lead case and the issue may be decided accordingly.</i>		
<i>Allotment Advice along with share</i>				

price Pg 41-42 of PB

Photocopy of

Cheque paid Pg 43 of PB

Contract Note Pg 45 to 47 of PB

Bank statement of assessee Pg 48 to 52 of PB

DP statement Pg 53 of PB

5. The Assessing officer in the impugned assessment order dated 14.12.2016 observed that the share prices of both the aforesaid scrips sky rocketed without having any financial strength. The parameters which are essential for increase in price of shares are not present. In absence of sound financial results it can be concluded that the increase is due to artificial increase. The trend observed of M/s Esteem Bio and M/s Trubotech again lead to a conclusion that prices of the shares were artificially hiked to create non-genuine LTCG to the beneficiaries. The Assessing Officer also observed that statements were also recorded by the investigation Wing in other cases of various brokers, operators and entry providers, who accepted that both M/s Esteem Bio and M/s Turbotech are Penny Stock companies and the scrips have been used to provide bogus LTCG to various 8 beneficiaries. Reliance was placed on various statements, like of Sh. Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar, which were all recorded before DDIT (Inv), Kolkata, wherein, the aforesaid persons had admitted that the scrip of M/s Esteem Bio and M/s Turbotech were used to provide bogus LTCG to various beneficiaries. Thereafter, the Assessing Officer after explaining the modus operandi of bogus LTCG held that the transactions of the assessee were sham transactions and the LTCG so declared of a sum of Rs. 41,85,762/- was nothing but unexplained Cash Credit under section 68 of the Act to be taxed @ 30% under section 115BBE of the Income Tax Act, 1961 in the hands of the assessee.

6. In the first appeal, the Ld. Commissioner of Income Tax (Appeals) confirmed the order of the AO by observing that the documents submitted as evidence to prove the genuineness of the transaction are make believe documents to cover up the true nature of the transactions, as it is revealed that the purchase and sale of shares are arranged transactions to create bogus profit in the garb of LTCG by well-organized network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or a commission.

7. Before us, Ld. Counsel for the assessee, Mr. Salil Aggarwal submitted that the assessee has filed before the AO and CIT(A) various documentary evidences in order to substantiate the genuineness of the LTCG so declared during the impugned 9 assessment year and no defect, error or any flaw in these evidences has been pointed by the AO as well the Commissioner of Income Tax (Appeals) and thus, he contended that the entire addition needs to be deleted on the ground of lack of investigation/enquiry and also due to failure to provide any fallacy in the documentary evidences so submitted by assessee and on the aforesaid proposition reliance was placed on the judgments of jurisdictional High Court in the case of CIT vs Fair Finvest Ltd. reported in 357 ITR 147 and PCIT vs Laxman Industrial Resources Ltd. reported in 397 ITR 106. The said documents so submitted by assessee are tabulated as under:

*For scrip of M/s Turbotech Engineering Ltd.*

Share Purchase Documents Pg 15 to 17 of PB

Share Certificate Pg 18 of PB

Share Transfer Form Pg 19 to 21 of PB

Contract Note issued by DP Pg 24 to 27 of PB

Assessee's bank statement Pg 28 to 29 of PB

DP statement Pg 30 to 32 of PB

*For scrip of M/s Esteem Bio Organic Food Processing Ltd.*

<i>IPO form</i>	<i>Pg 33 to 40 of PB</i>
<i>Allotment Advice along with share price</i>	<i>Pg 41 to 42 of PB</i>
<i>Photocopy of Cheque paid</i>	<i>Pg 43 of PB 10</i>
<i>Contract Note</i>	<i>Pg 45 to 47 of PB</i>
<i>Bank statement of assessee</i>	<i>Pg 48 to 52 of PB</i>
<i>DP statement</i>	<i>Pg 53 of PB</i>

8. The ld Counsel further submitted that the reasons given by AO as well as the Commissioner of Income Tax (Appeals) that increase in the price of M/s Esteem and M/s Turbotech was without any backing of the Financial Results is immaterial as the assessee had sold the shares on recognized stock exchange through a recognized stock broker and the prices of shares duly listed on stock exchange are not in control of assessee and nor any such allegation has surfaced on record that the assessee is involved in price manipulation of aforesaid scrips. He further submitted that reliance placed by AO on the interim order of SEBI, wherein, trading in securities of M/s Esteem Bio and M/s Turbotech were suspended temporarily is misconceived, as vide Adjudication Orders dated 06.09.2017 in the case of M/s Esteem Bio and 25.11.2014 in the case of M/s Turbotech, SEBI has found no irregularities in the trading of such scrips nor it has found its directors involved in any price rigging (said orders were placed in the paper book at pages 3 to 13 and 14 to 18 of PB – II) and thus, the reliance placed by AO on interim order of SEBI is uncalled for and unjustified. It was further argued that the AO has relied on various statements of alleged entry operators which have surfaced directly in the order of assessment and were never confronted by ld AO during the course of assessment 11 proceedings. Further, in the first appeal filed by assessee against the said order of assessment, the said issue of cross examination was raised before ld. CIT (A) which was never provided to the assessee. Thus, it was

*submitted that as the statements of alleged entry operators have never been confronted to the assessee and they have also not been produced for cross examination, even though specific request for the same was made by assessee before Id CIT (A), the assessment so made and addition so sustained is vitiated in law and addition so made is liable to be deleted as such. Reliance was placed on following judgments in support of the aforesaid proposition:*

*(i) KishinchandChellaram vs. CIT. [1980] 125 ITR 713 (SC)*

*(ii) CIT vs Ashwani Gupta. 322 ITR 396 (Del)*

*(iii) Andaman Timber Industries vs CCE (SC) reported in 127 DTR 241.*

*9. Ld. Counsel further relied on various case laws on the proposition that once the shares are sold through stock exchange and sufficient documentary evidences have been produced in order to support the genuineness of the LTCG claimed as exempt under section 10(38), hence, addition cannot be made in the hands of assessee without rebutting the documentary evidences and without conducting investigation to discard the said documents. The case laws so relied by assessee are tabulated below:*

*Particulars*

*Copy of judgment of Hon'ble Punjab and Haryana High Court in the case of PCIT vs Prem Pal Gandhi 12 in ITA No. 95/2017 dated 18.01.2018.*

*Copy of judgment of Hon'ble Punjab and Haryana High Court in the case of PCIT vs Hitesh Gandhi in ITA No. 18/2017 dated 16.02.2017.*

*Copy of judgment of Hon'ble Bombay High Court in the case of CIT v. Shyam R. Pawar reported in 229 Taxman 256 dated 10.12.2014.*

*Copy of judgment of Hon'ble Bombay High Court in the case of CIT CIT v. Smt. Jamnadevi Agrawal reported in 328 ITR 656 dated 23.09.2010.*

*Copy of judgment of Hon'ble Gujarat High Court in the case of CIT vs. Maheshchandra G. Vakil reported in 220 Taxman 166 (Magz) dated 25.09.2012.*

*Copy of judgment of Hon'ble Rajasthan High Court in the case of CIT vs. Smt Sumitra Devi reported in 229 Taxman 67 dated 24.02.2014.*

*Copy of judgment of Hon'ble Allahabad High Court in the case of CIT vs. Anirudh Narayan Agrawal reported in 219 Taxman 126 dated 16.01.2013.*

*Copy of order of Hon'ble ITAT Raipur in the case of DCIT vs Rakesh Saraogi & Sons (HUF) in ITA No. 93 to 99/RPR/2014 dated 16.04.2018.*

*Copy of order of Hon'ble ITAT Mumbai in the case of ITO vs M/s Arvind Kumar Jain (HUF) in ITA No. 4862/Mum/2014 dated 18.09.2017.*

*Copy of order of Hon'ble ITAT Jaipur in the case of Sh. Pramod Jain vs ITO in ITA No. 368/Jp/2017 dated 31.01.2018. Copy of order of Hon'ble ITAT Delhi in the case of Shobhit Goel (HUF) in ITA No. 2021/Del/2018 dated 13 25.09.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Smt. Sunita Khemka vs ACIT in ITA No. 389/Del/2018 dated 02.08.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Chander Prakash vs ITO in ITA No. 6880/Del/2017 dated 12.03.2018.*

*Copy of order of Hon'ble ITAT Kolkata in the case of Prakash Chand Bhutoria vs ITO in ITA No. 2394/Kol/2017 dated 27.06.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Mukta Gupta vs ITO in ITA No. 2766/Del/2018 dated 26.11.2018.*

*Copy of order of Hon'ble ITAT Kolkata in the case of Mahavir Jhanwar vs ITO in ITA No. 2474/Kol/2018 dated 01.02.2019.*

*Copy of order of Hon'ble ITAT Delhi in the case of Sh. Rajev Agarwal & sons vs ITO in ITA No. 872/Del/2018 dated 21.01.2019.*

*Copy of order of Hon'ble ITAT Delhi in the case of Sanjeev Jain vs ITO in ITA No. 3381/Del/2017 dated 15.01.2019.*

*Copy of order of Hon'ble ITAT Delhi in the case of Smt. Jyoti Gupta vs ITO in ITA No. 3510/Del/2018 dated 06.11.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Vidhi Malhotra vs ITO in ITA No. 93/Del/2018 dated 20.12.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Smt. Simi Verma vs ITO in ITA No. 3387/Del/2018 dated 06.11.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Smt. Shikha Dhawan vs ITO in ITA No. 3035/Del/2018 dated 27.06.2018.*

*Copy of order of Hon'ble ITAT Delhi in the case of Sh. Amitabh Bansal vs ITO in ITA No. 7802/Del/2018 dated 11.02.2019.*

*Copy of order of Hon'ble ITAT Kolkata in the case of Ms. Swati Mall vs ITO in ITA No. 2423/ Kol/2017 dated 07.12.2018.*

10. *On the other hand, the DR relied on the orders of the lower authorities and filed a written note dated 14.05.2019, which contained list of case laws to be relied by Revenue, wherein, reliance was placed on judgment of Hon'ble High Court of Delhi in the case of Udit Kalra vs ITO in ITA No. 220/2019.*

11. *In rejoinder, the ld Counsel submitted his arguments, which can be summarized as below:*

*(i) That the ld DR has failed to rebut the case laws so cited by assessee – appellant and also, the SEBI orders, wherein, the companies M/s Esteem Bio and M/s Turbotech have been absolved and no wrong doings have been found in the working of said companies.*

*(ii) That further, the reliance placed by ld DR on the order of Udit Kalra vs ITO (Delhi High Court) in ITA No. 220/2019 is again misplaced, as first of all no question of law was formulated by Hon'ble High Court of Delhi in the said case and thus, the same is*

*only dismissal in limine and on this proposition reliance is placed on the judgment of Hon'ble 15 Supreme Court in the case of CIT vs Rashtradoot (HUF) reported in 412 ITR 17.*

*(iii) That further, even on facts, the said order in the case of Udit Kalra vs ITO is distinguishable. As, the interim order of SEBI in the case of both the companies have been cooled down by subsequent orders of SEBI. 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. Rather the case laws so relied by assessee are directly applicable to the facts of assessee which have not been rebutted by ld DR.*

*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 16 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 17 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 18 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 Kunhayyammed vs State of Kerala reported in 245 ITR 360 and also in CIT vs. Rashtradoot (HUF) reported in 412 ITR . 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 assesseees 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 ld. 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 22 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.*

20. We have further considered the judgement passed in the matter of Udit Kalra (Supra) as relied upon by the Ld. DR before us in support of the case made out by the Revenue. It appears that the challenges made in the appeal before the Hon'ble Delhi High Court

in that case stood dismissed in limine; no question of law was found to be formulated. Apart from that the said judgment is distinguishable. In that particular case the scrips of the company were delisted on stock exchange, whereas, in the instant case suspension order in trading in securities of M/s Turbo Tech Engineering Ltd has ultimately been lifted by the adjudication order dated 25.11.2014 wherein SEBI has found no irregularities in the trading of such scrips; neither it has found its Directors involved in any price rigging. Such facts has categorically been mentioned in the judgement of *Swati Luthra (supra)*. Therefore, both factually and materially it is distinguishable from the instant case before us. It is relevant to mention that the orders passed by the SEBI are only of the year 2015 and not during that material point of time i.e. the period between 22.11.2011 and 23.05.2013 when the appellant was holding the shares. Moreso, the subsequent orders passed by the SEBI absolving some companies including M/s Turbo Tech Engineering Pvt. Ltd. whose scribes were under suspicion in the absence of any finding of rigging of price diluted the issue.

21. The objection relating to the shares being dematerialised after

purchase is also having no consequence. From the series of documents it appears that the prescribed procedure had been followed by the assessee from the stage of purchase till the shares are dematted or until sale of the same. Merely because the shares were dematted at a later stage no adverse inference could be drawn against the assessee. In fact there is hardly any chance to doubt or suspect that the transactions in purchase or sale are not genuine. These identical facts were also available in the case of Swati Luthra (Supra). In the instant case the entire transaction was carried out through the Demat account and banking channel upon which STT has been paid by the assessee before us. In order to hold the transaction is bogus and / or ingenuine, the Assessing Officer is required to bring in cogent/clinching evidence to prove the same. It is pertinent to mention that no observation is forthcoming from the orders passed by the revenue pointing out any material defect in the procedure followed by the assessee in such purchase and sale of the shares in question. Neither any cogent/corroborative evidence is brought on record by the revenue to hold otherwise and therefore, there is no doubt that the Assessing Officer has merely

proceeded to arrive at his conclusion that the transaction being bogus based only on mere surmise and conjecture.

22. Thus, taking into consideration the entire aspect of the matter in the absence of any independent enquiry made by the Ld. A.O as already observed by us respectfully relying upon the judgment passed by Hon'ble Delhi Bench in the case of *Swati Luthra Vs ITO, Ward 51(5), Delhi (Supra)* on the identical facts keeping in view of the orders passed by SEBI, we do not hesitate to observe that holding the said M/s Turbo Tech Engineering Ltd as a penny stock company by the authorities below without any corroborative evidence is uncalled for and unjustified. Such action is erroneous arbitrary whimsical and suffers from the principle of surmise and conjecture. Thus, the disallowance of the claim made by the assessee towards the Long Term Capital Gain to the tune of Rs.23,25,000/- in our humble opinion is bad in law and liable to be quashed. We order accordingly. Consequentially the addition of 3% of brokerage to the tune of Rs.69,750/-is also of no basis. The said addition made by the Learned AO is only on the basis of presumption. Thus, the said addition on the alleged payment of

commission @3% is also without any merit and thus deleted.  
Assessee's appeal is, therefore, allowed.

**ITA No. 08/Ind/19, 29/Ind/19, 30/Ind/19 & 113/Ind/19 (A.Y. 2014-15):-**

23. The identical issue involved in the case has already been dealt with by us in ITA No.07/Ind/2019 for A.Y. 2014-15 and in the absence of any changed circumstances the same shall apply *mutatis mutandis*.

24. In the result, all the captioned appeals filed by different assessees are allowed.

The order pronounced in the open Court on 25 .06.2021

Sd/-

Sd/-

(MANISH BORAD)

(MADHUMITA ROY)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

दिनांक /Dated : 25<sup>th</sup> June, 2021

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)  
concerned/ DR, ITAT, Indore/Guard file.

By Order,

Asstt.Registrar, I.T.A.T., Indore