

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE HON'BLE RAJPAL YADAV, VICE PRESIDENT
AND
HON'BLE MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.39/Ind/2019
Assessment Year 2014-15

Smt. Manorama Devi Sharma : Appellant
DF23, Sanatan House,
Vijay Nagar S. No.74C,
Indore
PAN : ASPPS5538J

V/s
ITO-3(1),
Indore : Respondent

ITA No.489/Ind/2019
Assessment Year 2014-15

Shri Pratap Bajaj : Appellant
29, Maharani Road,
Indore
PAN : ABRPB4864D

V/s
ITO-4(1),
Indore : Respondent

Appellant by	Shri Girish Agrawal, Shri Vijay Bansal & Miss Nisha Lahoti, ARs
Revenue by	Shri Harshit Bari, Sr.DR
Date of Hearing	07.07.2021
Date of Pronouncement	20.07.2021

ORDER

PER MANISH BORAD, A.M

The above captioned appeals filed at the instance of the assessee are directed against the orders of Ld. Commissioner of Income Tax(Appeals)-I (in short 'Ld. CIT], Indore dated 03.12.2018 & 25.01.2019 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 22.12.2016, framed by ACIT-3(1) & ACIT-4(1), Indore.

Following grounds of appeal in ITANo.39/Ind/2019(Manorama Devi Sharma):-

- "1. That the order passed by Ld. CIT(A) is arbitrary, bad in law and on facts.*
- 2. That the Ld. CIT(A) has erred in confirming the addition of Rs.28,24,342/- under section 68, whereas section 68 is not applicable on the transaction entered into by the assessee, which is quite unjust, illegal and against the facts of the case.*
- 3. That the ld. CIT(A) has erred in considering the script from which the assessee has earned Long Term Capital Gain as "Penny Stock", a term nowhere define under the Income Tax Act as any other law for the time being in force, which is quite unjust, illegal and against the facts of the case.*

4. That the ld. CIT(A) has erred in confirming the disallowance of claim of assessee of exempted LTCG based on information/statement gathered by investigation wing of the department, without any opportunity to cross examine such persons and without providing such documents for assessee's comments, which is quite unjust, illegal and against the facts of the case.

5. That the ld. CIT(A) has erred in confirming the disallowing of claim of exempted income based on wrong analysis of the financial and prices of the shares, which is quite unjust illegal and against the facts of the case.

6. That the ld. CIT(A) has erred in in mentioning the fact that Ld. AO has tried to conduct inquires during assessment proceedings, in confirming disallowance, whereas no such inquiries have been carried out, which is quite unjust illegal and against the facts of the case.

7. That the Ld. CIT(A) has erred in mentioning the fact without any evidence that the assessee has collusion with brokers to earn LTCG, which is quite unjust illegal and against the facts of the case.

8. That the Ld. CIT(A) has erred in concluding that the purchases have been made in cash which is quite unjust illegal and against the facts of the case.

9. The Ld. CIT(A) has erred in mentioning that the company, in shares of which the assessee has dealt, has not business or turnover, which is quite unjust illegal and against the facts of the case.

10. The Ld. CIT(A) has erred in ignoring the fact that the 2 companies were merged by the order of the Hon'ble Bombay High Court by considering the company as bogus, which is quite unjust illegal and against the facts of the case.

11. The ld. CIT(A) has erred by ignoring the various judgments quoted by the assessee, which is quite unjust illegal and against the facts of the case.

12. The Ld. CIT(A) has erred in confirming the addition of Rs.89,230/- under section 69C, without any evidence against the assessee which is quite unjust illegal and against the facts of the case.

13. Appellant craves to leave, add, amend, alter or modify of any grounds before final date of hearing.

Following grounds of appeal in ITANo.489/Ind/2019 (Shri Pratap Bajaj):-

1. That the Ld. CIT(A) has erred in confirming the addition made by Ld. AO by treating Long Term Capital Gain as bogus only on the basis of presumptions and doubts which quite just illegal and against the facts of the case.

2. That the Ld. CIT(A) has erred in confirming the addition made by Ld. AO by relying on the reports of some department authorities, which are not even mentioning the name of the appellant and not even confronted with the appellant which is quite unjust illegal against the facts of the case.

3. That the Ld. CIT(A) has erred in confirming the addition made by Ld. AO without appreciating the relevant documents which were produced before the ld. AO in support of genuine Long Term Capital Gain.

4. That the Ld. CIT(A) has erred in confirming the addition made by Ld. AO considering the same as Sham Transaction without any evidence against the appellant, which quite just illegal and against the facts of the case.

5. That the Ld. CIT(A) has erred in confirming the addition made by Ld. AO even when the transactions are done through proper banking channel and recognized stock exchange which quite just illegal and against the facts of the case.

6. Appellant craves to leave, add, amend, alter or modify of any ground before final date of hearing.

2. At the outset, Ld. Counsel for the assessee submitted that the common issue raised in the instant two appeals is against the finding of Ld. CIT(A) confirming the action of Ld. Assessing Officer denying the benefit of exemption u/s 10(38) of the Act for the Long Term Capital Gain earned by the assessee from sale of equity shares of listed company. Ld. Counsel for the assessee further

submitted that in the case of Pratap Bajaj, Long Term Capital Gain of Rs. 28,92,830/- and in the case of Manorama Devi Sharma of Rs. 28,24,342/- arose from sale of equity shares of Sunrise Asian Limited (in short 'SAL'). He also submitted that originally the assessee(s) purchased the shares of M/s.Conart Traders Ltd. but subsequently, M/s.Conart Traders Ltd. was merged with Sunrise Asian Limited (SAL), pursuant to order of Hon'ble Bombay High Court. Both the assessee(s) held the shares for more than 12 months and sold them during the year under appeal through recognized stock exchange and claimed the exemption u/s 10(38) of the Act.

3. Ld. Counsel for the assessee further submitted that Ld. Assessing Officer denied the benefit on the basis of his observation that the sudden spike in the share price of SAL is not in consonance with the financial strength and growth of the company. Ld. AO further referring to some investigation carried out at Kolkata in the case of some brokers and other related persons alleged SAL as a penny stock company and observed that the assessee managed to take accommodation entry in the form of LTCG in order to claim

the benefit of exemption u/s 10(38) of the Act and avoid tax liability. Ld. Assessing Officer thus denied the exemption and made the addition of the alleged amount to the income of the respective assessee(s).

4. Ld. Counsel for the assessee further submitted that similar set of facts and the issue of genuineness of claim of LTCG u/s 10(38) of the Act came up before Hon'ble Tribunal in case of *Shivnarayan Sharma & Ors vide ITANo.889/Ind/2018 & others* and Hon'ble Tribunal vide order dated 28.06.2021 decided in favour of the assessee placing reliance on the settled judicial precedence. The ratio laid down in this decision of Hon'ble Tribunal is squarely applicable on issues raised in the instant appeals. It was also submitted that one of the assessee namely Manorama Devi Sharma is wife of Shivnarayan Sharma who was an appellant before the Hon'ble Tribunal raising similar issue.

5. Per contra Ld. Sr. Departmental Representative (DR) though supported the finding of both the lower authorities but fairly accepted that the facts and issues raised in the instant appeals are the same as were dealt by the Hon'ble Tribunal in the case of

Shivnarayan Sharma & ors (supra). However, Ld. Sr. DR placed reliance on the judgment of Hon'ble High Court of Delhi in the case of *Suman Poddar vs. ITO, vide ITANo.841/2019* dated 17.09.2019.

7. We have heard the rival contentions and perused the records placed before us and carefully gone through the submissions made by both sides. Common issue challenged in the instant two appeals is the denial of claim of exemption u/s 10(38) of the Act of the Long Term Capital Gain from sale of equity share of listed company namely M/s. Sunrise Asian Limited.

8. Ld. Counsel for the assessee has submitted that the issue raised in the instant appeals is covered by the decision of this Tribunal in the case of *Shivnarayan Sharma & Ors (supra)* wherein also LTCG from sale of the equity shares of same company namely M/s. SAL was under challenge. The equity shares were originally purchased in the name of M/s. Conart Traders Ltd. but later this company was merged with Sunrise Asian Limited. For better understanding we will like to go through the brief facts observed by this Tribunal in the case of *Shivnarayan Sharma & Ors (supra)*, which reads as follows:

7. *Brief facts in the case of Shri Shivnarayan Sharma are that the assessee is an individual engaged in the business of bus body building. E-return of income for Assessment Year 2014-15 filed on 29.9.2014 declaring income at Rs.15,80,150/-. Case was selected for complete scrutiny assessment through CASS followed by issuance of notice u/s 143(2) and 142(1) of the Act. While examining the records and details filed by the assessee, Ld. A.O observed that the assessee has claimed exemption u/s 10(38) of the Act at Rs.28,47,833/- on sale of equity shares in the name of the company Sunrise Asian Ltd. 6,000 equity shares of M/s. Conart Traders Ltd were purchased on 22.10.2011 at Rs.1,50,000/- from P. Saji Textiles Limited. Pursuant to the order of Hon'ble Bombay High Court M/s. Conart Traders Limited was merged with M/s Sunrise Asian Limited. Thereafter 6000 equity shares of M/s SAL were received in lieu of the shares of M/s Conart Traders Limited. Subsequently assessee sold the shares of M/s SAL on the recognised stock exchange through a registered broker and against the sale consideration received, the cost of purchase was deducted giving rise of LTCG at Rs.28,47,833/-. However, Ld. A.O was not satisfied since in his view the extent of growth and financials of the company were not sufficient to justify the abnormal increase in the share price within a short span of time, which were very low in December, 2012 and then increased continuously up to April and May, 2015 and felled thereafter. Ld. A.O also gave reference to various searches conducted u/s 132 and survey u/s 133A of the Act carried out by the department on various brokers of stock exchange and other companies where the investigation team came across various bogus transactions of providing accommodation entries to give benefit to various persons to convert their unaccounted cash*

into accounted money in the form of bogus LTCG. Ld. A.O also took statement of the assessee and came to the conclusion that the assessee had no knowledge about the company. He concluded the assessment observing that M/s SAL is a penny stock company and the alleged transaction of earning LTCG is bogus and sham and the alleged LTCG is liable to be added as unaccounted cash credit u/s 68 of the Act and accordingly he added Rs.28,47,833/- and denied the benefit of exemption u/s 10(38) of the Act at Rs.28,47,833/- and also made addition for estimated brokerage expenses of Rs.89,935/- for arranging bogus LTCG. Income assessed at Rs.45,17,920/-

8. *Aggrieved assessee preferred appeal before Ld. CIT(A) against the addition made u/s 68 of the Act at Rs.28,47,833/-and addition of brokerage expenses at Rs.89,935/-. Again complete details of purchase and sales were filed along with the Demat account and bank statement. However, Ld. CIT(A) was not satisfied and he confirmed the view taken by Ld. A.O observing that the assessee is indulged in arranging bogus LTCG, the appellant had made investment through the derecognised broker and have earned excessive return within a short span of time which is extremely unfair. Placing reliance on the decisions Ld. CIT(A) held that the transactions of sale of equity shares giving rise to the alleged LTCG at Rs.28,47,833/- are sham which could not stand the test of human probability.*

9. On-going through the facts of the instant two appeals in light of the above stated facts in case of *Shivnarayan Sharma (supra)* we find that the facts are verbatim similar as regard the company,

period of holding, observation of the Ld. Assessing Officer and even the finding of ld. CIT(A). We further observe that this tribunal in the case of *Shivnarayan Sharma & Ors (supra)*, while dealing with the issue of genuineness of Long Term Capital Gain from sale of shares of M/s. SAL decided the issue by placing reliance on the decision of Coordinate Bench Mumbai in the case of *Dipesh Ramesh Vardhan vs. DCIT(supra)* order dated 11.08.2020, decision of Coordinate Bench of Jaipur in the case of *Ashok Agrawal vs. ACIT in ITANo.124/JP/2020* dated 18.11.2020 and also dealt with the decision of Hon'ble High Court of Delhi in the case of *Suman Poddar(Supra)* relied by the Ld. Sr. DR by relying on the latest judgment of Hon'ble High Court Delhi in the case of *Pr. CIT vs. Krishna Devi & Others ITANo.125/2020* dated 15.01.2021 wherein Hon'ble High Court of Delhi has considered the judgment of *Suman Poddar (supra)*.

10. The relevant finding of this Tribunal in the case of *Shivnarayan Sharma & Ors (supra)* reads as follows:

19. Subsequently Co-ordinate Bench of Jaipur in the case of *Ashok Agrawal V/s ACIT in ITA No.124/JP/2020 dated 18.11.2020* has followed the decision of Hon'ble Mumbai Tribunal in the case of

Dipesh Ramesh Vardhan (supra) while dealing with the same issue of Long Term Capital Gain from sale of equity shares of M/s Sunrise Asian Limited claimed to be exempt u/s 10(38) of the Act and decided in favour of the assessee observing as follows:-

“23. In the aforesaid decision, it has been held that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. In the case in hand, the Id. AO has referred to SEBI enquiry against M/s Sunrise Asian Ltd. However, we note that the said enquiry was regarding failure to comply with certain disclosure requirements and therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain and has no bearing in judging the genuineness of the transaction undertaken by the assessee or for that matter, the price and realization on sale of shares so undertaken by the assessee through the stock exchange. Further, it has been held in the aforesaid case that the findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc and for making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. In the instant case, as we have discussed earlier, there is no finding which proves assessee's connection, involvement or collusion with so called accommodation entry providers. Further in the aforesaid case, the issue as to whether the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not has been discussed at length. And referring to legal proposition laid down by the Hon'ble Supreme Court that the burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidence held that the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected. We are in complete agreement with the said view and in the instant case, we find that evidence produced by the assessee in support of his claim of purchase and

sale of shares on the stock exchange have not been refuted by any adverse findings or material which could demonstrate involvement of the assessee or collusion with so called accommodation entry providers to obtain bogus LTCG as so alleged by the authorities below.

24. We also find that while analyzing sale of shares of similar scrip of M/s Sunrise Asian Ltd and claim of exemption of long term capital gains u/s 10(38), the Mumbai Benches of the Tribunal in case of Anraj Hiralal Shah (HUF) vs ITO (supra) has upheld the claim of the assessee's claim of exemption under section 10(38) of the Act and the relevant findings of the Coordinate Bench contained at Para 8 read as under:-

"8. The assessee has earned speculation profit in the immediately preceding year through M/s Eden Financial Services also and the said profit has been used to purchase the shares of M/s Sunrise Asian Ltd. The assessee has offered the speculation profit for income tax purposes in the immediately preceding year and It has been accepted. Further the assessee has shown the purchase of impugned shares as investment in the Balance Sheet. Hence the purchase of shares has been accepted. Further the shares have been received in the D-mat account of the assessee and they have been sold through the Dmat account only. Hence the delivery of shares a/so stand proved. The AO has not brought any material on record to show that the assessee was part of fraudulent price rigging. Accordingly, in the absence of any evidence to implicate the assessee or to prove that the transactions are bogus I am of the view that the capital gains declared by the assessee cannot be doubted with. In that View of the matter the addition made towards expenses is not also sustainable.

25. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions of the Hon'ble jurisdictional High Court and of that of the Coordinate Benches in cases referred supra, we are of the considered view that the assessee has discharged the necessary onus cast on him in terms of claim of exemption of long term capital gains u/s 10(38) of the Act by establishing the genuineness of transaction of purchase and sale of shares and satisfying the requisite conditions specified therein and the gains so arising on sale of shares therefore has been rightly claimed as exempt u/s 10(38) of the Act. Accordingly, in the facts and circumstances of the case, we set-aside the order of the Id. CIT(Appeals) and the claim of the assessee u/s 10(38) is allowed. The matter is thus decided in favour of the assessee and against the Revenue. In the result, the ground of appeal so taken by the assessee is allowed.

26. In the result, the appeal of the assessee is allowed."

20. We have also observed that the above referred decision of Co-ordinate Bench of Mumbai and Jaipur has dealt in the issue of relating Long Term Capital Gain earned from sale of equity shares of M/s SAL holding it to be a genuine gain and in this context we also note that in the case of Shri Shivnarayahn Sharma and Prayank Jain the alleged company is M/s Conart Traders Ltd subsequently merged with M/s SAL under the order of Hon'ble Mumbai High Court and therefore the above stated decision will be squarely applicable in the case of these two assessee(s).

21. Further we observe that in the case of Govind Harinarayan Agrawal HUF, Manish Govind Agrawal HUF alleged issue of gain from share is from sale of equity shafes of Turbotech. Similar type of issue of the alleged bogus of Long Term Capital Gain from sale of shares of Turbotech came up before the Co-ordinate Bench held in the case of Swati Luthra wherein the Co-ordinate Bench has decided in favour of the assessee allowing both the grounds raised on merits as well as legal 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."

22. As regards the judgment of Hon'ble Delhi High Court in the case of *Suman Poddar V/s ITO (supra)* delivered on 17.09.2019 relied by Ld. Departmental Representative, we find that Hon'ble High Court of Delhi in its recent judgment dated 15.1.2021 in the case of *PCIT V/s Krishna Devi & Others ITA No.125/2020* dealing with the similar issue of claim of exemption u/s 10(38) of the Act for Long Term Capital Gain from sale of equity shares has duly considered the judgment of Hon'ble Delhi High Court in the case of *Suman Poddar V/s ITO (supra)* and has decided against the revenue confirming the order of the Tribunal stating it to be the last fact finding authority who on the basis of 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. Relevant extract of the judgment of Hon'ble Delhi High Court in the case of *PCIT V/s Krishna Devi & Others* is reproduced below:-
"10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

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 sensx; 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.

23. We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have not found to be incorrect. The conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the

equity shares held in Demat account and transactions performed on a recognised stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of *Andaman Timber Industries vs. CCE 281 CTR 241 (SC)* that “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”.

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Co-ordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018, 474/Ind/2019, 206/Ind/2019, 60/Ind/2019, 61/Ind/2019 and 987/Ind/2019 are allowed.

11. From perusal of the above finding we find that the decision of this Tribunal in the case of *Shivnarayan Sharma & others (Supra)* is squarely applicable on the common issues raised in the instant appeals and thus taking consistent view and respectfully following decisions and judgments referred hereinabove, we set aside the finding of Ld. CIT(A) and direct the Ld. Assessing Officer to allow

claim of the exemption of u/s 10(38) of the Act for Long Term Capital Gain earned from sale of listed equity shares of Sunrise Asian Ltd. which have been effected through recognized stock exchange, after making payment of Security Transaction Tax (STT) and holding the equity shares for more than 12 months. Thus, the addition of Rs. 28,24,342/- in the case of Smt. Manorama Devi Sharma and Rs.28,92,830/- in the case of Shri Pratap Bajaj stands deleted. All the effective grounds of appeal raised by both the assessee(s) are allowed.

12. In the result, appeals of the assessee(s) namely Smt. Manorama Devi Sharma & Shri Prakash Bajaj vide ITANos.39/Ind/2019, & 489/Ind/2019 are allowed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 20.07.2021.

Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 20.07. 2021
Patel/PS

Smt. Manorama Devi Sharma & Shri Prakash Bajaj

ITA Nos. 39 & 489/Ind/2019,

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

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