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.242/Ind/2019
Assessment Year 2014-15

Shri Vrindavan Tayal
C/o S V Agrawal & Asociates : Appellant
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN AASPT7552L
V/s
The ITO
Sendhwa (M.P.) : Respondent

ITA No.245/Ind/2019
Assessment Year 2014-15

Shri Govardhan Tayal : Appellant
C/o S V Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN AASPT7551K
V/s
The ITO
Sendhwa (M.P.) : Respondent

ITA No.246/Ind/2019
Assessment Year 2014-15

Shri Gopal Tayal : Appellant
C/o S. V. Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN AASPT7550J
V/s
The ITO
Sendhwa (M.P.) : Respondent

ITA No.247/Ind/2019
Assessment Year 2014-15

Shri Gaurav Tayal : Appellant
C/o S. V. Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN AEIPT3181R
V/s
The ITO
Sendhwa (M.P.) : Respondent

Assessee by	S/Shri S. N. Agrawal & Pankaj Mogra, CAs
Revenue by	Shri Harshit Bari, Sr.DR
Date of Hearing	22.06.2021
Date of Pronouncement	27.07.2021

O R D E R

PER MADHUMITA ROY, JM:-

The bunch of appeals filed by the assessee(s) are directed against the 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 sale of shares treating it as bogus. 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. However, the ITA No. 242/Ind/2019 is taken as the lead case.

2. The brief facts leading to the case is this that the assessee company filed its return of income on 09.02.2015 showing total income of Rs. 07,73,479/- which was proceeded under Section 143(1) of the Act. As per the return, the assessee derives income from Business (Ginning pressing, Khandsari udyog, and Sugar Mill), trading of shares and bank interest.

3. The same was selected for scrutiny through CASS and notice under Section 143(2) was issued and duly served upon the assessee. Upon verification of the computation of income and return of income filed by the assessee, it was found that the assessee claimed exempt long-term capital gain on purchase/sale of shares at Rs. 26,72,311/-. Such claim was, however, rejected by the Ld. AO treating it as bogus

which was, in turn, confirmed by the First Appellate Authority. Hence, the instant appeal before us.

4. The facts culled out from the records is this that the assessee purchased 350 Equity shares of Lifeline Drugs & Pharma Limited (in short "LDPL") through broker namely Shri Vishal Vijay Shah of Mumbai on 23.03.2012 at a consideration of Rs. 15,800/- in the previous year relevant to the A.Y. 2012-13. The purchase of shares was made by the appellant through account payee cheques and then transferred in the name of appellant with the respective company in the A.Y. 2013-14. The company then issued bonus shares to the appellant in the ratio 1:4, i.e. 1400 shares i.e. 350 equity share held earlier totaling to 1050 equity shares.

Out of the said 1050 equity shares as held by the appellant 350 equity shares were dematerialized on 05.10.2012 and remaining 1400 shares were dematerialized on 22.10.2012. Subsequently, share of face value of Rs. 10/- each was splitted into share of face value of Rs. 1/- each on 19.11.2013 total into 17500 share in place of 1750 shares held earlier. Finally these shares were sold by the appellant through broker Anand Rathi Ltd. (BSE Broker) during the period between 25.02.2014 to 11.03.2014. Through these transactions the appellant claimed to have earned long-term capital gain of Rs. 26,72,311/- which was claimed exempt under Section 10(38) of the Act.

5. Before the Revenue the assessee submitted the following documents in order to justify the genuineness of long-term capital

gain as claimed exempt under Section 10(38) of the Act:-

S. No.	*Particulars*	*Page No.*
1.	*Copy of purchase note dt. 23.03.2012 issued by Vishal Vijay Shah regarding purchase of 200 shares of M/s. Lifeline Drugs & Pharma Limited for Rs. 9,048/-*	*68*
2.	*Copy of ledger account of the appellant in the books of Vishal Vijay Shah*	*69*
3.	*Copy of bank statement of the appellant with State Bank of India wherein the amount paid towards purchase of shares is duly reflected*	*70*
4	*Physical copy of share certificate of M/s Lifeline Drugs & Pharma Limited duly transferred i the name of the appellant as on 15.06.2012*	*71-72*
5	*Copy of letter dt. 21.06.2012 as issued by M/s. Purva Sharegistry (India) Pvt. Ltd. in respect of transfer of shares in the name of the appellant*	*72*
6	*Copy of share certificate as issued M/s Ligeline Drugs & Pharma Limited regarding issue of 1400 bonus shares in the name of the appellant*	*73*
7	*Copy of trial balance of the appellant as on 31.03.2012 and 31.03.2013 duly reflecting the investment in shares of M/s Lifeline Drugs & Pharma Limited so as to prove the holding of these shares in the books of accounts of the appellant*	*77-80*
8	*Copy of D-Mat account of the appellant with M/s Anand Rathi Share and Stock Brokers Ltd. for the period from19.11.2018 in respect of shares of M/s Lifeline Drugs & Pharma Limited*	*75-76*
9	*Copy of sale note for sale of 15,000 shares of M/s Lifeline Drugs & Pharma Limited*	*81-83*
10	*Copy of bank statement of the appellant wherein the amount realized from sale of shares is duly reflected*	*70*

6. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee relied upon the written notes filed before us. The Ld. AR further submitted that the company namely M/s Lifeline Drugs & Pharma Limited now known as Arihant Multi Commercial Ltd. is not a paper company neither a shell company. In support of his contention he has filed the statement of Profit and Loss Account for the relevant Assessment Year and the balance sheet of the said company before us.

7. 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.

8. Further that 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.

9. Apart from that it was submitted by the Ld. Counsel for the assessee that the assessee duly discharged its onus by filing all the necessary documents in support of the genuineness of purchase and sale of these equity shares of M/s Lifeline Drugs & Pharma Ltd. Though the Ld. AO relied upon an investigation report which was admittedly carried out in case of another person and the assessee hereinbefore us is no way connected with such Investigation Wing of Kolkata neither any opportunity of cross-examination has been rendered to the assessee. He has relied upon the judgment of Hon'ble Apex Court in the case of Andaman Timber Industries vs. CCE reported in, 281 CTR 241 (SC) in this regard. No documentary proof has been provided by the Revenue to show that cash was given by the appellant for obtaining cheques on account of sale of shares and therefore, in the absence of any evidence contrary to the exempt long-term capital gain as claimed under Section 10(38) by the assessee

cannot be termed as bogus. In support of his argument he relied upon a synopsis rendering into 49 pages along with following judgments:-

S.No.	*Reference of the case Law*	*Citation*
1	*Smt. Simi Verma vs. ITO*	*ITA No. 3387/Del/2018*
2.	*Smt. Sunita Khemka vs. ACIT*	*(2018) 53 CCH 0415 Del. Trib.*
3.	*Shikha Dhawan vs. ITO*	*ITA No. 3035/Del/2018*
4.	*Swati Luthra*	*ITA No. 6480/Del/2017*
5.	*Lalit Kumar Aggarwal*	*ITA No. 3509/Del/2018*

It was further submitted by the Ld. AR that the issue is squarely covered by the judgment passed by the Co-ordinate Bench in the case of Radheyshyam Khandelwal vs. ACIT & Others in ITA No. 07&08/Ind/2019, 29&30/Ind/2019 & 113/Ind/2019 where the claim of long-term capital gain under Section 10(38) of the Act arising out of the sale of shares of M/s. Turbotech Engineering Ltd. in the identical situation were considered and allowed in favour of the assessee. He, therefore, prayed for deletion of addition made by the Revenue.

10. The Ld. AR relied upon the order passed by the Hon'ble Delhi Bench of ITAT in the matter of Anoop Jain vs. ACIT, reported in 181 ITD 218 wherein the issue of long-term capital gain on sale of shares of the same company namely M/s Lifeline Drugs & Pharma Ltd. has been decided in favour of the assessee. He ultimately prayed for deletion of addition made by the Revenue since the revenue has failed

to launch any contrary evidence to the genuineness of the transaction made by the appellant.

11. On the other hand, the Ld. DR vehemently argued in support of the order passed by the authorities below. He is further relied upon the judgment passed by the Hon'ble Delhi High Court in the following matters:-

1. Udit Kalra vs. ITO ward-50(1) in ITA No. 220/2019 dated 08.03.2019 (Delhi HC)
2. Udit Kalra vs. ITO ITA No. 6717/Del/2017 dated 08.01.2019
3. Suman Poddar vs. ITO [2019] 112 taxmann.com 330 (SC)

12. We have heard the rival submission made by the respective parties and 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 by Revenue to show that the persons investigated, including entry operators or stock brokers, have named the appellant was in collusion with them. No finding specifically against the appellant has been made in the Investigation team report as appearing on record and this cannot be any ground for holding the appellant guilty or linked to the wrong facts of the persons investigated.

13. Apart from that it appears on record that assessee has not given the opportunity to cross-examine the person based on whose statement the addition have been made in the hands of the assessee.

That it is a settled position of law that finding as recorded in one case cannot be relied in other cases until and unless the material as gathered and to be used against the assessee is not provided to the assessee and an opportunity of cross examination is not allowed to the assessee. Hence, material as collected by the Investigation Wing of Kolkata was general in nature and cannot be used in the specific case of the appellant moreso, when the name of the appellant was never included in their statements. Even if the name of the appellant appeared in their statements, it could not have been used against the appellant until and unless the appellant was allowed an opportunity to cross examine the person whose statement was recorded during the course of survey/searches. Hence, the material as received by the assessing officer behind the back of the appellant cannot be used against the appellant. In this regard, we have been enlightened by the ratio laid down in the judgment passed by the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE 281 CTR 241(SC) where it was held that the denial of opportunity to the assessee to cross-examine the witness whose statements were made the sole basis of assessment is a serious flaw rendering the order a nullity in as much as it amounts to violation of principle of natural justice. The relevant observation in this regard as made by the Hon'ble Supreme Court is reproduced hereinbelow:-

> *"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements*

and wanted to cross-examine, the adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. 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 17.03.2015 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.

8. 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."

14. So far as the merit of the matter is concerned we find that the identical issue has already been considered by the Delhi Bench of ITAT in the case of Anoop Jain (supra) as also relied upon the Ld. AR. While deciding the issue in favour of the assessee the Hon'ble Delhi Bench has been pleased to observe as follows:-

"21. A conspectus reading of all these relevant provisions of the Act show that initial burden is upon the assessee to justify his returned income and if some evidences have been gathered by the Assessing Officer, it is the duty of the Assessing Officer to confront those evidences to the assessee and seek explanation from him.

22. In the instant case, in justification of his return of income, the assessee furnished all the necessary documentary evidences to discharge the initial burden cast upon him. The Assessing Officer simply rubbished all the

documentary evidences by referring to the general observations and modus operandi of the entry operators and further supporting his observations by report of the Investigation Wing.

23. It would not be out of place to mention here that LDPL, now known as Arihant Multi Commercial Ltd, is not a paper company nor a shell company. In F.Y. 2013-14, the Revenue from operations were at Rs. 40,85,02,313/- and total assets were at Rs. 32,79,07,684/- which included investment, trade receivables, cash and cash equivalent, short term loans and advances and tangible assets. The share capital and reserves and surplus were at Rs. 3,62,40,000/- and Rs. 17,65,16,912/- respectively. Trade payables were at Rs. 10,80,74,165/-.

24. These financials go to show that LDPL is not a shell company. SEBI has suspended trading in shares of LDPL w.e.f 28.08.2015 whereas the assessee has sold shares from May 2014 to December 2014, many months before suspension of the scrip. It is not the case of the Assessing Officer, nor there is any evidence on record to show that SEBI has declared all transactions done in scrip of LDPL prior to the suspension as null and void. It is a matter of fact that SEBI looks into irregular movements in share prices and warns investors against any such unusual increase in share price. No such warning was issued by SEBI. The Assessing Officer has failed to produce any material/evidence to dislodge or controvert the genuineness of conclusive documentary evidences produced by the assessee in support of his claim considering the fact that he is a genuine investor and is from past many years, as explained elsewhere.

25. Surprisingly, neither the assessee nor his brokers are named as illegitimate beneficiaries to bogus long term capital gain in any of the alleged statements of the operators/broker or reports/orders of the SEBI or the Investigation Wing. In our considered view, additions made by the Assessing Officer and confirmed by the ld. CIT(A) are heavily guided by surmises, conjectures and presumptions and, therefore, have no legs to stand on.

26. It would not be out of place to refer to the decision of the Hon'ble Supreme Court in the case of Adamine Construction Pvt Ltd 99 Taxmann 45 wherein the Hon'ble Supreme Court, while dismissing the appeal, made the following observations:

"What is evident is that the AO went by only the report received and did not make the necessary further enquiries - such as into the bank accounts or other particulars available with him but rather received the entire findings on the report, which cannot be considered as primary material. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO."

27. In the case of Odeon Builders Pvt Ltd 110 Taxmann.com 64, the Hon'ble Supreme Court while dismissing the review petition, held as under:

"However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs.19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the ld. CIT(A) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs.19,39,60,866/-, is directed to be deleted."

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5 th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT.

5. In these circumstances, the Review Petitions are dismissed."

28. On identical set of facts, the coordinate bench in the case of Deepak Nagar 73 ITR [Trib] 74 has allowed the appeal of the assessee. The relevant findings of the coordinate bench read as under:

"22. For the sake of repetition, the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the INV Wing as well as information received from the INV Wing. It is apparent from the assessment order that the Assessing Officer has not conducted any independent and separate enquiry in this case of the assessee. Even the statement recorded by the INV Wing has not been got confirmed or corroborated by the person during the assessment proceedings. The Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the INV Wing is required to be corroborated and reasserted/reaffirmed during the assessment proceedings by examining the concerned persons who can affirm the statements already recorded by any other authority of the department.

23. There is no dispute that the statement which was relied upon by the Assessing Officer was not recorded by the Assessing Officer in the assessment

proceedings but it was pre existing statement recorded by the INV Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidence to disprove the evidences produced by the assessee.

24. Our above view is fortified by the decision of the Hon'ble Delhi High Court in the case of Fair Invest Ltd 357 ITR 146. The relevant findings of the Hon'ble Jurisdictional High Court of Delhi read as under:

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68."

25. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore, the judicial decisions relied upon by the ld. DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand. We, accordingly, direct the Assessing Officer to accept the LTCG of Rs. 11,93,55,564/- declared as such.

26. Since we have accepted the genuineness of the LTCG, we do not find any merit in the consequential addition of Rs. 6,05,312/- and the same is also directed to be deleted."

29. In his written submissions, the ld. DR has referred to various judgments and heavily relied upon the decision of the Hon'ble High Court of Delhi in the case of Suman Poddar ITA No. 841/2019 and in the case of Udit Kalra ITA No. 220/2019 and several other decisions of the coordinate bench.

30. We have given thoughtful consideration to the orders of the authorities below and have carefully perused the judicial decisions relied upon by the ld. DR. We find that in all those cases, either the assessee entered into solitary transaction

resulting into long term capital gain or prior to the solitary transaction, the assessee was neither engaged in the purchase and sale of shares nor subsequent to earning of long term capital gain, the assessee was found to be engaged in the purchase and sale of shares. These facts are clearly distinguishable from the facts of the case in hand. As mentioned elsewhere, the assessee is a habitual investor having portfolio of investment in shares in crores and is still holding investment in shares in several crores and is constantly engaged in investing in shares of various companies.

31. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge is purely a question of fact. We, accordingly, direct the Assessing Officer to accept the long term capital gain of Rs. 5,70,91,750/- declared as such.

32. Since we have accepted the genuineness of long term capital gain, we do not find any merit in the consequential addition of Rs. 11,43,835/- and the same is also directed to be deleted.

33. In the result, the appeal filed by the assessee in ITA No. 6703/DEL/2019 is allowed."

15. Before finalizing the matter we would like to refer the order passed by the Hon'ble Delhi ITAT in the case of Anoop Jain (supra). It appears that the purchase and sale of share of the same Lifeline Drugs & Pharma Ltd. company was considered wherein it was held that the Lifeline Drugs & Pharma Ltd. now known as Arihant Multi Commercial Ltd. is not a shell company.

16. It is evident from records that SEBI has suspended trading in shares of LDPL w.e.f 28.08.2015 whereas the appellant before us sold these shares on 25.02.2014 and 11.03.2014 through the broker M/s. Anand Rathi many months before suspension of this scrip. It is an admitted position that Revenue has never recorded showing that SEBI has declared all transactions done in scribe of LDPL prior to the suspension as null and void.

17. We have further considered the submissions made by the Ld. DR and the judgment passed by the Delhi High Court in the matter of Udit Kalra vs. ITO as relied upon by him. So far as Udit Kalra is concerned 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 been found that the Directors are involved in any price rigging. Such facts have 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 22.03.2012 and 11.03.2014 when the appellant was holding the shares of the company in question.

18. The Ld. DR also relied upon the judgment in the matter of Suman Poddar vs. ITO, reported in [2019] 112 taxmann.com 329 (Delhi). In fact, the said judgment was subsequently considered by the Honb'le Delhi High Court in the matter of PCIT vs. Smt. Krishna Devi reported in, ITA No. 125 of 2020 dated 15.01.2021 (Delhi). Since 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 appeal of the revenue was dismissed by the Hon'ble Court with the following observations:

> *"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."

19. We have further considered the judgment passed by the Hon'ble Delhi Bench in the matter of Swathi Luthra (supra) where the issue has been decided in favour of the appellant in identical matter.

However, without going into the further fact of the matter we would like to rely upon the judgment passed by the Co-ordinate Bench in the case of Radheyshyam Khandelwal & Ors.(supra) where the identical issues has been decided in favour of the assessee with following observation:-

> *"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."*

Thus, considering the entire facts of the matter, the judgment passed by the different Judicial Forums as relied upon by the Ld. AR and the Ld. DR as well, the particular judgment passed by the Hon'ble Delhi Bench dealing with the scrips of the same company namely M/s. Lifeline Drugs & Pharma Ltd. on the identical set of facts deciding the issue in favour of the assessee, the judgment passed by the Hon'ble Delhi High Court in the matter of PCIT vs. Smt. Krishna Devi, we with the above observation do not hesitate to allow the claim made by the appellant towards LTCG to the tune of Rs. 26,72,311/- in the absence of contrary evidence produced by the Revenue on record. The appeal filed by the assessee is, thus, allowed.

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20. These grounds of appeals are identical to that of the issues already been dealt with by us in ITA No.242/Ind/2019 for A.Y. 2014-15 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, both the appeals preferred by the assessee are also allowed.

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

The order pronounced in the open Court on 27.07.2021

Sd/-	Sd/-
(MANISH BORAD)	(MADHUMITA ROY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

दिनांक /Dated : 27th July, 2021

Tanmay

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

By Order,

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