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.244/Ind/2019
Assessment Year 2014-15

M/s. Ajay Kumar Balmukund
Jhawar HUF : Appellant
C/o S V Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore
PAN AAFHA4324N
V/s
The ITO
Sendhwa (M.P.) : Respondent

ITA No.249/Ind/2019
Assessment Year 2014-15

Smt. Aparna Jhawar : Appellant
C/o S V Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN ABCPJ3925E
V/s
The ITO
Sendhwa (M.P.) : Respondent

ITA No.250/Ind/2019
Assessment Year 2014-15

M/s Balmukund Dhanraj
Jhawar (HUF) : Appellant
C/o S. V. Agrawal & Associates
Dadi Dham, 24 Joy Builders Colony,
Near Rafael Tower, Old Palasia, Indore (M.P.)
PAN AAGHB9236B
V/s
The ITO
Sendhwa (M.P.) : Respondent

Revenue by	Shri Harshit Bari, Sr.DR
Assessee by	S/Shri S. N. Agrawal & Pankaj Mogra, CAs
Date of Hearing	21.06.2021
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 orders dated 18.11.2019 passed by the Ld. CIT(A)-II, Indore arising out the order dated 27.12.2016 passed by the Ld. ITO, Sendhwa under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "The Act") for A.Y. 2014-15.

2. Since the issues involved in these particular appeals are identical these are heard analogously and are being disposed of by a common order for the sake of convenience. However, the ITA No. 244/Ind/2019 is taken as a lead case.

3. The brief facts leading to the case is this that the assessee has filed its return of income on 31.08.2014 declaring net income of Rs. 4,12,396/-.

4. The assessee claimed long-term capital gain exempt under Section 10(38) of the Act at Rs. 23,03,300/- on purchase/sale of shares which is the subject matter before us. The assessee purchased 5000 equity shares of Turbotech Engineering Ltd. from one broker namely Shah Space Manager Pvt. Ltd. at a consideration of Rs. 15,000/- on 22.11.2011. Such share was dematerialized and credited in Demat account of the assessee with the broker namely M/s. Anand Rathi Share & Stock Brokers Ltd. These shares were finally sold through the said M/s. Anand Rathi Share & Stock Brokers Ltd. on 18.04.2013, 25.04.2013 and 02.05.2013. The entire sale proceed in respect of the sale of shares were received by the assessee in his bank account. The case was selected under scrutiny and notice under Section 143(2) was issued. During the course of assessment proceeding, the copy of P&L Account, Sale & purchase bills of share, purchase bills in the form of debit note as issued by the seller, Capital account, Trading account, Balance sheet were duly filed by the assessee. The claim of the assessee has

been rejected by the Ld. AO mainly on the ground that those shares were purchased off market and such debit notes was not considered as genuine as the person M/s. Shah Space Manager Pvt. Ltd. is not a broker of any Stock Exchange. The 5000 shares which was purchased at Rs. 15,000/- on 22.11.2011 and sold through Broker Exclusive Securities at a rate of Rs. 455.17 and 476.78 per share on 18.04.2013. Since the price of per share from Rs. 3 on 22.11.2011 since rigged up to Rs. 476 on 02.05.2013 i.e. by 150 times, the genuineness of the purchase and sale of those shares of M/s. Turbotech Engineering has been doubted by the Ld. AO particularly since that purchase of shares were made through off market transaction. Ultimately relying upon the report of the Investigation Team in respect of bogus transaction of capital gain, the Ld. AO rejected the claim made by the assessee under Section 10(38) of the Act, upon holding the transaction for purchase and sale of scrip of Turbotech Engineering are accommodative and only made for claiming bogus exemption of long-term capital gain which was, in turn, confirmed by the Ld. CIT(A). Hence, the instant appeal before us.

5. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that the details relating to these transactions being the copy of purchase bill in the form of debit note as issued by the seller, the copy of share certificate in physical duly transferring the same in the name of the assessee, copy of the Demat Account of the assessee, the copies of

bills in respect of sale of shares, the copy of the bank account of the assessee lying with the Bank of India reflecting the entire sale proceed as received by the assessee were duly filed before Revenue during the assessment proceeding. Since the shares were purchased off line there is no requirement of paying STT at the time of purchase; neither there was any restriction in purchase of shares from off market as also the argument advanced by the Ld. AR. It was further argued that the assessee was never involved in rigging of price rather the assessee followed the rules and regulation and sold these shares through the Stock Exchange.

6. 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 Turbotech Engineering Ltd. Though the Ld. AO relied upon an investigation report which was admittedly carried out in case of another person and the assessee hereinbeforeus 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. were considered and allowed in favour of the assessee. He, therefore, prayed for deletion of addition made by the Revenue.

7. 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)

8. 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.

9. Perusal of records further suggests that 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.

10. 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 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.*
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> *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.*"

11. So far as the merit of the matter is concerned we find that the identical issue has already been considered in the Co-ordinate Bench in the case of Radheyshyam Khandelwal & Ors. in ITA No. 07/Ind/2019, 08/Ind/2019, 29/Ind/2019, 30/Ind/2019 & 113/Ind/2019. In that particular case the transaction of the assessee being the purchase of shares of M/s. Turbotech Engineering Ltd. holding it for more than one year and the sale of such share through a registered share broker namely M/s. Anand

Rathi & Stock Brokers Ltd. in a recognised Stock Exchange and the payment of security transaction tax thereon were the facts under consideration. The entire transaction was duly supported by corroborative evidences which were filed before the authorities below as identical in the instant case.

12. Further that as we find from the records that Revenue has failed to point out any specific defect with regard to the documents supporting share transaction as submitted by the assessee. In the instant case the Ld. AO relied upon the report being F. No. 75A/2015/16/257.273 dated 27.04.2015 wherein certain BSE listed companies (Penny Stock) have been identified to be used for generating bogus LTCG including Turbotech Engineering Ltd. However, the suspension order passed by the SEBI was ultimately lifted by and under the adjudication order dated 25.11.2014 in the case of M/s. Turbotech Engineering Ltd. Needless to mention that no irregularity in the trading of such scrips neither any finding of involvement of the directors in any price regain has been mentioned by such order passed by SEBI. Therefore, reliance on such Investigation Report as made by Revenue is uncalled for, erroneous and unjustified.

13. 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 22.11.2011 and 18.04.2013 when the appellant was holding the shares of the company in question.

14. 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) and 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.*
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> *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.*
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> *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."*

15. 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. 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. Turbo Tech Engineering 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. 23,03,300/- in the absence of contrary evidence on record. The appeal filed by the assessee is, thus, allowed.

ITA Nos. 249/Ind/2019 & 250/Ind/2019 (A.Y. 2014-15):-

16. These grounds of appeals are identical to that of the issues already been dealt with by us in ITA No.244/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.

17. 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