

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND  
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 2792/MUM/2018  
Assessment Year: 2014-15**

Mr. Ripu Sudan Kundra,  
1<sup>st</sup>flr. 57/A, Plot No. 3 CT S1  
Gandhi Gram Road, Near Sunny S  
Jamaica ConsultateJuhu, Vile Parle  
(W),  
Mumbai-400049.

**PAN No. AZUPK 9777 F**

**Appellant**

ITO-3(1)(1),  
**Vs.** Mumbai.

**Respondent**

Assessee by : Ms. Ritu Kamal Kishor, AR  
Revenue by : Ms. Leena Srivastav, CIT-DR

Date of Hearing : 12/07/2021  
Date of pronouncement : 05/10/2021

**ORDER**

**PER S. RIFAUR RAHMAN, A.M.**

The present appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-57, Mumbai [in short 'CIT(A)'] for the assessment year 2014-15 dated 07.02.2018 and arises out of assessment completed u/s 143(3) of the Income Tax Act, 1961 (in short the Act).

2. The brief facts of the case are, assessee filed his return of income for the assessment year 2014 - 15 by declaring total income of ₹6,52,770/- on 30.07.2014. The return of income was processed u/s 143 (1) of the Income Tax 1961 (in short Act). The case was selected for scrutiny, notices under

section 143(2) and 142(1) of the Act were issued and served on the assessee. The assessing officer observed that assessee has earned long term capital gains of ₹21,97,65,021/- on sale of shares and immovable property and at the same time, the assessee has claimed set-off of short term capital loss of ₹ 23,54,71, 343/- on sale of shares during the present assessment year. In order to verify the same assessing officer issued notice calling for information on purchase and sale of shares of following scripts:

<b>Scrip code</b>	<b>Scrip name</b>	<b>Short term loss in ₹</b>
501945	Dhenubuild	3,95,17,635/-
512105	Shreenath Commercial	10,94,32,186/-
530561	Rad Global	4,14,88,123/-
531441	Tuni Textile	2,19,43,210/-
530561	Rad Global (buy)	4,85,67,264/-

3. The assessee filed the response before the assessing officer along with required details. The assessing officer observed in his assessment order that assessee has furnished purchase bill of shares, bank account statement and other broker note in claim of short term capital loss. The assessing officer fully relying on the investigations carried out by the Directorate of Investigation, Kolkata to unearth the organised racket of generating bogus entries of long-term capital gains which is exempt from tax. The assessing officer discussed elaborately in his order and he confronted the assessee why the short term capital loss should not be disallowed as per the investigation carried out in penny stocks cases. In response assessee has submitted following submissions:

- a) *Our client has purchased and sold the shares through its portfolio manager (i.e. standard chartered securities (India) Ltd.)*
- b) *He has neither received any shares though preferential allotment nor any bonus allotment.*

- c) *The assessee has not directly dealt with any broker other than Standard Chartered Securities (India) Ltd.*
- d) *Considering the above we request your honor the transaction done by our client are genuine in nature and no sham element is involved. Hence, Short Term Capital Loss from the above is to be allowed for set off against the long term capital against based on the provisions of section 71 of the Act.*

4. The assessing officer discussed the reasons why he is rejecting the contention of the assessee in his order and completed the assessment under section 143(3) of the Act. The AO fully relying in the investigation carried on by the Directorate of Investigation, Kolkata and *modus operandi* adopted, he came to following opinion:

- *The financials of the companies were very poor during the period of transaction.*
- *The business profile shows that the companies were not engaged into any substantial activity.*
- *The business profile shows that the companies were not having any future plans which could attract investors from all over India to invest in the company.*
- *The funds that were raised through preferential allotment have not been used for any business expansion and have been further advanced as loans and investments.*
- *The whole process of preferential allotment was a prearranged and a managed process so as to allot preferential shares to beneficiaries of bogus LTCG which could later be sold by them for booking accommodation entry of bogus LTCG/STCG in the garb of sale proceeds on sale of shares.*
- *The shares were rigged on the stock exchange through manipulation of the stock market.*
- *Various share brokers whose statements have been recorded and have been discussed in the appraisal have confirmed the fact that the shares of companies have been used for LTCG/STCG/loss.*
- *Providing entry of bogus Various Exit Providers have confirmed that they have purchased the shares of companies to provide entry of bogus LTCG/STCG/loss.*

*From the trade analysis it is observed that during the phase of price rigging the shares were not in demand by the general investors of the market and saw very low volume on most of the trading days and hence could not have commanded the price as observed. In any market, a sudden supply, if not matched by similar demand, leads to price fall. Considering the same, any rational investor would not have dumped a large number of shares without facing the risk of a significant price fall until and unless he was sure of the*

*demand side absorbing the supply. in the present case, the exit providers discussed above created the demand against the supply from the sellers (beneficiaries of bogus LTCG/STCG). In the whole process, the principle of price discovery was kept aside and the market lost its purpose. It is evident from the above analysis that the exit providers provided a hugely profitable exit to the sellers. This could be only possible if the sellers and exit providers were hand in glove with each other.*

**9. Judicial Support for the conclusions drawn:**

*Several Judicial pronouncements support this view that when there is no commercial purpose involved in a transaction and the transaction is for primary purpose of tax avoidance. Few such cases are discussed as under:*

- i. Tax planning may be legitimate provided it is within the framework of the law. Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by dubious methods. It is obligation of every citizen to pay the taxes honestly without resorting to subterfuges (M/s. McDowell's Co, Ltd Vs. CTO in 154 ITR 148).*
- ii. There is behind taxation laws as much moral sanction as is behind any other welfare legislation and it is a pretense to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than while considering a device to avoid tax, is not to asks whether the provisions should be constructed literally or liberally nor whether the transaction is not unreal and not prohibited by the statue, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation.*
- iii. The transaction is for the purpose of tax avoidance and is a "Fiscal Nullity" which should be ignored. According to the Black's Law Dictionary «Fiscal" mean forming \*of or relating to financial matters / of or relating to Public Finance or taxation\* «Nullity" means "something that is legally void / forged commercial transfer is a Nullity", Therefore, the correct wording of "Fiscal Nullity" is "something that is legally void relating to Public Finance or Taxation"*

*10. The discussion above clearly establishes that the shares of the above mentioned companies have been used for providing entry of bogus LTCG. Thus, it can be clearly seen that the shares of the above discussed companies were rigged to provide bogus capital gains/losses to beneficiaries with an express intention to defraud revenue and in turn avoid payment of legitimate taxes to the Government of India. As detailed above, you have purchased/ sold the share of following companies as under:*

*a) Radford Global Ltd. assessee had purchased 11,03,920 shares during the month of August 2013 @Rs. 44.24/- per share average price for a purchase consideration of Rs.4,88,34,407/- and sold these shares during the month of January 2014 @ Rs. 6.65 per shares average price for a total sale consideration of Rs.73,45,284/-, thereby incurring a total loss of Rs. 4,14,88,123/-.*

b) DhenuBuildcon India: assessee had purchased 2,67,000 shares during the month of February 2013 @ ₹150.82/- per share average price for a purchase consideration of ₹4,02,67,735/- and sold these shares during the month of November 2013 (@ Rs. 2.81 per shares average price for a total consideration of R\$. 7,50,100/-, thereby incurring a total loss of ₹ 3,95,17,635/-.

c) Shri NathCommereial; assessee had purchased 13,35,000 shares during the month of January 2013 @ Rs.80.61 /- per share average price for a purchase consideration of Rs.11,16,46,177/- and sold these shares during the month of September 2013 @Rs. 1.60/- per shares average price for a total consideration of Rs.22,13,91/-, thereby incurring a total loss of Rs. 10,94,32,186/-

d) Tuni Textiles Mills; assessce had purchased 4,00,000 shares during the month of January 2013 @Rs.75.05/- per share for a purchase consideration of Rs.3,00,18,583/- and sold these shares during the month of May 2013 @ Rs.20,19/- per shares for a total consideration of R\$. 80,75,273/- thereby incurring a total loss of Rs.2,19,43,210/-.

10. As it has been clearly proved from the aforesaid discussion that the trades of above discussed four companies were manipulated to give capital gains/losses to various parties, including the assessee. Thus, the assessee's claim of Short term Capital loss for Rs.21,23,81,154 out of Total Short Term Capital Loss Re. 23,54,71,343/- in respect of sale of shares of the above discussed companies is hereby disallowed and not allowed to be yet off.

5. Aggrieved, assessee preferred an appeal before CIT (A) and submitted a detailed submission before him in a tabulated format which is reproduced below:

“3.5. From the above analysis of the company whose scrips were purchased and sold by the assessee following conclusion was drawn which was rebutted by the appellant.

S. No.	AO's Contention	Our Reply
1.	The financials of the companies were very poor during the period of transaction	It is pertinent to note here that the investments were made through very reputed Portfolio Manager, an MC firm, Standard Chartered Securities (India) Ltd. There was no direct interface between the alleged broker and the appellant. Secondly, the portfolio manager takes there call on the basis of market forces and future perception of the company and the industry and not only on the basis of the number crunching.
2.	The business profile shows that the companies were not engaged into any substantial	The Appellant had not got any preferential allotment of shares. Hence, this is a baseless allegation by the AO and accordingly is not

	activity.	applicable to the Appellant's case.
3.	The business profile shows that the companies were not having any future plans which could attract investors from all over India to invest in the company.	As stated elsewhere in this submission, the Appellant has not got any allotment from any preferential/bonus shares allotment. It is further submitted that the allegation of accommodation entry is baseless. There is no privity of contract between the buyer and the seller. The transactions have been carried out on the platform of the Stock Exchange.
4.	The funds that were raised through preferential allotment have not been used for any business expansion and have been further advanced as loans and investments.	Further, the Appellant was no way connected with the investigation on various persons. Neither he had dealt with these persons nor he and-/ or his dealing have been named in any of the statements or other proceeding papers related to these persons.
5.	The whole process preferential allotment was a prearranged and a managed process so as to allot preferential shares to beneficiaries of bogus LTCG which could later be sold by them for booking accommodation entry of bogus LTCG/ STCG in the garb	The Appellant had made the investment in shares which were purchased and sold on the floor of the stock exchange and not from any of the brokers or parties named in the investigation proceedings. Payment had been made through banking channel for the purchases so made and the delivery was received and thus the purchase contract was completed. Similarly, in case of sale, delivery had been given and payment had been received through banking channels while selling the shares through the stock exchange system and completing the sale contract.
6.	The shares were rigged on the stock exchange through manipulation of the stock market.	The AO's observation as to the price rigging cannot be the reason for treating genuine LTCG as bogus, in genuine and/or accommodative in nature. This is a free market where the investor does not have any control over price.
7.	Various share brokers whose statements have been recorded and have been discussed in the appraisal have confirmed the fact that the share of companies have been used for providing entry of bogus LTCG/STCG/LOSS.	None of the persons have said that they have dealt with the Appellant not they have alleged that the transaction undertaken by him were bogus. Hence, this logic does not find any ground in this case.

6. Ld. CIT(A) considered the submissions of the assessee and dismissed the appeal filed by the assessee with the following observations:

*“3.6. I have analysed the detailed discussions made by the AO in the assessment order. I have also gone through the appellant's submissions. The rebuttal of the AO's contention by the appellant has been produced in the above paras. I have also gone through the judicial pronouncement submitted by the appellant. After going through the above I would like to analyse the AO's order and appellants contention which is discussed below.*

*1) From the perusal of investigation carried out by the investigation wing of following scrips a) Radford Global Ltd. b) Dhemubuildcon India c) Shreenath Commercial and d) Tuni Textiles Mills which had resulted in loss to the appellant and I find one thing is common. All the four companies financial health is very poor and there is sudden rise of prices of their shares and then there is sleep downward of prices.*

*2) The investigations carried out and statement recorded of the key persons confirm the nexus that the above companies were manipulating and providing capital gains/losses to various interested parties.*

*3) The appellant's submissions to rebut assessing officer's observation is that investments were made through very reputed portfolio manager, an MNC firm, Standard Chartered Securities (India) Ltd. It was further submitted that portfolio manager takes their call on the basis of market*

*forces and future perceptions of the company and the industry and not only on the basis of the number crunching.*

*4) This is the most clinching issue. If the portfolio manager takes a call on future perception of the company, the portfolio manager does some research of the financial of the company. From the perusal of the history of the above companies one can very well see that it is bad. So why will any prudent man will invest in the shares of such companies. So it proves that one will invest to buy bogus short term capital gain or loss. This is what the appellant has done by purchasing and selling the shares of these companies. The appellant cannot take the plea that he is not involved in the contract*

*between the buyer and the seller. The recent judgment of Nagpur Branch of Bombay High Court in the case of Sanjay Bimal Chand Jain L/H ShatideviBimalChand Jain vs The Pr. Commissioner of Income Tax-1 Nagpur & Another (Income Tax Appeal No. 18/2017).*

*"Though the above case is of S'TCG their Lordship held that the authorities have recorded a clearfinding of fact that the assessee had indulged in a dubious share transaction meant to account forthe undisclosed income in the grab of long term capital gain. While so observing, the authoritiesheld that the assessee had not tendered cogent evidence to explain as to how the shares in anunknown company worth Rs. 5/- had jumped to Rs. 485/- in no time. The Income Tax AppellateTribunal held that the fantastic sale price was not at all possible as there was no economic orfinancial basis as to how a share worth Rs. 5/- of a little known company would jump from Rs. 5/-to Rs. 485/-. The findings recorded by the authorities are pure findings of facts based on a properappreciation of the material on record. While recording the said findings, the authorities havefollowed the tests laid down by the Hon'ble Supreme Court and this Court in several decisions."*

*5) The appellant has submitted that the appellant has made the investment in share which wererepurchased in the floor of stock exchange and not from the broker or parties named in theinvestigation proceedings. I find the submissions of appellant baseless. Once the appellant hasdealt in shares of those companies which have been proved to be rigged and who have beenproviding bogus entries the plea that he had not purchased from those brokers holds no good. Thecompanies modus operandi is watched by all big players who deal in this trade. Hence theportfolio manager M/s Standard Chartered Securities (India) cannot be also absolved. However, since the portfolio manager works for the client and the client's interest is watched by thePortfolio Manager, the appellant wanted to have capital loss to set off against the capital gains andthe same was arranged.*

*6) Hence the appellant could not give any cogent and convening reply to the observation made by the AO. The AO has dealt in detail about the companies and the*

*modus operandi adopted by it. So in the light of above discussion I find the action of the AO correct and confirm the disallowance made by the AO on the assessee's claim of STCL of Rs. 21,28,81,154/- out of total short term capital loss of Rs. 23,54,71,343/- in respect of sale of shares of the above discussed companies. The set off is disallowed and disallowance made by AO is confirmed. Hence Appeal is dismissed."*

7. Aggrieved, the assessee is in appeal before us raising following grounds of appeal:

1. *On the facts and circumstances of the case the Ld. AO has erred in passing order u/s 143(3) dated 29.12.2016 of the Income Tax Act, 1961.*
2. *On the facts and circumstances of the case the Ld. AO has erred in disallowing short capital loss of ₹21,23,81,154/-.*
3. *On the facts and in the circumstances of the case the Ld. AO have erroneously relied on some of the stock transactions of sale of shares of companies considered as dealing in penny stock and having absolutely no relevance direct or indirect to the genuine transactions of the sale of shares by the Appellant.*
4. *On the facts and in the circumstances of the case the AO has erred in making this addition based on notional and imaginary situation and totally unsubstantiated.*

8. Before us Ld. AR submitted that assessee is regularly dealing in purchase and sale of shares and this assessment year, assessee has incurred short term capital loss due to steep fall in share prices and she submitted that assessee has purchased and sold the scripts online platform based on the prevailing market rate. The assessee has purchased shares directly from reputed share brokers and is no involvement of any preferred allotment or has not dealt in any off-line transactions. She submitted that all the relevant information relating to claim of actual loss was submitted before Assessing Officer and Ld. CIT(A). She submitted that Assessing Officer has relied on investigation carried on by the investigation wing, Kolkata. However, assessee

has only bought through portfolio manager and it has no control over management of the scripts. The assessee has incurred actual loss however revenue authorities treated the same under penny stock category and rejected the contention of the assessee. She brought to our notice relevant findings of tax authorities in para 8 of assessment order and para 3.6 of first appellate authority.

9. On the other hand, Ld. DR relied on the findings of Ld. CIT(A) and submitted that it is apparent bogus penny stock transactions.

10. Considered the rival submissions and material on record. We notice that assessee has regularly dealing in purchase and sale of shares and he has made investments through reputed portfolio manager, Standard Chartered Securities (India) Ltd. and it was submitted that based on their advice he has made investments. We notice from the records and assessment order that assessee has invested in the scrip Radford Global on August 2013 at the prevailing market rate and sold the same on January 2014 at the prevailing market rate and incurred loss. Similarly, assessee purchased shares of Dhenu Build Infrastructure Ltd on February 2013 at the prevailing market rate and sold the same on November 2013. The assessee also purchased shares of Shreenath Commercial and Finance Limited on January 2013 and sold the same on September 2013 as per the market rate. The assessee also purchased shares of Tuni Textile Mills Ltd on January 2013 and sold the same on May 2013. From the data submitted before us indicates that assessee has purchased the same from the stock market and sold the same by reacting to market condition and the steep fall in the price of the shares. From the conduct of the assessee we notice that assessee has purchased the same from

the stock market on the advice of portfolio manager. The crux of the matter is regarding claim of loss arising from the trading in shares of following companies, namely:

- a) Dhenu Builder, India (Rs. 3,95,17,365/-)
- b) Shri Nath Commercial (Rs. 10,94,32,186/-)
- c) Tuni Textile Mills (Rs. 2,19,43,210/-)
- d) Rad Global (Rs.4,14,88,123/-)
- e) Rad Global (Buy) Rs. 4,85,67,264/-)

From a perusal of the order of the lower authorities it is apparent that the disallowance as made by the AO and sustained by the Ld.CIT (A) is based on the enquiries conducted by Investigation Directorates of Kolkata & Ahmedabad on certain stock-brokers and entry providers and the statements recorded from them during the course of search. The analysis made by the Investigation Directorates on the financials/business profile of the impugned companies forms the base for rejecting the claim of loss. The lower authorities have referred to investigation carried out by the Directorates of Investigation on Radford Global to come to a conclusion that entities that have purchased shares of Radford Global are bogus/paper entities. Further, based on the findings in the Investigation Reports, the lower authorities have observed that a common pattern is seen in respect of all the impugned companies in that the financial health of all such impugned entities are poor, there is sudden rise of prices in their shares followed by a steep fall, statements recorded of key persons confirms manipulation in prices of stock to provide capital gains/loss to interested parties. Borrowing from the findings of the Investigation Reports, the lower authorities have held the claim as non-genuine, rejecting

the submission of the assessee that the investments were made through reputed portfolio manager who takes the call on the basis of market price, future perception of the company and that assessee is thus not directly involved in any transaction of purchase/sale between buyer and seller. The assessee had also placed documentary evidence before the AO in support of the impugned transaction.

It is the finding of the Ld.CIT (A) that assessee has not provided any cogent evidence to explain how shares of an unknown company jumps manifold in no time. According to the Ld.CIT (A), the assessee could not give any cogent and convincing reply to the observations of the AO. On the other hand, the assessee is aggrieved in that the AO has erroneously relied on some of the stock transactions of sale of shares of companies considered as dealing in penny stock and that have no relevance to the transaction of sale of shares carried out by the assessee to deny the claim of loss incurred by the assessee and that the findings of the AO as confirmed by the First Appellate Authority are on the basis of unsubstantiated / imaginary charges and allegations.

We have given our anxious thought and consideration to the matter in hand. The AO has disallowed the claim of the assessee based on analysis of the information received from Directorate of Investigation as a result of enquires undertaken by the officers of the Directorate. Based on the said information received, the AO has observed a pattern in the trading in scripts of those companies that has resulted in the claim of short-term capital loss to the assessee. Such companies were seen to have little financial credentials, no profitability, and no apparent explanation for abrupt rise in prices followed by

a steep fall in price of shares. Besides, there are statements of brokers/ entry providers who have accepted that they were involved in the scam of price rigging to facilitate accommodation entries to beneficiaries who have routed their unaccounted cash into the books through circuitous means. However, at the same time the assessee has produced documents to substantiate the genuineness of the transactions carried out through banking channels, through the medium of portfolio management whereby there is no contact between the buyer and the seller. The fact remains that there is direct evidence placed on record by the assessee to support the genuineness of the impugned transactions such as contract notes, share certificates, corroborative evidence indicating purchase/ sale through registered broker as juxtaposed against the findings of the AO based on the general report from Investigation and the modus operandi adopted by unscrupulous entry providers. There is no denying that there is no assessee-specific material on record of the AO to pin-point that the assessee has entered into an unholy nexus with entry providers so as to stage manage accommodation entry of STCL. The statements relied on by the AO in the nature of admissions are bereft of corroborative material to implicate the assessee herein in such scam. At the same time the material furnished by assessee to substantiate its claim remains unchallenged and uncontroverted. The purchases were neither off-market nor through preferential allotment. Besides, no copy of any report of information received was supplied to the assessee. The assessee was not confronted with any statement or material allegedly detrimental to the assessee arising or culled out of the Investigation report. Thus, the fact remains that the findings of the lower authorities are not based on evidence but on generalizations and probabilities. The AO could not place anything on

record, maybe through a process of his own enquiry, to decisively prove that assessee has obtained bogus STCL through his connivance with entry operators / exit providers. No such enquiry or investigation is seen carried by the AO other than borrowing information to be used against the assessee from the general report of Investigation Directorate. The claim of the assessee appears to have been rejected more on the basis of presumption rather than evidence. The fact also remains that copies of statements used against the assessee were not provided to the assessee. It certainly has incapacitated the assessee from effectively rebutting the same and also from seeking an opportunity for cross examination. When copies of statements relied upon were not provided, when there was no opportunity to cross examine those witnesses whose statements were relied upon by the AO to conclude that the transaction in question was part of penny scam, we have no hesitation in holding that the lower authorities erred in disallowing the claim stating that the assessee failed to provide cogent and convincing reply to the allegations raised. We observe from the record that in identical situation the Coordinate Bench of ITAT in ITA Nos. 4843 & 1228/Mum/2018 for Assessment Year 2013-14 & 2014-15 in the case of Ramprasad Agrawal Vrs. ITO (reported in [2018] 100 taxman.com 172 – Mum Trib) and Kamla Devi S. Doshi vrs. ITO reported in 88 taxmann.com 773 (Mum-Trib) decided the issue in favour of the assessee on merits. From the above decision, it is trite that denial of such crucial rights is a fatal flaw that renders the assessment order a nullity. An assessment purely based on suspicion, surmises and conjectures without any tangible evidence on record against the assessee of any connivance or collusion is unsustainable in law.

12. In the result, the appeal filed by the assessee is allowed.

**Order pronounced in the open Court on 05/10/2021.**

Sd/-  
(MAHAVIR SINGH)  
VICE PRESIDENT

Sd/-  
(S. RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 05/10/2021

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)  
**ITAT, Mumbai**