

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “SMC-2” BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 6834/DEL/2019

[Assessment Year: 2013-14

Bharat Jha – HUF B-96, Karari Extn. Prem Nagar, Mithla Vihar, Nangloi, Delhi-110086 PAN- AAAHB2601L	<u>Vs</u>	Asstt. Commissioner of Income-tax, Circle 37(1), New Delhi.
APPELLANT		RESPONDENT
Appellant by	None	
Respondent by	Sh. Om Prakash, Sr. DR	
Date of hearing	11.01.2022	
Date of pronouncement	31.01.2022	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-13, New Delhi, dated 24-01-2019, pertaining to the assessment year 2013-14. The assessee has raised following grounds of appeal:

“1. The order passed by the learned Commissioner of Income Tax (Appeals)-1 (“Ld.CIT(A)”) under section 250 of the Act is bad in law and on the facts and circumstances of the case.

2. *The Ld.CIT(A) has erred in law and on the facts and circumstances of the case in upholding the order passed by the Ld. Assessing Officer (“Ld. AO”) which is barred by limitation.*
3. *The Ld.CIT(A) has erred in law and on the facts and circumstances of the case in upholding the order passed by the Ld. Assessing Officer (“Ld. AO”) which is premised on lack of jurisdiction.*
4. *The Ld.CIT(A) has erred in law and on the facts and circumstances of the case in upholding the order passed by the Ld. Assessing Officer (“Ld. AO”) thereby making additon of Rs. 157458 under section 68 of the Act.*
5. *The above grounds of appeal are independent and without prejudice to one anotehr.*
6. *The appellatant may be allowed to add/withdraw or amend any ground of appeal at the time of hearing.”*

2. The facts, giving rise to the present appeal, are that the assessee had filed return of income on 19.03.2014 declaring an income of Rs. 3,32,410/-. Subsequently, the case was reopened and notice was issued u/s 148 of the Income-tax Act, 1961, hereinafter referred to as “the Act”. In response to the notice u/s 148 of the Act, the assessee filed return of income on 21.04.2018 disclosing total income at Rs. 3,32,410/-. The Assessing Officer during the course of assessment noticed that as per information available on record the assessee had made transaction of Rs. 7,15,350/- towards sales of shares of M/s Global Capital Markets Ltd. and earned long term capital gain of Rs. 1,57,458/- and claimed exemption on that income. However, the Assessing Officer was of the view that the particulars of

the shares were rigged and manipulated. Therefore, he made addition of Rs. 1,57,458/-.

3. Aggrieved, against this, the assessee preferred appeal before the learned CIT(Appeals), who, after considering the submissions, dismissed the appeal. Now the assessee is in appeal before this Tribunal.

4. Learned DR supported the orders of the authorities below and submitted that the finding of the authorities below is based upon the investigation carried out by the concerned Wing.

5. I have heard learned DR, perused the entire record and gone through the orders of the authorities below. I find that the learned CIT(Appeals) has given a finding of fact by observing as under:

“4.1 I have considered the material on record including oral and written arguments/submissions of the appellant/AR and the (impugned) assessment order.

4.2 The assessee filed the original return on 19.03.2014 showing return income of Rs. 3,32,410/- consisting of income from partnership firm, capital gains and income from other sources. The case was reopened by issuing notice u/s 148 in compliance to which, return disclosing income of Rs. 3,32,410/- was filed on 21.04.2018. The objections raised by the assessee vide submission dated 06.11.2018 were disposed off on 13.11.2018 by the

assessing officer.

The AO vide para 4 & 5 of the assessment order stated as follows:

"4. As per information available on records that the assessee had made transaction of Rs. 7,15,350/- towards sales of shares of M/s Global Capital Markets Ltd. during the FY 2012-13 relevant to AY 2013-14 and earned Long Term Capital Gain of Rs. 1,57,458.12 and exemption claimed on that income. As per the information the assessee has made the following transactions/investment.

Beneficiary PAN	Beneficiary Name	Scripcode	Total Pur_Qty	Total Sale Value
AAAHB2601L	BHARAT JHA (HUF)	5300263	3000	715350/-

5. On perusal of the report received from PMO and the data available on website: www.bseindia.com, it was found that the share price of the stocks is very low at present i.e. 3.61 (as on 26.03.2018). During FY 2011-12 the shares price varied in unusual manner. The value of share sharply increased Rs. 273 (on 01.07.2011) which this price decreased sharply to Rs. 92.08/- on 24.11.2011. This clearly indicates that price were rigged & manipulated. The market capitalization is very low and the shareholding is not very widespread and is in effective control of the promoters either directly or indirectly. Some of the shareholders like Reachsmart Construction Pvt. Ltd., Polpik Traders Pvt. Ltd., Reachsmart Dealtrade Pvt. Ltd. are controlled by renowned accommodation entry provider Devesh Upadhyay. Moreover, various entry providers like Sh. Abhishek Kayan (statement dated 18.08.2017), Sh. Ashok Kumar Kayan (statement dated 18.08.2017), Sh. Arun Kumar Maheshwari (statement dated 31.08.2017) and Sh. Bikash Sureka (statement dated 18.08.2017) had accepted in their statements, 18.08.2017, 31.08.2017 that the scrip Global Capital Market Ltd. is penny stock and they used this scrip for providing bogus LTCG to various beneficiaries. In view of the above, the above transactions of purchase of shares not been effected for commercial purpose but to intend/create artificial gains, with a view to accommodated unaccounted money into the book

4.2.1 During the appellate proceedings, the AR gave his written submission raising certain objections:

<i>Contention of the Ld. AO</i>	<i>Appellant's Response</i>
<p><i>The Ld. AO has discussed at length the modus operandi of the alleged scheme for routing unaccounted money of LTCG beneficiaries. While doing, the Ld. AO has discussed the role of 'Operators' 'Penny Stock', 'Entry Providers' and in such schemes.</i></p>	<p><i>While it is the case of the Ld. AO himself that it is the aforementioned entities who are responsible for implementation of money routing schemes, the Ld. AO has erroneously and for reasons best known to himself has proceeded against the appellant. In fact, the Ld. AO has not brought on record any live link between such entities and the appellant in the present case.</i></p> <p><i>Without prejudice to the above, it is stated that even assuming that some "operators" were involved, the transaction of the appellant cannot be challenged in absences of any live link.</i></p>
<p><i>The Ld. AO has elaborated about the fluctuation in price of the scrip.</i></p> <p><i>The Ld. AO has observed that though the networth and business activity of the penny stock company is negligible, the share prices have been artificially rigged.</i></p>	<p><i>It is humbly submitted that this fact is known in common parlance that inflation/ deflation of the prices of stock in an open market platform is not in the domain of even the promoters of a company, much less a subscriber, Various factors such as market forces act in controlling the price of a scrip.</i></p> <p><i>Further, such data is available in public domain that there are several companies being traced at high prices having negligible</i></p>

	<p><i>networth. There is no reason to attribute high networth to high price, which is otherwise regulated by market forces.</i></p>
<p><i>The Ld. AO has stated that “the report received from PMO and the data available on website.dseindia.com.”</i></p>	<p><i>Although the report came from the office of PMO and the data available on website: bseindia.com as stated by the assessing officer in assessment order but the assessing officer has not applied any mind and knowledge before issuing notice u/s 148 of the Act, being the appellant never make any investment of Rs. 5.50 lakh appx. For eighteen months to earn a very small penny amount of LTCG of Rs. 1.58 appx. The appellant has received return of investment @ 18.80%</i></p> <p><i>It is common knowledge that the proceeds from trading on stock exchange directly gets remitted to the investor’s bank account by the exchange and there is no exchange of cheques or the like.</i></p> <p><i>It is submitted that the scrip of M/s Global Capital Market Limited is being traded on BSE till date and there has been no suspension. Without prejudice to the aforesaid, it is stated that mere accusation is not proof of actual guilt. The fact that the scrip is being traded till date is a testimony to the aforesaid.</i></p>
<p><i>The Ld. AO has stated that various</i></p>	<p><i>Admittedly the appellant has sold its shares over BSE which is an</i></p>

<p><i>entry providers like Sh. Abhishek Jain, Sh. Ashopk Kumar Kayan, Sh. Arun Kumar Maheshwari, Sh. Bikash Sureka has accepted in their statement the shares of M/s Global capital Market Limited is penny stock.</i></p>	<p><i>anonymous platform, i.e. the appellant has no knowledge of who is the purchaser/ seller and the appellant is only dealing with the exchange.</i></p> <p><i>It is never within the control or domain of a seller (of any commodity whatsoever) to ascertain and assure itself of the reasons for which a purchaser is buying its product. More so in the transactions of sale of shares through stock exchange, the seller does not even have the mode of means to even connect with the purchaser to verify the alleged genuineness/ market sentiments. A prudent businessman only looks at maximizing its profits.</i></p>
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As stated by the appellant he made purchases of 30,000 equity shares of M/s Global Capital Market for Rs. 5,56,274.65 in August, September 2011. These were consolidated in the ratio of 1:10. Thus he held 3000 shares with a face value of Rs. 1/-. These were sold for Rs. 7,13,732.77 in February, March 2013 resulting in Long Term Capital Gains of Rs. 1,57,458/-.

4.2.2 The basic issues raised above can be summarized and classified as follows:

- 1. The AO has relied heavily on the investigation Report of Kolkata Investigation Directorate.*
- 2. The AO did not confirm that the material in the report was relatable to transaction entered by the assessee.*
- 3. That the copy of the investigation report and statement of persons recorded during survey and opportunity of cross examination was not provided by the AO.*

4. *That the transaction was genuine since, all the documentation done in which no infirmity was found.*

5. *The appellant has challenged the validity of proceedings u/s 148.*

4.4. *As regards point 1 & 2 in above para (4.2.2), it shall be addressed later. C the 3rd point regarding the AO not furnishing the relevant documents/reports and not allowing cross examination, it is stated that laws of evidence are not strictly applicable in income tax proceedings. The principle of "preponderance of probability" is judiciously followed as against "beyond reasonable doubt."*

It is also to be borne in mind, that Directorate of investigation, Kolkata in coordination with other Directorates of Investigation at other places, carried out a major exercise and unearthed the massive racket of entry operators and manipulators to launder the black money and tax evasion. During the said exercise various statements were recorded. Certainly, simultaneous action was not taking place in each and every beneficiary's case. Therefore every beneficiary or his representative was not available at the time of recording of those statements. This situation is unlike a normal court of law where at the time of recording of the statement, the other party or his representative is present in the same court and at the same time and his offering of the said cross examination does not pose any practical difficulty. It was not so in the present case. There is one more aspect of the matter. The Investigation Wing of the Income Tax department in course of discharge of the official duty, has generated a report which is almost akin to an expert opinion. Therefore, if necessary, the author of the report could be cross-examined. However, at no point of time there was demand to cross examine the author of the report. Therefore the evidentiary value of the said report is very much there like any other documentary evidence.

4.5. *In the present instance, the referred Investigation Report of Investigation Wing Kolkata was available on the public domain and the assessee had free access to the said documents. As regards cross examination, there are numerous rulings which support the case of revenue observing that "so long as the party charged has a fair and reasonable opportunity to see, comment and criticize the evidence, statement or record*

on which the charge is made against him the demands and the test of natural justice are satisfied." Nokia India Pvt. Ltd. vs. DDIT of Hon'ble ITAT Delhi which has relied upon the decision of Hon'ble Calcutta high Court in the case of Kisanlal Aggarwal vs. Collector of Land Customs AIR 1967 & Cal. 80 where the Hon'ble Court has held "No natural justice requires that there should be a kind of a formal cross-examination. Formal cross-examination is procedural justice So long as the party charged has a fair and reasonable opportunity to see, comment and criticise the evidence, statement or record on which the charge is being made against him the demands and the test of natural justice are satisfied. Cross-examination in that sense is not the technical cross-examination in a Court of law in the witness-box."

4.6 In the case of CIT v. Kunwer Fibers (P.) Ltd. 77 taxman.com 345 Hon'ble High Court of Delhi has held that the statements-recorded on 20.3.1996 were corroborated by the material. As far as the Question relating to cross examination is concerned, the court notices that though the documents were furnished to the assessee, it had not sought opportunity of cross examination; this was made at the fag end, in March, 1997. This court finds no justification to reject the statements, which merely explain the documents seized; the assessee could well have given a full explanation instead of seeking rejection of the documents.

4.7 In the case of GTC Industries Ltd. vs. ACIT 65 ITD 380 Hon'ble ITAT Bombay has held that the principles of natural justice do not require formal cross- examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidences, and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue could not rely on any evidences which had not been subjected to cross-examination.

4.8 To address the arguments of the appellant at points Background of the entire scheme, investigations and Findings of th and other agencies is relevant.

4.9.1 Outcome of Investigations by the Investigation wing of the Income Tax Department

- Total 84 BSE listed companies were identified as penny stock:***
- More than 60,000 PAN of the beneficiaries was involved.*
- More than 5000 paper/shell companies involved in providing*

accommodation entries were detected.

- *Statements of the directors of the companies were recorded.*

*Cash trail reflected how unaccounted/undisclosed cash beneficiaries was routed through to convert black money ii
LTCG/STCG.*

4.9.2 The Calcutta Directorate of Income Tax (Investigation) made extensive investigation and unearthed modus operandi of making black money into white as under:

"The modus operandi unearthed during the investigation by the Directorate of Investigation was that an entry beneficiary approaches an entry operator who is having shares of a listed quiescent company through some agent or mediator directly or indirectly. The beneficiary then on the instruction of entry operator buys the shares of the listed dormant company, either not doing any business or with a miniscule profit, is then jacked up to a desired level with the determined and regular buying and selling of the shares by some dummy persons or by other floated paper companies which are generally controlled and managed by the same entry operators. Sometimes, a lobby is formed by various entry operators for rigging up the price of the so called listed company and hence the floated paper companies of various entry operators are used for buying and selling of shares and raising the price of shares to a desired level. When finally the shares held by the beneficiary in the listed penny stock company reach the desired level or price, then the beneficiary is informed by the entry operator directly or through his agent to provide cash which can be routed to some other Jama Karchi companies or entities to buy those shares from the beneficiary. The cash received from the beneficiary is then handed over to the operator through agents or directly. The entry operator then routes and layers back this cash so received into various paper entities which are controlled and managed by him. These paper entities which have received layered money are then used as dummy buyers i.e. counter parties are ready, then the entry operator intimates the beneficiary to sell specific number of shares."

The Calcutta Directorate of Income Tax (Investigation) identified 84 companies (commonly called pennies of companies) which were being used for generating bogus long term/short term capital gains by certain entry operators. The Securities and Exchange Board of India (SEBI) has taken

cognizance of investigation carried by investigation of Income Tax Department and also carried out investigation in case of certain scrips and passed suitable instructions on the issue of manipulation of share market for providing bogus capital gains entries.

4.9.3 IMPORTANT OBSERVATIONS OF NSE/SEBI/SIT

11 member Special Investigation Team (SIT) of Hon'ble Supreme Court on Black Money has also pointed out the Misuse of exemption on Long Term Capital Gains tax for money laundering in the Third SIT report on Black Money.

Order of BSE of January, 2015 showing the list of 22 banned penny stock companies for trading.

The AR, on behalf of A has reiterated, that the various searches and investigations conducted by the IT Dept, Inv Wing Kolkata found no material against the A, hence he has no role and is thus an innocent Investor. The AR has also objected to his right of cross examination of persons/Company Directors/Stock brokers, whose statements were recorded during searches by the inv Wing.

Prima facie, it may appear to be so but, Income tax Act follows the juridical principle of 'preponderance of probability' and not 'beyond reasonable doubt'. Moreso in a scam of such a massive scale, with so many players involved, the laws of evidence have to be accordingly applied. Even the AO has drawn strength from judicial pronouncements which specially address such peculiar circumstances and facts.

4.10 The appellant has put forth an argument that the sale of shares was made on an anonymous platform, i.e. the appellant has no knowledge of who is the purchaser/seller and the appellant is only dealing with the exchange.

It is worthwhile to mention here that the Apex Court of the country has rejected this plea that every trading activity done on BSE platform does not have scope of manipulation. Hon'ble Supreme Court in a recent judgment dated 8th February 2018 in the case of Securities and Exchange

Board of India versus Rakhi Trading Private Limited (civil appeal number 1969 of 2011 with civil appeals number 3174-3177 of 2011 and civil appeal number 3180 of 2011) has observed as under:

"Considering the reversal transactions, quantity, price and time and sale, parties being persistent in number of such credit transactions with a huge price variations it will be too naive to hold that the transactions are through screen-based trading and hence anonymous. Such conclusion would be overlooking the prior meeting of minds involving synchronisation of b. and sell order and not negotiated deals as per the board's circular. The impugned transactions are manipulative/deceptive device to create a desired loss and oblique or profit."

Thus, the screen based transaction would not necessarily make it sacrosanct specially in a scam ridden case of such massive proportion involving thousands of crores of rupees.

5.1 DECISIONS RELIED UPON BY ITAT/COURTS IN FAVOUR OF REVENUE ON THE ISSUE OF CIRCUMSTANTIAL EVIDENCE IN PENNY STOCK CASES

- *CIT vs. Durga Prasad More [1971] 82 ITR 540 (SC)*
- *Sumati Dayal 214 ITR 801 (SC)*
- *Me Dowell & Co. 154 ITR 148 (SC)*
- *Som Nath Maini, 306 ITR 414 (HC)*
- *Ashok Mahehdru & Sons (HUF) v CIT 173 TAXMANN 178 (HC)*
- *Hersh Win Chadha Vs DCIT 135 TTJ 513 (ITAT Delhi)*
- *Arvind M Kariya Vs ACIT IN ITA No. 7024/Mum/2010 (ITAT Mumbai)*

5.2. DECISIONS IN FAVOUR OF REVENUE ON THE ISSUE OF RULE OF EVIDENCE

AO is a quasi - judicial authority and rigour of the rules of evidence contained in the evidence act are not applicable. There is no presumption in law that the AO is to discharge an impossible burden to assess the tax liabilities by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings.

- Dhakeshwari Cotton Mills Ltd. Vs. CIT (1954) 26 ITR 775 (SC)
S.S. Gadgil v. Lal & Co. (1964) 53 ITR 231 (SC)
- CIT v. Jay Engineering Works Ltd. (1978) 113 ITR 389 (Delhi HC)
- Dinshaw Darabshaw Shroff v. CIT (1943) 11 ITR 172 (Bom.)
- Hershwin Chadha Vs DCIT 135 TTD 51 (ITAT Delhi)

5.3 DIRECT DECISIONS OF HON'BLE COURTS/TRIBUNALS IN THE CASE OF PENNY STOCK COMPANIES IN FAVOUR OF REVENUE

- *M.K. Rajeshwari vs. ITO in ITA No. 1723/Bang/2018 vide order dated 12.10.2018 Hon'ble ITAT Bangalore Bench*
- *Abhimanyu Soin vs. ACIT in ITA No. 951/Chd/2016 vide order dated 18.04.2018 Hon'ble ITAT Chandigarh bench*
- *Sanjay Bimalchand Jain vs. ITO in ITA No. 61/Nag/2013 vide order dated 18th July, 2016 Hon'ble ITAT Nagpur Bench confirmed by Hon'ble Bombay High Court vide order dated 10.04.2017 (89 taxmann.com 196)*
- *Dinesh Kumar Khandelwal, HUF vs. ITO in ITA No. 58 & 59/Nag/2015 vide order dated 24th August, 2016*
- *Ratnakar M. Pujari vs. ITO in ITA No. 995/Mum/2012 vide order dated 03.08.2016 Hon'ble ITAT Mumbai Bench*
- *Disha N. Lalwani vs. ITO in ITA No. 6398/Mum/2012 vide order dated 22.03.2017 Hon'ble ITAT Mumbai Bench*
- *Hon'ble ITAT Mumbai in ITO vs. Shamim M. Bharwani [2016] 69 taxmann.com 65*
- *Usha Chandresh Shah Vs ITO in ITA No. 6858/Mum/2011 vide order dated 26.09.2014 Hon'ble ITAT Mumbai Bench*

CIT vs. Smt. Jasvinder Kaur 357 ITR 638 order dated 12.06.2013 (Gauhati HC)

5.4 While Ld AR has supported his contention citing various decisions of Hon'ble High Courts and ITATs but the final interpretation of the legislative intent and law of the land has been clearly put forth by the Hon'ble Supreme Court in the following three landmark judgements:-

- CIT vs. Durga Prasad More [1971] 82 ITR 540 (SC)

- Sumati Dayal 214 ITR 801 (SC)
- Me Dowell & Co. 154 ITR 148 (SC)

5.5. *The AR has emphasized on the AO's inability to produce any cogent material or evidence to establish any live link between the material relied and the case of the appellant.*

As can be seen from the magnitude, volume and surgical precision of the entire operation, it was an exercise which was targeted to achieve certain objectives to circumvent the law of the land, evade taxes and deprive the exchequer of its rightful due. The plethora of cases quoted by the AO all lend support to his decision, specially in such scam ridden cases wherein it is essential to pierce the veil of legitimacy and innocence/ignorance and look behind the charade woven to evade taxes. On the other hand, after due consideration of arguments put forth by the appellant, it is held that the Ld AR has not been able to controvert/successfully distinguish the judicial pronouncements quoted by the AO.

5.6 *The AR argued that the transaction of sale of these shares is through stock exchange and the sale consideration has been received via cheque. Whereas the ground of the AO is that the appellant could not discharge the onus cast upon him by virtue of section 68 in proving genuineness of the transaction, specially because the transaction is improbable.*

5.7 *Hon'ble Nagpur ITAT while delivering judgment dt.10.04.2017, in 61/Nag/2013. Assessment Year: 2006-07, in case of Sanjay Bimalchand Jain L/H of Smt. Shanti devi Bimalchand Jain Vs. Pr.CIT-l, Nagpur has dealt with and observed as under,*

“In this regard I may gainfully refer to the decision of Hon'ble jurisdictional High Court in the case of Major Metals Ltd. vs. Union of India and others in Writ Petition No. 397 of 2011 vide order dated 22nd February, 2012. The Hon'ble jurisdictional High Court in this case has held that a company cannot command disproportionate and huge share premium and such receipt of bogus share application money even though through banking channel can be held to be assessee's undisclosed income received in the garb of unjustified

share application money. In the present case I find that there is no justification whatsoever that the shares of an unknown company of Rs.5/- can be sold within two years time Rs. 485/- without there being any reason on record. This unexplained spurt in the value of unknown company shares is beyond preponderance of probability. It has been held by Hon'ble Apex Court in the case of Durga Prasad Mor and Sumati Dayal that the test of human probabilities have also to be applied by the authorities below. In the case of Sumati Dayal 214 ITR 801, it was held that during the year 1970-71 (pertaining to the assessment year 1971-72) between April 6, 1970, and March 20, 1971, the appellant claims to have won in horse race a total amount of Rs. 3,11,831/- on 13 occasions out of which ten winnings were from jackpots and three were from treble events. Similarly in the year 1971-72, the appellant won races on two occasions and both times the winning were from a jackpot. These receipts were tested on the touch stone of human probability and it was found that apparent was not real. That it was contrary to statistical theory and experience of the frequencies and probabilities. The exceptional luck enjoyed by the assessee was held to be beyond preponderance of probability. Hence the Hon'ble Apex Court has affirmed the view that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

When the present case is examined on the touch stone of above case law, it is clear that these transactions of the assessee can by no stretch of imagination be considered as investment transactions. They are only make believe transaction. Hence I do not find any infirmity in the revenue taxing the receipt in this regard.

The entire amount of the so called receipt of share sales could well also be treated as unexplained credit u/s 68 of the I.T. Act as it has all the ingredients of attracting the rigors of the said section. Section 68 of the I.T. Act provides that where any sum is found credited in the books of the assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the AO satisfactory, the sum so credited may be charged to income tax as income of the assessee of that year. In the present case the assessee's

explanation that the said receipt is on account of investment in shares whereby share of Rs.5/- of unknown company has jumped to Rs.485/- in no time has been totally rejected by the authorities below. The assessee has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for the sale price of these shares. The so called purchaser of these shares has not been identified despite efforts of the AO. The broker company through which shares were sold did not respond to queries in this regard. Hence the fantastic sale price realisation is not at all humanly probably, as there is no economic or financial basis, that a share of little known company would jump from Rs. 5/- to 485/-, In these circumstances, I do not find any infirmity in the orders of the authorities below. Accordingly I affirm the same and decide the issue against the assessee."

Nagpur Bench of Hon'ble Bombay High Court while delivering judgment dt. 10.04.2017, in ITA No 18/2017, has dismissed appeal against the above said order of the ITAT, Nagpur, in case of Saniav Bimalcharn L/Hof Smt. Shantidevi Bimalchand Jain Vs. Pr. CIT-I. Nagpur.

5.8 It can be seen from the above that the Hon'ble High Court and ITAT held that this kind of receipt can be taxed u/s 68. It is a trite that under sect 68, the onus is upon the appellant to prove three things namely, i) identity creditor , ii) credit worthiness of the creditor and iii) genuineness of t transaction. The appellant is trying to prove genuineness through the routir papers. In this case, reference has already been made to the ratio of Hon'bl Supreme Court in the case of Durga Prasad More (supra) where it has been observed that documents cannot be relied upon blindly: —

The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents

The A.O. has applied section 68 of Income Tax Act, 1961. The relevant provisions of section 68 are reproduced as under:

"68. Cash credits

Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no

explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

5.9 It may be seen that whether explanation of the appellant is satisfactory or not is to be seen with reference to the opinion of the assessing officer. The legal position in this regard is discussed in the following paragraphs

In the context of section 147, Hon'ble Supreme Court while delivering judgment in the case of Raymond Woollen Mills Ltd Vs. Income-Tax Officer And Others [1999] 236 ITR 34 (SC) laid down a ratio that the sufficiency or correctness of the material is not a thing to be considered by the courts. This view is reaffirmed by Hon'ble SC, in case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. 291 ITR 500(SC). The Hon'ble SC has stated as under:

"This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)]."

5.10 *In Anant Kumar Saharia Vs. CIT [1998] 232 ITR 533 (Gauhati), it was held as follows (page 539):*

"The belief is that of the Assessing Officer and the reliability or credibility or for that matter the weight that was attached to the materials naturally, depends on the judgment of the Assessing Officer. This court in exercise of power under article 226 of the Constitution of India cannot go into the sufficiency or adequacy of the materials. After all the Assessing Officer alone is entrusted to administer the impugned Act and if there is prima facie material at the disposal of the Assessing Officer that the income chargeable to income-tax escaped assessment this court in exercise of power under article 226 of the Constitution of India should refrain from exercising the power.

In the instant also, the case of the petitioner was fairly considered and thereafter the above decision is taken." (emphasis supplied).

5.11 Hon'ble Delhi High Court, while delivering the judgment, in case of Dalmia Pvt. Ltd. Vs Commissioner of Income Tax Delhi [2011] 14 Taxmann.com 106 (Delhi), on 26 September, 2011 has upheld this principle. The Hon'ble HC stated as under:

"..The sufficiency or correctness of the material is not a thing to be considered at this stage as held by Supreme Court in the case of Raymond Woolen Mills Ltd. V ITO (1999) 236 ITR 34 (SC), Green Arts (P) Ltd. V ITO (2005) 257 ITR 639 (Delhi). The assessee cannot challenge sufficiency of belief-ITO V. LakhmaniMewal Das (1976) 103 ITR 437 (SC).."

6.1 Therefore, I am of the considered view that if the subjectivity of 'reason to believe' cannot be subject matter of consideration of the appellate courts, the subjectivity in 'opinion' of the A.O. can never be subject matter of consideration of the appellate courts because certain incriminating material having some evidentiary value is required to form 'reason to believe' and there is less chance of subjectivity, however, 'opinion' can be formed' on the basis of some material which , strictly speaking, may not have any evidentiary value and has much more (inherent) subjectivity. What can be examined is whether there was material which has been appreciated and whether the opinion formed is logical and is one of the possible opinions which could have been formed in the given set of facts and circumstances.

6.2 The following recent rulings of the ITATs confirmed the findings of the assessing officer in similar cases involving bogus capital gains through transactions in Penny Stocks':

*i) **Pune ITAT:-** Rejects capital-gains claim on 'penny stock' sale; Disregards paper-trail through contract-notes*

Pune ITAT upheld undisclosed income addition for sale proceeds received by assessee-individual on sale of shares & rejected assessee's short term capital gains 'STCG' claim for AY 2006-07: Based on the enquiries conducted by BSE/SEBI, AO observed that the shares of a company dealt in

by assessee were tainted b\ penny stock in as much as its prices were manipulated, Accordingly he held that the STCG brought into books was nothing but income from undisclosed sources, it was noted that assessee had claimed huge STCG of Rs. 22 lakh in respect of penny stock purchased for a paltry sum of Rs. 75,000/, further noted that broker from whom assessee purchased the shares was visited with the penalties by SEBI and was debarred from acting as a share broker. On assessee's completion of paper-trail by producing contract notes, ITAT remarks that "mere furnishing of contract notes etc. and more specifically when seen in the background of the above noted facts, does not inspire any confidence and cannot be a ground to delete an addition, which is otherwise made on the solid bedrock of detailed enquiries". It therefore concluded that the assessee obtained only accommodation entries in the garb of STCG from transfer of penny stock and also sustained addition to the extent of 2% on account of commission for arranging deal of share-sale.

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ii) Hon'ble ITAT New Delhi in the case of Anip Rastogi [TS-5007-ITAT-2019(Delhi)] has upheld addition u/s 68 on account of credits arising on sale of penny stock on the ground that assessee had generated bogus entries of long term capital gains on sale of penny stocks.

iii) Very recently Hon'ble Delhi High Court in ITA No. 49/2018 pronounced on 17.01.2019 in the case of Pr. CIT Vs. NDR Prornotors Pvt. Ltd. almost similar circumstances held that "we have no hesitation in holding that the transactions in questions were clearly sham and make belief with excellent paper work tocamouflage their bogus nature the reasoning given is contrary to humanprobabilities for in the normal course of conduct, no one will make investment of such huge amount without being concerned about the return and safety of such investment. Accordingly the appeal is allowed."

In view of above discussion the addition of 1,57,458/- is hereby confirmed."

6. The assessee has not brought any material to contradict the finding of learned CIT(A). Moreover, the assessee chose not to attend the hearing despite having been given sufficient opportunity. I, therefore, confirm the finding of learned CIT(A). The grounds raised in the appeal are rejected.

7. The appeal is dismissed.

(KUL BHARAT)
JUDICIAL MEMBER

Madan PalVerma

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI

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