

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER**

ITA No.3404/Del/2019
Assessment Year: 2015-16

Riaz Munshi, E-5, Ist Floor, Kailash Colony, New Delhi-1100 48	Vs.	ACIT, Circle-17(2), New Delhi
PAN :AAMPM2657F		
(Appellant)		(Respondent)

Appellant by	S/Shri Gautam Jain, Adv. & Rajeev Sabharwal, CA
Respondent by	Shri Atiq Ahmed, Sr. DR

Date of hearing	28.03.2022
Date of pronouncement	08.06.2022

ORDER
PER SAKTIJIT DEY, JUDICIAL MEMBER:

This is an appeal by the assessee against order dated 28.02.2019 of learned Commissioner of Income-Tax(Appeals)-37, New Delhi pertaining to assessment year 2015-16.

2. Ground Nos. 1 to 3.8 are directed against addition of Rs.1,61,70,650 representing long term capital gain on sale of equity shares.

3. Briefly, the facts are, assessee, a resident individual, is stated to be deriving income from remuneration received as a director of M/s. N. Chirag Travels Pvt. Ltd. For the assessment year under dispute, assessee filed his return of income on 31.08.2015, declaring income of Rs.20,43,020. Assessee's case was selected for complete scrutiny due to alleged suspicious transaction relating to long term capital gain on shares. In course of assessment proceedings, while verifying the return of income filed by assessee, Assessing Officer noticed that, though, assessee had derived long term capital gain on sale of equity shares of M/s. Esteem Bio-organic Food Processing Ltd. (EBFPL) & M/s. Jackson Investments Ltd., however, assessee has not offered such long term capital gain in the return of income. Further, Assessing Officer noticed that as per the inquiry conducted by the Directorate of Investigation, Calcutta, it was found that an organized racket of

generating bogus entries of long term capital gain, which is otherwise exempt from tax, is in active operation. He observed, the modus operandi adopted by the operator was to make the beneficiaries buy some shares of pre-determined penny-stock company controlled by them. Such shares are transferred to the beneficiaries at a very nominal price, mostly, offline through preferential allotment of offline shares. After holding the shares for one year, the beneficiaries sell the shares at a very high price achieved through rigging by the operators and claims exemption under Section 10(38) of the Act. Further, as per the investigation done by Investigation Wing, Security & Exchange Board of India (SEBI) has conducted a thorough inquiry regarding artificial rigging of price of equity shares and found that certain entities are indulging in artificial price rigging. Therefore, in its Interim Report dated 29.06.2015, SEBI restrained several entities including promoters related entities. In the Interim Report, SEBI had also restrained M/s. EBFL as well as the assessee from accessing the security market and buying, selling and dealing any security either directly or indirectly in any manner. Thus, the Assessing Officer observed , the inquiry

conducted by the Investigation Wing as well as SEBI, clearly demonstrated that the share transactions from which assessee claimed to have derived long term capital gains are ingenuine and bogus transactions. Therefore, he held that the long term capital gain claimed as exemption under Section 10(38) of the Act is bogus and the so called long term capital gain is actually in the nature of unexplained cash credit under Section 68 of the Act. Accordingly, he added it back to the income of the assessee. Further, alleging that being a beneficiary of bogus long term capital gain assessee must have paid commission to operator/brokers, the Assessing Officer added back commission expenditure of Rs.4,85,120 under Section 69C of the Act. Contesting the aforesaid addition, though, assessee preferred an appeal before learned Commissioner (Appeals), however, he was unsuccessful.

4. Before us, learned counsel for the assessee submitted that the Assessing Officer has completely misdirected himself while treating the long term capital gain as unexplained cash credits. He submitted, without verifying the facts brought on record and applying his mind, by

simply relying upon the report received from Investigation Wing and the Interim Report of SEBI, Assessing Officer came to his conclusion. He submitted, though, Assessing Officer was very much conscious of the fact that in the final report dated 6th September 2017, SEBI had absolved the assessee from all charges and revoked restrictions imposed on the assessee from buying/selling of equity shares, however, the Assessing Officer did not give due consideration to such report of the SEBI. He submitted, even learned Commissioner (Appeals) also ignored the final report of the SEBI. He submitted, all the shares of EBFPL were purchased much earlier to the date of interim report of SEBI and some shares of EBFPL were sold in the preceding assessment years. He submitted, while dealing with similar additions made in respect of long term capital gain derived from sale of equity shares of EBFPL in assessment year 2014-15, the Tribunal in ITA No. 8314/Del/2018 dated 11.03.2020 has deleted the addition made under Section 68 of the Act by holding that the transaction relating to the sale of shares of EBFPL is genuine. Thus, he submitted, facts being identical in the impugned assessment year, the issue is squarely covered by the earlier decision of

the Tribunal. Without prejudice, he submitted, in case of many other assessees deriving capital gain on sale of shares of EBOFPL, the Tribunal has held the transaction to be genuine. In this regard, he relied upon the following decisions:

- i) Sunita Khemka vs. ACIT 53 CCH 415 (Del.-Tribu);
- ii) Amar ath Goenka vs. ACIT 54 CCH 344 (Delh.Tribu.);
- iii) Smt. Karuna Garg vs. ITO, Ward 39(4), New Delhi & Others ITA No.6480/Del/2017 etc., Dated 06.08.2019; &
- iv) Swati Luthra, New Delhi vs. ITO, Ward 51(5), New Delhi & Ors. ITA No.6480/Del/2017 etc. Dated 28.06.2019.

5. Specifically, drawing our attention to an order passed by the co-ordinate bench, in case of Smt. Kama Garg & Ors. Vs. ITO in ITA No.106/Del/2019 & Ors. dated 06.08.2019, he submitted, while dealing with an identical issue relating to claim of long term capital gain arising on sale of shares of EBFPL, Tribunal has held the transaction to be genuine as the Revenue failed to bring any material on record to establish its case. The Bench observed, the Assessing Officer without conducting any independent inquiry has simply relied upon the information received from Investigation Wing and interim report of

SEBI. He submitted, the aforesaid decision of the Tribunal was also upheld by the jurisdictional High Court in judgment dated 15.01.2021. Thus, he submitted the issue is more or less settled in favour of the assessee.

6. Learned Departmental Representative strongly relied upon the observations of the departmental authorities. In addition, he furnished the following submissions in writing:

- “i) The assessee was not able to substantiate that how he came to know about the availability of preferential shares allotment of M/s. Esteem Bio organic food processing limited (EBOFPL) and M/s. Jackwon investment Ltd.
- ii) It is submitted that in the matter of Esteem Bio Organic Food Processing Ltd., SEBI has conducted an investigation in the scrip of EBOFPL to ascertain whether there was any violation of the SEBI provision and regulation by the certain entities, which are connected to each other. After investigation SEBI has passed order on 25.09.2020 imposing penalty of Rs.5,00,000/- each on the entities, who are connected to each other and pushing up the price of the scrip of ESTEEM through unusual trades during the period Feb. 7 2013 and July 31, 2015. As per SEBI investigation, it was found that a set of connected entities were pushing up the price of the scrip through unusual trades in such a manner so as to make a positive contribution to the Last Traded Price (LTP) and establishing New High Price (NHP). Also, the trades of the persons have made positive contribution of LTP

on several occasions and such trades were instrumental in unusual price rise in the scrip Esteem Bio Organic Food.

- iii) Further, order of SEBI is passed in the matter of M/s. Esteem bio organic food processing limited on 22.12.2020 u/s. 11(1), 11(4) and 11B(1) of the SEBI Act, 1992 vide which the company M/s. Esteem bio organic food processing limited and others are debarred by the SEBI. As per the order of the SEBI these companies are restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in any manner whatsoever manner.
- v) Further reliance is also placed in the case of SEBI Vs. Rakhi Trading Pvt. Ltd. order dated 08.02.2018, in which the Hon'ble Supreme Court in the Para 46 of the order held that synchronized trading is violative of transparent norms of trading in securities.”

7. We have considered rival submissions in the light of decisions relied upon and perused the material on record.

8. Undisputedly, in the year under consideration, assessee had derived long term capital gain from sale of the following shares:

Esteemed Bio Organic Food Processing Ltd.:

Sale value of 27,300 shares	Rs. <u>1,50,50,820.00</u>
Less: Expenses on sale	Rs. <u>46,032.77</u>
	Rs. <u>1,50,04,787.23</u>
Less: Purchase consideration	Rs. <u>26,72,611.50</u>
	Rs. <u>1,23,32,175.73</u>

Jackson Investments Ltd:

Sale value of 4,000 shares	Rs. <u>12,52,000.00</u>
Less: Expenses on sale	Rs. <u>2,137.79</u>
	Rs. <u>12,49,862.21</u>
Less: Purchase consideration	Rs. <u>40,000.00</u>
	Rs. <u>12,09,862.21</u>

9. It is quite obvious, the Assessing Officer had received certain information from the investigation wing relating to certain irregularities in share market involving price rigging in certain shares. It is worth mentioning, the report of the investigation wing is also based on the interim report dated 29.06.2015 of SEBI stating that on inquiry, it was found that certain entities/individuals were involved in irregularities in share market, such as, price rigging. Thus, in the said interim report, SEBI, prima facie, found that certain entities/individuals were involved in price manipulation and IPO manipulation of the scrips and debarred them from buying/selling in shares. The list of such entities prepared by SEBI, as mentioned in the interim report, included the name EBFPL and the assessee. However, after conducting full-fledged inquiry and

investigation, the SEBI didn't find any adverse material against the assessee and many other entities. Hence, their name was removed from the list of debarred entities and the restraint order passed against them was revoked. Thus, in view of the final report of SEBI, there is nothing adverse against the assessee available with the Revenue. It is relevant to observe, though, the aforesaid final report of SEBI was available before the Assessing Officer, however, he has not taken cognizance of the clean chit given to the assessee and has harped on the interim report of the SEBI. Thus, it is quite apparent, the Assessing Officer has used the report of SEBI according to his convenience.

10. Instead of dealing with the specific facts and evidences brought on record by the assessee, Assessing Officer has ventured into exposition of legal principles. As could be seen from facts on record, assessee had also sold 15,600 shares of EBFPL in the immediately preceding assessment year 2014-15. Relying upon the very same report of the Investigation Wing as well as Interim Report of SEBI, Assessing Officer had treated the long term capital gain on sale of shares as ingenuine and added to the income of the assessee. However, while deciding the issue in appeal,

Tribunal in ITA No.8314/Del/2018 dated 11.03.2020 deleted the addition made by the Assessing Officer with the following observations:

“6. We have considered the rival submissions and perused the material on record. The assessment order clearly show that the A.O. merely reproduced the modus operandi of the entry providers who booked bogus long term capital gains through penny stock companies in which either there is no business or they have accumulated losses or a Company is floated only for that purpose. Learned ITA.No.8314/Del./2018 Shri Riaz Munshi, New Delhi. Counsel for the Assessee has filed financials of M/s EBFL from A.Ys. 2011-2012 to 2017-2018 and for the assessment year under appeal the financials are reproduced above, which clearly show that this Company is dealing in actual business activities. Its financials are very heavy and as such the modus operandi of this type of penny stock companies would not be available in the case of M/s EBFL. The findings of the A.O. are entirely based upon interim order of SEBI. However, it is an admitted fact that interim order of the SEBI have been later on revoked by the SEBI on assessee as well as M/s EBFL have been cleared from all allegations and charges. In the case of [Amar Nath Goenka vs., ACIT](#) reported in 54 CCH 344, the ITAT, Delhi Bench considered the scrips of M/s EBFL on identical facts and held as under:

"Assessee placed sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased shares through banking channel and actually got the shares transferred in his name. Purchase was made through cheque which is supported ITA.No.8314/Del./2018 Shri Riaz Munshi, New Delhi.

by bank statement. The transactions of sale have been made through Demat account. The contract note along with other

details were produced to show that purchase and sale of the shares have been made through banking channel through recognized Stock Exchange through Demat account on which Security Transaction Tax have also been paid. The A.O. did not make any enquiry on the documentary evidences filed by the assessee. No material have been brought on record against the assessee to disprove the claim of assessee. It is not the case of the Revenue that amount received on sale of shares is more than what is declared by the assessee. The assessee pleaded that the Interim Order of the SEBI have been diluted by passing final order in which no adverse view have been taken against the aforesaid company. Thus, the assessee's claim of purchase and sale of shares have been supported by documentary evidences. The statement of Shri Sanjay Vohra was recorded by the Investigation Wing, Kolkata, but, the same was not confronted to the assessee and ITA.No.8314/Del./2018 Shri Riaz Munshi, New Delhi. his statement was also not subjected to cross- examination on behalf of the assessee. Therefore, his statement cannot be read in evidence against the assessee. The A.O. did not mention any fact as to how the claim of assessee was sham or bogus. The assessee satisfied the conditions of [Section 10\(38\)](#). The broker through whom transactions were carried-out have not denied the transaction conducted on behalf of the assessee. It, therefore, appears that the addition is merely made on presumption and assumptions of certain facts which are not part of the record. There is no other material available on record to rebut the claim of assessee of exemption claimed under [section 10\(38\)](#). Issue is decided in assessee 's favour."

11. There is no difference in the factual position in the impugned assessment year. We have also observed, in case of various other

assessee involving identical dispute relating to long term capital gain derived from sale of shares of EBFPL, Tribunal has deleted the addition by holding the transaction as genuine. In fact, in case of Smt. Karuna Garg Vs. ITO & Ors. ITA No.1069/Del/2019 & Ors. dated 06.08.2019, co-ordinate Bench while dealing with identical issue of long term capital gain derived from sale of shares of M/s. EBOFPL has observed as under:

“19. We have carefully considered the orders of the authorities below and the relevant documentary evidences brought on record in the form of paper book in the light of Rule 18 (6) of ITAT Rules. Whether or not a person has discharged the burden cast upon him by the provisions of [section 68](#) of the IT Act is always a question of fact. All that has to be seen by us is whether the appellant has discharged the initial onus cast upon him by the provisions of [section 68](#) of the IT Act.

20. 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.

21. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received

from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings.

22. [Section 142](#) of the Act contains the provisions relating to enquiry before assessment.

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and reaffirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry.

24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of

M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic Food Processing Ltd - a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also.

25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI.

26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void.

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

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(/4ppeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under [Section 131](#) summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of [Section 68](#)."

28. The DR heavily relied upon the judgment of Hon'ble High Court of Delhi in the case of Udit Kalra Vs. ITO in ITA No.220/2019. We have carefully perused the order of the Hon'ble High Court and on going through the said judgment we find that no question of law was formulated by the Hon'ble High Court

of Delhi in the said case and there is only dismissal of appeal in limine as the Hon'ble High Court found that the issue involved is a question of fact.

29. As mentioned elsewhere the shares of M/s. Esteem Bio Organic Food Processing Ltd were suspended from trading in the stock exchange but that was from 29.06.2015 which is date of the order of the SEBI. The shares of two companies were purchased by the assessee in the month of February 2013 and November, 2012 which were sold in the month of February/ March 2014 and these transactions took place much before the report of the Investigation Wing and also before the order of the SEBI.

30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of [section 68](#) of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand.

31. We accordingly direct the Assessing Officer to accept the long term capital gains declared as such.”

12. It is relevant to observe, the aforesaid decision of the co-ordinate Bench was upheld by the Hon'ble jurisdictional High Court. It is quite evident that the transaction relating to purchase and sale of shares of the two entities disputed by the Assessing Officer were done by following due process. All the documentary evidences relating to the share

transactions were furnished before the departmental authorities. The aforesaid factual position has not been controverted by the Revenue. Thus, without controverting the facts and material brought on record by the assessee by bringing on record any contrary evidence, the departmental authorities cannot treat a transaction as ingenuine and convert the long term capital gain earned by the assessee as unexplained income. If, the Revenue doesn't want to accept assessee's claim, the burden is entirely on the Revenue to prove the contrary through cogent evidence. In the facts of the present appeal, undoubtedly, the Revenue has failed to do so. By simply relying upon the interim report of SEBI which forms the cornerstone of the disputed addition, the Assessing Officer has treated the share transactions as ingenuine. While doing so, he has deliberately not taken cognizance of the final report of SEBI, wherein, assessee was exonerated from all the charges. In so far as capital gain derived from sale of shares of M/s. Jackson Investment Ltd., interestingly, nothing adverse was found against this entity even in the interim report of SEBI. Thus, on overall consideration of the facts and circumstances of the case and keeping in view the ratio laid down in

various judicial precedents cited before us, including, the decision of the co-ordinate Bench in assessee's own case as referred to above, we hold that the addition made by the Assessing Officer and sustained by learned Commissioner (Appeals) is unsustainable. Accordingly, we delete the addition. Grounds are allowed.

13. In the result, the appeal is allowed.

Order pronounced in the open court on 8th June, 2022.

Sd/-

**(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER**

Sd/-

**(SAKTIJIT DEY)
JUDICIAL MEMBER**

Dated: 08th June, 2022.

Mohan Lal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation (Order drafted through Dragon software):	02.06.2022
2.	Date on which the draft of order is placed before the Dictating Member:	03.06.2022
3.	Date on which the draft of order is placed before the other Member:	.06.2022
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	08.06.2022
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	08.06.2022
6.	Date on which the final order received after having been singed/pronounced by the Members:	09.06.2022
7.	Date on which the final order is uploaded on the website of ITAT:	14.06.2022
8.	Date on which the file goes to the Bench Clerk	14.06.2022
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	