

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER AND  
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER**

***(Conducted through Virtual Court)***

**ITA No.839/Ind/2019  
Assessment Year: 2011-12**

Shri Sanjay Gupta,  
35, Siyaganj Main Road,  
Indore - 452001.  
[PAN – ACFPG 6576 L]  
(Appellant)

vs.

Income Tax Officer – 4(1),  
Indore.

(Respondent)

Appellant by : Shri Kailash Agrawal, AR  
Respondent by : Shri Harshit Bari, Sr. D.R.

Date of hearing : 13.06.2022  
Date of pronouncement : 26.07.2022

**ORDER**

**PER SUCHITRA KAMBLE, JUDICIAL MEMBER :**

This appeal is filed by the assessee against the order dated 21.06.2019 passed by the CIT(A)-II, Indore for the Assessment Year 2011-12.

2. The grounds of appeal are as under:

- “1. *On the facts and the circumstances of the case of petitioner so reopened u/s 148 is wrong and ab-initio void.*
2. *On the facts and the circumstances of the case the petitioner submits that the reasons so recorded are contrary to the facts of the case*
3. *On the facts and the circumstances of the case the petitioner has shown income from sale of shares of Kadambh Construction Limited as business income and not as capital gain and thus reopening u/s 148 without applying mind on the facts by the assessing, is wrong.*
4. *On the facts and the circumstances of the case, the Ld. Assessing Officer has erred in adding Rs.14,72,129/- as the amount of sale of shares of Kadambh Construction Limited has been shown in return of income under the head business and profession. Appellant purchased and sold shares through recognised stock exchange and on*

*prevailing/market price and thus there being double addition of the same income.*

5. *On the facts and the circumstances of the case, the Ld. Assessing officer and Ld. Commissioner of Income Tax (Appeals) has erred in considering that the appellant has shown bogus long term capital gain and claimed exemption u/s 10(38), as the appellant has shown the profit earned from Kadambh Construction Limited as income under the head "Profit/Gains from business/profession". The appellant has neither shown income under the head ""Capital Gains"" nor has claimed deduction u/s 10(38).*
6. *On the facts and in the circumstances of the case, the Ld. Assessing Officer and Ld. CIT(A) has erred by adding the amount of Rs.14,72,129/- as the same has been already taken into consideration in the sales shown in audited financials of the assessee for the year in question."*

3. In this case information was received from DDIT (Inv.), Unit-IV(I), Thane vide letter dated 12.03.2018 with regard to the transactions carried out by the assessee Shri Sanjay Gupta during the period relevant to the A.Y. 2011-12. The Assessing Officer after verification of the report has observed that the assessee has forwarded the data from PMO for the following BSE Limited penny stock which have been used for generating bogus LTCG/STCG of business income/loss.

Sr. No.	Full Name of Penny scrip	Scrip Code	Scrip Name
1.	M/s KCL Infra Projects Ltd. (KCL IPL), formerly known as Kadamb Construction Limited	531784	Kadamb Const

4. The DDIT (Inv), Thane elaborately discussed the modus operandi adopted by the syndicate members, brokers and the entry operators to being unaccounted cash into the business through share trading of penny stock scrip of above mentioned company. The statement of Shri Mohan Jhaver, Director of M/s KCL IPL was also recorded wherein he has acknowledged the fact that there has been manipulation in the share prices of M/s. KCL IPL by certain market operators. On perusal of list of beneficiaries enclosed with DDIT(Inv), Unit-IV(I), Thane it is noticed that the name of

the assessee is also appearing on beneficiary of such bogus LTCG claim. The assessee made the following transactions in the scrip of Kadamb Construction Limited.

Beneficiary Name	Scrip Name	Trade qty.	Trade Rate	Trade Value
Shri Sanjay Gupta	Kadamb Construction Limited	6000	73.25	739500
		2000	59.10	118200
		1025	57.15	58578.75
		5000	49	245000
		2000	56	112000
		2000	54.30	108600
		3000	53.70	161100
		1000	53.75	53750
		1000	57.20	57200
		1000	56.90	56900
		1000	61.30	61300
Total				1472128.75

5. After looking to the information, the Assessing Officer had reason to believe that some component of income of the assessee has escaped from assessment and therefore the Assessing Officer has duly recorded his reasons of belief on 26.03.2018 for reopening the case for the A.Y. 2011-12. Notice under Section 148 dated 28.03.2018 was issued to the assessee and the assessee filed his return of income for the A.Y. 2011-12 on 19.04.2018 declaring total income of Rs.2,77,510/-. Subsequently, notice under Section 142(1) read with Section 129 of the Act was issued on 10.10.2018 along with detailed questionnaire based on the DDIT's report and the statement of Shri Mohan Jhaver, Director of M/s KCLIPL. The Assessing Officer made addition of Rs.14,72,179/-.

6. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

7. The Ld. AR submitted that the assessee is involved in the business of trading of shares and securities in normal course of his business from a long time. The books of accounts for the year in question was duly audited under Section 44AB of the Act and all the transactions relating to purchase and sale of shares of Kadamb Constructions Limited have been recorded in the same year. Profit from trading in share was shown under the head "profit/gains from business/profession". The assessee has neither shown the profit earned under the head "capital gains" i.e. as LTCG nor he has claimed exemption under Section 10(38) of the Act on the same. Thus, the Ld. AR submitted that the assumption of the Assessing Officer that the assessee has traded in penny stock to route the unaccountable money is not justifiable. The assessee's object was not that to purchase this share to earn long term capital gain and to take the exemption under Section 10(38) of the Act. The assessee has also submitted contract notes, demate account, bank statement of purchase and sale of the shares of Kadamb Construction Limited during the assessment proceedings. It was duly mentioned in the assessment order that the assessee is the regular trader of shares. Ld. AR further submitted that the shares were traded in a recognised stock exchange through a recognised trader and through proper banking channel. Generally, trading in shares and securities is done using gut feeling and experience. Generally, traders plough their money in various small cap/medium cap/large cap shares to make a portfolio of shares for minimising the risk factor and to maximise returns. The assessee has also dealt with the shares of other companies for which the assessee has given details at page no.67 of the submissions filed before the CIT(A). Ld. AR submitted that the Assessing Officer has only emphasised on the financials of the company and not considered other reasons which are generally used by traders. The assessee has neither shown income from the head "capital gains" nor has claimed exemption under Section 10(38) of the Act. The Assessing Officer cannot make addition on the same account without checking the applicability of the income of the assessee. Ld. AR relied upon the decision of the Tribunal in case of Meenu Goyal vs. ITO (2018) Taxpub (DT) 1851 (Delhi Tribunal) and the decision of the Indore Bench of the Tribunal in the case of Ajit Jhavar vs. ACIT (2016) 28 ITJ 271. Ld. AR

further relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of Pr. CIT vs. Prem Pal Gandhi.

8. The Ld. DR submitted that during the course of assessment proceedings, it was noticed by the AO that the appellant had shown Long Term Capital Gain on sale of scrip viz. M/s. KCL Infra Projects Limited (formerly known as Kadamb Construction Limited) which were classified as "Penny Stock Scrip" as per the data available on ITD. The appellant had earned huge profit on the said transaction and had claimed exemption u/s.10(38) of the IT Act, 1961. Though assessee is regular trader in shares, but he has not given any cogent reply on the issue that what promoted him to purchase its share and why. Further it is also found that the assessee has purchased shares of various other scripts in a very low volume of renowned companies in year 2007, but he invested in the shares of M/s Kadamb Construction in large volume.

9. We have heard both the parties and perused all the relevant material available on record. In the assessment order, the Assessing Officer has not mentioned as to whether the scrip of Kadamb Constructions Limited was blacklisted at any point of time by the DSSC or NSC stock exchanges. The investigation report as claimed by the Assessing Officer appears to be not mentioned these facts as well. The entire assessment order is based on the DDIT (Inv), Thane and its report along with statement of Shri Mohan Jhavar, Director of KCLIPL. The assessee being in continuous purchase and sale of the scrip in his normal course of business has shown income from business and not from income from LTCG or STCG which should have been taken into account by the Assessing Officer while invoking of Section 68 of the Act. On account of accommodation entry providers, whether the other third parties are operating with the assessee or not and how it has been operated with the assessee is not set out in the assessment order itself. The LTCG on sale of scrip of M/s KCL Infra Projects formerly known as KADAMB Construction Limited though classified as penny stock by the Assessing Officer as mentioned in the Assessment Order, the same was not penny stock. The order of the CIT(A) also has not mentioned as to how the assessee has played a role in increase of share prices of the said scrip at particular juncture when the scrip will gain the price and this was never substantiated by the Assessing Officer. The entire case of Revenue was on the basis of LTCG and STCG but when the assessee has not claimed exemption under Section 10(38) and the same was never offered for the purchase of income on the said scrip

or other scrip, then the addition is not justified and thus will not attract Section 68 in respect of accommodation entry. Hence, the Assessing Officer as well as the CIT(A) was not right in making the addition under Section 68 of the Act. Thus, appeal of the assessee is allowed.

10 In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on this 26<sup>th</sup> day of July, 2022.

*Sd/-*  
**(BHAGIRATH MAL BIYANI)**  
Accountant Member

*Sd/-*  
**(SUCHITRA KAMBLE)**  
Judicial Member

**Indore, the 26<sup>th</sup> day of July, 2022**

***PBN/\****

*Copies to:* (1) *The appellant*  
(2) *The respondent*  
(3) *CIT*  
(4) *CIT(A)*  
(5) *Departmental Representative*  
(6) *Guard File*

*By order*

*Assistant Registrar*  
*Income Tax Appellate Tribunal*  
*Indore Bench, Indore*