

IN THE INCOME TAX APPELLATE TRIBUNAL BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ कोलकाता,

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

Sr. No.	ITA No. & AY	Bench	Appellant/PAN/ Represented by/Address	Respondent/ Represented by	Date of hearing	Date of pronouncement
1	841/Kol/2019 AY 2014-15	SMC	Jay Kumar Dubey (PAN: AMMPD0730A) Shri Anil Kochar, Advocate 545, G. T. Road (South), Howrah-711101	ITO, Ward-46(4), Kolkata. Shri P. P. Barman, Addl. CIT	01.08.2022	29.09.2022
2	457/Kol/2019 AY 2015-16	SMC	Sukhla Hazra Choudhury (PAN: ABIPH4897B) Shri Shuvo Chakraborty 53, Badamtala, Kalna Road, East Burdwan- 713101	ACIT, Cir-1, Burdwan Shri P. P. Barman, Addl. CIT	01.08.2022	29.09.2022
3	1966/Kol/2019 AY 2014-15	SMC	Shilpi Jain (PAN: AGSPJ1244R) None 174, Rabindra Sarani, Kolkata-700007.	ITO, Wd-45(2), Kolkata. Shri P. P. Barman, Addl. CIT	01.08.2022	29.09.2022
4	1968/Kol/2019 AY 2015-16	SMC	Kamal Kishore Jhanwar (HUF) PAN:AACHK4544B None 89, Netaji Subhas Road, Dalhousie, Kolkata- 700001.	ITO, Wd-35(3), Kolkata. Shri P. P. Barman, Addl. CIT	01.08.2022	29.09.2022
5	1970/Kol/2019 AY 2012-13	SMC	Shri Devki Nandan Gupta PAN:ADLPG2924M None BE-252 Sai Kutir Salt lake City, Salta Lake, Kolkata-700064.	ITO, Wd-22(4), Kolkata. Shri P. P. Barman, Addl. CIT	01.08.2022	29.09.2022
6	1862/Kol/2019 AY 2015-16	SMC	Smt. Mamta Bhagat PAN:AEBPB6791C None Tower-5, Flat-9B, South City Residence 375, Prince Anwar Shah Road, Kolkata-700068	ITO, Wd-7(3), Kolkata. Shri Biswanath Das, Sr. DR	01.08.2022	29.09.2022
7	543/Kol/2019 AY 2014-15	A	Ramesh Goyal PAN:ADQPG4745D None C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd floor, Kolkata- 700069.	ITO, Wd-2(2), Siliguri Shri Biswanath Das, Sr. DR.	01.08.2022	09.2022
8	266/Kol/2019 AY 2014-15	A	Pradeep Lata PAN:ABDPL1096M None Urvashi Apartment, 3, Hunger Ford Street, Kolkata-700017.	ITO, Wd-35(1), Kolkata Shri Biswanath Das, Sr. DR.	01.08.2022	29.09.2022
9	79/Kol/2019	A	Shri Jayanta Dey	ITO, Wd-24(1),	01.08.2022	29.09.2022

	AY 2014-15		PAN:ADZPD0283C None Shri N. K. Goyal, 16, N. S. Road, 2 nd floor, Kolkata-700001	Hooghly Shri Biswanath Das, Sr. DR.		
10	933/Kol/2018 AY 2014-15	A	R. K. Fitkariwala & Ors. (HUF) PAN:AADHR3067D None 7B, Kiran Shankar Roy road, High Court, Kolkata-700 001.	ITO, Wd-36(1), Kolkata Shri Biswanath Das, Sr. DR.	01.08.2022	29.09.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

All these captioned appeals filed by different assessees are against the separate orders of Id. CIT(A) passed against respective separate assessment orders by the AO u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. Since common issue is involved in all these appeals relating to the disallowance of claim of exemption u/s. 10(38) of the Act in respect of long term capital gains (LTCG) arising from sale of shares, we dispose of all these captioned appeals by this consolidated order for the sake of convenience and brevity.

3. Briefly stated, facts are narrated hereunder for each of the ITA No. captioned above, in seriatim:

3.1 **ITA No. 841/Kol/2019 [AY 2014-15]:** Assessee filed the return of income on 29.03.2015 reporting total income of Rs.2,17,200/-. Assessee had purchased 1000 equity shares of Turbo Tech Engineering Ltd. for Rs.35,850/- from Esquire Enclave Private Ltd. on 04.04.2012 @ Rs.35.85 per share. Assessee sold these shares through Shree Bahubali International Limited of Kolkata on 01.07.2013 @ Rs.498/- per share and the net amount received was Rs.4,86,290/-. Ld. AO made the addition towards LTCG of Rs.4,49,622/- as unexplained cash credits u/s 68 of the Act.

3.2 ITA No. 457/Kol/2019 [AY 2015-16]: Assessee filed the return of income on 14.10.2015 reporting total income of Rs.14,38,450/-. In this case, assessee has shown LTCG of Rs.8,40,287/- and claimed it as exempt. The assessee has claimed to have purchased 8000 shares of Surabhi Chemical & Investment Limited on 25.03.2013 against the sale of 20 shares of Windflower Sales Private Limited which were purchased for Rs.40,000/- on 21.12.2011 from Lichen Sales Pvt. Ltd. Shares of Surabhi Chemical & Investment Limited were credited to the account of the assessee on 17.12.2014 which were sold on 23.12.2014. Receipt of Rs.8,57,116/- on sale of shares of Surabhi Chemical & Investment Limited has been treated as by the ld. AO as income of the assessee from unaccounted sources 23.12.2014.

3.3 ITA No. 1966/Kol/2019 [AY 2014-15]: Assessee filed the return of income on 31.07.2014 reporting total income of Rs.1,36,960/-. In this case assessee has shown LTCG of Rs.18,71,450/- and claimed it as exempt. Assessee had purchased 49,000 shares of Kailash Auto Finance Ltd. for Rs.49,000/- and sold the same for Rs.18,71,450/-. Ld. AO held the amount of Rs.18,71,450/- as unexplained cash credit u/s 68 of the Act.

3.4 ITA No. 1968/Kol/2019 [AY 2015-16]: Assessee filed the return of income on 28.08.2015 reporting total income of Rs.1,69,370/-. In this case assessee has earned LTCG of Rs.4,50,750/-. This LTCG was set off against Long Term Capital Loss suffered from sale of other scrips and balance amount of Rs.1,52,370/- was claimed exempt from income-tax under section 10(38) of the Act. Assessee had purchased 2,500 shares of Sulabh Engineers & Services Ltd. at Rs.1,49,900/- on 14.03.2013 and sold the same on 04.09.2014 for Rs.6,00,650/-, total gains (LTCG) earned Rs.4,50,750/-. Ld. AO made the addition of Rs.6,00,650/- as unexplained cash credit u/s 68 of the Act in respect of sale consideration received on sale of shares.

3.5 ITA No. 1970/Kol/2019 [AY 2012-13]: Assessee filed the return of income on 25.09.2012 reporting total income of Rs.4,39,384/-. Assessee purchased 150 equity shares of High Land Dealcom Pvt. Ltd. from Debaraj Suppliers Pvt. Ltd. on 27.08.2009 for Rs.60,000/- in an off market transaction. Later, Highland Dealcom Pvt. Ltd. amalgamated with Twenty First Century Ltd. Subsequent to amalgamation, for these 150 equity shares of Highland Dealcom Pvt. Ltd., assessee was allotted 5700 shares of Twenty First Century Ltd. Assessee sold all these shares for a total consideration of Rs.18,50,200/- which was added by the ld. AO treating it as bogus and unexplained cash credit u/s 68 of the Act.

3.6 ITA No. 1862/Kol/2019 [AY 2015-16]: Assessee filed the return of income on 15.03.2016 reporting total income of Rs.8,46,200/-. Assessee purchased 50,000 shares of CCL International Ltd. for Rs.16,50,000/- from Hemlata Vinimay Pvt. Ltd. on 29.04.2013 for which payment was made on 28.11.2013 and sold the same resulting into LTCG of Rs.2,32,93,559/- which is claimed exempted u/s. 10(38) of the Act. Ld. AO treated Rs.2,32,93,559/- as income from undisclosed sources and made the addition.

3.7 ITA No. 543/Kol/2019 for [AY 2014-15]: Assessee filed the return of income on 14.11.2014 reporting total income of Rs.2,85,200/-. Assessee reported LTCG of Rs.55,73,988/- in his capital account which was claimed as exempt. Assessee had purchased 1,00,000 equity shares of Careful Projects Advisory Ltd. from Sanskriti Vincome Pvt. Ltd. @ Re. 1/- per share on 05.02.2012 and 50,000 shares of Panchshul Marketing Ltd. from Shakti Exports Pvt. Ltd. @ Rs. 2/- per share on 05.03.2016, thereby making a total investment of Rs.2,00,000/-. Thereafter, in FY 2013-14 Careful Projects Advisory Ltd. and Panchshul Marketing Ltd. got merged into Kailash Auto Finance Ltd. vide scheme of amalgamation. As a result of amalgamation scheme,

1,00,000 shares of Careful Projects Advisory Ltd. and 50,000 shares of Panchshul Marketing Ltd. were replaced by 150,000 shares of Kailash Auto Finance Ltd. on 22.07.2013. On subsequent dates, during the AY 2014-15, assessee sold 40,000 shares of Kailash Auto Finance Limited at Rs.58,10,519/-. Ld. AO disallowed the claim of exemption in respect of long term capital gain of Rs.55,73,988/- and made the addition u/s 68 of the Act.

3.8 ITA No. 266/Kol/2019 for [AY 2014-15]: Assessee filed the return of income on 09.01.2015 reporting total income of Rs.2,09,500/-. Ld. AO observed that assessee had claimed exemption on long term capital gain on sale of shares of “Shrsha Tex” for a sum of Rs.49,63,291/-. The said long term capital gain of shares was claimed on the sale of shares of Rs.52,21,500/- received through the share broker Eureka Stock & Share Bolding Ltd. Ld. AO after considering the submission of the assessee observed that assessee had never transacted in the scrip “Sharsha Tex” in the past and made the addition of Rs. 52,21,500/- as unexplained cash credits u/s 68 of the Act.

3.9 ITA No. 79/Kol/2019 for [AY 2014-15]: Assessee filed the return of income on 27.03.2015 reporting total income of Rs.6,58,120/-. Assessee claimed LTCG u/s. 10(38) of the Act for Rs.48,13,028/- and ld. AO had held it as bogus. Assessee had purchased 10,000 scrips of Smartchamps IT and Infra Ltd. on 02.06.2012 from Saffron Procon Pvt. Ltd., offline for Rs.1,00,000/-. Later, the said company Smartchamps IT and Infra Ltd. got amalgamated with Cressanda Solutions Ltd. w.e.f. 24.01.2013. In consequence to the amalgamation, against 10,000 shares of Smarchamps IT and Infra Ltd, 10,000 shares of Cressanda Solutions Ltd were issued to the assessee. Assessee sold the entire lot in the period from 26.06.2013 and 05.07.2013 for a total consideration of Rs.48,13,028/-. Ld. AO after considering the reports of the Investigation

Wing of the Department, came to the conclusion that huge profit earned by the assessee during such a short period of time is absurd and made the addition of Rs.48,13,028/- on account of bogus LTCG.

3.10 ITA No. 933/Kol/2018 [AY 2014-15]: Assessee filed the return of income on 26.09.2014 reporting loss of Rs.23,13,453/-. Assessee claimed exemption for LTCG u/s. 10(38) of the Act of Rs.12,28,800/- out of which Rs.3,46,324/- has been raised from the sale of scrip of the company named 'Nikki Global Finance Ltd. of 1000 shares on 18.02.2014 which were purchased on 29.03.2012. According to ld. AO, the claim of LTCG of Rs.3,46,324/- having been proved to be bogus and pre arranged was disallowed. Ld. AO treated the said sum of Rs.3,46,324/- as credit in the accounts of the assessee for which no satisfactory explanation was furnished. Ld. AO thus added the said sum to the total income of the assessee u/s. 68 of the Act.

4. All the present cases were selected for scrutiny u/s. 143(3) through CASS and the issue in all of them for selection relates to 'suspicious long term capital gain on shares'. In all the above appeals, according to the ld. AO, LTCG reported by the assessee in respective return was bogus and the entire transactions were done with the objective to introduce unaccounted money of the assessee in the books by using the route of LTCG which was exempt from tax u/s 10(38) of the Act. Thus, ld. AO held that the said LTCG are fabricated/engineered transactions by the respective assessees, sale of which falls under the category of penny stocks and the same were treated as bogus which were added in the total income by treating it as unexplained cash credit u/s. 68 of the Act. Ld. AO based his decision of treating the impugned transaction of sale of shares as bogus transaction by relying on the report of Investigation Wing of the Department wherein the Investigation Wing of the Department had studied the modus operandi of rigging the

prices of penny stocks and generation of capital gain there from. On appeal, Id. CIT(A) confirmed the action of the Id. AO. Aggrieved, assessee are in appeal before the Tribunal.

5. Recently on 14.06.2022, the Hon'ble jurisdictional High Court of Calcutta passed a judgment in the case of *Swati Bajaj and others [2022] 139 taxmann.com 352 (Cal)* dealing with set of cases with similar fact patterns as narrated above for the present appeals under consideration before us. Hon'ble jurisdictional High Court by taking the report of the Directorate of Investigation of the Department as the basis, gave its observations and findings, which are summarized hereunder.

5.1 There are two category of cases dealt with by the Hon'ble High Court, viz. first category being those arising out of the order of Tribunal dated 26.06.2019 in which 90 appeals filed by the assessee were allowed and second category is of those cases where assessee has challenged the assumption of jurisdiction by CIT under section 263 of the Act. In the present set of appeals before us, we are concerned with the first category whose relevant observations and findings by the Hon'ble High Court are noted below:

- a) *From the assessment order passed in the case of the assessee Smt. Swati Bajaj, we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy Director of Income Tax, Investigation Unit -II and III, Kolkata. [para 43]*
- b) *The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general*

statements of violation of principles of natural justice the assessee have not made out any case. [para 65]

- c) The test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted. [para 69]*
- d) Test of preponderance of probabilities have to be applied and while doing so, the court cannot loose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. [para 73]*
- e) The assessee was not named in the report and when the assessee makes the claim for exemption, the onus of proof is on the assessee to prove the genuinity. [para 73]*
- f) It is incorrect to argue that the assessee have been called upon to prove the negative in fact, it is the assessee's duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. [para 73]*
- g) The assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assessee had phenomenal and fanciful rise in price in a short span of time. [para 75]*
- h) The exercise that was required to be done by the Tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the 'players' can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the Tribunal which exercise has not been done. [para 99]*
- i) The assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee. [para 99]*
- j) The tribunal being the last fact finding authority was required to go deeper into the issue as the matter have manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "players" can never be established by*

direct evidence and therefore the surrounding circumstances was required to be taken note of by the tribunal which exercise has not been done. [para 99]

- k) *In such factual scenario, the Assessing Officers as well as the Commissioner (Appeals) have adopted an inferential process which is found to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the Commissioner (Appeals) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies when the general market trend was admittedly recessive and thereafter arrived at a conclusion which is a proper conclusion. [para 99]*
- l) *For all the above reasons, we hold that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer. [para 101]*
- m) *In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed by the respective Assessing Orders as affirmed by the CIT(A). [para 102]*

6. In the context of factual matrix of the present appeals before us narrated above, the position of law as enunciated by the Hon'ble jurisdictional High Court of Calcutta in *Swati Bajaj (supra)* carrying force of binding nature on the issue under consideration for us, was confronted to the respective Id. Counsels of the assessee who appeared before us. Id. Counsels were fair enough to state that issue involved in these appeals is squarely covered against the assessee by the said decision as the fact involved are identical to that which were before the Hon'ble High Court. For cases where none appeared before us on behalf of the assessee, the relevant factual matrix was captured with the assistance of Id. Sr. DR / CIT DR (already narrated above). Since the matter is squarely covered by the decision of Hon'ble jurisdictional High Court of Calcutta in the case of *Swati Bajaj & others (supra)*, we have taken up these also for adjudication *ex parte, qua* the assessee.

7. After hearing both the sides and taking into consideration the factual matrix of the cases before us vis-à-vis the decision of Hon'ble jurisdictional High Court of Calcutta in *Swati Bajaj & others (supra)*, we respectfully following the said decision carrying the force of binding nature, being the jurisdictional High Court, dismiss the appeals of the assessee and restore the order of the respective Id. AO as affirmed by the respective Id. CIT(A).

8. In the result, appeals of all the captioned assesseees are dismissed.

Order is pronounced in the open court on 29.09.2022.

**Sd/-
(RAJPAL YADAV)
VICE PRESIDENT**

**Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER**

Dated: 29 .09.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. The CIT(A), Kolkata
 4. The CIT , Kolkata
 5. The DR, ITAT, Kolkata Bench, Kolkata
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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata