

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 2552/KOL/2018
Assessment Year: 2014-2015**

Shyam Sunder Bajaj,.....Appellant
C/o. Subash Agarwal & Associates, Advocates,
Siddha Gibson,
1, Gibson Lane, Suite-213, 2nd Floor,
Kolkata-700069
[PAN:ADLPB1374N]
-Vs.-

Income Tax Officer,.....Respondent
Ward-36(2), Kolkata,
Aayakar Bhawan Poorva,
110, Shantipally, Kolkata-700107

Appearances by:

Shri Subash Agarwal, Advocate, appeared on behalf of the assessee
Shri Biswanath Das, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : 4th August, 2022

- A N D -

**I.T.A. No. 1122/KOL/2018
Assessment Year: 2014-2015**

Nawal Kishore Ladha & Sons (HUF),.....Appellant
4, Ballav Das Street, Room No. 446, Kolkata-700007
[PAN:AADHN0111J]
-Vs.-

Income Tax Officer,.....Respondent
Ward-44(3), Kolkata,
3, Government Place, Ground Floor,
Kolkata-700001

Appearances by:

N o n e, appeared on behalf of the assessee
Smt. Ranu Biswas, Addl. CIT(DR), appeared on behalf of the Revenue

Date of concluding the hearing : 16th August, 2022

ITA Nos.2552/KOL/2018, 1122/KOL/2018, 2093/KOL/2019,
2104/KOL/2018, 868/KOL/2019, 341/KOL/2018 & 1673/KOL/2019

- A N D -

I.T.A. No. 2093/KOL/2019
Assessment Year: 2015-2016

Hemant Kumar Patwari,.....**Appellant**
157, Netaji Subash Road, 3rd Floor,
Kolkata-700001
[PAN:AFUPP5126P]
-Vs.-

Income Tax Officer,.....**Respondent**
Ward-34(3), Kolkata,
Aayakar Bhawan Poorva, 9th Floor
110, Shantipally, Kolkata-700107

Appearances by:

Shri Vikash Surana, FCA, appeared on behalf of the assessee
Shri Biswanath Das, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : 4th August, 2022

- A N D -

I.T.A. No. 2104/KOL/2018
Assessment Year: 2014-2015

Rajesh Kumar Mohta,.....**Appellant**
C/o. Kapoor Mehrotra & Associates,
23, Ganesh Chandra Avenue, 3rd Floor,
Kolkata-700013
[PAN:AEWPM2136F]
-Vs.-

Income Tax Officer,.....**Respondent**
Ward-62(3), Kolkata,
Central Revenue Building,
Bamboo Villa,
169, A.J.C. Bose Road, Kolkata-700014

Appearances by:

No n e, appeared on behalf of the assessee
Shri Biswanath Das, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : 1st August, 2022

- A N D -

I.T.A. No. 868/KOL/2019
Assessment Year: 2014-2015

Shyama Agarwal,.....**Appellant**
Ishwar Kunj, CJ-63, 2nd Floor, Sector-II,
Salt Lake, Kolkata-700064
[PAN:AEUPA8954M]

-Vs.-

Income Tax Officer,.....Respondent
Ward-3(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069

Appearances by:

N o n e, appeared on behalf of the assessee
Shri Biswanath Das, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : 2nd August, 2022

- A N D -

I.T.A. No. 341/KOL/2018
Assessment Year: 2014-2015

Shyam Kariwala,.....Appellant
12A, N.S. Road, 5th Floor,
Kolkata-700001
[PAN:ACXPA5936G]

-Vs.-

Income Tax Officer,.....Respondent
Ward-36(2), Kolkata,
Aayakar Bhawan Poorva, EM Bypass,
110, Shantipally, Kolkata-700107

Appearances by:

Shri Subash Agarwal, Advocate, appeared on behalf of the assessee
Shri Biswanath Das, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : 4th August, 2022

- A N D -

I.T.A. No. 1673/KOL/2019
Assessment Year: 2015-2016

M/s. Sachida Sales Pvt. Limited,.....Appellant
M/s. Salarpuria Jajodia & Co. 3rd Floor,
7, Chittaranjan Avenue, Kolkata-700072
[PAN:AADCS7106F]

-Vs.-

Income Tax Officer,.....Respondent
Ward-9(4), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069

Appearances by:

Shri S. Jhajharia, A.R., appeared on behalf of the assessee
Shri P.P. Barman, Addl. CIT, appeared on behalf of the Revenue

Date of concluding the hearing : 1st August, 2022

O R D E R

Per Bench:-

All these captioned seven appeals filed by different assessees are against the separate orders of Id. CIT(Appeals) passed against respective separate assessment orders by the Assessing Officer under section 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. 2552/KOL/2018 (AY 2014-15): Assessee filed return of income on 28.07.2014 reporting total income at Rs.18,58,860/-. During the year, the assessee had earned Long-term Capital Gain of Rs.52,22,879/- and claimed it as exempt. The assessee had purchased 1,00,000 equity shares of Surabhi Chemicals & Investments Limited for Rs.2,00,000/- on 16.03.2012, 14.08.2012 and 13.04.2013, which were sold for Rs.54,22,879/- between the period 27.09.2012 to 04.12.2013 resulting into an increase of almost 2611% in a short span of 16 to 18 months. The Id. Assessing Officer treated this long-term capital gain as income from undisclosed sources denying the claim of exemption under section 10(38) of the Act. The Id. Assessing Officer also made an addition of Rs.26,114/- towards commission charged by the Operators by holding it as unexplained expenditure.

3.2. ITA No. 1122/KOL/2018 (A.Y. 2014-15): Return of income was filed on 30.03.2015 reporting total income of Rs.7,44,340/-. The assessee has claimed long-term capital gain of Rs.73,97,001/- on sale of shares of Unno Industries Limited as exempt under section 10(38) of the Act. In this respect, the assessee had initially purchased 2,38,000 shares of the Company called "Basukinath Real Estate Limited for a sum of Rs.3,00,000/- @ Rs.1.3 per share on 19.10.2012. Later on, this Company was merged with Unno Industries Limited. The assessee had sold these shares of Unno Industries Limited for a gross sale consideration of Rs.77,28,050/- on various dates in the assessment year 2014-15. The ld. Assessing Officer completed the assessment by adding a sum of Rs.77,28,050/- being gross sale consideration of shares as undisclosed income.

3.3. ITA No. 2093/KOL/2019 (A.Y. 2015-16): Return of income was filed on 29.10.2015 reporting total income of Rs.9,07,030/-. In the return of income, the assessee had claimed long-term capital gain of Rs.47,61,763/- as exempt. In this respect, it was noted that the assessee had purchased 2,71,500 equity shares of Kailash Auto Finance Limited, which were sold on different dates for Rs.50,45,332/- through the broking entity Arihant Capital Marketing Pvt. Limited. The details of purchase and sale of this script were examined based on the information received by the ld. Assessing Officer from the Directorate of Income Tax, Kolkata. The ld. Assessing Officer concluded the assessment by making an addition of Rs.47,61,763/- by treating it as unexplained cash credit under section 68 of the Act. He also made an addition of Rs.23,807/- towards commission payable towards the accommodation entries taken by the assessee in the form of long-term capital gain.

3.4. ITA No. 2104/KOL/2018 (A.Y. 2014-15): Return was filed on 20.07.2014 reporting total income of Rs.8,24,440/-. In the return, the assessee had included long-term capital gain from sale of equity shares

for Rs.81,65,046/- claimed as exempt under section 10(38) of the Act. In this respect, the facts are that the assessee purchased 1,600 shares on 08.03.2012 of Ratni Investment Co. Limited @Rs.50/- per share privately from M/s. Octopus Infotel (P) Limited for a total consideration of Rs.80,000/-. These shares of Ratni Investment Co. Limited were converted to the shares of M/s. Dhanleela Investment & Trading Company Limited. In February, 2013, bonus shares were issued in the ratio of 1:4, which gave the assessee 6,400 bonus shares. Subsequently these shares were sold through the Broker named M/s. Mehta Equities Limited for Rs.82,44,046/- resulting into a capital gain of Rs.81,64,046/-. Id. Assessing Officer enquired all these transactions based on information received from DIT (Inv.) of the Department and added the same to the total income of the assessee as undisclosed income.

3.5. ITA No. 868/KOL/2019 (A.Y. 2014-15): Return of income was filed on 31.07.2014 reporting total income of Rs.27,98,570/-. The assessee had claimed long-term capital gain on shares for Rs.1,23,61,198/- as exempt under section 10(38) of the Act. The Id. Assessing Officer noted that there was 3,00,000 shares of Luminaire Technologies Limited purchased at Rs.1/- per share, which were sold during the year @ Rs.42.20 amounting to Rs.1,26,61,198/- resulting into long-term capital gain of Rs.1,23,61,198/-. Assessment was completed by disallowing the claim of long-term capital gain exemption of Rs.1,23,61,198/-.

3.6. ITA No. 341/KOL/2018 (A.Y. 2014-15): Return was filed on 15.07.2014 reporting total income of Rs.5,51,249/-. The assessee had claimed long-term capital gain of Rs.47,16,148/- earned from sale of equity shares of Cressanda Solutions Limited, which were claimed as exempted under section 10(38) of the Act. In this respect, the assessee had purchased 10,000 equity shares of Smartchamp IT & Infra Limited on 17.12.2011 for a sum of Rs.1,00,000/-. Subsequently under the Scheme of Amalgamation of M/s. Smartchamp IT & Infra Limited with M/s.

Cressanda Solutions Limited, the share holding of the assessee got converted into the shares of Cressanda Solutions Limited. Under the Scheme of Amalgamation, one share each of Cressanda Solutions Limited was allotted for every share of Smartchamp IT & Infra Limited. Later on, these shares of Cressanda Solutions Limited were sold on different dates giving rise of long-term capital gain of Rs.47,16,148/-. By considering the surrounding circumstances and applying the mind of human probabilities coupled with the report of the Directorate of Investigation, Id. Assessing Officer treated the long-term capital gain as income from undisclosed sources denying the claim of exemption. He also made an addition of Rs.23,581/- in respect of commission as unexplained expenditure charged by the operators.

3.7. ITA No. 1673/KOL/2019 (A.Y. 2015-16):- Return of income was filed on 30.09.2015 reporting total income of Rs.7,49,300/-. In the course of assessment, Id. Assessing Officer noted that the assessee had dealt in share transactions for two companies, namely- (i) Pine Animation Limited for which shares worth Rs.20,04,200/- were purchased, which were subsequently sold for an amount of Rs.7,49,760/- resulting into a loss of Rs.12,54,440/-. (ii) The second company in which the assessee did share transactions, is Unno Industries Limited for which purchases were of Rs.24,38,656/- and sale for the same at Rs.10,02,691/- giving rise to the loss of Rs.14,35,963/-. Thus the assessee claimed a net loss of Rs.26,90,405/- and adjusted this with other Heads of Income pleading to reduction in total taxable income. Id. Assessing Officer opined that the trading loss on these penny shares is to be disregarded as the transactions affected by the assessee are not bonafide commercial transactions but are sham, bogus, unreal and artificial arrangement with a malafide intention to acquire benefit for tax purposes. He thus disallowed the trading loss and made an addition to the total income of the assessee for Rs.26,90,405/-.

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, except in one case, where the assessee has booked trading loss on transaction of shares of two Companies, which have been treated as penny stock. Thus, ld. AO held that the said LTCG/loss are fabricated/engineered transactions by the respective assessee, 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 /trading loss there from. On appeal, ld. CIT(A) confirmed the action of the ld. AO. Aggrieved, assessee is 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 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 assesseees have been called upon to prove the negative in fact, it is the assesseees 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 assesseees 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 Ld. 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 ld. AO as affirmed by the respective ld. CIT(A).

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

Order is pronounced in the open court on October 17, 2022

**Sd/-
(Girish Agrawal)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 17th day of October, 2022

- Copies to :*
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 - (2) ***Nawal Kishore Ladha & Sons (HUF),
4, Ballav Das Street, Room No. 446, Kolkata-700007***
 - (3) ***Hemant Kumar Patwari,
157, Netaji Subash Road, 3rd Floor, Kolkata-700001***
 - (4) ***Rajesh Kumar Mohta,
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Salt Lake, Kolkata-700064***
 - (6) ***Shyam Kariwala,
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- (7) *M/s. Sachida Sales Pvt. Limtied,
M/s. Salarpuria Jajodia & Co. 3rd Floor,
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- (8) *Income Tax Officer,
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- (13) *Income Tax Officer,
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- (14) *Commissioner of Income Tax (Appeals)- Kolkata*
- (15) *Commissioner of Income Tax- , Kolkata;*
- (16) *The Departmental Representative*
- (17) *Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.