

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.909/Ind/2018
(Assessment Year: 2014-15)

Shri Rupesh Vyas Indore	Vs.	ACIT-3(1) Indore
(Appellant / Assessee)		(Respondent / Revenue)
PAN: ACUPV 3307 M		
Assessee by	None	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	18.10.2022	
Date of Pronouncement	07.12.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 20.09.2018 passed by learned Commissioner of Income-Tax (Appeals)-1, Indore [**“Ld. CIT(A)”**], which in turn arises out of assessment-order dated 15.12.2016 passed by the learned ACIT-3(1), Indore [**“Ld. AO”**] u/s 143(3) of the Income-tax Act, 1961 [**“the Act”**] for Assessment-Year 2014-15, the assessee has filed this appeal on following grounds:

“1.That the learned Commissioner of Income Tax (Appeals)-1, Indore has further grossly erred both in law and, on facts in denying the claim of exemption of long term capital gain of Rs. 66,28,161/- on sale of shares sold on recognized stock exchange and, eligible for exemption u/s 10(38) of the Act and bringing to tax as unexplained credit u/s 68 of the Act.

2. That learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in making an addition of Rs. 66,28,161/- being sale consideration on sale of shares listed on recognized stock exchange as unexplained credit u/s 68 of the Act.

2.1. That while sustaining the aforesaid addition and denying the exemption learned Commissioner of Income Tax (Appeals) has failed to appreciate that, appellant was owner of equity shares of a listed company which had been held by it for a period exceeding 12 months and the same were sold on recognized stock exchange after payment of STT, resulting into a long term capital gain and therefore the long term capital gain accrued to the assessee on transfer of long term 'capital asset' was not includible in total income of the assessee in view of section 10(38) of the Act.

2.2. That the learned Commissioner of Income Tax (Appeals) has failed to appreciate the evidence tendered by the appellant to support the claim of sale of shares and hence, findings mechanically recorded on borrowed inference in disregard of evidence and based on irrelevant and extraneous considerations are misconceived and, misplaced.

2.3 That the learned Commissioner of Income Tax (Appeals) has confirmed the above addition and denied exemption without confronting the material/ investigation to appellant and also providing cross examination of the parties on whose statements reliance has been placed in impugned order of assessment and therefore order so made is in disregard of principles of natural justice is vitiated.

2.4 That further more the learned Commissioner of Income Tax (Appeals) has sustained the addition on mere speculation, generalized statements, theoretical assumptions and allegations and assertions, without there being any supporting evidence and is therefore not in accordance with law.

2.5 That the learned Commissioner of Income Tax (Appeals) while sustaining the above addition has arbitrarily and, mechanically rejected the explanation and evidence tendered by the appellant and made the addition and denied exemption by drawing subjective, premeditated and preconceived inferences therefore the same is not sustainable.

2.6 That the finding of the learned Commissioner of Income Tax (Appeals) that the appellant did not divulge the name of the person who advised her to buy the shares of MIs. Life Line Drugs and Pharma Ltd. and appellant did not have basic knowledge of share trading are wrong finding of learned commissioner, because appellant is regular investor in shares market. and also are irrelevant consideration either to bring to tax long term capital gain under section 68 of the Act or deny claim of exemption under section 10(38) of the Act and therefore, the addition made and confirmed is invalid.

2.7 That various adverse findings and conclusions recorded by the learned Commissioner of Income Tax (Appeals) are factually incorrect and contrary to record, legally misconceived and untenable.

2.8 That the learned Commissioner of Income Tax (Appeals) has erred in concluding without any basis that assessee has introduced his unaccounted

income in the form of long term capital gain by manipulating the penny stock

3. That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in Addition u/s 69C of unexplained commission paid @ 3% of Rs 1,99,847/- is erroneous.”

2. None appeared on behalf of assessee despite several hearings afforded from time to time. Ld. DR representing the Revenue was ready to argue the case. On perusal of Grounds of Appeal, it was observed that the present appeal can be heard on the basis of material held on record and after hearing Ld. DR. Accordingly, the appeal was heard and being disposed of by this order.

3. Briefly stated the facts are such that the assessee-individual filed his return of income on 21.10.2014 declaring a total income of Rs. 28,45,390/- from salary, house-property, business / profession and interest. In the return, the assessee also declared a long-term capital gain of Rs. 66,28,161/- earned from sale of equity shares of Lifeline Drugs and Pharma Ltd. exempted u/s 10(38) of the act. The assessee claimed to have purchased shares of Lifeline Drugs and Pharma Ltd. for Rs. 33,418/-; sold the same for Rs. 66,61,579/- and thereby earned a whopping capital gain of Rs. 66,28,161/-. Apprehending the capital gain as suspicious, the case was selected for scrutiny under CASS and the statutory notices u/s 143(2) and 142(1) were issued from time to time. During assessment-proceeding, the Ld. AO asked the assessee to prove the capital gain, in response to which the assessee made a detailed submission. Observing that the assessee has made an unrealistic non-taxable capital gain of Rs. 66,28,161/- on a very small investment of just Rs. 33,418/- and that too within a short period of just 18 months by indulging in the transactions of what is called “penny stock”, the Ld. AO completed assessment u/s 143(3) by order dated 15.12.2016 after making a total addition of Rs. 66,28,008/- on two counts, viz. (i) Ld. AO treated the capital gain of Rs. 66,28,161/- as bogus receipt u/s 68 of the Act, and also (ii) Ld. AO added a sum of Rs. 1,99,847/- on account of estimated brokerage-cost incurred by assessee out of undisclosed sources for arranging bogus capital gain. Aggrieved by the order of assessment, the assessee filed

appeal to Ld. CIT(A). The Ld. CIT(A), however, dismissed appeal and did not grant any relief. Now, the assessee has assailed the order of Ld. CIT(A) in this appeal filed before us.

4. By means of various grounds raised in Appeal-Memo as reproduced earlier, the assessee has challenged the twin-additions made by Ld. AO, viz. (i) addition of Rs. 66,28,161/- in respect of bogus capital gain, and (ii) addition of Rs. 1,99,847/- on account of estimated brokerage cost incurred by assessee out of unexplained sources.

5. Before proceeding further, we would like to narrate the details of the transactions done by assessee as culled out from the orders of lower-authorities. The assessee claims to have purchased shares of Lifeline Drugs and Pharma Ltd. for a total consideration of Rs. 33,418/- on 17.08.2012 through M/s Fairwealth Securities Ltd. / Vishal Vijay Shah. The shares were subsequently claimed to have been sold on 10.02.2014 / 12.02.2014 for a sum of Rs. 66,61,579/-, resulting into a exempted capital gain of Rs. 66,28,161/-.

6. During assessment-proceeding, Ld. AO confronted the assessee about these transactions and also recorded the statements of assessee u/s 131 of the act. Finally, the Ld. AO concluded that the capital gain declared by the assessee is not genuine and the same has been arranged by the assessee so as to claim benefit of section 10(38). The observations / conclusions made by Ld. AO are re-produced below:

“3.5 In view of the above statement it is concluded that assessee is a regular investor and doing regular trading in the stock exchange. He has not knowing to the company i.e. M/s Lifeline Drugs. The assessee has stated that on the tips received from market he has purchased and after some time on the rise of rates he has sold such scripts. It is also observed that assessee was unaware with the company's book results and its financial status. It is also noted that increase in the prices of the share of M/s Lifeline Drugs in just one and half year was approx 19834% is total unrealistic.

4. The assessee has been confronted with all the evidence gathered and the issues mentioned in the foregoing paragraphs at Para 6 of this order. The explanation of the assessee is general in nature that as the transaction is through Stock Exchange and the payment is by cheque, the transactions should

be treated as genuine. The background of the scheme given in the beginning of the order clearly shows that both the requirements are in built in the scheme and does not ipso facto prove genuineness of transaction. The SEBI after thorough investigation has certified that such transactions are rigged and are carried out to convert Black money into white. That being so, the credit in the bank account of the assessee cannot be treated as explained and is therefore, liable to be added under section 68 of the Act. The evidence gathered has to be evaluated in the background of what the Hon'ble Supreme Court referred to as the test of preponderance of human probability judged on the basis of surrounding circumstances. That there was a scheme is not in doubt and that the assessee is a beneficiary is also an admitted fact. The onus was therefore, on the assessee to prove that either there was no such scheme and even if there was one, the benefit to the assessee was as a result of genuine transaction. The assessee has miserably failed to discharge this onus and therefore, the only inescapable conclusion is that like thousand other individuals the assessee has also taken entry of bogus LTCG by paying unaccounted income.

4.1 It is true that in cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption by Act, lies upon assessee. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. To reiterate, the burden of proof, cast upon the assessee to prove that the claim of long term capital gain as exempt u/s. 10(38), is not discharged in the instant case.

4.2 The Hon'ble Supreme Court in the case of Commissioner of Income-Tax, West .vs Durga Prasad More 82 ITR 540 observed the often quoted following relevant observation:

"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an asses see who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. 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. "

That genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining. the genuineness, stands since settled by the apex court in Sumati Dayal v. CIT (1995) 214 ITR 801 (SC) wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary

evidences filed or relied upon by the assessee-appellant. That documentary evidences are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well settled, and reliance is placed on the decision in the case of Durga Prasad More 82 ITR 540 (SC).

5. *In view of the discussion made above and considering the facts and circumstances of the case, the following facts become manifestly clear:-*

i. That some unscrupulous operators in the capital market were running a scheme of providing entries of LTCG for a commission.

ii) The financial result of the Penny Stocks used for the purpose clearly indicate that its quoted price at the peak was the result of rigging

iii) The above mentioned facts have been independently also been confirmed by SEBI.

iv) That such schemes are prevalent for converting black money into white is common hnoioledge, independently confirmed by SEBI.

v. That a large number of individuals availed of the benefits of the scheme and took entries of LTCG amounting to several crores.

vi) Many such individuals have voluntarily without any enquiry by any authority have voluntarily withdrawn their claim and filed revised return.

vii) Statements of brokers, operators, director of paper companies that has bought these shares, directors of Penny stock companies all confess to such a scheme with detailed modus operandi which tallies with actual transactions

viii) The assessee is one such beneficiary who has taken entry of LTCG.

ix) As the trading in these shares are at a pre-determined time between pre-determined brokers at a pre-determined price; there is virtually no scope of any genuine trader in share to buy or sell these shares.

x) Thus whoever has benefited from transaction in these shares have transacted in accordance with the scheme and has admittedly converted his unaccounted cash equal to the sale proceeds of share in to white in the guise of exemption under section 10(38) of the Income Tax Act, 1961.

xi) With so much of evidence against the assessee, the onus was on assessee to prove that his trallsactions were genuine and that he had not availed benefit of the aforementioned scheme to convert black money into white.

xii) In Sumati Dayal vs. Commissioner of Income tax - the Supreme Court observed as under:

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption

provided by the Act lies upon the assessee. [See. Parimiseti Seetharamamma (supra) at P. 5361. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie, evidence against the assessee, viz. the receipt of money, and if he fails to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably"

6. Further, the transaction is found to be not genuine in view of the following observations and facts:

i) The financials of the penny stock Lifeline Drugs and Pharma and movement of the price is abrupt, unrealistic and not based upon any realistic parameters.
ii) In the similar circumstances, the honorable Gauhati High Court of CIT Vs Sanghamitra Bharali(361 ITR 481) had held that the capital gains are sham transactions entered only to give colour of genuineness and therefore, held that the capital gain arising out of these transactions cannot be believed as genuine and upheld taxing the said amount as unaccounted income brought into books in the guise of exempted capital gains.

iii) That even assuming the purchase as genuine, the sales, given the high rates for such penny stocks, with no real buyers, are bogus. The evidentiary value of payment of STI, cannot make a non-genuine transaction, a genuine one.

7. The following important decisions of the Hon'ble Supreme Court and other decisions are relied upon, while arriving at conclusion to affirmably say that the transactions entered into by the assessee in purchase and sale of LTCG are not genuine and has taken bogus entry of LTCG.

- (i) Sumati Dayal a. CIT. (1995) 2 J.1 JTH 801 (S C);
- (ii) Durga Prasad More - 82ITR 540 (SC)
- (iii) Mc. Dowell & Co. Ltd. - 154 ITR 148 (SC),
- (iv) Asst. CIT u. Sam Nath Mani . (2006) 100 TTJ 917 (Chd)
- (v) Gooinda Rajulu Mudaliar a. CIT. (1958) 34 ITR 807 (SC)
- (vi) Sreelekha Banerjee & othrs. o. CIT (1963) 49 ITR 112 (SC) .
- (vii) Kalekhan Mohammed Hanif u. CIT (1963) 50 ITR 1(SC) viii) CIT vs. Biju Patnaik - (1986) 160 ITR 674 (SC)
- (ix) CIT v. P. Mohanakala & Others - (2007) 291 ITR 278 (SC)

7.1. In the decision delivered on 27.3.2015, the Hon'ble ITAT, E-Bench, Mumbai has allowed the Revenue appeal in the case of Shamim M. Bharwani vide ITA No. 4906/Mum/2011 (AY 2006-07) and observed as under:

"firstly, documentary evidence in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s cannot be regarded as conclusive. Two, the preponderance probabilities only denotes the simultaneous existence of several facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i.e., in the absence of credible and independent evidences"

8. In view of the facts and circumstances discussed supra and circumstantial evidence available on record, it has been concluded that the transactions were sham transactions and aimed only to bring unaccounted money in the guise of exempt long term capital gain and paper work has been done merely to give a colour of authenticity to the transaction and by creating a façade of legitimate transactions. The same is therefore chargeable to tax u/ s 68 of IT Act.

Section 68 of the Income-tax Act, 1961, reads as under:

"68. 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."

The aforesaid section merely codifies what was the state of law prior to its enactment. Even when the Indian Income-tax Act, 1922, was in force it had been held in all judicial pronouncements that if cash credits are found in the books of account of the assessee and no explanation about the nature and source thereof is given or the explanation is not found satisfactory then the same could be charged to income-tax as income from undisclosed sources. It is not unknown that in order to avoid payment of tax an amount may be credited in the books of account in such a manner which may not disclose its true nature or source thereof. For example, amounts may be credited in the books of account as if they represented sums received from different persons. On plain reading of section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is sought to be given by the assessee, the Income-tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income-tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that enquiries are usually made in order to find out as to whether firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income-tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name-lender or not. Be that as it may, it is clear that the Income-tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a service charges. The use of the words "any

sum found credited in the books" in section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof.

It is neither necessary nor desirable to give examples to indicate under what circumstance section 68 of the Act can or cannot be invoked. What is clear, however, is that section 68 clearly permits an Income-tax Officer to make enquiries with regard to the nature and source of any or all the sums credited in the books of account of the company irrespective of the nomenclature or the source indicated by the assessee. In other words, the truthfulness of the assertion of the assessee regarding the nature and the source of the credit in its books of account can be gone into by the Income-tax Officer.

3.6 The term 'Burden of Proof' means burden to prove an allegation before a decision can be given. The question regarding burden of proof arises on a contested issue where one of the two contending parties has to introduce evidence and in the absence of such evidence, it is assumed that the party has failed. Sometimes in the statute itself it is provided that, burden of proof will be on the assessee or the assessing officer.

However, there is difference between 'Burden of Proof' and 'Onus of Proof' as 'Burden of Proof' lies on the person who has to prove a fact and it never shifts, but the onus may shift. As per section 103 of the Evidence Act, Burden is on that person w he wishes the court to believe in the existence of a particular fact. For instance, when a person who says positively that another had notice of a fact but does not adduce evidence to prove that positive fact, the court cannot hold that the other person had such notice, save that other person admits that he had notice.

A support for above conclusion can be found in the following legal dictum:

In the absence of any direct evidence, the quasi-judicial authorities can base their conclusions on the basis of what are known as notorious facts, bearing in mind the principles of section 144 of the Evidence Act. They can assume that, existence of any fact which they think likely to have happened in the course of normal conduct of public and private business. For this purpose, I rely on the ratio of the following judgments, wherein the doctrine of 'notorious fact' has been taken note of.

- (i) CWT Vs. Tohtah Industries Ltd. 67 ITR 283,*
- (ii) Malini R Rele Vs. ITO 205 ITR 52 (Mumbai) ITAT Third Member.*

While analyzing the facts of this case, it is kept in mind that the proceedings under Income Tax Act are not judicial proceedings in the sense in which the phrase 'judicial proceedings' is ordinarily used. The Assessing Officer is not fettered or bound by technical rules about evidence contained in the Indian Evidence Act and he is entitled to act on material which may not be accepted as evidence in a court of law. 26 ITR775 (S.C), 45 ITR 206 (S.C), 63 ITR 449 (S.C). Thus, the assessment can be made on the basis of inference on evidence which in criminal or civil justice may be insufficient. Further, as held by the Supreme Court in the case of Collector of Customs Vs. D. Bhoormal A.R. 1974 SC 859, the department is not required to prove its case with mathematical

precision towards demonstrable degree; for, in all human affairs absolute certainty is a myth, and as proof. Fundamental rules of evidence and interpretation in mind relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental of universal application.

This principle has been succinctly and felicitously put by Brett - "all exactness is a fake". EI Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in Blatch Vs. Archer according to the proof which "it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the Department to prove facts, which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

9. In view of the detailed discussion made above, the total amount of Rs. 66,28,161/- is added under section 68 of the Income tax Act, 1961. As the assessee has deliberately and willfully concealed its unaccounted income, and furnished inaccurate particulars of such income, the penalty proceedings under section 271(1)(c) are initiated for concealment and furnishing the inaccurate particulars also initiated.

Addition: Rs. 66,28,161/-

10. Addition on account of unexplained expenses U/S 69C of Rs. 1,99,847/-: As per the discussion made in the earlier para 3 above, it has been concluded that assessee has managed the bogus LTCG transaction to convert the unaccounted money available with him by investment in the penny stock with the help of brokers and claimed exemption u/s 10(38) of the Act. Since, the above transaction was routed through stock broker and stock exchange assessee must have spent some amount for taxes and brokers commission. As per normal business practices such expenses is worked out totaling to 3% of total transaction. The amount so spent @ 3% of total transaction of Rs.6661579/- is worked out at Rs.199847/-. Since, assessee has not disclosed this amount in his return of income, therefore, considering the facts as discussed above, the commission amount of Rs.199847/- is hereby added to the assessee's total income as unexplained expenditure incurred out of income from undisclosed sources u/s 69C of the Act. A penalty proceeding u/s 271(1)(c) of the Income Tax Act 1961 also initiated on this issue.

Addition Rs.1,99,847/-

7. During first appellate proceeding, the assessee submitted a detailed reply to Ld. CIT(A) which is noted by Ld. CIT(A) in his appeal-order. However, the assessee did not find any favour from Ld. CIT(A) who confirmed the entire addition by holding as under:

“4. On careful consideration of the points in issue as brought out in the assessment order, the grounds of appeal and the Submission of appellant the various grounds raised by the appellant are decided hereunder:-

4. 1. Ground NO.1: *This ground of appeal is general in nature. Therefore, no separate adjudication is required.*

4.2. Ground NO.2: *Through this ground of appeal, the appellant has challenged the addition of Rs.66,28,161/- on account of cash credit u/s 68 of the Act. The appellant has purchased the equity shares of M/s Lifeline Drugs and Pharma Ltd. of Rs. 33,418/- on 23-03-2012 through Vishal Vijay Shah. The appellant sold the same shares on 10-02-2014 & 12-02-20014 at Rs.66,61,579/-. The appellant earned the long term capital gain on the above transaction and claimed exemption u/s 10(38) of the LT. Act. The AO considered the amount of Rs.66,28,161/- as income from other sources u/s 68 of the LT. Act and made the addition.*

4.2.1 *The Directorate of Investigation, Kolkata carried out a country-wide investigation to unearth the organized racket of generating bogus entries of Long Term Capital Gain which is exempt from tax. The modus operandi adopted by the operators was to make the beneficiary buy some shares of a pre-determined Penny stock company controlled by them. These shares are transferred to the beneficiary at a very nominal price mostly off-line through preferential allotment or off-line sale to save STT. The beneficiary (an Individual) holds the share for one year, the statutory period after which LTCG is exempt under section 10(38) of the Income Tax Act, 1961. In the meantime the operators rig the price of the stock and gradually raise its price many times, often 500 to 1000 times. This is done through low volume transaction indulged in by the dummies of the operator at a pre-determined price. When the price reaches the desired level the beneficiary who bought the shares at a nominal price, is made to sell it to a dummy paper company of the operator. For this, unaccounted cash is provided by the beneficiary, which is routed through a few layers of paper companies by the operator and finally is parked with the dummy paper company that will buy the shares.*

4.2.2 *The result of the investigation in brief is as under:*

I. Individuals throughout the country inc1entified who have taken such bogus entries of LTCG amounting to several crores from 2010 to 2014.

II. The result of the enquiry was also shared with SEBI and the SEB] after investigating 28 cases have found the allegation to be correct. The balance

cases are still being investigated by SEEI. The SEBI has put in surveillance measure the scrip of M/s Lifeline Drugs and Pharma Ltd.

III. The beneficiaries were confronted in course of further investigation by the investigation Wing. Almost all of them barring a few have accepted having taken the entries for a commission. A sum of crores has been voluntarily surrendered by such assessees.

IV. As per searches/surveys/enquiries conducted by the Income Tax Department in the case of Penny Stock Companies it has been admitted by several entities like Madhya Pradesh Stock exchange Ltd., Indore, destiny Securities Ltd., New Delhi etc. That M/s Lifeline Drugs was one of the scrip through which Long term Capital Gains was arranged for beneficiaries. The SEBI had put in surveillance measure trading of M/s Lifeline Drugs and Pharma Ltd. holding the same to be a penny stock in which manipulations were carried out.

The appellant has not produced the evidences in support of this claim. From details and documents, it is noticed that:-

I. The assessee has not made any investment in shares ever in any scrip other than M/s Lifeline Drugs and Pharma Ltd. which clearly shows that the assessee has no knowledge of the market and the present transactions are part of a design to create capital without paying taxes on the same.

II. With collusion of the broker, shares were purchased of an unknown company with dubious background for miniscule consideration;

III. The process of purchase is not recorded on any stock exchange or market;

IV. The purchase of the shares of the company were made off-market;

V. The shares were converted into the DEMAT format just before the transaction;

VI. The assessee is unable to substantiate as to in which knowledge he has sold the shares on that particular date; VII. The company whose shares were purchased and sold are not engaged in any active business. It has no turnover or profit earning apartment to justify 200 time increase in its market price in the stock market. Hence it can be inferred that the prices were artificially jacked up to enable sellers of the shares to enjoy tax-free LTCG;

VIII. The above conclusion is fortified from the specific findings in the case of the scrip traded by the appellant i.e. M/s Lifeline Drugs and Pharma Ltd.;

IX. The SEBI in fact suspended trading of the above scrip due to surveillance measures. This also shows artificial tinkering with the prices of the shares of the company.

4.2.3 On going through the above information, the appellant indulged in

bogus long term capital gain and claimed the amount as exempt u/s 10(38) of the LT. Act by way of taking accommodation entry. The purchase of shares is an off market transaction. The appellant is a not regular investor in the shares and invested in shares for the first time and earned return of more than 200 times within a short span of period which IS extremely unusual. The shares in which the appellant traded are identified as Penny Shares by Investigation Wing of Kolkata.

4.2.4. *The reliance is placed on the following judicial pronouncements:-*

1. Sanjay Bimalchand Jain L/H Shantidevi Bimalchand Jain Vs PCIT (ITA No.18/2017 Bombay High Court (Nagpur Bench)

The assessee had purchased shares of two penny stocks of Kolkata based companies i.e., 8000 shares at the rate of Rs.5.50 per share on 08.08.2003 and 4000 shares at the rate of Rs.4/per share on 05.08.2003. The assessee sold 2200 shares at an exorbitant rate of Rs.486.55 per share on 07.06.2005 and 800 shares on 20.06.2005 at the rate of Rs. 485.65. The authorities held that the assessee had not tendered cogent evidence to explain as to how the shares in an unknown company worth Rs.5/ had jumped to Rs.485/in no time. Addition confirmed.

2. Chandan Gupta Vs CIT [2015J 54 taxmann.com 10 (Punjab & Haryana) / [2015] 229 Taxman 173

Hon'ble Punjab & Haryana/-High Court held that where assessee could not explain receipt of alleged share transactions profits credited in his bank accounts, then sale proceeds had to be added as income of assessee under section 68

3, Balbir Chand Maini Vs CIT [2011J 12 taxmann.com 276 (Punjab & Haryana) / [2011] 201 Taxman 94 (Punjab & Haryana (MAG.) / [2012] 340 ITR 161 (Punjab & Haryana) / [2012] 247 CTR 468 (Punjab & Haryana)

Section 69 of the Income-tax Act, 1961 - Unexplained investments Assessment year 1998-99 During assessment proceedings, Assessing Officer found that assessee had purchased certain shares of a company at rate between Rs. 2.50 and Rs. 3.40 per share in month of April, 1997 and part of those shares were sold through a broker at Rs. 55 per share - He came to opinion that value of said shares could not be as high as Rs. 55 per share _ He recorded statement of broker who admitted to have purchased shares in question but failed to produce books of account and other relevant docwnei2ts - He also found that alleged sale of shares had not taken place through any stock exchange - On scrutiny of books of account of broker, it was found that there were cash deposits in its bank account preceding issue of cheques in name of assessee for purchase of shares claimed to be sale proceeds of same shares received in advance - Broker could not give details of purchaser of shares - Moreover, shares claimed to have been sold through broker had not been. transferred even at time of making enquiry by Assessing Officer and same continued to be registered in name of assessee - In those circumstances. Assessing Officer held that transaction of sale of shares was an ingenuine transaction and made addition of alleged sale consideration to

assessee's income as income from undisclosed sources - Whether on facts, addition made by Assessing Officer was justified - Held, yes

4. Usha Chandresh Shah Vs ITO [2014-TIOL-1459-I.T.A.T.-MUM]

Where Hon'ble of ITAT Mumbai held that in this case assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of the company was declared as "Penny Stock" by SEEI and the broker Sanju Kabra, through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. The tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee. The CIT(A) was justified in confirming the order of the AD by applying the test of human probabilities

5. Ratnakar M Pujari Vs ITO [2016-TIOL-1746-ITATMUM]

Where Hon'ble ITAT Mumbai held that a transaction of 'off market purchase of share' for which payments were made in cash and the brokers had issued pre dated contract notes, is liable to be treated as bogus transaction, and hence such cash receipts are liable to be treated as 'unexplained cash receipts'

4.2.5 In view of the above circumstances it is concluded that the transactions were sham transactions and aimed only to bring unaccounted money. Relying on above cited judicial pronouncements, the addition made by the AO amounting to Rs.66,28,161/- is **Confirmed**. Therefore, the appeal on these grounds is **Dismissed**.

4.3 Ground No. 3: Through this ground the appellant has challenged the addition of Rs.1,99,847/- on account of commission paid on share accommodation entry. The appellant has taken the share accommodation entry after paying the commission to share brokers and entry operators, who is engaged in the business of providing of accommodation entries. The AO is justified in adopting 3% - commission of the total entry amount.

Therefore, the addition made by the AO amounting to Rs.1,99,847/- is **Confirmed**. Therefore, the appeal on this ground is **Dismissed**."

8. Before us, Ld. DR made a crystal-clear and pointed submission. He submitted that the assessee has declared exempted capital-gain from shares of Lifeline Drugs and Pharma Ltd., which is a company identified by Income-tax Department as "Penny-stock" and even the operations in the shares of company were also suspended by SEBI. Ld. DR submitted that these facts are clearly evident from "**Investigation Report in the case of Project Bogus LTCG / STCL Through BSE Listed Penny Stocks**" dated 27.04.2015

released by Directorate of Income-tax (Investigation), Kolkata, the relevant paragraphs of the report being reproduced below:

Page No. 2 of the Forwarding-Letter embodied in the Report:

“We identified the following BSE listed penny stocks which have been used for generating bogus LTCG:

<i>SL No</i>	<i>Script Code</i>	<i>Script Name</i>	<i>Full Name of Penny Stock</i>	<i>Amount of Total Value</i>
36	506113	Lifeline Dru	Lifeline Drugs & Pharma Ltd.	7361135725

Page No. 12 / 14 of the Report

“4. Project Basis Enquiry of the scam.

Various enquiries have been conducted by the Directorate of Investigation, Kolkata, on a project basis, which has resulted into the unearthing of a huge syndicate of Entry Operators, share brokers and money launderers, involved in providing bogus accommodation of Long Term Capital Gain, Short term capital loss. It has come to light that large scale manipulation has been/is being done In market price of shares of certain companies listed on the Bombay Stock Exchange by certain persons working as a syndicate in order to provide entries of tax exempt bogus Long Term Capital Gains to large number of persons in lieu of unaccounted cash. The basic objective of this racket is to convert black money into white without payment of Income Tax. The unaccounted cash of such persons [beneficiaries] is utilized to purchase shares of such companies at a very high artificially inflated market price. This practice is generally called Accommodation Entry Scam, as the activities of such persons are carried out with prime objective of accommodating unaccounted cash of beneficiaries into their regular books of accounts without paying any tax on the same. Some of the listed companies, directly or indirectly owned by operators and whose share prices have been apparently manipulated by the syndicate of operators, which have come to adverse notice of the Income Tax Department, are as under:

<i>SL No</i>	<i>Script Code</i>	<i>Script Name</i>	<i>Full Name of Penny Stock</i>
36	506113	Lifeline Dru	Lifeline Drugs & Pharma Ltd.

Learned DR also filed a copy the Order passed by the Securities and Exchange Board of India (SEBI) by which the SEBI had suspended operations in the script of Lifeline Drugs & Pharma Ltd., after receiving a reference from Principal Director of Income-tax (Investigation), Kolkata

informing that the Lifeline Drugs & Pharma Ltd. was a script which was used to generate Long Term Capital Gain.

9. Then, Ld. DR placed reliance on the decision of **Hon'ble High Court of Kolkata in PCIT Vs. Swati Bajaj, ITA No. 06/2022, dated 14.06.2022** decided recently in favour of Revenue. The decision is much detailed; has considered various legal precedents of the Hon'ble Supreme Court and other Courts; has taken into account the Investigation-Report dated 28.04.2015 prepared by Investigation-Wing of Income-tax Department; and considered the issues of cross-examination, human probability etc. Some relevant paragraphs of the decision are extracted below:

“69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, 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, in our considered view the methodology adopted by the department cannot be faulted.

70. It was argued by Mr. Bagaria that in the decision in Balram Garg, the decision in K.R. Ajmera has been overruled. To examine the correctness of the said submission, we have carefully gone through the findings rendered by the Hon'ble Supreme Court in paragraph 47 of the judgment in Balram Garg which reads as follows:

“Lastly, we have given our anxious consideration to the judgments relied upon by the learned counsel of the Respondent viz. [SEBI vs. Kishore R. Ajmera](#) [(2016) 6 SCC 368] and [Dushyant N. Dalal vs. SEBI](#) [(2017) 9 SCC 660]. Suffice it to hold that these cases are distinguishable on the

facts of the present case, as the former is not a case of insider trading but that of Fraudulent/Manipulative Trade Practices; and the latter case relates to Interest Penalty rather than the subject matter at hand. Reliance placed on the case of Kishore R. Ajmera (supra) to show that presumption can be drawn on the basis of immediate and relevant facts is contrary to law already settled by this Court in the case of Chintalapati Srinivasa Raju (supra) where it is held that "a reasonable expectation to be in the know of things can only be based on reasonable inference drawn from foundational facts." It has further been held that merely because a person was related to the connected person cannot be itself be a foundational fact to draw an inference."

71. On a careful reading of the above paragraph will show that the argument by placing reliance on the case of K.R. Ajmera to show that presumption can be drawn on the basis of immediate and relevant facts was contrary to the law already settled by the Hon'ble Supreme Court in Chintalapati S. Raju. Therefore, it would be incorrect to submit that the decision in K.R. Ajmera has been overruled. This position becomes clearer as the decision in K.R. Ajmera was referred to in Chintalapati S. Raju as could be seen in paragraph 30 of the said judgment. Therefore, we hold that the law laid down in K.R. Ajmera continues to be good law.

72. In the light of the above discussion, the only conclusion that can be arrived at is that the opinion can be formed and the decision can be taken by taking note of the surrounding circumstances which had been elaborated upon in K.R. Ajmera.

73. It is very rare and difficult to get direct information or evidence with regard to the prior meeting of minds of the persons involved in the manipulative activities of price rigging and insider trading. We can draw a parallel in cases of adulteration of food stuff, more than often action is initiated under the relevant Act after the adulteration takes place, the users of adulterated products get affected etc. Therefore, a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we cannot lose 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. The Income Tax department was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessee made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail for several reasons which we have set out in the proceedings. To reiterate, the assessee we 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. Unfortunately, the assessee have been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of

genuinity needs to be established otherwise, the assesseees are lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in [Section 68](#) of the Act. Thus, the assesseees cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. 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. The assesseees cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assesseees have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. The revenue had placed heavy reliance on the decision in McDowell to show that the claim of the assessee is not case of tax planning to be one of the tax avoidance by indulging in dubious methods. Mr. Bagaria had argued the rule in McDowell was considered in Azadi Bachao Andolan and Vodafone International and it is in the manner explained in these decisions the rule in McDowell needs to be applied. From paragraph 138 onwards the Hon'ble Supreme Court considered in detail as to why McDowell and what it says and what it does not say. The argument of Mr. Bagaria would primarily rests on as to what would mean by a sham transaction as a legal one and it is pointed out that all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. Further by referring to the decision in Vodafone International, it is submitted that the revenue cannot start with the question as to whether the transaction was a tax deferment/avoidance but the revenue should apply the "look at" test to ascertain its true legal nature and that genuine strategic planning had not been abandoned. Further the revenue has to establish on the basis of facts and circumstances surrounding the transactions that the impugned transaction is a sham or tax avoidance. In this regard Mr. Bagaria ITAT NO. 06 OF 2022 AND ETC. BATCH also referred to the decision in the case of Hill Country Properties Limited Versus Goman Agro Farms Private Limited 90 and also the decision in IRC Versus Duke of Westminster 91 .

74. In our considered view we need not travel thus far and wide to examine as to how and what is said and what is not said in McDowell Mr. Soumen Bhattacharya referred to the decision for the simple reason, to point out that tax planning may be legitimate provided it is within the frame work of law as

colourable devices cannot be part of tax planning which cannot be encouraged. Therefore what we are required to see is whether the claim made by the assessee before us are legitimate and whether there was any colourable devices adopted in the process and these colourable devices may or may not be directly but indirectly attributable to the assessee. Therefore, we need not labour much to examine as to how rule in McDowell needs to be applied as we are required to examine the factual scenario from the cases on hand which appear to be quite unique not probably drawn the attention of the courts and the tribunal earlier.

75. While it may be true that M/s. Swati Bajaj, Mr. Girish Tigwani or other assesseees who are before us could have been regular investors, investors could or could not have been privy to the information or modus adopted. In our considered view, what is important is that it is the assessee who has to prove the claim to be genuine in terms of [Section 68](#) of the Act. Therefore, 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 and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

76. It was argued that unless there are foundational facts, circumstantial evidence cannot be relied on. This argument does not merit acceptance as wealth of information and facts were on record which is the outcome of the investigation on the companies, stock brokers, entry operators etc. Based on those foundational facts the department has adopted the concept of "working backward" leading to the assesseees. While at that relevant stage the sounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over, were all taken into consideration to negative the claim for exception made by the assessee. Therefore, the department was fully justified in taking note of the prevailing circumstances to decide against the assesseees."

10. Thereafter, Ld. DR submitted that the ITAT, Indore Bench has already decided **Shri Abhishek Gupta Vs. ITO, Ward-5(5), ITA No. 74/Ind/2019, order dated 17.08.2022** wherein the identical issue of exempted capital gain from shares of Turbotech Engineering Ltd. was examined. Ld. DR submitted that after a mindful consideration and thorough analysis, the Bench has rejected the assessee's claim of long-term capital gain and upheld the additions made by revenue. Ld. DR submitted that the basic facts of the present appeal are similar to the facts involved in **Shri Abhishek Gupta (supra)** and there is no reason to deviate from the pre-existing decision. Ld. DR, therefore, prayed that the decision should be applied in present appeal too and the additions made / confirmed by lower authorities must be upheld.

11. We are in absolute agreement with the submission of Ld. DR that the issue of exempted capital gain arising from Turbotech Engineering Ltd. stands duly examined and concluded by ITAT, Indore Bench in the case of **Shri Abhishek Gupta (supra)**. We note that although the present appeal concerns the shares of Lifeline Drugs and Pharma Ltd., but the position is *pari materia* similar to the share of Turbotech Engineering Ltd. Further, we do not find any material change which could suggest non-applicability of the decision of **Shri Abhishek Gupta (supra)** in present appeal. Hence, we find no valid reason to deviate. Accordingly, we uphold the additions made by revenue-authorities and dismiss the Grounds raised by assessee.

12. In the result, this appeal of assessee is dismissed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 07/12/2022.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 07.12.2022

Patel/Sr. PS

Copies to:

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

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the fair order is placed before the Dictating Member for pronouncement	
5.	Date on which the file goes to the Bench Clerk	
6.	Date on which the file goes to the Head Clerk	
7.	Date on which the file goes to the Assistant Registrar for signature on the order	
8.	Date of dispatch of the Order	