

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.609/Ind/2019
Assessment Year: 2014-15

Parmanand Sachdev Indore	बनाम	ITO –Ward-5(5) Indore
(Appellant / Assessee)	/Vs.	(Respondent/ Revenue)
PAN: BDQPS 7324 K		
Assessee by	None	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	18.10.2022	
Date of Pronouncement	01.12.2022	

आदेश / O R D E R

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

Feeling aggrieved by appeal-order dated 21.02.2019 passed by learned Commissioner of Income-Tax (Appeals)-II, Indore [**Ld. CIT(A)**], which in turn arises out of assessment-order dated 20.12.2016 passed by the learned ITO, Ward-5(5), 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 Ld. CIT(A) grossly erred both on facts and in law, by passing the order under section 250, without giving the assessee an opportunity of being heard.

2. *The Ld. CIT(A) has erred in holding that total income of the assessee at Rs. 80,75,224/- as against the Returned income of Rs. 9,57,130/- thereby confirming addition of Rs. 71,18,094/- without hearing and passing an ex-parte order is quite unjustified, excessive and bad in law.*
3. *The Ld. CIT(A) has erred both on facts and in law in holding that the entire capital gain of Rs. 69,78,526/- arising to the appellant from sale of shares as his income from undisclosed sources, merely on guess work, surmises and conjectures, without hearing and passing an ex-parte order.*
4. *The Ld. CIT(A) has erred both on facts and in law in confirming the addition of Rs.1,39,568/- in the appellant's income merely on guess work, surmises and conjectures, without hearing and passing an ex-parte order."*

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 27.07.2014 declaring a total income of Rs. 9,57,130/- from salary and interest. In the return, the assessee also declared a long-term capital gain of Rs. 69,78,526/- earned from sale of equity shares of Turbotech Engineering Ltd. exempted u/s 10(38) of the act. The assessee claimed to have purchased 15,000 shares of Turbotech Engineering Ltd. for Rs. 45,000/-; sold the same for Rs. 70,23,526/- and thereby earned a whopping capital gain of Rs. 69,78,526/-. 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. 69,78,526/- on a very small investment of just Rs. 45,000/- and that

too within a short period of just 15 months by indulging in the transactions of what is called “penny stock”, the Ld. AO completed assessment u/s 143(3) by order dated 20.12.2016 after making a total addition of Rs. 71,18,094/- on two counts, viz. (i) Ld. AO treated the capital gain of Rs. 69,78,526/- as bogus receipt u/s 68 of the Act, and also (ii) Ld. AO added a sum of Rs. 1,39,568/- 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.

Ground No. 1:

4. In this ground, the assessee has claimed that Ld. CIT(A) has grossly erred by passing order u/s 250 without giving the assessee an opportunity of being heard.

5. Ld. DR drew our attention to Para No. 3.0 of the order of Ld. CIT(A) which reads as under:

“3.0 The case was originally fixed on 20.02.2018. On such date, the AR of the appellant had filed adjournment. On request of the AR the case was again fixed on 09.03.2018. Further, the case was adjourned to next date on the request of the appellant. Further, various notices were issued but nobody had attended on those dates. It is clear from the above facts that various opportunities were given to the appellant but the appellant had failed to file written submission after giving proper opportunity of hearing. Hence, in absence of any written reply, this case is being decided on merit basis.”

6. On a careful consideration, we note that the Ld. CIT(A) has issued given several opportunities to the assessee but, however, the assessee has not availed those opportunities. We further note that the Ld. CIT(A) has passed a detailed order on merits of the case through Para No. 4 / Page No. 16 to 20 and adjudicated the assessee’s grounds with a due consideration. Hence the order passed by Ld. CIT(A) is a detailed order on merits and not a summary-order. Being so, we do not find any merit in the claim of assessee

that the Ld. CIT(A) has passed order without giving opportunities of hearing. Therefore, we are inclined to dismiss Ground No. 1 of assessee which is devoid of any merit.

Ground No. 2 to 4:

7. By means of these Grounds, the assessee has challenged the twin-additions made by Ld. AO, viz. (i) addition of Rs. 69,78,526/- in respect of bogus capital gain, and (ii) addition of Rs. 1,39,568/- on account of estimated brokerage cost incurred by assessee out of unexplained sources.

8. 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 15,000 shares of Turbotech Engineering Ltd. @ Rs. 3/- per share for a total consideration of Rs. 45,000/- on 22.11.2011 through M/s Arihant Capital Marketing Limited. The purchase consideration is stated to have been paid in cash. The shares were subsequently claimed to have been sold on different dates from 17.04.2013 to 08.05.2013 for a sum of Rs. 70,23,526/-, resulting into a exempted capital gain of Rs. 69,78,526/-.

9. During assessment-proceeding, Ld. AO confronted the assessee about these transactions and made following observations:

- (i) The assessee has earned capital gain from the transactions of shares of Turbotech Engineering Ltd., which falls within the category of a “Penny stock” as per the information available with the Income-tax Department and this scrip has been used by persons to provide / obtain exempted capital gain u/s 10(38) of the act.
- (ii) The income-tax department has conducted various searches/surveys/enquiries on the members of stock-exchanges which have resulted into the unearthing of syndicates of various players involved in providing bogus accommodation entries of capital gain. Those players work as syndicate and manipulate market prices of “penny-stocks” in order to

provide exempted capital gain to the interest persons in lieu of unaccounted cash, with the objective to covert black money into white without payment of income-tax. Ld. AO has narrated the *modus operandi* applied by them for providing such bogus capital gain.

- (iii) Ld. AO examined the financials of Turbotech Engineering Ltd. and observed that the market capitalization of the company is very small and the P&L A/c shows that the company had no business during last 5 years. He further observed that the company had suffered losses during the period. He observed that the weak financials demonstrate that the company is having neither fundamentals nor potential.
- (iv) Ld. AO analysed the stock-market data of the share of Turbotech Engineering Ltd. and observed that the market price is unrealistic and not related to the financial results of the company. Ld. AO observed that the price of share was initially very low, which then continuously increased. Thereafter, the price again fell down and came to initial stage. Ld. AO, thus, observed that the market price of the share was artificially and intentionally rigged by about 15507% when there was no related-growth in the company with an objective to provide accommodation entry.
- (v) Ld. AO issued a summon u/s 131, followed by reminders, to the assessee to afford an opportunity to the assessee as also to ascertain the truth of the transactions undertaken by assessee. But the assessee did not appear. Ld. AO, therefore, concluded that the assessee did not have knowledge of the financials and credentials of Turbotech Engineering Ltd., whose prices have registered a whopping increase of 15507% in just one year.
- (vi) Ld. AO also gathered data of the persons who purchased shares from assessee through stock-exchange and issued notices u/s 133(6) to those persons. In the notices, Ld. AO called upon those persons to submit the relevant details. However, none of them responded.

10. Based on above observations, the Ld. AO inferred 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). Therefore, the Ld. AO assessee issued show-cause notice dated 02.12.2016 to the assessee, the contents of which are extracted below:

"आपके द्वारा किये गये व्यवहारों के सम्बन्ध में विभाग द्वारा आयकर अधिनियम, 1961 की धारा 132 के तहत ई स्टॉक एक्सचेंज के ब्रोकर्स एवं कई निर्धारितियों के ठिकानों पर सर्च एवं धारा 133 ए के तहत की गई सर्वे कार्यवाही के दौरान अन्वेषण विभाग को इस प्रकार के दस्तावेज/साक्ष्य हाथ लगे या पाए गये जिनके अवलोकन करने पर पाया गया कि, कई सिंडिकेट्स द्वारा तैयार किये गये प्लेटफार्म पर कई खिलाड़ियों द्वारा LTCG से संबंधित बोगस इंट्रीयाँ (Bogus Entries) स्टॉक एक्सचेंज के माध्यम से मैन्युप्लेट (Manipulation of stock Market) करके पेनी स्टॉक बायर्स की ट्रेडिंग के माध्यम से लोगो को बोगस दीर्घ-कालीन पूंजीगत लाभ, बोगस अल्प-कालीन पूंजीगत लाभ, बोगस दीर्घ-कालीन हानि एवं बोगस अल्प-कालीन पूंजीगत हानि से सम्बंधित बोगस इंट्रीयाँ (Bogus Entries) उपलब्ध करवाई गई, जिसमे वित्तीय व्यवहार दो पार्टियों के मध्य किये गये एवं एक पार्टी द्वारा अपनी लेखा पुस्तकों के माध्यम से इंट्रीयाँ अन्य पार्टी को दी गई, जिनमे से अधिकतर व्यवहार नगद में किये गये है जिससे खरीदी लागत एवं एक निश्चित दर पर कमीशन/ब्रोकरेज के साथ भुगतान किया गया ।

इस प्रकार आपके द्वारा जो व्यवहार के गये है वह एक सोची समझी योजना के तहत किये गये है जिन्हें विभागीय कार्यवाही के तहत दर्ज बयानों में उक्त कंपनियों के प्राधिकृत अधिकारी/निदेशकों द्वारा स्वीकार किया गया है कि हमारे द्वारा विभिन्न वेनिफिसरिज को एकमोडेशन इंट्रीयाँ (These accommodation entries are taken by various beneficiaries) उपलब्ध करवाई जाती रही है । इस प्रकार उपरोक्त तथ्यों के आधार पर सिद्ध होता है कि आपके द्वारा जो दीर्घकालीन पूंजीगत लाभ से सम्बंधित बोगस इंट्रीयाँ (Bogus Entries) प्राप्त करके दीर्घ-कालीन पूंजीगत लाभ अपनी आयकर विवरणी में दर्शाया गया तथा उस आय पर धारा 10(38) के तहत छूट का दावा कर कर मुक्त रखा गया जो न्यायोचित नहीं है क्योंकि आपके द्वारा किए गये व्यवहार वास्तविक होते तो विचाराधीन वर्ष के अलावा अन्य वर्षों में भी उक्त स्क्रिप् में एवं इसके अलावा अन्य स्क्रिप् में भी नियमित रूप से निवेश किया गया होता, लेकिन आपके द्वारा ऐसा नहीं किया गया है, इससे स्वतः ही स्पष्ट होता है कि, आपके द्वारा किये गये व्यवहार बोगस है एवं इन व्यवहारों को बोगस मानते हुए आपकी आय में जोड़ा जाना प्रस्तावित है । "

11. Responding to above notice, the assessee filed a detailed reply, the contents of which is noted by Ld. AO in Para No. 4.10 the assessment-order. However, the Ld. AO was not satisfied with the submission of assessee and relying upon following decisions favouring Revenue, the Ld. AO made twin-additions as mentioned in the beginning:

- (a) M/s Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC)
- (b) Shammin Varmani, ITA No. 4906/Mum/2011
- (c) Ziauddin A. Siddique ITA No. 4699 and 4700/Mum/2011

12. During first appellate proceeding, the assessee submitted a detailed reply to Ld. CIT(A) reiterating almost same submissions as made before Ld. AO but with the support of some more judicial precedents. However, the assessee did not find any favour from the Ld. CIT(A) who confirmed the entire addition by holding as under:

“4.0 *These grounds of appeal are with regard to making addition of Rs. 99,78,000 on account of exemption so claimed by the appellant u/s 10(38) of the IT Act, 1961. I have carefully gone through the assessment order as well as submission of the appellant in this regard.*

4.1 *During the course of assessment proceedings, it was noticed by the AO that the appellant had shown Long Term Capital Gain on sale of scrip viz M/s Turbo Tech Engineering Ltd which was classified as "Penny Stock Scrip" as per the data available on ITD. During the year under consideration, the appellant had purchased the shares of Turbo Tech Engineering Ltd. through M/s Shah Space Manager Pvt Ltd. and had earned a huge profit on the same & had claimed exemption u/s 10(38) of the Act on the said transactions.*

4.2 *The AO had issued notice u/s 131 of the Act to the appellant to explain the said transactions. But the appellant had appeared before the AO to explain the said transactions. It was noticed by the AO that the appellant was not a regular investor and not doing regular trading in stock exchange. It was also noticed that the appellant did not have any knowledge of M/s Turbo Tech. In the case of Turbo Tech, the AO had gathered various information. It is clear from the information that the market capitalization of this company was very small and the company had not done any business during last 5years. It is clear from this fact as to how can any person get huge profit from the shares of any company whose financial status was very low from the last 4 to 5 years. In the instant case, the appellant did not have any knowledge about M/ s Turbo Tech Engineering Ltd*

and he had purchased the shares of that company on the advice of his friend. Further, in its statement, the appellant had failed to explain the entire transaction so done by him. **What is at dispute is that whether this was really the Long-Term Capital Gain earn from such scrip? As laid down by the Hon'ble Apex Court, apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. This abnormal gain can't be explained by applying the test of human probability.** The reliance in this regard is being placed on **Commissioner of Income Tax v. Durga Prasad More, (1971) 82 ITR 540 and Sumati Dayal Vs. CIT 1995 AIR 2109, 1995 SCC Sup1.(2) 453.**

4.3 In this scheme, the shares of the penny stock companies are used by the beneficiaries of LTCGSTCL (LTCG in this case) generally through the route of preferential allotment (private placement) or off market transaction. These shares have a lock in period of 1 year as per securities and Exchange Board of India Issue of capital and disclosure requirements Regulations, 2009. Another route to acquire the shares is through Amalgamation or merger. In this route, the beneficiaries of LTCG are allotted shares of a private limited company which is subsequently amalgamated with a listed penny stock and the beneficiaries receive shares of the listed penny stock in exchange of the shares of private limited company.

4.4 Thereafter the prices of the shares of penny stock companies are rigged and are raised through circular trading. This is managed by 'the, 'operator" of the scrip. An "Operator" IS a person who is managing the overall affairs of the scheme and he is the one who contacts the entities who wish to take entry of bogus LTCG/STCL in their books and arranges the same through the scripts of penny stock companies. The operator manages many paper /bogus companies and uses them to do circular transactions to rig the price of the shares. The shares of these penny stock companies although listed on exchange are always closely held and are controlled by the promoter of the penny stock company and the operator who is arranging for the bogus LTCG j STCL. This is due to the fact that the general public is not interested in these shares as these companies have no credentials and this helps the operator to keep a control on the price movement of shares.

4.5 On going through the above information, **it is crystal clear that the appellant had 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 had made investment through the derecognized broker and had earned excessive return within a short span of period which is**

extremely unusual.

4.6 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 known company worth Rs.5/had jumped to Rs.485/- in to time addition confirmed

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

"Hon'ble Punjab & Haruana 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 [2011] 12 taxmann.com 276 (Punjab & Haryana)/[2011] 201 Taxman 94 (Punjab & Hal'yana)(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 documents - 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-ITAT-MUM

"where Hon'ble ITAT Mumbai held that in this case the 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 SEBI 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 AO by applying the test of human probabilities"

5. Ratnakar M Pujari Vs ITO [2016.;TIOL-1746-ITAT-MUM]
"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"

4.7 Hence, it is clear from the above facts, judicial decisions so discussed above and circumstances that **it was a sham transaction which cannot stand the test of human probability and therefore, the addition so made-by the AO is hereby confirmed and** accordingly, these grounds of appeal are **dismissed."**

13. Before us, Ld. DR made a crystal-clear and pointed submission. He submitted that the assessee has declared exempted capital-gain from shares of Turbotech Engineering 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:

SL No	Script Code	Script Name	Full Name of Penny Stock	Amount of Total Value
62	504358	Turbo Tech	Turbotech Engineering Ltd.	8319513048

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:

SL No	Script Code	Script Name	Full Name of Penny Stock
62	504358	Turbo Tech	Turbotech Engineering Ltd.

Page No. 29 / 33 of the Report:

“Brief Discussion on all listed Penny Stocks (Scripts) used in Bogus LTCG Scam.

As discussed in previous chapter we have searched surveyed some 32 share Broking Entities and more than 20 Entry operators. Out of the investigations of such high magnitude, we have unearthed and identified some 84 odd companies which are listed on Bombay Stock Exchange and are being used for providing bogus accommodation entry of Long Term Capital Gain/Short Term Capital Loss. List of such identified penny stocks, whose share prices have been apparently manipulated by the syndicate of operators, are as under:

SL No	Script Code	Script Name	Full Name of Penny Stock	Amount of Total Value	SEBI Action
62	504358	Turbo Tech	Turbotech Engineering Ltd.	8319513048	Suspended

14. 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 loose sight of the fact that the shares of very little known companies with insignificant 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 assessee 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 assessee 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 assessee has 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. The assessee 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 assessee has 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 a 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 rest 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 assesees 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 assesees 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 assesees 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 assesees. 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 assesees."

15. 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.

16. 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)**. Further, we do not find any material change which could suggest non-applicability of the decision in present appeal. Hence, we find no valid reason to deviate. Accordingly, we uphold the additions made by revenue-authorities and dismiss the Ground No. 2 to 4 of the assessee.

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

Order pronounced as per Rule 34 of I.T.A.T., Rules, 1963 on 01.12.2022.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 01 .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	