

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 621/Mum/2021 (A.Y. 2015-16)

Shri Hitendra C. Ghadia,

1702, Millennium Grand CHS,
Sector 11, Plot No. 71B, Kharghar,
Opposite Nimisha Hospital,
Navi Mumbai-410210

PAN: AALPG1399M

..... Appellant

Vs.

DCIT, CC-1(1),
9th Floor, Pratishtha Bhavan,
Old CGO Annexe, M.K. Road,
Mumbai-400020.

..... Respondent

ITA No. 619/Mum/2021 (A.Y. 2015-16)

Smt. Ilaben K. Ghadia,

1702, Millennium Grand CHS,
Sector 11, Plot No. 71B, Kharghar,
Opposite Nimisha Hospital,
Navi Mumbai-410210

PAN: AALPG1399M

..... Appellant

Vs.

DCIT, CC-1(1),
9th Floor, Pratishtha Bhavan,
Old CGO Annexe, M.K. Road,

Mumbai-400020.

..... Respondent

ITA No. 617/Mum/2021 (A.Y. 2015-16)

Smt. Ushaben H. Ghadia,
1702, Millennium Grand CHS,
Sector 11, Plot No. 71B, Kharghar,
Opposite Nimisha Hospital,
Navi Mumbai-410210
PAN: AALPG1399M

..... Appellant

Vs.

DCIT, CC-1(1),
9th Floor, Prathishtha Bhavan,
Old CGO Annexe, M.K. Road,
Mumbai-400020.

..... Respondent

Appellant by	:	Ms. Hiral Sejpal / Mr. Sarthak
Respondent by	:	Smt. Madhumalti Ghosh, CIT-DR
Date of hearing	:	12/01/2023
Date of pronouncement	:	20/03/2023

ORDER**PER GAGAN GOYAL, A.M:**

These three appeals by three assesseees are directed against the order of Commissioner of Income Tax (Appeals)-47, Mumbai (for short 'CIT (A)') dated 15.03.2021, 25.02.2021 & 10.03.2021 under section 143(3) of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2015-16. The assessee has raised similar grounds

for all the appeals. We shall first take up appeal in ITA No. 621/Mum/2021 as lead case, grounds are as follows:

“Ground No. 1:

1.1 On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals)-47 Mumbai ('the CIT(A)'), erred in disallowing the exemption claimed by the Appellant u/s 10(38) as Long-Term Capital Gain and thereby confirming the addition made by the Deputy Commissioner of Income Tax, Central Circle 1(1) ('the AO) amounting to Rs. 57,57,900/- u/s 68 of the Income Tax Act, 1961 (the Act).

1.2 The Hon'ble CIT(A) further erred in:

- neither giving an opportunity to cross examine nor giving the details on the basis of the addition;*
- solely relying on the findings of the investigation team and not considering the factual and legal submission filed by the appellant.*
- concluding that the entire transaction was a sham.*

1.3 In the aforesaid legal and factual matrix, the appellant prays that the AO be directed to allow the exemption u/s 10(38) of the Act of Long-Term Capital Gain amounting to Rs. 57,57,900/-.

Ground No. 2:

2.1 On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in rejecting the explanation and evidences of the appellant regarding the acquisition of 400 gms. of seized bullion and diamond Rs. 3,40,630/- respectively and thereby confirming the addition of Rs. 14,72,630/- u/s 68 of the Act.

2.2 The appellant prays that the explanations and evidences be considered and that the AO be directed to delete the aforesaid additions made u/s 68 of the Act amounting to Rs. 14,72,630/-

Ground No. 3:

3.1 On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in upholding the addition made by the AO u/s 68 of the Act without appreciating the fact that:

- *the Refrigerator amounting to Rs. 62,000/- was purchased in AY 2013-14;*
- *the Washing Machine amounting to Rs. 50,500/- was purchased in AY 2013-14;*
- *the Sony Battery amounting to Rs. 20,400/- was purchased in AY 2013-14;*
- *the laptop amounting to Rs. 58,000/- was purchased in AY 2014-15; by making an addition of Rs 1,90,900/- u/s 68 of the Act.*

3.2 The appellant prays that the AO be directed to delete the aforesaid additions made u/s 68 of the Act amounting to Rs. 1,90,900.”

2. Brief facts of the case are that a search operation was carried out on Balaji Group of companies on 28-01-2015. The premises of the assessee was also covered in the search. Thereafter case of the assessee was centralised and case of the assessee was selected for manual scrutiny under compulsory category. The assessee filed return of income on 26-09-2016 declaring a total income of Rs 20,70,790/-. Assessee is engaged in the business of civil construction and during the year under consideration derived his income from house property, business and profession and other sources.

3. In the assessment proceedings AO made addition of Rs 2,75,851/- on account of sale of jewellery, Rs 14,72,630/- on account of jewellery found during search, Rs 18,00,000/- on account of gift received, Rs 3,64,900/- on account of unexplained investment in electronics and Rs 57,57,900/- on account of long-term capital gain on penny stock. Aggrieved with this order of AO assessee preferred an appeal before the Ld.CIT(A)-47 Mumbai. Against this appeal of assessee Ld.CIT(A) allowed the appeal of assessee partly. Not being satisfied with the outcome of the order of the Ld.CIT(A) assessee preferred the appeal before us.

4. We have gone through the order of AO, order of Ld. CIT(A) and submissions of the assessee. Before us assessee raised total 3 substantive grounds with sub grounds.

5. Ground No.1 with its sub grounds pertains to disallowing the exemption claimed by the assessee u/s 10(38) on sale of penny stocks. In this matter originally the assessee had purchased 8,500/- equity shares of M/s Swift I.T & Services Pvt Ltd through Bhushit trading Pvt Ltd for a consideration of Rs 85,000/- on 14-02-2013. Assessee submitted a trail of purchase of share from JMD Soinds Ltd to Ruchi Global on 10-03-2012, Ruchi Global to Hitendra Ghadia on 18-02-2013(vide page no. 72 and 73 of factual paper-book no.1). For these shares assessee made payment through Abhyudaya Co-op bank vide cheque no. 100085 dated 05-03-2013. Thereafter this company M/s Swift I.T & Services Pvt Ltd merged with M/s Parag Shilpa Investment Ltd. on 10-05-2013. Order of honourable High Court was submitted before the authorities below and before us also vide page no. 38-43 of factual paper-book no.1. this new entity M/s Parag Shilpa Investment Ltd. is a listed company. Thereafter the assessee was allotted 8500/- equity shares of M/s Parag Shilpa Investment Ltd. consequent to the said merger on 02-08-2013 vide page no. 37 of the paper -book.

6. Thereafter assessee got these shares dematerialise (DMAT) with Bonanza Portfolio Ltd (depository) on 29-03-2014 vide page no. 66 of paper-book. The company M/s Parag Shilpa Investment Ltd. splited its shares in the ratio of 1:10 on 05-09-2014 by virtue of split now assessee has total 85,000/- shares of face value of Rs 1 each. These 85000/- shares assessee sold through two brokers no.1 M/s Bonanza Portfolio Ltd 63,000/- shares and M/s Zen Securities Ltd 22,000/-

shares. These shares were sold by assessee between starting from 11th of September 2014 to 17th oct 2014 vide page no. 48 to 51, 87 to 94 of paper book 1 and page no. 2 to 5 of paper- book 2 (additional evidence).

7. It is observed by us that the net worth of the company was only about Rs 32,00,000/- and the price of the script jumped from Rs 5.7 in 2012 to Rs 910.50 in 2014, i.e., in a short span of almost 2 years. The investee company declared a net profit of Rs 10,00,000/- during AY 2012-13 and Rs 40,00,000/- during AY 2016-17. It is further pertinent to mention that its EPS was almost negligible during the relevant period. **There is an established market practice of splitting the shares, in those cases where the demand of shares is very high. Company has tremendous brand value with strong financial credentials and floor price of shares is almost sky touched. In these cases, to make share available to every interested investor and to unleash the maximum possible value of shares, giant companies of respective industries carry such type of practice. A company with negligible investor base, negligible networth, negligible net profits and almost 0 EPS, adopting such type of practice of splitting the shares is not digestible for a lay man point of view. As there is no stamp duty involve on splitting of shares, but operator get higher nos. of shares to operate with. This our observation is against such type of transactions not withstanding the further facts as we will discuss in this order later on. A bare reading of list of investors also demonstrates a specific pattern of buying the shares by lead investor and then his/her family members also in huge quantity. As in this case assessee himself, his family members namely Smt. Ila Ben K. Ghadia and his wife Smt. Usha Ben Ghadia. Assessee purchased shares of M/s Swift I.T & Services Pvt Ltd, amalgamation of the same with M/s Parag Shilpa Investment Ltd. is a common**

practice being adopted by the investors and operators to avoid various cost like stock exchange charges, brokerage and STT applicable on purchase and then merger of 3 or 4 companies of the same nature in one listed company (In this case M/s Parag Shilpa Investment Ltd.). Nowhere in the submissions of the assessee it is transpired that why initially assessee purchased shares of M/s Swift I.T & Services Pvt Ltd and then its merger, split of shares and then rocketing in the price of shares. All these are abnormal phenomena not to be seen in case of genuine investment activities.

8. In all the investments made by various so-called investors this pattern of family involvement in large nos. is very common. The revenue has received a report from DGIT (Inv.), Kolkata and a report against the script and assessee from SEBI as under from the order of Ld. CIT (A):

“7.0 I have considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. Ground nos. 1 to 5 deal with addition of Rs. 57,57,900/- made by the AO as unexplained capital gains on sale of shares of PS IT Infrastructure & Services Ltd. as under:-

AY	Name of Scrip	No. Of Shares Purchased	Purchase Cost	Date of Purchase	No. Of Shares Sold	Sale Value	Date of Sale	Long Term Capital Gain
2015-16	PSIT	7500	75000	05/02/2013	1000	63360	11.09.2014	
					20000	1280200	12.09.2014	
					20000	1306000	17.09.2014	
					10000	668000	18.09.2014	
					12000	823080	01.10.2014	
					22000	1502260	21.10.2014	
					85000	5642900		5557900

7.1 While completing the assessment, the AO held that the assessee did not purchase these shares on the floor of the stock exchange i.e. through normal channels for purchase of shares and therefore purchase transaction was suspicious. The AO has further observed that subsequent to purchase, the prices of this scrip was rigged to a large scale to the value of Rs. 910 50, from purchase price of Rs. 10 per share, through a network of operators, stock brokers and exit providers. The AO in this regard had referred to the detailed investigation carried out by DGIT (Inv.) Kolkata, in respect of 84 penny stock companies, which also includes PS IT Infrastructure & Services Ltd., the company, on sale of which the assessee has received windfall gains and it has been concluded by them that these transactions were manipulated and were done with a view to earn tax exempted income. Accordingly the AO treated the long term capital gains as bogus and added the same in the hands of the assessee. The assessee raised various objections about this addition

7.2 During the course of appellate proceedings the issue of bogus long terms capital gain was referred to the AO for Remand Report. Therefore the AO vide his letter dated 23.12.2020 has submitted a detailed report. The contents of this report are reproduced as under for the sake of clarity.

"2. Vide letters under reference, the undersigned has been directed to submit the remand report in respect of the additional submissions of the assessee on additions made in AY. 2014-15

3 At the outset, it is humbly submitted that during the course of assessment proceedings, the assessee has been provided with ample opportunities to make all the relevant submissions and the assessment order has been passed after considering the submissions made by the assessee. Hence, the additional grounds raised by the assessee are not maintainable. The assessee was provided with an opportunity to present its comments vide letter dated 10.12.2020 on the additional documents submitted, but the assessee did not submit any reply.

4. Without prejudice to the above, the issues raised in additional ground and the comments thereon are as mentioned hereunder.

5. during the previous year, the assessee had claimed Long Term Capital Gain of Rs. 57, 57,900/ in respect of sale of one scrip viz. M/s PS IT & Infrastructure Services. The AO had added back the same in the scrutiny, treating it non-genuine.

5.1 The assessee has submitted the contract note cum tax invoice received from Zen Securities Ltd and details of volume of total trading on days on which the appellant sold the said shares. The same has been perused but not found tenable to prove genuineness of transaction. As already discussed in details in para 7 of assessment order, Investigation Directorate, Kolkata had undertaken investigation into 84 penny stocks including one M/s PS IT & Infrastructure Services, in which assessee was involved, and given detailed findings including bogus LTCG/STCL entries claimed by large number of beneficiaries. In view of the above, it may be inferred that the amount of Rs. 57.57, 900/ was correctly added to the income of assessee as bogus Long Term Capital Gain."

7.3 a copy of the remand report was shared with the assessee and further submissions made by him have been considered the modus operandi involving operators, intermediary and the beneficiaries has been detained in the investigation report prepared by DGIT, Kolkata Similar investigations were also carried out by the DGIT Mumbai and Ahmadabad. The basic aim of this was to route the unaccounted money of long term capital gain beneficiaries into their account books in the garb of long term capital gain. This nature of long term capital gain was taken by selling the shares on the stock exchange and registering the process arising out of the sale of shares into the books of accounts for implementing this scheme shares of some penny stock companies were used. In this scheme the shares of the penny stock companies were acquired by the beneficiaries at very low price through the route of preferential allotment. These shares had lock in period of one year as per SEBI guidelines In very few cases the shares were acquired through stock exchange These shares were then scrip into similar e denominations and then bogus shares were issued to increase the price. Thereafter the price of the shares of the penny stock companies were rigged' systematically and raised through circular trading this is managed by the operator of the scrip. The shares of these penny stock companies although registered on stock exchange but were always closely hold and are controlled by the parameters of the penny stock company and the operator who were arranging bogus Long Term Capital Gains. This is due to the fact that general public is never interested in such shares as the

companies had no credentials. Once the period of one year has passed and the shares prices have been sufficiently rigged, the beneficiaries sell these shares at the unarranged price in the stock market. It is further worth mentioning that purchase of the shares of these companies is not made by public but by the bogus entities which are referred to as exit providers. So firstly the unaccounted money of the beneficiaries is routed to the bogus entities normally exit providers and the shares held by the beneficiaries are bought by these bogus entities and thus long term capital gain are earned which are substantially claimed as tax exempted.

7.4 It is further seen that assessee is not engaged in substantial share trading activities or investment in shares his main sources of income is income from his construction business etc. Therefore the intention of the assessee to acquire the shares of PS IT Infrastructure and Services Ltd. is the pre determined move with the sole aim to earn bogus long term capital gains which are tax exempted. In the instant case the shares were acquired by the assessee at Rs. 10 and a year later split into shares of Rs. 5.70 each in February 2013 and thereafter the prices of these shares were raised from Rs. 5.70 to Rs. 910 in a short span of about 22 months. After all the beneficiaries had exited there was free fall in the price of these shares by August 2015 its prices again came down to Rs. 77.

7.5 It is further gathered that even SEBI has carried out detailed investigation in respect of suspicious transactions in the scrip PS IT Infrastructure & Services Ltd. and they passed a detailed order not only banning in the trading in this scrip but also prohibiting relevant stock brokers from doing any market transactions. The SEBI has clearly held that movement in the scrip was unusual and rigged. For clarity the relevant portion of SEBI's order is reproduced as under-

- 1. "Securities and Exchange Board of India ("SEBI") conducted an investigation into the trading and dealings in the scrip of PSIT Infrastructure and Services Ltd.(hereinafter referred to as 'PSIT/the company') as it observed abnormal movement in the price of the scrip on Bombay Stock Exchange Ltd ("BSE")during May 01, 2012 to July 31, 2015 (hereinafter referred to as the "investigation period / IP")*
- 2. It was observed that the company had made a preferential allotment of 1, 10, 00,000 shares of Rs. 10/-each at par on July 23, 2012 to 49 non-promoter entities. Further, two companies namely,*

Crescent Digital Technologies Limited and Swift IT Infrastructure and Services Ltd. merged with PSIT on June 05, 2013. Pursuant to the merger, 4,25,20,000 equity shares of Rs.10/each were issued by PSIT The new securities of PSIT were listed on BSE and permitted for trading on exchange w.e.f. August 13, 2013. Moreover, there was a sub-division of Rs. 10/per share of the Company into the shares of Rs. 1/-each w.e.f. September 03, 2014.

3. Investigation revealed that the maximum price rise in the scrip of PSIT occurred during the period May 01, 2012 to February 11, 2014 (hereinafter referred to as Order in the matter of PS IT Infrastructure and Services Ltd. price rise period'). During this price rise period the price rose from Rs. 50 to Rs. 466.95.

4. The Price Volume details of the scrip during this price rise period are as follows: Dates Opening Price (volume) on first day of the period(Rs.) Closing price (volume) on last day of the period (Rs.)Low price(volume) during the period (Rs.)High Price(volume) during the period (Rs.)Avg. no. of (shares) traded daily During The period May 01- 2012 to February 11, 2014Price50466.94.95 (21/05/12)466 9 (11/02/14)107.59Vol9001031 (17/10/13)6050 (19/11/13).

5. PSIT scrip was under suspension for trading from May 19, 2004 to February 9, 2012 and even after revocation of suspension, there was no trading till May 21, 2012. Investigation revealed that on May 21, 2012, only one trade took place. Subsequently, after a gap of almost 8 months, the trading started from January 2013 onwards when 59 trades took place till May 2013 and 123 trades took place from September 10, 013. ""To February 11, 2014.

6. there were a total of 185 trades for 17,431 shares on 162 trading days in PSIT scrip during this price rise period on 155 days, there was only one trade in the scrip. Further, 45 entities bought and 35 entities sold during the period.

7. Investigation observed that the trades by the sellers contributed to increase in the Last Traded Price (LTP) by a total of Rs. 462.65 during this price rise period (positive LTP). Further, 22 out of 35 sellers were connected to each other on the basis of off-market transfers and common addresses.

8. It was observed that the 22 seller entities received shares in the off market from 4 entities namely, Rajendra Kothari, Saroj Devi Kothari Nishant Sharma... Kothari and Raj Kumar Sharma.....

"59 In light of the foregoing, the above discussed trading behaviour and the conduct of the Noticees, the preponderance of probability leads to the conclusion that the tradings / transactions of the Noticees are not genuine and are contrary to their claim that is the same are in the ordinary course of their business. To reiterate, in this present case, the transferors (Noticees No. 23 to 26) transferred the shares through off market transactions in a distributed manner, and within a few weeks of the receipt of shares, the transferees (Noticees No. 1 to 22) started selling shares in miniscule quantities turn by turn in such a manner so as to raise the LTP of the scrip to the maximum limit possible with every trade over a period of several months. Hence, the preponderance of probability leads us to the conclusion that the Noticees have acted in a manipulative manner for increasing the price of the scrip of PSIT. In view of the above, I find that the Noticees have violated Regulations 3(a),(b)(c)(d), 4(1) and 4(2) (a),(e) of SEBI (PFUTP) Regulations, 2003. C If the answers to issues A and B are in the affirmative, what directions are required to be issued against the Noticees?"

60. As noted above, the violations of Regulations 3(a),(b), (c)(d), 4(1) and 4(2) (a)(e) of SEBI (PFUTP) Regulations, 2003 have been established against the Noticees. Now, the final question that emerges for consideration is what directions are required to be issued against the Noticees in light of the violations committed by them. In this regard, I note that Section 11 of SEBI Act casts a duty on the Board to protect the interests of investors in securities and to promote the development of and to regulate the securities market. For achieving such object. it has been authorized to take such measures as it thinks fit. Thus, power to take all measures necessary to discharge its duty under the statute, which is a reflection of the objective disclosed in the preamble, has been conferred in widest amplitude. Order in the matter of PS IT Infrastructure and Services Ltd. Pursuant to the said objective, PFUTP Regulations have been framed. The said Regulations apart from bringing transparency and fairness among other things aim to preserve and protect the market integrity in order to boost investor confidence in the securities market. Because of the non-genuine and manipulative scheme orchestrated by the Noticees where under Noticees No. 23 to 26 transferred the shares of PSIT in off-market to the other 22 Noticees and then they said 22 Noticees sold those shares in the market in miniscule quantities in a coordinated manner with an aim to increase the price of the scrip, not only the investors were defrauded and misled but it also

impaired the integrity of the securities market. In view of the same and considering the violations committed by the Noticees, it becomes necessary for SEBI to issue appropriate directions against them for debarring them from the securities market for an appropriate period of time. Order:

61. Considering the findings recorded in this order pertaining to the violations committed by the Noticees, I, in exercise of the powers conferred upon me under sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 read with section 19 thereof, hereby restrain the Noticees from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner for a period of six (6) months from the date of this order. Needless to say that in view of the prohibition on sale of securities, during the period of restraint, the existing holding, including units of mutual funds, of the Notices shall remain frozen.

62. It is made clear that if the Noticees have any open positions in any exchange traded derivative contracts, they can close out/square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. It is also clarified that these Notices can settle the pay-in and pay out obligations in respect of transactions, if any, which have taken place before the close of June 05, 2020.

63. The order shall come into force with immediate effect Order in the matter of PS IT Infrastructure and Services Ltd.

64. A copy of this order shall be served upon all recognized Stock Exchanges, Depositories and the Registrar and Share Transfer Agents to ensure compliance with the above directions."

7.6 Thus the SEBI held that transactions in the scrip of PS IT were in violation of regulations 3a, 3b, 3c, 3d, 4(1) and 4(2) of SEBI regulation 2003. The SEBI observed that 22 notices (Stock Brokers/operators) sold these shares in the market in minuscule quantities to increase the price of the scrip and thus not only the investors were misleading but also the integrity of the security market. Thus the SEBI barred these persons from operating in the security market for a period of 6 months. The order of SEBI makes it amply clear that transactions in the scrip of PS IT Infrastructure and Services Ltd. were manipulated and were not in normal course of business. As discussed above from the facts of the case it is clear that PS IT Infrastructure & Services Ltd. had a very small net worth

of only about Rs. 32 lakhs and it did not have any financial capacity or brand value so that its share prices could have multiplied over 90 times in a short span of about one year. In fact the asset base of this company is also very small. Further it had shown a net profit of Rs. 10 lakhs during A.Y. 2012-13 and Rs. 40 lakhs during A.Y. 2016-17 which is not very significant. It is further gathered that its earning per share was almost nil during the relevant period. Therefore it appears highly unlikely that this scrip could have increased from Rs. 5.70 in 2012 to Rs. 910.50 in 2014 in a short span of time, when the assessee group exited after booking a huge profit, and resultant LTCG were claimed as tax exempted."

9. Assessee claimed long term capital gain arising on sale of shares as exempted. Assessing Officer made additions on account of unexplained LTCG under section 68 and held that suspicious transactions in shares could not be exempted under section 10(38). Since assessee had failed to prove genuineness of his share dealing transactions and in view of fact that entire transactions were stage managed with object to plough back his unaccounted income in form of fictitious long term capital gain (LTCG) and claim bogus exemption, Assessing Officer was justified in denying exemption under section 10(38) and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68.

10. The report submitted by the Investigation department could not be thrown out on the grounds urged on behalf of the assessee. The assessee have not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue; the statements do not indict the assessee. That apart, the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (Investigation) of all the States of the country. It is thereafter the concerned Assessing Officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessee *qua* the

findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the Assessing Officers calling upon the assessee to explain the genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the same would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessee has miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessee have been issued notices under sections 143(2) and 142(1) they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the Assessing Officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the Assessing Officer in scrutiny assessment under section 143(3). The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessee have not made out any case.

11. 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 AO/ CIT (A) and ITAT 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 scrip of very little known companies. Furthermore, in all the cases, there were minimum 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 scrip, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted.

12. A holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, the authorities below cannot lose sight of the fact that the shares of very little known companies with in-significant business and net worth had a steep rise in the share prices within

the period of little over a year. The revenue 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. To reiterate, the assessee was not named in the report and when the assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuineness of the transaction. Unfortunately, the assessee has been harping upon the transactions done by him and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuineness needs to be established otherwise, the assessee is 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 genuineness 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. 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 have been called upon to prove the negative in fact, it is the assessee's duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuineness 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 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.

13. Following case laws were relied up on by the assessee and revenue, in which citations relied upon by the assessee, we found not tenable on the facts of the case and applicable law, whereas case laws relied up on by the revenue are acceptable on the given facts of the case:

- i). [SHRI BADRESH MANSUKHLAL DODHIA, MUMBAI](#) v. ACIT CIRCLE-1, KALYAN, ITA 5544/MUM/2018, 06-01-2021
- ii). ITO 24(3) (1), MUMBAI v. ARVIND KUMAR JAIN HUF, MUMBAI. [ITA 4862/MUM/2014](#) 18-09-2017
- iii). VIJAYRATTAN BALKRISHAN MITTAL, MUMBAI V. DCIT, CC- 8 (1), MUMBAI, [ITAT- ITA 3428/MUM/2019](#). Etc. Vide Legal paper book filed.

Case laws relied up on by the Revenue:

- i). Sanjay Bimalchand Jain v. PCIT-1, Nagpur [2018] 89 taxmann.com 196 (Bom.)
- ii). Suman Poddar v. I.T.O. [2019] 112 taxmann.com 330 (SC.)

In view, of the above factual matrix and law on this issue pronounced by the Hon'ble Apex Court and Jurisdictional High Court we are of the considered view that the transaction of LTCG claimed exempt u/s. 10(38) by the assessee is colourable device in guise of investment in listed shares. Entire transactions were stage managed with object to plough back his unaccounted income in form of fictitious long term capital gain (LTCG) and claim bogus exemption, Assessing Officer was justified in denying exemption under section 10(38) and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68. In the result, Ground No. 1 with its sub grounds is dismissed.

14. On ground No. 2 with their respective sub-grounds, we have gone through the paper book submitted by the assessee. We have examined documents attached by the assessee vide page nos. 142-146, 148-158, 131-135 and 136-140 of Factual Paper Book No. I and page nos. 6-7 of the Additional paper book-II. We found all the documents produced by the assessee are ante dated and even 3rd parties tax invoices are also involved in documentation part. The reasons assigned by the authorities below do not seem to be cogent and reasonable and requires re-examination of the same. In the light of these facts matter is re-stored to the file of jurisdictional AO for re-examination and verification is to be done in a way that some sustainable cogent reason can be there on record.

15. On ground No. 3 with their respective sub-grounds, we have gone through the paper book submitted by the assessee. We have examined documents attached by the assessee vide page nos. 191 To 193 of Factual Paper Book No. I

We found all the documents produced by the assessee are ante dated and even 3rd parties tax invoices are also involved in documentation part. The reasons assigned by the authorities below do not seem to be cogent and reasonable and requires re-examination of the same. In the light of these facts matter is re-stored to the file of jurisdictional AO for re-examination and verification is to be done in a way that some sustainable cogent reason can be there on record.

16. In the result, appeal of the assessee is partly allowed for statistical purposes.

ITA No. 619/Mum/2021 (A.Y. 2015-16)

17. Ground No. 1 with its sub-grounds is exactly similar to what assessee raised In ITA No. 621/Mum/2021 (A.Y. 2015-16). Ground No. 2 is not pressed by the assessee before us; Ground No. 3 is general in nature hence not adjudicated.

18. As the facts and law applicable is exactly similar in ground no. 1 to what we adjudicated vide para 13 (supra) In ITA No. 621/Mum/2021 (A.Y. 2015-16), decision is mutatis mutandis applicable here also. In the result, Ground No. 1 raised in this appeal is also dismissed.

19. In the result, appeal of the assessee is dismissed.

ITA No. 617/Mum/2021 (A.Y. 2015-16)

20. Ground No. 1 with its sub-grounds is exactly similar to what assessee raised

In ITA No. 621/Mum/2021 (A.Y. 2015-16). Ground No. 2 is not pressed by the assessee before us; Ground No. 3 is general in nature hence not adjudicated.

21. As the facts and law applicable is exactly similar in ground no. 1 to what we adjudicated vide para 13 (supra) In ITA No. 621/Mum/2021 (A.Y. 2015-16), decision is mutatis mutandis applicable here also. In the result, Ground No. 1 raised in this appeal is also dismissed.

22. **In the result, appeal of the assessee is dismissed.**

Order pronounced in the open court on 20th day of March, 2023.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, दिनांक / Dated: 20/03/2023

SK, Sr.PS

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy. /Asstt.Registrar)
ITAT, Mumbai