

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'D' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 905/Mum/2022 (A.Y. 2015-16)

DCIT, Central Circle-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	Disha Pankaj Shah G-5, Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092.  PAN : ALWPS7264B
(Appellant)		(Respondent)

I.T.A. No. 899/Mum/2022 (A.Y. 2015-16)

DCIT, Central Circle-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	Bhavya Pankaj Shah G-5, Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092.  PAN : DPXPS7999R
(Appellant)		(Respondent)

I.T.A. No. 903/Mum/2022 (A.Y. 2015-16)

DCIT, Central Circle-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	Kantilal Ramniklal Shah L/H Pankaj K. Shah G-5, Mangal Kunj Jambli Gulli, Borivali West, Mumbai-400 092.  PAN : AAHPS6922J
(Appellant)		(Respondent)

I.T.A. No. 900/Mum/2022 (A.Y. 2015-16)

DCIT, Central Circle-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	Hiloni Bhavik Shah G-5, Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092.
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	PAN : CNWPS0960A
(Appellant)	(Respondent)

I.T.A. No. 908/Mum/2022 (A.Y. 2015-16)

DCIT, Central Circle-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	Hiraben Khantilal Shah L/H Pankaj K. Shah G-5, Mangal Kunj Jambli Gulli, Borivali West, Mumbai-400 092.  PAN : AAHPS6934N
(Appellant)		(Respondent)

Assessee by	Shri Mani Jain & Shri Patreek Jain
Department by	Ms. Riddhi Mishra
Date of Hearing	21.03.2023
Date of Pronouncement	16.06.2023

### ORDER

#### PER BENCH:-

The revenue has filed all these appeals challenging the decision rendered by Ld CIT(A) in the respective hands of the assessees in deleting the additions made by the AO in respect of sale of shares. All the appeals are related to the assessment year 2015-16. Since the issues are identical in nature and are arising out of common set of facts, all these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the cases are stated in brief. The Revenue carried out search and seizure action under section 132 of the Act in the hands of the assessees on 12.2.2016. Consequent thereto, the assessments of the years under consideration were completed under section 143(3) read with section 153A of the Act. The search was conducted on the basis of information received from the Investigation Directorate of Kolkata that all these assessees have declared bogus long term capital gains from purchase

and sale of a penny stock named M/s Matra kaushal Enterprises Limited. It is the allegation of the revenue that some people have manipulated the prices of the equity shares of certain companies in order to take it to unrealistic levels of high/low prices, so that the capital gains/capital losses are generated by certain investors to suit their requirements. Hence, the AO took the view that the capital gains/capital losses declared by the assessee herein from sale of equity shares of the above said penny stock is bogus in nature. Accordingly, the AO assessed the sale proceeds of shares declared by the assessee in assessment year 2015-16 as the income of the assessee.

3. He also took the view that these assesseees would have incurred commission expenses in procuring bogus capital gains. Accordingly, he estimated commission expenses that would have been incurred by this assessee @ 7% of amount of capital gains.

4. The details of both the additions made in the hands of the assesseees herein are extracted below:-

<b>NAME OF ASSESSEE</b>	<b>SALE PROCEEDS U/S 68</b>	<b>ESTIMATED EXPENSES U/S 69</b>
Bhavya Pankaj Shah	2,29,79,150	16,08,240
Hiloni Bhavik Shah	2,30,11,500	16,10,805
Kantilal Ramniklal Shah (Through L/R Pankaj K Shah)	2,09,53,450	14,66,742
Disha Pankaj Shah	2,29,89,500	16,09,265
Hiraben Kantilal Shah	2,29,99,150	16,09,940

5. These assesseees challenged the above said additions by filing appeals before Ld CIT(A). The Ld CIT(A) deleted both the additions in the hands of all the assesseees herein and hence the revenue has filed these appeals.

6. We heard the parties on these issues and perused the record. We notice that identical additions on sale of shares of M/s Matra Kaushal Enterprises Limited was made on identical reasoning in the hands of one of the family members of these assesseees, viz., Shri Pankaj Kantilal Shah. The Tribunal, vide its order of even date passed in ITA No.898/Mum/2022 relating to

Assessment year 2015-16, has confirmed the order of Ld CIT(A) in deleting identical additions made by the AO. For the sake of convenience, we extract below the decision rendered by the Tribunal in the above said case:-

“8. We shall first take up the appeal filed by the revenue for AY 2015-16. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the assessment of sale proceeds of Rs.2.14 crores received on sale of shares, as income of the assessee. We notice that the above said amount is the sale consideration received by the assessee on sale of shares. The facts relating to this issue are discussed in brief. The assessee initially purchased One lakh shares of M/s Kaushalya Global Limited having a face value of Rs.10/- each for a total consideration of Rs.10.00 lakhs from M/s Pranjal Trading Co P Ltd on 23.10.2012. The consideration for purchase was paid through banking channels. The above said company was amalgamated with M/s P L Enterprises Limited, vide order dated 24.6.2013 passed by Hon'ble Andhra Pradesh High Court. Subsequently, the name of the above said company was changed to “Matra Kaushal Enterprises Limited” and the face value of shares was also split. Accordingly, the assessee got 10.00 lakh shares and those shares were dematerialized on various dates during the year relevant to AY 2015-16 through a broker named M/s Magnum Equity Broking Ltd. During the year under consideration, the assessee sold 4,14,500 shares in May and June, 2014 for a total consideration of Rs.2,13,91,985/- through stock exchange and computed long term capital gains of Rs.2,09,77,485/-. As noticed earlier, the AO has assessed the entire sale consideration of Rs.2.14 crores as income of the assessee.

9. The AO noticed that the search team had questioned Shri Pankaj Shah during the course of search about the capital gains declared by the family members. In the statements, he submitted that all these share dealings were carried out by his father Late Shri Khantilal Ramanlal Shah during his life time. Since he could not answer various questions posed by search team, he admitted that he will withdraw the exemption claimed in respect of long term capital gains in the hands of all the family members and this undertaking was also confirmed by him in the statements taken from him subsequently also.

10. Thereafter, the assessing officer has made post search analysis of transactions, wherein he discussed about the general modus operandi adopted to generate bogus long term capital gains. In this regard,

- (a) the AO has analyzed the price movements of shares of M/s Global Infratech & Finance Ltd.
- (b) Statement taken from an accommodation entry provider named Shri Rajkumar Kedia by Delhi Investigation wing with regard to shares of M/s Pine Animation Ltd, M/s Global Infratech & Finance Ltd, M/s Rutron International Ltd and M/s Shree Shaleen Textiles Ltd.
- (c) Statement taken from five exit-providing companies and Shri Anuj Agarwal with regard to purchase of M/s Global Infratech & Finance Ltd.

- (d) Similar discussions were made by AO with regard to M/s Sunrise Asian Ltd., M/s Cressandra Solutions Limited and M/s Matra Kaushal Enterprise Limited, M/s. Kuvam International Fashions Limited, M/s Tricom Fruit Products Limited.
- (e) With regard to M/s Matra Kaushal Enterprise Limited, the AO has extracted the financial statements, the chart for price movements, opening & closing prices in the stock exchange, Statement taken from Shri Soumen Sen, Statement taken from Shri Devang Bansilal Shah
- (f) All the above details have been extracted from the reports of investigation wing.

11. However, in the return of income, the assessee did not forego the exemption claimed against long term capital gain. Hence the AO asked the assessee to explain as to why the long term capital gains should not be assessed as income of the assessee, as admitted during the course of search. In response thereto, the assessee submitted that the above said admission to withdraw the claim of exemption was made by him under the erroneous impression that he may not be having documents in support of the exemption claimed. Further, since these transactions were carried out by his father, he was unaware of the transactions carried by his father and he was under bonafide belief that his father had committed wrong under the Income tax Act. Accordingly, he agreed to withdraw exemption in the various Statements taken from him. He further submitted that he examined the details of share transactions afterwards and found that all the transactions are supported by proper documents and payments. Accordingly, the assessee submitted before the AO that the exemption claimed u/s 10(38) of the Act has been claimed as per law and the same should be granted. The assessee also submitted that the assessing officer has proposed to assess the capital gains u/68 of the Act, but the assessee has proved all the three ingredients with regard to sale of shares/long term capital gains.

12. The AO took the view that the long term capital gain declared by the assessee is bogus for the following reasons:-

- (a) the assessee, being a prudent business man, did not explain as to why he chose to invest in the shares of companies having weak financials, i.e., the assessee has not shown that he carried out due diligence before buying shares of the above said company.
- (b) the assessee's claim that the investments were made by his late father is not acceptable, as the assessee was not a minor at the time of investment.
- (c) the assessee has retracted the admission given at the time of search.
- (d) though the documents were furnished in support of purchase and sale of shares, yet it was only a colourable device adopted to avail exemption of long term capital gains.
- (e) the modus operandi followed by accommodation entry providers support the decision of the AO that the long term capital gain declared by the assessee is bogus.

- (f) the SEBI has conducted investigations in the case of M/s First Financial Services and M/s Radford Global Ltd and found that there were manipulative trading in the above said two scrips.
- (g) the transactions carried on by the assessee is against human probabilities.

Accordingly, the AO held that the assessee has converted his unaccounted cash into accounted one by obtaining entries of long term capital gains. Accordingly, the AO rejected the claim for exemption u/s 10(38) of the Act. However, he proceeded to assess entire sale proceeds as income of the assessee.

13. The Ld CIT(A) noticed that the Mumbai bench of Tribunal has considered the sale of shares of M/s Matra Kaushal Enterprises Limited in the case of Manoj Kunverji Gala (ITA No.2225/M/2019 dated 08-02-2021) and deleted the addition made by the AO. Accordingly, the Ld CIT(A) followed the above said decision and deleted the addition in the instant case. We also notice that the Ld CIT(A) has also taken support of

- (a) the decision rendered by Hon'ble Delhi High Court in the case of PCIT vs. Smt. Krishna Devi (2021)(431 ITR 361)(Delhi), wherein it was held that mere placing reliance on the investigation report without further corroboration of the same on the basis of cogent material was not justified. The Hon'ble Delhi High Court further held that the theory of human behaviour and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the assessee.
- (b) the decision rendered by Mumbai bench of Tribunal in the case of Vijayrattan Balkrishan Mittal (ITA No.3428/Mum/2019 dated 01-10-2019).

Accordingly, he deleted the addition made by the AO. Consequently, the addition relating to estimated commission expenses was also deleted. The revenue is aggrieved.

14. The Ld D.R submitted that the assessee has shown payments and invoices for purchase of shares, but did not furnish copy of share certificate and share transfer form. The shares were dematerialized much after the date of purchase of shares. She further submitted that the financial statements of M/s Matra Kaushal Enterprises Ltd, would show that the financial position of the above said company would not justify the high share price movements. And it has also suffered losses. Accordingly, the Ld D.R submitted that the fundamentals of this company were very weak and hence no prudent business man will invest in this company. Hence, it is beyond human probabilities that the assessee has invested in this company. The Ld D R further submitted that accommodation entry providers and exit providers have confirmed that they were helping in manipulation of prices of this share. Accordingly, the Ld D.R submitted that there was pre-meeting of minds between the assessee, company and operators and this capital gain has been generated through collusion of all.

15. The Ld D.R placed her reliance on the following case laws to contend that the long term capital gains declared by the assessee were bogus and hence the AO has rightly assessed the sale proceeds as income of the assessee u/s 68 of the Act:-

- (a) JCIT vs. Nitin Kumar Dindayal Didwania (ITA 2092/Mum/2019 and others)
- (b) PCIT vs. Swati Bajaj (2022)(139 taxmann.com 352)(Cal)
- (c) Suman Poddar vs. ITO (2019)(112 taxmann.com 330)(SC)
- (d) Shri Sanjay Kaul vs. ITO (ITA No.1593/Del/2019 dated 7.1.2020)

16. The Ld D.R further submitted that the assessee had agreed to withdraw exemption u/s 10(38) of the Act in the statements taken from him during the course of search. He did not retract the same at the earliest possible opportunity, i.e., he has retracted from it only at the time of filing return of income. The Ld D.R contended that mere retraction of the statement will not disentitle the AO to make the addition and in support of this contention, he relied upon following case laws:-

- (a) Bannalaljat Constructions (P) Ltd vs. ACIT (2019)(106 taxmann.com 128)(SC).
- (b) B Kishore Kumar vs. DCIT (2015)(62 taxmann.com 215)(SC)
- (c) Bhagirath Aggarwal vs. CIT (2013)(31 taxmann.com 274)(Delhi)

17. The Ld D.R also referred to the decision rendered by Delhi bench of Tribunal in the case of Matra Kaushal Enterprises Ltd (ITA No.1010/Del/2018 dated 15-10-2019) and submitted that the addition made u/s 68 towards increase in Share capital has been confirmed by the Tribunal in the above said case. She further submitted that the addition made u/s 68 of the Act towards long term capital gains in the hands of Pravin B Jain HUF (ITA No.4788/Mum/2018 dated 21.11.2019) has been confirmed by the Tribunal.

18. The Ld A.R, on the contrary, submitted that the assessing officer has accepted genuineness of all the documentary evidences furnished by the assessee in support of purchase and sale of shares of above said company. He submitted that the assessee could not explain the details of purchase and sale during the course of search proceedings, since all these transactions were carried out by his father, who had since expired. Hence the assessee had agreed to withdraw exemption u/s 10(38) of the Act, since he was given impression by the search officials that some wrong was committed by his father and further, he was under the impression that all the relevant documents were not available. However, subsequently it was noticed that all the supporting evidences are available and accordingly, the assessee came to the conclusion that there was nothing wrong in the transactions of purchase and sale of shares made by his father. The Ld A.R submitted that the assessee has given detailed reply to the AO in this regard. He further submitted that the AO simply relied upon the report of investigation wing in order to draw adverse conclusions against the assessee. He submitted that the AO did not enquire the broker of the assessee in order to find out the veracity of the transactions, i.e., no

enquiry was conducted by the AO independently in order to show that the findings given in the report of the investigation wing is also applicable to the assessee. Accordingly, he contended that there is no reason to reject the claim for exemption u/s 10(38) of the Act. He further submitted that the exemption u/s 10(38) of the Act is a statutory exemption and hence, even if the assessee has agreed to withdraw the same, it cannot be denied to the assessee under the principle that there is no estoppel against the law.

19. The Ld A.R further submitted that the contention of Ld D.R that the company M/s Matra Kaushal Enterprises Ltd is having weak financials is against the facts. He submitted that the turnover of the above said company stood at Rs.98 crores for the year ending March, 2015. He submitted that the AO has relied upon certain statements given by the operators without putting them to the assessee. He submitted that the assessee is a regular investor in shares and hence the AO was not justified in singling out this share alone on the basis of investigation report. He submitted that there was no SEBI order against the assessee and hence it cannot be said that the assessee was involved in price manipulations. The Ld A.R further submitted that the data collected from BSE on price movement of this share would show that it hit all time high of Rs.69/- per share, where as the assessee has sold the shares at an average price of Rs.51/- only. Had the assessee been part of alleged group, which were manipulating the prices, then the assessee would have sold the shares at the highest price mentioned above. Further, the assessee has not fully sold the shares, i.e., he is still holding part of shares. Accordingly, the Ld A.R contended that the above said facts would show that the assessee has acted as investor only and hence the allegations made by the AO are liable to be rejected.

20. In support of various contentions, the Ld A.R placed his reliance on the following case laws:-

- (a) CIT vs. Shri Mukesh Ratilal Marolia (ITA No.456 of 2007 dated 7.9.2011, which is confirmed by Hon'ble Supreme Court, vide its order dated 27.1.2014 in SLP No.201462012.
- (b) PCIT vs. Ziauddin A Siddique (IT Appeal No.2012 of 2017 dated 04-03-2022)
- (c) CIT vs. Shyam R Pawar (2015)(54 taxmann.com 108)(Bom)
- (d) PCIT vs. Parasben Kasturchand Kochar (130 taxmann.com 176)(Guj)
- (e) PCIT vs. Krishnadevi (126 taxmann.com 80)(Delhi)
- (f) Shri Manoj Kunverji Gala vs. ITO (ITA No.2225/M/2019 dated 08.02.2021)
- (g) Shri Yogesh P Thakkar vs. DCIT (ITA No.1605/M/21 dated 03-02-2023)

Accordingly, the Ld A.R contended that the decision rendered by Ld CIT(A) on this issue does not call for any interference.

21. We heard rival contentions and perused the record. We noticed that the assessee has furnished all the details in support of purchase and sale of shares of M/s Matra Kaushal Enterprises Ltd and the said fact has also

been noticed by the AO in the assessment order. We noticed that the assessee has purchased the shares by paying Rs.10.00 lakhs through banking channels. Subsequently, the assessee became owner of 10,00,000 shares in the above said company after merger, split etc. During the year under consideration, the assessee has sold 4,14,500 shares through stock exchange. We notice that the assessing officer did not find any fault with any of the documents furnished by the assessee in support of purchase and sale of shares. The Ld D.R, however, submitted that the assessee has not furnished the copies of share certificates, share transfer forms etc. But the fact that the shares were dematerialized and credited to the account of the assessee would prove the fact of purchase of shares. In any case, it is not the case of AO also. Hence the transactions of purchase and sale cannot be doubted with as held by Hon'ble jurisdictional Bombay High Court in the case of CIT vs. Jamnadevi Agarwal (328 ITR 656)(Bom).

22. The case of the AO is that the assessee has agreed to withdraw the exemption claimed u/s 10(38) of the Act before the search officials. In this regard, it is submitted by the assessee before tax authorities as well as before us that he could not explain the details of purchase and sale during the course of search proceedings, since all these transactions were carried out by his father, who had since expired. It was further submitted that the assessee had agreed to withdraw exemption u/s 68 of the Act before the search officials, since he was given impression by the search officials that some wrong was committed by his father and further, he was under the impression that all the relevant documents may not be available. It is submitted that the assessee verified the records subsequently and noticed that all the supporting evidences are available. After consulting the tax consultants, the assessee came to know that there was nothing wrong in the transactions of purchase and sale of shares carried out by his father. Accordingly, it is stated that the assessee adhered to the claim for exemption u/s 10(38) of the Act. From the explanations so given, we notice that the assessee has agreed to withdraw the exemption claimed u/s 10(38) of the Act under misconception. Accordingly, we agree with the contentions that the declaration given by him under wrong impression should be ignored. In any case, as submitted by Ld A.R, the exemption given under the Act is a statutory right available to the assessee. Hence the same cannot be denied only on the reasoning that the assessee has waived his right, i.e., it is the duty of the assessing officer to allow the concession and benefits available to the assessee while computing total income as per the circulars issued by the CBDT. The case laws relied upon by the Ld D.R with regard to the addition made on the basis of sworn statements, in our opinion, are not applicable to the facts of the present case, in view of the discussions made supra.

23. Before us, the Ld D.R placed reliance on various case laws in support of the addition made by the AO. In our view, those decisions have been rendered on the basis of facts prevailing in those cases and hence they cannot be considered as a straight jacket formula to decide the issue under consideration, i.e., the decision has to be taken on the basis of facts available in each of the cases. In any case, we are dealing with some case

laws later. In the instant case, we noticed that the assessing officer has mainly relied upon the report given by the investigation wing of the Income tax department, which included the statements given by the alleged entry operators and exit providers. We noticed that the AO did not carry out any independent enquiry in order to find out whether the assessee was part of ring which indulged in the alleged price rigging. The AO, in particular did not examine the brokers/persons from whom/through whom the assessee has purchased and sold the shares. Based on the reports of investigation wing, the AO has arrived at the conclusion that the assessee has availed accommodation entries by way of long term capital gains. In this process, the AO has ignored the fact that the assessee is a regular investor in shares. He also could not disprove the fact that the purchase and sale of shares of the above said company was carried out by the father of the assessee, who has since expired.

24. We notice that an identical case of allegations that the assessee has availed accommodation entries for bogus capital gains was examined by the Hon'ble jurisdictional Bombay High Court in the case of Shyam Power (supra). The decision rendered by Hon'ble Bombay High Court in the above said case is extracted below:-

**“3.** Mr. Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumr, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

**4.** Mr. Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr. Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, **what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny.** It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt. Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. **The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies.** The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus.

If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

**7.** As a result of the above discussion, we do not find any substance in the contention of Mr. Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

**8.** Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.”

25. We may also refer to another decision rendered by Hon'ble Jurisdictional Bombay High Court in the case of PCIT vs. Ziauddin A Siddique (Income tax Appeal No. 2012 of 2017 dated 4<sup>th</sup> March, 2022) and relevant discussions made by Hon'ble Bombay High Court are extracted below:-

“2. We have considered the impugned order with the assistance of learned counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd (“RFL”) is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and even Security Transaction Tax (“STT”) has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against the assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgement of the Apex Court in Principal Commissioner of Income tax (Central)-1 vs. NRA Iron & Steel (P) Ltd (2019)(103 taxmann.com 48)(SC) but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide

the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

The Hon'ble jurisdictional High Court has held in the above said cases that the AO cannot make the addition simply relying upon the report given by the investigation wing. We may also refer to the decision rendered by the co-ordinate bench in the case of Mukesh Ratilal Marolia (6 SOT 247)(Mum), wherein it was held that the personal knowledge and excitement on events should not lead the AO to a state of affairs where salient evidences are overlooked. We notice that the above said decision of the Tribunal has been approved by Hon'ble Bombay High Court, vide its order dated 07-09-2011 passed in ITA No.456 of 2007. It is also noticed that the special leave petition filed by the revenue before Hon'ble Supreme Court has been dismissed vide SLP No.20146 of 2012 dated 27-01-2014. Since the assessee has furnished all the documents in support of purchase and sale of shares of M/s Matra Kaushalya Enterprises Ltd and since the said documents have not been doubted with, it was necessary for the AO to carry out deeper scrutiny of the transactions, if he felt that there was something wrong. Admittedly, the AO did not carry out any further investigation in the matter. As held by Hon'ble Bombay High Court, it was necessary for the AO to show that the assessee herein had participated in the price rigging in the market. No such finding has been reached by the AO.

26. In the case of Shri Yogesh P Thakkar vs. DCIT (ITA No.1065/Mum/2021 & others dated 03-02-2023, the co-ordinate bench has held that the addition made merely by placing reliance on the Kolkata Investigation Wing report, which are more general in nature, cannot be the basis for making addition u/s 68 of the Act, when the investigation wing has not implicated the assessee. Before us, the Ld D.R placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of Suman Poddar (supra). In the case of Shri Yogesh P Thakkar (supra), the Tribunal has considered the above said decision and noticed that the same has been distinguished by Hon'ble Delhi High Court itself in the case of PCIT vs. Krishnadevi (ITA 125/2020 dated 15.01.2021). The relevant observations made by the co-ordinate bench are extracted below:-

"5.12. We find that the ld. CIT(A) relied on the decision of Hon'ble Delhi High Court in the case of [Suman Poddar vs ITO](#) reported in 112 taxmann.com 329 dated 17/09/2019 where the decision was rendered in favour of the revenue. The Special Leave Petition filed by the assessee before the Hon'ble Supreme Court in this case was dismissed by the Hon'ble Apex Court vide its order dated 22/11/2019. But we find that there is yet another decision of Hon'ble Delhi High Court in the case of PCIT vs Krishna Devi and others in ITA 125/2020 ; 130 & 131/2020 dated 15/01/2021 reported in 126 taxmann.com 80 (Delhi HC) wherein similar issue of penny stock vis a vis long term capital gain exemption u/s 10(38) of the Act was subject matter of adjudication, in favour of the assessee. This decision rendered in the case of Smt Krishna Devi considers all the propositions laid out hereinabove and are squarely applicable to the facts before us. In fact the Hon'ble High Court duly endorses the elaborate

findings given by the Delhi Tribunal on various facets of the issue. Moreover, in this decision, the Hon'ble Delhi High Court duly considered the decision of Suman Poddar referred to supra and also the decision of Hon'ble Supreme Court in the case of Sumati Dayal which was heavily relied upon by the Id. DR before us also herein. The relevant operative portion of the decision of Hon'ble Delhi High Court in the case of Smt Krishna Devi is reproduced hereunder:-

10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

11. On a perusal of the record, it is easily discernible that in the instant case, **the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under [section 10\(38\)](#), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper.** Notices issued under [sections 133\(6\)/131](#) of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. **The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-**

planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of [Section 68 of the Act](#). It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from demat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. **Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged.**

**12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.** With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. **Lastly, reliance placed by the Revenue on Suman Poddar case (supra) and Sumati Dayal case (supra) is of no assistance. Upon examining the judgment of Suman Poddar case (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.**

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

15. Accordingly, the present appeals are dismissed.

**(emphasis supplied by us)”**

In the case of Smt Krishna Devi (supra), the Hon’ble Delhi High Court has held that the theory of human behaviour and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the respondent.

27. With regard to the reliance placed by the Ld D.R on the decision rendered by Hon’ble Calcutta High Court in the case of Swati Bajaj (supra), the co-ordinate bench has held as under in the above said case of Yogesh Thakkar (supra):-

“5.14. We find that the ld. DR had relied on the decision of Hon’ble Calcutta High Court in the case of PCIT vs Swati Bajaj reported in 139 taxmann.com 352 which is an elaborate decision rendered after considering various decisions of various High Courts on the subject. In the said decision, it was held that assessee had to establish the genuineness of rise of price of shares within a short period of time that too when general market trend was recessive. But we find that when there are several decisions of Hon’ble Jurisdictional High Court as stated supra are already in favour of the assessee, the same would prevail over this tribunal and this tribunal need not take cognizance of the Hon’ble Non-Jurisdictional High Court. The law is very well settled by the Hon’ble Supreme Court in the case of [Union of India vs Kamalakshi Finance Corporation Ltd](#) reported in 55 ELT 43 (1991) that the decision of Hon’ble Jurisdictional High Court would have higher precedence value than the decision of Hon’ble Non-Jurisdictional High Court on the Tribunal. The Hon’ble Supreme Court emphasised therein that the orders of the Tribunal should be followed by the authorities falling within its jurisdiction so that judicial discipline would be maintained in order to give effect to orders of the higher appellate authorities. The Hon’ble Apex Court has observed that utmost regard must be had by the adjudicating authorities and the appellate authorities to the requirement of judicial discipline. Hence we deem it fit and appropriate to follow the decisions of Hon’ble Jurisdictional High Court referred supra wherein the impugned issue is decided in favour of the assessee. Moreover, when there are two conflicting decisions of various High Courts, the Hon’ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 (SC)

had held that Construction that is favourable to the assessee should be adopted. Hence by following this principle, the decision of Hon'ble Calcutta High Court and other decisions that are rendered against the assessee, need not be followed by this Court in the peculiar facts and circumstances of the instant case."

Hence the decision rendered by the jurisdictional High Court is required to be preferred in the instant case also.

28. In the instant case, even though the AO has initially stated that he is rejecting the exemption claimed u/s 10(38) of the Act, yet the AO has assessed entire sale proceeds received on sale of shares ad income of the assessee, meaning thereby he has made addition u/s 68 of the Income tax Act. The responsibility placed upon the assessee u/s 68 of the Act is different, i.e., the initial burden to prove the cash credits is placed upon the shoulders of the assessee. In order to discharge the said burden, the assessee has to prove three main ingredients, viz., the identity of the creditor, credit worthiness of the creditor and genuineness of transactions. If the assessee proves all the three main ingredients, then the burden to disprove them would shift to the shoulders of the assessing officer. If the AO fails to disprove the three main ingredients proved by the assessee, then the assessing officer is not entitled to make addition u/s 68 of the Act. The decision rendered by Hon'ble Bombay High Court in the cases of Shyam Power (supra) and Ziauddin A Siddique (supra) are in the context of sec. 68 of the Act.

29. As noticed earlier, the assessee herein has discharged the initial onus placed upon him u/s 68 of the Act. We noticed that the assessee has furnished all documents relating to purchase and sale of securities. The shares have entered and exited his demat account. The purchase and sale transactions have been routed through the bank accounts of the assessee. All these documentary evidences produced by the assessee have not been disproved. However, the AO has simply relied upon the report of the investigation department including the statements taken from certain parties and held that the long term capital gains declared by the assessee are not genuine. It is also not the case of the AO that those parties have implicated the assessee nor he could show that the assessee was part of the team which was involved in the triggering of prices. No other material was brought on record by the AO to prove that the assessee has indeed availed only accommodation entries. With regard to questions as to why the shares of the above said company was purchased, the assessee has explained that the said decisions were taken by his late father and hence he could not explain the reasons. It was not shown that the said explanation was incorrect and hence, in our view, the same cannot be rejected.

30. Another important point that was placed before us is the chart of price movement of above said shares. The share price movement was taken out by the assessee from the website of Stock exchange. A

perusal of the same would show that the assessee did not sell the shares, when the prices were at peak. The assessee has sold the shares when the prices have started falling, which is the usual tendency of the investors. Had he been part of the wing, which triggered the prices, he would know the peak price and would have sold the shares at that price only. It was the case here and hence, this fact shows that the assessee was not part of that group. We further notice that the assessee is a regular investor in the shares and held shares in many companies.

31. In view of the foregoing discussions and on a conspectus of the matter, we are of the view that the decision rendered by the jurisdictional Hon'ble Bombay High Court in the cases of Shyam R Pawar (supra) and Ziauddin A Siddique (supra) are squarely applicable to the facts of the present case. Accordingly, we uphold order passed by Ld CIT(A) and accordingly hold that the Ld CIT(A) was justified in directing the AO to delete the assessment of sale consideration of shares as income of the assessee.

32. Since we have deleted the assessment of sale consideration of shares, the consequential addition made by the AO by way of commission expenses is also liable to be deleted. Accordingly, we uphold the decision of Ld CIT(A) in deleting the addition relating to commission expenses.”

7. We noticed earlier that the assessing officer has made the additions in the instant cases also on identical reasoning as given in the case of Pankaj Kantilal Shah (supra). We noticed that identical additions made in the hands of above said assessee has been deleted by Ld CIT(A) and his order has since been confirmed by the ITAT. Accordingly, following the decision rendered by the ITAT in the case of Pankaj Kantilal Shah (supra), we confirm the orders passed by Ld CIT(A) in deleting both the additions in the hands of all the assessees.

8. In the result, all the appeals of the Revenue are dismissed.

Pronounced in the open court on 16.6.2023.

Sd/-  
(KAVITHA RAJAGOPAL)  
Judicial Member

Sd/-  
(B.R. BASKARAN)  
Accountant Member

Mumbai; Dated : 16/06/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai