

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM**

आयकर अपील सं/ I.T.A. Nos.1948 & 1949/Mum/2022  
(निर्धारण वर्ष / Assessment Years: 2018-19 & 2019-20)

DCIT-CC-5(2) Room No. 1906, Air India Building, Nariman Point, Mumbai-400021.	<b>बनाम/</b> Vs.	Wellknown Business Ventures LLP 1 Esperance, Shahid Bhagat Singh Road Colaba, Mumbai-400039.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFW7375D</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Mahesh Agrawal/Hitesh Chimnani/Kunal Agrawal ( <i>on</i> <i>12.04.2023</i> )	
Revenue by:	Dr. Shyam Prasad (CIT-DR) ( <i>on</i> <i>12.04.2023</i> )/ Shri Manoj Kumar Sinha (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 07/07/2023  
घोषणा की तारीख /Date of Pronouncement: 27/07/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

These appeals have been preferred by the Revenue against the action of the Ld. CIT (A)-53, Mumbai [in short 'Ld. CIT(A)'] vide his orders dated 13.05.2022 passed for Assessment Years [in short 'AYs'] 2018-19 & 2019-20 in relation to the assessment orders dated 19.06.2021 & 13.05.2022 passed by the Assistant Commissioner of Income-tax, Central Circle 5(2), Mumbai [in short 'AO'].

2. Since the issues involved were common, both these appeals were heard together. And both parties argued them together, raising similar arguments on these issues. Accordingly, we dispose both these appeals by this consolidated order.



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3. We first take up the appeal for AY 2018-19 [in ITA No.1948/Mum/2022]. In the several grounds raised in this appeal, the Revenue has objected to the Ld. CIT(A)'s action of deleting the addition made by way of taxable long-term capital gain [LTCG] derived on sale of listed shares of M/s Responsive Industries Limited [in short 'RIL']. Briefly stated, the facts relating to the dispute are that, the assessee had sold 1,25,00,000 shares of M/s RIL in AY 2018-19 for an aggregate consideration of Rs.49,93,19,012/-. The assessee had computed the long term capital gain/LTCG in AY 2018-19 in the following manner :-

<b>Particulars</b>	<b>Amount</b>
Sale of 1,25,00,000 shares of Responsive Industries Ltd/RIL	
Full Value of Consideration	49,93,19,012/-
Less: Cost of Acquisition	2,16,61,176/-
Long Term Capital Gain/LTCG [claimed as exempt u/s 10(38)]	47,67,57,836/-

4. The AO in the assessment order has noted that the assessee is a part of the 'Responsive Group' on which survey action u/s 133A of the Income Tax Act, 1961 (hereinafter "the Act") was conducted on 22.10.2019. In the course of survey, Mr. Rishabh Agarwal, the Director of M/s RIL, was specifically required to explain the exemption claimed u/s 10(38) of the Act in relation to the gains derived on sale of listed shares of M/s RIL sold by the assessee-LLP. To this, he had responded that he would check with his Chartered Accountant and explain the same within 2-3 days. The AO noted that in the post-survey proceedings, the Director failed to comply with the



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same. The AO therefore in the course of assessment had required the appellant to furnish the detailed working of long-term capital gain/LTCG claimed as exempt u/s 10(38) of the Act along with the relevant contract notes, dates of purchase etc. Perusal of the assessment order reveals that the AO had primarily required the assessee to substantiate whether the conditions precedent to availing the benefit of exemption set out in Section 10(38) of the Act, as amended by the Finance Act, 2017 with effect from 01.04.2018, had been met or not. The AO had thus required the assessee to substantiate with evidences that, the listed shares of RIL sold during the year had been acquired upon payment of STT [*as mandated in third proviso to Section 10(38) of the Act*]; so as to avail the benefit of the exemption set out in Section 10(38) of the Act. In this regard, the assessee is noted to have explained that they had originally acquired 1,52,925 shares of RIL [earlier known as M/s Singhal Holdings Ltd] prior to 01.10.2004 [*prior to introduction of STT regime*] in the year 2000 and therefore the third proviso to Section 10(38) of the Act was not applicable to their case. The assessee explained that, thereafter they had subscribed to *preferential allotment* of 30,00,000 shares in the year 2006. Subsequent thereto, there were several events viz., *bonus issue/shares issued upon amalgamation/share-split /further preferential allotment etc.* Accordingly, the aggregate holding in M/s RIL stood at 14,84,25,340 shares during the year, out of which 1,25,00,000 shares were sold during the year. Relying on the CBDT Notification No.43/2017 dated 5<sup>th</sup> June 2017, the assessee submitted



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that, the impugned acquisition of shares sold during the year fell under the *specific exceptions notified by the CBDT* in exercise of the powers conferred to the *third proviso* to Section 10(38) of the Act. The assessee accordingly contended that they had rightly claimed exemption in relation to the long term capital gains/LTCG derived on sale of shares of M/s RIL u/s 10(38) of the Act. The AO however was not agreeable to these submissions of the assessee. The AO observed that, the assessee itself had admitted that they had not paid STT on purchase of shares which were sold during the year and therefore denied the benefit of exemption claimed u/s 10(38) of the Act. According to AO, the Notification cited by the assessee was distinguishable on facts and conditions and hence not applicable to the case. In absence of purchase bills and contract notes, the AO assumed the cost of acquisition of 1,25,00,000 shares sold during the year to be Rs.1/- each. Allowing the deduction for cost of acquisition of Rs.1,25,00,000/- from the gross sale consideration of Rs.49,93,19,012/-, the AO taxed the computed sum of Rs.48,68,19,012/- by way of taxable long term capital gain in the hands of the assessee. Aggrieved by this order of the AO, the assessee preferred an appeal before the Ld. CIT(A).

**5.** On appeal, the Ld. CIT(A) examined the background facts of M/s RIL as well as the shareholding-movement of assessee in M/s RIL. Taking into account, the dates on which shares were purchased, manner in which shares were acquired, demat statements, details of holdings in the two different demat accounts, the Ld. CIT(A) arrived at



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a conclusion that the case of the assessee fell under the exceptions set out in the CBDT Notification No.43/2017 dated 5<sup>th</sup> June 2017. The Ld. CIT(A) thus held that the third proviso to Section 10(38) was not applicable in the given facts of the present case and accordingly deleted the addition made by the AO. The relevant findings of the Ld. CIT(A) are as follows:-

“6.3.4 The 3<sup>rd</sup> proviso to Sec. 10(38) provides that the provisions of Sec. 10(38) shall not apply to the income arising from transfer of Long Term Capital Asset being equity shares in a company if the transaction of acquisition of such equity shares is entered into on or after 01.10 2004 and such transaction is not chargeable to STT, other than the acquisition notified by the Central Government The Central Government vide notification No. S.O. 1789 (E) has notified all the transactions of acquisition of equity shares on or after 01.10 2004 which are not chargeable to STT other than certain transaction mentioned in Clause (a), (b) and (c) of the notification. Acquisition of preferential share of existing listed company, share of which are not traded frequently on registered Stock Exchange, are not eligible for LTCG exemption u/s. 10(38) of the Act, if STT is not paid at the time of acquisition of such shares. Frequently traded shares means shares of a company, in which the traded turnover on a recognized stock exchange during the twelve calendar months preceding the calendar month in which the acquisition and transfer is made, is at least ten per cent of the total number of shares of such class of the company.

In the case of RIL, preferential allotment of shares was made on 15.02.2012 and before such allotment, total shares of RIL were 24.79,20,000. During twelve calendar months preceding the



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month in which preferential allotment was done, i.e. from Feb., 2011 to Jan, 2012, total 45,03,02,480 shares of RIL was traded on BSE and such trading volume exceeded 10% of the total no. of shares of RIL. Thus, preferential allotment of shares of RIL is not hit by the categories of transactions notified by CBDT's notification dated 05.06.2017.

The appellant has also acquired shares of RIL through Bonus shares and split of shares. This acquisition was not made through a recognized Stock Exchange. As per clause (b) of the notification dated 05.06.2017, the benefit of exemption from LTCG can be denied in such cases. However, proviso to clause (b) of the notification provides that clause (b) is not applicable where the acquisition through issue of shares by the company other than preferential allotment. In the case of the appellant, the acquisition of shares of RIL was also by the way of bonus shares and split shares. Thus, as per proviso to clause (b) of the notification dated 05.06.2017, the appellant is eligible for claim of LTCG even though STT was not paid at the time of acquisition of bonus shares and split shares.

6.3.5 With respect to the preference shares, bonus shares and split shares, these shares are not acquired through the recognized Stock Exchange. Therefore, acquisition of such shares was not subjected to STT. Thus, the acquisition of share of the RIL by the appellant was through preferential allotment, bonus shares and split of the shares and such mode of acquisition was not subjected to STT. Thus, the appellant was not required to pay STT on acquisition of shares of RIL as the shares were acquired by way of preferential allotment, bonus shares and split of the shares. The appellant was also not required to produce the copies of contract note of purchase bill.



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6.3.6 In view of the above facts, the appellant has sold shares of RIL on a recognized Stock Exchange and STT has been paid. The third proviso to section 10(38) is also not applicable to the facts of the case of the appellant as acquisition of shares through preferential allotment, bonus shares and split shares is not covered in transactions notified by CBDT in notification dated 05.06.2017. Thus, the addition of Rs. 48,68,19,012/- made by the AO in respect of LTCG on sale of shares of RIL is deleted.”

**6.** Being aggrieved by the above order of Ld. CIT(A), the Revenue is now before us.

**7.** Assailing the action of Ld. CIT(A), the Ld. CIT, DR appearing for the Revenue submitted that the Ld. CIT(A) had factually erred in holding that the shares of RIL were frequently traded on the stock exchange. According to him, the Ld. CIT(A) had wrongly held that the shares allotted to the assessee under preferential allotment without payment of STT in the year 2006/2012 fell under the exception set out in clause (a) of the Notification No.43/2017 dated 5<sup>th</sup> June 2017. He further claimed that the contention of the assessee that shares sold were out of bonus issue/share split was not only un-verifiable but a device adopted to avoid tax. He has furnished *a detailed written submission running into 21 Pages* in support of these contentions and accordingly urged that the order of the AO to be restored. Per contra, the Ld. AR has supported the order of the Ld. CIT(A) and *filed a written rebuttal* to the submissions of the Ld. DR. Both these submissions have been duly considered, and to the extent the



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contentions were relevant to the facts involved in the present case, they have been appropriately dealt with in the subsequent paragraphs.

8. We have heard both the parties and perused the records. Before advertng to the facts of the case, we first deem it fit to examine the relevant provisions of law along with the Notifications/Circulars etc, issued by the CBDT in connection therewith. In this context, it would be relevant to set out the provisions of Section 10(38) of the Act, which reads as under:-

**“any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where—**

**(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and**

**(b) such transaction is chargeable to securities transaction tax under that Chapter :**

Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB :

Provided also that nothing contained in sub-clause (b) shall apply to a transaction undertaken on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transaction is paid or payable in foreign currency:

**Provided also that nothing contained in this clause shall apply to any income arising from the transfer of a long-term capital asset, being an equity share in a company, if the transaction of acquisition, [other than the acquisition notified by the Central Government in this behalf, of such equity share is entered into on or after the 1st day of October, 2004 and such transaction is not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004)]:**



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**Provided also that nothing contained in this clause shall apply to any income arising from the transfer of long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust, made on or after the 1st day of April, 2018.”**

**9.** From the above, it is apparent that in order to avail the exemption set out in Section 10(38) of the Act, the following conditions must be fulfilled:-

- (a) the gain must accrue from sale of equity shares of a company,
- (b) the shares transferred must be in the nature of ‘long term capital asset’,
- (c) STT must be chargeable at the time of sale of shares,
- (d) If the shares are purchased after 01.10.2004 (post introduction of STT regime), STT must have been chargeable at the time of purchase of shares or otherwise such acquisition must be notified as an exception by the Central Government, and
- (e) the long term capital gain has accrued before 01.04.2018.

**10.** In the facts involved before us, we note that the conditions (b) & (e) are not in dispute before us viz., both the parties are in agreement that the shares of RIL sold were in the nature of long-term capital asset and that the gains had accrued before 01.04.2018. Coming to the conditions set out in (a) & (c) above, we note that the assessee has sold the equity shares of M/s RIL through a registered stockbroker, and the same had been subjected to STT at the time of sale. We find that, the supporting sale contract notes placed at Pages 103-104 of PB along with the relevant demat statement evidencing delivery of shares at Pages 105 of PB, were available both before the AO and Ld. CIT(A). Hence, the contention of Ld DR that the sale transaction is not



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ascertainable from the records are found to be factually incorrect. As far as the quantity of shares sold is concerned, the Ld. DR has contended that there was an incorrect disclosure by the assessee, as according to him, the shares sold during the year aggregated 1,43,00,000 and not 1,25,00,000. The Ld. AR, on the other hand, submitted that the Ld. CIT, DR had wrongly aggregated the three debits aggregating to 18,00,000 shares on 08.05.2017, 01.01.2018 & 26.03.2018 by way of sale of shares. He pointed out that, the Ld. CIT, DR had erred in presuming that all debits in demat accounts were on account of sale, whereas there are debits also upon *pledge, pooling arrangements, lock-in, temporary lending etc.* and showed us that these debits of 18,00,000 shares were received back by the assessee on later dates which fact is discernible from the demat statement placed at Page 105 of Paper Book. Having verified the facts placed before us, we find that this altogether new argument raised by the Ld. CIT, DR, which was never the case of the AO/Ld. CIT(A) was also untenable.

**11.** The Ld. CIT, DR had further pointed out that the shares sold by the assessee were purchased by a related entity, to dispute the correctness of sale of shares. In our considered view, this particular averment of the Ld. CIT, DR is irrelevant in as much as there is no bar in law or in the specific provisions set out in Section 10(38) of the Act that, the shares sold by an assessee cannot be purchased by a related entity. Moreover, it is not in dispute that the shares were transacted at the prevailing market prices on the floor of stock exchange and therefore the transaction with the related entity was at arm's length and



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hence cannot be viewed adversely. For the reasons discussed in the foregoing, we thus note that, the conditions set out in clauses (a) & (c) at para 9 (supra) are fulfilled in the present case.

**12.** The main issue-in-dispute before us is the condition (d), i.e. the third proviso to Section 10(38) of the Act, which was introduced by the Parliament by Finance Act, 2017 with effect from 01.04.2018. From AY 2018-19 and onwards, an assessee who transfers listed shares (subjected to STT), will also have to demonstrate that, either (a) these shares had been acquired upon payment of STT or (b) that these shares were acquired prior to 01.10.2004 (*before introduction of STT regime*) or (iii) that the transaction of acquisition is notified by the Central Government. The relevant Notification No.43/2017 dated 5<sup>th</sup> June 2017 issued by the CBDT in this regard reads as follows :-

“In exercise of the powers conferred by third proviso to the clause (38) of section 10 of the Income-tax Act, 1961 (43 of 1961) hereinafter referred to as the Income-tax Act, the Central Government hereby notifies all transactions of acquisition of equity share entered into on or after the 1st day of October, 2004 which are not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004), other than the following, namely :—

(a) where acquisition of existing listed equity share in a company whose equity shares are not frequently traded in a recognised stock exchange of India is made through a preferential issue:

Provided that nothing contained in this clause shall apply to acquisition of listed equity shares in a company:—



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(i) which has been approved by the Supreme Court, High Court, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;

(ii) by any non-resident in accordance with foreign direct investment guidelines issued by the Government of India;

(iii) by an investment fund referred to in clause (a) of Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of section 10 of the Income-tax Act or a Qualified Institutional Buyer;

(iv) through preferential issue to which the provisions of chapter VII of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply.

(b) where transaction for acquisition of existing listed equity share in a company is not entered through a recognised stock exchange of India:

Provided that nothing contained in this clause shall apply to the following acquisition of listed equity shares in a company made in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), if applicable,

(i) acquisition through an issue of share by a company other than the issue referred to in clause (a);

(ii) acquisition by scheduled banks, reconstruction or securitisation companies or public financial institutions during their ordinary course of business;

(iii) acquisition which has been approved by the Supreme Court, High Courts, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;



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- (iv) acquisition under employee stock option scheme or employee stock purchase scheme framed under the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
- (v) acquisition by any non-resident in accordance with foreign direct investment guidelines of the Government of India;
- (vi) where acquisition of shares of company is made under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011;
- (vii) acquisition from the Government;
- (viii) acquisition by an investment fund referred to in clause (a) to Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of section 10 of the income-tax Act or a Qualified Institutional Buyer;
- (ix) acquisition by mode of transfer referred to in sections 47 or 50B of the Income-tax Act, if the previous owner of such shares has not acquired them by any mode referred to in clause (a) or clause (b) or clause (c) [other than the transactions referred to in the proviso to clause (a) or clause (b)].
- (c) acquisition of equity share of a company during the period beginning from the date on which the company is delisted from a recognised stock exchange and ending on the date immediately preceding the date on which the company is again listed on a recognised stock exchange in accordance with the Securities Contracts (Regulation) Act, 1956 read with Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules made thereunder;

Explanation,—For the purposes of this notification,—

- (a) "frequently traded shares" means shares of a company, in which the traded turnover on a recognised stock exchange



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during the twelve calendar months preceding the calendar month in which the acquisition and transfer is made, is at least ten per cent of the total number of shares of such class of the company:

Provided that where the share capital of a particular class of shares of the company is not identical throughout such period, the weighted average number of total shares of such class of the company shall represent the total number of shares.

(b) 'listed' means listed in a recognised stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 and the rules made thereunder.

(c) "preferential issue" and "Qualified Institutional Buyer" shall have the meanings respectively assigned to them in sub-regulation (1) of regulation (2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

(d) "public financial institution" and "scheduled bank" shall have the meanings respectively assigned to them in Explanation to clause (viiia) of sub-section (1) of section 36 of Income-tax Act.

(e) "recognised stock exchange" shall have the same meaning assigned to it in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956.

(f) "reconstruction company" and "securitisation company" shall have the meanings respectively assigned to them in sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).



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**13.** In the facts before us, the dispute relates to the clause (b) read along with clause (a) of the above Notification. It is noted that, the Central Government has as a general rule notified that any transaction of acquisition of existing listed share which has not been entered through the stock exchange would be hit by the rigors of the third proviso to Section 10(38) of the Act. The following exceptions have been set out in the proviso to the said clause (b) by the Central Government :-

(i) Where the shares have been acquired through any issue by a company i.e. IPO, bonus, split etc., other than acquisition referred to the clause (a) viz., shares acquired in a preferential issue of existing listed shares which are not frequently traded. The exceptions to the latter have been set out in the proviso to clause (a) which are as follows:-

(a) Where such preferential issue is approved by SC/ HC/ NCLT/SEBI/ RBI;

(b) Where such preferential issue is made to a non-resident under the FDI guidelines;

(c) Where such preferential issue is made to a VCF/Investment Fund/QIB;

(d) Where the provisions of chapter VII of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply to such preferential issue.

(i) Where shares have been acquired by scheduled banks/ reconstruction companies or securitization companies;

(ii) Where such acquisition has been approved by SC/ HC/ NCLT/SEBI/ RBI;

(iii) Where shares have been acquired under the ESOP Scheme;

(iv) Any acquisition by non-resident under the FDI guidelines;



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- (v) Where shares are acquired under the SEBI Takeover Code;
- (vi) Where shares are acquired from Government;
- (vii) Acquisition by VCF/Investment Fund/QIB;
- (viii) Where the acquisition is by mode of transfer u/s 47 or 50B viz., shares received by way of gift, bonus issue, share split etc. or shares received upon amalgamation, demerger, conversion or slump sale etc. It is however to be ensured that the previous owner of the shares had not acquired them in terms of clauses (a) or (b) or (c), other than the exceptions set out therein.

To illustrate the above, say Mr. A had acquired the shares of listed company ABC Ltd off-market, without payment of STT and such transaction was not entered on the stock exchange. Thereafter Mr. A gifts these shares to his son, Mr. B and thus this transaction is not regarded as transfer u/s 47(iii) of the Act. Later on, Mr. B sells the listed shares on the stock exchange upon payment of STT. In this case, although the acquisition of Mr. B was by a mode referred to in Section 47 of the Act, but he shall not be entitled to the exception set out in sub-clause (ix) of the proviso to clause (b) of the Notification, as the previous owner i.e. Mr. A had acquired these shares in terms of clause (b) i.e. shares acquired without payment of STT [*not fall under any of the above exceptions to clauses (a) or (b)*].

**14.** Keeping the above position of law in mind, we now proceed to examine the facts involved in the present case. It is noted that, the assessee LLP was earlier a private limited company known by the name, M/s Wellknown Shares & Securities Pvt Ltd which was converted into an LLP in terms of Section 58(3) & (4) of the LLP Act, 2008, with effect 30-12-2013. The Ld. AR brought to our notice that, the assessee LLP had fulfilled the conditions set out in Section 47(iii) of the Act and therefore the conversion of company into LLP and the



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vesting of assets & liabilities including the shares held by the erstwhile company, M/s Wellknown Shares & Securities Pvt Ltd in M/s RIL was not regarded as 'transfer'. This factual position is noted to be not in dispute and therefore the case of the assessee may fall under sub-clause (ix) of proviso to clause (b) of the above Notification (supra). The assessee is however required to demonstrate that the previous owner, i.e. the erstwhile company, M/s Wellknown Shares & Securities Pvt Ltd, had acquired these shares by the modes/exceptions set out in the proviso to clauses (a) & (b) of the above Notification. In this regard, the Ld. AR brought to our notice that the shares of RIL had been acquired by the erstwhile company in the following manner :-

Sr No.	Date	No. of Shares	Cumulative No. of shares	Remarks
1.	07.06.2000	1,52,925	1,52,925	Shares purchased before 01.10.2004
2.	06.12.2006	30,00,000	31,52,925	Shares allotted under preferential allotment
3.	05.03.2007	94,58,775	1,26,11,700	Bonus shares allotted
4.	30.03.2009	26,93,333	1,53,05,033	Received pursuant to amalgamation of Responsive Polymers Industries with the company
5.	28.01.2010 to 26.03.2010	(9,89,269)	1,43,15,764	Transferred
6.	08.10.2010	12,88,41,876	14,31,57,640	Received upon the splitting of shares
7.	15.02.2012	52,67,700	14,84,25,340	Purchased via preferential allotment

**15.** It is noted that, one of the grievances of the Revenue is that the above dates of acquisition are not supported by evidences and therefore is not verifiable. The Ld. DR has also claimed that the demat statements have been filed before the lower authorities in piecemeal manner and that, according to him, there are apparent mismatches in



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the figures relating to the acquisition of shares. To this, the Ld. AR submitted that this plea raised by the Revenue was extraneous, and invited our attention to Page 13 of the assessment order, wherein the AO had extracted the survey report of the DDIT. He showed us that, the DDIT, at Para 7.17.5.6 of the survey report, had himself tabulated the details of the acquisition of shares by the assessee along with the dates and the cost paid for their acquisition. The Ld. AR also invited our attention to Pages 92 to 95 of the Paper Book, which contained the relevant extracts of the Register of Members and Share Ledger of M/s Sinhal Holdings Ltd (now known as M/s Responsive Industries Ltd/RIL). It is noted that this Register reveals that the assessee held 1,52,925 shares of the said company as on 7<sup>th</sup> June 2000. This fact is also discernible from the letter dated 31<sup>st</sup> October 2006 filed by M/s Sinhal Holdings Ltd with the Bombay Stock Exchange Ltd, which is found placed at Page 62 to 63 of the Paper Book. At Para (3) of the said Letter, it has been stated that the erstwhile company, M/s Wellknown Shares & Securities Ltd held 61.66% of the issued share capital of M/s Sinhal Holdings Ltd, which works out 1,52,925 shares. As far as the cost of acquisition is concerned, the original cost of these shares is not relevant, as in terms of Section 55(2)(b) of the Act, the prevailing Fair Market Value ('FMV') as on 01.04.2001 shall be regarded as the deemed cost of acquisition for the purposes of computation of capital gains from these shares.



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**16.** Now we come to the shares, which were acquired under preferential allotment at par on 6<sup>th</sup> December 2006. The Ld. AR brought to our notice the copies of the relevant letters filed with the Bombay Stock Exchange seeking their prior approval for the said preferential allotment, copy of Form 2 filed with ROC upon preferential allotment of shares, relevant letters filed with SEBI/BSE intimating completion of preferential allotment and compliance with their lock-in requirements. All these documents are found placed at Pages 58 to 90 of the Paper Book. It is noted that these documents show that the erstwhile company, M/s Wellknown Shares & Securities Ltd had subscribed to 30,00,000 shares at par on preferential allotment and the same is also appearing in the demat statement placed at Page 96 of paper book.

**17.** The assessee has placed before us the copy of the relevant Board Resolution passed on 2<sup>nd</sup> March 2007 by M/s Responsive Industries Ltd/RIL approving the issuance of bonus shares in the ratio of 3:1 to all the shareholders, which is found placed at Pages 72 to 74 of Paper Book. The demat statement held with Oriental Bank of Commerce which is placed at Page 96 of Paper Book reveals the credit of 94,58,775 bonus shares allotted by M/s Responsive Industries Ltd/RIL on 5<sup>th</sup> March 2007 in the ratio of 3:1. It also evidences the receipt of 26,93,333 shares on 26<sup>th</sup> August 2009 upon amalgamation of M/s Responsive Polymer Industries Ltd with M/s Responsive Industries Ltd/RIL. Accordingly, on this date the total shareholding of the assessee in M/s RIL stood at 1,53,05,033 shares. Thereafter, the



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assessee is noted to have transferred 9,89,269 shares between 28.01.2010 to 27.03.2010. Also, the share split which took place on 8<sup>th</sup> October 2010 by which one Equity share having Face Value of Rs.10/- was split into 10 Equity shares having Face Value of Re.1/- each is evident from the records. It is noted that M/s Responsive Industries Ltd/RIL had issued shares on preferential allotment again on 15<sup>th</sup> February 2012 at a price of Rs.111/- per share and the assessee had *inter alia* subscribed to 52,67,700 shares. The delivery of these shares are noted to have been received in the second Demat Account No.0004281 held with M/s Kamal Kumar Jalan Securities Pvt Ltd on 19<sup>th</sup> April 2012, copy of which is found placed at Page 102 of Paper Book. Hence, we find that the dates & cost of acquisition of the shares of RIL held by the assessee were verifiable and therefore this grievance of the Revenue is held to be factually unfounded.

**18.** The Ld. AR showed us that, the shares acquired by the assessee were held in three demat accounts viz., (i) Demat Account No.1301490000004577 with DP (Depository Participant), Oriental Bank of Commerce, (ii) Demat Account No.1201090005317890 with DP, Motilal Oswal, and (iii) Demat Account No. 0004281 with DP, M/s Kamal Kumar Jalan Securities Pvt Ltd. Inviting our attention to Page 55 of the Paper Book, the Ld. AR submitted that the 1,25,00,000 shares in question had been sold out of the shares held in the demat account with M/s Kamal Kumar Jalan Securities Pvt Ltd. He therefore contended that the cost/manner of acquisition of shares held in the demat account with M/s Kamal Kumar Jalan Securities Pvt Ltd ought



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to be considered for the purposes of arriving at the exempt/taxable value of capital gains by following the *First-in-First-Out Method* [in short 'FIFO Method']. Having taken note of the same, we find this contention of the Ld. AR to be ably supported by the **Circular No.768 dated 24-06-1998** wherein the CBDT had clarified this particular doubt, as to whether the FIFO Method set out in Section 45(2A) of the Act has to be applied across all holdings in multiple demat accounts or is it to be applied account-wise. The relevant clarification of the CBDT is as follows:

“5. Section 45(2A) stipulates that in the case of securities held in dematerialised form, for determining 'date of transfer' and 'period of holding', the FIFO method would be applicable. FIFO method is generally used to determine the value of any item moving out of a stock account and those remaining in stock at any point of time. When applied to an account holding dematerialised stock, it implies that, out of the existing holdings, the item that first entered into the account is deemed to be the first to be sold out. However, once a sale is linked with an earlier purchase, for determination of their 'date of transfer' and 'period of holdings', Board's Circular No. 704 would be applicable.

That is to say that the relevant contract notes as explained in Circular No. 704 will have to be referred to, for ascertaining the cost of the security sold and the date of transfer.

When actually operating an account of dematerialised stock by applying FIFO system, certain other issues can arise. For instance, an investor can hold part of his holdings of a security in physical form and the remaining in dematerialised form.



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Further, he may hold his dematerialised holdings in more than one account with one or more depositories. In such a situation, there can be doubts whether the FIFO system is to be applied globally on the entire holdings of physical and dematerialised holdings or not. In this connection, it is clarified that :

(a) FIFO method will be applied only in respect of the dematerialised holdings because in case of sale of dematerialised securities, the securities held in physical form cannot be construed to have been sold as they continue to remain in possession of the investor and are identified separately.

(b) In the depository system, the investor can open and hold multiple accounts. In such a case, where an investor has more than one security account, FIFO method will be applied accountwise. This is because in case where a particular account of an investor is debited for sale of securities, the securities lying in his other account cannot be construed to have been sold as they continue to remain in that account.

**19.** The Ld. DR, however, objected to the same by stating that, the assessee had changed his stand before us and that this plea was originally not raised before the AO. The Ld. AR, in this regard, showed us that, the assessee had filed all relevant documents viz., demat statements of different DPs before the lower authorities and all alternate claims had been raised before them. Hence, we find this grievance of the Revenue to be untenable. Moreover, the Ld. CIT, DR has been unable to dislodge the above factual position that the shares in question were sold from the demat account held with M/s Kamal Kumar Jalan Securities Pvt Ltd, and therefore in terms of the CBDT



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Circular (supra), the FIFO Method has to be applied account-wise and not across the multiple demat accounts held by the assessee. Also, this Tribunal being the last fact-finding authority, is required to ascertain the correct facts and record our independent findings in support of the conclusion on the matter contested before us. In light of the foregoing, we now proceed to examine the issue vis-à-vis the shares transferred/sold out of the demat account held with M/s Kamal Kumar Jalan Securities Pvt Ltd in light of the legal position discussed at Paras 8 to 13 above.

**20.** Admittedly, 1,25,00,000 shares which were sold out of the demat account with M/s Kamal Kumar Jalan Securities Pvt Ltd was received by the assessee LLP upon conversion of the erstwhile company, M/s Wellknown Shares & Securities Ltd in the year 2013. This act of conversion of company into an LLP was claimed to be compliant with the provisions set out in Section 47(xiii b) of the Act and therefore the transfer of shares of RIL by the erstwhile company to the assessee was not regarded as 'transfer' for income-tax purposes. We find the claim of assessee to be correct and note that the mode of acquisition of shares by the assessee is covered by Section 47(xii b) of the Act. The same is noted to fall under the exception carved out in sub-clause (ix) of proviso to clause (b) of the Notification No. 43/2017. In terms of the same sub-clause (ix) [*already elaborately discussed earlier*], the assessee is required to additionally demonstrate that the previous owner, i.e. the erstwhile company had acquired these 1,25,00,000 shares by the modes/exceptions set out in the Notification



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No. 43/2017. In the facts before us and on FIFO basis, it is noted that the assessee had sold 34,67,700 shares which were acquired by way of preferential allotment in 2012 and that the remaining 90,32,300 shares were sold out of the shares issued by RIL upon the splitting of its shares.

**21.** With regard to the 34,67,700 shares sold out shares acquired under preferential allotment on 19.04.2012, the Ld. DR has contended that the shares of RIL were not frequently traded at that material time and has provided the following calculation to show that only 2% (less than 10%, as prescribed) of the total shareholding was traded during the preceding year.

“For this purpose, the trading pattern of the shares has been verified from the BSE website where the share is listed. The relevant extract of the said details (*The complete extract of the share trading statistics as obtained from BSE website for the relevant period is annexed as Annexure-C.*) reveal the following:

Month	Open Price	High Price	Low Price	Close Price	No. of Shares
February-2011	92.50	93.90	89.00	92.15	845954
March-2011	92.50	94.80	89.00	92.20	456333
April-2011	92.90	99.00	91.15	93.00	363938
May-2011	93.20	95.00	88.15	94.45	932442
June-2011	94.00	95.60	84.50	93.55	653699
July-2011	93.70	117.50	91.90	108.40	399334
August-2011	109.55	111.20	102.50	110.65	304837
September-2011	110.50	120.00	104.85	105.50	240637
October-2011	105.75	110.00	104.00	107.80	121494
November-2011	108.00	108.00	94.00	101.40	127892
December-2011	101.00	103.50	87.05	100.20	124945
January-2012	100.50	112.00	98.00	108.00	101869
Total (A)					46,78,160
Total no. of shares as on 31'					26,16,44,500



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Jan 2012(B) (As per share holding pattern as per BSC Website as on Q.E.31 <sup>st</sup> Dec.2011-Annexure-D)					
10% of (B)					<b>2,61,64,450</b>
(A/B)%					2

iii) The above statistics are examined with due regards to the definition of 'frequently traded shares' as per the notification of 2017 reproduced in the foregoing section. As is clear from the above table and the evidences as obtained from BSE site, the total share issued by the company was 26,12,44,500 shares. The cumulative shares traded has been only 46,78,160 as against the minimum requirement of 2,16,64,450 shares. This amounts to a mere 2% of the total share holding as against the minimum requirement of "at least ten percent" for a trade to be considered frequently traded. The finding of the CIT(A) in case of the first 52,00,000 shares is thus factually incorrect. That being the case, the ruling that the gains there upon are eligible for exemption u/s.10 (38) is incorrect.”

**22.** The Ld. AR, however, referred to the following definition of '*frequently traded shares*' as set out in the Notification No. 43/2017, which has been reproduced below:-

“'frequently traded shares' means shares of a company, in which the *traded turnover* on a recognised stock exchange during the twelve calendar months preceding the calendar month in which the acquisition and transfer is made, is at least ten per cent of the *total number of shares* of such class of the company.”



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**23.** In terms of the above definition, the traded turnover of the shares has to be more than 10% of the total number of shares to qualify as '*frequently traded shares*'. The Ld. AR has claimed that the '*traded turnover*' denotes *total value of turnover* and not the *number of shares traded*. The Ld. AR has accordingly submitted that, if the monetary value of the traded turnover is divided by the total number of shares, then the resultant figure shall be in excess of 10% and thus the shares of RIL shall qualify as '*frequently traded shares*'. We however do not countenance this submission of the Ld. AR of the assessee. We agree with the Ld. DR that there has to be parity between the numerator and the denominator viz., since the total number of shares is considered as the denominator, the *traded turnover* has to denote the traded quantity of shares and not their monetary value. On the given facts, we therefore note that the 34,67,700 shares of M/s RIL sold during the year, cannot be said to be frequently traded and to that extent the same stands hit by the rigors of the third proviso to Section 10(38) of the Act. However, as noted by us earlier, the shares of RIL were acquired under preferential allotment in 2012 at a price of Rs.111/share. The assessee is noted to have sold these shares for a price of Rs.40/share during this year. We therefore note that there is no resultant profit and hence no taxable capital gain can be inferred upon sale of these 34,67,700 shares.

**24.** Coming to the remaining 90,32,300 shares, it is noted that these shares pertain to the shares issued by M/s RIL upon the share-split and thus is noted to fall under the *exception set out in sub-clause (i) of the*



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*proviso to clause (b) of the Notification (supra)*. According to the Ld. CIT, DR however the impugned transaction was an elaborate exercise of tax avoidance undertaken by the assessee and that allowing such benefit to the assessee would be against the spirit and intent of the introduction of third proviso in Section 10(38) of the Act. Before us, the Ld. AR has rightly pointed out that these contentions of the Ld. CIT, DR neither emanates from the given facts or the order of the AO or that of Ld. CIT(A) which is impugned before us. As noted above, the shares of M/s RIL, were acquired between (years) 2006 to 2012; and at that material time, there was no requirement in Section 10(38) of the Act to show that the shares sold upon payment of STT had also been acquired after payment of STT. In that view of the matter, it cannot be said that the assessee undertook these transactions to circumvent any law, particularly when the manner of acquisition of shares back then was of no relevance to ascertain the eligibility of a sale transaction to be covered by Section 10(38) of the Act. Also, the amendment by way of third proviso to Section 10(38) came in 2017 which was much after the share-split which took place in the year 2011 and hence the contention of the Ld. CIT, DR suggesting that the assessee had pre-planned to circumvent a post-facto law, brought in six years later, is devoid of any merit.

**25.** The Ld. CIT DR had additionally submitted that, as the share-split/bonus issue was made pursuant to such original shares which were not eligible for exemption, then the gains derived from sale of shares out of such issue viz., splitting/bonus should not be accorded



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the benefit of Section 10(38) of the Act. This argument of the Ld. CIT DR is however noted to be not borne out of the Notification No. 43/2017 (supra). We note that there is no such disabling condition laid down in sub-clause (i) of proviso to clause (b) of the Notification No. 43/2017 (supra), which reads as follows :-

“(i) acquisition through an issue of share by a company other than the issue referred to in clause (a);”

**26.** From the language used in the above sub-clause it is manifestly clear that, where shares are acquired through an issue of share by a company, other than the mode of preferential allotment as set out clause (a) of the same Notification, then the same shall be not be hit by the rigors of third proviso to Section 10(38) of the Act. Unlike clause (ix) to the proviso of clause (b), which provides that, where the mode of acquisition is covered by Section 47 or 50B of the Act, then the manner in which shares were acquired by the previous owner is relevant, there is no such additional condition set out in the above sub-clause (i) preventing the shares issued in share-split/bonus being covered by this exception, only because the original shares were acquired under preferential allotment i.e. mode set out in clause (a) of the Notification (supra). For the aforementioned reasons, we thus countenance the findings of Ld. CIT(A) allowing benefit of exemption claimed u/s 10(38) of the Act in relation to the gains derived upon sale of shares which were acquired pursuant to the share-split.

**27.** Hence, on overall consideration of the facts & circumstances, it is held that no addition by way of taxable long term capital gain was permissible upon the sale of 1,25,00,000 shares of RIL in the hands of



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the assessee during the relevant FY 2017-18. Accordingly, the order of the Ld. CIT(A) deleting the addition impugned before us is upheld and all the grounds raised in this appeal preferred by the Revenue are dismissed.

**28.** We now take up the appeal for the AY 2019-20 in ITA No. 1949/Mum/2022. In this AY, the assessee had further sold 1,25,00,000 shares out of the shares held in the Demat Account No. 0004281 held with the DP, M/s Kamal Kumar Jalan Securities Pvt Ltd. Since the gain from sale of such shares had accrued after 1<sup>st</sup> April 2018, the assessee did not claim exemption u/s 10(38) of the Act. Instead, the assessee is noted to have computed the taxable long-term capital gain upon sale of such shares u/s 112A of the Act. The conditions set out in Section 112A of the Act is noted to be similar to that of the conditions set out in Section 10(38) of the Act, which also provides as follows:-

“(i) the total income includes any income chargeable under the head "Capital gains";

(ii) the capital gains arise from the transfer of a long-term capital asset being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust;

(iii) securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004) has,—

(a) in a case where the long-term capital asset is in the nature of an equity share in a company, been paid on acquisition and transfer of such capital asset; or”

**29.** Like Section 10(38) of the Act, the CBDT has issued Notification No. SO 5054(E) dated 01.10.2018 notifying the nature of acquisitions to which the requirement of payment of STT at the time of



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their acquisition of the shares was dispensed with. It is noted that the classes of acquisitions set out in this Notification is akin to the Notification No. 43/2017 (supra), and, for the sake of convenience, it is being extracted below:-

“In exercise of the powers conferred by sub-section (4) of section 112A of the Income-tax Act, 1961 (43 of 1961) hereinafter referred to as the Income-tax Act, the Central Government, with a view to specify the nature of acquisition in respect of which the provision of sub-clause (a) of clause (iii) of sub-section (1) of section 112A of the Income-tax Act shall not apply, hereby notifies the transactions of acquisition of equity share entered into—

(I) before the 1st day of October, 2004; or

(II) on or after the 1st day of October, 2004 which are not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004), other than the following, namely:—

(a) where acquisition of existing listed equity share in a company whose equity shares are not frequently traded in a recognised stock exchange of India is made through a preferential issue:

Provided that nothing contained in this clause shall apply to acquisition of listed equity shares in a company;—

(i) which has been approved by the Supreme Court, High Court, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;

(ii) by any non-resident in accordance with foreign direct investment guidelines issued by the Government of India;



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(iii) by an investment fund referred to in clause (a) of Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of section 10 of the Income-tax Act or a Qualified Institutional Buyer; and

(iv) through preferential issue to which the provisions of chapter VII of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply.

(b) where transaction for acquisition of existing listed equity share in a company is not entered through a recognised stock exchange in India:

Provided that nothing contained in this clause shall apply to the acquisition of listed equity shares in a company which has been made in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and is—

(i) through an issue of share by a company other than the issue referred to in clause (a);

(ii) by scheduled banks, reconstruction or securitisation companies or public financial institutions during their ordinary course of business;

(iii) approved by the Supreme Court, High Courts, National Company Law Tribunal, Securities and Exchange Board of India or Reserve Bank of India in this behalf;

(iv) under employee stock option scheme or employee stock purchase scheme framed under the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;

(v) by any non-resident in accordance with foreign direct investment guidelines of the Government of India;



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(vi) in accordance with Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011;

(vii) from the Government;

(viii) by an investment fund referred to in clause (a) to Explanation 1 to section 115UB of the Income-tax Act or a venture capital fund referred to in clause (23FB) of section 10 of the income-tax Act or a Qualified Institutional Buyer; and

(ix) by mode of transfer referred to in section 47 or section 50B or sub-section (3) of section 45 or sub-section (4) of section 45 of the Income-tax Act, if the previous owner or the transferor, as the case may be, of such shares has not acquired them by any mode referred to in clause (a) or clause (b) or clause (c) [other than the transactions referred to in the proviso to clause (a) or clause (b)].

(c) acquisition of equity share of a company during the period beginning from the date on which the company is delisted from a recognised stock exchange and ending on the date immediately preceding the date on which the company is again listed on a recognised stock exchange in accordance with the Securities Contracts (Regulation) Act, 1956 read with Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules made thereunder;”

**30.** If the conditions set out in Section 112A of the Act is fulfilled, then in terms of Section 55(2)(ac) of the Act, the ‘*cost of acquisition*’ of long term Shares acquired before 01.02.2018 shall be the higher of (a) cost of acquisition and (b) lower of Fair Market Value [‘FMV’] as on 31.01.2018 or the full value of consideration. The assessee had



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accordingly computed the taxable long term capital gain u/s 112A of the Act in the following manner :-

Particulars	Amount (in Rs)		
Full Value of Consideration			49,90,07,498
Cost of Acquisition – Sec 55(2)(ac)			
Higher of :			49,31,25,000
(a) Original Cost of Acquisition		1,25,00,000	
(b) Lower of		49,31,25,000	
(i) Fair Market Value as on 31.01.2018	49,31,25,000		
(ii) Full Value of Consideration	49,90,07,498		
Long Term Capital Gain			58,82,498

**31.** The AO, following the same line of reasoning as set out in AY 2018-19 viz., the shares sold by the assessee were not acquired upon payment of STT and also did not fall under the exceptions set out in the Notification No. SO 5054(E) dated 01.10.2018. The AO thus held that the assessee was not entitled to avail the beneficial provisions contained in Section 112A of the Act. According to him, the shares were not acquired upon payment of STT and therefore the condition laid down in sub-clause (a) of Section 112A(1)(iii) was not fulfilled. The AO thus denied the benefit of the deemed cost of acquisition claimed under Section 55(2)(ac) of the Act. The AO accordingly re-computed the taxable long-term capital gain at Rs.48,65,07,498/- and added it to the total income of the assessee. Aggrieved by this order of the AO, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to delete the same.

**32.** Heard both the parties and perused the records. In light of the facts already discussed above and following our conclusions drawn while deciding the appeal for AY 2018-19, it is noted that the 1,25,00,000 shares sold out the demat account held with DP, M/s



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Kamal Kumar Jalan Securities Pvt Ltd pertains to the shares issued by M/s RIL upon share-split. It is noted to fall under the exception set out in sub-clause (i) of the proviso to clause (b) of the Notification No. SO 5054(E) dated 01.10.2018. We therefore hold that the Ld. CIT(A) had rightly accepted the computation of long term capital gain worked out by the assessee in terms of Section 112A read with Section 55(2)(ac) of the Act and hence we see no reason to interfere with the order of Ld. CIT(A) deleting the addition made by the AO. Accordingly, all the grounds raised in this appeal are dismissed.

**33.** In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on this 27/07/2023.

Sd/-

(AMARJIT SINGH)  
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 27/07/2023.  
Vijay Pal Singh, (Sr. PS)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai