

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

**BEFORE SHRI BR. BASKARAN AND SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.2104/Mum/2022

(निर्धारण वर्ष / Assessment Year: 2014-15)

Deepak Srichand Bathija 5-B, Elegant Apartment, 3 Sobhani Road, Colaba, Mumbai-400005.	<b>बनाम/</b> Vs.	NFAC, Delhi Room No. 356, CR Building, New Delhi.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPB6001A</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri H. S. Raheja	
Revenue by:	Shri P. D. Chogule (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 26/05/2023

घोषणा की तारीख /Date of Pronouncement: 26/07/2023

**आदेश / ORDER**

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

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 05.07.2022 for the assessment year 2014-15.

2. Brief facts are that the assessee had filed return of income of AY. 2014-15 on 30.07.2014 declaring total income of Rs.42,24,780/-. Thereafter, the case of the assessee was taken up for scrutiny by issuing notice u/s 143(2) of the Income Tax Act, 1961 (hereinafter "the Act") on 18.09.2015. The AO during assessment proceedings noted that assessee is involved in the business of finance & brokerage and derives income from business, Long Term Capital Gain (LTCG) & other sources. The AO noted that assessee has earned LTCG of Rs.32,09,789/- from sale of shares and payment was received from his share broker. And out of this Rs.19,23,000/- was earned as LTCG from sale of shares between 12.11.2013 to 16.12.2013 of M/s. Kailash Auto



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Finance Ltd. (hereinafter “M/s KAFL”) to the tune of Rs.19,23,000/-. And when AO asked the assessee to prove the claim of LTCG on sale of shares of M/s KAFL, assessee brought to his notice that he had initially purchased 50,000 shares of M/s. Panchshul Marketing Ltd. for Rs.50,000/- on 20.11.2012 @ Rs.1 per share; and later this company i.e. M/s. Panchshul Marketing Ltd. merged with M/s. KAFL (*as per the order of Hon’ble Allahabad High Court*); and consequent to that event of amalgamation, assessee was allotted shares of M/s. KAFL which was later sold in Nov/December, 2013 through the electronic platform of the stock exchange and assessee received the sale consideration of Rs.19,73,500/- through banking channel. And assessee filed the following documents to discharge his burden to prove the genuineness of the transaction which yielded the LTCG of Rs.19,23,000/- as under;-

- (a) Copy of Demat account statement reflecting the corporate action giving effect to the merger whereby the assessee has received shares of Kailash Auto Finance Ltd. in lieu of shares of Panchshul Marketing Ltd. held by him:
- (b) Copy of contract-cum-sale bills for sale of Kailash Auto Finance Ltd. on the Bombay Stock Exchange through broker M/s. Edelweiss Securities Ltd;
- (c) Copy of Demat Statement showing the pay-in of shares to the relevant settlement account of the assessee’s broker.
- (d) Copy of ledger account of the assessee with the assessee’s broker M/s. Edelweiss Securities Ltd.
- (e) Copy of Bank statement of the assessee reflecting the receipt of sale proceeds of the shares.”



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3. On the strength of the aforesaid relevant documents, assessee further contended that transaction of shares are supported by Demat account as well as the bank statement; and asserted that he has not indulged in any mal-practices or has conspired with anybody/broker/operator/promoters; and since the sale of share/scrips of KAFL [*which was a listed security*] and sold through recognized electronic platform and after payment of STT; and holding period was more than twelve (12) months, he claimed LTCG of Rs.19,23,000/- which should be allowed. However, the AO did not agree, and after taking note of the suspicious rise of share prices as well as taking note *inter-alia* of the statement given by Shri Sunil Deveani, Dipan Patel, Shri Narendra Balasia (*in the case of SMC Global Securities Ltd, Shri Alok Harlalka who is broker of M/s. SMC Global Securities Ltd*), he was of the opinion that the assessee's LTCG claim on sale of M/s. KAFL was bogus. And the AO took note of the Investigation Report of Directorate of Investigation Kolkata as well as the SEBI interim order dated 29.03.2016 against certain entry operators in respect of transaction in scrip of M/s. KAFL, wherein the SEBI opined that certain operators were involved in rigging the price of this share whereby the beneficiaries have made huge LTCG. The assessee contested the allegation made in the investigation report about the scrip of M/s. KAFL and pointed out that it cannot be used against the assessee because neither the investigation report nor the statement of 3<sup>rd</sup> parties which were the base of the ibid report have nothing incriminating against the assessee or its broker indulging in mal-practice or any wrong doing on the part of assessee or his broker; and



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it was pointed out that the statements referred in assessment order were undisputedly recorded behind the back of assessee and without cross-examination it cannot be used against assessee. Assessee also submitted that he was a regular investor in share market (in various scrips) and he invested in shares of M/s. Panchshul Marketing Ltd without any prior-information about it getting merged with M/s KAFL. And drew our attention to the AO's observation about M/s. Panchshul Marketing Ltd at para 4.2 wherein he says '*this company was in fact an unlisted company about two years old and didn't have any substantial profit*'. So according to Ld. AR, the assessee's action of investing Rs. one per share and investing Rs.50,000/- cannot be faulted. And in order to prove that assessee invested in fifty thousand shares of M/s. Panchshul Marketing Ltd, assessee produced the relevant documents which shows that assessee had subscribed for shares of M/s. Panchshul Marketing Ltd, and was allotted the shares, in normal course and that all transaction had evidence like bill of contract, allotment letter of shares, bank statements, De-mat statements etc. And also it was brought to the notice of AO that the broker through whom assessee had sold the shares (M/s. Edelweiss Securities Ltd.) was active [even after SEBI interim order dt 29.03.2016] and doing regularly its professional service as broker in the BSE & NSE, which shows that there was no restrictions placed by SEBI on its activities. Therefore, assessee again pleaded before the AO that no adverse view be taken against the LTCG claim since he was a genuine investor. However, the AO did not agree and after taking note of the suspicious rise of share prices as well as taking note of the statement



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given by entry operators, SEBI interim order dt 29.03.2016 and investigation report against the scrip M/s KAFL, the AO was of the opinion that the assessee's LTCG claim on sale of M/s. KAFL was bogus. And therefore he made an addition of the entire sale consideration of Rs.19,73,000/- u/s 68 of the Act by disallowing the LTCG claim and further added [*commission for earning LTCG*] of Rs.59,190/- as unexplained expenditure u/s 68 (69C) of the Act. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who dismissed the same. Aggrieved, the assessee is before this Tribunal.

**4.** Assailing the action of Ld. CIT(A)/AO the Ld. AR of the assessee Shri Hari Raheja drew our attention to the facts that the assessee have purchased shares of M/s. Panchshul Marketing Ltd. on 20.10.2012 (50,000 shares) at a cost of Rs.50,000/- through broker M/s. Overflow Merchandise Pvt. Ltd. in AY. 2013-14. For proving the same, the Ld. AR drew our attention to the page no. 7 to 11 of the PB wherein the proof of transaction of purchase of shares of M/s. Panchshul Marketing Ltd is found placed, wherein Debit note issued by M/s. Overflow of Rs.50,000/- dated 18.10.2012; and receipt of purchase consideration by cheque no.000201 dated 20.10.2012 is found placed at page no. 8 of PB; and documents to prove delivery of the shares and confirmation is found placed as well as bills from broker is also found in the PB. And thereafter, he submitted that the shares were dematerialized. And the Ld. AR brought to our notice that assessee filed the following relevant documents to prove the purchase of shares of M/s. Panchshul Marketing Ltd.



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- (a) Copy of purchase bills evidencing the purchase of share;
- (b) Copy of Receipt for payment of consideration for purchase of shares;
- (c) Copy of letter intimating delivery of shares to the assessee's demat account;
- (d) Copy of bank passbook reflecting the payment made to M/s. Overflow Merchandise Pvt. Ltd through account payee cheque;
- (e) Copy of Demat account statement reflecting receipt of shares of Panchshul Marketing in November 2012
- (f) Confirmation of account from M/s. Overflow Merchandise Pvt. Ltd. for the year in which the shares were purchased;
- (g) Copy of Demat account for most of the months thereafter showing the shares were held in Demat form.
- (h) Copy of intimation relating to amalgamation/reduction of capital with reference to the order of the High Court.
- (i) Copy of Demat account showing the conversion of the shares of Panchshul Marketing Ltd. to shares of Kailash Auto Finance Ltd.

**5.** The Ld. AR also brought to our notice the Hon'ble Allahabad High Court order dated 09.05.2013 which allowed the Scheme of arrangement and amalgamation and by virtue of it M/s. Kailash Auto Finance Ltd. allotted 50,000 shares of its shares (M/s. KAFL) in lieu of 50,000 shares of M/s. Panchshul Marketing Ltd (refer page no. 11 of the PB). Thereafter, the Ld. AR drew our attention to Demat statement for the period from 01.07.2013 to 31.07.2013 showing the allotment of 50,000 shares of M/s. KAFL in lieu of 50,000 shares of M/s. Panchshul Marketing Ltd. (refer page no. 18 of the PB). The Ld. AR also brought to our notice the sale bill dated 22.11.2013 of broker M/s.Edelweiss Securities Ltd. for sale of 20,000/- shares of M/s.



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KAFIL showing the sale price, their brokerage and STT charges etc. (refer page no. 19 of the PB). Thereafter, he drew our attention to sale bill dated 25.11.2013 of M/s. Edelweiss Securities Ltd. which evidences sale of 35,000 shares of M/s. KAF; the sale price, their brokerage and STT charges etc. (refer page no. 20 of the PB). The Ld. AR also brought to our notice the sale bill dated 26.11.2013 of M/s. Edelweiss Securities Ltd. for sale of 10,000/- shares of M/s. KAFIL showing the sale price, their brokerage and STT charges etc. (refer page no. 21 of the PB). The Ld. AR also brought to our notice, the account statement of assessee from the ledger of M/s. Edelweiss Securities Ltd. with details of payment (refer page no. 22 to 26 of the PB). The Ld. AR also brought to our notice, Demat statement dated 31.11.2013 showing debit of shares of M/s. KAFIL (refer page no. 27 of the PB). The Ld. AR also brought to our notice, relevant Bank statement showing receipt of sale consideration from M/s. Edelweiss Securities Ltd. (refer page no. 28 to 30 of the PB). The assessee has filed the following documents evidencing the purchase and sale of shares which are noted as under: -

- a) Detailed Summary chart of Purchase and Sale
- b) Contract notes/Broker notes for the sale of shares through stock exchange, in which no of shares sold, rate, date etc. has been duly mentioned.
- c) Copy of Demat/ Transaction Statement for the period 01.04.2013 to 31.03.2014.
- d) Copy of Purchase bills of shares (Page no. 19 & 26 of paper book).



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- h) Bank statement duly highlighting the receipt of sale consideration from shares.
- i) Computation of Income
- j) Copy of High Court Order of Merger of the Company

6. From perusal of the aforesaid documents, especially the contract-cum-bill which contains the details of the order no, trade no., name of shares, quantity, rate, etc is discerned. And the transaction of purchase as well as sale took place through banking channel. The shares were dematerialized, the sale transaction of shares of M/s. KAFL was through broker M/s. Edelweiss Securities Ltd. in the electronic platform of stock exchange. Thus, according to the Ld. A.R. despite all the relevant evidences were filed before the authorities below, but the AO as well as Ld. CIT(A) have proceeded on surmises and presumption based solely on the investigation report and interim-order of SEBI report which suggested that these are accommodation entries and prices of shares were manipulated without doing any verification on the evidences produced by the assessee which was erroneous.

7. According to Ld. AR, the AO held the claim of assessee as bogus on the strength of Interim Order passed by SEBI against M/s. KAFL and M/s. Panchshul Marketing Ltd. as well as M/s. Overflow Merchandise Pvt. Ltd. (*broker through whom assessee purchased shares of M/s. Panchshul Marketing Ltd*). And also pointed out that even in the interim report of SEBI, there is no prohibition/restriction



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on the broker (M/s. Edelweiss Securities Ltd.) through whom the assessee sold the shares of M/s. KAFL through the stock exchange. In this context, the Ld. AR brought to our notice the crucial fact/evidence/document which was the **final** order of the Security and Exchange Board of India (SEBI) dated 21.09.2017 wherein the SEBI has **exonerated** M/s. KAFL, M/s. Panchshul Marketing Ltd. and broker M/s. Overflow Merchandise Pvt. Ltd. from the suspect list and have held as under: -

“6. Considering the fact that there are no adverse findings against the aforementioned 244 entities with respect to their role in the manipulation of the scrip of Kailash Auto, I am of the considered view that the directions issued against them vide interim order dated March 29, 2016 and confirmatory orders dated June 15, 2016, September 30, 2016, October 21, 2016, October 27, 2016 and July 13, 2017 are liable to be revoked.

7. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11(4) and 11B of the SEBI Act, hereby revoke the interim order dated March 29, 2016 and confirmatory orders dated June 15, 2016, September 30, 2016, October 21, 2016, October 27, 2016 and July 13, 2017 qua aforesaid 244 entities (paragraph 5 above) with immediate effect.

8. The revocation of the directions issued vide the abovementioned orders (at paragraph 7) is only in respect of the entities mentioned at paragraph 5 of this order in the matter of Kailash Auto. As regards remaining entities in the scrip of Kailash Auto, violations under SEBI Act, PFUTP Regulations,



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etc., were observed and SEB I shall continue its proceedings against them. Hence, the directions issued vide confirmatory order dated June 15, 2016 against the remaining 2 entities shall continue. This revocation order is without prejudice to any other action SEBI may initiate as per law.”

**8.** The Ld. AR also drew our attention to the various Tribunal orders which has given relief to the assessee and mainly the decision to Mumbai Tribunal order ITA. No.390/Mum/2020 in the case of M/s. Anusmriti Sarkar Vs. ITO for AY. 2014-15 dated 07.06.2021 wherein the Tribunal was pleased to allow the appeal of the assessee and deleted the addition made u/s 68 of the Act LTCG claim of assessee on sale of shares of M/s. KAFL. He drew our attention to the page no. 101-117 of the PB which we find to be correct.

**9.** The Ld. A.R. therefore submitted that the addition may be deleted following the decisions of the coordinate bench of the Tribunal (supra) on identical facts dealing with the LTCG claim of M/s. KAFL.

**10.** The Ld. D.R., on the other hand, relied heavily on the order of authorities below and does not want this Tribunal to interfere with the impugned order of Ld CIT(A).

**11.** Having heard the rival submissions and after perusal of the material on record, the undisputed facts are that the assessee has earned a capital gain of Rs. 19,23,000/- on the sale of scrip namely



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M/s. Kailash Auto Finance Ltd [M/s KAFL]. The facts qua the purchase and sale of shares and necessary evidences were already discussed hereinabove and are not being repeated for the sake of brevity. It is noted that assessee has filed all the relevant evidences comprising summary of sale and purchase of shares, contract notes/broker notes, details of Demat account/transaction statement, copies of purchase bills, evidences of payment through banking channels along with bank statements etc. It is noted that the authorities below have relied merely on the report of investigation wing and interim-report of SEBI by ignoring the relevant facts on record. In this case, it is a matter of record that when called upon by AO, the assessee had furnished all the primary evidences in the form of bills, contract notes, Demat statement and bank accounts statement to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the AO nor the Ld. CIT(A) to be false or fabricated. The basis on which the AO has drawn adverse inference against the assessee (in the respect of the claim of LTCG from sale of shares of M/s KAFL) inter-alia was since SEBI interim order dated 29.03.2016 found the actions of various entities dealing with this scrip (M/s KAFL) was in violation of provisions of SEBI Act 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practice (PFUTP Regulation) and had passed the interim order dated 29.03.2016, wherein 246 entities/persons were restrained from accessing the securities market until the investigation is over. And along with the interim order dt 29.03.2016, SEBI had given the list of 246 entities which included the scrip of M/s KAFL and M/s.



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Panchshul Marketing Ltd and the initial broker from whom the assessee purchased shares of M/s. Panchshul Marketing viz M/s. Overflow Merchandise Pvt. Ltd. However, it has been brought to our notice that by order dated 21.09.2017, the SEBI was pleased to pass the **final order** u/s 11, 11(4) & 11B of the SEBI Act, 1992 in the case of M/s KAFL wherein barring two (2) entities [out of 246 entities (M/s. Bholebaba Suppliers Pvt. Ltd. and M/s. Overall Vincom Pvt. Ltd.)] all other persons/entities [including the scrip M/s KAFL and M/s Panchsheel Marketing and broker M/s. Overflow Merchandise Pvt. Ltd.] were exonerated because upon completion of investigation by SEBI it did not find any adverse evidence in respect of violation of provisions of PFUTP Regulation and took note of this fact as under:-

“5. Pursuant to the interim order, SEBI conducted a detailed investigation into the role of various entities in price manipulation in the scrip of Kailash Auto so as to ascertain the violation of securities laws. Upon completion of investigation by SEBI, investigation did not find any adverse evidence/adverse findings in respect of violation of provisions of the PFUTP Regulations in respect of the following 244 entities (against whom directions were issued vide the interim order and/or confirmatory orders) warranting continuation of action under section 11B r/w 11(4) of the Act.”

And has given the details of 244 entities exonerated, wherein the scrip of M/s KAFL and M/s. Panchshul Marketing Ltd is given as item no. 1 and 106 respectively and the broker through whom the assessee purchased the scrip of M/s. Panchshul Marketing Ltd i.e. M/s. Overflow Merchandise Pvt. Ltd (item no. 123) is found in this 244



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entities names exonerated by SEBI. Further, as asserted by the Ld. AR it is noted that the broker through whom assessee sold the shares was not even in the interim list of SEBI (restricting the transaction vide order dated 29.03.2016). We examined this fact and note from a perusal of the list of entities debarred from securities market vide interim order dated 29<sup>th</sup> March, 2016, that the name of the broker through whom the assessee had sold the shares of M/s KAFL i.e. M/s. Edelweiss Securities Ltd has not figured even in the initial interim order itself. Thus, it was not debarred from accessing the securities market while the SEBI interim order was in force against 246 persons/entities. Thus, we find that the main/foundational basis on which the AO had drawn adverse inference against the LTCG claim on sale of shares of M/s KAFL is not existing as per the final order of the SEBI (supra).

**12.** The AO has also relied on the report of the investigation wing and/or the statement of the several third party/persons recorded by the investigation wing in connection with the alleged bogus transaction in the shares of M/s KAFL. It is noted in this context that there is no material even in these statements directly implicating the assessee or the brokers M/s. Overflow Merchandise Pvt. Ltd or M/s. Edelweiss Securities Ltd. in any wrong doing; and it is undisputed that even though the investigation wing report is based on statement of several persons it cannot be relied upon because firstly it has been recorded behind the back of assessee; secondly a copy of the same has not been fully given to assessee; and thirdly assessee has not been given an opportunity to cross-examine the maker of such statement on the basis



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of which the investigation report has been made. Therefore, such a statement cannot be used as evidence against the assessee to draw adverse view. [refer case of Andaman Timber Industries 127 DTR 241) (SC)] wherein the Hon'ble Supreme Court has held that the assessment based on third party statement without giving an opportunity to the assessee to cross-examine the maker of adverse statement is not sustainable in law. Thus, anyway the investigation report based on third party statement cannot be the basis to draw adverse inference against the assessee, even though undisputedly there is no statement which incriminates assessee or the broker directly or in-directly in any manner. Therefore, the investigation report cannot be the basis for drawing any adverse inference against the assessee as wrongly relied upon by the AO. Therefore, the AO erred in relying on the investigation report of the investigation wing to disallow the claim of LTCG.

**13.** Thus, considering the facts of the case and the evidences in support of the LTCG claim clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act. As discussed (supra), the adverse order against the scrip (M/s KAFL and M/s. Panchshul Marketing Ltd) as well as the initial broker M/s. Overflow Merchandise Pvt. Ltd has been over-ruled by SEBI final order dated 21.09.2017 as discussed (supra). And the investigation report as discussed (supra) cannot be the basis for drawing adverse view against the claim of LTCG. When these two documents are kept aside, then



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only aspect surviving is the suspicious rise of share price of M/s KAFL, which cannot be the sole basis to discard the evidence given by assessee to substantiate the LTCG claim. True, the suspicious rise/fall of share price of M/s KAFL raises doubt in the mind, but Hon'ble Supreme Court held that suspicion cannot take the place of evidence. And it is noted that when called upon by the AO to prove the claim of LTCG from the transaction of M/s KAFL, the assessee have filed the best evidence to prove the transaction in question viz, bills, contract notes, demat Statement and the bank accounts statements to prove the genuineness of the transaction relating in the purchase of M/s. Panchshul Marketing Ltd and thereafter sale of shares [after amalgamation] of M/s KAFL which resulted in LTCG claim of Rs.19,23,000/-. Therefore, by applying the test of preponderance of probability, the claim of LTCG cannot be disallowed without AO pointing out any infirmities in the evidences produced by assessee, which unfortunately AO could not point out. So the assessee's claim of LTCG need to be allowed. And the commission added to the tune of Rs.58,190/- also based on surmises & conjectures does not survive. So it is also ordered to be deleted.

**14.** In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 26/07/2023.

Sd/-

(BR BASKARAN)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 26/07/2023.  
Vijay Pal Singh, (Sr. PS)

Sd/-

(ABY T. VARKEY)

JUDICIAL MEMBER



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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai