

ITA No.1029/KOL/2017 (A.Y. 2013-2014)

&

ITA No. 558/KOL/2018 (A.Y. 2014-2015)

Saroj Baid

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'B' BENCH, KOLKATA**

**Before Shri Sanjay Garg, Jjudicial Member  
&  
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 1029/KOL/2017  
Assessment Year: 2013-2014  
&  
I.T.A. No. 558/KOL/2018  
Assessment Year: 2014-2015**

**Saroj Baid,.....Appellant  
3B, Lal Bazar Street, 5<sup>th</sup> Floor,  
Kolkata-700001  
[PAN: AEDPB3177Q]**

**-Vs.-**

**Income Tax Officer,.....Respondent  
Ward-36(3), Kolkata,  
Aayakar Bhawan Poorva,  
9<sup>th</sup> Floor, 110, Shanti Pally, Kolkata-700107**

**Appearances by:**

*Shri Amalesh Sadhu, Staff, appeared on behalf of the assessee*

*Shri P.P. Barman, Addl. CIT, Sr. D.R., appeared on behalf of the Revenue*

**Date of concluding the hearing : July 03, 2023**

**Date of pronouncing the order : September 14<sup>th</sup>, 2023**

**O R D E R**

**Per Dr. Manish Borad, Accountant Member:-**

The captioned appeal bearing ITA No. 1029/KOL/2017 and ITA 558/KOL/2018 at the instance

of assessee for assessment year 2013-14 and A.Y. 2014-15 are directed against the order of Id. Commissioner of Income Tax (Appeals)-10, Kolkata dated 30.03.2017 and 13.02.2018 are arising out of the order under section 143(3) of the Act dated 20.01.2016 and 07.12.2016 framed by Id. ITO, Ward-36(3), Kolkata. The grounds of appeal for A.Y. 2013-14 read as under:-

- (1) *Ld Income Tax Officer has erred in law as well in fact in treating long term capital gain of Rs. 68,87,029/- as bogus and added to the returned income of your appellant as unexplained case credit under section 68 of I T. Act, 1961.*
- (2) *Ld Income Tax Officer has erred in law as well as in fact in denying exemption under section 10(38) of I.T. Act 1961 for long term capital gain of Rs. 68,87,029/- earned by your appellant on sale of 26000 shares of NCL Research & Financial Services Ltd.*
- (3) *Ld. Income Tax Officer has erred in law as well in fact in denying conclusion on transaction of so called penny stocks without providing to your appellant any material evidence to the contrary on which he relied upon.*
- (4) *Ld. Income Tax Officer has failed to appreciate that prices of equity shares in stock exchange is guided by market forces without any direct of indirect involvement of anybody.*
- (5) *Ld. Income Tax Officer has failed to appreciate that when purchase and sale of shares were supported by proper contract notes, deliveries of shares were made through demat accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG.*
- (6) *Ld. Income Tax Officer has failed to appreciate that your appellant has produced and submitted all possible documents, information in connection with her purchase and sale of shares of NCL Research & Financial Services*

*Ltd. on which L.T.C.G. of Rs. 68,87,029/- has been earned . The whole transactions of purchase and sale of shares giving rise to long term capital gain has been duly explained by your appellant step by step and supported by adequate and reliable evidences. But without any rebuttal of evidences produced and filed, Ld. I.T.O. has made assessment on the basis of suspicious or surmise, Ld. I.T.O. has not brought any material on record to support his finding that there has been collusion / connivance between the broker and your appellant for introduction of unaccounted money .*

*(7) Ld. Income Tax Officer has failed to appreciate the fact that it is well settled law that assessment cannot be made on the basis of suspicious. The suspicious of Ld. I.T.O cannot clinch the transaction against assessee.*

*(8) That the decision of Hon'ble Delhi I T A T "B" Bench in the case of Win chadha vs CIT (International Taxation) in ITA no. 3088 & 3107/Del/2005 and Sumati Dayal us CIT (1995) 8U Taxman 89 of Hon'ble Supreme Court are not applicable in the present case of your appellant.*

*(9) Ld.CIT (Appeals) has erred is denying exemption of Long Term Capital gain u/s 10(38) of I.T. Act, 1961 using the circumstantial evidence and completely ignoring the documentary evidence produced by your appellant in regard to earning of long term capital gain without rebuttal of the same.*

*(10) Ld. CIT (Appeals) has erred in drawing the conclusion that reliance of materials placed by your appellant in A.O. record are in the nature of contention challenging criminal on civil liabilities in a court of law and have no relevance while dealing with process of adjudication of assessee tax liability i.e. assessment under Income Tax Act, 1961.*

*(11) Ld. CIT (Appeals) has erred in drawing conclusion that is a sensitive matter like his, ever a single clue or revelation can be of great importance. To reverse the order of the A.O. are this technical plea will amount to talking a lopsided view of the proceedings. The assesses contention and objectives in this behalf that the material available on record was not admissible as evidence and it cannot be relied on by the A.O. are devoid of any merit and are rejected outright.*

*(12) Ld C.I.T (Appeals) has failed to appreciate the judgment of Hon'ble I T.A T. 'C' Bench Kolkata in the case of (i) DCIT C.C.I Vs Sunita Khemka ITA no.714 to 718/kol/2011 (ii) Hon'ble I.T.A.T. 'D; bench Kolkata in the case of Shri Dolarrai vs ITO Wd. 34(3) Kolkata, ITA no 19/kol/2014 dtd. 02.12.2016. (iii) Hon'ble ITAT 'A' Bench Kolkata in the case of Surya Prakash Toshniwal (HUF) Ward 41(3) Kolkata. The above judgement is squarely effaceable in the present case of your appellant.*

*(13) Ld I.T O. has erred in law as well as in fact in addition a sum of Rs. 34,695/- for unexplained expenditure towards commission charged by the operators for L.T.C.G. without furnishing any material or evidence.*

*(14) Ld. I.T.O. has erred in law as well as in fact in disallowing under section 14A read with Rule 8D entire expenses claimed Rs. 1,32,294/- incurred for earning taxable income.*

*(15) Ld. I.T.O. has erred in law as well as in fact in adding back interest received Rs. 10,782/- from Indusind Bank as income from undisclosed source. Whereas your appellant has shown bank interest of Rs, 5,962/- in her Profit & Loss accounts for the year ending 31<sup>st</sup> March 2013. However Ld. C.I.T.(Appeals) has erred in totally denying the request of your appellant to restrict the addition for interest income to Rs. 4,820/- in place of Rs 10,782/-*

*(16) That Ld. I.T.O. has erred in law as well as in fact in charging interest u/s.234B and 234C of I T. Act. 1961.*

2. The grounds of appeal for A.Y. 2014-15 read as under:-

*(1) That the order of Ld. Commissioner of Income Tax (Appeals)-10 is arbitrary and bad in law.*

*(2) Whether on the facts and circumstances of the case, the Ld. CITA was justified in upholding the addition made by the Ld. A.O. u/s.68 of the Act in respect of sale proceeds of shares of NCL Research & Financial Services Ltd. treating the same as income from undisclosed sources after rejecting the assessee's claim of Long Term Capital Gains*

*(LTCG) on sale those shares under section 10(38) of I.T. Act, 1961.*

*(3) That Ld. C.I.T.(A) erred in confirming the order of A.O. who merely relied on the information from Directorate of Investigation, Kolkata without applying his own mind and without placing on record any adverse material /finding on the evidences/ explanations placed by your appellant before A.O..*

*(4) That Ld. C.I.T. (A) erred in law as well as in fact in confirming the disallowance made by Ld. A.O. in denying the benefit of Long Term Capital Gain under section 10(38) of I.T. Act,1961.*

*(5) That Ld. C.I.T.(A) erred in law as well as in fact in holding the long term capital gain on sale of shares as bogus.*

*(6)That Ld. C.I.T.(A) erred in law and failed to appreciate the different legal decisions of Hon'ble I.T.A.T. Kolkata, which are squarely applicable in the present case of your appellant.*

*(7) That Ld. C.I.T. (A) erred in law in disallowing the claim of your appellant on the basis of human probability and surrounding circumstances and fully ignoring the documentary evidences produced by your appellant at the time of hearing before him as well as before Ld. A.O. in support of his claim of exemption u/s,10(38) of I.T.Act,1961.*

*(8) Whether on the facts and circumstances of the case, the Ld C.LT(A) was justified in upholding the action of the Ld A.O. in treating the transactions in share of NCL Research & Financial Services Ltd. resulting in Long Term Capital Gain as bogus and thereupon making addition on the presumption that commission @ 5% was paid for arranging the aforesaid bogus Long Term Capital Gain.*

*(9) Whether on the facts and circumstances of the case Ld. C.I.T.(A) was justified in upholding the disallowance made by the Ld AO u/s. 14A read with rule 8D of the Act.*

3. The facts in brief for A.Y. 2013-14 are that the assessee is an individual, who filed her return of income on 27.07.2013 declaring income of Rs.7,50,440/-. In the said return, the assessee has claimed exemption under section 10(38) of the Act for long-term capital gain of Rs.69,42,776/- from sale of equity shares of NCL Research and Financial Services Limited. The case selected for scrutiny through CASS in AST module by valid serving of notices under section 143(2) and 142(1) of the Act. During the course of assessment proceedings, the ld. Assessing Officer observed that during F.Y. 2008-09 the assessee purchased 33800 equity shares of NCL Research and Financial Services Limited @ Rs.2/- per share and total purchase price was at Rs.67,600/-. During the year under consideration, the assessee sold 26,000 shares of NCL Research and Financial Services Limited for a consideration of Rs.69,39,029/- thereby earning long-term capital gain of Rs.68,87,029/-. Price increase was almost 13700%. The ld. Assessing Officer called for the details of financial statements of NCL Research and Financial Services Limited which indicated poor results not commensurate to the steep increase in price of equity shares. He also observed that name of this company appears in the list of 84 penny stock companies listed with Bombay Stock Exchange, which the Investigation Wing has found to be managed by unscrupulous brokers, entry operators and money launderers involved in providing bogus accommodation entries of long-term capital gain and short-term capital loss. The ld. Assessing Officer was of the considered view that the assessee has dealt with penny stock

company, the financial statement of which truly states that increase in the price of equity shares were not commensurate to the business activities being carried out and has thus LTCG claimed is bogus not eligible for exemption under section 10(38) of the Act and alleged receipt of sale consideration is liable to be added as unexplained cash credit under section 68 of the Act.

4. Further we notice that for A.Y. 2014-15, the assessee has claimed long-term capital gain exemption under section 10(38) of the Act at Rs.1,48,58,305/- from the sale of same company's share i.e. NCL Research and Financial Services Limited, which the ld. Assessing Officer has held to be a penny stock company and came to a conclusion that the assessee has managed to take bogus long-term capital gain. As a result, the ld. Assessing Officer made the addition for unexplained cash credit for the sale consideration received from sale of equity shares during A.Ys. 2013-14 and 2014-15 giving rise to alleged long-term capital gain. The assessee failed to get any relief from the ld. CIT(Appeals). Being aggrieved, the assessee is in appeals before the Tribunal.

5. During the course of hearing, only a staff of the assessee represented. In the past, almost more than 25 dates of hearing have been fixed but the case fixed for hearing was adjourned for one reason or another. These appeals were filed during 2017 and 2018 and are almost six years old. The staff person on behalf of

the assessee failed to submit any written submission on behalf of the assessee. We, however, notice that written submissions were filed on 11.03.2019 and 06.04.2021 and the same have been considered for the purpose of adjudication of the issues in appeals before us.

6. On the other hand, ld. D.R. stated that the issues raised in the instant appeals are squarely covered in favour of the assessee by the judgment of the Hon'ble jurisdictional High Court in the case of Swati Bajaj (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022.

7. We have heard the rival contentions and perused the relevant material placed before us. We notice that the issue with regard to unexplained cash credit for alleged bogus long-term capital gain under section 10(38) of the Act is in dispute before us. We notice that the alleged long-term capital gain has been earned by the assessee during the year under appeal from sale of equity shares of NCL Research and Financial Services Limited. This company is in the list of 84 companies, which has been found to be penny stock company. The assessee had made huge gain due to price increase, which was almost 13700% in comparison to the purchase price, but the increase in price of shares is not commensurate to the financials of the company as observed by the lower authorities.

8. It is also pertinent to observe that recently Hon'ble Jurisdictional High Court has examined the issue of bogus capital gain claim made by a large number of assesseees in Kolkata. This issue has been examined in the case of Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022. A large number of assesseees have claimed long-term capital gain/loss. The Income Tax Department has carried out search/survey upon different entities, which unearthed that certain companies and professionals were providing such claim in the shape of accommodation by manipulating the stocks of certain shell companies. The Hon'ble Court has made a detailed analysis of the material found during the course of search and survey on the premises of third entities and set aside the orders of the ITAT in a group of appeals by holding that such claim by the assesseees for long-term capital gain was a bogus claim.

9. The common issue raised before us is with regard to genuineness of the claim of exempt income under section 10(38) of the Act in respect of long-term capital gain arising sale of equity shares from the listed companies, which were found to be the penny stock companies by both the lower authorities and the long-term capital gain so claimed found to be bogus in nature. We find that recently this Tribunal has adjudicated the similar issue

under identical in the case of Shyam Sunder Bajaj in ITA No. 2552/KOL/2018 and others vide order dated 17<sup>th</sup> October, 2022 and after placing reliance on the judgment of Hon'ble Jurisdictional High Court in the case of *Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.)* pronounced on 14.06.2022, observed as under:-

*“4. All the present cases were selected for scrutiny u/s. 143(3) through CASS and the issue in all of them for selection relates to ‘suspicious long term capital gain on shares’. In all the above appeals, according to the ld. AO, LTCG reported by the assessee in respective return was bogus and the entire transactions were done with the objective to introduce unaccounted money of the assessee in the books by using the route of LTCG which was exempt from tax u/s 10(38) of the Act, except in one case, where the assessee has booked trading loss on transaction of shares of two Companies, which have been treated as penny stock. Thus, ld. AO held that the said LTCG/loss are fabricated/engineered transactions by the respective assessees, sale of which falls under the category of penny stocks and the same were treated as bogus which were added in the total income by treating it as unexplained cash credit u/s. 68 of the Act. Ld. AO based his decision of treating the impugned transaction of sale of shares as bogus transaction by relying on the report of Investigation Wing of the Department wherein the Investigation Wing of the Department had studied the modus operandi of rigging the prices of penny stocks and generation of capital gain /trading loss there from. On appeal, ld. CIT(A) confirmed the action of the ld. AO. Aggrieved, assessees are in appeal before the Tribunal.*

*5. Recently on 14.06.2022, the Hon'ble jurisdictional High Court of Calcutta passed a judgment in the case of Swati Bajaj and others [2022] 139 taxmann.com 352 (Cal) dealing with set of cases with similar fact patterns as narrated above for the present appeals under consideration before us. Hon'ble jurisdictional High Court by taking the report of the Directorate of Investigation of the Department as the basis, gave its observations and findings, which are summarized hereunder.*

*5.1. There are two category of cases dealt with by the Hon'ble High Court, viz. first category being those arising out of the order of Tribunal dated 26.06.2019 in which 90 appeals filed by the assessees were allowed and second category is of those cases where1 assessee has challenged the assumption of jurisdiction by*

*CIT under section 263 of the Act. In the present set of appeals before us, we are concerned with the first category whose relevant observations and findings by the Hon'ble High Court are noted below:*

*a) From the assessment order passed in the case of the assessee Smt. Swati Bajaj, we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy Director of Income Tax, Investigation Unit -II and III, Kolkata. [para 43]*

*b) The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such statements of violation of principles of natural justice the assessee have not made out any case. [para 65]*

*c) The test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted. [para 69]*

*d) Test of preponderance of probabilities have to be applied and while doing so, the court cannot loose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. [para 73]*

*e) The assessee was not named in the report and when the assessee makes the claim for exemption, the onus of proof is on the assessee to prove the genuinity. [para 73]*

f) *It is incorrect to argue that the assesseees have been called upon to prove the negative in fact, it is the assesseees duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. [para 73]*

g) *The assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assesseees had phenomenal and fanciful rise in price in a short span of time. [para 75]*

h) *The exercise that was required to be done by the Tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the 'players' can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the Tribunal which exercise has not been done. [para 99]*

i) *The assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee. [para 99]*

j) *The tribunal being the last fact finding authority was required to go deeper into the issue as the matter have manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "players" can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the tribunal which exercise has not been done. [para 99]*

k) *In such factual scenario, the Assessing Officers as well as the Commissioner (Appeals) have adopted an inferential process which is found to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the Commissioner (Appeals) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden*

*and steep rise of the price of the shares of the companies when the general market trend was admittedly recessive and thereafter arrived at a conclusion which is a proper conclusion. [para 99]*

*l) For all the above reasons, we hold that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer. [para 101]*

*m) In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed by the respective Assessing Orders as affirmed by the CIT(A). [para 102]*

6. *In the context of factual matrix of the present appeals before us narrated above, the position of law as enunciated by the Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj (supra) carrying force of binding nature on the issue under consideration for us, was confronted to the respective ld. Counsels of the assessee who appeared before us. Ld. Counsels were fair enough to state that issue involved in these appeals is squarely covered against the assessee by the said decision as the fact involved are identical to that which were before the Hon'ble High Court. For cases where none appeared before us on behalf of the assessee, the relevant factual matrix was captured with the assistance of Ld. Sr. DR / CIT DR (already narrated above). Since the matter is squarely covered by the decision of Hon'ble jurisdictional High Court of Calcutta in the case of Swati Bajaj & others (supra), we have taken up these also for adjudication ex parte, qua the assessee.*

7. *After hearing both the sides and taking into consideration the factual matrix of the cases before us vis-à-vis the decision of Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj & others (supra), we respectfully following the said decision carrying the force of binding nature, being the jurisdictional High Court, dismiss the appeals of the assessee and restore the order of the respective ld. AO as affirmed by the respective ld. CIT(A)".*

10. Since no binding precedence in favour of assessee is placed before us, we respectfully following the decision of this Tribunal dated 17.10.2022 as well as the judgment of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others

(supra) find no infirmity in the orders of the ld. CIT(Appeals) and, therefore, dismiss all the grounds raised by the assessee for A.Y. 2013-14 and A.Y. 2014-15.

**11. In the result, both the appeals of the assessee are dismissed.**

Order pronounced in the open Court on 14<sup>th</sup> September, 2023.

**Sd/-  
(Sanjay Garg)  
Judicial Member**

**Sd/-  
(Manish Borad)  
Accountant Member**

***Kolkata, the 14<sup>th</sup> day of September, 2023***

*Copies to :(1) Saroj Baid,  
3B, Lal Bazar Street, 5<sup>th</sup> Floor,  
Kolkata-700001*

*(2) Income Tax Officer,  
Ward-36(3), Kolkata,  
Aayakar Bhawan Poorva, 9<sup>th</sup> Floor,  
110, Shanti Pally, Kolkata-700107*

*(3) Commissioner of Income Tax (Appeals)-10,  
Kolkata;*

*(4) Commissioner of Income Tax- ;*

*(5) The Departmental Representative*

*(6) Guard File*

*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***