आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA No. 352/Hyd/2019**
(निर्धारण वर्ष / Assessment Year: 2015-16)

Sri Anirudh Venkata Ragi, Hyderabad [PAN No. AKRPA0182C]	Vs.	Income Tax Officer, Ward-4(2), Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri S. Rama Rao, AR
राजस्व द्वारा/Revenue by: Ms. Sheetal Sarin, DR

सुनवाई की तारीख/Date of hearing: 02/11/2023
घोषणा की तारीख/Pronouncement on: 21/11/2023

आदेश / **ORDER**

PER K. NARASIMHA CHARY, J.M:

Aggrieved by the order dated 07/01/2019 passed by the learned Commissioner of Income Tax (Appeals)-1, Hyderabad ("Ld. CIT(A)"), in the case of Sri Anirudh Venkata Ragi ("the assessee") for the assessment year 2015-16, assessee preferred this appeal.

2. Briefly stated relevant facts are that the assessee is an individual, and during the assessment year 2015-16 derived income from long term capital gains to the tune of Rs. 2,60,28,410/- on sale of shares of M/s. Life Line Drugs & Pharma Ltd., and filed his return of income on 28/03/2016 admitting an income of Rs. 5,21,200/- after claiming exemption under section 10(38) of the Income Tax Act, 1961 (for short "the Act"). Learned Assessing Officer on verification, found that the assessee purchased 1,50,000 shares of M/s. Life Line Drugs & Pharma Ltd., at Rs. 6/- per share and sold the same at Rs. 283/- per share in a span of 19 months. She, therefore, entertained the doubt. On verification, learned Assessing Officer found that there is a huge syndicate of entry operators, sharebrokers and money launders involved in providing bogus accommodation of long term capital gains and short term capital loss by large scale manipulation of market prices of shares of certain companies listed on the Bombay Stock Exchange (BSE), with the basic object to convert black money into white, without payment of any taxes thereon. She further recorded that the Securities and Exchange Board of India (SEBI) identified some manipulators of share market by considering inputs from the income tax department and its own surveillance system.

3. Learned Assessing Officer, therefore, basing on the investigation carried out by the department in respect of M/s. Life Line Drugs & Pharma Ltd., proposed to disallow the exemption under section 10(38) of the Act and to treat the long term capital gains as income from un-explained source. Assessee contended that he realized the long term capital gains by transfer of capital asset and, therefore, in terms of section 10(38) of the Act, he is entitled to claim exemption.

4. Learned Assessing Officer referred to the statement of one Shri Anuj Agarwal, Director of certain companies, who admitted to have provided accommodation of long term capital gains in respect of certain companies including M/s. Life Line Drugs & Pharma Ltd., and in the facts and circumstances of the case, raised presumption that the transaction was not genuine and the abnormal gain was not real, but bogus. Learned Assessing Officer placed reliance on many decisions of many fora, including the Hon'ble Apex Court in the case of Durga Prasad More vs. CIT and various High Courts to reach a conclusion that the entire long term capital gains earned by the assessee is not genuine. She, accordingly, by order dated 29/12/2007 passed under section 143(3) of the Act, brought the entire sale consideration of shares to tax.

5. Aggrieved by such an action of the learned Assessing Officer, assessee preferred appeal before the learned CIT(A) and contended that the learned Assessing Officer discussed the modus operandi adopted by the accommodation entry operators and made the addition on the basis of the statement recorded by DDIT(Inv.), Kolkata, but as a matter of fact, there was no allegation against the assessee to be the beneficiary of such accommodation entry operation. Assessee filed the income tax returns, annual accounts along with computation statement, scrip details and contract notes for the financial year 2014-15.

6. Learned CIT(A), however, on a consideration of the facts in the light of the submissions made by the assessee held that the assessee did not submit any details of STT payments nor did the assessee prove as to how the abnormal profits were made on sale of shares within a span of 19 months. Observing that no new submissions were made, learned CIT(A)

upheld the findings of the learned Assessing Officer and dismissed the appeal. Hence this appeal by the assessee.

7. It is contended on behalf of the assessee that the assessee utilized the funds for himself and did not remit the amount back showing that the assessee did not act on behalf of anybody to route the untaxed black money back to the main stream. He further submitted that the meaning of penny stock is relevant as what is penny stock is not defined under the Income Tax Act, and in the common parlance, the share which has no value would be called as penny stock, but insofar as shares purchased by the assessee are concerned they had value not only at the time of purchase and at the time of sale, but even after three years from the date of sale of shares, in the year 2015, the shares were quoted in the Stock Exchange at Rs. 134.40 per share. It is, therefore, not a penny stock and the observations made by the learned Assessing Officer are not applicable to the facts.

8. As far as the applicability of the provisions of Section 10(38) of the Act is concerned, he submitted that according to the provisions of section 10(38) of the Act, the income arising on transfer of shares being long term capital asset is exempt from tax, the shares were acquired by the assessee, and received physically constitute capital asset. In respect of applicability of the provisions of Section 45 of the Act, he submitted that any gains derived on transfer of capital asset, is assessable under the head “capital gain”. He, therefore, submitted that it cannot be said that the assessee did not hold the shares of Lifeline Drugs and Pharma Ltd. (presently Arihant Multi Commercial) therefore, the assessee was in possession of capital asset.

9. On the aspect of whether there is a transfer of shares which were listed in the recognized Stock Exchange, he argued that the shares were transferred through such recognized stock exchanges to the transferee, the sale consideration was received through bank, and, therefore, the transfer is complete in accordance with the provisions of Section 45 of the Act. His case is that the provisions of Section 45 of the Act, mentions clearly that the capital gain shall be the consideration received as reduced by the cost of acquisition of the capital asset and the capital gain is correctly worked out by the assessee. The assessee derived sale consideration of Rs.2,66,46,410/-, received through a media approved by the Central Government, and, therefore, the provisions of Section 10(38) of the Act come into play.

10. He further argued that there is no evidence with the learned Assessing Officer to reach a conclusion that the transaction is a bogus one inasmuch as the shares were allotted by the company, the transfer is made through Demat Account of the assessee and through the Stock Exchange, and the sale consideration was paid through cheque. Further, there was no bar at the relevant point of time on transfer of shares of the company and, therefore, there is no possibility to doubt the genuineness of the shares. He submitted that the share transactions taken place is real and correct. He assailed the veracity of the evidence with the learned Assessing Officer in the shape of a report said to have been received by the learned Assessing Officer from the Deputy Director of Income-Tax (Inv), Kolkata pursuant to the survey under section 133A of the Act at the premises of M/s. Corp Securities Ltd., on that ground that it is questionable. He vehemently contended that the transaction carried out by the assessee is

genuine and the learned Assessing Officer and the learned CIT (Appeals) are not correct in holding that the share transaction is not genuine.

11. He further submitted that the learned Assessing Officer and the learned CIT(A) presumed that the transactions entered into by the assessee also are not genuine, but this presumption is not justified as there is no iota of evidence to this effect with the learned Assessing Officer. Adverting to the presumption under section 114 of the Indian Evidence Act, he submitted that it has no application to the facts of the case, because firstly, the presumption as mentioned in Section 132(4A) goes against the department and there is no other provision under the Income Tax Act where the learned Assessing Officer is permitted to presume without direct evidence. In such circumstances, the presumption entertained by the learned Assessing Officer and the learned CIT(A) is not lawful. Lastly, he submitted that the investigations made by the Income-Tax Department can be used only to prevent the recurrence of the instances, but not to penalize the assessees, who have genuinely invested in the company based on the information provided by SEBI.

12. In support of his contentions, learned AR placed reliance on the decisions reported in PCIT vs. Indravadan Jain, HUF & Mrs. Sushma Nagraj, PCIT vs Parasben Kasturchand Kochar, (2021) 130 taxmann.com 177 (SC), Parasben Kochar vs. ITO, in ITA No.549/AHD/2018, Reshmi Sudhakaran Vs ITO, in ITA No. 353/CHNY/2018, Arun Kumar Goyal Vs ITO, in ITA No.2416/Hyd/2018, Pr. CIT Vs Jagat Paravindbhai (2022) 142 taxmann.com 247 (Gujarat) and Pr. CIT Vs Smt. Krishna Devi reported in 431 ITR 361.

13. Per contra, learned DR submitted that the assessee, when called for to prove the genuineness of the transaction in view of the surrounding suspicion attended by the abnormal returns on the sale of shares, failed to prove the same. Here it is not a case of doubting Thomas but based on the sound investigation made by the tax department and also the SEBI, basing on the revelations made by the Kolkata based company. The suspicion of the learned Assessing Officer is strengthened by the fact that the assessee is not a professional investor in shares and never before nor after this particular transaction, the assessee ever dealt with any share transaction. Assessee reaped such huge profits in the only and maiden transaction, but the strange thing is that he is not encouraged by this successful venture. He submitted that however, meticulous the paper work done by the assessee, the fact remains that the things are not fitting, in the common course of natural events, human conduct and public and private business, in their relation to the facts of this particular case.

14. In support of her contentions, learned DR relied on the decisions of Hon'ble Supreme Court in the cases of Suman Poddar, SLP No. 26864/2019, dated 22/11/2019 and SEBI vs. Rakhi Trading P. Ltd., Civil Appeal No. 1969 of 2011, M/s. Dilip Kumar and Company & ors. Civil Appeal No. 3327 of 2007, M. Pirai Choodi, 334 ITR 262; Suman Poddar in ITA No. 841/2019, dated 17/09/2019, Udit Kalra in ITA No. 220/2019 and CM No. 10774/2019 (Hon'ble Delhi High Court), Sanjay Bimal Chand Jain (89 taxmann.com 196) (Hon'ble High Court of Bombay), Smt. Tharakumari in ITA No. 128/2019 & CMP No. 3353/2019 (Hon'ble High Court of Madras); decisions of Co-ordinate Benches of the Tribunal in Suman Poddar in ITA No. 1006/Del/2019, Krishna Devi in ITA No. 6356/Del/2019,

dated 04/01/2022, M/s. Vidya Reddy in ITA No. 2016/Chny/2017, Pooja Ajmani (106 taxmann.com 65), Raj Kumar B. Agarwal & others in ITA Nos. 1648 to 1652/Pun/2015, Sanjay Bimal Chand Jain in ITA No. 61/Nag/2013, M/s. Pankaj Kumar Agarwal & sons (HUF) and other in ITA Nos. 1413 to 1420/Chny/2018, M/s. Shamim M. Bharwani (69 taxmann.com 65), Shri Abhimanyu Soin in ITA No. 951/Chd/2016, Udit Kalra in ITA No. 6717/Del/2017, Smt. M.K. Rajeshwari 99 taxmann.com 339, Shri Sanat Kumar vs. ACIT in ITA No.1881/Del./2018, for the assessment year 2014-15 by order dated 14.06.2019 and Anandtex international P.Ltd, Vs. ACIT in ITA No. 2476/Del/2018, for the assessment year 2013-14, by order dated 24/02/2022, Recommendations of SIT on Black Money as contained in the Third SIT report released by Press Information Bureau dated 24/07/2015.

15. We have gone through the record in the light of the submissions made on either side. First coming to the argument that the assessee did the transactions through the stock exchange and banking channels and verifiability of these transactions on paper, it was held that the meticulous paper working is not the be all and end all in proving the genuineness of the transaction. We find in the case of Shri Sanat Kumar (supra), a Co-ordinate Bench of the Tribunal observed that, the meticulous paper work of routing the transaction through banking channel is futile when the results are altogether beyond human probabilities. In that case also neither in the past nor in the subsequent years, assessee has indulged into any such investment having huge windfall. Tribunal opined that had the assessee been so intelligent qua the intricacies of the share market, he would have definitely undertaken such risk-taking activities in the past or

future by making such investment in unknown stock. Tribunal, therefore, held that it was a sham transaction to convert undisclosed income into disclosed by evading tax under the garb of LTCG in connivance with entry providers.

16. So also in the case of Anandtex international P.Ltd, (supra) a Co-ordinate Bench of the Delhi Tribunal, after referring to the decisions reported in the cases of PCIT vs. NRA Iron and Steel (P) Ltd (2019) for 12 ITR 161 (SC), PCIT vs. NDR Promoters Pvt. Ltd. (2019) for 10 ITR 379 (Delhi), CIT vs. NR Portfolio Private Limited (2014) 42 taxmann.com 339 (Delhi) and CIT vs. Nova Promoters & Finlease (P) Ltd. 18 taxmann.com 217 held that it is legitimate for the learned Assessing Officer to look into the issues like - whether the two parties are related or known to each other, or mode by which parties approached each other? whether the transaction is entered into through written documentation to protect investment? whether the investor was an angel investor? what is the quantum of money invested? how the party believed the credit-worthiness of the recipient? what is the object and purpose of payment/investment? whether the share applicant is in existence and an independent entity? how the financial capacity of the share applicant to invest funds is proved? how the source of funds from which the high share premium was invested is dealt with by the assessee? why the investor companies had applied for shares of the Assessee Company at a high premium? in case the field enquiry conducted by the AO revealed that the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee? whether the assessee discharged their legal obligation to prove the receipt of share

capital/premium to the satisfaction of the AO? whether the assessee discharged the onus to establish the credit worthiness of the investor companies? did the assessee do anything more than mere mention of the income tax file number of an investor to discharge the onus under Section 68 of the Act? did the assessee do anything more than mere filing all the primary evidence in discharge of their onus to prove the identity of the investee? etc. It, therefore, cannot be that if the assessee does the transaction through stock exchange and through banking channels, it does not mean that the matter stops there or that it does not require any further investigation.

17. It is an admitted fact that the assessee is an individual and according to the learned AR, he is the Director, VRA Constructions Pvt. Ltd. According to the assessee, purchase of the shares of M/s. Life Line Drugs & Pharma Ltd., is the only transaction which the assessee contracted. Never before nor subsequently, the assessee dealt with the purchase or sale of shares. Assessee purchased 1,50,000 shares of M/s. Life Line Drugs & Pharma Ltd., at Rs. 6/- per share and sold the same at Rs. 283/- per share, and derived a profit of Rs. 2,60,28,410/- within a span of 19 months. Admittedly, assessee is not a professional in dealing in shares. According to the learned DR, if the assessee derived such disproportionately high profits in the maiden transaction, it would be but natural for the assessee to do similar transaction subsequently also. But it is not the case here.

18. Assessment order clearly reads that the learned Assessing Officer was conscious of the fact that various enquiries conducted by the Income Tax Department unearthed a huge syndicate of entry operators, share brokers and money launderers involved in providing bogus

accommodation of long-term capital gains and short term capital loss. Learned Assessing Officer was conscious of the facts of SEBI conducting enquiries and identifying some of the issues of the manipulations of share market with the inputs given by their own surveillance system and also by the Income Tax Department. In the light of this knowledge in the public domain, the learned Assessing Officer entertained a reasonable doubt as to the nature of transaction and opined that unless otherwise proved, it could be a bogus one. The learned Assessing Officer called upon the assessee to dispel the doubt by issuance of notice adverting to all these facts and such a notice as is reproduced in the assessment order furnishes a lot of information including the information received from the DDIT(Inv.), Kolkata basing on the statement of one Shri Anuj Agarwal, one of the Board of Directors of M/s. Corp Securities etc., whereunder it was admitted about providing accommodation entries in respect of M/s. Life Line Drugs & Pharma Ltd., also.

19. Assessee adverted to what is a share, what is a capital asset, what amounts to transfer of capital asset and how the long term capital gains are derived and exemption could be claimed. Assessee never revealed the source of his information about this particulars M/s. Life Line Drugs & Pharma Ltd., or its prospects giving hope to him to invest amount in this by purchasing good amount of shares etc. Learned Assessing Officer in the assessment order dealt with the trading pattern of the scrips M/s. Life Line Drugs & Pharma Ltd., as stated in BSE and noted the unpredictably high rising of price, supporting the presumption that all is not fair and there is manipulation of this price. It is pertinent to note that SEBI has taken the

issue relating to the penny stocks being traded for bogus long term capital gains and the statement of Shri Anuj Agarwal is corroborating the same.

20. Having regard to these facts and circumstances, we are of the considered opinion that the facts involved in this case are similar to the facts involved in the case of PCIT vs. SwatiBajaj [2022] 139 taxmann.com 352 (Calcutta). In that case also, the assessees made investments in the shares of a company, sold said shares and claimed exemption on long term capital gains during relevant assessment year. Learned Assessing Officer received information from the Investigation Wing, and it was observed that the prices of some shares of penny stock companies which included the company, the shares of which the assessee dealt with, were artificially rigged to benefit shareholders through bogus claim of long term capital gain. During scrutiny, the learned Assessing Officer issued notice directing the assessee to submit details of these share and was directed to explain with evidence that the transaction where assessee earned long term capital gains, were genuine. The learned Assessing Officer on analyzing the investments made by the assessee noted that the shares were purchased for Rs. 1 lakh and when the investments in shares became eligible for long term capital gains, it was sold for Rs. 29 lakhs during the period when the general market trend was recessive. He, thus, opined that such shares matched all the features of companies which were providing bogus long term capital gains and made additions under section 68 of the Act by treating long term capital gains as 'un-accounted income' on ground that assessee invested in the shares to convert unaccounted cash under the guise of long term capital gains. On appeal, the learned CIT(A) upheld the additions made by the learned Assessing Officer and further held that

merely because a transaction was done through banking channel itself could not validate the genuinity of the transaction and the burden of proof was on assessee to prove genuineness of the claim. On second appeal, the Tribunal deleted the additions on the ground that the assessee had duly placed on record the relevant contract notes, share certificate(s), detailed corroborative documentary evidence indicating purchase/sale of shares through registered brokers by banking channel, demat statements.

21. When the Revenue preferred appeal, Hon'ble Calcutta High Court reviewed the entire case law on the aspect and held that in a situation where an assessee purchased shares of a particular company for Rs. 1 lakh and when investments in shares became eligible for long term capital gains, it was sold for Rs. 29 lakhs, learned Assessing Officer is justified in opining that shares of such particular company matched all features of companies which were providing bogus long term capital gains and made additions under section 68 of the Act by treating long term capital gains as 'un-accounted income'; and it is for the assessee to establish creditworthiness of companies and that rise of price of shares within a short period of time was genuine, genuineness could not be established merely on basis of documents like bank details, purchase/sale documents and detail of demat account. Hon'ble Court further held that in absence of satisfactory explanation by assessee, learned Assessing Officer was bound to make additions under section 68 of the Act.

22. For the sake of completeness and ready reference, we deem it just and necessary to reproduce the relevant observations made by the Hon'ble Court hereunder:

"49. An investigation is commenced when allegations crops up regarding tax evasion. The Income-tax department was nowhere in the picture when the assessees effected purchase of the shares and subsequently sold the shares well after the period of 12 months. It is only when the assessees, substantially in large numbers, made fanciful claims of LTCG, time had come to examine its genuinity of such claims. While on this issue, it would be relevant to take note of the decision of the Hon'ble Supreme Court in Ram Jethmalani (supra). The matter before the Hon'ble Supreme Court was in respect to transfer of monies and accumulation of monies which were unaccounted for by many individuals and legal entities in the country in foreign banks. The degree of control on such transactions by the states was explained by the Hon'ble Supreme Court in the following terms:

> *If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted for monies are generally an indication of that.*
>
> *These matters before us relate to issues of large sums of unaccounted for monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted for monies, as alleged by the Government of India itself is massive. The show-cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possible unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.*

… … …

58. Therefore, the assessees have to specifically point out as to how they were prejudiced on account of non-furnishing of the investigation report in its entirety, failure to produce the persons from whom the statements were recorded for being cross examined would cause prejudice to the assessee as nowhere in the report the

names of the assessees feature. The investigation report states that the investigation has not commenced from the individuals but it has commenced who had dealt with the penny stocks, concept of working backwards. This is a very significant factor to be remembered. Therefore, there has been absolute anonymity of the assessee in the process of investigation. The endeavour of the department is to examine the "modus operandi" adopted and in that process now seek to identify the assessees who have benefited on account of such "modus operandi". Therefore, considering the factual scenario no prejudice has been established to the assessee by not furnishing the investigation report in its entirety nor making the persons available for cross examination as admitted by the department in substantial number of cases the assessees have not been specifically indicted by those persons from whom statements have been recorded.

59. We are conscious of the fact that there may be exceptions however nothing has been brought before us to show that there was an exception in any of these appeals heard by us. In a few cases the assessee has been made known of the statement of the Director of the penny stock company or the stock broker, entry operator despite which those assessees could not make any headway. While on this issue, we need to consider as to whether and under what circumstances the right of cross examination can be demanded as a vested right. In Kishanlal Agarwalla (supra), the Hon'ble Division Bench of this Court pointed out that no natural justice requires that there should be a kind of formal cross examination as it is a procedural justice, governed by the rules and regulations. Further it was held that so long as the party charged has a fair and reasonable opportunity would receive, comment and criticize the evidence, statements or records on which the charges is being against him, the demand and tests of natural justice are satisfied.

… … …

65. Thus, the report submitted by the investigation department cannot be thrown out on the grounds urged on behalf of the assessees. The assesses have not been shown to be prejudiced on account of non- furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue, the statements do not indict the assessee. That apart, we have noted that the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the

report has been submitted recommending the same to be placed before the DGIT (investigation) of all the states of the country. It is thereafter the concerned assessing officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessees qua the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the assessing officers calling upon the assessee to explain the genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the some would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessees have miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessees have been issued notices under sections 143(2) and 142(1) of the Act they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the assessing officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the assessing officer in scrutiny assessment under section 143(3) of the Act. 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 before us by the learned standing counsel for the revenue, nothing prevented the assesses who are ably defended by Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessees have not made out any case.

… … …

69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, in our considered view the methodology adopted by the department cannot be faulted.

70. It was argued by Mr. Bagaria that in the decision in Balram Garg (supra), the decision in K.R. Ajmera (supra) has been overruled. To examine the correctness of the said submission, we have carefully gone through the findings rendered by the Hon'ble Supreme Court in paragraph 47 of the judgment in Balram Garg (supra) which reads as follows:

> *Lastly, we have given our anxious consideration to the judgments relied upon by the learned counsel of the Respondent viz. SEBI v. Kishore R. Ajmera [(2016) 6 SCC 368] and Dushyant N. Dalal vs. SEBI [(2017) 9 SCC 660]. Suffice it to hold that these cases are distinguishable on the facts of the present case, as the former is not a case of insider trading but that of Fradulent/Manipualtive Trade Practices; and the latter case relates to Interest Penalty rather than the subject matter at hand. Reliance placed on the case of Kishore R.*

> *Ajmera (supra) to show that presumption can be drawn on the basis of immediate and relevant facts is contrary to law already settled by this Court in the case of Chintalapati Srinivasa Raju (supra) where it is held that "a reasonable expectation to be in the know of things can only be based on reasonable inference drawn from foundational facts." It has further been held that merely because a person was related to the connected person cannot be itself be a foundational fact to draw an inference.*

… … …

73. It is very rare and difficult to get direct information or evidence with regard to the prior meeting of minds of the persons involved in the manipulative activities of price rigging and insider trading. We can draw a parallel in cases of adulteration of food stuff, more than often action is initiated under the relevant Act after the adulteration takes place, the users of adulterated products get affected etc. Therefore, a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we 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. The Income-tax department was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessees made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail for several reasons which we have set out in the proceedings paragraphs. To reiterate, the assessee we 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. Unfortunately, the assessees have been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assessees are lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise

in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. Thus, the assessees cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. It is incorrect to argue that the assessees have been called upon to prove the negative in fact, it is the assessees 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. The assesses cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assesses have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. The revenue had placed heavy reliance on the decision in MCDowell & Co. Ltd. to show that the claim of the assessee is not case of tax planning to be one of the tax avoidance by indulging in dubious methods. Mr. Bagaria had argued the rule in MCDowell & Co. Ltd. (supra) was considered in Azadi Bachao Andolan (supra) and Vodafone International Holdings (supra) and it is in the manner explained in these decisions the rule in McDowell & Co. Ltd. (supra) needs to be applied. From paragraph 138 onwards the Hon'ble Supreme Court considered in detail as to why McDowell and what it says and what it does not say. The argument of Mr. Bagaria would primarily rests on as to what would mean by a sham transaction as a legal one and it is pointed out that all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. Further by referring to the decision in Vodafone International Holdings (supra), it is submitted that the revenue cannot start with the question as to whether the transaction was a

tax deferment/avoidance but the revenue should apply the "look at" test to ascertain its true legal nature and that genuine strategic planning had not been abandoned. Further the revenue has to establish on the basis of facts and circumstances surrounding the transactions that the impugned transaction is a sham or tax avoidance. In this regard Mr. Bagaria also referred to the decision in the case of Hill Country Properties Ltd. (supra) and also the decision Duke of Westminster (supra).

74. In our considered view we need not travel thus far and wide to examine as to how and what is said and what is not said in McDowell & Co. Ltd. (supra) Mr. Soumen Bhattacharya referred to the decision for the simple reason, to point out that tax planning may be legitimate provided it is within the frame work of law as colourable devices cannot be part of tax planning which cannot be encouraged. Therefore what we are required to see is whether the claim made by the assesees before us are legitimate and whether there was any colourable devices adopted in the process and these colourable devices may or may not be directly but indirectly attributable to the assessee. Therefore, we need not labour much to examine as to how rule in McDowell & Co. Ltd. (supra) needs to be applied as we are required to examine the factual scenario from the cases on hand which appear to be quite unique not probably drawn the attention of the courts and the tribunal earlier.

75. While it may be true that M/s. SwatiBajaj, Mr. Girish Tigwani or other assessees who are before us could have been regular investors, investors could or could not have been privy to the information or modus adopted. In our considered view, what is important is that it is the assessee who has to prove the claim to be genuine in terms of section 68 of the Act. Therefore, 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 assessees had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.

… … …

90. At this juncture it would be relevant to take note of the decision of the High Court of Delhi in Suman Poddar (supra).which was affirmed by the Hon'ble Supreme Court in Suman Poddar (supra):-

The first, issue which has been raised by the assessee that it has not been confronted with the statements of various parties relied upon by the Assessing Officer. The assessee has also contended that opportunity of cross-examining those parties/persons was not provided to the assessee. According to the assessee, this resulted in the violation of the principles of natural justice and thus assessment should be held void ab intio. However,, in our opinion, not providing opportunity of cross-examination may be in the nature of irregularity which is curable but not an illegality leading to annulling of the assessment. Further, the ld. CIT(A) in para 4.1 of the impugned order has held that addition has not been made solely on the basis of the statement of those persons/parties. The relevant part of the order of Ld. CIT(A) is reproduced as under:

> *I have considered the submission of the appellant and observation of the AO made in the assessment order on the issue. The appellant has stated that it has not been allowed cross-examination of parties on the basis of whose statement, the addition has been made. On this issue it is observed from the assessment record that the AO has made the addition on the strength of independent analysis of the documents to arrive at the conclusion that the appellant has failed to prove genuineness of the transaction in respect of STCL as discussed above. Statements and other material found in the course of investigation has been used by him as a corroborative material to strengthen his findings. As per the requirements of section 68 of the Act, the AO has shifted the onus back on the appellant by confronting the adverse findings. Therefore, the appellant has failed to discharge the onus cast upon it u/s. 68 of the Act to explain the transaction. The Investigation Wing has conducted detailed enquiries, made analysis of the seized/impounded documents and made analysis of beneficiaries. The report prepared contains details of complete modus operandi , commission charge against accommodation entries, list of conduit companies, list of their bank accounts in the name of conduits. The said list contains names of companies in which the appellant dealt. Therefore, the findings in the case of Investigation Wing corroborate the independent findings of the AO. Therefore, the AO was not required to allow the appellant the opportunity to cross-examine.*
>
> *The Tribunal in the case of Ram Nilwas Gupta, Dehradun v. DCIT, Dehradun on 6th February, 2019 in ITA No. 4881 to*

4883/Del/2016 (Assessment Years: 2010-11, 2012-13 and 2013-14), after considering various decisions of the Hon'ble Supreme Court, including the decision in the case Andaman Timbers Industries vs. Commissioner of Central Excise, Kolkata-II reported in MANU/SC/1250/2015: 2015 (324) E.L.T. 641 (SC), 2017 (50) S.T.R. 93 (SC), 2016 (15) SCC 785 has held as under:

In our opinion right to cross-examine the witness who made adverse report is not an invariable attribute of the requirement of the dictum, "audi alteram partem". The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules f evidence, and is the creation of Court, It is a part of legal and statutory justice therefore it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.

However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature.

We find that the Assessing Officer in the assessment order has referred to the general modus operandi of the bogus accommodation entry and thereafter, he has further referred to statement of the parties who has provided accommodation entry through managing and controlling the shares of the companies, in which the assessee has also transacted. The Assessing Officer thereafter asked the assessee to justify the rationale behind investment in these penny stock companies not having financial worth, however, the assessee failed to justify the same. The Assessing Officer provided as why the investment in the shares transacted by the assessee was not justified in view of the comparison of the other shares available. The Assessing Officer also pointed out the price fluctuation in the shares of the companies over a period, dividend history and other financial parameters to

> *substantiate that there was no term capital loss against receipt of cash money. The Ld. Assessing Officer accordingly concluded that the addition was made on the basis of the material available on record, the surrounding circumstances, the human conduct and preponderance of probabilities.*

In view of the above facts and circumstances and in law, we find that in instant case addition in dispute is not solely on the basis of the statement of persons and the Assessing Officer has relied on other materials. The statements of the persons who controlled the business of providing accommodation entry have been corroborated with the material, surround circumstances and preponderance of probability. We accordingly uphold the finding of the CIT(A) on that issue in dispute. The relevant grounds of the appeal of the assessee are accordingly rejected.

After describing the general modus operandi of accommodation entry by way of bogus capital gain/loss, the Assessing Officer has highlighted the statement of the persons who claimed to have provided bogus capital gain/loss entries. The assessee was then asked to justify the investment in the relevant shares. The Assessing Officer has pointed out that these companies are not having any significant/real business as seen from the financial statement of those companies. The price movement of the shares was also found to be unrealistic by him. The Assessing Officer has particularly pointed out that price movement of the relevant transacted by the assessee, were not matching with movement of the share market in general and movement of the other scrips in the same line of the business. The Assessing Officer also pointed out that volume transacted in those companies. The ld. Assessing Officer has pointed out that the assessee could not explain, why it invested in such script without knowing the financial performance of the company. The relevant analysis has been reproduced by the Assessing Officer in Para 3.4 (page 1 J.) of the assessment order. The conclusion of AO has already been reproduced by us in brief facts of the case.

The Hon'ble Delhi High Court in the case of Suman Poddar (supra), observed that shares of Cressanda Solutions Ltd. Have been identified by the Bombay Stock Exchange as penny stock used for obtaining bogus Long Term Capital Gain and no evidence of actual sale except contract notes issued by the share broker were produced by the assessee. The Hon'ble High Court accordingly dismissed the appeal of the assessee as no substantial question of law involved.

Thus, Tribunal has in depth analyzed balance sheets and profit and loss accounts of Cressanda Solution is Ltd. Which shows that astronomical increase in share price of said company which led to returns of 491 % for Appellant, was completely unjustified. Pertinently, EPS of said company was Rs. 0.01/- as in March 2016, it was Rs. 0.01/- as in March 2015 and -0.48/- as in March 2014. Similarly other financial parameters of said company cannot justify price in excess of Rs. 500/- at which Appellant claims to have sold said shares to obtain Long Term Capital Gains. It is not explained as to why anyone would purchase said shares at such high price.

Tribunal goes on to observe in impugned order as follows:

> *With such financials an affairs of business, purchase of share of face value Rs. 10/- at rate of Rs. 491/- by any person and assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make decision of judicial authorities fallacy.*
>
> *Evidences put forth by Revenue regarding entry operation fairly leads to conclusion that assessee is one of beneficiaries of accommodation entry receipts in form of long term capital gains assessee has failed to prove that share transactions are genuine and could not furnish evidences regarding sale of shares except copies of contract notes, cheques received against overwhelming evidences collected by Revenue regarding operation of entire affairs of assessee. This cannot be case of intelligent investment or simple and straight case of tax planning to gain benefit of long term capital gains earnings @ 491% over period of 5 months is beyond human probability and defies business logic of any business enterprises dealing with share transactions net worth of company is not known to assesses. Even brokers who coordinated transactions were also unknown to assessee. All these facts give credence to unreliability of entire transaction of shares giving rise to such capital gains ratio laid down by Hon'ble Supreme Court in case of Sumati Dayal v. CIT case. Though assessee has received amounts by way of account payee cheques, transactions cannot be treated as genuine in presence of overwhelming evidences put forward by Revenue fact that in spite of earning such steep profits assessee never ventured to involve himself in any other transaction which broker cannot be mere coincidence of lack of interest. Reliance is place on judgment in case of Nipun Builders and Developers*

Pvt. Ltd. (supra) where it was held that it is duty of Tribunal to scratch surface and probe documentary evidence in depth, in light of conduct of assessee and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not in case of NR Portfolio, obtrusive. Similarly bank statements provided by assessee to prove genuineness of transaction cannot be considered in view of judgment of Hon'ble Court in case of Pratham Telecom India Pvt. Ltd. Wherein it was stated that bank statement is not sufficient enough to discharge burden. Regarding failure to accord opportunity of cross examination, we rely on judgment of Prem Castings Pvt. Ltd. Similarly tribunal in case of Udit Kalra ITA No. 6717/Del/2017 for assessment year 2014-15 has categorically held that when there was specific confirmation with Revenue that assessee has indulged in ITA 841/2019 page 8 of 10 non-genuine and bogus capital gains obtained from transactions of purchase and sale of shares, it can be good reason to treat transactions as bogus difference of case of Udit Kalra attempted by Ld. AR does not add any credence to justify transactions. Investigation Wing has also conducted enquires which proved that assessee is also one of beneficiaries of transactions and entries provided, Even BSE listed this company as being used for generating bogus LTCG. On facts of case and judicial pronouncements will give rise to only conclusion that entire activities of assessee is colourable device to obtain bogus capital gains. Hon'ble High Court of Delhi in case of Udit Kalra ITA No. 220/2009 held that company had meagre resources and astronomical growth of value of company's shares only excited suspicion of Revenue and hence, treated receipts of sale of shares to be bogus. Hon'ble High Court has also dealt with arguments of assessee that he was denied right of cross examination of individuals whose statements led to enquiry. Ld. AR arguments that no question of law has been framed in case of Udit Kalra also does not make any tangible difference to decision of this Case, Since additions have been confirmed based on enquiries by Revenue, taking into consideration ratio laid down by various High Courts and Hon'ble Supreme Court, our decision is equally applicable to receipts obtained from all three entities. Further, reliance is also placed on orders of various Courts and Tribunals listed below. MK Rajeshwari v. ITO in ITA No. 17231 Bang/2018, order dated 12-10-2018.

> *Abhimanyu Soin v. Sanjay Bimalchand Jain v. ITO 89 taxmann.com 196. Dinesh Kumar Khandelwal, HUF v. ITO in ITA No. 58 & 591 Nag/2015, order dated 24-8-2016. Ratnakar M Pujari v. ITO in IT no. 995/Mum/2012, order dated 3-8-2016. ITA 841/2019 page 9 of 10 Disha N. Lalwani v. ITO in ITA No. 6389/Mum/2012, order dated 22-3-2017. ITO v. Shamin M. Bharwani MANU/IU/0493/2015: [2016] 69 taxmann.com 65. Usha Chandresh Shah v. ITO in ITA No. 6858/Mum/2011, order dated 26-9-2014, CIT v. Smt. Jasvinder Kaur MANU/GH/0241/2013: 357 ITR 638*
>
> *Facts as well as rationale given by Hon'ble High Court are squarely applicable to case before us. Hence, keeping in view overall facts and circumstances of case that profits earned by assessee are part of major scheme of accommodation entries and keeping in view ratio of judgments quoted above, we, hereby decline to interfere in order of ld. CIT(A).”*

23. Above observations of the Hon’ble High Court answer all the queries and contentions raised on behalf of the assessee. Here in this case also, no doubt assessee has meticulously completed the paperwork by routing his entire investment through banking channel, but the results thereof are altogether beyond the pale of common course of natural events, human conduct and public and private business. It is pertinent to note that neither in the past nor in the subsequent years, assessee engaged into any such investment to have a huge windfall. If the assessee been so informative qua the nuances of the share market, he would have certainly undertaken such adventurous activities at least in future by making such investment in the unknown stock. We are, therefore, of the considered view that what is apparent is not real and what is real is not made to appear. Investment in unknown stock by the assessee is not real and all the paper work and routing money through banking channels is only to make it real or legal, but when examined, the whole transaction of

sale and purchase of the stock with huge windfall to the assessee is only a part of the larger picture.

24. For the above reasons, we concur with the findings of the learned Assessing Officer and while upholding the same, we find the grounds of appeal devoid of any merits and are liable to be dismissed. Action of the learned CIT(A) is accordingly approved. Grounds of appeal are accordingly dismissed.

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

Order pronounced in the open court on this the 21st day of November, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad,
Dated: 21/11/2023

TNMM

Copy forwarded to:

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2. Income Tax Officer, Ward-4(2), Hyderabad.
3. Pr.CIT-1, Hyderabad.
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