

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.2513/Mum/2023

(A.Y: 2013-14)

Amarjit Kaur Surinder Singh Kochhar, 4, Plot No.667, 4 th Floor Satguru Sundari, Dr. Ambedkar Road, Khar (W), Mumbai-400052.	Vs.	ITO Ward-12(1)(1), Aayakar Bhawan, M.K.Road, Mumbai-400020.
PAN/GIR No. : AGSPK6461F		
Appellant	..	Respondent

Assessee by :	ShriManiJain&ShriPrateekJain.AR
Revenue by :	Shri.G.J.Ninawe. Sr.DR

Date of Hearing	02.11.2023
Date of Pronouncement	22.01.2024

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the National Faceless Appeal Centre(NFAC), Delhi / CIT(A) passed u/sec 143(3) r.w.s 147 and U/sec 250 of the Ac. The assessee has raised the following grounds of appeal:

- 1) *On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of ld. AO in reopening the impugned assessment proceedings by issue of notice u/s 148 which is without jurisdiction and bad in law.*

2. On the facts and circumstances of the case and in law, Ld. AO erred in issuing notice u/s 148 without proper sanction under section 151 of the Act.

3. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of ld. AO in holding that the appellant had entered into accommodation entry transaction in the form of bogus long term capital gain which was claimed as exempt u/s 10(38) of the Act, for the reasons mentioned in the impugned order or otherwise.

4. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of ld. AO in making addition of Rs. 13,07,250/- on account of sale value of shares of M/s. Access Global Limited, treating the same as unexplained cash credit by invoking provisions of section 68 of th Income Tax Act, 1961, for the reasons mentioned in the impugned order otherwise.

5 On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of IdAO making in making addition of Rs39,171/- as commission @3% being paid on alleged bogus share sale transaction by invoking the provisions of section 69C of the Act, for the reasons mentioned in the impugned order or otherwise.

6. On the facts and circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming the action of the ld. AO in not providing the opportunity of cross examination, violating the principles of natural justice

7 The appellant craves leaves to alter, amend, withdraw or substitute any ground or grounds or to add any new ground or grounds of appeal on or before the hearing

The appellant prays this Hon'ble Tribunal to delete the disallowance made by the ld.AO, which is confirmed by the ld CIT(A).

2. The brief facts of the case that, the assessee has filed the return of income for the A.Y 2013-14 on 16.11.2013 disclosing a total income of Rs.13,76,010/- and the return of income was processed u/s 143(1) of the Act. The Assessing Officer (AO) has received information from Kolkata Investigation Wing and after recording the reasons for reopening has issued notice u/s 148 of the Act. In compliance to notice, the assessee has filed the return of income for the A.Y 2013-14 on 18.07.2017. Subsequently, notice u/sec 143(2) and 142(1) of the Act were issued. In compliance to notice, the Ld. AR of the assessee appeared from time to time, furnished the details and the case was discussed. On perusal of the financial statements, the Assessing Officer found that the assessee has disclosed the income from salary, income from house property, business income, short term capital gains and income from other sources. Further the assessee has disclosed and claimed the exemption U/sec10(38) of the Act being long term capital gains on sale of shares of Rs.12,54,207/- and called for the information. The AO on verification of the financial statements found that found that the assessee has

earned long term capital gains on sale of shares of M/s Access Global Ltd and the assessee was asked to produce the details of purchase of shares, mode of payment and relevant supporting evidences. Whereas the assessee has purchased 300 shares of Rs.10/- paid up each of M/s Sea view Suppliers Ltd at Rs.484/- per share from M/s. Kalimata Tradecom Pvt Ltd through cheque on 24-08-2011 for Rs.1,45,200/- as per the purchase invoice bill. Subsequently the M/s Sea view Suppliers Ltd shares were amalgamated with M/s Access Global Ltd as per the decision of the Hon'ble High Cour of Calcutta order dated 15.11.2011. Since the M/s Seaview Suppliers Ltd was amalgamated, the assessee was allotted shares in the ratio of 1:47 shares of M/s Access Global Ltd and the assessee was allotted 14,100 shares of Access Global Limited. During the financial year 2012-13, the assessee has sold 5000 shares of M/S Access Global Ltd for Rs 13,07,250/- and earned Long Term Capital Gains (LTCG) of Rs.12,55,750/- and claimed exemption U/sec10(38) of the Act.

3. The AO has dealt on the purchase confirmation, sale contract notes, bank statement and demat account, statements in respect of shares purchase and relied on the

modus operandi, report of the Kolkata Investigation Wing, statements recorded in the survey operations U/sec133A of the Act on the share brokers and has doubted the earning of long term capital gains on shares. Further the AO find that there is no correlation of price rise and the financial/fundamental statements of the company. Finally the AO was not satisfied with the explanations and material information and observed that the transactions are not genuine and made addition of sale proceeds u/sec 68 of the Act of Rs.13,05,707/-and estimated commission expenditure u/sec 69C of the Act @ 3% of the sale value which worked out to Rs.39,171/- and assessed the total income of Rs.27,22,430/-and passed the order u/s 143(3)r.w.s147 of the Act dated 14.12.2017.

4. Aggrieved by the order, the assessee has filed an appeal with the CIT(A), whereas the CIT(A) has considered the grounds of appeal, submissions of the assessee, findings of the AO and in respect of addition u/s 68 & U/sec69C of the Act, the CIT(A) has confirmed the action of the AO and dismissed the assessee appeal. Aggrieved by the order of the CIT(A), the assessee has filed appeal with the Hon'ble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in sustaining the addition overlooking the facts and submissions that the purchase of shares are genuine through banking channels and the assessee has substantiated with various details referred in the assessment order and the CIT(A) order. Further there is no scope for the AO to make the additions based on the surmises and conjectures as the assessee has filed the voluminous documentary evidence in support of the claim. The Ld. AR explained the reasons for purchase of the shares and the amalgamation with the approval of the Hon'ble High Court of Calcutta. The Ld. AR mentioned that the AO has only relied on the investigation report and no independent enquiry conducted. The Ld.AR substantiated the submissions with the synopsis, factual paper book and the judicial decisions and prayed for allowing the appeal. Contra, the Ld.DR mentioned that the transactions are not genuine and relied on the order of the CIT(A).

6. Heard the rival submissions and perused the material on record. The sole matrix of the disputed issue is that the CIT(A) has sustained the additions u/sec 68 in respect of sale of shares and u/sec 69 in respect of estimated commission expenditure overlooking the material

information and evidences filed in the course of the assessment proceedings and appellate proceedings. The Ld. AR submitted that the assessee has furnished the information with evidences of purchase price, financial statements and summary of shares sold in F.Y 2012-13, ledger account copy, copies of bank account statement, copy of the contract note and sale of the shares, demat account statement and copy of physical share certificate. The Ld. AR contentions are that the assessee has purchased 300 shares of Rs.10/- paid up each of M/s Sea view Suppliers Ltd at Rs.484/- per share from M/s. Kalimata Tradecom Pvt Ltd through cheque on 24-08-2011 for Rs.1,45,200/- as per the purchase invoice bill. Subsequently the M/s Sea view Suppliers Ltd shares were amalgamated with M/s Access Global Ltd as per the decision of the Hon'ble High Cour of Calcutta order dated 15.11.2011. Since the M/s Seaview Suppliers Ltd was amalgamated, the assessee was allotted shares in the ratio of 1:47 shares of M/s Access Global Ltd and the assessee was allotted 14,100 shares of Access Global Limited. During the financial year 2012-13, the assessee has sold 5000 shares of M/S Access Global Ltd for Rs 13,07,250/- and earned Long Term Capital Gains (LTCG) of

Rs.12,55,750/- and claimed exemption U/sec10(38) of the Act. The assessee has sold the shares in the financial year 2012-13 through a registered broker. The Ld. AR demonstrated in support of shares, sale bills/contract notes, securitization tax paid at page 26 and 27 of the paper book. The Ld. AR also referred to the share purchase bills at page 5 of the paper book in F.Y 2011-12 to justify the genuineness of the purchases, sales and the long term capital gains as the assessee has sold the shares through recognized stock exchange where the STT has been paid in respect of listed shares and Ld.AR demonstrated the sales cum contract notes, copy of the bank statement reflecting the payment for purchase of shares at page 6&7 and also the bank statement at page 28 & 30 reflecting the receipt of sale value. The Ld. AR submitted that the assessee is actively trading in shares and the shares were purchased through the broker and the shares were listed on CSE and assessee has sold the shares subject to securitization Tax and the Ld. AR emphasized that the assessee is only investor and not in any price rigging of shares and no enquiry was conducted by the SEBI or BSE on the assessee and the Ld.AR relied on the submissions and judicial decisions filed before the lower authorities.

7. Whereas the facts and circumstances of the present case are similar and identical pertains to the A.Y 2013-14 in respect of sale of shares of M/s Access Global Ltd, dealt by the Hon'ble Tribunal in Shi Jatinder Kumar Jain Vs ITO in ITA No.338/Chd/2018 A.Y 2013-14 dated 14.06.2022 and granted relief observing at Page16 Para 6 to 7 of the order read as under:

“ 6.0 We have heard the rival submissions and have also perused the material on record. We have also gone through the assessment order as well as the order passed by the Ld. CIT (A) and the various judgments which have been relied upon by both the parties in support of their contentions.

6.1 At the very outset, we would like to observe that when the AO raised a query requiring the assessee to establish the genuineness of the impugned Long Term Capital Gains, the assessee had furnished documentary evidences which included copies of Contract Notes, Demat Account, details of share transactions with Shri Ashok Kumar Kayan, Contract Notes giving details like Trade number, Trade time, Contract Note number, Settlement number, details of Service Tax payment, STT paid and the brokerage paid to the broker. It was also demonstrated by the assessee that the purchase of shares for an amount of Rs. 8,22,800/- had been made through cheque in June, 2011. The assessee had also demonstrated that, subsequently, the sale proceeds from the shares of M/s. Access Global Limited were received again through banking channels. Apart from this, the assessee had also filed the judgment of the Hon'ble High Court of Kolkata ordering amalgamation of three

companies viz. M/s. Maple Goods Limited, M/s. Seaview Supplier Limited and M/s. Matrix Barter Private Limited as a consequence to which the assessee was allotted 7900 shares of M/s. Access Global Limited. The assessee had also furnished a copy of letter addressed to the assessee by M/s. Maple Goods Limited which showed the distinctive number of shares allotted to the assessee along with the Certificate number and the share folio number. All these documents have, apparently, been accepted by the lower authorities in as much as neither the AO nor the Ld. CIT (A) has pointed out any defect in these documents. A perusal of the orders of both the lower authorities would show that nowhere have the lower authorities cast any doubt on the genuineness of these documents. The only reason for not accepting the assessee's claim of having earned Long Term Capital Gain is on the basis of the statement of Shri Harshvardhan Kayan and also of two more persons viz. Shri Nand Jain and Shri Suresh Khemka.

6.2 We have also gone through the statement of Shri Harshvardhan Kayan and it is palpable that nowhere in the statement, Shri Harshvardhan Kayan has made any reference to the name of the assessee. Even in the statements of Shri Nand Jain and Shri Suresh Khemka there has been a passing reference of the name of the company M/s. Access Global Limited but there is no specific mention of the name of the assessee. It is also noteworthy that the statement of Shri Harshvardhan Kayan was recorded at the back of the assessee and only a copy of the statement was supplied to the assessee along with show cause notice issued by the AO but even after the assessee had made repeated requests for opportunity to cross examine Shri Harshvardhan Kayan, this request could not be acceded to. It is also a case in point that nowhere any statement of Shri Ashok Kumar Kayan has been recorded, with whom the assessee was having the dealings and instead 11 the statement of Shri Harshvardhan Kayan has been relied

upon by the lower authorities even when it was the assessee's submission before them that he had no dealings whatsoever with Shri Harshvardhan Kayan. The Ld. A/R has also rightly pointed out that the statement of Shri Harshvardhan Kayan was recorded under section 133A of the Act and not under section 131 and as such it was a statement which was not administered under oath and, therefore, the same did not have any evidentiary value in the face of the assessee denying any dealings with Shri Harshvardhan Kayan and also in the face of assessee providing voluminous evidences in support of the assessee's claim of having earned Long Term Capital Gains.

6.3 It is also to be noted that the AO had recorded the statement of the assessee during the course of assessment proceedings (this statement has also been reproduced by the AO in the assessment order) and in the said statement, the assessee has sought to explain in detail the sale and purchase of the shares, the same has been rejected only on the basis of statement of Shri Harshvardhan Kayan. Thus, in effect, although the assessee has furnished documentary evidences in support of his contention of having earned Long Term Capital Gains and has also in the statement recorded during the course of assessment proceedings, explained in detail, how the Long Term Capital Gains came to be earned by the assessee, first the AO and later the Ld. CIT (A) completely discarded the submissions of the assessee merely on the basis of preponderance of probability as well as on the basis of the statement of Shri Harshvardhan Kayan with whom the assessee had no dealings whatsoever and whose statement had been recorded behind the back of the assessee and who was not made available for cross examination by the assessee even when there were repeated requests by the assessee to do so. Thus, conspectus of the entire factual matrix would show that the Department acted firstly on the report of the Investigation Wing, secondly on the statement of Shri

Harshvardhan Kayan and thirdly on the surmise that it was highly unlikely and improbable that the assessee could have earned such huge amount of Long Term Capital Gain.

6.4 We have also gone through the report of the Investigation Wing and undoubtedly the name of Shri Ashok Kumar Kayan appears at serial no. 20 and it has been indicated in this report that this person was actively involved in Long Term Capital Gain scam. It is also seen that in reply to question no. 7, Shri Harshvardhan Kayan had stated in the statement recorded that he and his father Shri Ashok Kumar Kayan were engaged in providing Long Term Capital Gain/Loss entry through trading of different scrips by different 'JamaKharchi' companies through their broking companies M/s. Kayan Securities Pvt. Ltd and M/s. Ashok Kumar Kayan. Further, in the list of names pertaining to scrips in CStar of Kolkata Stock Exchange, the name of the company M/s. Access Global Limited is also mentioned. However, the name of the assessee does not appear anywhere and the AO has simply proceeded to assume that since Shri Ashok Kumar Kayan's name was in the list of entry operators providing entries relating to Long Term Capital Gain/Loss and, further, since the name of M/s. Access Global Limited figured in the list of scrips traded on platform C-Star of Kolkata Stock Exchange and, further, since the assessee had dealings with Shri Ashok Kumar Kayan and the assessee had sold shares of M/s. Access Global Limited, it was indicative that the assessee had earned bogus Long Term Capital Gains. However, in our considered view, suspicion howsoever strong cannot take substitute of facts.

6.5 The assessee has demonstrated with substantial evidences before the AO that the actual purchase and sale of the shares took place, such shares had distinctive numbers, the transactions were routed through the normal banking channels and the shares had been allotted to the assessee subsequently under an order of amalgamation/merger by the judgment of

Hon'ble High Court of Kolkata and, therefore, mere reliance on the report of Investigation Wing and statement of Shri Harshvardhan Kayan which do not even mention the name of the assessee, in our considered opinion cannot be upheld.

6.6 It is also our observation that when the AO had received the report of the Investigation Wing, he ought to have conducted independent enquiry to examine and verify the involvement of the assessee in the allegedly bogus Long Term Capital Gain claim rather than simply and blindly following the report of the Investigation Wing and the statement of Shri Harshvardhan Kayan to make a case against the assessee. A perusal of the assessment order would show that no independent enquiry had been conducted by the 12 AO and he has not even negated the evidences furnished by the assessee by producing counter evidence but has simply dismissed the assessee's explanation simply on the basis of the said investigation report and the statement of Shri Harshvardhan Kayan.

6.7 The Hon'ble High Court of Delhi in the case of CIT vs. Finvest Limited reported in 357 ITR 146 (Delhi) has held that when the assessee had filed documents including certified copies issued by the Registrar of Companies in relation to share application, affidavits of the Directors, Form 2 filed with the Registrar of Companies, confirmations by the applicant for company's shares, certificates by the Auditors etc. but even then when the AO choose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of one Shri Mahesh Garg, such inferences would be improper when the assessee had produced the relevant material. The Hon'ble Delhi High Court went on to observe that at least the AO ought to have enquired into the matter, if necessary, by invoking powers under section 131 of the Act but no effort was made in this regard and, therefore, in absence of any such finding that the material disclosed was

untrustworthy or lacked credibility, the AO merely concluded on the basis of the investigation report to make the addition under section 68 of the Act which was unsustainable in the eyes of law. In the present case it is apparent that the AO has not made any enquiry and the entire assessment order as well as the order of the Ld. First Appellate Authority is devoid of fact of any such enquiry, but the lower authorities have heavily relied upon the report of Investigation Wing wherein M/s. Access Global Limited has been allegedly identified as one of the penny stock company whose share prices had been artificially rigged to create non genuine Long Term Capital Gain. However, the AO failed to bring on record any part of the said report wherein the name of the assessee has ever been named or implicated. At the cost of repetition, we once again reiterate that the lower authorities have failed to bring on record any evidence to prove that the transactions carried out by the assessee were not genuine or that these documents furnished in support of the claim of the assessee were not authentic. It would also not out of place to mention that no specific enquiry or investigation was conducted by the Department in the case of Shri Ashok Kumar Kayan which would lend some credence to the theory which has been advanced by the Department. Therefore, in our considered opinion, the lower authorities had merely acted on surmises and conjectures and had delved on the theory of preponderance of probability even in the face of documentary evidences which were not negated as being false.

6.8 The Hon'ble Jurisdictional High Court i.e. High Court of Punjab and Haryana in the case of Daulat Ram Rawatmull (supra) had held that documentary evidences cannot be brushed aside merely on suspicion. This judgment of the Hon'ble Punjab and Haryana High Court was further upheld by the Hon'ble Apex Court.

6.9 The Department has relied on numerous decisions of the Coordinate Bench as well as of the Hon'ble Delhi High Court in the case of Udit Kalra in ITA No. 220/2019. However, we note that in the case Udit Kalra (supra) the glaring fact was that this company was directed to be delisted from the Stock Exchange whereas in the case of M/s. Access Global Limited no such finding of fact has been recorded. As per record, this company was not even issued any warning by the SEBI and as per record the transactions in shares of M/s. Access Global Limited were also not suspended by SEBI. Therefore, the reliance by the Department on the case of Udit Kalra (supra) will not be of much assistance to the Department. Further, the reliance on the case of Sumati Dayal reported in 214 ITR 801 (SC) and Durga Prasad More, 82 ITR 540 (SC) would also not help as both these judgments relate to the issue of circumstantial evidence, surrounding circumstances and applying the test of human probability when documentary evidences are missing. However, in the present case the assessee has provided ample evidences in support of his contention and the Department has not been able to negate them with counter evidence.

6.10 Therefore, considering the evidences furnished by the assessee, which the AO did not negate with any counter evidence, we are of the considered opinion that the assessee has successfully discharged the onus cast upon him in terms of provisions of section 68 of the Act and this discharge of onus is a pure question of fact and, therefore, the various decisions relied upon by the Department on the question of law would not be of any assistance to the Department. Since, in our considered view, on the facts of the case, the 13 assessee has been able to successfully discharge the onus cast upon him, the impugned addition has no feet to stand. We accordingly set aside the order of the Ld. CIT (A) and direct the deletion of the impugned addition.

6.11 As far as the assessee's alternate plea of quashing the assessment on the ground of not providing opportunity to the assessee to cross examine Shri Harshvardhan Kayan is concerned, since we have already given complete relief to the assessee on merits of the case, the ground raised by the assessee regarding not granting opportunity of cross examination becomes academic in nature and we are not inclined to adjudicate the issue at this juncture.

Since the facts of the present case are identical to the facts involved in the case of Shri Jatinder Kumar Jain Vs. ITO (supra) the only difference is that in the said case the assessee earned LTCG of Rs. 2,00,10,326/- on sale of shares of M/s Access Global Limited while in the present case, the LTCG of Rs. 2,99,97,757/- was earned from the sale of shares of M/s Access Global Limited. So, respectfully following the aforesaid referred to order dt. 14/06/2022 in ITA No. 338/Chd/2018 for the A.Y. 2013-14 in case of Shri Jatinder Kumar Jain Vs. ITO, Ludhiana , the impugned addition made by the AO and sustained by the Ld. CIT(A) is deleted.

8. In the result, appeal of the assessee is allowe

8. The Hon'ble High Court of Delhi in the case of Pr. CIT Vs. Krishna Devi, 126 taxmann.com 80 has observed as under:

Section 68 of the Income-tax Act, 1961 Cash credit (Bogus LTCG on sale of shares) - Assessment years 2014-15 and 2015-16 Assessee had sold shares of a company held by it and claimed exemption under section 10(38) on account of long-term capital gain (LTCG) arose on such sale of shares - Assessing Officer noted that there was astounding 4849.2 per cent jump in share prices of said company within a span of two years and financials of said company did not show any reason for such

extraordinary performance of its stock - Thus, he concluded that assessee had adopted a colourable device of LTCG to avoid tax and, accordingly, made addition under section 68 treating such LTCG arose on sale of such shares as bogus It was noted that there was no dispute that shares of said company were purchased by assessee online and payments were made through banking channel - Shares were dematerialized and sales were routed from demat account and consideration was received through banking channels Assessing Officer simply proceeded on basis of financials of company to come to conclusion that transactions were bogus Assessing Officer had not made its conclusion on basis of any cogent material Finding of Assessing Officer was thus purely an assumption based on conjecture made by Assessing Officer Whether, on facts, impugned addition made under section 68 by treating impugned LTCG as bogus was unjustified and same was to be deleted - Held, yes [Paras 11 and 13 in favour of assessee]

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned

manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through

banking channels.” The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

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

holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.

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

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

9. Similarly the Jurisdictional High Court of Bombay in the case of CIT Vs. Shyam R. Pawar, 54 taxmann.com 108 has observed as under:

Section 68 of the Income-tax Act, 1961 Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 Assessee declared capital gain on sale of shares of two companies. Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices. held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus Whether on facts, transactions in shares were rightly held to be genuine and

addition made by Assessing Officer was rightly deleted Held, yes [Para 7] [In favour of assessee]

It was revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange- words showed that the shares were purchased for code numbers S003 and R121 of STPL and RMPL pectively. Out of these two, only RMPL is listed in the appraisal report and it is stated to be involved in dus operandi It is on this material that the Assessing Offices holds that the transactions of sale and purchase of shares are doubtful and not genuine. In relation to assessee's role in all this, all that the Commissioner observed is that the assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the assessee to the accounted income and the assessee utilized the scheme Para 5]

The Tribunal concluded that there was something more which was required, which would connect the assessee to the transactions and which are attributed to the promoters/directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not cared forward by the revenue. A copy of the DMAT account, placed before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available which gave details of the transactions. The contract note is a system generated and prescribed by the stock exchange. From this material, the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client code has been referred to. But the Tribunal concluded that same, by itself, is not enough to prove that the transactions in the

impugned shares were bogus sham. The details received from stock exchange have been relied upon for the purposes of faulting the revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in the Tribunal's order are not vitiated by any error of law apparent on the face of the record either. [Para 6]

10. Hon'ble Supreme Court in the case of Pr. CIT Vs. Parasben Kasturchand Kochar, 130 taxmann.com 177 (SC) has observed as under:

Section 10(38) of the Income-tax Act, 1961 Capital gains Income arising from transfer of long-term securities (Shares) Assessment year 2014-15 Assessee-individual engaged in business of trading in shares claimed long term capital gains arising out of sale of shares as exemption under section 10(38) - Assessing officer denied claim and made certain additions into assessee's income on grounds that said gains were earned through bogus penny stock transactions and companies to whom sold shares belonged were bogus in nature Tribunal observing that assessee by submitting records of purchase bills, sale bills, demat statement, etc., had discharged his onus of establishing said transactions to be fair and transparent, same not being earned from bogus companies was eligible for exemption under section 10(38) High court by impugned order held that no substantial question of law. arose from Tribunal's order - Whether SLP against said impugned order was to be dismissed -Held, yes (Para 2) (In favour of assessee)

11. Similarly Hon'ble High Court in the case of Pr. CIT Vs. Prem Pal Gandhi, (401 ITR 0253) (P & H) has observed as under:

Capital gain-Share transaction-Addition-Deletion thereof-During course of assessment proceedings u/s 153A, it was noticed by AO that assessee had shown long term capital gain on sale of shares of company-AO treated share transaction as non-genuine transaction and amount was shown as long term capital gain on share transaction was added to income of assessee-CIT(A) deleted addition-Tribunal upheld order passed by CIT(A) and dismissed appeal of revenue-Held, assessee sold shares through MTL shares and Stock Broker limited which was SEBI registered Stock Broker-Payment for sale of shares was received through banking channels-All documentary evidence being in favour of assessee, deletion of addition made by CIT(A) was upheld by Tribunal-All these documentary evidences in favour of assessee were rejected by AO merely on basis of some casual replies given by assessee to AO- Documentary evidences were in favour of assessee and CIT(A) had passed very reasoned and speaking order-Dividend amount was received with regard to holding of shares and said amount was disclosed by assessee in his return of income and exemption was claimed accordingly-Thus, addition being without any logical basis was deleted-Revenue's appeal dismissed.

Held:

The CIT(A) examined the matter and the comments of the Assessing Officer in the remand report. It has been recorded by the CIT(A) that the purchase of shares in the financial year 2006-07 for an amount of Rs. 11 lakhs had been physically transferred in favour of the assessee in the books of the company namely GeeFCee Finance Limited. Further, the said

shares were dematerialized and credited in the assessee's account maintained with depository participant i.e. HDFC on 16.10.2006. The dividend amount of Rs. 1,50,000/- had been received with regard to aforementioned holding of shares on 23.10.2007. The said amount had been disclosed by the in his return of income and exemption was claimed accordingly. Thus, the addition being without any logical basis was directed to be deleted. (Para 4)

Assessee had sold shares through MTL shaes and Stock Brokers Limited as is noted by Assessing Officer in reply to question No.24 which is a SEBI registered Stock Broker. Furthermore the payment for sale of shares was received through Banking channels. All these documentary evidences in favour of the assessee were rejected by Assessing Offiver merely on the basis of some casual replies given by assessee to the Assessing Officer. However, the fact remains that all the documentary evidences are in favour of assessee and learned CIT(A) has passed a very reasoned and speaking order and we do not find any infirmity in the same."

12. The Hon'ble High Court of Bombay in the case of CIT Vs. Smt. Jamnadevi Agrawal, 328 ITR 656 (Bom) has observed as under:

Income-Cash credit-Genuineness of share transactions- Assessee offered long- term capital gains arising from sale of shares-On the basis of material seized during the search in the case of various assesseees who belong to H group, AO did not accept the capital gains and treated the entire sale proceeds of the shares as income from undisclosed sources under s. 68-Not justified-Fact that the assesseees in the group have purchased and sold shares of the same companies through the same broker cannot be a ground to hold that the transactions are

sham and bogus, especially when documentary evidence has been produced to establish the genuineness of the sale-Company has confirmed that it has handed over the shares purchased by the assesseees-Similarly, the sale of shares to the respective buyers is also established by producing documentary evidence-Purchase and sale price of the shares declared by the assesseees is in conformity with the market rates prevailing on the respective dates-Thus, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions-Tribunal has arrived at a finding of fact that the transactions were genuine-Nothing has been brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence-Also, no fault can be found with the finding recorded by the Tribunal that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees-Therefore, the decision of the Tribunal is based on findings of fact and no substantial question of law arises.

The fact that the assesseees in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim. From the documents produced, it is seen that the shares in question were in fact purchased by the assesseees on the respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions

were off-market transactions cannot be a ground to treat the transactions as sham transactions. The statement of the broker P that the transactions with the H Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence on record. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assesseees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees. No fault can be found with the above finding recorded by the Tribunal. Therefore, the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal.-Asstt. CIT vs. Kamal Kumar S. Agrawal (Indl.) & Ors. (2010) 41 DTR (Nag) (Trib) 105: (2010) 133 TT (Nag) 818 affirmed; Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124: (1995) 80 Taxman 89 (SC) distinguished. (Paras 11 to 14 & 16)

Conclusion:

Assessee having established the genuineness of purchase and sale of shares by producing documentary evidence and declaring the purchase and sale price of shares in conformity with the market rates prevailing on the respective dates, the finding of the Tribunal that the transactions were genuine is a finding of fact based on documentary evidence on record and, therefore, no substantial question of law arises from the order of the Tribunal deleting the addition under s. 68.

13. Similarly Hon'ble High Court of Bombay in the case of Pr.CIT-3 Vs. Ziauddin A Siddique. Income Tax Appeal No 2012 of 2017 order dated 4 March 2022 has observed as under:

1. The following question of law is proposed:

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs.1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was demated and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the amount of LTCG of Rs.1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the IT. Act, 1961?"

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

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

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

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

6. The appeal is devoid of merits and it is dismissed with no order as to costs.

14. The Hon'ble Supreme Court in the case of *Principal Commissioner of Income Tax Vs. Smt. Renu Aggarwal* (2023) 456 ITR 249 (SC) dated 3-07- 2023 has observed as under

“CASH CREDITS-TRANSACTIONS IN PENNY STOCKS-FINDING THAT THERE WAS NO ADVERSE COMMENT FROM STOCK EXCHANGE OR COMPANY WHOSE SHARES INVOLVED-ASSESSING OFFICER QUOTING FACTS PERTAIN- ING TO COMPLETELY UNRELATED PERSONS NAME OF ASSESSEE NEITHER QUOTED BY ANY SUCH PERSONS NOR MATERIAL RELATING TO ASSESSEE FOUND IN INVESTIGATION-TRIBUNAL AFFIRMING AND HIGH COURT DIS- MISSING DEPARTMENT'S APPEAL-

SUPREME COURT-SPECIAL LEAVE PETITION
DISMISSED-INCOME-TAX ACT, 1961, ss. 68, 260A.

Where the High Court dismissed the Department's appeal saying that no question of law arose from the order of the Tribunal affirming the order of the Commissioner (Appeals) allowing relief to the assessee, and the findings of the Commissioner (Appeals) to the effect that there was no adverse comment from the stock exchange or the company whose shares were involved in these transactions, that the Assessing Officer quoted the facts pertaining to completely unrelated persons whose statements were recorded and on the basis of unfounded presumptions, that the name of the assessee was neither quoted by any of such persons nor was any material relating to the assessee found at any place where investigation was done by the Investigation Wing, on a petition for special leave to appeal to the Supreme Court

special leave to appeal to the Supreme Court

The Supreme Court dismissed the petition. Decision of the Allahabad High Court (printed below) affirmed.

Petition for Special Leave to Appeal (C) No. 13033 of 2023.

Petition under article 136 of the Constitution for special leave to appeal from the judgment and order dated July 6, 2022, of the Allahabad High Court in I. T. A. No. 44 of 2022. The judgment of the High Court (coram: SURYA

PRAKASH KESARWANI and JAYANT BANERJI JJ.) ran as follows:

"JUDGMENT

Heard Sri Krishna Agarawal, learned counsel for the appellant. This appeal under section 260A of the Income-tax Act, 1961 has been filed challenging the order dated January 17, 2022, passed by the Income-tax Appellate Tribunal, Lucknow Bench 'SMC' Lucknow in IT. A. No. 205 of 2020 (assessment year 2014-15).

The basic question involved in the present appeal is with regard to deletion of some amount which was added by the Assessing Officer on the allegation of penny stock.

The appeal of the respondent-assessee was allowed against the assessment order. The appeal filed by the assessee was allowed by the Commissioner (Appeals). Against the appellate order the Revenue had filed the aforesaid income-tax appeal which has been dismissed by the Income-tax Appellate Tribunal.

After detailed discussion, the Income-tax Appellate Tribunal has recorded the following findings of fact

The above findings recorded by the learned Commissioner (Appeals) are quite exhaustive whereby he has discussed the basis on which the Assessing Officer had made the additions. While allowing relief to the assessee, the learned Commissioner (Appeals) has specifically held that there is no adverse comment in the form of general

and specific statement by the principal officer of the stock exchange or by the company whose shares were involved in these transactions and he held that the Assessing Officer only quoted the facts pertaining to various completely unrelated persons whose statements were recorded and on the basis of unfounded presumptions. He further held that the name of the appellants were neither quoted by any of such persons nor any material relating to the assessee was found at any place where investigation was done by the Investigation Wing. The learned Commissioner (Appeals) relying on various orders of the Lucknow Benches and other Benches has allowed relief to the assessee by placing reliance on the evidence filed by the assessee before the Assessing Officer. I do not find any adversity in the order of the learned Commissioner (Appeals) specifically keeping in view the fact that the Lucknow Benches in a number of cases after relying on the judgment of the hon'ble Delhi High Court in the case of Krishna Devi had allowed relief to various assessees."

The concurrent findings of fact have been recorded by the first appellate authority and the Income-tax Appellate Tribunal. Thus, no substantial question of law is involved in the present appeal. The matter is concluded by findings of fact.

For the reasons aforesaid, we do not find any good reason to entertain this appeal. Consequently, it is dismissed. Balbir Singh, Additional Solicitor General, (Raj Bahadur Yadav, Prahlad Singh, Samarvir Singh and Prashant Rawat, Advocates, with him) for the petitioner."

15. Considered the overall facts, submissions and the information find that the assessee has furnished the financials, details of broker and the transactions status. The AO has doubted the purchase and sale of shares and observed that the price rise is not commensurate with the financials of the investee company. The assessee has substantiated with all details and information and the AO has relied on the investigation report of income tax department and treated the long term capital gains on sale of shares as not genuine. Further the A.O. has not made any enquiry or independent investigation and relied on the statement of the parties in the survey U/sec133A of the Act and the assessee's name is not included in the list of investigation report. The fact remains that the assessee has submitted the requisite details in respect of purchase and sale of shares were not disproved. The transaction of purchase and sale of shares is through banking channel. Further as discussed in the above paragraphs the Honble Tribunal dealt on the same scrip of share and for the same assessment and has granted relief to the assessee. Accordingly, considering facts, circumstances, ratio of judicial decisions, submissions, evidences and rely on the judicial precedents and set aside the order of the CIT(A)

and direct the assessing officer to delete the additions and allow the grounds of appeal in favour of the assessee.

16. Since, the grounds of appeal on merits are decided in favour of the assessee, hence the grounds of appeal with respect to validity of reassessment proceedings raised by the assessee becomes academic and are left open.

17. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 22.01.2024

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 22.01.2024

KRK, PS

Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

ITA No. 2513/Mum/2023
Amarjit Kaur Surinder Singh Kochhar, Mumbai.

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(Asst. Registrar)
ITAT, Mumbai.