

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

BEFORE SHRI NARENDRA KUMAR CHOUDHRY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

**ITA NOS. 2427 & 2428/MUM/2021
(A.Y: 2014-15 & 2013-14)**

Vineet Mittal Shubham Building, Gandhigram Road Near Iskon Temple, Juhu Mumbai - 400049 PAN: AFHPM8584R	v.	DCIT – Central Circle – 3(3) Room No. 1923 Air India Building Nariman Point, Mumbai
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Mani Jain & Shri Pratik Jain
Department Represented by	:	Shri Ankush Kapoor
Date of conclusion of Hearing	:	21.12.2023
Date of Pronouncement	:	25.01.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. These appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 29.10.2021 for the A.Ys.2013-14 and 2014-15.

2. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 2428/MUM/2021 for Assessment Year 2013-14 as a lead appeal.

ITA.No. 2428/MUM/2021 (A.Y. 2013-14)

3. Brief facts of the case are, assessee is an individual deriving income from salary, rental income and interest income and filed original return of income on 03.07.2013 declaring a total income at ₹.2,06,32,150/-. The return was processed u/s 143(1) of Income-tax Act, 1961 (in short "Act"). The case was re-opened by issue of notice u/s 148 dated 16.09.2016 and the proceedings were abated.

4. A search & seizure action u/s 132 of the Act was carried out in Welspun group of companies at the premises of the assessee on 30.06.2017. The assessee was also covered under the search. Consequent to the search and seizure action, the case was centralized to the charge of present AO and notice dated 01.08.2018 u/s. 153A of the Act was issued and was duly served on the assessee. In response,

assessee filed his return of income on 05.09.2018 declaring total income at ₹.2,06,32,150/-.

5. Subsequently, notices under section 143(2) and 142(1) of the Act alongwith detailed questionnaire were issued and served on the assessee. In response, authorised representative of the assessee attended and submitted the relevant information as called for.

6. During the course of the assessment proceedings, with regard to claim of LTCG on sales of shares, Assessing Officer observed that during the search action, based on seized material and evidence gathered it was revealed that the assessee has shown abnormal long-term capital gain from penny stock i.e., Turbotech Engineering Ltd. in A.Y.2013-14 and A.Y. 2014-15. Further, Assessing Officer observed that as per working of long-term capital gain attached with return of income, assessee has claimed exemption u/s 10(38) of the Act. However, as per the details filed by the assessee during the course of assessment proceedings, assessee has shown long term capital gain from Turbotech Engineering Ltd. in A.Y.2013-14 and A.Y. 2014-15 are as below:

Name of Scrip	No. of equity shares	Mode of Acquisition	Date of Acquisition	Cost of Acquisition	Year of sale	Sale Consideration	Gain/ Loss
Turbotech Engineering Ltd.	40,000	Physical Share certificate	22-11-2011	80,000	FY 2012-13	1,71,91,404	1,71,11,404
Turbotech Engineering Ltd.	310031	Physical Share certificate	FY 2011-12 & FY 2012-13	3,49,549	FY 2013-14	12,19,73,443	12,16,23,894

7. Assessing Officer observed that Assessee had purchased 75,000 shares of M/s. Turbotech Engineering Ltd., (Scrip Code: 504358) on 22.11.2011 @ ₹.2 from M/s. Haresh Infrastructure Pvt. Ltd. for ₹.1,50,000/- and 2,75,000 shares were purchased on 19.04.2012 @1/- from M/s. Ekta Shares and Securities. The shares were purchased in physical format and then dematerialized. Further as per the information submitted by the assessee, the shares from M/s Haresh Infrastructure Pvt Ltd. was purchased by cash, so the veracity was that these were purchased on 22-04-2011 also doubtful. Assessing Officer observed that the assessee earned long term capital gain in the current year and claimed it as exempt u/s 10(38) of the Act.

8. Assessing Officer in his order from Page No. 3 to 40 has elaborately analysed various parameters with regard to Bogus long term capital gain such as Role of Operator, Role of promoters of the penny stock companies, Role of Share brokers, analysis of scrip of

M/s.Turbotech Engineering Ltd., SEBI Order of suspension of the scrip, etc. (for the sake of brevity the same is not reproduced below). Subsequently, Assessing Officer issued notice under section 142(1) of the Act requiring assessee to explain with evidences why the Long Term Capital Gain should not be treated as non-genuine and sale consideration received on the penny stock should not be taxed as an unexplained cash credit under section 68 of the Act.

9. In response, assessee filed its submissions vide letter dated 29.11.2019, for the sake of clarity it is reproduced below: -

1. "In this connection, at the outset, it is necessary to bring out the facts of the assessee's case in respect of the exemption claimed u/s 10(38) of the Income Tax Act, 1961.

a. It is submitted that your honor has mentioned that the assessee has purchased 40,000 shares of M/s. Turbotech Engineering Ltd. for Rs. 80,000/-, on 22nd November 2011 and 3,49,549 shares of M/s. Turbotech Engineering Ltd. in F.Y. 2011-12 and F.Y. 2012-13 for Rs. 3,49,549/-. However, we would like to state that, the assessee has purchased 75,000 shares from M/s. Haresh Infrastructure Pvt. Ltd. for Rs. 1,50,000/- on 22.11.2011 and 2,75,000 shares were purchased on 19th April 2012 @1/- from M/s. Ekta Shares and Securities. Copy of invoices mised by M/s Haresh Infrastructure Pvt. Ltd. and M/s. Ekta Shares and Securities were already submitted to your Honour vide earlier submissions. However, we are again enclosing herewith the same for your Honour's kind perusal and records as per annexure 1.

b. The assessee dematerialized 75,000 shares of M/s. Turbotech Engineering Ltd. on 08/02/2013 and 2,75,000 shares on 30/03/2013 with the demat account maintained

with broker Nirmal Bang Sec. Pvt. Ltd. Copy of demat statements were already submitted to your Honour vide earlier submissions. However, we are again enclosing herewith the same for your Honour's kind perusal and records as per annexure 2.

c. In the return of income filed for A.Y. 2013-14, the assessee has claimed exemption u/s 10(38) on sale of share of M/s. Turbotech Engineering Ltd. The working of which is shown below:

Particulars	Amount
Sale of 40,000 shares at an average rate of 429,7851 (sold on various dates and various rates)	1,71,91,404/-
Expenses incurred in selling these shares (Brokerage + Oilier Chgs Rounding Off)	85,957/-
Less: Cost of Acquisition	80,000/-
Net Profit on Sale of shares after charges	1,70,25,446/-

Copy of entire LTCG working including the amount as mentioned above alongwith entire set of ITR Form filed for the above captioned assessment year is already submitted to your honors in submissions made earlier. However, the copy of LTCG Working is again enclosed herewith as per annexure 3.

d. The details of consideration in respect of purchase made were duly submitted to your honors in earlier submission. We are again enclosing herewith the copy of ledger accounts of M/s. Ekta Shares and Securities and M/s. Haresh Infrastructure Pvt. Ltd, as per annexure 4.

2. Subsequently, looking at the rising prospects & share price of the company i.e. M/s. Turbotech Engineering Ltd., the assessee decided to liquidated its investment. Accordingly, the assessee has sold partly in AY 2013-14 & partly in AY 2014-15, through recognized stock exchange, on various dates via Nirmal Bang Sec. Pvt. Ltd. a recognized. In this respect, the copy of demat account is already submitted to your Honour in annexure 2. Also, the ledger account of M/s. Turbotech Engineering Ltd. is submitted to your Honour vide earlier submissions and is enclosed herewith as per annexure 5.

3. These sales were entered through recognized stock exchange and STT was duly paid on the same. Further, the entire sale

consideration were duly credited in bank account of the assessee through our registered share broker i.e. Nirmal Bang Securities, the copy of the ledger account of Nirmal Bang Securities in the books of the assessee and the bank statements wherein the amounts were credited are enclosed herewith for your Honour kind perusal and records as per annexure 6 and annexure 7 respectively. Also, the contract notes issued by the broker for the sale of shares of M/s. Turbotech Engineering Ltd. was already submitted to Your Honour vide earlier submission. However, we are again enclosing herewith the same as per annexure 8.

4. Accordingly, since the holding period from the date of purchase to the date of sale is more than 1 year, gain arising from sale of share is Long Term Capital Gain which is exempt u/s 10 (38) correctly disclosed in Income Tax Return.

5. However, arbitrarily rejecting the above documents and facts brought on record by the assessee, your Honour, has alleged that the information received by you shows that the above transaction carried out through recognized stock exchange is a colourable device and an accommodation entry. Your Honour has further alleged that the rise of stock price has been manipulated by brokers/entry providers merely to accommodate the assessee and provide non genuine long term capital gains.

6. Further, your honour has also alleged that the brokers and operators have also accepted in their statement that they have given accommodation entry to the assessee.

7. In this respect, it is submitted that the assessee has duly proved the genuineness of the transaction through which the assessee has claimed exemption u/s 10(38) of the Act. The same can be seen as follows:-

a. Source of the investment: The assessee has duly submitted the bank statement & other relevant documents to prove the source of the investment.

b. Business activity of the assessee: The assessee has been duly investing in the shares of numerous companies which can be seen from the statement of affairs submitted before your Honour. Therefore, this is not an isolated transaction made merely to allegedly convert the unaccounted income into genuine money.

C. Documents for purchase of shares: The assessee has duly submitted the entire documents for purchase of shares,

document for dematerialization the purchased shares and documents of invoice for purchase of the said shares.

d. Documents for sale of shares: The assessee has duly submitted the demat accounts and the bank statements showing the sale of shares and the receipt of sale consideration through proper banking channels.

8. The above documents and facts submitted by the assessee clearly prove the genuineness of the transaction and establish the fact that same have been routed through proper banking & legal channels. The source of the investment has not been doubted by your Honour. The transaction has been made through proper recognized stock exchange and STT has been duly paid on the same. The same has not been doubted by your Honour.

9. Further, your Honour has also made a general allegation that some of the orders by SEBI wherein some such penny stock company's trading has been suspended are available in public domain. It is submitted that such general allegation and some information available in public domain cannot be relied upon and used against the assessee. This view has been time and again upheld by the court of late.

10. Furthermore, it is submitted that as per the modus operandi stated by you, the alleged entry operators has converted alleged unaccounted money of the assessee into genuine money through such long term capital gains. In this respect, it is submitted that to prove the above allegation, it is important to establish the cash trail from the assessee to the broker/entry provider. However in the assessee's instant case no such cash payments has ever been made to the brokers/other party as the transaction has been entered in bona fide belief and through authorised stock exchanges in good faith and are further genuine as the payments and receipts has been made through banking channels.

11. Further, we would like to state that, when the sales transactions were entered, the same were entered on recognized stock exchange. Therefore, it is impossible for an investor to know or find out who is the purchaser or to whom the sold equity shares are delivered to. It may be surmise or a conjecture may be drawn with the assessee's case based on circumstantial evidence. However, the facts and documentary evidence placed before your honours substantiate the genuineness of the transactions undertaken by the assessee.

12. Further, as regards your honors contention that the assessee has entered into this transaction for allegedly converting the unaccounted money into genuine money through such long term capital gains, we submit that the assessee is regularly trading in long term/ short term shares and in general practice of trading in shares and is not an isolated transaction which the assessee has entered into. Further, we would like to state that during the period under consideration, assessee had entered into all transactions with a rational motive of earning income thereto and has properly accounting the same in the books of accounts and offering tax thereon as per the provisions of Income Tax Act, 1961.

13. Further, as regards your honors contention that the assessee has earned unrealistic profits from the said transactions mentioned in your show cause, we state that the assessee has many times earned huge gains which are unrealistic and therefore your honors allegation that there is an unrealistic gain in the said shares cannot form a base for determining the said transactions as non-genuine, as in share market activities which is an unpredictable market, there may be gains and losses, However every one invests or enters into a transaction with a view to earn substantial profits. There may even be unrealistic losses and there are incidences where people have lost all of their money in share markets and accordingly it cannot be said that just due to unrealistic gains the said transaction is not genuine and accordingly it is hereby stated that the said long term capital gain exemption which is duly undertaken as per the existing laws and undertaken through recognized stock exchanges and accordingly the claim taken is genuine and should not be rejected.

14. Accordingly, it is submitted that the exemption claimed u/s 10(38) on the long term capital gains are genuine and should not be rejected and therefore, the sale consideration on sale of M/sTurbotech Engineering Ltd, should not be taxed as an unexplained cash credit u/s 68 of the Income Tax Act, 1961.

15. Further, your honour has raised this issue that the assessee has paid commission for taking the accommodation entries, in this connection we would like to state that the assessee has not paid any commission nor has not taken any accommodation entries as it is clear from the above explanations and hence there is no such issue to be raised that the assessee has paid commission 3%, hence no addition can be made u/s 69C of the Income Tax Act, 1961 as the assessee has not incurred any such expenditure."

10. Not convinced with the submissions of the assessee, Assessing Officer rejected the same and analysed the above said share transactions and came to the conclusion with the following observation:-

"6.23 Findings and conclusion

6.23.1 The submissions made by the assessee and reply to show cause is considered. The facts of the case, investigations made by various directorates. From the discussion in the preceding paras it is concluded that long term/short term capital gains booked by assessee in his books were pre-arranged method to evade taxes and launder money. Following are the findings and the reasons which substantiates the findings.

a. Mode of acquisition of the shares: The assessee has purchased 40,000 shares of M/s Turbotech Engineering Ltd. for Rs 80,000/- in cash. The assessee has not traded in other scrips showing he was not a genuine investor.

b. Sale of shares and unusual rise in the price: The assessee has sold the 40,000 shares at the sale consideration of Rs 1,71,91,404/-, thus resulting the long term/short term capital gain totaling Rs 1,71,11,404/-, which is 214 times the increase of the cost price, and as discussed the rise in share prices is not holding to any commercial principles and market factors.

c. Findings of Investigation wing: During the search and seizure in the assessee case, it was identified that assessee alongwith his family member have booked long term capital gain in the scrip named M/s Turbotech Engineering Ltd. listed on Bombay stock Exchange which were identified by Investigation Wing, Kolkata, an entity used for providing bogus accommodation entry for Long term capital gain and short term capital loss. The said scrip is included in the list of 84 companies whose share prices have been apparently manipulated by the syndicate of operators

d. Findings of SEBI: It was concluded that trades executed with the connected entities has contributed significantly to the positive LTP in the scrip are manipulative in nature, it is also held that such trades are fraudulent in nature and would operate as deceit upon any person trading in the extant scrip.

e. Analysis of transactions: Facts revealed that such trading transactions of purchase and sale of shares are not been effected, for commercial purpose but to create artificial gains, with a view to evade taxes -

i. Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were product of design and mutual connivance on part of assessee and the operators.

ii. The assessee resorted to a preconceived scheme to procure long-term capital gains by way of price difference in share transactions not supported by market factors.

iii. Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence, impugned long term capital gain is not allowable.

f. Failure of Assessee to discharge his onus: The assessee has not been able to prove the unusual rise and fall of share prices to be natural and based on the market forces. It is evident that such share transactions were closed circuit transactions and clearly structured one.

g. Ignorance of the assessee about shares and penny stock companies: Assessee has failed to show of having any knowledge about the shares traded and having any knowledge about the fundamentals of the penny stock companies.

h. Financial analysis of the penny stock companies: The networth of the penny stock company is negligible. Even though the networth of the company and the business activity of the company is negligible the share prices have been artificially rigged to unusual high

i. Arranged transactions: The transactions entered by the assessee involve the series of preconceived steps, the performance of each of which is depending on the others being carried out. The true nature of such share transactions lacked commercial contents, being artificially structured transactions, entered into with the sole intent, to evade taxes. There are statement of various entry providers, operators, share-brokers and exit-providers in the entire arrangement.

6.23.2 The facts and circumstances of the case, as recorded above, clearly suggest that the revenue cannot take or accept such make-

believe transactions, as presented by the assessee. Truth or genuineness of such transactions must prevail over the smoke screen, created by way of pre-meditated series of steps taken by the assessee, with a view to imparting a colour of genuineness and character of commercial nature, to such share transactions. Needless to say that one has to look at the whole transactions and series of steps taken a to accomplish such share transactions, in an integrated manner, with a view to ascertaining the true nature and character of such purchase and sale of shares.

Legal Position

6.23.3 Honourable SC in case of Sumati Dayal Vs CIT has held that:

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See Parimisetti Seetharamamma (supra) at P. 5361. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature."

6.23.4 Further the following important decisions of the Hon'ble Supreme Court and other Courts are relied upon, while arriving at conclusion to affirmly say that the transactions entered into by the assessee in purchase and sale of LTCG/STCG are not genuine and has taken bogus entry of LTCG/STCG.

<i>Durga Prasad More</i>	<i>82 ITR 540 (SC)</i>
<i>Mc. Dowel & Co. Ltd.</i>	<i>154 ITR 148 (SC),</i>
<i>Asst. CIT v. Som Nath Mani</i>	<i>(2006) 100 TTJ 917 (Chd)</i>
<i>Govinda Rajulu Mudaliar v. CIT</i>	<i>(1958) 34 ITR 807 (SC)</i>
<i>Sreelekha Banerjee & Othrs. v. CIT</i>	<i>(1963) 49 ITR 112 (SC)</i>
<i>Kalekhan Mohammed Hanif v. CIT</i>	<i>(1963) 50 ITR 1(SC)</i>

CIT v. Biju Patnaik (1986) 160 ITR 674 (SC)

CIT v. P. Mohanakala & Others (2007) 291 ITR 278 (SC)

a) In the decision delivered on 27.3.2015, the Hon'ble ITAT, E-Bench, Mumbai has allowed the Revenue appeal in the case of Shamim M. Bharwanivide ITA No.4906/ Mum/2011 (AY 2006-07) and observed as under :-

"Firstly, documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported 'facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, ie, in the absence of credible and independent evidences"

.....

Thus considering the findings of the search/ survey, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the nature of transaction entered into by the assessee the LTCG of Rs 1,71,11,404/- claimed exempt u/s 10(38) of the act treated as non-genuine and the sale consideration received of Rs. 1,71,91,404/- on the penny stock taxed as an unexplained cash credit u/s 68 of IT Act, 1961. Penalty proceedings under section 271(1)(c) of the Act are separately initiated for furnishing inaccurate particulars of income.

Further, accommodation entry charges in the form of commission are paid in cash to entry operators. The source of cash is not explained. In respect of accommodation entries of LTCG, the market rate is 3% of the amount of entry. Accordingly, an amount of Rs.5,15,733/- @3% paid on Rs. 1,71,91,104/- added u/s 69C of IT Act, 1961. Penalty proceedings under section 271(1)(c) of the Act are separately initiated for concealment of particulars of income.

7. Subject to the above the total income of the assessee is computed as under:-

Total Income/(loss) under Normal provisions of the IT. Act, 1961:-

	Total Income (as per assessee's computation)	2,06,32,150
Add:	Unexplained cash credit u/s.68 (as per para 6)	1,71,91,404
Add:	Unexplained expenditure u/s.69C (as per para 6)	5,15,733
	Assessed Total Income	<u>Rs. 3,83,39,287</u>
	Rounded off to	<u>Rs. 3,83,39,290</u>

8. Assessed u/s. 153A r.w.s. 143(3) of the I. T. Act, 1961. Give credit for taxes paid, if any, after due verification. Working of tax, interest & demand as per computation in ITNS 150, is enclosed as an integral part of this order. Charged interest u/s. 234A, 234B & 234C as applicable. Issue Demand Notice accordingly. Issue penalty notice as discussed.

9. This order is passed with the prior approval of Addl. Commissioner of Income Tax, Central Range-3, Mumbai conveyed by his letter no. Addl. CIT/CR-3/Approval u/s 153D-35/2019-20 dated 26.12.2019 in terms of the provisions of section 153D of the Act."

11. Aggrieved, assessee preferred appeal before the Ld. CIT(A) and filed detailed submissions. After considering detailed submissions of the assessee and findings of the Assessing Officer, Ld. CIT(A) dismissed the grounds raised by the assessee observing that amounts shown in the books of the assessee as receipts from sale of shares of Turbotech Engineering Ltd., during the year arising out of the sale of scrip remain unexplained and the Assessing Officer has correctly disallowed the loss generated through trading of these scrips. With regard to unexplained

expenses under section 69C, Ld. CIT(A) sustained the action of the Assessing Officer. Further, with regard to addition of estimated commission being 3% amount to ₹.36,59,203/- on total sale value of shares, Ld. CIT(A) sustained the action of the Assessing Officer.

12. Aggrieved, assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the action of Ld. A.O. in passing the impugned assessment u/s 153A of the Act in the absence of any incriminating material found during the course of search, making the assessment order illegal and without jurisdiction.

2. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of Ld. AO in making the various additions/ disallowance in the absence of any incriminating material found during the course of search action, as per the grounds contained in the assessment order or otherwise.

3. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the action of Ld. AO in treating the long term capital gains on sale of M/s Turbotech Engineering Ltd. earned by the appellant as non-genuine and bogus transaction as per the grounds stated in the 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. 1,71,11,404/- by invoking provisions of section 68 of the Income Tax Act, 1961 being the amount of sale value of shares of M/s Turbotech Engineering Ltd. as per the grounds stated in the order or otherwise.

5. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in making addition of Rs. 5,15,733/- as alleged commission @3% being paid on bogus share transaction as per the grounds stated in the order or otherwise.

6. *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 Learned Assessing Officer, which is confirmed by the Learned CIT (A)."

13. At the time of hearing, Ld.AR of the assessee submitted that Ground No. 1 and 2 are not pressed, accordingly the same are dismissed as not pressed.

14. With regard to Ground Nos. 3 and 4, Ld.AR of the assessee brought to our notice relevant facts relating to the case and filed its written submissions challenging the findings of the Ld. CIT(A), for the sake of clarity it is reproduced below: -

"Re: Addition of sale value of shares of M/s. Turbotech Engineering Ltd (Ground No. 3 & 4 of Assessee Appeal of AY 2013-14 & AY 2014-15)

i) Re: Contention of Id.AO

2. The brief background of the case is that the assessee had 3,50,000 shares of M/s. Turbotech Engineering Limited which were sold during AY 2013-14 and AY 2014-15. The long term capital gain earned on sale of such shares was claimed as exempt u/s 10(38) of the Act in the respective years.

3. A search and seizure action u/s 132 of the Act was carried out on Welspun group of companies at the premises of the assessee on 30.06.2017. In the assessment proceedings, AO relying on the finding of Kolkata Investigation Wing identified that the assessee has booked the said long term capital gain in penny scrip M/s. Turbotech Engineering Ltd listed on Bombay Stock Exchange which

was not genuine. Further, The AO also relied on certain orders and investigations carried out by SEBI.

4. Further, the AO in the impugned assessment order made reference to some of the exit provider companies/ individuals who are mentioned to be indulged in manipulative trading. He accordingly treated the entire sale consideration as unexplained cash credit u/s 68 of the Act.

5. In this regard, we submit as under:

ii) Re: Purchase of Shares

6. The details of purchase of shares of M/s. Turbotech Engineering Limited made by the assessee is tabulated as under :

Date of purchase	quantity of share	Issue Price (₹.)	Amount
22.11.2011	75,000	2	1,50,000
19.04.2012	2,75,000	1	2,75,000
	3,50,000		4,25,000

7. In respect of the above referred shares, part purchase consideration was paid through broker M/s. Ekta Shares & Securities amounting to Rs.2,75,000/-. The balance consideration of Rs.1,50,000/- was paid in cash to M/s Haresh Infrastructure Pvt Ltd. Copy of invoice, ledger account and cash receipt duly acknowledged by the seller is placed at page no. 23-32 of the paper book of AY 2013-14.

iii) Re: Dematerialization of Shares

8. It is submitted that, the above shares were dematerialized on 08.02.2013 and 30.03.2013 as per the SEBI Rules. In this regard, copy of demat statement of assessee reflecting the above transaction is placed at page no. 57-62 of the paper book of AY 2013-14.

iv) Re: Sale of Shares in Feb-March 2014

9. The said shares were sold partly in AY 2013-14 and the balance in AY 2014-15. The details of sale of shares is tabulated as under:

A.Y.	NO. Of Shares	Purchase Cost	Sale Value	Profit on sale of shares
2013-14	40,000	80,000	1,71,91,404	1,71,11,404
2014-15	3,10,000	3,45,000	12,19,73,443	12,16,23,894

10. With respect to sales transactions, it is submitted that sales were made through recognized stock exchange and STT was duly paid on the same. Copy of the broker note, bank statement of the assessee and ledger account of the broker is placed at page no 63-96 of the paper book of AY 2013-14 and page no. 62-118 of paper book of AY 2014- 15. The same has nowhere been disputed by the AO.

11. Further, it is to be noted that the assessee is a regular investor in shares and securities and had investment of Rs.26,23,89,205/- as on 31.03.2013 and Rs.42,87,67,802/- as on 31.03.2014. Copy of financial statement assessee is placed at page no. 3 of paper book of AY 2013- 14 and page no. 3-4 of paper book of AY 2014-15..

12. Given the above, it is evident that the purchase and sale of shares of M/s. Turbotech Engineering Limited is genuine in nature and the said documents have nowhere been doubted by AO. It is stated that the addition made by the AO is merely on the basis of suspicion and surmises and the same is liable to be deleted.

v) SEBI investigation relied upon by AO

13. The AO has made a reference of SEBI order dated 01.01.2015 wherein the said scrip M/s. Turbotech Engineering Ltd was suspended w.e.f 07.01.2015. In this regard, it is stated that the said suspension order was passed in AY 2015-16 whereas the assessee had sold all the shares of M/s. Turbotech Engineering Ltd till AY 2014-15. This again proves that the transactions entered by the assessee with M/s. Turbotech Engineering Ltd are genuine as the same were entered in bonafide belief and thus, cannot be doubted.

14. It is further stated that the said script has been suspended merely on surveillance measure which could not be the base to make an addition by the AO. It is pointed out that pursuant to the said suspension order; no further action taken by SEBI against the company has been brought on record by the AO. Therefore, AO's action of treating the transaction as non-genuine merely on the basis of SEBI order does not hold any relevance.

15. Further, the AO has relied upon the SEBI order dated 14.05.2019 passed in the case of certain person to allege that the script has been manipulated. In this regard, it is submitted that the said order has been passed in the case of certain unrelated persons who were doing transaction in the impugned script amongst themselves which were manipulative in nature. It is relevant to point out that there is no allegation of SEBI that all the transactions done in the impugned script is not genuine.

16. Moreover, AO has failed to establish any link between the assessee and the persons barred by SEBI. No negative interference has been passed in respect of assessee or his transactions done in the impugned script. Therefore, such investigation of SEBI has no relevance in assessee's case.

17. Moreover, the assessee also relies on various judicial pronouncements wherein the said order passed by SEBI concerning the company M/s. Turbotech Engineering Limited are forming part of the case law compilation submitted by the assessee. The decisions relied upon by the assessee and the relevant para of the decisions is as follows:

a. Decision of Delhi Tribunal in the case of Swati Luthra v. ITO dated 28.06.2019 reported in 115 taxmann.com 167. (Page no 37-46 of case law compilation)

"16. We further find that Ld. AO has also mentioned about some order of SEBI. This order also was never confronted to the appellant during assessment proceedings. Moreover, the said order seems to be passed in year 2015, whereas the appellant had purchased the shares in year 2011 and 2013 and sold them in year 2014. It was evident from this document only that no action has been taken by the SEBI against the company during the period when the appellant holds the shares. Thus, even otherwise, we find that the order of SEBI so relied by Id. AO and CIT (A) is not applicable for the transactions under consideration.

In any case as stated above, the SEBI in its subsequent decision has absolved most of the companies including the companies whose scrips are under suspicion, as they were not found to be rigging the price. This fact alone vitiates the case of revenue."

b. Decision of Indore Tribunal in the case of Radheyshyam Khandelwal. V. ACIT vide ITA No. 7/Ind/2019 dated 25.06.2021. (Page no 86-117 of case law compilation)

"20. We have further considered the judgement passed in the matter of Udit Kalra (Supra) as relied upon by the Ld. DR before us in support of the case made out by the Revenue. It appears that the challenges made in the appeal before the Hon'ble Delhi High Court in that case stood dismissed in limine; no question of law was found to be formulated. Apart from that the said judgment is distinguishable. In that particular case the scrips of the company were delisted on stock exchange, whereas, in the instant case suspension order in trading in securities of M/s Turbo Tech Engineering Ltd has ultimately been lifted by the adjudication order dated 25.11.2014 wherein SEBI has found no irregularities in the trading of such scrips; neither it has found its Directors involved in any price rigging. Such facts has categorically been mentioned in the judgement of Swati Luthra (supra). Therefore, both factually and materially it is distinguishable from the instant case before us. It is relevant to mention that the orders passed by the SEBI are only of the year 2015 and not during that material point of time i.e. the period between 22.11.2011 and 23.05.2013 when the appellant was holding the shares. Moreso, the subsequent orders passed by the SEBI absolving some companies including M/s Turbo Tech Engineering Pvt. Ltd. whose scrips were under suspicion in the absence of any finding of rigging of price diluted the issue."

c. Decision of Delhi Tribunal in the case of Smt. Simi Verma V. ITO vide ITA No. 3387/Del/2018 dated 06.11.2018. (Page no 118-123 of case law compilation)

"7. I have carefully perused the orders of the authorities below and relevant documentary evidences brought on record. Purchase and sale of shares are documented and exhibited at pages 1 to 8 of the paper book. Sale of shares are carried out in BSE at the prices prevailing in the market which are duly supported by contract notes issued by the broker. The entire transactions have been discarded by the Revenue authorities because the BSE has suspended trading in shares of Turbotech Engineering Pvt Ltd in January 2015. The undisputed fact is that the assessee had sold the shares in the month of July and September 2013, therefore, any action taken in 2015 would not affect the transactions done in 2013. Moreover, neither the SEBI nor the BSE has nullified the transactions done in 2013 in the scrip of Turbotech Engineering Pvt Ltd. Merely because some market players were doing clandestine activities in some scrips in the stock market would not make genuine transactions bogus. Merely

because in the report of investigation wing, Kolkata name of Turbotech Engineering Pvt Ltd is mentioned would not make genuine transaction bogus. There is no direct evidence to demonstrate that the assessee was one of the direct beneficiaries of the accommodation entries provided by the company. Considering the facts of the case in totality in the light of supporting documentary evidences, I do not find any merit in the impugned additions. I, accordingly, direct the Assessing Officer to allow claim of long term capital gain exemption u/s 10(38) of the Act and delete the additions made u/s 69C of the Act."

18. *In view of the aforementioned facts and judicial pronouncements, it is stated that the action of the AO in relying on the suspension order of SEBI without taking into consideration the fact that the shares were sold by the appellant before such order was passed is not tenable in law.*

vi) Doubt on exit providers/promoters

19. *The AO in the impugned assessment order has relied upon certain statements of alleged entry providers in order to allege that the assessee has sold shares to such entry providers in order to obtain accommodation entries. Further, he has also issued a notice u/s 133(6) of the Act to certain exit providers and have relied upon their financials to doubt their capacity.*

20. *In this regards, it is stated that all the transactions were routed through recognised stock exchange, recognised broker and subject to SEBI regulations. The sale and purchase of transaction is carried out through computer terminal without any personal interface. It is stated that no person will come to know who is the buyer or seller of shares. In such case, it is impossible to carry out transactions through exit providers as contended by AO. Also, AO has failed to bring on record any evidence to link assessee with such entry providers.*

21. *Further, the AO has also relied upon the statements of various exit providers who have accepted of providing accommodation entry on commission basis. He has also relied on the statement of one Mr.Prawesh Berai and Mr. Anil Kumar Khemka. In this regard, it is stated that copies of the said statements were never provided to the assessee. Also, nowhere in the said statements, the name of the assessee has been specified. It is stated that no material was brought on record by the AO to show that the assessee had nexus with any of the individuals whose statements were recorded and relied upon by the AO. It is*

also pointed out that no opportunity of cross examination was granted to the assessee.

23. *In this regard, reliance is placed on the decision of Delhi Tribunal in the case of Smt. Shikha Dhawan v. ITO vides ITA No. 3035/Del/2018 dated 27.06.2018 wherein the statement of Mr. Anil Kumar Khemka has been discussed and it was held that such evidences cannot be held as evidence against the assessee. The said decision is placed at page no. 47-72 of the case law compilation. The relevant para is reproduced as under:*

"..... The claim of the assessee for sale of shares has been supported by the documentary evidences which have not been rebutted by the authorities below. Whatever inquiry was conducted in the cases of other parties and statement recorded of several persons namely Sh. Anil Khemka, Sh. Sanjay Vohra and Sh. Bidyoot Sarkar as referred in the assessment order and the report of the Investigation Wing were not confronted to the assessee and above statements were also not subject to cross- examination on behalf of the assessee. Therefore, such evidences cannot be read in evidence against the assessee. The order of the SEBI was also not confronted to the assessee. AO did not mention any such fact in assessment order. More so in those reports and statements, the name of the assessee has not been referred to. Ld. Counsel for the assessee, therefore, rightly contended that the twin conditions of section 10(38) of the Act have been satisfied in the case of the assessee....."

24. *Thus, the action of AO in relying upon the statements of the exit providers without any mention of assessee's name or nexus with such individuals whose statements have been recorded does not hold any relevance. 25. Moreover, the assessee has also placed reliance on the following decisions to substantiate the genuineness of the transaction wherein dealing with similar facts, addition has been deleted. These decisions have already been filed before Your Honour in our case law compilations*

a. Bombay High Court in the case of CIT v. Shri Mukesh Ratilal Marolia vide ITA No. 456 OF 2007 dated 07.09.2011 and confirmed by Hon'ble Supreme Court in order dated 27.01.2014 vide SLP NO. 20146/2012 (Page no 1-13)

b. Bombay High Court in the case of CIT v. Shyam R. Pawar dated 10.12.2014 reported in 54 taxmann.com 108 (Page no 14-15)

c. Bombay High Court in the case of PCIT v. Ziauddin A Siddique bearing IT Appeal No. 2012 OF 2017 dated 04.03.2022 (Page no 16-18)

d. Gujarat High Court in the case of PCIT v. Parasben Kasturchand Kochar dated 17.09.2020 reported in 130 taxmann.com 176 and confirmed by Hon'ble Supreme Court vide order dated 02.08.2021 reported in 130 taxmann.com 177 (Page no 19-21)

e. Delhi High Court in the case of PCIT v. Smt. Krishna Devi dated 15.04.2021 reported in 126 taxmann.com 80 (Page no 22-26)

f. Punjab and Haryana High Court in the case of PCIT v. Hitesh Gandhi bearing IT Appeal No. 18 OF 2017 (O & M) dated 16.02.2017 (Page no 27-33)

g. Rajasthan High Court in the case of CIT v. Smt. Pooja Agarwal dated 11.09.2017 reported in 99 taxmann.com 451 (Page no 34-36)

26. *In view of the above mentioned facts and judicial decisions, we request Your Honour to delete the addition made in the case of the assessee."*

15. Further, Ld.AR of the assessee has submitted various documentary evidences in support of the above said transaction and he brought to our notice contract notes of sales of shares, details of cheque issued by stock broker of the assessee towards sales, bank statements in support of the realisation of the sale proceeds and he submitted that the Long Term Capital Gain earned by the assessee is genuine and not an arranged one as alleged by the tax authorities.

16. Further, he submitted that Assessing Officer and Ld. CIT(A) have not pointed out any discrepancies in the documentary evidences submitted by the assessee. Ld.AR of the assessee submitted that without pointing out any discrepancies in the documentary evidences submitted by the assessee the Assessing Officer has heavily relied on the investigations carried out by the Directorate of Investigation. The predetermined action with specific intention is one of the circumstances evidences leading to the conclusion that the Long Term Capital Gain earned is not genuine. Further, assessee has not declared any Short Term Capital Gain or business income or exempt income of share transactions in the previous assessment years.

17. Further he brought to our notice that the assessee is a regular investor and having huge investment portfolio and submitted that the same is filed in the paper book at page 3.

18. On the other hand, Ld. DR objected to the submissions of the Ld.AR of the assessee. Ld. DR submitted that Shares were purchased in offline mode, in physical form, in cash, at a meagre price of ₹.2/- in 2011 and Shares were sold by assessee in 2013 @ ₹.420/- (210 times). The Net worth of company, M/s Turbotech, whose shares purchased

were Negligible and company shows Nil Income in all the 5 years. Further, Ld. DR submitted that the whole family earned LTCCG although non-traded regularly in sale/purchase of shares. In fact, Assessee has not traded in other scrips. As such assessee had No experience in identifying scrips. How they zeroed in on this scrip has not been explained. Further, Ld. DR submitted that SEBI suspended the trading of this scrip vide order dated. 01.01.15 and Survey action could not be executed on the 4 EXIT PROVIDERS as they were not found operating from their registered premises. SEBI order dated 14.05.19 established that the exit providers in the case of assessee are same as those involved in manipulating the scrip. Further, Ld. DR submitted that Exit providers have admitted to have provided accommodation entry in the penny scrip M/s Turbotech during search action. Assessing Officer has also made 3rd party enquiries and field enquiries by issuing 133(6) notices during the course of assessment. Investigation wing report- which identified Turbotech as an entity used for providing bogus accommodation entry. Thus, Assessing Officer has rightly concluded that the LTCCG claimed is nothing but a sham transaction effected with the help of entry operators through synchronized trading.

19. Further, Ld. DR relied on the following case law in support of his contentions: -:

- i. Hon'ble ITAT decision in the case of Sh Hitendra C Ghadia vs DCIT, CC-1(1) dated 20.03.23 in ITA No. 621/Mum/2021 and other ITAS*
- ii. Hon'ble SC decision in the case of Suman Poddar vs ITO (2019) - 112 taxmann.com 330 SC*
- iii. DCIT vs Lotus logistics & Developers Ltd. (2022) - 136 taxmann.com 110 Mumbai Tribunal A bench*
- iv. ITO 19 (3)(4) Mumbai vs Shamin M Bharwani - (2016) - 69 taxmann.com 65 Mumbai Tribunal E bench*
- v. Sanat Kumar vs ACIT, Circle 14(1) Delhi (2020) 122 taxmann.com 75 (Delhi Tribunal E bench)*
- vi. Satish Kishore v ITO ward 47(2) New Delhi (2019) 110 taxmann.com 307 (Delhi Tribunal G bench)*

20. Considered the rival submissions and material placed on record, we observe that the assessee is a regular investor as brought to our notice by the Ld AR at page 3 of the paper book, as per the Balance Sheet of the assessee as on 31.03.2013, assessee held shares and Debentures worth of Rs. 26,23,89,205/-. It shows that the assessee is a regular investor and had also made the investment in the scrip under consideration. The AO observed that assessee had made huge profit out of this investment because of this, it makes the scrip as suspicious and penny stock. We cannot agree to the above observation, merely because of huge profit, it does not make the scrip a penny stock. Further, it is

fact on record that the financials of the company are not commensurate with the purchase and sale price in the market. The assessee has purchased the shares from open market, D-mated the scrips and subsequently sold the same in the stock exchange. It clearly raises several doubt on the purchase and sales transactions recorded in this case. However, there is no discrepancies in the documents filed by the assessee claiming the deductions u/s 10(38) of the Act. At the same time, even though all the characteristics of the penny stock exists in the present case, still the revenue has not brought on record any materials linking the assessee in any of the dubious transactions relating to entry, price rigging or exit providers. Even in the SEBI report, there is no mention or reference to the involvement of the assessee except in the latest SEBI report of 2020, there is only restriction on trading of this script but there is no reference to assessee. We can only presume that the assessee is one of the beneficiary in this transactions merely as an investor who has entered in investment fray to make quick profit. Even the assessing officer has applied the presumptions and concept of human probabilities to make the additions without their being any material against the assessee. We observe that the Hon'ble Bombay

High Court in the case of Pr. CIT v. Ziauddin A Siddique in Income Tax

Appeal No. 2012 of 2017 dated 04.03.2022 held 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 I. T. Act, 1961?"

2. We have considered the impugned order with the 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."

21. Further, the Hon'ble Delhi High Court in the case of Pr. CIT v. Smt Krishna Devi in ITA 125/2020 dated 15.01.2021 held as under: -

"8. *Mr. Hossain argues that in cases relating to LTCC in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in Suman Poddar v. ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453.*

9. *Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips.*

10. *We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.*

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 LTCCG, which is exempt under Section 10(38), in a pre-planned 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 LTCCG. 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 LTCCG 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 ITA 125/2020 and connected matters Page 10 of 10 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.

15. Accordingly, the present appeals are dismissed."

22. Even otherwise, the Coordinate Benches of the Tribunal in the cases of Swati Luthra v. Ito [115 taxmann.com 167] and Radheyshyam Khandelwal v. ACIT in ITA No. 7/IND/2019 dated 25.06.2021 dealt with identical scrip wherein the assesseees have also earned Long Term Capital Gain at the high volume and the Tribunal ultimately decided the issue in favour of assessee. For ready reference, the conclusion drawn by the ITAT Delhi Bench in the case of Swati Luthra v. ITO (supra) is reproduced below: -

"13. In the instant case, the Assessing Officer himself observed that the movement in price of shares of M/s Esteem Bio and M/s.Turbotech were without any backing of financial performance of the said companies. In our considered view, the above factor at best was a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. Further, we also find from record that Ld. AO also didn't confront copies of statements recorded by Investigation Wing, Kolkata of Sh, Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar to the appellant during assessment proceedings and merely extracted copies of their statement in the assessment order only. The Ld. AO has not confronted any material to the assessee nor provided any adequate opportunity to the assessee to defend her case. Since the statements were not confronted to the assessee, she was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly to all the persons who have brought the scrips in the entire country. Thus, under these circumstances, atleast some inquiry should have done from these persons, whether they have provided any entry to the assessee, if the request for cross examination was not possible at that stage. Cross examination of a person in whose basis any adverse inference is drawn, then it cannot be primary evidence or material to nail the assessee and simply based on the statement no addition can be made. This has been held so by various courts, and also by Hon'ble Apex Court in the case of M/s Andaman Tiimber Industries vs. CCE (SC) reported in 127 DTR 241 has held as follows:

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such

opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

14. That the Id DR during the course of hearing placed heavy reliance on judgment of Hon'ble High Court of Delhi in the case of **Udit Kalra vs ITO** in ITA No. 220/2019. Relevant extracts of said judgment are extracted as below:

"The assessee is aggrieved by the concurrent findings of the tax authorities-including the lower appellate authorities rejecting its claim for a long term capital gain reported by it, to the tune of Rs. 13,33,956/- and Rs.14,34,501/- in respect of 4,000 shares of M/s Kappac Pharma Ltd. The assessee

held those shares for approximately 19 months; the acquisition price was Rs.12/- per share whereas the market price of the shares at the time of their sale, was Rs.720/-. It is contended that the assessee was not granted fair opportunity.

Mr. Rajesh Mahna, learned counsel appearing for the assessee relied upon the orders of the co-ordinate Bench of the tribunal, in respect of the same company i. e. M/s Kappac Pharma Ltd., and pointed out that the tax authority's approach in this case was entirely erroneous and inconsistent.

The main thrust of the assessee's argument is that he was denied the right to cross-examination of the two individuals whose statements led to the inquiry and ultimate disallowance of the long term capital gain claim in the returns which are the subject matter of the present appeal.

This court has considered the submissions of the parties. Aside from the fact that the findings in this case are entirely concurrent - A.O., CIT(A) and the ITAT have all consistently rendered adverse findings - what is intriguing is that the company (M/s Kappac Pharma Ltd.) had meagre resources and in fact reported consistent losses. In these circumstances, the astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. Having regard to these circumstances and principally on the ground that the findings are entirely of fact, this court is of the opinion that no substantial question of law arises in the present appeal.

This appeal is accordingly dismissed. "

*15. On going through the aforesaid judgment, we find that no question of law was formulated by Hon'ble High Court of Delhi in the said case and there is only dismissal of appeal in limine and the Hon'ble High Court found that the issue involved is a question of fact as held by Hon'ble Apex Court in **Kunhayammed vs State of Kerala reported in 245 ITR 360** and also in **CIT vs. Rashtradoot (HUF) reported in 412 ITR 17**. Even on merits and facts, the said judgment in the case of Udit Kalra vs ITO (supra) is distinguishable as in that case the scrips of the company*

were delisted on stock exchange, whereas, in the instant case, the interim order of SEBI in the cases of M/s Esteem Bio and M/s Turbotech have been cooled down by subsequent order of SEBI placed by assessee in its paper book. Thus, the case of Udit Kalra vs ITO relied by Id. DR is clearly distinguishable on facts and is not applicable to the facts of assessee. Thus, we hold that the case of assessee is factually and materially distinguishable from the facts of the case of Udit Kalra vs ITO so relied by Id DR.

16. We further find that Ld. AO has also mentioned about some order of SEBI. This order also was never confronted to the appellant during assessment proceedings. Moreover, the said order seems to be passed in year 2015, whereas the appellant had purchased the shares in year 2011 and 2013 and sold them in year 2014. It was evident from this document only that no action has been taken by the SEBI against the company during the period when the appellant holds the shares. Thus, even otherwise, we find that the order of SEBI so relied by Id. AO and CIT (A) is not applicable for the transactions under consideration. In any case as stated above, the SEBI in its subsequent decision has absolved most of the companies including the companies whose scrips are under suspicion, as they were nor found to be rigging the price. This fact alone vitiates the case of revenue.

17. We also find that the Ld. AO has raised objection regarding the cash purchase of shares and that shares were dematerialized few days back only from the date of sale. There is no law which prohibits the purchase of shares in cash, however in the present case, assessee had filed copies of bills of purchase, copy of share certificates and transfer forms etc. before Ld. AO and no adverse inference could be drawn only because the shares were purchased in cash. Regarding Demat of shares, we hold that it is the option of the buyer of shares to keep the shares either in Demat form or in paper form. Merely because the shares were dematted at a later stage, no adverse inference could be drawn. The Learned Counsel for the Assessee has taken us through various documents filed in the paper book as referred to above which specifically prove the purchase of shares made by assessee genuinely which were also sold genuinely. The transactions were carried through Demat account and banking channel on which STT has been paid by assessee. The report of the SEBI was not adverse in nature against

the assessee because name of the assessee did not appear therein for conducting dubious transaction. The report of the Investigation Wing and other material was neither confronted to assessee nor there was any inquiry from where it transpired that assessee was beneficiary of any bogus long-term capital gain; therefore, the same cannot be read in evidence against the assessee. A specific material against the assessee should have been brought on record to put assessee under liability. However, in the present case, the entire documentary evidence on record has not been disputed by the authorities below and there is no rebuttal to the explanation of assessee. No other adverse materials have been brought on record against the assessee. Further, no proper enquiry has been conducted by the A.O. on the documentary evidences filed by assessee. Whatever statements have been referred to in the order was general in nature with whom assessee did not have any transaction. Considering the totality of the facts and circumstances of the case, we hold that assessee has entered into genuine transaction of sale and purchase of shares and therefore, satisfied the conditions of Section 10(38) of the I.T. Act. The assessee is entitled for exemption under the same provision. We accordingly, set aside the orders of the authorities below and delete the addition of Rs. 41,85,762/-. Appeal of assessee is allowed."

23. Therefore, we respectfully follow the ratio of the above decisions and inclined to allow the grounds raised by the assessee. Accordingly the grounds raised by the assessee is allowed. The case laws relied by the Ld. DR are distinguishable to the facts of the case.

24. As far as Ld. DR submission that this scrip transaction is suspended by the SEBI and he brought to our notice the SEBI order, however, there is no specific findings against the script under

consideration or on the assessee. It was also brought to our notice that this script is still traded in the stock exchange.

25. With regard to Ground No. 5 and 6 relating to addition on account of commission paid on alleged bogus share transaction. Ld.AR of the assessee submitted that the above grounds are consequential to the ground no 3 & 4 as stated above. Thus, once the share transaction is held genuine and explained, the said addition shall also be deleted. He Further, submitted that the addition has been made by Assessing Officer merely on surmises without any evidence on record and thus may kindly be deleted. On the other hand, Ld DR objected to the above submissions and prayed that both the bogus LTCG and commissions paid on the same may be sustained.

26. Considered the rival submissions and material placed on record, we already held that the transaction involving the LTCG is genuine and in favour of the assessee, the consequential addition relating to the above transaction is also deleted. Accordingly, we direct the Assessing Officer to delete the above addition made u/s 69 of the Act.

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

ITA NO. 2428/MUM/2021 (A.Y. 2014-15)

28. Coming to the appeal relating to A.Y. 2014-15, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2013-14 are applicable to this assessment year also. Accordingly, this appeal is also allowed.

29. To sum-up, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 25th January, 2024.

Sd/-
(NARENDRA KUMAR CHOUDHRY)
JUDICIAL MEMBER

Mumbai / Dated 25.01.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum