

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

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 883/MUM/2023 (A.Y: 2014-15)

Udaykumar Prabhudas Shah 1601 Moksh Mahal P.K. Road, Sarvodaynagar, Mulund, Mumbai – 400080 PAN: ALYPS8682D	v.	Income Tax Officer – Ward – 29(3)(1) Kautilya Bhavan Bandra Kurla Complex Bandra (E), Mumbai - 400051
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Dharan Gandhi
Department Represented by	:	Ms. Kavitha Kaushik
Date of conclusion of Hearing	:	24.01.2024
Date of Pronouncement	:	07.02.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 04.01.2023 for the A.Y.2014-15.

2. Assessee has raised following grounds in its appeal

"1. *The Ld. Commissioner of Income-tax (Appeal), NFAC, erred in upholding the action of Income-tax Officer Ward 29(3)(1), Mumbai in adding Rs. 1,49,58,500/-, being sale proceeds on sale of shares of M/s Comfort Fincap Ltd. u/s 68 of the Act.*

2. *The Ld. Commissioner of Income-tax (Appeal), NFAC, erred in relying upon the judgment in case of PCIT -v. Swati Bajaj[2022], 139 taxmann.com 352 (Calcutta) without allowing the Appellant to reply and ignoring the judgments of the jurisdictional High Court and other High Courts.*

3. *The Ld. PCIT Commissioner of Income-tax (Appeal), NFAC, erred in upholding the action of the Ld. AO in making the impugned adding without even providing the Appellant the material relied upon and without granting any opportunity to cross examine the parties.*

4. *The Ld. AO has erred in levying interest u/s 234B and 234C of the Act*

5. *The Ld. AO has erred in initiating penalty u/s 271(1)(c) of the Act*

6. *The Appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing."*

3. At the outset, Ld. AR of the assessee submitted that the similar issue relating to Long Term Capital Gain by sale of shares of M/s.Compfort Fincap Ltd., has been considered by the Co-ordinate Bench of this Tribunal in the case of Alpa Udaykumar Shah v. ITO (assessee's wife case) for the A.Y. 2014-15 in ITA No. 391/AHD/2018 dated 26.08.2022 and Coordinate Bench has adjudicated the issue by directing the Assessing Officer to delete the addition (Copy of the order

is placed on record). He further submitted that all the facts are similar in this case, except for variation on quantity in sale of shares. He prayed that similar direction may be followed as the facts are similar.

4. On the other hand, Ld. DR relied on the orders of the lower authorities.

5. Considered the rival submissions and material placed on record, we observe from the record that on identical facts and also where the sale of share of same scrip is involved i.e, M/s. Comfort Fincap Ltd., has been considered by the Coordinate Bench in the case of Alpa Udaykumar Shah v. ITO (supra) and decided the issue in favour of the assessee in the A.Y.2014-15. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No.391/AHD/2018 dated 26.08.2022, held as under: - -

"7. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the long term capital gain declared by the assessee on sale of shares of M/s Comfort Fincap Ltd for ₹ 1,15,49,320/- was treated as bogus and manipulated, leading to the addition by the AO under section 68 of the Act. The view of the AO was based on certain factors which have been elaborated in the preceding paragraph which has been also confirmed by the learned CIT(A).

7.1 The 1st observation of the AO for holding the impugned capital gain as bogus was that the at the time of investment by the

assessee the company, was not known in public domain and share were purchased in offline. In this regard firstly we note that the offline purchase of share is not prohibited under the statute. Secondly, if some investment in the shares of a company is made, which at the relevant time was not known in public domain or in private placement does not mean that the investment is not genuine or pre-arranged unless some adverse materials are available on record.

7.2 It was also alleged that the price of the share of M/s Comfort Fincap Ltd. was increased manifolds in a short period of time which was not believed by the authorities below on the principles of preponderance of human probabilities in the given facts and circumstances. The rise in the price of the scrips of a company, having no financial base/business activity/profitability certainly gives rise to the doubt about such increase in the price. However, in the given case, the impugned company was engaged in the business activity and likewise, it was regularly showing income from operation and also declaring dividend and having registered in RBI as NBFC. Further, in our considered view, the sharp rise in the price of scrip cannot be a sole criteria for reaching to the conclusion that the price were rigged up to generate the long-term capital gain which is exempted under section 10(38) of the Act. Such observation during the assessment proceedings provides reasons to investigate the matter in detail and the same cannot take the place of the evidence. But in the case on hand, there was no enquiry conducted either by the SEBI or the stock exchange with respect to rigging up of share price of M/s Comfort Fincap Ltd. either by the assessee or his broker. Similarly, there was no complaint filed by any of the party either to the SEBI or the stock exchange about the assessee or brokers impleading that they were involved in the activity of rigging up the price of the shares. Similarly, the AO has not conducted an enquiry from the SEBI or BSE about the assessee whether he was engaged in the frivolous activities as alleged. The AO alleged that the SEBI has prohibited the impugned company to enter into transaction at stock market. However, we note that the SEBI has not taken any action against the scrip of the impugned company as the action was taken against the director promoter and the company from accessing to share market.

7.3 Further, the price of a share at stock exchange cannot be linked to the financial strength of the company, as such the same is governed by several market driven factors. The assessee is also a regular investor and have made investment in the scrip of other

companies. We also note that the assessee has acquired 55000 shares of impugned company whereas the shares were transferred only 34400 in numbers during the period of October 2013 to February 2014 and remaining shares are still held by the assessee. We also note the price of the impugned share also reached as high as Rs. 448 per share whereas the highest price at which, the assessee transferred was of Rs. 395 per share and lowest was of Rs. 187 per share. Thus in our considered view had the assessee indulged in pre-arrange transaction for taking accommodation entries then he should have transferred the entire holding and that too at the highest possible price.

7.4 The AO alleged that the CEO of Comfort Fin Securities and key person of the comfort group in the statement recorded before the DDIT Kolakata admitted to have provided accommodation entry in the scrip of M/s Comfort Fincap Ltd. Similar admission was also made by the other stock broker during the search and survey proceeding conducted by the DDIT Kolkata in the matter of penny stock. However their statements were not provided to the assessee for the rebuttal and cross examination. It was also not brought on record that any of the person whose statement was recorded have taken the name of the assessee or his broker. We also note that there was no allegation against the broker through whom the assessee has purchased and sold the impugned script. What has been adopted by the AO for making the addition was the modus of operandi as highlighted by the investigation wing of Kolkata. To our understanding, the mere modus of operandi cannot be the basis of making the addition or treating the capital gain as bogus until and unless it is supported by other corroborative material documents.

7.5 On further analyzing the facts of the present case, we note that the AO on one hand has alleged that the entire transaction was bogus but on the other hand the AO himself has allowed the cost of acquisition against the sale of shares, meaning thereby, the purchase of the shares has been admitted as genuine. The transactions of purchase and sales go hand in hand. In simple words, sale is not possible without having the purchases. Thus, once purchases has been admitted as genuine, then corresponding sales cannot be doubted until and unless some adverse materials are brought on record. As such, we note that the AO in the present case has taken contradictory stand. On one hand, the AO is treating the entire transaction as sham transaction and on the other hand he's allowing the benefit of the cost of acquisition for the shares while determining the bogus long-term capital gain.

7.6 The alleged scam might have taken place on generating LTCG to avoid the payment of tax. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this arrangement. The chain of events and the live link of the assessee's action that he was involved in such rigging up of share price should be established based on cogent materials. The allegation as discussed above implies that there was cash exchanged for taking exempted income by way of long term capital gain by way of cheque through banking channels. This allegation that cash had changed hands, has not been brought on record by the Revenue and there is also no such whisper in the order of the AO. There was no information brought on record suggesting that there was exchange of cash against the long-term capital gain shown by the assessee. Likewise we also note that the assessee has discharged the onus imposed under section 68 of the Act by furnishing the necessary documentary evidence in support of the identity, genuineness of transaction and creditworthiness of the parties. Therefore the same cannot be made subject to tax under the provisions of section 68 of the Act.

7.7 We also note that there was no dispute raised by the Revenue with respect to the following facts:

- 1. Purchase consideration of share was made through cheque*
- 2. Share was duly dematerialized in demat account*
- 3. Shares were sold through stock exchange after the payment of STT. The transactions have been confirmed by brokers.*
- 4. The payment were received through ECS through demat account*
- 5. Inflow of shares are reflected in demat account. Shares are transferred through demat account and buyers do not know the assessee.*
- 6. There is no evidence that the assessee has paid cash to the buyer or the broker or any other entry provider for booking LTCG and share were purchased by the determined buyer.*
- 7. The assessee has no nexus or any relation with company, its director or entry operator.*

8. *The assessee may have got only incidental benefit of price rise.*

9. *The opportunity of cross examination has not been extended to the assessee despite having the request from the assessee.*

7.8 *From the above, conduct of the assessee suggests that he was not involved in rigging or any wrongdoing. The case laws relied by the authorities below are distinguishable from the present facts of the case in so far there was SEBI enquiry conducted and found guilty of wrong practices but it is not so in the case on hand.*

7.9 *In our view, the income generated by the assessee cannot be held bogus only on the basis of the modus operandi, generalisation, and preponderance of human probabilities. In order to hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stock brokers for such an arrangements. In absence of such finding, it is not justifiable to link the fact or the finding unearthed in case of some third party or parties with the transactions carried out by the assessee. Further the case laws relied by the AO are with regard to the test of human probabilities which may be of greater impact but the same cannot used blindly without disposing off the evidence forwarded by the assessee. In simple words, there were not brought any evidence from independent enquiry to corroborate the allegation.*

7.10 *Now the controversy also arises whether a person who genuinely purchases the shares at a low price and sold at high price, therefore, he enjoyed the windfall from such scripts, can he be disallowed the benefit of tax exemption provided under section 10(38) of the Act in a situation where it is established that the share price of the company was rigged up to extend the benefit to certain parties. The Justice cannot be delivered in a mechanical manner. In other words, what we see on the records available before us, sometime we have to travel beyond it after ignoring the same. Furthermore, while delivering the justice, we have to ensure in this process that culprits should only be punished and no innocent should be castigated. An innocent person should not suffer for the wrongdoings of the other parties. In the case on hand, admittedly there was no evidence available on record suggesting that the assessee or his broker was involved in the rigging up of the price of the script of M/s Comfort Fincap Ltd.*

Thus, it appears that the assessee acted in the given facts and circumstances in good-faith.

7.11 In holding so we draw support and guidance from the judgment of Hon'ble Delhi High court in case of Pr. CIT vs. Smt. Krishna Devi reported in 126 taxmann.com 80 where it was held as under:

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.

7.12 Respectfully, following the judgment of Hon'ble Delhi High Court (Supra), we hold that in absence of any specific finding against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated as far as long term capital gain earned on sale of share of M/s Comfort Fincap Ltd. is concern.

7.13 We also note that this Tribunal in the case of Parasben Kasturchand Kochar Mehta Lodha & Co. Chartered Accountant vs. ITO bearing ITA No. 549/Ahd/2008 involving identical facts and circumstances has held as under:

"7. We have gone through the relevant record and impugned order and heard both the parties. Assessee submitted that he is a customer of ICICI Bank and having demat account of ICICI Securities Ltd. and he has purchased shares through ICICI Securities Ltd. and money has been paid through banking channel. Copies of bank statement and Demat account have been submitted before the lower authorities.

8. Ld. A.R. also drawn our attention towards the statement of Edelweiss Broking Ltd. through the said company shares were sold and also shown us copy of the Contract Note and all these details were furnished before the lower authorities. The assessee has earned long term capital gain from the sale of companies share i.e. Alpha Graphic India Ltd. and Blazon Marbles.

9. In our considered opinion, in such case assessee cannot be held that he earned Long Term Capital gain through bogus company when he has discharged his onus by placing all the relevant details and some of the shares also remained in the account of the appellant after earning of the long term capital gain.

10. *Ld. A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.*

11. *In support of its contention, ld. A.R. also cited an order of Co-ordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab Pvt. Ltd. vs. ITO wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the ld. A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee. "*

7.14 *At this juncture we also feel pertinent to refer the order of coordinate bench of Indore in case of Shivnarayan Sharma & Ors bearing ITA Nos. 889/Ind/2018, 474,206,60,987/Ind/2019, where in identical fact and circumstances, it was held as under:*

"16. Since we are adjudicating the above stated common issue on the basis of above assessee namely Shri Shivnarayan Sharma, we note that the assessee purchased 6000 equity shares of Conart Traders Ltd on 22.10.2011 at a cost of Rs.1,50,000/- . There is no restriction under the law to purchase equity shares on off line mode. Vide order dated 22.3.2013 of the Hon'ble Mumbai High Court M/s Conart Traders Limited was merged with M/s SAL and in lieu there of 6000 shares of M/s SAL were received by the assessee in its demat account. After holding the equity shares for more than 12 months since purchased on 22.10.2011, assessee sold the shares of M/s SAL during the period April 2014 to June 2014 through a registered broker and all the transactions of sale of shares took place on the recognised stock exchange. Sale consideration was received in the bank account attached with the Demat account. The detail of the persons purchasing the shares is not provided on the portal of SEBI and all the transactions of purchase and sale took place on the portal through registered brokers under the control of SEBI. M/s SAL has not been struck off as a shell company. Trading of shares of M/s SAL was permitted by SEBI. Prime

facie, all the conditions provided u/s 10(38) of the Act seems to have been fulfilled by the assessee.

17. As regards the second issue raised is that assessee was not provided opportunity of cross examination, we observe that Ld. A.O has referred to some investigation carried out by the Department in the case of some brokers and other assessee(s) located at Kolkata and other places and there is a reference of the company M/s SAL. However it is not disputed that name of the assessee is not appearing in such report nor any evidence was found by the Ld. A.O which could indicate that assessee was also a part or connected to the alleged racket of providing accommodation entry of bogus LTCCG nor any proof of any agreement between the assessee and other persons mentioned in the report has been found. So the basis of addition is primarily on the statement of third party as well as the information gathered from other sources. Perusal of the records shows that the assessee has not been provided any access to such report nor any opportunity was provided to cross examine those persons who accepted to have provided accommodation entries for the bogus LTCCG, to the assessee.

18. We observe that all the above stated facts and the issue of genuineness of LTCCG and failure of the Ld. A.O to provide opportunity to cross examination by the assessee with regard to the addition made u/s 68 of the Act for the sale consideration received from sale of equity shares of M/s SAL and addition for estimated brokerage expenses has been dealt by the Co-ordinate Bench of Mumbai Tribunal in the case of Dipesh Ramesh Vardhan V/s DCIT (supra) and the same is squarely applicable on the instant appeals.

23 We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have

not found to be incorrect. The conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the equity shares held in Demat account and transactions performed on a recognised stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of Andaman Timber Industries vs. CCE 281 CTR 241 (SC) that "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".

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Coordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018,

*474/Ind/2019, 206/Ind/2019, 60/Ind/2019,
61/Ind/2019 and 987/Ind/2019 are allowed."*

7.15 In view of the above discussion we hold that the capital gain earned by the assessee cannot be held as bogus merely on the basis of some report unearthed in case of third party/parties unless cogent material is brought against particular assessee on record. Therefore, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the grounds of assessee's appeal are allowed."

6. Since the issue involved in this appeal is exactly similar to the case of Alpa Udaykumar Shah *v.* ITO (assessee's wife case) and the facts are also identical, respectfully following the above decision in the above case, we allow the grounds raised by the assessee.

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

Order pronounced in the open court on 07th February, 2024.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Mumbai / Dated /02/2024
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