

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)

ITA No. 1306/MUM/2023
Assessment Year: 2013-14

Shanno Mohammed Yusuf Warsi,
1A, 101, Sangeeta Apts, Panch
Marg, Off Yari Road, Versova
Andheri West, Mumbai-400058.

Vs.

Income Tax Officer-25(1)(3),
4th floor, Building C-10, Room
No. 404, Pratyaksha Kar
Bhavan, Bandra Kurla
Complex, Mumbai-400051.

PAN NO. AAJPW 0272 F
Appellant

Respondent

Assessee by : Mr. Pankaj Soni
Revenue by : Mr. Manoj Kumar Singh, Sr. DR

Date of Hearing : 14/02/2024
Date of pronouncement : 26/02/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 16/02/2023 passed by the learned Commissioner of Income-tax(Appeals)- National Faceless Appeal Centre (NFAC), Delhi [in short the Ld. 'CIT(A)'] for assessment year 2013-14, raising following grounds:

- 1. That on the facts and circumstances of the case of the appellant and in law learned CIT (Appeals) has erred in upholding the validity of re-opening of assessment u/s. 147 of the Act.*
- 2. That on facts and circumstances of the case of the appellant and in law learned CIT(Appeals) has erred in upholding the addition of*



Rs 2,30,01,500/- as unexplained cash credit u/s 68 of the Act and of Rs.5,75,037/- unexplained expenditure u/s 69C of Act.

- 3. Without prejudice to the generality of grounds of appeal no. 1 & 2 above, on facts and circumstances of the case of the appellant and in law learned CIT (Appeals) has erred in not appreciating that the addition of Rs 2,30,01,500/- as unexplained cash credit u/s 68 of the Act and of Rs.5,75,037/- unexplained expenditure u/s 69C of Act is on existent facts.*
- 4. Without prejudice to the generality of grounds of appeal no. 1 & 2 above, on facts and circumstances of the case of the appellant and in law learned CIT (Appeals) has erred in not appreciating that the addition of Rs 2,30,01,500/- as unexplained cash credit u/s 68 of the Act and of Rs.5,75,037/- unexplained expenditure u/s 69C of Act has been made by assessing officer without bringing on the appellants assessment records any material in support of facts alleged by him.*
- 5. Without prejudice to the generality of grounds of appeal no. 1 & 2 above, on facts and circumstances of the case of the appellant and in law learned CIT (Appeals) has erred in not appreciating that the addition of Rs 2,30,01,500/- as unexplained cash credit u/s 68 of the Act and of Rs.5,75,037/- unexplained expenditure u/s 69C of Act has been made by assessing officer merely based on the some communication received by him without verifying the correctness of the same and without confronting the appellant with any material in relation thereto.*
- 6. That the order of learned CIT (Appeals) being contrary to the facts of the case, evidence and material on record and law applicable thereto should be set aside, amended or modified in accordance with ground of appeal deduced above.*
- 7. Each of the ground of appeal enumerated above are independent of and without prejudice to one another.*
- 8. That the appellant craves leave to reserve to herself the right to add to, alter or amend any of the aforesaid ground of rounds of appeal at or before the time of hearing and to produce such further evidence, documents, and papers in support of its claim as may be necessary.*

2. Briefly stated facts of the case are that the assessee , an individual, filed its return of income for the year under consideration on 30/07/2013 declaring total income at ₹ 12, 72, 400/-. Subsequently, on receipt of information that assessee obtained accommodation entries of bogus long-term capital gain, the Assessing Officer recorded reasons to believe that income escaped assessment and issued notice under section 148 of the



Income-tax Act, 1961 (in short the Act) for reassessment under the provisions of section 147 of the Act.

2.1 During reassessment proceedings the Assessing Officer asked the assessee to justify sale consideration of ₹2,30,01,500/-received on sale of shares of “Essar (India) Ltd’ as genuine. The Assessing Officer referred to the investigation carried out by the Directorate of Income-tax (Investigation), Kolkata, in the cases of some of the brokers, who were dealing in providing accommodation entry of long-term capital gain under section 10(38) of the Act including in the scrip of ‘Essar India Ltd’. The investigation revealed different steps of entire process of providing accommodation entry of long-term capital gain/short-term capital loss. The first step is of acquiring of shares of ‘Penny’ stock company. The term ‘Penny’ stock has been referred in relation to the shares having very low price or negligible price. The shares of ‘penny’ stock companies were acquired by the beneficiaries of long-term capital gain at very low prices mainly through the route of preferential allotment (private placement) or off-market transactions. In another route , the beneficiaries of long-term capital gain were allotted shares of a private limited company, which was subsequently amalgamated /merged with a listed ‘Penny’ stock company and the beneficiaries received shares of listed ‘Penny’ stock in exchange of shares of private limited company. In some cases, shares acquired through stock exchange were split and bonus shares were issued to increase



the volume. Under the second step, the prices of the shares of the 'Penny' stock companies were rigged through circular trading. This process was managed by a group of operators for a period exceeding one year. Under the third step, when the shares prices had been sufficiently rigged to a high level, the beneficiaries would sell their shares at the high/inflated price on the stock exchange, which will be purchased by a set of operators, named as exit providers. The sale would result an exorbitant amount of capital gain in the hands of beneficiaries, which was exempted from tax under section 10(38) of the Act. Under the fourth step, after sale of shares by the beneficiaries, prices of the penny stock companies would fall and the exit providers would sell the shares at loss and would claim short-term capital loss, which would be utilised for adjustment against capital gain. The Assessing Officer has also referred to the cash trail in such type of transactions revealed in the investigation carried out by the directorate of Income-tax (investigation), Kolkatta. For ready reference, relevant part of the assessment order is reproduced as under:

“14. Cash Trail by Investigation Wing, Kolkata:

Investigation Wing, Kolkata has prepared a sample cash trail for showing that how the mechanism works for the syndicate of providing long term capital gain/ short term capital loss. For preparing this cash trail Investigation Wing, Kolkata has followed the money movement from undisclosed proprietorship accounts, where cash is being deposited mostly, to the Jamakharchi companies who are registered as clients with the share brokers. Undisclosed and unaccounted cash gets deposited to proprietorship accounts and then it gets transferred to client companies, who exist in paper only. From the Jamakharchi client company account, money gets transferred to Beneficiaries of Long Term Capital Gain via Share Broker's Account. On a sample basis, just to illustrate the modus



operandi Investigation Wing, Kolkata has prepared cash trail of more than 1500 Crore Rupees.

14.2 To elaborate it more, when a person needs entry of LTCG, he approaches a share broker or entry operator. Entry operator gets him registered with some share broker as a client. Then shares of a listed penny stock are provided to beneficiaries. After a year, beneficiary provides cash to entry operator for having equalling amount of entry of LTCG. Then entry operator or share broker gets such cash deposited to the various accounts and routes it to bogus client. Bogus client purchases the penny stock shares from beneficiary on abnormally higher rate. Thus a beneficiary gets back his unaccounted cash as cheques/RTGS for receipt against sale of shares.

14.3 Almost all the proprietorship accounts, where cash is getting deposited never files Income Tax Returns. Moreover, they tend to close such accounts very often, so that they can evade any STR/FIU/Income Tax issues. If one goes through the K/Cs of such proprietorship accounts, it can be seen that they are opened in the name of dummy persons, who are either employees or relatives of entry operators. Investigation Wing, Kolkata has gone to even the registered offices of many such cash depositing firms, but as expected there was no existence found for any such persons/firms. Almost all such accounts were opened with fake addresses. Role of banking authorities is also highly questionable here.

14.4 Same is true, in the case of Paper/Jamakharchi/bogus Clients also. Though they are registered as a client with share brokers, and Brokers maintains KYC for such bogus clients also, but these clients does not exists at their given registered address. In many cases it was found that such client companies are missing, or existing nowhere. Even the person of share broker could not find its clients. When share brokers were confronted with this, they either accepted that such clients are bogus or they failed to make any reasonable explanation.”

2.2 In the case, the assessee had purchased 45,000 shares through ‘preferential’ allotment at ₹ 50 per share against payment of ₹22,50,000/- though cheque dated 26/05/2011. The shares were transferred into assessee’s ‘D-mat’ account i.e. electronic account for keeping records of shares held by a person, on 14/07/2011. The shares were then split on 23/02/2012 into 4,50,000 shares of rupees one each. The shares were then sold in month of September 2012 on various dates on ‘stock exchange’ through a broker for a



total sale consideration of ₹2,30,01,500/-, on which the assessee computed long-term capital gain of ₹2,06,99,474/-, which was claimed as exempted from income tax purpose under the provisions of section 10(38) of the Act.

2.3 The Assessing Officer analysed financials of the company namely 'Essar (India) Ltd' and observed that it was neither engaged into any substantial activity nor having any future plans and the funds raised through preferential allotment had been not used for business expansion but had been further advanced as loans and investments. The Assessing Officer further observed as how the share price of the company were rigged in the period subsequent to the purchase of shares by the assessee in preferential allotment. The relevant observations of the Assessing Officer are reproduced as under:

“11. Essar India (Scrip No.531502):

This company was having market price of share at around Rs. 1.93 for the share having face value of Re 1 in May, 2011. Thereafter, the price was jacked up to Rs.24.74 from Rs 1.93 in 20 months that is till January, 2013. Thus, within in 20 months the price was jacked up nearly 13 times. After that the price was maintained in the range of Rs. 20 to Rs. 24. So that the interested beneficiaries were able to book the long term gains. After that the price was made to fall freely so that interested beneficiaries who had booked at high market price can avail bogus short Term Capital Loss. Thereafter the prices have gone down to merely Rs.5. The daily trading details in shares of the company are given below. The price & volume movement of the shares of the company from 01/01/2011 to 31,12.2014 is given below in a graphical from:



11.2 In the curve above while LTCG is booked while the share price is going up, the downward journey is used by the operators for booking bogus losses. The LTCG beneficiary pays cash to exit entry provider or a person who wants to book a loss and in return gets the cheque. The operator deducts his commission from the cash. As prices crash the loss taking beneficiary sells these shares bought at high value for small value resulting in artificial loss.

11.3 The financial health of the company is taken out from the data available in public domain and which is used by the investors is as follows:

FY	Share capital	Gross Turnover	Expenses	PAT	Earnings Per Share
2009-10	5.00	2.43	2.6	0.04.	0.08
2010-11	5.00	1.25	1.37	-0.07	-0.01
2011-12	8.18	3.06	3.01	0.03	0.00
2012-13	8.18	13.66	13.61	0.03	0.00
2013-14	8.18	15.72	15.72	-0.45	-0.06
2014-15	20.44	8.71	12.76	-4.05	-0.19

11.4 Thus, it is clear that the networth of the above 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 by the group of operators including Shri Anil Agarwal of Mumbai to accommodate beneficiaries seeking long term capital gain and losses. No prudent businessman and particularly trader or investor in stock will invest in such penny scrip which is defunct and inoperative.”



2.4 For verification of the shares purchased by the exit providers, notices under section 133(6) of the Act were issued on 16/12/2016, however, same remained non-complied. The relevant finding of the Assessing Officer is reproduced as under:

“13.4 With a view to verify, their genuineness and cash trail, notices u/s 133(6) of the Act, dated 16.12.2016 were issued to the purchasers of the shares, calling for details of share sale/purchase with the assessee during the year, their financial statements and return of income and bank statements. However, no reply is received till date and the covers are returned back by the postal authorities with the remark of "Left". These buyers are either the dummy persons for the purpose of providing entry or the persons who want to take an artificial LTCG/STCL. As per BSE data, the share prices of the scrip fell sharply thereafter. The volume of the transaction was also at the high during fall period. From the above facts and analysis it can be said that parties involved in purchasing from the assessee at the other end had no intention of a genuine investor and failed to act as per market sentiments.”

2.5 The Assessing Officer also issued summon under section 131 of the Act to the assessee and recorded his statement. The Assessing Officer has summarised statement of the assessee as under:

“16.2 The assessee Smt. Shanno Mohammed Yusuf Warsi, stated in her statement recorded on oath that she had traded / invested in shares in the year 2011 and after that she has never traded / invested. She further stated that she was suggested by the brother regarding the scrip of Esaar India Ltd. and accordingly she invested in the preferential allotment of the said shares. She stated to have no knowledge about financials of the company. The assessee has further stated that she has never invested / traded in shares after this particular scrip, on account of religious restrictions. She further stated to have not trading in shares and it was all due to religious restrictions. She is not able to show any knowledge of the penny stock company, its financial position or what are the activities of the company. Despite poor fundamentals of companies why the assessee bought this penny stock has not been explained. Every prudent businessman, while investing in share market will always find relevance in updating him/her about the basic financial fundamentals of company he/she wants to invest.”



2.6 For verification of the preferential allotment of shares to the assessee, the Assessing Officer issued notice under section 133(6) of the Act to the company M/s Essar (India) Ltd , calling for details is provided in para 16.4 of the assessment order, however the notice returned back with the postal remark the 'receiver refused'.

2.7 In background of the above facts, the Assessing Officer issued a final show cause notice to the assessee as why the alleged sale consideration of shares of 'Essar(India) Ltd' might not be treated as unexplained cash credit in terms of section 68 of the Act. After considering submission of the assessee, the learned Assessing Officer concluded as under:

16.6 All the indicators mentioned in Paras above, point to only one thing that the shares prices are being manipulated and they are not in response to normal market demand. Such type of companies and the trend of price movement is a classic example of manipulation of penny stock shares by accommodation entry providers. How the share prices are manipulated by hawala operators in case of such small companies is a fact well known and that need not be separately discussed here. It may be sufficient to point out that the financial results of company, the trends in price movement, purchase of the shares of unknown Co. listed in exchange, very small capital and shareholders base of Co., purchases by assessee of these shares without assigning any specific reasons for investing in such unknown Co; all indicate to only one thing that entire purchase of shares of M/s Esaar India Ltd was nothing but a part of hawala accommodation entry. The conclusion that the assessee has paid cash for obtaining accommodation is not based merely on a confessional statements of Mr Anuj Agarwal and Mr Sushil Kumar Agarwal Directors of M/s Korp Securities which is a Share Trading company and created mainly for the purpose of giving accommodation entry to various beneficiaries in the form of Long Term Capital gain. The specific names of beneficiaries have been culled out from the books of accounts maintained by the persons covered by the Investigation wing and it is only in these cases, information has been passed by the wing. The admission by Mr. Anuj Agarwal and Mr Sushil Kumar Agarwal, is not a bald statement. Most of the companies involved in providing accommodation entry to assessee were floated by them only. Therefore his statement cannot be brushed aside and his statement cannot be regarded as mere third party statement;



rather he is one of the parties to the transaction of accommodation entry racket and therefore his statement has great evidentiary value.

17. Once the hawala operator has already admitted to be manipulating shares which is also proved by low financials of the company to fetch high price in market, the burden of proving a fact is said to be established under the Evidence Act and thereafter the onus of proving that such fact did not exist, shifts to the person denying the existence of such facts. Mere denial by the assessee without evidence is only self-serving and does not discharge the onus of proof, unless he is able to prove with evidence that the statement given by Mr Anuj Agarwal and Mr Sushil Kumar Agarwal was unreliable. The denial by assessee, also does not lend any credibility, especially in the light of findings that the financial of the company did not command such high price at all. Thus, it is apparent that the assessee has not been able to discharge the onus of proving that he has not given any money as cash loans or received back the cash loans with interest.

18. Findings and conclusion

The submissions made by the assessee and reply to show cause is considered. The facts of the case, investigations made by various directorates, statements recorded during the assessment proceedings are considered. From the discussion in the preceding paras, it is concluded that long term capital gains booked by assessee in her 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 claimed to have purchased the shares through preferential allotment. However, when letter was issued u/s. 133(6) of the Act, to Essar India Ltd., calling for information regarding the assessee, the same was returned back by the postal authorities with the remark "receiver refused".
- b. *Sale of shares and unusual rise in the price:* Further the assessee has sold the 4,50,000 shares at the price of Rs 2,30,01,500/-, thus resulting the long term capital gain of Rs.2,06,99,474/-, which is 10 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:* The findings of the Directorate of Investigation of Mumbai and Kolkata as discussed above have proved various brokers as entry providers, the scrip of Essar India Ltd. used for providing Bogus LTCG and cash trail in the case of paper companies. It is proved that the assessee had worked out an arrangement in which the shares were acquired by the assessee, the share prices were rigged and then with the help of entry operators by routing the cash, shares were sold at high price to arrive at tax free capital gains.
- d. *d. 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.*
- e. 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.*
- f. Financial analysis of the penny stock companies: The earning per share and profits for the relevant period are negligible and in contrast with the price rise of the share of the company which unusually high as discussed above.*
- g. Cash trail in the accounts of the entry providers: The investigations in the fund flow analyzed in the accounts of the entry providers have established that the cash has been routed from various accounts to provide accommodations to assessee.*
- h. 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.*
- i. The assessee has done merely one transaction and no other transactions in shares were done. The assessee is taking shelter under the garb of religious restrictions. If a person earns profit at such a high rate, it is quiet obvious that he will always further invest in shares.*

18.2 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 a series of steps taken 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.



18.3 Accordingly, the whole transaction is executed through colorable device with a view to evade taxation. The reliance is placed on the decision of Hon'ble Supreme Court in the case of Mcdowell in which the following is held:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. On this aspect one of us, Chinnappa Reddy J., has proposed a separate and detailed opinion with which we agree".

18.3.1 Further, as per the human probabilities also, the above transaction is not accepted. In this regard, reliance is placed on the decision of Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT 214 ITR 801 (SC).

18.3.2 Further more in the decision of Hon'ble Supreme Court in the case of Durga Prasad More vs. CIT 82 ITR 540 (SC), it was held that the contents in the documents cannot be given undue importance and the reality and substance of the transaction is to be considered.

18.4 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 claim of assessee of LTCEG of Rs.2,06,99,474/- as exempt u/s 10(38) of the act is hereby denied and the amount of Rs.2,30,01,500/- received back as sales proceeds on sale of shares is hereby added in the total income of the assessee as unexplained cash credit u/s.68 of the Act. Penalty proceeding u/s 271(1)(c) is initiated for furnishing inaccurate particulars of income with a view to concealment of income.

18.5 Further, Rs.5,75,037/-, being 2.5% of sale value of Rs.2,30,01,500/-, is hereby added in the income of the assessee as unexplained expenditure u/s.69C on account of commission paid for arranging the entire transaction of bogus LTCEG. Penalty proceeding u/s 271(1)(c) is initiated for furnishing inaccurate particulars of income with a view to concealment of income."

3. Before the Ld. CIT(A) the assessee challenged validity of the reassessment as well as merit of the addition. The Ld. CIT(A) rejected the objections challenging validity of the reassessment observing as under:

"5. Ground No.1 relate to issue of notice u/s.148 of the Act without fresh tangible material, without independent application of mind and



without having valid reason. It is to note that the AO got information which was vital about the bogus long term capital gain / long term capital loss and modus operandi of entry providers. The information was provided by the Pr.DIT(Investigations), Kolkata after thorough enquiries and investigations. The AO during the course of assessment proceedings the appellant was summoned u/s.131 of the Act wherein she was not able to show any knowledge of the penny stock company its financial position or what are the activities of the company. Assessing Officer sought to reopen assessment in case of appellant on ground that appellant, during relevant period had purchased shares in the company ESSAR India at very low price and after that, price of these shares had risen phenomenally and they were sold at high price and in process, appellant had claimed long term capital gains. The Assessing Officer based on the information arrived at the reason that there had been price rigging and manipulation in trading of scrip of ESSAR India and appellant not being a regular investor, had being a clear link between linorina by investing in this unknown comer anth ris earned bogus long term capital gains by investing in this unknown company. There formation of belief that income chargeable to tax had escaped assessment, reopening of assessment was justified. Reliance is placed on the decision of High Court of Rajasthan in the case of Jawari Lal Lunia v. Union Of India [2022] 139 taxmann.com 406 (Rajasthan)(05-02-2022) wherein it has been held in respect of valid reason to believe that income had escaped assessment is as follows:-

".....7. In this context, if we peruse the detailed reasons recorded by the Assessing Officer, we find that he was having information indicating that certain operators, syndicate members and brokers were indulging in providing accommodation entries, often times creating penny stock companies and using them as conduit for converting untaxed income by bringing them on record by paying no tax claiming it to be long term capital gain, tax on sale of shares which was at the relevant time exempted. One such company found to be indulging in such activities was Life Line Drugs and Pharma Limited. The assessee, during the period relevant to the assessment year 2015-2016, had purchased shares in the said company at the very low price. After that, the price of these shares had risen phenomenally and they were sold at high price. In the process, the assessee had claimed a long term capital gain of Rs. 2,47,99,000/- The Assessing Officer, therefore, collected the available material with him and formed following belief:

"Analysis of the financials of the company was also done and it was noticed that-

- The financial of M/s Life Line Drugs & Pharma Limited were very poor during the sudden upsurge in the scrip price.
- The business profile shows that the company was not engaged in any substantial activity.



- *The business profile shows that the company was not having strong fundamentals which could attract investors from all over India to invest in the company.*

Thus, the assessee have earned a the (bogus) Long term capital Gain of Rs. 2,47,99,000/ in the following circumstance:

- *By investing in an unknown company*
- *By being fortunate that the price of the scrip decreased in the absolute absence of any financial fundamental*
- ** By selling his shares to entities which do not even exist and are of no means and could not have bought the shares from their own funds*
- *• Despite SEBI, the domain regulator finding that there was price rigging and manipulation in trading of the scrip*
- *• Assessee investing in limited scrips mentioned above whose financials were not strong.*
- *• Assessee not being a regular investor in Market."*

8. In our opinion, the Assessing Officer had sufficient material at his command to form a belief that the income chargeable to tax has escaped assessment. There is a clear Officer and his link between the information available with the Assessing formation of belief that the income chargeable to tax has escaped assessment....."

5.1 The decision of the Hon'ble High Court of Rajasthan is squarely applicable to the facts of the case under consideration. Further, reliance is also placed on the recent decision of Hon'ble High Court of Delhi in the case of Saroj Bhatia v. Principal Commissioner of Income-tax [2022] 145 taxmann.com 237 (Delhi). Respectfully, following the same, the Ground No. 1 is dismissed."

3.1 As regarding merit of the addition, the assessee before the Id CIT(A), contended that all evidences supporting to the transactions were filed before the Assessing Officer, however the Assessing Officer has neither rejected nor objected genuineness of the documentary evidences. The assessee filed date wise events of purchase and sale of shares of M/s Essar India Ltd. According to the assessee, long-term capital gain on transfer of equity shares of Essar (India) Ltd was genuine in view of following observations:

"5. Long term capital gain on transfer of equity shares of Essar (India) Ltd. is genuine based on the following factors:



- a) *The shares have been transacted (sold) on the on SEBI recognized stock exchange.*
- b) *Shares purchased are credited to demat account immediately on purchase without any delay.*
- c) *Shares have remained in the demat account for a period of more than one year.*
- d) *Purchase of shares is shown in my balance sheet for the year ended 31st March 2012.*
- e) *Purchase cost is neither paid in cash nor is the purchase transaction back dated.*
- f) *Consideration for sale of shares is received by an account payee cheque.*
- g) *Securities Transaction Tax (STT) has been paid on transactions of shares.*
- h) *Sale price of shares matches with the BSE quotations from the BSE website.*
- i) *There is no evidence that I have indulged in the manipulation of share price.*
- j) *I took a calculated risk at the time of purchase of shares without knowing how the share price would reflect after a year or so. I would have made a loss if the share price had gone down. Therefore, merely because investigation wing has reported the scrip as penny stock and share price appreciated, it does not conclude that the profits are not genuine.”*

3.2 It was submitted that there was no direct or circumstantial evidence against the assessee and entire premise of the Assessing Officer was based on presumption and suspicion. The assessee further referred to statement of Sh Anil Khemka, director of M/s Devshayam Stockbroking Privately, referred by the Assessing Officer and submitted that the assessee had not executed any transaction with Mr. Khemka. The assessee submitted that he sold the shares through a registered stock broker M/s B N Rathi security on stock exchange platform and without any awareness of



the corresponding buyer. It was further submitted that share price movement might be as a result of many factors including market sentiments, liquidity position of the market, general economic scenario etc. along with the fundamentals of the company. The assessee also relied on no. of decisions, which have been reproduced by the Ld. CIT(A) in the impugned order.

3.3. The Ld. CIT(A) however, noted that **firstly**, the prices of the stock of Essar (india) Ltd were nowhere linked to the financial of the company. **Secondly**, there had been price rigging and manipulation in the trading of scrip of Essar (India) Ltd and **thirdly** the assessee not being a regular investor and had earned long-term capital gain by investing in unknown company. The Ld. CIT(A) relied on the decision of the **Hon'ble Calcutta High Court in the case of PCIT Vs Swati Bajaj (2022) 139 taxmann.com 352(Calcutta)** and upheld the addition of ₹ 2,30,01,500/- as unexplained cash credit under section 68 of the Act and addition of ₹5,75,037/- for estimated commission at the rate of 2.5% of sale value of the shares of Essar (India) Ltd as unexplained expenditure in terms of section 69C of the Act.

4. Regarding ground No. 1 of the appeal, before us, the learned counsel for the assessee submitted that reasons to believe recorded by the Assessing Officer are based on the 'suspicion' and without 'application of the mind'. He further submitted that there was no 'tangible material' for recording reasons to believe having nexus



with the assessee. In support of its contention, the learned counsel relied on the decision of Hon'ble Bombay High Court in the case of **Anwar Mohammed Shaikh reported in (2023) 148 taxmann.com 288 (Bombay)**. The Learned Departmental Representative on the other hand submitted that case law relied upon by the assessee are in relation to new regime of reopening of assessment provided under section 148A of the Act, whereas the case of the assessee pertains to old regime of reopening , therefore the case law relied upon by the assessee was distinguishable.

5. We have had rival submission of the parties on the issue in dispute and perused the relevant material on record including paper book filed by the assessee. In the case, the AO has recorded reasons to believe that income escaped assessment, which has been filed by the assessee on pages 26 of the paperbook. For ready reference, said reasons recorded are reproduced as under:

“Reasons for reopening:

In this case, return of income was filed on 31.07.2013 declaring total income of Rs. 12,72,400/- for the assessment year under consideration.

2. Information has been received through ITD system of the department in respect of transactions in Penny Stock done by various assesseees. It is further informed that the office of the Pr. DIT (Investigation), Kolkatta had made investigations regarding accommodation entries of bogus capital gain/loss through Penny Stock. The enquiries have revealed that the entire entry providing scam, comprises of various levels of operators who introduced the unaccounted cash of beneficiaries in their accounts through a layer of transactions and utilize the said cash for purchase of shares at manipulated prices which ultimately results in payment of the amount back to the beneficiary in the guise of sale proceeds of shares ostensibly resulting in Long Term Capital Gain to the beneficiary. Reverse modus operandi is adopted in order to provide entry of bogus Short Term



Capital Loss. The ultimate purpose of the both is to reduce the tax liability of the assessee.

3. Assessee is one of the beneficiaries as per the information provided on ITD system. The assessee has entered in the transactions of shares and securities of Essar (India) Ltd. during F.Y. 2012-13 and earn bogus LTCL /STCL amounting to Rs.2,30,01,500/- during the A.Y.2013-14. On perusal of the return of income, it is seen that the assessee has not offered the income related to the said transactions in his return of income for A.Y. 2013-14.

5. In view of above, I have reason to believe that income chargeable to tax to the extent of Rs. 2,30,01,500/- has escaped assessment for A. Y. 2013-14 in the case of the assessee within the meaning of section 147 of the I. T. Act, 1961.

6. Therefore notice us.148 of the I.T. Act, 1961 may be issued if statutory approval by the Jt. Commissioner of Income Tax, -25(1), Mumbai is accorded.”

5.1 **Firstly**, We find that Hon'ble Supreme Court in the case of ACIT vs Rajesh Jhaveri stock brokers (p) ltd (2007) 161 Taxman 316(SC) has held that for reopening of the assessment, there should be a relevant material, on which a reasonable person could make requisite belief that income escaped assessment. On perusal of the above reasons recorded in the case of the assessee, we find that the Assessing Officer has relied on the information supplied by the Principal Director of Income-tax (investigation), Kolkatta, which was gathered during searches and surveys conducted on various persons, who were engaged in providing accommodation entries of long-term capital gain to beneficiaries and providing short-term capital loss to exit providers. The report sent by the investigation wing has referred to inquiries conducted on various operators who introduced unaccounted cash of beneficiaries in their accounts through a layer of transactions and utilised the said cash for



purchase of shares at manipulated price and ultimately transferring the payment back to the beneficiaries in the guise of sale proceeds of shares. The assessee is one of the beneficiaries of the transactions of shares of 'Essar(India) Ltd' and therefore in our opinion the information supplied by the Director of Income-tax (investigation) is relevant material for reopening of the case of the assessee. The information of the large scale rigging and manipulation of shares and admission by the various operators before the investigation wing that they were engaged in providing accommodation entries of long-term capital gain is a material for a reasonable person to believe that income escaped assessment. In such circumstances, the contention of the learned counsel of the assessee that there is no tangible material linked with assessee, is rejected. **Secondly**, regarding the contention that Assessing Officer has not carried out any investigation prior to record reasons and issue of notice under section 148 of the Act is concerned, we are of the opinion that prior to introduction of the section 148A of the Act with effect from 1/4/2021, the Assessing Officer was not authorised to carry out any enquiry, before issue of notice under section 148 of the Act and therefore he was supposed to record reasons on the basis of material available before him only. In the case of Anwar Mohammad Shaikh (supra), reopening notice was issued on the basis of high-value suspicious transactions with fictitious profit based on the income tax department business application available in their database, which the Hon'ble High



Court held that was on the basis of the pure suspicion that the petitioner had entered into the fictitious transactions and without carrying out any further investigation or an independent assessment connecting the petitioner to the particular transaction specified in the information. But in the case in hand, the assessment has been reopened on the basis of extensive investigation carried out by the Principal Director of Income-tax (investigation) having connection with the transaction carried out by the assessee. The learned CIT(A) has relied on the decision of Hon'ble High Court of Rajasthan in the case of **Jawari Lal Lunia** (supra), wherein the assessment was reopened in similar circumstances. In view of above, we do not find any infirmity in the order of the Ld. CIT(A) and accordingly we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground No. one of the appeal of the assessee is accordingly rejected.

6. The ground nos. 2 to 7 of the appeal are related to merit of the addition made under section 68 of the Act amounting to ₹2,30,01,500 and addition made under section 69C amounting to ₹5,75,037/-. The learned counsel submitted that assessee has discharged its onus under section 68 and section 69C of the Act by way of filing documents like source of investment made, contract note for purchase of investment and sale of investment, bank statement reflecting payment and receipt of sale proceeds of investment, 'D-mat' account to prove delivery and control of shares,



ledger copy of share broker account etc. The learned Counsel further submitted that addition made under section 68 of the Act for long-term capital gain on sale of shares of Essar(India) Ltd has been deleted by the Coordinate bench of Bombay Tribunal in the case of Dheeraj Babulal Shah in ITA No. 4092/Mum/2019. He further relied on (i) the decision of coordinate bench of the Tribunal in the case of Jagmohan Agrawal in ITA No. 604/KOL/2018 , (ii) decision of Hon'ble Bombay High Court in the case of Shyam R Pawar reported in (2015) 54 taxmann.com 108 (Bombay) and (iii) decision of coordinate bench of Tribunal in the case of Mrs Pallavi Mayur Gandhi in ITA No. 2251/Mum/2022.

7. The ld DR on the other hand relied on the order of lower authorities.

8. We have heard rival submissions and perused relevant material on record. In the instant case, the issue in dispute involved before us is whether the assessee has abused the provisions of section 10(38) of the Act. The section 10(38) of the Act has been introduced with effect from 1/4/2015, where in capital gain arising from sale of shares held for more than one year i.e. long term capital asset, on recognised stock exchange, were exempted from tax, but now this section has been amended and the exemption benefit has been withdrawn by way of proviso inserted through Finance Act, 2018 with effect from 1/04/2019. Under the relevant period for availing benefit of tax exemption on sale of shares u/s



10(38) of the Act, the assessee was required to sale shares on platform of recognised stock exchange by way of paying security transaction tax (STT). But the condition of online transaction was mandatory for sale and not mandatory while purchase of shares. It is in this background, few unscrupulous tax payer, purchased the shares through offline mode or other than through stock exchange though some operators, who artificially rigged up the prices of those shares and after mandatory period of one year of long term capital gain u/s 10(38) of the Act, sold those shares at high prices on stock exchange, for which a set of persons arranged by the operators were available for purchase online. The term 'Penny stocks' is prevalent in global security market or western market, which refers to shares of small public companies that trade for less than one dollar per share, which further revised to include shares having value upto 5 dollars. The Cambridge business dictionary has defined the penny stock as *a share with a very low value because it is considered a high-risk investment, for example in a company that is small, little known, or not very successful.* **The Hon'ble High Court of Calcutta in the case of Swati bajaj (supra) in para 100 has observed that** 'Penny' stocks are shares that trade at a very low price, have very low market capitalization, are mostly illiquid, and are usually listed on a smaller exchange. Penny stocks in the Indian stock market can have prices below Rs 10/- or sometimes even upto Rs. 20/-. Those stocks are very speculative in nature and



are considered highly risky because of lack of liquidity, smaller number of shareholders, and limited disclosure of information.

8.1 The investigation carried out by the Investigation wing of Income-tax Department, Kolkatta has referred to large-scale involvement of beneficiaries, where shares having very small value were picked up by the operators, for providing benefit or say abuse of section 10(38), commonly known as long term capital gain on 'penny' stock transactions. In background of above facts of the case, we find that the assessee has also shown to have purchased 45,000/- shares of Essar (India) ltd on 7/05/2011 at a price of Rs. 50 per share through preferential allotment against payment of Rs. 22,50,000/- . The shares were than spilt from Rs. 10 per share to Rs. 1.00 per share and 4,50,000/- shares were credited to D-mat account of the assessee. The assessee then sold the shares on various dates as under:

Date of Sale	Quantity sold	Sale Consideration (Rs.)
03-09-2012	50,000	24,99,334
04-09-2012	60,000	29,87,231
05-09-2012	50,000	24,81,870
06-09-2012	40,000	19,95,474
10-09-2012	50,000	25,84,142
11-09-2012	50,000	26,44,007
12-09-2012	50,000	25,94,120
13-09-2012	50,000	25,69,176
14-09-2012	50,000	25,94,120
Total	4,50,000	2,29,49,474



8.2 In support of the contention that transaction of long-term capital gain on sale of the shares of M/s Essar (India) Ltd is genuine, the assessee filed the documents to support the transaction of sale of shares on stock exchange, like sale through broker M/s BN Rathi Securities ltd, sale transactions on recognised stock exchange platform, payment received through banking channel, the Dmat-statement to prove delivery and control of shares, ledger account of share broker's. But those documents are not crucial for determination for abuse of section 10(38) of the Act. What is crucial is establishing genuineness of the transaction of purchase of shares in question. In support thereof the assessee filed copy bank statement of HDFC bank statement through which payment of ₹22,60,000/- was made to Essar(India)ltd on 07/05/2011. On perusal of bank statement available on paperbook page-44, we find that there is a credit of ₹ 22, 50,000/- on 05/05/2011 i.e. just two days before payment for purchase of shares. On paper book page 45, the assessee has filed a copy of application for preferential allotment to the Company namely Essar (India) ltd but in said application payment details are not mentioned. Further the assessee has filed a copy of allotment of shares in preferential issue by dated 26/05/2011. Regarding the person who advised for purchase of the shares, the assessee in a statement recorded before the Assessing Officer submitted that he came to know the shares through his brother. The relevant statement, available on paperbook page 81, is reproduced as under:



“Q.14 Did anyone give advice regarding sell/purchase of shares? If so, How do you decide on the advice?”

Ans. I don't trade in shares.

Q.15 Whom do you contact in case of any suggestions regarding sell/purchase of shares? How do you know that person? What makes him qualified to advise you on the sell/purchase of these shares?”

Ans. On account of religious restrictions I don't purchase or sell shares anymore.

Q.16 How have you been allotted/purchased these shares?”

Ans. I purchased these shares through preferential allotment.

Q.17 Please state what does it mean by preferential allotment? How did you come to know about this term and when?”

Ans. A think it is an approved mechanism of SEBI for purchasing shares.

Q.18 Did somebody contact you for preferential allotment in the company ESAAR INDIA LTD

Ans. I got to know about the shares through my brother.

Q.19 Did you do fundamental analysis before considering investing?”

Ans. It was spontaneous decision and my brother's advice.

Q.20 What were your expectations? What did your brother advice on this?”

Ans. Investment was done as it is generally done with intension of appreciation over long term.

Q.21 Did you communicate your expectations on the share allotment? What did you communicate? •

Ans. NO.

Q.22 Did the Director of the company inform you the price of preferential allotment beforehand? Did you agree to it or did you bargain?”

Ans. NO.

Q.23 Did you meet again either directly or through an intermediary? If you met through intermediary, please provide his name, phone number and contact details?”

Ans. NO.



Q.24 When did you commit subscribing to the shares allotment in writing? Please provide a copy of the same?

Ans. Yes, the application form along with necessary supporting has already been submitted to you during course of assessment proceedings.

Q.25 How did you pay the money? In what form? Do you have any documents to substantiate the same?

Ans. By cheque of my HDFC Bank account. The Bank statement which shows the debit to my account for purchase payment has already been submitted to you during course of assessment proceedings.

Q.26 Did the director ask for any KYC documents? What did you give to him? In what format? If in softcopy, through what email, you dispatched them and to what email address?

Yes, the application form was submitted along with the required necessary documents like PAN card, Demat statement etc.

Q.27 How did you monitor the commitments made by the Director? Did you make any correspondence with company on the same?

Ans. Not applicable

Q.28 When did you see the shares credited into your Demat account?

Ans. The shares was credited on 14th July, 2011 in the Demat account which I maintained with B.N RATHI SECURITIES LTD.

Q.29 Did the company perform well in the year under consideration? If no, what did you decide about your investment? Why did you not try to call the director or any other responsible person in the company for the same?

Ans. I am not aware. The investment was done on advice of my brother. I did not make any attempt to contact company directors.

Q.30 Did you receive quarterly performance statistics of the company from time to time?

Ans. Yes, the post kept on coming. However, I never used to study them.

Q.31 How often did you monitor the stock of the company in the time periods?

Ans. No active monitoring was done.”

8.3 We find that Hon’ble High Court of Calcutta in the case of Sawti bajaj (supra) has in para 99 of their order observed that the



assessee cannot be heard to say that they had blindly followed advice of third-party and made the investment whereas selection of the shares to be purchased is a very complex issue and it requires personal knowledge and expertise as investment is not in a mutual fund. The Hon'ble High Court observed that in this background the human probability would assume significance.

8.4 In the case in hand, also the assessee invested in the shares of Essar (india) ltd for the first time without any knowledge of the share market. It is also not known how the assessee invested in a company situated at Kolkatta without carrying out any financial analysis of the company, whereas the assessee is based at Mumbai. The purchase through preferential allotment is an off market transactions and no prudent person shall enter into such a transaction without knowing or related to the promoters of said company. The assessee has also failed to establish its motive for investment in such an unknown company without any financial rationale.

8.5 Further the Assessing Officer , pointed out unusual price rise in shares of the company for the period from Nov 2011 till 2015 and thereafter share price fell to low , i.e the price which was prevalent during purchase of the shares by assessee. The Assessing Officer has also referred to the financial data of the company, which does not show any performance vis-à-vis the price rise of the shares of the company. The assessee also could not explain such a high-rise



in the shares of the company without any corresponding financial results.

8.6 In the light of investigation carried out by the investigation wing of income tax Department Kolkata, it is found that at the time of the sale of the shares at high prices, a particular set of persons, which have been termed as exit provider, had only purchased the shares for the purpose of acquiring capital loss for further adjustment against capital gain. In the case of the assessee also the Assessing Officer issued notice under section 133(6) of the Act to the parties, who purchased shares from the assessee, but none of the parties could be located at their addresses and the notices sent returned un-served. The non verification of share purchase parties also goes to support the outcome of the investigation, that the purchaser were in collusion with the operators of the entire scam of manipulation of shares of the company for benefiting by way of capital loss and to facilitate long-term capital gain in the hand of seller of the shares.

8.7 Before us the learned counsel for the assessee relied on the decision of the coordinate bench of Tribunal in the case of **Dheeraj Babulal Shahin ITA No. 4272/Mum/2018 and 4092/Mum/2019** but in the said case the assessee was one of the promoter of M/s Essar (India) Ltd, and therefore the transaction of purchase of the shares, not held to be doubtful or no genuine. But in the instant case the purchase through preferential allotment has not been



established to be genuine one. In the case of PCIT Vs Ziauddin A Siddique in ITA No. 2012 of 2017, decided by the Hon'ble Bombay High Court, the purchase of shares was on platform of stock exchange through recognized stockbrokers, but in the instant case the purchase is through off-line transactions of preferential allotment directly by the company and not through stock exchange. In the case of Shyam R Pawar (supra) also the purchase of the shares was done through online transactions, but in the instant case purchase is obviously through off-line transactions. In view of the distinguishable facts, the decisions relied upon by the assessee are not applicable over the facts of the instant case.

8.9 The Hon'ble High Court of Calcutta in the case of Swati bajaj (supra) in para 99 observed that the department established the artificial price rise of the shares by adopting manipulative practices and consequently whatever resultant benefits which accrued from such manipulative practices were to be treated as tainted. The Hon'ble High Court further observed that the assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee reaped was not tainted, however the assessee failed to prove or establish so, and therefore the Assessing Officer was justified in coming to a conclusion that so-called explanation offered by the assessee was not to their satisfaction and the assessee having not proved the genuineness of the claim, the creditworthiness of the companies in which they had



invested and the identity of the person to whom the transactions are done, have to necessarily fail.

8.10 In view of aforesaid discussion, respectfully following the finding of the Hon'ble Calcutta High Court in the case of Swati bajaj (supra), we uphold the finding of the Ld. CIT(A) on the issue in dispute. The grounds raised by the assessee on the merit of the addition are therefore dismissed.

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

Order pronounced in the open Court on 26/02/2024.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 26/02/2024
Dragon Legal/Rahul Sharma, Sr. P.S.

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,
(Assistant Registrar)
ITAT, Mumbai