

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

**BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.94/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2012-13)

Sheetal Rupesh Savla 601 Dev IN Apartments, Adenwala Road, Plot-511, Matunga, Mumbai-400019.	<b>बनाम/</b> Vs.	ITO Ward-20(3)(3) 6 <sup>th</sup> Floor, Piramal Chamber, Parel, Mumbai- 400012.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADHPK2176R</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Dharen V. Gandhi (Adv) Shri Dinesh Shah
Revenue by:	Shri Nayanjoti Nath (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 07/02/2024

घोषणा की तारीख /Date of Pronouncement: 18/03/2024

**आदेश / ORDER**

**PER BENCH**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 07.12.2022 for the assessment year 2012-13.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) upholding the action of the AO by making an addition of Rs.73,11,760/- u/s 68 of the Income Tax Act, 1961 (hereinafter referred "the Act" which according to the assessee ought to have been held to be exempt u/s 10(38) of the Act.

3. Brief facts are that the assessee is an individual and had filed her return of income on 26.07.2012 for Assessment Year 2012-13 declaring total income of Rs.8,26,720/-. Later on, the assessment was reopened under section 147 of the Act; and the AO noted that the assessee has shown long term capital gains (LTCG) on sale of Shares of M/s Arya Global Shares and



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Securities Limited (hereinafter M/s AGSSL), which assessee claimed to be exempt under section 10(38) of the Act. According to AO, assessee has shown to have received Rs.73,24,001/- from sale of shares of M/s AGSSL on which Securities Transaction Tax (STT) was paid, therefore, assessee claimed the LTCG of Rs.66,64,001/- and claimed it as exempt u/s 10(38) of the Act. In order to verify the genuineness of the claim, the AO called for the details of the transaction; and pursuant to which, the assessee brought to the AO's notice that she had applied for 1,50,000 shares of M/s AGSSL on preferential basis which were allotted on 19.11.2009 for a consideration of Rs.33,00,000/- which were split into 15,00,000 shares on 23.09.2010. Later, in relevant assessment year 2012-13, 3,00,000 shares of M/s AGSSL were sold on the floor of Bombay Stock Exchange through the brokers M/s JM Financial Services Ltd which yielded LTCG which was claimed as exempt u/s 10(38) of the Act. The total sales consideration for sale of 3,00,000 shares of M/s AGSSL was Rs.73,24,001/- and the LTCG claimed exempt was Rs.66,64,001/. The assessee produced evidence before AO to substantiate the allotment/purchase of the shares by producing by producing the respective Share Certificates; and that purchase as well as the sale consideration has passed through the banking channel; and that the shares were duly dematerialized; and the shares were sold through recognized stockbroker M/s. JM Financial Services Ltd in the electronic platform of BSE after remitting STT and contended that it has fulfilled the requirement of law to claim the LTCG from sale of shares as exempt u/s 10(38) of the Act.

**4.** However, the AO didn't agree. According to him, the gain shown by the assessee were from sale of penny scrip. According to AO, shares of M/s AGSSL was classified as penny scrip which were used for providing



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accommodation entries to beneficiaries like assessee in the form of bogus capital gain/losses. Thereafter, the AO discussed about the investigation report of the wing which spelled out the *modus operandi* of unscrupulous entry providers from para nos. 8.5 to 8.13 of the assessment order; and made general assertions and observations, which according to him, is the manner and mode used by entry operators in active connivance with exit providers to accommodate bogus LTCG/losses in transactions of these penny scrips. The relevant facts concerning the assessee's case, is noted by the AO from para no. 8 and onwards. The AO is noted to have found from records that the assessee applied for shares of M/s. AGSSL [*previously known as Pee Jay International Ltd before June 2006, and then known as Kuvam International Fashions Ltd till May 2012*] and on 19.11.2009, she was allotted 1,50,000 shares @ Rs 10/- per share, which price were later reduced to Rs.1/- per share after split into 15,00,000 shares. In the relevant year, assessee sold 3,00,000 shares of M/s AGSSL. According to AO, there was circumstantial and other material to suggest that transaction of sale of shares of M/s Kuvam (now known as AGSSL) is not natural but is arranged one. The AO issued SCN to assessee which contents he reproduced at pages 10 to 12; and assessee's reply has been reproduced at pages 12 to 24 of his order; and thereafter, AO from para 8.2 to 8.13 noted the share price movement from Rs.6.8 on 18.6.2009 to Rs.174 on 22.09.2010, Rs.140 on 16.02.2011 and came down to Rs.2.65 on 6.01.2012; which price fluctuations were not based on any fundamental or extraordinary cause or performance of M/s. AGSSL. After extracting the financials of M/s AGSSL from para no.8.3 of his order, the AO observed that there was no extraordinary events to justify price rise in share prices and thus held that the price was indeed rigged by operators to accommodate beneficiaries. The



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AO referred to the statements of some exit providers (anonymous) who all have confirmed that their bank account, DMAT account were misused by certain operators. The AO further notes that he had issued notice u/s 133(6) of the Act to Bombay Stock Exchange and after getting the data of the those who had purchased these shares, he has also issued notice u/s 133(6) of the Act to those purchasers (anonymous) which were returned back by postal authorities as unserved. The AO further refers to the statement of two directors of M/s AGSSL, Shri Bhavesh Makwana and Deepak Rathod, who according to him, were not able to substantiate and provide any logical explanation to support the rise in prices of the shares in the market. According to AO, foregoing facts shows that transaction and resultant LTCG was bogus. However, AO acknowledged that assessee submitted reply to show cause notice dated 17.12.2019 (Pages 12 to 24 of the assessment order) wherein she pointed out that the whole transaction of buying and selling of shares happened through banking channel; the sale of shares was through the Bombay Stock Exchange through registered broker; shares were demated; and filed all the relevant evidences in the form of contract notes, share certificates, bank statements. The assessee relied on few case laws of Hon'ble Bombay High Court in CIT Vs. Shri Mukesh Ratilal Marolia and CIT Vs Shyam Pawar, CIT Vs Jamna Devi Agarwal and Tribunal order in GTC Industries V ACIT. However, the AO rejected the plea of assessee on the basis of report of investigation wing wherein *modus operandi* of unscrupulous entry providers have been explained in detail. So, according to AO, surrounding circumstances, human conduct and preponderance of probability lien in favour of revenue to disbelieve the documentary evidence; and he was of the opinion that the sale proceeds of shares was found to be not explained to his satisfaction; and thereafter he



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held that assessee has resorted to the transaction from which LTCG was earned was intended for bringing in her books, unaccounted money without giving tax. Thus according to the AO, the LTCG on sale of shares of M/s AGSSL shown by assessee is not genuine and represent undisclosed income of the assessee and made an addition of Rs.73,24,001/- under section 68 of the Act.

**5.** On appeal, the Ld. CIT(A) upheld the action of the AO. The Ld. CIT(A) is noted to have rejected the submissions put forth by the assessee. Aggrieved, the assessee is before us.

**6.** Assailing the action of the Lower Authorities, the Ld AR pointed out that AO as well as Ld. CIT(A) has not doubted the purchase/investment of 1,50,000 shares in M/s AGSSL on 19.11.2009; and the sales of the aforesaid shares through broker M/s. JM Financial Services Ltd during the financial year through BSE in the case of M/s AGSSL for Rs.73,24,001/- on which assessee claimed LTCG of Rs.66,64,001/-; and contended that the claim of LTCG and resultant exemption u/s 10(38) of the Act ought not to have been denied to assessee, since sale of share took place at the Bombay Stock Exchange wherein STT was paid; and the transaction of purchase and sales happened through banking channel. According to Ld. AR, when the purchases and sales and holding period of shares have been accepted by both the authorities, merely on suspicion and surmises, the impugned action of disallowing the LTCG/exemption is erroneous. Therefore, the action of AO/Ld. CIT(A) to disallow the LTCG claim is un-sustainable in law. According to him, findings rendered by them were factually misplaced and unjustified. The Ld AR submitted that the assessee is not responsible nor



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has any role in the price of M/s AGSSL going up or down and it is governed by market forces.

7. Further, according to the Ld. AR, the assessee was not a first time investor but rather she was a regular investor and drew our attention to the investment made by the assessee over the years stood at Rs.46,93,781 as at 31.3.2008; Rs.40,99,067 as at 31.3.2009; Rs.86,97,815 as at 31.3.2010; Rs.1,96,40,264 as at 31.3.2011; Rs.3,37,02,974 as at 31.3.2012; Rs.8,48,20,169 as at 31.3.2013; Rs.9,79,51,724/- as at 31.3.2014; Rs.12,29,11,798/- as at 31.3.2015; Rs.12,29,51,719 as at 31.3.2016 and Rs.12,29,39,582 as at 31.3.2017 and Rs.12,29,39,582 as at 31.3.2017. And therefore, according to him, assessee's action of investing in share of M/s AGSSL could not be doubted when both the authorities [AO/Ld. CIT(A)] could not dispute the genuineness of the purchase/dematerialization of the shares/bank transaction/sale through Bombay Stock Exchange on which STT was paid and relevant evidences consisting Shares Certificates, Sales Contract Notes, and Bank statements thereof could not have been brushed aside. With regard to the assertion by the AO that the notices u/s 133(6) issued to parties who had purchased shares through the Bombay Stock Exchange were returned back by the postal authorities, the Ld AR pointed out that the AO has not given the names of the so called exit providers nor confronted the assessee with the details of the exit providers and without confronting the assessee with at least the name of the exit providers while recording her statement on 9.12.2019, the AO could not have mentioned in the assessment order, his enquiries; and moreover, according to Ld AR, the AO failed to bring out the nexus between the assessee / her broker with the so called exit providers. In respect of the statements recorded as asserted by the AO, the Ld. AR pointed out that the assessee had never dealt with any of



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the persons whose names are mentioned in the assessment order viz Shri Bhavesh Makwana and Shri Deepak Rathod, directors of M/s AGSSL. According to the Ld. AR, these statements cannot be used against assessee for the simple reason that admittedly they were recorded behind the back of the assessee, and neither the copies of these statements were provided to the assessee during the course of assessments nor the AO gave an opportunity to cross-examine the makers of the statements. And therefore, according to Ld. AR neither the statement nor the contents of the statement could be used against the assessee. Anyway the Ld. AR pointed out that the statements of Shri Bhavesh Makwana and Shri Deepak Rathod, directors of M/s AGSSL doesn't contain anything to incriminate or implicate the assessee / broker of any wrong doing. And therefore, assessee being an investor in so many companies had also genuinely invested in the shares of M/s AGSSL.

8. Further according to the Ld AR, the findings rendered by the AO/CIT(A) were factually misplaced and unjustified and took us through the contemporaneous evidences placed on record to show that the transaction in shares of AGSSL were properly documented. He argued that neither the AO nor the Ld. CIT(A) had pointed out any specific defect or infirmity therein and rather both of them had cited extraneous considerations to make the impugned addition. The Assessee has provided several documents in support of the transaction of LTCG consisting of Share Certificates, Contract notes for sale of shares, Bank Statements reflecting payments / receipts for purchase and sales of shares. The Ld. AR pointed out that in response to summons u/s 131 of the Act, the assessee appeared before the AO and gave a statement before the AO on 9.12.2019, where she was questioned in detail about the investments in M/s AGSSL, she satisfactorily explained the transaction of purchase and sale of shares



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giving complete information and evidences about the transaction and withstood the cross examination and the AO could not elicit any wrong doing / illegal action on the part of the assessee. The Ld. AR thus submitted that when the transactions were supported by corroborative evidences which remained undisputed, these irrelevant surrounding circumstances cited by the lower authorities to make the impugned addition was unsustainable both on facts and in law. He thus urged that the orders of the lower authorities be reversed and the impugned additions be deleted and the claim of assessee allowed. The Ld AR also referred to various decisions and case laws to substantiate his case.

**9.** Per contra, the Ld. DR appearing for the revenue supported the orders of the lower authorities. The Ld. DR submitted that shares of both were purchased off-line by assessee for meagre cost and later sold when the prices have been artificially rigged/increased by synchronous trading and as pre-planned, the shares were sold to exit entry operators at an exorbitant price. According to the Ld. DR, by this modus operandi, undue benefit in the form of exempted gains was claimed by assessee. According to Ld. DR, assessee couldn't explain why she invested in M/s AGSSL and pointed out to the financials of M/s AGSSL, and wondered as to how such a company can fetch such high price unless it was pre-fixed by unscrupulous entry providers as revealed by the investigation report of the Investigation Wing of Department. Therefore, he does not want us to interfere with the action of the Ld. CIT(A) and prayed for dismissing the appeal of the assessee.

**10.** In his rejoinder, the Ld. AR rebutted the submission of Ld. DR and contended that there was no incriminating statement or/documentary material against assessee to show that the assessee had indulged in any



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wrongdoing and that the assessee had discharged the burden to prove the purchase/sale of shares in question and the AO, without any evidence / material to link the assessee or her broker with any of the entry providers could not have drawn adverse view against the assessee's claim of LTCG.

**11.** We have heard both the parties and perused the records; and we find that AO/Ld. CIT(A) has not found any infirmity in the primary documents produced by the assessee in support of claim of exemption of LTCG u/s 10(38) of the Act. We find that AO during assessment proceedings had asked the assessee to prove the claim of LTCG of Rs.66,64,001/- from sale of Shares of M/s AGSSL pursuant to which, the assessee filed documents (*refer page no. 115 to 127 of PB along with documents*) to prove the claim, which documents have not been found by AO to suffer from any infirmity. The assessee placed evidence to prove the purchases of shares of M/s. AGSSL and allotment letter dated 19.11.2009 for allotment of 150,000 shares referring to the share certificate no 00015524 under Registered Folio No. 0005202 for 150000 shares, a copy of which is seen from perusal of page no. 115 of PB, thus the purchase of the shares by assessee cannot be disputed. And further, we note that assessee has purchased 150,000 shares of M/s. AGSSL on 19.11.2009 for total consideration of Rs.33,00,000/- @ Rs. 22 per share which consideration was given through Cheque 607880 for Rs.8,25,000/- from Bank of Baroda A/c 09330100004483, Usmanpura, Ahmedabad Branch of Bank of Baroda and Cheque no 615755 for Rs.24,75,000/- drawn on HDFC Bank A/c No 00061330001791 Navrangpura Branch, Ahmedabad as evidenced by perusal of Bank Statement at Pages 116 and 117 of PB; and thereafter, the shares were dematerialized. It is further noted that, assessee was allotted 150,000 Shares of M/s AGSSL which was later split in to 15,00,000 shares of M/s AGSSL



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and later sold shares of M/s AGSSL on 06.05.2011, 09.05.2011 and 26.05.2011 in Bombay Stock Exchange through broker M/s. J M Financial Services Ltd (*refer contract notes placed at pages 120 to 125 of PB*) and consideration have passed through banking channel (*refer page no. 126 and 127 of PB*) and STT paid on the sale transaction (*refer Contract notes at Pages 120 to 125 of PB*), thus sale of shares cannot be held as bogus; and once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record, the same cannot be held as bogus transaction merely on the basis of a general investigation report wherein there is no mention of any wrong doing by assessee or of her broker, or involvement in modus-operandi as stated in Report of Mumbai Investigation Wing (*referred at para 2, 8.1 and 8.15.1.c*) which we note, are general report and does not impute any wrong doing of assessee/broker. Similarly the SEBI Report mentioned at Para 8.18 of assessment order does not refer to investigation in the shares of M/s AGSSL or in any way incriminate assessee being part of modus-operandi to do any illegal acts or being a beneficiary of accommodation entry as stated therein; and there is no material/evidence to infer that the assessee / her broker had participated in the modus operandi along with entry operators. Even before us, the revenue failed to bring on record any material or evidence to show that the SEBI has proceeded against M/s AGSSL for manipulating the share prices in stock market. According to the Ld. AR, the AO also doubted the financial prudence of the assessee to have purchased in the first place the shares of M/s AGSSL; and wondered as to how the price of shares of M/s AGSSL could have increased in a span of two years, and AO also relied on the statements of Shri Bhavesh Makwana and Shri Deepak Rathod ,



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directors of M/s AGSSL; and according to AO, by making such a claim of LTCG/exempt income, assessee was bringing in her books unaccounted money. Thus, according to AO, assessee has laundered her black money to white and therefore, he held the transaction as bogus and added Rs.73,24,001/- u/s 68 of the Act.

12. The main plea of the assessee is that such an action of the AO/Ld. CIT(A) cannot be legally sustained in the light of the fact that assessee has discharged the burden of proving the genuineness of claim regarding LTCG by submitting primary documents to substantiate the claim (LTCG) by proving the events of purchase of shares, dematerialization of the shares, allotment of share of M/s. AGSSL and transfer of shares to demat account, and the sale happening through Bombay Stock Exchange Electronic platform. Therefore, according to Ld. AR, AO could not have drawn adverse view against the claim made by assessee without first finding any infirmity in the primary documents filed by the assessee, which in this case AO/Ld. CIT(A) have not made any allegation about it. In such a scenario, according to Ld. AR, the AO was duty bound to show from the incriminating evidences, he relies upon in the assessment order (*like report of investigation wing, SEBI order, statement of director/entry providers, etc*) that assessee was participant in the *modus operandi* to convert black money of assessee in active connivance with these statement-makers. Unless AO is able to point out from the report/statements of entry operators the role of assessee as a wrong doer or participant in the *modus-operandi* (*as stated in the investigation wing*), the impugned action of AO/Ld CIT(A), in the light of primary documents has to fall.



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**13.** As noted (supra), AO/Ld. CIT(A) has been influenced by the investigation report submitted by the Investigation Wing of the Department functioning at Mumbai. It is true that some unscrupulous entry operators had devised methods/modus-operandi to beneficiaries to facilitate laundering their black money to white through pre-planned receipt in the form of bogus LTCG, loans etc. But the discussion of lower authorities, we find to be general in nature and there is nothing in the discussion to link/connect the assessee somehow with the modus-operandi of the Investigation Wing or Report. Since there is no evidence incriminating assessee in the investigation report of being part of the nefarious acts, conspiracy or abetment, such a report of investigation wing cannot be of any aid to the revenue and both the authorities erred in placing reliance on such report to draw adverse inference against assessee.

**14.** As noted (supra), the lower authorities have not doubted the documents which were furnished in support of the purchases. Rather the lower authorities doubted the investment rationale of the assessee purchasing the shares of M/s AGSSL. The AO wondered as to how the assessee could have invested in such an entity which did not have any future outlook at the time of purchase, which according to him was unusual and suspicious. Moreover, the AO have not brought on record any evidence/material to show that assessee's investment in M/s. AGSSL was the outcome of any pre-planned scheme for facilitating huge gain by rigging the share market. Other than citing bald statement of Shri Bhavesh Makwana and Shri Deepak Rathod , directors of M/s AGSSL there is no iota of evidence/material to connect the aforesaid persons with assessee or anyone associated with assessee in any wrong doing. And it is not the case of AO that the aforesaid persons have imputed any role of assessee in the



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alleged modus-operandi to rig the share market or that assessee was a beneficiary of accommodation entry. Without any incriminating material to connect assessee with the aforesaid persons; their statement cannot in anyway discredit the LTCG claim of assessee on sale of shares of M/s. AGSSL. Therefore, we find that statements referred by AO of Shri Bhavesh Makwana and Shri Deepak Rathod , directors of M/s AGSSL) is of any use to disbelieve/discredit the documents submitted by assessee to claim the LTCG.

**15.** As noted (supra), during the year in several lots, shares of M/s. AGSSL were sold. The assessee has placed before us the contract notes issued by registered stock broker M/s. JM Financial Services Ltd which fact is evident from page 120 to 125 of PB. The purchase/sale transaction has happened through the banking channel which has not been disputed. It is noted that none of these documents to have been found to be defective or false by any of the lower authorities. It is also noted that the broker through whom assessee had conducted then transaction M/s. JM Financial Services Ltd has also not been alleged to be guilty of any wrong doing or manipulation. It is also not the case of the revenue that the shares were not sold at the prices at the prevailing price on the floor of Bombay Stock Exchange on the given date of sale. The Ld AR submitted that an adverse view cannot be formed from the fact that notices sent under section 133(6) to the buyers of shares of M/s AGSSL through the Bombay Stock Exchange were returned by postal authorities, since it is common knowledge that there is no scope for sellers of shares in stock market to know who has purchased the shares in the market. It is noted that the AO has not spelled out the name of the so called exit providers and therefore in such a scenario, without bringing any evidence / material about the identity of exit provider and the



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nexus of such an entity with the assessee / broker, no adverse view could have been taken against the assessee in the given facts and circumstances of the case. Thus, we find that the assessee had discharged her burden of substantiating the sale of the listed shares which were subjected to STT, on the floor of stock exchange in order to avail the benefit of the exemption set-out in section 10(38) of the Act.

**16.** AO have doubted the genuineness of the sale of the share of M/s AGSSL on the basis of unusual rise in the share prices, which according to him was not supported neither by any market factors nor the fundamentals of the scrip itself. According to him, the assessee could not properly explain the unusual price rise over two years, and therefore, the sale of shares were held to be not genuine. According to us, merely because the price of shares have gone up cannot be the basis of branding the shares of M/s. AGSSL and LTCG claim as bogus. Because it is common knowledge that the prices of shares listed in a stock exchange are subject to upper and lower circuits placed by stock exchanges / SEBI and these are monitored very closely by Stock exchanges and SEBI. The fact that during the tenure of holding of shares by the assessee (from 19.11.2009 to 26.05.2011) no action was taken by SEBI against the assessee or her broker for price rigging or to be part of any illegal activity in respect of price rigging proves the fact that the assessee has nothing to do with the change in prices of M/s AGSSL.

**17.** We note that the AO has referred to the statement of Shri Bhavesh Makwana and Shri Deepak Rathod, directors of M/s AGSSL who were not able to justify the increase in the price of M/s. AGSSL and therefore, according to AO, these statements confirm that the assessee's claim of LTCG is bogus. However, the Ld. AR pointed out that statements of Shri



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Bhavesh Makwana and Shri Deepak Rathod , directors of M/s AGSSL cannot be relied upon by AO/Ld. CIT(A) because it was neither recorded in assessee's presence nor confronted to the assessee nor the AO allowed assessee to cross-examine them. Therefore, according to him, those statements even if incriminating cannot be used against the assessee unless cross-examined as held by Hon'ble Supreme Court in Andaman Timber Industries Vs. CCE reported in (2015) 281 CTR 241 (SC). Moreover, Ld. AR pointed out that the statements (referred by the AO in the assessment order) of these persons would reveal that they have not made any allegation against the assessee or her broker of any misconduct or wrong doing or being part of any illegal acts/modus-operandi to convert unaccounted money. This assertion of Ld. AR could not be controverted by revenue before us. Therefore, nothing turns on these statements of Shri Bhavesh Makwana and Shri Deepak Rathod , directors of M/s AGSSL to discredit the primary documents filed by assessee to prove the claim of LTCG. And as we noted above, even though AO has asserted to have issued notices to the exit providers but having not given the details / names of such exit providers and not confronted the assessee with their names, even while questioning the assessee during assessment proceedings, we are afraid, no reliance can be made on such an assertion of the AO; and therefore, nothing turns on of the observations made by AO regarding exit providers. Moreover, the assessee was summoned by the AO during the assessment proceedings and AO failed to elicit any wrong doing on assessee's part as alleged in the investigation report. Since there is no nexus between the entry operators, the question of making addition does not arise. Therefore, we do not countenance the action of the lower authorities and direct the deletion of the addition u/s 68 of the Act.



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**18.** The Ld AR also brought to our notice the decision of Tribunal in the case of ITA 592/Ahd/2020 ITO Vs Shri Champalal Gopiram Agarwal where the Tribunal deleted the addition made on account of rejecting the claim of LTCG on sale of Shares of AGSSL.

9.1 From the preceding discussion we note that the entire basis of AO to treat the transaction as bogus was based on the information received from DDIT(Inv.), unit-6(2) Mumbai that the impugned two scrips were penny stock. However, the AO nowhere pointed out any adverse finding in such report against the assessee. We further note that assessee carried out the transaction in impugned scrip namely M/s Arya Global Shares & Securities Ltd and Vax Housing Finance Corp. Ltd at stock exchange through registered broker which was duly supported by the documentary evidences such as bills, Demat account, and bank statements, showing payment were done through banking channel. The AO nowhere found any discrepancies in the documentary evidences. The dominant basis of treating the impugned transaction as bogus was based on assumption of the AO that the impugned scrip was found as penny stock by the DDIT(Inv.), unit-6(2) Mumbai. Thus, it was the onus upon the AO to bring such facts on record before making any allegations against the assessee. In the present case, the learned CIT-A after detailed verification has reached to the conclusion that the transaction carried out by the assessee was genuine and based on the documentary evidence. At the time of hearing, the learned DR has not brought any iota of evidence against the finding of the learned CIT-A. At the same time, 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/disallowances was the mere assumption. To our understanding, the mere assumption, surmises and conjecture cannot be the basis of making the addition or treating the transaction in sale of share of impinged company as bogus until and unless it is supported by the material documents.

9.2 In our view, the income generated by the assessee cannot be held bogus only on the basis of the modus operandi, generalisation, and assumptions of certain facts. In order to hold income earned or loss incurred by the assessee



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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, no adverse inference can be drawn against the assessee.

9.3 Now the controversy also arises whether a person who genuinely entered into purchase and sale of particular shares at stock exchange which was rigged up by some other person or group of persons, therefore, he enjoyed the windfall from such action of other person, can he be disallowed the benefit of tax exemption or carry forward of loss. To our mind 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 Arya Global Shares & Securities Ltd and Vax Housing Finance Corp. Ltd. Thus, it appears that the assessee acted in the given facts and circumstances in good-faith.

9.4 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 sensx; 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



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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 demat 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.



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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.

9.5 Respectfully following the judgment of Hon'ble Delhi High Court (Supra), we hold that in absence of any specific finding against the assessee, the assessee cannot be held to be guilty or linked to the wrong acts merely on basis of surmises and assumptions. In view of the above discussion, we hold that the income earned by the assessee on the scrip of M/s Arya Global Shares & Securities Ltd and loss incurred on the scrip of Vax Housing Finance Corp. limited cannot be held bogus merely on the basis of some assumption of the AO unless cogent materials are brought on record. Therefore, we don't find any reason to disturb the finding of the learned CIT(A) and direct the AO to delete the addition and disallowances made by him. Hence the grounds of Revenue's appeal is hereby dismissed.

**19.** Coming to the judgements cited before us, it is clarified that we have carefully perused the cited judgements relied upon by both the parties and but only those judgements which are found to be relevant to the case in hand, have been discussed in the ensuing paragraphs.

**20.** It is noted that the Ld. AR had rightly relied upon the judgment of the Hon'ble jurisdictional Bombay High Court in the case of **Shyam R. Pawar (229 Taxman 256)**. In the decided case also, the assessee was purchasing



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and selling the shares through a broker in Mumbai, for purchase of shares of (i) M/s. Bolton Properties Ltd., (ii) M/s Prime Capital and (iii) M/s. Mantra; and he has transacted through the broker at Calcutta and two operators namely Mr. Sushil Purohit and Shri Jagdish Purohit, and one of them was the Director of M/s. Bolton Properties Ltd. who had purportedly admitted to have manipulated the share price of M/s. Bolton Properties Ltd. Mr. Jagdish also reportedly floated several investment companies which were aggressively used in the entire deal with the broker M/s. Prakash Nahata & Co. According to AO, the shares offloaded by the beneficiaries through M/s. Prakash Nahata & Co., were ultimately purchased by the investment companies controlled by Shri Purohit. The name of the assessee figured during the course of the investigation. The AO noted that these entities/companies, whose shares were traded by the assessee, were not having sufficient business activities justifying the increase in their shares prices. Therefore, the AO concluded that certain operators and brokers devised a scheme to accommodate the unaccounted monies of the assessee in guise of capital gains. The AO accordingly added the capital gains derived by the assessee under Section 68 of the Act. On appeal, the Hon'ble jurisdictional High Court upheld the Tribunal order deleting the addition, by observing as under:

“..It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises



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doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.



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7. As a result of the above discussion, we do not find any substance in the contention of Mr.Suresh kumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.”

**21.** We may also gainfully refer to the decision rendered by this Tribunal in the case of **DCIT Vs Mukesh R Marolia (6 SOT 247)** (affirmed by the Hon’ble Bombay High Court in their order in ITA No. 456 of 2007 dated 07-09-2011 ) wherein on similar facts and circumstances the addition made by the AO on account of purported bogus LTCCG derived on purchase/sale of shares (off-market) was deleted by observing as under:

“10. We heard both sides in detail and perused rival contentions in the light of the records of the case and the paper book filed by the assessee. In the return of income filed by the assessee for the year under appeal, the purchase of flat at Colaba for a consideration of Rs. 2,06,72,904 was reflected. The assessee’s contribution in the purchase of the flat was @ 70 per cent for which the investment amounted to Rs. 1,44,71,033. The source of investment was, among other things, the sale proceeds of shares of Rs. 1,41,08,484. This amount has been questioned by the revenue authorities.

10.1 The assessee has purchased the shares of four companies viz., Allan Industrial Gases Ltd., Mobile Telecom, Rashee Agrotech and Centil Agrotech, during the previous years relevant to the assessment years 1999-2000 and 2000-01. The books of account maintained by the assessee for both the years clearly reflected the purchase of those shares. The shares are reflected in the balance sheets filed by the assessee along with the returns of income for the assessment years 1999-2000 and 2000-01. Therefore, it is seen that as a prima facie evidence, the purchases of shares have been contemporaneously entered into the books of account of the assessee.



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10.2 The assessee has been declaring agricultural income in his returns of income for the assessment years from 1990-91 to 2001-02. The total agricultural income returned by the assessee up to the assessment year 1999-2000 was at Rs. 7,57,883. The amount invested in the purchase of shares as on 31-3-1999 was Rs. 4,48,160. The cash available with the assessee by way of agricultural income was much higher than the investment made by the assessee in the purchase of shares as on 31-3-1999. After making the investments in the shares, the assessee had a surplus cash balance of Rs. 3,09,000 as on 1-4-1999. Thereafter, the assessee has further returned an agricultural income of Rs. 66,000 for the assessment year 2000-01. The amount invested in the purchase of shares in the year ending on 31-3-2000 was Rs. 2,57,020. Again the assessee had a cash balance thereof of Rs. 1,18,771. Therefore, it is, very clear that the investment made by the assessee in shares during the previous periods relevant to the assessment years 1999-2000 and 2000-01 was supported by cash generated out of agricultural income. The above agricultural income have been considered in the respective assessments. Therefore, the contention of the assessing authority that the assessee had no sufficient resourcefulness to make investments in the shares is unfounded.

10.3 Purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were quite sham on the legal proposition arrived at by the CIT(A) that off-market transactions are not permissible. The assessee has stated that the transactions were made with the help of professional mediators who are experts in off-market transactions.

10.4 When the transactions were off-market transactions, there is no relevance in seeking details of share transactions from Stock Exchanges. Such attempts would be futile. Stock Exchanges cannot give details of transactions entered into between the parties outside their floor. Therefore, the reliance placed by the assessing authority on the communications received from the Stock Exchanges that the particulars of share transactions entered into by the assessee were not available in their records, is out of



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place. There is no evidential value for such reliance placed by the assessing authority. The assessee had made it very clear that the transactions were not concluded on the floor of the Stock Exchange. The matter being so, there is no probative value for the negative replies solicited by the assessing authority from the respective Stock Exchanges. We are of the considered view that the materials collected by the assessing authority from the Stock Exchanges are not valid to dispel or disbelieve the contentions of the assessee.

10.5 The next set of evidences relied on by the assessing authority are the statements obtained from various parties. When certain persons like Radha Ashok and Sandeep D. Shah made negative statements against the assessee, persons like Satish Mandovara and Mangesh Chokshi had given positive statements in support of the contention of the assessee. But, the assessing authority sought to pick and choose the statements given by various parties. While accepting and rejecting such statements given by the parties, the Assessing Officer has made a mistake of accepting irrelevant statements and rejecting relevant statements. During the relevant period in which the assessee transacted in shares, persons like Radha Ashok and Sandeep D. Shah were not carrying on their business of brokers as in the manner they carried on the business in the past. Even their Stock Exchange Memberships were cancelled. It was Shri Satish Mandovara who was carrying on the business mainly for and on behalf of Shri Mangesh Chokshi, Director of M/s. Richmond Securities Pvt. Ltd. Those two persons have categorically admitted before the assessing authority that they had dealings with the assessee in respect of the share transactions. They have confirmed the transactions stated by the assessee that he had with them. These positive statements made before the assessing authority supported the case of the assessee. There is no force in the action of the assessing authority in relying on the negative statements of the other parties whose role during the relevant period was either irrelevant or insignificant. Therefore, in the facts and circumstances of the case, it is, our considered view that certain statements relied on by the assessing authority do not dilute the probative value of the statements given by other persons in favour of the assessee confirming the share transactions entered into by the assessee.



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10.6 The above circumstances have made out a clear case in support of the book entries reflecting the purchase and sale of shares and ultimately supporting the money received on sale of shares and finally investing the same in the purchase of flat. The chain of transactions entered into by the assessee have been properly accounted, documented and supported by evidences.

10.7 Therefore, we find that the explanations of the assessee seems to have been rejected by the assessing authority more on the ground of presumption than on factual ground. The presumption is so compelling that comparatively a small amount of investment made by the assessee during the previous year period relevant to the assessment years 1999- 2000 and 2000-01 have grown into a very sizable amount ultimately yielding a fabulous sum of Rs. 1,41,08,484 which was used by the assessee for the purchase of the flat at Colaba. The sequence of the events and ultimate realization of money is quite amazing. That itself is a provocation for the Assessing Officer to jump into a conclusion that the transactions were bogus. But, whatever it may be, an assessment has to be completed on the basis of records and materials available before the assessing authority. Personal knowledge and excitement on events, should not lead the Assessing Officer to a state of affairs where salient evidences are over-looked. In the present case, howsoever unbelievable it might be, every transaction of the assessee has been accounted, documented and supported. Even the evidences collected from the concerned parties have been ultimately turned in favour of the assessee. Therefore, it is, very difficult to brush aside the contentions of the assessee that he had purchased shares and he had sold shares and ultimately he had purchased a flat utilizing the sale proceeds of those shares.

10.8 For a moment, even if all the above evidences are ignored, one cannot overlook the pressure of the evidence coming out of the survey carried out by the department in the business premises of the assessee. There was a survey carried out by the department in the business premises of the assessee. In the course of survey, contract notes for sale of shares, copies of bills thereof, photocopies of share certificates etc., were found. The purchase and sale of shares were also found recorded in the books of account. The department has no case that the survey was a staged enactment. A survey is always



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unexpected. So, it is not possible to presume that the assessee had collected certain fabricated documents and kept at his business premises so as to hoodwink the survey party to lead them to believe that the assessee had entered into share transactions. Atleast such an inference is not possible in law. The department has no defence against the forcible argument of the learned counsel that the survey conducted by the department has out and out upheld the contention of the assessee that he had purchased and sold shares. We find that this solitary evidence collected in the course of survey is sufficient to endorse the bona fides of the share transactions made by the assessee.”

**22.** At this juncture, we may gainfully refer to the decision of the Hon’ble Gujarat High Court in the case of **Pr.CIT Vs Parasben K. Kochar (130 taxmann.com 176)**. In the decided case also, the assessee had furnished all relevant documents such as contract notes, demat statements, bank statements, ledgers, bills etc. to substantiate the LTCG derived on sale of listed shares. The AO, however, disputed the genuineness of the same by placing reliance on statements of certain persons obtained by the Investigation Wing. On appeal the Hon’ble Gujarat High Court is noted to have upheld the order of this Tribunal holding that since the assessee was not given opportunity to cross-examine these persons, the addition was unsustainable. The relevant findings of the Hon’ble High Court were as follows :-

“2. We take notice of the fact that the issue in the present appeal is whether the assessee earned long term capital gain through transactions with bogus companies. In this regard, the finding of fact recorded by the Tribunal in paras 9, 10 and 11 reads thus:—

"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



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and some of the shares also remained in the account of the appellant after earning of the long term capital gain.

10. Learned 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, learned A.R. also cited an order of Coordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab (P.) Ltd. v. 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 learned A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee."

3. Thus, the Tribunal has recorded the finding of fact that the assessee discharged his onus of establishing that the transactions were fair and transparent and further, all the relevant details with regard to such transactions were furnished before the Income-tax authorities and the Tribunal also took notice of the fact that some of the shares also remained in the account of the appellant.

4. We take notice of the fact that the assessee has a Demat Account maintained with the ICICI Securities Ltd. and has also furnished the details of such bank transactions with regard to the purchase of the shares. In the last, the Tribunal took notice of the fact that the statements recorded by the investigation wing of the Revenue with regard to the Tax entry provided were informed to the assessee despite giving him opportunity to meet such an allegation. In the overall view of the matter, we believe that the proposed question cannot be termed as a substantial question of law for *the purpose of maintaining the appeal under section 260-A of the Act, 1961.*"

**23.** The Ld. AR of the appellant has rightly relied on another judgment of the Hon'ble Bombay High Court in the case of **CIT Vs Jamna Devi Agarwal (328 ITR 656)**. In the decided case, also the Revenue had disputed



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the genuineness of the long-term capital gains derived by the assessee on sale of shares of listed companies for similar reasons as cited in the present case. On appeal, the Hon'ble High Court upheld the decision of this Tribunal deleting the additions by observing as under:

“12. From the documents produced before us, which were also in the possession of the Assessing Officer, it is seen that the shares in question were in fact purchased by the assessees on the respective dates and the company has confirmed to have handed over the shares purchased by the assessees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were **off-market** transactions. However, the purchase and sale price of the shares declared by the assessees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assessees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions.

13. The statement of Pradeep Kumar Daga that the transactions with the Haldiram group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assessees were in consonance with the market price. On a perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought to our notice that the findings recorded by the Tribunal are contrary to the documentary evidence on record.

14. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assessees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assessees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assessees. No fault can be found with the above finding recorded by the Tribunal.

15. Reliance placed by the counsel for the Revenue on the decision of the apex court in the case of Sumati Dayal [1995] 214 ITR 801 is wholly



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misplaced. In that case, the assessee therein had claimed income from horse races and the finding of fact recorded was that the assessee therein had not participated in races, but purchased winning tickets after the race with the unaccounted money. In the present case, the documentary evidence clearly shows that the transactions were at the rate prevailing in the stock market and there was no question of introducing unaccounted money by the assesseees. Thus, the decision relied upon by the counsel for the Revenue is wholly distinguishable on the facts.

16. For all the aforesaid reasons, we hold that the decision of the Tribunal is based on findings of fact. No substantial question of law arises from the order of the Tribunal. Accordingly, all these appeals are dismissed. No order as to costs.”

**24.** The Ld AR also brought to our notice the recent judgment rendered by the Hon’ble jurisdictional Bombay High Court in the case of **PCIT v. Ziauddin A Siddique (ITA No. 2012 of 2017) dated 04.03.2022** which is found to be relevant in the facts involved in the present case. In the decided case, the issue before the Hon’ble High Court was whether this Tribunal was right in law in deleting the addition made u/s 68 of the ACT in relation to LTCG derived on sale of shares, ignoring the fact that the shares were purchased from off-market sources and that the sharp rise in prices were not supported by financials. Answering the question raised by the Revenue in the negative, the Hon’ble High Court held that there was a finding of fact that the purchase & sale of shares occurred on the platform of stock exchange, upon payment of STT and were supported by documentary evidences and therefore there was no perversity in the order of this Tribunal. The Court further noted that there was no allegation against the assessee that he had participated in price rigging in the market and therefore dismissed the appeal of the Revenue. The relevant findings of the Hon’ble High Court which is binding upon us, are as follows :-



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“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.<sup>1</sup> 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.”

**25.** It is noted that similar questions were also put up for consideration before the Hon’ble Rajasthan High Court in the case of **Pr.CIT Vs Gaurav Bagaria (453 ITR 513)** which read as follows :-

- I. "Whether on the facts and in the circumstances of the case, the Learned ITAT was justified in deleting the addition of Rs. 7593444/- made on account of unexplained credit u/s 68 of the Act when the assessee was unable to justify equity trading by picking the shares of specific companies with poor net worth?
- II. Whether on the facts and in the circumstances of the case, the Learned ITAT, Jaipur was justified in deleting the addition of Rs. 7593444/- by



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holding the transaction as genuine because transaction is through Stock Exchange and payment is by cheque, completely ignoring the fact that such masquerade is used methodically to provide accommodation entries in order to show the sham transaction as genuine?

- III. Whether on the facts and in the circumstances of the case, the Learned ITAT, Jaipur was justified in deleting the addition of Rs. 151869/- being commission paid to acquire such accommodation entry?
- IV. Whether on the facts and in the circumstances of the case, the Learned ITAT, Jaipur was justified in rejecting the Revenue's appeal without considering the case on merit where the additions were made by the AO on the basis of corroborative information received from Investigation Wing, Kolkata given that the case fails under exception as per para 10(e) of CBDT circular no. 03/2018 dated 20-08-2018.

**26.** The Hon'ble High Court is noted to have answered the above questions against the Revenue by following their earlier judgment rendered in the case of **CIT v. Smt. Pooja Agarwal, [2018] 99 taxmann.com 451**, by observing as under :-

“..Learned ITAT has specifically held that the assessee has produced all the relevant documentary evidence to establish genuineness of the transaction and there is no contrary evidence to doubt the correctness of the evidences produced by the assessee and therefore treating the transaction of purchase and sale as sham is not justified. Further, learned ITAT has also relied upon the decision of the jurisdictional High Court in CIT v. Smt. Pooja Agarwal, [2018] 99 taxmann.com 451 (Raj.) wherein learned ITAT has relied upon the judgment of Division Bench involving the same facts wherein the Division Bench has dismissed the appeal filed by the Revenue.”

**27.** We also gainfully refer to the decisions cited by the Ld. AR, rendered by the coordinate Benches of this Tribunal wherein also, on similar facts and circumstances, following the above referred judgments of the



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jurisdictional High Court, this Tribunal deleted the addition/s made by the AO u/s 68 of the Act in relation to the long-term capital gains derived on these listed shares of TTL. The Ld. AR had brought to our notice that, the coordinate Bench at Delhi in the case of **Seema Tayal Vs. ITO (ITA. No.1132/Del/2018) dated 28.06.2019** was pleased to delete similar addition on account of alleged bogus LTCG made by the AO in relation to sale of shares of TTL by the assessee by holding as under: -

“17. That 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. Thus, the judgment of the Hon’ble High Court has to be seen if similar facts are permeating in the present appeal also and if there is difference on facts, then the judgment cannot be applied. In the judgment of Hon’ble Apex Court in Kunhayyammed vs State of Kerala reported in 245 ITR 360 and also in CIT vs. Rashtrdoot (HUF) reported in 412 ITR 17, the Hon’ble Apex Court have held that if the High Court has not admitted the question of law, and has dismissed the appeal, then it is a case of dismissal in liminie. Even on merits and facts, the judgment of Udit Kalra vs ITO (supra) is distinguishable as in that case the company was into consistent losses, whereas, the scrip in which assessee has dealt is a growing and high turnover company and dividend paying company. As TTL was having turnovers of Rs. 117.39 crores (AY 2014-15); Rs.150.59 crores (AY 2015-16); Rs 154.88 crores (AY 2016-17); and Rs. 146. 23 crores (AY 2017-18). The financial statements of said company are available in public domain, which have also been placed at Pages 325 to 370 of PB– II by assessee. That further, the interim order of SEBI in the case of TTL banning trading has been uplifted and cooled down by subsequent order of SEBI vide order dated 31.10.2018 placed before us at Pages 305 to 324 of PB– II by assessee. Thus, the growth in prices of TTL was backed by sound financials and as such, 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



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materially distinguishable from the facts of the case of Udit Kalra vs ITO so relied by Id. DR.

18. ....

19. On the above facts and circumstances, we find that the transaction of the assessee of deriving long term capital gains of Rs. 1, 93, 56, 813/- by selling shares of M/s Trinity Tradelink Ltd. was treated as bogus by the Revenue only on the basis of suspicion and probability and without finding any defect in the various documentary evidences filed by the assessee and further, the finding recorded by Id CIT (A) on page 26 of his order that the addition has been made on independent analysis of the documents, is contrary to material available on record. As on perusal of the order of assessment, we find that no independent inquiry was made with regards to alleged entry operator Sh. Vikrant Kayan. Whereas, the sole basis of making the impugned addition was statement of Sh. Vikrant Kayan, which too was recorded behind the back of assessee by DIT (Inv) Kolkata and the statement alone cannot be the conclusive evidence to nail the assessee and hence needs to be excluded for consideration as the said person has not been allowed cross examination by assessee, even though various requests were made by assessee. As such, the transaction of the assessee was duly supported by relevant documentary evidences without there being any rebuttal by lower authorities; the addition made by the Assessing Officer of Rs. 1,93,56,813/- by treating the LTCG as bogus is unsustainable. In view of our above finding, we, therefore, delete the addition of Rs.1,93, 56,813/-.

20. As we find the transaction of long term capital gains of Rs.1,93,56,813/- derived by the assessee as genuine and as such, further addition of Rs. 3,87,136/- made by the Assessing Officer on account of alleged commission is consequential and is also liable to be deleted and accordingly, the same is also hereby deleted.”

**28.** The Ld. AR of the appellant has relied on another judgment of the Hon’ble Rajasthan High Court in the case of **PCIT Vs Ritu Agarwal Shreeram Bhawan (453 ITR 520)** which has been confirmed by the



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Hon'ble Supreme Court as the Civil Appeal No 9/2011 of 2022 by order dated 24.04.2023 of the Department has been dismissed by the Apex Court. In the decided case, the Hon'ble High Court has upheld the order of the Tribunal allowing the LTCG claim/exemption u/s 10(38) of the Act on sale of scrip of M/s Sunrise Asian Limited. The observations of the Hon'ble Court are as under: -

“On going through the contents of the order of learned ITAT dated 18.11.2020, it is established that before rendering the judgment the learned ITAT has considered entire facts of the case, and has given a categorical finding that in the case in hand the assessee produced all the documentary evidence to establish the genuineness of transaction. The learned Assessing Officer as per the learned ITAT has failed to produce the contrary material evidences to rebut the claim of the assessee and documents produced by him. Learned ITAT has considered the bank statement, demat account, books of account, contract notes which were external documents and were not in the control of the assessee and therefore the claim of manipulation and for treating the transaction in question is as sham and bogus were not proven and hence untenable.”

**29.** We are also guided by the decision of Jurisdiction Bombay High Court referred by the Ld AR, in the case of PCIT V Indravadan Jain ITA 458 of 2018 where the Hon'ble Court has held that

3. Respondent had shown sale proceeds of shares in scrip Ramkrishna Fincap Ltd. (RFL) as long term capital gain and claimed exemption under the Act. Respondent had claimed to have purchased this scrip at Rs.3.12/- per share in the year 2003 and sold the same in the year 2005 for Rs.155.04/- per share. It was A.O.'s case that investigation has revealed that the scrip was a penny stock and the capital gain declared was held to be accommodation entries. A broker Basant Perival & Co. (the said broker) through whom these transactions have been effected had appeared and it was evident that the broker had indulged in price manipulation through synchronized and cross deal in scrip of RFL. SEBI had also passed an order regarding irregularities



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and synchronized trades carried out in the scrip of RFL by the said broker. In view thereof, respondent's case was reopened under Section 148 of the Act.

4. The A.O. did not accept respondent's claim of long term capital gain and added the same in respondent's income under Section 68 of the Act. While allowing the appeal filed by respondent, the CIT[A] deleted the addition made under Section 68 of the Act. The CIT[A] has observed that the A.O. himself has stated that SEBI had conducted independent enquiry in the case of the said broker and in the scrip of RFL through whom respondent had made the said transaction and it was conclusively proved that it was the said broker who had inflated the price of the said scrip in RFL. The CIT[A] also did not find anything wrong in respondent doing only one transaction with the said broker in the scrip of RFL. The CIT[A] came to the conclusion that respondent brought 3000 shares of RFL, on the floor of Kolkata Stock Exchange through registered share broker. In pursuance of purchase of shares the said broker had raised invoice and purchase price was paid by cheque and respondent's bank account has been debited. The shares were also transferred into respondent's Demat account where it remained for more than one year. After a period of one year the shares were sold by the said broker on various dates in the Kolkata Stock Exchange. Pursuant to sale of shares the said broker had also issued contract notes cum bill for sale and these contract notes and bills were made available during the course of appellate proceedings. On the sale of shares respondent effected delivery of shares by way of Demat instructions slip and also received payment from Kolkata Stock Exchange. The cheque received was deposited in respondent's bank account. In view thereof, the CIT[A] found there was no reason to add the capital gains as unexplained cash credit under Section 68 of the Act. The tribunal while dismissing the appeals filed by the Revenue also observed on facts that these shares were purchased by respondent on the floor of Stock Exchange and not from the said broker, deliveries were taken, contract notes were issued and shares were also sold on the floor of Stock Exchange. The ITAT therefore, in our view, rightly concluded that there was no merit in the appeal.

5. We also find no infirmity in the order passed by the ITAT and no substantial questions of law as proposed in the appeal arises.



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**30.** Apart from the above, the Revenue has also relied upon several judgments rendered in the context of unexplained cash credit u/s 68 of the Act by the judicial forums. Having perused those judgments, it is noted that, the question as to whether the assessee had satisfied the three ingredients set out in Section 68 of the Act is essentially a fact finding exercise. We note that the facts involved in each of them were distinguishable to the issue involved in present case i.e. genuineness of capital gains derived on sale of shares. Since these judgments were noted to be not relevant to the present case, we do not deem it fit to discuss each of them separately. However, we discuss and distinguish some of the cases as under: -

1. The case of Sumati Dayal case ([1995] 214 ITR 801) was considered by the judgement of Hon'ble Bombay High Court in the case of Jamnadevi Agarwal (supra) and held that the context in the case of Sumati Dayal was that there was a finding on fact that the assessee had not participated in races but purchased winning tickets are the race with unaccounted money. Whereas in the present case the documents clearly establish that the assessee has purchased the shares and sold the same in the stock market at the relevant market prices.
2. The case of Durga Prasad More (82 ITR 540SC) was on the circumstance that the documents (trust deed) furnished by the assessee was not accepted as genuine by the department and therefore in that context the Honble Court has stated that the Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities
3. The case of CIT v P Mohankala (2007) 161 taxman 169 (SC) was in the context of receipt of substantial amounts of gifts from persons whose capacity to pay was doubted by the Court and in that context the Court has stated to apply the test of human probability.



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4. Similarly, the decision rendered in the case of **Sanat Kumar Vs ACIT (ITA 1881/Del/2018)**, is also found to be on completely different footing wherein the assessee was not able to produce the relevant details to justify its claim.

5. Further, the decision of Tribunal in the case of **Pooja Ajmani V ITO (ITA No.5714/Del/2018)** is rendered in 2019 where the assessee was deficient in furnishing in the documents in support of her claim of LTCG and therefore the decision was given against her but in the case of assessee, she has furnished all the evidences in support of purchase and sale of shares and therefore the case is not applicable.

6. In the case of **Sanjay Bimalchand Jain Vs PCIT (supra)** cited by the Revenue, the assessee had made payments in cash for acquisition of shares and therefore genuineness of purchase was held to be in doubt. It was also found that the address of the listed shares purchased and the address of the stock broker was the same which was found to be peculiar and there was no response to the notices issued by the AO. We find that there are no such facts present in the assessee's case and therefore this judgment relied upon by the Revenue is also found to be factually distinguishable.

7. The case of **Udit Kalra (ITA 220/2019)** has been distinguished in the case of Seema Tayal (supra) discussed above.

**31.** For the various reasons discussed in the foregoing and following the judgments cited above, more particularly of the binding jurisdictional High Court in the cases of Shyam Pawar (supra), Ziauddin A Siddique (supra), Mukesh R Marolia (supra) & Jamna Devi Agarwal (supra), Indravadan Jain (supra) Ritu Agarwal Shreeram Bhawan (supra) we hold that, the Ld. CIT(A) had erred both on facts and in law in upholding the AO's action of making addition u/s 68 of the Act, in relation to the proceeds derived on sale of shares of AGSSL alleging it to be bogus. We therefore direct the AO to delete the addition of Rs 73,11,760/- made u/s 68 of the Act and allow the claim of LTCG/exemption claimed u/s 10(38) of the Act.



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32. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 18/03/2024.

Sd/-  
(BR BASKARAN)  
ACCOUNTANT MEMBER

Sd/-  
(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 18/03/2024.  
Vijay Pal Singh, (Sr. PS)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai