IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.1519/Mum/2021
(**निर्धारण वर्ष** / Assessment Year: 2014-15)

Mrs. Nisha Ashish Gupta 1501, Anmol Enclave, Opp Patel Auto, Goregaon West, Mumbai-400062.	**बनाम**/ Vs.	ITO-31(2)(4) Pratyakshakar Bhavan, C-13, Bandra Kurla Complex, Bandra (East), Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADLPG0969J		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Vishnu Agarwal/Shri Amit Agarwal
Revenue by:	Shri Ashok Kumar Ambastha (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 21/12/2023
घोषणा की तारीख /Date of Pronouncement: 23/01/2024

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 18.08.2021 for the assessment year 2014-15.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) upholding the action of the AO disallowing the Long Term Capital Gain (LTCG) claimed by the assessee in respect of sale of shares M/s. Sunrise Asian Limited (hereafter "M/s. Sunrise") of Rs.98,81,550/- u/s 68 of the Income Tax Act, 1961 (hereinafter "the Act"). And thus denying deduction u/s 10(38) of the Act as well as upholding addition of Rs.1,97,631/- as commission for arranging the bogus LTCG (2% of commission) u/s 69C of the Act.

3. Brief facts are that the assessee is an individual and had filed her return of income on 24.07.2014 for AY. 2014-15 declaring total income of Rs.17,51,980/-. Later on, the case of the assessee was reopened u/s 147 of the Act; and the AO noted during the assessment proceeding that assessee has received Rs.98,81,550/- from sale of shares of M/s. Sunrise and claimed long term capital gain (LTCG) on sale of shares at Rs.93,25,870/- which assessee claimed as exempt u/s 10(38) of the Act. The AO called for the details of the transaction and pursuant to which the assessee brought to AO's notice that she has purchased off-market 20,000 shares of M/s. Santoshima Trade Links Ltd. (hereinafter "M/s. Santoshima") @ Rs.25/- per share on 17.11.2011 through broker M/s. P Saji Textiles Ltd for a consideration of Rs.5,00,000/-. And thereafter, on 26.06.2013 M/s. Santoshima got amalgamated with M/s. Sunrise Asian Ltd. And as per the scheme of amalgamation ordered by the Hon'ble High Court, the assessee received 20,000 shares of M/s. Sunrise which shares have been sold in the Bombay Stock Exchange (BSE) by assessee during the year under consideration. The total sale consideration was to the tune of Rs.98,81,550/- and she claimed LTCG of Rs.93,25,870/-. The assessee produced evidence before AO that purchase as well as the sale consideration has passed through the banking channel and that the shares were demated and the shares were sold through BSE/recognized stock broker M/s. Hem Securities Ltd. However, the AO taking note of the report of the Investigation Wing (Kolkata) that the scrip of M/s. Sunrise was one of the eighty four (84) penny stock which were used

by entry operators for converting unaccounted money of beneficiaries like assessee in the garb of LTCG/loss, disbelieved the genuinity of the transaction. The AO in the assessment order explained the *modus operandi* followed by the entry operators for providing accommodation entries to beneficiaries like assessee in the garb of LTCG/loss; and he wondered as to how the price of a share of M/s. Sunrise purchased at Rs.25/- would command upto Rs.496/- per share in span of two years and disbelieved the claim of assessee making a gain of Rs.93,25,870/-. The AO noted that assessee had purchased the shares of M/s. Santoshima which is an entity controlled by one Shri Vipul Bhatt (through dummy directors), who also controls M/s Sunrise, which fact according to AO has been admitted by him before the department. According to AO, the exit providers who bought back the shares from the assessee [*through different companies as shown by the AO from page no. 5 to 7 (chart*)] was also controlled by Shri Vipul Bhatt. Thereafter, the AO noted the financials of M/s. Sunrise and was of the opinion that the price of shares of M/s. Sunrise was rigged from Rs.25 per shares to Rs.500 for giving accommodation entries to beneficiaries in the form of LTCG which amount is exempt u/s 10(38) of the Act. Thereafter, he took note of the investigation report of the investigation wing of the Department wherein the statement of Shri Vipul Bhatt was recorded on 09.02.2015 u/s 132(4) of the Act wherein he accepted that he was an entry operator and was providing bogus accommodation entry to various persons in lieu of commission. According to the AO, Shri Vipul Bhatt has explained the *modus*

operandi adopted by him wherein shares of entities controlled by him were sold through synchronized trading in stock exchange in active collusion by his own other entities/exit providers. The AO took note of the financial of M/s Sunrise and the Investigation report to opine that M/s. Sunrise was a penny stock which was used by unscrupulous entry operators for providing bogus LTCG to assessee. Thereafter, he discussed about search conducted in the case of Shri Anuj Agarwal (*director of M/s. Korp Securities Ltd. and two other LLP).* According to the AO, Shri Anuj Agarwal was an entry operator who played key role in the manipulation of share price of M/s. Sunrise; and according to AO, Shri Anuj had helped various persons in obtaining accommodation entries in the form of LTCG/STCL, and in his statement recorded, he has furnished the name of shares which were used for providing bogus LTCG/STCG, which AO notes at para no. 15.2 of assessment order. According to the AO, he had issued notice u/s 133(6) of the Act to the broker who sold the shares of assessee through Bombay Stock Exchange (*i.e. M/s. Hem Securities Ltd.*) and directed it to file the details of sale of shares of M/s. Sunrise. However, according to the AO, no satisfactory reply was received from them. Thereafter, the AO discussed at Para no. 16 of his order, the cash trail (*in general*) i.e. modus operandi carried out by entry-operators for the benefit of beneficiaries who wants to get their unaccounted money laundered as white and that too without paying tax. Thereafter, he noted that the SEBI has restricted the aforesaid persons from trading in the market. And thereafter, he issued summons u/s 131 of the Act to

assessee and recorded her statement which is reproduced from page no. 22 to 29 of the assessment order. And thereafter, he was of the opinion that entire purchase/sale transaction of shares of M/s. Sunrise was not for commercial purpose but to create artificial gain by manipulating the share market which was pre-planned and pre-fixed through syndicate of un-scrupulous entry providers discussed (supra). And he also noted that SEBI had suspended the transaction of this scrip for some time and revoked the suspension on 16.08.2011. But according to the AO no trading is taking place of this scrip as per online search conducted by him. Thereafter, he disallowed the assessee's claim of LTCG as well as exemption claimed on it u/s 10(38) of the Act and added the entire sale consideration of Rs.98,81,550/- u/s 68 of the Act; and further, was of the opinion that assessee in order to arrange the aforesaid accommodation entry, ought to have spent commission @ 2% to the broker/entry providers which he computed at Rs.1,97,631/- which was also added as unexplained expenditure u/s 69C of the Act. And thus AO made an addition of Rs.98,81,550/- + Rs.1,97,631/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the appeal of the assessee. Aggrieved, the assessee is before us.

4. We have heard both the parties and perused the records. The assessee is an individual and had filed her return of income on 24.07.2014 declaring total income of Rs.17,51,980/-. Thereafter, the assessment was reopened u/s 147 of the Act; and AO directed the assessee to furnish the details regarding the LTCG claim of

Rs.93,25,870/- on sale of shares of M/s. Sunrise. Pursuant to which, the assessee brought to the notice of the AO that she has purchased 20,000 shares of M/s. Santoshima Trade Links Ltd @ 25 per shares on 17.11.2011 from M/s. P Saji Textile Ltd for which assessee filed copy of the Debit Note issued from share transferor found placed at page no. 40 of the PB. From a perusal of this document, we note that M/s. P Saji Textile Ltd had debited Rs.5,00,000/- on account of sale of 20,000 equity shares of M/s. Santoshima @ Rs.25 per shares; and at Page no. 41 of PB copy of the share certificate of M/s. Santoshima in the name of M/s. P Saji Textile Ltd is found placed, and on its reverse side, the transfer of these shares in the name of the assessee dated 20.11.2011 (*Register folio No. 224 in the name of the assessee)* is found placed therein. Further, it is noted that purchase consideration has been given by assessee through Cheque No.583658 of Rs.5,00,000/- which fact is evident from bank-statement found placed at Page no. 64 of PB. The 20,000 shares of M/s. Santoshima has been held in depository/demat of HDFC bank of assessee from 01.03.2013 onwards, [along with five other shares] which fact is evident from perusal of Page no. 62 of the PB. Demat statement/depository services rendered by HDFC Bank to assessee regarding holding of shares is seen from perusal of Page no. 61 of PB which shows the details of shares held for a period from 01.06.2013 to 30.06.2013. It is further noted that on 26.06.2013 M/s. Santoshima got amalgamated with M/s. Sunrise and as per the scheme of amalgamation as ordered by Hon'ble High Court, the assessee received 20,000 shares of M/s. Sunrise as per the swap ratio of 1:1 of

shares of M/s. Santoshima. And thus, assessee received 20,000 shares of M/s. Sunrise in lieu of shares of M/s. Santoshima. Thereafter, the shares were transferred to the Demat Account/depository services of HDFC Bank which fact is evident from perusal of statement of depository services of HDFC Bank for period between 1st June, 2013 to 30.06.2013 (Refer page no. 61 PB); and the assessee sold the shares in lots in the month of November 2013 between 7th Nov to 22nd Nov, 2013 on the electronic platform of BSE for rate ranging between Rs.492 to Rs.496 per share through the broker M/s. Hem Securities Ltd. for total sale consideration of Rs.98,81,550/- which fact is discernable from copy of the broker/contract note place from page no. 42 to 60 of PB and demat statement is found placed at page no. 62 PB. It is noted that the assessee had remitted STT on the sale transaction of shares of M/s. Sunrise and claimed LTCG of Rs.93,25,870/- which according to the assessee was exempt u/s 10(38) of the Act. The AO has disallowed the LTCG claim of assessee by mainly taking note of report submitted by investigation wing (Kolkata) as well as he doubted the financial prudence of the assessee to have purchased in the first place the shares of M/s. Santoshima; and wondered as to how the price of shares of M/s. Sunrise could have increased 20 times in a span of two years, and he also referred to SEBI orders in other scrips wherein SEBI found that a syndicate of unscrupulous entry providers are manipulating the market by rigging the share prices to generate exempt income; and AO relied on the statement of Shri Vipul Bhatt director of M/s. Sunrise; and brokers (*Shri Anuj Agarwal and some others*

brokers) who according to him dealt in manipulating the share price of M/s. Sunrise and the AO concluded that assessee by making claim of LTCG/exempt income was bringing her unaccounted money back to her regular books by laundering her black money to white, and therefore, he held the transaction as bogus and added Rs.98,81,550/- u/s 68 of the Act and commission @ 2% for facilitating such transaction.

5. The main plea of the assessee is that impugned additions are not legally sustainable in the light of the fact that assessee has discharged the burden of proving the genuineness of her claim regarding LTCG on sale of shares of M/s. Sunrise by submitting primary documents to substantiate the claim of LTCG. The assessee in order to prove the transaction which led her to claim the LTCG/ exemption u/s 10 (38) of the Act had proved the events of purchase of shares, dematerialization of the shares, merger of entities ordered by the Hon'ble High Courts order; and thereafter, allotment of share of M/s. Sunrise and transfer of shares to demat account, and the sale happening through Bombay Stock Exchange Electronic platform after remitting STT. Therefore, according to Ld. AR, AO could not have drawn adverse view against the LTCG claim made by assessee without first finding any infirmity in the primary documents filed by the assessee, which in this case has been undisputed of AO/Ld. CIT(A) and they have not leveled any allegation/infirmity about the veracity of the relevant documents. In such a scenario, according to Ld. AR, the AO was duty bound to show from the incriminating evidences which 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 her purported black money in active connivance with these statement-makers (Shri Vipul Vidur Bhatt, Shri Anuj Agarwal). According to Ld. AR, unless AO is able to point out from the report/statement of the so called entry operators and spell out the role of assessee/broker as a wrong doer or participant in the *modus-operandi (as stated in the report of the investigation wing)*, the impugned action of AO/Ld CIT(A), in the light of un-impeached primary documents has to fail.

6. We find that AO during assessment proceedings had asked the assessee to prove the claim of LTCG of Rs.98,81,550/- from sale of shares of M/s. Sunrise. And pursuant to such a direction, the assessee had filed the primary documents as discussed (supra) to prove the claim, which documents have not been found by AO to suffer from any infirmity. As noted the assessee has placed evidence to prove the purchases of shares of M/s. Santoshima and allotment of physical share certificate no. 437 under register Folio No. 224 a copy of which is seen from perusal of reverse of Page no. 41 of PB. Further, AO has not even disputed the existence of D-mat/Depository account of assessee maintained with HDFC Bank, which shows that shares purchased were credited in the Depository/D-mat account of the assessee. Therefore, once the holding of shares in D-mat account cannot be disputed, then the purchase & holding of shares cannot be held as bogus. And further, we note that assessee has purchased the

shares of M/s. Santoshima from M/s. P Saji Textiles by cheque through Canara Bank vide Cheque No.583658 dated 08.08.2011 for Rs.5 Lakhs. It is further noted that M/s. Santoshima got merged with M/s. Sunrise vide scheme approved by Hon'ble High Court on 27.07.2012. And by virtue of amalgamation, the assessee got allotted the equity shares of M/s. Sunrise as per swap ratio (1:1) as approved in the scheme and consequently, assessee was allotted 20,000 equity shares of M/s. Sunrise. Since the amalgamation order was passed by the Hon'ble High Court after notice to Income Tax Department, ROC, SEBI etc, the shares of M/s. Sunrise *per-se* cannot be held to be bogus shares. And consequent to merger, the shares of M/s. Sunrise (*allotted to assessee*) was deposited in demat account (*refer page no. 61 to 63 PB*) and later sold between 06th Nov, 2013 to 20th Nov, 2013 in Bombay Stock Exchange through broker M/s. Hem Securities and consideration have passed through banking channel (*refer page no. 70-71 of PB*) and STT paid on the sale transaction; 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 (*of Investigation Wing of Kolkata*) wherein there is no mention of any wrong doing by assessee or of his broker, or assessee's involvement in *modus-operandi* as stated in the Report of Investigation Wing or SEBI. Unless there is anything incriminating qua assessee or her broker mentioned in the

Kolkata Investigation Wing Report *(referred at para 9.1 to 9.6*) and SEBI Report (*mentioned at Para 17 of assessment order*) to be part of *modus-operandi* to do any illegal acts, the ibid reports cannot be used against the assessee. Further, in this regard, we note that AO at Page no. 32 at Para 20(h) of his order, have also cited the SEBI order suspending trading of shares of M/s. Sunrise and later on revoking the same on 16.08.2011 which according to him, supports his view that share transaction was in-genuine/bogus. However, the Ld. AR, brought to our notice that observation of AO is erroneous and the order of the SEBI dated Feb, 2016 suspending the trading of this scrip was only for twenty one (21) days and also for non-compliance of prevailing listing agreements, and not for any manipulation of share prices. Even before us, the revenue failed to bring on record any material or evidence to show that the SEBI has proceeded against M/s. Sunrise for manipulating the share market any report or material to suggest any role of assessee in illegal acts.

7. As noted (supra), AO/Ld. CIT(A) has been influenced by the investigation report submitted by the Investigation Wing of the Department functioning at Kolkata. 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 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.

8. AO have doubted the genuineness of the sale of the share of M/s. Sunrise on 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 appellant 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 (20 times) cannot be the basis of branding the shares of M/s. Sunrise and LTCG claim as bogus. Moreover, after having taken note of the price of shares of M/s Sunrise traded in two years [*in similar case of an assessee who traded in similar scrip of M/s. Sunrise i.e Colins Pankaj Shah (ITA. No.393/Mum/2023) for AY 2014-15*] this Tribunal vide order dated 22.12.2023, have noted (*in that order*) at para 6 & 7 that the price of shares of M/s. Sunrise has risen gradually and there was no abnormal rise in price of shares and the data as discussed in that order shows that there was regular transaction happening in the stock exchange. Having noted that there is no change in facts and there is no evidence/material to show that assessee/broker was a participant in any pre-planned conspiracy to rig the share market and that too to convert her unaccounted money as indicated in the *modus-operandi* of the

Investigation Wing of Department or SEBI, no adverse view could be drawn in the facts of the instant case. In this context, the Ld. DR drew our attention to the observation of AO at para 13.1 – 13.2 of his order wherein AO has noted that he had issued notice u/s 133(6) of the Act to the broker of assessee (M/s. HEM Securities) through whom assessee had sold shares of M/s. Sunrise, but since it did not elicit any response, the AO rightly held that the buyers/exit providers were part of the grand scheme of accommodation entry operators. In his rebuttal, the Ld. AR of assessee in this regard, pointed out that assessee sold the shares of M/s. Sunrise through recognized broker M/s. Hem Securities in the electronic platform of BSE and it is common-knowledge that there is no scope of knowing as to who purchased the shares; and according to him, even if the broker omits to respond for whatever reason cannot be a ground to draw adverse view against scrip sold by assessee. Further according to Ld. AR even if the department is able to identify the buyers of the shares (through stock-exchange), then AO is bound to reveal the details of buyer, and before drawing any adverse view, assessee ought to be given an opportunity to rebut/cross-examine such purported exit providers, which in this case AO did not do. In this regard, we find that AO has made a bald statement that notices u/s 133(6) of the Act was issued to M/s. HEM Securities [*broker through whom assessee had sold shares of M/s. Sunrise*], and since the notice elicited no response from M/s. HEM Securities, the AO drew adverse view against scrip/assessee. Such a conclusion of AO/Ld. CIT(A) cannot be countenanced for the simple reason that M/s. HEM is not

under the control of assessee and omission on its part to reply cannot be a ground to draw adverse view against the assessee. Moreover, the AO had sufficient powers to summons/enforce the appearance of directors of M/s. HEM, and moreover, it is not the case of AO that M/s. HEM has been black-listed by SEBI for indulging in manipulation/rigging etc. Further, AO has not conducted any enquiries to show that assessee was a beneficiary of the nefarious activities as stated in investigation wing report. No attempt has been made to identify the details of entities which purportedly bought the shares [*through BSE* anonymously from assessee]. Neither such details have been confronted to the assessee nor his broker M/s. Hem Securities has been found to be black-listed by SEBI for any wrong doing/manipulation of the share-market. No enquiry was conducted by AO to show as to whether there was any connection of assessee/broker with such entities (buyers/exit providers). Moreover, it is noted that AO has mentioned the name of certain entities which all purchased the shares of M/s Sunrise from 5th Nov, 2013 to 20 Nov, 2013 (refer Page 5-7 of assessment order), but it is noted that the AO has not made any attempt to identify which entity purchased the scrips from assessee. And even though AO made passing reference of M/s Mihir consultancy as the exit provider, no material has been referred to connect/link assessee or her broker with such exit provider. Therefore, the bald/general statement of AO in no way aid the revenue to cast asperation on the transaction which resulted in assessee's claim of LTCG on sale of share of M/s. Sunrise. Therefore, we do not find any

merit in the contention of Ld. DR and observation made by AO at para 15.3 of his order that the buyer of shares [*through BSE*] from assessee were entities controlled by Shri Vipul Bhat. In such a scenario, without bringing any evidence/material about the identity of exit provider and the nexus of such an entity with assessee/broker, no adverse view could have been taken against the assessee in the given facts and circumstance of the case.

9. Further we note that the AO has relied on the statement of Shri Vipul Bhatt (*director of M/s. Sunrise*) who admitted that M/s. Santoshima was a paper company and managed by him. According to AO, M/s. Sunrise was also a paper entity providing accommodation entry, which was also controlled by Shri Vipul Bhat. Further, according to AO, he has confronted assessee with the statement of Shri Vipul Bhatt and statement of brokers (*Shri Anuj Agarwal*) but assessee failed to give any satisfactory response. So according to the AO, these statements confirm that assessee's claim of LTCG is bogus. However, the Ld. AR pointed out that statements of Shri Vipul Bhatt or brokers cannot be relied upon by AO/Ld. CIT(A) because firstly there was nothing incriminating against the assessee/broker of being part of any wrong doing/modus-operandi; and secondly, it cannot be used against the assessee because it was neither recorded in assessee's presence nor AO allowed her 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, the Ld. AR pointed out that the statements of these persons would reveal that they have not made any allegation against the assessee or her broker of any misconduct or wrongdoing 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 director of M/s. Sunrise or broker to discredit the primary documents filed by assessee to prove the claim of LTCG. Therefore, the claim of LTCG need to be allowed. Therefore, we do not countenance the action of the lower authorities to make addition u/s 68 of the Act.

10. The Ld. AR has brought to our notice that the similar case came up before the Tribunal (*LTCG claim on sale of shares of M/s. Sunrise)* wherein the Tribunal in the case of Sanket Shailendra Mody Vs. ITO (ITA. No.1780/Mum/2022 for AY. 2014-15) vide order dated 13.12.2022 held in favour of the assessee and directed the AO to delete the addition and allow the exemption claimed on the LTCG from the sale of shares M/s. Sunrise by holding as under: -

> "3. We have heard the rival submissions and perused the materials available on record. The assessee is an individual and is a partner in a partnership firm M/s Diashine Exports. The assessee has been investing in shares and mutual funds for a long time. He had filed his return of income for the Asst Year 2014-15 on 15/09/2014 declaring total income of Rs 13,49,500/-. In the said return, the assessee claimed exemption u/s 10(38) of the Act in respect of long term capital gain derived from sale of shares of Sunrise Asian Ltd. The said return was duly processed

u/s 143(1) of the Act. This was later sought to be reopened u/s 147 of the Act on the ground that the claim of exemption u/s 10(38) of the Act claimed by the assessee was on account of penny stock shares dealt by assessee which was held to be bogus as per the investigation report of Kolkata Income Tax Department. The validity of reopening of assessment is not in challenge before us. The claim of exemption u/s 10(38) of the Act on sale of shares of Sunrise Asian Limited was sought to be examined by the ld. AO in the course of re-assessment proceedings. The assessee submitted that he purchased 5000 shares of Sunrise Asian Ltd on 18/03/2011 @ Rs 20 per share for Rs 1,00,000/-. It is not in dispute that the purchase of these shares were met out of accounted sources of the assessee and shares were duly dematted in the demat account maintained by the assessee. The said shares were held by the assessee for more than 2 years by the assessee and sold for Rs 445 per share in Asst Year 2014-15 for an amount of Rs 22,24,286/-. The assessee furnished the following documents in support of his contentions before the lower authorities :-

……………..

4. The ld. AO had relied on the findings of the investigation wing of Kolkata which are outlined in para 6 of his assessment order. The main grievance of the ld. AO is that rise in share price of Sunrise Asian Ltd is devoid of commercial principle or market factors; that transactions are based on mutual connivance on part of assessee and operators; that assessee resorted to preconceived scheme to procure bogus long term capital gains and hence the transactions are not bonafide; that SEBI also

passed an order holding that share prices were determined artificially by manipulations; that these are close circuit transactions and are pre-structured; that assessee had failed to discharge his onus cast on him ; that net worth of Sunrise Asian Ltd is negligible and that its share prices were artificially rigged; that investigations prove that cash is routed through various accounts to provide these bogus long term capital gain entries. The ld. AO by making these observations proceeded to treat the sale proceeds of the shares as unexplained cash credit u/s 68 of the Act. Since the receipt of sale proceeds was treated as bogus, the ld. AO also proceeded to add estimated commission @ 2% for arranging the said bogus transaction as unexplained expenditure u/s 69C of the Act.

5. We find that each and every averment of the ld. AO were duly met by the assessee before the ld. CIT(A) in his written submissions filed before the ld. CIT(A). The ld. CIT(A) upheld the action of the ld. AO.

6. At the outset, we find that the documentary evidences submitted by the assessee were found to be genuine and no adverse inferences were drawn by the revenue on the same. The transactions were carried out by the assessee in the secondary market through a registered share broker at the prevailing market prices. Payments were received by the assessee by account payee cheques from the stock exchange through the registered broker. Amounts received on sale of shares were duly subjected to levy of Securities Transaction Tax (STT) at the applicable rates.

6.1. We find that no enquiries were carried out by the revenue either on the broker or with the stock exchange with regard to transactions carried out by the assessee. The revenue had merely relied on the Kolkata investigation report without linking the assessee with the various allegations leveled in the said investigation report.

6.2. We find that the revenue had not proved with any cogent evidence on record that assessee was involved in converting his unaccounted income into exempt long term capital gains by conniving with the so called entry operators, promoters of Sunrise Asian Ltd and brokers who were involved in artificial price rigging of shares. No evidence is brought on record to prove that assessee was directly involved in price manipulation of the shares dealt by him in connivance with the brokers and entry operators.

6.3. It is not in dispute that the assessee had made purchase of shares in offmarket. Now the next issue that arises for our consideration is as to whether an off market purchase of shares could be taken as a ground to declare the entire transaction as sham. In our considered opinion, the transactions could not be treated as sham merely because they are done in off-market, if the assessee had discharged his onus of proving the fact that shares purchased by him were dematerialized in the Demat account and held by the assessee till the same were sold from the Demat account of the assessee. The transaction of holding the shares are reflected in Demat account and sale of shares are through Demat account. More so, when there is no dispute regarding the purchase price and sale price of shares. Our view

is further fortified by the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Jamnadevi Agarwal reported in 328 ITR 656 (Bom).

6.4. We find that independent enquiries were conducted by Securities and Exchange Board of India (SEBI in short) and SEBI had passed a separate order in respect of the said scrip in which assessee had dealt. In the said order, SEBI had listed out the names and PAN of various persons who were involved in artificial price rigging of shares and the list of beneficiaries. The assessee's name or the broker through whom the assessee bought and sold the shares does not figure in the said list in the order of SEBI. Hence even SEBI does not allege any involvement of the assessee herein with the manipulation of share prices.

6.5.We find that the assessee had held the shares in the instant case for more than two years and then sold the shares in the open market at prevailing market prices. The assessee bought the shares on 18/03/2011, which was prior to the investigation period carried out by SEBI as admittedly SEBI carried out investigation of this scrip for the period 16/10/2012 to 30/09/2015. Infact on perusal of the order of SEBI dated 06/09/2021, we find that the assessee had sold the shares during the period 16/10/2012 to 28/06/2013 wherein the average closing price of shares of Sunrise Asian Ltd was Rs 502.45 per share. Thereafter, the same shares had gone upwards to Rs 603.25 per share and later came down to Rs 88.80 per share. These facts are reflected in page 4 of SEBI order dated 06/09/2021. We further find that from page 40 of the SEBI

order, there is a categorical finding that 46 persons were involved in price manipulation and the relevant findings of SEBI order are reproduced hereunder:-

……………….

6.6. From the above order of SEBI , it is very clear that SEBI, based on its investigations and replies given by various parties, had ordered either to take action against certain parties or had discharged certain parties on the ground that they are not involved in the price manipulation. In any case, the assessee's name or the broker, through whom assessee transacted had not figured in the said list either in the restraint list or in the discharged list. Hence it could be safely concluded that the assessee herein is merely a gullible investor, who had resorted to make investment in the shares of Sunrise Asian Limited based on market information and had sold the shares in the secondary market in prevailing market prices. It is not the case of the revenue that assessee herein had directly sold the shares in the secondary market with clear knowledge of the name of the person to whom the said shares were sold. In secondary market transactions, the buyer and seller are not supposed to know each other unless it is a case of 'block deals'. Same is the case of the assessee herein. Admittedly, the assessee's case does not fall under the category of 'block deals'.

6.7. Hence the entire addition has been made merely by placing reliance on the Kolkata Investigation Wing report which are more general in nature and does not implicate the assessee herein in any manner whatsoever. We are unable to persuade ourselves to accept to the contentions of the ld. DR that Kolkata

Investigation Wing had conducted a detailed enquiry with regard to the scrip dealt by the assessee herein and hence whomsoever had dealt in this scrip, would only result in bogus claim of long term capital gain exemption or bogus claim of short term capital loss. Merely because a particular scrip is identified as a penny stock by the income tax department, it does not mean all the transactions carried out in that scrip would be bogus. So many investors enter the capital market just to make it a chance by investing their surplus monies. They also end up with making investment in certain scrips (read penny stocks) based on market information and try to exit at an appropriate time the moment they make their profits. In this process, they also burn their fingers by incurring huge losses without knowing the fact that the particular scrip invested is operated by certain interested parties with an ulterior motive and once their motives are achieved, the price falls like pack of cards and eventually make the gullible investors incur huge losses. In this background, the only logical recourse would be to place reliance on the orders passed by SEBI pointing out the malpractices by certain parties and taking action against them. Since assessee or his broker is not one of the parties who had been proceeded against by SEBI, the transaction carried out by the assessee cannot be termed as bogus.

6.8. We hold that the entire addition has been made based on mere surmise, suspicion and conjecture and by making baseless allegations against the assessee herein. Now another issue that arises is as to whether the ld. AO. merely on the basis of Kolkata investigation wing report could come to a conclusion that the transactions carried out by the assessee as bogus. In our

considered opinion, the ld. AO is expected to conduct independent verification of the matter before reaching to the conclusion that the transactions of the assessee are bogus. More importantly, it is bounden duty of the ld. AO to prove that the evidences furnished by the assessee to support the purchase and sale of shares as bogus. This view of ours is further fortified by the decision of Hon'ble Delhi High Court in the case of PCIT vs Laxman Industrial Resources Ltd in ITA No. 169/2017 dated 14/03/2017. It is well settled that the suspicion however strong could not partake the character of legal evidence. Hence the greater onus is casted on the revenue to corroborate the impugned addition by controverting the documentary evidences furnished by the assessee and by bringing on record cogent material to sustain the addition. No evidence has been brought on record to establish any link between the assessee herein and the directors of Sunrise Asian Limited or any other person named in the assessment order being involved in any price rigging and also the exit provider. This onus is admittedly not discharged by the revenue in the instant case.

6.9. We find that the Co-ordinate Bench of this Tribunal in the case of Mukesh Ratilal Marolia vs Additional CIT reported in 6 SOT 247 (Mum ITAT) dated 15/12/2005 had held that personal knowledge and excitement on events should not lead the ld. AO to a state of affairs where salient evidences are overlooked. When every transaction has been accounted, documented and supported, it would be very difficult to brush aside the contentions of the assessee that he had purchased shares and had sold shares and ultimately purchased a flat utilizing the sale proceeds of those shares and therefore, the co-ordinate bench

chose to delete the impugned additions. We find that this tribunal decision was approved by the Hon'ble Jurisdictional High Court in ITA No. 456 of 2007 dated 07/09/2011. It is pertinent to note that the Special Leave Petition preferred by the Revenue against this decision before the Hon'ble Supreme Court has been dismissed vide SLP No. 20146 of 2012 dated 27/01/2014.

6.10. Further we find that the Hon'ble Jurisdictional High Court in the case of CIT vs Shyam S Pawar reported in 54 taxmann.com 108 (Bom), it was held that where Demat account and contract note showed details of share transaction and the ld.AO had not proved the said transaction as bogus, the long term capital gain earned on said transaction could not be treated as unaccounted income u/s 68 of the Act. The relevant operative portion of the said judgement is reproduced below:-

> 5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny. 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 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.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar 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.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.

6.11. Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, we are not inclined to accept to the stand of the ld. CIT(A) in sustaining the impugned additions on account of denial of exemption for long term capital gains u/s 10(38) of the Act and estimated commission @ 2% against the same. Accordingly, the grounds raised by the assessee are allowed."

11. 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 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 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.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar 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."

12. We may also gainfully refer to the decision rendered by this Tribunal in the case of **DCIT Vs Mukesh R Marolia (6 SOT 247)** wherein on similar facts and circumstances the addition made by the AO on account of purported bogus LTCG 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.

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 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.

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 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."

13. On further appeal, it is noted that the Hon'ble Bombay High Court in their order in ITA No. 456 of 2007 dated 07-09-2011 has affirmed the order of this Tribunal.

14. 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 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 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 assessees. 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."

15. 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 occured on the platform of stock exchang, upon payment of STT and were supported by documentary ecidences 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 :-

> "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.1 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."

16. 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), 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 M/s Sunrise Asian Technologies Ltd alleging it to be bogus. We therefore direct the AO to delete the addition made u/s 68 of the Act and therefore the addition made of Rs 1,97,631/-as commission also does not survive. So, it is also directed to be deleted.

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

Order pronounced in the open court on this 23/01/2024.

Sd/-	Sd/-
(S RIFAUR RAHMAN)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 23/01/2024.
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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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