

**THE INCOME TAX APPELLATE TRIBUNAL,
'SMC' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 54/KOL/2023
Assessment Year: 2012-2013**

***Ajay Kumar Singhania (HUF),.....Appellant
51, Nalini Seth Road,
Burrbazar, Kolkata-700007
[PAN:AAIHA2767G]***

-Vs.-

***Income Tax Officer,.....Respondent
Ward-43(1), Kolkata,
3, Government Place (West),
Kolkata-700001***

Appearances by:

No one, appeared on behalf of the assessee

*Shri Manoj Tiwari, JCIT, Sr. D.R. appeared on behalf of
the Revenue*

Date of concluding the hearing : April 04, 2024

Date of pronouncing the order : June 3, 2024

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present appeal is directed at the instance of assessee against the order of Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 5th December, 2022 passed for assessment year 2012-13.

2. This appeal was listed for hearing on 07.03.2023. However, the ld. Assistant Registrar took the file on 03.03.2023 and adjourned it to 15.03.2023 on the ground that Bench will not be functioning on 07.03.2023. Thereafter it has been listed on 18 occasions, out of that on 4 occasions, Bench did not function. At different stages different Counsels appeared. First Shri Sunil Surana, ld. A.R. appeared and thereafter pleaded no instruction. The Tribunal has again issued fresh notice to the assessee, then Shri Saurav Bhagaria and Shri Ritesh Goel, A.R. appeared and sought adjournment on behalf of the assessee. Power of Attorney in favour of Shri Ritesh Goel is available on the record. When this matter was listed on 03.04.2024, one Mr. Santanu Chakraborty appeared and requested for adjournment. We have appraised him that this matter has been lingering for a long time and the Bench is not inclined to grant further adjournment. Even thereafter we have adjourned the hearing to 4th April, 2024 on the request of the ld. Counsel for the assessee, but on 4th April, no one had appeared. With the assistance of ld. D.R., we have gone through the record carefully and reserve the judgment.

3. A perusal of Form 36 would reveal that the assessee has raised seven grounds of appeal, but the grievances of the assessee revolve around two issues, namely,

(a) ld. CIT(Appeals) has erred in confirming the addition of Rs.10,76,990/-, which was added by the ld. Assessing Officer by making disallowance of the claim of assessee under section 10(38) of the Income Tax Act. In other words, the assessee has claimed

exemption on account of earning long-term capital gain resulted on sale of shares. This long-term capital gain benefit has been denied to the assessee by the ld. Assessing Officer.

(b) ld. CIT(Appeals) has erred in upholding the reopening of the assessment.

Apart from these main grounds, the other addition is of Rs.21,540/-, which has been made by the ld. Assessing Officer on account of estimated commission expenses incurred by the assessee for arranging such long-term capital gain. Similarly, ld. Assessing Officer has disallowed a sum of Rs.11,984/- with the aid of section 14A. The assessee is aggrieved with all these three additions. Rest of the issues pleaded in other grounds are peripheral arguments to these central points.

4. Brief facts of the case are that the assessee has filed its return of income on 04.07.2012 declaring total income of Rs.4,06,284/-. The return was processed under section 143(1). The ld. Assessing Officer thereafter received an information from the Investigation Wing of Kolkata exhibiting the fact that certain individuals and Companies were engaged in arranging bogus long-term capital gain/loss benefit. The ld. Assessing Officer has recorded the reasons, which have been reproduced in the first four pages of the assessment order. He thereafter issued notice under section 148 of the Income Tax Act. In response to the notice under section 148, the assessee filed a letter dated 08.03.2019 submitting therein

that the original return filed by it be treated as filed in response to the notice under section 148 of the Income Tax Act. The ld. Assessing Officer appraised the assessee that he has to file the return electronically, otherwise the system does not generate notice under section 143(2) of the Income Tax Act. In other words, system does not authorize Assessing Officer to select return for scrutiny assessment. The assessee did not file the return in the authorized module and ld. Assessing Officer put the assessment machinery in motion by issuance of a notice under section 142(1) on 28.06.2019. The assessee thereafter filed the return on 22.08.2019 and the ld. Assessing Officer has issued notice under section 143(2) providing an opportunity to the assessee as to what he wants to submit in support of its return. The assessee thereafter requested the Assessing Officer for supply of the reasons, which according to the finding of the ld. Assessing Officer in the assessment order duly accepted. The assessee further raised the objection that approval by the ld. CIT for reopening be not supplied, but ld. Assessing Officer has rejected this claim of the assessee and submitted that complete details were given to the assessee. The ld. Assessing Officer thereafter elaborated the details on page no. 6 of the assessment order and we deem it appropriate to take note of the factual observations of the ld. Assessing Officer, which read as under:-

“IV. The assessee had shown sale proceeds of shares [6000 nos.] in the scrip of M/s Multiplus Resources Ltd as long term capital gain and claimed exemptions u/s 10(38) of the I T Act. Originally, the assessee had claimed to have purchased 300 no. of shares of M/s Heritage Vintrade P Ltd from Kamdhenu Commosales P Ltd @Rs 200 per share as off market deal on 21.12.2009 for a purchase consideration of Rs 60,000/- for which no details of had been filed. Afterwards the share of M/s Heritage Vintrade P. Ltd was amalgamated with M/s. Multiplus Resources Ltd as a scheme of

merger, approved by Hon'ble High Court, the assessee obtained 6000 shares of M/s. Multiplus Resources Ltd in lieu of shares of the of the merged company and sold 6000 Nos of shares in December 2011 for Rs.10,76,990/- .The assessee has not filed any contract nots evidencing sale of the shares nor any receipt acknowledging payment of purchase price to M/s Kamdhenu Commosales P Ltd . The copy of purchase bill, copies of share certificate, copy of allotment of share letter from M/s. Multiplus Resources Ltd, Bank statement were furnished by the assessee in support of his claim of transaction. The share broker through which the sale of 6000 shares of M/s. Multiplus Resources Ltd has not been named.

The analysis of past years return data is shown in the following table:

AY	Income from Salary in Rs.	Income from other sources in Rs.	Income from House Property in Rs.	Business Income in Rs.	Gross income in Rs.	Total income in Rs.	Total income in Rs.	Exempt LTCG in Rs.
2009-10	0	1 1618	0	331693	343311	243311	0	0
2010-11	0	25522	0	-181519	0	0	0	0
2011-12	0	0	0	550825	394828 (Brought forward loss set off of Rs. 155997)	296328	0	0
2012-13	0	0	0	506284	506284	406284	1017875	

V. In view of the above, some issues have emerged and a show cause letter was issued to the assessee on 09.12.2019 and the date of compliance was fixed on 14.12.2019. The copy of the show-cause letter is reproduced as under:

Please refer to this office letter dated 23.11.2019 wherein your objection regarding initiation of the assessment proceedings has been sorted out stating the legal consequences of not sending satisfaction of the Ld. Pr. Commissioner of Income Tax, thus invaliding the assessment proceedings not tenable in law. For your information, it is stated that the proceeding has been duly initiated after obtaining prior approval of the Ld. Commissioner of Income Tax Koi-15 on 05.02.2019.

It is further noticed that you are not participating the assessment proceedings on some trivial grounds so as to defeat the finding of escapement of income in the grab of LTCG on sale of shares. From your submission it is found that you are engaged in earning income from investment in shares including LTCG besides income in the option/put segment you are therefore requested to furnish the details of purchase/ sale price amounting to .Rs 19,30,550/- received as sale

of shares of M/s Multiplus Resources Ltd with all documentaries evidences like purchase /sale bill ,contract notes, acknowledgement of payment of purchase price ,the ledger, demat A/c ,Bank statement from the FY 2009-10 to 2011-12.

You are again impressed that you will forfeit the right of producing the additional evidences/ information in the proceeding before the higher authority if all the evidences relied on by you to establish the authenticity of the transaction leading to capital gain or any profit from sale of shares are not filed during the course of assessment proceedings. You are given ample scope of defending yourself that the reason of escapement of income is not attracted in your case because of transparency of both your purchase & sale transactions.

Since the assessment will be barred by limitation on 31.12.2019 ,your reply should reach the undersigned by 14.12.2019 positively failing which addition of Rs 19,30,550/ - as unexplained investment u/ s 69A of the I T Act will be made.

VI. As no reply has been received, the findings that have come to the surface on examination of various facts and circumstances are described below. However, at the onset, the modus operand! of the scheme of generation of LTCG on sale of shares is discussed in brief.

Brief Description of Penny Stock

1. A Penny Stock is a company which is listed in a Stock Exchange for trading having very small amount of market capitalization. Very few people invest/trade in such a company which could be evident from the volume of transactions. Penny stocks are usually traded at a very low price and mostly illiquid, and are usually listed on a smaller exchange. These stocks are very speculative in nature and are considered highly risky because of lack of liquidity, smaller number of shareholders, large bid-ask spreads and limited disclosure of information.

2. The modus operandi of earning bogus LTCG on Penny Stock.

(a)With the collusion of broker, shares are purchased of an unknown company with very fake back ground.

(b)The initial transactions are generally off market transactions. After buying the shares off market, DMAT Accounts are opened at a later date and then shares are transferred to the DMAT Account.

(c)After a year the shares are sold by the assessee. In the meantime the share prices are rigged by the concerned broker/operator to an abnormally high level.

(d)The shares are then sold by the assessee and the sale consideration are received. The sale consideration is in fact first paid by the assessee in cash to a trusted confidant of the broker. This cash consideration which is passed through banking channel and finally reaches the account of the broker. Then, the assessee is paid the consideration.

(e)Thus, the assessee's own unaccounted cash is introduced and returns in the form of Bogus Long Term Capital Gain which is exempted from tax.

3.It would be worthwhile to mention that our capital markets are driven mainly by Foreign Institutional Investors, commonly called FII and also Domestic Institutional Investors, known as DIIs, which are mainly Mutual Funds. Besides, there are some High Networth Individuals, called HNIs. People who are Retail Investors who wishes to invest or trade in the market mostly follows the trend of the FII and DIIs, and sometimes HNIs. It has been noticed that those entities as stated above never buy stocks which have no financial credibility. They follow the fundamentals of the companies by studying their financial statements and buy the stocks as and when opportunity comes. Various electronic business media also regularly discuss the trends of the stocks which are fundamentally and technically very strong for their upward movements and recommend through experts particularly for retail investors to buy/sell stocks for trading as well as for investment.

4.But, retail investors, who buys stocks of those companies which have no financial credibility ought to have some ulterior motive, otherwise, they would not invest their hard earned money, whatever may be the amount, in those stocks.

It has been discussed earlier that the trading volume of the penny stocks are very low and it is noticed that, even a genuine trader who had bought such stocks for day trading on the basis of market news had got trapped. This had happened due to large bid-ask spread of the prices of the penny stocks and liquidity being very thin. Accordingly, the shares also could not be disposed of, according to the prices expected by the traders/investors. Another phenomenon of such penny stocks which has been noticed is that only those having ulterior motive had bought those stocks off market. They would never buy such penny stocks through exchanges. Only, the genuine traders, interested to trade on day basis bought and sold such stocks and squared off their positions within the day either making some gains or incurring loss.

5.Thus it is amply clear that those who bought those stocks off market and held the same for more than one year had always have some ulterior motive to infuse their unaccounted money on such stocks, waiting for the opportune moment, which would allow them to earn LTCG, as it is exempt from tax. Had they been genuine traders in the

market, they would have surely traded those stocks on daily basis. As regards facilitating the deal, not only the brokers are actively involved, there were other entities called exit providers and operators.

5. The Id. Assessing Officer thereafter depicted the *modus operandi* with the help of a diagram and dealt with all the submissions made by the assessee. The Id. Assessing Officer has disbelieved the claim of the assessee and made an addition of Rs.10,76,990/-. He further estimated the commission expenditure incurred by the assessee @ 2% of the alleged gain and made an addition of Rs.21,540/-. The Id. Assessing Officer further observed that the assessee has a dividend income of Rs.11,984/- and the assessee did not debit any expenditure in the accounts towards earning of exempt income. The Id. Assessing Officer worked out the disallowance with the help of Rule 8D and made an addition of Rs.11,984/-.

6. Appeal to the Id. CIT(Appeals) did not bring any relief to the assessee. The Id. 1st Appellate Authority has reiterated the finding of the Id. Assessing Officer.

7. Before us, though no one has come for argument but a brief synopsis/written submission has been filed by the assessee. We take note of this submission, which reads as under:-

BRIEF NOTE OF SUBMISSIONS ON BEHALF OF THE APPELLANT BRIEF FACTS

1.The instant appeal pertains to the assessment year 2012-13 for which an assessment was made under section 147 of the Income Tax Act, 1961 (the "Act"). Proceedings under Section 148 of the Act were initiated by the A.O. vide notice dated 07.02.2019. The reasons recorded noted that the appellant had booked allegedly bogus LTCG under Section 10(38) of the Act to the tune of Rs.19,30,550/-. The relevant information was passed on to the AO by the Investigation Wing of the Kolkata Directorate.

2. The appellant has been carrying on business of trading in Sarees, Shares and Securities - under both segment Cash and Futures/Options. The appellant also had investments in shares and mutual funds.

3. The appellant maintains proper books of accounts and return of income for the AY 2012-13 was submitted under Section 139 in ITR-4 by the appellant on 04.07.2012 vide E-filing acknowledgement number 404273651040712 and total income shown in the return was Rs.406,284/-. This return was duly processed under Section 143(1) of the Act on 24.11.2012. The purchases made by the appellant for trading in shares and/or investments also includes 300 Equity Shares (Face value Rs.10 per share) of M/s. Heritage Vintrade Pvt. Ltd. From M/s. Kamdhenu Commosales Pvt. Ltd. For Rs.60,000/- on 21.12.2009. The said shares brought were duly transferred in the name of appellant on 30.12.2009.

4. As per the scheme of amalgamation sanctioned by the Hon'ble Calcutta High Court, 6000 equity shares were allotted to the appellant in M/s Multiplus Resources Ltd. in lieu of 300 equity shares in M/s. Heritage Vintrade Pvt. Ltd. through allotment advice dated 16.12.2010. The 6000 shares in M/s. Multiplus Resources Ltd. were sold through the platform of the Calcutta Stock Exchange Limited resulting in Long Term Capital Gain of Rs.10,17,875/- claimed to be exempt under Section 10(38) Act in AY 2012- 13.

5. After receiving notice under Section 148 of the Act, the appellant through letter submitted on 08.03.2019 requested the AO to kindly treat the return filed under Section 139 as return in response to notice under Section 148 issued and also with a specific request to provide the copy of reason recorded along with the copy of the approval from the approving authority to make further compliances. The AO expressed his inability to accept the return filed under Section 139 as a return filed under Section 147 in response to notice under Section 148 and insisted to file a fresh return of income under Section 147 for online generation of reason for reopening the case due to electronic system governing the processing of reassessment proceedings.

6. The appellant submitted return of income under Section 147 of the Act on 22.08.2019 and through online response module informed the AO of the filing of return of income under Section 147 and once again requested to provide the reasons recorded for initiation of proceedings under Section 147 along with the copy of the approval granted by the approving authority. The AO provided a copy of the reasons recorded through letter dated 24.09.2019 but copy of the approval/sanction letter granted by the approving authority under

Section 151 of the Act, was not provided in spite of repeated request, failing which the appellant was unable to file proper objections to initiation of proceedings under Section 147 of Act.

7. *The reasons recorded revealed that on the basis of information received from the Investigation Wing of the Kolkata Directorate through PCIT-15 vide letter dated 08.12.2015, the AO made allegations against the appellant in respect of transactions made in quoted shares of M/s. Multiplus Resources Limited during the AY 2012-13 resulting to escapement of income to the tune of Rs.19,30,550/-. As per the report of the Investigation Wing, the AO alleged that the appellant made investment- - the alleged penny stock M/s. Multiplus Resources Ltd. and through the said script many beneficiaries including the appellant had availed accommodation entries in the form of bogus LTCG exempted under Section 10(38) of the Act.*

8. *Certain information and details were called for through notice issued under section 142(1) of the Act on 24.09.2019 through online module and reminder on 05.10.2019 to which the appellant objected through its letter dated 23.10.2019 of not receiving any such notices on his registered e-mail address and requested for 7 days time for compliance of the notice. The details and information which were called for were under preparation by the appellant and in the meantime the AO who initiated proceedings under Section 148 had issued a show cause notice on 08.11.2019 to furnish reply on or before 15.11.2019 which was duly complied with by the appellant, "he AO further issued summon under Section 131 of the Act vide his letter dated 18.11.2019 to appear on or before 22.11.2019 either personally or through authorized representative. The appellant appeared before the AO through his authorized representative but hearing was not provided stating that personal attendance of the appellant is mandatory. However, in the summon under Section 131, it was clearly mentioned that "you are hereby required to attend my office at 3, Govt. Place, Kolkata on 22.11.2019 at 2.00 PM thereto giving evidence and/or produce either personally or through an authorized representative the books of accounts or other documents". However, after receiving all the documents, the hearing was refused. The appellant also submitted documents as per summon under Section 131 were online on 22.11.2019. The same fact was also recorded by the appellant vide his letter dated 26.11.2019. The same fact was also recorded by the appellant vide his letter dated 26.11.2019 and 13.12.2019.*

9. *The appellant also submitted copies of following on 14.12.2019:-*

(a) *Share Certificates of M/s. Heritage Vintrade Pvt. Ltd. which eventually got amalgamated with M/s. Multiplus Resources Ltd.*

as per Scheme of Amalgamation sanctioned by Hon'ble Calcutta High Court;

(b)Purchase bill of shares of M/s. Heritage Vintrade Pvt. Ltd.;

(c)Shares transfer letter - Shares of M/s. Heritage Vintrade Pvt. Ltd. transferred in the name of the appellant;

(d)Allotment advice of shares of M/s. Multiplus Resources Ltd. in lieu of shares of M/s. Heritage Vintrade Pvt. Ltd.;

(e)Allotted share certificate of M/s. Multiplus Resources Ltd.;

(f)Extract of bank statement reflecting credit amount of Rs.10,76,989.75 for sale proceeds of shares of M/s. Multiplus Resources Ltd.

10.The AO, without giving any further opportunity to the appellant, passed the assessment order under Section 143(3)/147 of the Act dated 18.12.2019 assessing the total income at Rs.15,16,798/- after making addition of Rs.11,10,514/- under Section 69A, 69C and disallowance under Section 14A of the Act to the returned income.

11.The assessee has filed this appeal taking the grounds as stated in the memo of Appeal and the ground wise submissions are as under :-

Submissions

12.Ground nos. 1 & 2 relates to the challenging the reopening. The Assessing officer has merely relied upon the report of the investigation wing and there has been no application of his own mind while recording the reasons for reopening. It is nothing but a borrowed satisfaction of investigation wing on the basis of which reopening was made which is illegal and impermissible in law. Relying upon the following case laws:

Sabh Infrastructure Vs ACIT in (2018) 99 taxmann.com 499 (Delhi)

Harikishen Sunderlal virmani Vs DCIT in (2017) 88 taxmann.com 548 (Gujrat)

13.In Ground nos. 3 to 5 the assessee has disputed the addition of Rs 10,76,990/- under 69A of the Act. The Learned Assessing officer has treated the sale price of listed shares of Multiplus Resources Limited as unexplained investment in form of which Long term capital gains has been claimed under section 69A. It is humbly submitted that all relevant purchase related evidence were provided to the Learned Assessing officer being purchase bills and the said purchases were made through proper banking channels and bank

statement evidencing the same were also provided to the learned Assessing officer. The said shares were sent to demat.

14. Subsequently the shares were amalgamated and further sold and in the said process the assessee earned long term capital gains on Rs.10,17,874 during the year under consideration. The said payments were also received through proper banking channels.

15. The said transaction was treated as sham only on the basis of the note sent by investigation wing and no independent verification was done by the learned Assessing officer nor was any material brought on record by the learned assessing officer. It is submitted that all evidences have been filed so as to prove the genuineness of the said transactions which were carried out through the exchange, the transactions were carried out through demat account and purchase and sale were through normal banking channels.

16. It is further submitted that the scrip was not a part of the report considered by the Hon'ble Calcutta High Court in the case of Swati Bajaj (Citation). On the contrary, this Hon'ble Tribunal has allowed the assessee's appeal in relation the scrip M/s. Multiplus Resources Ltd. In the following cases:-

(a) Ravindra Sanghai in ITA No 698/Kol/2010 of Hon'ble ITAT Kolkata

(b) Smt Vimlesh Kumar Singh in ITA No 21/B11/2013 of Hon'ble ITAT Kolkata

(c) Pavillion Commercial Pvt Ltd in ITA No 935/Kol/2012 of Hon'ble ITAT Kolkata.

Therefore in view of the above the addition under section 69A may be deleted.

Ground No 6 the Assesse has disputed the addition of Rs 21,540 where the addition was made on alleged commission. However there was no evidence of any such payment and the said transaction itself has been considered as not genuine merely on surmises and conjectures therefore the addition may be deleted.

Ground No 7 the Assessee has disputed the Addition under section 14A. It is submitted that the addition made is erroneous.

8. With the assistance of ld. D.R., we have gone through the record carefully. A perusal of the written submission would reveal that the assessee has challenged the reopening of the assessment

and this is also one of the fold of grievances pleaded in Ground No. 1. The submission of the assessee in the written submission is that the ld. Assessing Officer has reopened the assessment on the basis of a report transmitted by the DIT (Investigation), Kolkata. He has not applied his independent mind and therefore, reopening has been made on a borrowed satisfaction, which is not valid. In support of this contention, he relied upon the judgment of the Hon'ble Delhi High Court in the case of Sabh Infrastructure -vs.- ACIT [(2018) 99 taxmann.com 499 (Delhi)] and judgment of the Hon'ble Gujarat High Court in the case of Harikishen Sunderlal Virmani -vs.- DCIT [(2017) 88 taxmann.com 548 (Gujrat)]. We do not find any force in this submission of the assessee because the ld. Assessing Officer has not blindly relied upon the investigation report. He has specifically recorded that he has gone through the report on page no. 5 of the assessment order. The ld. Assessing Officer has observed that *“the name of the assessee appears on the list of beneficiaries sent by the Investigation Wing. I have perused the report of the Investigation Wing. I have also examined the return of the assessee. In the return of income, the assessee has shown only income from salaries of Rs.5,06,284/-. However, as per the information received, the assessee has booked bogus long-term capital gain to the tune of Rs.19,30,550/-. In view of the above, there are reasons to believe that the income chargeable to tax to the tune of Rs.19,30,550/- has escaped assessment for A.Y. 2012-13. The case thus attracts the provision of section 147 of the Income Tax Act, 1961”*.

9. The above analysis of the ld. Assessing Officer would suggest that he has gone through the report. In the light of the report filed by the assessee and thereafter apprised himself that long-term capital gain claimed by the assessee is a bogus one, which is to be treated as escaped income. Thus there is no borrowed satisfaction. The ld. Assessing Officer has to *prima facie* form his opinion on the basis of a live nexus between the information possessed by him, vis-à-vis his belief that income has escaped assessment. We do not find any merit in this fold of contention and Ground No. 1 is rejected.

10. A perusal of the assessment order would reveal that assessee has originally purchased 300 number of shares of M/s. Heritage Vintrade Pvt. Limited from Kamdhenu Commosales Pvt. Limited @ Rs.200/- per share as off market for a purchase consideration of Rs.60,000/-. Thereafter shares of M/s. Heritage Vintrade Pvt. Limited was amalgamated with M/s. Multiplus Resources Limited as per a scheme of merger. The assessee obtained 6000 shares of M/s. Multiplus Resources Limited in lieu of shares of the merged company and sold these 6000 shares in December, 2011 for a sum of Rs.10,76,990/-. In other words, the shares purchased on 21.12.2009 for a consideration of Rs.60,000/- could attain the value of Rs.10,76,990/- in December, 2011, i.e. roughly in two years. This phenomenal increase in the value of the shares give rise to a suspicion in the mind of the ld. Assessing Officer and, therefore, he confronted the assessee to submit the requisite details.

11. We find that in the written submission, the assessee has demonstrated that it has filed necessary details inventorized as (a) to (f) in Column No. 9 of its submission. But perusal of the assessment order would reveal that the assessee has adopted delaying tactics and did not submit the complete details. The ld. Assessing Officer has made an elaborate inquiry and found out that shares of M/s. Heritage Vintrade Pvt. Ltd. with the help of M/s. Multiplus Resources Ltd. were stage managed. We find that this aspect has been dealt by the Hon'ble Jurisdictional High Court in the case of PCIT -vs. Swati Bajaj [139 taxmann.com 352 (Calcutta)]. In this detailed judgment running into more than 80 pages, Hon'ble High Court has considered the problem of penny stock companies and how long-term capital gain has been earned by certain companies/individuals in a staged manner *modus operandi*. While taking note of the report of the DIT (Investigation), the Hon'ble Court in paragraph no. 52 to 55 onwards has observed as under:-

"52. Having steered clear of the objection raised regarding the report, we shall briefly deal with the contents of the report which states that the DIT, Kolkata had under taken the accommodation entries LTCG investigation on a much larger scale than earlier as a result they were able to identify a very large number of beneficiaries who have together taken a huge amount of bogus entries of LTCG and 64,811 beneficiaries were identified to be involved in the bogus claims of LTCG which was estimated above Rs. 38,000 crores. It is stated that in order to cast the net wide the department adopted a different approach of investigation which acquired a character of a project. The report states that illegal business of bogus LTCG involves three different individuals, the promoter of "penny stocks" companies also known as syndicate member, the share brokers and the entries operators who purchases the shares through paper companies by taking cash and many at times the three categories of individuals perform overlapping roles and at times, a single individual may perform all the three functions. The report further states in the investigations done earlier with regard to the bogus LTCG, the approach was to target the

individuals and through him identify the penny stock and beneficiary and this method had yielded results on a limited scale emanating only from individual/individuals targeted. Therefore, keeping in mind, the rampant nature and exponential growth of the illegal business in the recent times and to cast the net wide the department reversed the methodology of investigation. In that process, it is stated, that they first identified the "penny stocks" and then started targeting the individuals who dealt in them. The report states that by adopting such method they were able to virtually cover almost all Kolkata based operators in one investigation. Further the report states that it is an on-going process which acquires the character of a project that will continue for quite some time unlike usual investigation which aims at the individual involved. The report has identified 84 penny stocks listed with the BSE which have been used for generating bogus LTCG which includes 18 scripts on which the DIT (Investigation-I) Delhi had conducted investigation and the results were circulated. The report mentions 22 entities who are brokers who were covered in the investigation involved in the purchase/sale and price rigging of the penny stocks of the 84 companies. The report states that it is pertinent to note that the list includes some of the big names like Anand Ratithi, Religare and SMC. The report further states that the figure of the total transaction of the brokers is only above Rs. 15,970 crores as against the total trade in the script which is more than Rs. 38,000 crores. The reason being that there are other brokers from other cities including some leading names who have traded in these scripts but they could not be covered in the investigation. Further the report states that the department was able to establish full cash trail starting from cash deposit account to the accounts of the beneficiary for nearly a sum of more than Rs. 1575 crores and the broker wise split up was provided in a tabular form. The report explains the modus operandi in the following terms:-

Modus Operandi

The whole business of providing entries of bogus LTCG over the years have become much more organised and with economy of scale in full operation the stake involved have become huge. Before the actual transaction start taking place there are brokers in different towns who contact prospective clients and take paper booking for entries. The Commission to be paid to the operators is decided at this stage however, no money is paid. Once the booking is complete the operators have a reasonably good idea of how much LTCG is to be provided along with the break-up of individual beneficiaries. This data is essential to decide which penny stock or companies to use for the job and which beneficiary to buy how many shares.

53. Thereafter the report speaks of the types of penny stock companies, the entities involved in the transaction, the transaction

which involves three legs, the merger method, and a pictorial representation as to how the share prices raised to astronomical level and thereafter there is a downward trend which according to the department is used by the operators for booking bogus LTCL. The report further states that list of beneficiaries DGIT (INB) wise along with the statements have been forwarded for dissemination to the assessing officers through the Chief Commissioner of Income Tax concerned. The information was provided in a soft form recorded in a DVD. There were five folders namely:- (i) Investment report, (ii) LTCG data base, (iii) LTCG summary, (iv) LTCG trade ledger, (v) STCL summary, (vi) STCL trade ledger and (vii) SEBI orders

54. Further the report states that the data of DGIT(International Tax) shows that large number of NRIs and well-known FIIs are buying and selling these penny stocks and this appears to be a case where the black money stashed a broad is coming back to India (purchase) or money being sent out of the country (sale). The report points out that while only Rs. 27.57 crores have been gone out of the country, an amount of above Rs. 114.97 crores has come in. The report has been signed by the Principal Director of Income Tax (Investigation), Kolkata. The report has been communicated to the DGIT (Investigation) of all the states. Thus, we find that the methodology of the investigation by the department is quite different from the normal method of investigation which commences from the investor or the assessee as the case may be. The report states that on account of huge sums of money being claimed as LTCG/LTCL, a different approach/methodology was adopted by the department, by commencing the investigation not from the individuals who traded with the penny stocks but investigation has started targeting the individuals who dealt with those penny stocks. This concept can be mentioned to be one of "working backwards". This is one of the modes of causing an investigation, considering its magnitude. The approach of the department cannot therefore be faulted. Therefore, a different approach is required to be taken on the effect and efficacy of the report according to the department is in the nature of a project. The Court sit in judgment over the methodology adopted by the department as no taxpayer is entitled to any benefit which shall not accrue to him under the provisions of the Act. If any dubious methodology has been adopted for the purpose of availing certain benefits not admissible under law, the same will not come within the ambit of tax planning but shall be a case of tax avoidance by adopting illegal methods. Therefore, we are of the view that the department was justified in proceeding to take up the cases, not only within the jurisdiction of the state of West Bengal but other states as well. Thus, the moot question would be if the report is the starting point for considering as to how the claim of LTCG/LTCL by the respective assessees were genuine, we should consider as to whether the assessing officers have committed any error of law, error of jurisdiction or error on facts, leading to the assessments being held to be not sustainable.

55. The first argument on behalf of the assessee is that the copy of the investigation report was not furnished to them despite specific written request made on behalf of the assesses to furnish the copy of the report, the statements recorded and provide those persons from whom statements were recorded to be cross examined on behalf of the assessee. There is no dispute to the fact that the copy of the statement said to have been recorded during the course of investigation has not been furnished to the assessee and the request made by some of them for cross examining of those persons was not considered. The question would be as to whether the non-compliance of the above would render the assessments bad in law. The argument of the revenue is that the assessments cannot be held to be illegal merely on the grounds that the copy of the report was not furnished as the respective assessing officers have clearly mentioned as to the nature of investigation done by the department and as the report itself states that the investigation commenced not from the assessee's end but the individuals who dealt with these penny stocks who were targeted. It is equally true invariably in all cases, the statement of the stock brokers, the entry operators or the Directors of the various penny stock companies does not directly implicate the assessee. If such being the situation, the assessee cannot be heard to say that the copy of the entire report should have been furnished to him, the person from whom the statements were recorded should have been produced for cross examination as admittedly there is nothing to implicate the assessee Smt. Swati Bajaj of insider trading or rigging of share prices. But the allegation against the assessee is that the claim for LTCG/LTCL is bogus. As pointed out by Mr. Rai, learned senior standing counsel, the investigation report is general in nature not assessee specific. Therefore, we are required to see as to whether non-furnishing of the report which according to the revenue is available in the public domain would vitiate the proceedings on the ground that the assessee was put to prejudice”.

12. We further find that Hon'ble Jurisdictional High Court has dealt with all the possible questions raised by the different Id. Representatives. The assessee has admitted that this decision is against him but he further relied upon three decisions of the ITAT mentioned in paragraph no. 16 of its submission. But it is to be appreciated that this Tribunal being subordinate to the Hon'ble High Court is required to follow the judgment of the Hon'ble Jurisdictional High Court instead of following the orders of the

Coordinate Bench on this issue. Therefore, we are of the view that assessment in dispute is squarely covered by the decision of the Hon'ble Jurisdictional High Court and we do not find force in the submission of the assessee. The second fold of grievance is also rejected.

13. As far as the estimation of commission expenses for arranging alleged bogus long-term capital gain is concerned, we are of the view that Id. Assessing Officer has rightly estimated. This ground is also rejected.

14. As far as the addition made under section 14A is concerned, we find that total exempt income claimed by the assessee is only Rs.11,984/-. This is a dividend income claimed by the assessee in the Profit & Loss Account. The Id. Assessing Officer has observed that the assessee has not debited any expenditure for earning this dividend income. He, therefore, made an addition of Rs.11,984/-. To our mind, this addition is little on the higher side. The Id. Assessing Officer should have not estimated the expenditure equivalent to the exempt income. Therefore, we allow partly this ground of appeal and restrict this addition to 1,000 rupees.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 03/06/2024.

Sd/-

Sd/-

(Manish Borad)
Accountant Member

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 3rd day of June, 2024

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*(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC), Delhi;*

(4) CIT- , Kolkata

(5) The Departmental Representative;

*(6) Guard File
TRUE COPY*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.