

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIALMEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.3897 & 3879/MUM/2023
Assessment Year: 2013-14 & 2014-15

Dharmendra Jayantilal Shah 1301/4, Raheja Tipco Height, Rani Sati Marg, Malad West, Maharashtra – 400 097 (PAN: ANHPS1594D)	Vs.	Assistant Commissioner of Income Tax-31(1), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee : Shri Rajkumar Singh, AR
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 30.04.2024
Date of Pronouncement : 10.06.2024

ORDER

PER BENCH:

These two appeals filed by the assessee are against the orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order nos.TBA/NFAC/S/250/2023-24/1055776011(1), dated 06/09/2023 and ITBA/NFAC/S/250/2023-24/1055776991(1), dated 15.05.2023 and passed against the assessment orders by the Assistant Commissioner of Income Tax- 31(1), Mumbai u/s.143(3) r.w.s. 147 and 143(3) of the Income-tax Act(hereinafter referred to as the “Act”), dated 28.12.2017 and 29.12.2016 and for AY 2013-14 and 2014-15, respectively.

2. Grounds taken by the assessee are in respect of addition made u/s.68 by denying exemption claimed u/s.10(38) of the Act for the sale proceeds of listed equity shares alleged as penny stock amounting to Rs.1,65,26,324/- for Assessment Year 2013-14 and Rs.1,42,66,160 for Assessment Year 2014-15. Additions made in both the years are similar in nature relating to transaction of sale of shares, difference being in respect of scrips involved in each year and amount of sale consideration.

2.1. Assessee has also raised legal issue on re-assessment proceedings and assessment order passed thereafter u/s.147 r.w.s. 143(3) for Assessment Year 2013-14 vide ground no.1 which has not been pressed in the course of hearing before us. Accordingly, ground no.1 for Assessment Year 2013-14 is dismissed as not pressed.

3. Brief facts of the case as culled out from records are that assessee is engaged in the business of buffing of SS utensils and labour job work. Return of income for Assessment Year 2013-14 was filed on 17.09.2013 reporting total income at Rs.20,80,080/-. Case of the assessee was re-opened by issuing notice u/s. 148, dated 27.01.2017 based on information from the investigation wing of the Department that, the assessee had transacted in certain shares characterised by the Department as penny scrips. After necessary investigation and examination, this re-assessment proceeding was completed vide order u/s. 143(3) r.w.s.147 dated 28.12.2017. In this re-assessment, ld. Assessing Officer enquired about the capital gain of Rs.1,50,26,324/- on sale on shares of ESSAR India Ltd., claimed as exempt u/s.10(38) of the Act. Assessee furnished the necessary details in this respect.

3.1. Assessee made an application for preferential allotment of equity shares of Essar India Ltd. against which 30,000 equity shares of Rs.10/- each at a premium of Rs.40/- each were allotted to the

assessee on 25.05.2011. These shares were allotted for a lock in period of one year from the date of allotment. Assessee paid Rs.15,00,000/- towards this allotment by issuing a cheque drawn on the Malad Sahakari Bank Ltd. dated 04.05.2011. These shares were credited in the DMAT account of the assessee on 14.07.2011. The shares were sub divided at new face value Re.1/- each which resulted into assessee holding 3,00,000 shares against original allotment of 30,000 shares which was duly reflected in the DMAT account. Later, these shares were sold by the assessee during the period from 08.10.2012 to 27.02.2013 on the platform of Bombay Stock Exchange (BSE) through SEBI registered brokers namely, Bonanza Portfolio Ltd. and Arihant Capital Markets Ltd., for total sale consideration of Rs.1,65,26,324/-.

3.2. To corroborate these facts, assessee furnished the relevant documentary evidences in the course of assessment proceedings which are placed on record in the paper book before us containing 113 pages. The index of this paper book is reproduced below for ease of reference.

Sr. No.	Particulars of Documents Enclosed	Page No.
1.	Copy of contract notes of stock broker, Bonanza Portfolio Ltd. for shares of Essar India Ltd. sold on the floor of Stock Exchange of BSE between 08/10/2012 to 12/10/2012	1 to 10
2.	Copy of contract notes of stock broker, Arihant Capital Markets Ltd. for shares of Essar India Ltd. sold on the floor of Stock Exchange of BSE between 12/11/2012 to 01/03/2013	11 to 48
3.	D'mat Statement of assessee with HDFC Bank Ltd. reflecting the immediate debit of shares of Essar India Ltd. on sale	49
4.	Bank Statement of assessee with HDFC Bank highlighting the immediate receipt of sale proceeds of shares of Essar India Ltd. on sale	50 to 58

5.	Ledger Account of assessee from the books of stock broker, Bonanza Portfolio Ltd. & Ledger of Bonanza Portfolio Ltd. from the books of assessee of A.Y.2013-14	59 to 60
6.	Ledger Account of assessee from the books of stock broker, Arihant Capital Markets Ltd. & Ledger of Arihant Capital Markets Ltd. from the books of assessee of A.Y.2013-14	61 to 69
7.	<p>Following relevant documents in support of shares of Essar India Ltd. purchased in preferential offer:</p> <p>i) Letter dated 17/03/2011 written by assessee to Board of Directors of Essar India Ltd. expressing his desire to purchase the 1,00,000 shares of Essar India Ltd. in preferential allotment</p> <p>ii) Copy of share application letter dated 28/04/2011 given by assessee to Board of Directors of Essar India Ltd. along with copy of cheque of Rs.15,00,000/- issued for purchase of 1,00,000 shares in preferential allotment</p> <p>iii) Copy of allotment letter dated 26/05/2011 issued by Essar India Ltd. allotting 30,000 shares at the premium of Rs.40 per share having face value of Rs.10 each share on 25/05/2011 against the payments made by assessee at Rs.15,00,000/-</p> <p>iv) Copy of bank statement of assessee with Malad Sahakari Bank Ltd. evidencing the payment of Rs.15,00,000/- made for purchase of above named scrip on 06/05/2011</p> <p>v) Copy of DMAT Statement of assessee with HDFC Bank evidencing the credit of 30,000 shares of Essar India Ltd. on 14/07/2011</p> <p>vi) Copy of Notice dated 03rd August, 2011 issued by BSE permitting the shares allotted on preferential basis on 25/05/2011 of Essar India Ltd. for trading on its floor from 4th August, 2011</p> <p>vii) DMAT Statement of assessee showing the sub-division of shares from 30,000 shares to 3,00,000 shares on 23/02/2012</p>	<p>70</p> <p>71 to 73</p> <p>74</p> <p>75 to 77</p> <p>78 to 79</p> <p>80 to 82</p> <p>83</p>
8.	Copy of ITR acknowledgement, Computation of Total Income and complete set of personal, business	84 to 98

	& consolidated Balance Sheet & Profit and Loss Account of assessee of A.Y.2013-14	
9.	Complete set of Tax Audit Report U/s.44AB of the Act	99 to 113

4. Similar are the facts for Assessment Year 2014-15 wherein the scrip in which the assessee dealt is of Out of City Travels Solutions Ltd. (erstwhile Tilak Ventures Ltd.). Details of purchase and sale of shares of this scrip is tabulated as under:

Quantity	Date of sale	Sale amount	Purchase Amount	Gain /Loss
15000	09.01.2014	43,14,816	3,45,000	39,69,816
7000	31.01.2014	19,85,614	1,61,000	18,24,614
10000	12.02.2014	28,26,604	2,30,000	25,96,604
5000	20.02.2014	14,27,785	1,15,000	13,12,785
3000	25.02.2014	8,55,772	69,000	7,86,772
5000	03.03.2014	14,33,278	1,15,000	13,18,278
5000	04.03.2014	14,22,291	1,15,000	13,07,291
50000		1,42,66,160	11,50,000	1,31,16,160

4.1 From the above table, it is noted that assessee had purchased 50,000 shares through preferential allotment for Rs.11,50,000/- and subsequently sold for a total consideration of Rs.1,42,66,160/-, resulting into long term capital gain of Rs.1,31,16,160/-. In this respect also, in the course of regular assessment proceedings u/s. 143(3), assessee furnished the relevant documentary evidences to substantiate his claim which are also placed on record in the paper

book containing 101 pages. Index of this paper book is reproduced for ease of reference.

Sr. No.	Particulars of Documents Enclosed	Page No.
1.	Copy of contract notes of stock broker, Arihant Capital Markets Ltd. for sale of 50,000 shares of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) sold on the floor of Stock Exchange of BSE between 09/01/2014 to 03/03/2014	1 to 39
2.	D'mat Statement of assessee with HDFC Bank Ltd. reflecting the immediate debit of shares of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) on sale	40 to 45
3.	Bank Statement of assessee with HDFC Bank highlighting the immediate receipt of sale proceeds of shares of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) on sale	46 to 48
4.	Ledger Account of assessee from the books of stock broker, Arihant Capital Markets Ltd. of A.Y.2014-15	49 to 51
5.	Following relevant documents in support of shares of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) purchased in preferential offer: <p>i) Copy of share application letter dated 08/09/2012 given by assessee to Board of Directors of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) along with a cheque of Rs.11,50,000/-issued for purchase of 50,000 shares in preferential allotment</p> <p>ii) Copy of Information Memorandum dated 29/08/2012 of Out of City Travel Solutions Ltd. (Tilak Ventures Ltd.) issued for allotment of shares on preferential basis</p> <p>iii) Copy of allotment letter dated 20/10/2012 issued by Essar India Ltd. allotting 50,000 shares at the premium of Rs.22 per share having face value of Rs.1/ each share on 18/10/2012 against the payments made by assessee at Rs.11,50,000/-</p> <p>iv) Copy of bank statement of assessee with Malad Sahakari Bank Ltd. evidencing the</p>	52 to 53 54 to 75 76 to 77 78 to 83

	<p>payment of Rs.11,50,000/- made for purchase of above named scrip on 13/10/2012</p> <p>v) Copy of DMAT Statement of assessee with HDFC Bank evidencing the credit of 50,000 shares of Essar India Ltd. on 12/12/2012</p>	84 to 89
6.	Copy of ITR acknowledgement, Computation of Total Income and complete set of personal, business & consolidated Balance Sheet & Profit and Loss Account of assessee of A.Y.2014-15	90 to 101

5. In the course of assessment proceedings, ld. Assessing Officer made analysis of the scrips in which the assessee dealt for their financial health, investigation in the case of operators, cash trails, SEBI reports and their findings *qua* the accommodation entry providers. Ld. Assessing Officer also issued notices u/s.133(6) to the purchasers of the shares sold by the assessee, referred to as 'exit providers' which according to him remained un-complied. Ld. Assessing Officer also issued summons u/s.131 on the assessee whereby his statements were recorded. Ld. Assessing Officer has reproduced the statement of the assessee in the impugned assessment order recorded by him on 04.12.2017 during the course assessment proceedings. In the said statement, assessee had given the details relating to the share transactions undertaken by him.

6. It was further submitted by the assessee that the transactions in the said scrips were subjected to STT levy and consideration of sale and purchase for the said scrips had been routed through normal banking channel and no addition can be made without backing of any shred of evidence, more particularly when name of the assessee does not appear in any report as beneficiary of the alleged scrips transactions.

7. Ld. Assessing Officer, after considering the submissions made by the assessee, arrived at adverse conclusion by observing that there is unusual rise in the price of the shares sold by the assessee which has been investigated by the Investigation Wing of the Department to establish that cash has been routed from various accounts to provide accommodation to the assessee and that assessee has failed to discharge his onus to prove the unusual rise and fall of share prices. Ld. Assessing Officer also placed heavy reliance on the doctrine of preponderance of human probability to hold that the assessee is indulged in bogus and dubious share transactions since he had not been able to adduce cogent evidences in this regard. Ld. Assessing Officer also noted that assessee did not produce the purchasers of the shares sold by him. Ld. Assessing Officer, thus completed the assessment by making an addition u/s 68 of the Act towards sale consideration received by the assessee on the transaction of sale of shares in the aforesaid scrips in the respective years. Aggrieved, assessee went in appeal before the CIT(A).

8. Ld. CIT(A) has reproduced extensive literature on the concept of preponderance of probability in various countries and India, on the plugging of loopholes in the system for black money, various other doctrines and plethora of judicial precedents which is appreciated. However, we note that the same has not been related and their relevance mapped to the facts of the case and corroborative documentary evidences placed on record by the assessee at the assessment stage.

8.1. Ld. CIT(A) while giving his decision in para 7 for Assessment Year 2013-14, observes that payment through cheque and the receipt of the sale proceeds through bank cannot prove the genuineness of the transaction. According to him, even the transaction through stock exchange cannot give strength to the fabricated devices. He further observes that there may be absence of direct evidence that cash was

introduced for obtaining the accommodation entry but circumstantial evidence is the evidence of various facts, if taken together, they may form a chain of circumstances leading to an inference of presumption of the existence of principle fact. According to him, it is impossible to have direct evidence or demonstrative proof of every move in the nature of transactions under taken by the assessee and therefore he supported the Assessing Officer who according to him cannot be expected to produce such evidences.

8.2. While arriving at a conclusion of dismissing the appeal of assessee, in respect of various statements relied upon by the ld. Assessing Officer, ld. CIT(A) noted that it is not a case that the Assessing Officer has solely relied on the statement of the entry providers for the purpose of making addition u/s.68 since these were corroborated by other evidences/ documents. On this observation, ld. CIT(A) thus held that assessment order passed by the Assessing Officer does not get vitiated merely because he did not allow cross examination to the assessee, though not sought. Thus, aggrieved, assessee is in appeal before the Tribunal.

9. Before us, ld. Counsel for the assessee has reiterated the submissions made before the authorities below. He has also placed on record all the relevant documents and evidences in the form of paper book, index of which are already extracted above, backed by compilation of judicial precedents. The submissions so made are not reiterated to avoid duplicity.

9.1. In the course of hearing, ld. Sr.DR had referred to various adjudication orders passed by SEBI and asserted that the share transactions undertaken by the assessee are of tainted scrips which were investigated and subjected to penalties. Ld. Counsel for the assessee has placed on record his rebuttal and clarifications on the

various orders of SEBI vide submission dated 15.05.2024. The adjudication orders of SEBI furnished by ld. Sr.DR are tabulated as under:

Sr. No.	Date of Order	Order Passed Under Section	Order Passed Against
1	17th July, 2019	Section 15-1 read Rule 5	Arihant Capital Markets Ltd.
2	20th July, 2017	Section 15-1 read Rule 5	Insight MultitradingPvt. Ltd.
3	31 May, 2019	Section 15-1 read Rule 5	1. Goodpoint Impex Pvt. Ltd. 2. Shallot Tie-Up Pvt. Ltd. 3. Topwell Properties Pvt. Ltd. 4. Shallot DealtradePvt. Ltd.
4	25th August, 2022	Section 15-1 read Rule 5	Essaar India Ltd.
5	26th April, 2023	Settlement Order	Arihant Capital Markets Ltd.

9.2. On each of the above orders, assessee has made his submission which is discussed as under:

- a) For order at Sr. No.1, it is submitted that this relates to period between 01.04.2014 to 11.03.2016, whereas assessee had sold the shares of Essar India Ltd. between 08.10.2012 and 27.02.2013. Shares of Out of City Travel Solutions were sold between 09.01.2014 and 04.03.2014 by following the prescribed procedures and applicable rules. Thus, this order has no relevance to the facts of the present case.
- b) For the order at Sr. No.2, proceedings initiated were dropped and no penalty was imposed.
- c) In respect of order at Sr. No.3, no investigation or enquiry of any kind was carried out against the assessee either by SEBI or by concerned stock exchange. Hence, this has no relevance or application to the case of the assessee.

- d) The order at Sr. No.4 is adjudicated in case of third parties which has no relevance or application to the case of the assessee since shares of Essar India Ltd. were allotted on preferential basis to the assessee and assessee invested his own funds.
- e) Facts in order at Sr. No.5 deal with physical shares stolen or counterfeited whereas in the case of the assessee these were sold on registered stock exchange out of DMAT account, acquired under preferential allotment.

10. We note that transactions for purchase and sale of the aforesaid shares were undertaken on the stock exchange platform through the SEBI registered broker on which STT was levied and the consideration was routed through normal banking channel. The entire flow of these transactions is corroborated by relevant documentary evidences placed on record. While making the addition, there are no discrepancies pointed out by the Assessing Officer in the documents and the details furnished by the assessee. Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the assessee. These evidences furnished have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the addition made by him. At any stage of the present case, Revenue has not brought on record any material about participation of the assessee with any such dubious transactions relating to accommodation entry, price rigging or exit providers. To our mind, Ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details furnished in his office. Once the assessee has produced documentary evidence to establish the veracity of his claim, the burden would shift on the Revenue to establish its case.

10.1. On the perusal of records, it is discernible that Id. Assessing Officer had proceeded on the basis of analysis of the financials of the companies. According to him, sharp jump in the share prices of the aforesaid scrips is not justified. He has relied upon the search and survey operations conducted by the investigation wing of the Department at various locations in respect of alleged penny stocks which sets out the modus operandi adopted in the business of providing entries for bogus capital gains. The conclusion drawn by the Id. Assessing Officer of implicating the assessee is un-supported by any cogent material on record. The finding arrived at by the Id. Assessing Officer is thus purely an assumption based on conjectures and surmises. In our thoughtful considerations to the facts and circumstances of the case, it is not in controversy that assessee has discharged his burden by submitting the relevant documents, details of which are already extracted above by way of index of the two paper books.

10.2. For the above observations and findings, we place our reliance on the decision in the case of CIT vs. Jamnadevi Agrawal[2012] 20 taxmann.com 529 (Bom), wherein it was held that transactions of purchase and sale of shares cannot be considered to be bogus, when the documentary evidences furnished by the assessee establish genuineness of the claim. We also draw our force from the decision of Hon'ble High Court of Delhi in the case of PCIT v. Krishna Devi [2021] 126 taxmann.com 80 (Del) wherein the Court noticed that the reasoning given by the Assessing Officer to disbelieve the capital gain declared by the assessee, viz. astronomical increase in the price of shares, weak fundamentals of the relevant companies are based on mere conjectures.

10.3. Also, reliance placed by the ld. Assessing Officer on the report of investigation wing without further corroboration based on cogent material does not justify the conclusion that the impugned transaction is bogus, sham and part of racket of accommodation entries. It does not prove that the assessee has carried out the impugned transactions of purchase and sale of shares in connivance with the people who were involved in the alleged rigging of share prices. In absence of any such material, enquiry and examination, the addition made pertaining to receipt of sale consideration of the impugned transaction cannot be sustained. In our considered view, ld. Assessing Officer has not established that the assessee was involved in price rigging.

11. We note that ld. Assessing Officer has observed about the so called purchasers of shares sold by the assessee who have not been identified as none responded to the notices issues u/s.133(6) of the Act. In this context, it is worth noting that impugned share sale transactions undertaken by the assessee are on the online digital trading platform of stock exchange of BSE which is a regulated market under the aegis of a regulator viz. SEBI. There is nothing on record from the market regulator SEBI for the relevant period which establishes the 'tainted' status of the scrips involved in the present case, so as to hold the share sale transactions as bogus/accommodation entry as alleged by the ld. AO. Also, the operations and modus operandi of this regulated market does not in any way provide for any mechanism by which assessee can bring forth the identity of the buyers of his shares and their creditworthiness. Further, sale proceeds are received through the stock market process into the pre-identified bank account of the seller i.e., the assessee which cannot be tainted as 'unexplained or unaccounted or undisclosed' money for the addition made u/s. 68 by the ld. Assessing Officer.

11.1. From the perusal of the statement of assessee recorded by the Id. Assessing Officer during the course of assessment for Assessment Year 2013-14 as reproduced in the impugned order demonstrates that he is a long-term investor, investing since year 2006 and is aware of his DMAT account, brokers through whom transactions were undertaken, shares in which he had invested and stock market operations. He produced all the relevant documentary evidences before the Id. Assessing Officer in support of his deposition in the statement recorded. From all of this, we notice that assessee has –

- a. purchased the shares under preferential allotment by making payment through banking channel.
- b. dematerialized the shares purchased by credit to the DMAT account and were later sold out of the same holding.
- c. sold the shares on the platform of recognised stock exchange on the then prevailing prices.
- d. received the sale proceeds through stock market process in his bank account.

11.2. From the above, we note that Id. Assessing Officer has not brought on record any material to show that assessee was part of any group which was involved in the manipulation of share prices. Suspicion by the Id. Assessing Officer on the purchase and sale of shares is baseless.

12. Id. Assessing Officer, while drawing the adverse conclusion noted about the cash trail in the accounts of entry providers. He based his conclusion on the finding of investigations done by the Investigation Wing rather than bringing on record any direct and cogent material to establish existence of such a cash trail where the assessee has transacted in cash. In this respect, Id. CIT(A) has

supported the ld. Assessing Officer by stating that Assessing Officer cannot be expected to produce such evidences and has merely harped on general proposition of having circumstantial evidence leading to inference or presumption. In this respect in the absence of any corroborative material brought on record by the authorities below, we hold against drawing such inference or presumption.

13. We also note that in the first appellate order, Ld. CIT(A) while dismissing the appeal observed that ld. Assessing Officer by not allowing the assessee to cross examination the brokers, operators and exit providers whose statements were relied upon by the ld. Assessing Officer, does not vitiate the assessment. Negating the request made by the assessee, Ld. CIT(A) confirmed the addition. The approach adopted by ld. CIT(A) while dismissing the appeal and stating that assessment order passed by the Assessing Officer does not get vitiated merely because Assessing Officer did not allow cross examination, is not in compliance with the provisions of section 142(3) of the Act which is a statutory mandatory procedural requirement for making a valid assessment. We note that the required compliance with section 142(3) has not been met.

13.1. We refer to the relevant provisions of sec. 142 which are reproduced as under:

Sec. 142 (1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 139 or in whose case the time allowed under sub- section (1) of that section for furnishing the return has expired a notice requiring him, on a date to be therein specified,-

142(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such inquiry as he considers necessary.

142(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under sub- section (2) or

any audit under sub- section (2A) and proposed to be utilised for the purpose of the assessment.

[emphasis supplied by us by bold and underline]

13.2. From the above and in the present context, we note that section 142(2) empowers the AO to make such enquiry as he considers necessary. The discretion is on the AO under the said section. However, having conducted such enquiry as provided in Sec. 142(2), it is incumbent upon the AO u/s. 142(3) to give an opportunity of being heard in respect of any material gathered on the basis of any enquiry done u/s. 142(2) and proposed to be utilised for the purpose of the assessment. It is important to note that Sec. 142(3) uses the word “shall” which makes it mandatory requirement on the part of the AO to comply with it.

13.3. We also take note of the provisions of Sec. 143(3) wherein the assessment is to be completed by the AO which also provides in sub-section (3) that AO shall make an assessment by an order in writing, inter alia, “*after taking into account all relevant material which he has gathered.*” Thus, by keeping the provisions of Sec. 142(3) read with section 142(2) and Sec. 143(3) in juxtaposition, we understand that it is a mandatory statutory requirement on the part of the AO to comply with the provisions of Sec. 142(3) in completing the assessment proceeding, failure of which may vitiate the entire assessment itself since this sub-section uses the word “shall”. The only exception to this requirement is where an assessment is made u/s 144 which is not so in the present appeals before us.

14. As already noted above, Ld. CIT(A) dealt with extensive literature on the concept of preponderance of probability and other doctrines to dismiss the appeal of the assessee. According to us, the theory of preponderance of probability is applied to weigh the evidence of either

side and draw a conclusion in favour of a party which has more favourable factor in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of fact that might go against the assessee. Once nothing has been proved against the assessee with the aid of any direct material, nothing can be implicated against the assessee on the presumption or suspicion, howsoever, strong it might appear to be true.

15. Considering the totality of the facts and circumstances of the case, factual matrix and submissions of parties narrated above as well as discussion and observations made herein above, we delete the addition made u/s 68 towards proceeds of sale of listed shares which gave rise to Long Term Capital Gain on the said sale claimed exempt by the assessee u/s 10(38), in both the assessment years. Accordingly, grounds taken by the assessee in this respect are allowed in both the appeals.

16. For the aforesaid findings, we find force of binding nature from the decisions of Hon'ble High Court of Bombay being a jurisdictional High Court:

i) Pr. CIT v. Ziauddin A Siddique [Income-tax Appeal No. 2012 of 2017, dated 4-3-2022] held as under:-

"1. The following question of law is proposed:

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs. 1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was DMATed and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the

amount of LTCG of Rs. 1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

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 v. NRA Iron & Steel (P.) Ltd. 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.

6. The appeal is devoid of merits and it is dismissed with no order as to costs."

ii) PCIT vs. Indravadan Jain HUF [2023] 156 taxmann.com 605 (Bom) wherein it was held:

"Where shares were purchased by assessee on floor of stock exchange and not from broker, payment was made through banking channel, deliveries were taken in DMAT account where shares remained for more than one year, contract notes were issued and shares were also sold on stock exchange, there was no reason to add capital gains as unexplained cash credit under section 68"

iii) CIT vs. Shyam R. Pawar [2015] 54 taxmann.com 108 (Bom) wherein it was held:

“Where DMAT account and contract note showed details of share transaction, and Assessing Officer had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income under section 68”

17. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 10 June, 2024

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 10 June, 2024

MP, Sr.P.S.

Copy to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai