

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH, AHMEDABAD**

**BEFORE Ms. SUCHITRA RAGHUNATH KAMBLE, JUDICIAL MEMBER  
&  
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 288/Ahd/2019  
(निर्धारण वर्ष / Assessment Year: 2015-16)

<b>Shailesh K. Patel HUF</b> C/o. Ketan H. Shah, Advocate 512, Time Square – I, Op. Ram Baug Bungalow, Thaltej Shilaj Road, Thaltej, Ahmedabad, Gujarat 380059	<b>बनाम/ Vs.</b>	<b>The Income Tax Officer</b> Ward – 3(3)(5), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AALHS9548E		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

अपीलार्थी ओर से /Appellant by :	Shri Ketan Shah & Shri Aman Shah, A.Rs.
प्रत्यर्थी की ओर से/Respondent by :	Shri Ashok Kumar Suthar, Sr. DR

<b>Date of Hearing</b>	04/06/2024
<b>Date of Pronouncement</b>	18/06/2024

**ORDER**

**PER SHRI NARENDRA PRASAD SINHA, AM:**

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-3, Ahmedabad, (in short ‘the CIT(A)’) dated 24.01.2019 for the Assessment Year 2015-16.

2. The assessee has taken following grounds of appeal:

“1. *The CIT(A) has erred in not appreciating the facts that, the Assessing Officer has wrongly made addition of Rs. 73,29,100/- in account of*

*investment in shares, it is said that, as per statement of facts referred above, and evidences produced therewith he ought not to have made such addition and same is required to be deleted. (Tax Effect Rs. 31,45,930/-)*

2. *The CIT(A) has erred in not appreciating the facts that The Lr. AO has given wrong finding as per para 3.1, 5, 6, page 25 para 3.3 to para 3.23 of the order which is perverse on facts and also on law and therefore, the addition made may please be deleted. (Tax Effect Rs. 31,45,930/-)*
3. *The CIT(A) has erred in not appreciating the facts that the Lr. Assessing Officer has not provided the inquiry papers as well as notice u/s 133(6) referred by him and further no examination / cross examination allowed and therefore, the addition based on so called inquiry is merely based on conjectures, surmises and therefore, addition made is liable to be deleted. (Tax Effect Rs. 31,45,930/-)*
4. *The Lr. CIT(A) has also erred in not appreciating the facts that the assessee has purchased the shares out of regular source of income of past years and books of accounts has been accepted as such without applying sec. 145 and therefore, the purchase made cannot be doubted on this ground and consequently the addition made may please be deleted. (Tax Effect Rs. 31,45,930/-)*
5. *The Lr. CIT(A) has also erred in not appreciating the various submissions and case laws cited before him as per two submissions dated 30-10-2017 and 15-03-2018 as well as Paper Book No. I page 1 upto 167 as well as Paper Book - II page 1 upto 213 and based on these submissions / case laws he ought to have deleted the whole addition. (Tax Effect Rs. 31,45,930/-)”*

3. The grounds taken by the assessee pertain to disallowance of Rs.73,29,100/- on account of Long Term Capital Gain (LTCG) claimed exempt under Section 10(38) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) and which was added under Section 68 of the Act in the assessment order. Before we adjudicate the grounds taken by the assessee, it would be relevant to re-capitulate the facts of the case.

#### **Brief facts of the case:**

4. The return of income for A.Y. 2015-16 was filed by the assessee on 15.02.2016 declaring total income of Rs.4,78,120/-. The case was selected

for complete scrutiny under CASS and notice under Section 143(2) of the Act was issued to the assessee. In the course of assessment, the AO noticed that the assessee had claimed LTCG of Rs.73,29,100/- as exempt under Section 10(38) of the Act, which was derived on sale of shares of Lifeline Drugs & Pharma Ltd. (LDPL) and Mahavir Advanced Remedies Ltd. (MARL). In the course of assessment, the AO made enquiries in this regard and the relevant facts which emerge from the assessment order are as under:

(i) The assessee had purchased 2150 shares of LDPL on 01.04.2013 @ Rs.36.10 per share from M/s. Vijay Bhagwandas & Co. for a consideration of Rs.78,177/- which was paid in cash. Further, 5000 shares of MARL were also purchased from the same broker M/s. Vijay Bhagwandas & Co. on 26.06.2013 @ Rs.7.77 per share for consideration of Rs.40,350/- which was also paid in cash. Thus, the assessee had paid total consideration of Rs.1,18,527/- in cash to M/s. Vijay Bhagwandas & Co. for purchase of these two shares.

(ii) The shares of LDPL were sub-divided from Rs.10 per share to Rs.1 per share on 08.11.2013 and, thus, the total holding of this share had increased to 21500.

(iii) The assessee had sold 21500 shares of LDPL on 1<sup>st</sup> & 2<sup>nd</sup> September, 2014 @ Rs.263/- per share and the total sale consideration received was Rs.56,54,500/-.

(iv) The shares of MARL were sold on 03.09.2014 for a consideration of Rs.35,93,767/- @ Rs.359.58 per share. The shares of MARL were also subdivided and this proceeds was in respect of sale of 1000 shares.

(v) The sale of two shares was effected through share broker Tradebull Securities Pvt. Ltd. and the sale consideration of Rs.56,54,500/- and Rs.35,93,767/- was credited to the banks accounts of the assessee with CITI Bank on 03.09.2014 and 04.09.2014 respectively.

(vi) The assessee had disclosed LTCG of Rs.73,29,100/- on the sale of these two shares which was claimed exempt under Section 10(38) of the Act.

(vii) The payment of purchase price of shares Rs.1,18,703/- in cash even though the assessee was having operational bank account raised suspicion about the genuineness of the transactions.

(viii) The AO found that the companies LDPL & MARL were not having good financial track record. Further, both these companies were penny stock companies which were utilized to arrange accommodation entries to the interested beneficiaries. The price of shares of LDPL and MARL were put on artificial rise and fall in a pre-arranged manner. The AO reproduced a chart of price fluctuation of shares of LDPL & MARL for the period from 01.04.2013 to 2<sup>nd</sup> September, 2014 in the assessment order, from which, he found that the shares of two companies were very thinly traded and artificially manipulated for price fluctuation.

(ix) The AO also referred to the Investigation Report of the Income Tax Department carried out by the DDIT (Inv.), Kolkata in the case of LDPL and MARL. He referred to the statements given by Shri Anuj Agarwal, Shri Pravin Agarwal, Shri Ashok Kayan and Shri Harshvardhan Kayan regarding manipulation in price of these two scripts and about providing accommodation entries to the interested beneficiaries through the

manipulative trading of the two shares. A copy of statements of these persons was provided to the assessee.

(x) The AO concluded that the entire edifice of LTCG was a colorable device to give the color of genuineness to these transactions for bringing back its own unaccounted money into the books of accounts without payment of any tax. Accordingly, a detailed show cause notice was issued by the AO to the assessee vide letter dated 15.12.2017. The assessee furnished its response to the show cause notice vide letter dated 21.12.2017 and the allegations as made by the AO were denied.

5. After considering the reply to the assessee, the AO concluded that the assessee had failed to explain as to why the shares of LDPL and MARL were purchased in off market transactions when the assessee maintained a de-mat account and regular trading in market was done through the demat account. Further, the assessee had also not explained why the purchased shares were kept in pool account of the broker M/s. Vijay Bhagwandas & Co., when the assessee was maintaining its own demat account. Considering these factors and circumstantial evidences, the AO concluded that the intention of the assessee was to obtain accommodation entries and he held that the assessee had failed to discharge the onus to establish the genuineness of the transactions. Therefore, the amount credited in the accounts of the assessee as LTCG was held as unexplained and accordingly addition of Rs.73,29,100/- was made under Section 68 of the Act. The AO also held that the transaction of LTCG was a sham transaction only to bring its own unaccounted money in the guise of exempted LTCG and only paper work was done to give a color of authenticity to the transactions by creating a façade of legitimate transactions.

6. In the first appeal, the Ld. CIT(A) upheld the addition as made by the AO. He passed a detailed order and apart from the decisions as quoted in the assessment order the Ld. CIT(A) also relied upon the decision of Mumbai ITAT in the case of *ITO vs. Shamim Bharwani* (68 taxmann.com 65) and the decision of Ahmedabad ITAT in the case of *Pavankumar M Sanghvi vs. ITO* (81 taxmann.com 308).

**Submission of the assessee**

7. Shri Ketan Shah, Ld. AR of the assessee submitted that the purchase and sale transactions were all supported by proper documentary evidences and there was no reason to doubt the genuineness of the transactions. He submitted that there was no dispute to the fact that assessee had purchased the share of LDPL and MARL in support of which the contract note of broker M/s. Vijay Bhagwandas & Co. was furnished and the source of this investment was also explained. The Ld. AR explained that the assessee was having surplus cash balance which was utilized for making payment for purchase of shares and that off market purchase of shares was an accepted mode of acquisition. He submitted that the genuineness of the purchase of shares was not doubted by the AO and no disallowance was made on account of the purchases. The shares purchased were sold through a registered broker at the rate as quoted on the stock exchange, on which STT was paid and the entire sale consideration was received through banking channel. Considering these facts, there was no reason for the AO to doubt the genuineness of the transactions. As regarding fluctuation in the share price of the two companies transacted by the assessee, the Ld. AR submitted that fluctuation in price of shares is normal and there was no evidence that the

assessee had indulged in malpractice of fluctuation of shares, neither the price fluctuation of these two companies was controlled by his broker.

8. As regarding the copy of statement of Shri Anuj Agarwal, Shri Pravin Agarwal, Shri Ashok Kayan and Shri Karshvardhan Kayan provided to the assessee in the course of assessment, the Ld. AR submitted that various seized/impounded materials were referred in their statements and assessee had requested the AO to provide him a copy of those seized documents. According to the Ld. AR in the absence of seized materials, based on which the statements of those persons were recorded, the assessee could not have given a meaningful reply to the AO. He further submitted that those statements had no evidentiary value and the opportunity of cross examining those person were never allowed to the assessee in spite of specific request. He emphasized that the statement made during the search and survey without supporting evidences has no evidentiary value and the third party statement without an opportunity to cross examine the parties cannot be relied upon. Further that the enquiry report as referred in the assessment order was also not provided. In this regard, he has relied upon various judicial pronouncements as under:

- i. Vijay K. Patel-HUF vs. ITO in ITA No. 313/Ahd/2019
- ii. Chandra Prakash Jhunjhunwala vs. DCIT in ITA No.2351/Kol/2017
- iii. ITO vs. M/s. Ice Worth Reality LLP in ITA Nos. 565 & 566/Ahd/2020
- iv. PCIT vs. Parasben Kasturchand Kochar, [2021] 130 taxmann.com 177 (SC)
- v. PCIT vs. Sandipkumar Parsottambhai Patel, [2023] 150 taxmann.com 192 (Gujarat)
- vi. DCIT vs. Shri Ambalal Chimanlal Patel in ITA No.2398/Ahd/2018

- vii. ITO vs. M/s. Indravadan Jain in ITA No.4861/Mum/2014 & Anr.
- viii. Dipesh Ramesh Vardhan vs. DCIT in ITA No.7648/Mum/2019 & Ors.
- ix. DCIT vs. Saurabh Mittal in ITA No. 16/Jp/2018
- x. Mrs. Neeta Bothra vs. ITO, [2022] 137 taxmann.com 463 (Chennai-Trib.)
- xi. PCIT vs. Champalal Gopiram Agarwal, [2023] 155 taxmann.com 66 (Gujarat)
- xii. Atulbhai Amritlal Mehta vs. DCIT, [2023] 150 taxmann.com 90 (Ahmedabad – Trib.)

9. The Ld. AR further submitted that SEBI had suspended the trading of shares of these two companies after the purchase and sale transactions in the shares was completed by the assessee and that the assessee was never aware of the fact that scrips were in the nature of penny stock companies. He contended that in the investigation report carried out by the Calcutta Directorate as well as in the statements recorded by different persons the name of the assessee never appeared and there was no specific allegation against the assessee that he had entered into an accommodation entry. The Ld. AR submitted that assessee was a regular investors in shares and this was not the only transaction carried out by the assessee. He assailed the invocation of provisions of Section 68 of the Act by the AO and submitted that this provision was not at all attracted as the AO had not added the entire sale consideration which was credited to the books of accounts.

**Submission of the Revenue:**

10. Shri Ashok Kumar Suthar, Ld. SR-DR appearing for the Revenue submitted that there is no dispute to the fact that the shares of LDPL and MARL were penny stock company. He explained that the assessee had

declared exempted capital-gain from shares of LDPL & MARL which were identified by Income-tax Department as “Penny-stock” and even the operations in the shares of these companies were suspended by SEBI. The Ld. DR submitted that these facts were clearly evident from “Investigation Report in the case of Project Bogus LTCG / STCL Through BSE Listed Penny Stocks” dated 27.04.2015 released by Directorate of Income-tax (Investigation), Kolkata. The Ld. DR strongly supported the orders of the AO and the CIT(A) and placed reliance on the decision of Hon’ble High Court of Kolkata in *PCIT Vs. Swati Bajaj*, (139 taxmann.com 352) decided in favour of Revenue. He emphasized that this decision has taken into account the Investigation-Report prepared by Investigation-Wing of Income-tax Department; considered the issues of cross-examination, human probability etc. and various legal precedents of various Courts on this issue was also considered therein.

**Findings and Order:**

11. We have carefully considered the rival submissions and the materials on record. The crux of the issue to be decided in this appeal is whether the claim of LTCG made by the assessee would be considered as genuine. The assessee has contended that it was a regular investor in shares and stocks, payments were received through banking channels, the stock brokers are registered entities and the regulatory authorities namely SEBI or the Stock Exchange had not taken any action against the trading of the shares of the companies during the trading period of the assessee. Further that the materials/documents based on which statements was recorded were not provided to the assessee and the persons who had given statements were not made available for cross examination in spite of specific request. Therefore, the theory of circumstantial evidence or the theory of human probabilities

cannot be applied to the assessee's case. The assessee has pleaded absolute innocence to the allegation of accommodation entry as made in the assessment order.

12. The assessee has submitted that the sale of shares were made through stock exchange on which STT was paid, the payment was received through banking channel and the exemption of LTCG was rightly claimed. Where the issue of LTCG is involved, not only the sale of shares but the genuineness of the purchases also has to be examined. In the mechanism of capital gains computation what is relevant is not only the sale of shares but also the purchase of shares. Therefore, the genuineness of the entire transaction of acquisition as well as sale of shares has to be looked into as a whole. One can't adopt a dissecting approach by accepting the sale of shares as genuine without examining the genuineness of purchase of the shares. The AO had casted aspersion on purchase of shares while doubting the genuineness of the entire transaction. The contention of the assessee that the purchases were not doubted as no disallowance on account of purchase was made can't be accepted. The AO in the assessment order had specifically pointed question mark on the purchase transactions.

13. The primary facts of this case not under dispute. The assessee has contended that it was a regular investor in shares and that the transactions giving rise to LTCG were not one off transactions. It is found that the assessee had opened a demat account with Tradebulls Securities (P) Ltd. on 21.07.2011. The first investment in shares made by the assessee was in F.Y. 2012-13 and the investment in the scrip's of NHPC Ltd. (713 shares), Reliance Industries (138 shares) & Reliance Power Ltd. (25 shares) were appearing in the demat statement as on 31.03.2013. The same investment

continued in subsequent years and in F.Y. 2014-15 another investment in share of Salvation Develop was added. It is, thus, found that the assessee was making investment in shares through its demat account with Tradebulls Securities (P) Limited. If so, the assessee has not explained as to why it purchased shares of LDPL and MARL in off market transactions in F.Y. 2013-14. The Id. AR submitted that the purchase of shares in off- market was the own call of the assessee it is the prerogative of the assessee as how to conduct its business and that the Revenue cannot doubt the transactions for this reason alone. It is true that it is the prerogative of the assessee to conduct its business in the manner, as it deems proper. Nevertheless, any deviation in the conduct of the assessee has to be judged considering the overall manner in which the business was conducted and such deviation has to be properly explained. The explanation given by the assessee for this deviation of off-market purchase of shares is not found convincing. When the assessee had made all the past investments as well as entered into the future transactions through its demat account, the incidence of off-market purchase of shares certainly raises the doubt about the conduct and real intention the assessee.

14. The transaction carried through recognized Stock Exchange not only proves the time of transaction but also conclusively decides the holding period of the shares. The purchase of LDPL and MARL shares by the assessee in off market when all the past investment in shares were made through recognized Stock Exchange through demat account; had rightly raised the eyebrows of the Revenue regarding genuineness of these share transactions and the claim of LTCG. The contract note issued by the broker for off market purchase of shares is only an internal voucher between the related party (buyer and seller) which is always subject to manipulation.

Such evidence cannot conclusively establish the genuineness of the transaction. Neither the assessee nor the broker have explained the reason for carrying out the transactions in off market manner which is ordinarily not permissible and subject to certain legal constraints under Security Contract (Regulation) Act, 1956. Further, the reason for payment for purchase of these shares in cash has also not been explained. There is no evidence for cash payment so as to confirm the actual date of transaction. It is also found that the cash payment for the purchase of shares was not made in one go but was staggered on different dates. From the ledger account of the broker M/s. Vijay Bhagwandas & Co. in the books of the assessee for the period 01/04/2013 to 31/03/2014, the cash payment was found in the following manner:

Date	Particulars	Vch Type	Debit	Credit
1/4/2013	To Lifeline drugs & pharma ltd Sale of 5000	Journal	78353.00	
26/06/2013	To Mahavir Advanced Remedies Ltd - Sale of 2150 Shares		40559.00	
1/4/2013	by cash received	receipt		19000.00
1/4/2013	by cash received	receipt		19000.00
3/4/2013	by cash received	receipt		19000.00
4/4/2013	by cash received	receipt		19000.00
5/4/2013	by cash received	receipt		2345.00
26/6/2013	by cash received	receipt		19000.00
27/6/2013	by cash received	receipt		2567.00
			118912.00	118912.00

15. If the assessee was having sufficient cash balance why the payment was not made in a single go and why the payment was made in installments. Further, if the cash payment was made in staggered manner to obviate the rigors of section 40A(3) of the Act, what prevented the assessee to deposit the available cash in the bank account and make the single payment through cheque, was also not explained by the assessee. The conduct of the

assessee is not only inexplicable but it raises serious doubt about the timing of the purchase transaction as well on the genuineness of the entire LTCG claim. The contract bills for purchase of shares and ledger account of the assessee for payment in cash are essentially self-serving evidence and they don't establish the factum of purchase of shares on the given date.

16. What is relevant to establish the purchase transaction is the date of dematerialization of shares. As already discussed earlier, the assessee was maintaining demat account since July 2011. The assessee has not explained as to why the shares purchased on 01.04.2013 and on 26.06.2013 in the off market transactions were not dematerialized immediately after purchase. The assessee has brought on record a letter dated 5<sup>th</sup> April, 2014 from the broker M/s. Vijay Bhagwandas & Co. to the effect that 5000 shares of MARL and 21,500 shares of LDPL were being held by the broker in the pool account as on 31<sup>st</sup> March, 2014. This letter is also in the nature of self-serving evidence. **The share of MARL was dematerialized on 28.08.2014 whereas the share of LDPL was dematerialized on 01.09.2014 only few days prior to their respective sale in the first week of September 2014.** Why the shares purchased in April 2013 and June 2013 were dematerialized after long delay on 28.08.2014 and 01.09.2014, has not been explained by the assessee. Rather the dematerialization of the shares, only a few days prior to their sale, is strong evidence to the orchestration of the entire event of purchase of shares. The purchase of the shares were close to the date of their dematerialization, which was orchestrated to the preceding year by creating evidence of off market transactions and by payment of purchase price of shares in cash, which cannot be verified with any independence evidence.

This was ostensibly done to prolong the period of holding so as to claim the gain as LTCG. Considering these facts and the sequence of events the AO had rightly raised question mark on the genuineness of LTCG claim of the assessee.

17. The genuineness of transactions can be tested on the principle of preponderance of human probability as settled by the Hon'ble Apex Court in the case of *Smt. Sumati Dayal vs. CIT, (1995) 214 ITR 801 (SC)*. The documentary evidences in themselves, cannot be held as conclusive evidence of the transaction. When someone is deliberately entering into a transaction in shares of penny stock company, it is obvious that all the documentary evidences will be in order. After all, one has to establish the transactions with reference to the documentary evidences so as to claim the benefit of exemption of LTCG available under the Act. Therefore, while examining such evidences, surrounding circumstances also has to be taken into account in order to unravel the true nature of the transactions. The Hon'ble Supreme Court has observed in the case of *CIT vs. Durga Prasad More, [1971]82ITR540(SC)* that “*the taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.*” In penny stock transactions a facade of genuineness is created and in order to unravel the truth one has to go behind such façade. The Hon'ble Supreme Court had held in the case of *Vodafone International Holdings B.V. v. Union of India (204 Taxman 408)(SC)* that the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant.

18. When we examine the evidences brought on record by the Assessing Officer, the first question that arises is whether these evidences satisfy the test of preponderance of human probability. The assessee was not new to share trading activity and the past investment were made through demat account. If so, why it didn't trade in a listed shares but made an investment in shares by way of off-market purchase of unlisted share of unknown decrepit company LDPL & MARL. Further, why the payment for purchase of shares was made in cash in tranches when the assessee was maintaining a bank account and when all the past acquisition of shares were made through banking channel. The distinctive number of shares purchased off-market is also found missing on the contract-cum-bills and the certificate number is also not appearing. These details are missing even in the pool holding certificate dated 5<sup>th</sup> April, 2014 issued by the broker. The assessee has also not brought on record any evidence for allotment of 21500 shares of LDPL of face value of Rs.1/- on subdivision of the shares on 08.11.2013. Similarly, no evidence for allotment of 500 additional shares of MARL on subdivision has been produced. Further, why these shares were not dematerialized immediately after purchase but only a few days prior to the sale in September 2014? Obviously, the shares were dematerialized prior to sale in order to pay the STT and give it a colour of LTCG which is exempt u/s. 10(38) of the Act.

19. The department had conducted detailed enquiries in the organized racket of bogus LTCG transactions which were claimed exempt from tax. During the course of investigation the transactions in BSE listed penny stocks, which were used for generating bogus LTCG, were verified. The SEBI had suspended the trading of shares of LDPL & MARL. It is immaterial that such suspension was after completion of trading in shares by

the assessee. The suspension by SEBI reflects the dubious nature of the transactions, which can't be ignored and which was pursuant to manipulation / abrupt movement in the price of these security as noticed by BSE. The AO has analyzed the price movement of these share during the period from 1<sup>st</sup> April, 2013 to 2<sup>nd</sup> September, 2014 in the assessment order from which it is evident that there was continuous manipulation of the price of these shares. The volume of trade in these shares was mostly in single digit and the price of LDPL was progressively increased from Rs.36.1 as on 1<sup>st</sup> April, 13 to high of Rs.584.35 on 12<sup>th</sup> November, 2013 and on the next day i.e. 14<sup>th</sup> November, 2014 the price had suddenly dipped to Rs.59.55/-. We see similar trend and fluctuation in the share price of MARL as well. These enquiries and evidences conclusively proved that the trades were manipulated and the gains/losses made by beneficiaries in trade of these securities can't be held as genuine. The AO had further analyzed the financial statements of LDPL & MARL in the assessment order and found that the movement of its share price was abrupt, unrealistic and not based upon any sound realistic parameter. The Supreme Court has held in the case of *SEBI Vs. Rakhi Trading (P) Ltd. (90 taxmann.com 147(SC))* that abnormal difference between the prices at which the trades were executed without corresponding effect on the price of the underlying security, shows that the option in which the party traded was not in demand in the market and that it was unusual that the trades were transacted with such huge profits when there was no change in the underlying prices. It was held by the Apex Court that such trade transactions were obviously only aimed at carrying out manipulative objective. Following this principle laid down by the Apex Court, there was nothing wrong in the Revenue's doubt about the genuineness of the transaction, considering the volatile fluctuation in share price of LDPL & MARL. The AO had issued a detailed show cause notice to the assessee to

establish the genuineness of the LTCG as claimed. It is apparent from the assessment order that the AO had doubted the genuineness of the transactions and this aspect was not at all addressed by the assessee in its submissions.

20. The AO has referred to the investigation carried out by the Calcutta Directorate in respect of penny stock companies. During the course of investigation, the transactions in BSE penny stock which was utilized for generating bogus LTCG were verified. The modus operandi of accommodation entry through the transaction of penny stock companies have been discussed in detail in the orders of the AO and the CIT(A). From the statements recorded by the some of the brokers in Calcutta, it revealed that bogus LTCG of huge proportion was provided by some of the brokers to the interested beneficiaries and the total quantum of such entry provided was as under:

Stock Broker	Bogus LTCG M/s Lifeline Drugs
The Calcutta Stock Exchange Ltd	3,35,14,28,918
Gateway Financial Services Ltd	26,21,97,061
SMC Global Securities Ltd	1,88,05,018
KORP Securities Ltd	1,86,56,81,200
Millenium Stock broking Pvt Ltd	5,30,88,497
Stock Broker	Bogus LTCG M/s Mahavir Ad. Remedies
The Calcutta Stock Exchange Ltd	64,84,43,212
Anand Rathi Share & Stock Brokers Ltd	24,89,45,625
Religare Securities Ltd	2,17,96,692

21. The surrounding circumstances that the shares of LDPL & MARL were utilized for generating huge bogus LTCG having total trade value of above proportion, as revealed in the investigation carried out by the

Department, puts a question mark on the genuineness of the transactions carried out by the assessee. The statement of the share brokers of Kolkata who were involved in providing accommodation entries through Jamakarchi/shell Companies also casts a serious doubt on the genuineness of the transactions. They had categorically admitted to have provided accommodation entries through multilayered transactions and trading in the shares of LDPL & MARL. Though the assessee was nowhere indicted in their statements the fact that accommodation entries were provided by dealing in shares of LDPL & MARL, stands established.

22. The assessee was provided with a copy of statements of Shri Anuj Agarwal, Shri Pravin Agarwal, Shri Ashok Kayan and Shri Harshvardhan Kayan in the course of assessment proceeding. The contention of the assessee is that the assessee was not named as a beneficiary by any of the brokers and thus there was no direct evidence in their statements. The Id. AR vehemently argued that the assessee was never allowed an opportunity to cross examine the brokers nor a copy of the documents referred in their respective statements and the investigation report of Kolkata Directorate was made available.

23. It is true that in the statement of the stock brokers/entry operators as relied upon by the Revenue, the name of the assessee was not appearing. If that being the case, the assessee cannot take a plea that it was not allowed an opportunity to cross-examine them as there was nothing in their statements to implicate the assessee. The allegation against the assessee is not of insider trading or manipulating the price of the shares, rather the allegation is that the claim of the LTCG made by the assessee was bogus. It has not been explained as to how non-production of persons for cross examination has

caused prejudice to the assessee as the name of the assessee didn't appear in their statements. In fact, the investigation carried out by the Calcutta Directorate did not commence from the individuals, but it commenced with the entities who had dealt in penny stock and provided accommodation entries. It was by working backwards that the investigation was taken to the logical end in the hands of the beneficiaries. It was held by Hon'ble Supreme Court in the case of *State Of Jammu And Kashmir vs Bakshi Ghulam Mohammad*, AIR 1967 SC 122 that the right of hearing cannot include the right of cross examination and the right must depend upon the circumstances of each case and must also depend on the statute under which the allegations are being inquired into. Following this legal pronouncement, there was no vested right for the assessee to cross examine the persons who had not deposed anything against the assessee.

24. Hon'ble Calcutta High Court in the case of Swati Bajaj (supra) had observed on the right of cross-examination and on not providing the investigation report of Kolkata Directorate in entirety as under:

*“58. Therefore, the assesseees have to specifically point out as to how they were prejudiced on account of non-furnishing of the investigation report in its entirety, failure to produce the persons from whom the statements were recorded for being cross examined would cause prejudice to the assessee as nowhere in the report the names of the assesseees feature. The investigation report states that the investigation has not commenced from the individuals but it has commenced who had dealt with the penny stocks, concept of working backwards. This is a very significant factor to be remembered. Therefore, there has been absolute anonymity of the assessee in the process of investigation. The endeavour of the department is to examine the "modus operandi" adopted and in that process now seek to identify the assesseees who have benefited on account of such "modus operandi". Therefore, considering the factual scenario no prejudice has been established to the assessee by not furnishing the investigation report in its entirety nor making the persons available for cross examination as admitted by the department in substantial number of cases the assesseees have not been specifically indicted by those persons from whom statements have been recorded.”*

As the assessee has failed to prove the test of prejudice, the contention that it was not allowed the opportunity of cross-examination can't be accepted. The right to cross-examine can't be treated as a test of fair hearing particularly when the assessee has not been indicted in the statements. By not providing the opportunity to cross-examine, there was no violation of principle of natural justice and the right to defend itself was not affected in any manner.

25. It is also found that the AO had not relied solely on the investigation report of the Calcutta Directorate as well as the statement of share brokers explaining the modus operandi of accommodation entries. Rather the AO had independently examined the true nature of the transactions carried out by the assessee. It is difficult to get direct information or evidence in respect of manipulative activities of price rigging and accommodation entry which happens with prior meeting of minds between the beneficiary and the stock broker. It was held by the Hon'ble Calcutta High Court in the case of *PCIT vs. Swati Bajaj (supra)* that a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we cannot lose sight of the fact that the shares of very little-known companies with in-significant business had a steep rise in the share prices within the period of little over a year. To reproduce from the said order:

*“69. Thus, the legal principle which can be culled out from the above decision is that to prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been a unnatural rise in the price of the scrips*

*of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, in our considered view the methodology adopted by the department cannot be faulted.*

.....

*72. In the light of the above discussion, the only conclusion that can be arrived at is that the opinion can be formed and the decision can be taken by taking note of the surrounding circumstances which had been elaborated upon in Kishore R. Ajmera (supra).*

*73. It is very rare and difficult to get direct information or evidence with regard to the prior meeting of minds of the persons involved in the manipulative activities of price rigging and insider trading. We can draw a parallel in cases of adulteration of food stuff, more than often action is initiated under the relevant Act after the adulteration takes place, the users of adulterated products get affected etc. Therefore, a holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, we cannot loose sight of the fact that the shares of very little known companies with insignificant business had a steep rise in the share prices within the period of little over a year. The Income-tax department was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessee made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail for several reasons which we have set out in the proceedings paragraphs. To reiterate, the assessee we not named in the report and when the assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuinity. Unfortunately, the assessee have been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assessee are lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in Section 68 of the Act. Thus, the assessee cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee*

*does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. It is incorrect to argue that the assesseees have been called upon to prove the negative in fact, it is the assesseees duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. The assesseees cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assesseees have lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. ....*

*75. While it may be true that M/s. Swati Bajaj, Mr. Girish Tigwani or other assesseees who are before us could have been regular investors, investors could or could not have been privy to the information or modus adopted. In our considered view, what is important is that it is the assessee who has to prove the claim to be genuine in terms of section 68 of the Act. Therefore, the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assesseees had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22 months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the assessing officer cannot be faulted.*

*76. It was argued that unless there are foundational facts, circumstantial evidence cannot be relied on. This argument does not merit acceptance as wealth of information and facts were on record which is the outcome of the investigation on the companies, stock brokers, entry operators etc. Based on those foundational facts the department has adopted the concept of "working backward" leading to the assesseees. While at that relevant stage the sounding circumstances, the normal human conduct of a prudent investor, the probabilities that may spill over, were all taken into consideration to negative the claim for exception made by the assessee. Therefore, the department was fully justified in taking note of the prevailing circumstances to decide against the assesseees."*

26. The Hon'ble High Court thus endorsed that surrounding circumstances has to be taken into account and the matter can't be decided only on the basis of documentary evidences brought on record by the assessee. The Court also upheld the approach of the Department by 'working

backwards' to reach to the beneficiaries who had taken accommodation entries. Further, the Court re-iterated that the onus was squarely on the assessee to prove the genuineness of the credit entry appearing in the form of LTCG in their books of accounts. The discrepancies and adverse evidence collected by the AO in the course of assessment were not explained by the assessee and the thrust was always on the documentary evidence of the transactions. The documentary evidences cannot be relied upon and treated as conclusive in view of various unanswered questions as already discussed earlier and the dubious nature of transactions. The surrounding circumstances of the transactions establish that the transactions entered into by the assessee were not genuine. The assessee had not discharged its onus against the overwhelming adverse evidences that has been brought on record by the Revenue authorities.

27. The thrust of the assessee's argument is that the sale consideration was received by cheque on which STT was paid and, therefore, the LTCG earned was genuine. This cannot be accepted in view of multiple adverse evidences collected by the Revenue and the assessee cannot be treated as a passive beneficiary of the transactions. The Hon'ble Supreme Court held in the case of *Security And Exchange Board of India vs. Rakhi Traders Pvt. Ltd., (supra)* that in trade transactions with huge price variations of the transactions, it will be too naïve to hold that the transactions were through screen based trading and hence anonymous. According to the Apex Court, such conclusion would be overlooking the prior meeting of minds involving synchronization of buy and sale order and that such transactions were manipulative/deceptive device to create a desired loss and/or profit.

28. On consideration of the facts and the surrounding circumstances as discussed above, we are of the considered opinion that the transactions entered into by the assessee are not genuine. The manner of purchase of shares of LDPL & MARL in off-market transactions, inordinate delay in dematerialization of those shares and their dematerialization just days before their sale; the assessee has not discharged its onus against the adverse evidences brought on record by the AO and no satisfactory reply was given to explain the same. The unusual sequence in the purchase transactions, the preponderance of probabilities and the surrounding circumstances as discussed above, are heavily loaded against the genuineness of the transactions and, therefore, we have no hesitation in confirming the findings of the AO which was upheld by the Id. CIT(A).

29. The assessee has relied upon several case laws which are found to be different on facts. On the other hand, the AO and the Id. CIT(A) have also relied upon various decisions in their respective orders. The issue is not of application of any particular case law, but to examine and appreciate the facts and circumstances of the instant case. The Id. AR has submitted that identical issue of sale of shares of LDPL and MARL was involved in the case of the sister concern, *Shailesh M Patel (HUF)*, which was decided by the ITAT Ahmedabad in *ITA NO.281/AHD/2019 dated 29.10.2021* in favour of the assessee. On the other hand, there are decisions where the issue of LTCG on sale of shares of LDPL was involved and which was decided against the assessee. It is also found that the decisions relied upon by the assessee were delivered prior to the judgement of Hon'ble Calcutta High Court in the case of *Swati Bajaj (supra)*. The decision in the case of Swati Bajaj is a detailed

one wherein various legal precedents of Hon'ble Supreme Court and other Courts have been taken into account. Further the investigation report prepared by Kolkata Directorate, the issue of cross- examination, human probability etc. were considered and discussed in detail therein. We have already extracted the relevant portion of the decision in our order earlier. Be that as it may, the legal position is well settled that each case rests on its own facts. Our decision in this case is guided solely by the facts and circumstances of the instant case, including the assessee's explanations in respect thereof. The case laws relied upon by the assessee were delivered in peculiar facts of each case. Therefore, the assessee cannot derive assistance from those case laws as the issue is principally factual.

30. The issue involved in the case is not of application of any particular case law but to examine and appreciate the facts and circumstances of the instant case. As the Revenue had invoked the provisions of Section 68 of the Act, the onus was squarely on the assessee to prove the genuineness of the credit transaction, which has not been discharged. The objection of the Ld. AR that the Revenue didn't add the entire sale consideration u/s 68 of the Act is also not relevant. The facts remains that the LTCG claim of the assessee was credited to books of the assessee and when the addition is made to the extent of LTCG credit we can't expand it to include the entire sale consideration. What is relevant is that the Revenue has brought enough materials on record to exhibit the transactions as sham or bogus as well as unexplained and the assessee has miserably failed to establish the genuineness of the impugned credit entry of LTCG appearing in the accounts. Since the exempted LTCG claim of the assessee was only a façade

created to conceal the true nature of the credit entry of Rs.73,29,100/- appearing in the accounts, the addition as made by the AO is confirmed and the order of the Id. CIT(A) is upheld.

31. In the result, appeal preferred by the assessee is dismissed.

**This Order pronounced on 18/06/2024**

Sd/-  
(SUCHITRA RAGHUNATH KAMBLE)  
**JUDICIAL MEMBER**

Ahmedabad; Dated 18/06/2024

S. K. SINHA

*True Copy*

Sd/-  
(NARENDRA PRASAD SINHA)  
**ACCOUNTANT MEMBER**

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad