

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 1854/Ahd/2019
Assessment Year 2014-15**

The ITO, Ward-1(2)(3), Ahmedabad (Appellant)	Vs	Shri Mahesh Somabhai Patel 28, Anurag Bunglow, Nr. B.R. Park, Science City, Sola, Ahmedabad-380061 PAN: ACCPP4215C (Respondent)
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**Revenue Represented: Smt. Malarkodi. R. Sr. D.R.
Assessee Represented: Shri Anil Kshatriya, Advocate**

Date of hearing : 26-03-2024
Date of pronouncement : 19-06-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue as against the appellate order dated 06.11.2019 passed by the Commissioner of Income Tax (Appeals)-10, Ahmedabad, arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2014-15.

2. The solitary ground raised by the Revenue is that the Ld. CIT(A) erred in deleting the addition of Rs.1,04,95,968/- being bogus Long Term Capital Gain claimed u/s.10(38) of the Act from bogus transaction of shares through penny stock.

3. The brief facts of the case is that the assessee is an individual, deriving income from trading in shares, Partner in Golden Developers. For the Assessment Year 2014-15, the assessee filed his Return of Income on 25.09.2014 showing total income of Rs.4,71,380/-. The return was taken up for scrutiny assessment and made an addition of Rs.1,09,67,348/- being bogus Long Term Capital gain on sale of penny stock scrip.

4. Aggrieved against the same, the assessee filed appeal before Ld. CIT(A). The Ld. CIT(A) held that the assessee purchased 13000 shares of M/s. Transcend Commerce Ltd. on 18.10.2012 by making cheque payment from Mehsana Sahakari Bank Ltd. which was debited on 20.10.2012 through share broker M/s. Jintana Vanijya Pvt. Ltd. and recognized stock exchange. On merger of M/s. Transcend Commerce Ltd on 16.05.2013, the assessee was allotted 28860 shares of M/s. SRK Industries Ltd. Thereafter the shares were subdivided into Rs.5/- face value of 57720 shares. The above shares were sold by the assessee during 13.11.2013 to 20.11.2013 in various lots for a consideration of Rs.1,04,95,967/- and received the consideration through RTGS, after paying the Securities Transaction Tax. Thus both the purchase and sales are done through banking channel and recognized stock exchange. After verification of the bank accounts of the assessee the Ld. CIT(A)

deleted the addition made by the Assessing Officer by observing as follows:

“The controversy has two facts, one that the appellant has earned genuine long term capital gains therefore the same should be allowed as exempt u/s.10 (38) of IT Act, 1961. In this connection, the submission of the appellant along with evidences such as bank details, share transfer forms, purchase and sale invoices which were before the AO, has been examined. The appellant has purchased 13000 shares of Transcend Commerce Ltd. on 18.10.2012 by making cheque payment. The cheque No. 156053 has been debited to appellant's account in the Mehsana Sahakari Bank Ltd. on 20.10.2012

Further the substantial issue is relating to genuineness of LTCG which have been claimed as exemption u/s 10(38) The appellant has purchased 13000 shares of Transcend commerce Ltd for an amount of Rs 1,30,000/- through Jintana Vanijya Private Ltd. on 20.10.2012. As per details verified, the cheque has actually been debited in the account of appellant on 20.10.2012. The shares were sold through recognized stock exchange. The appellant claimed that it was investment of Rs. 1,30,000/- through cheque to earn capital gain in due course of time. The 28860 shares of SRK industries received against 13000 shares of Transcend Commerce Limited on 16.05.2013 on merger. Thereafter shares were subdivided into 57720 shares. The appellant had earlier filed before the AO and now filed in this office following documents

- i) Statement of bank account showing the payment made to purchase the shares.*
- ii) A copy of demat account reflecting purchase and sale of shares.*
- iii) Brokers note showing the purchase of these shares.*
- iv) Brokers note showing the sale of these shares.*
- v) Bank Statements.*

The important details culled out from the documents on record are as under:

Sr. No.	Particulars	Details and Explanation		
1	<i>Scrip Purchased</i>	<i>Transcend Commerce limited</i>		
2	<i>Purchase Quantity</i>	<i>13000</i>		
3	<i>Date of Purchase</i>	<i>18.10.2012</i>		
4	<i>Amount paid for Purchase</i>	<i>Rs.1,30,000/-</i>		
5	<i>Payment made for Purchase</i>	<i>Rs.1,30,000/- through cheque debited on 20.10.2012 .</i>		
6	<i>Broker & Address for Purchase</i>	<i>Jintan Vanijya Private limited</i>		
7	<i>Date of Dematerialization Form</i>	<i>08.112012</i>		
8	<i>Date of entry in Demat A/c</i>	<i>08.11.2012</i>		
9	<i>Sale Quantity</i>	<i>Date</i>	<i>Number of Shares</i>	<i>Amount of Rs.</i>
		<i>13.11.2013</i>	<i>11150</i>	<i>2024873</i>
		<i>18.11.2013</i>	<i>20700</i>	<i>3744649</i>

		19.11:2013	21075	3851545
		20.11.2013	4795	874900
		Total	57720	1,04,95,967/-
10	Date of Sale	As above		
11	Amount of Sale	Rs. 1,04,95,967/-		
12	Amount received through	Received through RTGS		
13	Broker and Address for sale	Shah investor's home ltd. SIH.L House, Opp. Ambawadi Jain Temple, Ahmedabad.		

The perusal of information in table above indicates that the shares were purchased in the year 2012 for an amount of Rs. 1,30,000/- through cheque and the assessment year is 2013-14. Thereafter, the shares were dematerialized and credited to the account of appellant on 08.11.2012 for a few months before they are sold on 13.11.2013 to 20.11.2013 through BOLT of recognized stock market. As per record the appellant was not promoter of the company of which shares have been purchased, hence the shares can be held in physical form which were dematerialized only on 08.11.2012. The payments for sale of shares have also been received through banking channel. Therefore, no question can be raised on the timeline of the transaction.

4.1 It is also noticed that the Assessing Officer has not brought on record to prove that any of the evidences of share transactions filed by the Appellant are false or untrue. The AO has basically gone on the contents of Investigation report wherein it is stated that certain persons of Kolkata are involved into the business of providing accommodation of bills. However, she was not made available the copy of statement or the witness of department for cross-examination. This issue has cropped up through the judgments relied by the appellant. So the addition made was based merely on the self-serving contention is the form of statement without any further corroborative evidences which do not have any evidentiary value in the eyes of law in view of about facts of the case, it is amply clear that the facts of the case are squarely covered by the decision of Ahmedabad Tribunal in the case of Chartered Motors Pvt. Ltd. Vs. ACIT in IT(SS)A No. 26/Ahd 2012 which has been upheld by Hon'ble Gujarat High Court. In another case of CIT vs. Mukesh R. Marolla in ITA No.456 of 2007, ITAT, Mumbai wherein the shares were not recorded on the floor of stock exchange but effected through off-market trade held to be valid and Hon'ble Bombay High Court while confirming the decision held that off-market trade is no unlawful activity. It is further seen that SLP filed by the department against the said decision has been dismissed by the Apex Court-CIT vs. Mukesh R. Marolla in SLP (Civil) No. 20146/2012 (SC) dated 27.01.2014. When share purchase transactions were off-market transactions, the same cannot be held to be bogus even if any attempt is made to get details from stock exchanges.

I hold that any evidence collected behind the back of appellant and not provided the opportunity of cross examination, the same cannot be used as evidence against the Appellant to make the impugned addition. Even in absence of the statement, I find that the AO has not brought on record any other material collected through independent inquiries to show that the amount in question should be treated as undisclosed income of

the Appellant when the Appellant furnished all the documents which were available to establish that the LTCG claimed by the Appellant was genuine On the other hand, the shares are in the appellant's demat account from 08.11.2012 onwards which is credible and independent evidence, therefore, shares are held by the appellant for a period of more than 12 months from the date of cheque debited in his bank account i.e. 18.12.2012. AR discussed that this was shown as investments in the books of accounts.”

5. The Revenue is in appeal before us deleting the addition made by the Ld. CIT(A). The Ld. Sr. D.R. Smt. R. Malarkodi appearing for the Revenue strongly relied upon the observations made by the assessing officer in the assessment order and submitted in the facts of the case, the capital gain which has been made by the assessee are bogus penny stocks, hence the addition made is liable to be restored.

6. Per contra, the Ld. Counsel Shri Anil Kshatriya appearing for the assessee reiterated the submissions made before Ld. CIT(A). He further submitted that the assessee is an individual and engaged in trading of shares and also Partner in Golden Developers. The assessee also purchased various other shares namely Valchand Nagar, Adani Enterprise, Power Grid, Adani Power, India Bulls and sold the same during the financial year. Both purchase and sale of shares were done through banking channels through recognized stock exchange and through brokers. The shares were kept in Demat account and then sold through brokers. He drawn our attention to the memos of stock brokers and submitted that the shares were sold through authorized stock broking firms. The Ld. Counsel further submitted that the A.O. during the course of assessment proceedings did not make any independent enquiry on allotment of shares of Transcend Commerce Ltd., which was latter

merged with the SRK Industries Ltd. and allotted 28,860 shares. Thereafter when the shares were subdivided into face value of Rs.5/- and the assessee was allotted 57,720 shares. The A.O. did not make any enquiry whether SRK Industries Ltd. is a genuine company or not but merely relying upon the investigation report held that the sale transaction made by the assessee as bogus.

6.1. Ld. Counsel further drawn our attention to Page No. 115 of the Paper Book wherein various investments made in other shares namely Valchand Nagar, Adani Enterprise, Power Grid, Adani Power, India Bulls and relevant statement, Demat account, confirmation of accounts, bank accounts, etc. Thus the assessing officer is not correct in holding the transaction whereas the Ld. CIT(A) after verifying the entire transactions held the transactions as genuine and allowed the deduction u/s 10(38) of the Act which does not require any interference and the Revenue appeal is liable to be dismissed.

7. We have given our thoughtful consideration and perused the materials available on record. The assessing officer has held that the sale of shares of SRK Industries Ltd. as bogus transaction based on Investigation Wing report received by the department. Further perusal of the assessment order makes it clear, the assessing officer is not doubted the purchase of the shares through banking channels and demating the shares. Further the sale of above shares were made in four lots and the sale considerations were also received by the assessee by RTGS through banking channel which was also not doubted by the assessing officer. The

only reason for denying the benefit is based on the investigation report of the Department that M/s. SRK Industries Ltd. is identified as one of the penny stock company. The Ld. A.O. has not brought any material to support his finding that there has been collusion or connivance between the broker and the assessee for the introduction of his own unaccounted money in the sale transaction. Further despite the assessee's specific request, no opportunity of cross examination was provided to the assessee, on the basis of whose statements reliance has been placed to hold that the sale of shares was sham/bogus.

7.1. The Hon'ble Supreme Court in the case of **Parasben Kasturchand Kochar [2021] 130 taxmann.com 177 (SC)** held that the assessee-individual was engaged in business of trading in shares claimed long term capital gains arising out of sale of shares as exemption under section 10(38). The Assessing officer denied claim and made certain additions into assessee's income on the ground that said gains were earned through bogus penny stock transactions and companies to whom sold shares belonged were bogus in nature. The Tribunal observing that assessee by submitting records of purchase bills, sale bills, demat statement, etc., had discharged his onus of establishing said transactions to be fair and transparent, same not being earned from bogus companies was eligible for exemption under section 10(38) of the Act. The High court by impugned order held that no substantial question of law arose from Tribunal's order. The SC dismissed the SLP against said impugned order. In the above case, the Gujarat High Court while passing the order observed as under:

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

"9. In our considered opinion, in such case assessee cannot be held that he earned Long Term Capital gain through bogus company when he has discharged his onus by placing all the relevant details and some of the shares also remained in the account of the appellant after earning of the long term capital gain.

10. Learned A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.

11. In support of its contention, learned A.R. also cited an order of Coordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab (P.) Ltd. v. ITO wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the learned A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee."

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

7.2 Jurisdictional High Court in the case of **Himani M. Vakil [2014] 41 taxmann.com 425 (Gujarat)** held that where assessee duly proved genuineness of share transactions by bringing on record contract notes for sale and purchase, bank statement of broker and demat account showing transfer in and out of shares, Assessing Officer was not justified in bringing to tax capital gain arising from sale of shares as unexplained cash credit.

7.3 Further in the case of **Maheshchandra G. Vakil [2013] 40 taxmann.com 326 (Gujarat)**, the Gujarat High Court held that where assessee proved genuineness of share transactions by

contract notes for sale and purchase, bank statement of broker, demat account showing transfer in and out of shares, as also abstract of transactions furnished by stock exchange, Assessing Officer was not justified in treating capital gain arising from sale of shares as unexplained cash credit.”

8. The Co-ordinate Bench of this Tribunal in the case of **ITO Vs. Shri Nileshkumar Dashratbhai Patel** (in ITA No. 55/Ahd/2020 dated 16.08.2022) **considered the very same script of SRK Industries Ltd. and allowed the Long Term Capital Gain** claimed by the assessee by observing as follows:

“10. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the long term capital gain declared by the assessee on sale of shares of M/s SRK Industries Limited for ₹ 1,04,55,043/- was treated as bogus and manipulated, leading to the addition by the AO under section 68 of the Act. The view of the AO was based on certain factors which have been elaborated in the preceding paragraph. However, the ld. CIT-A, subsequently, was pleased to delete the addition made by the AO, holding the impugned long term capital gain as genuine.

10.1 The 1st controversy arises before us whether the name of the script M/s SRK industries Ltd is appearing in the investigation report carried out by Kolkata investigation wing. Indeed, it has been alleged by the AO that the name of impugned script is appearing in the list of penny stock and this fact was also found to be true by the SEBI in its investigation. In this regard, we note that the allegation by the revenue has not made any reference to any such report except merely a bald statement recorded in the assessment order. The dominant basis of treating the impugned long-term capital gain as bogus was based on the investigation carried out by investigation wing of income tax Kolkata. Thus it was the onus upon the revenue to bring such facts on record before alleging against the assessee. In the present case the learned CIT-A after detailed verification has reached to the conclusion that the transaction carried out by the assessee was genuine and based on the documentary evidence. At the time of hearing, the learned DR has not brought any iota of evidence against the finding of the learned CIT-A. At the same time, we also note that there was no allegation against the broker through whom the assessee has purchased and sold the impugned script. What has been adopted by the AO for making the addition was the modus operandi highlighted by the investigation wing of Kolkata. To our understanding, the mere modus operandi cannot be the basis of making the addition or treating the capital gain as bogus until and unless it is supported by the material documents. On analyzing the facts of the present case, we note that the AO on one hand has alleged that the entire transaction was bogus but on the other hand the AO himself has allowed the cost of acquisition against the sale of shares, meaning thereby, the purchase of the shares has been admitted as genuine. The transactions of

purchase and sales go hand in hand. In simple words, sales is not possible without having the purchases. Thus, once purchases has been admitted as genuine, then corresponding sales cannot be doubted until and unless some adverse materials are brought on record. As such, we note that the AO in the present case has taken contradictory stand. On one hand, the AO is treating the entire transaction as sham transaction and on the other hand he's allowing the benefit of the cost of acquisition for the shares while determining the bogus longterm capital gain. It is important to note that the AO in assessment order has also made the addition of Rs. 209200/- being 2 percent of the long-term capital gain which the assessee incurred in arranging alleged bogus long-term capital gain. Admittedly, the same was deleted by the learned CIT-A, the revenue has not challenge the same before the ITAT. Thus, it is transpired is this that such expenses were not bogus in nature. Certainly, the impugned expenses have direct nexus with the alleged so-called bogus long-term capital gain but the revenue has not challenge the deletion of the same. Thus, it is construed that the impugned amount was admitted as genuine which is again contradictory to the stand taken by the AO.

10.2 It was also alleged that the price of the share of M/s SRK Industrires Ltd. was increased manifold in a short period of time which was not believed by the authorities below on the principles of preponderance of human probabilities in the given facts and circumstances. The rise in the price of the scripts of a company, having no financial base/business activity/profitability certainly gives rise to the doubt about such increase in the price. But in our considered view, this cannot be a sole criteria for reaching to the conclusion that the price were rigged up to generate the long-term capital gain which is exempted under section 10(38) of the Act. Such observation during the assessment proceedings provides reasons to investigate the matter in detail and the same cannot take the place of the evidence. But in the case on hand, there was no enquiry conducted either by the SEBI or the stock exchange with respect to rigging up of share price of M/s SRK Industries Ltd. by the assessee or his broker. Similarly, there was no complaint filed by any of the party either to the SEBI or the stock exchange about the assessee or brokers impleading that they were involved in the activity of rigging up the price of the shares. Similarly, the AO has not conducted an enquiry from the SEBI or BSE about the assessee whether he was engaged in the frivolous activities as alleged.

10.3 We also note that the AO has referred to the investigation carried out by the investigation wing of Kolkata wherein it was unearthed that the certain broker or entry provider have accepted that they have used the script of the several paper companies to provide bogus exempted long term capital gain to certain class of beneficiaries in consideration of cash. However, there was no name of the broker namely M/s Shah Investor Home Ltd. in the list of the brokers provided by the AO through whom the assessee has carried out the transactions. Thus the assessee cannot be alleged for the involvement in price manipulation. Nevertheless, there was no information available on record whether the name of the assessee was appearing in the investigation carried out by the investigation wing of Kolkata or any other investigation carried out by the Income Tax Department. It was also not brought any material that those brokers or entry providers have taken the name of the assessee or the broker of the assessee and provided their services either to the assessee or assessee broker.

10.4 The alleged scam might have taken place on generating LTCG to avoid the payment of tax. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this arrangement. The chain of events and the live link of

the assessee's action that he was involved in such rigging up of share price should be established based on cogent materials. The allegation as discussed above implies that there was cash exchanged for taking exempted income by way of long term capital gain by way of cheque through banking channels. This allegation that cash had changed hands, has to be brought on record by the Revenue but we find that there is no such whisper in the order of the AO. There was no information brought on record suggesting that there was exchange of cash against the long-term capital gain shown by the assessee. Likewise we also note that the assessee has discharged the onus imposed under section 68 of the Act by furnishing the necessary documentary evidence in support of the identity, genuineness of transaction and creditworthiness of the parties. Therefore the same cannot be made subject to tax under the provisions of section 68 of the Act.

10.5 We also note that there was no dispute raised by the Revenue with respect to the following facts:

- 1. Purchase consideration of share was made through cheque*
- 2. Share was duly dematerialized in demat account*
- 3. Shares were sold through stock exchange after the payment of STT. The transactions have been confirmed by brokers.*
- 4. The payment are received through ECS through demat account*
- 5. Inflow of shares are reflected in demat account. Shares are transferred through demat account and buyer are not know top the assessee.*
- 6. There is no evidence that the assessee has paid cash to the buyer or the broker or any other entry provider for booking LTCG and share were purchased by the determined buyer.*
- 7. The assessee has no nexus or any relation with company, its director or entry operator*
- 8. The assessee may have got only incidental benefit of price rise*
- 9. The opportunity of cross examination has not been extended to the assessee despite having the request from the assessee.*

10.6 From the above, conduct of the assessee suggests that he was not involved in rigging or any wrongdoing. The case laws relied by the authorities below are distinguishable from the present facts of the case in so far there was SEBI enquiry conducted and found guilty of wrong practices but it is not so in the case on hand.

10.7 In our view, the income generated by the assessee cannot be held bogus only on the basis of the modus operandi, generalisation, and preponderance of human probabilities. In order to hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stock brokers for such an arrangements. In absence of such finding, it is not justifiable to link the fact or the finding unearthed in case of some third party or parties with the transactions carried out by the assessee. Further the case laws relied by the AO are with regard to the test of human probabilities which may be of greater impact but the same cannot used blindly without disposing off the evidence forwarded by the assessee. In simple words, there were not brought any evidence from independent enquiry to corroborate the allegation.

10.8 Now the controversy also arises whether a person who genuinely purchases the shares at a low price and sold at high price, therefore, he enjoyed the windfall from such scripts, can he be disallowed the benefit of tax exemption provided under section 10(38)

of the Act in a situation where it is established that the share price of the company was rigged up to extend the benefit to certain parties. The Justice cannot be delivered in a mechanical manner. In other words, what we see on the records available before us, sometime we have to travel beyond it after ignoring the same. Furthermore, while delivering the justice, we have to ensure in this process that culprits should only be punished and no innocent should be castigated. An innocent person should not suffer for the wrongdoings of the other parties. In the case on hand, admittedly there was no evidence available on record suggesting that the assessee or his broker was involved in the rigging up of the price of the script of SRK Industries Ltd. Thus, it appears that the assessee acted in the given facts and circumstances in good-faith.

10.9 In holding so we draw support and guidance from the judgment of Hon'ble Delhi High court in case of Pr. CIT vs. Smt. Krishna Devi reported in 126 taxmann.com 80 where it was held as under:

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire

conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.

10.10 Respectfully following the judgment of Hon'ble Delhi High Court (Supra), we hold that in absence of any specific finding against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated as far as long term capital gain earned on sale of share of M/s SRK Industries is concern.

10.11 We also note that this Tribunal in the case of Parasben Kasturchand Kochar Mehta Lodha & Co. Chartered Accountant vs. ITO bearing ITA No. 549/Ahd/2008 involving identical facts and circumstances has held as under:

7. We have gone through the relevant record and impugned order and heard both the parties. Assessee submitted that he is a customer of ICICI Bank and having demat account of ICICI Securities Ltd. and he has purchased shares through ICICI Securities Ltd. and money has been paid through banking channel. Copies of bank statement and Demat account have been submitted before the lower authorities.

8. Ld. A.R. also drawn our attention towards the statement of Edelweiss Broking Ltd. through the said company shares were sold and also shown us copy of the Contract Note and all these details were furnished before the lower authorities. The assessee has earned long term capital gain from the sale of companies share i.e. Alpha Graphic India Ltd. and Blazon Marbles.

9. In our considered opinion, in such case assessee cannot be held that he earned Long Term Capital gain through bogus company when he has discharged his onus by placing all the relevant details and some of the shares also remained in the account of the appellant after earning of the long term capital gain.

10.Ld. A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.

11. In support of its contention, ld. A.R. also cited an order of Co-ordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab Pvt. Ltd. vs. ITO wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the ld. A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee.

10.12 At this juncture we also feel pertinent to refer the order of coordinate bench of Indore in case of Shivnarayan Sharma & Ors bearing ITA Nos. 889/Ind/2018, 474,206,60,987/Ind/2019, where in identical fact and circumstances held as under:

16. Since we are adjudicating the above stated common issue on the basis of above assessee namely Shri Shivnarayan Sharma, we note that the assessee purchased 6000 equity shares of Conart Traders Ltd on 22.10.2011 at a cost of Rs.1,50,000/- . There is no restriction under the law to purchase equity shares on off line mode. Vide order dated 22.3.2013 of the Hon'ble Mumbai High Court M/s Conart Traders Limited was merged with M/s SAL and in lieu there of 6000 shares of M/s SAL were received by the assessee in its demat account. After holding the equity shares for more than 12 months since purchased on 22.10.2011, assessee sold the shares of M/s SAL during the period April 2014 to June 2014 through a registered broker and all the transactions of sale of shares took place on the recognised stock exchange. Sale consideration was received in the bank account attached with the Demat account. The detail of the persons purchasing the shares is not provided on the portal of SEBI and all the transactions of purchase and sale took place on the portal through registered brokers under the control of SEBI. M/s SAL has not been struck off as a shell company. Trading of shares of M/s SAL was permitted by SEBI. Prime facie, all the conditions provided u/s 10(38) of the Act seems to have been fulfilled by the assessee.

17. As regards the second issue raised is that assessee was not provided opportunity of cross examination, we observe that Ld. A.O has referred to some investigation carried out by the Department in the case of some brokers and other assessee(s) located at Kolkata and other places and there is a reference of the company M/s SAL. However it is not disputed that name of the assessee is not appearing in such report nor any evidence was found by the Ld. A.O which could indicate that assessee was also a part or connected to the alleged racket of providing accommodation entry of bogus LTCG nor any proof of any agreement between the assessee and other persons mentioned in the report has been found. So the basis of addition is primarily on the statement of third party as well as the information gathered from other sources. Perusal of the records shows that the assessee has not been provided any access to such report nor any opportunity was provided to cross examine those persons who accepted to have provided accommodation entries for the bogus LTCG, to the assessee.

18. We observe that all the above stated facts and the issue of genuineness of LTCG and failure of the Ld. A.O to provide opportunity to cross examination by the assessee with regard to the addition made u/s 68 of the Act for the sale consideration received from sale of equity shares of M/s SAL and addition for estimated brokerage expenses has been dealt by the Co-ordinate Bench of Mumbai Tribunal in the case of Dipesh Ramesh Vardhan V/s DCIT (supra) and the same is squarely applicable on the instant appeals.

23. We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have not found to be incorrect. The conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the equity shares held in Demat account and transactions performed on a recognised stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of Andaman Timber Industries vs. CCE 281 CTR 241 (SC) that "not allowing the assessee to cross examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected".

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Co-ordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018, 474/Ind/2019, 206/Ind/2019, 60/Ind/2019, 61/Ind/2019 and 987/Ind/2019 are allowed.

10.13 It is also important to note that the addition was made by the AO based on the statements/information received from the 3rd party but no opportunity was afforded by the revenue for the cross-examination which is against the principles of natural justice as

held by the Hon'ble Apex Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006.

10.14 We also note that various Tribunals involving identical facts and circumstances have decided the issue on hand in favour of the assessee. The list of such cases for ready reference are enumerated as under:

Sr. No.	ITA No.	Case
1	17/JP/2018	ITO vs. KapilMittal
2	2966/CHNY/2018	Mrs Madhu V Jhaver
3	4267/Mum/2018 & 694/Mum/2018	Smt. Geeta Khare & Anr.
4	1775/Mum/2019	Shri Rakesh Shantilal Shah vs. ITO
5	3740/Mum/2019	Smt. Bhavna B. Kothari
6	80/PUN/2019	Dnyandeo Laxman Rajale
7	1413 to 1420 /CHNY/ 2018	M/s. Pankaj Agarwal & Sons (HUF) & Ors. vs. ITO

10.15 In view of the above discussion we hold that the capital gain earned by the assessee cannot be held bogus merely on the basis of some report finding unearthed in case of third party/parties unless cogent material is brought against particular assessee on record. Therefore, we don't find any reason to disturb the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the grounds of Revenue's appeal are dismissed.

11. In the result, the appeal of the Revenue is dismissed.”

8.1 Similarly, the Co-ordinate Bench of Mumbai Tribunal in the case of Smt. Geeta Khare Vs. ACIT in ITA No. 4267/Mum/2018 dated 29.05.2019 treated the Long Term Capital Gain on sale of shares of SRK Industries Ltd. as a genuine transaction and granted exemption u/s. 10(38) of the Act by observing as follows:

7.10. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld CITA was not justified in upholding the action of the ld AO in bringing the long term capital gains on sale of shares of SRK Industries Ltd in the sum of Rs. 2,26,36,372/- as unexplained income of the assessee treating the same as just an accommodation entry. The ld AO is directed to grant exemption u/s 10(38) of the Act in the sum of Rs. 2,26,36,372/- to the assessee. Accordingly, the ground raised by the assessee is allowed.

9. Respectfully following the above judicial precedents, we do not find any infirmity in the order passed by the Ld. CIT(A) in allowing the assessee's appeal and granting the benefit of Section 10(38) of the Act to the assessee. Thus the grounds raised by the Revenue is devoid of merits and the same is liable to be dismissed.

10. In the result, **the appeal filed by the Revenue is hereby dismissed.**

Order pronounced in the open court on	19-06-2024
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Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Ahmedabad: Dated 19/06/2024 TRUE COPY

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद