

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI  
BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

**ITA No. 2010/Mum/2023 (A.Y.2014-15)**

**ITA No. 2011/Mum/2023 (A.Y.2015-16)**

**Antony Leo Sequeira**

I-702 Green Wood,  
Andheri-Kurla Road,  
Andheri (E), Mumbai-400 059  
PAN: AAHPS3570Q

..... Appellant

Vs.

**ACIT, Central Cir-2(1),**

R. No. 80  
Kautilya Bhavan, C-41 to C-43,  
G-Block, Bandra Kurla  
Complex, Bandra (East),  
Mumbai- 400 051

..... Respondent

&

**ITA No. 2720/Mum/2023 (A.Y.2014-15)**

**ITA No. 2718/Mum/2023 (A.Y.2015-16)**

**ACIT, Central Cir-2(1),**

R. No. 80  
Kautilya Bhavan, C-41 to C-43,  
G-Block, Bandra Kurla  
Complex, Bandra (East),  
Mumbai- 400 051

..... Appellant

Vs.

**Antony Leo Sequeira**

I-702 Green Wood,  
Andheri-Kurla Road,  
Andheri (E), Mumbai-400 059  
PAN: AAHPS3570Q

..... Respondent

Appellant by : Shri K. Gopal & Shri Om Kandalkar , Ld. AR  
Respondent by : Shri Ajay Chandra & Shri Manoj Kumar,  
Ld. DR  
Date of hearing : 08/05/2024  
Date of pronouncement : 10/07/2024

**ORDER****PER GAGAN GOYAL, A.M:**

These cross appeals by Revenue and Assessee are directed against the order of Ld. CIT (A) – 48, Mumbai dated 14.05.2021 and 11.04.2023 respectively passed u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2014-15 and 2015-16. The revenue has raised the following grounds in ITA No. 2720/Mum/2023 for AY 2014-15:-

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in allowing the appeal of the assessee without going into the merits of the additions as it was evident that assessee had taken accommodation entry in the form of penny stock.*

2. The assessee has raised the following grounds of appeal in ITA No. 2010/Mum/2023 for AY 2014-15:-

## **I. Legal Grounds:**

### **A. Re-opening by way of notice dated 07.03.2019 issued under section 148 of the Act is bad in law**

1. The Ld. Commissioner of Income Tax (Appeals) 48, Mumbai [hereinafter referred to as 'CIT (A)'] erred in passing the order dated 11.04.2023 and upholding the validity of the notice dated 07.03.2019 issued under section 148 of the Act without appreciating the fact that there is no tangible material available on record to suggest that income chargeable to tax has escaped assessment. Therefore, in the absence of any reason to believe' that income chargeable to tax has escaped assessment, the order passed by the Ld. CIT (A) is unlawful, bad in law and the same may be quashed and set aside.

2. The Ld. CIT(A) is not justified in upholding the reopening by issuing the notice dated 07.03.2019 under section 148 of the Act without appreciating the fact that the reopening has been initiated by merely relying upon the information received from the Director of Income Tax (Inv.) Unit 6(2), Mumbai and the same amounts to borrowed satisfaction. Hence, reopening merely on the basis of borrowed satisfaction is not permissible by law and therefore, the reopening is unlawful, unwarranted and therefore, bad in law.

## **II. On merits:**

3. The Ld. CIT(A) erred in confirming the action of the Ld. A.O. in making disallowance amounting to Rs. 5,03,98,853/- under section 68 of the Act by treating the Long term Capital Gains as unexplained cash credit without appreciating the facts and circumstances of the case. Thus, the addition made under section 68 of the Act is not justified and the same may be deleted.

4. the Ld. CIT (A) is not justified in passing the order dated 11.04.2023 upholding the disallowance amounting to Rs.5, 03, 98,853/- made under section 68 of the Act without appreciating the fact that the said transaction of sale of shares was conducted through recognised stock exchange. Therefore, the same constitutes a genuine transaction. Therefore, the disallowance made under section 68 of the Act is unjustified and therefore deserves to be deleted.

5. The Ld. CIT (A) is not justified in upholding the disallowance made under section 68 of the Act amounting to Rs. 5, 03, 98,853/- on account of alleged bogus long term Capital Gains without providing any opportunity to the Appellant to cross examine the parties whose statements were relied upon during the course of search action conducted under section 132 of the Act on the premises of M/s. Risa International Limited. Thus, the

*disallowance made is in severe breach of the principles of natural justice and therefore, the disallowance may be deleted.*

*6. The Ld. CIT(A) is not justified in upholding the disallowance made under section 68 of the Act without appreciating the facts that the Appellant has discharged the primary onus cast upon him by the provisions of section 68 of the Act by providing all the details regarding the sale and purchases of shares so as to explain the nature, source and genuineness of the said transaction. In view of the same, the disallowance made under section 68 of the Act is not justified and therefore, the same may be deleted.*

*7. the Appellant seeks leave to add, alter and amend the above grounds whenever required.*

3. The brief facts of the case are that the assessee being an individual filed his return of income for A.Y. 2014-15 on 21.11.2014 declaring total income at Rs. 38,34,930/- consisting of income under the head 'salary', income from house property and income from other sources. During the year under consideration, assessee claimed exempt long term capital gain u/s. 10(38) of the Act amounting to Rs. 5, 03, 98,853/-. This LTCG arisen out of sale and purchase of the shares of M/s. Risa International Ltd. There was a search carried out at the premises of Shri Naresh Manakchand Jain.

4. In this case, information has been received in the office of the DDIT (Inv.)- Unit 6(2), Mumbai from the office of the DGIT (Inv), Pune, which has been subsequently forwarded to this office in regard to the beneficiaries who have obtained bogus LTCG in the shares of M/s. Risa International Limited (hereinafter referred as RIL). M/s RIL was formerly known as M/s. Govindji Trikamdas Export Ltd having registered address at 604, Kushal Point, 4th Road, Ghatkopar (West), Mumbai. Search action u/s. 132 of the Income Tax Act was conducted on 20.10.2016 at the office premises of RIL, 1315, Tower B, Dalamal Towers, Free

Press Journal Marg, Nariman Point, Mumbai. RIL made preferential allotment of 3,14,00,000 equity shares at price of Rs. 10/- per share and raised Rs. 31,40,00,000/- as paid up capital of the company from 49 persons including the assessee, Shri Antony Sequeira. The assessee sold the shares on BSE platform and received a payout in the bank account.

5. In view of above, a notice u/s. 148 of the Act dated 07.03.2019 was issued to the assessee. In response to this notice, the assessee has filed return of income on 03.04.2019 again declaring the same income i.e. Rs. 38, 34,930/-. Ultimately, an addition u/s. 68 of the Act amounting to Rs. 5, 03, 98,853/- was made. The assessee being aggrieved with this order preferred an appeal before the Ld. CIT (A), who in turn dismissed the appeal of assessee vide order dated 11.04.2023. The present appeal of the assessee before us is against this order of Ld. CIT (A) and that we will take up after deciding the appeal of the revenue in the same order.

6. As observed (supra), assessment of the assessee was already completed u/s. 143(3) r.w.s 147 of the Act vide order dated 09.12.2019. Subsequently, a notice u/s. 153C of the Act was issued on 04.03.2021 and assessee again filed a return in response to the same on 12<sup>th</sup> February 2021 declaring total income at Rs. 38,34,930/-. We have observed in the order passed by the AO u/s. 143(3) r.w.s. 153C of the Act that, same figure of addition i.e. Rs. 5, 03, 98,853/- was made and in addition to this an amount of commission amounting to Rs. 16,27,013/- was also made on account of expenses on alleged bogus LTCG. The assessee being aggrieved with this order of AO preferred an appeal before the Ld.

CIT (A), who in turn allowed the appeal of the assessee. The relevant extracts of the findings of the Ld. CIT (A) are reproduced herein below as under:-

*“6.14 Conclusion- The aforesaid detailed discussion with respect to various judicial decisions clearly laid down the following principles -*

*(1) The assessments which have been concluded u/s. 143(3) of the Act and not pending at the time of search proceedings, do not abate.*

*(ii) For this purpose, intimation u/s. 143(1) of the Act would constitute an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/s. Gurinder Singh Bawa (79 taxmann.com 398)*

*(iii) the proceedings u/s. 153A/153C of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material is found during the course of search proceedings.*

*(iv) The Assessing officer does not have jurisdiction to make additions/disallowances which are not based on any incriminating material found during the course of search proceedings.*

*(v) In the case of completed/un-abetted assessments, where no incriminating material is found during the course of search, the assessment u/s. 153A/153C of the Act is to be made on originally assessed/returned income and no addition or disallowance can be made de hors the incriminating evidences recovered during the course of search.*

*(vi) Any admission or confession needs corroboration with evidences. In order to make a genuine and legally sustainable addition on the basis of admission or confession during search action, it is necessary that some incriminating material must have been found to correlate the undisclosed income with such statement.*

*(vii) Any statement recorded under section 132(4) cannot be considered as incriminating material found in the course of search as these are recorded to elicit more information/explanation of the search person on the incriminating documents/gold/jewellery found during search.*

*6.15. Conclusion in the present case, additions have been made on account of information received from the Investigation Wing regarding accommodation entries from Mr Naresh Manakchand Jain group. As stated above, the AO has not brought on record either through the assessment order or any other communication about any incriminating document or material found or seized during the Search and Seizure action u/s. 132 of the Act in the case of Mr Naresh Manakchand Jain, which can be connected with the*

*impugned addition. In this regard, the appellant has submitted few judicial decisions of Hon'ble ITAT where identical issue of accommodation entries from Mr Naresh Manakchand Jain, have been decided in favour of the assesseees. Few of the judgments are briefly as under-*

*1. In case of DCIT Vs Meghraj Sohanlal Jain (Supra), ITAT Mumbai "D" Bench held as under (This Judgment is related to individual case of Appellant Director for A.Y. 2013-14 in which issues relevant to the unsecured loan received from Naresh Manakchand Jain & His associates)*

*i) "It is submitted that a search & seizure operation u/s. 132 of I.T. Act was conducted by DIT Unit 3(2), Mumbai, Mangal Group on 01.10.2013. The Mangal Group is owned by Mr. Meghraj Jain, Mr Ajit Jain & family members of them. They hold major shareholding and directorship in companies of Mangal group. The Ld. AO has made additions related to transaction with Naresh Manakchand Jain group in way of unsecured loan/ share application money/ bogus purchase to whichever parties covered in Mangal Group.*

*ii) Then, Your Honourable Predecessor CIT (A) has deleted the addition made by the lad. AO in Assessment Year 2013-14 in case of Mr. Meghraj Jain who is part of Mangal Group. Further, the revenue has filed appeal against this order. Then, Hon'ble ITA T Mumbai Bench D, in its order Ref ITA No-4703/M/2017 dated 29th Aug. 2019 have dismissed the revenue's appeal. It is seen that issue & facts of the deleted addition are identical in your appellant matter.*

*iii) Both of the respected authorities have noticed that the appellant furnished the copies of the account confirmation of the lender companies, acknowledgement of income tax return of lender companies, and their audited financial statement, bank account of lender companies and affidavit of the lender companies confirming the loan transactions. The companies had also filed the return of income in the relevant assessment year. There were nowhere found immediate deposit of cash before issuance of cheques. The loan was given by account payee cheques through normal banking channels. The interest was also paid and TDS was also deducted thereon. The identity, credit-worthiness and genuineness of the transaction were not seems in genuine. It is seen that the above said facts are as much as similar to the case of your appellant.*

*Copy of the CIT (A) as well as Copy of ITAT order was attached in case of Mr. Ajit Jain whose was another director of your appellant."*

*2. The Jurisdictional Hon'ble Income Tax Appellate Tribunal (ITAT) Mumbai Bench "B" in our own case of Diwali Capital & Finance Pvt. Ltd. V. DCIT CC-2(3) ITAT No. 2091 & 3986/MUM/2017 (A.Y.: 2007-08 & 2008-09)] has held as under:*

"From the facts of the case that during the assessment proceedings, the assessee has submitted the following details: -

During assessment proceedings the assessee had submitted copy of income tax return along with audit report of share applicants i.e. investing companies. Copy of form no.2 of Diwali Capital & Finance Pvt. Ltd. Copies of bank accounts of the assessee which inter alia depicts the credit entries by way of transfer of the amounts given to the assessee company by cheque.

Confirmation of the investing company has also been filed.

Sr. No.	Name	Amount
1	Alka Diamonds Industries Ltd.	1,00,00,000/-
2	Artillegence Bio-Innovations Ltd.	75,00,000
3	Macrosoft Technology Pvt. Ltd	75,00,000/-
4	Nicco Securities Pvt. Ltd	75,00,000/-
5	Navlakha Agrex Pvt. Ltd.	75,00,000/-
6	Total	4,00,00,000/-

13. Further during the course of assessment proceeding the assessee also informed that the share application form received from the investor companies and some of the other documents i.e. copy of the resolution passed by the Board of Directors of assessee company for investment in shares of these companies Covering letter forwarding there with the required documents/ papers for Investment in shares of the assessee company were seized in search action u/s. 132 of the Act, in the office premises in November 2014. These papers have been seized and it is still lying with the assessing officer. Copies of the same have not been given to the assessee as yet. We find from the facts of the case that the assessee has filed the relevant pages of inventory listing the documents during the course of search u/s. 132 for establishing the fact that the documents mentioned above have been seized and are in the possession of the assessing officer. The above documents are enough to establish the credibility and the genuineness of the transactions. So far as present status of the investing companies is concerned, the assessee has filled data of Company Master Data from the website of Ministry of Corporate Affairs (MCA). Such data are in respect of investing company Alka Diamond Industries Ltd. The state of the

*Investing Company as on 25.10.2017 is active. Therefore, the company is still in existence and active. The master data also discloses that Balance sheet up to 31.03.2016 has been filed in respect of each of the companies mentioned above. Therefore, there cannot be any doubt about the identity of the company. The amounts have been received from investing company have Come through banking channel which are duly reflected in the Balance sheet of the assessee company. Therefore, there cannot be any doubt about the genuineness of the transaction. So far as credit worthiness is concerned the investing company is regularly assessed to income tax and they are disclosing substantial income. Even these transactions are disclosed in the audited accounts filed along with the return of income.*

*14. As the facts are identical to AY 2007-08 and the reason recorded by CIT (A) while deleting the addition in A.Y. 2007-08 are also exactly identical. In such circumstances, we have already confirmed the order of CIT (A) deleting the addition and hence, following the earlier years order as decided above, we delete the addition. The appeal of assessee is allowed.*

*3. The Jurisdictional Hon'ble Income Tax Appellate Tribunal (ITAT) Mumbai Bench "B" in case of our group concern Bluestock Investment Pvt. Ltd. V. DCIT CC-2(3) [ITAT No. 2090 & 3987/MUM/2017 (A.Y.: 2008-09 & 2007-08)] has held as under: -*

*10. We find that exactly identical issue has been dealt with by us in the group cases in the case of Diwali Capital & Finance Pvt. Ltd. vs. DCIT in ITA No. 2091/Mum/2018 for AY 2008-09 wherein, we have held as under. -*

*"11. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that during the assessment proceedings, the assessee has submitted the following details: - During assessment proceedings the assessee had submitted copy of income tax return along with audit report of share applicants i.e. investing companies.*

*Copy of form no.2 of Diwali Capital & Finance Pvt. Ltd., Copies of bank accounts of the assessee which inter alia depicts the credit entries by way of transfer of the amounts given to the assessee company by cheque. Confirmation of the investing company has also been filed. Further during the course of assessment proceeding the assessee also informed that the share application form received from the investor companies and some of the other documents i.e. copy of the resolution passed by the Board of Directors of assessee company for investment in shares of these companies Covering letter forwarding there with the required documents/papers for investment in shares of the assessee company were seized in search action u/s. 132 of the Act, in the office premises in November 2014. These papers have been seized and it is still lying with the assessing officer. Copies of the same have not been given to the assessee as yet. We find from the facts of the case*

*that the assessee has filed the relevant pages of inventory listing the documents during the course of search u/s. 132 for establishing the fact that the documents mentioned above have been seized and are in the possession of the assessing officer. The above documents are enough to establish the credibility and the genuineness of the transactions. So far as present status of the investing companies is concerned, the assessee has filed data of Company Master Data from the website of Ministry of Corporate Affairs (MCA). Such data are in respect of investing company Alka Diamond Industries Ltd. The state of the investing company as on 25.10.2017 is active. Therefore, the company is still in existence and active. The master data also discloses that Balance sheet up to 31.03.2016 has been filed in respect of each of the companies mentioned above. Therefore, there cannot be any doubt about the identity of the company. The amounts have been received from investing company have Come through banking channel which are duly reflected in the Balance sheet of the assessee company. Therefore, there cannot be any doubt about the genuineness of the transaction. So far as credit worthiness is concerned the investing company is regularly assessed to income tax and they are disclosing sub.*

*12. As the facts are identical to AY 2007-08 and the reason recorded by CIT (A) while deleting the addition in AY 2007-08 are also exactly identical. In such circumstances, we have already confirmed the order of CIT (A) deleting the addition and hence, following the earlier years order as decided above, we delete the addition. The appeal of assessee is allowed."*

*13. As the issue is covered in assessee's group case in the case of Diwali Capital & Finance Pvt. Ltd. (supra), the facts being identical, we delete the addition and allow this appeal of assessee.*

***6.16 Considering the totality of the facts and circumstances, I am of the considered view that the impugned addition cannot survive de hors the incriminating evidences as held in the above binding judicial decisions. Moreover, the issue is finally settled by Hon'ble Supreme Court in the recent judgment in the case of PCIT Vs Abhisar Buildwell P. Ltd. in Civil Appeal no. 6580 of 2021 dated 24.04.2023. Hence, there is no scope of any ambiguity now. The AO is accordingly directed to delete the impugned addition made in the assessment order. Thus, the ground of appeal nos. 1 and 2 are allowed.***

7. We have gone through the order of Ld. CIT (A) alongwith judicial pronouncement relied upon by him with reference to the facts of the matter. The judgment of Ld. CIT (A) while relying on PCIT Vs. Abhisar Buildwell P. Ltd. in Civil Appeal no. 6580 of 2021 dated 24.04.2023 is correct interpretation of the issue

and we do not find any perversity in the order of Ld. CIT (A). **In the result, both the appeals filed by the revenue in ITA No. 2720/Mum/2023 (A.Y. 2014-15) and ITA No. 2718/Mum/2023 (A.Y. 2015-16) are dismissed.**

8. **In the result, both the appeals of the revenue are dismissed.**

**ITA No. 2010/Mum/2023 (A.Y.2014-15)**

**ITA No. 2011/Mum/2023 (A.Y.2015-16)**

9. Both the appeals filed by the assessee are identical in the nature. We are adjudicating ITA No. 2010/Mum/2023 (A.Y. 2014-15) first and the findings will apply mutatis mutandis to ITA No. 2011/Mum/2023 (A.Y. 2015-16) also. Fact of the case has already been partially discussed (supra) in the appeal of the revenue. Here our focus will be on merits of the case and consequent facts applicable.

10. The brief facts of the case are, during the year under review, the Appellant had sold 84,775 shares of M/s Risa International Ltd for a total consideration of Rs. 5,12,46,602/- and long term capital gain on sale of such shares amounting to Rs 5,03,98,853/- was treated as exempt income u/s. 10(38) of the Act. The Appellant was in receipt of notice u/s. 148 of the Act dated 07.03.2019 in response to which he had e-filed the return of income on 03.04.2019. The Ld. AO had provided the reasons for reopening of the assessment to the Appellant on 17.06.2019 (attached herewith as Annexure 3 (Refer Page No. 31- 35 of Paper Book)), against which it has filed its objections vide letter dated 09.07.2019 on 11.07.2019 (attached herewith as Annexure 4 (Refer Page No. 36-43 of Paper Book)). The Ld. AO has vide his letter dated 18.10.2019 set aside the objections raised by the Appellant (attached herewith as Annexure 5 (Refer Page No. 44-45

of Paper Book)) and proceeded to complete the assessment on the basis of the information received from the investigation wing and the documents submitted by the Appellant. The reasons for Reopening of assessment are, on the basis of the information received in the office of DDIT (Inv) Unit 6(2), Mumbai from the office of DOIT (Inv), Pune, which was forwarded to the Ld. AO, he was of the view that the Appellant was one of the beneficiaries who had obtained bogus long term capital gain on sale of shares of M/s. Risa International Limited ("RIL").

- M/s. RIL made preferential allotment of 3,14,00,000 equity shares at price of Rs. 10/- per share and raised Rs. 31,40,00,000/- as paid up capital of the company from 49 persons including the Appellant, Shri Antony Sequeira.
- The Appellant made LTCG for A.Y. 2014-2015 of Rs. 5, 03, 98,853/- on sale of shares of RIL
- During search action on RIL it was found that the company had declared turnover of Rs. 143.70 crores as on 31.03.2014 with a net profit of Rs. 3.67 crores without having any warehouse, sales office, only 2-3 employees etc. The company had shown stock in trade of Rs. 3.19 crores but no physical stock was found during the search.
- As per findings of search action and statements recorded u/s. 132(4) of the Act, it was proved that RIL had made no sales and purchase and have just inflated the sale and purchase on paper for manipulation and that accounts are fabricated and RIL is a bogus paper company;
- As per the statement of Mr. Naresh Jain, entry operator of the scrip RIL, he explained the entire process of synchronised trading by way of artificial increase

and decrease in volume/liquidity of stock of RIL to facilitate bogus LTCG to the clients against receipt of cash from them.

**• The exit provider in this case Mr. Rohidas Sarjine, has admitted and filed a submission that there was no genuine activity through his account, that his account was managed and operated completely by Mr. Naresh Jain. It is seen that the Appellant has made 5 transactions of sale of 11,930 shares of RIL worth Rs. 64, 99,200/- during F.Y. 2013-2014.**

• On aforesaid basis, it is evident that the Appellant has not disclosed fully and truly all material facts necessary for its assessment

• Thus, the LTCG on sale of shares claimed as exempt in A.Y. 2014-15 amounting to Rs. 5,03,98,853/- on sale of shares of RIL is bogus and has escaped assessment

11. We have gone through the paper book submitted by the assessee and considered the submissions before the lower authorities and before us also. It is also observed that on the basis of the information received from the Investigation Wing, the Ld. AO had issued notice u/s. 133(6) of the Act to M/s Risa International Ltd. to confirm the sale/purchase of shares carried out by the Appellant during the year under consideration. M/s. Risa International Ltd had vide letter dated 29.11.2019 denied having undertaken any transactions with the Appellant during the year under review.

12. The report submitted by the Investigation department could not be thrown out on the grounds urged on behalf of the assessee. The assessee have not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not

specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue; the statements do not indict the assessee. That apart, the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (Investigation) of all the States of the country. It is thereafter the concerned Assessing Officers have been informed to consider as to the bonafideness and genuineness of the claims of LTCG/LTCL of the respective assessee *qua* the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the Assessing Officers calling upon the assessee to explain the genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the same would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessee has miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessee have been issued notices under sections 143(2) and 142(1) of the Act they have been directed to furnish the documents, the assessee have complied with the directions, appeared before the Assessing Officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented

the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the inquiry which is being conducted by the Assessing Officer in scrutiny assessment under section 143(3) of the Act. The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such general statements of violation of principles of natural justice the assessee have not made out any case.

13. 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 AO/ CIT (A) and ITAT 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 scrip of very little known companies. Furthermore, in all the cases,

there were minimum 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 scrip, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted.

14. A holistic approach is required to be made and the test of preponderance of probabilities have to be applied and while doing so, the authorities below cannot lose sight of the fact that the shares of very little known companies with in-significant business and net worth had a steep rise in the share prices within the period of little over a year. The revenue 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. To reiterate, the assessee was 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 genuineness of the transaction. Unfortunately, the assessee has been harping upon the transactions done by him and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuineness needs to be established otherwise, the assessee is 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 genuineness 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 assessee have been called upon to prove the negative in fact, it is the assessee's 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 genuineness and identity. The assessee 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 assessee 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.

15. We have considered the case laws relied upon by the assessee as well as the revenue and observed that the case laws relied upon by the revenue are more pertinent to the facts of the matter. Case laws relied up on by the Revenue:

- i). Sanjay Bimalchand Jain v. PCIT-1, Nagpur [2018] 89 taxmann.com 196 (Bom.)
- ii). Suman Poddar v. I.T.O. [2019] 112 taxmann.com 330 (SC.)

In view, of the above factual matrix and law on this issue pronounced by the Hon'ble Apex Court and Jurisdictional High Court we are of the considered view that the transaction of LTCG claimed exempt u/s. 10(38) of the Act by the assessee is colourable device in guise of investment in listed shares. Entire transactions were stage managed with object to plough back his unaccounted income in form of fictitious long term capital gain (LTCG) and claim bogus exemption, Assessing Officer was justified in denying exemption under section 10(38) of the Act and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68 of the Act. The prime evidence against the assessee is presence of the exit provider namely **Mr. Rohidas Sarjine, has admitted and filed a submission that there was no genuine activity through his account, that his account was managed and operated completely by Mr. Naresh Jain.** This fact on the record remained unchallenged by the assessee and there is not even a whisper about it in addition to the fact that the share price of the

share was moved from 1.82 per share in April 2011 and rigged to the peak of Rs. 1,425/- per share in August 2014, which again came down to Rs. 0.88 per share in March 2016. **In the result, Grounds taken by the assessee are dismissed.**

16. **In the result, both the appeals of the assessee are dismissed.**

Order pronounced in the open court on 10<sup>th</sup> day of July, 2024.

Sd/-

(ANIKESH BANERJEE)  
JUDICIAL MEMBER

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 10/07/2024

*Dhananjay, Sr. PS*

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**