

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "E" Bench, Mumbai.

Before Ms. Kavitha Rajagopal (JM) & Shri Omkareshwar Chidara (AM)

I.T.A. No. 2064/Mum/2023 (A.Y. 2011-12)

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| Kaushik Chandravadan Parikh 1216, Prasad Chambers Opera House, Mumbai-400 004. PAN : AADPP1909Q (Appellant) | Vs. | ACIT-19(2) Mumbai (Respondent) |
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| Assessee by | Shri B.V. Jhaveri & Ms. Bhargavi Raval |
| Department by | Shri P.D. Chougule |
| Date of Hearing | 02.05.2024 |
| Date of Pronouncement | 26.07.2024 |

ORDER

Per Omkareshwar Chidara (AM) :-

In the above captioned appeal, the appellant raised two main grounds, first being the reopening of assessment as invalid and the second being the addition u/s. 68 of the Income Tax Act (the Act for short) relating to denial of Long Term Capital Gains (LTCG for short) exemption benefit claimed u/s. 10(38) of the I.T. Act. The third consequential ground raised relates to commission paid to the entry provider.

2. In this background, let us analyse the facts mentioned by Learned Assessing Officer (Ld. AO for short) in the assessment order

(a) It is mentioned by Ld. AO that there is a search and seizure operation conducted by Income Tax Investigation Directorate u/s. 132 in the premises of Shri S.C. Shah at Ahmedabad and during the operations, the Income Tax Department found certain incriminating material which shows that Mr. Shah was providing factitious entries to various persons based on which the beneficiaries claim false

exemptions u/s. 10(38). It was also mentioned that Mr. Shah managed bogus LTCG during A.Y. 2011-12 and 2012-13 to many clients in the shares of M/s. Prraneta Industries Ltd. (PIL for short), formerly known as Aadhaar Venture Ltd., which is controlled by him.

b) The assessee purchased shares of the company through stock exchange. The contract notes of broker which evidences the purchase and sale of shares was submitted to the Ld. AO. The concerned Demat account also was filed. The assessee has further mentioned that all the transactions were done through banking channels.

c) A statement was recorded by Ld. AO and the assessee repeated the above averments before Ld. AO.

d) But, the assessee could not say how the share price of M/s PIL went up by seven times within a period of slightly more than a year despite the fact the company's financial fundamentals were weak and the profit of the company are negligible which is paramount for increase in share price.

e) The Ld. AO mentioned that there are certain search and seizure operation conducted by Kolkata Investigation Directorate on several brokers/entry/exit operators who in collusion were artificially jacking up small company shares without fundamentals by using more than 70 shell companies. There are more than 80 penny stocks which were involved in this scam and beneficiaries are scatted all over the country. Prraneta Industries Ltd. is one of such penny stock which is manipulated, as per Ld. AO. At para 6, Ld. AO gave the modus operandi of share operators and benefit various assesseees to claim LTCG and short term capital loss through stock exchange forum.

f) The Ld. AO analysed the share transactions of M/s. PIL, which changed its name to Aadhaar Ventures India Ltd.

g) The Ld. AO at pages 7 to 10, gave the details of balance sheet and profit and loss account of M/s. PIL, the company's share purchased by assessee, for the years 2008 to 2018 almost 10 years.

For all these years, the EPS i.e. earnings per share is “Zero”, almost no taxable profits, no finance cost, no manpower expenses, total income and expenditure is almost same.

h) The assessee had been investing in other shares like Bajaj Group, ICICI, BEL etc. and the profits are market related and in none of these big companies shares, the assessee got astronomical profits like the penny stock of M/s. Prraneta Industries Ltd., even though other companies invested by him are having sound management which is time-tested and had very strong economic fundamentals.

i) The Ld. AO at para 8.6 concluded that the share price of PIL was rigged as per SEBI’s findings. He further says that the share price skyrocketed despite not having awesome profit, EBIDTA margin, bonus and dividend history. The share price was increased due to circular trading by a cartel of brokers using shell companies. After all this circumstantial evidence and applying the theory of “test of human probabilities”, the Ld. AO held that the artificial price hike of shares is pre-planned one to get undue benefit by misusing the exemption u/s. 10(38) of the I.T. Act.

j) The Ld. AO at page No. 22 of the assessment order has mentioned that the share transactions were not governed by market factors prevalent at relevant time of such trade, but were the product of design and mutual connivance on the part of assessee and operator.

k) The Ld. AO, has opined that the assessee is not able to prove the unusual rise and fall of shares to be natural and is based on the market forces. It is evident that such share transactions were closed circuit transactions and clearly structured ones.

l) the Ld. AO further stated at para 10 as follows :-

“10. The facts and circumstances of the case, as recorded above, clearly suggest that the revenue cannot take or accept such make-believe transactions, as presented by the assessee. As mentioned above, the jamakarchi companies and the group entities are directly involved in jacking up the prices of shares of the assessee to provide undue benefits to the assessee. Truth or genuineness of such

transactions must prevail over the smoke screen, created by way of pre-meditated series of steps taken by the assessee, with a view to impart a color of genuineness and character of commercial nature, to such share transactions. Needless to say that one has to look at the whole transactions and a series of steps taken to accomplish such share transactions, in an integrated manner, with a view to ascertaining the true nature and character of such purchase and sale of shares. The whole transactions are to be viewed after looking into facts unearthed during search and survey proceedings on many brokers/agents/dummy directors of jamakarchi companies, the results of these actions repeatedly point out the dummy activities carried out by the market agent. This conclusion drawn is not based on any assumption, but, supported with all the evidences, facts and admissions by dummy clients leading to cartel of group entities.”

- m) Finally, the Ld. AO relied on the decisions of Mcdowell Ltd. Vs. CTO (154 ITR 148) (SC) for the proposition that tax planning is allowed under law, but not clourable devices created to give a colour of genuineness is permissible.
- n) The Ld. AO has made an addition of Rs. 331,61,224/- as unexplained income u/s. 68 of the Income Tax Act.
- i) As the Ld. AO opined that all the tax exemptions are structured deals to get under tax exemption, payment of commission to operators/brokers is only corollary and hence 2% commission is quite reasonable and added to Rs. 6,63,224/- as unexplained expenditure u/s. 69C of the Act and completed assessment.

3. Aggrieved by the above additions u/s. 68 and section 69C, denying the exemptions u/s. 10(38), the assessee filed an appeal with the following grounds with the Ld. CIT(A), who passed an appeal order u/s. 250 of the Act on 24.12.2018 confirming the additions made by Ld. AO.

4. Before the Ld. CIT(A), the assessee filed submissions as follows :-

- a) The additions made by Ld. AO relating to denial of exemption u/s. 10(38) of LTCG and payment of commission u/s. 69C, have no basis as the shares were purchased through a reputed broker, on the recognised stock

exchange and payments and receipts towards purchased and sale of shares were made through banking channels.

- b) The assessee got LTCG as per provisions of Income Tax paid securities transaction Tax as per law.
- c) The Ld. AO made additions without any evidence and the arguments of Ld. AO are based on conjectures and surmises.
- d) the reopening of assessment is bad in law and without jurisdiction.

5. In his order, the Ld. CIT(A) mentioned at para 4 page 3 that the assessee had the reasons to reopen the assessment and making additions. As per law, the Ld. AO had "Reason to Believe" that the income escaped tax because he got information from Mumbai Investigation Directorate that the assessee took accommodation entries from Mr. Shirish Chandrakant C. Shah with regard to bogus penny stock transactions. It was also mentioned that Ahmedabad Investigation Directorate conducted search and seizure operations and found that he was using several shell companies and manipulating shares of insignificant companies to give accommodation entries to various persons all-over the country, to claim bogus exemption u/s. 10(38) of the Act. So, the Ld. CIT(A) held that the reopening of assessment by Ld. AO is valid.

6. Before the Ld. CIT(A), the assessee further mentioned that he does not know Mr. Shirish Shah and purchased the shares through broker on stock exchange and paid consideration through cheque. Copies of Broker's contract notes relating to purchase and sale of shares on various dates alongwith details of rate at which shares were sold, were filed before the Ld. CIT(A). It was submitted by the assessee before the Ld. CIT(A) that section 68 is not applicable in his case the transactions are properly recorded in the books of account, all three ingredients of identity, creditworthiness and genuineness of transaction were established by him beyond doubt. Reliance was placed on some cases law where addition in similar circumstances (in

assessee's opinion) was deleted by appellate authorities. In view of the same, the assessee pleaded before the Ld. CIT(A) to delete all the additions.

7. After perusing the cases-law and material filed before him, the Ld. CIT(A) did not agree with the submissions of assessee and confirmed the additions made by Ld. AO with following observations :

- a) The appellant purchased shares of M/s. PIL by paying Rs. 47,17,500/- and sold the same within a short span of 12 to 13 months and received Rs. 3,31,61,224/-, i.e. more than 700% gain was claimed which is peculiar and abnormal gain.
- b) The Ld. AO's comments about detailed search and seizure operations by Investigation Wing of Kolkata, Ahmedabad and Mumbai, had to be taken into consideration where incriminating materials were found and seized relating to manipulation of 84 penny stocks, without financial fundamentals, were rigged and accommodation entries were provided to several assessees all over the country by using more than 70 shell companies and structured deals on the floor of stock exchange.
- c) The documents filed by assessee are mere masks to hide the real nature of transactions.
- d) The findings of Ld. AO are based on strong surrounding circumstances and preponderance of probabilities and hence addition was confirmed.
- e) Initial investment of unknown credentials and weak financials and subsequent jump in the share price of the company cannot be an accident or windfall but because of manipulation in price of shares in a pre-planned manner by interested broker and entry operators.
- f) The Ld. CIT(A) held that initial onus lies on the assessee to prove how the share price M/s. PIL went up astronomically high within 12 to 13 months even though there are no profits in that company, the EPS is Zero, no taxes are paid. It only after discharging this onus, the onus shifts to Ld. AO to disprove the documents filed by assessee that they are not genuine.

- g) The Ld. CIT(A) relied on the cases of Sanjay Bimalchand Jain, Hon'ble Jurisdictional Bombay High Court where it was held that if the price of scrip goes up multi-fold within a short span without corresponding financials and profits, the transaction should be held as sham. As the facts and circumstances are same, the ratio laid down by Hon'ble High Court of Bombay is applied and the addition is confirmed.
- h) Thus, the Ld. CIT(A) confirmed the additions made by the Ld. AO after perusing all the material before him and after taking into consideration all the decisions available with him.
8. Aggrieved by the orders of Ld. AO and the Ld. CIT(A), the appellant filed further appeal before this Tribunal with the following grounds of appeal :-
1. The commissioner (Appeals) erred in not dealing with and disposing of the ground no.1 regarding reopening of the assessment for which the assessee had filed detailed written submissions and relied on the decision of the Hon. High Court at Bombay.
 2. The Commissioner (Appeals) erred in observing that the ground no.1 is general in nature and therefore, the same required no separate adjudication.
 3. The Commissioner (Appeals) failed to consider that the AO issued the notice u/s. 148 of the Act without taking the prior approval the Pr. C.I.T. u/s. 151(l) of the Act and therefore, the reopening of the assessment is bad in law and without jurisdiction.
 4. The Commissioner (Appeals) erred in dismissing the appeal of the assessee and thereby erred in confirming the addition of Rs.3,31,61,2247- u/s. 68 of the Act and erred in confirming the addition of Rs.6,63,2247- u/s. 69C of the Act.
 5. The Commissioner (Appeals) failed to appreciate that the assessee had purchased the shares of Praneta Industries Ltd. on the terminal of the Stock Exchange Mumbai at the prevailing market through the registered broker and there is not an iota of evidence adduced or referred by the A.O. which was found in the search at the premises of the said Shri Satish Chandrakant C. Shah to show that the purchase of shares by the assessee was a part of modus operandi to generate the alleged bogus LTCG and therefore, the A.O. has failed to show that the assessee had any connection of any nature whatsoever with the said Shri Satish Chandrakant C. Shah whose premises were searched by the officers of the Department.

6. The Commissioner (Appeals) failed to appreciate that the assessee had sold the shares of Prraneta Industries Ltd. on the terminal of the Stock Exchange Mumbai at the prevailing market price through the registered broker and nothing was found in the course of the search at the premises of Shri Shirish Chandrakant C. Shah which would show that the assessee was a party to the alleged cartel of brokers and dummy directors of jamakharchi companies and involved in artificially jacking up the price of the shares of Prraneta Industries Ltd.
7. The Commissioner (Appeals) failed to appreciate that the A.O. without adducing any evidence alleged that the assessee worked out an arrangement whereby the price of the shares were rigged and with the entry operator by routing cash earned the alleged long term capital gains (LTCG) which are exempt from payment of tax.
8. The Commissioner (Appeals) ought to have appreciated that if the assessee was, as alleged by the A.O., a party to a cartel then the A.O. out to have shown with whom the assessee formed a cartel and with whom the assessee made alleged arrangements to rig the price of the shares and with whom the assessee routed the alleged cash.
9. During the hearing before the bench the Ld. AR argued at length and submitted all the transactions done by assessee are genuine, only through banking channels were used, the assessee purchased the shares on the floor of recognised stock exchange through a renowned broker in the normal course. It was argued that he does not know Mr. Shirish C. Shah. It was submitted that STT was paid and amount was received from broker by cheque. As the transactions were reflected in their books of account, the claim u/s. 10(38) is proper and submitted that the order of the Ld. CIT(A) should be reversed and addition of Ld. AO to be deleted.
10. Per contra, Ld. DR heavily relied on the orders of lower authorities, Ld. AO and the Ld. CIT(A) and submitted that the addition was properly made based on the information received from Investigation Wing of Income Tax Department. The transactions relating to LTCG claim u/s. 10(38) are sham and all documentary evidences were created to show that claim is genuine. In view of weak financial fundamentals of scrip of PIL, it was submitted that the price rise is abnormal and hence the addition made should be sustained.

11. As far as the reopening of the assessment, no adjudication is done here as the assessee filed “written submissions” on 10.10.2023 in which it was stated that the assessee is not pressing grounds regarding reopening of the assessment. Hence, these grounds of appeal 1 to 3 are dismissed as withdrawn

12. Then, coming to addition relating to section 68 and denial of exemption claimed by assessee u/s. 10(38) is to be adjudicated.

13. The addition made by Ld. AO, confirmed by the Ld. CIT(A) is upheld for the following reasons.

a) From the “Statement of Facts” filed by assessee before the Ld. CIT(A) it is observed that the assessee invested almost Rs. 45 crores in 5 years (cumulatively) and earned a net profit of approximately Rs. 3 crores (after setting off of losses) in shares, both long term and short term. The investments are in prominent company shares and assessee got market-related profits and is reliable and understandable. Now, compare the same with the investment claimed to have been made by assessee in the impugned A.Y. Rs. 40 lakhs was approximately claimed to have been invested in M/s. Prraneta Industries Ltd. and within 12 to 13 months, and got a LTCG of Rs. 3.5 crores, a whopping 900% plus and that too the shares which are tainted as per the Investigation of Kolkata and Ahemedabad Investigation Directorate of Income Tax. This is against the theory of human probability propounded by Hon'ble Supreme Court in the case of Mcdowell, Durga Prasad More and Sumati Dayal (214 ITR 80)(SC).

b) The claim of assessee is that he does not know the operator of share Mr. Shirish Shah. In this type of cases, there is no need of knowing the persons directly and there are intermediaries only for the purpose of converting black money into the white and bringing into the books, which is popularly known as “Colourable Device”. The Ld. AO, at length has discussed

the presence of intermediaries and operators and search and seizure operations conducted on them.

c) Let us examine the case through the lense of price mechanism of shares vis-à-vis the intrinsic value of company fundamentals. The Ld. AO, in the assessment order has given the fundamental of scrip, M/s. PIL, purchased by assessee. (Later name changed to Aadhar Ventures India Ltd.) and the same are analysed as under :

The ostensible business of M/s. PIL is “Infrastructure” as per Annual Report of company. There would be opening and closing stock in such business every year in the normal course and they are absent here. The balance sheet and profit and loss account for 10 years is reproduced by Ld. AO in the assessment order. From the Profit and Loss account, it is observed that, in 5 years, no materials were consumed, finance cost as “Zero”, no fixed assets are seen and there is negligible depreciation, profit for 5 years is less than Rs. 4 crores, no taxes are paid, the EPS for all 5 latest years “Zero”, there is no dividend history, receipts and payments are almost equal. With such weak financial fundamentals, the share price can never command such astronomical price increase by 900% in 12 to 13 months. Where direct evidence is not forthcoming, circumstantial evidence can be taken to deduce the actual happenings. Exactly, in these circumstances, Hon'ble Jurisdictional Bombay High Court has held in the case of Sanjay Bimal Chand Jain ITA No. 18/2017, as follows :-

“Undisclosed income in the garb of LTCG has to be assessed as undisclosed credit u/s. 68 because “.....The authorities have recorded a clear finding of fact that the assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. While so observing, the authorities held that the assessee has not tendered cogent evidence to explain as to how the shares in a unknown company worth Rs. 5/- had jumped to R.s.485/- in no time. The Income Tax Appellate Tribunal held that the fantastic sale price was not at all possible as there was no financial basis as how a share worth Rs.5/- of a little known company would jump from Rs. 5/- to Rs. 485/-. The findings recorded by the authorities are pure findings of the fact based on proper appreciation of the material on record. While recording the said

findings, the authorities have followed the test laid down by the Hon'ble Supreme Court and this court in several decisions.....".

d) We do not agree with the appellant's contention that the entire assessment order is based on report of Investigation as we find that the order of the Ld. AO is based on independent analysis of material facts available on record. Of course, the Ld. AO has referred to and has taken support of investigation wing of the department, ITD data, BSE data, money control website, taxman, court ruling, internet and findings of the SEBI but the Ld. AO has applied his mind and cogently put all the facts and circumstances of the case. The appellant by raising such grounds, it appears to us, wants to take shelter under such documentary evidences which themselves have been created as masks to cover the true nature of transaction. A genuine transaction must be proved to be genuine in all respect. The onus was on the appellant to prove that the transaction leading to claim LTCG was distinctly genuine transaction and not bogus, premeditated transaction arranged with a view to evade taxes. The onus was on the appellant to prove that M/s. Prraneta Industries Ltd. (formerly known as Aadhar Venture India Ltd.) was a company whose scrips were capable of being traded at high price as it was the appellant who had traded in the shares of the this company which resulted in a claim of long term capital gains exempted under section 10 (38). Once the appellant was issued show cause notice which strongly suggested that trading of shares leading to LTCG was not genuine, the onus was on the assessee to prove that he has earned genuine LTCG under section 101 of the Indian Evidence Act, 1972 as it is the assessee who is asserting a claim that he was engaged in genuine share transactions. It is relevant to note here that Hon'ble Supreme Court in the case of Shri Charan Singh versus Chandra Bhan Singh AIR 1988 SC 637 has clarified that the burden of proof relies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party

must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question.

e) The Ld. AR has placed reliance on the Hon'ble Jurisdictional High Court's decisions of PCIT Vs. Indravadan Jain HUF and PCIT Vs. Ziauddin A Siddique for the proposition that where the transactions were done through stock exchange and banks, the claim of assessee should be accepted. But, in those cases, the fundamental financials of scrip, which is very important to determine the share price were not discussed and hence distinguishable. In the impugned case on hand, Ld. AO, extensively discussed the financials of scrip and demonstrated that the share can never command such high price in normal circumstances. Wherever there are abnormal gains, the onus would lie on the assessee to prove the abnormal circumstances, and here the assessee has not discharged his onus. The price manipulations were discussed by Hon'ble Jurisdictional High Court of Bombay in Sanjay Bimalchand Jain, mentioned above and Hon'ble High Court confirmed the addition of Ld. AO and denied the claim of assessee with respect to LTCG u/s. 10(38). As the impugned case on hand circumstances are similar to this case of Sanjay Bimalchand Jain, reliance is placed on this case and addition is confirmed.

f) Securities Exchange Board of India SEBI, has restrained Mr. Shirish C. Shah and others from accessing to share market for a period of 2 years for manipulating several penny stocks, as punishment, vide its order dated 14.1.2009 for creating artificial volumes in share market on stock exchange in violation of Regulation 4(a) to (d) of SEBI Regulations 1995. As mentioned in the beginning of the order, in the premises of Mr. Shirish C. Shah, a search and seizure operation was conducted by Ahmedabad Investigation Directorate of Income Tax where incriminating material was found relating to manipulating of several penny stocks and he was found to be giving

accommodation entries to several parties all over country to claim bogus exemption u/s. 10(38) of the Act.

g) The menace of obtaining bogus LTCG through penny stocks was recognised by Central Board of Direct Taxes, CBDT which works under Ministry of Finance and it has directed the Income Tax Department to contest the decisions of the Ld. CIT(A)/ITAT/High Court on merits by filing appeals in all penny stock cases, even if the tax effect is less than the threshold fixed for filing appeals.

h) Thus, from the cases relied on in this order, it can be seen that the scam of penny stocks had spread its wings from Delhi to Chennai and Gujarat to Gauhati i.e, all over the country, the Tribunals/courts held the decisions in favour of Department, in several cases SBI/SAT have penalised the operators, thousands of assesseees have opted for Vivad Se Vishwas Scheme of Government and withdrew appeals of penny stock, pending in appeal at that time. Subsequent to this scam, the Income Tax Act was amended by extending the period of holding of share to claim LTCG.

14. Following judicial decisions are relied upon to confirm the addition made by Ld. AO in the similar circumstances :-

(1) Principal CIT Vs. Swati Bajaj 139 Taxman.com 352(Kol)(2022) : Almost all the objections/grounds raised by the assessee against the addition made by Ld. AO were answered by the Kolkata High Court in this case. Heavy reliance is placed on this decision because it is the culmination of collective wisdom of 22 Advocates who argued this case on behalf assesseees, 7 Advocates on behalf of the Revenue and more than 100 decisions of various Courts/Tribunals were cited by both parties – assessee and Revenue to forward their arguments for and against the additions made by the Income Tax Department as almost 90 appeals of various assesseees were clubbed and heard as the issue is common in all these appeals – various penny stocks

were used to manipulate the share price and claim exemption u/s. 10(38) of the Act. Several arguments were made and heard by Hon'ble High Court of Kolkata in this batch of cases. The Hon'ble High Court of Kolkata gave lot of importance to this case because it may create precedent to various other cases in the country as the report of DGIT(Inv) Kolkata found accommodation entries relating to claim of LTCG relating to 64,811 beneficiaries and the amount involved is above Rs. 38,000 crores. This scam is only by Kolkata operators and similar manipulations done were found by Delhi and Mumbai Investigation Directorates of Income Tax. The reports indicated the involvement of 22 Brokers who were covered in the investigation, purchase and sale of price was rigged in 84 company shares. The report further stated that several big brokers like Anand Rathi, Religare and SMC were also involved and all manipulations were done through stock exchanges and several dummy/shell companies bank accounts were utilised and the Department was able to establish full trail of cash to the extent of Rs. 1575 crores. (Para 53 of Hon'ble Kolkata High Court decision).

The assessee's contention that investigation report of DGIT(Inv) Kolkata was not furnished to her and cross-examination opportunity was not provided to her was dealt by Hon'ble Kolkata High Court and it was held that these issues will not vitiate proceedings of Revenue nor they are required to be given to assessee because the respective AOs have clearly mentioned the nature of investigation done stating that the investigation was commenced not from assessee's end but the individuals who dealt with these penny stocks were targeted. It is equally true that the assessee could not establish the prejudice caused to them for not giving opportunity to cross-examine them. (Paras 55 to 67 of Hon'ble High Court decision).

Thus, not giving cross-examination opportunity did not and would not vitiate the proceedings as whatever information to be given to each assessee, was already given and necessary notices u/s. 143(2)/142(1) mentioned required particulars by the concerned Assessing Officers. Thus, full

opportunity was afforded to the assessee, held by Hon'ble Kolkata High Court.

The next argument of the assessee is that they were not implicated in the Investigation report also does not hold much water, it was held in the following words :-

To reiterate, the assessee were not named in the report and when the assessee makes the claim of exemption, the onus of proof is on assessee to prove the genuineness. Unfortunately, the assessee are harping on the transactions done by them and by relying on the documents in their hands to contend that Department should prove the steep rise in the scrip is not genuine, which is incorrect.

Another argument forwarded by the assessee is that section 68 is not applicable to them because of the fact that transactions are done through bank, stock exchange, broker and reflected in books of account etc. The Hon'ble Kolkata High Court rebutted these arguments by saying that one of the key element to be satisfied for non-applicability of section 68 is “genuineness of transactions”. Here the genuineness of transaction was attacked by Revenue on many counts – eg., statements of operators, astronomical rise of share price despite weak fundamentals of company, utilising 77 shell companies to route the transactions etc.

It was further held by Hon'ble Kolkata High Court in this regard as follows :-

“The assessee cannot escape from the burden cast upon him and unfortunately in these cases, the burden is heavy as facts establish that the shares which were traded had phenomenal and fanciful rise and short fall in price in short span, which led to LTCG/STCL. Therefore, until the assessee discharges his burden of proof, the addition made by the AO cannot be faulted.”

The Hon'ble Kolkata High Court has dealt with this issue of section 68 by relying on various decisions like N.R. Portfolio Pvt. Ltd., A Govindarajulu

Mudaliar Vs. CIT 205 ITR 802 (SC), Full Bench decision of Sophia Finance Ltd. 205 ITR 98 (Del), Nova Promoters Finlease (P) Ltd. 342 ITR 169 (Del), CIT Vs. Nipun Builders Ltd. 350 ITR 407 and held that mere issuance of cheque and providing bank detail would not be sufficient to discharge the liability of assessee in view of the link between entry providers and incriminating evidence.

In this case of Swati Bajaj, Hon'ble Kolkata High Court has mentioned that several assesseees who were involved in this penny stock scam all over the country availed Vivad Se Vishwas Scheme, paid taxes and withdrew their appeals pending at various stages at that time.

In this case of Swati Bajaj, the Ld. CIT(A) has confirmed the addition made by AO by holding that payments were made through bank, transactions were done through stock exchange and other features are only apparent features and the real feature were manipulated with abnormal price upwards and sudden dip thereafter and held that the transactions would fall within the realm of suspicious and dubious transaction. Thus, the Ld. CIT(A) concludes by holding that considering the facts of the assessee's case and the preponderance of probabilities against the assessee, the entire capital gains demand has to be treated as fictitious and bogus more particularly when the assessee has not furnished cogent evidence to explain how the shares in an unknown company jumped up so fast and such fantastic sale price was not at all possible when there was no economic or financial basis to justify the price rise and therefore affirmed the order passed by the AO. Aggrieved by the order of the Ld. CIT(A), the assessee filed appeal to ITAT, and then the matter travelled to High Court and Hon'ble Kolkata High Court delivered a landmark judgement on the lines mentioned above. As the contentions and issues are similar to that of our impugned assessee, reliance is placed on this decision.

(2) In the case of Sanjay Bimalchand Jain, 89 Taxman.com 196 (Bom), Hon'ble Bombay High Court held as follows :-

“In this case, the assessee had purchased shares from the penny stock companies for a lower amount and within a year, sold such shares at higher amount and the assessee has not tendered cogent evidence to explain as to why shares in unknown company jumped to such a higher amount in no time and also failed to provide details of persons, who purchased the said shares, the transaction was held to be an attempt to hedge the undisclosed income as LTCG. It was also held that the assessee had indulged in a dubious share transaction meant to account for undisclosed income in the garb of long term capital gains and thus, exemption u/s. 10(38) could not be granted to the assessee. In this Hon'ble Jurisdictional High Court's case, the broker did not respond to the notices issued by the AO, whereas in our impugned case, the alleged buyers of shares did not respond to notices issued by Ld. AO. As the circumstances are similar, addition made by the AO had to be confirmed. In this case of Mr. Sanjay Jain also, assessee was not afforded any right to cross-examination, and assessee claimed that the transactions were done through bank and stock exchange, but Hon'ble Bombay High Court still confirmed the addition made by the AO.” (The price of the penny stock went up astronomically from Rs. 5 to Rs. 485/- as mentioned earlier in this order).

(3) Similarly, Hon'ble Delhi High Court in the case of NDR Promoters (P) Ltd. held that where the assessee created lot of paper work to camouflage the transactions of bogus nature to look like genuine, there is no need of cross-examination.

(4) Reliance is placed on Hon'ble Delhi High Court's decision of Suman Poddar Vs. PCIT, where it was held that the share transactions were bogus because the company whose shares allegedly purchased were of penny stock and this decision was affirmed by Hon'ble Supreme Court vide 112 taxman.com 330 (SC)(2019). The Hon'ble court has opined that in this type of cases, cross-examination opportunity is not required because statements and other material found in the course of investigation were used as a corroborative material to strengthen the findings of AO. The AO made the addition based on several factors and analysis to prove that there is no genuineness in the transaction and utilised the statements of operators as corroborative evidence only.

(5) Reliance is placed on the decision of Hon'ble Supreme Court in the case of SEBI Vs. Kishore R. Ajmera (2016) 66 taxman.com 288 for the proposition that direct evidence is not material, and it was held as follows:-

“Court has pointed as to the important aspect with regard to the proximity of time between the buy and sell orders, prior meeting of minds, unnatural rise in the prices of the scrips and how the conclusion can be gathered from various circumstances coupled with preponderance of probabilities. At para 26, Hon'ble Supreme Court held “According to us, knowledge of who the 2nd party/client or the broker is not relevant at all. While the screen based trading system keeps the identity of parties anonymous, it will be too naive to rest the final conclusions on said basis which overlooks a meeting of minds elsewhere. Direct proof of such meeting of minds elsewhere would rarely forthcoming. The test would be is one of preponderance of probabilities.....”

In this case, Hon'ble Supreme Court dealt with the circumstances of synchronous trade of illiquid scrips (as mentioned by the AO in the assessment order in our case on hand also) and confirmed the order of Securities Appellate Tribunal w.r.t imposition of monetary penalties on brokers. The ratio laid down by Hon'ble Apex Court in this case is that, in similar circumstances, circumstantial evidence can be taken into account.”

(6) In the case of CIT Vs. Pushpa Malpani, Hon'ble Gujarat High Court, dismissed the Revenue's appeal in the case of Penny stock on the ground that the broker in question was not banned by SEBI. Conversely, in our case on hand, the AO, in the impugned assessment order has mentioned that the operators were banned from trading for a particular period. Hence, the addition made by the AO on this ground, is confirmed.

(7) Similarly, in the case of SEBI Vs. Mega Corporation Ltd. 136 taxman.com 333, while dealing with a case of income earned through price manipulations of share, held that right to cross-examination of a person who gave a complaint, was rejected by Hon'ble Supreme Court.

(8) In the case of Smt. Thara Kumari Vs. PCIT, Hon'ble Madras High Court upheld the addition made by the AO by disallowing the exemption claimed by assessee u/s. 10(38) because the price of scrip M/s. Luminaries Technologies Ltd., was artificially jacked up after referring to the report of Investigation

Directorate of Kolkata. Similar is the scrip “Splash Media & Infra Ltd.” in the case on hand and accordingly reliance is placed on this decision to uphold the addition made by AO.

(9) In the case of Udit Kalra ITA No. 220/2009, Hon'ble Delhi High Court held that the company had meagre resources at disposal, negligible profit, but there was unusual and very high growth in the share price which does not support the same, the transaction was held to be sham.

(10) In the case of Sanat Kumar Vs. ACIT Delhi, Circle 36(1), Hon'ble ITAT Delhi Bench has held that the so-called sale proceed of shares received and claimed as exempt u/s. 10(38) was held to be sham transaction because of huge price rise of shares at the time of sale despite the fact that company's profits are negligible and did not support such price rise.

(11) In the case of Satish Kishore Vs. ITO Delhi, ITA No. 1704 of 2019 dated 6.8.2019, Hon'ble ITAT Delhi has held that the transactions of penny stock are manipulated ones to get arranged benefits to claim false exemption u/s. 10(38) because there is a cartel of brokers involved in jacking up the scrip without corresponding profit/prospects of company. All the contentions of assessee that he was not given cross-examination opportunity, transactions were done through stock exchange and money received through banking channels were considered and then only the exemption u/s. 10(38) was denied because these affairs are all pre-conceived and arranged affairs which lack genuineness. The same decision was rendered in the case of Sandeep Bhargava Vs. ACIT Delhi, 109 taxman.com 174 (Delh-Trib).

(12) In the case of Hitendra Ghadia Vs. DCIT, Hon'ble ITAT Mumbai, it was held that issuance of bonus shares and splitting of shares happens only when there is huge demand for shares and there is high profitability and liquidity in shares. In these cases, to make share available to every interested investor and to unleash the maximum possible value of shares, giant

companies of respective industries carry such type of practice. A company with negligible investor base, negligible networth and profit and almost 'Zero' EPS, adopting such type of splitting shares is not digestible from layman point of view and all these are abnormal phenomena, especially when the Kolkata Investigation Wing of Income Tax Department held such transactions as sham only to get fraudulent benefit u/s. 10(38) of the Act. The scrip which skyrocketed was classified by SEBI as "Penny Stock" like that of our case. After taking into consideration all the contentions of transactions through banking channel, stock market cross-examination opportunity was not given were considered and it was held to be sham transaction. Similar decisions were rendered by the Coordinate Benches of Mumbai in the following cases too :-

- Shri Bhadresh Mansukhlal Dodhia Vs. ACIT Kalyan, ITA No. 5544/Mum/2018 dated 6.1.2021.
- ITO-24(3)(1), Mumbai Vs. Arvind Kumar Jain HUF, Mumbai ITA No. 4862/Mum/2014 dated 18.9.2017
- Vijayrathan Balkishan Mittal Mumbai Vs. DCIT ITA No. 3428/Mum/2019
- Ratnakar M. Pujari Vs. ITO, Ward 25(3)(3), Mumbai
- Dinesh Kumar Tulsiyan Vs. ITO ITA No. 813/Pune.

(13) Shamim M. Bharwani Mumbai Vs. ITO-19(3)(4), Mumbai ITA No. 4906/Mum/2011 (A.Y. 2006-07), Hon'ble Mumbai ITAT : In this case, it was held that, a penny stock company, Eltrol Ltd., exposing the modus operandi adopted by assessee, in the case of such stocks, the price, de-horse any fundamentals or other factor, of paper companies being raked up on the exchange, so as to yield "gain" and then again, equally, without basis, grounded to yield "loss", both of which, i.e., "gain" and "loss" find ready customers or takers. The purpose is to evade tax. The Ld. CIT(A) wrongly dismissed the Revenue's case by glossing over the many attendant facts and incidents, the most vital, and on which we observe complete silence or absence of any explanation, is the absence of any credentials of investor-company. It was further held that the documentary evidence in the face of unusual events, as prevailing in the instant case, and without any corroborative evidence, cannot be regarded as conclusive. For the scrip to

trade 50 times its face value, in the absence of trail blazing performance or great business prospects in future, by all counts, it is a paper company and reverse the findings of first appellate authority and confirm the impugned sum u/s. 68 of the I.T. Act.

(14) In the case of M.K. Rajeshwari Vs. ITO, the coordinate bench of the Tribunal has held that while dealing the issue of long-term capital gain accrued to the assessee, one has to examine the financials of the company whose shares were inflated within a short period and after the sharp rise in the price of shares, it again comes down. It was held as follows :-

“In the light of the ratio decidendi of the cases cited above, the contention of the assessee that the transaction leading to long-term capital gains are supported by documents such as sale and purchase invoices, bank statement etc., cannot be accepted. In view of the facts and circumstances of the case brought on record by the Assessing Officer after proper examination of the material facts and taking into account corroborating evidences gathered by the Directorate of Income-tax (Investigation), Kolkata, involving a network of brokers and operators engaged in manipulation of market price of the shares of the HBC bioscience controlled and managed by such person with a purpose to provide accommodation entries in the form of long- term capital gains. The onus was on the assessee to prove the transaction leading to claim of long-term capital gain was a genuine transaction. The assessee failed to justify manifold increase in the prices of the share of 'HBC bioscience' despite weak financials of the company. Initial investment in the company of unknown credential and subsequent jump in the share prices of such a company, cannot be an accident or windfall but could be possible, because of manipulation in the share prices in a preplanned manner, as brought on record by the Assessing Officer. In view of the failure on the part of the assessee to discharge his burden of proof and explain nature and source of the transaction, in our opinion, the Ld. CIT(A) has rightly confirmed the addition in dispute, which does not require any interference on our part. We accordingly, uphold the action of the Ld. CIT(A) on the issue in dispute and dismiss the grounds raised by the assessee on this issue.”

(15) In the case of Rajkumar B. Agarwal vs. DCIT (ITAT Pune), Bench “B” ITA Nos. 1648 & 1649/PUN/15, it was held as follows :-

“The assessee completed paper-trail by producing contract notes for purchase and sale of shares of PIL. Mere furnishing of contract notes etc. does not inspire any confidence in the light of facts. Test of human probability should be applied and apparent should be ignored to unearth

the harsh reality (Sumati Dayal 214 ITR 801 (SC) & Durga Prasad More 82 ITR 540 (SC) applied”.

(16) In the case of Pooja Ajmani Vs. ITO (ITAT Delhi) April 25, 2019 ITA No. 5714/Del/2018, it was held as follows :-

“10(38) Bogus Capital Gains From Penny Stocks : u/s. 101 of Evidence Act, 1972, the onus is on the assessee to prove that the LTCG is genuine. The assessee cannot on failure to establish a prima facie case, take advantage of the weakness in the AO’s case. The jump in the share price of a company of unknown credentials cannot be an accident or windfall but is possible because of manipulations in a pre-planned manner by interested broker and entry operators. The LTCG transactions are a sham”.

(17) Abhimanyu Soin Vs. Asst, Cit, Circle VII, Ludhiana, ITAT, Chandigarh, Bench A, ITA No. 951/chd/2016

“On consideration of the facts of the case as a whole it cannot be accepted that the assessee can have long term capital gains of Rs. 80,25,291/- within 17 months of buying of shares at Rs.2,72,000/- a non-descript company incorporated in 2007 which got merged in 2009. This cannot be a case of intelligent investment or a simple tax planning to gain benefit of long term capital gains”.

(18) Mrs Vidya Reddy Vs. ITO International Taxation, Ward-1(2), Chennai ITAT, D Bench, Chennai

“All these trading patterns show that LTCG admitted by the assessee is arranged one. The payment of Security Transaction Tax was to paint credit worthiness to the transaction and claim exemption u/s. 10(38). In view of the information provided by the Investigation wing, Kolkata, the recommendations of SIT on Black money etc, the AO required the assessee to prove her claim of exemption. After considering her reply etc. held inter alia that it is clear that the assessee has manipulated the sale of shares within a span of time in collusion with the brokers in order to earn tax free exempt Long term capital gain on sale of shares u/s 10(38) etc”.

(19) In the case of Somnath Maini Vs. CIT 306 ITR 414, the Hon'ble Punjab & Haryana High Court, held that claim of genuineness of transactions can be rejected even if the assessee backs the same with evidence which is not trustworthy. Hon’ble Income Tax Appellate Tribunal – Chandigarh, in the case of Assistant Commissioner of Income Tax Vs. Som Nath Maini by

placing reliance on the decision of Hon'ble Supreme Court in the case of Durga Prasad More (2002) 3 BOMLR 747, 2003 (1) MhLj 420 has observed as under :-

"It is true that when transactions are through cheques, it looks like real transaction but authorities are permitted to look behind transactions and find out the motive behind transactions. Generally, it is expected that apparent is real but it is not sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine, it is highly improbable that share price of a worthless company can go from Rs. 3 to Rs. 55 in a short span of time. Mere payment by cheque does not render a transaction genuine. Capital gain tax was created to operate in a real world and not that of make believe. Facts of the case only lead to the inference that these transactions are not genuine and make believe only to offset the loss incurred on the sale of jewellery declared under VDIS. In the totality of facts and circumstances of this case and material on record, we are of the considered view that the CIT(A) was not justified in deleting the impugned addition We accordingly set aside the order of the CIT(A) and restore that of the AO."

(20) Chennai ITAT in the case of Rajnish Agarwal Vs. ACIT has held that the penny stock of SRK Industries Ltd. is not having any financial strength of its own and the sale and purchase of these shares were held to be sham and LTCG u/s. 10(38) was denied to the assessee.

(21) Similarly, in the cases decided by various Tribunals of the country as mentioned below also, have held that the penny stocks without financial fundamentals to support the astronomical price rise of hundreds of times within short span of one to two years, are sham transactions and LTCG claim u/s. 10(38) was denied to them :

- a) Usha Chandresh Shah ITA No. 6858/Mum/2011, Mumbai
- b) Zakrullah Chaudhary ITA No. 669/PN/2012, Pune
- c) Chandan Gupta ITA No. 7024/Mum/2010, Mumbai
- d) Chandan Gupta ITA No. 550/Chd/2008 dated 26.9.2013 Chandigarh
- e) Napar Drugs Ltd. 98 ITD 265, Delhi
- f) Dinesh Kumar Khandelwal HUF Vs. ITO ITA No. 58/Nag/2015 dated 24.8.2016
- h) Ratnakar M. Pujari Vs. ITO 9951/Mum/2012 dted 3.8.2016

(22) In the case of CIT(A) Vs. Jasvinder Kaur 357 ITR 638 also, Hon'ble Gauhati High Court has held that price manipulations of penny stocks

analysed by AO was on correct footing and held that assessee was not eligible for LTCG u/s. 10(38) of the Act.

15. To sum up, the addition made by Ld. AO, is confirmed and the claim of assessee LTCG u/s. 10(38) was denied because of :

- a) various cases-law mentioned in this Appellate Order
- b) facts and circumstances narrated by Ld. AO in the assessment order like weak financial fundamentals of company, virtually no business was conducted for 5 years by M/s. Prraneta Industries Ltd.
- c) artificially jacking up the price of shares without financial back-up.
- d) structured and pre-conceived trades on stock exchange.
- e) existence of exit providers, extensive investigation done by Kolkata Investigation Wing done after search and seizure operations by Income Tax Department.
- f) ban order on the operators of this scrip by SEBI/SAT.
- g) involvement of more than 70 shell companies in the scam.
- h) the Ld. AO made the addition based on all the above factors, facts and circumstances cumulatively narrated in assessment order and statements of operators is only one of the factor and supplementary to the main arguments of Ld. AO.

16. The Ld. AO has also made an addition of 2% commission payment for getting accommodation entries etc. from various intermediaries As he is a beneficiary to claim exemption of LTCG u/s. 10(38). This 2% commission amounting to Rs. 6,63,224/- is quite reasonable. As it is already held that the transaction as not genuine and only make-believe agreement, the payment of commission is corollary, the addition towards commission is also upheld. Hence, the additions made with respect to LTCG and commission payment are hereby confirmed. It is further held

that the order of the Ld. CIT(A) is quite logical and fact-based and hence upheld.

17. The appeal of assessee is dismissed.

Order pronounced in the open court on 26th July, 2024.

Sd/-
(Kavitha Rajagopal)
Judicial Member

Sd/-
(Omkareshwar Chidara)
Accountant Member

Mumbai : 26.07.2024

Copy of the Order forwarded to :

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

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai