

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 562/JPR/2023
निर्धारण वर्ष / Assessment Years : 2014-15

Aditya Baheti G-7, Kabir Marg, Bani Park, Jaipur.	बनाम Vs.	Income Tax Officer, Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AFFPB5970A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby :Ms. Nupur Khandelwal, C.A (V.H.)
राजस्व की ओरसे / Revenue by: Smt. Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing :28/08/2024
उदघोषणा की तारीख / Date of Pronouncement: 23/09/2024

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal is filed by the assessee is directed against the order of the Ld. CIT(A) dated 30.06.2023, National Faceless Appeal Centre, Delhi[herein after referred to as "CIT(A)/(NFAC)"] for the assessment year 2014-15.

2. The assessee has raised the following grounds of appeal:-

"1.The Ld. Assessing Officer has grossly erred in making addition amounting to Rs. 23,89,107/- in the total income of Rs. 14,36,073/- as declared by the assessee for the A.Y. 2014-15. The contention of the Ld. AO is that the investment made in the company Tarbo

Tech Ltd. And expenditure incurred in earning the LTCG u/s 10(38) is bogus, is not acceptable.

2. The Ld. Assessing Officer has also erred in adding Rs. 48,790/- in the income of the assessee as commission paid by the assessee from his unexplained income for earning above income on the assumptions and personal imagination of transaction.

3. The ld. CIT Appeal has not considered our reply submitted on the Income Tax Portal on 09.06.2023 vide response to notice ID 100063149108 and the same has been marked as "no response submitted" in the order issued by the CIT(A) dated 30.06.2023.

3. Brief facts of the case are that the assessee is an individual and has carried out business under the name & style M/s RDB Auto. The assessee has income from salary and Other Sources during the year. The assessee has filed his return of income on 31.03.2015 for assessment year 2014-15 declaring total income of Rs. 14,36,070/- wherein the assessee has claimed deduction of Rs.23,89,107/- under sec. 10(38) of the I.T. Act, 1961. In this case, an information was received by the Ld. AO from the Investigation Wing arising out of the searches conducted that the assessee has claimed exemption on Long Term Capital Gains (LTCG) by trading in the shares of M/s Tarbo Tech Ltd., which is a penny stock listed company. The proceedings under sec. 147 of the Act were initiated in the case of the assessee and notice under sec. 148 dated 27.09.2016 was issued and served upon the assessee. In response to the notice, the assessee e-filed return of income declaring total income of Rs. 14,36,070/-, same as declared in his original return of income. As per the details available with the Department, ld. AO noticed that the assessee has claimed

exemption of Rs. Rs.23,89,107/- under sec. 10 (38) of the Income Tax Act, 1961 on sale of shares of M/s Tarbo Tech Ltd. The assessment was completed by treating the LTCG as income from other sources and also commission for acquiring accommodation entry. The Total Income of the assessee was assessed at Rs.38,73,970/-.

4. Aggrieved, from the said order of assessment the assessee has filed an appeal before the ld. CIT(A). The ld. CIT(A) after hearing the contention of the assessee dismissed the appeal of the assessee by giving following findings on the issue:-

“6. During the course of appellate proceedings, various notices were issued and served upon the appellant the details of which are tabulated hereunder for reference:-

Sr. No.	Date of issue of notice and type of notice	Date of compliance	Reply of appellant
1.	Notice dated 28.12.2020 seeking documents in support of appeal memo	06.01.2021	No Reply
2.	Notice dated 23.03.2022 seeking documents in support of appeal memo	28.03.2022	No Reply
3.	Notice dated 06.04.2022 seeking documents in support of appeal memo	08.04.2022	No Reply
4.	Notice dated 18.10.2022 seeking documents in support of appeal memo	27.10.2022	No Reply
5.	Notice dated 21.11.2022 seeking documents in support of appeal memo	28.11.2022	No Reply
6.	Notice dated 02.12.2022 seeking documents in support of appeal memo	09.12.2022	No Reply
7.	Notice dated 22.12.2022 seeking documents in support of appeal memo	30.12.2022	No Reply
8.	Notice dated 02.01.2023 seeking	09.01.2023	No Reply

	documents in support of appeal memo		
9.	Notice dated 01.02.2023 seeking documents in support of appeal memo	09.02.2023	No Reply
10.	Notice dated 21.04.2023 seeking documents in support of appeal memo	28.04.2023	No Reply
11.	Notice dated 03.05.2023 seeking documents in support of appeal memo	10.05.2023	No Reply
12.	Final show cause notice dated 01.06.2023 seeking document in support of Appeal memo	09.06.2023	No Reply

6.1 It is clear from the above that the appellant has been granted several opportunities to represent its case in the appellate proceedings but has failed to make any submissions in support of the grounds of appeal filed by it. This shows that the appellant is not interested in prosecuting the appeal filed by it. In the appellate proceedings, burden of proof lies on the appellant to prove that the facts and the findings of the Assessing Officer are incorrect. Since the appellant has chosen not to submit any details in support of grounds of appeal, it is not possible to decide appeal on merit.

6.2 As mentioned in paragraph 6 of this appeal order, this office has issued several letters to file written submission, however, neither any adjournment was sought for nor was any written submission filed. The letters were issued through ITBA System at the mail ID provided by the appellant. It is verified that all the mails sent through the ITBA are delivered to his email ID, however, no reply is submitted in support of the grounds of appeal filed.

From the above conduct of the appellant, it is evident that the appellant is no more interested in pursuing the appeal. Hon'ble Supreme Court in the case of CIT Vs B.N. Bhattacharjee and others [1979] 10 CTR 354 (SC) observed that preferring an appeal, means effectively pursuing it. Hon'ble M.P. High Court in the case of Estate of Late Tukojirao Holkar Vs CWT [1979] 223 ITR 480 (M.P.) dismissed the reference filed at the instance of the assessee for default and for not taking necessary steps. Considering the conduct of the assessee in the present circumstance, I am of the view that the assessee is not interested in pursuing the appeal. This view has been affirmed by Hon'ble ITAT Ahmedabad in case of Amitkumar H. Shah Vs. ACIT in ITA No. 2985/Ahd/2010 vide their order dated 31.12.2013, wherein following the order of ITAT Delhi Bench in the case of CIT Vs Multiplan India Pvt. Ltd., [1991] 38 ITD 320 (Del), ITAT

has dismissed the appeal filed by the assessee for want of persuasion. Under these circumstances, the current appeal of the appellant is dismissed.

7. In result, the appeal of the appellant is dismissed.”

5. Aggrieved from the order of the ld. CIT (A) the assessee has preferred this appeal beforeus on the grounds as reiterated in para 2 above. To support the grounds so raised the ld. AR appearing on behalf of the assessee has placed reliance on the written submission which is reproduced as under:-

“Brief Facts of the case-

During the AY 2014-15, assessee has filed return of income declaring total income of Rs.14,36,070/- on 31.03.2015.

During the year under scrutiny, the assessee has made investment in Share of Tarbo Tech Ltd and Claimed exemption of Rs. 23,89,107 u/s 10(38) of the Income Tax Act,1961 on sale of these shares. The Ld. Assessing officer has denied the exemption u/s 10(38) of the Income Tax Act, 1961 to the assessee on considering the company as penny stock companies as per their and SEBI Investigation. The Ld. Assessing officer disallowed the exemption claimed by the assessee and added back Rs.2389107/- in the income of the assessee treating as bogus LTCG exemption U/s.111A of the Income Tax Act. The Ld assessing officer also added Rs.48790/- in the income of the assessee as commission paid for acquiring such accommodation entry.

Aggrieved by the assessment order passed u/s 148/143(3) of the Income Tax Act,1961 dated 08.12.2017, assessee preferred an appeal before the CIT(A) wherein the same was dismissed by the CIT(A) on the grounds not acceptable by the assessee.

Appeal on following points-

- a) Adding back of genuine Long term capital gain u/s10(38) claimed by the assessee amounting to Rs.23,89,107/-
- b) Adding commission paid on above transaction on baseless assumptions amounting to Rs.48970/-

- c) Non consideration of reply furnished by the assessee and declaring no response received from assessee and passing of order u/s 250 by the CIT(A)-1, Jaipur.

I. **Our Submission-**

Ground No.1-

During the assessment proceedings on verification of records, the A.O. noted that the assessee appellant had claimed exempt income on Long Term Capital Gain of Rs. 23,89,107.00/- on sale of shares of Tarbo Tech Ltd. As per ITS data, assessee had sold shares of Tarbo Tech Ltd of Rs. 24,39,453.00/- during the year under consideration. It was also detected that M/s. Tarbo Tech Ltd. is a penny stock listed company with a small capital base but huge market capitalization. Information in respect of trading of penny stock i.e. M/s. Tarbo Tech Ltd. is available in ITS data/AIR. Accordingly, a show cause notice was issued to the assessee vide letter dated 01.11.2017 asking the assessee to furnish explanation on or before 06.11.2017 failing which it was proposed that the whole scheme would be treated as an attempt to introduce undisclosed income and LTCG amounting to Rs. 23,89,107/- was proposed to be added on account of undisclosed income.

The assessee vide reply dated 30.11.2017 enclosed relevant documents and submitted as under :

- 1) Purchase was made through registered broker.
- 2) Shares were allotted after paying STT
- 3) It is a genuine transaction.
- 4) Copy of share purchase bill, share sale bills etc. were filed.
- 5) 5000 equity shares were purchased through Durga Prasad & Co. (registered on NSE) vide bill dated 10.04.2012 for Rs. 50,345/- inclusive of STT, Stamp duty etc.
- 6) Shares were deposited in Demat account.
- 7) 5000 shares were sold in FY 2013-14 for Rs. 24,39,453/- which was credited in bank account on 05.07.2013.

The AO considered the above submissions of the assessee but did not accept the contentions of the assessee. The AO concluded that the alleged LTCG shown by the appellant on account of sale/purchase of shares of Tarbo Tech Ltd. is a bogus transaction and it actually represents unaccounted money routed back to appellant in the garb of LTCG. The AO also contended that beneficiaries have paid commission @ 1-2% in cash in lieu of bogus LTCG entry shown from artificial trading in penny stock. Thus, the AO added Rs. 23,89,107/- to total income of assessee under section 68 of the Act and commission paid @ 2% to the tune of Rs.48790/-was added to the total income of the assessee under section 69C of the Act. Thus the AO completed the assessment at the total income of Rs. 38,73,970/-.Aggrieved by the order of AO, the assessee preferred appeal before the Id. CIT(A).The Id. CIT (A) after detailed discussion and considering various judicial pronouncements, sustained the additions of Rs. 23,89,107/- under section 68 on account of sale of shares claiming exempt LTCG under section 10(38) and Rs. 48790/- under section 69C on account of commission.

Theassessee'ssubmissesasunder:

“ That during the assessment year under appeal, he had sold listed equity shares of ‘Tarbo Tech Limited’ through recognized stock exchange, the shares which were sold were held by the appellant as Investments in the Books of Accounts. It is relevant to mention that the shares held were Long Term Capital Asset within the meaning of the section 2(29A) of the Income Tax Act, 1961 On sale of the shares, the appellant had earned long term capital gain of Rs.23,89,107/-and had claimed exemption of this amount, which is strictly in conformity of section 10(38) of the Income Tax Act, 1961 and as per the norms of SEBI Rules.

During the assessment Proceedings, the Ld. AO has questioned the exemption of Rs.23,89,107/-claimed by the Appellant based on surmises and suspicion, despite detailed submissions along with corroborative evidences as well as legal documents by the Appellant.

Transaction of Purchase of the shares is genuine:

In this connection, the Appellant hereby submits that the transaction of Purchase of equity shares is proved and established by independent, contemporaneous documentary evidences during the assessment proceedings. The payment for purchase of shares was made through legal channel and the shares were kept as an Investment in the books of accounts. The Appellant has purchased the shares through Durga Prasad & Co. These shares were deposited in Demat A/c with Maverick Share Brokers Ltd, Jaipur Appellant has already furnished following

documents during the course of Scrutiny Proceedings vide letter dt.:- 24/10/2017 to justify the transaction of purchase of equity shares;

-Copy of Contract note issued by the Broker.(See Pg. No.20)

It is relevant to mention the appellant had purchased 5000 equity shares of the Company on 10/04/2012 in DEMAT format, as it is evident from the contract note. The broker is listed on Recognised Stock Exchange and the company is also listed on Recognised Stock Exchange. This information is very vital and proves the fact that the Appellant had in fact purchased the equity shares of Tarbo Tech Ltd. Under these circumstances, there is absolutely no basis for the AO to presume that the transaction for purchase thereof was not genuine. Further, the AO has not proved that the cash emanated from the coffers of the appellant. In simple words the AO has not proved the cash by the assessee was paid to whom and when? In the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain.

Transaction of Sale of the shares is genuine:

In view of the favourable market conditions, appellant has sold the equity shares through Recognized stock exchange during the year under appeal. The sale consideration was received in the Bank account of the Appellant. It is relevant to mention here that the appellant has paid the Security Transaction Tax (STT) on the sale of such shares. Appellant has already furnished the following document before Assessing Officer vide letter dt.:- 24/10/2017 to support the genuineness of the Sale transaction;

-Contract note of the Broker through whom the shares were sold (See Pg. No.21)

Despite furnishing of contemporaneous documentary evidence, Ld. AO has alleged that the transaction of sale of shares as non genuine without any cogent material in support of non genuine nor he has mentioned that purchases and sale transactions are bogus. Ld. AO is not justified in taking contrary view with regard to transaction of sale of shares. Show cause notices issued by the Assessing officer taking contrary view were merely on the basis of suspicion which should not be sustained in the eyes of law. As held in many cases by Apex court that suspicion however strong, cannot take the place of proof.

Ld. AO has not brought any conclusive material on record to support his contentions. Further, Appellant has duly discharged its onus to prove the genuineness of the transaction of sale of shares.

Ld. AO cannot make addition just because there is high difference in purchase price and sale price of the shares. Ld. AO has made unjustified allegation that by taking the support of unusually high sale price compared to purchase price which is on the basis of mere suspicion. Appellant hereby emphasizes that he has no control over the sentiments of secondary market. Appellant is independent from the price movement of the scrip on the recognized stock exchange. As a prudent share holder would stand static when the market is in upswing, appellant has sold the shares through recognized stock exchange on the basis of financially suitable market conditions.

Further, the Appellant hereby respectfully submits that the Ld. AO has not properly appreciated the Modus Operandi followed in connection to transactions of shares. The assesee has purchased 5000 equity shares of the company on 10/04/2012 in DEMAT Account. These 5000 shares had been sold on 03/07/2013 for Rs. 24,39,453/- and allegedly earned LTCG of Rs. 23,89,107/-

As regards sale, the shares were sold through recognized stock exchanges through reputed brokers. The appellant maintained account with Maverick Share Brokers (P) Ltd. STT was paid in all the transactions. The moment sales were effected, the demat accounts were debited. It is submitted for kind consideration that a sale through a recognized stock exchange which were electronically operated cannot be manipulated. So also debit and credit entries in the Demat Account which were maintained by reputed and independent DPs. The process involved is automatic transmission of the information through electronic device regarding sale of shares. The sale proceeds were then received by account payee cheques/drafts from the brokers where the appellants maintained trading account. These were credited in the bank accounts and recorded in regular books of the appellant in regular course. The bank accounts of the Appellant evidence receipt of sale consideration by account payee cheque/draft. The resultant gains were reflected in the books of accounts and shown in the returns filed in the regular course. Hence there is no scope for disbelieving transactions as bogus.

It is respectfully submitted that there is no material evidence on record against the Appellant except some vague, confusing enquiries sought by the Ld. AO to draw the conclusion which adversely affects the Appellant.

The Ld. AO has not appreciated the fact that there cannot be a sale without a purchase. There was no scope for suspecting these transactions. Therefore, assessment made by Ld. AO and confirmed by Ld. CIT(A) which is predominantly influenced by suspicion is liable to be set aside.

Relevant decided cases-

Reliance is placed on the

1). The Bench has taken into consideration that similar type of issue had arisen in the case of Shri Manohar Lal Chugh vs ITO, Ward 6(1), Jaipur (ITA No. 312/JP/2021 dated 31-08-2022)

We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. The AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Nouvea Multi Media Ltd. on the basis of information received from the Directorate of Investigation that an organized racket of generating bogus entries of LTCG in penny stock has been unearthed as a result of investigation carried out through-out the country, wherein certain persons were found indulged in providing accommodation entries, inter-aliabogus Long Term Capital Gains which is claimed as exempt under section 10(38) of the IT Act by the beneficiaries in order to facilitate the beneficiaries to convert their black money into white without paying Income-tax. The AO has narrated the modus operandi of various entry providers which is a general statement of far as the indulgence of certain persons in providing the accommodation entry of bogus long term capital gains as well as other transactions. However, in the said narration of modus operandi there is nothing against the particular transaction of purchase and sale of shares by the assessee. The AO has specifically mentioned that during the course of enquiry in certain cases it has come to light that large scale manipulation has been done in the market price of shares of certain companies listed on Stock Exchange by a group of persons working as a syndicate for the purpose of providing entry of tax exempt bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash. These observations of the AO in the assessment order cannot constitute any tangible material or evidence to show that the transaction of the assessee is bogus being an accommodation entry. The AO in the show cause notice though referred the statements of Directors/entry operators, who have operated as entry providers/brokers, however, neither any documentary reference is made in the show cause notice or any such reference is made in the finding of the AO while holding the transaction as bogus by availing the accommodation entry of long term capital gain. The AO has either discussed the modus operandi of

entry providers or the judgments on the issue but has not made any reference of any material or documentary evidence which reveals that the assessee has indulged in availing the accommodation entry of bogus long term capital gain. There is no dispute that once the assessee has claimed the long term capital gain from purchase and sale of shares which is exempt under section 10(38) of the Act, the primary onus is on the assessee to substantiate his claim by producing the supporting evidence. We find that the assessee is a regular investor in shares. We also find that in the case in hand the assessee purchased 20,000 equity shares of M/s. Nouvea Multi Media Ltd. through Mawerick Share Broker Pvt Ltd. who is registered in BSE for a sum of Rs. 6,33,124/- which includes STT, Stamp Duty etc. vide Bill No. 546 dated 09.01.2008 and 0036 dated 15.01.2008. The shares were deposited in DMAT A/c with M/s. Alankit Assignment Ltd., Jaipur and the quantities of 20000 shares were credited on 24.01.2008. M/s. Nouvea Multi Media Ltd. was listed in stock exchange and the shares were purchased at the rates prevailing on the date of purchase in BSE. The assessee received 40000 Right Shares issued by the company later on. We find that the assessee has duly reflected all these shares in the Books of accounts as an Investment and on sale of shares, the assessee has claimed exempt LTCG in the return of income for the assessment year 2010-11. Thus it is clear that 20,000 shares acquired by the assessee on 15.01.2008 in Demat format as it is evident from the Demat Account and reflected in the Books of account for the year under consideration. We further note that the assessee produced the copy of purchase bills of these shares along with the bank statements showing the purchase consideration paid by the assessee through cheque along with copy of Transaction statement/Demat account, Contract note issued by the broker, copy of ledger account. The shares acquired by the assessee are duly reflected in the Demat account of the assessee. Once the shares are dematerialized and credited in the Demat account of the assessee, the holding of the shares by the assessee cannot be disputed. It is also not in dispute that the assessee sold 20,000 shares held in the Demat account of the assessee during the year under appeal for a consideration of Rs. 20,03,929/- which was credited in Bank on 22.03.2010. The AO has treated the transaction of sale of 20,000 shares as bogus being accommodation entry but has not doubted the holding of the shares by the assessee to the tune of 20,000 shares in the Demat account of the assessee. Once the assessee has produced all the supporting evidences which include purchase bill, bank statement showing the payment of purchase consideration, Demat account, holding of shares in the Demat account, sale of the shares through Stock Exchange which are also reflected in the Demat account of the assessee and receipt of the sale consideration in the bank account of the assessee as it is evident from the bank account, statement of the assessee, then in the absence of any contrary

material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of the investigation carried out by the Department in some other cases where some persons were found indulged in providing accommodation entry. The AO in the entire assessment order has not made reference to single documentary evidence which can be said to be an incriminating material against the assessee to show that the assessee has availed accommodation entry of bogus Long Term Capital Gain. Therefore, the mere suspicion cannot be a ground for treating the transaction as bogus in the absence of any evidence or material on record by the AO. In the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction. Even if the AO doubted the transaction, then to establish that the transaction is bogus, the AO is required to produce the contrary material evidence so that the evidence produced by the assessee can be controverted. In the absence of such contrary material or evidence brought on record by the AO and the evidence produced by the assessee is otherwise independently verifiable being the documents in the shape of bank statement, Demata account, books of account and bills for which the assessee has no control or say, therefore, the said evidence cannot be manipulated by the assessee. Once the evidence produced by the assessee is not prepared or beyond the scope of any manipulation by the assessee, then the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. The Ld. A/R has filed all the possible documentary evidence relating to purchase and sale of the stock on which the LTCG was earned. All the details are filed in assessee's Paper Book and the same were filed before the Ld. AO. The details file are as under:

S.No.	Particulars	Paper Book Page No.
1.	Copy of Contract note of the Broker through whom the shares were sold.	102
2.	Copy of Ledger Account maintained by him with the Broker	103-105
3.	Copy of transaction statement with Prabhat Financial Services Ltd.	106
4.	Copy of Bank statement of the assessee	107-109

In short, after the AO confronted the appellant with circumstantial evidence the Ld. A/R filed all possible documentary evidences in his possession. It is clear that AO has

based his addition u/s 68 of the Act on the basis of statement of the entry operator and information received from the Investigation Wing of the Department. However in the statement of entry operator no question was ever put to the entry operator regarding transaction through the companies, through which alleged cash of appellant was routed. On one hand the AO has oral statements/oral evidences in the form of statement of entry operator (never confronted to the appellant); the appellant has rebutted these oral evidences by filing documentary evidences listed above. It is a settled law that documentary evidences will always carry more weight than the oral statements. After the oral statements were available to the AO, the appellant proved the oral statements to be incorrect by filing documentary evidences. Thereafter the AO did not prove the documentary evidence to be untrue/bogus/nongenuine. The AO never confronted the documentary evidence to the person whose oral statement was recorded & relied upon. Therefore the oral statement loses their evidential value in light of the documentary evidences placed by appellant. Even the oral statement is general and does not pinpoint or mention appellant name anywhere. Neither does it mention anywhere that cash from appellant was received & it was same cash which was routed back to the appellant through bank account. Considering the above documentary evidences, it clearly outweighs the oral evidences relied upon.

6.1. It is settled position of law that addition cannot be made simply on the basis of statement alone. The same has to be substantiated and corroborated either by enquiries or by linking it with tangible material/ evidence. It is a settled law that statement, that too of 3rd person, alone cannot be treated as incriminating material for the purposes of making addition for assessment completed u/s 143(3). It has been held in many judgments that mere statement u/s 132(4) or u/s 131 is not sufficient to make an addition. A statement made must be related to some incriminating material or the statement must be related to material by subsequent inquiry/investigations.

2). Judgement of ITAT Hyderabad in the case of Santosh Kumar Goyal (ITA No. 168/Hyd/2011) which was reported on November 6, 2013. The ratio of the said judgement is to the effect that-

“ having been followed by the assessee from the stage of purchase till the shares are dematted there is hardly any room to doubt or suspect that the transactions in purchase are not genuine.”

“ observations of the AO that the purchases and sales of shares were made with reference to penny stocks which were purchased at a nominal price and sold at a very high price, since all the sale transactions were made through stock

exchangesthereisharldyanyscopeforpricemanipulation.Itisallthemoreso, since the assessee has paid STT.”

“It is not possible to take any adverse view on the basis of mere suspicion that SEBI has initiated some action.”

“ considering the absence of any positive corroborative evidence brought on record by the assessing officer to substantiate his allegation of the assessing officerastothenongenuinenatureofthetransactions,concludedthattheconclusions of the assessing officer are based on mere suspicion, surmises and conjectures and consequently, his orders cannot be sustained.”

3) Hon’ableRajasthanHighCourtinthecaseofCITv.SumitraDevi(Raj.)268 CTR 0351 has held:- (See P.B. of Judgements Pg. No.9-13)

Findings as ultimately recorded by AO had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the ITAT, the AO had failed to show that the material documents placed on record by the assessee like broker’s note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO, like the notice under Section 136 to the company having been returned unserved; delayed payment to the brokers; and de-materialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.(Para 7)

In an overall view of the matter, the finding as recorded by the appellate authorities after a thorough consideration of the material on record that the transaction of purchase and sale of shares could not be treated as non- genuine, remains a justified finding on facts; and we are unable to find any substantial question of law worth consideration in this case.(para 8)

In an overall analysis, the findings as concurrently recorded by the CIT(A) and the ITAT, that addition under Section 68 of the Act was not sustainable, remains essentially in the realm of appreciation of evidence. The Appellate Authorities have returned the finding of fact in favour of the assessee after due appreciation of evidence on record, on relevant considerations, and on sound reasonings. The finding neither appears suffering from any perversity nor is of such nature that cannot be reached at all. Hence, no substantial question of law is involved in this appeal.(Para 10)

Where shares were sold by assessee for consideration through named stock broker and appellant furnished all the evidence to establish genuineness of transactions, AO was not justified in making addition u/s 68.

4) Hon'ble ITAT, Jodhpur Bench in ACIT v. Pankaj Raj Shah (ITA330/Jod/2011 dated 28.06.2013) has held:- (See P.B. of Judgements Pg. No.53-63)

“We have considered the submissions of both the parties and carefully gone through the material available on record. In the present case, it appears that the assessee purchased the shares of M/s Shree Nidhi Trading Co. Ltd. from market at the price prevailing at that time and those shares were put into DEMAT account. The assessee purchased the shares on 26-06-2004 and acquired those shares before 17-06-2005 through Stock Exchange. Those shares were reflected in the balance sheet of the assessee for the year ended on 31-03-2005 and 31-03-2006.

The holding of the shares was more than one year as shares were sold between the period 25-08-2006 to 21-09-2006 at Rs. 15,11,870/-. The assessee also incurred the expenses in the form of Brokerage, Securities Transfer Tax, Service Tax, Stamps etc., those expenses were not doubted by the Assessing Officer. The assessee also furnished the Bank receipt note, Statement of Security Transaction Note, Contract Note etc. Therefore, the transaction was genuine and the Long Term Capital Gain on the sales of shares of M/s Shree Nidhi Trading Co. Ltd., amounting to Rs. 14,59,240/- was rightly claimed as exempt u/s 10(38) of the Act because the assessee fulfilled both the conditions for claiming exemption u/s 10(38) of the Act. The first condition was that transaction of those shares was to be entered into on or after the date on which Chapter VII of the Finance (No.2) Act, 2004 came into force i.e. 01-10-2004 and the transaction was chargeable to Securities Transaction Tax under this Chapter. In the present case, shares were acquired by the assessee on 17-06-2005 through Stock Exchange and put into DEMAT account. When those shares were sold, the assessee incurred the expenses of Rs. 1891/- on account of Securities Transaction Tax and those shares were held for more than one year. Therefore, the profit earned on the sale of the shares was Long Term Capital Gain which was exempt u/s 10(38) of the Act. We therefore, considering the totality of the facts of the case as discussed herein above are of the view that the CIT(A) rightly deleted the addition made by the Assessing Officer. In that view of the matter, we do not see any merit in this appeal of the Department.

In the result, the appeal filed by the Revenue is dismissed.”

- 5) Hon'ble Bombay High Court in CIT v. Shyam R. Pawar (2015) 54 taxmann.com 108 on a similar issue has held:

“Assessee declared capital gain in sale of shares of two companies-Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held such transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and therefore, made addition u/s 68- On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus-Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted-Held-yes.”

- 6) Hon'able Gujarat High Court in PCIT v. Ramniwas Ramjivan Kasat (2017) 82 taxmann, com 458 (Gujarat) on a similar issue has held:

Section 68 of the Income-tax Act, 1961-Cash credits (Shares)-A.Y. 2006-07- During relevant year, assessee sold certain shares owned by him-Assessing Officer opined that purchase of shares in question itself was bogus and, thus, there was no question of sale of same-He thus added amount of sale proceeds of shares to assessee's taxable income-Tribunal noted that shares had been purchased in previous assessment year-It was further found that assessee's investment for previous assessment year had been taken in scrutiny and in assessment order purchase of shares had been accepted as genuine-Tribunal thus concluded that no addition could be made with aid of section 68 when such shares were sold in relevant assessment year-Whether on facts, impugned order passed by Tribunal did not require any interference-Held, yes.

- 7) Hon'able ITAT, Kolkata Bench in Dolarrai Hemani v. ITO (ITA 19/Kol/2014 dated 02.12.2016 on a similar issue has held:

“We find that the similar issue had been adjudicated by the co-ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos. 714 to 718/Kol/2011 dated 28.10.2015 and in the case of ITO vs Rajkumar Agarwal in ITA No. 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that when purchase and sale of shares were supported by proper contract notes, deliveries of shares were received through demat accounts. ITA No.19/Kol/2014 Dolarrai Hemani, AY 2005-06 maintained with various agencies, the shares were purchased and sold through recognized broker and the sale

considerations were received by account payee cheques, the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG. We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money. 2.9.6. In view of the aforesaid facts and findings and the judicial precedents relied upon, we have no hesitation in directing the Id AO to accept the claim of exemption of LTCG of the assessee arising out of sale of shares of G.K. Consultants Ltd and accordingly allow the ground raised by the assessee in this regard.”

8) Hon’able ITAT, Ahmedabad Bench in Pratik Suryakant Shah & Others v. ITO (ITA 810/Ahd/2015 dated 21.10.2016) on a similar issue has held:

“For the sake of the completeness of the adjudication, even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn. ITA Nos. 810 to 815, 922 to 926/Ahd/2015 Shri Pratik Suryakant Shah & others – Total 11 Appls AYs 2006-07 & 2008-09 9 18.

In

the light of the decisions of the Hon’ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker’s contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.”

9) Hon'able Allahabad High Court in CIT v. Udit Narain Agrawal [2013] 31 taxmann.com 76(All.):

In this case, it was contented by assessee's counsel that after the allotment of shares, the same were transferred to Demat A/c, remained in demat account during the period of holding and transferred to the demat account of the buyer, itself proves the genuineness of the purchase/sale transaction of shares having regard to the relevant provisions contained in the Depository Act. The transaction made through demat account is in itself an evidence to prove the genuineness of share transaction. Merely because the sale of shares fetched a handsome price, which price is supported by official quotation issued by Magadh Stock Exchange, therefore, there can not be any reason to doubt the genuineness of the sale transaction of the shares. It is settled position of law by the decisions reported in 26 ITR 776(SC), 37 ITR 288(SC), 63 ITR 449(SC) and 1 SOT90(Mum)(supra) to support that suspicion even strong enough cannot take the character of evidence.

Considering the fact that the shares were allotted to the assessee which were kept in demat account, the decision was made in favour of assessee.

The AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Tarbo Tech Ltd. on the basis of information received from the Directorate of Investigation that an organized racket of generating bogus entries of LTCG in penny stock has been unearthed as a result of investigation carried out through-out the country, where in certain persons were found indulged in providing accommodation entries, inter-alia bogus Long Term Capital Gains which is claimed as exempt under section 10(38) of the IT Act by the beneficiaries in order to facilitate the beneficiaries to convert their black money into white without paying Income-tax. The AO has narrated the modus operandi of various entry providers which is a general statement so far as the indulgence of certain persons in providing the accommodation entry of bogus long term capital gains as well as other transactions. However, in the said narration of modus operandi there is nothing against the particular transaction of purchase and sale of shares by the assessee. The AO has specifically mentioned that during the course of enquiry in certain cases it has come to light that large scale manipulation has been done in the market price of shares of certain companies listed on Stock Exchange by a group of persons working as a syndicate for the purpose of providing entry of tax exempt bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash. These observations of the AO in the assessment order cannot constitute any tangible material or evidence to show that the transaction of the assessee is bogus being an accommodation entry. The AO in the show cause notice though referred the statements of Directors/entry operators, who have operated as entry providers/brokers, however, neither any documentary reference is made in

the show cause notice or any such reference is made in the finding of the AO while holding the transaction as bogus by availing the accommodation entry of long term capital gain. The AO has either discussed the modus operandi of entry providers or the judgments on the issue but has not made any reference of any material or documentary evidence which reveals that the assessee has indulged in availing the accommodation entry of bogus long term capital gain. There is no dispute that once the assessee has claimed the long term capital gain from purchase and sale of shares which is exempt under section 10(38) of the Act, the primary onus is on the assessee to substantiate his claim by producing the supporting evidence. The assessee is a regular investor in shares and had discharged his part of providing genuine and true documents.

Ground No. 2 relates to commission paid for the accommodation entries is consequential to the issue involved in ground no. 1, therefore, when we have given a finding that the transaction of purchase and sale of shares and consequential Long Term Capital Gain cannot be treated as bogus, then the addition made by the AO on account of notional commission paid treating the same as undisclosed expenditure under section 69C will not be sustainable being consequential hence the same should also be deleted.

The contention of the department through its investigation report that such company is a penny stock company and was formed only for the purpose of giving accommodation entries might be correct, **assessee does not dare to challenge the investigation report of the department**, but only

requests the department to consider the fact that the assessee was not indulged in such dubious entry system and had purchased and sold shares of the respective company under good intention in order to earn profit, since it is the very basic condition for one's existence is that one always craves to earn profit and avoid losses.

Assessee was unaware of the activities going inside the said company and has invested in the company after coming to know through somebody that investing in TarboTech Ltd may yield good profits. Since the assessee has always been a loyal citizen and would not indulge in any activity or practice that would expose him towards legal implications, assessee invested in good faith in the company and as soon as the assessee saw the rise in the price of the shares, the assessee decided to sell it off and book capital gains thereon.

In the entire chain of activity, assessee was not aware of the inner intention and core basis of formation of such company, had the assessee been known to the fact, he would have not been entered into such transaction.

Ground No.3-

The Ld, assessing officer passed assessment order on 08.12.2017 u/s 148/143(3) of the Income Tax Act, 1961 adding back the LTCG claimed by the assessee considering this as bogus entries.

Aggrieved by this, assessee filed an appeal before the CIT(A)-1, Jaipur and the same was instituted on 11.01.2018 against the assesment order dated 08.12.2017 passed u/s 143(3) of the Income Tax Act,1961 as issued by the Income Tax officer, ward-3(2), Jaipur for AY 2014-15.

Therein after order u/s 250 of the Income Tax Act,1961 was passed on 30.06.2023 against the assessee stating that the LTCG claimed by the assessee is not tenable and also that information called by the assessee through issuance of various notices were not complied by the assessee which in entirety is not true.

Assessee accepts and acknowledges that there might be several occasions when information was called by the department but not supplied by the assessee, but the assessee also wants to state that none of these non submissions were deliberate but only due to some technical glitch of email ids relating to assessee. Assessee had no intention to surpass the authority calling for information when the assessee is in possession of all the documents that might be required for finalizing the assessment.

Also, notice served on 01.06.2023 naming final show cause notice seeking documents in support of appeal memo was duly replied on 06.06.2023 although the due date of the same was 09.06.2023 but the same has not been considered by the CIT(A)-1, Jaipur and the order u/s 250 states that the no reply was filed by the assessee due to which it seemed to them that assessee is no longer interested in the case and hence not preferring to reply over the same which is incorrect.

The assessee has genuine and core intentions to align with the judicial system of the country and nowhere expects to surpass them in any case what so ever. Assessee has duly filed the reply for final show cause notice which should have been taken into consideration.

Moreover, it appears to the assessee that although the assessee might be in default for non reply of several notices but it also appears that CIT(A)-1 was also in a hurry to pass order u/s 250 without even considering the assessee's reply and dismissing the case of the assessee in a hap hazard manner.

Assessee pleads before the Hon'ble judge to consider the fact of the assessee's non involvement in such entry system and allow the exemption claimed by the assessee u/s 10(38) and also deduction of expense claimed for earning such income.

Further, contention of the department that no reply was submitted by the assessee even after calling for multiple times is also not correct, as reply to final show cause notice dated 01.06.2023 seeking documents in support of Appeal was submitted in 06.06.2023 which was not at all considered by the department and assessment order was passed citing that no response has been submitted by the assessee for final show cause notice.

Copy of the reply and order u/s 250 has been enclosed.(Pg No.22-39)

Assessee has good faith in the judicial system of the country and believes that the above mentioned case shall be decided only after considering the facts presented by the assessee.”

6. During the course of hearing, the ld. AR for the assessee prayed that the Ld. CIT(A) has passed the ex-parte order and the assessee was not provided adequate opportunity of being heard. Thus, the assessee may be provided one more opportunity to advance his arguments/submissions before the ld. CIT(A) in the interest of equity and justice.

7. Per contra, Ld. DR supported the order of the CIT(A).

8. We have heard both the parties and perused the materials available on record. From the order of ld. CIT(A), it is noted that the appeal of the assessee is dismissed by the ld. CIT (A) for want of non-prosecution of the appeal after several opportunities. The Bench further noted the grievance from the grounds of appeal of the assessee wherein he submitted that the ld. CIT(A) has on the grounds raised by the assessee merely stated that “ *The ld. CIT Appeal has not considered our reply submitted on the Income Tax Portal on 09.06.2023 vide response to notice ID 100063149108 and the same has been marked as “no response submitted” in the order issued by the CIT(A) dated 30.06.2023*”. Thus, the ld. AR

of the assessee prayed that he may be granted one chance to represent the facts before the Id. CIT(A). The object of the Bench is to provide justice. Considering the overall facts of the case and looking to the facts /grievance of the assessee as raised hereinabove, the Bench feels that one more chance should be given to the assessee to contest the case before the Id. CITA) and submit the necessary reply to resolve the issue raised in the appeal before him. Thus the appeal of the assessee is restored to the file of the Id. CIT(A) for afresh adjudication of the case but after providing sufficient opportunity of being heard to the assessee.

9. Before parting, we may make it clear that our decision to restore the matter back to the file of the Id. CIT(A) shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by the Id. CIT(A) independently in accordance with law.

In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 23/09/2024.

Sd/-
(राठौड़ कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member
जयपुर / Jaipur
दिनांक / Dated:- 23/09/2024

Sd/-
(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

*Santosh

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Aditya Baheti, Jaipur.
2. प्रत्यर्धी / The Respondent- ITO, Jaipur.
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File ITA No. 562/JPR/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar