

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI**

**SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

ITA No. 150/MUM/2024
(Assessment Year: 2012-13)

ITA No. 993/MUM/2024
(Assessment Year: 2014-15)

ITA No. 992/MUM/2024
(Assessment Year: 2015-16)

Income Tax Officer 41(4)(1), Mumbai

Kautilya Bhavan, BKC,
Bandra East, Mumbai-400051
Maharashtra

..... **Appellant**

Vs

Chirania Trading LLP, Mumbai

914, Corporate Annex,
Near Udyog Bhavan,
Sonawala Lane, Goregaon East
Mumbai-400063 Maharashtra
[PAN: AAHFC7445A]

..... **Respondent**

C.O.No. 39/MUM/2024
In ITA No. 150/MUM/2024
(Assessment Year: 2012-13)

Chirania Trading LLP, Mumbai

914, Corporate Annex,
Near Udyog Bhavan,
Sonawala Lane, Goregaon East
Mumbai-400063 Maharashtra
[PAN: AAHFC7445A]

..... **Appellant**

Vs

Income Tax Officer 41(4)(1), Mumbai

Kautilya Bhavan, BKC,
Bandra East, Mumbai-400051,
Maharashtra

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Jay Bhansali
For the Respondent/Department : Shri H. M. Bhatt/Shri Raj Singh
Meel

Date

Conclusion of hearing : 29.08.2024
Pronouncement of order : 30.10.2024

ORDER

Rahul Chaudhary, Judicial Member:

1. This is a batch of three appeals preferred by the Revenue for the Assessment Years 2012-2013, 2014-2015, and 2015-2016 and a Cross-Objection filed by the Assessee in appeal preferred by the Revenue for the Assessment Year 2012-2013.
2. The appeals pertaining to 2012-2013, 2014-2015, and 2015-2016, arise from three separate orders, dated 14/11/2023, 31/01/2024 and 31/01/2024, respectively, passed by the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the **CIT(A)**']. However, since identical issues arising from common factual matrix were raised in the appeals the same were heard together and are, therefore, being disposed by way of a common order.
3. Facts common to all the three appeals are that in the return of income, the Assessee had claimed exemption under Section 10(38) of the Act in respect of Long Term Capital Gains arising from the transfer of shares of KDJ Holidayscapes & Resorts Ltd Limited [for short '**KDJH**']. In the assessment/reassessment proceedings, the Assessing Officer rejected the aforesaid exemption claimed by the Assessee under Section 10(38) of the Act holding that KDJH was identified as a 'penny stock company' in the Investigation Report of Directorate of Income Tax (Investigation), Kolkata in 'Project Bogus LTCG/STCG through BSE Listed Penny Stock' (For short 'the Investigation Report'); there was artificial rise in the quoted price of the shares and that the Assessee had sold the shares at an artificially high price to book bogus Long Term Capital Gains and

thereby introduced unaccounted cash into its books of accounts. Thus, the Assessing Officer added the sale consideration received by the Assessee on transfer of shares as income in the hands of the Assessee invoking the provisions contained in Section 68 of the Act. Further, an addition of 5% of the aforesaid sale consideration was also made in the hands of the Assessee as unexplained commission expenses incurred by the Assessee for taking accommodation entry of bogus long term capital gains. Thus, the aggregate additions made in the hands of the Assessee were as under:

(a)	Assessment Year 2012-13	:	INR. 2,72,49,526/-
(b)	Assessment Year 2014-15	:	INR. 15,43,84,188/-
(c)	Assessment Year 2015-16	:	INR. 3,25,02,220/-

4. In the respective appeal preferred by the Assessee, the above additions made by the Assessing Officer were deleted by the CIT(A) on merits.
5. Being aggrieved the Revenue has preferred appeal before the Tribunal challenging the above relief granted by the CIT(A).

Appeal by Revenue for the Assessment Year 2014-2015
ITA No. 993/Mum/2024

6. In view the quantum of addition involved and the date of passing the assessment order, Learned Departmental Representative took up appeal for the Assessment Year 2014-2015 as the lead matter. The said appeal has been preferred by the Revenue challenging the order, dated 31/01/2024, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 28/12/2016, passed under Section 143(3) of the Act.
 - 6.1. The Revenue has raised following grounds in the said appeal:

"1. Whether on the facts and in the circumstances of the case and in

law, the Hon'ble ITAT has erred in overlooking the explicit finding of the directorate of Investigation, Kolkata that the share price of script M/s KDJ Holidascapes& Resorts Ltd was manipulated for tax evasion and entry of entire sale proceeds was taken while incurring expenses in nature of commission."

2. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in not appreciating the fact that the entire sale proceeds which was credited in the books of account, on account of transaction in script M/s KDJ Holidayscapes & Resorts Ltd was manipulated for tax evasion and said transaction itself was not genuine and hence entire proceeds were needed to be brought to tax u/s 68 of the I.T. Act."*
7. We have heard both the sides on the above grounds of appeal which are taken up together hereinafter.
8. Placing reliance on the Assessment Order, dated 28/12/2016, passed by the Assessing Officer under Section 143(3) of the Act, the Learned Departmental Representative submitted that CIT(A) had erred in deleting the addition made by the Assessing Officer under Section 68/69C of the Act by allowing the appeal preferred by the Assessee vide order dated 28/12/2016 passed under Section 143(3) of the Act. It was submitted that Assessee had taken bogus long term capital gains entry to introduce its own unaccounted cash in the books of accounts. The sale of shares of the company under consideration was made at an artificially increased price (which did not correspond to the financial strength in the said company). It was submitted that as per the Investigation Report of Directorate of Income Tax (Investigation), Kolkata in the case of 'Project Bogus LTCG/STCG through BSE Listed Penny Stock' [hereinafter referred to as the '**Investigation Report**'], KDJH was identified as a penny stock company and that the Appellant was beneficiary of the pre-arranged purchase & sale transactions resulting in artificial long term capital gains income which were claimed to be exempt under

Section 10(38) of the Act.

9. Per Contra, the Learned Authorised Representative for the Assessee placed reliance on the Order, dated 31/01/2024, passed by the CIT(A) and supported the same by submitting that there was no material before the Assessing Officer to arrive at a conclusion that KDJH was in the nature of a penny stock company or that the Assessee had introduced unaccounted cash in the garb to exempt long term capital gains. The Learned Authorised Representative for the Appellant reiterated the submission made before the CIT(A) *[as reproduced in paragraph 5.3 of the order impugned]*. It was vehemently contended that no statement/material on which reliance was placed by the Assessing Officer to arrive at the conclusion that the Assessee had taken accommodation entry or entered into bogus penny stock purchase/sale transactions was made available to the Assessee. The Revenue has failed to provide any order passed by the Securities Exchange Board of India (**SEBI**) in support of the contention that KDJH is a penny stock company or to show that the quotes price of shares of KDJH at the BSE was rigged. It was submitted that, to the contrary, the CIT(A) had referred to the inquiry conducted by the Assessing Officer itself which revealed that the Assessee had undertaken genuine transactions. It was also submitted that the contention of the Revenue that the financial of KDJH do not have any strength is also factually incorrect. It was submitted that the CIT(A) had correctly deleted the additions. In support the Learned Authorised Representative for the Assessee relied upon the following judicial precedents:

- i. PCIT Vs. Ziauddin A Siddique (ITXA No. 2012 of 2017).
- ii. Rehana Anwar Shaikh Vs. Assessing Authority Delhi (ITA No. 1606/Mum/2022).
- iii. Karishma Ajay Agarwal Vs. ITO (ITA No. 2586/Mum/2022).
- iv. Farzad Sheriar Jehani Vs. ITO (159 taxmann.com 9).
- v. Vikram N. Chandan Vs. ITO (ITA 70/Mum/2024).

10. We have given thoughtful consideration to the rival submission and perused the material on record. The undisputed facts, as emanating from the record, are as under:
- 10.1. The Assessee is a Limited Liability Partnership. During the relevant previous year, the Assessee sold 11,05,512 shares of KDJH. 4,05,502 shares of KDJH were sold between September, 2013 to December 2013 and balance 7,00,010 shares of KDJH were sold in February, 2014 (post split). Since the aforesaid shares of KDJH were held for more than one year, the long term capital gains of INR 14,39,03,336/- earned were claimed to be exempt under Section 10(38) in the return of income filed by the Assessee for the Assessment Year 2014-2015 on 23/09/2014 declaring total income at INR.99,530/-.
- 10.2. The case of the Assessee was selected for regular scrutiny. The Assessing Officer noted that in the Investigation Report the Kolkata Investigation Directorate has, after investigation, identified 84 scripts (including KDJH) as penny stocks used by the script operators to providers provide bogus long term capital gains accommodation entry to beneficiaries. The Investigation Report described the modus operandi of the penny stock script operators, intermediaries and the beneficiaries and stated that the aforesaid scheme was aimed at routing unaccounted money into the books of accounts of the beneficiaries in the garb of exempt long term capital gains. Therefore, the Assessee was asked to explain the genuineness of the transaction involving purchase/sale of shares of KDJH.
- 10.3. The Assessee provided following explanation to the Assessing Officer:
- (a) The Assessee (i.e. Chirania Trading LLP) came into existence

on 28/11/2011 after conversion of Chirania Trading Private Limited (a company incorporated & registered under the provisions of the Companies Act on 24/08/2010), into a limited liability partnership.

- (b) KDJH was originally known as Gomti Finlease India Limited (for short '**Gomti Finlease**'). The shares of Gomti Finlease were listed on the Bombay Stock Exchange (BSE).
- (c) 22,51,000 shares of shares of Gomti Finlease were originally purchased by Chirania Trading Private Limited (at the purchase price of INR 5/- per shares) in an off-market transaction through Share Purchase Agreement, dated 18/11/2010, entered into by the Chirania Trading Private Limited with the promoters of the Gomti Finlease. Copy of the Share Purchase Agreement, dated 18/11/2010, was filed to substantiate the purchase transaction.
- (d) Since 75% of the shares of Gomti Finlease listed on BSE were acquired, the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were triggered and the Chirania Trading Private Limited was mandated to make open offer to the public. As a result, Chirania Trading Private Limited came out with open offer and acquired another 1000 shares of Gomti Finlease at the purchase price of INR 5 per share. In support the Assessee filed a copy of letter dated 19/11/2010 filed with BSE, a copy of Public Announcement made regarding Open Offer, and post offer announcement dated 07/04/2011.
- (e) In the year 2011, name of Gomti Finlease was changed Two-up Financial Services Ltd. and Chirania Trading Private Limited got converted into Chirania Trading LLP (i.e. the

Assessee in the present case).

- (f) Subsequent thereto, somewhere in the year 2012, scheme of merger of another company (i.e. KDJ HolidayScapes & Resorts Limited) with Two-up Financial Services Ltd was approved. As per the aforesaid scheme the Assessee was allotted 16% shares of the resulting company on account of holding 75% shares in Two-up Financial Services.
- (g) In the year 2013, the name of Two-up Financial Services (formerly known as Gomti Finlease) was changed to KDJ HolidayScapes & Resorts Ltd [referred to as '**KDJH**']. Thus, on account of the change of the name of the resulting company, Gomti Finlease which was subsequently known as Two-up Financial Services Ltd came to be known as KDJH.
- (h) During the relevant previous year, the Assessee sold listed share of KDJH, which were held for more than 12 months, through stock exchange at the quoted share price after paying applicable securities transaction tax. The sale transaction was undertaken through a SEBI Registered broker and entire purchase consideration was received through banking channel. The capital gains arising from the same were claimed to be exempt from tax under Section 10(38) of the Act in the return of income filed by the Assessee for the Assessment Year 2014-15. In support the Assessee filed copy of the D-mat account statement, copy of invoices/contract notes, certificate of holding, ledger of broker, and bank statements.

10.4. The Assessing Officer rejected the above explanation offered by the Assessee observing as under:

- (a) The Directorate of Investigation of Kolkata had carried out investigation that prove that brokers, entry operators and the beneficiaries (such as the Assessee) had worked out a scheme under which the shares were acquired at low prices from entry providers, thereafter the share prices were rigged to reach unusual highs and then the shares purchased were sold by the beneficiaries to exit providers at unusual high price to book exempt long term capital gains in a pre-arranged manner. The routing the cash used to take place through person operating the script and providing bogus long term capital gains entries.
- (b) The Assessee had purchased shares of KDJH through off market transaction.
- (c) There was unusual rise in the quoted price of shares of KDJH that was not supported by any commercial principles or market factors.
- (d) The net worth of KDJH was negligible and the share prices have been artificially rigged to reach an unusual high.
- (e) The purchase/sale transactions lacked commercial substance, being artificially structured transactions, entered into with the sole purpose of evading taxes and introducing unaccounted cash into books.

10.5. In view of the above, vide Assessment Order, dated 28/12/2016, passed under Section 143(3) of the Act, the Assessing Officer rejected the claim for exemption made by the Assessee under Section 10(38) of the Act in the return of income relying upon the findings of the Investigation wing and the theory of probability [as propounded in the case of *Sumati Dayal (214 ITR 801) (SC)* and the

case of Durga Prasad More (82 ITR 540) (SC)]. The Assessing Officer, thus, made addition of INR 14,71,89,021/- under Section 68 of the Act holding the entire the proceeds raising from sale of shares of KDJH as unexplained cash credit. The Assessing Officer also made addition of INR 71,95,167/- (computed at the rate of 5% of INR 14,71,89,021/-) under Section 69C of the Act holding the same to be unexplained expenditure incurred by the Assessee for the taking bogus long term accommodation entry.

10.6. In appeal filed by the Assessee before the CIT(A), detailed submission were made on behalf of the Appellant which have been reproduced in paragraph 5.2 of the order impugned and the relevant extract of the same reads as under:

"2.14. *From the above, your honour will appreciate that the appellant purchased shares of KDJ Holidayscapes through share purchase agreement, payment made through banking channels, necessary SEBI compliances being made, received the delivery of the said shares in its Demat Account, the said shares were held in the Demat Account for more than one year, the same were sold on stock exchange through registered broker and the payment in respect of the same was settled immediately through account payee cheques. Thus, your honour will appreciate that the above share transaction is genuine and the Long Term Capital Gain earned thereon is exempt u/s 10(38) of the Income Tax Act, 1961.*

2.15. *The Id Assessing Officer has made observation that the net worth of the script KDJ Holidayscapes was negligible the share prices increased drastically. In this regard the appellant submits as under:*

2.15.1. *M/s KDJ Holiday & Resorts Ltd is a company engaged in hospitality business. The company is a part of the KDJ Group, which is owned by three business houses of Mr Surendra K Kedia, Mr Ashok Deora and Mr Dinesh K Jalan. The company owns two resorts at Jodhpur and Khandala .The appellant has enclosed at page 173-179 of the compilation a valuation report of an analyst which values the assets of the company at Rs325 Crores. The company is developing a 60 room resort in Goa. KDJ Holiday & Resorts Ltd owns 51% stake in KDJ Hospitals Ltd, which is in the process of setting up a 160 bed multi super specialty hospital in Jodhpur, India. As per the*

valuation report, the valuation of KDJ Holiday Resorts Ltd is Rs 120 Crores, half of which is owned by KDJ Holiday & Resorts Ltd. The company operates in the Vacation Ownership Service business which basically sells future vacations for a specified number of years at today's price. The company has a member base of 1,300 members.

The appellant has enclosed one more CRISIL report at page 180-183 of the compilation dated 31.03.2016. As per the report, the company has acquired land bank in Goa which it plans to invest around Rs 20 Crores. It is affiliated with Resort Condominiums International (RCI) which has a network of over 6,000 resorts in 93 countries.

- 2.15.2. The company's subsidiary M/s KDJ Hospitals Ltd has obtained term loan of Rs 60 Crores from a consortium of banks including Rs 20 Crores from State Bank of India. Copy of Sanction Letter with State Bank of India dated 14.03.2014 is enclosed herewith at page 188-197 of the compilation. M/s KDJ Holidayscapes & Reports Ltd has given corporate guarantee for the said term loan along with personal guarantee of Mr Surendra K Kedia, Mr Ashok Deora and Mr Dinesh K Jalan. M/s Hospihealth Consultants India Pvt Ltd has prepared techno economic vetting report for the proposed term loan, copy of which is enclosed herewith at page 198-203 of the compilation. A copy of photographs of the under-construction hospital building is enclosed herewith at page 204- 207 of the compilation.
- 2.15.3. The appellant has enclosed the stand-alone financial statements of M/s KDJ Holidayscapes and Resorts Ltd for financial year 2012-13 to financial year 2014-15 at page 208-255 of the compilation. As per the Balance Sheet of the company as on 31.03.2015, the net worth was Rs 24.32 Crores. The sales of the company were Rs 5.77 Crores. The company has investment in M/s KDJ Hospital Ltd and M/s KDJ Hospitality Pvt Ltd of Rs 8.92 Crores. The company has given loans and advances of Rs 13.88 Crores. The Balance Sheet and Auditors Report is signed by Chartered Accountant M/s ASL & Co.
- 2.15.4. The company is still in existence and is regularly filing tax returns. A summary of the past results is as follows:

Financial Year	Sales	Net Profit before tax	Provision for tax
2011-12	7,00,300/-	11,98,788/-	64,000/-
2012-13	4,05,46,614/-	10,16,303/-	1,36,493/-
2013-14	2,45,64,629/-	-8,35,507/-	-
2014-15	5,77,73,302/-	9,80,194/-	1,88,000/-

2015-16	52,70,000/-	-1,97,20,000/-	-
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2.15.5. *A perusal of the company master data from ROC website, copy of which is enclosed herewith at page 256 of the compilation, shows that the company has filed annual returns regularly. The immovable property of the company worth Rs3.25 Crores has been charged.*

This shows that the company has significant net worth.

2.16. *The appellant submits that in the stock market, there is no correlation between net worth and share price. Merely if a script has a high net worth does not mean that it has a high share price and vice versa. In the share bazaar, certain shares such as Bank of India are traded 1/5 th of their book value where certain shares are traded many more times of their book value. For example, in the case of Advaned Enzymes Technologies Ltd, the book value per share is Rs 70/- but the share price is Rs 1,904/- ie 27 times its book value. Medicamen Biotech Ltd Book Value of Rs19.19, made a 52 week high of 367.10 from a low of Rs 38.65 in February 2016, i.e near 20 times Bookvalue and a PE of 91.86. There are Numerous Instances of High PE and Multiple times BV.*

2.17. *The AO has alleged that the Kolkata Investigation Directorate has come to the conclusion that KDJ Holidayscapes and Resorts Limited is a penny stock. The Id Assessing Officer has not provided the appellant with the relevant report of the Kolkata Investigation Directorate and hence the same cannot be used against the appellant on ground of natural justice. The appellant submits that there is no bar in the law that Long Term Capital Gains cannot be earned on penny stock or such Long Term Capital Gain is illegal unless it is proved that such Long Term Capital Gain is against the exchange of cash. The appellant submits that just because KDJ Holidayscapes and Resorts Limited is a penny stock does not mean that the appellant has exchanged cash against its exempt LTCG.*

2.18. *The AO has alleged that the appellant does not have significant substantial trading/investment activity but has mainly interest income. The appellant submits that it has regularly earned capital gains. In Assessment Year 2012-13, the Appellant earned long term capital gain on sale of shares of Rs 2,27,51,223/-. In Assessment Year 2014-15, the Appellant earned long term capital gain on sale of shares of Rs 14,71,89,021/-. In Assessment Year 2015-16, the appellant earned long term capital gain on sale of shares of Rs 3,00,32,342/-.*

2.19 *The AO has reproduced a chart of share price of KDJ Holidayscapes for last 5 years. As can be seen from the share*

price chart for last five years, the stock does not have a bell shaped curve that is traditionally associated with penny stocks. It peaks in December 2013, then falls again in March 2014 and peaks again in July 2014. Normally, a penny stock peaks only once but in this case there are two peaks which shows that it is not a regular penny stock.

2.20. *The AO has stated that from the statement of brokers, it is observed that the appellant was a beneficiary of bogus LTCG. The appellant submits that the Assessing Officer has not given the appellant a single statement of any third party on which the Assessing Officer is relying upon. SEBI have not passed any adverse order against KDJ Holidayscapes. The AO has not named a single person in the entire Assessment Order on whose evidence lead him that the appellant was involved in bogus LTCG. The AO has not granted the appellant right of cross examination.*

2.20.2 xx xx

2.20.3 xx xx

20.21. *The Id Assessing Officer has recorded the statement of Mr Mahesh Saraf, partner of the appellant LLP. The statement was recorded u/s 131 of the Income Tax Act 1961 on 21.09.2016.*

At Question 10 of the statement, Mr Saraf states that the appellant acquired 75% stake of KDJ Holidayscapes in November 2010 and thereafter did various open offer compliances such as appointment of merchant banker, appointment of Registrar, Newspaper Advertisement, public announcement, escrow account, intimation to BSE and SEBI, CDSL, NSDL etc

At Question 21 of the statement, Mr Saraf states that the shares were sold through broker M/s Emkay Global Financial Services Ltd. The entire sales consideration was received by account payee cheque

Thus, a perusal of the statement shows that no infirmities were found by the Id Assessing Officer. Further, the entire statement of Mr Mahesh Saraf was not provided to the appellant and hence the same cannot be relied upon.

2.22. *The AO states that the appellant has not discharged the burden of proof. The Id Assessing Officer has not found any infirmities of the statement of the appellant recorded u/s 131 of the Act on 21.09.2016. The appellant states that it has duly replied to the notice u/s 142(1) of the Act issued by the Id AO. Thereafter, there was no further enquiry by the Id Assessing Officer. Hence, the appellant has discharged the burden of proof.*

2.23. xx xx

2.24. *The AO has relied upon.....*

In this case, the appellant submits that there are no evidence against the appellant. SEBI have not passed any adverse order against KDJ Holidayscapes. The ROC compliances of KDJ Holidayscapes are up to date. The AO has not proved that the appellant has given any cash to any party in order to obtain bogus LTCG"

The Assessee placed reliance on various judicial precedents including the decision of the Mumbai Bench of the Tribunal in the case of ITO v Jimeet Modi [ITA No.:4297/Mum/2018 dated 29.07.2021] and Karishma Ajay Agarwal Vs. ITO, Ward – 21(2)(1), Mumbai [ITA No. 2586/Mum/2022, dated 02/03/2023]

10.7. The above submission found favour with the CIT(A) and vide order dated 31/01/2024, the CIT(A) deleted the additions made under Section 68 and 69C of the Act and accepted the exemption under Section 10(38) of the Act as claimed by the Assessee in the return of income. Therefore, the Revenue in appeal before the Tribunal.

10.8. During the appellate proceedings before the Tribunal, both sides reiterated the stand taken in the assessment and first appellate proceedings.

10.9. We perused the orders passed by the authorities below. We note that the CIT(A) has, while granting relief to the Assessee, concluded as under:

"5.6. The undisputed facts.....

5.7 It is seen from the facts that purchases of shares in this case was not a simple off market purchase or preferential allotment of shares, as the assessee purchased the entire shareholding of the promoters of the company and has also made an open offer to the public shareholders. The assessee has filed copy of Demat Statement which shows that shares were credited to the demat account. It appears that the shares were purchased in the normal course. The assessee has filed financial statements of

Chirania Trading Pvt. Ltd. for the year ended 31.03.2011, following the acquisition of shares on 18.11.2010 vide Share Purchase Agreement. The shares are duly disclosed under the head "Investment" in Schedule 3 of the Financial Statements for the year ended 31.03.2011 at a cost of Rs 1,17,82,626/-. Subsequently, on 28.11.2011, Chirania Trading Pvt Ltd was converted into Chirania Trading LLP. The shares were duly disclosed in the Financial Statements of Chirania Trading LLP for the year ended 31.03.2012.

- 5.8 It is seen that neither the Stock Exchange nor the regulator or any other agency has passed any order against the appellant or the broker or the company or its promoters or the alleged purchasers of shares. It is seen from the records that after selling 6,31,800 of shares between December 2011 and January 2012, the appellant was holding 16,20,200 (22,52,000 – 6,31,000) shares of erstwhile Gomti Finlease (India) Ltd was shown as investment in the Balance sheet as on 31.03.2012 appearing in schedule - 3 of accounts at a cost of Rs.85,22,252. Similarly after selling 11,05,512 during the FY 2013-14 balance shares were appearing in the Balance Sheet as on 31.03.2014. It is also noted that the shares of the said company are listed on the Exchange and regularly quoted and the AO has not taken cognizance this fact during the assessment proceedings.
- 5.9 The appellant submitted evidences to indicate that the company had active business and had substantial operations. KDJ Holidayscapes & Resorts Ltd is a company engaged in hospitality business and part of the KDJ Group, which is owned by three business houses of Mr Surendra K Kedia, Mr Ashok Deora and Mr Dinesh K Jalan. KDJ Holidayscapes & Resorts Ltd owns two resorts one at Jodhpur and other at Khandala. Assets of the company are valued at Rs325 Crores by an analyst. It is also seen that the company is developing a 60 room resort in Goa. KDJ Holidayscapes & Resorts Ltd owns 51% stake in KDJ Hospitals Ltd, which is in the process of setting up a hospital in Jodhpur. It appears from these details that KDJ Holidayscapes & Resorts Ltd is a genuine company engaged in hospitality business
- 5.10 In the assessment order the AO placed heavy reliance on the fact that KDJ Holidayscapes & Resorts Ltd was having market price of shares at around Rs 4/- in September 2011, which increased to Rs. 99/- by December 2013. Thus, AO noted that within 27 months, the price was jacked up 25 times. Then the price of the script fell and thereafter, the price was again travelled up from Rs. 25/- in April 2014 to Rs.80/- in July 2014 and fell again to Rs 20/-. AO noted that there were two peaks wherein the share price was high. The AO further observed that KDJ Holidayscapes & Resorts Ltd. had net worth between Rs 0.46 Crores to Rs 24 Crores during the period March 2011 to

March 2015. The turnover of the LLP varied between Rs Nil to Rs 6.45 Crores and the net profit was negligible. The AO observed that the sharp rise in price of the shares during this period did not correlate with the poor financial health of the company. Therefore, the AO alleged that the scrip M/s. KDJ Holidayscapes & Resorts Ltd is a penny stock and the appellant with pre planned way has arranged for himself substantial LTCG.

- 5.11 It is pertinent to note that the transaction cannot be accepted as genuine if there are intriguing reasons to disbelieve the nature of the transactions. Thus, it is relevant to identify if there are any compelling reasons to believe that the nature of transaction is not what is being claimed by the appellant. In this context, I find that there is no direct indication in the order of assessment about the enquiries conducted by the investigation wing about the particular shares. There is no mention as to whether the conclusion has been arrived at on the basis of the price movements or some other enquiries even remotely connected to the appellant. I find that what the AO has made a general discussion on the modus operandi of bogus LTCG through penny stock and not the method adopted in case of shares of 'KDJ Holidayscapes & Resorts Ltd.' or by the appellant specifically. Therefore, it appears that the addition made by the AO is largely driven and concluded on the basis of price movement of the shares without references to incriminating findings against the appellant or the company. Hon'ble Apex Court in the following cases held that the addition cannot be based on suspicion.....
- 5.12 Thus, the AO is empowered to assess income by disregarding the apparent nature of transaction, if he is able to bring on record evidences/facts to show that the apparent is not real. What is required to be undertaken is a thorough exercise to determine whether there are reasons to disbelieve the claim made by the appellant. In the present case, I find that the AO has proceeded on incorrect assumptions, which are (a) holding that there is price rigging when in fact it was not, and the price at which shares were sold was the price at which they were listed (b) observing that the appellant has manipulated settlement bills and the rate was not in consonance with Market rate when the same is not the fact (c) observing that the shares had no volume when in-fact there was a reasonable volume. I also find that the AO has not brought on record any evidence to disprove the claim of the appellant other than stating that the LTCG is bogus. It is also a settled law that mere substantial gains cannot be the reasons for disbelieving the claim of the appellant.
- 5.13 In the assessment order, while making additions, the AO had relied on the report of Investigation wing of Kolkata, which is available in public domain. In this report it is only mentioned that large number of beneficiaries has claimed bogus

LTCG/STCL. A perusal of the said investigation report shows that the name of KDJ Holidayscapes & Resorts Ltd. does not appear in the report. This shows that the enquiry carried out by the investigation wing of Kolkata did not reflect the name of the appellant as the beneficiary. In this context, the AO has failed to provide any information about the statement recorded from the any persons and its connection with the appellant. Also, it is not the case of the AO that in the said statements, shares of KDJ Holidayscapes & Resorts Ltd or the appellant have been named. Thus, from the careful reading of the facts and discussion it is seen that no nexus has been established between the statements recorded and the transaction of the appellant.

5.14 The Id. Assessing Officer had issued notice u/s 133(6) to broker M/s Emkay Global Financial Services Ltd. The said entity confirmed that the assessee had sold shares of M/s KDJ Holidayscapes & Resorts Ltd. M/s Emkay Global Financial Services Ltd provided Demat statement of assessee, KYC of assessee, Demat account opening form of assessee; and Security holding and transaction statement of the assessee. During the assessment, the AO has issued notices u/s 133(6) of the Act to 39 buyers. Out of the 39 buyers, 16 buyers have admitted that they have no transaction with the appellant. The other 23 buyers failed to reply to the notice u/s 133(6) of the Act. If it was a penny stock, the buyers would have had a pre-planned arrangement with the appellant. However, the buyers have denied that they knew the appellant. None of the parties are Kolkatta based parties. During the assessment proceedings, the AO has recorded the statement of Mr. Mahesh Saraf, partner of the assessee LLP on 21.09.2016 u/s 131 of the Act. Mr. Saraf hasnowhere admitted that the LTCG was bogus. It is also seen from the assessment order that no infirmities were found by the Assessing Officer in the documents filed by the assessee and during the enquiries conducted by him. Further, it is not the case of the assessing officer that SEBI has passed an adverse order against the appellant, against the broker or against KDJ Holidayscapes & Resorts Ltd. Since no SEBI order was passed, the KDJ Holidayscapes & Resorts Ltd cannot be regarded as a penny stock.

5.15 From the gamut of facts brought out above, it appears that the AO is predominantly influenced by the penny stock related issue for treating the said transactions as sham. It is, however, seen that there is no adverse criticism on the relevant documentation involving these share transactions nor is there any allegation against the appellant individually as involved in price rigging or taking the benefit of accommodation entries to route his cash into the books of account. Thus, the purchase of shares of KDJ Holidayscapes & Resorts Ltd by the appellant is backed by evidences which have not been doubted by the AO and the reasons provided by him for making the addition can at the most

be termed as presumptions. In view of the evidences submitted by the appellant to substantiate the transaction and in the absence of any adverse finding by the AO on any of the documents filed by the appellant, the LTCG claimed by the appellant cannot be treated as bogus.

- 5.16 Another circumstantial fact, which has to be taken into consideration, is that the appellant was holding 22.51 lakh shares of KDJ Holdiayscapes & Resorts Ltd. During the FY 2011-12 the appellant sold only 6,31,800 shares and during the current financial year the assessee has sold 4,05,502 during the September 2013 and 7,00,010 in February 2014 shares post split amounting to 11,05,512 shares on the Bombay Stock Exchange and the balance 53,73,480 shares of Rs.2/- each were shown as closing balance. The assessee has submitted contract notes, demat statement, ledger account of broker, Global Report, STT certificate. The assessee has earned LTCG of Rs 14.39 Crores out of sales consideration of Rs 14.71 Crores. If the intention of the assessee was only to encash the surge price of shares, he could have sold entire holding, but as seen from the records, he sold only part of the holding in 2011-12 and part in 2013-14. Even after sales in two tranche, the appellant had shares in his possession. Therefore, the arguments of the AO related to typical Penny Stock case are not ipso facto applicable in the case of the appellant. The evidences filed by the appellant reveal that the sale was of an equity share; the equity share was held for more than 1 year making it a long term asset; the sale was after the STT law was passed by Finance (No 2) Act 2004; and the sale was subject to STT. I am of the opinion that the assessee has satisfied all the conditions mentioned in Section 10(38) of the Act.
- 5.17 The AO has alleged that the Kolkata Investigation Wing had proved that the entry operators had manipulated the share price. However, the AO has not brought any material on record relating to such operators in the Assessment order, not provided a copy of the statements of any broker or alleged exit provider to the appellant which were recorded by the Investigation Wing. The AO has not given the appellant any chance to cross examine such parties whose alleged statements are sought to be used in the assessment. The AO ought to have provided such statements to the appellant but he has failed to do so. The AO has not proved that the appellant gave any cash to any party at the time of sale of shares. The AO has not shown how the appellant's cash was deposited in the bank account of the entry operator. The alleged exit providers who have replied to notice u/s 133(6) of the Act have denied any transaction with the appellant.
- 5.18 The Assessing Officer has heavily relied upon the probability theory and has placed reliance on the case of Sumati Dayal (supra) and the case of Durga Prasad More (supra). I am of the

view that the theory of probability is not applicable to the facts of the case here. It is a settled proposition that preponderance of probability is a valid method of making assessment, if the AO is able to establish that the apparent is not real by bringing on record evidence to this effect, as has been held by the Hon'ble Apex Court in the above cases:

5.19 In view of the above factual matrix and looking to the facts, I am of the considered opinion that the case of the Appellant is squarely covered by the orders of the jurisdictional ITAT in the cases of **ITO v Jimeet Modi** (ITA 4297/M/2018) dated 29.07.2021 and **Karishma Ajay Agarwal Vs. ITO, Ward - 21(2)(1), Mumbai** in ITA No. 2586/Mum/2022 dated 02.03.2023, where in the same scrip of KDJ Holidayscapes and Resorts Limited was involved. Further reliance is placed on the latest decision of the jurisdictional High Court of Bombay in the case of **CIT v Indravan Jain (supra)**. In view of the above discussion, the sale of shares of M/s.KDJ Holidayscapes & Resorts Ltd by the appellant cannot be treated as bogus. The appellant is entitled for exemption under section 10(38) of the Act. Thus, the addition made under section 68 of Rs. 14,71,89,021/- is hereby deleted. Accordingly, the Ground No. 2 of the appeal is allowed.” (Emphasis Supplied)

10.10. During the hearing the Learned Departmental Representative had reiterated that the Assessee had made off-market purchase of shares and that the shares so purchased were sold at an unusually high price which was not in line with financial position of the company. It was submitted that the aforesaid clearly showed that the purchase/sale transactions were pre-arranged. Therefore, the purchase/sale transaction should be regarded as bogus transactions designed to generate tax exempt capital gains income in the hands of the Assessee and to introduce unaccounted cash of the Assessee in its books. Having given thoughtful consideration to the aforesaid submissions and on perusal of record, we find that the submissions made by the Learned Departmental Representative are not supported by the material on record and the same not hold good in the peculiar facts and circumstances of the present case in view of the following:

(a) In our view, the bogus penny stock transactions are generally

structured in a manner that there is little direct evidence and therefore, the genuineness of such transactions would have to be adjudicated by testing the circumstantial evidence on the touchstone of preponderance of probabilities and by keeping in view the surrounding facts and circumstances of the case. In case of penny stock transaction involving parties identified as tainted Operator, Syndicate Member, Broker, and/or Exit Operator by Investigation Wing, SEBI etc. the preponderance of probability that the transaction undertaken being tainted would be in favour of the Revenue and against an assessee claiming the transaction to be genuine, putting higher onus on such assessee to prove genuineness of the transaction. However, in the present case the test of human probabilities when applied to the attending facts prevailing at the relevant time, tilt the balance in favour of the Assessee. The circumstantial evidence and surrounding facts do not support the case of the Revenue as explained in hereinafter.

- (b) It is undisputed fact that the shares of Gomti Finlease got purchased in an off-market transaction, however, the intimation regarding the transaction, the details of number of shares of purchased as well as the purchase price was given to (a) BSE - the stock exchange, (b) SEBI – the securities market regulator and to (c) the general public as a result of the open offer. Therefore, the purchase of shares in the present case cannot be treated at par with allotment or preferential allotment of shares of a private limited company.
- (c) Further, in the present case the shares purchased were not of an unlisted private limited company. In the present case more than 75% of shares of a listed company were acquired. On account of merger of a private limited company into the

aforesaid listed company, the aforesaid shareholding of around 75% got reduced to 16% of equity shares of the resulting company. This indicates that the private limited company (which merged into the listed company) had better financial strength. While explaining the rationale of merger, the Appellant had explained that KDJH was engaged in hospitality business and had reasonable business operations. KDJH had a member base and owned two resorts one at Jodhpur and other one at Khandala. Further, KDJH was also developing a 60 room resort in Goa. As per analyst report of Yashvi Securities Pvt. Ltd, dated 29/05/2014, placed at pages 43 to 47 of the paper-book, assets of KDJH were valued at around INR 325 Crores. Further, KDJH also owned 51% stake in KDJ Hospitals Ltd, which was in the process of setting up a hospital in Jodhpur. In view of the aforesaid facts (as emanating from material on record), the purchase transaction in the present case did not fit into the 'modus operandi' as stated in the Investigation Report of Directorate of Income Tax (Investigation), Kolkata in the case of 'Project Bogus LTCG/STCG through BSE Listed Penny Stock' and referred to by the Assessing Officer in the Assessment Order.

- (d) As on date, the Assessee continues to hold 44,97,694 shares of KDJH. It is not the case of the Revenue that the Assessee was acting in concert with the operator and was part of the operator group. The allegation against the Assessee is that the Assessee is a beneficiary. However, there is nothing on record to support the aforesaid allegation. The sole reason for making the addition in the hands of the Appellant is that the shares were sold at an unusually high price. While it has been alleged by the Revenue that the price of the shares was rigged to reach unusual high, the Revenue has failed to place

on record any order passed by SEBI to show that purchase/sale transaction in the shares of KDJH or Gomti Finlease were subjected to any scrutiny by SEBI. It is not the case of the Revenue that the Assessee was named as a beneficiary or a person acting in concert in any SEBI investigation/order.

- (e) The Assessment Order is silent about the entry/exit provides, and the script operators. There is no reference to any inquiry having been conducted by the Assessing Officer with reference to the broker or exit providers. On the other hand the CIT(A) has given categorical finding that the inquiries conducted by the Assessing Officer did not yield any material or information adverse to the Assessee. Emkay Global Financial Services Ltd, the SEBI registered share-broker of the Assessee had responded to the notice issued by the Assessing Officer under Section 133(6) of the Act and had confirmed to undertaking sale transactions for the Assessee. The CIT(A) has also recorded that the Assessing Officer had issued notices to various parties who had allegedly purchased shares from the Assessee, however, the aforesaid inquiry/investigation also did not yield any information/material to support the contention of the Revenue that the Assessee was beneficiary of bogus long term capital gains transaction. Even during the appellate proceedings before us, nothing was placed on record to controvert the aforesaid findings returned by the CIT(A). The Learned Departmental Representative had only relied upon the findings and observations of the Assessing Officer. However, the Assessment Order did not contain any discussion on the inquiry conducted by the Assessing Officer and the response to notices issued under Section 133(6) of

the Act received by the Assessing Officer. As a result, the findings returned by the CIT(A) have gone uncontroverted during the appellate proceedings before us.

- (f) There is nothing on record to show that the any action has been taken by SEBI, Stock Exchange or any other regulator/agency against the Assessee, its broker, KDJH, or its promoters for the alleged manipulation of quoted price of shares listed on BSE.
- (g) In our view, the Assessee had discharged the primary onus by explaining the purchase/sale transaction and filing all supporting documents and details. We note that the Assessee had furnished Share Purchase Agreement, Open Offer document, contract notes for sale of shares, demat account statement, ledger accounts, and bank statements to substantiate the genuineness of the purchase/sale transactions. The Appellant had also filed valuation report of Yashvi Securities Limited, CRISIL Report dated 31/03/2016, financial projections, loan sanctioning letter dated 14/03/2014 issued by State Bank of India etc. to show business operation of KDJH. We note that the Assessing Officer has also failed to point out any defect or infirmity in the aforesaid documents/explanation furnished by the Assessee. The Assessing Officer has also failed to bring on record any material to shift the onus back to the Assessee. On the other hand the CIT(A) has observed that the shares were purchased in the normal course and were duly reflected in the financial statements of the Assessee for corresponding period. We note that it is not even disputed by the Revenue that the shares were sold through stock exchange and/or that the same were held for more than 12 months.

(h) Further, the CIT(A) has granted relief to the Assessee and deleted the addition by placing reliance, inter alia, upon the decision of Co-ordinate Bench of the Tribunal in the case of ITO v Jimeet Modi [ITA 4297/M/2018, dated 29.07.2021] and Karishma Ajay Agarwal Vs. ITO, Ward – 21(2)(1), Mumbai [ITA No. 2586/Mum/2022, dated 02.03.2023] wherein additions in respect of consideration from sale of shares of KDJH in somewhat similar circumstances were deleted by the Tribunal. In our view, the Assessee stands on a better footing as per the recitation of relevant facts hereinabove.

10.11. Thus, there is nothing before us to persuade us to take a different view of the matter than what has been taken by the CIT(A). Accordingly, we do not find any infirmity in the order passed by the CIT(A) deleting the addition of INR.15,43,84,188/- made under Section 68 of the Act. Since we have concluded as aforesaid, the question of overturning the decision of the CIT(A) to delete the addition made under Section 69C of the Act on account of alleged commission expenses incurred by the Assessee to take bogus accommodation entry does not arise. Therefore, the order of CIT(A) deleting addition of INR.71,95,167/- made under Section 69C of the Act is also confirmed.

11. Accordingly, in view of the above, Ground No. 1 & 2 raised by the Revenue are dismissed.

Appeal by Revenue for the Assessment Year 2015-2016
ITA No. 992/Mum/2024

12. Now, coming to ITA No. 993/Mum/2024 being appeal preferred by the Revenue challenging the order, dated 31/01/2024, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 22/12/2017, passed

under Section 143(3) of the Act.

- 12.1. The grounds raised by the Revenue are directed against the deletion of additions of INR.3,10,00,606/- and INR.15,01,617/- made by the Assessing Officer under Section 68 and 69C of the Act, respectively.
- 12.2. Both the sides had agreed that there is no change in the facts and circumstances of the case, and therefore, our finding/adjudication in relation to grounds raised in appeal for the Assessment Year 2014-15 shall apply to the corresponding grounds raised in the present appeal.
- 12.3. Accordingly, in view of identical facts & circumstances; and adopting the reasoning given hereinabove while deciding appeal for the Assessment Year 2014-15, order of CIT(A) deleting the additions of INR.3,10,00,606/- and INR.15,01,617/- made by the Assessing Officer under Section 68 and 69C of the Act, respectively, is confirmed. Accordingly, Ground No. 1 & 2 raised by the Revenue in appeal are dismissed.

Appeal by Revenue for the Assessment Year 2012-2013 ITA No. 150/Mum/2024
&
Cross Objection filed by the Assessee CO No. 39/MUM/2024

13. Now, coming to ITA No. 150/Mum/2024 being appeal preferred by the Revenue challenging the order, dated 14/11/2023, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 22/12/2017, passed under Section 143(3) read with Section 147 of the Act.
 - 13.1. The grounds raised by the Revenue are directed against the deletion of additions of INR.2,61,11,965/- and INR.11,37,561/- made by the Assessing Officer under Section 68 and 69C of the Act, respectively.

- 13.2. During the course of hearing the learned Authorised Representative for the Assessee had pointed out that for the Assessment Year 2012-13, reassessment proceedings were initiated against the Assessee and additions under Section 68 and 69C of the Act, identical to those made in the regular assessment proceedings for the Assessment Year 2014-15, were made in the hands of the Assessee. Before the CIT(A), the Assessee had challenged the validity of the re-assessment proceedings initiated under Section 147 of the Act as well as the additions made on merits. While the CIT(A) rejected challenge to the validity of the reassessment proceedings, relief was granted to the Assessee as additions made under Section 68 and 69C of the Act were deleted. The Revenue had challenged the aforesaid relief granted by the CIT(A) in appeal before the Tribunal while the Assessee has filed cross-objections in relation to the validity of re-assessment proceedings.
- 13.3. As far as the additions made under Section 68 and 69C of the Act are concerned, both the sides agreed that there was no substantial change in the facts and circumstances of the case, and therefore, our finding/adjudication in relation to grounds raised in appeal for the Assessment Year 2014-15 would apply to the corresponding grounds raised in the present appeal. Therefore, adopting the reasoning given hereinabove while deciding appeal for the Assessment Year 2014-15, order of CIT(A) deleting the additions of INR.2,61,11,965/- and INR.11,37,561/- made by the Assessing Officer under Section 68 and 69C of the Act, respectively, is confirmed. Accordingly, Ground No. 1 & 2 raised by the Revenue in appeal are dismissed.
- 13.4. Since the relief granted by the CIT(A) to the Assessee has been sustained by us hereinabove, the cross-objections raised by the Assessee have been rendered academic in nature and therefore,

dismissed.

14. In result, (a) appeals preferred by the Revenue for the Assessment Years 2012-13, 2014-15 & 2015-16 are dismissed and (b) the Cross Objections filed by the Assessee for the Assessment Years 2012-13 is dismissed.

Order pronounced on 30.10.2024.

Sd/-

(Amarjit Singh)
Accountant Member

Sd/-

(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.10.2024
Milan, LDC

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण , मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai