

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI  
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
AND  
SHRI SUDHIR KUMAR, JUDICIAL MEMBER**

**ITA Nos. 1218 &27/Del/2021  
(Assessment Years: 2014-15 &2015-16)**

DCIT, Circle-43(1), New Delhi (Appellant) <b>PAN:AEWPK0416L</b>	Vs. <b>Shri Krishan Kumar,</b> 154, Deepali Enclave, Pitampura, New Delhi (Respondent)
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Assessee by :	Shri Ruchesh Sinha, Adv
Revenue by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing	11/10/2024
Date of pronouncement	19/12/2024

O R D E R

**PER M. BALAGANESH, A. M.:**

1. These appeals in ITA Nos. 1218 &27/Del/2021 for AYs 2014-15 and 2015-16, arise out of the order of the Commissioner of Income Tax (Appeals)-14, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] dated 24.09.2020 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 24.12.2017 by the Assessing Officer, ACIT, Circle-40(1), Delhi (hereinafter referred to as 'Id. AO').
2. Identical issues are involved in both the appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.
3. Though the revenue has raised several grounds before us, the only effective identical issue to be decided in these appeals is as to whether the

Learned CITA was justified in deleting the addition made on account of denial of LTCG exemption under section 10(38) of the Act in the facts and circumstances of the instant case.

4. We have heard the rival submissions and perused the materials available on record. The return of income for the assessment year 2014-15 was filed by the assessee on 30-9-2014 declaring total income of Rs 5,37,900/-. The assessee is an individual and running a proprietary concern namely M/s Aggarwal Marble House engaged in the business of trading of marbles. During the year under consideration, the assessee had claimed exemption under section 10(38) of the Act on sale of shares of M/s Unno Industries Ltd. The scrip of M/s Unno Industries Ltd was considered as a penny stock by the revenue. The workings for long term capital gains of Rs 63,06,402/- claimed by the assessee as exempt under section 10(38) of the Act are as under:-

S no.	No of shares	sale of shares		Cost of shares		LTCG
		Date	Sale price	Date	Cost price	
1.						
1.	2,33,000	04.03.14	47,68,905	15.02.13	2,33,000	45,35,905
2.	1,00,000	06.03.14	18,70,497	15.02.13	1,00,000	17,70,497
	3,33,000		66,39,402		3,33,000	63,06,042

5. The assessee had purchased 1500000 shares of M/s Unno Industries Ltd @ Re 1 each for Rs 15,00,000/- which was paid by the assessee vide Cheque No. 773461 dated 12-2-2013 drawn on IDBI Bank. The said shares were allotted to the assessee on preferential basis by the company in pursuance of scheme of arrangement which was approved by the shareholders of the company on 13-8-2012 and further approved by the Hon'ble Bombay High Court by its order dated 18-1-2013. These shares were

duly dematted by the assessee and the shares got credited in the demat statement on 28-3-2013. The assessee had opened the said Demat account with his broker M/s Vivek Financial Focus Limited (a registered share broker and depository participant). The assessee after holding the shares for a period of more than one year, sold 333000 shares in the open market through a registered share broker in the recognized stock exchange after duly suffering Securities Transaction Tax (STT). The remaining 1167000 shares of Unno Industries Limited were continued to be shown by the assessee in the Investments schedule by the assessee in his Balance Sheet as on 31-3-2014. Accordingly, the LTCG earned by the assessee in the sum of Rs 63,06,402/- on sale of shares of M/s Unno Industries Limited were claimed to be exempt under section 10(38) of the Act by the assessee in the return of income. From the perusal of the balance sheet of the assessee as on 31-03-2013 and 31-03-2014 which are enclosed in pages 52 and 53 of the Paper Book, it is seen that assessee is a regular investor in shares of various companies and had chosen to invest in the shares of Unno Industries Limited also. In fact, after the allotment of shares of Unno Industries Limited to the assessee on preferential basis comprising of 1500000 shares of Re 1 each totaling to Rs 15,00,000/-, the assessee had duly reflected the same in the investment schedule as on 31-03-2013. During the assessment year 2014-15, part of such investments of 3,33,000 shares were sold and the remaining 11,67,000 shares of Re 1 each totaling to Rs 11,67,000/- was continued to be shown in the balance sheet of the assessee as on 31-03-2014 under the head investment in shares and debentures.

6. The Learned AO issued notice under section 133(6) of the Act to Unno Industries Ltd, which was not complied with by the said company. The assessee was confronted by the Learned AO in this regard. The assessee

stated that he does not know any of the directors and hence he could not ensure compliance of notice under section 133(6) of the Act by the company or produce the directors for examination. The Learned AO based on this, concluded that when the assessee does not know any of the directors of Unno Industries Ltd, then how in the year 2013 he could have been allotted shares on preferential basis. Later, summons under section 131 of the Act was issued to the assessee by the Learned AO. Statement was recorded from the assessee on oath. Assessee submitted that he is a regular investor in shares and the investment in Unno Industries Ltd was made based on net worth and profitability of the said company, but the Learned AO from the financials of Unno Industries concluded that there is no net worth or profitability with Unno Industries Ltd. The statements recorded from middlemen were also provided to the assessee by the Learned AO . Further, the Learned AO observed that the shares of Unno Industries Ltd was suspended from trading vide SEBI adjudication order dated 26-05-2016. Further, there is a SEBI order dated 28-04-2023 which was placed on record by the Learned DR before us at the time of hearing, which was passed specifically with regard to the scrip of Unno Industries Ltd, wherein a sum of Rs 5 lakhs penalty was levied on Unno Industries Ltd for violation of regulations 3(a), (b), (c ), (d) , 4(1) and 4(2)(a) of PFUTP Regulations, 2003. All these factors apart from Investigation Wing report of Kolkata collectively contributed to the Learned AO drawing an adverse conclusion on the assessee that the scrip dealt by the assessee was a tainted scrip and there was abnormal rise in prices of the share value of the said scrip which was not commensurate with the actual performance of the said company. Accordingly, the Learned AO proceeded to deny the claim of exemption under section 10(38) of the Act claimed by the assessee in the sum of Rs 63,06,402/- representing the LTCG and brought the same to tax as unexplained cash credit in the hands of the assessee. Since the said sum

was treated as accommodation entry, corresponding commission expenditure was also added as unexplained cash credit under section 68 of the Act by the Learned AO.

7. The Learned CITA deleted the addition made in the hands of the assessee on the ground that the Learned AO had merely relied on the report of the Investigation Wing of Kolkata and statement of various brokers and other persons as recorded by the Investigation Wing, Kolkata and had alleged that the share transactions in Unno Industries Ltd are pre-arranged, sham, bogus and in the nature of accommodation entries. All these allegations are leveled on the assessee by the Learned AO without making any independent examination of facts and the conduct of the assessee. Further opportunity of cross examination of such alleged entry provider were also not provided to the assessee by the Learned AO.

8. The Learned DR before us vehemently argued that the entire transactions are pre-arranged and pre-meditated. Hence the onus is on the assessee to prove that the same are not pre-arranged and pre-meditated. He also argued that similar addition was made by the learned A.O. in assessment year 2015-16, wherein notice under section 133(6) of the Act was issued by the Learned AO to Unno Industries Limited, which was not complied with by the company. The assessee was also issued summons under section 131 of the Act for which no response was made by the assessee before the Learned AO for assessment year 2015-16. He submitted that other than this, all other facts are identical with that of assessment year 2014-15.

9. It is not in dispute that the sale consideration received by the assessee on sale of 3,33,000 shares of Unno Industries Limited was Rs. 66,39,402/-. The long-term capital gains (LTCG) derived by the assessee on such sale was

Rs. 63,06,402/-. We find that the Learned AO had made an addition under Section 68 of the Act by denying the claim of exemption under Section 10(38) of the Act only for the long-term capital gains portion of Rs. 63,06,402/-. This goes to prove that the Learned AO was satisfied about the three ingredients of Section 68 of the Act viz. namely identity of the party who has given the money, genuineness of the transaction and credit worthiness of the party who has given the money with regard to the differential portion of Rs. 3,33,000/- being the cost of acquisition of 3,33,000 shares of Re. 1 each. If the genuineness of the transaction is to be doubted, the Learned AO ought to have doubted the entire sale consideration receipt of Rs. 66,39,402/-. Whereas in the instant case, he has doubted only to the extent of long-term capital gains earned by the assessee to the tune of Rs. 63,06,402/- on the ground that the same is not genuine and arising out of pre-meditated and pre-arranged transactions. This itself categorically goes to prove that the Learned AO had merely relied on the external information in the form of Kolkata Investigation Wing report, SEBI Order in the case of Unno Industries Limited wherein assessee has not been implicated in any manner whatsoever at all. In the SEBI Order, the assessee's name is not mentioned as one of the party who had either colluded with the entry operators or with the promoters or was involved in artificial price rigging of share prices so as to earn unwarranted benefit in the form of claim of exemption under Section 10(38) of the Act. These facts are conspicuously absent either in the assessment order or in the SEBI orders relied upon by the Learned DR.

10. As far as non-compliance to notice under Section 133(6) of the Act by Unno Industries Limited, the assessee is a mere investor in the shares of Unno Industries Limited. If the Principal Officer of Unno Industries Limited does not comply with notice issued under Section 133(6) of the Act,

how can an ordinary investor like the assessee having minority stake in the said company be able to prevail upon the Principal Officer or the directors of Unno Industries Limited to ensure compliance to notice under Section 133(6) of the Act. This is the practical ground reality which the Learned AO had completely failed to understand. If the notice under Section 133(6) of the Act issued by the Learned AO to Unno Industries Limited is not complied, nothing had prevented the Learned AO to issue summons directly to Unno Industries Limited to ensure the presence and take examination on oath. This was not done by the Learned AO . If the said company had not complied with the summons also, then the Learned AO could have proceeded with the natural consequence of non-response to the summons against Unno Industries Limited in the manner known to law. These remedial actions were not done in the instant case and instead adverse opinion is framed on the assessee before us without any basis. As far as the assessee is concerned, as a mere gullible investor, he has purchased the shares by making cheque payment to the company ( though in off market on preferential allotment basis). The share certificates to that extent were duly issued to the assessee. The shares were duly dematted by the assessee within time with the authorized depository participant . Then the shares were held by the assessee for more than one year . The part of the shares were sold by the assessee in the open market through a registered share broker in the recognized stock exchange after duly suffering STT. The sale proceeds of the shares were indeed received by the assessee from the stock exchange through the registered share broker in regular banking channels. The assessee once he sells the shares in the open market is not even aware to whom he had sold. In this background, the documents submitted by the assessee cannot be disbelieved merely because the scrip dealt by the assessee happens to be a tainted scrip according to Learned AO or according to Kolkata investigation wing or according to SEBI order .

Assessee has invested in shares of various companies and Unno Industries is only one such company. This is evident from the Balance Sheet of the assessee enclosed in Pages 52 and 53 of the Paper Book. Unless there is a direct evidence against the assessee, no adverse inference could be drawn on the transaction carried out by the assessee. It is trite law that suspicion howsoever strong cannot partake the character of legal evidence. The entire addition has been made in the hands of the assessee merely on suspicion, surmise and conjecture without bringing on record any material or evidence as to how the assessee herein was involved in the alleged connived transactions. The report of Kolkata Investigation Wing and SEBI orders might only trigger reason to suspect that the transaction carried out by the assessee may not be genuine, but that does not conclusively prove that the transaction carried out by the assessee is ingenuine without bringing on record the adverse inferences and materials against the assessee. This has not been done in the instant case at all. Further the very same Learned AO had accepted the three ingredients of the section 68 by accepting the nature and source of credit to the extent of Rs 3,33,000/- in the instant case by adding only the long-term capital gains portion and not the entire sale consideration portion on sale of shares.

11. Further, we find that the authorised representative of the assessee vide letter dated 12-12-2016 had duly responded before the Learned AO , the purpose behind assessee making investment in shares of Unno Industries Limited by stating that considering the net worth of the said company and the profitability shown there on in the financial statements for various years from 2011 to 2012 and also considering the fact of scheme of amalgamation between Unno Industries Limited and Pinnacle Vintrade Limited, Basukinath Real Estate Limited and Baviscon Vincom Limited which was approved by the Hon'ble High Court, there was a forecast that the net

worth of the said company will increase and thereby the value of the share also would improve. Considering these facts, the assessee being a gullible investor, had ventured into making investment in the shares of Unno Industries Limited. The date of approval of scheme of merger by the Hon'ble Bombay High Court was 18-01-2013 and assessee bought the shares on 15-02-2013. We find that the learned CITA had taken cognizance of the fact that the Bombay Stock Exchange had noticed substantial increase in abrupt movement in the price of shares of Unno Industries Limited and accordingly within one month i.e. on 31-03-2016 had suspended the trading in the scrip of Unno Industries Limited. The assessee's transaction took place in the month of March-2014 which was much much before the suspension of the trading of scrip of Unno Industries Limited. Hence, even the action of suspension of scrip of Unno Industries Limited has got no bearing on the assessee herein either for sale made in Assessment Year 2014-15 or in Assessment Year 2015-16.

12. We find that a statement on oath was recorded from the assessee on 28-11-2016 wherein a specific query was put by the learned AO to the assessee as to how he came to know about the shares of Unno Industries Limited. In response, the assessee submitted that depending upon the net worth and the profitability of Unno Industries Limited and the merger policy thereon, he was made known about the shares of that company during the professional discussions. Further, he had also stated that he had during discussions with the financial advisor, came to know about the preferential allotment of shares being made by Unno Industries Limited. Specifically, vide Question No. 13, a query was raised to the assessee stating that investigation wing had unearthed the price manipulation of the scrip dealt by assessee for earning fictitious long-term capital gain and accordingly, it was queried as to why the sale proceeds of

shares should not be treated as income from undisclosed sources of the assessee. In response thereto, the assessee had categorically stated that he does not know the directors of the company and he does not have any connection with the directors of the company. He had also stated that if the investigation wing had found any direct evidence against him, he is ready to face the music. Further, in response to the final Question No. 15 raised by the learned AO on the assessee, the assessee responded that he is a regular investor in shares and all his transactions are genuine and if there is any other document that is required, he is ready to submit. This goes to prove that assessee had merely entered into the investment of shares of Unno Industries Limited as a gullible investor by taking advice from the financial advisor and the market news that was getting circulating. The assessee, of course, had also taken cognizance of the profitability and net worth of the said company and the merger policy that is being elaborated supra. Hence, no malice or malafide could be attributed on the purpose of assessee venturing into investment in shares of Unno Industries Limited. Moreover, the payment for purchase of those shares, though allotted to him on preferential allotment basis, had been made by account payee cheque and share certificates to that effect were physically received and duly dematted with the registered depository participant. Further, the shares were purchased in assessment year 13-14 after obtaining the approval of the Hon'ble Bombay High Court approving the merger. No action whatsoever or adverse inference drawn on the assessee in the year of purchase of shares. When those shares are kept in demat account which were sold by the assessee in the open market after duly suffering STT, the same cannot be doubted by the revenue. These facts have been taken due cognizance by the Hon'ble Jurisdictional High Court in the case of PCIT vs Smt Krishna Devi reported in 431 ITR 361 (Del). The relevant observations in that regard are reproduced hereinbelow:-

**“10.** We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

**11.** On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under section 10(38), in a preplanned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the

*consideration has been received through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.*

**12.** *Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on Suman Poddar case (supra) and Sumati Dayal case (supra) is of no assistance. Upon examining the judgment of Suman Poddar case (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.*

**13.** *The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.*

**14.** *In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.*

**15.** *Accordingly, the present appeals are dismissed."*

13. We find that the Learned DR vehemently relied on the decision of Hon'ble Calcutta High Court in the case of PCIT vs Swati Bajaj reported in 446 ITR 56 (Cal) which is an elaborate decision rendered after considering various decisions of various High Courts on the subject. In the said decision, it was held that assessee had to establish the genuineness of rise of price of shares within a short period of time that too when general market trend was recessive. But we find that when there is a decision of Hon'ble Jurisdictional High Court as stated supra which is already in favour of the assessee, the same would prevail over this Tribunal and this Tribunal need not take cognizance of the Hon'ble Non-Jurisdictional High Court. The law is very well settled by the Hon'ble Supreme Court in the case of Union of India v. Kamalakshi Finance Corporation Ltd reported in 55 ELT 43 (SC) that the decision of Hon'ble Jurisdictional High Court would have higher precedence value than the decision of Hon'ble Non-Jurisdictional High Court on the Tribunal. The Hon'ble Supreme Court emphasized therein that the orders of the Tribunal should be followed by the authorities falling within its jurisdiction so that judicial discipline would be maintained in order to give effect to orders of the higher appellate authorities. The Hon'ble Apex Court has observed that utmost regard must be had by the adjudicating authorities and the appellate authorities to the requirement of judicial discipline. Hence we deem it fit and appropriate to follow the decision of Hon'ble Jurisdictional High Court referred supra wherein the impugned issue is decided in favour of the assessee. Moreover, when there are two conflicting decisions of various High Courts, the Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC) had held that Construction that is favourable to the assessee should be adopted. Hence by following this principle, the decision of Hon'ble Calcutta High Court relied upon by the Learned DR before us , need not be followed by this Tribunal in the peculiar facts and circumstances of the instant case.

14. Considering the totality of the facts and circumstances of the instant case and respectfully following the judicial precedents relied upon hereinabove, we find that there is no case for making any addition u/s 68 of the Act in the hands of the assessee by denying the exemption under section 10(38) of the Act for the LTCG on sale of shares of Unno Industries Limited in the facts and circumstances of the instant case. Accordingly, the grounds raised by the assessee are allowed.

15. We have already taken cognizance of the submissions of both the sides that facts in Assessment Year 2015-16 are identical to Assessment Year 2014-15 and hence the decision rendered by us hereinabove for Assessment Year 2014-15 shall apply mutatis mutandis for Assessment Year 2015-16 also , except with variance in figures.

16. In the result, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 19/12/2024.

-Sd/-  
**(SUDHIR KUMAR)**  
**JUDICIAL MEMBER**

-Sd/-  
**(M. BALAGANESH)**  
**ACCOUNTANT MEMBER**

Dated: 19/12/2024  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi