

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, KOLKATA**

**SHRI SONJOY SARMA, JUDICIAL MEMBER  
SHRI SANJAY AWASTHI, ACCOUNTANT MEMBER**

**I.T.A. No. 1433/Kol/2024  
(Assessment Year 2012-2013)**

**Deputy Commissioner of Income Tax,  
Central Circle-4(2), Kolkata,**

5<sup>th</sup> Floor, Room No. 506, 110,  
Shanti Pally, Kolkata – 700107

..... **Appellant**

**vs.**

**Dharmendra Singh,**  
FE-330, Salt Lake City,  
Bidhan Nagar IB Market,  
North 24 PGNS - 700016  
[PAN: AIRPS7029Q]

..... **Respondent**

**Appearances by:**

Assessee represented by : P.K. Singh, AR  
Department represented by : Kapil Mandal, Addl. CIT, Sr. DR

Date of concluding the hearing : 20.08.2025  
Date of pronouncing the order : 01.09.2025

**ORDER**

**PER SANJAY AWASTHI, ACCOUNTANT MEMBER**

1. In this case, there is a delay of 58 days which has been requested to be condoned as under by the Revenue:

<i>“Dates</i>	<i>Events/Reasons</i>
06.03.2024	<i>CIT(A) order received to the office of the Pr. Cit, Central-2, Kolkata</i>
08.03.2024	<i>Requisition of Appeal Scrutiny Report (ASR) called from the DCIT (Hqrs), Central-2, Kolkata</i>
06.05.2024	<i>Appeal Scrutiny Report (ASR) sent to the office of the Pr. CIT, Central-2, Kolkata</i>
25.06.2024	<i>Approval for filing 2<sup>nd</sup> appeal u/s 253 before the Hon’ble ITAT received from the Office of the Pr. CIT, Central-2, Kolkata</i>
26.06.2024	<i>Filed 2<sup>nd</sup> Appeal u/s 253 before the Hon’ble ITAT, Kolkata</i>

*“As the limitation to file appeal under section 253 expires on 06.05.2024, there caused a delay in filing of this appeal in 51 days. Therefore, it is requested to kindly condone the delay in filing appeal for the sake of substantial justice.*

*Verification*

*I, the undersigned, do hereby verify on solemn affirmation in Kolkata that the contents of this affidavit are true to the best of my knowledge and nothing material has been concealed.”*

1.1 Considering the reasons given, we hereby condone the delay and admit this appeal for adjudication.

2. This appeal arises from order dated 29.02.2024, passed u/s 250 of the Income Tax Act, 1961 (hereafter “the Act”) by the Ld. Commissioner of Income Tax (Appeals), Kolkata-27 [hereafter “the Ld. CIT(A)].

2.1 The brief facts of the case are that the assessee had filed its return of income for A.Y. 2012-13 on 21.10.2012, declaring total income at Rs.44,49,200/-. The said return was processed u/s 143(1) of the Act, 1961. Thereafter, an information was received from Investigation Wing, Kolkata regarding a Survey action conducted on an entry operator. Further, after examining the data and evidence on records, this case was reopened u/s 148 of the Act on 29.03.2019. In response to the notice from AO the assessee filed return of income on 29.04.2019. However, the assessee did not comply with the terms of the said notices. Later, the AO passed the assessment order u/s 147 r.w.s 143(3) of the Act on 06.12.2019, determining a total income of Rs.51,00,200/-. On perusal of the assessment order, it is noticed that the A.O. had made one addition of unexplained cash credit of Rs. 6,51,000/- u/s 68 of the Act.

2.1 The Ld. CIT(A) has given the following brief findings on the basis of which relief has been given to the assessee.

*“5.1.1 I have perused the assessment order as well as the submission of the assessee. Reliance is placed on PCIT vs. Indravadhan Jain (HUF) Bombay High Court, Appeal No. 454 of 2018 in which the Hon'ble High Court stated that "no addition on account of sale of penny stock, if no direct involvement of the assessee". In the present case, the assessee filed his DEMAT account which proves that the transactions were happened through banking channels. Further,*

*it cannot be proved that the direct involvement of the assessee. Hence, this ground of assessee is allowed. Therefore, the AO is directed to delete the addition.”*

2.2 The Revenue is aggrieved with this and has approached the ITAT with the following revised grounds:

*“1. That in the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made u/s.68 on account of Bogus LTCG derived on sale of penny stock [M/s. Echowave Infotech Limited) for amount of Rs 6,51,000/- without appreciating the material brought on record and facts evaluated by the A.O. in the assessment order.*

*Hence, this case clearly falls under the exceptional clause Le cases pertaining to Penny Stocks vide Para no. 3.1(h) of CBDT's latest Circular no. 5/2024 dated 15.03.2024.*

*2. That the Ed. CIT(A) had erred in law in plainly drawing negative inference on the basis of furnished documents viz. DMAT account, relevant banks statements, by the assessee individual, without appreciating the true nature and character of the M/s. Echowave Infotech Limited and the transactions of its stocks/scrips.*

*3. That on the judgments of the case law as cited by the Ld. CIT(A) cannot be accepted as it does not squarely applicable to the grounds of appeal filed by the assessee in this case.*

*4. That the Department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.”*

3. Before us, the Ld. DR assailed the action of Ld. CIT(A) and stated that there was good information available with the department and M/s Ecowave Infotech ltd. was a penny stock which had allegedly dubious credentials and hence the long-term capital gains (LTCG) shown by the assessee was allegedly bogus. The Ld. DR took us through various portions of the Ld. AO's order, especially para 5 at pages 5 and 6 thereon, to show that the impugned transaction was nothing but a money laundering exercise. The passage read out by the Ld DR (para 5 of AO) was as under:

*“(5.) In response to that the assessee submitted his reply / explanation vide letter dated 18.11.2019 along with copy of Demat Statement as on 02.04.2012. The assessee has not submitted any details with respect to share transaction entered into in the scrips 'M/s. Sakshi Vyapar Pvt. Ltd., M/s. Sharp Transport Pvt. Ltd. or M/s. Ecowave Infotech Ltd. Accordingly, the transactions entered into in these scripts were remained unexplained. As has seen from the information available on records that these transaction were not genuine transactions but were accommodated transactions entered into only to provide LTCG or LTCL to beneficiaries. As the assessee was not able to prove these*

*transactions as genuine transactions by submitting supporting documents, the profit shown from these transactions amounting to Rs.6,51,000/- is treated as unexplained cash credit u/s.68 of the Income Tax Act, 1961 and added to the total income of the assessee. Further, penalty proceedings u/s 271(1)(c) of the Act are initiated separately for concealment of income.”*

3.1 Thereafter, the Ld. DR relied on the case of Swati Bajaj reported in 139 taxmann.com 352 (Cal).

3.2 Per contra, the Ld. AR took us through his paper book where the entire facts as to how he became the owner of the shares in M/s Ecowave Infotech Ltd, has been described as under:

*“So far as my particular case is concerned, initially I purchased shares of one Gravity Barter Pvt. Ltd. on or about 24.09.2010 from M/s Winall Vinimay Pvt. Ltd. and the payment was made to the said company by account payee cheque. A copy of relevant ledger account showing that I had purchased shares of Gravity Barter Pvt. Ltd. on or about 24.09.2010 and had made payment by account payee cheque is enclosed hereto. Later on, I came to know that the said Private Limited Company was converted into a Public Limited Company and its name became "Oasis Cine Communication Ltd" and that the shares of the erstwhile company were split up.*

*Again afterwards, I came to know that "Oasis Cine Communication Ltd." became "Ecowave Infotech Ltd." and thus I am an old and genuine shareholder of the said company for valuable consideration which company witnessed several changes in its constitution over the period and even after sale of 2.000 shares of said company, I remained owner of the remaining shares of the said company. A copy of relevant Bill in respect of sale of shares of Ecowave Infotech Ltd through the registered broker, Sajendra Mookim of 6, Lyons Range, Kolkata and copy of ledger account of share investment reflecting sale of the said shares and receipt of consideration money by account payee cheque are also enclosed hereto. Moreover, in usual course, I am a regular investor in shares and mutual funds which fact can be ascertained from my Income Tax Returns, Balance Sheets and Profit and Loss Accounts of earlier and subsequent years. Copies of my Balance Sheet, Profit and Loss Account, Fax Computation Statement and Capital Gains Account Statement are also enclosed. There may be some instances of bogus transactions in respect of dealing in shares of the said company as stated to have been found by Directorate of Investigation but I do not know of any such instance. Merely because some transactions in respect of trading of share of the said company were found to be bogus, ALL transactions cannot be assumed to be bogus. At least, my case cannot be roped in under such category because I know I have not indulged in any such bogus transaction and therefore I also request you to summon alleged persons who have given their statements on oath for having provided accommodation entries to enable me to cross examination such persons and I have reasons to believe that they will have to admit that they have not provided any accommodation entry to me in respect of sale of shares of the said company by me and that my transactions are genuine.”*

Thereafter, the Ld. AR relied on the case of Shri Gautam Kumar Pincha, ITA No. 569/Kol/2017, dated 15.11.2017, to canvass the point that the impugned transaction was genuine.

4. We have carefully considered the rival submissions, gone through the documents and have perused the case laws relied upon by both the sides. Right at the outset, it deserves to be mentioned that the case law relied upon by the Ld. AR is dated 15.11.2017, whereas the Hon'ble Jurisdictional High Court's judgment in the case of Swati Bajaj (supra) is dated 14.06.2022. Therefore, the Coordinate Bench decision relied upon by the Ld. AR cannot help him merely on the strength of the findings thereon. In this case, it is clear that the assessee was the owner of closely held company which allegedly got converted to M/s Ecowave Infotech Ltd. From the documents before us, we are able to understand that the initial purchase was an off-market one leading to a situation where the genuineness of the said trade cannot be readily ascertained. Thereafter, it is seen that the LTCG was earned through sale of shares of M/s Ecowave Infotech Ltd, which resulted from the conversion of earlier private limited entities. It is a situation of this kind which has been dealt with in the case of Swati Bajaj (supra) and it has been held that such trades cannot be held to be genuine. The relevant portions from the Swati Bajaj judgment (supra) deserve to be extracted:

*“The report submitted by the Investigation department could not be thrown out on the grounds urged on behalf of the assessee. The assessee has not been shown to be prejudiced on account of non-furnishing of the investigation report or non-production of the persons for cross examination as the assessee has not specifically indicated as to how he was prejudiced, coupled with the fact as admitted by the revenue, the statements do not indict the assessee. That apart, the investigation has commenced targeting the individuals who dealt with the penny stocks and after examining the modus seeing the cash trail the report has been submitted recommending the same to be placed before the DGIT (Investigation) of all the States of the country. It is thereafter the concerned Assessing Officers have been informed to consider as to the bona-fidness and genuineness of the claims of LTCG/LTCL of the respective assessee qua the findings which emanated during the investigation conducted on the individuals who dealt with the penny stocks. Therefore, the assessments have commenced by the Assessing Officers calling upon the assessee to explain the*

*genuineness of the claim of LTCG/LTCL made by them. In all the assessment orders, substantial portion of the investigation report has been noted in full. A careful reading of the same would show that the assessee has not been named in the report. If such be the case, unless and until the assessee shows and proves that she/he was prejudiced on account of such report/statement mere mentioning that non-furnishing of the report or non-availability of the person for cross examination cannot vitiate the proceedings. The assessee has miserably failed to prove the test of prejudice or that the test of fair hearing has not been satisfied in their individual cases. In all the cases, the assessee has been issued notices under sections 143(2) and 142(1) they have been directed to furnish the documents, the assessee has complied with the directions, appeared before the Assessing Officer and in many cases represented by Advocates/Chartered Accountants, elaborate legal submissions have been made both oral and in writing and thereafter the assessments have been completed. Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not be in a position to take part in the inquiry which is being conducted by the Assessing Officer in scrutiny assessment under section 143(3). The assessee was conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessee who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, based on such general statements of violation of principles of natural justice the assessee has not made out any case. [Para 65]*

*To prove the allegations, against the assessee, can be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled and when direct evidence is not available, it is the duty of the Court to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded so as to reach a reasonable conclusion and the test would be what inferential process that a reasonable/prudent man would apply to arrive at a conclusion. Further proximity and time and prior meeting of minds is also a very important factor especially when the income tax department has been able to point out that there has been an unnatural rise in the price of the scrips of very little known companies. Furthermore, in all the cases, there were minimum of two brokers who have been involved in the transaction. It would be very difficult to gather direct proof of the meeting of minds of those brokers or sub-brokers or middlemen or entry operators and therefore, the test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume of trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted. [Para 69]*

*A holistic approach is required to be made and the test of preponderance of*

*probabilities have to be applied and while doing so, the court cannot lose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. The revenue was not privy to such peculiar trading activities as they appear to have been done through the various stock exchanges and it is only when the assessee made claim for a LTCG/STCL, the investigation commenced. As pointed out the investigation did not commence from the assessee but had commenced from the companies and the persons who were involved in the trading of the shares of these companies which are all classified as penny stocks companies. Therefore, the argument of the assessee that the copy of the investigation report has not been furnished, the persons from whom statements have been recorded have not been produced for cross examination are all contention which has to necessarily fail. To reiterate, the assessee was not named in the report and when the assessee makes the claim for exemption the onus of proof is on the assessee to prove the genuinity. Unfortunately, the assessee has been harping upon the transactions done by them and by relying upon the documents in their hands to contend that the transactions done were genuine. Unfortunately, the test of genuinity needs to be established otherwise, the assessee is lawfully bound to prove the huge LTCG claims to be genuine. In other words if there is information and data available of unreasonable rise in the price of the shares of these penny stock companies over a short period of time of little more than one year, the genuinity of such steep rise in the prices of shares needs to be established and the onus is on the assessee to do so as mandated in section 68. Thus, the assessee cannot be permitted to contend that the assessments were based on surmises and conjectures or presumptions or assumptions. The assessee does not and cannot dispute the fact that the shares of the companies which they have dealt with were insignificant in value prior to their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine and consequently they are entitled to claim LTCG on their transaction. Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise. It is incorrect to argue that the assessee has been called upon to prove the negative in fact, it is the assessee's duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. The assessee cannot be heard to say that their claim has to be examined only based upon the documents produced by them namely bank details, the purchase/sell documents, the details of the D-Mat Account etc. The assessee has lost sight of an important fact that when a claim is made for LTCG or STCL, the onus is on the assessee to prove that credit worthiness of the companies whose shares the assessee has dealt with, the genuineness of the price rise which is undoubtedly alarming that to within a short span of time. [Para 73]*

*While it may be true that assessee could have been regular investors, investors could or could not have been privy to the information or modus adopted. What is important is that it is the assessee who has to prove the claim to be genuine in terms of section 68. Therefore, the assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were traded by the assessee had phenomenal and fanciful rise in price in a short span of time and more importantly after a period of 17 to 22*

*months, thereafter has been a steep fall which has led to huge claims of STCL. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the Assessing Officer cannot be faulted. [Para 75]"*

4.1 Respectfully following the judgment in the case of Swati Bajaj (supra) it is held that the Ld. CIT(A) has fallen into an error in disregarding the Hon'ble Jurisdictional High Court's judgment and instead relying on the Hon'ble Bombay High Court case law, which would rest on its peculiar facts. In this case, the initial purchase is shrouded in off-market transactions, even when the sale appears to have been made on the Calcutta Stock Exchange, which would presumably be on the verge of shutting down around the time of the said trade, leading to some difficulty in verification. Be that as it may, the case of Swati Bajaj (supra) applies to M/s Ecowave Infotech Ltd the facts of this case and hence the action of Ld. AO is upheld and the decision rendered through the impugned order is set aside.

5. In result, appeal of the revenue is allowed.

Order pronounced on 01.09.2025

Sd/-  
**(Sonjoy Sarma)**  
**Judicial Member**

Sd/-  
**(Sanjay Awasthi)**  
**Accountant Member**

Dated: 01.09.2025  
AK, Sr. P.S.

*Copy of the order forwarded to:*

1. Appellant
2. Respondent
3. Pr. CIT
4. CIT(A)
5. CIT(DR)

//True copy//

By order

Assistant Registrar, Kolkata Benches

