

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

**BEFORE SHRI NARENDRA KUMAR CHOUDHRY, HON'BLE JUDICIAL MEMBER
&
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 2065/MUM/2023 (A.Y. 2014-15)

Farzad Sheriar Jehani 4 th Floor, Phiroza Mansion Gunbow Street, Fort Mumbai - 400001 PAN: AABPJ8316R	v.	ITO – 17(1)(4) Currently ITO – 17(3)(1) Room No. 123, 1 st Floor Kautilya Bhavan C-41 to C-43, G Block Bandra Kurla Complex, Bandra (E) Mumbai - 400051
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Rahul Sarda
Department Represented by	:	Shri Ujjawal Kumar Chavan
Date of Conclusion of Hearing	:	11.10.2023
Date of Pronouncement	:	22.12.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 04.05.2023 for the A.Y. 2014-15.

2. Brief facts of the case are, assessee filed its return of income on 31.03.2015 declaring taxable income of ₹.13,49,630/- and the return of income was processed under section 143(1) of Income-tax Act, 1961 (in short "Act"). Subsequently, the case was selected for scrutiny under CASS and notices under section 143(2) and 142(1) of the Act were issued and served on the assessee along with questionnaire. In response, Authorised Representative of the assessee attended and submitted the relevant information as called for.

3. The assessee is an individual and partner in three (3) firms namely Leopold Café & Stores, New York Café, Leos Boulangerie and assessee has derived incomes under the head Salary, Income from Partnership firm, Capital Gains, Other Sources and Agricultural income. During the course of assessment proceedings, Assessing Officer observed that assessee has claimed exempt income of ₹.82,52,616/- on account of Long Term Capital Gain on payment of STT under section 10(38) of the Act. Based on the information available on record, he observed that assessee has sold 7550 shares of Penny Stock "Kappac Pharma" (suspected scrip) during the current assessment year. The sale value of entire Shares was of ₹.52,27,792/- and assessee had purchased the shares of Parixit Gas Company Ltd. in physical form on 09.10.2012 for

₹.83,050/- and demated the same on 10.01.2013 with Balance Equity Broking (India) Private Limited. The assessing officer has observed that Assessee has declared huge profit in this scrip, hence, he is of the opinion that all these transactions are pre-arranged. The Assessing Officer by relying on the report of Directorate of Investigation, Kolkata to unearth the organized racket of generating bogus entries of Long Term Capital Gain which is exempt from tax. He extracted the various findings from that report and discussed various modus operandi of booking the shares to rigging of the prices and exit prices in his order and exclusively discussed the financial results of the scrip "Kappac Pharma" from financial year 2009 to 2013 and observed that the above said scrip does not have any significant profit, EBIDTA Margin, EPS, bonus, dividend Etc. The extract from the annual report of M/s. Kappac Pharma Limited (in short "KPL") for the year 2012-13 again being reproduced by him and observing that the increase in the stock price of KPL was not at all commensurate with the purpose of the company.

4. Further, he observed that parameters which are essential for increase of price of shares were not present, still, the share price is increased multi-fold therefore there is artificial increase by circular trading of shares forming carte. Further, he observed that trading of

this scrip was suspended by BSE. This itself shows that the above said scrip is traded in the market by artificially hiked the prices to create non-genuine Long Term Capital Gain.

5. After reproducing the sale of shares by the assessee in the open market in his order (Page No. 10) in which Assessing Officer has listed the various quantities, various rates and to various buyers in his order, for the total sum of ₹.52,27,792/-, considering the fact that SEBI after thorough investigations in such penny stock cases has certified that such transactions are rigged and are carried out to convert black money into white. Accordingly, he considered the above transaction as non-genuine and represents undisclosed income of the assessee liable to be added under the head "Income from other sources" as opposed to submissions of the assessee that section 68 of the Act cannot be invoked as there is no unexplained credits in the accounts and all documentary evidences along with other evidences has been submitted.

6. The Assessing Officer analysed the above said share transactions and came to the conclusion with the following observation: -

"8. Findings and conclusion

8.1 The submissions made by the assessee are considered. From the facts of the case and the discussion in the preceding

paragraphs, it is concluded that long term capital gains booked by assessee in his books were pre-arranged method to evade taxes and launder money. Following are the findings and the reasons which substantiate the findings.

a. Mode of acquisition of the shares:

The assessee had purchased 7,550 shares of KAAPAC Pharma Ltd. for Rs 46,700/-. However, it is noticed that the assessee has not purchased of any other scrip in such a huge quantity.

b. Sale of shares and unusual rise in the price:

The assessee has sold the 7,550 shares for total consideration of Rs. 52,27,792/-, thus, resulting in long term capital gain of Rs 51,81,092/-, which is a 112% increase of the cost price, and, as discussed, the rise in share prices is not holding to any commercial principles and market factors.

C. Analysis of transactions:

Facts revealed that such trading transactions of purchase and sale of shares are not been effected, for commercial purpose but to create artificial gains, with a view to evade taxes-

i. Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were product of design and mutual connivance on part of assessee and the operators.

ii. The assessee resorted to a pre-conceived scheme to procure long-term capital gains by way of price difference in share transactions not supported by market factors.

iii. Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence, impugned long term capital gain is not allowable.

d. Failure of Assessee to discharge his onus:

The assessee has not been able to prove the unusual rise and fall of share prices to be natural and based on the market forces. It is evident that such share transactions were closed circuit transactions and clearly a structured one. The assessee has not submitted any data/information about Kappac Pharma which

prompted him to invest in this scrip or which explains the substantial increase in the price of the scrip from 2013 onwards.

e. Ignorance of the assessee about shares and penny stock companies:

Assessee has failed to show having any knowledge about the shares traded and having any knowledge about the fundamentals of the penny stock companies, though, she was summoned u/s.131 of the I.T.Act, 1961 to ascertain whether she possess any knowledge about shares.

f. Financial analysis of the penny stock companies:

The net worth of the penny stock company is negligible. Even though the net worth of the company and the business activity of the company are negligible, the share prices have been artificially rigged to unusual high.

g. Arranged transactions:

The transactions entered by the assessee involve the series of pre-conceived steps, the performance of each of which is depending on the others being carried out. The true nature of such share transactions lacked commercial contents, being artificially structured transactions, entered into with the sole intent, to evade taxes."

7. By relying on the decision of Hon'ble Supreme Court in the case of Sumati Dayal v. CIT (214 ITR 801), Durga Prasad More v. CIT and CIT v. P. Mohankala and decision of Delhi ITAT in the case of Hersh Win Chadha v. DCIT (ITA No. 3088 to 3098 & 3107/Del/2015), Assessing Officer made the addition under section 68 of the Act of ₹.52,27,792/- and unexplained cash expenditure under section 69C of the Act to the extent of ₹.1,58,338/- taxable income of the assessee.

8. Aggrieved assessee preferred appeal before the Ld. CIT(A) and raised grounds of appeal and filed detailed written submissions, for the sake of clarity it is reproduced below: -

"WRITTEN SUBMISSION:

1) The Ld. Assessing Officer has treated the stock of shares sold by the assessee as penny Stock and treated the sale proceeds as Unexplained Cash Credit without appreciating that the sales were in fact Long Term Capital Gain (LTCG) and Security Transaction Tax (STT) was paid and by virtue of the same the Long Term Capital Gain (LTCG) is exempt under section 10(38) of Income Tax Act, 1961 and all other compliance have been fulfilled.

2) The Ld. Assessing Officer made the addition in the case of the assessee by relaying on general evidences gathered by various enforcement agencies with regard to transaction done and taking at of prices of so called "Penny Stocks". Nowhere in the order of Ld. Assessing Officer has clearly bring out the role of the assessee in the "Modus Operandi" of purchasing bogus capital gains and also failed to bring out the any evidence which substantiate cash has exchanged between the Seller and Buyer of the share. Since the transaction has been carried out through the common platform of Recognised and Reputed Stock exchange.

3) The Ld. Assessing Officer has failed to bring material on record to support its finding that there has been collusion/connivance between the Broker and the assessee for the introduction of its unaccounted money.

4) The Ld. Assessing Officer has considered Long Term Capital Gain as Bogus Purely on surmises and conjuncture (sic), no transaction can be held as bogus unless the same is proved on the basis of sound reasoning and evidence.

5) The Ld. Assessing Officer has neither pointed out any discrepancy in the evidences relied upon by the assessee nor brought out any direct or inference evidence contradictorily to the gaminess of transaction.

6) Nowhere, the Ld. Assessing Officer has alleged that the transaction by the Appellant with these particular broker or share was bogus, merely because the investigation was done by SEBI against Company or its activity. Appellant cannot be said to have

entered into in genuine transaction, insofar as, Appellant is not concerned with the activity of the Company and have no control over the same. Further, Ld. Assessing Officer has not brought on record the Final SEBI Order, which also not available on Public Domain:

7) Further, during the course of scrutiny hearing, the Ld Assessing Officer had issued the Show Cause Notice and our client/appellant had also replied in details to explain the point wise answer with necessary judicial pronouncement.

8) Our Client/appellant again reiterates that the explanation provided as above is not contrary to facts and explanation provided during the course of the Scrutiny hearing. Ld. CIT (APPEAL) require to kindly consider the above-mentioned explanations in defence of Investment in Shares of "KAPPAC PHARMA" which is listed and traded in Recognised Stock Exchange.

9) Our Client/Appellant also want to submit the copies of the List of Shareholders for the FY 2012-2013, 2013-2014 which were downloaded from the Ministry of Company Affairs in which the name of the Appellant was also reflected as Shareholders. It had it be a case of Bogus Long-Term Capital Gain from Penny Stock the name of the Appellant wouldn't have been there in the List of Shareholders for the years mentioned in this earlier paragraph. The List of Shareholders for the FY 2012-2013, 2013-2014.

10) The prayer before your honour, to consider the additional evidence under Rule 46A of the Income Tax Act, 1962 which were not produce before the Ld. Assessing Officer. Kindly consider the same as an Additional Evidence.

11) Further, we are also enclosing list of various judicial pronouncement of High Courts and Tribunals which are listed below.

Udit Kalra vs. ITO (Delhi High Court)

s. 10(38) Dogue Capital Gains from Penny Stocks: It is intriguing is that the company had meagre resources and reported consistent losses. The astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange. The assessee's argument that he was denied the right to cross-examine the individuals whose statements led to the Inquiry and ultimate disallowance of the long term capital gain claim is not relevant in the wake offindings of fact.

The Pr Commissioner Of Income Tax ... vs Prem Pal Gandhi C/O KcTower Chd (Punjab /Haryana High Court)

The assessee purchased shares of a company during the assessment year 2006- 2007 at Rs. 11/- and sold the same in the assessment year 2000-2009 at Rs. 400/- per share. In the above case, namely, ITA-18-2017 also the assessee had purchased and sold the shares in the same assessment years. The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources, in ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner.

Prakash Javia, Indore vs Acit-4(1), Indore on 25 May, 2021

The Tribunal upheld appeal made by assessee on all grounds raised by the assessee in support of their case and against the revenue. Also, it submitted that the Kappac Pharma Limited is neither included in the list of Shell Companies nor has been struck off from the Registrar of companies. Reliance placed on decision of LT.A.T., Mumbai in the case of Shakti Hardware Collections Private Ltd. 6301/Mum/2014 dated 31.01.2018.

It is also submitted that the alleged information received by the Ld. AO from investigation wing about the company Kappec Pharma Limited was never made available to the assessee which violates principles of natural justice and thus renders entire proceedings as void. Reliance placed on the Judgment of Hon'ble Supreme Court in the case of Sona Bullders [2001] 119 Taxman 430. Further, it is submitted that no material was found by the Id. AO which could establish that the assessee had converted unaccounted money into accounted money by managing bogus LTCCG.

Reliance placed on judgment of Hon'ble Delhi High Court in the case of Krishna Devi ITA No. 125 of 8/16/22, 2020 dated 15.01.2021 & Judgment of Hon'ble Bombay High Court in

the case of Uttamchand Jain [2009] 182 taxman 243 dated 02.07.2009

Principal CIT Hitesh Gandhi in ITA No. 18/2017, dated 16-2-2017 (Punj.&Har.);

The Tribunal upheld the findings recorded by the CIT(A). It was categorically recorded by the Tribunal that as noticed by the CIT(A), in the remand report the Assessing Officer was not able to contradict the facts regarding purchase of shares and sale thereof. Further, it was recorded that the assessee had sold shares through MTL shares and Stock Broker limited which is a SEBI registered Stock Broker. The payment for sale of shares was received through banking channels. All the documentary evidence being in favour of assessee, the deletion of the addition made by the CIT(A) was upheld by the Tribunal.

The findings recorded by the CIT (A) and the Tribunal are pure findings of fact which have not be shown to be illegal, erroneous perverse by the learned counsel for the appellant. He has also not been able to produce any material on record to controvert the said findings. Thus, no Substantial question of law arises. Consequently, finding no merit in the appeal by Revenue and the same is dismissed.

Dipesh Ramesh Vardhan vs. DCIT (ITAT Mumbai)

s. 10(38)/68: Bogus Capital Gains from Penny Stocks: The AO has not discharged the onus of controverting the documentary evidences furnished by the assessee and by bringing on record any cogent material to sustain the addition. The allegation of price rigging/manipulation has been levied without establishing the vital link between the assessee and other entities. The whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said party. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue

DCIT vs. Rakesh Saraogi & Sons (HUF) (ITAT Raipur)

s. 10(38) Bogus Capital Gains Penny Stocks: Assuming brokers may have done manipulation, assessee cannot be held liable when the entire transaction is done through banking channels duly recorded in Demat accounts with

Govt depository and traded on stock exchange Nothing on record to suggest assessee gave cash and purchased cheque from broker (Sanjay Bimalchand Jain (Bom HC) distinguished)

Ramprasad Agarwal vs. ITO (ITAT Mumbai)

s. 10(38) Bogus capital gains from penny stocks: If the holding of shares is D-mat account cannot be disputed then the transaction cannot be held as bogus. The AO has also not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee. Once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of statement of one Anil Agrawal recorded by the Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee.

Since there is no Substantial Question of Law, and in lieu of the explanation and documentary proof submitted, submit a humble prayer to consider the above mentioned points while disposing of the Appeal favourably."

9. Ld. CIT(A) after considering the findings in the assessment order which is based on the investigations of Directorate of Investigation, Kolkata and further, analyses of the Assessing Officer, Ld. CIT(A) dismissed the appeal filed by the assessee by relying on the decision of Hon'ble Punjab and Haryana High Court in the case of CIT v. Prem Pal Gandhi and decision of Bangalore ITAT in the case of MK Rajeshwari v. ITO [TS – 9007-ITAR – 2018 (Bangalore)], in the case of Poonam Gupta v. DCIT [TS-6399-ITAT-2021 (Bangalore)] and decision of the Hon'ble

Supreme Court in the case of Suman Poddar v. ITO (2020) 268 Taxman 320 (SC).

10. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. *Addition u/s 68 Rs.52,27,792/-*

1.1 The Learned CIT (A) erred in upholding the addition made by the Assessing Officer (AO) under section 68 of the Income Tax Act, 1961 on an erroneous basis that the investment made in KAPPAC PHARMA LTD shares and Long Term Capital Gain on share is considered as not explained although all the necessary evidence was filed in the course of proceedings.

1.2 The Learned CIT (A) failed to appreciate that the provision of section 10(38) of the Income Tax Act, 1961 are attracted since the Appellant has offered explanation about the nature and source of investments supported by all documentary evidence as requested by learned CIT(A) which the learned CIT(A) erred in not considering these evidence.

1.3 The Learned CIT (A) erred in treating the isolated transaction of purchase of Shares in 2012 and sale thereof in 2014 resulting in long term capital gain of Rs. 52,27,792/- as business profit and not as Capital Gain as claimed by the assessee Appellant although Capital Gain have been accepted all throughout in other Long Term Capital Gain Share transaction The learned CIT (A) erred in considering the finding which is on protective basis

2. *Addition u/s 69 C: Rs 1,58,338/-*

2.1 The Learned CIT (A) erred in upholding the addition made by the Assessing Officer (AO) under section 69C of the Income Tax Act, 1961 on an erroneous basis that the estimated commission i.e. 3% of Rs 52,27,792/- by treating same as unexplained expenditure is without any evidence and same is arbitrary.

3. *No Opportunity of Cross Objection*

3.1 The Learned Assessing Officer did not provide with documents and statements relied upon while passing the adverse order, thus

not giving any opportunity of cross examination as well as cross objection on the same. Hence there is a Gross Violation of Principal of Natural Justice to the appellant.

The appellant prays for following reliefs :

(a) This Hon'ble Tribunal be pleased to direct the AO to delete the addition made u/s. 68 and 69C of the Income Tax Act, 1961.

(b) Any other relief, which the Hon'ble Tribunal deems fit.

11. At the time of hearing, Ld.AR of the assessee submitted that assessee has transferred 7550 shares of KPL and earned Long Term Capital Gain exemption under section 10(38) of the Act. Further, he submitted that assessee has submitted various documentary evidences in support of the above said transaction and he brought to our notice contract notes of sales of shares [Page No. 43 to 49 of the Paper Book], details of cheque issued by stock broker of the assessee towards sales [Page Nos. 50 to 60 of the Paper Book], bank statements in support of the realisation of the sale proceeds and he submitted that the Long Term Capital Gain earned by the assessee is genuine and not an arranged one as alleged by the tax authorities.

12. Further, he submitted that Assessing Officer and Ld. CIT(A) have not pointed out any discrepancies in the documentary evidences submitted by the assessee. Ld.AR of the assessee submitted that without pointing out any discrepancies in the documentary evidences

submitted by the assessee the Assessing Officer has heavily relied on the investigations carried out by the Directorate of Investigation, Kolkata. Ld. AR contravened the findings of the Assessing Officer that KPL had made losses consistently over the past years, the increase of share price was not commensurate with the financial results and the purchase of shares of KPL appeared to be a predetermined action of the assessee leading to earning of Long Term Capital Gain by way of dubious methods. The predetermined action with specific intention is one of the circumstances evidences leading to the conclusion that the Long Term Capital Gain earned is not genuine. Further, assessee has not declared any Short Term Capital Gain or business income or exempt income share transactions in the previous assessment years. In this regard, Ld.AR of the assessee submitted as under: -

"The fundamental submission of the Appellant is as follows:

a. If some persons connive to rig the prices of shares of a listed company, that would not mean that every person who sold shares of that listed company on stock exchange, was party to the design of price rigging. Since these shares are listed on the stock exchange, there would always be persons who have sold the shares without being party to the price rigging. The listed shares are available to every owner of shares across the country and it would be unreasonable to proceed on the basis that all such sellers throughout the country have connived to rig the share prices. And, unless there is evidence of a particular person's connivance, it cannot be assumed that he was party to the design/ price rigging. When the Appellant observed the price of the shares rising, without being aware of the reason for increase in the price, the Appellant started selling these shares. Even if the prices would have risen on

account of any alleged price rigging by certain persons, such price would be available to every owner of shares including the Appellant for selling without being aware of the price rigging.

b. The Appellant was not party to the alleged price rigging. Neither SEBI nor any other authority has made any allegation against the Appellant. Even the investigation carried out by the Directorate of Investigation, Kolkata has not found any material showing the involvement of the Appellant. There is no material to suggest that the Appellant converted his unaccounted cash into long term capital gains.

c. The Appellant was an innocent risk-taking investor who purchased shares with a view to make gains. The decision to sell the shares was taken in order to book the extraordinary gains.

d. The fact that even in a case there is rigging in the price of the shares by certain individuals, there would always be certain innocent investors who sell the shares upon witnessing huge rise in prices without being party to the price rigging, was also acknowledged by the coordinate bench of this Tribunal in the case of Manish Kumar Baid v. ACIT (ITA No. 1236-37/Kol/2017, dated 18th August 2017). Another coordinate bench of this Tribunal in the case of ITO v. Ronak Iqbal Lakhani (ITA No. 835/Mum/2022, dated 17th January 2023) held that "merely because some person misused the share market to rig certain shares in the share market for nefarious purpose, cannot be the ground to draw adverse view against innocent regular investors".

e. Therefore, in the absence of any material to show the involvement of the Appellant in the alleged price rigging or that the Appellant was party to any wrong doing in any manner, no addition can be made to Appellant's income.

f. The AO/ CIT (A) have relied on alleged general findings of the investigation report of the Directorate of Investigation, Kolkata. Admittedly, even in the said investigation report, the name of the Appellant does not appear. It is not the AO's case also that any role is attributed to the Appellant in the alleged price rigging of the shares of KPL in such investigation. The general findings of the investigation report cannot be used to assail even genuine transactions. No copies thereof were also furnished to the Appellant which is violative of principles of natural justice.

Factually incorrect statements made by the AO in the Assessment Order

g. The case of the AO is one admittedly based on "circumstantial evidence". The AO has made the following factual errors in the Assessment Order while constructing a case based on circumstantial evidence:

Sr.No.	<i>Factually incorrect observation / statement made by the AO</i>	<i>Correct position</i>
1.	<p><i>It is seen from assessee's case records that his return of income does not show income from trading in shares in the past" (Para 6.1(i)/ pg. 4 of AO order)</i></p> <p><i>The AO has relied on this finding to doubt that the Appellant would purchase shares of a company that did not show financial performance.</i></p> <p><i>The AO has observed "It is extremely difficult to believe the fact that assessee would invest Rs. 83,050 on the suggestion of friends (whose name he couldn't even recall)" (Para 6.1(i)/ pg. 4 of AO order)</i></p>	<p><i>Not only in the year under consideration but even in other years, the Appellant has earned income from shares and the same has been reflected in the return of income.</i></p> <p><i>Computation & ITR of AY 2014-15- pg. 18 to 35</i></p> <p><i>Computation & ITR of AY 2013-14- pg. 82 to 95</i></p> <p><i>Computation & ITR of AY 2015-16- pg. 96 to 100</i></p> <p><i>Computation & ITR of AY 2016- 17- pg. 101 to 107</i></p> <p><i>Thus, it is incorrect to state that the transaction in question was the only transaction in shares being carried out by the Appellant. Since the observation/ basis on which the inference is drawn itself is incorrect, the inference cannot be sustained. The AO did not require the Appellant to disclose the name of the friends on whose suggestion the Appellant purchased the shares. Had the AO required the Appellant to disclose the names of the persons on whose advice the shares were purchased, the Appellant would have done so. Hence, this observation of the AO is without any basis.</i></p>
2.	<p><i>trading in the securities of Kappac Pharma Ltd. was suspended by BSE (Notice No. 20150101-24 dated 01- Jan- 2015 from January 7, 2015 pursuant to direction received from SEBI. This is another</i></p>	<p><i>The alleged directions issued by SEBI are not available in public domain. The AO has not brought on record what those alleged SEBI directions were and how the Appellant was connected with the same. The alleged BSE notice is also</i></p>

Sr.No.	<i>Factually incorrect observation / statement made by the AO</i>	<i>Correct position</i>
	evidence that shares of Kappac Pharma were artificially hiked to create non- genuine LTCG to the assessee along with other beneficiaries" (Pg. 8 of AO order)	<p>not available in public domain.</p> <p>The only information regarding action being taken by SEBI against KPL which is in public domain is an Order dated 30.04.2019 wherein only a monetary penalty of a meagre amount of Rs. 1,00,000/- was imposed on the KPL for violation of PIT Regulations, 1992. In default of payment of the monetary penalty, coercive proceedings were adopted against KPL under Attachment Proceeding 5438 of 2019 (04.12.2019) which were vacated by Release Order No. RRD-3/50/2020 dated 09.11.2020.</p> <ul style="list-style-type: none"> - Order dated 30.04.2019 - pg. 108 to 117 - Attachment Proceeding 5438 of 2019 (04.12.2019) - pg. 118 to 121 - Release Order No. RRD-3/50/2020 dated 09.11.2020-pg. 122 <p>Neither is there any allegation against the Appellant nor has any proceeding been initiated against the Appellant.</p>
3.	"The SEBI after thorough investigation in such penny stock cases has certified that such transactions are rigged and are carried out to convert Black money into white" (Para 6.47 pg. 10 of AO order)	<p>Same as above.</p> <p>No such alleged order <i>passed</i> by or investigation carried out by SEBI has been brought out by the AO</p>
4.	"The assessee had purchased 7,550 shares of KAAPAC Pharma Ltd. "for Rs. 46J00/-. However, it is noticed that the assessee has not purchased of any other scrip in such a huge quantity" (Para 8.1(a)/ pg. 11 of AO order)	<p>At the outset, the observation that 7,550 is a huge quantity is factually incorrect. The purchase consideration was admittedly only Rs. 46,700/-.</p> <p>The Appellant has purchased shares of other companies also and the same is reflected in the returns and records of the Appellant which have not been doubted in any manner whatsoever by the AO.</p>
5.	*The assessee has not been able to prove the unusual rise and fall of share prices to be natural and based on the market forces. It is evident that	These observation of the AO show that the AO has failed to understand how the stock market functions. The AO has failed to appreciate that even speculative factors (and not

Sr.No.	<i>Factually incorrect observation / statement made by the AO</i>	<i>Correct position</i>
	<p><i>such shares transactions were closed circuit transactions and clearly a structured one. The assessee has not submitted any data/ information about Kappac Pharma which prompted to invest in this scrip or which explains " the substantial increase in the price of the scrip from 2013 onwards." (Para 8.1(d)/pg, 12 of AO order)</i></p>	<p><i>necessarily financial performance) lead to rise and fall in the share prices.</i></p> <p><i>For instance, Zomato Limited, a listed company was trading between the price of Rs. 126 to Rs. 154.70 during the period between July 2021 to January 2022. Till this time, Zomato Ltd. was not a profit making company at all. Despite the same, its shares were listed and trading and even rising on account of speculative factors. Price of shares of Zomato Ltd. and its audited financials (taken from its annual report) are available in public domain and are annexed hereto.</i></p> <p><i>Screenshots showing prices - pg. 123 to 125</i></p> <p><i>Audited financial statement of Zomato Ltd. for year ended on 31.03.2022-pg. 126 to 132</i></p> <p><i>The price of shares of Zomato Ltd. is only one such example and there are multiple such companies whose shares show significant price rise without underlying financials/ profitability. A holder of shares of such companies cannot be expected to "prove the unusual rise and fall of share prices to be natural and based on the market forces" as sought to be done by the AO in the present case.</i></p> <p><i>To expect an assessee to preserve data/ information about an investee company "which prompted him to invest in this scrip" is unreasonable and the observation in this regard fails to appreciate the nature of stock market transactions which are often made on the basis of oral advice.</i></p>
6.	<p><i>"Assessee has failed to show having any knowledge about the shares traded and having any knowledge about the fundamentals of the penny</i></p>	<p><i>The Appellant had proper knowledge in the shares she invested and she has duly informed the AO that the investment was made on the basis of oral advice. No</i></p>

Sr.No.	<i>Factually incorrect observation / statement made by the AO</i>	<i>Correct position</i>
	<i>stock companies, though, she was summoned u/s 131 of the LT. Act, 1961 to ascertain whether she possess any knowledge about shares" (Para 8.1(e)/ pg. 12 of AO order)</i>	<p><i>further question questions were asked by the AO in this regard. There was not even a single question which the Appellant failed to answer. The AO did not point out any question which the Appellant has failed to answer properly.</i></p> <p><i>The statement of the Appellant was recorded and a perusal of the said statement would reveal the same. Despite repeated requests during the scrutiny proceedings, the AO has failed to hand over a copy of the said statement to the Appellant</i></p>
7.	<i>"The money trail of transactions was also examined and, in a large number of transactions trial right from cash deposit account to the beneficiaries account was unearthed." (Para 5.37 pg. 3 of AO order)</i>	<i>Admittedly, no such alleged cash trail has been unearthed in the case of the Appellant. In fact, it is not even the case of the AO that such cash trail was attempted to be established in the case of the Appellant.</i>
8.	<i>"Shown below are the trade data pertaining to assessee's sale of shares of Kappac Pharma Ltd. These are the cross parties who have purchased shares from the assessee and provided exit entry ..." (Para 6.47 pg. 10 of AO order)</i>	<p><i>At the outset, it needs to be noted that the shares were sold on the stock exchange and the Appellant is not aware about the counter party to its sale transactions.</i></p> <p><i>The AO has not brought on record any material to show how the alleged counter- parties were also parties to the arranged transaction. It is not the case of the AO himself that any action had been taken by SEBI or the Income Tax Department against any of these alleged counterparties.</i></p> <p><i>Furthermore, the total of the individual quantities of shares sold as set out by the AO comes to 7,600 whereas the Appellant only sold 7,550 shares. Hence, there is an apparent discrepancy in the details relied on by the AO.</i></p> <p><i>The AO/ investigation department has not taken the alleged investigation to its logical end.</i></p>
9.	<i>"As is evident from the investigation, the actual source</i>	<i>Firstly, the statement of the AO is inherently contradictory. After</i>

Sr.No.	<i>Factually incorrect observation / statement made by the AO</i>	<i>Correct position</i>
	<i>of this credit as explained by the assessee that it is sale proceeds of shares are found to be not only not unsatisfactory but false." (Para 6.47 pg. 10 of AO order)</i>	<i>finding the explanation of the Appellant to be not unsatisfactory, the AO has termed the explanation as false.</i> <i>Secondly, there is no such finding by the investigation department. This observation is the ipse dixit of the AO. No specific finding by the investigation department against the Appellant has been relied on by the AO. This is because there is no finding against the Appellant.</i>

h) Thus, the whole case of the AO is based on preponderance of probability and on the basis of a theory that there were no underlying fundamentals of KPL which would have justified the price rise. The Appellant states that even assuming (but not admitting) that certain persons who rigged the price of the shares, the Appellant was neither a party to the same. The Appellant sold the shares at the price available on the stock market. The Appellant reiterates his fundamental submission set out hereinabove.

General statements in the CIT (A) Order without any material

i) The order of the CIT (A) also proceeds on the basis that merely because the Appellant has dealt in a penny stock, the Appellant is a party to the alleged price rigging and bogus transaction without appreciating that the Appellant was not a party to the alleged price rigging and bogus transaction. The Appellant, being a shareholder, had sold the shares on the stock exchange to book his gains without being party to any such wrongdoing. The price was available to all shareholders to sell on the stock market.

j) The CIT (A) has wrongly observed that the Appellant has not been able to rebut the findings of the AO and that the Appellant has made general statements. In fact, the CIT (A) failed to appreciate that there was no material to link the Appellant to the alleged price rigging and the allegations of the AO were general statements.

k) The judgements relied on by the CIT (A), in para 6.5 to 6.7/ pg. 9 & 10 of CIT (A)'s order are clearly distinguishable:

a. MK Rajeshwari (ITAT Bangalore) (pg. 133 to 148 of paperbook) - In this case, the scrip involved was of M/s Mahavir Advanced Remedies Ltd. and the assessee in this

case contended that she purchased the shares from the Managing Director of this company and the ITAT found discrepancies in the version of the assessee regarding the purchase of the shares (Para 6).

Whereas in the present case, no discrepancy is found in the purchase of the shares by the Appellant and the same has been admitted by the AO.

b. Poonam Gupta (ITAT Bangalore) (pg. 149 to 151 of paperbook) - The assessee did not appear before the ITAT. The ITAT decided this matter in the absence of the assessee since there was no material to controvert the findings given by the CIT (A).

There is no ratio laid down in this judgement (Para 4) and it cannot be treated as a precedent.

c. Suman Poddar (SC) (pg. 152 to 159 of paperbook) At the outset, it needs to be noted that the Supreme Court has merely dismissed the SLP against the judgement of the Delhi High Court. Thus, it cannot be said that the SC has laid down any ratio in its order.

The scrip which was traded in this case was identified by the Bombay Stock Exchange as a penny stock being used for bogus long term capital gains (Para 8). This material fact is completely absent in the present case.

Furthermore, in this case, the Delhi High Court noted that the transaction in shares was a one-off transaction for the assessee despite earning huge profits which showed the incorrectness of the claim of the assessee in that case (Para 9).

In order to show that the present case of the Appellant was similar to the one in Suman Poddar's case, the AO has also stated that the Appellant has not shown income trading in the past. This observation of the AO has been specifically demonstrated hereinabove to be factually incorrect.

Therefore, this judgement is also not applicable to the facts of the present case.

13. In this regard, Ld.AR of the assessee relied on the following case law: -

- i. Manish Kumar Baid v. ACIT (ITA No. 1236-37/Kol/2017, dated 18th August 2017).*
- ii. ITO v. Ronak Iqbal Lakhani (ITA No. 835/Mum/2022, dated 17th January 2023).*
- iii. ACIT v. Munish Financial (ITA No. 2637 & 2638/Mum/2022, dated 31 March 2023).*
- iv. CIT v. Shyam R. Pawar [2015] 229 Taxman 256 (Bom.).*
- v. Swati Luthra v. ITO [2020] 181 ITD 603 (Del.).*
- vi. Dipesh Ramesh Vardhan v. DCIT (ITA No. 7648/Mum/2019, dated 11th August 2020).*
- vii. Prakash Javia HUF v. ITO (ITA No. 464/Ind/2019, dated 25 May 2021).*
- viii. Yogesh Kumar Dalmia v. ACIT (ITA No. 774-75/Kol/2018, dated 9 August 2019).*

14. On the other hand, Ld. DR relied on the order of the lower authorities. Further, Ld. DR submitted as under: -

a. The Department has not accepted the purchase of the shares as genuine.

b. The company, M/s Kappac Pharma Limited ("KPL"), was a loss making company and did not report any sales. The price chart of the scrip shows a bell curve which was typical of a 'penny stock'.

C. That KPL was a 'penny stock' and there were illegal dealings in it was a proven fact. Therefore, the Appellant cannot be treated as an innocent investor. The fact that Appellant has dealt in this penny stock and has purchased the shares in cash is sufficient to treat the long term capital gains as bogus on the basis of preponderance of probabilities.

d. The obtaining of long term capital gains was a transaction that involved "forgery" and "criminal activity" since contract notes are bogus. This case ought to be treated differently from a case where an assessee simply makes a wrongful claim and claims excess deduction or claims deduction of personal expenditure.

15. In the rejoinder, Ld.AR of the assessee raised objections to the submissions of the Ld. DR. Ld.AR of the assessee filed its written submissions, for the sake of clarity it is reproduced below: -

"4. Rejoinder to argument in para 3(a) above - The oral submissions go beyond the findings of the AO in para 4 and para 8.1(a) of the assessment order itself. The AO has not doubted the purchase at all. A transaction cannot be considered as doubted on the basis of generalized assumptions and statements unless the AO categorically and unequivocally rejects/ doubts the same. Hence, the learned Departmental Representative cannot contend that the purchase itself is doubted by the AO. It is settled position of law that departmental representative cannot make out a new case which is not the case of the assessing officer also. The Appellant relies on the Third Member decision of the Tribunal in the case of ACIT v. Ms. Aishwarya K. Rai [2010] 127 ITD 204 (Mum.) which held as follows:

"4. It is no doubt true that the learned D.R. can make any arguments in support of the stand taken by the Assessing Officer but there are certain inherent limits of his arguments inasmuch as he cannot transgress the boundaries made by the Assessing Officer. In other words, the learned D. R. can support the action of the Assessing Officer with any arguments. he can rely on any case law in support of the Assessing Officer's case, but he cannot make out altogether a new case which was not the subject matter of consideration by the Assessing Officer or the learned first appellate authority."

5) Rejoinder to argument in para 3(b) above - The Department has failed to appreciate that shares of even a loss making company can trade at a high value. The example of shares of Zomato Ltd. is one such example. Despite having loss of Rs. 12,225 million for the year ended 31 March 2022 and Earning per Share (EPS) of minus Rs. 1.67, the shares of Zomato Limited have traded at a considerable value reaching a peak of Rs. 154.70/- on 18th November 2021 (see pg. 123 to 132 of paperback - 1). The

performance of Zomato Limited for the year ended 31 March 2022 was worse than its performance for the year ended 31 March 2021, despite which the price of the shares was high and even showed an increase. The bell curve in the price chart of KPL which was relied on by the learned Departmental Representative is visible in the price chart of Zomato Limited also. The arguments on behalf of the Department fail to factor in the speculative nature of prices and that the prices also depend demand-supply factors.

6) *Rejoinder to argument in para 3(c) above - This argument is contrary to the law laid down by the jurisdictional High Court in the case of CIT v. Shyam R. Pawar [2015] 229 Taxman 256 (Bom.) (pg. 206 to 210 of paperbook - 1) holding that "something more was required which would connect the Assessee to the transactions". No statement has been made by any person naming the Appellant as having been involved in availing bogus long term capital gains entry. No material has been found by the Investigation Department which relates to the Appellant's alleged involvement. Also, no such material has been provided to the Appellant. These factual aspects were not disputed by the learned Departmental Representative.*

Furthermore, no adverse inference can be drawn against the Appellant for purchasing the shares in cash since "there is no law which prohibits the purchase of shares in cash". This was held by the Delhi bench of the Tribunal in para 17 of its judgment the case of Swati Luthra v. ITO [2020] 181 ITD 603 (Del.) (pg. 211 to 223 of paperbook-1@pg. 222).

7) *Rejoinder to argument in para 3(d) above - The allegations of "forgery" and "criminal activity" have been made without any basis. The contract notes are issued by the stock-broker and are authorised by the stock exchange. The allegations of "forgery" and "criminal activity" have not even been made by the AO. No proceedings have been initiated against the Appellant on the allegation that there is forgery or criminal activity. These allegations are made only with a view to create prejudice against the Appellant. Hence, the learned Departmental Representative is once again attempting to make out a case which is not the case of the AO himself. The Appellant once again relies on the judgement in the case of ACIT v. Ms. Alshwarya K. Rai (supra) in this regard.*

The submission that this case ought to be treated differently from a case where an assessee simply makes a wrongful claim and claims excess deduction or claims deduction of personal expenditure is also a submission made to create prejudice against the Appellant. This submission also ignores the fact that this Hon'ble Tribunal has in numerous similar cases, upon finding that there was no evidence

to disallow the claim of the long term capital gains made by assessee's, rejected the Department's stand and interpretation of investigation carried out by its investigation wing. Therefore, the Appellant respectfully submits that each case ought to be viewed in light of the peculiar facts before the Hon'ble Tribunal and the stand of the Department and the assessee before it.

8) The learned Departmental Representative also submitted that the distinction drawn on behalf of the Appellant in the judgements relied on by the CIT (A) was incorrect and that only the obiter dicta of these judgements was read on behalf of the Appellant to incorrectly distinguish the judgements. The arguments of the learned Departmental Representative are incorrect on the following grounds:

a. MK Rajeshwari (pg. 133 to 148 of paperbook 1) - A perusal of para 8 of this judgement (@pg. 146) shows that the assessing officer in that case had examined SEBI's findings and had brought out sufficient material to demonstrate that the transactions were not genuine, the findings were not controverted by the assessee by placing evidence, there is a finding in this judgement that the "Revenue has brought sufficient material on record to demonstrate that unaccounted money was introduced in the books of accounts".

However, all these factors are ex facie absent in the present case.

b. Suman Poddar (pg. 152 to 159 of paperbook 1) - In this case, the Delhi HC reproduced the observations of the Tribunal in para 11 of Tribunal's judgement (@pg. 157 of paperbook 1). A perusal of the same makes it clear that the assessee was not aware about its own stockbroker through whom the transaction was carried out. The Tribunal also found the fact that the assessee did not venture to involve himself in any other transaction despite steep profits as a relevant factor. Furthermore, in that case, "there was specific confirmation with the Revenue that the assessee has indulged in non-genuine and bogus capital gains" and that "Investigation Wing had also conducted enquiries which proved that the assessee is also one of the beneficiaries of the transactions".

These factors are completely absent in the case of the Appellant.

9. Viewed from any angle, the judgments' in the case of MK Rajeshwari (supra) and Suman Poddar (supra) turned on their own facts. In both these judgments, the Revenue was able to show the connection of the assessee therein with the bogus transactions which is the sine qua non to sustain the addition as per the judgment of the jurisdictional High Court in Shyam R. Pawar (supra). Therefore, merely because a certain conclusion against the assessee's therein was reached in the judgments' in MK Rajeshwari (supra) and Suman Poddar (supra), the same cannot be applied to all cases without appreciating the difference in the facts of each case.

10) In light of the above, the fundamental case of the Appellant (also set out in para 9 to 14 of the brief Written Note/ Submissions @pg. 3 to 4 of paperbook 1) may be noted. The Appellant cannot and ought not to be condemned on the basis of preponderance of probabilities. The stock market regulator SEBI has also noted that even in shares whose prices are rigged, there could be innocent investors. This has been appreciated and upheld by the Tribunal in the case of ITO v. Ronak Iqbal Lakhani (ITA No. 835/Mum/2022) (pg. 184 to 189 of paperbook-1 @pg. 189).

11) Therefore, the additions may be deleted and the Appeal may be allowed."

16. Considered the rival submissions and material placed on record, we observe that the assessee is not the regular investor and had specifically made the investment in the scrip under consideration. It is fact on record that the financials of the company are not commensurate with the purchase and sale price in the market. The assessee has purchased the shares from open market, D-mated the scrips and subsequently sold the same in the stock exchange. It clearly raises several doubt on the purchase and sales transactions recorded in this case. However, there is no discrepancies in the documents filed by the assessee claiming the deductions u/s 10(38) of the Act. At the same

time, even though all the characteristics of the penny stock exists in the present case, still the revenue has not brought on record any materials linking the assessee in any dubious transactions relating to entry, price rigging or exit providers. Even in the SEBI report, there is no mention or reference to the involvement of the assessee. We can only presume that the assessee is one of the beneficiary in this transactions merely as unsuspecting investor, who has entered in investment fray to make quick profit. Even the assessing officer has applied the presumptions and concept of human probabilities to make the additions without their being any material against the assessee. We observe that the Hon'ble Bombay High Court in the case of Pr. CIT v. Ziauddin A Siddique in Income Tax Appeal No. 2012 of 2017 dated 04.03.2022 held as under: -

"1. The following question of law is proposed:

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs.1,03,33,925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was demated and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the amount of LTCG of Rs.1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

2. We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd. ("RFL") is done through stock exchange and through the registered Stock Brokers. The payments have been

made through banking channels and even Security Transaction Tax ("STT") has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgment of the Apex Court in Principal Commissioner of Income-tax (Central)-1 vs. NRA Iron & Steel (P.) Ltd. but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

6. The appeal is devoid of merits and it is dismissed with no order as to costs."

17. Further, the Hon'ble Delhi High Court in the case of Pr. CIT v. Smt Krishna Devi in ITA 125/2020 dated 15.01.2021 held as under: -

"8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in Suman Poddar v.

ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453.

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips.

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 pre-planned 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 v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (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 v. CIT (supra) too turns ITA 125/2020 and connected matters Page 10 of 10 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."

18. Therefore, we respectfully follow the ratio of the above decisions and inclined to allow the grounds raised by the assessee. Accordingly the ground raised by the assessee is allowed.

19. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 22nd December, 2023.

Sd/-
(NARENDRA KUMAR CHOUDHRY)
JUDICIAL MEMBER
Mumbai / Dated 22.12.2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum