

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE
DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 747/Del/2022
Asstt. Year: 2015-16

Sangeeta Devi Jhunjhunwala, IPSO Legal H-35, 1 st Floor, Jangpura Extension, New Delhi – 110 014 PAN AAAPJ3918J	Vs.	ITO, Ward-70(1) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Rajiv Saxena, Ms. Sumangla Saxena, Shri Shayam Sunder, Shri Dishant Seth, Advocates
Department by :	Shri Amit Shukla, Sr. DR
Date of Hearing:	05.04.2023
Date of pronouncement:	18.05.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals) - 28, New Delhi ("**CIT(A)**") dated 22.03.2022 pertaining to the Assessment Year ("**AY**") 2015-16.

2. The assessee has taken the following grounds:-

"1. That Ld. CIT(A) has erred in law as well as on facts in confirming the following additions/disallowances.

a. Disallowance on claim of exemption u/s. 10(38) of the Act on Long Term Capital Gain of Rs. 1,17,34,753/-.

b. Addition of Rs. 2,11,226/- u/s 69C of the Income-tax Act, 1961."

Ground No. 2 and 3 are only arguments in support of ground No. 1(a) and ground No. 1(b)

3. The facts relating to ground No. 1(a) are that the assessee is an individual and derives income from salary, other sources and capital gain which she claimed exempt under section 10(38) of the Income Tax Act, 1961 (**the "Act"**). For AY 2015-16, she e-filed her return on 25.08.2015 declaring income of Rs. 7,27,000/- which was processed under section 143(1) of the Act. Her case was selected for complete scrutiny through CASS for the reason "suspicious sale transaction in shares and exempt long term capital gain shown in return (Penny stock tab in ITS)". Statutory notices were issued and served. In response, details as called for were furnished. The Ld. Assessing Officer (**"AO"**) examined them. The Ld. AO found that the assessee earned long term capital gain of Rs. 1,17,14,346/- on sale of shares of M/s. HPC Biosciences Limited which the assessee claimed as exempt under section 10(38) of the Act. She had purchased 20,000 shares on 03.01.2013 at the rate Rs. 5/- per share for Rs. 1,00,000/- which she sold during the previous year relevant to AY 2015-16 at the rate Rs. 591.74 per share for Rs. 1,18,34,753/-. From the details of the share transactions the Ld. AO noticed that there was a steep escalation in the value of shares within a short span of time from the date of acquisition of the shares and that the listed company M/s. HPC Biosciences Limited does not justify the price of shares transacted. The Ld. AO also noticed that the sale proceeds have been deposited in her bank account on different dates.

4. During assessment proceedings, the Ld. AO issued notice to the assessee under section 131 of the Act to record her statement but the assessee did not turn up on the date fixed. The Ld. AO drew adverse inference that the assessee does not want to come clean on the fact of the case; she has no knowledge of financial performance, the growth, risk factors etc. of M/s. HPC Biosciences Limited; she has no expertise of trading in stock market; she has hardly dealt in transaction of shares except this

penny stock and that the transaction manifests well planned activity of some person who is dealing in entry operator business.

5. The Ld. AO issued show cause notice dated 21.12.2017 under section 142(1) of the Act, the text of which is reproduced in para 8 of his assessment order. In para 2 thereof, the Ld. AO apprised the assessee of the Investigation Report of Pr. DIT (Inv.) Kolkata wherein it is stated that M/s. HPC Biosciences Limited has been identified as BSE listed stock which have been used for generating bogus long term capital gain and exemption under section 10(38) of the Act has been claimed on the capital gain against the sale of scrips of M/s. HPC Biosciences Limited. The Directorate of Investigation, Kolkata has undertaken investigation on accommodation entry of long term capital gain and identified beneficiaries who have taken bogus entries of long term capital gain. The modus operandi unearthed during the investigation by the Directorate of Investigation was also brought to the notice of the assessee in detail.

5.1 On the basis of details filed by the assessee and other information gathered from the assessee as also the reply dated 26.12.2017 of the assessee, the Ld. AO recorded the finding that undoubtedly there was a scheme unravelled by the Directorate of Investigation of which the assessee was a beneficiary. The onus shifted to the assessee to prove the contrary that there was no such scheme and that the transaction was genuine. According to the Ld. AO, the assessee failed to discharge the onus cast upon her. He, therefore, concluded that like thousand other individuals, the assessee had also taken entry of bogus long term capital gain by paying unaccounted income.

5.2 The Ld. AO therefore, denied the claim of exemption of the long term capital gain of Rs. 1,17,34,753/- under section 10(38) of the Act and added the same to the income of the assessee under section 68 r.w.s. 115BBE of the Act. He also added Rs. 2,11,226/- to the income of the assessee being commission @ 1.8% of trade value on account of providing accommodation

entries under the deeming provisions of section 69C of the Act as expenditure incurred out of books to obtain such entry.

5.3 Accordingly, the Ld. AO completed the assessment on total income of Rs. 1,26,72,979/- on 28.12.2017 under section 143(3) of the Act.

6. The assessee filed appeal before the Ld. CIT(A) challenging the additions. During appellate proceedings, the assessee filed revised grounds and written submissions which the Ld. CIT(A) incorporated in para 4 of his appellate order. The Ld. CIT(A) considered both the additions together. He observed after examining the submissions of the assessee that M/s HPC Biosciences Limited was showing miniscule profit of Rs. 52.61 lakhs as on 31.03.2013. However, the share price of the company increased by about 60 times in a span of 13 months and the market cap of the company as market price were reached in several thousand crores in May and June, 2014 while the total of the balance sheet of the company was about Rs. 30 crores only. Only the form of the transaction exists in assessee's case by creating necessary documents but the financial results of the company do not justify such steep escalation in the price of its shares and as such there is no substance in transaction undertaken by the assessee. The Ld. CITA) therefore, recorded the finding that the Ld. AO has correctly looked beyond the apparent scenario and looked into the real nature of the transaction and the intention behind undertaking the impugned transactions.

6.1 The submissions of the assessee made during appellate proceedings were also countered by the Ld. CIT(A) by bringing on record the findings and modus operandi of a typical penny stock and its characteristics which squarely applied to the case of M/s. HPC Biosciences Limited.

6.2 The Ld. CIT(A) referred to a number of decisions and concluded his findings in para 5.24 and 5.25 of his appellate order reproduced below:-

"5.24 All these cases are applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the circumstances and not getting influenced by the picture shown by the appellant which is coloured

by the use of sham devices. The case laws relied upon by the AR have been perused. No doubt that the decisions in these cases are in favour of the assessee but it appears that the Hon'ble Tribunals/Courts which have passed these judgements have not been made aware of the entirety of the circumstances. Moreover, the fact that the assessee in these cases fail to clear the test of human probabilities, has not been brought to the knowledge of these judicial authorities. Therefore, these cases are not being found relevant in the present case where the AO has gone to the very root of the transactions after doing deep analysis of the facts and circumstances. AO has independently applied his mind. AO has passed a speaking order and he has dealt with all the contention of appellant. There is no basis in the claim of appellant that since SEBI order dated 25.05.2015 was revoked by SEBI itself and that the statements of third party have not been confronted to him. It is seen that AO has passed his finding after analysing the financials and price amount of appellant company and after examining the same, he has concluded that the transaction of long term capital gain was sham.

5.25 The facts of the present case clearly reveal that the transactions of purchase and sale of shares had been effected with the motive to create bogus profit under the head LTCG. The appellant resorted to a readymade scheme for purchase and sale of shares which was run by some Entry Operators. Such transactions are not genuine and natural transactions, but pre-conceived transactions, resulting in creation of bogus profits which are tax exempt. Such transactions are mutually self-serving to the parties to the transactions. I have come to conclude on the basis of above analysis and investigation by AO, documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities that what is apparent in this case is not real, that these financial transactions were sham ones and that this entire edifice was only a colourful device used to evade tax. Moreover, the impugned transactions of shares are preordained one, not for legitimate purpose in view but for the purpose of creating non-genuine and artificial profits, with a view to reduce valid tax liability. Therefore, I agree with the view of the AO that the said transactions are sham transactions and accordingly, the addition made by the AO is confirmed and the grounds of appeal are dismissed.”

6.3 Resultantly, the Ld. CIT(A) dismissed the appeal of the assessee and confirmed the additions made by the Ld. AO.

7. Dissatisfied, the assessee is in appeal before the Tribunal and the grounds relate thereto.

8. The Ld. AR submitted that no inquiry has been made on the assessee in HPC Biosciences Limited's case. The assessee is only a passive beneficiary. Drawing our attention to the page 7 para 5 of the Ld. AO's order, the Ld. AR submitted that the Ld. AO has described the modus

operandi in transactions like those of the assessee and drew conclusion that the assessee has also followed the same. The Ld. AR further contended that vide order dated 06.09.2017 the SEBI has exonerated the assessee and confirmatory order of SEBI was revoked against the assessee but not against M/s. HPC Biosciences Limited which is obvious from para 4 and 6 page 7 and 11 thereof, a copy of which was brought on record. The Ld. AR placed reliance on the decision of Delhi Tribunal rendered on 15.03.2021 in the case of Shri Tapas Kumar Mallik vs. ACIT in ITA No. 8142/Del/2018 copy thereof appears at pages 199-214 of the Paper Book. Our attention was invited to para 15 of the order (supra) appearing at pages 204-205 of the Paper Book.

9. The Ld. DR, on the other hand relied on the order of Ld. AO/CIT(A). He invited our attention to para 7 at page 9 of the Ld. AO's order as also para 7.1 at page 15 of his order. The Ld. DR placed before us written submissions containing therein chronology of inquiries conducted and penal order passed by SEBI in the case of M/s. HPC Biosciences Limited and the peculiar facts and surrounding circumstances of assessee's investment in scrip of M/s, HPC Biosciences Limited. We reproduce the same hereunder:-

- “1. *The core issue before the Hon'ble bench in the above case is 'whether the Long Term capital Gain earned by the assessee on sale of scrip of M/s HPC Biosciences Ltd during FY2014-15 is genuine and eligible for benefit of section 10(38) of IT Act, 1961?*
2. *The company M/s HPC Biosciences Ltd, its promoter directors and other entities were investigated by SEBI for market manipulation and fraudulent trading in violation of Prevention of Fraudulent and unfair Trade Practices (PFUTP) Regulations with other violations of SEBI Act/rules and penalized.*

Chronology of Inquiries conducted and penal order passed by SEBI in case of M/s HPC Biosciences Ltd.

- a) *SEBI conducted an investigation in the scrip of HPC to ascertain manipulation, if any, in the IPO process of the Company in backdrop of huge rise that was observed in the traded volume and price of scrips of the Company (HPC BIO) and three other companies during the period from January 01, 2013 to December 31, 2014.*

- b) *Based on preliminary findings, the whole time member of Securities and Exchange Board of India , vide an interim order dated June 29, 2015, restrained 254 entities from accessing the securities market and from buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions were passed in the matter of IPO of certain companies including HPC.*
- c) *After the June Interim Order, confirmatory orders were passed with respect to the said matter on February 17, 2016, June 14, 2016, August 25, 2016, October 27, 2016 and June 15, 2017, except for certain specific reliefs provided to certain entities it was prima facie found that the preferential allottees (assessee in question was also one of preferential allottee), pre IPO transferees along with the funding group entities and trading group entities have used the stock exchange system to artificially increase volume and price of the HPC scrip for making illegal gains and to convert ill-gotten gains into genuine one.*
- d) *Subsequently, vide order dated September 06, 2017, the Confirmatory Orders were revoked with respect to 216 entities out of the total 254 entities. M/s HPC Biosciences Ltd was not amongst the 216 entities in whose case confirmatory orders were revoked.*
- e) *After the Revocation order, the whole time member passed directions vide order dated December 22, 2020 against eleven entities (including M/s HPC Biosciences Ltd.) where the said company was restrained from; accessing the securities market by issuing prospectus, offer document or advertisement soliciting money from the public in any manner for 8 years.*
- f) *Vide further order dated 25.02.2022 SEBI held M/s HPC BioSciences Ltd and other entities guilty of unfair trade practices and penalties were imposed for violation of various provisions of SEBI act and rules (including PFTUP Regulations) for total amount of Rs 25 lakh against M/s HPC Biosciences Ltd.*
- g) *SEBI passed another order on 22.04.2022 under section 15-1 of SEBI Act for violation of SEBI ICDR Regulations, 2009 against M/s HPC Biosciences ltd and its directors/key persons particularly in relation to preferential allotment just prior to filing of prospectus for IPO on 13.01.2013 in violation of extant rules and imposed further penalty of Rs 20 lakh in total for such violations.*

Peculiar facts and surrounding circumstances of assessee investment in scrip of M/s HPC Biosciences Limited.

1. *Assessee decided to invest in shares of this unknown, unlisted entity through private preferential allotment on 03.01.2013 of 10000 shares at rate of Rs 10 per share. Assessee has offered no explanation as to what led her to make this particular investment.*

2. *On the day of allotment itself i.e on 03.01.2013, the company issues bonus shares in 1:1 ratio. This happy co-incidence enabled assessee to acquire 20000 shares of M/s HPC Biosciences Ltd for mere Rs 5 per share.*
3. *Within 13 days of initial allotment, the company filed prospectus for with BSE Small and Medium Enterprises (SME) segment on January 13, 2013 and*
4. *The shares in question were listed on the BSE SME Platform on March 19, 2013.*
5. *Within 15 months of listing the share prices of this scrip rose many fold reaching around Rs 590/- per share in May-June 2014.*
6. *Again by grand lucky co-incidence assessee was able to sell his shares acquired @ Rs 5 per share at Rs 590/- per share (growth of almost 118 times) and earn (tax-exempt) stupendous returns of more than 117 times within span of 18 months of initial investment.*

The extraordinary series of lucky co-incidences in favour of assessee needs to viewed and appreciated in larger context of preponderance of probabilities to arrive at balance judgement.

*At this juncture, it is relevant to refer to the case of **SEBI vs. Kishore Ajmera (Civil Appeal No. 2818 of 2008)**, dated February 23,2016, wherein the Hon'ble Supreme Court held that:*

'It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may to be inferred by a logical process of reasoning from the totality of the attending facts circumstances surrounding the allegations /charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the be helpless, it is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable / prudent man would adopt to arrive at a conclusion".

10. We have carefully considered the rival submissions and perused the records. The facts are not in dispute. However, we recapitulate the facts. The assessee purchased 10000 equity shares of unlisted company M/s. HPC Biosciences Limited @ Rs. 10/- per share directly on 01.01.2013 which were allotted to the assessee on 03.01.2013. On the day of allotment itself i.e. 03.01.2013 the company issued bonus shares in 1:1 ratio which enabled the assessee to acquire 20,000 shares @ Rs. 5/- per share. M/s. HPC Biosciences Limited filed prospectus with BSE for SME segment on

13.01.2013 and the shares were listed on BSE platform on 19.03.2013. The share price of this scrip rose many fold within a short span of 15 months and reached around Rs. 590/- per share in May-June, 2014. The assessee sold 5100 shares on 28.05.2014, 8400 shares on 03.06.2014, 6300 shares on 05.06.2014 and 200 shares on 24.02.2015 for an aggregate sum of Rs. 1,18,34,753/- through M/s. Narayan Securities Ltd. resulting in long term capital gain of Rs. 1,17,14,346/- which the assessee claimed as exempt under section 10(38) of the Act.

11. It is in the backdrop of the above factual matrix that we have to consider the assessee's claim of earning the impugned long term capital gain and exemption thereof under section 10(38) of the Act. It is an admitted position that during assessment proceedings the Ld. AO brought to the notice of the assessee that AIR data, ITS query (ITD) revealed that she had the impugned long term capital gain from penny stock company i.e. M/s. HPC Biosciences Limited and that as per Investigation Report of Pr. DIT(Inv.) Kolkatta M/s. HPC Biosciences Limited has been identified as BSE listed stock which has been used for generating bogus long term capital gain. Vide show cause notice dated 21.12.2017, the Ld. AO required the assessee to prove the genuineness of the claim of long term capital gain. The reply dated 26.12.2017 submitted by the assessee was not acceptable to the Ld. AO being not satisfactory. Before the Ld. CIT(A), the assessee submitted that all the transactions have been done through banking channel or through account payee cheque ruling out the possibility of 'transaction being accommodated in lieu of cash of equal amount'. The existence of an entry operator was also denied. It was also submitted that the shares of M/s. HPC Biosciences Limited cannot be termed as penny stock. The Ld. AO merely relied upon the information of Kolkata Investigation Wing and did not apply his mind. It was the contention of the assessee that the transactions of purchase and sale of the scrip of M/s. HPC Biosciences Limited entered into by the assessee were of normal prudent person.

12. The explanation of the assessee did not convince the Ld. CIT(A) who observed inter alia in para 5.8 of the appellate order that only the form of the transactions is existing which has been done by creating the necessary documents. However, the financial result of M/s. HPC Biosciences Limited do not justify such steep escalation in the price of its shares. Therefore, the Ld. AO has looked into the real nature of transactions and the intention behind undertaking the impugned transactions. We are inclined to agree with the approach of the Ld. AO/CIT(A). We observe that when the Ld. AO confronted the assessee with the modus operandi adopted by the assessee through chart flow diagram and graph to have huge credits in the shape of sale of shares by using the shares of penny stock company, the assessee could not explain why did she invest in such scrip without knowing the financial performance of the company. These factors among others enabled the Ld. AO to reach the conclusion that the assessee entered into sham transactions to convert her unaccounted cash in the garb of exempt long term capital gain. The Ld. DR brought to our notice the results of enquiry conducted by the SEBI in the case of M/s. HPC Biosciences Limited and pointed out that vide order dated 22.12.2020 the company was restrained from accessing the securities market by issuing prospectus, offer document or advertisement soliciting money from the public in any manner for eight years. Further vide order dated 25.02.2022 SEBI held the company guilty of unfair trade practices and imposed penalty of Rs. 25 lakhs for violation of various provisions of SEBI Act and Rules. Again vide order dated 22.04.2022 under section 15-I of SEBI Act, SEBI imposed a further penalty of Rs. 20 lakhs upon the company and its directors/key persons for preferential allotment of shares just prior to filing of prospectus for IPO on 13.01.2013 in violation of extant rules and regulations etc. We, therefore, endorse the findings of the Ld. CIT(A) recorded by him in para 5.25 (extracted above) of his appellate order.

13. The impugned addition has been made by the Ld. AO under section 68 of the Act which provides that where any sum is found credited in the books of an assessee maintained for any previous year and the assessee

offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year.

13.1 In *Roshan Di Hatti vs. CIT* (1977) 107 ITR 938 (SC) the Hon'ble Supreme Court held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee is on him.

13.2 The Hon'ble Supreme Court observed in *CIT vs. P. Mohanakala* (2007) 161 Taxman 169 (SC) that the expression 'the assessee offers no explanation' means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true that the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine-qua-non for forming the opinion.

13.3 In *Sumiti Dayal vs. CIT* (1995) 80 Taxman 89 (SC) the Hon'ble Supreme Court held that if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, viz. the receipt of money, and if he fails to rebut the same, the said evidence being un rebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however act unreasonably.

14. Let us examine the case of the assessee on the touch stone of the principles of law enunciated by the Hon'ble Supreme Court in the decisions (supra).

14.1 The Ld. AO had in his records information that the assessee had indulged in 'suspicious sale transaction in shares' and claimed exemption of the long term capital gain under section 10(38) of the Act in the return for which reason the assessee's return was selected for complete scrutiny.

14.2 During assessment proceedings, statutory notice under section 143(2) of the Act was served upon the assessee to produce evidence in support of the return. Again notice under section 142(1) of the Act along with questionnaire was issued, in compliance of which requisite details were furnished. On examining the details, the Ld. AO found that during the previous year relevant to AY 2015-16 the bank account of the assessee was credited by sums on different dates aggregating to Rs. 1,18,34,753/-. He sought explanation because the Ld. AO had information that the investigation made by the Directorate of Investigation, Kolkata had revealed that some unscrupulous operators in the capital market were running a scheme of providing entries of long term capital gain for commission. The methodology adopted involved three legs, namely, purchase of share by the beneficiary offline: to save on STT using the loopholes in section 10(38) of the Act which places restriction of trading by payment of STT on sale of shares and not on purchase; price rigging: after purchase of shares the syndicate members start rigging the price gradually through the brokers; lastly the final sale by the beneficiary after the share was held by him for one year. The beneficiary is contacted either by the syndicate member or the broker (middle man) through whom the initial booking was done. The beneficiary provides the required amount of cash which is routed through some of the paper companies of the entry operator and is finally parked in one company which will buy the share from the beneficiary. The paper company issues cheque to the beneficiary.

14.3 The Ld. AO was of the view that the assessee followed the same methodology.

14.4 The explanation which the assessee gave before the Ld. AO was that the scrips of M/s. HPC Biosciences Limited were not penny stock. All the

transactions were done through banking channel or through account payee cheque as a normal prudent person.

14.5 The Ld. AO issued summons under section 131 of the Act to examine the assessee on oath with a view to test the veracity or otherwise of the explanation but the assessee did not turn up on the date fixed. The Ld. AO drew adverse inference.

14.6 The Ld. AO issued final show cause notice under section 142(1) of the Act which forms part of the assessment order at pages 10-16 containing therein inter alia information/details available in the public domain enclosing as Annexure A comparative profit and loss account and balance sheet of the company M/s. HPC Biosciences Limited for various years stating that even an investor with risk appetite on a higher side is highly unlikely to invest in such a scrip.

14.7 Thus opportunity was given by the Ld. AO to the assessee to show cause why the exemption under section 10(38) of the Act for an amount of Rs. 1,17,34,753/- be not denied treating the receipt as unexplained cash credit under section 68 of the Act since the explanation offered by the assessee about the nature and source thereof was not convincing and satisfactory.

14.8 In response the assessee vide reply dated 26.12.2017 reiterated the same explanation which was given earlier, held by the Ld. AO as not, in his opinion, satisfactory.

15. It is, thus obvious that it is not a case in which there was no independent application of mind by the Ld. AO as alleged by the assessee. The Ld. AO did not accept the explanation offered by the assessee as satisfactory on the basis of proper appreciation of material and other attending circumstances available on record. The assessee, in our humble opinion utterly failed to discharge successfully the onus which lay upon the assessee to prove the genuineness of the transaction. Merely because the transaction is through account payee cheque alone which is the strongest

plea of the assessee cannot convert a non-genuine transaction into a genuine transaction.

15.1 Nothing has been done by the assessee except filing the details of the transaction and making a bald plea that transaction has been done as a normal prudent person. However, even this plea is contrary to facts brought on record by the Revenue. The assessee did not consider the business activity of the company M/s. HPC Biosciences Limited, its financials and its creditability.

15.2 In CIT vs. Precision Finance Pvt. Ltd. 208 ITR 465 (Cal) the Hon'ble Calcutta High Court has observed that it is for the assessee to prove the identity of the creditor/ his creditworthiness and the genuineness of the transactions. In CIT vs. Nova Promoters Finlease Pvt. Limited (2012) 342 ITR 169 (Del) the Hon'ble Delhi High Court held that it would be incorrect to state that the onus to prove the genuineness of transaction and creditworthiness of the creditor stands discharge in all cases if payment is made through banking channels. Whether or not onus is discharged depends on the facts of each case. Mere furnishing of particulars is not enough. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine. In para 17 of his order, the Ld. AO stated that though the transaction undertaken by the assessee may seem to fulfil the legal requirement of section 10(38) of the Act, the same are sham transactions as the share prices of M/s. HPC Biosciences Limited were manipulated to raise the same exponentially. The price rise of the penny stock scrip was abrupt, sudden and unrealistic. No cogent material has been brought by the assessee on record to rebut the above finding of the Ld. AO. We may refer the observations of the Hon'ble Supreme Court in SEBI vs. Kishore Ajmera (supra) that it is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to be reasonable conclusion therefrom.

16. Let us now peep into the precedents.

16.1 In Pr. CIT vs. Swati Bajaj (2022) 446 ITR 56(Cal), the AO received information from Investigation Wing that the prices of some shares of penny stock companies which included the company X in which the assessee made investment, were artificially rigged to benefit share holders through bogus claim of long term capital gain. The assessee had purchased shares of the company for Rs. 1 lakh and when the investments in shares became eligible for long term capital gain it was sold for Rs. 29 lakhs during the period when the general market trend was recessive. The AO opined that the shares of the company X matched all the features of the companies which were provided bogus long term capital gain and made addition under section 68 of the Act by treating long term capital gain as unaccounted income on the ground that the assessee invested in shares of company X to convert unaccounted cash under the guise of long term capital gain.

16.1.1 When the matter was taken by the Revenue before the Hon'ble Calcutta High Court it held that it has been established by the Revenue that the rise of prices of the shares was artificially done by adopting manipulative practices. Consequently, whatever resultant profit accrued from out of such manipulative practices, same were also to be treated as tainted. However, the assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee had reaped was not tainted. This has not been proved or established by the assessee. Therefore, the AO was well justified in coming to a conclusion that the so called explanation offered by the assessee was not to his satisfaction. Thus, the assessee having not proved the genuineness of the claim, the creditworthiness of the company in which the assessee had invested and the identity of the person from whom the transactions were done, the assessee had to necessarily fail.

16.1.2 The court went on to observe further that in such a factual scenario, the AO had adopted an inferential process which was found to be a process which would be followed by a reasonable and prudent person. The AO had culled out proximate fact of the case, took into consideration the

surrounding circumstances which came to light after investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the company when the general market trend was admittedly recessive and thereafter arrived at a conclusion which was a proper conclusion and in the absence of any satisfactory explanation by the assessee, the AO was bound to make addition under section 68 of the Act.

16.2 The decision (supra) applies squarely to the facts of the case under consideration before us.

17. Pr. CIT vs. Nandkishore Agarwala (2022) 143 taxmann.com 402 (Cal): In this case also the assessee claimed long term capital gain arising on sale of shares as exempt. The AO made addition on account of unexplained long term capital gain under section 68 and held that suspicious transactions in shares could not be exempted under section 10(38) of the Act.

17.1 When the revenue filed appeal before the Hon'ble Calcutta High Court, the Court held that the assessee had failed to prove genuineness of his share dealing transactions and in view of the fact that the entire transactions were stage manage with object to plough back his unaccounted income in form of fictitious long term capital gain and claimed bogus exemption, the AO was justified in denying exemption under section 10(38) and treating such bogus long term capital gain in penny stock under purview of unexplained cash under section 68 of the Act.

18. Sanjay Kaul vs. PCIT (2020) 199 taxmann.com 470(Delhi): In this case the Hon'ble Delhi High Court held that where the assessee was not regular investor in shares and had only invested in high risk stocks of obscure companies with no business activities or assets, which were identified as the penny stocks, the AO had correctly concluded that the assessee entered into a prearranged sham transaction so as to convert unaccounted money into accounted money in guise of capital loss and therefore the alleged short term capital loss was rightly disallowed.

19. Sanjay Vimal Chand Jain vs. PCIT Nagpur (2018) 89 taxmann.com 196 (Bom): In this case the assessee had purchased shares from the penny stock companies for a lower amount and within a year, sold such shares at higher amount and the assessee had not tendered cogent evidence as to why shares in unknown company had jumped to such a higher amount in no time and also failed to provide details of persons who purchased the said shares and the Hon'ble Bombay High Court held that the transaction was an attempt to hedge the undisclosed income as long term capital gain.

20. Suman Poddar vs. ITO (2019) 112 taxmann.com 330 (SC): In this case the Hon'ble Supreme Court reproduced the relevant part of the order of CIT (Appeals) wherein he observed that in the assessment order the AO referred to the general modus operandi of bogus accommodation entry and thereafter, he has further referred to statement of parties who had provided accommodation entry through managing and controlling the shares of the companies in which the assessee has also transacted. The AO thereafter asked the assessee to justify the rationale behind investment in these penny stock companies not having financial worth, however, the assessee failed to justify the same. The AO also pointed out the price fluctuation in the shares of the companies over a period, dividend history and other financial parameters to substantiate that there was no capital loss against receipt of cash money. The AO made the addition on the basis of material available on record, the surrounding circumstances, the human conduct and preponderance of probabilities.

20.1 The Hon'ble Supreme Court observed that the statement of the persons who controlled the business of providing accommodation entry have been corroborated with the material, surrounding circumstances and preponderance of probability and upheld the finding of the CIT(Appeals).

20.2 The Hon'ble Supreme Court noted that the AO after describing the general modus operandi of accommodation entry by way of bogus capital gain/loss highlighted the statement of the persons who claimed to have

provided bogus capital gain/loss entry. The assessee was then asked to justify the investment in the relevant shares. The AO has pointed out these companies are not having any significant/real business as seen from the financial statement of those companies. The AO has particularly pointed out that price movement of the shares transacted by the assessee were not matching with movement of share market in general and movement of other scrips in the same line of business. The AO has pointed out that the assessee could not explain why it invested in such scrip without knowing the financial performance of the company.

20.3 The Hon'ble Supreme Court quoted the observation of the Tribunal that with such financials and affairs of business purchase of shares of face value of Rs. 10/- at rate of Rs. 491/- by any person and assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make decision of judicial authorities fallacy.

20.4 The Hon'ble Supreme Court observed that the Tribunal placed reliance on the decision of Delhi High Court in the case of Nipun Builders and Developers Pvt. Ltd. in ITA No. 120 of 2012 dated 07.01.2013 wherein the Delhi High Court held that it is the duty of Tribunal to scratch surface and probe documentary evidence in depth, in the light of conduct of assessee and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not.

20.5 The Tribunal declined to interfere with the order of the Ld. CIT(A) keeping in view overall facts and circumstances of the case that profits earned by the assessee are part of major scheme of accommodation entries.

20.6 The Hon'ble Delhi High Court dismissed the appeal of the assessee as no substantial question of law was involved and the Hon'ble Supreme Court affirmed the decision of the Hon'ble Delhi High Court in its judgment in Suman Poddar's case (supra).

21. Udit Kalra vs. ITO Manu/Del/1507/2019: In this case the assessee invested in 4000 shares in a penny stock company which share prices were increased astronomically within a period of approximately 19 months when the price of acquisition was Rs. 12/- per share, on the date of sale it was Rs. 720/-. The Hon'ble Delhi High Court affirmed the order passed by the Tribunal and dismissed the appeal filed by the assessee.

22. Before us, the assessee has placed reliance on the following decisions of the Hon'ble Delhi High Court:

- i. Pr.CIT vs. Smt. Krishna Devi (2021) 431 ITR 361(Del.)
- ii. Pr.CIT vs. Karuna Garg (ITA No. 477/2022) decided on 23.11.2022
- iii. Pr.CIT vs. Smt. Bindu Garg (ITA No. 519/2022) decided on 08.12.2022

22.1 Reliance has also been placed on the following decisions of Coordinate Delhi Benches of the Tribunal:

- i. ITO vs. Smt. Shivani Gupta (ITA No. 5204/Del/2020) dated 06.04.2021
- ii. Shri Mukesh Mittal vs. ITO (ITA No. 761/Del/2020) dated 26.03.2021
- iii. Shri Tapas Kumar Mallick vs. ACIT (ITA No. 8142/Del/2018) dated 19.03.2021
- iv. Amit Jindal vs. ITO (ITA No. 1547/Del/2019) dated 24.02.2022

23. Before we proceed further, let us notice the observation of Hon'ble Supreme Court in Padmasundara Rao (Decd.) vs. State of Tamil Nadu 255 ITR 147 (SC). The Hon'ble Supreme Court in the decision (supra) observed that the courts should not place reliance on decisions without discussing how the factual situation fits in with the fact situation of the decision on which reliance is placed. Judicial utterances are made in the setting of the facts of particular cases. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

23.1 The Hon'ble Delhi High Court applied the law laid down by the Hon'ble Supreme Court (supra) in its Full Bench decisions in the case of J.T (India) Exports and another vs. UOI and another 262 ITR 269 (Del) (FB).

24. In the light of the law laid down by the Hon'ble Supreme Court in Padmasundara Rao's case (supra) and applied by the Hon'ble Delhi High Court in its Full Bench decision in J.T.(India) Exports (supra), let us look into the fact situation of the assessee's case viz. a viz. the cases relied upon by the assessee.

24.1 In Smt. Krishna Devi's case (supra) the assessee had purchased the shares of the company online. The shares were dematerialised and sales were routed through Demat account. But in the case of the assessee before us, the assessee purchased shares of unlisted company offline directly through private preferential allotment, not reported in the stock exchange and on the day of allotment itself, the company issued bonus shares in 1:1 ratio. The shares were listed on BSE platform later on. The facts of the assessee's case being different from those of Smt. Krishna Devi's case, the decision of Hon'ble Delhi High Court in Smt. Krishna Devi's case cannot render any assistance to the assessee. Moreover, the Hon'ble Supreme Court has issued notice in SLP filed by the revenue in Pr. CIT vs. Krishna Devi (2022) 287 Taxman 91 (SC).

24.2 It is noticed from the Tribunal's consolidated order dated 31.07.2019 copy at pages 86-100 of Paper Book that appeals of the assesseees, namely Smt. Karuna Garg, Bindu Garg and Krishna Devi were heard together and the representative of both the sides had agreed that the underlying facts are identical in the case of all the above assesseees and the Tribunal took the case of Bindu Garg as the lead case. The Tribunal stated the facts that the assesseees had purchased shares of two company online through two brokers stationed at New Delhi. Shares of one company were dematerialised on the date of purchase. The shares of another company were kept in common pool account of the broker on the day of purchase and purchase consideration

was paid after 2-3 days. The sale transactions were done through Demat account via online trading. In these cases the Tribunal recorded the finding that the assessee discharged the onus cast upon them under section 68 of the Act. Thus the Tribunal had decided the appeals of the assessee in their favour. On appeals filed by the Revenue, the Hon'ble Delhi High Court dismissed them holding that no substantial question of law arose in those appeals. Nonetheless the fact remains that on facts all these cases are distinguishable. As stated earlier, in the case of the assessee at hand, the assessee had not purchased the shares online through brokers but the shares were purchased by the assessee directly from an unlisted company offline through private preferential allotment and on the day of allotment itself the company issued bonus shares in 1:1 ratio. The shares were listed on BSE platform later on. Hence the decisions of the Delhi High Court in Karuna Garg's case and Bindu Garg's case do not in any way help the assessee. Moreover as observed earlier the assessee has utterly failed to discharge the onus cast upon her to prove the genuineness of the share transactions entered into by her which has been held to be sham.

24.3 In Smt. Shivani Gupta's case (supra) the Tribunal followed the decision of co-ordinate Bench in Tapas Kumar Mallick's case (supra) which was decided in the light of the decision of the Hon'ble Delhi High Court in the case of Smt. Krishna Devi (supra). We have observed in para 24.1 above that the case of the assessee before us is distinguishable on facts from the case of Smt. Krishna Devi (supra) in which the investment in shares was made online by making payment through banking channels whereas the assessee under consideration before us had purchased shares of unlisted entity directly offline through private preferential allotment and on the day of allotment itself the said company had issued bonus shares in 1:1 ratio. Therefore, in our opinion, reliance on the decision of the Tribunal in Smt. Shivani Gupta's case (supra) is misplaced.

24.4 In Mukesh Mittal's case (supra) the CIT(Appeals) had followed the rule of preponderance of probability. The Tribunal, however followed the decision

of Hon'ble Delhi High Court in Krishna Devi (supra) among others and held that the assessee has successfully discharged onus cast upon him by provisions of section 68 and such discharge is purely a question of fact. Even at the risk of repetition, we state that the facts in Krishna Devi's case were altogether different from the facts of the assessee's case at hand in which the assessee had purchased shares in question off market whereas in Krishna Devi's case the shares were purchased online which were reported to the Stock Exchange. The assessee before us has not been able to discharge the onus of proving the genuineness of the transaction which has been held to be sham.

24.5 In Shri Tapas Kumar Mallick's case (supra), the assessee had purchased equity shares through initial public offer (IPO) of HPC Biosciences Limited on 15.03.2013 whereas the assessee before us had purchased the shares offline directly through private preferential allotment not reported in the stock exchange and on the day of allotment itself the company issued bonus shares in 1:1 ratio. The facts are therefore different from the facts of Shri Tapas Kumar Mallick's case and therefore reliance on this case by the assessee is of no help to her.

24.6 In Amit Jindal's case (supra), the shares were purchased through offline trading with a view to earn huge profit as admitted by the assessee in his statement recorded by the AO under section 131 of the Act. The Tribunal followed the decision of the Co-ordinate Bench in the case of Smt. Karuna Garg (supra). However, in Smt. Karuna Garg's case, the shares were purchased online through broker. It is, therefore, obvious that the facts of the assessee's case are not identical with the facts of Smt. Karuna Garg's case.

25. There is yet another set of Tribunal's decisions in favour of the Revenue on identical facts.

25.1 DCIT vs. Pawan Kumar Malhotra (2010) 2 ITR (Trib) 250 (Del): in this case the Delhi Tribunal held that cash credit may be inferred even in respect

of amount recorded as sale price of shares held by the assessee at an abnormal rate at 70 times the cost, so that the inference that it is sham has to be upheld as an instance of disguise cash credit.

25.2 ITO vs. Shamim M Bharwani (2015) 170 TTJ (Mumbai) 238: in this case the assessee earned income from sale of shares of ECL. The assessee claimed said amount as exempt under section 10(38). The AO took the view that share transactions were not genuine. He added sale proceeds of shares to the income of the assessee under section 68 of the Act. The CIT(Appeals) decided in favour of the assessee. The Revenue appealed before the Tribunal which noted that the purchase of shares was off market purchase not reported to the stock exchange and that the shares belonged to a penny stock company, with no credentials, and selling rates were artificially hiked, with no real buyers. On facts, the Tribunal held that inference of sales being bogus was unmistakable and consequently the impugned addition was confirmed.

25.3 Sanjay Kaul vs. ITO (2020) 181 ITD 146/82 ITR (Trib) 441(Delhi): in this case the assessee claimed short term capital loss on sale of shares. The AO received an information from Dy. Director (Inv.) wherein he referred to general practice followed by certain companies, brokers and operators for providing bogus long term/short term capital loss and the assessee was also one of the beneficiary. The AO had pointed out that the assessee could not explain why he invested in such scrip without knowing financial performance of the company. The assessee could not rebut those adverse findings by the AO and therefore, he made addition under section 68 of the Act. The CIT(Appeals) endorsed the findings of the AO. On appeal by the assessee, the Tribunal held that on facts, short term capital loss claimed by the assessee was not genuine and therefore, the AO was justified in treating the same as unexplained under section 68 and in making the impugned addition.

25.4 Sannat Kumar vs. ACIT (2020) 122 taxmann.com 75 (Delhi- Trib): in this case the assessee purchased shares of CSL @ Rs. 10/- per share and

after one year sold the same at Rs. 476/- to Rs. 503/- per share. The AO found that CSL had been duly investigated by the Department of Revenue Intelligence (DRI) and found that the same was a bogus company engaged in arranging for bogus long term capital gain. Accordingly, the AO denied exemption under section 10(38) and brought alleged long term capital gain to tax under section 68. The Ld. CIT(A) decided against the assessee who brought the matter before the Tribunal. The Co-ordinate Bench of Delhi Tribunal held that when the assessee sold shares, working of CSL was not above board and it was only providing accommodation entry in the form of long term capital gain and short term capital gain to evade tax. The assessee also failed to explain the business of CSL and failed to produce balance sheet of CSL. The assessee also failed to prove genuineness of transactions. Therefore, impugned addition was to be sustained.

26. At this juncture it may not be out of place to mention that in the case of DCIT vs. Phoolwati Devi (2009) 314 ITR (AT) 1 (Delhi) it has been held that documentary evidence are normally accepted as a proof of transaction but where such evidence is unbelievable in the light of the test of human probabilities and surrounding circumstances, the rejection of such evidence would be justified.

26.1 In Swati Bajaj's case (supra) the Hon'ble Calcutta High Court observed in the context of the report of the Pr. DGIT (Inv.) Calcutta that large number of NRIs and well known FIIs are buying and selling penny stocks and this appears to be a case where the black money stashed abroad is coming back to India (purchase) or money being sent out of the country (sale). The report points out that while only Rs. 27.57 crores have gone out of the country, an amount of above Rs. 114.97 crores has come in. The report has been communicated to the DGIT (Inv.) of all the states. In the opinion of the Hon'ble Calcutta High Court the methodology of the investigation by the department is quite different from the normal method of investigation which commences from the investor or the assessee as the case may be. On account of huge sums of money being claimed as long term capital gain/long term capital loss, a different approach/methodology was adopted

by the department by commencing the investigation not from the individuals who traded with penny stocks but investigation has started targeting the individuals who dealt with those penny stocks. This concept can be mentioned to be one of “working backward”. This is one of the modes of causing an investigation, considering its magnitude. The approach of the department cannot therefore be faulted.

26.2 The Hon’ble Calcutta High Court observed further that the court sit in judgment over the methodology adopted by the department as no taxpayer is entitled to any benefit which shall not accrue to him under the provisions of the Act. If any dubious methodology has been adopted for the purpose of availing certain benefit not admissible under law, the same will not come within the ambit of tax planning, but shall be a case of tax avoidance by adopting illegal methods. Therefore, the department was justified in proceeding to take up the cases, not only within the jurisdiction of the state of West Bengal but other state as well.

26.3 The Hon’ble Calcutta High Court observed that the assessee is lawfully bound to prove the huge long term capital gain claims to be genuine. If there is information and data available of unreasonable rise in the price of shares of penny stock companies over a short period of time, 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. The assessee cannot escape from the burden cast upon him and unfortunately the burden is heavy as the facts establish that the shares which were traded by the assessee had phenomenal and fanciful rise 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 short term capital loss. Therefore, unless and until the assessee discharges such burden of proof, the addition made by the AO cannot be faulted.

27. On the facts and in the circumstances of the assessee’s case in hand and in the light of the judicial precedents set out above, we have no hesitation at all in holding that the Ld. AO/CIT(A) were perfectly justified in

treating the impugned transactions as sham and discarding the assessee's explanation as not satisfactory. We concur with their findings that the assessee failed to discharge the onus cast upon her under section 68 of the Act. Accordingly, the impugned addition is sustained and the assessee's ground No. 1(a) of disallowance of exemption under section 10(38) of the Act on long term capital gain of Rs. 1,17,34,753/- is hereby rejected.

28. The next grievance of the assessee raised in ground No. 1(b) is that the Ld. CIT(A) erred in confirming the addition of Rs. 2,11,226/- under section 69C of the Act. During assessment proceedings, the Ld. AO required the assessee to show cause why an amount of Rs. 2,11,226/- (being 1.8% of sale price of shares) be not added to the income as being paid as commission for such bogus entry. The explanation of the assessee before the Ld. AO/CIT(A) was that the purchase of the shares were directly through banking channel from company and sale was made through stock exchange and service charges were paid. Thus question of assumption of brokerage/commission does not arise. The explanation of the assessee was not acceptable to both Ld. AO/CIT(A). In view of the report by the Directorate of Investigation about modus operandi behind providing the accommodation entry for long term capital gain, it was held by them that the element of commission on account of providing accommodations entries is taxable in the hands of the beneficiary. Accordingly, the impugned addition was made by the Ld. AO under section 69C of the Act which the Ld. CIT(A) confirmed. This has brought the assessee before the Tribunal.

29. The Ld. AR reiterated the same arguments which were advanced before the Ld. AO/CIT(A). The Ld. DR relied on the order of the Revenue authorities.

30. We have heard the Ld. Representative of the parties, carefully considered their submissions and perused the records. The impugned addition has been made by the Ld. AO by invoking the provisions of section 69C of the Act which reads thus:

“unexplained expenditure, etc.

69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.”

31. It is an admitted position that the assessee purchased 20,000 shares of M/s. HPC Biosciences Limited for Rs. 1 lakh on 03.01.2013 i.e. during the financial year 2012-13 relevant to AY 2013-14. Obviously, the transaction pertained to AY 2013-14 and not AY 2015-16 which is the year under our consideration. We are, therefore, of the opinion that the impugned addition cannot be made under section 69C of the Act in AY 2015-16. We, therefore, set aside the order of the Ld. AO/CIT(A) on the point and delete the addition of Rs. 2,11,226/-. We decide ground No. 1(b) in favour of the assessee.

32. As stated in the beginning, ground No. 2 and ground No. 3 are only arguments in support of ground No. 1(a) and 1(b). These arguments have duly been considered by us while dealing with the issues related thereto. Therefore, no separate adjudication is called for.

33. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 18th May, 2023.

sd/-

**(DR. BRR KUMAR)
ACCOUNTANT MEMBER**

sd/-

**(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 18/05/2023

Veena

Copy forwarded to -

1. Applicant

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	