

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member  
and Shri Sandeep Gosain, Judicial Member**

**ITA No. 3801/Mum/2011**  
(Assessment Year: 2005-06)

Ms. Farrah Marker C/o. D.C. Bothra & Co. CAs 297 Tardeo Road, Wille Mansion Nana Chowk, Mumbai 400007	Vs.	Income Tax Officer 19(3)(1) Bandra Kurla Complex Bandra (E), Mumbai
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PAN - AAEPF3167B

**Appellant**

**Respondent**

Assessee by:	Shri Rajkumar Singh
Revenue by:	Capt. Pradeep Arya

Date of Hearing:	06.04.2016
Date of Pronouncement:	27.04.2016

**ORDER**

**Per Jason P. Boaz, A.M.**

This appeal by the assessee is directed against the order of the CIT(A)-30, Mumbai dated 24.02.2011 for A.Y. 2005-06.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, an individual, filed her return of income for A.Y. 2005-06 on 04.08.2005 declaring income of ₹1,19,653/- after claiming the income from long term capital gain (LTCG) of ₹93,00,012/- on sale of listed equity shares and subjected to STT as exempt under section 10(38) of the Income Tax Act, 1961 (in short 'the Act'). The return was processed under section 143(1) of the Act and the case was subsequently taken up for scrutiny. In the course of assessment proceedings, the AO observed that the shares of Shukun Constructions Ltd. (hereinafter referred to as 'the said shares') are nothing but penny stock and that the assessee has back dated the purchase of the said shares in transactions to generate artificial gain. He required the assessee to substantiate her claim of exemption on the capital gain arising on the sale of the said shares. After considering the

details, documents and submissions filed by the assessee in support of the claim of exemption from LTCG on sale of the said shares and discussion of available data on penny stocks, modus operandi generally adopted by interested persons to avail the arranged exemption of LTCG/STCG/speculation profit/loss, stock price movement of the said company and on the basis of the statement recorded from one Shri Niraj Sanghvi, the AO concluded that the LTCG shown by the assessee on sale of the said shares of Shukun Constructions Ltd. is not a genuine transaction but a fabricated one. In that view of the matter, the AO, while concluding the assessment, treated the entire sale proceeds of the said shares amounting to ₹95,12,812/- as unexplained cash credit under section 68 of the Act and brought the same to tax in the assessee's hand. The assessment was accordingly completed under section 143(3) of the Act, vide order dated 31.12.2007 wherein the assessee's income was determined at ₹96,32,470/-; primarily due to the addition of the sale proceeds on sale of the said shares amounting to ₹95,12,812/- under section 68 of the Act.

2.2 Aggrieved by the order of assessment for A.Y. 2005-06 dated 31.12.2007, the assessee preferred an appeal before the CIT(A)-30, Mumbai. The learned CIT(A) dismissed the assessee's appeal vide the impugned order dated 24.02.2011 upholding the addition made by the AO under section 68 of the Act.

3.1 Aggrieved by the order of the CIT(A)-30, Mumbai dated 24.02.2011 for A.Y. 2005-06, the assessee has preferred this appeal before the Tribunal raising the following revised grounds of appeal: -

**"I - Appeal Ground No.1:-**

*That on facts and circumstances of the case and in law, the ld. C.I.T. (Appeals) has erred in confirming the addition made by the ld. Assessing Officer u/s. 68 of the I.T. Act, 1961 at Rs.95,12,812/- on the basis of amount found credited in the bank account of appellant without adjudicating the legal plea raised that assessee appellant was neither required under the provisions of the tax law nor has maintained any books of accounts for the assessment year under appeal hence addition made u/s.68 is bad in law.*

**2 - Appeal Ground No-2:-**

*That without prejudice to appeal ground no. 1, the ld. C.I.T. (Appeals) has erred in confirming the addition made by the id. A.O. u/s. 68 at Rs.95,12,812/- without properly appreciating the fact that source & identity of such receipt in bank account of assessee appellant and genuineness of the said transaction was established on assessment record with the support of related documentary evidences.*

**3 - Appeal Ground No.3:-**

- a) *That the ld. C.I.T (Appeals) has erred in confirming the disallowance of exemption claim made u/s. 10(38) at Rs.93,00,012/- in respect of long-term capital gain earned on sale of listed equity shares sold through recognized stock exchange which has duly been subjected to security transaction tax(S.T.T.).*
- b) *That without prejudice to appeal grounds no. 3(a), if capital gain income earned at Rs.93,00,012/- on sale of listed equity shares was not long-term capital gain due to back dated purchase allegation made by the Id. Assessing Officer, the ld. C.I.T. (Appeals) ought to have directed the ld. Assessing Officer to assess the said capital gain income of Rs.93,00,012/-as short-term capital gain income u/s.111A on evidential strength of dematerialization of the said sold shares in the name of appellant assessee almost before 3 months prior to its sale, which has been confirmed by the respective share broker as well as Stock Exchange in cross verification carried out and no irregularity or any allegation for the same has been found or made.*
- 4- *That the all the appeal grounds raised hereinabove are independent grounds and without prejudice to each other.”*

3.2.1 On a perusal of the grounds raised (supra), it is seen that all of these are interlinked and pertain to the addition of ₹95,12,812/- of unexplained cash credit under section 68 of the Act. At the outset, the learned A.R. for the assessee submitted that all the grounds raised challenge the addition made and upheld under section 68 of the Act and also with regard to the assessee's claim for exemption under section 10(38) of the Act in respect of the LTCG arising on sale of the said shares of M/s. Shukun Constructions Ltd. The learned A.R. for the assessee vehemently argued that the order of the assessment has been made by the AO only on presumptions, conjectures and surmises, totally disregarding the documentary evidences furnished in the course of assessment proceedings. It is submitted that the impugned order of the learned CIT(A) was almost a verbatim reproduction

of the order of assessment and the conclusion was rendered summarily without any proper reasoning; i.e. basically it was a non-speaking order.

3.2.2 The learned A.R. for the assessee submitted that the assessee had furnished all the necessary documents as required to establish the genuineness of the purchase and sale transactions of the said shares of M/s Shukun Constructions Ltd., such as copy of brokers contract notes for purchase of shares and also confirmation thereof, copy of physical share certificates, copy of letter for split of shares, D-MAT statement of assessee with Stock Holding Corporation of India (SHCIL) evidencing the dematerialization of the said shares in the assessee's name almost three months before the sale of the said shares, copy of contract note of stock broker for sale of the said shares through Bombay Stock Exchange (BSE), evidencing the payment of Securities Transaction Tax (STT) thereon, price movement evidence of stock on BSE on which the said shares were listed and traded and also copy of the bank statement of the assessee evidencing the receipt of sale proceeds of the said shares through regular banking channels. The learned A.R. for the assessee submitted that all these documentary evidences were furnished before the AO in the course of assessment proceedings vide covering letters dated 09.07.2007, 16.07.2007 and 16.08.2007 and form part of Paper Book I (pages 1 to 72) placed before the Tribunal.

3.2.3 It is submitted that the first notice by the AO to the assessee to establish the genuineness of these transactions was issued by the AO on 13.11.2007 fixing the hearing on 21.11.2007, wherein the assessee, vide letter dated 31.11.2007 reiterated her position in the matter and re-submitted the aforementioned documents to the AO. It is submitted that subsequently the AO passed the order of assessment ignoring all the documentary evidence furnished by the assessee and made an addition of the entire sale proceeds of the said shares under section 68 of the Act on the presumption and suspicion that the purchases of the said shares by the assessee was a back dated and arranged transaction.

3.2.4 In this regard, the learned A.R. for the assessee submitted that enquiry by the AO revealed that the sale transaction of the said shares is at the prevailing market rate as confirmed by the BSE on which it was listed and traded. It was also submitted that the transaction of sale of the said shares was confirmed by the concerned stock broker, M/s. Khambatta Securities Ltd. registered with SEBI and BSE and the sale proceeds were remitted by them to the assessee through banking channels after receiving it from the exchange. The learned A.R. for the assessee assailed the assumption of the AO about the modus operandi generally adopted by interested persons through tainted stock brokers for arranged back dated purchase of penny stocks/shares, late filing of return, etc. is contrary to all the facts of the case and the evidence brought on record and filed by the assessee to establish that in the case on hand, the assessee had filed her return of income for A.Y. 2004-05 (i.e. the year in which the said shares were purchased) within the due date as per the provisions of section 139(1) of the Act. It is submitted that the purchases of the said shares has been shown by the assessee in her balance sheet as on 31.03.2004 which is duly audited within the statutory time limit. It is contended by the learned A.R. for the assessee that these facts being a part of the assessment record controvert all the presumptions, observations and allegations of the AO that the purchase of the said shares is back dated and so arranged to enable the assessee to claim exemption from LTCG thereon. It was also submitted by the learned A.R. for the assessee that the assessee had purchased the 'said shares' through M/s. Falgun Finvest, an authorised sub-broker duly registered with SEBI, who had given the delivery of the said shares in physical form through off market trade with appropriate transfer forms and these physical share certificates were lodged for transfer in the name of the assessee. It is submitted that copies of the said share certificates duly transferred in the name of the assessee were placed before the AO and forms part of the records of assessment. These facts, the learned A.R. for the assessee contends, are part of the corroborative documents which are placed at additional Paper Book (pages 1 to 7) which further highlights the

erroneous basis adopted by the AO to hold that purchases of the said shares were back dated. The concerned return of income having been filed by the assessee for A.Y. 2004-05, i.e. the year in which the said shares were purchased, within the due date as per section 139(1) of the Act with duly audited accounts and having been processed and accepted by the Department, it is contended that the AO's observation in the order of assessment for A.Y. 2005-06 that the purchases of the said shares are not genuine/arranged/back dated hold no water. It is submitted that if the AO had real proof that the purchases of the said shares was backdated/arranged, etc. then nothing prevented him from initiating proceedings for re-opening the assessment for A.Y. 2004-05 upto 31.03.2011 as provided under the Act; which has not been done. The learned A.R. for the assessee contends that the facts of the case as laid out above, clearly establish that the contention of the AO that the purchases of the said shares was back dated, arranged, etc. leading to the addition under section 68 of the Act was totally misplaced. In support of this proposition, the learned A.R. for the assessee placed reliance on the decisions of the Coordinate Benches of this Tribunal in the case of (i) Jatin Chhadwa (ITA No. 8573/Mum/2010 dated 24.08.2012) and (ii) Harkhchand K. Gada HUF (ITA Nos. 1772, 1773, 1775, 1778 & 1779/Mum/2010 and others dated 08.08.2012).

3.2.5 The learned A.R. for the assessee contends that all the facts and evidences placed on record before the authorities below goes to establish that the orders of the AO/CIT(A) on the issue of treating the sale proceeds of ₹95,12,812/- on sale of the said shares as unexplained cash credits under section 68 of the Act were based not on any findings of any material fact but merely on suspicion and surmises. The learned A.R. for the assessee further questioned the legal sanctity and tenability of the AO's strong reliance for his actions on a statement recorded behind the back of the assessee from one Shri Niraj Sanghvi received on 31.12.2007, the date on which the order of the assessment was passed for A.Y. 2005-06. The learned A.R. for the assessee submitted that the purchases of the said shares were made through M/s. Falgun Invest whose Proprietor is Smt. Charu N. Sanghvi, whereas the statement relied on by the AO in the order

of assessment was of Shri Niraj Sanghvi, husband of Smt. Charu N. Sanghvi on 31.12.2007, the day the order of assessment was passed without either making the same available to the assessee for rebuttal or giving the assessee due opportunity to cross-examine Shri Niraj Sanghvi. In support of the proposition that denial of opportunity to the assessee to cross-examine the witness, whose statement was the basis of the order of assessment, is a serious flaw rendering the order a nullity in as much as it amounted to violation of the principles of natural justice since the assessee was adversely affected, the learned A.R. for the assessee placed reliance on the decision in the case of Andaman Timber Industries (2015) 281 CTR 241 (SC).

3.3 Per contra, the learned D.R. for Revenue placed strong reliance on the orders of the authorities below. The learned D.R. submitted that the addition under section 68 of the Act made by the AO was after detailed analysis of the facts of the case and the learned CIT(A) has correctly confirmed the same. It was prayed that the impugned order of the learned CIT(A) be upheld.

3.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record, including the judicial pronouncements cited. From a perusal of the Paper Book (pages i to viii and pages 1 to 72) containing copies of written submissions, copies of documents placed before the authorities below, we find that documents pertaining to the purchase and sale of shares of M/s Shukun Constructions Ltd. such as contract notes of brokers, copies of physical share certificates, transfer of physical shares to the name of the assessee and consolidation by the company, the D-MAT account statement of the assessee with SHCIL confirming the said shares in the assessee's name, bank statements and summary thereof and financial statements of the assessee, viz., Balance Sheet of earlier years showing that the fact of holding these shares were furnished before the AO from 16.07.2007 onwards, i.e. well before the assessment was concluded on 31.12.2007. It is also seen that the show cause notice issued by the AO to the assessee

on 13.11.2007 as to why the transaction in the said shares be not treated as a bogus/arranged one was replied to by the assessee vide letter dated 21.11.2007 addressed to the AO. In our considered view, after an appreciation of the material on record, we find that no proper investigation has been carried out by the AO to controvert the material evidence brought on record by the assessee. Even the statement recorded on 31.12.2007 by the AO from one Sir Niraj Sanghvi, which was strongly relied upon by the AO, we find has no evidentiary or corroborative value as it is of a person who has no role in the said share purchase transactions. Further, the said statement, recorded on the day the order of assessment was concluded, i.e. 31.12.2007, was recorded behind the back of the assessee and neither copy of the same was given to the assessee for rebuttal, nor was the assessee allowed due opportunity to cross-examine Shri Niraj Sanghvi. It is seen from the record that no statement was recorded from Smt. Charu Sanghvi, Proprietor, Falgun Invest from whom the assessee purchased the said shares of M/s. Shukun Constructions Ltd. In this factual and legal matrix as discussed above, we find that the statement of Shri Niraj Sanghvi, which was so strongly relied upon to form the basis of the AO's conclusion, is fatally flawed and has no corroboratory or evidentiary value since it was recorded behind the back of the assessee and was used to arrive at an adverse finding in respect of the assessee's purchase of the 'said shares' without putting the assessee on notice by affording her opportunity of rebuttal of the statement and/or cross-examination of Shri Niraj Sanghvi.

3.4.2 It is also seen that, as contended by the assessee, there is no evidence on record to show that any action or enquiry was carried out either by the SEBI or BSE in respect of the alleged manipulation or propping up of the price rate movement of the 'said shares' of Shukun Constructions Ltd., as has been assessed by the AO. We find from the details filed by the assessee on record in pursuance of the query by the AO in the course of assessment proceedings, that the shares of Shukun Constructions Ltd. is listed on BSE and that the sale transaction of the 'said shares' by the assessee is at the rate quoted on the date of sale has



been confirmed both by BSE and the concerned stock broker M/s. Khambatta Securities Ltd. It is strange that the AO has made the addition under section 68 of the Act treating the entire sale proceeds of the 'said shares' received by the assessee through regular banking channels from stock broker registered with SEBI, M/s. Khambatta Securities Ltd., which facts have been confirmed by the said stock broker. In our considered view, in these factual circumstances, the assessee has discharged the onus required under section 68 of the Act as she has established the identity of the payer, source of funds received on sale of the same shares and the genuineness of the transaction.

3.4.3 The addition under section 68 of the Act in the case on hand, it appears, has been made only because the AO presumed that the purchases of the 'said shares' of M/s. Shukun Constructions Ltd. were not made on the date as disclosed by the assessee, but was backdated and an arranged transaction, and not because there was any irregularity in the sale of the said shares. We find from the material on record that the purchases of the said shares were duly disclosed under the head investment in the audited Balance Sheet as on 31.03.2004 relevant to A.Y. 2004-05. In this context we concur with the averments of the learned A.R. for the assessee that if there was any adverse material in respect of the purchases of the 'said shares', the AO ought to have or would have proceeded to initiate proceedings for re-opening the assessment for A.Y. 2004-05 while concluding the assessment for A.Y. 2005-06, the year under consideration, on 31.12.2007 or thereafter till 31.03.2011, which he has not done.

3.4.4 We also find that the decision of the ITAT, Chandigarh Bench, in the case of Somnath Mani (100 TTJ 917) relied on by the AO is factually different and not applicable to the facts of the assessee's case. In that case, the facts were that the sale proceeds of the shares sold were not reported on the transaction date at the concerned Stock Exchange. Further, the said shares continued to appear in the name of that assessee for quite a long period after the sale and also the sale proceeds were received by that assessee only in instalments over a period of six to seven months after the

date of sale of shares. In the case on hand, however, we find that the factual matrix is quite different. In the case on hand the assessee received the full sale proceeds of the sales of the 'said shares' from the stock broker as and when they were sold; BSE has confirmed her sale transaction on the date shown and also the fact that the said shares on sale have been transferred to the buyer immediately is evident from her D-MAT account. In this factual matrix, we find that the decision in the case of Somnath Mani (supra) is factually different and distinguishable from the case on hand; is not applicable to reach an adverse finding in the case on hand and has been erroneously applied and relied on by the AO.

3.4.5 The assessee has placed before us a compilation of judicial pronouncements, the ratio of which has been placed reliance upon in furtherance of her case. In the case of Andaman Timber Industries (2015) 281 CTR 214 (SC) the Hon'ble Apex Court has held that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected. In our considered view, this judgement of the Hon'ble Apex Court supports the case of the assessee in the case on hand as she was not afforded any opportunity of cross-examination of Shri Niraj Sanghvi whose statement was a basis for the AO making the addition under section 68 of the Act. This finding of ours is in addition to our earlier finding (supra), that the statement of Shri Niraj Sanghvi has no legal sanctity or evidentiary value as he was not the person through whom the 'said shares' of M/s. Shukun Constructions Ltd. were purchased.

3.4.6 Another case relied upon by the assessee is of the Coordinate Bench of this Tribunal in the case of Jatin Chhadwa in ITA No. 8573/Mum/2010 dated 24.08.2012 for A.Y. 2005-06. In this case, on similar facts, we find that the Coordinate Bench has held that the claim of the assessee cannot be denied on the basis of presumptions and surmises in respect of penny stock without conducting any inquiry and by disregarding the direct evidences on record by the assessee.

3.4.7 In the decision of the Coordinate Bench of this Tribunal in the case of Harkhchand K. Gada (HUF) & Others in ITA Nos. 1772 to 1775, 1788 & 1789/Mum/2010 dated 08.08.2012 relied on by the assessee, on similar facts, the Coordinate Bench, following the judgements of the Hon'ble Bombay High Court in the case of Mukesh R. Manolia in ITA No. 456 of 2007 dated 07.07.2011 and of the Coordinate Bench in the case of Sharda Credit Pvt. Ltd. (ITA No. 3415/Mum/2007 dated 09.02.2009) held that shares purchased/sold off market cannot be considered illegal transactions. It was also found that the assessee was not provided the opportunity to cross-examine a witness whose statement was relied upon to form the basis for taking an adverse view in that case, overlooking the direct documentary evidence placed on record of the sale/purchase transaction in shares such as brokers contract notes, confirmation of receipt of sale proceeds through regular banking channels, reflection of these transactions in the assessee's audited financial statements and relevant returns of income and it was held by the Bench that in these circumstances, the sale of shares could not be held to be non-genuine.

3.4.8 From the appreciation of the facts of the case, the material evidence placed on record by the assessee and in the light of the discussion of the factual and legal matrix of the case as discussed from para 3.1 to 3.4.7 of this order (supra), we are of the considered opinion that the authorities below, i.e. AO/CIT(A) have made the addition under section 68 of the Act merely on presumptions, suspicions and surmises in respect of penny stocks; disregarding the direct evidences placed on record and furnished by the assessee in the form of brokers contract notes for purchases and sales of the 'said shares' of M/s. Shukun Constructions Ltd., copies of the physical share certificates and her D-MAT account statement establishing the holding of the shares in her name prior to the sale thereof; confirmation of the transactions of buying and selling of the 'said shares' by the respective stock brokers, receipt of sale proceeds through banking channels, etc. As observed earlier in this order, we are of the view that the statement recorded from Shri Niraj Sanghvi on 31.12.2007, the day the order of assessment was passed, would have no evidentiary or corroborative value to be the basis for coming to an

adverse view in the case on hand, since it was recorded behind the assessee's back, from a person who was not involved in the purchase of the said shares and also since the assessee was not afforded opportunity for rebuttal of the same and to cross-examine the said person. We are also of the view that the ratio and the factual matrix of the decisions in the cited case, i.e. Jatin Chhadwa (supra), Harkhchand K. Gada (HUF) & others (supra) and Andaman Timber Industries (supra) would be applicable and support the case of the assessee since no adverse finding has been rendered in respect of the direct material evidence placed on record in respect of her transactions of purchase and sale of the 'said shares' of M/s. Shukun Constructions Ltd. which stand duly disclosed in her audited Balance Sheets filed with the return of income of assessment years 2004-05 and the current year under consideration. In this factual and legal matrix of the case, as discussed above, we find that the addition of ₹95,12,812/- under section 68 of the Act made and confirmed by the authorities below to be unsustainable and therefore direct the AO to delete the said addition and accept the LTCG income of ₹93,00,012/- shown as exempt under section 10(38) of the Act. Consequently, ground No. 1 of the assessee's appeal is allowed.

4. As we have decided the assessee's appeal on facts and merits of the case as per ground No. 1 (supra), we do not deem it necessary to address and adjudicate on the legal and alternate issues raised by the assessee in grounds 2 & 3(a) &(b).

5. Ground No. 4 is general in nature and therefore no adjudication is called for thereon.

6. In the result, the assessee's appeal for A.Y. 20095-06 is allowed as indicated above.

Order pronounced in the open court on 27<sup>th</sup> April, 2016.

Sd/-  
**(Sandeep Gosain)**  
**Judicial Member**

Sd/-  
**(Jason P. Boaz)**  
**Accountant Member**

Mumbai, Dated: 27<sup>th</sup> April, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -30, Mumbai*
4. *The CIT-19, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar  
ITAT, Mumbai Benches, Mumbai*

n.p.