

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC' NEW DELHI**

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

**I.T.A .No.-5714/Del/2018
(ASSESSMENT YEAR-2014-15)**

Pooja Ajmani A-6/20, Triveni Apartments, Paschim Vihar, New Delhi. PAN No. ALZPA8149G (APPELLANT)	vs	ITO Ward 20(4) New Delhi. (RESPONDENT)
Appellant by		Shri K.P. Gaunguli, Adv.
Respondent by		Shri S.L. Anuragi, Sr. DR

ORDER

This appeal filed by the Assessee is directed against the order dated 23.07.2018 of the Ld. CIT(Appeals)-40, Delhi relevant to assessment year 2014-15 on the following grounds of appeal: -

1. *"That, on the facts and in the circumstances of the case and in law, CIT(A)-40, New Delhi was not justified in confirming the addition of Rs. 23,68,313/- as income of the assessee due to the amount received from Kappac Pharma Limited.*
2. *That on the facts and in the circumstances of the case and in law, CIT(A)-40, New Delhi has failed to appreciate that the Assessing Officer made the addition mentioned above without confronting the appellant with the statement to Shri Gupta given by him before the income tax authorities and also*

denying the appellant an opportunity to cross examine Shri S.K. Gupta.

3. That, on the facts and in the circumstances of the case and in law, CIT(A)-40, New Delhi was not justified in confirming the addition of Rs. 23,68,313/- specially when the same was done by copy pasting the information received from different wings of IT department and without making any enquiry in the matter.

4. That the appellant craves, leaves to add, to amend any of the grounds mentioned above any time before or in the course of hearing of appeal before ITAT."

2. The brief facts of the case are that assessee filed return of income was filed on 19/12/2014 declaring total income at Rs. 1,21,740/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income Tax Act, 1961 (in short "Act") was issued on 18/09/2015. During the year under consideration, the assessee has received remuneration from Rahat Latex India Pvt. Ltd. income under the head salary. The assessee had also disclosed long-term capital gain of Rs.23,22,498/- which was earned by sale of equity shares of Kappac Pharma Ltd. AO observed that according assessee she had acquired 4000 equity shares of M/s Kappac Pharma Ltd (Registered office 13/2014, Rerni Bizcourt Veera Desai Road, Andheri West Mumbai

Mumbai City' MH 400053), from M/s Corporate Stock Broking Private Ltd (Registered office A/25, Kalindi Apartment, Nr. Jaymala Bus Stop, Ishanpur, Ahemadabad -380050, Gujrat) at a price of Rs.13.09 per share on 13.09.2012. The assessee sold 3500 shares of Kappac Pharma Ltd Scrip No.506938 through her broker Shri Parasram Holdings Pvt. Ltd. for a total consideration of Rs.23,76,500/- through Bombay Stock Exchange and paid STT of Rs.2377/-. The Assessing Officer received a report from the office of Principal DIT, Investigation, Kolkata, informing that an organized racket of generating bogus entries of Long Term Capital Gains (LTCG) which was exempt from tax had been unearthed in which price of the shares of the penny stock companies were rigged and were raised through circular trading. The Assessing Officer discussed the modus operandi in detail in the assessment order. As per the information available with the Assessing Officer, the shares of Kappac Pharma Ltd. were found to be heavily traded through the top brokers whose activities were being scrutinized by the Investigation Wing. The Investigation Wing, Kolkata recorded the statement of such brokers and sub-brokers who were involved in purchasing of the scrips. A detailed analysis of the financials, price and volume of the shares of the company was also done by the Assessing Officer who then concluded that the transactions showing long term capital gain, which has been claimed by the assessee as exempted under section 10(38), were sham

transactions as the surrounding circumstances and the statement of various share brokers prove these facts. After a detailed analysis of the investigation report with the materials available on record in the case of the assessee and on further examination of the financials of Kappac Pharma Ltd., the Assessing Officer concluded that the modus operandi adopted by the assessee followed the pattern discovered by the Investigation wing during various search and survey operations. Since the assessee had sold the scrip Kappac Pharma Ltd., which was included in the list of penny stock as provided by the Investigation Wing, Kolkata, summons were issued to the assessee under section 131 to prove the genuineness and creditworthiness of the transaction and the statement of the assessee was also recorded. It was observed that apart from the questions relating to questions and experience in dealing in investment share, no proper answer/justification was given by the assessee with regard to question relating to allotment of share, prove of purchase of shares justification for purchase of the particular shares, justification for dematerialization of share just before sale of information regards how the assessee knew promoter of Kappac Pharma Ltd., mode of allotment etc. It was also noted that the assessee did not have a demat account at the time of buying the 4000 shares of Kappac Pharma Ltd. from Corporate Stock Broking Pvt. Ltd. The Assessing Officer also called for the demat account statement of the assessee from the broker

Shri Parasram Holdings Pvt. Ltd. under section 133(6) of the Act and it was noted that the assessee had never made investment in the shares since opening of her demat account and only the transactions which were done were the sale of the shares of Kappac Pharma Ltd. It was also noted that even after making windfall profit, the assessee had not made any further investment in any other stock, which as per the Assessing Officer was against human probability. It was further, noted that the assessee opened her demat account on 15/01/2014 with Shri Parasram Holdings Pvt. Ltd. and dematerialized shares which, indicated that she had prior knowledge regarding increase in the price of share since the shares were sold in the very next month. Thereafter, a letter was also issued by the Assessing Officer to Corporate Stock Broking Pvt. Ltd. through which the shares had been purchased but the letter was returned back unserved and the status of the company under the MCA master data was showing as "strike off". The Assessing Officer relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Durgaprasad More (82 ITR 540) wherein the Hon'ble Court have made reference to the test of human probability. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT (214 ITR 801). It was held that transactions showing exempt Long Term Capital Gain under section 10(38) though appear to be real but as a fact were sham transactions. It was also noted that it has been

held by the Hon'ble Kolkata High Court in the case of CIT Vs. Precision Finance Pvt. Ltd. (208 ITR 465) that payment through account payee is not sacrosanct. It was held that it is apparent that the assessee has adopted a colorable device of LTCEG to avoid tax by relying on the decision of the Hon'ble Supreme Court in the case of Mac Dowell & Co. Vs. CTO (154 ITR 148). Tere assessee was required to show cause as to why the credit of Rs.20,23,990/- + Rs.3,44,322/- amounting to Rs.23,68,313/- by way of Long Term Capital Gain should not be treated as bogus and added to the income. It was submitted that all the necessary documents in respect of the purchase and shares have been submitted. It was held that the transaction is a bogus or sham transaction and the amount of capital gain of Rs.23,68,313/- claimed as exempt Long Term Capital Gain was not genuine and addition of Rs.23,68,313/- was made to the return income of the assessee under section 69A. Provisions of section 115BBE were applied and amount was taxed at the rate of 30%. It was also noted that the said receipt was deposited in the bank account maintained with Kotak Mahindra Bank, Pachim Vihar, Delhi and is deemed to be the income of the assessee under section 69A of the Act and assessment was completed at an income of Rs.24,90,053/- vide order dated 16.12.2016. Aggrieved by the assessment order, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 23.7.2018 has dismissed the appeal of

the assessee. Against the impugned order, assessee is in appeal before the Tribunal.

3. Ld. Counsel for the assessee has stated that Ld. CIT(A) was not justified in confirming the addition of Rs. 23,68,313/- as income of the assessee due to the amount received from Kappac Pharma Limited. He further submitted that Ld. CIT(A) has failed to appreciate that the Assessing Officer made the addition mentioned above without confronting the assessee with the statement to Shri Gupta given by him before the income tax authorities and also denying the appellant an opportunity to cross examine Shri S.K. Gupta. It was further submitted that Ld. CIT(A), New Delhi was not justified in confirming the addition of Rs. 23,68,313/- specially when the same was done by copy pasting the information received from different wings of IT department and without making any enquiry in the matter. In support of his contention he filed 02 Paper Book one is containing pages 1-13 having details of purchases of 4000 equity shares of M/s Kappac Pharma Ltd. from M/s Corporate Stock Broking (P) Ltd.; details of sales of 3500 share and another 500 shares through his broken M/s Shri Parasram Holding and a certificate that the documents mentioned above are true copies of the original to the file of the AO. In another Paper Book which is containing pages 1-101 having the copies of decisions in the case of PCIT vs. Best Infrastructure (India) Pvt. Ltd; PCIT vs. Laxman Industrial Resources

Ltd; Sabh Infrastructure Ltd. vs. ACIT; ITAT, SMC Bench, New Delhi decision in the case of Shikha Dhawan vs. ITO in ITA No. 3035/Del/2018 (AY 2014-15); ITAT, SMC, Bench decision in the case of Meenu Goel vs. ITO in ITA No. 6235/Del/2017 (AY 2014-15) and ITA No. 3387/Del/2018 (AY 2014-15) in Smt. Simi Verma. vs. ITO.

4. On the other hand, Ld. DR relied upon the orders of the authorities below. He further stated that assessee has not substantiated his claim before the revenue authorities. He further submitted that the documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions in the facts and circumstances of the case as it is revealed that purchase and sale of shares are arranged transactions to create bogus profit in the garb of tax exempt long term capital gain by well organized network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or commission. He further stated that the case laws relied upon by the AO as well as Ld. CIT(A) may be read as his arguments including the decision of the Hon'ble Supreme Court of India in the case of Mc Dowell and Company Limited, 154 ITR 148.

5. I have heard both the parties and perused the records especially the impugned order. I find that AO after a detailed analysis of the

investigation report with the materials available on record in the case of the assessee and on further examination of the financials of Kappac Pharma Ltd., price & volume of the scrip of Kappac Pharma Ltd., concluded that the modus operandi adopted by the assessee followed the pattern discovered by the Investigation wing during various search and survey operations. It was held that that the transactions showing long term capital gain, which had been claimed by the assessee as exempt under section 10(38), were sham transactions. It was held that it was a case of bogus long-term capital gain obtained through brokers and that the assessee had used colourable device for avoidance of tax. The receipt of Rs.23,68,313/- was deemed to be income under section 69A. The assessee has contended that 4,000 shares of Kappac Pharma Ltd. purchased from Corporate Stock Broking (P) Ltd. at a price of Rs.13.09 per share in physical form. It has also been submitted that out of the 4,000 shares, 3000 shares were sold on 04/02/2014 for @Rs.677 per share and another 500 were sold on 18/02/2014 for a sum of @Rs.691 per share. It has also been submitted that the assessee did not indulge in any manipulation which may have been done by some broker and that the appellant was not given opportunity for cross examination. It has also been submitted that the Assessing Officer has made the addition without considering the facts of the case and only on the basis of presumption and presuppositions. It is noticed that prima

facie, copies of all documents have been submitted to substantiate the genuineness of transactions related to purchase and subsequent sale of shares leading to long-term capital gain claim by the appellant. I find that these documents were also placed before the Assessing Officer who, after detailed examination and discussion and going beyond the said documents has established that the said documents were a mere mask to hide the real nature of transactions. By analysing the Balance Sheet, Profit & Loss account and the trade pattern of Kappac Pharma Ltd. during the period March, 2010 to March 2014, the Assessing Officer has pointed out that the share price of this company was neither affected by the movement of sensex nor the financials of the company justified such extraordinary jump in the price of its shares. It is noticed that apart from being based on evidences gathered during search and survey operations, analysis of the material on record and analysis of information from various sources, the findings of the Assessing Officer are also based on strong surrounding circumstances, preponderance of probability and human conduct in the light of detailed analysis of the modus operandi adopted by brokers and operators engaged in the business of providing entries of long term capital gains to the interested beneficiaries which has come to surface as a result of deep and wide investigation. Initial investment in a company of unknown credentials and subsequent jump in the share price of such a company cannot be

an accident or windfall but was possible, as clearly brought on record by the Assessing Officer, because of the manipulations in the price of shares in a pre-planned manner by the interested broker and entry operators. The insistence of the assessee that the transactions leading to long-term capital gains are supported by documents such as sale and purchase invoices, bank statements etc. cannot be accepted in view of the fact and circumstances of the case brought on record by the Assessing Officer after proper examination of the material facts and after taking into account the findings of SEBI and corroborating evidences gathered by the Directorate of Investigation, Kolkata against a network of brokers and operators engaged in manipulation of market price of shares of certain companies controlled and managed by such persons with a purpose to provide accommodation entries in the form of long term capital gains. Further, the contention of the assessee that long term capital gains cannot be treated as bogus merely because some investigation with regard to certain company and broker or investigation has been carried out by the Directorate of Investigation, Kolkata only proves that the appellant wants to take shelter under such documentary evidences which themselves have been created as masks to cover up the true nature of transaction. A genuine transaction must be proved to be genuine in all respect. The onus was on the appellant to prove that the transaction leading to claim of long term capital gains

was distinctly genuine transaction and not bogus, premeditated transaction arranged with a view to evade taxes. The onus was on the assessee to contradict the findings that Kappac Pharma Ltd. was a company whose scrip was capable of being traded at high price as it was the appellant who had traded in the shares of the this company which resulted into claim of long term capital gains which is exempt under section 10(38). Once the assessee was made aware of the result of the investigation which proved that trading of shares leading to long term capital gains was not genuine, as per section 101 of the Indian Evidence Act, 1972, the onus was on the assessee to prove that she had earned genuine long term capital gains as it was the assessee who has made a claim that she was engaged in genuine share transactions.

I find that in the case of Shri Charan Singh vs. Chandra Bhan Singh (AIR 1988 SC 6370), the Hon'ble Supreme Court have clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. In the case under consideration, since it is the appellant who had made the claim that she

had earned genuine long term capital gain, all the facts were especially within her knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof" is used in two distinct meanings in the law of evidence viz, 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the others. In this case, once the evidence that assessee has claimed bogus long term capital gain was introduced by the Assessing Officer, the burden of evidence shifted to the assessee. During the assessment proceeding and ever during the assessee proceeding, the assessee has failed to produce any evidence to prove that the long term capital gain claimed by her was genuine. In the present case, it is seen that the assessee has failed to discharge her burden of proof and the Assessing Officer, on the other hand, has proved that the claim of the appellant was incorrect. The enquiry conducted by SEBI was further corroborated by the investigation carried out by the Directorate of Investigation, has been thoroughly analysed by the Assessing Officer to prove that the assessee has introduced bogus long term capital gains in her books of

account by routing her unaccounted income through a tax evasion scheme. The statement of brokers engaged in providing bogus long term capital gains clearly proves that Kappac Pharma Ltd. is one of such companies whose scrips have been manipulated to provide bogus long term capital gains. It is noted that on similar facts and circumstances, Hon'ble ITAT A-Bench, Chandigarh in the case of Shri Abhimanyu Soin vs ACIT, Circle-7, Ludhiana in ITA No.951/Chd./2016 vide order dated 18/04/2018, have expressed the view that the undisclosed income in the garb of long term capital gain has to be assessed as unexplained. The Hon'ble ITAT have held as under:-

"14. The ratio laid down by the Hon'ble Supreme Court in the case of SumatiDayal Vs. CIT [1995] 214 1TR 801 = 2002-TIOL-885-SC-IT-LB is squarely applicable in this case. Though the assessee has received the amounts by the way of account payee cheques, the assessee could nowhere prove the purchase of shares as claimed to have been made on 02/72/2008 in cash and it urns also not proved about the availability of the funds with the assessee as on the date of purchase of shares. The assessee was not in India as per the passport details available as per the record. This, coupled with the fact that the transfer of money in cash from Ludhiana to Delhi and a person representing the broker operating at Kolkata has collected the money at Delhi cannot be accepted. The tax authorities are entitled to look into the surrounding circumstances to

find out the realities and the matter has to be considered by applying test of human probabilities as enunciated by the Hon'ble Supreme Court. The fact that inspite of earning 3072% of profits, the assessee never ventured to involve himself in any other transactions with the broker which gave him even much lower profits during the period which cannot be a mere coincidence or lack of interest or absence of advice from the financial institutions as done earlier.

15. In view of the detailed discussion above, and keeping in view the entirety of the facts and circumstances and specific peculiarity of the instant case and the judgments quoted above, we decline to interfere in the order of the Ld. CIT (A).

16. In the result, appeal of the Assessee is dismissed."

5.1 On the issue of circumstantial evidence and in the matters related to the discharge of 'onus of proof' and the relevance of surrounding circumstances of the case, the Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More [(1972) 82 ITR540], have observed as under:

"...that though an appellant's statement must be considered real until it zvas shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-sewing recitals in the documents, it was for the party to establish the transfer of those recitals, the taxing authorities zvere entitled to look into the surrounding circumstances to find out the reality of such recitals. Science has not yet

invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability. Human minds may differ as to the reliability of piece of evidence, but, in the sphere, the decision of the final fact finding authority is made conclusive by law."

5.2 I further find that the above ratio as laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of Sumati Dayal vs. CIT (214 ITR 801). It is essential on the part of the Assessing Officer to look into the real nature of transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. Further, in the case of McDowell & Co. Ltd. [(1985) 154 ITR 148 (SC)], the Hon'ble Supreme Court have observed as under:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."

5.3 Every person is entitled to so arrange his affairs as to avoid taxation but the arrangement- must be real and genuine and not a sham or make believe.

5.4 Keeping in view of the aforesaid discussions, I am of the view that documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions in the facts and circumstances of the case as it is revealed that purchase and sale of shares are arranged transactions to create bogus profit in the garb of tax exempt long term capital gain by well organised network of entry providers with the sole motive to sell such entries to enable the beneficiary to account for the undisclosed income for a consideration or commission. I further find that the share transactions leading to long term capital gains by the assessee are sham transaction entered into for the purpose of evading tax. I note that the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 is squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as

before this Bench. In view of above discussions, I am of the considered opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee.

6. In the result, the Appeal of the Assessee is dismissed.

Order pronounced on 25-04-2019.

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Date: 25/04/2019

SRBhatnagar

Copy forwarded to: -

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

By Order,

Assistant Registrar, ITAT, Delhi Benches