

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI MAHAVIR SINGH, JM

आयकर अपील सं./ITA No.4861/Mum/2014

(निर्धारण वर्ष / Assessment Year :2005-2006)

ITO-24(3)(1), Mumbai	Vs.	M/s Indravadan Jain HUF, 87/8, Kapadia Building Jawahar Nagar, S.V.Road, Goregaon (West), Mumbai-62
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAH 0054 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.5168/Mum/2014

(निर्धारण वर्ष / Assessment Year :2005-2006)

ACIT-24(3), Bandra(E), Mumbai-51	Vs.	Shri Indravadan Jain, 23/26, Vijaya Villa, Jawahar Nagar, S.V.Road, Goregaon (West), Mumbai-63
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPJ 9737 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri Vishwas Jadhav
निर्धारिती की ओर से /Assessee by : Shri Pramod Kumar Parida
Ms. Sajukta Chowdhury &
Miss Priya Bhalawal

सुनवाई की तारीख / Date of Hearing : **30/03/2016**

घोषणा की तारीख/Date of Pronouncement **27/05/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the revenue against the order of CIT(A)-34, Mumbai, for the assessment year 2005-2006, in the matter of order passed u/s.143(3) r.w.s.147 of the I.T.Act.

2. In both these appeals the revenue is aggrieved for deleting the addition by CIT(A) in respect of long term capital gains treated by AO as unexplained cash credit u/s.68 of the IT Act.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee had shown sale proceeds of shares in the scrip "Ramkrishna Fincap Ltd." as Long Term Capital Gain and claimed exemption under the Act. Further the assessee had claimed to have purchased this scrip at Rs.3.12 per share in the year 2003 and sold the same in the year 2005 for Rs.155.04 per share. Considering the above discussed facts and having regard to the investigation so done, these scrips were found to be penny stock and the capital gain declared was held to be only accommodation entries. Further, the broker M/s.Basant Periwal and Co. through whom the transactions were effected had appeared as "DRI probing evasion by firms via jama kharchi" who was indulged in price manipulation through synchronized and cross deal in scrip of Ramkrishna Fincap P.ltd. Furthermore, it was also communicated that SEBI has passed an order dated 9.7.2009 regarding the irregularities and synchronized trades carried out in scrip of Ramkrishna Fincap Ltd. by the broker M/s.Basant Periwal & Co. In view of the above, the case was reopened after recording reasons by issue of notice u/s.148 dated 30.3.2012 which was duly served on the assessee.

4. In view of the above discussion, the AO did not accept assessee's claim of long term capital gain and added the same in assessee's income

u/s.68 of the Act. By the impugned order the CIT(A) deleted the addition after having following observation :-

“2.3 I have carefully considered the submissions of the appellant in the paper book filed. The original return of income for A. Y. 2005-06 was filed on 28.3.2007. The notice u/s 148 was issued on 30.3.2012. Though the notice was issued beyond four years time from the end of the assessment year but case was reopened before 6 years the question of change of opinion does not arise in this case.

2.4. As per provisions of section 149, it is clear that even after lapse of 4 years, but not more than six years, the assessment can be reopened. In the appellant's case, even though 4 years have been lapsed, the case was reopened before 6 years Therefore the case of the appellant is validly reopened. Since this is a case wherein which the assessment is reopened beyond four years, the Assessing Officer had complied with the technical requirement of getting the approval from the JCIT. In fact, the JCIT after having gone through the material on record was satisfied and then approved the reopening. Hence, it cannot be said that the Assessing Officer did not independently applied the mind before arriving at the belief that there was an income escaped assessment. This is not a case of either change of opinion or reappraisal of existing material on record.

2.5 Various courts have held that to assume the jurisdiction u/s 147, there should be some concrete material available before the Assessing Officer and the existence of such material should be real and it should not be according to the whims and fancies of the Assessing Officer. The Assessing Officer must form an opinion that the income has escaped assessment and there must be some basis for forming such belief. The reasons recorded must have a rational connection to the formation of belief. There must be a nexus between the material in possession of the Assessing Officer and the formation of belief. The reason for formation of belief must be in good faith and it should not be mere pretence. As mentioned above the material before the AO was not only the report of DDIT (inv) ,but also the annexures containing various other details. Thus the AO after appraising these materials fully had applied his mind, got satisfied, before forming a belief and then recorded the reason and it is not according to the whims and fancies of the AO. Hence the AO had complied with all the legal requirement of law before reopening the case.

2.6 I would like to rely on the recent Delhi High Court decision in the case of M/s Rajat Export Import India Pvt. Ltd. vs.ITO 341 ITR 135 (DeL). The Head Note is as under:

Reassessment--Reason to believe that income has escaped assessment--Fool proof case for making addition not necessary--Information received by Assessing Officer from investigation wing giving instrument number, date, name of bank and branch and account number, indicating assessee had taken accommodation entry from entry provider--Reopening of assessment on basis of information proper--Income-tax Act, 1961, s. 148.

At the stage when reasons are recorded for reopening the assessment, the Assessing Officer is not required to build a fool proof case for making addition to the assessee's income; all that he is required to do at that stage is to form a prima facie opinion or belief that income has escaped assessment. The relevancy of the material before the Assessing Officer is to be judged only from that perspective and not from the perspective as to whether the material is sufficient or adequate to sustain the addition ultimately. That will be an aspect which the Assessing Officer will examine and decide in the course of the reassessment proceedings after hearing the assessee in the manner required by law.

For the assessment year 2004-05, the Assessing Officer issued notice to the assessee under section 148 of the Income-tax Act, 1961, calling upon the assessee to file a return of income on the ground that income chargeable to tax had escaped assessment. The assessee replied stating that the return filed originally by the assessee-company may be treated as return filed in response to the notice and raising detailed objections to the reopening of the assessment, including one that there was no escapement of income to justify the reopening of the assessment, that the amount of Rs. 3 lakhs received from the company 8 was in the nature of share application money received through banking channels and that the share applicant company had sufficient creditworthiness to advance the monies to the assessee for purchase of the shares. The Assessing Officer overruled the objections of the assessee stating that his belief that income chargeable to tax had escaped assessment was based on a report of the investigation wing which had examined meticulously the various bank accounts of the assessee and other parties besides other substantive material like recorded statements of proven entry operators. On a writ petition contending that the information contained in the material handed over to the assessee was not relevant for the purpose of forming the belief that income chargeable to tax had escaped assessment in the case of the assessee because the name of the assessee did not find a place in the statement of the director of 8 or in any other material :

Held, dismissing the petition, that in the reasons recorded the Assessing Officer had referred to the investigation made by the Director of Income-tax (Investigation), who was in charge of the investigation into groups that operated as entry providers or entry operators, in the case of a group which was found to have operated multiple accounts in various branches of banks to introduce

unaccounted money in the guise of gifts, loans, share application money, etc. After referring to the broad and general modus operandi adopted by the entry providers, the Assessing Officer specifically noticed from the list of entries given to him by the investigation wing that the assessee had taken accommodation entry from 8 in the amount of Rs. 3 lakhs. 8 (J) had been described as an entry provider and the instrument number, date, name of the bank and the branch as well as account number were given. This information constituted reason to believe, prima facie, that income chargeable to tax had escaped assessment in the hands of the assessee. The material before the Assessing Officer was relevant and afforded a live link or nexus to the formation of the prima facie belief that income chargeable to tax had escaped assessment in the assessee's hands. Admittedly, the information received from the Director of Income-tax (Investigation) did contain material linking 8, stated to be an entry provider, with the assessee. The reasons to believe recorded in writing by the Assessing Officer were detailed and showed application of mind. It was therefore unnecessary to go into whether the assessee had been implicated in the statement of the director of Shri Mukesh Choksi.

2.7 In the above mentioned case the Assessing Officer had received information from Investigation Wing and accordingly reopened the assessment based on the information provided. Identical are the facts in appellant's case also. In view of the above discussion, I hold that the reopening is proper and valid in the eyes of law. This ground of appeal of the appellant is dismissed.

3 Ground No.2 is directed against addition of Rs.60,19,691/- by treating the genuine long term capital gain as unexplained cash credit u/s.68 of the Income Tax Act.

3.1 The Assessing Officer has discussed this issue in para 7 to 9 of the impugned assessment order. It was noticed that SEBI had conducted independent enquiries in the case of Besant Periwal & Co. that too in the scrip "Ramkrishna Fincap Limited through whom the appellant has made the said transactions and conclusively proved that Besant Periwal & Co. had inflated the price of the said scrip and it was clear that Ramkrishna Fincap Limited has no networth or such price hike and the profits offered was evident of the same. As far as the contention of the appellant that he has genuinely purchased and sold the scrip "Ramkrishna Fincap Limited" was concerned, it was noticed that the appellant has done transaction with M/s.Besant Periwal & Co. in only one transaction, i.e. 'Ramkrishna Fincap Limited' that too in the particular period of which the SEBI has given a specific finding. The Assessing Officer has found that the appellant has not done any transaction through M/s.Basant Periwal & Co. except in scrip "Ramkrishna Fincap Limited. The appellant has done such transaction in the period in which the price of the scrip has been artificially inflated by M/s.Basant Periwal & Co. through it only. The Assessing Officer has treated this transaction as colourable device as envisaged in

the judgement of the High Court in the case of Mc.Dowell and the entire long term capital gain of Rs.60,19,691/- was treated as unexplained cash credit u/s.68 of the Income tax Act.

3.3 The submissions made by the appellant is as under:-

"Before coming to the conclusion that the claim of exemption of LTCG is ingenuine the Ld AO issued show cause notice dated 26/02/2013 asking the appellant to substantiate the transaction of purchase and sale of shares in respect of Ramkrishna Fincap Ltd through stock broker M/s. Basant Periwal & Co Kolkata. In addition to the detailed submission made we have to first bring the facts of case one by one as under:

1.1. The appellant bought 30000 shares of Ramkrishna Fincap Ltd on the floor of Kolkata stock exchange through a registered share broker M/s. Basant Periwal & Co.

1.2. In pursuance of purchase of shares the bill was raised by the broker on the appellant.

1.3. In performance of the obligation against purchases of shares the appellant made the payment by way of a/c payee cheque which is duly debited in the bank a/c of appellant (Copy enclosed).

1.4. The stock exchange then after transferred the said shares of M/s.Ramkrishna Fincap Ltd in the Demat alc of the appellant held with depository HDFC Bank Ltd on 31/03/2004 (Copy enclosed).

1.5. Before selling the shares the appellant held these shares in his demat a/c for more than 1 year.

1.6. The impugned shares then were sold through M/s. Basat Periwal & Co on the floor of Kolkata Stock Exchange on various dates. Here it is pertinent to bring to your honour's notice that the said shares were sold on Kolkata stock exchange because the same were listed only on Kolkata stock exchange.

1.7. Pursuant to sell of shares the broker issued a contract note cum bill for sale of shares vide various bills.(Copy enclosed).

1.8. On sale of shares the appellant effected the delivery of said shares by way of demat instruction slip drawn in favour of broker who then transferred to Kolkata stock exchange.

1.9. After transfer of shares from appellant demat a/c the broker M/s.Basant Periwal & Co who received the payment from Kolkata Stock Exchange issued the cheque in favour of appellant. The said cheque was then deposited in appellants bank a/c. Necessary evidence of having deposited and credited the cheque in appellants bank a/c enclosed hereto as per Ex '0' for your honour's perusal and consideration.

2. From the series of events your honour will appreciate that the transactions of purchase and sales are genuine beyond doubt because of the following further facts:

a) That there was no privy of contract between the appellant and the seller as the appellant has bought the shares on the floor of recognized stock exchange i.e. Kolkata where the said scrip is listed. Appellant do not know who is seller similarly when sold the appellant does not know to whom the shares have been sold.

b) For claiming the benefit of exemption u/s. 10(38) of Act three requirement needs to be fulfilled. First the share should be held for more than 1 year, Secondly it should be listed and sold on recognized stock exchange and thirdly on the said sale necessary security transaction tax (STT) has been paid. In support of fulfillment of all ingredients please find copy of bills and ledger copy as per Ex 'E' for your honour's perusal and consideration.

c) A perusal of the bills of purchase and sale your honour will appreciate that the shares have been held for more than 1 year, the same has been sold on recognized stock exchange and necessary STT has been paid to govt treasury. Hence to doubt the genuine transaction as mere accommodation entry will be against the spirit of the investment as well against the govt invitation to make investment in shares.

d) Lastly for treating the genuine LTCG as mere accommodation entry the Ld AO has discussed the reasons in para 7.1 of the assessment order. The Ld AO has cited various reasons which are discussed and replied one by one as under:

AO's Contention	Our Reply
1. Sharp rise in the price of share from Rs. 3.10 to Rs.171 between the period 01/04/2004 to 28/05/2005.	As far as Ld AO's observation that there is sharp increase in the shares prices during the period of one year cannot be the reason for treating genuine LTCG as accommodation because this is a free market where the investor does not have any control over price. Moreover there is no privy of contract between the buyer and seller As far as initiation of investigation on broker is concerned the appellant is no way concerned with the activity of broker. The appellant has made the investment in shares which was purchased and sold on the floor of stock exchange not from or to M/s. Basant Periwal &
2. SEBI initiated investigation in respect of sell and buy dealings in the said Ramkrishna Fincap Ltd shares.	
3. The investigation revealed that the transactions through M/s. Basant Periwal & Co on the floor of stock exchange in this particular scrip was more than 83%.	
4. SEBI initiated adjudicating proceedings against M/s. Basant Periwal & Co vide show cause notice (SCN) issued and there were allegation of gross violation	

<p><i>of the various clause of SEBI regulations and Bye laws</i></p>	<p><i>Co. Against purchase payment has been made by a/c payee cheque delivery of shares has been received thereby the contract is completed. Similarly shares have been sold, delivery has been given & payment has been received by alc payee cheque. Thereby sale contract is also complete in all respect as per Contract Ac 1956. Hence the appellant is no way concerned with the enquiry of Basant Periwal & Co by SEBI. It is pertinent to mention here that about purchase and sale of shares on the floor of Kolkata stock exchange the department is in possession of necessary evidence which were called by them. Still the Ld AO has not discussed by the order that assessee has purchased these shares on the exchange and not from Basant Periwal & Co. Basant Periwal & Co has acted as a broker only. In spite of all these the Ld AO doubted the transaction as ingenuine & consequent L TCG as bogus. Thirdly transaction cannot be treated as ingenuine because of the investigation being done by SEBI against M/s. Basant Periwal & Co for the activities done by them because the appellant is not concerned with third parties activities or have any control over their activities.</i></p> <p><i>Lastly transaction cannot be treated as ingenuine because of violation of bye laws by broker and fine levied on him. It is of utmost important here that M/s. Basant Periwal & Co never stated before any of the authority that the transaction in M/s. Ram Krishna Fincap Ltd on the floor of Kolkata Stock Exchange are ingenuine or mere accommodation entries. Without prejudice even if they have admitted the same cannot be applied to appellant as the appellant has genuinely bought and sold these shares on the floor of Kolkata Stock exchange. On which the appellant has no control.</i></p>
<p><i>5. SEBI imposed fine of Rs.3,00,000/- on M/s. Basant Periwal & Co for violation of Bye laws of SEBI.</i></p>	
<p><i>6. Based on the above the Ld AO held that the transactions are mere accommodation entries and unexplained credit. For treating the same he has discussed the reason in para 8 of the assessment order.</i></p>	

From the above facts and circumstances your honour will admit that merely because investigation has been done on M/s. Basant Periwal & Co by SEBI and SEBI has levied fine on him the genuine transactions done on the floor of Stock Exchange cannot be treated as ingenuine. What the appellants has done is that he purchased the shares, made the payment by alc payee cheques, sold these shares, received the delivery of shares, gave the delivery and received the payment by a/c payee cheque. Hence the genuine transaction cannot and should not be treated as ingenuine merely on arbitrary view or suspicion. It is submitted that on the similar facts the transactions have been treated as genuine and L TCG thereon has been allowed by the Hon'ble ITAT in the following decisions.

*Mahesh Mundra Mumbai vs ITO 21(1)ITA No. 1176/Mum/2012
ITO ward 20(1) vs Naveen Gupta in ITA No 696 (Delhi) SOT 2006
94 Delhi
Mayur M Shah HUF Mumbai vs ITO 25(3) ITA No. 2390/Mum/2013
ITO v Smt Kusumlata in ITA No. 387 105 TT J (2006) 265 Jodhpur
Chandrakant Babulal Shah vs ITO 16(2)(4) ITA No.
6108/Mum/2009
Dalpat Singh Choudhary vs ACIT (2012) 143 TT J 500 (Jodhpur
Trib)
ACIT v Shri Ravindra Kumar ToshnivalITA No. 5302/Mum/2008
Jafferli K Rallonse v DCIT Central 5 in ITA No. 68/Mum/2009
Mukesh R Marolia v Addl CIT 6 SOT 247
Mrs Rajini devi A. Chowdhary v ITO ITA No. 6455/M/07 Dated
30/04/2008
DCIT v Shri Pinakir L Shok in ITA No. 3030 & 3453/M/08 Dated
14/07/2009*

In the aforesaid decisions the broker through whom the shares were purchased and sold have deposed before the investigation wing and have given statement that these are mere accommodation entry or in some cases the where about of the broker is not known even through the Hon'ble ITAT has held that the transaction cannot be treated as ingenuine the below mentioned reasons. Whereas in appellants case M/s Sasant Periwal & Co has never stated or there is any adverse findings that these transactions are not done on the floor of Kolkata stock exchange.

- 1. That no opportunity to cross examination has been given.*
- 2. Shares have been purchased, demated and sold for which necessary bills have been issued.*
- 3. Shares have been sold through demat a/c and against the sale payment has been received by alc payee cheques etc.*
- 4. STT shares have been sold on recognized stock exchange on which STT have been paid.*

When the enquiry has been made on the back of appellant without providing any opportunity to cross examine the broker the addition made cannot be sustained as held in the decision of Kum Saumya Agrawal v ITO.(2008) 174 Taxman 60 (Agra) Mog

A reading of the aforesaid decisions your honour will appreciate that appellants case is on very strong footing because the appellant has purchased these shares on floor of stock exchange, the payment against these shares have been made by a/c payee cheques the said shares have been credited in appellants demat a/c, the appellant has sold these shares after holding them for more than 1 year, on the said transaction of purchase and sales necessary STT has been paid, the broker M/s. Basant Periwal & Co has never stated that these transactions are mere accommodation entries. Merely because he has violated the bye laws of the SEBI cannot be the reason for treating the genuine transaction as bogus. In this connection support is taken from Hon'ble Jharkhand High Court decision wherein they have held that transaction with even tainted share broker who has been fined cannot lead to genuine transaction as bogus.

CIT v Arun Kumar Agarwal HUF 210 Taxman 205 (Jharkhand High Court)

A perusal of the aforesaid facts and the judgements of Hon'ble ITAT & High Court your honour will admit and appreciate that merely because the broker has violated the bye laws of SEBI and has been fined cannot be the reason for treating genuine transactions as bogus and the consequent benefit thereon.

In view of the aforesaid submission it is requested to direct the Ld AO to treat the L TCG as genuine, give the exemption available as per law u/s. 10(38) of the Act and delete the unwarranted addition made to the returned income u/s. 68 of the Act and oblige."

3.4 I have carefully gone through the above submissions of the appellant along with the paper book and the impugned assessment order. During the course of the assessment proceedings itself, the appellant had filed copy of bank pass book, broker's bills for purchase and sale of shares, contract note, demat account, statement of securities transaction tax for equity etc. The above documents were furnished before me which is available in the paper book.

3.5 From the perusal of records, the facts emerged are as under:-

The appellant bought 3000 share of Ramkrishna Fincap Ltd. on the floor of Kolkata Stock Exchange through a registered share broker M/s.Basant Periwal & Co. In pursuance of purchase of shares the bill was raised by the broker to the appellant. The appellant has paid the purchase consideration by cheque and debited in their Bank Alc. After paying the purchase consideration shares have

been transferred in appellant's demat account which remained in demat account for more than one year.

The impugned shares were sold through M/s.Basant Periwál & Co. on the floor of Kolkata Stock Exchange on various dates as the same were listed only on Kolkata Stock Exchange. Pursuant to sell of shares the broker issued a contract note cum bill for sale of shares vide various bills which are furnished during the course of appellate proceedings. On sale of shares the appellant effected the delivery of the said shares by way of demat instruction slip drawn in favour of broker who then transferred to Kolkata Stock Exchange. After transfer of shares from demat a/c of the broker M/s.,Basant Periwál & CO. who received the payment from Kolkata Stock Exchange issued the in favour of the appellant. The said cheque was then deposited in appellant's bank alc. Necessary evidence of having deposited and credited the cheque in appellant's bank a/c. are also enclosed. The broker has deducted security transaction tax from sale consideration and same has been deposited with Government by the recognized stock exchange.

3.6. I have also perused broker's bills and contract notes issued by Basant Periwál & Co. in support of the transactions and the source of the proceeds along with copy of the bank pass book with Vijaya Bank maintained by the appellant for the period 8.9.2004 to 16.3.2006. The above clearly shows that the sale transaction carried out by the appellant was duly disclosed to the department. The Assessing Officer did not have any material on record to show that the sale of shares were bogus. The Assessing Officer had not carried out any investigation also in this regard. Purely relying on the report forwarded by the ADIT(Inv), the Assessing Officer came to a conclusion that the entire transaction of sale of shares as bogus.

3.7 Identical issue has been adjudicated by the jurisdictional ITAT in number of cases involving similar facts and circumstances. On the similar facts the transactions have been treated as genuine and L TCG thereon has been allowed by the Hon'be ITAT in the following decisions:-

1. Mahesh Mundra Mumbai vs ITO 21(1)ITA No. 1176/Mum/2012
2. ITO ward 20(1) vs Naveen Gupta in ITA No 696 (Delhi) SOT 2006 94 Delhi
3. Mayur M Shah HUF Mumbai vs ITO 25(3) ITA No.2390/Mum/2013
4. ITO v Smt Kusumlata in ITA No. 387 105 TTJ (2006) 265 Jodhpur
5. Chandrakant Babulal Shah vs ITO 16(2)(4) ITA No.6108/Mum/2009
6. Dalpat Singh Choudhary vs ACIT (2012) 143 TTJ 500 (Jodhpur Trib)
7. ACIT v Shri Ravindra Kumar ToshnivalITA No. 5302/Mum/2008

8. *Jafferli K Rallonse v DCIT Central 5 in ITA No. 68/Mum/2009*
9. *Mukesh R Marolia v Addl CIT 6 SOT 247*
10. *Mrs Rajini devi A. Chowdhary v ITO ITA No. 6455/M/07 Dated 30/04/2008*
11. *DCIT v Shri Pinakir L Shok in ITA No. 3030 & 3453/M/08 Dated 14/07/2009*

In the aforesaid decisions, the broker through whom the shares were purchased and sold have deposed before the investigation wing and have given statement that these are mere accommodation entry or in some cases the whereabouts of the broker is not known even though the Hon.ITAT has held that the transaction cannot be treated as ingenuine. Whereas in the appellant's case M/s.Basant Periwal & Co. has never stated or there is any adverse findings that these transactions are not done on the floor of Kolkata Stock exchange. Merely because he has violated the bye laws of the SEBI cannot be the reason for treating the genuine transaction as bogus. The appellant has also relied on the Hon'ble Jharkhand High Court decision in the case of CIT vs.Arun Kumar Agarwal HUF 2010 Taxman 205 wherein they have held that transaction with even tainted share broker who has been fined cannot lead to genuine transaction as bogus. Since the facts are identical, the issue is squarely covered by the above decisions of the Jurisdictional ITAT and Jharkhand High Court decision in the case of CIT vs. Arun Kumar Agarwal HUF cited supra, and in the absence of any corroborative evidence gathered by the AO to prove the alleged sale of shares are bogus, the addition made by the Assessing Officer treating the profit on sale of shares as undisclosed income is hereby deleted.

4. In the result, the appeal is "Partly Allowed"

5. Similar addition made by the AO in the hands of the assessee (individual) was deleted by CIT(A) after having following observation :-

"3.4 I have carefully gone through the above submissions of the appellant along with the paper book and the impugned assessment order. During the course of the assessment proceedings itself, the appellant had filed copy of bank pass book, broker's bills for 'purchase' and sale of shares, contract note, demat account statement of securities transaction tax for equity etc. The above documents were furnished before me which is available in the paper book.

3.5 From the perusal of records, the facts emerged are as under:-

The appellant bought 3000 share of Ramkrishna Fincap Ltd. on the floor of Kolkata Stock Exchange through a registered share broker M/s.Basant Periwal & Cc. In pursuance of purchase of 'shares the bill was raised by the broker to the appellant. The appellant has

paid the purchase consideration by cheque and debited in their Bank Alc. After paying the purchase consideration shares have been transferred in appellant's demat account which remained in demat account for more than one year. The impugned shares were resold through M/s. Basant Periwal & Co. on the floor of Kolkata Stock Exchange on various dates as the same were listed only on Kolkata Stock Exchange. Pursuant to sale of shares the broker issued a contract note cum bill for sale of shares vide various bills which are furnished during the course of appellate proceedings. On sale of shares the appellant effected the delivery of the said shares by way of demat instruction slip drawn in favour of broker who then transferred the shares to Kolkata 'Stock Exchange/ After transfer' of shares from appellant demat a/c of the broker M/s. Basant Periwal & CO. who received the payment from Kolkata Stock Exchange issued the bill in favour of the appellant. The said cheque was then deposited in appellant's bank a/c. Necessary evidence of having deposited and credited the cheque in appellant's bank a/c. are also enclosed. The broker has deducted security transaction tax from sale consideration and same has been deposited with Government by the recognized stock exchange.

3.6, I have also perused broker's bills and contract notes issued by Basant Periwal & Co. in support of the transactions and the source of the proceeds along with copy of the bank pass book with Vijaya Bank maintained by the appellant for the period 8.9.2004 to.16.3.2006. The above clearly shows that the sale transaction carried out by the appellant was duly disclosed to the department. The Assessing Officer did not have any material on record to show that the sale of shares were bogus. The Assessing Officer had not carried out any investigation also in this regard. Purely relying on the report forwarded by the ADIT(Inv), the Assessing Officer came to a conclusion that 'the entire transaction of sale of shares as bogus.

3.7. Identical issue, has been' adjudicated by the jurisdictional ITAT in number of cases involving, similar facts and circumstances. On the similar facts the transactions have been treated as genuine and LTCG thereon has been allowed by the Hon'ble ITAT in the following decisions:-

1. Mahesh Mundra Mumbai vs ITA 21(1)ITA No. 1176/Mum/2012
2. ITO ward 20(1) V f3 Naveen 'Gupta in ITA No 6'96 (Delhi) SOT 2006 94 Delhi.
3. Mayur M Shah HUF Mumbai vs ITA 25(3).ITA No.2390/Mum/2013
4. ITO v Smt Kusurnlata in ITA No. 387. 105 TTJ (2.006) 265 Jodhpur.
5. Chandrakant Babulal Shah vs ITO 16(2)(4) ITA No.6108/Mum/2009 .
6. Dalpat Singh Choudhary vs ACIT (2012) 143 TTJ 500 (Jodhpur Trib) .
7. ACIT v Shri Ravindra Kumar Toshnival ITA No. 5302/Mum/2008

8. *Jafferall K Rallonse v DCIT Central 5 in ITA No. 68/Mum/2009*
 9. *Mukesh R Marolia v Addl CIT 6 SOT 247*
 10. *Mrs Hajini devi A. Chowdhary v ITO ITA No. 6455/M/07 Dated 30/04/2008*
 11. *DCIT v Shri Pinakir L Shok in ITA No. 3030 & 3453/M/08 Dated 14/07/2009*

In the aforesaid decisions, the' broker through whom the shares were purchased, and sold have deposed before the 'investigation wing and have given statement that these are 'mere. accommodation entry or in some cases the whereabouts of the broker' is not known even though the Hon.ITAT has held that the transaction cannot .be treated as ingenuine. Whereas in the appellant's case M/s,Basant Periwal & Co: has never stated ,or there is any adverse findings that these transactions' are not done on the floor of Kolkata Stock exchange. Merely because he has violated the bye laws of the SEBI cannot be the reason for- treating the genuine transaction 'as bogus. The appellant has also relied on the Hon'ble Jharkhand High Court decision in the case of CIT vs.Arun Kumar Agarwal HUF 2010 Taxman 205 wherein they have held that transaction with even tainted share broker who has been fined cannot lead to genuine transaction as bogus. Since the facts are identical, the issue is squarely covered by the above decisions of the Jurisdictional ITAT and Jharkhand High Court decision. in the case of CIT vs. Arun Kumar Agarwal HUF cited 'supra, and in the absence of any corroborative evidence gathered by the AO to prove ,the alleged sale of shares are bogus, the addition made by the Assessing Officer treating the profit on sale of shares as undisclosed income is hereby deleted."

6. Against the above order of CIT(A), the revenue is in appeals before us.
7. Ld. DR relied on the order of AO, whereas ld. AR relied on the order of CIT(A) and the decision of jurisdictional High Court in the case of Shyam R. Pawar, 54 Taxman.com 108.
8. We have considered rival contentions and carefully gone through the orders of authorities below and found from the record that the AO has treated the share transaction as bogus on the plea that SEBI has initiated investigation in respect of Ramkrishna Fincap Pvt. Ltd. The AO further stated that investigation revealed that transaction through M/s Basant

Periwal and Co. on the floor of stock exchange was more than 83%. We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT(A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transaction in M/s Ramkrishna Fincap Pvt. Ltd. on the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT(A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT(A) at para 3 to 5 has not been controverted by the department by brining any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT(A). Moreover, issue is also covered by the decision of

jurisdictional High Court in the case of Shyam R. Pawar (supra), wherein under similar facts and circumstances, transactions in shares were held to be genuine and addition made by AO was deleted. Respectfully following the same vis-à-vis findings recorded by CIT(A) which are as per material on record, we do not find any reason to interfere in the order of CIT(A).

9. In the result, both appeals of the revenue are dismissed.

Order pronounced in the open court on this 27/05/2016.

Sd/-

(MAHAVIR SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 27/05/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY
ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai