

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

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## INCOME TAX APPEAL NO. 456 OF 2007

The Commissioner of Income Tax .. Appellant  
Vs.  
Shri Mukesh Ratilal Marolia .. Respondent.

Mr. Suresh Kumar with Mr. Ravindra Lokhande for the Appellant.  
Mr. P.J.Pardiwala, Senior counsel with Mr. Atul K. Jasani for Respondent.

**CORAM** : J.P. DEVADHAR & K.K. TATED, JJ.  
**DATE** : 7TH SEPTEMBER, 2011.

P.C.

1 Whether the ITAT was justified in deleting the amount of Rs.1,41,08,484/- received by the Assessee on sale of the shares as unexplained investment under section 69 of the Income Tax Act, 1961 is the question raised in this Appeal.

2 The Assessment Year involved herein is A.Y. 2001-2002.

3 The Assessee was carrying on business of manufacturing handkerchiefs as the proprietor of Rupal Manufacturing Company. In the Assessment Year in question the Assessee claimed that he had sold the

shares of four companies, namely, M/s Alang Industrial Gases Ltd., Mobile Telecommunication Ltd., M/s Rashel Agrotech Ltd. and M/s. Sentil Agrotech Ltd, which were purchased during the year 1999-2000 and 2000-2001. The entire sale consideration amounting to Rs.1,41,08,484/- was utilised for the purchase of a flat at Colaba, Mumbai and accordingly benefit of section 54E of the Income Tax Act, 1961 was claimed.

4 The Assessing Officer has held that neither the purchase nor sale of shares were genuine and that the amount of Rs.1,41,08,484/- stated to have been received by the Assessee on sale of shares was undisclosed income and accordingly made addition under section 69 of the Income Tax Act, 1961. The Appeal filed by the Assessee was dismissed by CIT (A).

5 On further Appeal, the ITAT by the impugned order allowed the claim of the Assessee by recording that the purchase of shares during the year 1999-2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these

circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

6 Similarly, the sale of the said shares for Rs.1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine.

7 In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs. 1,41,08,484/- represented unexplained investment under Section 69 of the Income Tax Act, 1961 cannot be faulted.

8 In the result, we see no merit in this Appeal and the same is dismissed with no order as to costs.

**(J.P. DEVADHAR, J.)**

**(K.K. TATED, J.)**

Bombay High Court

[2006] 6 SOT 247 (MUM.)  
IN THE ITAT MUMBAI BENCH 'F'  
Mukesh R. Marolia

v.

**Addl. Commissioner of Income-tax, Rg-15(2)**

DR. O.K. NARAYANAN, ACCOUNTANT MEMBER AND RAJ PAL YADAV, JUDICIAL MEMBER  
IT APPEAL NO. 1201 (MUM.) OF 2005 [ASSESSMENT YEAR 2001-02]  
DECEMBER 15, 2005

**Section 69 of the Income-tax Act, 1961 - Unexplained investments - Assessment year 2001-02 - Assessee claimed that he had sold certain shares during relevant previous year and deposited sale proceeds of shares in his bank account - Assessing Officer, observing that purchase and sale of shares was not reflected in records of Bombay Stock Exchange, held that claim of assessee regarding purchase of shares was bogus and no such shares were purchased by assessee and, consequently, sale of shares was also bogus - Assessing Officer, therefore, treated sale proceeds of shares as unexplained investment under section 69 and added same to income of assessee - Commissioner (Appeals) confirmed addition holding that share transactions were carried out by assessee outside stock exchange and not through any registered broker - Assessee's claim was that these were off-market transactions - Whether since purchase and sale of shares outside floor of Stock Exchange is not an unlawful activity, it was not possible to hold that transactions reported by assessee were quite sham - Held, yes - Whether since books of account maintained by assessee clearly reflected purchase of those shares and since evidence on record fully established that assessee had purchased shares and had sold shares, sale proceeds of shares stood explained by assessee - Held, yes - Whether, therefore, addition in question was unjustified - Held, yes**

**Section 69 of the Income-tax Act, 1961 - Unexplained investments - Assessment year 2001-02 - Assessing Officer treated certain amount, credited in bank account of assessee's minor son, as unexplained investment under section 69 and added same to income of assessee - Whether since said amount represented realization of loan outstanding with one 'R', addition was not justified - Held, yes**

**Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2001-02 - Assessing Officer treated certain amount, deposited in bank account of assessee's minor daughter, as unexplained cash credit under section 68 and added same to income of assessee - Assessing Officer rejected explanation of assessee that said amount was gifted to his daughter by his brother, who was a non-resident, and payment was routed through NRE account - Whether since remittance of money was supported by banking documents, there was no reason to disbelieve version of assessee and make an addition thereof - Held, yes - Whether, therefore, said addition was liable to be deleted - Held, yes**

**Section 54E of the Income-tax Act, 1961 - Capital gains - Not to be charged in certain cases - Assessment year 2001-02 - Assessee claimed that during previous year, he had sold certain shares and deposited sale proceeds of shares in his bank account - He also claimed that during previous year he purchased a flat and made investment in flat out of sale proceeds of shares - Assessee further claimed deduction under section 54E of long-term capital gains, earned on sale of shares as against purchase of said flat - Whether since sale proceeds of shares had been explained by assessee, he was entitled to benefit of section 54E against purchase of flat - Held, yes**

**S.K. Tulsian and Paras Seth for the Appellant. R.K. Singh for the Respondent.**

**ORDER**

**Per Dr. O.K. Narayanan, Accountant Member.** - This appeal is filed by the assessee. The relevant assessment year is 2001-02. It is directed against the order passed by the CIT(A)-XV at Mumbai on 24-12-2004 and arises out of the assessment completed under section 143(3) of the Income-tax Act, 1961.

2. The assessee is carrying on the business of manufacturing handkerchief as the proprietor of M/s. Rupal Manufacturing Company. The assessee had filed its return of income for the impugned assessment year for a total income of Rs. 4,28,219 added by an agricultural income of Rs. 6,000. The income returned by the assessee included business income, income from other sources and also long-term capital gains on sale of shares and sale of office premises.

3. The assessee had purchased a residential flat at Colaba, Mumbai during the relevant previous year. The flat was jointly purchased with his wife. Assessee's share in the flat is 70 per cent and the share of wife is 30 per cent. The long-term capital gains declared by the assessee on sale of shares and office premises were accordingly claimed as deduction under section 54E

as against the purchase of the said flat. According to the assessee, the investment in the flat was made out of the sale proceeds of shares and office premises thereby utilizing the sale consideration for the purchase of eligible asset for claiming deduction under section 54E.

4. In the course of assessment proceedings, the Assessing Officer held on the basis of enquiries made by him that the claim of the assessee regarding purchase of shares was bogus and no such shares were purchased by the assessee and consequently the sale of shares also was bogus. Therefore, the Assessing Officer came to the conclusion that the funds deposited by the assessee in his bank account as the sale proceeds of the shares and utilized for the purchase of flat at Colaba, remained unexplained. The sale proceeds of shares accounted by the assessee has been treated by the assessing authority as unexplained money. The sale proceeds of shares was Rs. 1,41,08,484. In the above circumstances, the said amount has been added by the assessing authority under section 69 of the Income-tax Act, 1961. Further as a consequence of the above finding, the Assessing Officer declined the claim of deduction made by the assessee under section 54E. In effect, the amount invested by the assessee in the purchase of residential flat at Colaba, Mumbai has been treated by the assessing authority as unexplained investment and further perpetuated by the refusal to grant deduction claimed by the assessee under section 54E, which ofcourse is only an inevitable consequence. There were another two credits in the bank statement of the assessee's minor son which totalled to Rs. 6,61,063. The Assessing Officer has added this amount also as unexplained investment under section 69. Another deposit of Rs. 2 lakhs was in the account of assessee's minor daughter. According to the assessee, the said amount was gifted to his daughter by his co-brother who is a non-resident. The payment was routed through NRE account. But, the explanation was not accepted by the assessing authority resulting in the addition of Rs. 2 lakhs as unexplained cash credit under section 68.

5. The above three additions were taken in first appeal. The CIT(A) considered the grounds raised by the assessee against the addition of Rs. 1,41,08,484 made by the assessing authority under section 69. The CIT(A) confirmed the addition upholding the finding of the assessing authority that the purchase of shares was bogus. The main thrust of the CIT(A) to arrive at the above finding was that the share transactions were carried out by the assessee outside the stock exchange and not through any registered broker. The CIT(A) held that the responsibility of the assessee is greater in proving the *bona fides* of such off-market transactions. In fact, while arriving at his conclusion, the CIT(A) did not approve the mode of share transactions adopted by the assessee, off the Stock Exchange. The addition was therefore confirmed. As an obvious consequence, the disallowance of claim of deduction under section 54E was also upheld. Regarding the remaining two additions also, the CIT(A) agreed with the assessing authority that the assessee has not proved the *bona fides* of those amounts. Those two additions also have been confirmed. The first appeal was accordingly dismissed by the CIT(A). The assessee is aggrieved and therefore, the second appeal before us.

6. The grounds raised by the assessee in this appeal read as under :

"1. That on the facts and in the circumstances of the case, the Ld. CIT (A) erred in having confirmed the high-pitched assessment on an alleged unexplained investment/income of Rs. 1,54,53,250 as against returned by the assessee at Rs. 4,78,290 without considering the fact that the purchases and sales of shares and subsequent investment in house property were made through accounted and disclosed money/source only.

2. That on the facts and in the circumstances of the case, the Assessing Officer and the Ld. CIT(A) acted arbitrarily in having treated the deposits totalling to Rs. 1,41,08,484 as unexplained investment under section 69 of the Act disbelieving the actual state of affairs that the said sum was deposited to the Bank out of sale proceeds of shares of different companies through account payee cheques, the details of which were made available to the revenue authorities with evidence and also reflected in the return of income.

3. That the revenue authorities further erred in not having allowed deduction under section 54F in spite of the fact that out of the sale proceeds of shares amounting to Rs. 1,41,08,484 and office premises of Rs. 2,32,358, investment towards purchase of a flat was made and hence, in terms of section 54F of the Act, the assessee was entitled to deduction under that section.

4. That the revenue authorities acted capriciously in having disbelieved the source for purchase of shares out of long-term capital gains and agricultural income and wrongly invoked the provisions of section 69 of the Act ignoring the explanation and details of year-wise income from agriculture which was used for purchase of shares and in support of which cash book was filed before them and hence, the allegation of non-genuine transaction is baseless.

5. That the Assessing Officer and the Ld. CIT(A) grossly erred in having ignored the confirmations of brokers/sub-brokers/their assistant in respect of share transactions and invoked provisions of section 69 on mere suspicion holding that all the transactions were bogus and not genuine.

6(a) That the Ld. CIT(A) misdirected himself in having upheld the addition of Rs. 6,61,063 under section 69 of the Act being

the bank balance of the minor son on the alleged ground of non-disclosure of cash deposits as income, in spite of the fact that the said income was already included in the assessee's hand under section 64(1A) and the said sum represented the refund of outstanding loan credit from Rainbow Industries through account payee cheques.

6(b) That the revenue authorities have made the said addition under section 69 of the Act on the alleged ground of lack of evidence of such refund and this Act was arbitrary and uncalled for inasmuch as the transaction was through banking channel and the identity and genuineness of the transaction could have been easily found out.

7. That the Learned CIT(A) fell in error in confirming the addition of Rs. 2,00,000 under section 68 of the Act being the bank deposit in the assessee's minor daughter's bank account on the alleged ground of lack of genuineness and creditworthiness, in spite of the fact that the money was given by assessee's co-brother as gift through cheque issued on Bank of India, Mumbai, confirmation and bank statement of the said co-brother were filed.

8. That the order of the learned CIT(A) is arbitrary, unwarranted, without any merit and bad in law, the same should be quashed and the assessee be given such relief(s) as prayed for."

7. Before proceeding further, it is necessary to discuss in brief, the facts relating to the three additions disputed in the present appeal. As far as the addition of Rs. 1,41,08,484 is concerned, the facts related to certain transactions of purchase and sale of shares accounted by the assessee. The funds necessary for purchasing the flat at Colaba were raised by the assessee by selling the shares. The sale proceeds of shares were brought into the bank account of the assessee. According to the assessee, he had purchased 1,41,400 shares of M/s. Allan Industrial Gases Limited; 11,500 shares of Mobile Tele-communications Limited; 34,000 shares of Rashel Agro Tech Ltd., and 27,700 shares of Centil Agro Tech Ltd. The total number of shares thus purchased by the assessee was 2,19,600. The purchases were made through M/s. Rushab Investments, Radha Ashok and Anil Securities. The purchases were made during the period from February to August 1999 *i.e.*, during the previous year periods relevant to the assessment years 1999-2000 and 2000-01. All the 2,14,600 shares were sold by the assessee during the period April 2000 to February 2001, which is the previous year relevant to the assessment year under appeal. The shares were sold through M/s. Richmond Securities Pvt. Ltd., and M/s. Scorpio Management. The assessing authority made enquiries regarding the *bona fides* of the purchase and sale of those shares. He had issued notice and summons to the concerned parties to explain the nature of transactions they had with the assessee. The Assessing Officer has discussed the details of the enquiries conducted by him in a detailed manner in the assessment order. As a result of the enquiries, Assessing Officer sought to disbelieve the purchase of shares recorded by the assessee for the following reasons :

- (I) That Radha Ashok, the Broker has informed that he never sold any shares to the assessee.
- (II) That Sandeep D. Shah, proprietor of Rushab Investments stated in his statement recorded under section 131 that he never sold any shares to the assessee.
- (III) That the bills issued by Ami Securities were colour photostat copies of unused bills.
- (IV) That National Stock Exchange of India has informed that the shares of M/s. Mobile Tele Communications Limited said to be sold by Ami Securities were never available for trading in the capital market segment of the Exchange.
- (V) That Ami Securities was expelled from the membership of the stock exchange with effect from February 20, 1999.
- (VI) That the purchase and sale of shares are not reflected in the records of Bombay Stock Exchange.
- (VII) That assessee had no funds with him for the purchase of the shares.
- (VIII) That the interconnected Stock Exchange of India has informed that no transactions were carried out by Richmond Securities Pvt. Ltd. in respect of the assessee.
- (IX) That another Broker Scorpio Management ceased to be a member of the National Stock Exchange with effect from February 20, 1999.
- (X) That Shri Mukesh Chokshi, Director of Richmond Securities Pvt. Ltd., has made a statement that he had not issued any bill to the assessee;
- (XI) That the ADIT (Inv.) at Hyderabad has informed that according to M/s. Centil Agro Tech., the assessee had never held any of its shares.
- (XII) That the assessee did not produce Mr. Sathish stated to be a broker. Even though the assessee has informed that all the payments except that of Rs. 11,55,750 were received from M/s. Richmond Securities Pvt. Ltd. The assessee had also received monies from Rushab Investments and Tripathi Sales Corporation, but the latter two receipts were not disclosed by him. The genuineness of the transactions were not established for the failure of the assessee to identify the real persons behind the brokers through whom purchase and sale were said to be made.
- (XIII) That the assessee could not prove the creditworthiness of the parties involved in the transactions and also their identity and

therefore, has failed in proving the genuineness of the transactions as such. This failure is in spite of number of opportunities given by the assessing authority by issuing notice under section 142(1).

**7.1** On adjudicating the issue of addition of Rs. 1,41,08,484, the learned Commissioner of Income-tax arrived at the following conclusion :

"But the most important point is the veracity of the transactions conducted by the appellant. The off-market transactions are not recognized transactions, particularly when all the shares transacted are quoted shares. When the share transaction is not through Stock Exchange, greater responsibility is there with the appellant and more particularly when it is not conducted through a registered broker. If such off-market transactions are recognized, then what is the necessity of conducting transactions through Stock Exchange ? What is the need of the regulatory authority like SEBI. On appreciation of the evidence collected by the Assessing Officer, both the purchase and sales claimed to have been made by the appellant are found to be non-genuine. Hence, the addition made by the Assessing Officer on this account under section 69 of the Act is quite justified. It is, therefore, confirmed."

**7.2** Regarding the next addition of Rs. 6,61,063, it was made under section 69 as unaccounted investment against the credits reflected in the bank account of the assessee's minor son, Master Pratik. In the course of assessment proceedings, the Assessing Officer has noticed that the assessee had shown a sum of Rs. 35,490 under the head 'Income from other sources'. This interest income came out of the bank account of assessee's minor son. The Assessing Officer found that there were two deposits in the name of assessee's minor son totalling to Rs. 6,61,063, the source of which have not been properly explained. Therefore, it was added. In first appeal, the CIT(A) also agreed that no evidence was produced by the assessee to prove the source of the sum of Rs. 6,61,063 represented by fixed deposits in the name of assessee's minor son. The contention of the assessee was that the said amount was outstanding as a loan credit with M/s. Rainbow Industries at Tardeo, Mumbai. It was further explained by the assessee that the said amount was repaid by M/s. Rainbow Industries which was in turn reflected by the fixed deposits.

**7.3** The third addition is the amount of Rs. 2 lakhs made under section 68. This amount has been reflected in the accounts of the assessee's minor daughter Miss Zankhana. According to the assessee, the amount was gifted by assessee's co-brother. His explanation was not accepted by the assessing authority as well as the CIT(A). Therefore, the said addition was also confirmed.

**8.** The above three mentioned additions confirmed by the CIT(A) are the subject-matter of this appeal. We will first consider the addition of Rs. 1,41,08,484.

**8.1** Shri S.K. Tulsian, the learned Counsel appearing for the assessee made extensive arguments against the addition. His contentions are summarized below.

**8.2** The foremost argument of the learned counsel is that the case of the assessee regarding purchase and sale of shares was fully supported by the details collected in the course of survey conducted by the department in the business premises of the assessee. There was a survey carried out by the department in the business premises of the assessee. Copies of contract notes for sale of shares, copies of bills thereof, photocopies of share certificates etc., were found in the course of survey. It is the case of the learned counsel that these details collected by the department by itself is the best testimony for the case of the assessee that he had purchased and sold shares resulting in capital gains which was utilized by him for the purchase of flat at Colaba.

**8.3** The learned counsel submitted that as far as the share transactions are concerned, not only the department collected positive evidences in the course of survey, in support of the accounts of the assessee regarding purchase and sale of shares, but also to be noted that no incriminating document or evidence indicating any doubtfulness in the *bona fides* of the share transactions were found in the course of survey. It is the case of the learned counsel that survey was done by the department without any prior notice and almost surprisingly and therefore, what was found in the course of survey should be accepted on its face value.

**8.4** That the assessee had submitted number of evidences before the assessing authority to prove the genuineness of the share transactions. The assessing authority had relied on the negative replies received from Bombay Stock Exchange, the National Stock Exchange and the Interconnected Stock Exchange of India to reject the explanations of the assessee without recognizing the basic fact that those share transactions were off-market transactions and obviously there would be no records regarding those transactions with those stock exchanges. The assessing authority was making enquiries with those Stock Exchanges knowing that the enquiry results would be futile. Such negative answers cannot be used against the assessee as positive evidence. The Assessing Officer himself knew that those enquiries would serve no purpose.

**8.5** That the fact that summons could not be served on few brokers which has been used against the assessee, even though the identity of the brokers were not disputed by the assessing authority. The bills issued by those brokers in respect of share transactions were found in the course of survey itself. The learned counsel further submitted that the purchases of all the shares

were duly recorded, disclosed in the return of income filed by the assessee for the assessment years 1999-2000 and 2000-01. That the purchases were made out of the identified and disclosed funds; that the sale of the shares were duly disclosed in the returns filed by the assessee for the assessment year 2001-02; that the persons through whom most of the purchase and sales were transacted had confirmed the transactions with the assessee; that the proceedings from the sale of shares were received by the assessee by account payee cheques and pay orders. The assessee had produced letters from various companies confirming the holding of shares by the assessee during the relevant period. That the purchase and sales of shares were off-market transactions and as such the communications from various Stock Exchanges were wholly irrelevant.

**8.6** The learned counsel of the assessee further explained on the facts of the case. He has filed detailed paper book containing such details. The break up of purchase and sale of shares are furnished. The learned counsel submitted that most of the purchase and sale of shares were carried out through Shri Satish Mandovara, Mediator, who is a specialist in off-market trading of shares. Shri Satish Mandovara was the Assistant of Shri Mangesh Chokshi, Director of M/s. Richmond Securities Pvt. Ltd. Both Shri Satish Mandovara and Shri Mangesh Chokshi in the respective statements recorded under section 31 of the Income-tax Act have confirmed that the transactions are entered into by them with the assessee were genuine. Regarding the source of investments, the assessee has explained before the Assessing Officer that he had agricultural income which reflected in the returns filed for the assessment years 1990-91 to 2001-02. The learned counsel invited our attention to the cash on hand available with the assessee for various year endings detailed in the paper book.

**8.7** The learned counsel submitted that the Assessing Officer has erred in appreciating the statements given by Shri Satish Mandovara. Shri Satish Mandovara is the proprietor of M/s. Rushab Investments which is different from the other Rushab Investments referred to by the Assessing Officer. As the proprietor of M/s. Rushab Investments he has been filing returns of income. It was also stated by him that he got shares of the concerned companies transferred in the name of the assessee. The learned counsel further submitted that the above evidence proved beyond any reasonable doubt that the assessee had actually purchased and sold shares.

**8.8** In fact, denial of Shri Sandeep D. Shah any transaction with the assessee, the learned counsel submitted that he had categorically stated that as Proprietor of M/s. Rushab Investments, the business was discontinued with effect from 1997, whereas, in fact the impugned shares were purchased by the assessee from M/s. Rushab Investments during the accounting years 1998-99 and 1999-2000. He explained that during this period Shri Satish Mandovara carried on the business in the name and style of M/s. Rushab Investments and he has categorically confirmed the sale of the impugned shares to the assessee. Therefore, the Assessing Officer has erred in relying on the denial of Shri Sandeep D. Shah.

**8.9** The learned counsel further submitted that eventhough summons issued to various companies could not be served, the communications received from relevant Stock Exchanges proved that those shares were quoted shares which showed that the transactions entered into by the assessee were genuine.

**8.10** Regarding the sale of the shares, the learned counsel submitted that in the light of statements made available before the assessing authority it was made clear that the shares were sold through Shri Satish Mandovara who was an Assistant of Shri Mangesh Chokshi, the Director of M/s. Richmond Securities Pvt. Ltd. The sales are supported by the details issued by M/s. Richmond Securities Pvt. Ltd. Payments were issued by cheques. The bank accounts were identified. Shri Mandovara paid the money to the assessee out of the collections made from various jobbers. Even the cheques were issued on behalf of M/s. Richmond Securities Pvt. Ltd. as instructed by Shri Mangesh Chokshi. It was the case that M/s. Scorpio Management Consultancy Pvt. Ltd. also that the identity of the said company as a broker was never doubted. Even though the sales transactions were off-market transactions, they were documented and supported by various evidences.

**8.11** Therefore, the learned counsel submitted that there is no basis for sustaining an addition of Rs. 1,41,08,484.

**9.** Shri R.K. Singh, the learned Commissioner of Income-tax who appeared for the Revenue placed the case of the Revenue in detail before the Bench. He stated that the Assessing Officer has made conclusive enquiries in a very extensive manner to prove that the purchase and sale of shares claimed by the assessee were only paper transactions for creating accountable money for purchasing the flat in Colaba. The learned Commissioner submitted that it is quite magical to believe that a small amount of money invested by the assessee in shares of certain companies multiplied astronomically within a very short span of time and the shares sold for a high amount as much as Rs. 1,41,08,484, which conveniently supported assessee's investment in the purchase of flat at Colaba.

**9.1** The learned Commissioner submitted that the above transactions were very incredible and that incredibility is further compounded by the fact that the entire transactions were made outside Stock Exchange. They were all off-market transactions. When all the above facts are read together, it is, to be clearly seen that the assessee has made up a story regarding the purchase and sale of shares so as to make out a case of non-existing capital gains.

**9.2** He stated that the off-market transactions as stated by the assessee was not proper. Radha Ashok, the Broker has confirmed in his statement before the assessing authority that he never sold any shares to the assessee. Shri Sandeep D. Shah, Proprietor of M/s. Rushab Investments made a similar statement before the assessing authority. Bills of Ami Securities were forged and unused bank bills were utilized by the assessee to give a true picture of transactions. The broker has been expelled from the Stock Exchange much before transactions took place. In the above circumstances, it is, to be seen that the assessee has failed to establish the identity as well as the creditworthiness of the brokers involved in the case.

**9.3** The learned Commissioner further contended that it is clear from the statement of Mr. Mangesh Chokshi, Proprietor of M/s. Richmond Securities Pvt. Ltd. that assessee's money was routed through Shri Satish Mandovara who is a broker.

**9.4** The learned Commissioner submitted that if the entire factual matrix of the case is examined in a logical manner, it is, very clear that the assessee was building up a story of purchase and sale of shares by making false entries in the books of account and arranging forged documents to support such entries. This is very clear from the statements extracted by the Assessing Officer from the concerned parties. Statements given by those parties do really quash the concocted story made out by the assessee.

**9.5** The learned Commissioner further contended that the Assessing Officer as well as the CIT(A) have examined the issue in a very exhaustive manner explaining each and every instance of evidence and have passed very speaking orders and have conclusively arrived at a finding that the amount of Rs. 1,41,08,484 stated to be received by the assessee on sale of shares was only bogus and not real. He, therefore, submitted that the addition may be confirmed in the hands of the assessee.

**10.** We heard both sides in detail and perused rival contentions in the light of the records of the case and the paper book filed by the assessee. In the return of income filed by the assessee for the year under appeal, the purchase of flat at Colaba for a consideration of Rs. 2,06,72,904 was reflected. The assessee's contribution in the purchase of the flat was @ 70 per cent for which the investment amounted to Rs. 1,44,71,033. The source of investment was, among other things, the sale proceeds of shares of Rs. 1,41,08,484. This amount has been questioned by the revenue authorities.

**10.1** The assessee has purchased the shares of four companies viz., Allan Industrial Gases Ltd., Mobile Telecom, Rashee Agrotech and Centil Agrotech, during the previous years relevant to the assessment years 1999-2000 and 2000-01. The books of account maintained by the assessee for both the years clearly reflected the purchase of those shares. The shares are reflected in the balance sheets filed by the assessee along with the returns of income for the assessment years 1999-2000 and 2000-01. Therefore, it is seen that as a *prima facie* evidence, the purchases of shares have been contemporaneously entered into the books of account of the assessee.

**10.2** The assessee has been declaring agricultural income in his returns of income for the assessment years from 1990-91 to 2001-02. The total agricultural income returned by the assessee up to the assessment year 1999-2000 was at Rs. 7,57,883. The amount invested in the purchase of shares as on 31-3-1999 was Rs. 4,48,160. The cash available with the assessee by way of agricultural income was much higher than the investment made by the assessee in the purchase of shares as on 31-3-1999. After making the investments in the shares, the assessee had a surplus cash balance of Rs. 3,09,000 as on 1-4-1999. Thereafter, the assessee has further returned an agricultural income of Rs. 66,000 for the assessment year 2000-01. The amount invested in the purchase of shares in the year ending on 31-3-2000 was Rs. 2,57,020. Again the assessee had a cash balance thereof of Rs. 1,18,771. Therefore, it is, very clear that the investment made by the assessee in shares during the previous periods relevant to the assessment years 1999-2000 and 2000-01 was supported by cash generated out of agricultural income. The above agricultural income have been considered in the respective assessments. Therefore, the contention of the assessing authority that the assessee had no sufficient resourcefulness to make investments in the shares is unfounded.

**10.3** Purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were quite sham on the legal proposition arrived at by the CIT(A) that off-market transactions are not permissible. The assessee has stated that the transactions were made with the help of professional mediators who are experts in off-market transactions.

**10.4** When the transactions were off-market transactions, there is no relevance in seeking details of share transactions from Stock Exchanges. Such attempts would be futile. Stock Exchanges cannot give details of transactions entered into between the parties outside their floor. Therefore, the reliance placed by the assessing authority on the communications received from the Stock Exchanges that the particulars of share transactions entered into by the assessee were not available in their records, is out of place. There is no evidential value for such reliance placed by the assessing authority. The assessee had made it very clear that the transactions were not concluded on the floor of the Stock Exchange. The matter being so, there is no probative value for the negative replies solicited by the assessing authority from the respective Stock Exchanges. We are of the considered view

that the materials collected by the assessing authority from the Stock Exchanges are not valid to dispel or disbelieve the contentions of the assessee.

**10.5** The next set of evidences relied on by the assessing authority are the statements obtained from various parties. When certain persons like Radha Ashok and Sandeep D. Shah made negative statements against the assessee, persons like Satish Mandovara and Mangesh Chokshi had given positive statements in support of the contention of the assessee. But, the assessing authority sought to pick and choose the statements given by various parties. While accepting and rejecting such statements given by the parties, the Assessing Officer has made a mistake of accepting irrelevant statements and rejecting relevant statements. During the relevant period in which the assessee transacted in shares, persons like Radha Ashok and Sandeep D. Shah were not carrying on their business of brokers as in the manner they carried on the business in the past. Even their Stock Exchange Memberships were cancelled. It was Shri Satish Mandovara who was carrying on the business mainly for and on behalf of Shri Mangesh Chokshi, Director of M/s. Richmond Securities Pvt. Ltd. Those two persons have categorically admitted before the assessing authority that they had dealings with the assessee in respect of the share transactions. They have confirmed the transactions stated by the assessee that he had with them. These positive statements made before the assessing authority supported the case of the assessee. There is no force in the action of the assessing authority in relying on the negative statements of the other parties whose role during the relevant period was either irrelevant or insignificant. Therefore, in the facts and circumstances of the case, it is, our considered view that certain statements relied on by the assessing authority do not dilute the probative value of the statements given by other persons in favour of the assessee confirming the share transactions entered into by the assessee.

**10.6** The above circumstances have made out a clear case in support of the book entries reflecting the purchase and sale of shares and ultimately supporting the money received on sale of shares and finally investing the same in the purchase of flat. The chain of transactions entered into by the assessee have been properly accounted, documented and supported by evidences.

**10.7** Therefore, we find that the explanations of the assessee seems to have been rejected by the assessing authority more on the ground of presumption than on factual ground. The presumption is so compelling that comparatively a small amount of investment made by the assessee during the previous year period relevant to the assessment years 1999- 2000 and 2000-01 have grown into a very sizable amount ultimately yielding a fabulous sum of Rs. 1,41,08,484 which was used by the assessee for the purchase of the flat at Colaba. The sequence of the events and ultimate realization of money is quite amazing. That itself is a provocation for the Assessing Officer to jump into a conclusion that the transactions were bogus. But, whatever it may be, an assessment has to be completed on the basis of records and materials available before the assessing authority. Personal knowledge and excitement on events, should not lead the Assessing Officer to a state of affairs where salient evidences are over-looked. In the present case, howsoever unbelievable it might be, every transaction of the assessee has been accounted, documented and supported. Even the evidences collected from the concerned parties have been ultimately turned in favour of the assessee. Therefore, it is, very difficult to brush aside the contentions of the assessee that he had purchased shares and he had sold shares and ultimately he had purchased a flat utilizing the sale proceeds of those shares.

**10.8** For a moment, even if all the above evidences are ignored, one cannot overlook the pressure of the evidence coming out of the survey carried out by the department in the business premises of the assessee. There was a survey carried out by the department in the business premises of the assessee. In the course of survey, contract notes for sale of shares, copies of bills thereof, photocopies of share certificates etc., were found. The purchase and sale of shares were also found recorded in the books of account. The department has no case that the survey was a staged enactment. A survey is always unexpected. So, it is not possible to presume that the assessee had collected certain fabricated documents and kept at his business premises so as to hoodwink the survey party to lead them to believe that the assessee had entered into share transactions. Atleast such an inference is not possible in law. The department has no defence against the forcible argument of the learned counsel that the survey conducted by the department has out and out upheld the contention of the assessee that he had purchased and sold shares. We find that this solitary evidence collected in the course of survey is sufficient to endorse the *bona fides* of the share transactions made by the assessee.

**10.9** Therefore, in short on the basis of the internal evidences available with the assessee and the fact that the sale proceeds were collected through bank accounts and coupled with the external evidence of survey and statement of parties, we have to hold that the sale proceeds of Rs. 1,41,08,484 has been explained. Therefore, the said addition is deleted.

**11.** As we have held that the sum of Rs. 1,41,08,484 has been explained by the assessee, the assessee is entitled for the benefit of section 54E against the purchase of flat at Colaba, in accordance with law. The assessing authority is, therefore, directed to grant the benefit of section 54E to the assessee.

**12.** Next we will consider the addition of Rs. 6,61,063. The case of the assessee was that the amount represented the realization

of loan out-standing with M/s. Rainbow Industries. As per the ledger copy of account of M/s. Rushab Investments (Page 159 of the paper book), there was an opening balance as on 1-4-2000 amounting to Rs. 6,61,063.43. There are also payment entries by cheques for Rs. 1,61,063.43 and Rs. 5 lakhs. This statement of account has been confirmed by the Proprietor of M/s. Rushab Industries. He has also furnished his assessment particulars before the assessing authority. Therefore, in such circumstances, without any further enquiries and collection of evidence, it is not possible for the assessing authority to come to a finding against the assessee. The assessee has explained the availability of cash necessary for making bank deposits with the help of his accounts and account of copies of the other party along with his confirmation. In these circumstances, we find that the addition of Rs. 6,61,063.43 is not justified. Therefore, it is, deleted.

**13.** The last point is regarding the addition of Rs. 2 lakhs. The assessee has furnished the details of the remittance of the said amount by Shri Ravindra Kumar Tailor who is in New Zealand. He is the co-brother of the assessee. He had issued cheque No. 251788 dated 13-3-2001 drawn on his NRE Account 27622 with Bank of India, Mumbai Central Branch. When the remittance of money is supported by banking documents, there is no reason to disbelieve the version of the assessee and make an addition thereto. It is not justified. This addition is also therefore deleted.

**14.** In result, the appeal filed by the assessee is allowed.