

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ, 'एस. एमसी .', अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
" SMC " BENCH, AHMEDABAD**

**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER And
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1309/Ahd/2018

(निर्धारण वर्ष / Assessment Year : 2014-15)

Bhagwatiben Vinodkumar Surani C-20, Om Niketan Apartment Jawahar Bus Stop Vasna, Ahmedabad	बनाम / Vs.	The Income Tax Officer Ward-5(2)(1) Ahmedabad-380 015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AWDPS 9147 D		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	-None-
प्रत्यर्थी की ओर से/ Respondent by :	Shri R.A. Dhyani, Addl.CIT

सुनवाई की तारीख / Date of Hearing	04/03/2020
घोषणा की तारीख / Date of Pronouncement	05/03/2020

आदेश / O R D E R

PER SHRI SANDEEP GOSAIN, JUDICIAL MEMBER :

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)-5, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-5/ITO.Wd.5(2)(1)/262/2016-17 dated 12/03/2018 arising in the assessment order passed under s.143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 26/12/2016 relevant to Assessment Year (AY) 2014-15.



2. The assessee has raised the following grounds of appeal:-

"1. The learned Commissioner of Income Tax (Appeals) has erred in confirming the addition of Rs. 15,06,889/- made by the Assessing Officer treating the Long term capital gain on sale of shares of Alang Gases Ltd. including cost thereof as alleged Unexplained cash credits u/s.68 of the I.T. Act, 1961 and thereby erred in disallowing exemptions claimed by the Appellant u/s.10(38) of the I.T. Act, 1961.

2. The learned Commissioner of Income Tax (Appeals) has erred in confirming the above addition made by the Assessing Officer as Income from other sources only on the basis of the investigation carried out by DGIT (INV) Kolkota and SEBI that Scrip of Alang Ind. Gases Ltd. is Penny Stock indulged in providing Bogus Long Term Capital Gain of which appellant is one of the beneficiaries.

3. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Assessing Officer in completing the assessment without providing copy of the statements, material etc. relied upon by him hence the same being against the principles of natural justice and law requires to be cancelled.

4. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Assessing Officer in not granting an opportunity for cross examination of the persons making the statement on the basis of which addition has been made. Hence the assessment so made being against the principles of natural justice and law is illegal and void ab initio.

3. Today, the case was fixed for hearing but none appeared on behalf of assessee nor any adjournment application has been filed on record.

4. From the records, we observe that required notice was sent to the assessee by Registered Post which was duly served upon the assessee and in this respect acknowledgment from the Department of Posts has already been placed on record which shows that even in spite of service of notice, the



assessee or his representative has not come before this Court for attending the hearing which goes to show that assessee is not interested in pursuing with her present appeal. However, Ld.DR present in the Court is ready to the arguments, therefore we proceed to decide the appeal on merits *ex-parte* qua the assessee, after hearing the Ld.DR.

5. Brief facts of the case are that assessee has filed her return of income on 22/03/2015 declaring total income of Rs.2,45,560/-. The case was selected for scrutiny and serving a statutory notice and after seeking reply of the assessee, assessment order u/s.143(3) r.w.s.147 of the Act was framed on 26/12/2016 thereby making addition on account of unexplained cash credits u/s.68 of the Act.

4. Aggrieved by the order of the AO, assessee preferred appeal before Ld.CIT(A), who after considering the case of both the parties, dismissed the appeal filed by the assessee.

5. Aggrieved by the order of the Id.CIT(A), now the Assessee is in appeal before us on the grounds mentioned hereinabove. Although assessee has raised four grounds but all the four grounds raised by the assessee are inter-connected, inter-related and relates to challenging the order of Ld.CIT(A) in confirming the addition made by the Assessing Officer on account of unexplained cash credits u/s.68 of the Act.



6. We have heard the Ld.DR and perused the material placed on record as well as the orders passed by the revenue authorities. In the instant case, we find that during the course of assessment proceedings, the assessee was asked to explain the impugned cash credits but even in spite of availing numerous opportunities, the assessee could not explain the impugned cash credit. Thus, additions were made by the Assessing Officer. After considering the submissions as well as the facts of the present case, we find that the CIT(A) has decided these issues in paragraph No. 4 of his order. However, operative portion is contained in paragraph Nos.4.3 to 4.11 which are reproduced hereunder:

"Decision:

4.3. I have carefully considered the Assessment Order and submission filed by the Appellant. During the course of assessment proceedings, the AO has observed that on during the financial year under consideration, the assessee has claimed exemption of long term capital gain for Rs. 14,78,289/- u/s. 10(38) of the Act in respect of sale of share of Alang Industries Gases Limited. The assessee claimed that 28600 shares of Alang Industries Gases Ltd. have been purchased on 1.4.2012 @1/- per share.

The appellant has obtained share certificates in physical form and same was dematerialized later on by him and then such shares were sold in the market. The appellant has claimed that as sale was subject matter of STT and the shares were sold through SEBI registered brokers. The appellant has mainly argued that entire transactions are supported by documentary evidences like purchase bill, payment, sale bill, consideration received through cheque, DEMAT statement etc hence such amount cannot be subject matter of addition relying upon findings of the Kolkata Investigation Directorate and SEBI as well as other information including statements of various persons including operators, entry providers and stock brokers.

4.4. On careful consideration of entire facts, it is observed that Kolkata Investigation Directorate had undertaken investigation into 84 penny stocks (Turbo Tech being one of it) and has given detailed findings indicating bogus LTCG/STCL



entries claimed by large number of beneficiaries. The modus operandi involving operators, intermediaries and the beneficiaries has been detailed in the investigation report prepared and disseminated by the Kolkata Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad. These being circumstantial evidences are most relevant for deciding the issue whether appellant has earned genuine capital gain or bogus capital gain.

4.5. Before dealing with the facts of appellant's case, it is important to discuss issue of penny stock and its modus operandi of transactions. If a person who is having unaccounted income who wants to convert this income into white then he approaches an Entry Operator. The entry operator maintains accounts of numerous persons and legal entities and is in constant touch with the persons who are engaged in managing an Entry giving penny stock company. A penny stock company is that company whose shares are listed on a stock exchange like BSE and has very low market Capitalization and are traded at a very low price. More often Entry giving Penny Operator companies do not do any real business activity. The unique feature of Entry giving penny stock company is tremendous jump and slump in the share prices in a short span of time. In fact in a typical technical analysis one may find that the fluctuation in share prices of entry giving company runs into thousands of percentage. Once the person 'A' having unaccounted income contacts the person 'E'(Entry Operator) the person 'E' gives person 'A' to invest certain amount in a company at a very low price. This purchase may happen through either stock exchange or preferential allotment wherein shares of 'P' (an entry giving penny stock company) will be bought by 'A'. It may also happen that 'E' will ask 'A' to buy shares of some other private limited company which will be subsequently merged with company 'P' and by virtue of this merger the shares of 'P' will automatically come to 'A'. Once the shares of 'P' will get credited to account of 'A' then the Entry Operator 'E' along with the share brokers will jack up the prices of shares of 'P'. As such common investors are not interested in 'P' hence the shares of this company is extremely sterile without much volatility. Through circular trading the shares of 'P' is increased. Once the prices of the shares are rigged to an optimum amount, entry operator asks the beneficiary to deliver the unaccounted cash. This may be delivered in parts as well as in one go. Once the unaccounted cash is delivered by the beneficiary 'A', the same is then routed by the operator to the books of counter-parties (purchasers), through a maze of various other paper companies, which ultimately buy the shares belonging to the beneficiary at high prices. When the corresponding amount reaches into the account of these counter parties, either by way of Cheque or RTGS, the operator instructs the beneficiary to place a option for the shares in a particular lot size on a particular date and time. According same is being conveyed to the counter parties or the person operating the terminal behalf



counter parties and on the given date and time transaction, i.e. purchase of sc / from the beneficiary through stock exchange, is executed.

4.6. In this way, the shares of the beneficiaries are bought by the dummy concer (counter parties) and the unaccounted money of the beneficiary is routed to the books the beneficiary as a bogus entry of LTCG After one year Entry Operator ask the person "A" to sell these shares of 'P' and get the capital gain. This capital gain arises through stock markets and after one year hence this gain is an exempt income of person 'X'. This the one way of doing transactions in penny stock and transferring unaccounted money and obtaining long term capital gain or loss as the case may be. Even in some of the cases, the shares of the penny stock companies are acquired by the beneficiaries of LTCG at very low prices through the route of preferential allotment (private placement) and of market transaction. These shares have a lock-in period of 1 year as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2009. It is also observed that in some of the cases all the transactions are back dated means purchases are shown to be made in cash one year prior to sale even though actual purchase has not happened. As companies are also involved in such transactions, back dated letter is given to assessee for allotment of shares and transfer of physical shares one year prior to sale of shares but in fact no such act has been carried out. These activities are carried out only at the time of Dematerialization of shares meaning thereby assessee is given physical shares when assessee gives such shares for Dematerialization but papers are artificially created such that shares were purchased by assessee one year prior to Dematerialization and shares were held by him. By adopting these various methods, assessee obtains bogus long term capital.

4.7. It can be seen from financial data of the company which is available at public domain; no prudent person will invest in such companies. When there are large number of fundamental companies are available in the market, why appellant has chosen to invest in these types of shares clearly prove that appellant wishes to obtain exempt capital gain by obtaining accommodative entries. It is an established law that Income Tax proceedings fall in the domain of preponderance of probabilities, meaning that the action of assessee is considered to be rational and well inform falling in the domain where probable choice are exercised. In **Sumati Dayal** Case Hon'ble Supreme Court has held as under:-

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the



assessee. [See. Parimiseti Seetharamamma (supra) at P. 5361. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably.

The financial analysis made herein above clearly prove that the decision of investment in nondescript penny stock is highly unlikely for a prudent investor and also that the quantum jump in stock prices of Alang Industrial Gases Ltd.

4.8. The AO has also referred to SEBI Report wherein SEBI dated 19th December, 2014 has found various persons as fraudulent in their market practices and restrained them from further trading. The scrip in which Appellant has made the transaction is listed in penny stock by SEBI and no prudent person would invest in such type of shares. As discussed herein above, transactions of shares were not governed by market practices and payment was made in cash which prove that transactions are non-genuine and Appellant has resorted to preconceived scheme to procure long term capital gain by way of price difference in share transactions which is not support by market.

4.9. The statement of ShriSanjay Dhirajlal Vora, the Regional Director (East Zone) of M/s.Anand Rathi Shares & Stock Brokers Ltd. recorded on 8.4.2015 reveals the modus operandi adopted to avail bogus short term capital loss.

4.10. With regard to observation of Appellant that entire transactions are supported by various documentary evidences, it is observed that shares in which Appellant has carried out transaction is penny stock, brokers have also confirmed that there are manipulative transactions in above scrip which is further supported by SEBI Order relied by AO, entire circumstantial evidences clearly suggest that Appellant has obtained accommodation entries. This issue and modus operandi in similar transaction is discussed by Mumbai ITAT in the case of ITO vs Shamim Bharwani 69 taxmann.com 65 as under:

"4.1 As shall be evident from the foregoing narration of events, the primary facts (and figures) of the case are not in dispute, which (dispute) arises principally on account of the different inferences drawn from the same set of primary facts by the two Revenue authorities. The issue is, thus, essentially factual, revolving or centering



around as to which of the two inferential findings are maintainable in law, i.e., in view of the surrounding facts and circumstances of the case. The Revenue's principal and the only charge is qua the genuineness of the transaction/s, and which has been acceded to by the first appellate authority in view of the documentary evidences furnished by the assessee in support of his claims. That genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in Sumati Dayal (supra), relied upon by the Revenue, wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary evidences filed or relied upon by the assessee-appellant. That documentary evidences are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well settled, and for which the Revenue relies on the decision in the case of Durga Prasad More (supra). What is relevant, more so where the genuineness of the transaction is in issue, is the truth of the document/s furnished in substantiation, as well as the substance of the transaction and not its form, and which is to be determined on the basis of and on the conspectus of the entirety of the facts and circumstances of the case.

The issue before us is whether the documents furnished by the assessee, including averments made by him, or even his broker, satisfy the test of preponderance of human probabilities. In our view if the assessee has reasonably explained the 'intriguing' facts and circumstances as pointed by the AO, and on the strength of which the genuineness is assailed by him, and which further agree with that observed in the .case of a penny stock company, no case for treating the transaction as not genuine shall arise. The onus u/s.68 though is on the assessee, so that his explanation would, however, require being substantiated or proved. The case law in the matter is legion, and toward which we may, if only for the sake of completeness of our order, advert to the some of the celebrated decisions by the apex court in the matter:

*A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807 (SC);
Sreelekha Banerjee v. CIT [1963] 49 ITR 112 (SC);
Kale Khan Mohammad Hanit v. CIT [1963] 50 ITR 1 (SC);
Durga Prasad More (supra);
CIT v. Biju Patnaik [1986] 160 ITR 674/26 Taxman 324 (SC);
Sumati Dayal (supra); and
CIT v. P. Mohanakala [2007] 291 ITR 278/161 Taxman 169 (SC)*

We may further clarify that in proceeding with the matter, we have circumscribed the entire material on record.

4.2 The assessee, to begin with, has nowhere explained as why the shares were purchased in cash, the source of which is ascribed to cash-in-hand, and not to any



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contemporaneous evidence, as cash withdrawn from bank on that or nearby dates. How was the cash, one may ask, transmitted from Mumbai, where the assessee is resident, to Kolkata, where the purchase stands made, and the broker, to whom it is paid, located?

4.3 *Then, again, why was the transaction not carried through a recognized stock exchange (SE), mandatory in law, even as it was done through its registered member. This becomes relevant and significant for more than one reason. Firstly, it proves the time of the transaction, which is of essence inasmuch as it determines the holding period of the shares/asset, with reference to which, where over 12 months, exemption from tax to gains arising on transfer is granted by law per s.10(38) read with other relevant defining provisions of the Act. The first appellate authority has in this regard mentioned the settlement number of the transaction as D-2005326. The same, even as stated by the A.O. (refer para 4.8 of the assessment order), is the number of the contract note issued by the broker. The settlement, where the transaction is carried through the SE, which is admittedly not the case, is between the brokers or the members of the SE and, accordingly, only a net amount is payable or receivable by a particular broker for a particular period, called the settlement period, which extends to generally one week or a fortnight, and which is to or from the SE, which aggregates the financial impact, i.e., the net result of all the transactions amongst all the brokers for the settlement period, acting as a collecting/disbursing agency. A single amount is thus either payable or receivable by each broker to or from the SE for a particular period, which is again numbered (i.e., as settlement number), and serves to settle the financial obligations to or claims on all the other members of the exchange, i.e., of each broker, for that period. This is of course accompanied by giving and taking delivery of the shares, either in physical form or by issuing or accepting delivery, which in either case is remitted by the member to his clients, for on behalf of the whom he acts, charging a fee called brokerage/commission, for his services. The whole purport of the forgoing note on the trading process is to clarify that the settlement only signifies a settlement between the brokers, carried out through the exchange acting as a nodal agency, so that the purchase transaction/s under reference may not be so construed inasmuch the same is admittedly off the market (exchange), which stands established by the Revenue through the communication per its letter to the AO in response to a notice u/s. 133(6) by the Calcutta Stock Exchange. This aspect is in fact not disputed by the assessee. The same may not necessarily imply that the transaction is not genuine or not undertaken at the relevant time, but then the same would have to be shown with reference to some corroborative, external evidence. The contract note/bill by the broker is only an 'internal voucher', i.e., by person who is a party to the transaction and, thus, acting in cohesion, if not if collusion. It is after all a document generated by him, so that its truth, in the context of paper companies, the 'selling' of 'gains' and 'losses' in which the brokers, as operators, play a significant role, cannot therefore be decided with reference thereto or the statement by the broker, a related party. This, however, would be so only where there are strong factors or circumstances which cause serious doubt about the transaction. For example, how*



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one may ask, were the shares transmitted to the assessee, located at Mumbai, who would have signed the transfer form?

The broker or the assessee nowhere states the reason for carrying out the transaction in the manner done, i.e., off the market, which is not ordinarily permissible, and is subject to some legal constraints under Securities Contracts (Regulation) Act, 1956. Rather, how could he deal with the assessee, who is not his client! Then, again, why was it paid for in cash, for which there is no evidence, and neither has the broker been shown to accept cash in the ordinary course of his business. Why, for the persons trading therein, this would be an impediment to claim the cost of shares traded in, in view of the non obstante clause of s. 40A(3).

The brokers are in fact required to maintain separate bank account for the funds received from or on behalf of the clients, so that the same do not merge with that of the broker himself. What is equally important is the date on which the shares were dematerialized. This is as no transaction could be carried out in listed shares, i.e., in the physical form, where the shares stand dematerialized by the company. Why were the shares sent for dematerialization only in May 2005, i.e., after a delay of over a year, having been dematerialized only on 12.07.2005 (PB pg.10), i.e., days prior to their sale on 22.07.2005. That is, assuming that the shares were actually purchased and delivered to the assessee in May, 2004. Rather, as it would appear to us, the dematerialization of the shares coincides with the spiraling price of the scrip, so that an orchestration of the 'events' is apparent. The shares, even assuming a valid purchase, thus, would be close to the date/s of dematerialization. The assessee states of having reported its purchase (of shares) on 06.05.2004, per his balance-sheet as at 31.03.2005, enclosing it along with his return of income for A.Y.2005-06 (PB pgs. 15, 16). The return of income, however, is filed only on 28.10.2005, which is even subsequent to the sale of shares on 12.07.2005, so that the said reporting of the transaction, which of course does not bear the date of purchase, is to no moment. The assessee relies on a communication from the company dated 17.05.2004 (PB pg. 2) to show that the shares were lodged for transfer with the company immediately upon purchase on 06.05.2004, evidencing, thus, the validity of the purchase date. In this regard, we may firstly clarify that proving purchase as genuine; the Revenue doubting the price rise and, thus the gain, would therefore only make out a case for the exclusion of a part (Rs. 54,250/-) of the impugned sum of Rs. 12.15 lacs, which represents the entire sale proceeds of the shares. It needs to be appreciated that what is essentially under cloud, and being seriously doubted as to the genuineness, is the gain stated to arise on the transaction. It is the gain which is abnormal, i.e., both qua the scrip; its' trading and, thus, its quantum, and unexplained, besides being tax exempt, and which is independent of its purchase. The purchase of shares of a little known company of the face value of Rs. 10/- each at Rs. 21-22 would even otherwise hardly raise any eyebrow or doubt. The purchase gets doubted examined only for the reason that it represents a part of the overall transaction, which is considered by the Revenue as an artifice. In other words, proving the purchase would by itself not prove the transaction of gain, which stands



impugned and, further, being at a minor sum has little bearing in the matter. In fact, the A.O. states precisely this (refer para 4.9(a) of his order), that even assuming the purchase as genuine, the sales, given the high rates for such penny stocks, with no real buyers, are bogus. Coming to the assessee's contention on merits, the letter dated 17.05.2004 supra inspires little confidence. It does not specify the name of the authorized signatory, the sign being otherwise not visible. It bears no serial number, even as it represents a communication, which a company or its secretarial department is required to make in the regular course of its business. It further does not bear any indication of the manner in which it is conveyed to the assessee, i.e., by hand, per post -ordinary or registered; per courier, etc., which is, again, a norm, besides establishing its date. Such remittances are generally through registered post, so that it would constitute evidence with the company for having delivered the shares, which are even otherwise valuable documents. The incidental question that arises is the date when the shares were dematerialized by the company. This is as it clearly shows that the shares, issued only on 31.03.2004, being remitted to the transferee in the physical form on 17.05.2004, were not converted into the D-mat form till then. This is relevant as the trading on the exchange, which only would make the share a listed share, gain on which is exempt u/s.10(38), could as per the guidelines only be in the D-mat form. No wonder, the trading on the exchange in the said scrip commences only on 03.03.2005. 'How could, in that case, it be said that the assessee has transferred/sold a listed share after holding it for a period of a year (or more)?' The assessee speaks of having deposited STT, but, then, the question is whether the said payment would make a non-genuine transaction, genuine.

4.4 *Further on, why, and on what basis, the assessee, a teacher by profession as well as a partner in a partnership, with no documented or reported experience in trading in shares or investment therein - his balance sheet as on 31.03.2005 reflecting no investment in shares except the 2500 shares in ECL (besides another for a meager amount of Rs. 2100), pick the said shares, i.e., selected the said scrip for investment, and which in fact stood issued only days earlier on 31.03.2004. The company reportedly has no standing either in the industry or in the market (i.e., for the goods or services it presumably deals in), or even in the trading circles, i.e., for shares. That apart, no material to establish its business activity, viz. its annual reports, or of the companies under the same management/industry,-etc., to exhibit its credentials in any manner, stands adduced by the assessee at any stage of the proceedings. Continuing further, how and on what basis, a share trading in the range of Rs. 217- to Rs. 22/- in May 2005, witness a rise to Rs. 465 to Rs. 490 inside a couple of months - the assessee's sale, at Rs. 487/- apiece, being on 22.07.2005. This is amazing by any standard, and which has not been explained in any manner, i.e., assuming it to be not a case of price manipulation, which is the modus operandi adopted for reflecting prices on the SE. Who, one may ask, are the purchasers of such shares, i.e., in a nondescript company at such high prices; no information qua which stands furnished at any stage, even as it is they who have apparently bought the shares, supplying the credit to the assessee, which is being questioned and examined as to its genuineness u/s. 68 of the Act. All this definitely casts serious*



doubts on the genuineness of the sale price and, thus, the ensuing gain. This, in fact, is a classical feature of a penny stock, the price zooming for no apparent, economic or even technical, reasons. One could understand where the same is in sympathy with the market sentiment or some industry-wise favorable development, even as the share ostensibly trades, i.e., going by the market quote, at over 22 times its price obtaining two months earlier, implying, by correspondence, a jump in the market index to the same or similar extent, i.e., 2200%, over the same period, which is both unheard of - work as it does to, a growth rate of 13200% p.a., and, of course, not shown. There is again no whisper and, consequently, no information on record of the particular industry/s in which, if any, the said company operates, or its financials, much less future prospects, the information on all of which gets factored into and captured in what is called 'price', representing an equilibrium of the supply and demand forces. In fact, each of the other incidences, i.e., for a penny stock company, are exhibited in the present case, as pointed out by the AO per paras 4.8 and 4.9 of his order, as under:

(a) The scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders. The purchases are off market purchases, and not reported on the exchange;

(b) purchase/s is back dated, i.e., per a back dated contract note, paid for in cash, so that there is no trail;

(c) the purchases are in the physical form, and dematerialized only subsequently; generally long after the purchase date, being back dated and, further, close to the date of sale; and

(d) The investee is a penny stock company, with no credentials, and the sale rates artificially hiked, with no real buyers, so that inference of the sales being bogus, is unmistakable.

4.5 The assessee was show caused on all these parameters, seven in number, listed at para 4.11 (page 7) of the assessment order, to no satisfactory reply by the assessee and, in fact, at any stage. There is in fact no reply to the AO (refer para 4.14 (i) of the assessment order), whose satisfaction the law mandates, so that the purview of the appellate authority is as to whether the AO in being not satisfied had acted reasonably, i.e., given the assessee's explanation, including the materials/evidences furnished in support, or not. The AO, accordingly, treated the impugned transaction as not satisfactorily explained, and added the same u/s.68 of the Act. Reliance was placed by him on the decisions by the tribunal in the case of Som Nath Maim (*supra*), also reproducing there-from, as well as in the case of Dy. CIT v. Housing Development & Finance Corp. Ltd. [2006] 98 IIP 319 (Mum.), rendered applying the first principles and the legal propositions enunciated by the apex court per the decisions cited by the AO (*supra*). The tribunal in the case of Ziauddin A. Siddique [IT Appeal Nos. 4699 & 4700 (Mum.) of 2011, dated 25-4-



2014] issued a finding of fact, of course on the basis of the material on record, as to circular trading, in case of a penny stock company, Eltrol Ltd., exposing or validating the modus operandi as stated to be adopted in the case of such stocks - the price, de-hors any fundamentals or other factors, of paper companies being raked up on the Exchange, so as to yield 'gain', and then again, equally without basis, grounded to yield 'loss', both of which, i.e., 'gain' and 'loss', find ready 'customers' or 'takers'. The purpose is to evade tax or to yield some tax benefit. True, this has not been established in the present case, but the features are strikingly same, with the impugned transaction bearing the same incidents, so that odds are loaded heavily against the genuineness of the transaction. The onus to establish the same, it is to be borne in mind, is on the assessee. The Id. CIT (A) has dismissed the same as merely suspicions. We are, however, unable to, for the reasons afore-stated, persuade ourselves to agree with him, each of the several incidents and, therefore, the questions arising, that impugn the genuineness in the present case, are based on admitted and undisputed facts. The issue, as clarified at the beginning of the discussion, being the validity of the inferential findings –there being a difference between the two Revenue authorities. We find the observations by the AO as valid and relevant, to no satisfactory answer or explanation by the assessee, i.e., to the questions, incidents or the phenomenon observed. Dismissing the same as mere suspicions, as does the Id. CIT (A), is, to our mind, glossing over the many attendant facts and incidents, the most vital, and on which we observe complete silence or absence of any explanation, is the absence of any credentials of the investee-company. The Id. CIT (A) picks up one incident or aspect of the transaction at a time to note of it being backed by documentary evidence/s and, therefore, genuine. The approach is fallacious. Firstly, documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported 'facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i.e., in the absence of credible and independent evidences. For a scrip to trade at nearly 50 times its' face value, only a few months after its issue, only implies, if not price manipulation, trail blazing performance and/or great business prospects (with of course proven management record, so as to be able to translate that into reality), while even as much as the company's business or industry or future program (all of which would be in public domain), is conspicuous by its absence, i.e., even years after the transaction/s. The company is, by all counts, a paper company, and its share transactions, managed. We, accordingly, reversing the findings of the first appellate authority, confirm the assessment of the impugned sum u/s.68 of the Act. We decide accordingly.

4.6 The assessee has relied on several case laws. As would be apparent from the forgoing, abundant case law has been relied upon by the both sides. The issue is not of the application of any particular case law. The legal propositions being well



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settled, each case rests on its own facts. Our decision, likewise, and as would also be apparent, is guided solely by the facts and circumstances of the instant case, including the assessee's explanation in respect thereof. The reliance on case law, the facts of none of which were gone through at the time of hearing, even as the issue is principally factual, would thus be of no assistance to the assessee's case. We may though clarify that the Revenue having invoked the provision of s. 68, the burden to prove the credit transaction/s and, thus, its genuineness is on the assessee. It is therefore not necessary or incumbent on the Revenue to, i.e., for the purpose of application of sec.68, to either disprove or exhibit the transaction as sham or bogus, and its obligation only extends to show that the genuineness of the impugned credit transaction is doubtful or has not been satisfactorily proved by the assessee.

5. In the result, the Revenue's appeal is allowed."

It is also observed that in the recent decision Hon'ble Ahmedabad ITAT in the case of Pavankumar M. Sanghavi v/s ITO 81 taxmann.com 308 has held that when Assessee received unsecured loan but could not produce lenders for verification and these lenders were found to be shell companies, said loan transactions could not be said to be genuine merely because assessee filed loan confirmations copies of ledger accounts and other supporting evidences. The relevant observation of the ITAT is also reproduced herein below:

"8 As I proceed to deal with genuineness aspect, it is important to bear in mind the fact that what is genuine and what is not genuine is a matter of perception based on facts of the case vis-a-vis the ground realities. The facts of the case cannot be considered in isolation with the ground realities. It will, therefore, be useful to understand as to how the shell entities, which the loan creditors are alleged to be, typically function, and then compare these characteristics with the facts of the case and in the light of well settled legal principles. A shell entity is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transactions- to give it color of a normal business entity, used as a vehicle for various financial maneuvers. A shell entity, by itself, is not an illegal entity but it is their act of abatement of, and being part of, financial maneuverings to legitimize illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial maneuverings for the benefit of its clients, or, with that predominant underlying objective, to give the color of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even a layman, much less a Member of this specialized Tribunal, cannot be oblivious of these ground realities."



4.11. *The sequence of facts and the modus operandi adopted by the appellant shows that the entire transaction made by him was nothing but accommodation entries taken by him to camouflage his undisclosed income under the garb of capital gains, income from which is exempt income. This is nothing but a colorful device adopted to avoid payment of tax which is not permissible as per law, in view of the decision of the **MC Dowell & Co. Ltd. Vs. CTO 154 ITR 148 (SC)**. The Hon. Supreme Court has held that "the taxing authority is entitled and is indeed bound to determine the true legal relation resulting from transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. " Moreover, the Hon'ble High Court of Delhi in a recent decision in the case of *Commissioner of Income Tax Vs M/s. Abhinandan Investment Ltd., dated 19.11.2015 (ITA 130/2001)* has categorically explained the principle laid down by the Supreme Court in the case of *MC Dowell & Co* and the same is fully applicable to the facts of penny stock cases.*

*In present case Appellant has dealt in penny stock, which is similar to shell companies for which various investigations were already carried out by Calcutta Investigation Wing and SEBI Order referred supra hence long term capital in present case is also an accommodative entry and AO is correct in treating such sale value as income from other sources. In view of the judicial pronouncements referred herein above and the circumstantial evidences, I am inclined to agree with the AO in holding the transactions as non-genuine and this ground of appeal is, therefore, **dismissed.**"*

8. After having gone through the facts of the case, we find that this case pertains to the additions made by Assessing Officer on account of detailed enquiries being carried out by Kolkata Investigation Directorate with regard to 84 penny stocks company as well as SEBI. The *modus operandi* involving operators, intermediaries and the beneficiaries have already been detailed in the investigation report prepared and disseminated by the Kolkata Investigation Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad. After thorough



investigation, the Assessing Officer concluded in his order at paragraph Nos.4.8 and 4.9. The relevant particulars are extracted hereunder:

(a) The scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders. The purchases are off market purchases, and not reported on the exchange;

(b) purchase/s is back dated, i.e., per a back dated contract note, paid for in cash, so that there is no trail;

(c) the purchases are in the physical form, and dematerialized only subsequently; generally long after the purchase date, being back dated and, further, close to the date of sale; and

(d) The investee is a penny stock company, with no credentials, and the sale rates artificially hiked, with no real buyers, so that inference of the sales being bogus, is unmistakable.

8.1. Even before us, no new facts or circumstances have been placed on record and the orders passed by the revenue authorities have also gone unrebutted, therefore, we find no reason to interfere into or to deviate from such findings of the authorities below and we uphold the findings of the Ld.CIT(A) and reject the ground raised by the Assessee.

10. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Court on 05-03-2020 at Ahmedabad

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Ahmedabad; Dated 05/ 03 /2020
टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS



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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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