



**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 70/Bang/2023
Assessment Year : 2012-13

M/s. The Hamlet, No. 11, Kemwell House, Tumkur Road, Yeshwanthpur, Bangalore – 560 022. PAN: AAFT6690D	Vs.	The Income Tax Officer, Ward – 6(2)(4), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri H.N. Kincha, CA
Revenue by	:	Shri D.K. Mishra, CIT - DR

Date of Hearing	:	24-08-2023
Date of Pronouncement	:	16-11-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of the order dated 27.12.2022 passed by the NFAC, Delhi for A.Y. 2012-13 on following grounds of appeal:

“1. The learned Commissioner of Income tax (Appeals) has erred in passing the appellate order in the manner passed. The appellate order as passed is bad in law and is liable to be quashed.

2. In any case, the learned Commissioner of Income tax (Appeals) has erred in confirming the assessment order passed by the learned Assessing Officer. On the facts and circumstances of the case, the learned Commissioner of Income tax (Appeals) should have quashed, the order passed by Assessing Officer or atleast should have deleted the additions made by the Assessing Officer.

3. *The learned Commissioner of Income tax (Appeals) has also erred in confirming the reopening of assessment by learned Assessing Officer. The conditions precedent for issue of notice U/s. 148 of I.T. Act, 1961 having not been satisfied, the reopening of assessment was bad in law and hence the learned Commissioner of Income tax (Appeals) should have instead of confirming the assessment order, quashed the reopening of assessment.*

4. *In any case, the passing of the order without complying with the legal and statutory requirements of reassessment proceeding also makes the order bad in law and liable to be quashed.*

5. *In any case, non disposal of objections filed through speaking order makes the assessment bad in law and such order is liable to be quashed.*

6. *In any case and without prejudice, the assessment order passed in the absence of material/information/report and the opportunity of cross examination of the persons whose statements were relied upon becomes bad in law, passed against the gross violation of principles of natural justice and such impugned order is liable to be quashed.*

7. *In any case and without further prejudice, the Assessing Officer has erred in treating the transaction of sale of shares as not genuine and of accommodative in nature and adding the sale consideration of Rs. 7,00,00,000/- to the returned income of the appellant. The addition being wrong on the facts of the case and law applicable is to be deleted.*

8. *In any case and without further prejudice, the Assessing Officer has erred in not allowing the carry forward of short term capital loss of Rs. 1,75,000/- arising on sale of shares. The disallowance being wrong on the facts of the case and in law applicable is to be deleted.*

9.1 *The learned Commissioner of Income tax (Appeals) has also erred in upholding the addition on merits. The addition as made being bad in law and on facts should have been actually deleted by learned Commissioner of Income tax (Appeals).*

9.2 *The learned Commissioner of Income tax (Appeals) has erred in concluding that :*

- a) *The transactions done by appellant are against human probabilities.*
- b) *The transaction is sham.*
- c) *The transaction is to turn undisclosed income to disclosed income in connivance with entry providers.*
- d) *The transaction in shares was done by the appellant with the sham companies with unknown credentials.*
- e) *The appellant has failed to prove that transaction is genuine.*
- f) *The appellant has failed to discharge the burden of proof.*
- g) *The transaction is entered into for purpose of evading tax.*
- h) *There is no economic or financial justification for transaction in shares.*
- i) *The purchasing companies have no wherewithal to purchase the shares.*
- j) *That there are thousands of companies on the address given by the purchasers.*
- k) *The purchasing companies have responded to notice u/s. 133(6) in tappal/manually instead of replying by mail.*

All the above conclusions/finding in the appellate order are erroneous, not based on evidence or documents but are made totally on conjectures and surmises and hence are to be totally disregarded.

10. The learned Commissioner of Income tax has also erred in holding that the provisions of section 68 of I.T. Act, 1961 are applicable on the present case. On the facts and circumstances of the case and law applicable, the provisions of section 68 are not applicable and the addition made U/s. 68 of I.T. Act, 1961 as confirmed by Commissioner of Income tax (Appeals) is to be deleted.

11. The Appellant denies the liability to pay interest u/s 234B of the Act. The interest having been levied erroneously is to be deleted.

12. In view of the above and other grounds to be adduced at the time of hearing it is requested that the impugned orders be quashed or at least addition of sale consideration be deleted and the loss as returned be allowed to be carried forward and interest levied thereon be deleted.”

2. Brief facts of the case are as under:

2.1 Assessee is a firm doing its business of real estate and infrastructure development. For the year under consideration, it filed its return of income on 30.07.2012 declaring short term capital loss of Rs.1,75,000/-. The return was taken up for scrutiny and was processed u/s. 143(1) vide intimation dated 15.02.2013. Later on assessee received notice u/s. 148 of the act dated 30.03.2019 intimating assessee regarding the reopening of the assessment year under consideration. Assessee asked for the reasons recorded which were issued on 29.11.2019 which is as under:

Recd on 2-12-19
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**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 6(2)(4), BANGALORE**

To: THE HAMLET 11 KEMWELL HOUSE, TUMKUR ROAD YESHWANTHPUR BANGALORE 960022, Karnataka India			
PAN: AAAF76690D	Assessment Year: 2012-13	Dated: 29/11/2019	Letter No.: ITBA/AST/F/17/2019-20/1021318145(1)

Sr/ Madam/ M/s.
Subject: Reason for Re-opening in your case for A.Y.2012-13-reg.

The assessee firm, M/s. Hamlet, consists of 5 partners. It is noticed from the return that Business Code 0403, i.e., Builders is mentioned. The firm has declared Short Term Capital Loss on Sale of other assets of Rs.175000/-.

Information received from the DDIT(Inv.), Unit 3(1), Kolkata vide letter No. DDIT(Inv.)/U-3(1)/Kol/Disseminator/2018-19/13590-864 dated 11.03.2019 addressed to ITO, Ward-2(2)(4), Bangalore and received in this office on 25-3-2019.

The assessee, M/s. The Hamlet, has received Rs.3,00,00,056/- from the Bank account No.01900210007891 with UCB Bank, Main Branch, Kolkata of M/s. Newedge Realtors Pvt. Ltd. M/s. Newedge Realtors P. Ltd. is a shell company engaged in providing accommodation entries in the form of bogus share capital / share premium which were used for routing funds through web of bank transactions.

Further verification of the return shows that the assessee has declared Short term capital loss of Rs.1,75,000/- on sale of Other Assets. The cost of acquisition is Rs. 7,01,75,000/- and sale consideration is Rs.7,00,00,000/- leading to the above loss. The details of investment leading to short term capital loss, sources for investment in purchase of assets leading to loss declared needs to be verified.

In view of the above, I have reason to believe that income for the A.Y. 2012-13 has escaped assessment within the meaning of provisions of Section 147.

FOR THE HAMLET
PARTI ET

Note: If digitally signed, the date of digital signature may be taken as date of document.
BMTQ BUILDING, 90 FEET ROAD, 6TH BLOCK, NEAR SHI SHI GAME'S VILLAGE, KORAMANGALA, BANGALURU, KARNATAKA, 960008
Email: BANGALORE/ITO.2.4@INCOMETAX.GOV.IN

* The Notice/Letter/Order No. mentioned above may be treated as DRN for the purpose of procedure for issuance of income Tax Notice prescribed by Circular No. 18/2019 dt. 14 August 2019.

2.2. In response to the reasons recorded, assessee vide letter dated 25.12.2019, wherein the objections to the proceedings were raised which also forms part of the assessment order reproduced in para 6.3 that reads as under:

“1. The assessee also would like to submit the following further objections to the proceedings.

i) The notice u/s 148 is not valid and not in accordance with the laws as the reasons recorded for reopening assessment is without verifying the facts and circumstances of the case.

ii) The notice is sent only on the premise that M/s. Newedge Realtors Pvt. Ltd. is a shell company and all transactions of that company, without any exceptions, are accommodation entries in the form of bogus share capital/share premium without verifying the nature of the transactions.

iii) The proceedings u/s 147 are initiated without studying and ascertaining the value of shares of M/s. Kemwell Biopharma Pvt. Ltd., a reputed company with a turnover of over Rs. 100 crores and profit before tax of Rs. 16 crores. The share valuation certificate of Kemwell Biopharma Pvt Ltd is attached herewith.

iv) The notice sent u/s 148 is merely on suspicion and not after verifying/scrutinising and not placing any incriminating records to show that the transactions are accommodation entries. No cross examination opportunity of the person on whose purported statement the enquiry has been caused has been provided.

v) The reasons to believe that income escaped assessment is not in accordance with the settled position of law.”

2.3. The Ld.AO based on the above objections raised by the assessee considered the issue that forming part of the reasons recorded and made an addition in the hands of the assessee at Rs. 7 crores by disallowing the short term capital loss.

Aggrieved by the order of the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

2.4. The in the primary ground raised by the assessee was regarding non-disposal of the objections filed by the assessee thereby making the assessment bad in law. The Ld.CIT(A) considered this legal issue by observing as under:

“6.8 i) The appellant has contended that the AO did not dispose off the objections filed through a speaking order which makes the assessment bad in law.

As per the appellant it filed objections to the "reasons recorded" vide letter dated 25.12.2019 which was submitted on 27.12.2019. The subject of the said letter is "Reasons for reopening / AY2012-13 /The Hamlet / PAN.../Reference: Letter ... dated 29.11.2019". The heading of the said letter does not clearly spell out that this letter is regarding "Objections filed to the reopening of assessment".

ii) The AO has discussed this letter in para 6.3 of the assessment order stating that "The assessee in response to furnishing of reasons for reopening the assessment stated as under:-

(i) The shares sold of M/S. Kemwell Biopharma Pvt. Ltd. [KBPL] was of a reputed pharmaceuticals manufacturing company. The said company had a turnover of Rs.100 Crore during the FY 2011-12 and profit before tax of Rs.16 Crore. Therefore, the shares sold were not of any defunct company;

(ii) The assessee f was in need of funds for repayment of unsecured loans taken and the partners decided to raise the funds by disposing off part of its investment in shares, The preference shares were sold in the normal course through banking channel;

(iii) The assessee had no information or was aware that M/s. New Edge Realtors Pvt. Ltd. is a shell company engaged in providing accommodation entries in the form of bogus share capital/share premium which were used for routing funds through web of banking transactions;

(iv) The shares being of a reputed pharma company running good profits and paying dividends to preference shareholders. Hence, there were no reasons for it for taking any accommodation entries from any persons. The preference shares were sold at arm's length at fair value and received the proceeds through banking channels. Therefore by any stretch of imagination the transaction cannot be termed as accommodation entries.

(v) Re-opened the assessment on investigation report without verifying the facts and scrutinizing the available details, on borrowed satisfaction without bringing any incriminating materials on record.

(vi) Forming of belief and application of mind by the AO

The AO too has not stated that these are "Objections filed by appellant to the reasons recorded for reopening the assessment".

iii) Thereafter the AO has rebutted this response of appellant to furnishing of reasons for reopening the assessment from para 6.4 to 8 of the said order. Thus, the contentions raised by appellant have been rebutted by the AO through a speaking order which forms a part of assessment order itself.

In view of the above facts the above contention raised by appellant vide GOA No. 2.3 cannot be upheld.

6.9 In view of the facts and respectfully following the judgments outlined in paras 6.3 to 6.8 of this order it is hereby held that reopening of assessment by the AO u/s 147 and assessment made by the AO u/s 147 of the Act is valid and it satisfies the requirement of the law that prior to reopening of the assessment the AO has to apply his mind to the tangible material available and conclude that he has the reason to believe that income has escaped assessment. Copy of reason recorded were duly provided by AO. Thus, the reopening of assessment u/s 147 of the Act in the present case is fully justified. Thus, all the mandatory preconditions before reopening of assessment u/s 147 of the Act were duly complied and met with by the AO. Thus, the notice issued by AO u/s. 148 of Act is held to be a valid notice. The Grounds of Appeal No. 2.1 to 2.3 are dismissed."

2.5. The Ld.CIT(A) thus dismissed the legal issue raised by the assessee. On merits of the case, the Ld.CIT(A) relied on the decisions of *Hon'ble Delhi High Court* in case of *NDR Promoters Ltd.* reported in *410 ITR 379* and by applying the test of human probability as laid down by *Hon'ble Supreme Court* in case of *Sumati Dayal* reported in *214 ITR 801* and *Durga Prasad* reported in *82 ITR 540* upheld the action of the Ld.AO by observing as under:

“7.12 I find that the entire amount of the so called receipt on sale of shares has been treated correctly as unexplained credit u/s 68 of the Act, as it has all the ingredients of attracting the rigours of the said section. Section 68 of the Act provides that where any sum is found credited in the books of the appellant maintained for any previous year and the appellant offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the AO satisfactory, the sum so credited may be charged to income tax as income of the appellant of that year. In the present case, the appellant's explanation that the said receipt is on account of investment in shares, whereby shares of unknown company have been transacted with by appellant has been totally rejected by the AO. The appellant has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for transaction in these shares. There is no economic or financial basis that a share of little known company would transacted in by appellant.

7.13 Considering the aforesaid facts and the various decisions as cited above, it is clear that the assessee has manipulated the share transaction within a short span of time in collusion with the brokers in order to earn STCL. Further from the above facts and surrounding circumstances, human conduct, preponderance of probabilities etc. I find that the AO has clearly established that the impugned transaction is not made for an investment i.e. the motive is not to derive income but to convert unaccounted income to accounted income that too by an arrangement and it is a manipulated transaction in collusion with the brokers to paint creditworthiness to the transaction and claim exemption. This is in accordance

with the ratio laid by the Hon'ble Apex Court in Sumati Dayal Vs Commissioner Of Income-Tax, 214 ITR 801 (SC), that " the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities.

7.14 The action of AO in making additions u/s 68 of the Act of Rs.7,00,00,000/- and disallowing the claim of STCL of Rs.1,75,000/- is fully justified in view of the following facts-

- a) Appellant has never traded in shares. In the trading of shares of M/s. Kemwell Biopharma Pvt. Ltd. (M/s. KBPL), the Appellant converted unaccounted income to accounted income.*
- b) Net worth of this company is negligible as per the financials.*
- c) Transactions undertaken are not bonafide. Shares of M/s. Kemwell Biopharma P. Ltd. (M/s. KBPL) are devoid of any commercial value. Transactions are premeditated and structural ones.*
- d) Appellant failed to discharge the onus cast on him to prove the genuineness of these share transactions and same is linked to market factors and commercial principles.*
- e) These artificially structured transactions were entered into with sole purpose of evading tax.*
- f) Artificial STCL are created.*
- g) It is a preconceived scheme to procure bogus STCL in share transactions of scrip of M/s. Kemwell Biopharma P. Ltd. (M/s. KBPL) which is not supported by market factors.*
- h) Net worth of this company is negligible but its share price is artificially rigged.*
- i) Operator, Brokers and Exit providers made an arrangement of routing cash to obtain bogus STCL.*
- j) I agree with the finding of AO that these transactions are not genuine due to following reasons:-*

- 1. There is no evidence of operational activity to prove the financial strength of the purchase of shares*
- 2. Online verification of financials of the purchasing companies shows that they don't have the wherewithal to purchase the shares by paying such huge consideration.*
- 3. The evidentiary value of payment through RTGS cannot make a non genuine transaction a genuine one*

4. Even if its argued that the creditors are holding companies / Non banking financial companies, there is no evidence that they have in turn received finances from credit worthy companies.

5. On verification of the Bank account statement it is noticed that there is a regular pattern of Deposits by way of cheques / RTGS to the accounts of the above 3 companies followed by payments to parties including the assessee.

6. During scrutiny proceedings it was submitted that the assessee purchased back the preference shares from the 3 companies after 2 years ;

7. As per PAN Database, the mail ids given for M/s. Newedge Realtors Pvt Ltd., and M/s. Rootstar Builders Pvt Ltd., is MBBANKA©SIFY.COM. Banka family is found to be accommodation entry provider.

8. On verification from Google it is noticed that in the address of each of the purchasing companies there are thousands of companies with the same address, No genuine and worthwhile company will co-habit with with thousands of other companies.

9. The 3 companies could have replied by mail by the appointed date of 13.12.2019 but preferred to send their replies through messenger to this office, after the assessee had become aware of the inquiry.

7.15 In view of the above mentioned facts, the material brought on record by the AO, and the decision of CIT vs Durga Prasad More (1971) 82 ITR 540 and the case of Sumati Dayal vs. CIT (supra) 214 ITR 801 (SC), the test of human probabilities needs to be applied and true nature of the transaction has to be ascertained in light of the surrounding circumstances. Considering the facts and circumstances of the case, I find that the appellant has indulged in dubious share transaction meant to account for the undisclosed income in the garb of STCL. In view thereof addition of Rs.7,00,00,000/- made by the AO u/s 68 of the I.T. Act are hereby upheld. The action of AO in disallowance the STCL claimed of Rs.(-)1,75,000/- is upheld.

7.16 Appellant has contended that AO did not produce the witnesses whose statements were recorded and used against the Appellant. The contention of the Appellant is not acceptable in view of following judgments:-

i. The Hon'ble ITAT, Mumbai in the case of GTC Industries Ltd. vs ACIT, ITAT, Mumbai, [1998] 65 ITD 380 (BOM) held that "Where statements of witnesses were only secondary

and of subordinate material used to buttress main matter connected with amount of additions, it had to be held that there was no denial of principles of natural justice if witnesses were not allowed to be cross-examined by assessee".

7.17 In view of the above facts and discussion and respectfully following the judgments outlined above, the Grounds of Appeal No. 3 to 6 are dismissed."

Aggrieved by the order of the Ld.AO, the assessee preferred appeal before this *Tribunal*.

3. The Ld.AR submitted that **Ground nos. 1 and 2** are general in nature and therefore do not require any adjudication.

3.1. Ground nos. 3 – 6 are raised by assessee challenging the reopening of the assessment. The preliminary issue raised in **Ground no. 5** is that the objections raised by assessee were not dealt with by way of a speaking order, thereby making the assessment bad in law.

3.2. The Ld.AR submitted that, the addition made in the assessment order is in respect of sale consideration received by assessee on sale of preference shares amounting to Rs.7 crores which was treated as unexplained cash credits u/s.68 of the act. The Ld.AR submitted that, the assessing officer in the reasons recorded is referring to a company by name M/s. Newedge Realtors Pvt. Ltd. to whom assessee sold 3 lakhs shares of M/s. Kemwell Biopharma Pvt. Ltd. for an amount of Rs 3 crores approximately. It is further recorded in the reasons for reopening that, the DDIT, Investigation Wing informed the Ld.AO regarding M/s. Newedge Realtors Pvt. Ltd. to be a shell company and engaged in providing accommodation entries in the form of bogus

share capital/bogus share premium, which was used for routing funds through web of bank transactions. The Ld.AR submitted that, based on a borrowed satisfaction, the Ld.AO also doubted the sale of shares by assessee that another two companies by the name M/s. Swift Residency Pvt. Ltd. and M/s. Rootstart Builders Pvt. Ltd. for Rs. 3 crores and Rs. 1 crore respectively.

3.3. It is submitted by the Ld.AR that there is no material on record for doubting the transactions between assessee and these companies and therefore the Ld.AO did not have any power to reopen the assessment merely for verification of capital loss earned by the assessee. He submitted that the powers vested with the Ld.AO cannot be exercised casually to verify any transaction and that the Ld.AO has to make independent assessment by verifying the available information, examine documentary evidences and then record reasons as to the basis of which he formed an opinion that the income has escaped assessment.

3.4. The Ld.AR submitted that no such reasons has been recorded in respect of the above two transactions and therefore the assessing officer cannot assume the power to reopen the assessment. The Ld.AR thus submitted that all these points have not been dealt with by the Ld.AO which forms part of the objections raised.

3.5. The next issue that is raised by assessee in **Ground no. 6** is regarding non-granting of opportunity to cross examine the persons whose statements were relied on and therefore the assessment order was passed is bad in law.

3.6. The Ld.AR submitted that during the assessment proceedings, summons were issued by the Ld.AO u/s. 131 of the act to the three parties who had purchased shares from the assessee requiring them to furnish details of shares purchased of M/s. Kemwell Biopharma Pvt. Ltd., basis of valuation of shares at the time of purchase of shares, whether the purchase was registered with the stock exchange and copy of the demat account, progress account. It is submitted by the Ld.AR that the three purchasers of shares submitted their responses on 19.01.2019 manually in the tapal section and summary of the submissions by M/s. Swift Residency Pvt. Ltd., M/s. Rootstar Builders Pvt. Ltd. and M/s. Newedge Realtors Pvt. Ltd. has been summarised by the Ld.AO in para 6.8 of the assessment order. For the sake of convenience, the same is reproduced as under:

“6.8 The 3 purchasers of the shares submitted their response on 19-1-2019 through a messenger and filed it manually in the tappal section. The summary of the submissions by M/s. Swift Residency Pvt. Ltd. M/s. Rootstar Builders Pvt. Ltd. & M/s. Newedge Realtors Pvt. Ltd. are summarised as under :

(i) Its authorized signatory, Director, has expressed inability to attend personally & hence details sent by post. He submitted that

(ii) they were approached by M/s. The Hamlet for sale of shares of M/s. Kemwell Biopharma Pvt. Ltd.

(iii) they invested surplus funds in purchase of the above shares;

(iv) the payments were through RTGS;

(v) they had not obtained valuation report since it is redeemable preference shares which fetches tax free dividends & realizes face value on sale;

(vi) Sale not registered with Stock Exchange since they are not listed there;

(vii) Purchased shares directly from M/s. The Hamlet and received sale bill. The shares were in physical form as it was not in dematerialized form;

The signatories enclosed copy of sale bill issued by M/s. The Hamlet Bank account statement reflecting the payment for the transaction.”

3.7. The Ld.AR submitted that the assessee does not know regarding the three companies or any one of the companies to be a part of Banka family and that the buyers are entry providers. He submitted that to this extent, cross examination has been denied to the assessee and therefore the entire assessment is bad in law.

In support of the contentions raised by the Ld.AR relied on following decisions.

Non disposal of objections filed by way of a separate speaking order makes the assessment bad in law:

- *Ferrous Infrastructure (P) Ltd. vs. DCIT reported in 63 taxmann.com 201 (Delhi)*
- *Deepak Extrusions Pvt. Ltd. vs. DCIT, WA No. 16725/2017(T-IT) Karnataka 80 taxmann.com 77*
- *Sri Lakshmana vs. ITO in ITA No. 382/Bang/2018*
- *ITO vs. P G Chandrashekar in ITA No. 1080/Bang/2015*

Borrowed satisfaction without independent verification / enquiry by assessing office is bad in law

- *CIT vs. Atul Jain reported in 164 Taxman 33 (Delhi)*
- *Surani Steel Tubes Ltd. reported in 136 taxmann.com 139 (Guj.)*

Right of cross examination:

- *Chandra Devi Kothari – W.P. No. 3970/2014 (T-IT) Assessment Year 2007-08*
- *Gourav Gupta vs. ITO in ITA No. 2513/Bang/2018*

3.8. The Ld. DR on the contrary submitted that, there was material received from the investigation wing to form a reasonable belief and that there was live link between the information received and the sale transaction between the assessee and M/s. Newedge Realtors Pvt. Ltd. who was alleged to be an entry provider. The Ld. DR submitted that on the information received by the Ld.AO from investigation wing, no opinion was required to be expressed or given nor any mind was to be applied for the purposes of reopening an assessment. The Ld. DR submitted that while recording the reasons to reopen, the assessing officer need not establish the escapement of income. The belief at that time is only *prima facie* and not conclusive. He submitted that at the 'Reasons recorded should not depict gossip, rumour or suspicion, and the 'belief' must be held in good faith. The Ld. DR referred to the expression "believe" in Section 147 that requires only an objective satisfaction based on definite material and information, howsoever insufficient it is. He further submitted that the sufficiency of the material cannot be gone into, but only relevancy is to be considered and that the reasons for the belief should have a rational connection or a relevant bearing on the formation of the belief and should not be extraneous or irrelevant. The Ld. DR thus submitted that the Ld.AO is not required to build a full proof case but only to form a *prima facie* opinion or a belief that income has escaped assessment. The Ld. DR vehemently argued that the relevancy of the material before the Ld.AO is to be judged from that

perspective and not from the perspective as to whether there is sufficient material or adequate material to sustain the addition while completing the assessment. He submitted that this actually has to be done in the course of the assessment proceedings. The material is therefore to be considered as *prima facie* and sufficient for the purposes of reopening of the assessment under 148. Thus the assessing officer has tangible material based on which a belief was formed that income has escaped assessment in the hands of the assessee for the year under consideration.

3.9. Regarding the non disposal of objection, the Ld. DR submitted that the Ld.AO has considered the objection in the assessment order itself. Referring to the letter dated 25/12/2019 filed by the assessee the Ld. DR submitted that, it no where suggests that the letter dated 25/12/2019 is filed by the assessee in objection to the reasons recorded. He submitted that the letter dated 25/12/2019 is in submissions on the merits of the case. He referred to para 6.3 of the assessment order where the Ld.AO is discussing the letter dated 25/12/2019 filed by the assessee. He also referred to the observation of the Ld.CIT(A) in para 6.8 of the impugned order to support his submission that the Ld.AO has considered the letter dated 25/12/2019 filed by the assessee in the assessment order in which the assessee is challenging the reasons recorded on merits.

3.10. In respect of not providing the cross objection, the Ld. DR submitted that assessing officer has not made addition in the hands of the assessee based on the statements given by the three

purchasers referring to the paper book filed by the assessee dated 17.04.2023, the Ld. DR submitted that the replies filed by the three purchasers forms part of the paper book that clearly shows that assessee was given a copy of the same.

3.11. Further he referred to para 6.9 of the assessment order wherein on the same date when the three purchasers had submitted their response, assessee also submitted was rather affirmed that the sale of share was not registered with the stock exchange since they were not listed shares and that the loss of Rs.1,75,000/- was on account of proportionate stamp duty paid on purchase of shares which forms part of acquisition of shares and therefore it is an allowable loss. He thus submitted that the objection of non-granting of cross objection is therefore baseless.

We have perused the submissions advanced by both sides in the light of records placed before us.

4. We note that the assessee is objecting to the reopening of the assessment on three prepositions:

1. Borrowed satisfaction without independent verification or enquiry by the Ld.AO.
2. Non-disposal of objections by way of a separate speaking order
3. Denial of right to cross examine.

4.1. It has been vehemently argued by the Ld.AR that for all the above three issues, the reopening of the assessment deserves to

be quashed in consequence to which the assessment order passed has to be held to be bad in law.

Before we consider the above propositions, it is necessary to look into the reasons recorded by the Ld.AO. For the sake of convenience, the same is scanned and reproduced here under:

Reason
2-11-19
97

**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 5(2)(4), BANGALORE**

To, THE HAMLET 11 KEMWELL HOUSE, TUMKUR ROAD YESHWANTHPUR BANGALORE 560022, Karnataka India			
PAN: AAAF1680D	Assessment Year: 2012-13	Dated: 29/11/2019	Letter No: ITBA/AST/F/17/2019-20/102131B145(1)

Sir/Madam/ M/s.

Subject: Reason for Re-opening in your case for A.Y.2012-13-reg.

The assessee firm, M/s. Hamlet, consists of 6 partners. It is noticed from the return that Business Code 0403, i.e., Builders is mentioned. The firm has declared Short Term Capital Loss on Sale of other assets of Rs.175000/-.

Information received from the DDIT(Inv.), Unit 3(1), Kolkata vide letter No. DDIT(Inv.)U-3(1)/Kol/Dissemination/2018-19/13590-864 dated 11.03.2019 addressed to ITO, Ward-2(2)(4), Bengaluru and received in this office on 25-3-2019.


The assessee, M/s. The Hamlet, has received Rs.3,00,00,056/- from the Bank account No.01900210007891 with UCO Bank, Main Branch, Kolkata of M/s. Newedge Realtors Pvt. Ltd. M/s. Newedge Realtors P. Ltd. is a shell company engaged in providing accommodation entries in the form of bogus share capital / share premium which were used for routing funds through web of bank transactions.

Further verification of the return shows that the assessee has declared Short term capital loss of Rs.1,75,000/- on sale of Other Assets. The cost of acquisition is Rs. 7,01,75,000/- and sale consideration is Rs.7,00,00,000/- leading to the above loss. The details of investment leading to short term capital loss, sources for investment in purchase of assets leading to loss declared needs to be verified.

In view of the above, I have reason to believe that income for the A.Y. 2012-13 has escaped assessment within the meaning of provisions of Section 147.

Note: If digitally signed, the date of digital signature may be taken as date of document.
BMTCL BUILDING, 40 FEET ROAD, 6TH BLOCK, NEAR KHB GAMES VILLAGE, KORAMANGALA, BANGALURU, Karnataka, 560091
Email: BANGALORE.IT02.4@INCOMETAX.GOV.IN

* The Notice/Letter/Order No. mentioned above may be treated as OIR for the purpose of procedure for issuance of income Tax Notice prescribed by Circular No. 18/2019 dt. 14 August 2019.

FOR THE HAMLET

PARTI es

A. First Preposition:

A.1. The words '*reason to believe*' appearing in section 147 cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that the Assessing Officer forms a '*belief*' from the examination he makes and if he finds from any information that he receives, that the taxable income has escaped assessment, it would amount to saying that he has '*reason to believe*' that such income has '*escaped assessment*'. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision. At the stage, where he finds a cause or justification to believe that such income has escaped assessment, the assessing officer is not required to base his belief on any final adjudication of the matter. The '*reasons*' should, no doubt, have rational connection with formation of the '*belief*'.

A.2. In the present facts of the case, the period of four years has not expired, and therefore, the conduct of the assessee regarding disclosure of material facts need not be the basis for initiating the proceedings and they can be commenced if the assessing officer has '*reason to believe*' that the income has escaped assessment notwithstanding that there was full disclosure of material facts on record. The assessee in such cases cannot defend the initiation of action on the ground that the facts were already placed on record and that the assessing officer must have or ought to have considered them. The power to make assessment or reassessment, where the initiation has been made within four years of the end of the relevant assessment year, would be

attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings.

A.3. We do not find merit in the submission of Ld.AR, that the reasons recorded by the Ld.AO for re-opening of the assessment is merely due to the investigation conducted by the Investigation Wing, or the information received from the Investigation Wing. We have examined the belief recorded by the Ld.AO in the present facts of the case as to whether, there was sufficient or any tangible materials available on the record for the Ld.AO to form the reasonable belief, and whether, there was 'live link' existing between such material and the income chargeable to tax that is believed to have escaped assessment.

A.4. In the present case there was a definite information coming from the Investigation Wing and conclusions which was arrived at by the Ld.AO in the reasons recorded seeking to reopen the assessment was based on certain information. Further on verification of the return of income filed by the assessee showed that assessee the assessee had earned capital loss. Therefore, the ratio laid down for valid reopening of the assessment has been fulfilled in the present case.

A.5. The next argument of the assessee is that the reasons recorded by the Assessing Officer is mere reproduction of the information received and further there is no live link between the

information received (tangible material) and formation of belief. We note that in the present case, the reasons for the reopening were recorded by the Ld.AO, by extracting the information that was received from the Investigation Wing that the assessee has transacted with accommodation entry provider, and further noted that that on perusal of returned income the assessee had declared long-term capital loss. Such belief was formed after looking at the return of income in schedule CG.

A.6. Be that as it may, there are no fetters on an Assessing Officer to carry out preliminary inquiries before issuance of notice of reopening in order to collect information on basis of which he may either form a belief that income chargeable to tax had escaped assessment or abandon any further inquiry, upon being satisfied that no such belief could be formed. The purpose of independent inquiry is to verify the facts and material contained in the information and to collect additional facts and materials which would supplement and support the inference drawn by Investigation Wing that there was some income accrued or arisen to the assessee during the relevant assessment year which had not been offered for tax.

A.7. Thus, based on the above discussions, the case on hand is not the one, where it can be argued that the Ld.AO on a vague or unspecific information, initiated the proceedings of reassessment without taking pains to form his own belief in respect of such materials. Therefore, the first contention of the assessee that the reopening is on a borrowed satisfaction and therefore the reopening is bad in law cannot be accepted.

We accordingly, reject this proposition also raised by the assessee.

B. Second Contention

B.1. The Ld.AR submitted that the objections raised by the assessee in lieu of the reasons recorded has not been disposed off by the Ld.AO as per the ratio of *Hon'ble Supreme Court* in case of *GKN Driveshaft (I) Ltd. Vs. ITO* reported in (2002) 125 taxman 963 and therefore the assessment order passes is bad in law.

B.2. In order to deal with this contention, it is necessary to peruse the response of the assessee in lieu to the reasons recorded by the Ld.AO. For the sake of convenience, the same is scanned and reproduced herewith as under:

THE HAMLET

25th December 2019.


To,
Income-tax Officer,
Ward - 6(2)(4),
BMTC Building,
80 Feet Road,
6th Block, Koramangala,
Bangalore - 560 095.


Dear Madam,

**Sub: Reasons for Re-opening/AY 2012-13/ The Hamlet/PAN: AAAFT6690D.
Ref: Letter No:ITBA/AST/FII7/2019-20/1021318145(1) dated 29/11/2019.**

With reference to your above said proceedings the assessee would like to state the following.

The Hamlet is a partnership firm having its registered office at Bangalore which is engaged in real estate and infrastructure development. The firm was holding 40,00,000 preference shares of Rs. 100/- each whose book value was Rs. 40,10,00,000/-. During the financial year 2011-12 the firm has sold 7,00,000 preference shares to three parties for a consideration of Rs. 7,00,00,000/- in order to meet its funds requirement. The shares were sold to three parties whose names and addresses have been given. The cost of acquisition of the shares was 7,01,75,000/- including the proportionate stamp duty of Rs. 1,75,000/-. The assessee firm has declared short term capital loss of Rs. 1,75,000/- on sale of these shares. The assessee firm was in receipt of notice u/s 148. In response to the said notice the assessee firm has filed return of income vide ack no. 467604920260419 dated 26.04.2019.


 27 DEC 2019


 Partner

FOR THE HAMLET

B.3 The assessee firm has also requested the assessing officer to furnish, the reasons recorded for reopening the assessment for AY 2012-13. In response to the assessee firm's request for reasons recorded for reopening of assessment and the ld. AO has stated that they have received information from the DDIT(Inv), Unit 3(1), Kolkata vide letter No.DDIT(Inv)/U-3(l)/KoVDis5emination/2018-19/13590-664 dated 11.03.2019.

B.4 In the said information it is stated, that M/S The Hamlet has received Rs.3,00,00,056/-from the bank account. No. 01900210007891 with Uco Bank, Main Branch, Kolkata of M/s. Newedge Realtors Pvt. Ltd, which is shell company engaged in providing accommodation entries in the form of bogus share capital/share premium' which were used for routing funds through web of bank transactions.

B.5 Further the ld. AO has stated that further verification of the return shows that the assessee has declared short term capital loss of Rs. 1,75,000/- on sale of other assets. The cost of acquisition is Rs. 7,01,75,000/- and sale consideration is Rs. 7,00,00,000/- leading to the above loss. The details of investment leading to short term capital loss, sources for investment in purchase of assets leading to loss declared needs to be verified.

B.6 On the basis of above grounds, it is stated that ld. AO has reason to believe that income for the AY.2012-13 has escaped assessment. Within the meaning of Section 147 for Rs.3,00,00,056/- for the amount received from Newedge Realtors Pvt Ltd for bogus Share Capital/Share Premium. In

this regard the assessee firm has already made written submissions filed online vide letter dated 06.12.2019 and followed by physical submission of the same on the same date.

B.7 The Id. A.R. submitted that the assessee firm was holding asset in the form of Preference Shares of a profitable company M/s. Kemwell Biopharma Private Limited (KBPL) whose creditworthiness and carrying value of shares are not disputed. To meet its funds requirements, it has sold the preference shares of KBPL.

B.8 The assessee firm was the absolute owner of the shares. The sale is made in the normal course of sale of investments. The said amount is also properly accounted in the books of accounts of the assessee. That shares are sold to three companies registered under the Companies Act, 1956. The sale is at arms-length price which is not disputed. The sale proceeds of sale of the said asset are received through normal proper banking channels through RTGS which is also not disputed. All documentary evidences as to the ownership and sale of shares and bank statements are already produced. Therefore, the genuineness of the transaction is established. Now, the only interpretation of the I T Department is that the shares are sold to companies which are termed as shell companies engaged in accommodation entries and their creditworthiness.

B.9 He submitted that though clear meaning of accommodation entries is not defined, in the present context it generally means shares of defunct companies are sold for exorbitant values to book profits or high value shares are sold at meagre prices to book

losses i.e. accommodation entries in the form of bogus share capital/share premium which were used for routing funds through web of bank transactions. This is not the case here, neither the assessee dealt with the shares of shell company nor indulged in any transaction connected with the capital or premium of that so called shell companies. The assessee firm would like to state that the KBPL shares, which carries the value was sold. The assessee firm has departed with its title to the shares (Asset) and received the value of the sold asset as per law and received proceeds of money through the banking channels. As such this cannot be termed as accommodation entries by any means. No prudent person will depart with his money as well as the property. Our enquiry in the market established that the financial position of those companies are sound enough to make investments. Just because those companies are engaged in providing accommodation entries, it cannot be termed that our transaction with those companies are also accommodation entries. The money was received through the bank and used in the business of the assessee which is available in the records. The case is reopened merely on the basis of investigation report which still seems to be inconclusive. The investigative department has made several general observations and on the basis of such general observations our case is reopened without verifying the details, without appreciating the reasons and merely based on purported general statements of the representatives of those companies recorded by the DIT (Inv.). Such generalized statements cannot be put against the assessee and will not have any evidentiary value. No evidence as to positive confirmation from the

parties with respect to the alleged transaction with the assessee firm is placed on record. The entire proceedings are conducted on generalized statements of the representatives. of those companies and the investigative department. No examinations as to the available records are made by the assessing officer to form an opinion. The sole reason for reopening the case appears to be that of general information sent by the DIT (Inv.) and the borrowed satisfaction of the assessing officer. No material has been brought on record which is transaction specific to justify the reason for re-opening and the reopening assessment is based on suspicion, it is also well settled that the term reason to believe is vitally different from reason to suspect. Assessing Officer has the power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. No such tangible material has been placed on record. On the other hand, the assessee firm has established the genuineness of the transactions by producing all the documentary evidences in support of the transactions.

B.10 In the case of *PCIT v. Manzil Dinesh Kumar Shah (2018) 95 Taxmann.com 46 (Guj)*, it was held that; even the assessment which is completed u/s 143(1) cannot be reopened without proper reason to believe. If the reasons state that the information received from the VAT Dept that the assessee entered into bogus purchases needed deep verification, it means the AO is reopening for doing a fishing or roving inquiry without proper reason to believe, which is not permissible. The Court also observed that, before closing, we can only lament at the possible revenue loss. The law and the principles noted

above are far too well settled to have escaped the notice of the Assessing Officer despite which if the reasons recorded fail, the test of validity on account of a sentence contained, it would be for the Revenue to examine reasons behind it.

B.11 In the case of *Amar Jewellers Ltd. v. Dy. CIT (2018) 254 Taxman 384 (Guj)* Gujarat High Court held that; on verifying the record it was found that, there was no nexus with the reasons recorded for initiating the reassessment proceedings and the information received by the AO from the investigation wing, accordingly, the reassessment was held to be bad in law.

B.12 The assessee had no intimation or any information and not aware whether M/s. Newedge Realtors Pvt Ltd is a shell company or engaged in providing accommodation entries in the form of bogus share capital/share, premium which were used for routing funds through web of bank transactions. The assessee firm has entered in to the transaction with bona fide belief and the transaction is also made at arm's length. All documentary evidences are provided. Therefore, it is established beyond doubt that the transaction is genuine and the assessing officer cannot justify in drawing an adverse inference only on suspicion and because the parties fails or neglects to respond to his notices. The assessee has approached all the parties and on asking about the summons issued by your good office they informed that the are reflecting in their books of account and bank statements and have lied directly to you confirming the transactions.

B.13 Further, as per the reasons for reopening as supplied by the assessing officer, only one transaction of sale of shares to M/s Newedge realtors Private Limited to the extent of Rs. 3,00,00,000/- is stated by the DIT (Lav.). The assessing officer has recorded another two transactions of sale of shares to M/s. Swift Residency Pvt Ltd and Rootstar Builders Pvt Ltd for Rs. 3,00,00,000/- and Rs. 1,00,00,000/- respectively to be examined without placing any material on record. The Assessing Officer has no power to reopen the case merely for verification of capital gains/loss. The powers vested in the assessing officer cannot be exercised casually to verify the transactions. The assessing officer has to make independent assessment by verifying the available information, examine documentary evidences and record the reasons as to the basis on which he formed an opinion that the income has escaped assessment. No such reasons seem to have been recorded in respect of the above two transactions and therefore, the assessing officer cannot assume the powers to reopen the assessment. The ld. A.R. stated that if we have a different view, he requested to accord an opportunity of cross examining the persons on whose statement the enquiry has made.

B.14 Further the assessee firm would like to state, that no part of taxable income has escaped the assessment. The assessee had declared entire income both taxable as well as exempted incomes in the return of income at appropriate schedules meant for that particular nature of income. The referred short-term capital loss of Rs.1,75,000/- is declared under the schedule CG of the Return of Income. Therefore,

there is no escapement of income for the AY 2012-13. The ld. A.R. also submitted the following further objections to the proceedings.

- i. The notice u/s 148 is not valid and not in accordance with the laws as the reasons recorded for reopening assessment is without verifying the facts and circumstances of the case.
- ii. The notice is sent only on the premise that M/s. Newedge Realtors Pvt. Ltd. is a shell company and all transactions of that company, without any exceptions, are accommodation entries in the form of bogus share capital/share premium without verifying the nature of the transactions.
- iii. The proceedings u/s 147 are initiated without studying and ascertaining the value of shares of M/s. Kemwell Biopharma Pvt. Ltd., a reputed company with a turnover of over Rs. 100 crores and profit before tax of Rs. 16 crores. The share valuation certificate of Kemwell Biopharma Pvt Ltd is attached herewith.
- iv. The notice sent u/s 148 is merely on' suspicion and not after verifying/scrutinizing and not placing any incriminating records to show that tie transactions are accommodation entries. No cross-examination opportunity of the person on whose purported statement the enquiry has been caused has been provided.

- v. The reasons to believe that income escaped assessment is not in accordance with the settled position of law. .

B.15 Without prejudice to the above, ld. A.R. had furnished the details asked for in the notice sent u/s 142(1) dated 19/10/2019 and 29/11/2019 and other notices from time to time which includes audited financial statements, details of calculation of capital gains, confirmations, bank statements etc.

B.16 In view of the above, the ld. A.R. submitted that that there are no reasons to believe that the above said income for AY 2012-13 has escaped assessment within the meaning of provisions of section 147 and the proceedings u/s 148 of the Act are unsustainable in the law. Therefore, he requested drop further proceedings u/s 148 of the Act in the interest of justice and law as from the documents produced and explanations provided, it is abundantly clear that it is a genuine transaction. Accordingly, he prayed not to make any additions to the income declared in the return.

B.17. It is pertinent to note from the assessment order that the assessee responded to the notice dated 30/03/2019 of reopening issued under section 148 by filing return of income on 26/04/2019. Thereafter statutory notice for conducting assessment was issued to the assessee on 04/06/2019 and 05/07/2019 calling for various details. It is thereafter that the assessee sought for the reasons recorded as per para 6.2 of the assessment order. The Ld.AO issued the reasons recorded vide

intimation dated 29/11/2019. It is further mentioned in para 6.2 that assessee was called upon to furnish further details.

B.18. It is thereafter vide letter dated 25/12/2019 that the assessee filed the detailed submissions on merits. This letter was filed with the office of the Ld.AO on 27/12/2019. In the said letter the assessee is submitting that the 148 has been issued on mere suspicion and without studying and ascertaining the facts of the transaction. The assessee is also mentioning non granting of cross objection which is the third contention raised by the Ld.AR before this *Tribunal*.

B.19. We note that the Ld.AO has dealt with the submissions of the assessee in para 6.3 of the assessment order regarding the merits of the case. In our opinion the letter dated 25/12/2019 has been considered by the Ld.AO in the assessment order. The assessment order cannot be therefore treated as a non speaking order as submitted by the Ld.AR, more so when the assessee participated in the assessment proceedings and the letter dated 25/12/2019 was filed just before three days to the date of the assessment order.

We accordingly, reject this proposition also raised by the assessee.

C. Third Contention

C.1. The Ld.AR submitted that denial of cross examination by the Ld.AO has vitiated the principles of natural justice. He submitted that the Ld.AO had called for information from the

three purchasers by issuing summons u/s. 131 of the act as per para 6.5 of the assessment order. The date fixed for appearance of the three purchasers was 13.12.2019. However as per para 6.6 on 13.12.2019 only assessee's representative appeared and furnished the details. The three purchasers submitted their response on 19.01.2019 through a messenger and filed the submissions manually in tapal. The submissions of the three purchasers have been reproduced in para 6.8 which is identical with the submissions of the assessee during the assessment proceedings.

C.2. Based on the above facts, in our opinion cross examination has not been asked by the assessee at all as there is no information that has been parted by the purchasers which is against the assessee and has been used in order to make additions in the hands of the assessee. The principles of cross examination has been analysed in great detail by *Hon'ble Supreme Court* in case of *Andaman Timbers* reported in (2015) 62 *taxmann.com* 3. *Hon'ble Supreme Court* has observed that when a statement has been recorded of a third party which is against the assessee and has been used against the assessee without granting an opportunity to cross examine by the assessee amounts to violation of principles of natural justice. This basic requirement of law is not satisfied in the present facts of the case. Therefore in our opinion, cross examination of the three purchasers need not be *suomoto* granted by the assessing officer

in the present facts of the case even though assessee never asked for it.

We accordingly, reject this proposition also raised by the assessee.

Based on the above discussion, we do not find any infirmity in the assessment being reopened u/s. 148 of the act and the objections raised by assessee does not satisfy the required criterias in the present facts of the case.

Accordingly, ground nos. 3 to 6 raised by assessee stands dismissed.

5. Now on merits of the case, in **Ground no. 7**, the assessee is raising an issue of treatment of the transaction of the shares to be non-genuine in the hands of the assessee.

5.1. Facts of the issue are that the assessee had entered into an agreement to sell on 08/02/2011 with Chemsworth Pvt. Ltd and Bioworth India Pvt. Ltd. for sale of lands for a total sale consideration of RS.270 Crores. As per this sale agreement, the sale consideration is to be paid as under:

- i. Rs. 50,00,000/- paid on 08.02.2011 vide cheque no. 465716 drawn on Canara Bank, Tumkur Road Branch, Bangalore.
- ii. Rs. 41,00,000/- to be payable on or before 11.03.2011.
- iii. and the balance sale consideration is to be paid on 23.03.2011.

Copy of the agreement to sell is enclosed in the Paper book filed before us at page 12-43, which is kept on record.

5.2. Subsequently on 10/03/2011, a Security agreement was executed among the aforesaid parties as per which, the securities were granted to the assessee towards advance consideration for purchase of lands the details of which are as under:

- a) Preference Shares of M/s. Kemwell Biopharma Private Limited, held in the name of M/s. Chemsworth Private Limited, 10,00,000 Fully paid – up Shares of Rs. 100/- each amounting to Rs. 10,00,00,000/-(Rupees Ten Crores only), bearing Distinctive Nos. 2001 to 10,02,000, Registered Folio No. 01 Share Certificate No. P/010:
- b) Preference Shares of M/s. Kemwell Biopharma Private Limited, held in the name of M/s. Chemsworth Private Limited, 10,00,000 Fully paid – up Shares of Rs. 100/- each, amounting to Rs. 10,00,00,000/- (Rupees Ten Crores only), bearing Distinctive Nos. 10,02,001 to 20,02,000, Registered Folio No. 01, Share Certificate No. P/011;
- c) Preference Shares of M/s. Kemwell Biopharma Private Limited, held in the name of M/s. Bioworth India Private Limited, 10,00,000 Fully paid – up Shares of Rs. 100/- each, amounting to Rs. 10,00,00,000/- (Rupees Ten Crores only), bearing Distinctive Nos. 22,00,001 to

32,00,000, Registered Folio No. 02, Share Certificate No. P/008;

d) Preference Shares of M/s. Kemwell Biopharma Private Limited, held in the name of M/s. Bioworth India Private Limited, 10,00,000 Fully paid – up Shares of Rs. 100/- each, amounting to Rs. 10,00,00,000/- (Rupees Ten Crores only), bearing Distinctive Nos. 32,00,001 to 42,00,000, Registered Folio No. 02, Share Certificate No. P/009;

Copy of the security agreement is enclosed in the paper book at page 44-55, which is kept on record.

5.3. The assessee thus received following advances towards sale consideration of lands till 23/03/2011.

DATE	MODE OF RECEIPTS/PAYMENTS	AMOUNT
08/02/2011	RECD ADVANCE VIDE CHQ NO. 465716	50,00,000/-
10/03/2011	RECD PREF SHARES OF KEMWELL BIO PHARMAPVT LTD	40,00,00,000/-
11/03/2011	RECD ADVANCE VIDE CHQ NO. 557610	50,00,000/-
23/03/2011	RECD ADVANCE VIDE CHQ NO. 557614	39,50,000/-
	TOTAL ADVANCES RECEIVED	41,39,50,000/-

5.4. As the entire sale consideration could not be paid by those two companies with in the specified date as per the Agreement to sell dated 08/02/2011, a memorandum of cancellation of sale agreement was executed on 28/03/2011 as per which, the

agreement to sell dated 08/02/2011 got terminated. A copy of the Cancellation Memorandum is enclosed at page 56-63 of the Paper book. At page 3 of this memorandum, it is stated that the assessee had forfeited 40 crores being the advance of Rs. 20 crores each by the purchasers for non performance of the Sale agreement and refunded the balance advances received to the tune of Rs. 1,39,50,000/- to the purchasers. (41,39,50,000 – 40,00,00,000)

5.5. Thus, by virtue of the termination of the sale agreement, the assessee acquired 40,00,000 at 6% non-convertible preference shares of M/s Kemwell Biopharma Private Limited in the month of march relevant to FY 2011-12. These shares were duly accounted in the books of the assessee for the FY 2011-12 and shown as Preference shares account in schedule 6 to the Balance Sheet. A copy of the audited financial statements of the assessee for AY 2011-12 is enclosed at pages 64-69 of the paper book, which is kept on record.

5.6. During the financial year relevant to assessment year under consideration, need of money for repayment of loan creditors and for other business reasons arose and the assessee sold 7,00,000 shares out of 40,00,000 shares for Rs. 7 Crores to the following purchasers:

1) New Edge Realtors Pvt Ltd	Rs. 3,00,00,000/-
2) Swift Residency Pvt Ltd	Rs. 3,00,00,000/-
3) Rootatar Builders Pvt Ltd	Rs. 1,00,00,000/-

	Rs. 7,00,00,000/-

5.7. The purchasers of the shares and payment received from them have been dis-believed by the authorities below. It is submitted by the Ld.AR that the authorities below assumed that the assessee paid cash to these companies and that in turn these companies made payment through banking channels.

5.8 The above conclusions are sought to be drawn by the lower authorities for the following reasons:

- a) In respect of these 3 companies there is no evidence of any operation / activities.
- b) The financial strength of the companies are not strong enough to enable to pay such huge money.
- c) As per the mail ID given these companies are said to belong to Banka family and Banka family is found to be accommodation entry provider.
- d) The verification of bank statements of these Companies shows that there are several deposits via RTGS in the bank accounts immediately before the payment was made to appellant.
- e) That on the address mentioned of these 3 companies there are thousands of companies on the same address.

- f) That these companies were issued summons u/s. 131 of the Act and they have sent reply in Tapal rather than sending replies by e-mail.

5.9 He submitted that none of the above conclusions are based on any evidences and intact some of the conclusions drawn are in gross violation of principles of natural justice.

5.10. The Ld.AR submitted that the Assessee sold Preference Shares of Kemwell Biopharma Pvt. Ltd. which has robust business turnover of over Rs.100 Crs. and profit before tax of Rs.16 crores. It is not a defunct/suitcase/shell company. It is submitted that the assessee had also received dividend of Rs.15,78,082/- on preference shares during the financial year relevant to year under appeal which was claimed exempt u/s 10(34) of the Act. A copy of the financial statements of Kemwell Biopharma Pvt. Ltd. for the financial year 2010-11 relevant to AY 2011-12 are enclosed at pages 70-108 of the paper book which is kept on record.

5.11. The Ld.AR submitted that in course of assessment proceedings, in response to the summons issued by the Ld.AO, all the 3 purchasers filed letters confirming the transaction of purchase of shares. All the 3 purchasers also enclosed the copies of the sale bills, ledger extract of the assessee in the books of the purchasers and copies of the bank statements showing the payments made for the purchases. All the 3 purchasers had also enclosed the copy of financial statements for the year under consideration. The copies of details filed by the 3 companies

along with the annexure are available at Page nos. 106 to 123 of the paper book filed, which is kept on record.

5.12. It is submitted that the bank statements of these 3 companies clearly show that, the purchasers had sufficient funds at their disposal for the purchase of shares. The bank statements of the Purchasers had several bank transactions and the bank statement clearly shows that these companies had operational activities. It is submitted by the Ld.AR that the objection of the Assessing Officer regarding several RTGS credits in the purchaser's bank account prior to payment to assessee, infact, strongly supports the case of the assessee. It is further submitted that, the balance sheets of these companies show that the purchasers had sufficient financial strength to make the payment for purchase of these shares. The networth of these companies are as under:

NAME OF THE COMPANY	SHAREHOLDERS FUNDS (SHARE CAPITAL + RESERVES & SURPLUS)	RELEVANT PAGE NO. OF PAPER BOOK FILED
1.NEWEDGE REALTORS PVT LTD	29,97,00,604/-	128
2.ROOTSTAR BUILDERS PRIVATE LIMITED	21,83,01,898/-	142
3. SWIFT RESIDENCY PRIVATE LIMITED	9,45,00,930/-	155

5.13. It is also submitted that the shares of Kemwell Bio Pharma Pvt. Ltd. purchased from the assessee were duly accounted in the books of accounts of the purchasers and shown in schedule to non-current investments. (page nos. 137,150 and 163 of the paper book filed)

5.14 He submitted that merely stating that there are thousands of companies in the same address without any facts or without any detail whatsoever cannot be a reason for concluding that these buyers companies are non-genuine. It is not known as to what was verified by whom and what was the result of the search at Google. In fact, no such names of companies are stated by the Assessing Officer in the assessment order. Merely making a blind statement about thousands of companies being on the same address would not serve any purpose.

5.15 The fact of filing of the response in Tapal and not filing by e-mail is not a violation of law. The replies have been officially filed and the assessing Officer has not shown any fault or mistake in the replies filed by the buyers. Despite the non-appearance of these parties, the Assessing Officer had all the rights in law to make further enquiries with these companies, which was not done.

5.16. Based on the above facts, the Ld.AR submitted that it is not known as to how it is concluded by the authorities below that the buyers are related to alleged Banka family, who are supposed to be entry providers. Further it is submitted that, it is not known as to how the authorities below deduced that even if the alleged Banka family is entry provider and that the transactions by these 3 purchasers are also case of entry provided through Banka family. The assessee firm or its partners do not know Banka family and had no transactions with them. The AO has not accorded any opportunity of cross examining the persons on

whose statements he relied despite the assessee's written request made.

5.17 The Id. A.R. submitted that not allowing of cross examining the witness by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity, as expressed by the Hon'ble Calcutta High Court in the case of Eastern Commercial Enterprises Z10 ITR 103 (Cal), wherein it was held that it is a trite law that cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against the party unless the party is put on notice of the case made out against him. Therefore, the addition made by the assessing officer based on the statement of an alleged entry operator is not sustainable in law, as the Assessing Officer did not provide an opportunity to the appellant to cross examine such statement.

5.18. The Ld.AR submitted that the Ld.AO has also not brought on record any corroborative material or evidence to prove that the assessee had unaccounted cash and that such unaccounted cash was given to these 3 buyers and they in turn made the payments by banking channels. He submitted that all these are only fallacious assumptions and addition cannot be made on the basis of conjectures or surmises.

5.19. The Ld.AR submitted that the assumption made by the Assessing Officer that the assessee had given cash to receive cheque would mean that the assessee had parted with valuable

shares and cash also. There is no reason for the assessee to depart with a valuable asset (Pref. shares) as well as cash while taking only the asset's worth by cheque. The AO has not taken cognizance of this fact.

5.20. It is submitted that even as for alleged cash payment there is no evidence of any cash trail found by the Ld.AO/Ld.CIT(A), to the purchasers being the alleged entry providers. There is no iota of any evidence or any adverse material or information against the assessee of having seized with huge cash in order to treat the sale transaction by the assessee to be not genuine.

5.21 In any case, he submitted that it is not known as to in whose case the investigation was done by the department, what were the results of action taken and who gave the statements if any and what were the contents of statement and how and where the name of the appellant got connected to the investigation. In the absence of all such details it is erroneous to link the names of the buyer as also the name of assessee to suggest that transaction is sham/dubious.

5.22 The ld. A.R. submitted that the learned CIT(A) at page nos. 8 to 23 of the appellate order reproduced the Written submission filed by the assessee and then relied upon various case laws with respect to penny stocks and confirmed the addition made by the Assessing officer. There is absolutely no evidence for rigging of prices of shares of Kemwell Biopharma Pvt Ltd. The assessee had furnished the financial statements of the Kemwell Biopharma Pvt ltd which clearly shows the financial stability of the

company. None of the case laws quoted in the appellate order are applicable to the facts of the case.

5.23 He submitted that Sec 68 of the I.T. Act casts initial burden on the Taxpayer. In a case where some credits appear in the books of the assessee, the assessee is required to prove the identity of the payer, genuineness of the transaction and the capacity of the payer to pay the amount. In this case the assessee has clearly identified the buyers and also proved the capacity of the buyers to pay the money and the transaction being of purchase and sale of share was totally genuine. The AO/CIT(A) has not pointed out any deficiency in the documents furnished by the buyers or any weakness in the explanation offered by the buyers. In this case, the addition u/s 68 is made merely on the basis of suspicion and assumption. There is no evidence what so ever to prove the transaction as non-genuine or sham, In fact, the relevant material gathered from the investigation wing is not brought on record nor is the report shared with the assessee. He submitted that the addition if any has to be made only by adducing evidence of definite character. The addition cannot be made only on some circumstances which might create some suspicion (Krishnan and Agnihotri v/s State of Madhya Pradesh 1SCC (816) (SC)).

5.24 The ld. A.R. further submitted that again, the Honourable Supreme court in the case of Omar Sanjay Mohamad Seth v/s CIT 37 (ITR) 151 had held that no addition can be made on the basis of surmises, conjectures or suspicion. The Honourable Supreme court in the case of Umacharan Shah v/s CIT 37 (ITR) 271 held that however strong the suspicion be, it cannot take the

space of evidence. The assessee has duly and fully explained the nature and source of the receipt of sale consideration on sale of Preference shares. The identity of the buyer genuineness of the transactions and credit worthiness of the buyers have been fully proved. The relevant case laws in this regard are available at page nos. 279 to 363 of the Compilation of case laws filed. The assessee is required to prove the source of credit received in his books and as per the law then prevailing the appellant was not required to prove the source of source. (Amendment brought into statute with effect from 01.04.2013) The case laws to the effect that source of source need not be proved are available at page nos. 364 to 391 of the compilation of case laws filed. In any case, the buyer of the shares have duly responded to the summons issued and had furnished all the information called for and also confirmed the fact of payment further fortifies the genuineness of the transactions. The buyer companies are identifiable corporate entities duly registered under Companies Act. These companies have authentic bank account. These companies have PAN Nos. and they are regular tax payers.

5.25 The Id. A.R. submitted that the assessee has discharged the onus of proving the transaction and establishing the identity and genuineness of the buyer of the Preference Shares. Therefore, if- at all the Assessing Authority had any doubt he could have made further enquiry on the buyer's investors. In any case, the Assessing Officer could have verified with the respective AOs of the buyers as per law and procedure laid down by Hon'ble Gujarat High Court in the case of CIT v. Ranchod Jivabhainakhava (ITA 50

of 2011 (Guj.), judgment of *Hon'ble Supreme Court* in the case of *ORRISSA CORPORATION LTD.* reported in 159 ITR 78 and of *Hon'ble ITAT, Ahmedabad* in the Case of *ROHINI BUILDERS* reported in 76 TTJ 521.

5.26 He also relied on the judgement of Hon'ble' High Court of Delhi in the case of CIT v/s. Staler Investment Ltd 192 ITR 287 wherein held as under:

"...if it be assumed that the subscribers to the increased share capital were not genuine even then under no circumstances could the amount of share capital be regarded as undisclosed income of the assessee. It may be there were some bogus shareholders, and the money may have been provided by some other persons. It would have been more sensible to re-open the assessments of the person alleged to have advanced the money. How this amount of increased share capital could be assessed in the hands of the company itself was beyond understanding.

Though the above cases were with reference to Share capital investment, the principle is equally applicable to the case of the assessee.

5.27. The ld. A.R. submitted that the assessee has conclusively proved with documentary evidence that it has actually sold the shares and had received the amount through proper banking channel. There is no unexplained credit at all and the provisions of sec. 68 of I.T. Act, 1961 are not applicable to the case of assessee. In view of the above submissions the assessee prayed that the additions as made/confirmed be deleted in the interest of justice and equity.

6. On the contrary, the Ld. DR relied on the view taken by the Ld.CIT(A) and placed reliance on the decision of *Hon'ble Supreme Court* in case of *NDR Promoters Ltd. (supra)* and submitted that

the transactions are considered not genuine on the following reasons:

- a. There is no evidence of operational activity to prove the financial strength of the purchasers of the shares.
- b. Online verification of the financials of the purchasing companies shows that they do not have the wherewithal to purchase the shares by paying such huge consideration.
- c. The evidentiary value of payment through RTGS cannot make a non genuine transaction, a genuine one.
- d. Even if it is argued that the creditors are holding companies/non banking Finance Cos., there is no evidence that they have in turn received finances from credit worthy sources.
- e. On verification of the Bank account statement, it is noticed that there is a regular pattern of Deposits by way of cheques/RTGS to the accounts of the above 3 companies followed by payments to parties including the assessee.
- f. During scrutiny proceedings, it was submitted that the assessee purchased back the preference shares from the 3 companies after 2 years.
- g. As per PAN Database, the mail ids given for M/s. Newedge Realtors pvt Ltd. & M/s. Rootstar Builders Pvt. Ltd. Is **MBBANKA@SIFY.COM** Banka family is found to be accommodation entry provider.
- h. On verification from Google, it is noticed that in the address of each of the purchasing companies there are thousands of companies with the same address. No genuine and

worthwhile company will co-habit with thousands of other companies.

- i. The 3 companies could have replied by mail by the appointed date of 13.12.2019 but preferred to send their replies through messenger to this office, after the assessee had become aware of the inquiry.

7. We have perused the submissions advanced by both sides in the light of records placed before us.

7.1. Admittedly, the shares sold by assessee are the preference shares which are not listed. The addition has been made in the hands of the assessee by holding that the purchaser being M/s. Newedge Realtors Pvt. Ltd. are engaged in providing accommodation entries. The assessee had sold the preference shares held by it in M/s. Kemwell Biopharma Pvt. Ltd. to three parties being M/s. Newedge Realtors Pvt. Ltd., M/s. Swift Residency Pvt. Ltd. and M/s. Rootstar Builders Pvt. Ltd. The Ld.AO has information only in respect of M/s. Newedge Realtors Pvt. Ltd. and not against the other two purchasers however the purchasers are held to be no genuine for various reasons as mentioned in para 8 of the assessment order.

7.2. The addition of Rs.7 crores has been made in the hands of the assessee u/s.68 of the act on such finding in case of the purchasers. It is not the case of the Ld.AO that assessee has received the above monies in cash which was not disclosed in the return of income. We note that the details of the payment made by the three purchasers who are allegedly held to be

accommodation entry providers have made the payment to the assessee in cheque which has been disclosed entirely by the assessee in its return of income under the head, short term capital loss on sale of other assets. It is submitted that section 68 of the act can be invoked only in respect of cash credits which has not been satisfactorily explained by the assessee.

7.3. It is contended by the Ld.AR that assuming the 3 companies being accommodation entry providers, who purchases the preference share of M/s. Kemwell Biopharma Pvt. Ltd. from assessee, cannot be a reason to make addition in the hands of the assessee u/s.68 of the act. However, the three ingredients u/s. 68 has should be considered in order to make addition u/s. 68 of the act the hands of the assessee. We note that confirmations from the three purchasers was furnished before the Ld.AO by the purchasers itself. Further on perusal of the details filed by the assessee in the form of the financial statements and the books of accounts of the assessee, the assessee earned capital loss not because of difference in the value of the shares sold. In fact, we note that the shares could be sold only at face value, as these were redeemable, non convertible, non participative preference shares.

7.4. It is a settled legal preposition that a claim which is supported by evidences cannot be denied by an assessing officer unless and until contrary evidences are brought on record. It is not the case of the Ld.AO that the claim made by the assessee false, fabricated and bogus. It is also not the case established by the Ld.AO that the sale transaction by the assessee is an off

market transaction. In fact, the observation of Ld.AO in para 8(reproduced herein above) does not in any manner lead to a conclusion that the sale transaction by the assessee is a colourable device in order to earn capital loss. It is also a settled law that, suspicion, however strong cannot take place of legal proof. There is no iota of circumstantial evidence with the authorities below in order to take assistance of the ratio laid down in case of *NDR Promoters (supra)* by *Hon'ble Supreme Court*.

7.5. We therefore agree with the Ld.AR that the sale carried out by the assessee cannot be looked into from the angle of tax evasion. Further the assessee has established the purchase of the shares and during the year 2011 and therefore cannot be categorised as make-believe transaction. Even we do not find any evidence brought on record by the Ld.AO that could establish an intention to earn loss and to reduce any huge profits. In fact we note that the loss was due to the proportionate stamp duty that was paid on purchase of shares that formed part of the cost of shares.

7.6. We note that the Ld.AO has not questioned that the purchasers were short of creditworthiness, genuineness of the transaction and identity. Even the purchasers have responded to the notice issued under section 133(6) of the Act. Thus the identity, creditworthiness and genuineness of the transaction has been established by the assessee.

7.7 At this point, we also find important to refer the provisions of section 68 of the Act which reads as under:

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the-Assessing Officer satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

- (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
- (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*

Provided further that nothing contained in the first proviso shall apply if (he person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.

7.8 From the above, we note that the provisions of section 68 of the Act can be attracted where there is a credit found in the books of accounts and the assessee failed to offer any explanation or the offer made by the assessee is not satisfactory in the opinion of the assessing officer. The assessee has explained to the authorities below that the impugned amount represents the sale of 7 lakhs shares out of 40 lakh shares for Rs.7 crores, which cannot be disputed by authorities below without bringing contrary evidence on record Thus, in our considered view, the impugned amount cannot be treated as unexplained cash credit under section 68 of the Act merely on the ground of suspicion.

7.9 We also note that the provisions of section 68 of the Act cannot be applied in relation to the sales receipt of preference shares shown by the assessee in its books of accounts. It is

because the sales receipt has already been shown in the books of accounts as income/loss at the time of sale only.

7.10 We are also aware of the fact that there is no iota of evidence having any adverse remark on the purchase of shares shown by the assessee in the books of accounts. Once the purchase/transfer of shares have been accepted in the relevant assessment year, then the corresponding sales cannot be disturbed without giving any conclusive evidence/finding. We therefore do not find any merit in the reasoning by the Ld.AO as well as by Id. CIT(A) in their orders to make addition made in the hands of the assessee under section 68 of the Act. On our view the addition made deserves to be deleted.

Accordingly, ground no. 7 raised by assessee stands partly allowed

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 16th November, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 16th November, 2023.
/MS /VG/SPSs

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore