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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 29.07.2020

+ **I.T.A. 203/2020 & C.Ms. 16898/2020 and 16899/2020**

SANJAY KAUL

..... Appellant

Through: Mr. Deepak Kapoor and Mr. Saurabh
Soni, Advocates.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX
DELHI-8, NEW DELHI

..... Respondent

Through: Mr. Kunal Sharma, Senior Standing
Counsel with Ms. Zehra Khan,
Advocate for the Revenue.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 260-A of the Income Tax Act, 1961 ('the Act') is directed against the order dated 07.01.2020 ('impugned order') passed by the Income Tax Appellate Tribunal ('ITAT'), Bench-G, New Delhi in ITA No. 1593/Del/2019 for the Assessment Year ('AY') 2015-16 whereby the appeal of the Appellant- assessee has been dismissed and consequently the order of CIT(A) has been upheld.

2. Briefly stated the facts of the present case are that the Assessee filed its original Income-tax return on 30.09.2015 declaring total income of

Rs.3,12,59,350/- for the assessment year in question. During the previous year 2014-15 relevant to the AY 2015-16, appellant earned long-term capital gain ('LTCG') of Rs.4,15,67,925/- on sale of shares in unlisted companies. The appellant further incurred short-term capital loss ('STCL') of Rs. 1,57,23,872/- out of which a sum of Rs.1,22,76,352/- related to purchase and sale of the shares of following three listed companies:

<i>S.No.</i>	<i>Description</i>	<i>STCL (Rs.)</i>
<i>1.</i>	<i>Cressanda Solutions Ltd.</i>	<i>24,66,430</i>
<i>2.</i>	<i>Kailash Auto Finance Ltd.</i>	<i>42,52,805</i>
<i>3.</i>	<i>Matra Kaushal Enterprises Ltd. ('MKEL')</i>	<i>55,55,067</i>
	<i>Total</i>	<i>1,22,76,352</i>

3. The AO framed the assessment order dated 27.12.2017 under section 143(3) of the Act, making an addition of Rs.1,22,76,352/- under Section 68 read with 115BBE and Rs.3,06,908/- under section 69C of the Act, disallowing the STCL claimed as set off under Section 70 of the Act, in the computation of income on the ground that it was bogus. Aggrieved by the said order, the appellant filed first appeal under Section 246A of the Act before the CIT(A). Vide order dated 14.01.2019, the said appeal of the appellant was dismissed and the additions made under Section 68 and 69C of the Act were confirmed. In further appeal, the ITAT confirmed the order of the CIT(A) and rejected the appeal of the Assessee. The ITAT, while dismissing the appeal, agreed with the contention of the assessee that addition for STCL cannot be made under Section 68 of the Act. However, it also observed that mentioning of

wrong section in the assessment order would not render the entire assessment as null and void as the AO has correctly acquired jurisdiction over the case.

4. Before us, Mr. Deepak Kapoor, learned counsel appearing on behalf of the appellant impugns the aforesaid order by arguing that ITAT has committed a grave error having failed to take into consideration that transactions related to shares of aforementioned three listed companies, were carried through its registered share broker-M/s. Elite Wealth Advisors Ltd., on Bombay Stock Exchange, which is a recognised stock exchange. He argues that there was no possibility of any nexus between buying and selling brokers since the appellant carried out transactions through a registered broker. Learned counsel further argues that the assessee has discharged the onus and substantiated STCL arising out of sale transactions of the aforementioned three companies by sufficient documentary evidence produced before the AO, CIT(A) and the ITAT. None of the documents produced were rebutted or contradicted by the authorities. The appellant has discharged the onus and substantiated STCL and in these circumstances the additions are not sustainable. Once the ITAT held that Section 68 is not applicable, since it was a case of cash debit and not cash credit, the burden of proof was on the revenue to sustain the addition by leading cogent evidence. The income-tax department failed to gather and produce any credible material in support of treatment of STCL as bogus and therefore, the order of ITAT upholding the additions is unsustainable.

5. We have given due deliberation to the contentions of the Appellant, however, we find that no substantial question of law arises for our consideration to entertain the present appeal.

6. The assessee, in the income-tax return, set off STCL of Rs.1,22,76,352/-, relating to sale of shares of three companies. This was disallowed by the AO holding the same as part of accommodation entry business of providing bogus long-term/short-term capital loss. The AO relied upon the report of the Deputy Director of Income-tax (Investigation), Unit – 2(3), Kolkata wherein the general practice followed by the companies, brokers and operators for providing LTCG/STCL to beneficiaries has been explained. The involvement of the assessee in the entire chain of generating bogus entries of long-term capital gain/loss were taken into consideration. The AO concluded that the assessee was not a regular investor in shares and had invested only in high risk stocks which during investigation were found to be obscure companies with no business activity or asset and were identified as ‘Penny Stocks’. The AO concluded that the assessee had entered into a sham transaction with full knowledge so as to convert unaccounted money into accounted money in the guise of capital loss. Further, the evidence in the nature of testimonies of person in-charge with the management and control of the aforementioned Penny Stock companies were also taken into account. This evidence forms the basis for the Assessing Officer to conclude that the STCL claimed by the assessee was not genuine or market driven but was a pre-arranged transaction noted in the accounts of the assessee in lieu of unaccounted cash. Although the AO and CIT (A) treated the capital loss as an unexplained entry under Section 68 of the Act, the ITAT held that said provision is not attracted. However, ITAT still sustained the additions observing that STCL should be disallowed as the same has resulted from bogus transactions. This finding of fact is based taking into consideration the entire evidence on record and also the views expressed by this Court in the case of *Suman Poddar v. Income Tax Officer, ITA No.*

841/2019. The relevant portion of the impugned order is extracted hereinbelow:

“4.7 The first, issue which has been raised by the assessee that it has not been confronted with the statements of various parties relied upon by the Assessing Officer. The assessee has also contended that opportunity of cross-examining those parties/persons was not provided to the assessee. According to the assessee, this resulted in the violation of the principle of natural justice and thus assessment should be held void ab initio. However, in our opinion, not providing opportunity of cross-examination may be in the nature of irregularity which is curable but not an illegality leading to annulling of the assessment. Further, the Id. CIT(A) in Para 4.1 of the impugned order has held that addition has not been made solely on the basis of the statement of those persons/parties. The relevant part of the order of Ld. CIT(A) is reproduced as under:

"4.1 I have considered the submission of the appellant and observation of the AO made in the assessment order on the issue. The appellant has stated that it has not been allowed cross-examination of parties on the basis of whose statement, the addition has been made. On this issue it is observed from the assessment record that the AO has made the addition on the strength of independent analysis of the documents to arrive at the conclusion that the appellant has failed to prove genuineness of the transaction in respect of STCL as discussed above. Statements and other material found in the course of investigation has been used by him as a corroborative material to strengthen his findings. As per the requirement of section 68 of the Act, the AO has shifted the onus back on the appellant by confronting the adverse findings. Therefore, the appellant has failed to discharge the onus cast upon it u/s 68 of the Act to explain the transaction. The Investigation Wing has conducted detailed enquiries, made analysis of the seized / impounded documents and made analysis of beneficiaries. The report prepared contains details of complete modus operandi, commission charged against accommodation

entries, list of conduit companies, list of their bank accounts in the name of conduits. The said list contains names of companies in which the appellant dealt. Therefore, the findings in the case of Investigation wing corroborate the independent findings of the AO. Therefore, the AO was not required to allow the appellant the opportunity to cross-examine."

4.8 *The Tribunal in the case of Ram Niwas Gupta, Dehradun Vs DCIT, Dehradun on 6th February, 2019 in ITA No.4881 to 4883/Del/2016 (Assessment Years: 2010-11, 2012-13 and 2013-14), after considering various decisions of the Hon'ble Supreme Court, including the decision in the case Andaman Timbers Industries Vs Commissioner of Central excise, Kolkata -II reported in 2015 (324) E.L.T. 641 (SC), 2017 (50) S.T.R. 93 (SC), 2016 (15) SCC 785 has held as under:*

"105. In our opinion right to cross-examine the witness who made adverse report, is not an invariable attribute of the requirement of the dictum, "audi alteram partem". The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence, and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.

However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee.

But this rule is not applicable where the material or evidence used is of Collateral Nature."

4.9 *We find that the Assessing Officer in the assessment order has referred to the general modus operandi of the bogus accommodation entry and thereafter, he has further referred to statement of the parties who has provided accommodation entry through managing and controlling the shares of the companies, in which the assessee has also transacted. The Assessing Officer thereafter asked the assessee to justify the rationale behind investment in these penny stock companies not having financial worth, however, the assessee failed to justify the same. The Assessing Officer provided as why the investment in the shares transacted by the assessee was not justified in view of the comparison of the other shares available. The Assessing Officer also pointed out the price fluctuation in the shares of the companies over a period, dividend history and other financial parameters to substantiate that there was no financial logic for investment in the company except for claim of bogus short-term capital loss against receipt of cash money. The Ld. Assessing Officer accordingly concluded that the addition was made on the basis of the material available on record, the surrounding circumstances, the human conduct and preponderance of probabilities.*

4.10 *In view of the above facts and circumstances and in law, we find that in instant case addition in dispute is not solely on the basis of the statement of the persons and the Assessing Officer has relied on other materials. The statements of the persons who controlled the business of providing accommodation entry have been corroborated with the material, surround circumstances and preponderance of probability. We accordingly uphold the finding of the CIT(A) on that issue in dispute. The relevant grounds of the appeal of the assessee are accordingly rejected.*

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5.1 After describing the general modus operandi of accommodation entry by way of bogus capital gain/loss, the Assessing Officer has highlighted the statement of the persons who claimed to have provided bogus capital gain/loss entries. The assessee was then asked to justify the investment in the relevant shares. The Assessing Officer has pointed out that these companies are not having any significant/real business as seen from the financial statement of those companies. The price movement of the shares was also found to be unrealistic by him. The Assessing Officer has particularly pointed out that price movement of the relevant shares transacted by the assessee, were not matching with movement of the share market in general and movement of the other scrips in the same line of the business. The Assessing Officer also pointed out that volume transacted in those script was also very low. There was no history of dividend payout by those companies. The ld. Assessing Officer has pointed out that the assessee could not explain, why it invested in such script without knowing the financial performance of the company. The relevant analysis has been reproduced by the Assessing Officer in Para 3.4 (Page-1 J.) of the assessment order. The conclusion of AO has already been reproduced by us in brief facts of the case.

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5.4 The Hon'ble Delhi High Court in the case of Suman Poddar (supra), observed that Shares of Cressanda Solutions Ltd. have been identified by the Bombay Stock Exchange as penny stock used for obtaining bogus Long Term Capital gain and no evidence of actual sale except contract notes issued by the share broker were produced by the assessee. The Hon'ble High Court accordingly dismissed the appeal of the assessee as no substantial question of law involved.

"7. Thus, Tribunal has in depth analyzed balance sheets and profit And loss accounts of Cressanda Solutions Ltd. which shows that astronomical increase in share price of said company which led to returns of 491% for Appellant, was completely unjustified. Pertinently, EPS of said company was Rs. 0.01/- as in March 2016, it was

Rs. - 0.01/- as in March 2015 and -0.48/- as in March 2014. Similarly, other financial parameters of said company cannot justify price in excess of Rs. 500/- at which Appellant claims to have sold said shares to obtain Long Terms Capital Gains. It is not explained as to why anyone would purchase said shares at such high price.

Tribunal goes on to observe in impugned order as follows:

10. With such financials and affairs of business, purchase of share of face value Rs. 10/- at rate of Rs.491/- by any person and assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make decision of judicial authorities fallacy.

11. Evidences put forth by Revenue regarding entry operation fairly leads to conclusion that assessee is one of beneficiaries of accommodation entry receipts in form of long term capital

gains. assessee has failed to prove that share transactions are genuine and <http://itatonline.org> could not furnish evidences regarding sale of shares except copies of ITA 841/2019 Page 7 of 10 contract notes, cheques received against overwhelming evidences collected by Revenue regarding operation. of entire affairs of assessee. This cannot be case of intelligent investment or simple and straight case of tax planning to gain benefit of longterm capital gains. earnings @491% over period of 5 months is beyond human probability and defies business logic of any business enterprise dealing with share transactions. net worth of company is not known to assessee. Even brokers who coordinated transactions were also unknown to assessee. All these facts give credence to unreliability of entire transaction of shares giving rise to such capital gains. ratio laid down by Hon'ble Supreme Court in case of Sumati Dayal vs. CIT, 214 ITR 801 is squarely applicable to case. Though assessee has received amounts by way of

account payee cheques, transactions cannot be treated as genuine in presence of overwhelming evidences put forward by Revenue. fact that in spite of earning such steep profits, assessee never ventured to involve himself in any other transaction which broker cannot be mere coincidence of lack of interest. Reliance is place on judgment in case of Nipun Builders and Developers Pvt. Ltd. (supra), where it was held that it is duty of Tribunal to scratch surface and probe documentary evidence in depth, in light of conduct of assessee and other surrounding circumstances in order to see whether assessee is liable to provisions of section 68 or not. In case of NR Portfolio, it was held that genuineness and credibility are deeper and obtusive. Similarly, bank statements provided by assessee to prove genuineness of transactions cannot be considered in view of judgment of Hon'ble court in case of Pratham Telecom India Pvt. Ltd., wherein, it was stated that bank statement is not sufficient enough to discharge burden. Regarding failure to accord opportunity of cross examination, we rely on judgment of Prem Castings Pvt. Ltd. Similarly, Tribunal in case of Udit Kalra, ITA No. 6717/Del/2017 for assessment year 2014-15 has categorically held that when there was specific confirmation with Revenue that assessee has indulged in ITA 841/2019 Page 8 of 10 non-genuine and bogus capital gains obtained from transactions of purchase and sale of shares, it can be good reason to treat transactions as bogus. differences of case of Udit Kalra attempted by Ld. AR does not add any credence to justify transactions. Investigation Wing has also conducted enquiries which proved that assessee is also one of beneficiaries of transactions entered by Companies through multiple layering of transactions and entries provided. Even BSE listed this company as being used for generating bogus LTCG. On facts of case and judicial pronouncements will give rise to only conclusion that entire activities of assessee is colourable device to obtain bogus capital gains. Hon'ble High Court of Delhi in case of Udit Kalra, ITA No. 220/2009 held

that company had meager resources and astronomical growth of value of company's shares only excited suspicion of Revenue and hence, treated receipts of sale of shares to be bogus. Hon'ble High Court has also dealt with arguments of assessee that he was denied right of cross examination of individuals whose statements led to enquiry. Id. AR argument that no question of law has been framed in case of Udit Kalra also does not make any tangible difference to decision of this case. Since additions have been confirmed based on enquiries by Revenue, taking into consideration ratio laid down by various High Courts and Hon'ble Supreme Court, our decision is equally applicable to receipts obtained from all three entities. Further, reliance is also placed on orders of various Courts and Tribunals listed below. MK. Rajeshwari vs. ITO in ITA No. 17231Bang/2018, order dated 12.10.2018. Abhimanyu Soin vs. ACIT in ITA No. 951 1/Chd/2016, order dated 18.04.2018. Sanjay Bimalchand Jain vs. ITO 89 taxmann.com 196. Dinesh Kumar Khandelwal, HUF vs. ITO in ITA No. 58 & 591 Nagl2015, order dated 24.08.2016. Ratnakar M Pujari vs. ITO in IT No. 9951Muml2012, order dated 03.08.2016. ITA 841/2019 Page 9 of 10 Disha N. Lalwani vs. ITO in ITA No. 6398 / Mum / 2012, order dated 22.03.2017. ITO vs. Shamin. M Bharwani [20 16] 69 taxmann.com 65. Usha Chandresh Shah Vs ITO in ITA No. 6858 / Mum / 2011, order dated 26.09.2014. CIT vs. Smt. Jasvinder Kaur 357 ITR 638.

12. facts as well as rationale given by Hon'ble High Court are squarely applicable to case before us. Hence, keeping in view overall facts and circumstances of case that profits earned by assessee are part of major scheme of accommodation entries and keeping in view ratio of judgments quoted above, we, hereby decline to interfere in order of Ld. CIT(A). (emphasis supplied)

8. From above extract, it would be seen that Cressanda Solutions Ltd. was in fact identified by Bombay Stock

Exchange as penny stock being used for obtaining bogus Long Term Capital Gain. NO evidence of actual sale except contract notes issued by share broker were produced by assessee. No question of law, therefore arises in present case and consistent finding of fact returned against Appellant are based on evidence on record.”

7. In view of the concurrent factual findings arrived at by the income-tax authorities and with no tenable evidence with the assessee to the contrary, in our opinion, no substantial question of law arises for our consideration. As a result, the present appeal along with the pending applications is dismissed.

SANJEEV NARULA, J

MANMOHAN, J

JULY 29, 2020

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