

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.315/Ind/2012 & 252/Ind/2016

Assessment Years 2008-09 & 2010-11

Smt. Annapurna Maheshwari, 155, Anoop Nagar, Indore (Appellant)	Vs.	ACIT 4(1), Indore (Respondent)
PAN No.ACAPM7243D		

ITA No.53/Ind/2014
Assessment Year 2008-09

Shri Pradeep Maheshwari HUF 155, Anoop Nagar, Indore (Appellant)	Vs.	ACIT 3(1), Indore (Respondent)
PAN No. AAIHP8501M		

Revenue by	Shri P.K. Mitra, Sr.DR
Assessee by	S/Shri Sumit Neema, Sr.Adv & Pankaj Shah,CA
Date of Hearing	15.10.2018
Date of Pronouncement	31.10.2018

ORDER

PER MANISH BORAD, AM.

The above captioned three appeals are filed at the instance of different assessees. ITA No.315/Ind/2012 & ITA No.252/Ind/2016

Annapurna Maheshwari & Pradeep Maheshwari
ITA No.315/Ind/2012, 252/Ind/2016 & 53/Ind/2014

in the case of Smt. Annapurna Maheshwari pertaining to Assessment Year 2008-09 & 2010-11. is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-II (in short 'Ld.CIT(A)'), Indore dated 24.1.2012 & Ld. CIT(A)-22 (holding concurrent jurisdiction of CIT(A), Indore-I dated 11.12.2010 & ITA No.53/Ind/2014 in the case of Shri Pradeep Mahdeshwari HUF relating to Assessment Year 2008-09 Ld. Commissioner of Income Tax (Appeals)-I, Indore dated 23.10.2013 which are arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 30.12.2010 & 15.03.2013 & 28.12.2010 respectively framed by ACIT-4(1) , ITO 4(1) & ACIT-3(1), Indore.

2. The relevant grounds in each three appeals reads as follows;

I.T.A. No.315/Ind/ 2012 in respect of Smt. Annapurna Maheshwari pertaining to Assessment Year 2008-09

1. That the Learned CIT(A) erred in confirming the action of the AO of treating the short term capital gain of Rs. 41,29,512/- taxable u/s 111A @ 10% as income from other sources by holding these transactions as sham and bogus. That on the facts and in the circumstances of the case and in law these transactions are genuine and the treatment of the said transaction by the Assessing Officer is wrong and bad in law and it is prayed that the short term capital gain of Rs.41,29,512/- be accepted as such.

2. That the appellant craves leave to add, to alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of appeal on or before final hearing, if necessity so arises.

I.T.A. No.252/Ind/ 2016 in respect of Smt. Annapurna Maheshwari pertaining to Assessment Year 2010-11

1. That the Learned CIT (A) erred in upholding the action of the AO of treating and adding short term capital gain offered of Rs.28,31,383/- as Income from undisclosed sources. That on the facts and in the circumstances of the case and in law, the said treatment/addition is wrong and it is prayed that the short term capital gain be accepted as such.

2. That the Learned CIT(A) erred in treating short term capital gain offered of Rs.2,49,406/- as trading profit. That on the facts and in the circumstances of the case and in law, the said treatment/addition is wrong and it is prayed that the short term capital gain be accepted as such.

3. That the appellant craves leave to add, to alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of appeal on or before final hearing, if necessity so arises.

I.T.A. No.53/Ind/2014 in respect Shri Pradeep Maheshwari HUF, pertaining to Assessment Year 2008-09

1. That the Learned CIT(A) erred in confirming the action of the AO of treating the short term capital gain of Rs. 23,80,747/- taxable u/s IIIA @ 10% as unexplained credits u/s 68 by holding these transactions as sham and bogus. That on the facts and in the circumstances of the case and in law these transactions are genuine and the treatment of the said transaction by the Assessing Officer as sham and bogus is wrong, bad in law and the addition made u/s 68 is patently wrong and it is prayed that the addition may-very kindly be deleted and the short term capital gain of Rs.23,80,747/- be accepted as such.

2. That the Learned CIT(A) erred in confirming the action of the AO of treating the long term capital gain of Rs. 17,23,052/- claimed exempt u/s 10(38) as unexplained credits u/s 68 by holding these transactions as sham and bogus. That on the facts and in the circumstances of the case and in law these transactions are genuine and the treatment of the said transaction by the Assessing Officer as sham and bogus is wrong, bad in law and the addition made u/s 68 is patently wrong and it is prayed that the addition may very kindly be deleted and the exempt long term capital

gain of Rs.17,23,052/- be accepted as such.

3. That the appellant craves leave to add, to alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of appeal on or before final hearing, if necessity so arises.

3. From perusal of the above grounds we find that the common issue is regarding treating the transaction giving arise to Short Term Capital Gain and Long Term Capital Gain from purchase/sale of shares as bogus and sham and taxing them as unexplained credit u/s 68 of the Act by both the lower authorities. As the issues raised are common these three appeals were heard together and being disposed off by this common order for sake of convenience and brevity.

4. For the purpose of adjudication we will take up the facts of Smt. Annapurna Maheshwari for Assessment Year 2008-09 relating to I.T.A. No.315/Ind/2012 and our decision on the common issue referred above shall be applied on the remaining two appeals to be dealt in forthcoming paragraphs.

5. Brief facts relating to Smt. Annapurna Maheshwari for Assessment Year 2008-09 as culled out from the records are that

the assessee is an individual having regular source of income from salary, house property, capital gain and income from other sources. Income of Rs.46,16,412/- declared in the income tax return submitted on 31.07.2010. Return filed were processed u/s 143(1). Case selected for scrutiny. Statutory notice u/s 143(2) of the Act duly served upon the assessee. While scrutinizing the details the learned Assessing Officer (In short 'Ld.A.O') observed that Short Term Capital Gain of Rs.41,29,512/- has been shown from purchase and sale of equity shares of IFCI Ltd. Contract note for purchase of shares, details of payments made for the purchase, necessary documents evidencing sale of shares and the payments received thereof were filed. Ld.A.O however noticed that there was a significant gap between the date of purchase through contract note and the payments made to the broker. One of the instance he noted was that the contract note dated 19.7.2016 for purchase of 31,000 equity shares of IFCI Ltd @ Rs.8.18 and the amount was Rs.2,86,412/-. The payment for this purchase was made on 4.5.2007 i.e. almost after 10 months, which raised the suspicion in his mind about the genuineness of the purchase transactions. Even though necessary ingredients of genuine purchase were

provided by the assessee but she failed to get any favour from the Ld.A.O, and he treated the alleged Short Long Term Capital Gain at Rs.41,29,512/- as income from other sources and assessed total income of Rs.46,16,410/-.

6. Aggrieved assessee preferred an appeal before Ld.CIT(A) but failed to succeed as the view taken by the Ld.A.O was confirmed by Ld.CIT(A) observing as follows;

“4.3 Ground No.2 to 6 are directed against AO's action in holding the claim of STCG as in-genuine and treating such income as income from undisclosed sources. In view of factual position, as noted above, and oblivious inferences emerging the AO's action is found to be fully justified and has to be necessarily approved keeping in view the further discussion made here in after.

4.3.1 It has to be appreciated that the revenue authorities are functioning in a democratic set-up and are not discharging their duties in a police state whereby they can force the assessee/appellant and co- conspirators to admit the truth of the transactions though the same appears to be obvious and apparent and it is usual on the part of the appellant /assessee and there are co- conspirators/abettor and then for the AR to claim and contend that there is no direct evidence that such transactions were not genuine and the transactions were supported by valid documents and were carried out through banking channel and hence should be accepted as genuine knowing-fully well that such transactions were not genuine. The aforesaid facts have to be again examined and analyzed with appreciation of the constraints and limitations within which the AO has to

function and operate. Firstly, these transactions which are normally well-documented and are secretly negotiated are scrutinized by the AO after a sufficient gap of time i.e. nearly two years from the end of the relevant F.Y and then when the appellant/assessee and the other persons abetting the assessee in such manipulation are confronted by the AO, there is usual tendency to evade the replies or in the least to delay the replies. The AO again has to finalize the proceedings within the statutory limitation involved and then he cannot devote the entire time available at his disposal to a particular case. Here, it will be pertinent to make reference to the observation of the Hon'ble Supreme Court in the case of Sumati Dayal v. CIT 214 ITR 80(SC) made in the context of sale and purchase transactions of prize winning lottery tickets which are very much applicable to the facts of the case. The same are as extracted here under:

"The matter has to be considered in the light of human probabilities. The Chairman of the Settlement Commission has emphasized that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. It is, in our view, a neutral circumstance, because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with her which she could surrender to the Race Club. The observation by the Chairman of the settlement Commission that "fraudulent sale of winning tickets is not an usual practice but is very much of an unusual practice and ignores the prevalent malpractice that was noticed by the Direct taxes Enquiry committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972, whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc. was withdrawn. Similarly, the observation by the Chairman that if it alleged that these tickets were obtained through fraudulent means,

it is upon the allexer to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are thereon, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering the surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence."

So also, reference can be made to the observation of the Hon'ble Supreme Court in the case of CIT v. Durga Prasad More 82 ITR 540 (SC) on page 545 to the effect that the contents in the documents cannot be given undue importance and the reality and substance of the transaction is to be considered.

4.3.2 Further judicial notice in the aforesaid facts is required to be taken of prevailing malpractice in the filed of manipulation of stock prices of such dubious companies by the operator and manipulators with or without the active help and assistance of to spread rumours or highly exaggerated growth/profit prospects' of such companies leading to such phenomenal price rise. Reference can be made to the following decisions:

(a) CWT v. Rohtas Industries Ltd., 67 ITR 283 (SC), wherein it was

held that "In the absence of any direct evidence, a judicial or quasi-judicial Tribunal can base its conclusions on the basis of what are known as notorious facts bearing in mind the principles of section 144 of the Evidence Act."

(b) 'Attar Singh Gurmukh Singh v. ITO 191 ITR 667(SC) wherein, while interpreting the provisions of section 40A(3), it was held that

"In interpreting a taxing statute, the court cannot be oblivious of the proliferation of black money which is under circulation in our country."

4.3.3; AO's finding that it is a case of dubious tax planning, it has to be necessarily upheld for the simple reasons that the only object of the appellant in so entering into such dubious transactions was evading/avoiding incidence of tax by bringing unaccounted cash needed for investment in the form of income attracting lower rate of tax. In the result, the AO's action is fully supported by the Apex Court's judgment In the case of McDowell v. CTO [1985] 154 ITR 148 (SC) and the appellant's case can not derived any benefit from the series of judgments like Arvind Narottamdas v. CWT (1988) 173 ITR 479 (SC)] and Union of India v Playworld Electronics P. Ltd. (1990) 184 ITR 1308(SC) in view of detailed discussion below. So far as the rule in McDowell & Co. Ltd v Commercial Tax Officer (1985) 154 ITR 148 (SC) is concerned, it still holds the field and hits tax planning's and devices with the clear intent of evasion of tax. In CWT v Arvind Narottamdas(1988) 173 ITR 479 (SC) and Union of India v Play world Electronics P.Ltd. (1990) 184 ITR 308(SC), the Apex Court carved out an exception from the McDowell rule holding that if the impugned transactions were bonafide and having a clear financial or economic objective, the McDowell rule shall not hit even if tax saving is incidental to such transactions. In the present appellant's case, bonafides of transaction has not been established. On the contrary, in view of

detailed discussion made above it clearly emerges that such sale purchase transaction of shares was dubious and manipulated. Hence, the Arvind Narottamdas and Play world Electronics P.Ltd even cases do not bail out the appellant from the Mc Dowell rule consequences. So far as Azadi Bacho Andolan case is concerned it involved international law also in as much as the laws of Mauritius and double taxation avoidance agreement (DTAA~ between India and Mauritius were involved. It is settled law that where there is clash between the international law and the sovereign law of a State, the latter shall yield before the former. In the present appellant's case, no such clash is involved and therefore, he can not seek any protection from the Azadi Bacho Andolan case ratio also.

4.3.4 Thus in view of clear facts on record as discussed above, the alleged transaction of sale of shares resulting in STCG was clearly a sham and bogus transaction and not a genuine transaction as claimed. In view of the aforesaid discussion the AO's action in treating the sale consideration of shares as income from undisclosed sources is fully justified and accordingly confirmed”.

7. Aggrieved assessee is now in appeal before the Tribunal.
8. At the outset Ld. Senior Counsel for the assessee submitted that the issue raised in the instant appeal is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench in the case of Shri Omprakash Phatandas Phajwani v/s ACIT, I.T.A.No.968/Ind/2016 order dated 19.1.2018 wherein similar facts relating to sale of IFCI Ltd shares and abnormal delay in making the payment of purchase to the share broker were there for

adjudication and the Co-ordinate Bench allowed the assessee's appeal holding that for the alleged short term capital gain both the lower authorities erred in treating the Short Term Capital Gain as income from other sources. Ld. Senior Counsel for the assessee has also submitted that no proper opportunity was given to the assessee to cross examine Shri Vishal J Shah who is the son of the share broker and the statement of Shri Vijay V Shah was recorded by the DDIT, Mumbai and not by the Assessing Officer himself. Thus the truthfulness of the statement remain untested by the Ld.A.O. He further requested that an adequate opportunity ought to have been given to the assessee to cross examine the share broker through whom the equity shares of IFCI Ltd were purchased.

9. Per contra the Ld. Departmental Representative vehemently argued supporting the orders of both the lower authorities.

10. We have heard rival contentions and perused the records placed before us. In the instant appeal relating to Smt. Annapurna Maheshwari for Assessment Year 2008-09, the sole grievance of the assessee is against the finding of Ld.CIT(A) confirming the action of

the Ld.A.O treating the Short Term Capital Gain from purchase/sale of equity shares of IFCI Ltd at Rs.46,91,512/- as income from other sources and also holding that these transactions are sham and bogus. From perusal of details, we find that there were three transactions for purchase and sale of equity shares of IFCI Ltd. Purchases were made on 19.7.2006, 26.09,2006 and 27.09.2006 of 35,000/-, 15,000/- and 40,000/- equity shares of IFCI Ltd for a sum of Rs.2,86,412/-, Rs.1,43,250/- and Rs.4,23,591/- respectively. These purchases were made through Settlement No.0607079, 0607127 and 060712B issued by the Stock broker M/s. Vijay Bhagvandas & Company who is the member of Stock Exchange, Bombay and registered with SEBI Reg. No.INB 011194819. All the above referred equity shares of IFCI Ltd were duly transferred into the d-mat account held by the assessee and the shares were sold on 15.5.2007, 15.7.2007 and 14.8.2007 at the sale consideration of Rs.16,43,711/-, 7,04,448/- and Rs.26,34,606/-respectively. Revenue has not disputed this fact that the alleged equity shares of IFCI Ltd were transferred in the d-mat account of the assessee after the purchase and transferred out from the demat account at the time of sale. Revenue has also not

disputed that the payments have been made through account payee cheque and similarly genuineness of sale consideration has also not been doubted which were made through a registered broker of recognized stock exchange.

11. The bone of contention was that there was a significant gap between the date of purchase and the date of payment for the purchases which is around 8 to 9 months and the same has been the main cause for treating the alleged transaction as bogus. The Ld.A.O also took support of the statement given by Mr. Vishal Vjay J Shah who is the son of the proprietor of the stock broking firm M/s. Vijay Bhagvandas & Company who denied the alleged transaction of purchases were denied. However nothing odd was noticed about the payment for purchases made through account payee cheque. These two reasons lead the way of the alleged treatment of Short Term Capital Gain from sale of shares declared by the assessee as income from other sources along with treating them as sham and bogus transactions.

12. We find that very same set of facts came up before the Co-ordinate Bench in the case of Shri Omprakash Phatandas Phajwani

v/s ACIT (*supra*) wherein the shares of IFCI Ltd were purchased and there was a significant gap in between the date of purchase as per the contract note and date of payment for the purchases. The Tribunal decided the issue in favour of the assessee observing as follows;

“7. We have heard rival contentions and perused the records carefully.

8. In Ground No.1 to 6 raised by the assessee the sole grievance is against the order of Ld.CIT(A) partly confirming the addition made by Ld. A.O by treating the short term capital gain of Rs.6,62,870/as income from undisclosed sources which was added by the Ld.A.O applying provisions of section 68 of the Act. We observe that the issue revolves round the transaction of short term capital gain from sale of shares. The Ld.A.O has doubted the genuineness of purchase of IFCI shares which were bought through the broker M/s. Chandravan Bhaichand Muchchala, Mumbai by contract note No.7024 dated 17.10.2006. At that point of time price per equity share of IFCI Ltd was Rs.9.95. However the payment for this purchase of Rs.1,19,530/- was made after nine months i.e. 1.7.2007. The 12000 equity shares bought by the assessee @Rs.9.95 per share were transferred to Dmat account on 13.8.2007 and then these were sold on 17.8.2007 and the price per equity share on the date of sale was around Rs.63.

9. The Ld.A.O doubted the impugned purchase because the payment was made after nine months even when there was no regular transaction between the assessee and broker and also there was extra ordinary increase in the prices of the equity shares. As mentioned by the Ld.A.O in the impugned assessment order that National Stock Exchange denied

of having any transaction of purchase of IFCI td. shares by the assessee due to this reason the purchases were doubted and the transaction was treated as spam and the alleged sale receipt from sale of shares was treated as unexplained income. When the matter came up before the Ld.CIT(A), he ignored the existence of any purchase made on 17.10.2006 and calculated the short term capital gain by taking cost of equity shares on the date of dematizing of 12000 equity shares. This resulted into the short term capital gain loss totaling Rs.18,504/-. The Ld.CIT(A) accordingly treated Rs.6,62,870/- as income from unknown sources after giving benefit of purchase cost of Rs.1,19,530/- against the sale consideration.

10. Before moving further we will like to reproduce the findings of Hon'ble Gujarat High Court in the case of CIT V/s Himani M Vakil [2014] 41 taxmann.com 425 (Gujarat HC) wherein similar issue and almost identical facts came up for adjudication and Hon'ble High Court dismissed the revenue's appeal observing as follows;

"Whether on facts and circumstances of the case and in law, the Hon'ble ITAT is right in deleting the addition of Rs.36,72,631/- made u/s 68 by the Assessing Officer by treating the Short Term Capital Gain as unexplained cash credit?"

2. The assessment year is 2006-07 and the relevant accounting period is 1.04.2005 to 31.3.2006. The respondent - assessee, an individual, filed her return of income showing total income of Rs.8,72,299/- including short term capital gain of Rs.2,78,413/- and long term capital gain of Rs.3,41,683/-. During the year under consideration the assessee claimed long term capital gain of Rs.34,65,171/- on a scrip named Shri Nidhi Trading Limited. On scrutinizing the complete transaction the total sale value came to Rs.36,72,631/- and total purchase value came to Rs.2,07,460/-. The assessee accordingly showed capital gain of Rs.34,65,171/-. The Assessing Officer after seeking details from the

parties treated the sum of Rs.36,72,631/- credited in the books of accounts unexplained cash credit under section 68 of the Act and brought it to tax. The assessee carried the matter in appeal before the Commissioner (Appeals) who allowed the said ground of appeal and directed the Assessing Officer to accept the claim of the assessee of Rs.34,65,171/ - as capital gains. The revenue carried the matter in appeal before the Tribunal, but did not succeed.

3. Mr. Manav Mehta, learned counsel for the appellant has assailed the impugned order by placing reliance upon the reasoning adopted by the Assessing Officer.

4. As can be seen from the impugned order, the Tribunal, after appreciating the evidence on record, has found that before the Assessing Officer the assessee had explained that the purchase transactions were made on the «Online Trading System" and these transactions are genuine. Earlier, this is prior to 1.4.2005, it was not compulsory for the client to have his own transaction record under SEBI guidelines. Therefore, the purchases earlier were made using the broker's code, and it was for this reason that the broker had used the «self code". Since the shares were sold after 1.4.2005, the transactions were not under the broker's code. As regards service tax and stamp charges the contract note of the broker clearly mentioned that the brokerage was inclusive of service tax etc. In the case of the selling broker the Service tax Securities Transaction tax and Education Cess were separately mentioned. As regards the point raised by the Assessing Officer that there was absence of broker-client agreement, the Tribunal accepted the submission of the assessee that the genuineness of the transactions was already proved by the contract notes for sale and purchase, the bank statement of the broker, the Demat Account showing transfer in and out of shares, as also abstract of transactions furnished by the CSE. The Tribunal, after appreciating the evidence on record, concurred with the findings recorded by the Commissioner (Appeals) that the assessee had furnished complete details which were not found false or bogus by the Assessing Officer and that it

was only on suspicion that the Assessing Officer had treated the capital gain declared by the assessee as unexplained cash credit under section 68 of the Act. In the light of the aforesaid findings of fact recorded by it, the Tribunal dismissed the appeal of the revenue.

5. In the light of the above findings of fact recorded by the Tribunal, it is not possible to state that the view adopted by the Tribunal is, in any manner, unreasonable or perverse. Besides, the learned counsel for the appellant is not in a position to show that the Tribunal has placed reliance upon any irrelevant material or that any relevant material has been ignored, nor is he able to point out any material to the contrary so as to dislodge the concurrent findings of fact recorded by the Tribunal. Under the circumstances, the impugned order being based upon concurrent findings of fact recorded by the Tribunal upon appreciation of the evidence of record, does not give rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeal is, accordingly, dismissed."

11. Now in order to appreciate and examine the facts in the light of above judgment, we find that the assessee placed following documents before the lower authorities;

1. Contract note cum bill of broker from whom shares were purchased;
2. Confirmation of accounts from the same broker
3. Copy of ledger accounts of Broker
4. Copy of bank account of the assessee
5. Copy of D-mat account of the assessee
6. Copy of statement of affairs of the assessee
7. Copy of contract note cum bill for sale of shares

12. Now above referred details except for the genuineness of purchase,

the Ld.A.O has not challenged the genuineness of other details most importantly the sale of shares which have been effected by the assessee through Bombay Stock Exchange portal and sold through Angel Capital & Debt Market Ltd. The relevant documents in the paper book from page 23 to 30 prove beyond doubt the genuineness of sale of equity shares. It is also not disputed that the share of IFCI Ltd were dematized after the purchase and they have been debited from this account at the time of sale. As far as purchase is concerned the shares have been purchased through a registered broker who is a member of Stock Exchange, Bombay having SEBI registration No.INB010005219. For the only reason that the payment of purchase has been made after a lapse of 9 months cannot render the purchase as non genuine unless and otherwise any material is brought on record which could negate this fact.

13. Further we find that the addition has been made for the unexplained credit of Rs.7,64,346/- but nowhere right from the assessment proceedings and till the proceedings before the appellate authority, revenue authorities have ever doubted the source of amount of sale consideration of Rs 7,64,346/- which the assessee received through banking channel from sale of shares held in Dmat account through the recognized stock exchange which is verifiable from the contract note.

14. We therefore in the given facts and circumstances of the case are of the considered opinion that both the lower authorities erred in treating the alleged transaction of sale of equity shares as a sham transaction. We accordingly set aside the findings of both the lower authorities and allow the appeal of the assessee and further hold that the assessee has rightly shown the short term capital amounting to Rs.6,44,816/- from sale of equity shares of IFCI Ltd. In the result Ground No. 1 to 6 of the assessee's appeal are allowed.

15. In the result the appeal of the assessee is allowed”.

13. From the perusal of the above finding of the Co-ordinate Bench as well as in the given facts and circumstances of the case, we find that the facts and issues are verbatim similar so much so that the genuineness of the sale transactions has not been doubted by the revenue authorities. Equity shares of the IFCI Ltd have been purchased by making payment through disclosed sources in the form of account payee cheque. Equity shares have been duly transferred in and transferred out of the demat account of the assessee at the time of purchase and sale respectively. The alleged addition made u/s 68 of the Act for unexplained cash credit do not apply in the given facts when the sale consideration has itself been found to be genuine. Therefore for the only reason that payments have been made after significant time which is also in the range of 8 to 9 months and the denial of the share broker of the alleged transaction even when the contract note has been issued showing complete details of the shares purchased, settlement number, order number, security name, purchase rate, service tax charged and all the necessary ingredients are mentioned in the contract note for the purchase of equity shares of well known company i.e. IFCI Ltd, then in such situation the purchase cannot be doubted. Therefore if

the purchase and sale are not doubted as the payments made for purchase and sale consideration received are also genuine, demat account has been used for the alleged transactions of purchase and sale, then mere delay in payment itself cannot prove that the transactions are sham and bogus. We therefore respectfully following the decision of Co-ordinate Bench and in view of our above finding set aside the order of the lower authorities and allow the ground raised by the assessee and direct the Ld. Assessing Officer to treat the alleged profit from sale and purchase of equity shares of IFCI Ltd at Rs.41,29,512/- as short term capital gain and tax accordingly. In the result appeal of the assessee is allowed.

14. Now we take I.T A.No.252/Ind/2016 in the case of Smt. Annapurna Maheshwari for Assessment Year 2010-11 wherein similar grounds have been raised as those raised for Assessment Year 2008-09 thereby challenging the finding of both the lower authorities of treating the short term capital gain of Rs.30,80,790/- as income from other sources at Rs.28,31,383/- and business profit of Rs.2,49,406/-.

15. We find that in the Assessment Year 2010-11 assessee purchased equity shares of Reliance India Infra , HDIL, Unitech and Reliance Communications. The assessee declared short term capital gain of Rs.28,31,383/- for purchase and sale of equity shares of Reliance India Infra. There was a gap of around 6 months for the payment for purchase of equity shares. The alleged transactions were not accepted by the share broker and all other relevant details i.e. contract note, demat account, mode of payment by account payee cheque, genuineness of sales including the source and sale consideration have not been doubted. The given facts are similar to the case dealt by us in the case of same assessee for Assessment Year 2008-09. We therefore apply the same reasoning and also following the decision of Co-ordinate Bench in the case of Shri Omprakash Phatandas Phajwani v/s ACIT, (*supra*) are of the considered opinion that both the lower authorities erred in treating Rs.28,31,383/- as income from other sources which were rightly shown by the assessee as Short Term Capital Gain. We, therefore allow Ground No.1 raised by the assessee and direct the Assessing Officer to tax the alleged income of Rs.28,31,383/- from sale of shares as Short Term Capital Gain and not as income from

other sources. In the result Ground No.1 raised by the assessee is allowed.

16. As regards Ground No.2 which deals with the profit of Rs.2,49,045/- earned by the assessee wherein the delivery of shares have not been taken through demat account because the shares were sold in short span of time i.e. within 7 to 8 days of the purchase and for this reason the gain of Rs.2,49,045/- has been treated as business profit. We find that the assessee is not a regular trader of shares as it earned income from salary and house property. This is not the case of an intra day trading nor of the forward market trading for derivatives. It is simply a case that share have been purchased and they were held in the demat account of the broker and as the assessee has sold them in a very short period they were not transferred to her demat account. It is not the case of revenue that the broker i.e. HDIL Financial Ltd has not received the delivery of shares purchased and has not delivered the shares at the time of sale. In such situation treating of income of Rs.2,49,045/- as business income will not be justified. We therefore set aside the finding of lower authorities and direct the Assessing Officer to tax the income of Rs.2,49,045/- treating it as

Short Term Capital Gain from sale of shares. Ground No.2 of the assessee is allowed.

17. Ground No.3 is general in nature which needs no adjudication.

18. In the result the grounds raised by the assessee for Assessment Year 2010-11 are allowed.

19. Now we take I.T.A.No.53/Ind/2014 in the case of Shri Pradeep Maheshwari for Assessment Year 2008-09 wherein the assessee has raised three grounds. Issues raised in Ground No.1 & 2 relates to treatment of short term capital gain and long term capital gain at Rs.23,80,747/- and Rs.17,23,052/- as unexplained cash credits u/s 68 of the Act

20. As far as Ground No.1 relating to Short Term Capital Gain of Rs.28,31,383/- is concerned from perusal of the records we find that the facts and circumstances which we have dealt in the case of Smt. Annapurna Maheshwari in I.T.A.No.315/Ind/2012 and I.T.A.No.252/Ind/2016 are verbatim similar as the short term capital gain has arised from purchase and sale of equity shares of

IFCI Ltd and genuineness of the purchase transactions has been doubted for significant delay in making the payment for purchase and all other circumstances remains the same i.e. the genuineness of payment and sale consideration and transactions being routed through the demat account held by the assessee. We therefore apply the same reasoning as we have applied in the above referred two appeals in the case of Smt. Annapurna Maheshwari and allow Ground No.1 raised by the assessee, directing the Assessing Officer to tax the alleged income of Rs.23,87,747/- by treating it as Short Term Capital Gain from sale of listed equity shares as per the provisions of Section 111A of the IT Act.

21. As far as Ground No.2 is concerned the facts are little different because the alleged capital gain of Rs.17,23,052/- has been claimed as exempt income by virtue of provision of Section 10(38) of the I.T. Act. However the Assessing Officer applying the same finding which he has taken for treating the short term capital gain as unexplained cash credit u/s 68 of the Act has treated the transaction as sham and bogus. Ld.A.O has denied the benefit of exemption u/s 10(38) of the Act and added the income as income

from other sources u/s 68 of the Act. Ld. CIT(A) has confirmed the view taken by the Ld.A.O. As far as the genuineness of the transaction is concerned the facts remains the same about the purchase and sale of the equity shares of IFCI Ltd through the stock brokers duly evidenced by contract notes and payment through account payee cheque. We intend to apply the same decision as taken by us while adjudicating same issue and similar facts in the preceding paragraphs and accordingly find no merit in the finding of both the lower authorities of treating the alleged transactions giving rise to Long Term Capital Gain as sham and bogus and therefore the addition should not have been made for unexplained cash credit u/s 68 of the Act.

22. However whether the alleged income is to be treated as short term capital gain or long term capital gain still needs to be looked into. For the purpose of claiming the exemption for Long Term Capital Gain the listed equity shares should be held by the assessee for more than 12 months. From perusal of facts we observe that the alleged income of Rs.17,23,052/- was earned from two transactions, firstly from selling 10,000 equity shares of IFCI Ltd

giving a gain of Rs.,4,05,418/- and another transaction of selling 25,000 equity shares of IFCI Ltd giving gain of Rs.13,17,634/-. In both these transactions the purchase date i.e. date of contract note is 16.06.06 and 25.7.06. The payment for these purchase was made on 04.05.2007 and most importantly as discernable from paper book Page-21 the equity shares purchased came in to the demat account of the assessee as on 25.6.2007, which means that the transfer of equity shares into the demat account of the assessee is after making the payment on 4.5.2007. It is true that the purchase date are as per contract note is 16.6.06 and 25.6.06 but the payment for the purchase has occurred on 4.5.2007 and the transfer of the shares into the demat account of the assessee has been done after making the payment and these equity shares of IFCI Ltd were sold on 26.6.07 and 27.8.07. This shows that the shares of IFCI Ltd were held by the assessee for a period of less than 12 months. There is no evidence on record placed by the assessee which can prove that the stock broker who sold the equity shares to the assessee, held them on behalf of the assessee in its demat account on the date of the contract note. This fact strengthens our view that the shares were held in the demat

account of the assessee for a period of less than 12 months.

23. Situation may have been different if on the date of the contract note or a day or two thereafter the equity shares had been transferred to the demat account of the assessee or it would have been proved that the stock broker has held the shares on behalf of the assessee irrespective of the fact whether the payment for the purchase have been made or nor not, then it may have been inferred that the period of such holding of equity shares had been more than 12 months then the claim of the assessee may have been entertained under the provisions of section 10(38) of the Act. But the facts in the instant case clearly shows that except the date of contract note i.e. 16.6.06 and 25.6.06 there is no further action from both the sides i.e. the assessee and the stock broker for completing the transaction of transfer of equity shares of IFCI Ltd. It is only after the payment on 4.5.07 that the transfer of equity shares took place into the demat account of the assessee on 25.6.07 and 24.8.07. Exemption u/s 10(38) of the Act is allowable if the equity shares are '**held**' by the assessee for more than 12 months and if they are held for less than 12 months then the

alleged gain/loss is Short Term Capital Gain/Loss as the case may be.

24. Similar issue has come up before the Mumbai Tribunal in the case of ITO V Deepchand Shah (2011) 128 ITD 488 wherein it was held that “it is necessary to trace corresponding purchase of shares from the demat account maintained by the broker in order to verify whether such purchases of respective shares were actually made by broker on behalf of the assessee and shares so purchased were credited to its demat account and were lying there till same were transferred to demat account of the assessee after a period of more than one year”. Examining the facts of the instant appeal and our discussions in the preceding paragraphs on this issue we are of the considered view that the alleged transaction claimed by the assessee to have resulted into Long Term Capital Gain is not sustainable and the alleged transaction of earning income of Rs.17,23,052/- should be taxed by the Assessing authority treating it as Short Term Capital Gain because the equity shares sold in these transactions were held for less than 12 months and therefore they were in the category of Short Term Capital Assets. In the

Annapurna Maheshwari & Pradeep Maheshwari
ITA No.315/Ind/2012, 252/Ind/2016 & 53/Ind/2014

result Ground No.2 of the assessee is partly allowed.

25. Ground No.3 is general in nature which needs no adjudication.

26. Accordingly appeal of the assessee is partly allowed.

27. In the result I.T.A.No.315/Ind/2012& I.T.A.No 252/Ind /2016 in the case of the assessee Smt. Annapurna Maheshwari is allowed and I.T.A.No.53/Ind/2014 in the case of Shri Pradeep Maheshwari HUF is partly allowed.

The order pronounced in the open Court on 31.10.2018.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 31 October, 2018

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By order
Private Secretary/DDO, Indore