

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" B " BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI TR SENTHIL KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 542/AHD/2022

निर्धारण वर्ष/Asstt. Year: 2014-2015

Smt. Avani Ajay Palan, 30, Parshwanath Nagar Society, Behind Akota Atithi Gruh, Vadodara-390020. PAN: ACTPP2664E	Vs.	Income Tax Officer, Ward-1(2)(4), Vadodara.
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(Applicant)		(Respondent)
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Assessee by :	Shri Deepak Shah, A.R
Revenue by :	Ms Saumya Pandey Jain, Sr.D.R

सुनवाई की तारीख/**Date of Hearing** : **23/08/2023**

घोषणा की तारीख /**Date of Pronouncement**: **08/11/2023**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income tax (Appeals), Vadodara, arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-2015.

2. The assessee has raised followings grounds of appeal:

(1) That the Ld. CIT(A) has erred on facts and under the law in confirming the addition of Rs.95,43,251/- under section 68 of IT Act as against long term capital gain of Rs.95,43,251/- claimed as exempt by appellant under section 10(38) of IT Act inter alia because:

(i) Statement of Shri Anuj Agrawal, Director of Korp Securities Ltd recorded by DDIT (Inv), Kolkata did not have any evidentiary value as the same were recorded in the absence of the Appellant..

(ii) Copies of recorded statement of Shri Anuj Agrawal, Director of Korp Securities Ltd as mentioned at pages 6-10 of the assessment order were not provided to the Appellant.

(iii) Recorded Statement of Shri Anuj Agrawal, Director of Korp Securities Ltd could not be relied upon as the AO did not allow the Appellant to cross examine Shri Anuj Agrawal, Director of Korp Securities Ltd despite a specific request having been made by the Appellant.

(iv) Documentary evidences have been filed by the appellant to prove long term capital gain of Rs.95,43,251/- on sale of shares have neither been controverted nor disproved by the Ld. CIT(A) / AO .

(v) The Ld. CIT(A) / AO had not brought anything on record to prove that the Appellant had routed her own unaccounted money in the garb of long term capital gain.

(2) That the Ld A.O/CIT have also wrongly challenged the mechanism of purchase of shares acquired by the appellant without bringing any material on record.

(3) That the Hon'ble CIT (A) has erred in law and on fact by upholding the Ld. AO's order which was based on the arbitrary and on surmises, by denying claim of LTCG on mechanical and irrelevant factors and moreover no adverse material on record to disapprove the evidence on record. On one hand the Ld AO stated that purchase of shares were was bogus and on other hand the Ld AO while denying the exempted Capital of Rs. 95,43,251/- (Rs. 99,43,251 Rs. - 4,00,000) U/s 10(38) allowed the purchase cost of Rs. 4,00,000/-. Hence the order passed by the Ld AO is based on arbitrary and on surmises and based on the statement of the third party only.

(4) That the Ld A. O / CIT(A) Provisions of sections 68 of IT. Act in terms had no application to the facts of Appellant's case.

(5) Your appellant most humbly reserves the right to add, amend, alter or substitute the ground in this appeal on or before the time of hearing.

3. The only effective issue raised by the assessee is that the learned CIT(A) erred in confirming the disallowance of claim of exempted long term capital gain on sale of shares by holding the same as bogus.

4. The facts in brief are that the assessee is an individual and declared income from shares trading/ partnership firm. The assessee during the year claimed exemption of long-term capital gain of Rs. 95,43,251/- on sale of shares of M/s Sunrise Asian Ltd. The brief history is that the assessee in a private placement applied for 20000 shares of M/s Santoshima Tradelink Ltd @ 20 per share on 19th September 2011. Accordingly, the assessee paid an amount of Rs. 4 Lakh to M/s Santoshima Tradelink Ltd vide cheque dated 19th September 2011. However, the shares of M/s Santoshima Tradelink Ltd., were not listed at the stock exchange. Therefore, an arrangement was made between the assessee and M/s Santoshima Tradelink Ltd. As per such arrangement, the shares certificate of M/s Conart Traders Limited for 20000 shares were issued to the assessee on 26th November 2011 which were previously held by M/s Santoshima Tradelink Ltd. Subsequently, the assessee as on 15th August 2013 dematerializes the shares of Conart Traders Ltd. Thereafter M/s Conart Traders got amalgamated with M/s Sunrise Asian and accordingly 20000 shares of M/s Sunrise Asian were issued to the assessee which were credited in her demat account. Now the entire shares of M/s Sunrise Asian Ltd were sold by the assessee during the year under consideration on different dates during the month of July 2013 to August 2013 on BSE platform for an amount aggregating to Rs. 99,43,251/- only. Thus, the assessee earned long term capital gain of Rs. 95,43,251/- which she claimed as exempted income under section 10(38) of the Act. The assessee in support of her claim furnished copy of share application form, copy of cheque issued for purchased of shares, copy of share certificate issued to her by Conart Traders Ltd, copy of amalgamation scheme approved by Hon'ble High Court, copy of demat account, copy of contract note for sale of shares and copy of bank statement showing amount received through banking channel.

5. However, the AO found that the Income tax Investigation of Kolkata has carried out countrywide search and survey proceedings on several brokers or sub-brokers to find out the racket of bogus long-term capital gain. The DDIT Kolkata

identified 84 companies whose shares/script were utilized by the entry provider/broker to provide bogus long term capital gain by rigging their price at the stock exchange through synchronized trading. The scrip of M/s Sunrise Asian Ltd is included in the 84-scrip identified by the DDIT-Kolkata. The AO found that the DDIT during search or survey proceeding recorded statement of several broker/sub-brokers who admitted that they have provided bogus LTCG in the scrip of Sunrise Asian Ltd. The AO also inquired about trade data from BSE and found that the price of the script i.e. Sunrise Asian Ltd was abnormally increased manifold in the year under consideration without any basis and after peak period rapidly decreased. Before the peak period, there were very low transactions, and the price was systematically increased. Thereafter, a huge number of transactions were carried out in the impugned script. The AO further found that the modus operandi explained by the entry provider/broker/sub-broker regarding the script of Sunrise Asian Ltd are identical to the transaction entered by the assessee. The AO also doubted the acquisition of shares by the assessee. As such, the AO found that the assessee failed to explain how she got the shares of Conart Trader Ltd when she applied for the shares of M/s Santoshima Tradelink Ltd. Thus, the AO considering the finding of DDIT Kolkata and modus operandi of the assessee as well considering the principle of human probability, surrounding circumstantial evidence held the long-term capital gain earned by the assessee as bogus and disallowed the same.

6. On appeal preferred by the Assessee, the learned CIT(A) also confirmed the finding of the AO. The relevant observation of the learned CIT(A) is extracted as under:

20. I have gone through the facts of the case and assessment order of the AO. It is noticed that the appellant in this case could not substantiate the purchase of shares as no proof as to when and how the Form for the purchase of 20,000 shares of Santoshima Lease Finance and Investment (India) Ltd. was furnished. Further no proof as to how the shares of Santoshima were dematerialized in the demat account of the appellant as 'Conart Trader's Ltd.' with supporting documents. The shares of Santoshima Tradelinks were not listed in the stock exchange. Therefore, an arrangement was made by issuing debit note to

Conart Trader's Limited by Santoshima Trade Links Limited and the name of the assessee was entered in the share certificate of Conart Trader's allegedly issued to Santoshima Trade Links Ltd. and later on, the same was dematerialized in the assessee's demat account. Therefore, on account of merger of Conart Trader's Ltd. in Sunrise Asian Limited, since the company M/s Santoshima Trade Links Ltd. to whom the assessee has applied for the shares have also been merged with Sunrise Asian Limited, the shares of Sunrise Asian Limited ought to have been issued to the assessee on merger. The fact remains that Santoshima Lease Finance and Investment (India) Ltd./ Santoshima Trade Links Ltd., cannot issue or sell any shares of Conart Traders Ltd. being a separate entity even if there is merger as per Hon'ble High Court's order and change of name of company. As per the provisions of the Companies Act, such transaction of shares cannot be done, and even if it is done, the same is done violating the provisions of Companies Act and SEBI Rule and the same is illegal and as such, said transaction can be held to be a void. It is also not out of place to mention here that the shares were purchased off market and the same was done with the connivance of the promoters of various companies. Thus, the purchase transaction of the shares could not be established. Therefore, it is not established that the appellant held the shares of a listed company on a recognized stock exchange for the said period before their sale. These observations when considered in the light of above facts that the appellant could not furnish any verifiable proof for the purchase /delivery of shares of M/s Sunrise Asian Ltd.. cast serious doubts on the genuineness of the claim of purchases of such shares.

21. The appellant did not submit copies of the documents to substantiate the genuineness of transactions related to purchase and subsequent sale of shares, leading to long-term capital gain, claimed by the appellant. I find that those documents were placed before A.O, who after detailed examination and discussion and going beyond these documents, established that these documents are mere masks to hide the real nature of transactions. These shares are transferred to the beneficiary at a very nominal price mostly offline transaction, through preferential allotment. All these are done on commission basis and beneficiaries get accommodation entries for LTCG, which was claimed exempt.

21. The findings have been corroborative with the results of investigation carried out by the Directorate of Investigation, only proves that such documentary evidences have been created as masks to cover up the true nature of transaction. Here it is pertinent to mention here that no independent enquiry by the AO was necessary as alleged by the AO as complete enquires done by Investigation Wing were duly analyzed by the AO, who acted independently to scrutinize the details and duly show- caused the appellant to justify her claim of exemption u/s 10(38) of LTCG but the appellant could not substantiate her reply. A genuine transaction must be proved to be genuine in all respect. The onus was on the appellant to prove that the transaction leading to claim of LTCG was distinctly genuine transaction and not bogus, premeditated transaction arranged with a view to evade taxes by the AO. The onus was on the appellant to contradict the findings that M/s Sunrise Asian Ltd. was a company whose scrips were capable of being traded at high price as it was the appellant who had traded in the shares of the this company which resulted into claim of short term capital gains. Once the appellant was made aware of the result of investigation, which proved that trading of shares leading to LTCG was not genuine, the onus was on the appellant to prove that it has earned genuine LTCG under section 101 of the Indian Evidence Act, 1972 as it is the appellant who is asserting a claim that it was engaged in genuine share transactions. It is relevant to note here that Hon'ble Supreme Court in the case of Shri Charan Singh versus Chandra Bhan Singh AIR 1988 SC 637 has clarified that the burden of proof relies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of her own right and the

clearness of her own proof. It cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. Since in this case the appellant had made the claim that it had earned genuine LTCG, all the facts were especially within his knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by it and a case is made out, the onus shifts on to deponent. In this case, once the evidence that appellant has claimed bogus LTCG was proved by the AO, the burden of evidence shifted to the appellant. During the assessment proceeding and even during the appellate proceeding, the appellant has failed to produce any evidence to prove that the long term capital gain claimed by it was genuine.

22. In the present case, I find that the appellant has failed to discharge its burden of proof and the AO, on the other hand, has proved that the claim of the appellant was incorrect. The enquiry conducted by the investigation carried out by the Directorate of Investigation, Kolkata, which has been thoroughly analyzed based on survey u/s 133A on Q3.03.2015 and statement on oath of Mr. Anuj Agarwal of M/s Korps Securities Ltd. to prove that the appellant has introduced bogus LTCG in his bank account by routing its unaccounted income through a tax evasion scheme involving shares of M/s Sunrise Asian Ltd. Reliance is placed upon the decision of Hon'ble Delhi ITAT in the case of Nokia India Pvt. Ltd. vs. DCIT (2015) 59 taxmann.com 212 (Delhi). It has been held by the Hon'ble Bench in the said case that statements were duly provided to assessee during proceedings before Assessing Officer, however, assessee never asked for cross-examination, hence this plea of cross examination raised at such a later stage of proceedings was not justified. Further reliance is placed on the decisions of Hon'ble Supreme Court in the case of ITO vs. M.Pirai Choodi (2012) 20 taxmann.com 733 (SC)/ (2011) 334 ITR 262 and M/s Pebble Investment and Finance Ltd. vs. ITO (2017-TIOL-238-SC-ITI), Hon'ble Delhi High Court in the case of CIT vs. Kuwer Fibers (P) Ltd. (2017) 77 taxmann.com 345 (Delhi). Further, I find that right to cross-examine as held in various decisions, is not an absolute right and depends not only the circumstances of the case but also on the statute concerned. The Hon'ble Supreme Court has held in the case of State of J&K vs. Bakshi Gulam Mohd. AIR 1967 (SC) 122, and in the case of Nath International Sales vs. UOI AIR 1992 Del 295 that the right of hearing does not include a right to cross examine. The right to cross examine must depend upon the circumstances of each case and also on the statute concerned. In the case of T. Devasahaya Nadar vs. CIT (1965) 51 ITR 20 (Mad) it was held that "it is not an universal rule that any evidence upon which the department may rely should have been subjected to cross-examination. If the AO refuses to produce an informant for cross examination by the assessee there cannot be any violation of natural justice. In the case of GTC Industries Ltd. Vs ACIT(1998) 60 TTJ(Bomb-Trib) 308, it was held that where statement and report of third parties are only the secondary and subordinate material which were used to buttress the main matter connected with the amount of addition, denial of opportunity to cross examine third did not amount to violation of natural justice. Each case has got to be decided on the facts and circumstances of that case. The relevant factors to be considered are surrounding circumstances, objective facts, evidences adduced, presumption of facts based on common human experience in life and reasonable conclusions. In the present case, as discussed above, there is overwhelming evidences as discussed in details in the order that the transactions on which adverse views have been taken are sham transactions.

23. As far as the appellant's demand for cross examination of third party is concerned, it is to be stated that nowhere in the show cause notice, it was alleged by the AO that the appellant has traded through these persons, whereas the statement of those persons, which are quoted in the show cause notice is only one of the many documentary evidences showing that the scrip of Sun Asian is only a penny stock, which is used for providing accommodation entry to the beneficiaries, by various share brokers and entry operators throughout the country and the statement of the above persons, are only a testimony to

that out of many individuals involved in the process of giving accommodation entries. Moreover, the Investigation Wing of the Department through surveys, search and seizure operations has unearthed a huge scandal of bogus long term capital gain through BSE listed penny stocks involving number of share brokers, entry operators and their paper companies/ firms and the beneficiaries who has brought their unaccounted cash to the books of accounts by way of bogus long term capital gain through way of bogus investment in the penny stock like Sun Asian. From the nature of investment and gain earned by the appellant within a very short span of time from investing the scrip of Sun Asian by resorting to dubious method of purchases, as described herein above, unambiguously proved the involvement of some brokers/ entry operators as admitted in their statement recorded of Shri Anuj Agarwal of M/s Korps Securities Ltd. As discussed above, this person is only a tip of huge iceberg in the wide net work of providing accommodation entry through various penny stocks. In view of the above, there is no necessity to give cross examination of this person to the appellant and, therefore, the request of the appellant was rightly rejected.

Further, reliance is placed upon the decision of *GTC Industries Ltd. V. ACIT(1998) 60 TTJ(Bomb-Trib) 308, [1998] 65 ITD 380 (BOM)*, in which it was 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.

25. With respect to the circumstantial evidence and in the matters related to the discharge of 'onus of proof and the relevance of surrounding circumstances of the case, the relevant observations and findings of Hon'ble Supreme Court in the case of *CIT Vs. Durga Prasad More [1972] 82 ITR 5 40*, are

"that though an appellant's statement must be considered real until it was shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-serving recitals in the documents, it was for the party to establish the transfer of those recitals, the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability. Human minds may differ as to the reliability of piece of evidence, but, in the authority is made conclusive by law. Deere, the decision of the final fact finding

26. The above ratio laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of *Sumati Dayal V CIT 214 ITR 801 (S.C)*. It is essential on the part of the AO to look into the real nature of transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. It is pertinent to state here, the wisdom of Hon'ble Supreme Court in *CIT V Arvinda Raju (TN) (1979) 120 ITR 46 (S.C)* wherein it was held that-

35. In view of the facts and circumstances borne out of the assessment order and legal precedents as discussed above, I am of the view that documents submitted as evidences to prove the genuineness of transaction are themselves found to serve as smoke screen to cover up the true nature of the transactions in the facts and circumstances of the case as it is revealed that purchase and sale of shares are arranged transactions merely giving a colour of authenticity by creating a façade of transactions to create bogus profit in the garb of LTCG by well-organized network of entry providers with the sole motive to sell

such entries to enable the beneficiary to account for the undisclosed income for a consideration or commission. It is relevant to mention here that the prices have increased many fold times as soon as the period of one year has expired so as to avail the benefit of exempt long term gain. There is no justifiable indicator such as some significant business transaction in the case of M / s Sunrise Asian Ltd. to substantiate such abnormal rise in its scrips. The onus was on the appellant to explain the source and nature of the amount credited in his bank account on this account. The appellant, however, could not discharge the onus as the explanation furnished by her has been found to be unsatisfactory. The SEBI has, time and again, after thorough investigation, certified that such transactions are rigged and are carried out to convert black money into white. The appellant miserably failed to discharge the onus to prove that there was no such scheme of manipulation of scrips for routing unaccounted money as tax exempt bogus capital gains.

36. In view of the above discussion, I am of the considered view that share transactions leading to LTCG by the appellant are sham transaction entered into for the purpose of evading tax. Accordingly, it is held thhat the AO has rightly disallowed the claim of the appellant and added the said amount of Rs.95,43,251/- as income of the appellant and the same is hereby confirmed. Thus, ground of appeal no.1 is dismissed.

7. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

8. The learned AR before us filed a paper book running from pages 1 to 108 and contended that the shares of the company namely M/s Conart Trader Ltd were acquired by the assessee through M/s Santoshima Tradelink Ltd. which is evident from the debit note, shares certificate and shares transfer form placed on page 36 to 39 of the paper book. The learned AR also pointed out that the shares were sold on the floor of the stock exchange where the buyers are not known. The learned AR also submitted that the shares were purchased through the banking channel and the cost of the shares purchased was also allowed by the revenue while calculating the income of the assessee. Thus, as per the learned AR, the purchase of the share cannot be doubted.

9. On the other hand, the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case have been elaborately

discussed in the previous paragraphs. Therefore, we are not inclined to repeat the same for the sake of brevity and convenience. At the outset, we find the coordinate bench of the Jaipur ITAT in the case of Shri Ashok Aggarwal and Smt. Ritu Aggrawal bearing ITA No. 124 & 188/JP/2020, involving identical facts and circumstances as of the present assessee, has decided the issue in favour of the assessee. The relevant finding of the Jaipur ITAT is extracted as under:

12. We have considered the rival submissions as well as the relevant material on record. The AO has doubted the transactions of purchase and sale of shares by the assessee of M/s. Sunrise Asian Ltd based on the investigation carried out by the Investigation Wing, Kolkata wherein certain persons were found indulged in providing accommodation entries, inter-alia bogus Long Term Capital Gains which is claimed as exempt under section 10(38) of the Act by the beneficiaries in order to facilitate the beneficiaries to convert their black money into white without paying Income-tax. The AO has narrated the modus operandi of various entry providers which is a general statement so far as the indulgence of certain persons in providing the accommodation entry of bogus long term capital gains as well as other transactions. However, in the said narration of modus operandi, there is nothing against the particular transaction of purchase and sale of shares by the assessee. The AO has specifically mentioned that during the course of enquiry in certain cases it has come to light that large scale manipulation has been done in the market price of shares of certain companies listed on Stock Exchange by a group of persons working as a syndicate for the purpose of providing entry of tax exempt bogus long term capital gains to large number of beneficiaries in lieu of unaccounted cash. These observations of the AO in the assessment order cannot constitute any tangible material or evidence to show that the transaction of the assessee is bogus being an accommodation entry. The AO in the show cause notice has stated that information has been received from the Investigation Wing, Kolkata vide letter dated 27.04.2015 that Sunrise Asian Ltd is engaged in giving entries of bogus LTCCG and further, enquiries were made in the matter and it was found that BSE vide notice No. 2016110726 has declared Sunrise Asian Ltd to be suspended due to direction from SEBI. In reply to the show-cause, the assessee vide letter dated 13.12.2016 has specifically requested for such information/documents/statements and details of enquiry which has been conducted by the AO as apparent from his reply and the contents thereof read as under:

13. We however, find that no such information/documents/statements was made available to the assessee thereby violating the basic principle of confronting the assessee with the documents which the Revenue wishes to rely against the assessee. Further, it is noted that in the assessment order so passed, the AO has made reference to a statement of Shri Vipul Vidur Bhatt recorded u/s 132 during certain search operations by the Investigation Wing, Mumbai and has relied on the same for holding the transaction as bogus by availing the accommodation entry of long term capital gain and beneficiary of the bogus LTCCG scam. As the assessee was again not confronted with such statement during the show-cause notice and he came to know of the same from perusal of the assessment order, he raised the objection before the Id CIT(A) that no such statement of Shri Vipul Vidur Bhatt recorded u/s 132 was made available to him during the course of assessment proceedings and secondly, he deserves a right to cross-examine Shri Vipul Vidur Bhatt whose statement is being used against the assessee. However, we find that even during the appellate proceedings, the assessee was not made available any such statement and even the right

of cross examination was denied by the Id CIT(A) who exercises the co-terminus powers as that of the AO. Thus, in view of the decision of Hon'ble jurisdictional High Court in case of CIT vs A.L Lalpuria Construction (P) Ltd (supra) and the decision of the Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra), the assessment based on statement of third party without giving an opportunity to the assessee is not sustainable in law. The Hon'ble Supreme Court in case of Andaman Timber (Supra) while dealing with the issue has held in para 5 to 8 as under:-

14. Therefore, the statement of a third party cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. Even on perusal of such statement of Shri Shri Vipul Vidur Bhatt, we find that it is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee. The AO has either discussed the modus operandi of entry providers and their statements but has not made any reference of any material or documentary evidence which reveals that the assessee has indulged in availing the accommodation entry of bogus long term capital gain. There is no dispute that once the assessee has claimed the long term capital gain from purchase and sale of shares which is exempt under section 10(38) of the Act, the primary onus is on the assessee to substantiate his claim by producing the supporting evidence. We find that in the case in hand this is not an isolated transaction of purchase and sale of shares by the assessee of M/s. Sunrise Asian Ltd but the assessee has been regularly purchasing and selling the shares as it is evident from the details of the holding of various shares as reflected in the financial statements as on 31st March, 2013 as under:-

15. Thus as on 31.03.2013, the assessee was holding the shares of about 12 companies which include shares of M/s. SantoshimaTradelinks Ltd worth Rs 31,68,000/- which were acquired in the financial year 2011-12 and similarly reflected in the balance sheet as on 31.03.2012. We find that the assessee has duly reflected all these shares in the Balance Sheet as on 31.03.2012 as well as 31.03.2013 and the return of income for the assessment year 2012-13 and 2013-14 was also filed in time before the date of sale of the shares starting September 2013 onwards in various lots till March 2014. Thus it is clear that 158400 shares acquired by the assessee on 08.10.2011 were reflected in the Balance Sheet as on 31st March, 2013. We further note that the assessee produced the copy of allotment advice of these shares issued by the company along with the bank statement showing the purchase consideration paid by the assessee through cheque whereby the shares were allotted of face value of Rs 10/- at a premium of Rs 10/- each. The bank account of the assessee has reflected the payment of Rs. 31,68,000/- for purchase of shares. The AO has not disputed that subsequently there were events of amalgamation of the company with M/s. Sunrise Asian Ltd. pursuant to scheme of amalgamation duly approved by the Hon'ble High Court of Mumbai and consequently the assessee was allotted 158,400 shares of M/s Sunrise Asian Ltd as against 158,400 shares of M/s. SantoshimaTradelinks Ltd originally allotted by the company. The shares acquired by the assessee are duly reflected in the Demat account of the assessee. Once the shares are dematerialized and credited in the Demat account of the assessee, the holding of the shares by the assessee cannot be disputed. The AO has treated the transaction of sale of 158400 shares as bogus being accommodation entry but has not doubted the holding of these shares in the Demat account of the assessee. Once the assessee has produced all the supporting evidences which include allotment advice, bank statement showing the payment of purchase consideration, Demat account showing holding of shares in the Demat account, sale of the shares through Stock Exchange which are also reflected in the Demat account of the assessee and receipt of the sale consideration in the bank account of the assessee as it is evident from the bank account statement of the assessee, then in the

absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of the investigation carried out by the Department in some other cases where some persons were found indulged in providing accommodation entry. The AO in the entire assessment order has not made reference to single documentary evidence which can be said to be an incriminating material against the assessee to show that the assessee has availed accommodation entry of bogus Long Term Capital Gain. Therefore, the mere suspicion cannot be a ground for treating the transaction as bogus in the absence of any evidence or material on record.

16. The Id. D/R has relied upon the decision of Hon'ble Delhi High Court in case of Suman Poddar vs. ITO (supra) wherein the Hon'ble High Court has confirmed the finding of the Tribunal and finally observed in para 8 as under :-

Thus it is clear that in the said case the Tribunal's finding is based on the fact that no evidence of actual sale except the contract notes issued by the share broker was produced by the assessee. In those facts, the Hon'ble High Court has held that no question of law arises in the said case. On the contrary, in the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction. Even if the AO doubted the transaction, then to establish that the transaction is bogus, the AO is required to produce the contrary material evidence so that the evidence produced by the assessee can be controverted. In the absence of such contrary material or evidence brought on record by the AO and the evidence produced by the assessee is otherwise independently verifiable being the documents in the shape of allotment advice, bank statement, Demat account, books of account and contract notes for which the assessee has no control or say, therefore, the said evidence cannot be manipulated by the assessee. Once the evidence produced by the assessee is not prepared or beyond the scope of any manipulation by the assessee, then the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. As we have already mentioned that this is not an isolated transaction of purchase and sale of shares in single scrip, but the assessee has been holding the shares of 12 companies out of which the AO has doubted only one scrip. Thus the decision of Hon'ble Delhi High Court will not help the case of the department.

17. The Id. D/R has also relied upon the decision of Hon'ble Guahati High Court in case of CIT vs Smt. Sanghamitra (supra). In that case, the AO, in the order of assessment, noted that though the shares were sold through bank account of the assessee, purchase of shares were not made through the bank account of the assessee. The AO also observed that since the return for the asst. yr. 2000-01 relevant to the year of purchase, was filed after the date of sale and that purchase of shares was not done through the bank account of the assessee, the actual event of purchase of the shares of assessee could not be verified and, therefore, it was apparently an afterthought and a modus operandi adopted to convert the undisclosed income into 'capital gain'. The director of the company was also summoned, but no such person was found available at the address of the company obtained from Guwahati Stock Exchange and no company by name of Birdhichand Pannalal Agency was in existence at the said given address. The share broker was also examined under section 131 and in course of examination, he stated that all records of purchase and sale of shares were lost and thus, the actual purchase and sale of shares could not be verified. The AO, therefore, treated the 'capital gain' as bogus and disallowed the long-term 'capital gain', sought to be exempted under s. 54 of the Act, to the tune of Rs. 15,33,160 and added back the same as income from undisclosed sources'. In the context of said facts, it was held by the Hon'ble High Court that where no documents could be produced in support of purchase and sale of shares and the transaction could not be verified, that in such situations, the genuineness of the transaction has to be examined from the surrounding circumstances and has held as under:

18. On the contrary, in the case in hand the assessee produced all the relevant documentary evidence to establish the genuineness of the transaction which are otherwise independently verifiable being the documents in the shape of allotment advice, bank statements showing payment towards the purchase and sale receipts, Demat account statement reflecting the purchase, conversion and subsequent sale of shares, financial statements and books of account and the return of income relevant for the assessment year pertaining to year of purchase and year of sale, the contract notes reflecting the transaction executed as per price prevailing on the stock exchange. We therefore find that unless these documentary evidence are proved otherwise or any contrary evidence brought on record, the assessee has discharged his onus to prove the transaction of purchase and sale of shares and consequential capital gain. Thus the decision of Hon'ble Gauhati High Court will not help the case of the department.

19. There is another decision of the jurisdictional Hon'ble Rajasthan High Court in case of Pramod Jain (supra) relied upon by the Id A/R where the Hon'ble High Court has referred to its earlier decision in case of CIT vs. Smt. Pooja Agrawal (supra) and has affirmed the findings of the Coordinate Bench and held that no question of law arises and has dismissed the appeal of the Revenue. The relevant findings of the Coordinate Bench are contained at para 6 to 8 as under:

20. Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdiction High Court in case of CIT vs. Smt. Pooja Agarwal (supra) has held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company by way of private placement of face value of Rs 10/- at a premium of Rs 10/- on payment of consideration by cheque and therefore, it is not a case of payment of consideration in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduced his unaccounted income in the shape of long term capital gain. The aforesaid decision of the Hon'ble Rajasthan High Court thus supports the case of the assessee and being of the jurisdictional High Court is binding on this Tribunal.

21. Further the AO has discussed the abnormal rise in the share price of the shares of Sunrise Asian Ltd without any under lying fundamentals. The Delhi Benches of the Tribunal in case of Mohan Lal Agarwal (HUF) vs ITO Ward (1)(4) (ITA 2767/ DEL/2018 order dated 26-11-2018) have held that Capital gains cannot be treated as bogus solely on the basis that the price of the shares has risen manifold and the reason for astronomical rise is not related to any fundamentals of market. If the transactions are duly proved by trading from stock exchange and the documentation is proper, the gains cannot be assessed as unexplained credit or as unexplained money. It was further observed that nowhere it has been found that assessee was in any manner found to be beneficiary of any accommodation entry under any inquiry or investigation and there is no material that any

action has been taken by the SEBI against the company and the company has been black-listed or suspended from trading on account of price manipulation. Once all these transactions are duly proved by trading on stock exchange, then to hold the sale of shares as unexplained and bogus cannot be upheld. Similarly, in the instant case, we find that the AO has not brought on record any material or documentary evidence to show that the assessee has availed accommodation entry of bogus long term capital gains under any enquiry or investigation rather the assessee has produced all relevant documentary evidence in support of his purchase and sale transaction through the stock exchange and there is nothing on record that the trading in the scrip has been suspended by SEBI on account of any price manipulation. We therefore find that the assessee satisfies the necessary ingredients and conditions as so specified in section 10(38) of the Act, in terms of transfer of long term capital asset by way of sale of equity shares on which STT has been paid, he shall therefore be eligible for exemption in respect of whole of the income so realized on transfer of such shares as the provisions of section 10(38) talks about any income arising from transfer of such long term capital asset which shall be exempt from tax.

22. Further, the Mumbai Benches of the Tribunal in case of *Vijayrattan Balkrishan Mittal vs. DCIT [2020] 121 taxmann.com 100 (Mumbai – Trib)* has again discussed this issue in threadbare in para 7 to 37 as under:-

22. In the aforesaid decision, it has been held that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. In the case in hand, the Id. AO has referred to SEBI enquiry against M/s Sunrise Asian Ltd. However, we note that the said enquiry was regarding failure to comply with certain disclosure requirements and therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain and has no bearing in judging the genuineness of the transaction undertaken by the assessee or for that matter, the price and realization on sale of shares so undertaken by the assessee through the stock exchange. Further, it has been held in the aforesaid case that the findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc and for making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. In the instant case, as we have discussed earlier, there is no finding which proves assessee's connection, involvement or collusion with so called accommodation entry providers. Further in the aforesaid case, the issue as to whether the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not has been discussed at length. And referring to legal proposition laid down by the Hon'ble Supreme Court that the burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidence held that the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected. We are in complete agreement with the said view and in the instant case, we find that evidence produced by

the assessee in support of his claim of purchase and sale of shares on the stock exchange have not been refuted by any adverse findings or material which could demonstrate involvement of the assessee or collusion with so called accommodation entry providers to obtain bogus LTCG as so alleged by the authorities below.

24. We also find that while analyzing sale of shares of similar scrip of M/s Sunrise Asian Ltd and claim of exemption of long term capital gains u/s 10(38), the Mumbai Benches of the Tribunal in case of Anraj Hiralal Shah (HUF) vs ITO (supra) has upheld the claim of the assessee's claim of exemption under section 10(38) of the Act and the relevant findings of the Coordinate Bench contained at Para 8 read as under:-

25. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions of the Hon'ble jurisdictional High Court and of that of the Coordinate Benches in cases referred supra, we are of the considered view that the assessee has discharged the necessary onus cast on him in terms of claim of exemption of long term capital gains u/s 10(38) of the Act by establishing the genuineness of transaction of purchase and sale of shares and satisfying the requisite conditions specified therein and the gains so arising on sale of shares therefore has been rightly claimed as exempt u/s 10(38) of the Act. Accordingly, in the facts and circumstances of the case, we set-aside the order of the Id. CIT(Appeals) and the claim of the assessee u/s 10(38) is allowed. The matter is thus decided in favour of the assessee and against the Revenue. In the result, the ground of appeal so taken by the assessee is allowed.

10.1 The above finding of the Jaipur ITAT has also been confirmed by the Hon'ble Rajasthan High Court in IT Appeal No. 54 of 2021 reported in 152 taxmann.com 181 by observing as under:

8. We are of the view that learned ITAT has passed the order on consideration of material and relevant facts, logical conclusion has been arrived at and the same must be allowed to rest. There is no gross violation of principles of natural justice or failure of justice, no error has crept in the order impugned of learned ITAT. The Coordinate Bench of this court in [D.B. IT Appeal No. 22 of 2021 dated 6-4-2022 titled as Pr. CIT v. Sanjay Chhabra, in the similar facts and circumstances has already taken a view that in the appeal at hand under section 260A of the Act no substantial question of law arises.

9. In the light of above discussions, the present appeal under section 260A of the Act does not call for interference and is hereby dismissed as no substantial question of law arises worth consideration.

10.2 Thus, respectfully following the order of the coordinate bench of Jaipur ITAT which was subsequently confirmed by the Hon'ble Rajasthan High Court, involving identical facts and circumstances, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the grounds of appeal of the assessee are hereby allowed.

11. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the Court on 08/11/2023 at Ahmedabad.

**Sd/-
(TR SENTHIL KUMAR)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated
Manish

**(True Copy)
08/11/2023**

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