IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA

Before Shri Sanjay Garg, Judicial Member
&
Dr. Manish Borad, Accountant Member

I.T.A. No. 1782/KOL/2018
Assessment Year: 2015-2016

Manoj Jain (HUF),.....Appellant
15B, Clive Row,
Kolkata-700001
[PAN: AAJHM3349B]
-Vs.-
Income Tax Officer,.....Respondent
Ward-35(4), Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700107

Appearances by:
Shri Miraj D. Shah, A.R., appeared on behalf of the assessee

Shri B.K. Singh, JCIT, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : July 31, 2023
Date of pronouncing the order : September 21, 2023

O R D E R

Per Dr. Manish Borad, Accountant Member:-

This appeal at the instance of assessee for assessment year 2015-16 is directed against the order of ld. Commissioner of Income Tax (Appeals)-10, Kolkata dated 20th July, 2018, is arising out of the order under

section 143(3) of the Act dated 19.12.2017 framed by ld. ITO, Ward-35(4), Kolkata. The ground of appeal reads as under:-

> *"On the facts and circumstances of the case, ld. CIT(A) was not justified in upholding the addition made by the ld. AO u/s 68 of the Act in respect of sale proceeds of shares of Sulabh Engineers & Services Limited treating the same as income from undisclosed sources and rejecting the appellant's claim of Long Term Capital Gains (LTCG) on sale of those shares".*

2. The facts in brief for A.Y. 2015-16 are that the assessee is HUF, who filed his return of income on 25.07.2015 declaring income of Rs.3,00,620/-. In the said return, the assessee has claimed exemption under section 10(38) of the Act for long-term capital gain of Rs.47,25,995/- from sale of equity shares of Sulabh Engineers & Services Limited. The case selected for scrutiny through CASS in AST module by valid serving of notices under section 143(2) and 142(1) of the Act. During the course of assessment proceedings, the ld. Assessing Officer observed that during F.Y. 2014-15, the assessee purchased 25,000 equity shares of Sulabh Engineers & Services Limited on 15.03.2013 and total purchase price was at Rs.14,97,708/-. During the year under consideration, the assessee sold 25,000 shares (20,000 shares on 26.05.2014 & 5000 shares on 29.05.2014)) of Sulabh Engineers & Services Limited for a total consideration of Rs.62,23,703/- thereby earning long-term capital gain of Rs.47,25,995/-. The ld. Assessing Officer called for the details of financial statements of Sulabh Engineers & Services Limited which indicated poor results not commensurate to the steep increase in price of equity shares. He also observed that name of

this company appears in the list of 84 penny stock companies listed with Bombay Stock Exchange, which the Investigation Wing has found to be managed by unscrupulous brokers, entry operators and money launderers involved in providing bogus accommodation entries of long-term capital gain and short-term capital loss. The ld. Assessing Officer was of the considered view that the assessee has dealt with penny stock company, the financial statement of which truly states that increase in the price of equity shares were not commensurate to the business activities being carried out and has thus LTCG claimed is bogus not eligible for exemption under section 10(38) of the Act and alleged receipt of sale consideration is liable to be added as unexplained cash credit under section 68 of the Act. The assessee failed to get any relief from the ld. CIT(Appeals). Being aggrieved, the assessee is in appeal before the Tribunal.

3. The ld. Counsel for the assessee apart from reiterating the submissions before the lower authorities and also referring to the paper book dated 21.05.2019 containing 32 pages also placed reliance on the decision of this Tribunal in the case of M/s. Gateway Financial Services Limited & Others in ITA No. 982/KOL/2018 & Others dated 14th July, 2023 stating that the assessee was not found to be engaged in the alleged manipulation of price nor has been involved in the price rigging with entry operators as alleged by the ld. Assessing Officer referring to the Investigation Wing report. He also stated that the assessee has entered into this transaction as a normal investor

and, therefore, even the SEBI did not find it important to take up the case of the assessee by way of issuing any notice.

4. On the other hand, ld. D.R. stated that the issue raised in the instant appeal is squarely covered in favour of the assessee by the judgment of the Hon'ble jurisdictional High Court in the case of Swati Bajaj (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022.

5. We have heard the rival contentions and perused the relevant material placed before us. We notice that the issue with regard to unexplained cash credit for alleged bogus long-term capital gain under section 10(38) of the Act is in dispute before us. We notice that the alleged long-term capital gain has been earned by the assessee during the year under appeal from sale of equity shares of Sulabh Engineers & Services Limited. This company is in the list of 84 companies, which has been found to be penny stock company. The assessee had made huge gain due to price increase, in comparison to the purchase price, but the increase in price of shares is not commensurate to the financials of the company as observed by the lower authorities.

6. It is also pertinent to observe that recently Hon'ble Jurisdictional High Court has examined the issue of bogus capital gain claim made by a large number of assessees in Kolkata. This issue has been examined in

the case of Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022. A large number of assessees have claimed long-term capital gain/loss. The Income Tax Department has carried out search/survey upon different entities, which unearthed that certain companies and professionals were providing such claim in the shape of accommodation by manipulating the stocks of certain shell companies. The Hon'ble Court has made a detailed analysis of the material found during the course of search and survey on the premises of third entities and set aside the orders of the ITAT in a group of appeals by holding that such claim by the assessees for long-term capital gain was a bogus claim.

7. The issue raised before us is with regard to genuineness of the claim of exempt income under section 10(38) of the Act in respect of long-term capital gain arising sale of equity shares from the listed companies, which were found to be the penny stock companies by both the lower authorities and the long-term capital gain so claimed found to be bogus in nature. We find that recently this Tribunal has adjudicated the similar issue under identical in the case of Shyam Sunder Bajaj in ITA No. 2552/KOL/2018 and others vide order dated 17th October, 2022 and after placing reliance on the judgment of Hon'ble Jurisdictional High Court in the case of *Swati*

Bajaj & Others (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022, observed as under:-

> *"4. All the present cases were selected for scrutiny u/s. 143(3) through CASS and the issue in all of them for selection relates to 'suspicious long term capital gain on shares'. In all the above appeals, according to the ld. AO, LTCG reported by the assessee in respective return was bogus and the entire transactions were done with the objective to introduce unaccounted money of the assessee in the books by using the route of LTCG which was exempt from tax u/s 10(38) of the Act, except in one case, where the assessee has booked trading loss on transaction of shares of two Companies, which have been treated as penny stock. Thus, ld. AO held that the said LTCG/loss are fabricated/engineered transactions by the respective assessees, sale of which falls under the category of penny stocks and the same were treated as bogus which were added in the total income by treating it as unexplained cash credit u/s. 68 of the Act. Ld. AO based his decision of treating the impugned transaction of sale of shares as bogus transaction by relying on the report of Investigation Wing of the Department wherein the Investigation Wing of the Department had studied the modus operandi of rigging the prices of penny stocks and generation of capital gain /trading loss there from. On appeal, ld. CIT(A) confirmed the action of the ld. AO. Aggrieved, assessees are in appeal before the Tribunal.*
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> *5. Recently on 14.06.2022, the Hon'ble jurisdictional High Court of Calcutta passed a judgment in the case of Swati Bajaj and others [2022] 139 taxmann.com 352 (Cal) dealing with set of cases with similar fact patterns as narrated above for the present appeals under consideration before us. Hon'ble jurisdictional High Court by taking the report of the Directorate of Investigation of the Department as the basis, gave its observations and findings, which are summarized hereunder.*
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> *5.1. There are two category of cases dealt with by the Hon'ble High Court, viz. first category being those arising out of the order of Tribunal dated 26.06.2019 in which 90 appeals filed by the assessees were allowed and second category is of those cases where1 assessee has challenged the assumption of jurisdiction by CIT under section 263 of the Act. In the present set of appeals before us, we are concerned with the first category whose relevant observations and findings by the Hon'ble High Court are noted below:*
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> > *a) From the assessment order passed in the case of the assessee Smt. Swati Bajaj, we find that the genesis of the issue commenced from an investigation report submitted by the Directorate of Income Tax, Investigation, Kolkata (DIT). The investigation report has been prepared by the Deputy*

Director of Income Tax, Investigation Unit -II and III, Kolkata. [para 43]

b) The assessee were conscious of the fact that they have not been named in the report, therefore made a vague and bold statement that the non-furnishing of report would vitiate the proceedings. Therefore, merely by mentioning that statements have not been furnished can in no manner advance the case of the assessee. If the report was available in the public domain as has been downloaded and produced by the revenue, nothing prevented the assessees who are ably defended by the Chartered Accountants and Advocates to download such reports and examine the same and thereafter put up their defence. Therefore, the based on such statements of violation of principles of natural justice the assessees have not made out any case. [para 65]

c) The test to be applied is the test of preponderance of probabilities to ascertain as to whether there has been violation of the provisions of the Income-tax Act. In such a circumstance, the conclusion has to be gathered from various circumstances like the volume from trade, period of persistence in trading in the particular scrips, particulars of buy and sell orders and the volume thereof and proximity of time between the two which are relevant factors. Therefore, the methodology adopted by the revenue cannot be faulted. [para 69]

d) Test of preponderance of probabilities have to be applied and while doing so, the court cannot loose sight of the fact that the shares of very little known companies with in-significant business had a steep rise in the share prices within the period of little over a year. [para 73]

e) The assessee was not named in the report and when the assessee makes the claim for exemption, the onus of proof is on the assessee to prove the genuinity. [para 73]

f) It is incorrect to argue that the assessees have been called upon to prove the negative in fact, it is the assessees duty to establish that the rise of the price of shares within a short period of time was a genuine move that those penny stocks companies had credit worthiness and coupled with genuinity and identity. [para 73]

g) The assessee cannot escape from the burden cast upon him and unfortunately in these cases the burden is heavy as the facts establish that the shares which were

traded by the assessees had phenomenal and fanciful rise in price in a short span of time. [para 75]

h) The exercise that was required to be done by the Tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the 'players' can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the Tribunal which exercise has not been done. [para 99]

i) The assessee had opportunity to prove that there was no manipulation at the other end and whatever gains the assessee has reaped was not tainted. This has not been proved or established by any of the assessee. [para 99]

j) The tribunal being the last fact finding authority was required to go deeper into the issue as the matter have manifested large scale scam. Thus, the orders of the tribunal are not only perfunctory but perverse as well. The exercise that was required to be done by the tribunal is to consider the totality of the circumstances because the transactions are shown to be very complex, the meeting of minds of the "players" can never be established by direct evidence and therefore the surrounding circumstances was required to be taken note of by the tribunal which exercise has not been done. [para 99]

k) In such factual scenario, the Assessing Officers as well as the Commissioner (Appeals) have adopted an inferential process which is found to be a process which would be followed by a reasonable and prudent person. The Assessing Officers and the Commissioner (Appeals) have culled out proximate facts in each of the cases, took into consideration the surrounding circumstances which came to light after the investigation, assessed the conduct of the assessee, took note of the proximity of the time between the buy and sale operations and also the sudden and steep rise of the price of the shares of the companies when the general market trend was admittedly recessive and thereafter arrived at a conclusion which is a proper conclusion. [para 99]

l) For all the above reasons, we hold that the Tribunal committed a serious error in setting aside the orders of the CIT(A) who had affirmed the orders of the Assessing Officer. [para 101]

m) In the result, these appeals are allowed and the substantial questions of law framed/suggested are answered in favour of the revenue and against the assessee restoring the orders passed by the respective Assessing Orders as affirmed by the CIT(A). [para 102]

6. In the context of factual matrix of the present appeals before us narrated above, the position of law as enunciated by the Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj (supra) carrying force of binding nature on the issue under consideration for us, was confronted to the respective ld. Counsels of the assessee who appeared before us. Ld. Counsels were fair enough to state that issue involved in these appeals is squarely covered against the assessee by the said decision as the fact involved are identical to that which were before the Hon'ble High Court. For cases where none appeared before us on behalf of the assessee, the relevant factual matrix was captured with the assistance of Ld. Sr. DR / CIT DR (already narrated above). Since the matter is squarely covered by the decision of Hon'ble jurisdictional High Court of Calcutta in the case of Swati Bajaj & others (supra), we have taken up these also for adjudication ex parte, qua the assessee.

7. After hearing both the sides and taking into consideration the factual matrix of the cases before us vis-à-vis the decision of Hon'ble jurisdictional High Court of Calcutta in Swati Bajaj & others (supra), we respectfully following the said decision carrying the force of binding nature, being the jurisdictional High Court, dismiss the appeals of the assessee and restore the order of the respective ld. AO as affirmed by the respective ld. CIT(A)".

8. On going through the above decision of this Tribunal, wherein ratio laid down by the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others (supra) has been referred and relied. Hon'ble Court has held such transactions of earning of long-term capital gain of penny stock companies as bogus based on the test of preponderance of probability gathered from various circumstances like volume from trade, period of persistence in trading in the particular scrip, particulars of buy and sale orders, steep increase in the price of the equity shares not commensurate with the financial of the alleged penny stock companies and also rigged of entry operators, who have accepted

of being providing accommodation entries in the form of bogus long-term capital gain. We find that the said judgment of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others (supra) is completely applicable on the facts of the instant case. So far as the reliance placed by the ld. A.R. on the decision of this Tribunal in the case of M/s. Gateway Financial Services Limited(supra), we find that this Tribunal after considering the order of the Security & Exchange Board of India, in which one of the parties was the assessee dealt by this Tribunal and the SEBI after detailed investigation and considering the facts of the case exonerated the assessee from the charges leveled in the show-cause notice, which means that SEBI which controls the platform on which transaction of purchase and sale of equity shares is carried out, has specifically carried out the detailed investigation and the preponderance of probability was ruled out and the assessee was not found to be engaged in the manipulation of price of the alleged penny stock companies. Thus the facts of the case before us in the case of M/s. Gateway Financial Services Limited are totally distinguishable and cannot be applied in the facts of the case of the assessee in the instant appeal as no such order of the SEBI exonerating the assessee has been placed before us.

9. Therefore, since no other binding precedence in favour of assessee is placed before us, we respectfully following the decision of this Tribunal dated 17.10.2022 as well as the judgment of the Hon'ble Jurisdictional High Court in the case of

Swati Bajaj & Others (supra) find no infirmity in the orders of the ld. CIT(Appeals) and, thus, dismiss all the grounds raised by the assessee for A.Y. 2015-16.

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

Order pronounced in the open Court on 21st September, 2023.

Sd/-	**Sd/-**
(Sanjay Garg)	**(Manish Borad)**
Judicial Member	**Accountant Member**

Kolkata, the 21st day of September, 2023

Copies to :(1) Manoj Jain (HUF),
15B, Clive Row, Kolkata-700001

(2) Income Tax Officer,
Ward-35(4), Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700107

(3) Commissioner of Income Tax (Appeals)-10, Kolkata;
(4) Commissioner of Income Tax- ;
(5) The Departmental Representative
(6) Guard File
TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.