IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

SA No.152/Del/2020
(ASSESSMENT YEAR 2014-15)

ITA No.761/Del/2020
(ASSESSMENT YEAR 2014-15)

Sh. Mukesh Mittal, 138, Deepali Enclave, Pitampura, New Delhi- 110 034 PAN –AJGPM 2125D	Vs.	Income tax Officer, Ward-41(1), New Delhi.
(Appellant)		**(Respondent)**

Appellant By	**Sh. Gautam Jain, Adv.** **Sh. Lalit Mohan, CA**
Respondent by	**Ms. Rakhi Vimal, Sr. DR**
Date of Hearing	**06.01.2021**
Date of Pronouncement	**26.03.2021**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

The present appeal is preferred by the assessee against the order dated 29.11.2019 passed by the Ld.

Commissioner of Income Tax (Appeals)- 14, New Delhi {CIT (A)} for Assessment Year 2014-15.

2.0 The brief facts of the case are that return declaring taxable income of Rs. 85,85,510/- was filed on 30.7.2014 through e-filing and was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'). The case was selected for scrutiny through CASS. During the year under consideration, the assessee has declared income from house property, short term capital gain and other sources. Besides this, the assessee has declared income from long term capital gains to the tune of Rs. 5,83,61,303/- which has been claimed exempt u/s 10(38) of the Act.

2.1 During the year under consideration, the assessee had sold 7,50,000 shares of M/s Radford Global Ltd. for a total consideration of Rs. 5,99,40,819/- against the purchase of 1,50,000/- shares at Rs. 22,50,000/- resulting into long term capital gains of Rs. 5,76,90,819/-. The assessee was allotted 1,50,000/- preferential shares on 20.1.2012 at a price of Rs. 15/- per share which included premium of Rs. 5/- per

share. Subsequently, these shares were split and the assessee was allotted 7,50,000 shares of M/s Radford Global Ltd., formerly known as M/s P.S. Global Ltd. These shares were sold through M/s Vivek Financial Focus Ltd. In addition to the above, the assessee also sold 55,000 shares of M/s V&K Software Ltd. (now known as USG Tech Ltd.) for a total consideration of Rs. 7,13,384/- whereas these shares were purchased at a price of Rs. 42,900/- resulting into long term capital gain of Rs. 6,70,484/-.

2.2 In the assessment order, the Assessing Officer (AO) noted that as per the investigation report of Pr. DIT (Inv.) Kolkata, the assessee was one among the beneficiaries in the list by accepting bogus long term capital gain entries through stock brokers trading in circular and penny stocks. The name of the stock which was used for the purpose of providing accommodation entry has been stated to be M/s Radford Global Ltd. (old name P.S. Global Ltd.) in the form of capital gains. To verify the above transactions reported by the assessee for claiming long term capital gain of Rs.

5,76,90,819/- claimed as exempt u/s 10(38) of the Act, the assessee was asked to furnish all details including bank statement, share brokers note, ledger account copies, share certificates, and all other documentary evidences in support of purchase and sale of shares and the mode of payment and receipts of proceeds. Further, notices u/s 133(6) of the Act dated 27.9.2016 were issued to M/s Radford Global Ltd., Security Exchange Board of India ("SEBI") and the broker M/s Vivek Financial Focus Ltd. It is stated that the investigation was also undertaken by SEBI and that SEBI in its interim report dated 19.12.2014, in exercise of the powers conferred in terms of section 19 read with section 11(1), section 11(4) and section 11B of the SEBI Act, 1992, restrained 108 persons/entities including the assessee from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner, till further directions. The name of Shri Mukesh Mittal is stated to appear at S.No 36 of the said list. In the said order it was held as under:

"26 Since prior to the trading in its scrip during the examination period. Radford did not have any significant financial standing in the securities market, in my view, the only way it could have increased its share value is by way of market manipulation. In this case, it is noted that the traded volume and price of the scrip increased substantially only after Radford Group & Suspected Entities and allottees started trading in the scrip. The average volume increased by 5,05,066% (5050 times) during the patch I, i.e., from 98 shares per day to 4,95,063 shares per day and the price increased by 74.8% during the same period, i.e. from Rs. 49.2 to Rs. 86. Radford Group & Suspected Entities were trading in the scrip above the LTP and their trades created artificial volumes and manipulated the price of the scrip during the examination period. It is further noted that on the days when Radford Group & Suspected Entities were not trading, the trading volumes in the scrip were very low and the substantial increase in traded volumes as observed in this case was mainly due to their trading. I further note that Radford Group & Suspected Entities and allottees traded amongst themselves as substantiated by their matching contribution to net buy and net sell in patch I. there was no change in the beneficial ownership of the substantial number of traded shares as the buyers and

sellers both were part of the common group and were acting in league/concert to provide LTCG benefits to the allottees. In view of the above, I prima facie find that Radford Group & Suspected Entities and allottees used securities market system to artificially increase volume and price of the scrip for making illegal gains to an to convert ill gotten gains into genuine one".

2.3 A show cause notice dated 2.12.2016 u/s 142(1) of the Act was issued to the assessee and reply dated 12.12.2016 was filed wherein the assessee contended as under:

"a) That the said order only pertained to scrip Radford Globals Ltd. and not to scrip V&K Software;

b) That the said order is not final order but only an interim order and hence could not be considered as reliable to form any adverse inference in the matter;

c) That the said order is solely based on prima facie observation only of the SEBI and not on any final or concrete findings of the SEBI;

d) That the transactions so entered into by the assessee have not been cancelled or annulled by the SEBI, as empowered under section 9 of Securities Contract (Regulation) Act, 1956;

e) That all the transaction of sales had been done through screen based trading on recognized stock exchange. The assessee doesn't have any details about the identity of the persons to whom he sold the shares;

f) That it is an undisputed fact in case of screen based trading, all trades are executed in the opaque screen wherein person do not get to choose counterpart to their trade. The automated systems itself matches orders on a price time priority basis and hence is not possible for anybody to have access over the identity of counter party dealing in any transaction. Since the counter party identity is not displayed, one can never have any choice with whom it wants to deal or not to deal;

g) That assessee Mr Mukesh Mittal is a regular investor in the stock market and all of his investments and income is duly assessed to tax;

h) That SEBI has not placed any material on record to show any culpable conduct on the part of the assessee even by discharge of the standard of preponderance of probabilities;

i) That all the documents, which SEBI had provided to the assessee during the course of proceedings do not prove at all that Mr. Mukesh Mittal was involved in fraudulent transaction. On the contrary, these evidences/documents

so provided by SEBI has established that trade transaction of Mr. Mukesh Mittal is genuine;

j) That the summary of trade of Sh. Mukesh Mittal obtained from Extracts of order log and trade log drawn from the date provided to us in CD by SEBI is as under:

Date	Qty. Ordered	Qty. sold to persons mentioned in Table IV of the interim order*	Qty. sold to others	Total Qty. sold	Qty. unsold
26.4.2013	150000	87649	62351	150000	----
7.5.2013	250000	25000	----	25000	----
8.5.2013	64691	14691	50000	64691	----
20.5.2013	100000	10000	----	100000	----
20.6.2013	123028	123028	----	123028	----
26.6.2013	35000	10000	2500	12500	22500
27.6.2013	80000	32000	28000	60000	20000
28.6.2013	50000	12318	16308	28626	21374
2.7.2013	105265	71878	8387	80265	250000
3.7.2013	105890	67940	37950	105890	----
Total	838874	844504	205496	750000	88874
Percentage of total share sold		73%	27%		11.85%

**Table IV of the interim order specifies the list of 44 persons alleged as related party and suspected entities. Hereinafter referred to as Table IV entities.*

k) That shares sold by Sh. Mukesh Mittal were purchased by different persons through different stock brokers through online trading platform of Bombay Stock Exchange at different point of time;

l) That consideration for aforesaid share trade was received by Sh. Mukesh Mittal through proper banking channel as per SEBI and BSE norms;

m) That shares were not immediately purchased by the buyers on placement of sale order by Sh. Mukesh Mittal. Rather there was considerable amount of time gap in placement of sales order and purchase of shares by the buyer. Therefore, sales order placed by Sh. Mukesh Mittal at the online trading platform of BSE, was open to the other investors for purchase of those shares;

n) That only 73% of the shares sold by Sh. Mukesh Mittal were purchased by persons mentioned in table IV of the interim order passed by SEBI. Remaining 27% shares were purchased at similar price by other investors, who are not alleged as related party and suspected entities in the interim order;

o) That no evidence has been brought on record that investment made by Sh. Mukesh Mittal in the preferential allotment of shares of Radford Global Limited was not out of his own funds but funded by Radford group or other suspected entities;

p) That similarly no evidence has been brought on record that consideration received on sale of shares of Radford Global Ltd. was black money of Sh. Mukesh Mittal routed through

Radford group or other suspected entities and converted into Tax free LTCG;

q) *That SEBI itself has admitted that there were proper Board Resolutions in place for issuing the preferential shares. The company had properly issued of preferential shares after taking shareholder/board approvals. SEBI has not contended or contested the validity of the issue of the preferential allotment and hence the preferential shares allotted to the assessee were under due process of law; and*

r) *That in the absence of cogent material no much presumption can be drawn that entire purchase and sale transactions of Sh. Mukesh Mittal was a device for the purpose of money laundering by Sh. Mukesh Mittal and to convert black money into tax free LTCG."*

2.4 The AO, however, denied the claim of Rs. 5,76,90,819/- being not taxable u/s 10(38) of the Act on sale of shares of M/s Radford Global Ltd. in the order of assessment dated 27.12.2016 passed u/s 143(3) of the Act. The AO held that the receipt of Rs. 5,76,90,819/- was nothing but unexplained cash credit u/s 68 of the Act to be taxed @ 30% u/s 115BBE of the Act at the hands of the assessee.

Furthermore, he also held that commission @ 3% to 5% would have been charged for providing arranged capital gains and since the assessee has claimed LTCG of Rs. 5,76,90,819/, an amount of Rs. 17,98,225/- i.e. 3% of Rs. 5,99,40,819/- being the total sale value of shares of M/s Radford Global Ltd.) was to be added u/s 69C of the Act as unexplained expenditure of the assessee.

2.5 Aggrieved, the assessee approached the Ld. First Appellate Authority. The submissions of the assessee are reproduced in the appellate order in which the assessee reiterated the submissions made before the A.O. and filed details of purchase and sale of scrip of M/s Radford Global Ltd. to show that he had entered into genuine transaction which was supported by documentary evidences. It was further submitted that the interim order of the SEBI had been revoked and the assessee had been cleared from all the allegations. The Ld. CIT (A) was of the opinion that the evidences furnished by the assessee with respect to the long term capital gain of Rs.5,76,90,819/- could not be accepted as

genuine as it had been established by the Investigation Wing of the Department, after making detailed enquiries, that the brokers through whom the assessee had purchased shares were involved in business of providing accommodation entries and that the shares purchased by the assessee were in the nature of penny stock. The Ld. CIT (A), did not accept the contention of assessee and following the rule of preponderance of probability dismissed the appeal of assessee. It was observed that in the order of SEBI dated 26.8.016, it had declined to revoke the restraint imposed upon the assessee. Thus, the addition of LTCG of Rs. 5,76,90,819/-, as unexplained cash credits u/s 68 of the Act, was upheld along with the addition of Rs. 17,98,225/- made on account of alleged unexplained commission expenditure u/s 69C of the Act.

2.6 Now, the assessee has approached this Tribunal challenging the order of the Ld. CIT (A) and has raised the following grounds of appeal:

"1 That the learned Commissioner of Income Tax (Appeals) 14, New Delhi has erred both in law and on fact in sustaining addition of Rs. 5,94,89,044/- representing long term on sale of equity share and 3% commission on sale vlue of shares through registered stock exchange and brought to tax u/s 68 of the Act at the rate provided u/s 115BBE of the Act, though the same was eligible for exemption u/s 10(38) of the Act.

1.1 That while sustaining the aforesaid addition and denying the exemption learned Commissioner of Income Tax (Appeals) has failed to appreciate that, appellant was owner of equity shares of a listed company which had been held by it for a period exceeding 12 months and the same were sold on recognized stock exchange after payment of STT, resulting into a long term capital gain and therefore the long term capital gain accrued to the assessee on transfer of long term 'capital asset' was not includible in total income of the assessee in view of section 10(38) of the Act.

1.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate the evidence tendered by the appellant to support the calim of sale of share and hence, findings mechanically recorded on borrowed inference in disregard of evidence and based on irrelevant and extraneous considerations are misconceived and, misplaced.

1.3 That the learned Commissioner of Income Tax (Appeals) has confirmed the above addition and denial of exemption without appreciating that neither the material/investigation relied upon was confronted to appellant and nor cross examination of the parties on whose statements reliance had been placed in impugned order of assessment was granted and therefore order so made in disregard of principles of natural justice was vitiated.

1.4 That further more the learned Commissioner of Income Tax (Appeals) has sustained the addition on mere

speculation, generalized statements, theoretical assumptions and allegations and assertions, without there being any supporting evidence and is therefore not in accordance with law.

1.5 That learned Commissioner of Income Tax (Appeals) has failed to appreciate that once the broker of the assessee M/s Vivek Financial focus Ltd. had neither denied and nor disputed the genuineness of transaction, the conclusion arrived in the order is highly whimsical, arbitrary, illogical and wholly untenable.

1.6 That the learned Commissioner of Income Tax (Appeals) while sustaining the above addition has arbitrarily and, mechanically rejected the explanation and evidence tendered by the appellant and made the addition and denied exemption by drawing subjective, premeditated and preconceived inferences therefore the same are not sustainable.

1.7 That various adverse findings and conclusions recorded by the learned Commissioner of Income Tax (Appeals) are factually incorrect and contrary to record, legally misconceived and untenable.

1.8 That the learned Commissioner of Income Tax (Appeals) has erred in concluding without any basis that assessee has introduced his unaccounted income in the form of long term capital gain by manipulating the penny stock.

It is therefore, prayed that it be held that exemption denied and addition made and sustained by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and appeal of the appellant be allowed."

3.0 The Ld. Authorized Representative (AR) reiterated the submissions made before the authorities below and referred to pages 298-309 of the Paper Book which contained

the Final Order dated 20.9.2017 of the SEBI in which SEBI, after detailed investigation, has revoked the interim order against the assessee. It was submitted that this was the sole reason for rejecting the claim of the assessee. It was argued that the AO did not make any further investigation into the matter. He contended that the material upon relied by the AO was not provided to the assessee. Neither copies of statements of alleged entry operators were supplied nor was cross examination provided. It was submitted that the AO has mechanically lifted the conclusions/observations from the interim order without making any independent inquiries either from the SEBI or the stock exchange to ascertain genuineness of such transactions. He submitted that the theory of preponderance, human probabilities, circumstantial evidence so called rules of suspicious transactions are not applicable in respect of transactions of listed security where the transactions are supported by evidences on record. He submitted that the assessee is a habitual investor having portfolio of investment in shares and has earned capital gains

both in preceding and succeeding years. It was submitted that the allegation that there was an astronomical increase in the price of share of M/S Radford Global Ltd. (old Name PS Global Ltd) cannot be a valid basis to deny the legitimate claim of long term capital gain claimed by assessee u/s 10(38) of the Act. He also referred to the financials of M/s Radford Global Ltd. from Assessment Years 2010-2011 to 2015-16 to plead that this company is not penny stock company. He also referred to the orders of assessment u/s 153C/153A and u/s 143(3) of the Act in the case of M/s Radford Global Ltd. for Assessment years 2013-14 to 2015-16. The financials for the assessment year under appeal in the case of M/s Radford Global Ltd. are reproduced as under:

Particulars	Assessment year 2014-15
Share Capital	14,06,23,000
Reserves and Surplus	5,77,67,887
Tangible Assets	1,51,839
Inventories	9,17,40,364
Trade receivables	11,18,94,152
Cash and Cash equivalents	3,10,125
Revenue from operations	11,03,60,575
Other income	87,73,463
Profit before Tax	26,10,120

3.1 The learned AR submitted that in case of Shri Brij Bhushan Singhal vs. ACIT, the Tribunal considered an identical issue in scrip of the same company M/s Radford Global Ltd. In that case also, interim order of the SEBI was rejected and the appeal of assessee has been allowed. He submitted that the issue is covered in favour of the assessee by the aforesaid decision. I was further submitted that a similar view has also been expressed in the case of Sh. Riaz Munshi v. ACIT (supra). He also relied upon the following decisions in which such proposition has been held in favour of the assessee:

i) Smt. KarunaGarg v. ITO ITA No. 1069/D/2019 dated 6.8.2018 A.Y. 2014-15

ii) Smt. SimmiVerma v. ITO ITA No. 3387/D/2018 dated 6.11.2018 A.Y. 2014-15

iii) Smt. Jyoti Gupta ITA No. 3510/D/2018 dated 6.11.2018 A.Y. 2014-15

4.0 The Ld. DR on the other hand relied upon the orders of the authorities below and submitted that the assessee had entered into bogus transaction and purchase

value is very less and that the shares have been sold at a high price. It was submitted that the Ld. CIT (A) has rightly invoked the principle of preponderance of probability against the assessee. It was argued that the *modus operandi* was examined by the Kolkata Investigation Wing because there was a rigging in the profit. It was also contended that the order dated 20.9.2017 could not be relied upon since the company M/s Radford Global Ltd. was yet a penny stock company and had not been cleared by SEBI. Therefore, the authorities below had correctly made the addition against the assessee. Reliance was placed upon the decision of Delhi Bench of ITAT in the case of Suman Poddar vs. ITO dated 25.07.2019, which was confirmed by the Hon'ble Delhi High Court dismissing the appeal of assessee vide order dated 17.09.2019 in ITA.No.841/2019. The judgment of Hon'ble Delhi High Court in the case of Udit Kalra vs., ITO in ITA.No.220/2019 dated 08.03.2019 in which scrip of M/s. Kappac Pharma Ltd., has been considered, was also relied upon.

5.0 We have heard the rival contentions and have also perused the relevant records available with us, especially the orders of the revenue authorities and the case laws referred hereinabove. The assessment order clearly shows that the AO has merely reproduced the *modus operandi* of the entry providers who booked bogus long term capital gains through penny stock companies. The show cause notice dated 2.12.2016 issued by the AO during the assessment proceedings and the findings of the AO are based upon interim order of SEBI dated 19.12.2014. Even the Ld. CIT (A) has relied upon another interim order dated 26.8.2016 confirming the earlier interim order dated 19.12.2014. However, it is now an admitted fact that interim orders of the SEBI have been later on revoked by the SEBI. The interim orders framed by SEBI dated 19.12.2014 and 26.8.2016 were revoked in respect of 82 entities including the assessee by final order dated 20.9.2017. It was held in Para 9 of the said order as under:

> *"9 Upon completion of investigation by SEBI, investigation did not find any adverse evidence/ adverse*

findings in respect of violation of provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities market) Regulations, 2003 (PFUTP Regulations) in respect of following 82 entities (against whom directions were issued vide the interim orders as confirmed vide the above said confirmatory orders) warranting continuation of action under section 11B r/w/ 11(4) of SEBI Act. However investigation has found adverse findings against Radford which warrants Adjudication proceedings".

5.1 The name of the assessee appears at item 77 of the list. Further it was held in Para 10 as under:

"10 Considering the fact that there are no adverse findings against the aforementioned 82 entities with respect to their role in the manipulation of the script of Radford, I am of the considered view that the directions issued against them vide interim orders dated December 19, 2014 and November 9,2015 which were confirmed vide orders dated October 12, 2015, March 18, 2016 and August 26, 2016 are liable to be revoked."

5.2 The decision of ITAT in the case of Shri Brij Bhushan Singhal vs. ACIT (supra), considered the scrip of M/s Radford Global Ltd. on identical facts and held as under:

"30. Further, the assessing officer has heavily relied upon the various orders passed by The Securities and Exchange Board Of India in various companies in which the assessee has earned the long-term capital gain as well as in case of the assessee. First Such order relied upon is interim ex parte orders dated 19/12/2014 passed in case of M/s First financial services Ltd and M/s Redford global Ltd. The learned CIT-A was also heavily harping upon the orders of the SEBI for confirming the addition. In interim order in Redford global Ltd, dated 19/12/2014 assessee was restricted to access the securities market till further directions. Subsequently, on 20/09/2017, SEBI passed an order in that company holding that there are no adverse findings against the aforementioned 82 entities, which included the family of the assessee, and the assessee himself with respect to their role in the manipulations in prices of the script of the company. Therefore, it revoked the original order passed on 19/12/2014. ……..

……..

31. Almost similar orders were passed in all the companies wherever the income tax department asked the

SEBI to enquire. The assessee has placed all these orders at page number 302 – 419 of the paper book. Furthermore, the para number 96 of the above order clearly shows that the intimation is also given to The Director General Of Income Tax Investigation, New Delhi and The Principal Director Of Income Tax Investigation Kolkata and Chandigarh for necessary action. From this, it is apparent that reliance on the interim order of securities exchange control Board of India by the revenue authorities is misplaced as in each of these companies in which the income tax department requested SEBI to investigate has given a clean chit to the assessee and his family. Therefore, reliance on SEBI interim order was misplaced and even otherwise now do not survive in view of subsequent final orders of SEBI."

5.3 Similar view has also been expressed by the ITAT in the case of Shri Riaz Munshi wherein it was held as under:

"6. We have considered the rival submissions and perused the material on record. The assessment order clearly show that the A.O. merely reproduced the modus operandi of the entry providers who booked bogus long term capital gains through penny stock companies in which either there is no business or they have

accumulated losses or a Company is floated only for that purpose. Learned Counsel for the Assessee has filed financials of M/s EBFL from A.Ys. 2011-2012 to 2017-2018 and for the assessment year under appeal the financials are reproduced above, which clearly show that this Company is dealing in actual business activities. Its financials are very heavy and as such the modus operandi of this type of penny stock companies would not be available in the case of M/s EBFL The findings of the A.O. are entirely based upon interim order of SEBI. However, it is an admitted fact that interim order of the SEBI have been later on revoked by the SEBI on assessee as well as M/s EBFL have been cleared from all allegations and charges. In the case of Amar NathGoenka vs. vs., ACIT reported in 54 CCH 344, the ITAT, Delhi Bench considered the scrips of M/s EBFL on identical facts and held as under:

"Assessee placed sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased shares through banking channel and actually got the shares transferred in his name. Purchase was made through cheque which is supported by bank statement. The transactions of sale have been made through Demat account. The contract note along with other details were produced to show that purchase and sale of

the shares have been made through banking channel through recognized Stock Exchange through Demat account on which Security Transaction Tax have also been paid. The A.O. did not make any enquiry on the documentary evidences filed by the assessee. No material have been brought on record against the assessee to disprove the claim of assessee. It is not the case of the Revenue that amount received on sale of shares is more than what is declared by the assessee. The assessee pleaded that the Interim Order of the SEBI have been diluted by passing final order in which no adverse view have been taken against the aforesaid company. Thus, the assessee's claim of purchase and sale of shares have been supported by documentary evidences. The statement of Shri Sanjay Vohra was recorded by the Investigation Wing, Kolkata, but, the same was not confronted to the assessee and his statement was also not subjected to crossexamination on behalf of the assessee. Therefore, his statement cannot be read in evidence against the assessee. The A.O. did not mention any fact as to how the claim of assessee was sham or bogus. The assessee satisfied the conditions of Section 10(38). The broker through whom transactions were carried-out have not denied the transaction conducted on behalf of the assessee. It, therefore, appears that the addition is merely

made on presumption and assumptions of certain facts which are not part of the record. There is no other material available on record to rebut the claim of assessee of exemption claimed under section 10(38). Issue is decided in assessee 's favour."

6.1. In the present case, the assessee submitted sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased the shares through banking channel and actually got the shares transferred in his name. The purchases are supported by bank statements. The transaction of the sale have been made through Demat Account which is corroborated by contract note and other details and transaction is carried out through banking channel through stock exchange through Demat Account on which Security Transaction Tax have also been paid. The A.O. merely relied upon interim order of the SEBI to make addition against the assessee, otherwise, there were no evidence or material on record to disprove the claim of assessee. Since the interim order of the SEBI have been revoked against the assessee and M/s EBFL, therefore, nothing survives in favour of the A.O. The A.O. did not make any further investigation or enquiry into the matter and merely relied upon the interim order of the SEBI and investigation carried out by the Kolkata Wing. Further, it is not clear from the assessment order

whether Investigation Wing report have been confronted to the assessee or any right of cross-examination have been allowed to any statement recorded at the back of the assessee. The assessee asked for the cross-examination of any statement which is used against the assessee for making the addition. But, the assessment order is silent on this aspect. Therefore, the above facts clearly show that assessee entered into the genuine transaction and as such the profit on sale of scrip was exempt from tax. The Ld. D.R. relied upon decisions of the ITAT, Delhi Benches, Delhi in the cases of SumanPoddar vs., ITO (supra) and UditKalra vs., ITO (supra), in which the findings of the Tribunal had been that these are cases of penny stock companies which fact is not there in the present case. Therefore, these decisions would not support the case of the Revenue as having distinguishable on facts. The authorities below have not rebutted the explanation of assessee that he has indulged in dealing in scrips in earlier year as well as in subsequent years. It would, therefore, show that assessee is regularly dealing in scrips. The A.O. has not brought any adverse material against the assessee so as to make the above additions. Considering the totality of the facts and circumstances of the case and financials of M/s EBFL as reproduced above

and other years [PB-76], we set aside the Orders of the authorities below and delete both the additions.

7 *In the result, appeal of the assessee allowed."*

5.4 We also find that the AO has held that many share brokers as well as many employees of these share broking companies in Kolkata, in their statements recorded under section 131 of the Act, have admitted to the fact that they have artificially inflated the prices of the shares of their dummy companies to deliberately provide bogus accommodation entries of the long term capital gain/loss, short term capital gain/loss to the beneficiaries. However, no such statement has been confronted or supplied to the assessee during the course of assessment proceedings. In fact no specific statement has even been referred by the AO in the order of assessment or in the show cause notice extracted in the order of assessment. On the contrary, the fact is that the assessee is a habitual investor. The undisputed details of investment and disinvestment made by the assessee and accepted by the

revenue in the earlier year, instant year and succeeding year is as under:

Sr. No.	Assessment Year	Particulars	Date of Sale	Sale Price	Date of Purchase	Purchase price	Capital Gain
i)	2012-13	Vikas Global Limited	--	--	--	--	13,183 (Claimed exempt u/s 10(38)
ii)	2014-15 (other than script under considerat ion)	SBI Magna Insta Cash	10.5.2013	45,06,452	2.5.2013	45,00,000	6,452 (Short term capital gain)
		SBI Premier Liquid Fund	4.7.2013	2,30,79,188	--	2,30,00,000	791,88 (Short term capital gain)
		V&K Software	21.2.2014	7,13,384	--	42,900	6,70,484 (Claimed exempt u/s 10(38)
iii)	2015-16	Dhruv Global Ltd.	16.3.2015	12,500	9.9.2002	50,000 (Indexed cost 1,14,541)	-1,02,041
		Cubical Services	11.6.2014	13,61,908	8.3.2013	4,34,982	9,26,926 (Claimed exempt u/s 10(38)
iv)	2017-18	PC Jewellers	20.2.2017	1,53,02,868	21.8.2013	33,56,119	1,19,46,749 (Claimed exempt u/s 10(38)
		PVR	20.2.2017	1,28,353	8.12.2007	22,725	105628 (Claimed exempt u/s 10(38)
v)	2018-19	MotilalOswal	11.5.2017	4,93,675	27.4.2017	5,00,000	-6325 (Short term capital gain)
vi)	2019-20	Oil & Natural Gas Corporation	21.2.2019	2,06,700	16.1.2019	1,93,011	13,689
		Polka Resorts (P) Ltd.	23.3.2019	1,08,00,000	23.1.2017	22,95,082	85,04,918
		MotilalOswal	7.9.2018	1,10,37,986	16.5.2017	98,00,000	12,37,986

5.5 It is also seen that the assessee has placed on record complete documents and evidences to support purchase and sale of shares of M/s Radford Global Ltd. The

sale was through screen based trading and STT and all charges were duly paid. The consideration was received through banking channels. In such circumstances, the AO ought to have conducted independent enquiries and verifications with due application of mind before drawing any adverse inference. Thus, the approach of the Assessing authority in making the addition is also contrary to section 142(1) of the Act which provides that for the purpose of obtaining full information in respect of income or loss of any person, the AO may make such enquiry as he considers necessary.

5.6 Much has been argued before us as to the astronomical increase in price of shares of M/s Radford Global Ltd. However, isolated fact of increase in prices of a scrip, without evidence of any involvement of the assessee cannot be the basis to deny the claim made by the assessee, particularly when SEBI has specifically exonerated the assessee. The addition has, thus, been made on surmises, conjectures and suspicion. The transactions of the assessee are prior to any

enquiry or order made by SEBI. Thus, when a person who has been absolved by SEBI and, when the revenue has not placed any material in the shape of statement or otherwise to prove any involvement of the assessee in alleged wrong doing, then there remains no justification to hold that the amount credited represented unexplained credits u/s 68 of the Act. The decision of the ITAT in the case of Karuna Garg (supra) also supports the above wherein it was held as under:

> *"21. A perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or*

corroborated by the person during the assessment proceedings.

22. Section 142 of the Act contains the provisions relating to enquiry before assessment.

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and reaffirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first Appellate Authority are devoid of any such enquiry.

24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was

restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic Food Processing Ltd - a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also.

25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warn investor against any such

unusual increase in shares prices. No such warnings were issued by the SEBI".

5.7 In an identical issue, ITAT Delhi Bench had deleted addition made u/s 68 of the Act in the case of another assessee Smt. Krishna Devi. The Department went in appeal before the Hon'ble Delhi High Court against such deletion. The Hon'ble Delhi High Court upheld the order of the ITAT in PCIT and Others vs. Krishna Devi and Others reported in (2021) 431 ITR 0361. The Hon'ble Delhi High Court observed that ITAT being the last fact finding authority, on the basis of evidence brought on record, had rightly come to the conclusion that the lower tax authorities had sustained the addition without any cogent material on record. The Hon'ble Delhi High Court found no perversity in the order of the Tribunal. Thus, the sum and substance of the judgment of the Hon'ble Delhi High Court was that mere reliance on the report of the investigation wing without further corroboration does not justify the conclusion of treating the transaction as bogus and sham. Identical are the facts in the present appeal before

us and the ratio laid down by the Hon'ble Delhi High Court as above, applies equally in this case also.

5.8 Similarly, the Hon'ble Supreme Court in the case of Adamine Construction (P) Ltd.99 Taxmann 45 has held as under:

> *"What is evident is that the AO went by only the report received and did not make the necessary further enquiries - such as into the bank accounts or other particulars available with him but rather received the entire findings on the report, which cannot be considered as primary material. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO. The assessee had discharged the onus initially cast upon it by providing the basic details which were not suitably enquired into by the AO."*

5.9 In yet another case of Odeon Builders (P) Ltd 110 Taxmann.com 64, the Hon'ble Supreme Court, while dismissing the review petition, held as under:

> "*However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs.19,39,60,866/- was based solely on third party*

information, which was not subjected to any further scrutiny. Thus, the Ld. CIT (A) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs.19,39,60,866/-, is directed to be deleted."

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5 th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which

have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT.

5. In these circumstances, the Review Petitions are dismissed."

5.10 On somewhat identical facts, the Coordinate Bench of ITAT Delhi in the case of Deepak agar 73 ITR (Trib) 74 allowed the appeal of assessee and held as under:

"22. For the sake of repetition, the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the INV Wing as well as information received from the INV Wing. It is apparent from the assessment order that the Assessing Officer has not conducted any independent and separate enquiry in this case of the assessee. Even the statement recorded by the INV Wing has not been got confirmed or corroborated by the person during the assessment proceedings. The Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the INV Wing is required to be corroborated and reasserted/reaffirmed during the assessment proceedings

by examining the concerned persons who can affirm the statements already recorded by any other authority of the department.

23. There is no dispute that the statement which was relied upon by the Assessing Officer was not recorded by the Assessing Officer in the assessment proceedings but it was pre existing statement recorded by the INV Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidence to disprove the evidences produced by the assessee.

24. Our above view is fortified by the decision of the Hon'ble Delhi High Court in the case of Fair Invest Ltd 357 ITR 146. The relevant findings of the Hon'ble Jurisdictional High Court of Delhi read as under:

"6. This Court has considered the submissions of the parties. In this case the discussion by the CIT(Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the

assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68."

25. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore, the judicial decisions relied upon by the ld. DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand. We, accordingly, direct the Assessing Officer to accept the LTCG of Rs.

11,93,55,564/- declared as such. 26. Since we have accepted the genuineness of the LTCG, we do not find any merit in the consequential addition of Rs. 6,05,312/- and the same is also directed to be deleted."

5.11 In her written submissions, the Ld. DR has referred to various judgments and heavily relied upon the decision of the Hon'ble High Court of Delhi in the case of Suman Poddar ITA No. 841/2019 and in the case of Udit Kalra ITA No. 220/2019 and several other decisions of the coordinate bench, which are clearly distinguishable from the facts of the case of appellant, particularly having regard to the final order of SEBI revoking the interim orders.

5.12 We are, thus, of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and such discharge is purely a question of fact. We, accordingly, direct the Assessing Officer to accept the long term capital gain of Rs. 5,76,90,819/- declared as such and allow exemption u/s 10(38) of the Act. In light of the above, we delete the

impugned addition made of Rs. 5,76,90,819/- on account of unexplained cash credits u/s 68 of the Act. Since we have deleted the addition on account of unexplained cash credits u/s 68 of the Act, we do not find any merit in the consequential addition of Rs. 17,98,225/- and the same is also directed to be deleted.

6.0 In the result, the appeal of the assessee is allowed.

7.0 Since, we have already adjudicated the assessee's appeal on merits, the Stay Application becomes *in fructuous* and is dismissed.

8.0 In the final result, the appeal of the assessee stands allowed and the stay application is dismissed. Order pronounced on 26 March,2021

S/d

(N.K. BILLAIYA)
ACCOUNTANT MEMBER

S/d

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 26 /03/2021
dragon
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT

4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI