

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'SMC' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)  
&  
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 799/KOL/2023  
Assessment Year: 2015-2016**

***Brajesh Narnolia,.....Appellant  
419, City Center,  
Luby Circular Road,  
Dhanbad-826001, Jhankhand  
[PAN: ACZPN0347G]***

***-Vs.-***

***Income Tax Officer,.....Respondent  
Ward-1(1), Asansol,  
Aayakar Bhawan,  
Room No. 3, Ground Floor,  
116, Vivekananda Sarani, Kanyapur,  
Asansol-713341, West Bengal***

**Appearances by:**

*Shri S.S. Gupta, 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 : January 15, 2024**

**Date of pronouncing the order : January 17, 2024**

**O R D E R**

**Per Rajpal Yadav, Vice-President (KZ):-**

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals), National

Faceless Appeal Centre (NFAC), Delhi dated 12.06.2023 passed for A.Y. 2015-16.

2. Though the assessee has taken seven grounds of appeal, but his grievance revolves around a single issue, namely ld. CIT(Appeals) has erred in confirming the action of the ld. Assessing Officer, for which long-term capital gain claimed by the assessee amounting to Rs.10,07,722/- was disallowed as exempt under section 10(38) of the Income Tax Act.

3. Brief facts of the case are that the assessee has filed his return of income on 12.09.2015 declaring total income of Rs.9,77,350/-. The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued and served upon the assessee. During the course of scrutiny assessment, it revealed to the ld. Assessing Officer that the assessee has purchased 6,000 of equity shares of Sulabh Engineers & Services Ltd. through the broker, namely Motilal Oswal Securities Limited @ Rs.74.30 only per share on 09.05.2013. These shares were sold by the assessee in two parts, namely 2,000 shares on 22.07.2014 @ Rs.242.28 per share and 4,000 shares @ Rs.243.02 per share on 04.08.2014 and in this way, the assessee has claimed total sale consideration of Rs.9,72,080/- and claimed long-term capital gain as exempt under section 10(38) of the Income Tax Act. The ld. Assessing Officer disallowed this claim and held that Sulabh Engineers & Services Ltd. is a paper entity and its stocks were manipulated by

the experts for granting undue benefits to certain investors. The ld. Assessing Officer has discussed whole details from page no. 4 upto 10 of the assessment order in holding how this investment is to be treated as unreal.

4. Dissatisfied with the assessment order, the assessee carried the matter in appeal before the ld. CIT(Appeals), but this appeal did not give any relief to the assessee.

5. Before us, while impugning the orders of revenue authorities, ld. Counsel for the assessee has filed written submissions, which is reproduced here:-

*The main dispute in the said appeal is on alleged addition of Rs. 10,07,722/- being Long Term Capital Gain on sale of share of Sulabh Engineers and Services Limited for the alleged ground that it is a penny stock and the assessee has made substantial gains by selling these shares even when the general market trend was recessive.*

*It is submitted that Long Term Capital Gain derived by the assessee in the purchase and sale of shares of the said company i.e. Sulabh Engineers and Services Limited have been accepted as genuine by Hon'ble Tribunal Benches i.e., Hon'ble Kolkata ITAT, Hon'ble Chennai ITAT and Hon'ble Lucknow ITAT.*

1. *Vasudha Jain vs ITO - Kolkata ITAT*
2. *Smt. Suman Kothari vs ITO - Kolkata ITAT*
3. *Deepak Kumar Agarwal vs ACIT - Kolkata ITAT*
4. *Smt. Nainimal Jain Anita vs ITO - Chennai ITAT*
5. *Asish Kumar Bose vs DCIT- Kolkata ITAT*
6. *Sanjay Kumar Agarwal (HUF) vs ITO - Kolkata ITAT*
7. *Uma Shanker Dhandhanania vs ITO - Lucknow ITAT*

*In a recent decision rendered by Hon'ble Calcutta High Court in the case of Pr.CIT vs Swati Ba.jaj fl39 taxmann.com 3521, the claim of LTCG earned on sale of shares of penny stock companies have been denied by the AO and such additions have been upheld by Hon'ble High Court mainly due to the reason that such a steep rise in share*

*prices, that too when the general market trend was recessive is contrary to the principle of preponderance of probabilities.*

*In the facts before the Hon'ble Calcutta High Court it has been specifically observed by the Hon'ble High Court as under:-*

*"That assessee purchased shares of Surabhi Chemicals and Investment Limited("S") for Rs. 1 lakhs and when investments in shares became eligible for LTCG it was sold for Rs. 29 lakhs during period when general market trend was recessive"*

*Based on these facts Hon'ble High Court decided the issue in favour of revenue.*

*It is submitted that the decision of Hon'ble Calcutta High Court is distinguishable on facts*

*In assessee's case, the facts are that shares purchased at Rs. 4,46,527.59/- have been sold at Rs. 14,54,249.76/- and thus the sale price is only 3.3 times of cost.*

*Whereas in the case before Hon'ble Calcutta High Court, the shares purchased were sold at a price which was 29 times of cost i.e. share purchased at Rs. 1 lakh were sold at Rs. 29 lakh.*

*Further the Hon'ble High Court was highly guided and persuaded by the revenue for the fact that the general market trend was recessive.*

*In assessee's case the shares were purchased in May, 2013 when the BSE Sensex was 19,760 and when the shares were sold in the month of July, 2014 and August, 2014 the BSE Sensex was 26,300 and 26,674. And thus it is factually incorrect to assume that the gains have been made in a recessionary market.*

*Similarly the NSE Index(NIFTY) also rose from 5985 in May, 2013(month of purchase) to 7,840 and 7,968 in July and August, 2014(month of sale).*

*Copies of the BSE and NSE Sensex for the period April, 2013 to December, 2014 are enclosed in our earlier paperbook filed on 20-09-2023 [Pg. 127-131].*

*It is further submitted that the share prices of Sublabh Engineers and Services Limited have risen from Rs. 60 in the month of April, 2013 to Rs. 240 in the month of November, 2014. A chart showing the month-wise share prices of the said company starting from April,*

2013 to November, 2014 are enclosed in our earlier paper book filed on 20-09-2023 [Pg. 132-136].

It is significant to note that the share prices have remained in the range of around Rs. 240 for a period of 8 Months (April, 2014 to November, 2014).

Thus it is submitted that the case Pr.CIT vs Swati Bajaj 139 taxmann.com 352 of Hon'ble Calcutta High Court is distinguishable on facts.

It is important and relevant to mention here that after the rendition of the decision of Swati Baijai(Supra). by Hon'ble Calcutta High Court, several benches of the Income Tax Tribunal has distinguished the case of Swati Bajai on facts and taken decisions accordingly.

In the following decisions, the Judgement of Hon'ble Calcutta High Court in the case of Swati Bajai has been distinguished on facts:

1. IT A No. 982,983,984 & 2068/Kol/2018 IT AT Kolkata Gateway Financial Services Ltd & Ors. Vs ACIT.
2. 198 ITO 533(Chandigarh- Trib.) Trivikram Singh Toor Vs. Pr. CIT
3. 219 TTJ (Cuttack) 220 ITO Vs. Bimala Dew Singhania

Further it is submitted, that "a judgment should not be read as a provision of law. A judgment is confined to the facts and circumstances of its own case. It is only when the facts and circumstances in two cases are similar that the ratio of the former case becomes applicable to the latter case" as held by Hon'ble Karnataka High Court in the case of Flipkart India Pvt. Ltd. Vs. Asst. CIT T396 ITR 551 (Karn.H

Reliance is also placed on the decision of Hon'ble Supreme Court in the case of Padmasundara Rao vs State of Tamil Nadu 255 ITR 147(S.C.) wherein the Hon'ble Court held as under:

"Precedents - Decision made on setting of facts of particular case - Reliance on earlier decision to be based on fitting factual situation."

"Courts should not place reliance on decisions without discussing how the factual situation fits in with the fact situation of the decision on which reliance is placed"

Further it is submitted that, the assessee has invested in the shares of Sulabh Engineers and Services Limited as an innocent and gullible investor. And there is no evidence and/or allegation of the

*assessee's involvement in the price manipulation of the scrip. Also, there is no evidence and/or allegation of any involvement of the assessee's broker i.e. M/s. Motilal Oswal Securities Ltd., in the price manipulation of the scrip.*

*Further it is submitted that the report prepared by the Directorate of Investigation Kolkata dt. 27-04-2015 mentions the brokers who were involved in price rigging of the said scrip. It is important to note that the broker M/s. Motilal Oswal Securities Ltd. is not among the list of brokers who were involved in the price rigging.*

*Similarly, it is also important to note, that, as per the report of the SEBI dt. 03-09-2020, the assessee is neither a Beneficiary nor a Noticee who have been implicated and were alleged to be involved in the price rigging.*

*Further it is also relevant and important to note the decision of Hon'ble Supreme Court in the case of Pr. CIT Vs. Renu Aggarwal [294 Taxman 523 (S.C.YI. wherein the Hon'blr Court held as under:*

*"Section 69A, read with section 10(38), of the Income-tax Act, 1961-Unexplained moneys (Share dealings)- High Court by impugned order held that where assessing officer disallowed exemption claimed by assessee under section 10(38) and made additions, alleging involvement in penny stock which were being misused for providing bogus accommodation of LTCG, however, there was lack of adverse comments from stock exchange and officials of company involved in these transactions and no material relating to assessee was found in investigation wing report, additions made by Assessing Officer had rightly been deleted. SLP filed by revenue against impugned order was to be dismissed"*

*In the case of assessee also, there were no adverse comments either from the stock exchange or from the officials of the company.*

6. His emphasize was that no doubt Sulabh Engineers & Services Ltd. is one of the Company in the list of 84 companies considered by the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal. But his case is distinguishable than the other cases. He submitted that the assessee has not earned any

abnormal profit. He purchased the shares @Rs.74/- per share and sold them around Rs.240 to Rs.243/- per share. The average value enhanced in stock exchange on shares in this period of eight months for which assessee retained his investment is more than the assessee got while investing in the Sulabh Engineers & Services Limited. Therefore, operative force of the argument of the ld. Counsel for the assessee is that since the assessee has earned a very normal profit on this investment. His investment should be considered as an innocent investment.

7. On the other hand, the revenue relied upon the order of the Hon'ble Jurisdictional High Court in the case of Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.) and submitted that there is no distinguishable feature in this case.

8. We have duly considered the rival contentions and gone through the record carefully. Hon'ble High Court in the case of Swati Bajaj has examined a large number of companies, whose shares were manipulated by certain share brokers for granting undue benefit to the investors either in the shape of gain or loss whenever it is required to an investor. Therefore, the very credential of this company where investment was made is unreliable. The

genuineness of an investee company is not dependent on the magnitude of profit earned by an investor. The assessee might have made investment when the shares of the company were already managed to a particular level and he sold his investment very early, but that small profit is earned by the assessee would not result into automatic genuineness of the transaction. It is an incorrect conception conceptualized by the assessee to segregate himself from the treatment of other such investors. It cannot be accepted as fact to distinguish the judgment of the Hon'ble Jurisdictional High Court, simply for the reason that magnitude of profit is on the lower side to the assessee. As far as the other decisions are concerned, all these details have been duly considered by the Hon'ble Jurisdictional High Court and we cannot deviate ourselves to take a different view, particularly qua one company, which is part of the list of 84 companies, where investments were held by the Hon'ble High Court as bogus. The assessee's investment cannot become genuine because he earned a lesser amount of profit and at the cost of repetition, we again observe that magnitude of profit is not a decisive factor about genuineness of existence of an investee company, therefore, we do not find any error in the order of Id. CIT(Appeals), hence this appeal is dismissed.



**9. In the result, the appeal of the assessee is dismissed.**

Order pronounced in the open Court on 17/01/2024.

Sd/-

**(Girish Agrawal)**  
**Accountant Member**

Sd/-

**(Rajpal Yadav)**  
**Vice-President (KZ)**

**Kolkata, the 17<sup>th</sup> day of January, 2024**

*Copies to :(1) Brajesh Narnolia,  
419, City Center,  
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*(2) Income Tax Officer,  
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Asansol-713341, West Bengal*

*(3) Commissioner of Income Tax (Appeals),  
National Faceless Appeal Centre (NFAC), Delhi;*

*(4) CIT- , Kolkata;*

*(5) The Departmental Representative*

*(6) Guard File*

*TRUE COPY*

*By order*

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

**Laha/Sr. P.S.**