

IN THE ITAT MUMBAI BENCH 'J'

Jafferli K. Rattonsej

v.

Deputy Commissioner of Income-tax, Central Circle 5*

D. MANMOHAN, VICE-PRESIDENT

AND R.K. PANDA, ACCOUNTANT MEMBER

IT APPEAL NO. 5068 (MUM.) OF 2009

[ASSESSMENT YEAR 2006-07]

JANUARY 25, 2012

ORDER

R.K. Panda, Accountant Member - This appeal filed by the assessee is directed against the order dated 19.06.2009 of the Ld. CIT(Appeals)- Central II, Mumbai relating to Assessment Year 2006-07.

2. The grounds of appeals raised by the assessee are as under :

"1. The learned CIT(Appeals), erred in confirming the finding of the Assessing Officer in not considering the gains on the sale of shares of Rs. 4,94,51,910/- as long term capital gains and thereby also confirming the consequent denial of exemption u/s. 10(38) of the Income-tax Act, 1961.

2. The learned CIT(A), erred in confirming the finding of the Assessing Officer that the purchase of the shares can be considered only on the date of dematerialization and therefore the holding period becoming less than 12 months hence, the capital gains of Rs. 80,03,027/- (5,29,22,774 - 4,41,10,775) be taxed as short term capital gains.

3. The learned CIT(A) further erred in holding that the purchase value of the shares sold be taken at the average of high and low price of the shares traded on the NSE and BSE on the date of dematerialization viz. Rs. 4,41,10,775/- and treating the same as unexplained investment in the shares.

4. Without prejudice to above, the appellant has made investment in shares in earlier year which were duly reflected in the books of account of the appellant, hence the addition of Rs. 44110775/-unexplained investment for the year under consideration may be deleted.

5. Without prejudice to above, the transaction in shares being genuine and sufficient evidences were produced, the long term capital gains shown by the

appellant as exempt under section 10(38) of the Income-tax Act, 1961 may be accepted and additions confirmed by the CIT(A) may be deleted."

3. Facts of the case, in brief, are that the in response to notice u/s.153A dated 27.11.2006, the assessee furnished return of income on 29.12.2006 declaring total income of Rs. 68,01,840/-. The income of the assessee consists of income from house property of Rs. 2,54,100/- and interest of Rs. 55,63,980/-received from Kirtilal Kalidas Diamond Exports. The assessee had shown Long Term Capital Gain of Rs. 4,94,51,910/- on account of sale of the following shares which was claimed as exempt u/s.10(38) of the I.T. Act.

<i>Sr.No.</i>	<i>Name of Scrip</i>	<i>Total No. of Shares</i>
1.	Micro Technology	24,500
2.	Prraneta Ind.	16,00,000
3.	Radhe Developers	22,500
4.	Royal Airways	71,000
5.	K. S. Oils Ltd.	46,000
6.	Sanjeevani Parant	10,000

4. During the course of assessment proceedings, the AO asked the assessee to furnish the following details regarding the transactions of above mentioned shares.

(i) A copy of Demat Account reflecting purchase and sale of shares.

(ii) Broker's Note showing the purchases of these shares.

(iii) Broker's Note showing the sales of these shares.

(iv) Statement of Bank Accounts which shows the payment made to the Broker towards the purchases of shares and receipts from the sale of shares

4.1 In response to the above, the assessee furnished the following :-

(i) Copies of contract notes issued by the broker Mahasagar Securities Pvt Ltd. for the purchase of above mentioned shares,

(ii) Copy of ledger account of Mahasagar Securities Pvt. Ltd. in the books of assessee.

(iii) Statement of demat account held with Techno Shares and Stocks Ltd.

4.2 To verify the assessee's claim of purchase of the above shares, the AO issued summon to the principal Director of Mahasagar Securities Pvt. Ltd. on 16.01.2008 requiring him to furnish the brokers note regarding the purchase of the above mentioned shares by the assessee and the copy of ledger account of assessee in the books of Mahasagar Securities Pvt. Ltd. He was directed to furnish the above

information on or before 04.02.2008. Since no reply was received, the AO issued another summon to Mahasagar Securities Pvt. Ltd. on 05.05.2008 for furnishing the above details on or before 09.05.2008. However, since no reply was received, the AO issued another summon on 21.07.2008. In the mean time, the AO asked the assessee to produce the director of Mahasagar Securities Pvt. Ltd. vide order sheet entries dated 10.06.2008 and 03.10.2008. However, the assessee also did not produce him for the verification of his transactions of purchase of shares.

4.3 The AO subsequently issued notice u/s.133(6) to National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) calling for certain information. The Stock Exchanges were specifically asked to furnish the details whether the shares mentioned above were traded through the Stock Exchanges as per the Contract notes furnished by the assessee. The details of broker notes, Trade Nos., Settlement No. and date of purchase of these shares were provided to the Stock Exchanges.

4.4 In response to the notice issued u/s.133(6), the NSE vide letter dated 15.07.2008 informed that M/s. Mahasagar Securities Pvt Ltd is neither a registered trading member nor a sub broker affiliated to any registered trading member of stock exchange. Further, the securities of the company Parraneta Industries are not listed on the exchange. The BSE vide letter dated 16.7.2008 informed that M/s. Mahasagar Securities Pvt. Ltd. is not registered with the BSE.

4.5 The AO scrutinized the Demat A/c. held with Techno Shares and Stock Ltd. and found that the above mentioned shares are dematerialized immediately before the date of sale i.e. either on the same date of sale or 2 to 3 days before the sale of shares. The AO, therefore, issued another show cause notice asking the assessee to explain as to why the Long Term Capital Gain claimed by the assessee should be accepted, since as per the Demat A/c. statement the share holding period is less than 12 months and as per the provision of section 2(42A) of the I.T. Act, the shares sold by the assessee are short term capital asset.

4.6 In response to the same, the assessee furnished a reply which the AO reproduced in the body of the assessment order at para 7.8 which reads as under :-

"With ref to your letter dated 09/09/2008, it is submitted that the exemption claim u/s.10(36) is the exemption granted on shares held for more then 12 months. It is submitted that the shares were purchased for more then 12 months before the sale. When the shares were purchased the assessee assume that the shares will be transferred to his demat account were they were held in the pool account of the broker and the assessee was under the impression that they were in his account and she was not aware they were not transferred in the material form. However, when she wanted to sell this shares an on investigation it was found that this shares have not transferred in the name of the assessee the advisor shown ignorance and open a new demant account and transfer the same before the sale.

The assessee is in the habit of relying on portfolio management advisors who act on his behalf and the management of such funds and shares is entirely left to them to ensure that the procedural aspect of the transaction are completed by the advisors. The assessee was not intending to conduct any transaction in any illegal manner but abide by the law absolutely. This lapse if any is due to the over sight and not

intentional. The assessee believes that ones she purchased the shares the brokers note and the bill are sufficient evidence that the transaction is completed. In view of the magnitude transaction and looking at the spirit of the law it is humbly submitted that the capital gains may be considered as long term capital gain u/s.10(36) on which the STT ties paid and not short term capital gains."

4.7 Subsequently, Shri Mukesh Chokshi, Director of Mahasagar Securities Pvt. Ltd. attended the office of the AO on 24.12.2008 in response to the summons issued u/s.131 of the LT. Act and his statement was recorded u/s.131 of the I.T. Act. In the said statement Shri Mukesh Chokshi in his reply to question No.7 to 10 specifically denied to have purchased any shares for the assessee by his company Mahasagar Securities Pvt. Ltd. He also stated that, the broker's notes furnished by the assessee, have not been issued by Mahasagar Securities Pvt. Ltd. Since Shri Mukesh Chokshi has categorically denied to have issued any contract notes and denied to have any transaction with the assessee and denied to have known the assessee, the AO allowed an opportunity to the assessee to cross examination. Shri Mukesh Chokshi, Director of Mahasagar Securities Pvt. Ltd., which the assessee availed.

4.8 In response to the questions put by the representative of the assessee to Shri Mukesh Chokshi in presence of the AO Shri Mukesh Chokshi reiterated that he has not purchased any shares for the assessee and has not issued any brokers note. Therefore, the AO came to the conclusion that the brokers note furnished by the assessee regarding the alleged purchase of shares are not genuine.

4.9 Simultaneously, summons were also issued to the BSE and NSE on 24.12.2008 to furnish the details of trading carried out of the shares of various companies. The brokers note claimed to be issued by Mahasagar Securities Pvt. Ltd. were also provided to the stock exchanges to verify the transactions. However, both these stock exchanges vide letter dated 26.12.2008 informed the AO that M/s. Mahasagar Securities Pvt. Ltd. is not registered with the stock exchange and no trading as reflected in the brokers notes were carried out on stock exchange.

4.10 The AO found from the Demat account held with Techno Shares and stocks Ltd. (DP ID 12031500, Client ID 00011021) that, the shares were credited in this demat ID by transfer from another DP. To verify the DPs from which shares were credited a summons u/s.131 of the I.T. Act was issued to Techno Shares and Stock Ltd. on 24.12.2008. In response to this Techno Shares and stock Ltd. furnished the details called for. The AO observed from the details furnished, that, the above mentioned shares have been transferred from mainly two depositories namely-1. Sunchan Securities and 2. Bank of India. The assessee also confirmed that he does not have any Demat account in these two depositories. Therefore, the AO was of the opinion that there is no question of transferring the shares from one Demat account of assess to another Demat account. According to the AO it is quite clear that, the assess was not holding the above mentioned shares before the date of Dematerialisation in the Demat account held with Tecno Shares and stocks Ltd. In the back drop of above mentioned facts gathered from the investigations carried out and the statement of Shri. Mukesh Choksey the AO came to the following conclusions regarding the purchase and sale of shares.

(I) Assesses had no transaction with Mahasagar Securities.

(II) The ledger account showing the transactions with Mahasagar securities is not genuine as Shri. Mukesh Choksey, Director of Mahasagar securities has categorically denied of having the transaction with the assessee.

(III) The Contract Notes/Brokers notes furnished by the assessee are not genuine, as Shri. Mukesh Choksey, Director of Mahasagar securities has categorically denied to have Issued any contract notes to the assessee.

(IV) The replies received from the B.S.E. and N.S.E also proves that, the transactions as appearing on the brokers notes for purchase of the disputed shares have not been done through the Stock Exchanges. These shares were not traded through the stock exchanges.

(V) The shares were not dematerialized after the purchase.

(VI) The shares got dematerialized only on the day of sale or 2 to 3 days before the date of sale. The shares have been transferred from the another D.P in which the assessee has no Demat account.

(VII) The assessee has not furnished any evidence to establish that, the shares were actually purchased by him.

All these facts according to the AO established that, the purchase of shares as claimed by the assessee are not genuine.

4.11 The AO noted that the assessee only furnished the contract notes of a brokers and ledger account of Mahasagar Securities Pvt. Ltd. to support the claim of purchase of shares. No other documentary evidence was furnished to prove the genuineness of the purchases. Since the person who was supposed to sign or issued these contract notes has denied to have signed and issued the contract notes, therefore, the AO came to the conclusion that these documents are not genuine but fabricated. He also rejected the contention of the assessee that he was in habit of relying on portfolio management advisors and, therefore, was not aware that the shares were not dematerialized after the purchase in absence of any evidence to this effect. The AO compared the prices of share at the time of purchase and the price at the time of sale of shares and noted that within a span of one year, the prices have gone up from 18 times to 86 times which according to him was abnormal. Therefore, the AO was of the opinion that the entire transaction of purchase and sale of all the shares are manipulated, colorable and not genuine. The assessee has tried to make it genuine by obtaining the fabricated contract notes in the name of the broker Mahasagar Securities Pvt. Ltd. Such a transaction, according to him, could squarely fall into the category of colorable device and cannot be allowed. For this proposition, the AO relied on the decision of the Hon'ble Supreme Court in the case of *McDowell & Co. Ltd. v. CTO* [1985] 154 ITR 148/22 Taxman 11 and various other decisions. Relying on various decision the AO held that the entire amount of Rs. 5,09,25,802/- brought in the books by the assessee under the head "capital gains" is nothing but unaccounted income of the assessee which is liable to be taxed in view of the provisions of section 68 of the I.T. Act. Since the assessee has deducted the purchase amount of Rs. 14,01,123/- from the sales and shown

Long Term Capital Gains of Rs. 4,95,28,208/- and since he held the purchases to be not genuine, the AO did not allow the deduction of Rs. 14,01,123/-.

4.12 Without prejudice to the above, the AO held that even if it is assumed (though not accepted) that, since the assessee has shown receipts from the sale, therefore, there may be purchase of shares on or before the date of sale, then also the receipts from the sale of shares would become the Short Term Capital Gain and not Long Term Capital Gain, as the holding period becomes less than 12 months. The date of purchase, if at all is to be considered, can be considered only as date of dematerialization in the Demat Account with Techno Shares and Stocks Ltd. If this view is considered, the price of the shares on the date of dematerialization would then become the purchase price of the assessee. As the purchase on this date was not accounted for in the books of account, therefore, it has to be treated as unaccounted purchase and the entire purchase amount becomes the unexplained investment in shares. The AO analysed the total purchase price on the date of dematerialization of shares which comes to Rs. 4,41,10,775/-. According to him this amount becomes the unexplained investment in shares, as it is not accounted for in the books of accounts. Since, the total sale receipts from the shares has been shown at Rs. 5,09,25,802/-, therefore, the Short Term Capital Gain on account of sale of the shares comes to Rs. 80,03,027/-. However, as the entire receipts on the sale of shares have been treated as unaccounted income and added back to the total income, the AO did not make any separate addition under unexplained investment and short term capital gain. Thus, the AO made an addition of Rs. 5,09,25,802/- as unexplained cash credit u/s. 68 of the I.T. Act.

5. Before the Ld. CIT(A) it was submitted that the purchase of the said shares was genuine, the sale of the said shares are out of the balance held in the demat account of the assessee, the said shares were transferred on the floor of the exchange, there are bills and contract notes for effecting such transfers and the amount has been received by account payee cheque substantially establishing the source of the receipt. Therefore, the primary onus to establish the genuineness of the transaction has been established by the assessee and, therefore, the same is not liable to be taxed u/s. 68 of the I.T. Act. It was submitted that the AO in the instant case, has not only weighed the evidences in terms of bank accounts, account payee cheques, books of accounts, contract notes etc. against the assessee but he went against these evidences themselves which is not permissible in law. It was accordingly, submitted that the entire amount of Rs. 5,09,35,802/- being the entire receipts on the sale of the said shares made by the AO as unexplained income be deleted.

5.1 The assessee submitted before the Ld. CIT(A) that the shares were held for more than 12 months before the date of sale and the payment for the purchase was also made to Mahasagar Securities Pvt Ltd. by an account payee cheque drawn on HDFC Bank, Tulsiani Chambers, Nariman Point Branch, Mumbai vide cheque no. 557060. The said cheque has been cleared from the assessee's bank account with HDFC Bank on 05/12/2005. The assessee was under the bonafide belief that the shares would have been transferred to his Demat account as they were held in the pool account of the broker Mahasagar Securities Pvt. Ltd and the assessee was under a belief that they were in his account. However, when he wanted to sell the said shares, he found that the said shares have not yet been transferred in his name and when his portfolio management advisor, who was in charge of handling the

administration and the procedural part, showed ignorance about the same, the assessee opened a new demat account in Techno Shares and Stocks Ltd. and transferred the said shares in the demat account with Techno Shares and Stocks Ltd. before the sale thereof. The assessee having received the said shares in his Demat account with Techno Shares and Stocks Ltd. presumed that the same would be transferred by Mahasagar Securities Pvt. Ltd. and did not further verify the source of the shares.

5.2 It was argued that the AO has relied on the falsified statement of Director of Mahasagar Securities P. Ltd and has only considered his denial. The assessee submitted confirmation letter from Sunchan Securities stating that shares were transferred to the assessee's Demat account on instructions from Mahasagar Securities Pvt. Ltd. It was submitted that some of the said shares were received as Bonus Shares on the original shares purchased by the assessee earlier and some of the said shares included shares which were split after the purchase of the original shares. Therefore, the same remaining in the form of "shares and securities" cannot be doubted and there cannot be levy as cash credit in respect thereof.

5.3 It was further submitted that some of the said shares were received as bonus shares are out of the balance held in the Demat account of the assessee, the said shares were transferred on the floor of the exchange, there are bills and contract notes for effecting such transfers and the amount has been received by account payee cheque. The assessee also filed certain additional evidences.

5.4 The Ld. CIT(A) sent the additional evidences filed before him to the AO and called for a remand report from him. After obtaining the remand report from the AO and after considering the submissions of the assessee to the remand report, the Ld. CIT(A) held that no addition can be made u/s.68 of the I.T. Act in the instant case. He, however, upheld the alternate proposition of the AO in treating the Short Term Capital Gain on the sale of the shares and the unexplained investment in the acquisition of the said shares. While doing so, he noted the AO has adopted two different stands, on one hand he is charging entire sale proceeds of the impugned shares as unaccounted income U/s. 68 of the Act and on the other hand, he is charging the total sale receipt from the impugned shares as Short Term Capital Gain. He has further charged to tax the total purchase price of the impugned shares on the date of dematerialization as unexplained investment in the relevant shares. According to him, the AO cannot be allowed to have two different decisions on the same set of facts. He can either tax the impugned transaction of shares as unexplained cash credit U/s. 68 of the Act or as Short Term Capital Gains as well as unexplained investments. According to him the facts and circumstances placed before him as well as the facts apparent from the assessment order reveal that entire sale proceeds of the shares were received on the sale of dematted shares through the registered broker i.e. M/s. Techno Shares and Stocks Ltd. 1. Vikas Building, Ground Floor, 11 Bank Street, Fort, Mumbai-400 001. The said broker is the registered broker on the BSE and NSE having registration no. INB 011033637 and INB 231033631 respectively. The said broker is regularly assessed to Income-tax by Asstt. Commissioner of Income-tax. Circle 4(2), Mumbai and his PAN No. has been furnished before the AO as AAAC 4464G. The said broker M/s. Techno Shares & Stocks Ltd. was in touch with the AO and he has furnished the requisite information before the AO regarding the sale of impugned shares. The said broker has a website

known as www.technoworld.in. The said broker M/s. Techno Shares & Stocks Ltd. has unambiguously stated that it had carried out the transactions of sale of impugned shares on behalf of the assessee and that necessary charges were paid in respect of the same to the Stock Exchange and the Securities Transaction Tax (STT) in respect of the relevant sales of impugned shares were also paid as per provisions of law. The assessee had also produced the relevant contract notes for the sale of impugned shares from the said brokers i.e. M/s. Techno Shares and Stocks Ltd, copy of brokers account in his books of accounts and copy of his bank statement evidencing the details of receipt of the sale consideration through the aforesaid M/s. Techno Shares & Stocks Ltd. The sale consideration was received by account payee cheques through banking channels and from a reputed BSE/NSE broker who is regularly assessed to tax by ACIT Circle-4(2) Mumbai. These relevant shares trading have been routed through prescribed and mandatory channels which are monitored by SEBI, BSE, NSE etc. No abnormalities reported by any agency. There is no seized material found nor seized by any authority U/s. 132(1) of the Act or otherwise on this issue. Neither any statement on oath U/s. 132(4) of the Act was recorded on this issue nor any disclosure made. These overwhelming evidences have not been discounted by the AO and he has not assailed the reliability, validity or genuineness of sale of the impugned listed shares. The jurisdictional AO of the said Techno Shares & Stocks Ltd. has also not found anything wrong or anything suspicious about the capacity or creditworthiness of the said M/s. Techno Shares & Stocks Ltd. in the Assessment Year 2006-07 with reference to the sale transactions of the impugned shares with the assessee concerned. The corresponding brokerage income earned on the sale of these listed shares have been accepted by the Department and charged to tax. STT has also been paid on the trading of these listed shares. He observed that in view of these over-whelming evidences and the facts and circumstances, the sale proceeds of the impugned shares cannot be disbelieved. AO has not discussed any evidence to assail the said sale transaction of impugned shares. On the other hand, the material evidences indicate that the sales of the impugned shares have genuinely taken place. Relying on a couple of decisions, he held that once the identity of the creditor, his capacity to advance the loans and the genuineness of the sale transactions are established then onus shifts on to the department. Since the assessee in the instant case has discharged the primary onus cast on him and the AO has not brought any material to counter the overwhelming evidences produced by the assessee, he deleted the addition made by the AO u/s.68 of the I.T. Act. He however, upheld the action of the AO on account of the alternate addition made under Short Term Capital Gain and unexplained investment as discussed in para 11 and 11.11 appearing on pages 16 and 17 of the assessment order. According to the Ld. CIT(A) the AO could not disprove the sale proceeds of the impugned listed shares and the assessee also could not successfully prove the purchase of the aforesaid relevant shares from the said M/s. Mahasagar Securities P. Ltd. on the specified dates and the evidences collected by AO are sufficient to hold that the impugned listed shares were not dematerialized on or immediately after the alleged dates of purchases. The impugned shares got dematerialized perhaps on or about the date of sale of the impugned listed shares. The assessee has not furnished sufficient evidences to establish that the impugned shares were genuinely purchased on the specified date from the said M/s. MSSP. He accordingly upheld the alternate action of the AO in taxing the short term capital gain of Rs. 80,03,027/- and unexplained investment of Rs. 4,41,10,775/-.

6. Aggrieved with such order of the Ld. CIT(A) the assessee is in appeal before us.

7. The Id. counsel for the assessee referring to pages 18 to 43 of the paper book drew the attention of the Bench to the copies of contract notes and purchase bills of the shares purchased from Mahasagar Securities Private Limited (MSPL). Referring to paper book page 44 of the paper book he drew the attention of the Bench to the copy of the bank statement of HDFC Bank evidencing the payment for purchase of shares. Referring to paper book page 45 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copy of the accountant payee cheque issued to MSPL by the assessee. Referring to paper book pages 46 to 58 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copy of the ledger account of MSPL in the books of the assessee. Referring to paper book page 59 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copy of the ledger account of the assessee in the books of MSPL. Referring to paper book pages 62 to 88 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copies of the contract notes and sale bills of all the shares sold from Techno Shares & Stocks Ltd. Referring to paper book pages 89 to 94 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copy of the D-mat account. Referring to paper book page 95 of the paper book the Id. Counsel for the assessee drew the attention of the Bench to the copy of the confirmation letter dtd. 28.10.2005 from Sunchan Securities Limited according to which they have transferred the various shares on behalf of MSPL to the DP account of the assessee with M/s Techno Shares & Stocks Limited. Referring to para 8 of the assessment order at page 11 & 12, the Id. Counsel for the assessee submitted that the A.O. doubted only the purchases but does not dispute the sale. However, he has made an addition u/s 68 of the Act which was deleted by the Id. CIT(A) and for which the Revenue is not in appeal before the Tribunal.

7.1 He submitted that the entire addition of unexplained investment is based on the statement given by Mr. Mukesh Choksi. Referring to the copy of statement of Mr. Mukesh Choksi recorded on 24.12.2008, a copy of which is placed at paper book pages 19 to 23) he submitted that in reply to question No. 7 Mr. Mukesh Choksi submitted that he does not know the assessee. Similarly in his reply to Question No. 8 he has stated that the transactions as per ledger account shown to him are not carried out through them. He has stated that their name has been wrongly used and no transaction mentioned in the ledger has been carried out. According to them MSPL has no relation with the assessee and his wife. Referring to the cross examination statement of Mr. Mukesh Choksi recorded u/s 131 of the Act by the assessee in the presence of the A.O. (copy of which is placed at paper book pages 24 to 26, the Id. Counsel for the assessee drew the attention of the bench to the reply given by Mr. Mukesh Choksi in response to Question No. 2 wherein he has confirmed to have received the cheques. Referring to the reply given by Mr. Mukesh Choksi during the course of cross examination, he submitted that vide Question No. 4 he had stated that he prepares the account on receipt basis and cheques received by him are accounted as a general receipt and on which the commission earned by him have been accounted fully. He submitted that from the above it can be noted that MSPL has not denied receipt of money but only have denied the transaction itself. He submitted that it is a case where the receipts were recorded as general receipt and it is the case of the assessee that the accounts of the brokers were not properly maintained. Maintenance of accounts not properly by the broker cannot be

a reason to treat the evidences of the assessee as in-sufficient and the entire transaction cannot be treated as bogus. He submitted that since the shares were dematerialised before the date of sale it confirms the fact that the said shares were in fact purchased by the assessee prior to the de-materialisation. Referring to the confirmation letter dtd. 28.10.2005 from Sunchan Securities which was filed before the A.O. he submitted that the same clearly states that the shares purchased by the assessee were transferred on behalf of MSPL to the DP account. Therefore, the above evidences clearly and conclusively prove that the assessee has duly discharged the onus cast upon him. The Revenue has not brought on record anything to show that these are false or untrue.

7.2 He submitted that Mr. Mukesh Choksi at one time denies to have made the transactions with the assessee or even knowing the assessee. However, during cross examination he has accepted to have received the cheque from the assessee. Therefore there is no evidentiary value of Mr. Mukesh Choksi on account of double speaking. Referring to the decision of Hon'ble Calcutta High Court in the case of *CIT v. Eastern Commercial Enterprises* [1994] 210 ITR 103, he submitted that the Hon'ble Court in the said decision has observed that a man indulging in double speaking cannot be said by any means a truthful man at any stage and no court can decide on which occasion he was truthful. Referring to the decision of the co-ordinate Bench of the Tribunal in the case of *Asstt. CIT v. Mrs. Uttara S. Shorewala* [2011] 48 SOT 6 (URO)/12 taxmann.com 460 (Mum.) he submitted that the Tribunal following the decision of the Hon'ble Calcutta High Court has dismissed the appeal filed by the Revenue and allowed the C.O. of the assessee on account of double speaking by Mr. Mukesh Choksi.

7.3 Referring to the CBDT Circular No. 704 dt. 28.4.95 (copy of which is placed at paper book page 49) he submitted that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. Referring to Circular No. 768 dt. 24.06.1998 issued by CBDT (copy of which is placed at paper book page 50) he submitted that the Circular was issued to clarify determination of the date of transfer and the period of holding of securities held in dematerialised form. He submitted that in view of the above two circulars issued by CBDT it is crystal clear that in case of securities the "date of purchase" is conclusively to be taken from the broker's note/contract note and the period of holding is also to be reckoned from the date of purchase and not from the date of dematerialisation as alleged by the A.O. and the Id. CIT(A). He submitted that demating of the shares is a lengthy process which takes about 6 to 8 months or even more than that. Therefore, in view of the various documents furnished by the assessee the purchase of shares are genuine, the holding period of each share is more than 12 months and therefore the same cannot be rejected merely on the basis of statement of Shri Mukesh Choksi who indulges in double speaking. He also relied on the following decisions:-

01 *CIT v. Korlay Trading Co. Ltd.* [1998] 232 ITR 820 (Cal.)

02 *Asstt. CIT v. Claridges Investments & Finances (P.) Ltd.* [2007] 18 SOT 390

(Mum.)

- 03 *Abhishek Mohata v. ITO* (I.T.A Nos. 122 to 124/Kol/2011)
- 04 *Dhakeswari Cotton Mills Ltd. v. CIT* [1954] 26 ITR 775 (SC)
Asstt. CIT v. J.R. Solvent Industries (P) Ltd. 24 DTR 387 (Chd.)
- 05 *Atma Ram Tulsyan* ITA 495/ALL/2007
- 06 *ITO v. Smt. Kusumlata* [2007] 13 SOT 61 (Jodh.)
- 07 *CIT v. Anupam Kapoor* [2008] 299 ITR 179/166 Taxman 178 (Punj. & Har.)
- 08 *Mansi Modi (Poddar) v. ITO* [ITA No 1465/Kol/2010]

8. The Id. D.R., on the other hand, heavily relied on the order of the Id. CIT(A). He submitted that in view of denial of Mr. Mukesh Choksi the transactions cannot be accepted as genuine. The various decisions relied on by the Id. Counsel for the assessee are distinguishable and are not applicable to the facts of the present case. He accordingly submitted that the order of the Id. CIT(A) should be upheld.

9. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. In the instant case the A.O. made addition of Rs. 5,09,25,802/- as unexplained cash credit holding the sale of shares by the assessee as bogus. While doing so he relied heavily on the statement given by Mr. Mukesh Choksi wherein he has stated that the transactions of purchase of shares are not carried out through them and the name of his company has been wrongly used and no transaction mentioned in the ledger has been carried out through them. The A.O. had also another proposition that the total purchase price on the date of dematerialisation comes to Rs. 44110775/- which becomes unexplained investment in shares. After deducting the investment in shares from sale price the short term capital gain comes to Rs. 80,03,027/-. However, since he considered the entire receipt on the sale of shares as un-accounted income and added the same to the total income of the assessee u/s 68 of the I.T. Act he did not make any separate addition under the head unexplained investment and short term capital gain.

9.1 We find the Id. CIT(A) deleted the addition u/s 68 on the ground that the sale of shares has not been doubted by the A.O. in the assessment proceedings as well as during remand proceedings and the assessee has proved the genuineness of the sale of shares, therefore, no addition can be made u/s 68 of the Act. The Revenue is not in appeal before us against the said observation of the Id. CIT(A). However, the Id. CIT(A) upheld the alternate proposition of the A.O. that the purchase price on the date of dematerialisation of shares become unexplained investment in the hands of the assessee and the difference between in sale and purchase of shares has to be treated as short term capital gain since the assessee could not substantiate the purchases. Therefore, the question that has to be answered in the grounds raised by the assessee is as to whether the purchase of shares by the assessee are genuine or not and whether the holding period is more than 12 months or not.

9.2 We find the assessee before the A.O. has filed the copies of contract notes and purchase bills of all the shares purchased from MSPL (copies of which are placed at paper book page 18 to 43). Similarly the bank statement maintained with HDFC bank shows evidence of payment to MSPL. The Xerox copy of the account payee cheque issued to MSPL dtd. 1.12.05 for Rs. 12,40,565/- is placed at paper book page 45 and was also filed before the A.O. and CIT(A). The copy of ledger A/c of MSPL in the books of the assessee and the copy of the ledger account of the assessee in books of MSPL were also filed before the A.O. Similarly the copies of contract notes and sale bills of all the shares transferred to Techno Shares & Stocks Ltd. with copy of D-Mat account and copy of confirmation letter dtd. 28.10.2005 from Sunchem Securities P. Ltd. were also filed before the A.O. Nothing was brought by the A.O. to prove that any of these evidences filed by the assessee is false or untrue. The Revenue has basically gone on the statement of Mr. Mukesh Choksi who denied to have known the assessee and denied to have made any transaction with the assessee on account of purchase of shares. The relevant questions and answers of Mr. Mukesh Choksi recorded by the A.O. on 24.12.2008, copy of which is placed at paper book page No. 19 to 23 are as under.

Q No. 7:- Do you know Shri Jafferali K. Rattonsej and Smt. Hamida Rattonsej?

Ans. No. I do not know them.

Q No. 8:- I am showing you the ledger account of Mahasagar Securities Pvt. Ltd. in the books of Shri J.K. Rattonsej and Smt. Hamida J. Rattonsej. From this account it is seen that the assessee have carried out regular transaction with Mahasagar Securities Pvt. Ltd. Pl. confirm the ledger account furnished by the assessee with the copy of ledger account of J.K. Rattonsej and Smt. Hamida J. Rattonsej appearing in the books of Mahasagar Securities Pvt. Ltd.

Ans.: I have seen the ledger and on the perusal of the same I found that the transactions are not carried out through us. It seems that our name has been used and no transaction mentioned in the ledger have been carried out through us. Mahasagar Securities have no relations with the J.K. Rattonsej and Smt. Hamida J. Rattonsej.

9.3 On the basis of the above statement of Mr. Mukesh Choksi the Id. CIT(A) upheld the alternate proposition of the A.O. that total purchase price on the date of dematerialisation of shares amounting to Rs. 4,41,10,775/- becomes unexplained investment since the purchases are not recorded in the books of the assessee on that date and the difference between the sale price and the purchase price amounting to Rs. 80,03,027/- becomes short term capital gain since the holding period of the shares is less than 12 months.

9.4 However, we find during the course of cross examination by the assessee before the A.O. on 29.12.2008 Mr. Mukesh Choksi confirmed to have received the cheques from the assessee. The relevant question No. 2 and answer thereof is as under:-

Q.2. Question put up by Shri Digant Bhatt - We have issued a Cheque from Jafferalli K. Rattonsej, Hamida Rattonsej for Rs.12,40,565/- and Rs.11,91,378/- respectively, which you have received, kindly confirm.

Ans. I confirm the above cheques have been received by me.

Similarly, reply given by Shri Mukesh Choksi to Question No. 3 to 5 are as under:-

Q.3 Question put up by Shri Digant Bhatt - We have received the shares in Demat Account of Shri Jafferalli K. Rattonsej and Hamida Rattonsej from Sunchan Securities Ltd. on your behalf, kindly confirm.

Ans. I have not given any instructions.

Q.4 Question put up by Dr. Mahesh Akhade * In the statement recorded u/s.131 of the IT. Act on 24.12.2008, you have denied in the answer to Question No.8, 9, 12 & 13 that Mahasagar Securities Pvt. Ltd. and Alliance Intermediaries Network Pvt. Ltd. has no relationship to the assesseees J.K. Rattonsej, Hamida Rattonsej, Sunay Mehta and Samit Mehta. You have also denied you have any share transactions with these persons. Kindly confirm the same.

Ans. I am preparing accounts on receipt basis and the cheques received by me are accounted as a general receipts and on which the commission earned by me has been accounted fully. Here the shares have been delivered by Sunchan Securities, I have not given any instructions to Sunchan Securities.

Q.No.5 Question put up by Dr. Mahesh Akhade - Kindly furnish the statement of bank accounts of Mahasagar Securities Pvt. Ltd. in which the above mentioned two cheques amounting to Rs.12,40,565/- and Rs.11,91,378/- have been deposited.

Ans. At present they are not available with me, I will furnish the same after receipt of the same.

9.5 From the above, it is clear that Mr. Mukesh Choksi is double speaking in his statements i.e. one given before the A.O. and the one during cross examination before the A.O. Under these circumstances one has to see the evidentiary value of a person making double speaking. We find the Hon'ble Calcutta High Court in the case of *Eastern Commercial Enterprises (supra)* has held that a man indulging in double speaking cannot be said by any means a truthful man at any stage and no Court can decide on which occasion he was truthful. We find the co-ordinate bench of the Tribunal in the case of *Mrs. Uttara S. Shorewala (supra)* (in which one of us - the Accountant Member is a party) following the decision of Hon'ble Calcutta High Court upheld the order of the Id. CIT(A) in holding that the A.O. cannot make any addition in the assessee's hands despite the assessee not having made any payment to the entities mentioned by Shri Choksi, whose statement is being relied upon by him. The CIT(A) also noted that Mr. Mukesh Choksi has been vacillating right through and has given different versions at different stages of the proceedings and therefore his evidence was unreliable.

9.6 In view of the above judicial decisions the statement of Mr. Mukesh Choksi cannot be a deciding factor for rejecting the genuineness of the purchase of shares by the assessee especially when all other supporting evidences filed by the assessee were neither proved to be false or untrue. We further find merit in the submission of the Id. counsel for the assessee that the dematerialization of shares

from physical holding is a lengthy process and takes considerable time. Therefore, when there is no dispute to the dematerialization of shares before the date of sale, therefore, the shares were purchased much prior to the date of sale.

9.7 The CBDT Circular No. 704 dtd. 28.4.1995 states that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. The CBDT Circular No. 768 dtd. 24.6.1998 was issued to clarify the determination of date of transfer and the period of holding of securities held in demat form. It has been stated there in that earlier Circular No. 704 issued by the CBDT relating to the "date of transfer" and "period of holding" does not change even when securities are held in the dematerialized form. Therefore in view of the above two circulars of CBDT it is clear that in case of securities the "date of purchase" has to be taken from the broker's note/contract note and the period of holding is also to be reckoned from the "date of purchase" and not from the "date of dematerialization". Since the holding period of the shares as per the broker's note and its subsequent sale after dematerialization is more than 12 months, therefore, the shares become long term capital asset and the assessee's claim of long term capital gain is correct. In this view of the matter we set aside the order of the Id. CIT(A) and direct the A.O. to accept the long term capital gain declared by the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed.

10. In the result, appeal filed by the assessee is allowed.