

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 402 & 403/JP/2017
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

Shri Om Prakash Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACFPM 8683 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA. No. 406/JP/2017
निर्धारण वर्ष / Assessment Years : 2013-14

Smt. Snehlata Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAXPM 8076 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA. No. 413/JP/2017
निर्धारण वर्ष / Assessment Years : 2013-14

Smt. Radhika Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGPPM 2153 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA. No. 404/JP/2017
निर्धारण वर्ष / Assessment Years : 2013-14

Shri. Atul Krishna Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AFYPM 5174 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA. No. 412/JP/2017
निर्धारण वर्ष / Assessment Years : 2013-14

Shri. Ajay Krishna Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAWPM 8549 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA. No. 405/JP/2017
निर्धारण वर्ष / Assessment Years : 2013-14

Shri. Vijay Krishna Modi B-49, Keshav Path, Suraj Nagar (West), Civil Lines, Jaipur.	बनाम Vs.	The DCIT, Central Circle-2 Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: ACEPM 9993 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (C.A.)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 25/05/2018

उदघोषणा की तारीख / Date of Pronouncement : 24/08/2018

आदेश / ORDERPER BENCH

All these appeals have been filed by the respective assessees against the respective orders passed by Id. CIT(A)-4 Jaipur dated 31.03.2017 for the assessment years 2012-13 & 2013-14. Since common issues are involved, all these appeals were heard together and are being disposed off by this consolidated order.

2. At the outset, the Id. AR has submitted that the matter pertaining to Om Prakash Modi in ITA No. 402/JP/2017 may be taken as a lead case for discussions and the facts and circumstances of other cases are exactly identical. The Id. DR did not raise any specific objection against taking the case of Om Prakash Modi as a lead case. Therefore, for the purpose of the present discussions, the case of Shri OM Prakash Modi is taken as a lead case.

3. In case of Om Prakash Modi in ITA No. 402/JP/2017, the assessee has taken various grounds of appeal and has effectively challenged the addition made by the AO U/s 68 of the Act by denying the exemption of long term capital gain U/s 10(38) of the Act and also making an addition U/s 69C of the Act.

4. Briefly, the facts of the case are that the assessee has filed his return of income U/s 139(1) of the Act on 24.07.2012 declaring total income of Rs. 12,34,370/-. Thereafter, a search and seizure action U/s 132 of the Act was carried out on the members of Okay Plus-JKD Group on 04.09.2013 of which the assessee is one of the members.

Thereafter, notice U/s 153A was issued on 03.03.2014 and in response the assessee filed his return of income on 31.03.2014 declaring the income of Rs. 1,234,370/- as original declared. During the course of assessment proceedings, the AO observed that the assessee has shown long term capital gains of Rs. 26,83,000/- on sale of shares of M/s Quest Financial Services Ltd. which were claimed as exempt U/s 10(38) of the Act. Simultaneously, the AO received information from the Investigation Wing, Kolkata, that survey U/s 133A of the Act was conducted at the business premises of Shri Prakash Jajodia who is one of the promoter of M/s Quest Financial Services Ltd and it has been found out that Shri Prakash Jajodia through a number of Private Limited shell companies and some penny stock companies was involved in providing bogus long term capital gain to its customers for commission. Accordingly, a show cause dated 18.01.2016 was issued to the assessee as to why the long term capital gains on sale of shares of M/s Quest Financial Services Ltd. be not treated as bogus and why commission expenses ranging between 5 to 6% of the transaction value should not be brought to tax as undisclosed expenses.

5. In response, the assessee filed his reply on 21.01.2016 requesting for the copies of statements of Shri Prakash Jajodia and other associates recorded during the course of survey proceedings. It was further submitted by the assessee that he had purchased shares of the companies which were subsequently amalgamated with M/s Quest Financial Services Ltd. by virtue of the order passed by the Hon'ble Calcutta High Court. It was further submitted that the sale transaction took place through authorized broker on the online system of recognized stock exchange where the sellers and buyers are random

parties and they do not know each other. It was further submitted that no incriminating documents was found during the course of search which support the allegation of bogus long term capital gain. It was further submitted that the allegation is made against the assessee on the basis of so called statements recorded of a third persons having no privity of contract with the assessee thus an effective opportunity may be provided to cross examine all such persons to arrive at a fair conclusion in the matter.

6. The assessee's submission was not found acceptable to the Assessing Officer. Firstly, regarding the plea of the assessee that no incriminating material was found during the course of the search proceedings, the Assessing Officer held that as on the date of search i.e. 04.09.2013, there was time limit for issuing notice U/s 143(2) of the Act and therefore, the assessment proceedings for the assessment year 2012-13 got abated and it is, therefore not necessary that the addition could be made only on the basis of incriminating material found during the course of search. Thus, original jurisdiction as well as jurisdiction as per Section 153A of the Act is retained by the AO. Regarding the assessee's plea that an effective opportunity may be provided for cross examination of persons whose statements have been recorded and taken as a base, the AO held that he is not bound by any technical rules of the law of evidence and it is open to him to collect material to facilitate assessment even by private enquiry. Regarding the assessee's plea that statement of all the persons are on same pattern, the Assessing Officer observed that all the concerns of Shri Prakash Jajodia are being managed by him only and all other directors are dummy and therefore, when all the concerns are engaged in the same kind of

activities and are managed by the same person then answer to the question in the statement is also suppose to be the same.

7. The AO thereafter stated that the assessee had purchased shares of M/s Dristi Suppliers Limited and M/s Reward Agencies Limited and later on, in terms of amalgamation sanctioned by the Hon'ble Kolkata High Court, shares of M/s Quest Financial Services Ltd. were allotted to the assessee in lieu of shares in M/s Dristi Suppliers Limited and M/s Reward Agencies Limited. The AO thereafter referred to the statement of director of M/s Dristi Suppliers Limited and M/s Reward Agencies Limited and held that M/s Quest Financial Services Ltd. was a company in which Shri Prakash Jajodia was a director and he was involved in the racket of providing accommodation entries of bogus long term capital gain. It was accordingly held by the AO that Shri Om Prakash Modi has received entries of bogus long term capital gains of Rs. 26,83,000/- out of his untaxed income and it is an attempt to introduce untaxed income in his capital account, therefore, long term capital gains of Rs. 26,83,000/- was added to the total income U/s 68 of the IT Act. Further, relying on the information received from the Investigation Wing, Kolkata, the AO held that the assessee had paid commission at the rate of 5% to 6% of the long term capital gain and therefore, the amount of Rs. 1,60,980/- was treated as undisclosed income and brought to tax U/s 69C of the Act.

8. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id CIT(A) observed that the assessee had purchased 400 physical shares of M/s Reward Agencies Pvt. Ltd. from M/s Gangotri Dealers Pvt. Ltd. during April, 2011 @ 500 per share, and 400 shares of

M/s Drishti Suppliers Pvt. Ltd. from M/s Lokseva textrade Pvt. Ltd. during October, 2010 @ 500 per share and as per scheme of amalgamation sanctioned by the Hon'ble Kolkata High Court, the assessee had received 36,000/- equity shares of M/s Quest Financial Services Ltd. in lieu of 400 shares of M/s Drishti Suppliers Pvt. Ltd. and 40,000 equity shares of M/s Quest Financial Services Ltd. in lieu of 400 shares in M/s Reward Agency Pvt. Ltd. Further, the Id. CIT(A) noted that the assessee had subsequently made online sale through broker M/s Giriraj Stock Broking Pvt. Ltd. of Calcutta Stock exchange of 36,000 equity shares of M/s Quest Financial Services Ltd. for a total consideration of Rs. 28,82,800/- and after reducing the purchase cost of Rs. 1,99,800/, the assessee has earned gains of Rs. 26,83,000/-.

9. Regarding cross examination of Shri Prakash Jajodia, the Id. CIT(A) held that the right of cross examination is not absolute right and so long as the AO has made available the statements to the assessee for rebuttal, the AO has not acted arbitrarily. It was accordingly held that the assessment was validly made though the assessee was not given the right of cross examination. Regarding assessee's plea that Shri Prakash Jajodia has subsequently retracted his statement by filing affidavit dated 20.02.2015, the Id. CIT(A) held that the assessee has not produced any material to show that the admission made by Shri Prakash Jajodia was incorrect. Further, the Id. CIT(A) has held that the shares of M/s Quest Financial Services Ltd. were allotted to the assessee on 27.02.2012, therefore, the period of holding is less than 12 months and the assessee is not entitled for exemption of long term capital gain U/s 10(38) of the Act. Thereafter, the Id. CIT(A) has held in para 3.1.2.10 & 3.2.2 as under:-

"3.1.2.10 From the above, it is seen that assessee has not controverted AO's findings nor disproves those facts. Here AO has genuinely doubted the veracity of the purchase bill dt 06.04.2011 & 13.04.2011 from M/s Gangotri Dealers Pvt Ltd on following grounds:

- a) The bill has got no running no or distinctive no.*
- b) Purchase transaction was not online as share in physical forms through transfer deeds were purchased directly from the investors.*
- c) No STT was paid on this share transfer transaction.*
- d) The purchase of share was not credited in demat account.*
- e) High ratio of allotment of shares 1:100 when.*
- f) SEBI conducted a Preliminary inquiry in the dealings of the broking firm of Sh Prakash Chand Jajodia M/s Concord Vinimay Pvt Ltd and M/s Giriraj Stock Broking Pvt Ltd and subsequently debarred them also. M/s Giriraj Stock Broking Pvt Ltd has surrendered its CSE and BSE card also. Assessee has deliberately kept these facts away from the knowledge of the AO.*
- g) SEBI has also barred from trading more than 250 entities including individuals and companies from the securities market from suspected tax evasion and laundering of black money through stock market platforms.*
- h) No details filed by the assessee to prove its contention or disprove AO's findings. Documents e.g. (i) copy of share certificates (Reward*

Agencies Pvt. Ltd, Drishti Suppliers Pvt. Ltd. allotted to it (ii) Article of Association of company (iii) Valuation Report of a registered valuer evidencing value of shares allotted to assessee (iv) details of annual return filed before the Registrar of Companies (ROC) Kolkata (v) Copy of Board's resolution authorizing addition of share holders during the year 2011 (vi) Details of Register of Members/ Share holders duly authenticated by competent authority & (vii) Minutes of General & Board Meeting during FY 2011-12. All these details could have proved bonafidy of original purchase of share from M/s Gangotri Dealers Pvt Ltd.

i) Assessee in the invoice and various submissions made before the AO and during the appellate proceeding has mentioned the name of M/s Quest Fin vest Services Ltd whereas he claims to have received shares of M/s Quest Financial Services Ltd in lieu of shares of M/s Reward Agencies Pvt Ltd & M/s Drishti Suppliers Pvt Ltd. It is pertinent to mention here that assessee has not provided copies of shares certificate (in physical form) of M/s Reward Agencies Pvt Ltd & M/s Drishti Suppliers Pvt Ltd nor the Demat Statement evidencing ownership of shares of M/s Quest Financial Services Ltd.

j) Even to prove his contention, assessee could have asked the AO examine M/s Gangotri Dealers Pvt Ltd and M/s Giriraj Stock Broking Pvt Ltd. It is pertinent to mention that the order time is not mentioned Contract Notes in Form A issued by M/s Giriraj Stock Brokings Pvt Ltd.

k) Period of holding of M/s Quest financial Services Ltd. is less than 12 months.

After duly considering above facts and circumstances of the case, I would like to rely on the decisions by the apex court in the case of Sumati Dayal vs. CIT [1995] 214 ITR 801 (SC); Durga Prasad More reported in 82 ITR 540 (SC) and Mc. Dowell & Co. Ltd. 154 ITR 148 (SC), besides by the Tribunal in the case of Asst. CIT vs. Som Nath Mani [2006] 100 TTJ 917 (Chd), the impugned claim of bogus LTCG as unexplained income u/s. 68 of the Act is hereby sustained.

3.2.2. I have duly considered assessee's submission and carefully gone through assessment order. I have also taken a note of factual matrix of the case as well as applicable case laws relied upon. The issue is covered by the findings given for Gr. No. 1. As the purchases of original shares of M/s Reward Agencies Pvt. Ltd and M/s Drishti Suppliers Pvt. Ltd are not genuine, accordingly, it is presumed that assessee has paid commission @ 5 to 6% of the bogus claim of LTCG. Accordingly, in view of facts and circumstances of the case, as discussed above, AO's action is hereby sustained. Assessee's appeal fails in Gr. No. 2."

10.1 During the course of hearing, the Id. AR has submitted that the impugned assessment order is prima facie illegal inasmuch as it is solely based on the statements of a third party who is completely unknown and unrelated to the assessee. It must be noted that the statements of the said third party were not recorded by the Assessing

Officer during the course of assessment proceedings, but were recorded in the investigation proceedings conducted by the Investigation Wing. Thus, in the present case, the Ld. AO has based the entire assessment order upon the statements of a third party which were recorded by some other authorities and that too behind the back of the assessee. As a matter of fact, and as can be seen from the assessment order itself that no corroborative material was either found during the course of search or was referred to in the assessment order, nor was brought on records by making independent enquiries during the course of assessment proceedings. On the other hand the assessee has filed various documents evidencing allotment of shares, copy of D-mat Account, payments being made by account payee cheque and similarly also the evidence related to proper sale, which was made online on the Calcutta Stock Exchange. However all these evidences were just ignored and not rebutted by the AO before making addition. In view of these facts, it is submitted that the impugned addition being solely based upon such uncorroborated statements of a third party is clearly bad in law.

10.2 The Id AR referring to the decision of Hon'ble Rajasthan High Court in the case of CIT vs Pooja Agrawal, stated that in the said decision, the Hon'ble High Court has held that so far as assessee has furnished all the supporting documents in the shape of copy of contract notes regarding purchase and sale of shares, copy of D-mat account etc, the fact of transaction entered into cannot be denied simply on the ground that in his statements appellant denied having made any transactions. Further as payments and receipts were made through

account payee cheques and transactions were routed through Calcutta Stock Exchange and there was no evidence that the cash has gone back in appellant's account, it was held by the Court that simply mentioning that findings were on the basis of appraisal report prepared by Investigation wing after considering all the material facts available on record is not sufficient. It was thus observed by the Hon'ble Court that

"The AO has failed to prove through any independent enquiry or relying on some material that the transactions made by the appellant through share P.K. Agrawal were non genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohit."

In view of above, it was submitted that heavy reliance placed by the lower Authorities on the so called statements of Sh. Prakash Jajodia without making any direct inquiry is not in accordance with law laid down by Hon'ble Rajasthan High Court.

10.3 Reliance was also placed on judgment delivered by Hon'ble Punjab and Haryana High Court in the case of The Pr. CIT vs Sh. Hitesh Gandhi, wherein it has been observed that when:

- *shares were actually purchased as these were reflecting in D-mat accounts ;*
- *AO rejected the contention of purchase on the basis of suspicion arising out of reckless/ casual replies given by assessee during assessment proceedings ;*
- *No post search enquiries were conducted in the form of recording statements of broker so as to bring on record any evidence of the said transaction being an accommodation entry ;*

- *STT has been on sale of shares and shares had been sold through National Stock Exchange ;*
- *Payment for sale of shares was received through banking channels;*

Thus, when all the documentary evidences filed before the Ld. AO were in favour of assessee, solely on the basis of some casual replies given by assessee, transactions cannot be held as sham.

10.4 It was submitted that in the case before Hon'ble Punjab and Haryana High Court, shares were purchased for cash, then too, transaction was held as genuine as all the documents were in favour of assessee, thus case of assessee is far better as payment for purchase of such shares was made by account payee cheques.

10.5 It was submitted that it is also a matter of fact that the statements of Shri Prakash Jajodia was recorded on 26.08.2014. Subsequently, a show cause notice was served on M/s QFSL on 16.02.2015 wherein it was stated that Shri Prakash Jajodia has accepted in his sworn statements that QFSL was engaged in providing accommodation entries as bogus LTCG. On receipt of such show cause notice, retraction affidavit was filed by Sh. Prakash Jajodia on 20.02.2015, wherein he has specifically narrated the situation under which his statements were recorded by the authorities, and deposed on oath, that the said statements duly mentioned at the end in his own handwriting that they were being recorded in pressure, force and coercion. Since in the case of assessee, additions were made by placing sole and heavy reliance on the so called retracted statements of Shri Prakash Jajodia, it is submitted that no cognizance of the same could be placed over the same to conclude and implead any assessee with such a higher demand of tax. The Ld. CIT(A), has disregarded the contention

of assessee regarding retraction filed by Sh. Prakash Jajodia by placing reliance on the judgment of jurisdictional High Court in the case of Ravi Mathur & others. In this regard, it is submitted that in the said case, retraction was held as an afterthought when the additions were made in the case of the person who had made the retraction and not in the case of the third party as happened in our case on which heavy and sole reliance is placed for making addition in the hands of assessee stood retracted by him in terms of his affidavit. Further the statements of Ravi Mathur were recorded at the time of search on 09.11.1995, whereas retraction was made as late as in November 1996, during assessment proceedings, whereas Sh. Prakash Jajodia has retracted from his statements merely 4 days after the show cause notice was served on him. Therefore, facts of the case relied upon are totally different and thus reliance placed by Id. CIT(A) is misplaced

10.6 The Id. AR further submitted that the statements of Shri Prakash Jajodia were recorded behind the back of assessee, therefore vide reply to the show cause notice, it was requested to the Ld. AO that such person be confronted to assessee and be allowed to cross-examine him so as to verify the veracity / truthfulness of the statements made by him. However, in spite of the dire necessity of cross-examination in the circumstances of the case, the assessee's request for cross-examination was turned down in an arbitrary manner, without specifying any justifiable reason. The Ld. AO merely stated that he was not bound by the technical rules of evidence and therefore, was not under any obligation to provide cross-examination of the aforesaid person. The Ld. AO further referred that there is no provision for permitting cross-examination and also that right to cross-examination is not necessarily a

part of reasonable opportunity. Ld. CIT(A) also affirmed such action of Ld. AO in not affording opportunity of cross examination by placing reliance on some judicial pronouncements, which all are not at all relevant and ignored the binding judgment of the Hon'ble Apex court in the case of CCE Vs. Andaman Timber Industries, (324) ELT 641 wherein it has been held as under:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail

the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above."

In this regard, it was submitted that :-

- i. Impugned addition have been made solely on the basis of statements of a third party i.e. Shri Prakash Jajodia who is completely unknown and unrelated to the assessee. There is no corroborative evidence found either during the course of search or assessment proceedings. No other material has been referred to by the Ld. AO.
- ii. The said statements were not even recorded by Assessing Officer himself, but were recorded by some other authority. Thus, the Ld. AO could not have simply used these statements against assessee without at least examining such person himself during the course of assessment proceedings.
- iii. The said statements of Shri Prakash Jajodia stood retracted by himself thus has no evidentiary value.
- iv. Statements of Shri Prakash Jajodia were recorded behind the back of assessee and were not allowed to be cross-examined in spite of the specific requests made by assessee which were turned down in arbitrary manner.
- v. Such uncorroborated and retracted statements were relied upon and used against the assessee without providing any opportunity of

cross-examination, nor was any other corroborative material brought on record.

vi. The shares of QFSL were allotted to the assessee by virtue of order of the Hon'ble Calcutta High Court, who has granted the permission of amalgamation of companies after thorough investigation and examination of scheme of amalgamation, thus it cannot be said that the assessee in conjunction with some persons has managed the affairs in such a manner which could affect the working of an institution such as the Hon'ble Calcutta High Court.

vii. Transaction of sale was routed through recognized stock exchange where trading is done on an on-line system and is impossible for a person to have knowledge about the buyer who can be any person of this planet.

viii. Even in the said retracted statements, nothing adverse has been stated against assessee by Shri Prakash Jajodia. A perusal of the statements shows that he has made general remarks about how he provided bogus LTCG to certain persons however, the assessee has nowhere been implicated by him anywhere in his statements.

ix. The requirement of allowing cross-examination of witnesses, whose statements are sought to be used against the assessee, is a sine qua non for validity of adjudication proceedings. The Ld. AO has unlawfully tried to dispense with this requirement by stating that he is not bound by the Technical Rules of Evidence Act. In this regard, it is submitted that such requirement is not a technical rules of evidence, but is one of the principles of natural justice which the Assessing Officer being a quasi-judicial authority is bound by law to follow. In the present case however, the impugned assessment order has been passed in

violation of the principles of natural justice and therefore, is prima-facie bad in law.

10.7 It was submitted that Jaipur Bench of Tribunal in the case of Sh. Pramod Jain vs. DCIT (*ITA No. 368/JP/2017 dated 31.01.2018*) has relied upon the view taken by Hon'ble Apex Court in Andaman Timbers and held that the statements of witness cannot be made sole basis of making assessment without giving an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity.

10.8 It was further submitted that Ahmedabad bench of Tribunal in the case of Smt. Sunita Jain vs ITO quashed the assessment order by placing reliance on Apex Court judgment in the case of Andaman Timber (cited supra) as entire assessment was based upon the statements of Sh. Mukesh Choksi, which were neither supplied to assessee nor was opportunity of cross examination was provided.

10.9 The AO as well Id. CIT(A) have placed reliance on some judicial pronouncements to hold that right to cross examine is not absolute, however such judgments have been passed in different set of facts and furthermore have been superseded by Hon'ble Apex Court judgment in the case of Andaman Timber Industries (supra) which now governs the field.

10.10 The Id. AR also submitted that the transaction of sale of shares by the assessee is completely genuine duly supported by necessary evidences and thus, could not have been held as bogus in view of the following:

- i. The assessee has acquired shares in lieu of his original holdings, as a result of amalgamation with QFSL. Such acquisition and sale were made under proper documentary evidences in the shape of allotment letter and bills and vouchers which were duly submitted before the Ld. AO during the course of assessment proceedings. A perusal of such evidences would show that all the transactions were carried out through the Calcutta Stock Exchange (CSE) having independent trade Nos., duly appearing in the respective bills of sales.
- ii. In consideration of allotment of shares, the payment was made through an account payee cheque which stands debited in the bank account of the assessee. Also the payments in respect of bills raised by the broker i.e. M/s Gangotri Dealers (P) Ltd against the services rendered to assessee were made through account payee cheque. Further, all the sale transactions were made through online portal. The shares sold by the assessee were through the Stock Exchange.
- iii. All the sale transactions were made through online portal after due payment of STT, thus the assessee fulfills all the conditions of section 10(38) to claim such profits as exempt income. At this juncture it is further submitted that the Ld. CIT(A) has alleged at page 42 of the appellate order that since the shares of QFSL which were received by the assessee in lieu of original shares post amalgamation only in January 2012, and were subsequently dematerialized and sold between Sept to Nov 2012, the capital gain arising in the hands of the assessee was short term and the assessee was not entitled to LTCG as claimed. The Ld. CIT(A) further placed reliance on various pronouncements to support his allegations. In this regard it is

humbly submitted that the various case laws cited by the Ld.CIT are on the backdrop of whether holding period of shares should be reckoned from the date of making application for a particular share or from the date of actual allotment. It is in this backdrop that various judgements were pronounced wherein it was held that the date on which the shares were allotted or the rights were conferred upon the holder was to be considered for the purpose of computing the holding period. As against this the fact of the present case is that the original shares were bought by the assessee in 2010 against which shares of QFSL were allotted in lieu of amalgamation between the companies. Thus, the holding period for ascertaining whether the shares were short term or long term has to be reckoned from the date when shares were originally purchased by the assessee. Also with regards to the observation of lower authorities that the purchase transaction was not online, and no STT was paid thereon and accordingly not credited to Dmat account, it is submitted that there was no requirement of purchases to be online for claiming exemption u/s 10(38). It has been further alleged that swap ratio for allotment of shares of QFSL was quite high, in this regard it is submitted that the said swap ratio was approved by the Hon'ble Calcutta High Court and assessee had no control over the same. Thus these findings of the Ld. CIT(A) needs to be grossly ignored.

10.11 It was further submitted that the AO has failed to substantiate his case by conducting any independent enquiry or by bringing any material on record to prove that assessee has received his money back. Thus

doubts regarding genuineness of transaction are nothing more than suspicion on the basis of so called statements of a third party not related to the assessee in any manner.

10.12 It was submitted that the Id. CIT(A) has confirmed the said transaction as non genuine relying upon various judgments on "preponderance of human probabilities". In this regard, it was submitted that such cases cannot at all be relied upon to draw adverse inference in the case of assessee as assessee's transaction is supported by all the requisite documentary evidences.

In this regard, reliance is placed on decision of Hon'ble Special bench of Mumbai ITAT in the case of ITO Vs. M/s. GTC Industries Limited Tobacco House where the Hon'ble Special Bench of ITAT after considering all the aspects of "preponderance of human probabilities" and other issues has held that :

"46.It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

The aforesaid judgment of Hon'ble Special Bench was followed by Hon'ble Kolkatta ITAT in the case of Mahendra Kumar Baid Vs. ACIT dated 18.08.2017.

In case of Dhakeswari Cotton Mills Ltd. Vs. CIT 26 ITR 775 Hon'ble Supreme Court held that there must be something more than bare suspicion to support the assessment u/s 23(3) of the Act.

10.13 The Id. further submitted that the SEBI enquiry cannot be a basis for addition. The Id. CIT(A) has observed that SEBI has debarred M/s Girriraj Stock Broking (p) ltd (Member of Calcutta stock exchange) in Feb 2016 and that it had surrendered its membership. In this regard, it is submitted that such action was much after (i.e. almost 4 years) assessee sold shares, thus no adverse inference can be drawn in the case of assessee on the basis of such order in assessment year under reference. The main reason of addition is the enquiry made by SEBI that these companies are involved in price rigging and thereby helping others in purchasing the capital gain. This cannot be considered as conclusive evidence to hold the assessee as liable for making addition in the income tax proceedings. Furthermore, order of SEBI directing investigation in the case of broker was passed much later than the transactions entered in by assessee, thus negative conclusion drawn in the case of assessee on the basis of such order does not hold good. In this regard, reliance is placed on the decision of Hon'ble Jharkhand High Court in the case of CIT v. Arun Kumar Agarwal (HUF) (2013) 085 DTR 0219 wherein it has been held as under:

"10. We have considered the submissions of the learned counsel for the parties and we are of the considered opinion that the learned Assessing Officer was much influenced by the enquiry report which may has been brought on record by the efforts of the Assessing Officer and that enquiry report was prepared by the SEBI and from the observations made by the Assessing Officer himself, it is clear that after getting that enquiry report, the SEBI prima facie found involvement of some of the share brokers in unfair trade practices. Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he show his bonafide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of S.E.B.I and Stock Exchange, then merely because of that fact a person who bonafidely entered into share transaction of that company through such broker then only by mere assumption such transactions cannot be held to be a shame transaction. Fact of tinted broker may be relevant for suspicion but it alone necessarily does lead to conclusion of all transaction of that broker as tinted. In such circumstances, further enquiry is needed and that is for individual case. Such further enquiry was not conducted in that case.

11. At this juncture, it would be relevant to mention here that it is not disputed by the Revenue before us that the shares of these assesseees were already shown in the earlier Balance Sheet submitted by the assesseees, and therefore, in that situation, how the revenue condemned the transaction even on the ground of steep rise in the shares. If within a period of one year, the share price has risen from Rs.5 to 55 and from 9 to 160 and one person was holding the shares much prior to that start of rise of the share, then how it can be inferred that such person entered into sham transaction few years ago and prepared for getting the benefit after few years when the

share will start rising steeply. In present case even there was no reason for such suspicion when the shares were purchased years before the unusual fluctuation in the share price. Here in this case, we have given example of one of the Tax Appeal wherein the shares were purchased in the year 2004 and were sold in the year 2006, which is said to be one of the case wherein the gap in the purchase and sale of the shares was narrowest. In other cases as we have noticed from the various orders of the C.I.T(Appeals) that, the shares of some of the companies were purchased by the assessee even five years ago from the time of sale and those purchasers were already disclosed in the Balance Sheet of the assessee, then from any angle, it is proved that the assessee had held the shares much prior to 12 months of the sale of the shares."

10.14 It was submitted that in the case of assessee, no material was found which could support the allegation of the Ld. AO that assessee has converted his undisclosed money in the guise of LTCG. Therefore, in the circumstances, it is humbly submitted that the assessee had entered into a genuine transaction of purchases and sales of shares routed through the recognized stock exchange and the funds have been transacted through banking channels and the shares were kept by the assessee in D-mat account and the sales were subject to STT. Thus all the conditions enumerated in section 10(38) for holding the profit from the sale of shares as exempt have duly been fulfilled by the assessee, thus in no circumstances it could be held as bogus or sham transaction more particularly when no corroborative evidence was brought on record by the department to hold that assessee had introduced his undisclosed income in the garb of long term capital gain and the statements of third party relied upon by the department stood retracted

by such person himself which fact had not been considered at all by lower authorities.

11. Per contra, Id. DR has submitted that the assessee has shown a huge long term capital gain within a short period of one year from the sale of shares and therefore, as per the rule of preponderance of human probability the transaction of the assessee cannot be accepted as genuine and the onus is on the assessee to prove the same as how there is a spike in the price of the shares within such short duration. The surrounding circumstances clearly lead to only one possible conclusion that the assessee has manipulated the entire record and availed the bogus transaction of long term capital gain to convert his unaccounted income to avoid tax through long term capital gain. Further, the Id. DR has relied upon the orders of the Assessing Officer as well as Id. CIT(A) and submitted that during the course of survey conducted U/s 133A of the Act, statement of Shri Prakash Jajodia was recorded who has admitted that he is involved in providing accommodation entries of bogus long term capital gains through his companies and M/s QFSL is one such company and in view of that the lower authorities have rightly brought the amount of Rs. 26,83,000/- to tax U/s 68 of the Act. It was further submitted that the right of cross examination is not an absolute right and where the statement of Shri Prakash Jajodia and other persons were made available to the assessee, there is no prejudice which was caused to the assessee. In light of same, it was submitted that the order passed by the lower authorities be confirmed.

12. We have heard the rival contentions and perused the material available on record. The assessee has purchased 400 shares of M/s Drishti Suppliers Pvt. Ltd. for a consideration of Rs. 2,00,000/- and in support of the same, the assessee has produced the purchase bill of the shares purchased from M/s Lokseva Textrade Pvt. Ltd. dated 15.10.2010 which shall the distinct numbers of the shares which have been acquired by the assessee. The purchase price of Rs. 500 per shares itself shows that it was not a transaction of purchase of penny stock. The payment of purchase consideration was made by the assessee through cheque which is evident from the bank account of the assessee at page 29 to 30 of the paper book. Thereafter, M/s Drishti Suppliers Pvt. Ltd. along with other companies were amalgamated with M/s Quest Financial Services Pvt. Ltd. which was duly approved by the Hon'ble Kolkata High Court vide its order dated 22.09.2011. The assessee in the meantime got the physical shares certificate dematerialized into demat account on 21.11.2011. There is thus, no reason to doubt the allotment of shares to the assessee after the amalgamation took place between M/s Drishti Suppliers Pvt. Ltd. and M/s Quest Financial Services Pvt. Ltd. and subsequent to the amalgamation, the assessee was allotted shares of M/s Quest Financial Services Pvt. Ltd. on 21.02.2012 duly reflected in the assessee's Demat statement. Hence, the allotment of 36,000 equity shares of M/s Quest Financial Services Pvt. Ltd. cannot be doubted or disputed as these shares were issued in demat form post amalgamation by a listed company. It is also not in dispute that the shares were issued in exchange of the shares held by the assessee in M/s Drishti Suppliers Pvt. Ltd. Therefore, once the shares issued by M/s Quest Financial

Services Pvt. Ltd. cannot be doubted then, holding of the shares in M/s Drishti Suppliers Pvt. Ltd. by the assessee cannot be doubted as the shares could be allotted only on exchange of shares. The holding of the shares of M/s Drishti Suppliers Pvt. Ltd. and allotment of shares of M/s Quest Financial Services Pvt. Ltd. are directly interconnected, therefore, the genuineness of the purchase transaction cannot be questioned. Further, the purchase consideration has also been paid through cheque, therefore, even if the purchase consideration is found to be very less in comparison to the sale consideration at the time of sale of shares, in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape in the long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in absence of any corroborating evidence. Further, the AO has passed the assessment order based on the statement of Shri Prakash Jajodia and his associates however, the assessee has specifically demanded the cross examination of Shri Prakash Jajodia during the course of assessment proceedings as we have noted above. However, the Assessing Officer did not offer the opportunity to the assessee to cross examine Shri Prakash Jajodia. In view of the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries 127 DTR 241 the assessment based on statement without giving an opportunity is not sustainable in law. We further note that the assessee produced copy of affidavit of Shri Prakash Jajodia who has retracted his statement, however without going into controversy of the retraction of the statement, the fact remains that the statement of a third party cannot be used by the AO

without giving an opportunity of cross examination to the assessee. A similar issue has come up before this Bench in case of Shri Pramod Jain and others vs. DCIT (*ITA No. 368/JP/2017 dated 31.01.2018*) while dealing with an identical in para 6 to 8 we have held as under:-

"6. We have considered the rival submissions as well as relevant material on record. The assessee purchases 800 equity shares M/s Gravity Barter Ltd. for a consideration of Rs. 4 lacs the assessee has produced the purchase bill of the shares purchase from M/s Winall Vinimay Pvt. Ltd. which shows that the assessee purchase 800 equity shares having face value of Rs. 10/- each M/s Gravity Barter Pvt. Ltd. in allots of 400 each for a consideration of Rs. 2 lacs each total amount to Rs. 4 lacs @ Rs. 500 per shares. The purchase price of Rs. 500 per share itself shows that it was not a transaction of purchase of penny stock. These shares were duly reflected in the balance sheet as 31.03.2011. The payment of the purchase consideration was made by the assessee vide cheque on 17.05.2011 which is evident from the bank account of the assessee at page 40 of the paper book. In the mean time the said M/s Gravity Barter Pvt. Ltd. changed its status from private limited to a public limited and fresh certificate was issued by the Registrar of company on 05.02.2011 which is placed at page 43 of the paper book. Therefore, there is no reason to disbelief the fact of fresh certificate issued by the Registrar of companies on 05.02.2011 and hence, the date mentioned in the order of the Hon'ble Kolkata High Court as 18.04.2011 appears to be typographical mistake. Even otherwise these two dates do not have any effect on the genuineness of the transactions of purchase of equity shares by the assessee of M/s Gravity Barter Pvt. Ltd. The assessee though produced all the relevant

records and evidences right from the purchase bills, certificate issued by the Registrar about the change of name, the communication between the assessee and the seller of the shares and thereafter, the amalgamation of M/s Gravity Barter Ltd. with M/s Oasis Cine Communication Ltd. which was duly approved by the Hon'ble High Court vide order dated 28.8.2011. The assessee in the mean time got the physical share certificate dematerialized into Demat account on 16.02.2012. There is no reason to doubt the allotment of the shares to the assessee after amalgamation took place between M/s Gravity Barter Ltd. and M/s Oasis Cine Communication Ltd. and subsequent to amalgamation the assessee was allotted shares of M/s Oasis Cine Communication Ltd. on 04.02.2012. Hence, the allotment of 35,200 equity shares of M/s Oasis Cine Communication Ltd. cannot be doubted or disputed as these shares were issued post amalgamation and by a listed company. It is also not in dispute that these shares of M/s Oasis Cine Communication Ltd. were issued in exchange of the shares held by the assessee of M/s Gravity Barter Ltd. Therefore, once the shares issued by M/s Oasis Cine Communication Ltd. cannot be doubted then the holding of the shares of the M/s Gravity Barter Ltd. by the assessee correspondingly cannot be doubted because of the reasons that the shares of M/s Oasis Cine Communication Ltd. could be allotted only in exchange of shares of M/s Gravity Barter Ltd. The holding the shares of M/s Gravity Barter Ltd. and the allotment of shares M/s Oasis Cine Communication Ltd. are directly interconnected. In the absence of holding of shares M/s Gravity Barter Ltd. the shares of the M/s Oasis Cine Communication Ltd. could not be issued or allotted to the assessee. Therefore, holding of the shares by the assessee at least at

time of amalgamation took place and shares of the M/s Oasis Cine Communication Ltd. on 04.02.2012 cannot be doubted. Moreover, these shares were dematerialized by the assessee in the Demat account, therefore, on the date of allotment of share of M/s Oasis Cine Communication Ltd the assessee was holding these shares and prior to that the assessee was holding the shares of M/s Gravity Barter Ltd. on exchange of the same the shares of M/s Oasis Cine Communication Ltd. were issued to the assessee. The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd. is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee. Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the

shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipated the exceptional appreciation in the share price due to extraordinary event of merger/amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

7. *In case of equity shares M/s Paridhi Properties Ltd. the assessee purchase 50,000 equity share on 26.03.2011 by paying share application money of Rs. 5 lacs which is duly reflected in the bank account of the assessee as paid on 28.03.2011. Therefore, the payment of share application money has been duly established by the assessee through his bank account for allotment of shares of 50,000 equity shares of M/s Paridhi Properties Ltd. The share allotted in private placement as per of Rs. 10/- cannot be termed as penny stock. The AO doubted that the entire process of application and allotment of shares as it have been completed within a short duration of 5 days, which in the opinion of the AO is not possible in ordinary course. However, when the assessee has produced the record including the share application, payment of share application money, allotment of share then merely because of a short period of time will not be a sufficient reason to hold that the transaction is bogus. The shares allotted to the assessee vide share certificate dated 31.03.2011 were dematerialized on 21.10.2011, therefore, on the date of dematerialization of the shares the holding of the shares of the assessee cannot be doubted and hence the acquisition*

of the shares of the assessee cannot be treated as a bogus transaction. Nobody can have the shares in his own name in demat account without acquiring or allotment through due process hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

8. As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain. It is also pertinent to note that the shares of M/s Oasis Cine Communication Ltd. are still held by the assessee in its demat account to the extent of 17,200 shares and therefore, the holding of the shares by any parameter or stretch of imagination cannot be doubted. The AO has passed the assessment year based on the statement of Shri Deepak Patwari recorded by the Investigation Wing of Kolkata however, the

assessee has specifically demanded the cross examination of Shri Deepak Patwari vide letter dated 15.03.2016 specifically in paras 3 and 4 as reproduced by the AO at page No. 7 of the assessment order as under:-

"3. Since, the shares were allotted by the company through private placement after completing the formalities of ROC and were sold through the recognized Bombay Stock Exchange (BSE) there is no question of knowing individual persons or company official personally in the whole process, so the assessee is not in position to produce any one for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the Income tax Act 1961 to the concerned individual persons or company officials for cross examination. Please note that the assessee is ready to bear the cost of their travelling in this regards.

4. As regard your opportunity given to us to read the recorded statement of Shri Deepak Patwari and to produce him from the cross examination before your good self, we have to submit that from the reading of the statements of Shri Deepak Patwari it is clear that he has never taken the name of the assessee, nor the assessee is aware of any Shri Deepak Patwari neither he has made any transaction with him, so in what capacity he can call him for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the income Tax act 1961 to him also for cross examination. We also request your good self to kindly provide us the copy of statements of Shri Deepak Patwari along

with the other relevant documents. Please note that the assessee is ready to bear the cost of his travelling in this regard."

It is manifest from the assessee's reply to show cause notice that the assessee had specifically demanded the cross examination of Shri Deepak Patwari however, the Assessing Officer did not offer the opportunity to the assessee to cross examine Shri Deepak Patwari. Further, the AO asked the assessee to produce the Principal Officers of the M/s Gravity Barter Ltd. and M/s Paridhi Properties Ltd. However, in our view if the Assessing Officer wanted to examine the principal Officers of those companies he was having the authority to summon them and record their statements instead of shifting burden on the assessee. It is not expected from the assessee individual to produce the principal Officers of the companies rather the AO ought to have summoned them if the examination of the officers were considered as necessary by the AO. Hence, it was improper and unjustified on the part of the AO to asked the assessee to produce the principal Officers of those companies. As regards the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the

impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of

levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in par 46 as under:-

"46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on

material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company

or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt.

Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under:-

"12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended that in view of the finding reached, which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

"Contention of the AR is considered. One of the main reasons for not accepting the genuineness of the transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, HCL, [IPCL](#), BPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, company's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered

into cannot be denied simply on the ground that in his statement the appellant denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima facie the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purihit and Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering

all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohi. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

13. Thus, it is clear that the Bench in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Bench after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdictional High court in case of CIT vs. Smt. Pooja Agarwal (supra) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account, then in the absence of any evidence brought on record, it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similarly, in the case in hand, the assessee has produced the relevant records to show the purchase of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and the said evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the assessee has introduced his unaccounted income in the shape of long term capital gain. We find that the Id. CIT(A) has also referred to SEBI enquiry against M/s GIRRIRAJ Stock Broking (P) Ltd and has stated

that current status is that M/s GIRRIRAJ Stock Broking (P) Ltd is under investigation. Therefore, in absence of specific findings which can be known only on completion of enquiry and in absence of any material on record that the subject matter of the enquiry has any connection with the transaction of bogus long term capital gain, the same cannot be relied upon by the Revenue. Further, the Id CIT(A) has stated that period of holding is less than 12 months. In this regard, reference can be drawn to the provisions of section 2(42A)(c) which provides that "*in the case of a capital asset being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, there shall be included the period for which the share or shares in the amalgamating company were held by the assessee.*" In the present case, the original shares in M/s Drishti Suppliers Ltd were bought by the assessee in 2010 against which shares of Quest Financial Services Ltd were allotted to the assessee pursuant to amalgamation between the companies. Thus, the holding period has to be reckoned from the date when shares in M/s Drishti Suppliers Ltd were originally purchased by the assessee. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account.

14. Ground No. 6 is regarding the addition made by the AO on account of notional commission of Rs. 1,60,980/- u/s 69C of the Act which is consequential to the issue of treatment of long term capital

gain as bogus. Once, we have reversed the finding of the AO on the issue of treatment of long term capital gain as bogus then, the consequent addition made by the AO on notional commission is not sustainable. Accordingly, the same is deleted.

15. In rest all appeals, the issue raised by the respective assesseees are common and arising from identical facts as in the appeal in ITA No. 402/JP/2017 except the difference of addition made by the AO. Accordingly, in view of our finding on these issues in ITA No. 402/JP/2017, the grounds raised in these appeals in ITA No. 403/JP/2017, 404/JP/2017, 405/JP/17, 406/JP/17, 412/JP/2017 & 413/JP/2017 are decided in favour of the assessee.

In the result, the appeals filed by the assesseees are allowed.

Order pronounced in the open Court on 24/08/2018.

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 24/08/2018.

***Santosh**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-A. Shri Om Prakash Modi, Jaipur.
B. Smt. Snehlata Modi, Jaipur.
C. Smt. Radhika Modi, Jaipur.
D. Shri. Atul Krishna Modi, Jaipur.
E. Shri. Ajay Krishna Modi, Jaipur.

F. Shri. Vijay Krishna Modi, Jaipur.

2. प्रत्यर्थी / The Respondent- DCIT, Central Circle-2, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 402 to 406, 412 & 413/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar