

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH: KOLKATA**  
 (समक्ष) Before श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम.बालागणेश, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

**I.T.A. No. 604/Kol/2018**  
**Assessment Year: 2014-15**

Jagmohan Agarwal (PAN: ACGPA6150K)	Vs.	Assistant Commissioner of Income- tax, Circle-35, Kolkata.
Appellant		Respondent

Date of Hearing	21.06.2018
Date of Pronouncement	05.09.2018
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri Saurabh Kumar, Addl. CIT

**ORDER**

**Per Shri A.T.Varkey, JM**

This appeal preferred by the assessee is against the order of the Ld. CIT(A) –10, Kolkata dated 15.02.2018 for AY 2014-15.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) in confirming the addition made by AO of Rs.11,49,425/- u/s. 68 of the Act, which the assessee claimed as LTCG from sale of scrips of M/s. Essar India Ltd., without providing copies of materials and without giving opportunity to the assessee to cross-examine the person whose statement the AO relied to draw adverse inference against the assessee's transaction which resulted in additions thus was in violation of natural justice. And the AO has considered irrelevant material and not considered the relevant material the assessee produced before him to disallow the claim of the assessee.

3. Brief facts of the case is that the assessee is an individual and had filed his return of income for the A.Y.2014-15, showing total income of Rs.2,38,420/-. The case of the

assessee was selected for scrutiny through CASS and accordingly AO issued notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). The AO notes that in response to the said notices, the Ld. AR of the assessee appeared and filed required details and documents. During the course of assessment proceedings, the A.O. observed that the assessee had shown Long Term Capital Gain on sale of scrips of M/s. Essar India Ltd., which were exempt u/s 10(38) of the Act. Further, it was noted by the AO that the earning in the said scrips has been reported as suspicious by Investigation Wing and accordingly the case of the assessee was selected for scrutiny. On the basis of documents submitted during the course of assessment proceedings and the data available on various stock market website in respect of the said scrip, the AO analysed the fundamentals, graphs and the price movement of the said scrip during the period under consideration. While analysing the stock of M/s. Essar India Ltd. with benchmark index, viz., sensex, the A.O. discussed about abnormal price rise of shares of M/s. Unno Industries and had also at various places referred to the share of M/s Kailash Auto. Taking note of these cases also the AO concluded the fact that the transactions by the assessee in the scrip transaction were rigged. The AO had also stated that he had obtained information u/s 133(6) about 'Exit Providers' or 'Counter Parties' from Bombay Stock Exchange (BSE), which corresponds to the purchase and sale transactions of the assessee in the said scrip. According to AO, the said information contained the names of 'M/s. East India Securities Ltd.' and 'M/s. GCM Securities Ltd.' as Counter Party Member, against whom Shri L.K. Agarwal and Shri Goutam Bose, entry operators, had given statement. Further, during the course of assessment proceedings, reference to statement of one Shri S. Dokania was also made. Further, the AO had reproduced the entire modus operandi of bogus LTCG, which has been stated by SEBI in its various orders. After considering the abovementioned facts and documents, the AO issued a show cause notice on the assessee in respect of LTCG transactions in the scrips of M/s. Essar India Ltd. and in response to the said notice the appellant stated that the said transactions were carried out through BSE and banking channels and could be verified by AO. The assessee further stated that STT were deducted on the sale of said scrips. However, the AO was not convinced with the assessee's contention. Instead the AO relied on his fundamental analysis, human conduct and

preponderance of probabilities, and concluded the said transactions to be sham and bogus. The A.O after placing reliance on various judicial pronouncements, added back the entire amount of sale proceeds of Rs.11,49,425/- as unexplained cash credit u/s 68 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) which was dismissed. Aggrieved, the assessee is before us.

4. The Ld. AR assailing the action of Ld. CIT(A) /AO submitted that the appellant is a regular investor and he keeps on investing in various other scrips based on the fundamentals of the company and market information. Similarly, the appellant had purchased the shares of M/s. Esaar India Ltd. after analyzing the financials of the company for the quarter ended 31st December 2012 (copy enclosed), the appellant observed that the company had reported a profit of Rs.24.97 lacs as against a meagre profit of Rs. 0.34 lacs for quarter ended 31st December 2011. Now having regard to the growth of the company and the future prospect, the appellant was of the view that the purchase of the 25000 shares of the said company at a price of Rs.10.83 per share was a good bargain and accordingly purchased the shares of the said company for Rs 2,70,750/-. Later on, the appellant sold the shares of the said company at a reasonable profit of Rs.35.18 per share (Rs46.00 - 10.83) and thus made a gain of Rs 8,78,675/-. However, the AO disbelieved the claim of LTCG and held it to be a bogus transaction and added back the entire amount of sale proceeds of Rs. 11 ,49,4251-[ Rs 46 per share for 25000] as unexplained cash credit u/s 68 of the Act. It was pointed out to us by the Ld. AR that had there been an involvement of the appellant in such scam, then the appellant should have sold it a price of Rs.67.95 per share (on 21.08.2014), being the highest price of which the shares of the said company was traded, so the theory of collusion and suspicious transaction fails.

5. Further according to ld AR, in the show cause notices and the assessment order, the AO had stated the fact that the information prepared by the DIT (Inv.) were based on various enquiries made by it and various statements recorded by investigation team under oath. However, the Ld. AR pointed out that the AO had failed to provide the copies of the same to the assessee. Further, according to Ld. AR, the AO had not brought on record any

material/evidence against the assessee based on which he was of the view that the amount of LTCG earned by the appellant were all bogus. The Ld. AR drew our attention to the following judicial decisions, wherein it had been held that the AO is bound to provide the copies of information which were collected behind the back of the assessee. Further, according to Ld. AR, the AO is also bound to provide an opportunity of cross examination in respect of statements adverse to him, which were recorded behind the back of the assessee and which were relied upon before taking any adverse view against the assessee:-

6. The Ld. AR drew our attention to the case of KALRA GLASS FACTORY VS SALES TAX TRIBUNAL – SUPREME COURT 167 ITR 488 OF 1987 wherein it has been held that the elementary principle of natural justice as applied to Income Tax proceedings, is that the assessee should have the knowledge of the material that is going to be based against him so that he may be able to meet it where for instance the statement of a person is recorded behind the back of the assessee, but not tested by cross examination, such a statement cannot be allowed to be used to the prejudice of the assessee. Also Hon'ble Supreme Court in the case of DHAKESWARI COTTON MILLS LTD. vs. C.LT. (25 ITR 775) has emphasized the issue of applicability of "The Principle of Natural Justice". In that case SLP was filed by the assessee under the provisions of Article-136 of the Constitution, contended that, the assessment order which was passed u/s. 23 (3) of the Income Tax Act was made in violation of the principles of Natural Justice. The Hon'ble Apex Court observed as under:

*"It is ..... surprising that the Tribunal took from the representative of the department statement of gross profit rates of other cotton mills without showing the statement to the assessee and without giving him an opportunity to show that that statement had no relevancy whatsoever to the case of the mill in question."*

The Ld. AR submitted that similar views have been taken in following cases:-

- LAXMANBHAI S. PATEL V. CIT ITR NO. 41 OF 1997
- ALOK AGRAWAL V. DCIT, 67 TTJ 109
- CIT VS EASTERN COMMERCIAL ENTERPRISES 210 ITR 103 (CAL)
- KISHINCHANDCHELLARAM VS CIT (1980) 125 ITR 0713 (SC)
- CIT VS PRADEEP KR GUPTA 303 ITR 95
- CIT VS SMC SHARE BROKERS LTD 288 ITR 435

7. According to Ld. AR, in the absence of any material/evidences proving the involvement of the appellant in circular trading, it can be concluded that the additions made by the AO were merely on the basis of suspicion and surmise, which resulted from purported generalized information received from Investigation Wing. In this regard, Ld AR placed reliance on following judicial pronouncements wherein it was stated that addition cannot be made merely on the basis of presumption, assumption and suspicion which cannot take the shape of proof:-

8. The Ld. AR drew our attention to the decision of Hon'ble Supreme Court in the case of K.P. Varghese v. Income Tax Officer (SC) (1981) 131 ITR 0597 wherein the Hon'ble Apex Court held that -

*"the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such on understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is on understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration."*

9. Further reliance for this proposition is also placed on the judgment of Hon'ble Apex Court in the case of Uma Charan Shaw & Bros, Co, vs, CIT (37 ITR 271). It has been further held in the following cases that suspicion howsoever strong cannot take the place of proof:

- a) 37 ITR 151 (SC) Omar Salay Mohammad Salt vs CIT
- b) 26 ITR 736 (SC) Dhirajlal Girdharilal vs CIT
- c) 26 ITR 775 (SC) Dhakeshwari Cotton Mills Ltd. vs CIT
- d) 37 ITR 288 (SC) Lal Chand Bhagat Ambica Ram vs CIT

10. Further, in the case of Raj Kumar Agarwal (ITA No. 1330/K/07), reliance was placed on Hon'ble Calcutta High Court's decision in the case of Cabro Industrial Holdings Ltd. (244 ITR 422) wherein it was held that the claim of the assessee should not be denied on mere suspicion.

11. According to the Ld. AR, during the course of assessment proceedings despite asking for information and documents, the AO failed to provide the copies of information and statements which were supposed to have been collected behind the back of the assessee, thereby violating the principles of natural justice as laid down in following cases:-

- KALRA GLASS FACTORY VS SALES TAX TRIBUNAL – SUPREME COURT 167 ITR 488 OF 1987
- DHAKESWARI COTTON MILLS LTD. VS CIT (26 ITR 775)
- LAXMANBHAI S. PATEL V. CIT ITR NO. 41 OF 1997
- ALOK AGARWAL V. DCIT, 67 TTJ 109
- CIT VS EASTERN COMMERCIAL ENTERPRISES 210 ITR 103 (CAL)
- KISHINCHAND CHELLARAM VS CIT (1980) 125 ITR 0713 (SC)
- CIT VS PRAKEEP KR GUPTA 303 ITR 95
- CIT VS SMC SHARE BROKERS LTD 288 ITR 435

12. In the aforesaid back ground, according to Ld. AR, it appears that the additions were made by the A.O, were stereotype in nature and were based on surmises and were not on the basis of material relating to the case of appellant. Therefore, in the aforesaid basic ground, it can be concluded that the additions made by the AO were merely on the basis of suspicion, which cannot take the shape of proof. In this regard we would again like to place reliance on the following cases:-

13. In the case of K.P. Varghese v. Income Tax Officer (SC) (1981) 131 ITR 0597 the Hon'ble Apex Court held that -

*"the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such an understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is an understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him and there is no concealment or suppression of the consideration."*

14. The Ld. AR drew our attention to the decision of the Tribunal in the case of Manish Kumar Baid, Mahendra Kumar Baid vs ACIT (ITA No. 1236/1237/Kol/2017 dated 18.08.2017) (A.Y. 2014-15) wherein it has been held that:-

*We find lot of force in the arguments of the Ld. AR that the AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct and preponderance of probability without bringing on record any legal evidence against the assessee. We rely on the judgement of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for the proposition. The various facets of the arguments of the ld AR supra, with regard to impleading the assessee for drawing adverse inference which remain unproved based on the evidences available on record are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the ld AR are also not reiterated for the sake of brevity.*

15. It has also been held in the said order that-

*“Hence we hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations levelled by the AO against the assessee which in our considered opinion, has no legs to stand in the eyes of law”*

16. According to Ld. AR, the instant case is similar to the case of Manish Kumar Baid and Mahendra Kumar Baid, as the AO had not brought on record neither any material nor conclusive evidence in support of his allegations and, therefore, no additions should have been made against the assessee.

17. It was urged before us by the ld. AR that the appellant had discharged his onus of proving the genuinity of the said transactions by submitting all the documents evidencing purchase and sale and all the relevant bank statements. Therefore, according to Ld. AR, the onus was on the AO to verify the said purchases and sales transactions by issuing various notices u/s 131 or 133(6) of the Act. However, the AO without verifying the said transactions concluded the fact that the said LTCG were bogus and in support of his contention he placed reliance on some general modus operandi which proved nothing of assessee's involvement in any scam and was of a generalized nature and nothing to do with the assessee.

18. The Ld. AR submitted that in the assessment order the AO has stated that he had enquired into the matter by issuing notice u/s 133(6) to BSE asking it to furnish the details of counter parties, their addresses, contact numbers and PAN. However, the AO had failed (i) to give a copy of the information BSE gave to AO pursuant to his notice, (ii) no material from BSE was pointed to draw adverse inference against the assessee, (iii) no material was based by AO to prove that the assessee was in any way involved in circular trading to rig the value of shares. The only thing the AO had done is reproduce the extract of general details received from BSE. Further, the AO was also in possession of statement of operators of counter party member who had accepted their role in managed and synchronized transactions. During the course of assessment proceedings the AO neither apprised the appellant of such information collected u/s 133(6) nor provided the copies of the same for rebuttal. Further, the copies of statement and an opportunity for cross examination were also not granted to the appellant, thereby violating the principles of natural justice. It was pointed out by the Ld. AR that the assessee had nothing to do with share transaction of M/s. Kailash Auto and M/s. Unno Industries. According to Ld. AR, the AO had referred to these two companies' share transactions which are irrelevant in the case of assessee and was only to create suspicion and reference of these companies exposes non-application of mind of AO. Likewise, the names of two operators are mentioned at page 9 of the order of AO i.e. of Shri L. K. Agarwal and Shri Gautam Bose whose statements have been purportedly recorded by the Department are referred to draw adverse view. On this fact it was pointed out by the Ld. AR that these two persons are in no way connected with the assessee and had nowhere made any incriminating statement against the assessee to the effect that assessee had involved in rigging. Not only that the AO failed to give copies of these two persons statement referred to by AO and that of Shri S. Dhokani whose statement was also referred to by AO to justify the suspicion against the appellant, makes the order bad for violation of natural justice. According to Ld. AR, no statement against assessee can be used by AO to draw adverse inference unless a copy is given to assessee and opportunity to cross examine is allowed.

19. According to Ld. AR, the transactions in the scrips were legally entered into by the appellant through its registered broker and all the payments were made and received through banking channels. The copies of contract notes, de-mat statement and bank statements have been submitted to the AO during the course of assessment proceedings. The Ld. AR drew our attention to the following cases wherein it has been held that when the purchase and sale of shares were supported by proper contract notes, deliveries of shares were received through de-mat accounts, the shares were purchased and sold through recognized broker and the sale consideration were received through banking mode, the transactions cannot be treated as bogus .

20. In this regard the Ld. AR placed reliance on the case of Surya Prakash Toshniwal HUF Vs, ITO Wd-41(3), Kol. ( ITA, No. 1213/Kol/2016) (Pronounced on 11.01.2017), wherein the Tribunal had held as under:

*"The assessee in the instant case has made the transactions for the sale and purchase of the shares through a valid stock broker who was in existence at the relevant time with the stock exchange and this fact has not been doubted by the lower authorities. In view of the above we hold that the lower authorities had not brought on record sufficient reasons for disallowing the claim of the assessee. In this connection we rely in the case of CIT versus Carbo Industrial Holdings Limited reported in 116 taxman159 where the Hon'ble jurisdictional High court has held as under:*

*"If the share broker, even after issue of summons does not appear, for that reason, the claim of the assessee should not be denied, specially in the cases when the existence of broker is not in dispute, nor the payment is in dispute. Merely because some broker failed to appear, assessee should not be punished for the default of a broker and on mere suspicion the claim of assessee should not be denied,"*

*Similarly we also find guidance and support from the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. Emerald Commercial Ltd. reported in 120 taxman 282 whereby it was observed as under :*

*"Business income-Business loss-Loss on sale of shares-Details of purchase and sale of shares furnished-Payment and receipts were through account payee cheque-identity of seller and purchaser not disputed-Claim for loss could not be disallowed on the mere ground that the assessee failed to produce the brokers for verification of the transaction-Finding of the Tribunal that the loss incurred by the assessee in the share dealings is genuine and is allowable was based on material and was not perverse-CIT vs. Carbo Industrial Holdings Ltd.(2000) 161 CTR (Cal) 282 : (2000) 244 ITR 422 (Cal) followed"*

*Respectfully following the aforesaid judgments we find that the proposition laid down by the Hon'ble Courts are applicable to the instant case on hand, The addition was made by the lower authorities on several grounds as discussed above but on analysis of the fact we find*

*that there was no fault on the part of the assessee. Therefore we are inclined to reverse the order of lower authorities. Hence this ground of appeal of the assessee is allowed."*

21. Further, our attention was drawn to the case of ITO vs Arvind Kumar Jain HUF (ITA No. 4862/Mum/2014) (Pronounced on 18.09.2017), the Tribunal (Mumbai) had held that *"if the DMAT account and contract note show details of the share transactions and the AO has not proved the transactions to be bogus, the capital gains earned on the said transactions cannot be treated as unaccounted income u/s 68, The fact that the broker was tainted and violated SEBI regulations would not make assessee's transactions bogus,"*

22. Further, our attention was drawn to the case of Kiran Kothari HUF Vs ITO. Wd - 35(3) Kol. (ITA No. 443/Kol/2017), Pronounced on 15.11.2017, the Tribunal had held as under:

*"At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain, Neither these evidences were found by the AO nor by the Id. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that LTCG is exempted u/s 10(35) of the Act on the basis of suspicion surmises and conjectures, It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence. In the aforesaid facts and circumstance, for allowing the appeal we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alpine Investments in ITA No. 620 of 2008 dated 26th August 2008 wherein the High court held as follows:*

*"It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment k appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee. In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed."*

9.4. *We note that the Id. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the Id, AR (supra) and have been duly considered to arrive at our conclusion, The Id. DR could not bring to our notice any case laws to support the impugned decision of the Id CIT(A)/A.O. In the aforesaid facts and circumstances of the case, we hold that the Id. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act, We therefore direct the AO to delete the addition,"*

*Further, we would also like to place reliance on the case of Dolarral Hemani, ITO (ITA No. 19/Kol/2014) (AY 2005-06) Dt. Of pronouncement 02.12.2016) wherein Tribunal has held:*

*"We find that the similar issue had been adjudicated by the co-ordinate bench of this tribunal in the case of DCIT vs Sunita Khemka in ITA Nos, 714 to 718/Kol/2011 dated 28.10.2015 and in the case of ITO vs Rajkumar Agarwal in ITA No, 1330 (Kol) of 2007 dated 10.8.2007 wherein it was held that, when purchase and sale of shares were supported by proper contract notes, deliveries of shares were received through demat account maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by account payee cheques. the transactions cannot be treated as bogus and the income so disclosed was assessable as LTCG. We find that in the instant case, the addition has been made only on the basis of the suspicion that the difference in purchase and sale price of these shares is unusually high. The revenue had not brought any material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money."*

23. Also in the case of Surya Prakash Toshniwal HUF vs ITO (ITA No. 1213/Kol/2016) (AY 2005-06) (date of pronouncement 11.01.2017), the Tribunal while allowing the appeal of the assessee has observed as under:-

*"The assessee in the instant case has made the transactions for the sale and purchase of the shares through a valid stock broker who was in existence at the relevant time with the stock exchange and this fact has not been doubted by the lower authorities. In view of the above we hold that the lower authorities had not brought on record sufficient reasons by disallowing the claim of the assessee"*

24. Reliance was also placed on the case of Manish Kumar Baid, Mahendra Kumar Baid (supra) wherein it has been held by the Tribunal that-

*"It is also a matter of record that the assessee has furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act. We also find that the various case laws of Hon'ble Jurisdictional High Court relied upon by the Ld AR and findings given thereon would apply to the facts of the instant case. The Ld. DR was not able to furnish any contrary cases to this effect. Hence we hold that the A.O. was not justified in assessing the sale proceeds of shares of KAFL, as undisclosed income of the assessee u/s 68 of the Act. We accordingly hold that the reframed question no 1 raised hereinabove is decided in the negative and in favour of the assessee.*

*It is relevant to rely on the decision of the Calcutta High Court in the case of CIT vs Alpine Investment (ITA No. 620 of 26.08.2008). In this case the shares were transacted through recognized stock brokers and through regular bank channel and supported by contract notes and bills. The stock broker also appeared and accepted the transactions to be genuine. The A.O. however relied solely on the statement of Shri Roopani at the time of search without taking cognizance of cross examination and documents produced and disallowed the loss treating it to be bogus. The CIT(A) upheld the disallowance which was deleted by the tribunal. While dismissing the revenue's appeal u/s 260A the Calcutta High Court observed as 'It appears that the share loss and the whole transactions were supported by contract notes, bills*

*and were carried through recognized stock broker and all the payments received from stock broker through payee instruments which were also filed in accordance with the assessment.*

*It appears from the facts and materials placed before the Tribunal and after examining the same the Tribunal came to the conclusion and allowed the appeal filed by the assessee. In doing so, the tribunal held that the transaction fully supported by the documentary evidences could not be brushed aside on suspicion and surmises, However, it was held that the transactions of share are genuine. Therefore we do not find that there is any reason to hold that there is any substantial question of law involved in this matter. Hence, the appeal being ITA NO.620 of 2008 is dismissed. "*

25. The Ld. AR further relied on the judgement of Hon'ble Bombay High Court in the case of CIT vs Lavanya Land Pvt. Ltd. (2017) 83 taxmann.com 161 (Bom) to contend that there was no evidence whatsoever to allege that money changed hands between the assessee and the broker or any other person including the alleged exit provider whatsoever to convert unaccounted money for getting benefit of LTCG as alleged. In the said case, the Hon'ble High Court at para 21 held that in absence of any material to show that huge cash was transferred from one side to another, addition cannot be sustained.

26. The following judgments were also brought to our notice by the Ld. AR:-

M/s. Classic Growers Ltd. vs CIT (ITA No. 129 of 2012) (Cal HC) :- In this case the A.O. found that the formal evidences produced by the assessee to support huge losses claimed in the transactions of purchase and sale of shares were stage managed. The Hon'ble High Court held that the opinion of the AO that the assessee generated a sizeable amount of loss out of prearranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the AO but he miserably failed to substantiate that. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the ld AO was misplaced and not substantiated.

CIT vs Shreyashi Ganguli (ITA No. (Cal HC) : 196 of 2012) In this case the Hon'ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI's action. However the transactions were as per norms and suffered STT, brokerage, service tax, and cess. There is no iota of

evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

CIT vs Runata Properties Pvt. Ltd. (ITA No. 105 of 2016) (Cal HC):- In this case the Hon'ble Calcutta High Court affirmed the decision of this tribunal, wherein, the tribunal allowed the appeal of the assessee where the AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

27. The Id AR further submitted before us that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of *Hon'ble Supreme Court in the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. As per the Id AR the AO/ CIT(A) was not justified in invoking the provisions of section 68 of the Act to hold that the sale proceeds of shares. There is no evidence on record to disbelieve that the assessee sold shares through registered share and stock broker with BSE. The assessee produced all evidences to explain the source of the amounts received by the assessee from the brokers. The AO was not justified in assessing the sale proceeds of shares as unexplained cash credit under section 68 of the Act.

28. On the other hand, the Ld. DR vehemently opposed the plea of the Ld. AR and relied on the decision of the Ld CIT(A) and the AO and urged before the bench not to interfere with the order of the Ld CIT (A).

29. We have heard the rival submissions and perused the records. We note that in the present case, the assessee had purchased 25000 shares of M/s. Essar India Private Limited on 22.03.2012 from a recognized stock broker M/s. R. L. Agarwala Capital Market Ltd. through the BSE. These shares were held in the de-mat account of the assessee placed at pages 13 and 14 of paper book and ultimately these shares were sold through M/s. R. L. Agarwala Capital Market Ltd. through the BSE and on such sale, Security Transaction Tax was duly paid. Payments were duly received in the bank account of the assessee. The transactions were all through a registered broker and through BSE since the scrips of M/s. Essar India Pvt. Ltd. was a listed company in BSE backed by a contract note (page 2 and 8&9 of the paper book) and shares were credited in the de-mat accounts (page 13 and 14 of the paper book) and duly reflected in the books of account. In the light of these evidences on record we are of the opinion that the purchase and sale of shares per-se cannot be held to be bad.

30. We note that the Ld. CIT(A) has disbelieved or discarded the evidence produced by the assessee to substantiate that the purchase and sale of shares of M/s. Essar India Pvt. Ltd. through the BSE, through recognized stock broker and through banking channel was genuine by observing as under:

*“I also find that all the submissions made by the appellant during the course of the appeal point towards the elaborate documentation, meaning thereby that the appellant has produced papers relating to application for the shares, the allotment of the shares, the share certificates, payments by cheque and the necessary papers filed before the Registrar of companies, where the name of the assessee has been reflected as a shareholder. The appellant has also filed proof of amalgamation of the companies wherein the shareholding has changed hands. It is also the contention of the appellant that it has provided copies of the bank statement, bank contract notes and delivery instructions to the broker by way of proof that all these transactions were genuine. However, in my considered view of the matter, it is precisely this elaborate paperwork that strengthens the matter relating to the bogus benefit of the LTCG, which clearly has been schemed, preplanned and executed with malafide intelligence and precision. Therefore all these papers are mere documents and not any evidence. The whole gamut of transactions are unnatural and highly suspicious, and therefore the rules of SUSPICIOUS TRANSACTIONS ought to apply in the instant case. There are grave doubts in*

*the story propounded by the assessee before the authorities below. None of the material produced before the Ld. AO by the assessee-appellant are enough to justify the humongous gains accruing to the assessee by way of Capital Gains. In my considered view the banking documents are mere self serving recitals.”*

31. We note that the assessee has produced before the Ld. CIT(A) (i) paper relating to the application for shares, (ii) allotment of the shares, (iii) share certificates, (iv) payment by cheque, (v) necessary papers filed before the Registrar of Companies, (vi) the name of the assessee has been reflected as a shareholder, (vii) the proof of amalgamation of the companies wherein the shareholding has changed, (viii) bank statement, (ix) bank contract notes and delivery instruction to the broker to prove the genuineness of the transactions which has been disbelieved on the species plea that production of these documents strengthens the suspicious transaction of bogus transaction cannot be accepted at all. The Ld CIT(A) ought not to have brushed aside these documents without pointing out any defects and therefore the impugned action of Ld CIT(A) cannot be countenanced. Moreover the AO has referred in his assessment order the name of M/s. Kailash Auto and M/s. Unno Industries and also statements of Shri L.K. Agarwal and Shri Goutam Bose and Shri S. Dokania. However these persons statements have neither been reproduced in the assessment order nor the assessee given a copy of the statements to rebut. So the action of both AO and Ld CIT(A) referring to statements which were purportedly recorded under oath by the Investigation Wing cannot be made the basis for drawing adverse inference against the assessee. Thus the action of AO to refer to certain purported statements of the three individuals without establishing any nexus with the assessee can at best mislead or create suspicion and reference to irrelevant material itself makes the order bad. Not only that the AO has not even bothered to give a copy of the same to the assessee and did not give an opportunity to the assessee to cross examine those persons itself vitiates the action of the AO and the order passed by him is therefore fragile for violation of natural justice and null in the eyes of law as held by the Hon'ble Supreme Court in Andaman Timber Industries Vs. Commissioner of Central Excise in Civil Appeal No. 4228 of 2006 dated 16.11.2015. These purported statement though the contents of which neither we are aware nor the appellant assessee, cannot be the basis for drawing adverse inference against the assessee in the light of documents produced before AO/CIT(A) and this Tribunal.

32. We find that the transactions of capital gains as claimed by the assessee was duly backed by relevant facts and documentary evidences which include the following :-

A. Documents/facts supporting purchase of shares in question:-

- i) The assessee purchased the 25000 shares on 22.03.2012 through Bombay Stock Exchange.
- ii) The shares have been purchased against sale of another share and the balance payment has been made through a/c payee cheque.
- iii) The relevant copy of Bank Statement showing the balance payment was produced before us and CIT(A)/AO.
- iv) The shares were not allotted through a Public Offer but were purchased in secondary market through a recognized Stock Exchange.
- v) The Contract Notes for purchase of aforesaid shares is enclosed (Page 2 of paper book)
- vi) The complete details of the broker is as follows:  
Name: R L Agarwala Capital Markets Ltd. PAN: AABCR8213Q  
Address: Martin Bum House, 2nd floor, suite no. 207, 1, R. N. Mukherjee Rd, Kolkata - 1 Contact no. (033) 2248-2458
- vii) The shares were purchased in de mat form.
- viii) The De mat a/c was opened in 2006. The name of DP is East India Securities Ltd.& DPID being IN300327. Its address is as follows:  
DA-14, Sector-1, Salt Lake City, Kolkata-700 064
- ix) The De mat Statement for the year 01/04/2011 to 30/06/2016 was produced before us and CIT(A)/AO (Page 13 & 14 of paper book)
- x) The shares were credited to appellant de mat a/c on 28.03.2012.

B. Documents/facts supporting sale of shares in question:

- i) The shares were listed in Bombay Stock Exchange.
- ii) The complete details of the broker is as follows:  
Name : R L Agarwala Capital Markets Ltd. PAN : AABCR8213Q  
Address: Martin Burn House, 2nd flr, suite 207, 1, R. N. Mukherjee Road, Kolkata - 1 Contact no. (033) 2248-2458
- iii) The Contract Notes for sale of aforesaid shares was produced before us and CIT(A)/AO (Page 8 & 9 of paper book)
- iv) The De mat Statement reflecting the debit of shares from the account is enclosed. (page 13 & 14 of paper book)
- v) The Ledger from the broker for my transactions in shares of Essar India Ltd. is enclosed(Pages 10 and 11 of paper book)
- vi) The relevant copy of Bank Statement reflecting the receipts from such sale was produced before us and CIT(A)/AO.

- vii) The funds on sale proceeds were utilized for purchase of 10,000 shares of Mangalore Chemicals & Fertilizers Ltd., in IPO application of Power Grid Ltd. and other investment in shares.

33. We find force in the contentions of the Id. AR that the AO and CIT(A) was not justified in rejecting the claim of the assessee on the basis of theory of suspicious transactions surrounding circumstance, human conduct and preponderance of probability without bringing on record any relevant material or legally admissible evidence against the assessee. For the said proposition we rely on the judgment of the Special Bench of Mumbai Bench in the case of GTC Industries Ltd. (supra). The various facets of the contention of the AO, to rope in the assessee for drawing adverse inferences which remain unproved based on the evidence available on record are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the Id. AR are also not reiterated for the sake of brevity. We further find that neither the reports relied on by the AO has not been brought on record nor is there any reference of finding of such report to impute the assessee is there on record. The AO has merely carved out certain features/modus- operandi of companies indulging in practices not sanctioned by law and as mentioned in such report. However, we note that neither any investigation was carried out against the assessee nor against the brokers to whom the assessee dealt with the purchase and sale of shares in question. Thus the AO has failed to bring on record any material contained in the purported reports which are having so called adverse impact on the assessee. We further note that the company under scanner as recorded by the AO at page 4 of his order was having shareholder fund as on 31.03.2014 of Rs.21.82 crores and was having assets worth Rs.41.50 crores and a turn-over of Rs.15.72 crores and profit of Rs.10 lacs. Thus the allegation that these companies did not have financial credentials at the time of purchase of shares or sale of shares is not correct and so is perverse and therefore we do not subscribe to the said finding.

34. At the cost of repetition, we find that the transactions of sale of shares by the assessee was duly backed up by material/evidence including contract notes, demat statement, bank account reflecting transactions, the shares having been sold on the online platform of the stock exchange and each trade of sale of shares were having unique trade number and trade

time. It is not the case of the AO that the shares which were sold on the date mentioned in the contract note were not the traded price on that particular date. The AO doubted the transactions due to the rise in the stock price (the assessee purchased for a share at Rs.10.82 and sold it for Rs.46/- per share after 20 months for a profit of Rs. 36/- per share) and for that the assessee cannot be blamed unless there was any material/evidence to prove that the assessee or any one on his behalf has rigged the stock price. It should be noted that the Stock Exchange and SEBI are the statutory authorities appointed by the Govt. of India to ensure that there is no stock rigging or manipulation. The AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation against the assessee or the brokers or the company in question. In absence of any evidence to back the conclusion of AO/CIT(A), it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It is also pertinent to note that the assessee has purchased the stocks through BSE and through registered brokers and thereafter the assessee has sold the shares through the registered share/stock brokers with Bombay Stock Exchange, and is supported by valid contract notes as per law; and in similar case, the Hon'ble Calcutta High Court in the case of Principal CIT vs Rungta Properties in ITA No.105 of 2016 dated 08 May, 2017 wherein it was held that

*“on the last point, the tribunal held that the AO had not brought relevant material to show that the transactions in shares of the company involved were false or fictitious. It is the finding of the AO that the scripts of this company was executed by a broker and the broker was suspended for some time. It is the assessee's contention that even though there are allegations against the broker, and for that reason the assessee cannot be held liable on this point, the tribunal held that –*

*“As a matter of fact the AO doubted the integrity of the broker and the broker firm and also AO observed that the assessee had not furnished any explanation in respect of any discussion of trading of shares. The AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by stock as fictitious. The AO has also not doubted the genuineness of the documents placed by the assessee on record. The AO's observation and conclusion are merely based on information. Therefore on such basis, no disallowance can be made and accordingly we find no infirmity in the order of the ld. CiT(A), who has rightly allowed the claim of the assessee. This ground no.1 of the revenue is dismissed.”*

*We agree with the reasoning of the tribunal on this point also. We do not find any reason to interfere with the impugned order. The suggested question, in our opinion do not raise any substantial question of law.”*

35. In the light of the documents stated in para 30 at Page14(supra) we find that there is absolutely no adverse material to implicate the assessee to the entire gamut of

unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the Id. CIT(A) to be false or fictitious or bogus nor the AO had issued any notice to the brokers for confirmation. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence. In the aforesaid facts and circumstance, for allowing the appeal we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26<sup>th</sup> August, 2008 wherein the High Court held as follows :

*“It appears that there was loss and the whole transactions were supported by the contract notes, bills and were carried out through recognized stock broker of the Calcutta Stock Exchange and all the bills were received from the share broker through account payee which are also filed in accordance with the assessment.*

*It appears from the facts and materials placed before the Tribunal and after examining the same, the tribunal allowed the appeal by the assessee.*

*In doing so the tribunal held that the transactions cannot be brushed aside on suspicion and surmises. However it was held that the transactions of the shares are genuine. Therefore we do not find that there is any reason to hold that there is no substantial question of law held in this matter. Hence the appeal being ITA No.620 of 2008 is dismissed.”*

36. We note that the Id. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the Id. AR (supra) and have been duly considered to arrive at our conclusion. The Id. DR could not

bring to our notice any case laws to support the impugned decision of the Id. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the Id. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We therefore direct the AO to delete the addition.

37. Coming to the next addition of Rs.43,934/-, i.e., 5% of Rs.11,49,425/-, as undisclosed expenditure u/s 69C of the Act in respect of purported payments made to Share Brokers/Entry Operators. On this issue since we have found the purchase and sale of shares are genuine no addition can be made in this regard, so it is ordered to be deleted.

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

Order is pronounced in the open court on 05/09/2018

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(A. T. Varkey)  
Judicial Member

Dated: 5<sup>th</sup> September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Shri Jagmohan Agarwal, 1, R. N. Mukherjee Road, Lal Bazar, Kolkata-700 001.
- 2 Respondent – ACIT, Circle-35, Kolkata.
- 3 CIT(A)-10, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary