

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.838/Kol/2017
Assessment Year:2014-15

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| Smt. NaliniBothra C/o S.L. Kochar, Advocate, 86, Canning Street, Kolkata-700001 [PAN No.ADRPB 5103 F] | बनाम/ V/s. | Income Tax Officer, Ward-35(3),, 10, Shantipally, Aayakar Bhawan, Poorva, 9 th Floor, Kolkata-107 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

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| अपीलार्थी की ओर से/By Appellant | Shri Anil Kochar, Advocate |
| प्रत्यर्थी की ओर से/By Respondent | Shri Debasish Lahiri, Addl. CIT-DR |
| सुनवाई की तारीख/Date of Hearing | 20-08-2018 |
| घोषणा की तारीख/Date of Pronouncement | 16-11-2018 |

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2014-15, arises against the Commissioner of Income Tax (Appeals)-10, Kolkata dated 14.03.2017 in case No.219-CIT(A)-10/W-35(3)/16-17/Kol involving proceeding u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee's sole substantive ground challenges both the lower authorities' identical action terming its Long Term Capital Gains (LTCG) of ₹34,25,766/- to be bogus thereby adding the same as unexplained cash credits u/s. 68 of the Act. We

deem it appropriate at this stage to reproduce CIT(A)'s detailed findings affirming the Assessing Officer's action to this effect as follows:-

"07. DECISION:

1. I have carefully examined the action of the Ld. AO in treating an amount of Rs.34,25,766/- , claimed by the appellant as LTCG as bogus. The Ld. AO has very carefully analyzed the information received from the Investigation Wing, and has recorded the noteworthy features of the Company whose shares were purchased & sold by the assessee-individual. The economic parameters of the said company over the period March 2010 to March 2014 have also been brought on record, in the analysis. The rise and fall of the prices as recorded had been brought out by the Ld. AO to be artificial and not commensurate with the normal market, as the Company had no business at all.

2. The Ld. AO has also brought forth information that the Regulatory Authority SEBI has also after investigating such abnormal price increases of certain stocks investigated the matter and suspended trading in certain scrips. It is very clear that the prices of these scrips fell sharply after the offloading of these scrips by pre-arranged and manipulated transactions. The entire transactions were carried out on the Stock Exchange to give it a color of real transactions.

3. The Ld. AO has confronted the assessee-appellant with the facts as available in the statement of one Shri Anuj Agarwal of M/s Korp Securities Ltd, who represented the Broker which has facilitated the trading of the impugned shares. During the assessment stage, the assessee-individual has after receipt of the final show cause notice chosen not to answer, and therefore I find no merit in the claim of the appellant during the appeal stage that no proper opportunity had been given to the assessee in the scrutiny stage.

4. I am in agreement with the Ld. AO that the transactions relating to the claim of LTCG as made by the Ld. AO come within the ambit of "suspicious transactions", and therefore the rules of suspicious transactions would apply to the case. Payment through Banks, performance through stock exchange and other such features are only apparent features. The real features are the manipulated and abnormal price of off load and the sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld.AO fall in the realm of "suspicious" and "dubious" transactions. The Ld. AD has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of Win Chadha Vs CIT (International Taxation) in ITA No.3088& 3107/Del/200S, the Hon'ble Delhi ITAT "B"-Bench has observed, on 31.12.2010 as under:

"SUSPICIOUS AND DIBIOUS TRASANCTION HOW TO BE DEALT WITH:

6.11. The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.

6.12. In the case of Sumati Daya/ V. CIT (1995) 80 Taxman 89 (SC), the Hon'ble Supreme Court has dealt with the relevance of human conduct, preponderance of probabilities and surrounding circumstance, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:

"... .. It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the

taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.

..... Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record, an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence. "

CIRCUMSTANTIAL EVIDENCE HOW TO BE USED

6.13. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so associated with the fact in issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are -

- (1) the circumstances alleged must be established by such evidence, as In the case of other evidence
- (2) the circumstances proved must be of a conclusive nature and not totally Inconsistent with the circumstances or contradictory to other evidence.
- (3) although there should be no missing links in the case, yet It is not essential that every one of the links must appear on the surface of the evidence adduced; some of these links may have to be inferred from the proved facts;
- (4) in drawing those Inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.
- (5) The circumstantial evidence can, with equal facility, be resorted to In proof of a fact In issue which arises In proceedings for the assessment of taxes both direct and Indirect, circumstantial evidence can be made use of In order to prove or disprove a fact alleged or in issue. In fact, in whatever proceedings or context Inferences are required to be drawn from the evidence or materials

available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth."

6.14. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance in the Income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable Inferences and estimation of facts is inevitable. Courts generally will not interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious.

6.15. The Assessee's technical contentions about admissibility and reliance on material available on the AO's record are In the nature of contentions challenging criminal or civil liabilities in a court of law. We are dealing with a process of adjudication of assesses tax liability I.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon'ble Supreme Court In the case of S.S. Gadgill (supra) no 'lis' is involved in adjudication of tax liability. The Assessee's contention that there was no new material before the AO after the CIT(A)'s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, in a sensitive matter like this, even a Single clue or revelation can be of great Importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of investigation agencies like CBI, DRI, ED whose were in the offing, as the relevant investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf. The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that It cannot be relied on by the AO, are devoid of any merit and are rejected outright."

In view of the above discussion, I find no infirmity in the orders of the Ld. AO, and I confirm the same. Grounds 4,5,6,& 7 taken by the appellant stand dismissed."

We have given our thoughtful consideration to rival contations. Case file perused.

3. There is no dispute about the assessee to have declared LTCG in issue of ₹34,25,766/- derived from transfer of 1700 shares in M/s NCL Research. The Assessing Officer's case in assessment order was that M/s NCL Research Finance had no business activity during the relevant holding period to justify it astronomical rise in its share price. He prepared a detailed chart assuming alleged collusion of entry operatos in the above stock price increased by way of rigging. He accordingly concluded in assessment order dated 27.12.2016 that all the corresponding material on record read with department's search action carried out in various entry operators'

case made it clear that the above LTCCG were in fact bogus unexplained cash credits. He rejected the assessee's explanation based on all the relevant documentary evidence in the nature of statements of share investments, statement of accounts, contract notes issued by ICICI Securities, bank statement reflecting payments, receipts, contract note issued by ICICI Security Ltd. and demat statement regarding her investments to conclude that the impugned sum of ₹30,34,25,766/- deserved to be added as unexplained cash credits in her hands. All this resulted in the impugned addition which stands affirmed in the CIT(A)'s order extracted hereinabove.

4. Learned Departmental Representative vehemently contends during the course of hearing that both the lower authorities have rightly added the impugned bogus LTCCG u/s 68 of the Act in assessee's hands. He quotes case laws *Sumati Dayal vs. CIT* (1995) 214 ITR 801 (SC) and *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) in support. The Revenue's case therefore is that impugned addition is liable to be sustained.

5. We are given our thoughtful consideration to rival contention. We first of all find that this tribunal's co-ordinate bench's order in *Neeraj Gupta vs. ITO* in **ITA No.863/Kol/2018** rejects Revenue's identical arguments regarding the said assessee's LTCCG derived from sale of shares held in M/s NCL Research Finance Services Ltd. as follows:-

"2. The sole issue that arises for my adjudication is whether the Assessing Officer was right in rejecting the claim of the assessee that he had earned Long Term Capital Gains on purchase and sale of the shares of M/s UNNO Industries Limited and M/s NCL Research & Financial Services Ltd. The AO based on a general report and modus operandi adopted generally in these cases and on general observations has concluded that the assessee has claimed bogus long term capital gain. He made an addition of the entire sale proceeds of the shares as income and rejected the claim of exemption made u/s 10(38) of the Act. The evidence produced by the assessee in support of the genuineness of the transactions was rejected.

3. The assessee carried the matter in appeal and the ld. CIT(A), had upheld the addition. The ld. CIT(A) has in his order relied upon "circumstantial evidence" and "human probabilities" to uphold the findings of the AO. He also relied on the so called "rules of suspicious transaction". No direct material was found to controvert the evidence filed by the assessee, in support of the genuineness of the transactions. In other words, the overwhelming evidence filed by the assessee remains unchallenged and uncontroverted. The entire conclusions drawn by the revenue authorities, are based on a common

report of the Director o Investigation, Kolkata, which was general in nature and not specific to any assessee. The assessee was not confronted with any statement or material alleged to be the basis of the report of the Investigation Wing of the department and which were the basis on which conclusion were drawn against the assessee. Copy of the report was also not given.

4. Under the circumstances, in a number of cases this bench of the Tribunal has consistently held that decision in all such cases should be based on evidence and not on generalisaton, human probabilities, suspicion, conjectures an surmises. We have in all cases deleted such additions. Some of the cases were detailed finding which are listed below:-

- | <i>Sl. No.</i> | <i>ITA Nos.</i> | <i>Name of the Assessee</i> | <i>Date of order / judgment</i> |
|----------------|---|-------------------------------------|--|
| 1. | 1236-1237/K/17 | Manish Kumar Baid & Others vs. ACIT | 18.08.2017 |
| 2. | ITA – Kolkata 2443/Kol/2017 | Kiran Kothari (HUF) vs. ITO | 15.11.2017 |
| 3. | 22 of 2009 CIT, Kolkata-III | vs Bhagwati Prasad Agarwal | 29.04.2009 Calcutta High Court |
| 4. | 456 of 2007 CIT vs. Shri Mukesh Ratilal Marolia | | 07.09.2011 Bombay High Court |
| 5. | 18 of 2017 Punjab PR. CIT (Central) Ludhiana | vs Sh. Hitesh | 16.02.2017 and Haryana High Gandhi, Court |
| 6. | 95 of 2017 Pr. CIT vs. Prem Pal Gandhi | | 1801.2018 Punjab and Haryana High Court |
| 7. | 2281/Kol/2017 Navneet Agarwal, Legal Heir of Late Kiran | | 20.07.2018 ITAT – Kolkata Agarwal vs ITO, Ward-35(3), Calcutta ITA No. 863/Kol/2018 Assessment Year: 2014-15 Neerj Gupta. |

5. I am bound by the proposition of law laid down in these case law. They are squarely applicable to the facts of the case. The ld. Departmental Representative, though not leaving his ground, could not controvert the claim of the ld. Counsel for the assessee that the issue in question is covered by the above cited decisions of the Hon'ble High Courts and the ITAT.

6. The ld. Departmental Representative filed detailed written submissions and relied on the judgment of the Hon'ble Supreme Court in the case of Securities and Exchange Board of India vs Rakhi Trading Private Ltd in Civil Appeal No.1969 of 2011 with Civil Appeal Nos. 3174-3177 of 2001 and Civil Appeal No.3180 of 2011. The ld. Counsel for the assessee submits that there is no surviving order of SEBI against the assessee or the company, the script of which was purchased and sold by the assessee. When there is no surviving adverse order of SEBI, against the claim of the assessee, the judgment of the Hon'ble Supreme Court cannot be applied to the facts of this case.

7. In view of the above discussion the addition in question is deleted and the appeal of the assessee is allowed.”

It also emerges that this tribunal's yet another co-ordinate bench's decision in Navneet Agarwal vs. ITO in **ITA No.2281/Kol/2017** decided on 20.07.2018 has rejected

Revenue's similar arguments going by suspicious circumstances than based on evidence as follows:-

"13. The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the *modus operandi* adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee's action giving her involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from income tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

14. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of legal import laid down by the Courts of law.

15. In our view, just the *modus operandi*, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish

circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisations. Courts of law are bound to go by evidence.

16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, we do not find that the assessing officer as well as the Ld. CIT(A), have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, in our view, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

17. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon'ble Court held:

“Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of

the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,--- this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each”.

The observations of the Hon'ble Apex Court are equally applicable to the case of the assessee. In our view, the assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence in our view under these circumstances nothing can be implicated against the assessee.

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:

a) AyaubkhanNoorkhan Pathan vs. The State of Maharashtra and Ors.

“23. A Constitution Bench of this Court in State of M.P .v. Chintaman Sadashiva Vaishampayan AIR 1961 SC1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v. T.R. Varma, AIR 1957 SC 882; Meenglas TeaEstate v. Workmen, AIR 1963 SC 1719; M/s. KesoramCotton Mills Ltd. v. Gangadhar and Ors. ,AIR 1964 SC708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors. AIR 2009 SC 2448;Biecco Lawrie and Anr. v. State of West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v.Saroj Kumar Sinha AIR 2010 SC 3131).

24. In *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. *audi alteram partem*.

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In *Rajiv Arora v. Union of India and Ors.* AIR 2009SC 1100, this Court held: *Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.*

30. *The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.*”

b) *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II* wherein it was held that:

“4. 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.

5. 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.

6. 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 17-3-2005[2005 (187) E.L.T. A33 (S.C.)] 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.

7. 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.”

19. On similar facts where the revenue has alleged that the assessee has declared bogus LTCG, it was held as follows:

a) The CALCUTTAHIGH COURT in the case of BLB CABLES & CONDUCTORS[ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:

“.....we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but

also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal." [quoted verbatim]

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed."

b) The JAIPUR ITAT in the case of VIVEK AGARWAL[ITA No.292/JP/2017]order dated 06.04.2018 held as under vide Page 9 Para 3:

"We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

c) The Hon'ble Punjab and Haryana High Court in the case of PREMPAL GANDHI[ITA-95-2017(O&M)] dated 18.01.2018 at vide Page 3 Para 4 held as under:

"..... The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner."

The Court also held the following vide Page 3 Para 5 the following:

"Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises."

d) The BENCH “D” OF KOLKATA ITAT in the case of GAUTAM PINCHA [ITA No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:

“In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered 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 ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also 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. These evidences were neither found by the AO nor by the ld. 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 income from LTCG is exempted u/s 10(38) of the Act.”

Further in Page 15 Para 8.5 of the judgment, it held:

“We note that the ld. 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 ld. AR (supra) and have been duly considered by us to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT (A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. 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.”

e) The BENCH “D” OF KOLKATA ITAT in the case of KIRAN KOTHARI HUF [ITA No. 443/Kol/2017] order dated 15.11.2017 held vide Para 9.3 held as under:

“..... 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 ld. 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 ld. 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 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.

It further held as follows:

“We note that the ld. 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 ld. AR (supra) and have been duly considered to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. 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.”

f) The BENCH “A” OF KOLKATA ITAT in the case of SHALEEN KHEMANI [ITA No.1945/Kol/2014] order dated 18.10.2017 held as under vide Page 24 Para 9.3:

“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee 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 LTCCG. These evidences were neither found by the ld AO 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 bona fide and genuine and therefore the ld AO was not justified in rejecting the assessee’s claim of exemption under section 10(38) of the Act.”

g) The BENCH “H” OF MUMBAI ITAT in the case of ARVINDKUMAR JAINHUF [ITA No.4682/Mum/2014] order dated 18.09.2017 held as under vide Page 6 Para 8:

“..... We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his

activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transactions in M/s Ramkrishna Fincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A).”

h) The Hon’ble Punjab and Haryana High Court in the case of VIVEK MEHTA [ITA No. 894 OF2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

“On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed.”

i) The Hon’ble Jurisdictional Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Kol/2009 dated 29.04.2009 at para 2 held as follows:

“The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”

j) The Hon’ble Supreme Court in the case of PCIT vs. Teju Rohit kumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon’ble Gujrat High Court as under:

“ It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown

sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises.”

20. *Applying the proposition of law as laid down in the above-mentioned judgments to the facts of this case we are bound to consider and rely on the evidence produced by the assessee in support of its claim and base our decision on such evidence and not on suspicion or preponderance of probabilities. No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares and hence exempt from income tax.*

21. *Under the circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question.”*

6. We afforded sufficient opportunity to the Revenue for indicating any material on record indicating the assessee's nexus with the alleged share price rigging or her name having specifically mentioned in any search statement. There is no such material forthcoming from the case file. We therefore adopt the above detailed reasoning *mutatis mutandis* to delete the impugned addition of unexplained LTCG.

7. This assessee's appeal is allowed.

Order pronounced in open court on 16/11/2018

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 16/11/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Smt. Nalini Bothra, C/o S.L. Kochar, Advocate, 86, Caning Street, Kolakta-700001
2. प्रत्यर्थी/Respondent-ITO Ward-35(3), 110, Shanti Pally, Aayakar Bhawan, Poorva, 9th Floor, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।