

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

Before **Shri S.S.Godara, Judicial Member** and  
**Dr. A.L. Saini, Accountant Member**

**ITA No.1730/Kol/2017**  
Assessment Year :2014-15

ITO Ward-40(2) 2 <sup>nd</sup> Floor, 3 Government Place West,Kolkata-700001	<b>V/s.</b>	Shri Suresh Chand Gupta 16, Tara Chand Dutta Street, Kolkata-700073 <b>[PAN No.ACZPG 0724 C]</b>
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Ajoy Kr. Singh, CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Manish Tiwari, FCA
सुनवाई की तारीख/Date of Hearing	26-11-2018
घोषणा की तारीख/Date of Pronouncement	26-12-2018

**आदेश /O R D E R**

**PER S.S.Godara, Judicial Member:-**

This Revenue's appeal for assessment year 2014-15 arises from the Commissioner of Income Tax (Appeals)-12, Kolkata's order dated 20.04.2017, passed in case No.10190/CIT(A)-12/Kol/Ward-40(2)/2016-17, in proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The Revenue's sole substantive ground raised in the instant appeal pleads that the CIT(A) has erred in law and on facts in reversing the Assessing Officer's action treating assessee's alleged Long Term Capital Gains (LTCG) of ₹3,84,74,960/- to be bogus in the nature of unexplained cash credits u/s 68 of the Act. The CIT(A)'s detailed discussion qua the impugned sole issue reads as under:-

*"3.2 I have perused the observations and findings contained in the assessment order. I have also considered the submission of the appellant along with paper book filed by Ld. A/R which contained, inter-alia, the following documents:-*

Copy of capital gain calculation sheet for A.Y 2014-15	--	37	--
Copy of Allotment advice and share application Form of NCL Research & Financial Services Ltd.	38	--	39
Copy of Demat statement	40	--	42
Copy of show cause letter dated 06.12.2016	43	--	61
Copy of reply to show cause letter filed before AO	62	--	69
Copy of notice u/s. 142(1) dated 17.11.2016	70	--	72
Copy of reply to notice u/s. 142(1) dated 17.11.2016 filed before AO	73	--	74
Copy of notice u/s. 142(1) dated 23.09.2016	75	--	76
Copy of reply filed on 07.11.2016 before AO	77	--	78
Copy of notice u/s. 142(1) dated 10.06.2016	79	--	80
Copy of reply filed on 22.08.2016 before AO	--	81	--

The factual background reveals that the appellant claimed exemption for Rs.2,79,06,132/- towards LTCG on sale of shares u/s. 10(38) in respect of following share scripts.

PARTICULARS	AMOUNT (Rs)
Sale consideration of 29,000 shares of NCL Ltd.	3,58,81,132
Less: cost of acquisition of 29,000 shares	7,975,000
Long Term Capital Gains	2,79,06,132

The A.O. in course of scrutiny assessment proceeding desired the assessee to justify its claim u/s 10(38). The assessee filed complete details in respect of acquisition of shares in the past and sale of such shares in the current year. Details furnished included allotment advice, share application form, bank statement, Demat A/c etc. A.O. finally issued show cause letter dated 06.12.2016 proposing to make addition in respect of sale of shares of NCL Research & Financial Services Ltd. The appellant denied the various allegations made in the show cause notice and opposed the addition in his reply to show cause letter dated 14.12.2016.

The A.O. has not accepted the explanation relating to sale of shares of said script and has proceeded to treat such sale consideration relating to share scripts of NCL as unexplained cash credit Vis 68. However, such addition having been made for Rs. 3,84,74,9601- instead of actual figure of Rs. 3,58,81,1321-.

I find that AO besides relying upon the general report of the Investigation wing, Kolkata has not brought on record, any cogent, relevant evidences which can prove that in reality there was no purchase & sale of shares by the appellant. Examination of appellant's bank statement and demat statement reveals that the appellant sold shares through online trading system and through registered share broker which were duly debited from his Demat A/c. The shares were duly deposited! credited in the demat account maintained with the third party in due course and at the same time the sold shares were also debited from demat account in due course. The transactions of sale were made through online trading system. The contract notes clearly indicated the trade number with time as well as order date with time. The script was not suspended by SEBI at the time when the transaction was entered by the appellant. The scripts of NCL Research was reported to be suspended by SEBI in 2015 whereas such shares scripts which were acquired by the appellant in 2012 were sold in the current year. Therefore so-called suspension by SEBI cannot have adverse impact. There is no denial of any transaction of allotment or sale of shares. The shares were acquired at issue price and sold at prevailing market rate. Entire transaction were routed through the stock exchange and the entire transaction were routed through proper banking channel. The shares were duly reflected in the demat account of the appellant. The appellant has paid STT as well as all statutory charges levied by the stock exchange. The AO has disallowed the claim of the appellant and treated the long term gain as unexplained cash credit solely on the basis of general report of the Investigation wing, Kolkata. The AD's observations are purely based on suspicion and surmises.

I find from the paper book that the appellant had applied for 29000 Equity Shares of NCL Research and Financial Services Ltd. on preferential allotment basis and purchase consideration through account payee cheque which was duly cleared. The source of investment as explained by the appellant has not been disputed by AO. Moreover, such investment is supported by share application and bank statement as filed in the paper book.

Pursuant to such application the appellant was allotted all the shares as per Allotment advice and Share Certificate was also issued to the appellant. This fact is not in dispute. This investment was reflected under share Investment in the audited balance sheet for the year ended 31.03.2013. The copy of allotment letter and share certificate has been submitted and balance sheet is also filed in the paper book. The appellant has filed copies of contract notes in course of assessment. I find that the entire sale proceeds net of statutory charges have been received in bank account of the appellant. The genuineness of said transactions and rates at which such shares were sold in recognised stock exchange have not been challenged by AO. All transactions have been made through regular banking channels. All these transactions have been reflected in appellant's audited accounts and Income Tax Return. Thus from the materials placed in the paper book, it can safely be concluded that the transactions were complete in terms of documentation and there was no defect in the papers submitted by the appellant in support of the transactions. The appellant has proved the transaction on the basis of documents. No investigation has been carried out by the AO or by the investigation wing to bring on record any material to disbelieve the claim of the appellant. AO has only made academic discussion regarding the probability of the appellant having entered into transaction in collusion with operator of script with a view to claim bogus capital gains and get tax free income. In fact the AO has not doubted the purchase or sale price prevailing at the material point of time. There is no allegation by the AO that the transactions were between related parties. In absence of any material brought on record to show that the long term gain of the appellant is a bogus gain, the entire general discussion in the assessment order should fade into insignificance. It is a settled position of law that no addition or disallowance should be made or sustained on conjectures, speculation & suspicion, how high or strong there may be, because suspicion and surmises without any evidence cannot take place of proof.

I find that the appellant made a specific request before the AD to produce any documentary evidence of SEBI's certification regarding price rigging by the company. The appellant also desired copies of evidences received by the AO or relied upon by the AO stated to have been received from Director of investigation, Kolkata based on which the allegation of bogus long term capital gain was made by the AO but the AO never furnished any such evidence to the appellant. The appellant also asked the AO to allow cross examination of those persons whose statements are relied upon by the investigation wing or by the AO himself. This also was denied by the AO. I find that this is a clear violation of principles of natural justice. I find that the Calcutta High Court in the case of CIT Vs Eastern Commercial Enterprises reported in 210 ITR 103 has held that right to cross examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross examination is one of the corner stones of natural justice. Thus on this ground itself the assessment is held to be bad in law. I find that the AO having said that he had certain investigation report from the Investigation wing, Kolkata and report from SEBI he must have cross examined these evidences with the appellant. I find that the AO failed to appreciate request made by the appellant seeking copies of statements, reports etc. The AO has mechanically followed investigation report without establishing any link of such reports with that of the appellant company. It is also apparent from the assessment order that no independent finding is recorded in treating the long term capital gain as bogus gain by the AO. Be that as it may be, on merits it is observed that the addition was made with the predetermined mindset that the gain is a bogus gain and the appellant has entered into transaction in collusion with the operators of script with a view to have exempt income. I find that the AO mechanically and arbitrarily followed the investigation report without establishing any link of such report with the appellant. I find, that the assessment order is full of presumptions and assumptions without any authentic legal evidence thereof. The allegation about price rigging etc. is without bringing on record any cogent material and corroborative evidences is not sustainable. There is nothing on record to suggest that the prices were rigged by the appellant and/ or any other person on behalf of the appellant. The AO has also alleged that some unscrupulous operators were running a scheme of providing entries of long term capital gain for a commission. The AO also alleged that in the statement recorded of the broker/operator/directors of paper/shell companies they have admitted to such scheme with detailed data. However the AO has failed to bring any evidence on record to suggest involvement of the appellant in such alleged manipulations. The aforesaid allegation clearly show that these are suspicion, surmises and conjectures and

far from truth more so when the appellant has discharged its onus completely by producing necessary details and evidences.

Ld. AR has placed reliance upon number of decisions of jurisdictional High Court as well as jurisdictional Tribunal and has also relied upon non-jurisdictional High court decisions in support of various contentions raised by him. I find that these decisions are relating to trading losses as well as long term capital gains. I find from the submissions of the AR that in the following decisions the facts are almost similar to that of the appellant and hence are squarely applicable in its case. I find that Jharkhand High Court in the case of CIT Vs Arun Kumar Agarwal (HUF) reported in 26 Taxmann.com 113 has held that "10. We have considered the submissions of the learned counsel for the parties and we are of the considered opinion that the learned Assessing Officer was much influenced by the enquiry report which may has been brought on record by the efforts of the Assessing Officer and that enquiry report was prepared by the SEBI and from the observations made by the Assessing Officer himself, it is clear that after getting that enquiry report, the SEBI prima facie found involvement of some of the share brokers in unfair trade practices. Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bona fidely and if he show his bona fide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of S.E.B.I and Stock Exchange, then merely because of that fact a person who bonafldely entered into share transaction of that company through such broker then only by mere assumption such transactions cannot be held to be a shame transaction. Fact of tinted broker may be relevant for suspicion but it alone necessarily does lead to conclusion of all transaction of that broker as tinted In such circumstances, further enquiry is needed and that is/or individual case. Such further enquiry was not conducted in that case." I also find that Jurisdictional High Court in the case of CIT Vs Bhagwati Prasad Agarwal (ITA No. 22 of 2009) dated 29.04.2009 has held that "that the chain of transaction entered into by the assessee have been proved. accounted for, documented and supported by evidence. The assessee produced the contract notes, details of his DEMAT account and, also, produced documents showing that all payments were received by the assessee through bank. In these circumstances the information from stock exchange cannot be used to deny exemption of LTCG claimed by Assessee." Similarly in the case of Classic Growers Ltd Vs CIT (ITA No. 129 of 2012) vide order dated 28.02.2013 has held "Therefore, it cannot be said by any stretch of imagination that any loss was generated The opinion that the assessee generated a sizeable amount of loss out of pre-arranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the Assessing Officer, but he miserably failed to substantiate that Loss might have been suffered if the loss was suffered, then appropriate deduction has to be made and there is no reason why the Assessing Officer should have refused to do so. The learned Tribunal restored the order of the Assessing Officer and set aside the order passed by the CIT (Appeal) without application of mind The learned Tribunal ignored the fact that the transaction was carried out at the prevailing price. Therefore, the question of generating loss could not have arisen. The suspicion entertained by the Assessing Officer was misplaced or in any event not substantiated" *I further find that the AR has relied upon various decisions of Jurisdictional Tribunal on the similar issue and I find that in the light of said decisions there remains no doubt that the transactions entered by the appellant cannot be considered as bogus in nature. I find that it is not a case of client code modification done by the broker. It is also not the case of AO that the appellant has resorted to any client code modification to earn this Long term capital gain. I also find that the AO has not made any enquiry about the directors of NCL shares. The AO has not brought any material on record that cash trail of the appellant company was prepared by the Investigation Wing or by him. I also find that the AO has failed to point out that either the appellant or its directors were ever subjected to any investigation by any agency in respect of these transactions. As far as AO's observation that there is sharp increase/ decrease in the share prices during the period I find that this cannot be a ground for treating the Long term capital Gain as non genuine or bogus in nature because this is a free market where the investor does not have any control over price. The AO did not have any material on record to show that the purchase and sale of shares were bogus. The AO has to bring material on record to support his finding that there has been*

*collusion/connivance between the broker and the assessee for the introduction of its unaccounted money without paying any tax. I also agree with the contentions of the AR of the appellant that the online trading system of stock exchanges is a free market where the investor does not have any control over the prices. The sharp rise and fall in price of share cannot be a ground for considering transaction as bogus. Therefore, I am unable to uphold the action of AO which was based on suspicion and surmises and completely guided by Investigation report of Kolkata investigation Wing without any evidence brought on record. The AO is accordingly directed to delete the addition of Rs. 3,84,74,9601- made as unexplained cash credit U/s 68 of Income tax Act, 1961 since claim of appellant u/s 10(38) cannot be said to be bogus. These grounds are allowed."*

3. Learned CIT-DR vehemently contends during the course of hearing that the Assessing Officer had rightly added assessee's alleged LTCG to be bogus in nature after rejecting genuineness / creditworthiness of its explanation. He quotes hon'ble apex court's landmark decisions in *Sumati Dayal vs. CIT* (1995) 80 Taxmann 89/214 ITR 801 (SC) and *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) that any explanation submitted in income tax proceedings has to be appreciated in the light of human probabilities than on mechanical aspects. His further case is that assessee has availed entries from entry operators regarding the impugned LTCG. These entry operators are stated to have deposed in their search statements that they had rigged prices of M/s NCL Research and Financial Services Ltd. followed by impugned entries on sale of shares therein. We find no merit in Revenue's instant arguments. This tribunal's decision in **ITA No.1551/Kol/2018** in *D.D. Agarwal (HUF) vs. ITO* decided on 16.11.2018 has already declined the Revenue's similar arguments qua the very scrip quoting a catena of case law 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 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 share 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 transaction was rejected.*

*3. The assessee carried the matter in appeal and the Id. CIT(A), Kolkata, had upheld the addition. The Id. 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,*

assessee based on a common report of the Director of 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 generalisation, human probabilities, suspicion, conjectures and surmises. We have in all cases deleted such additions. Some of the cases were detailed finding have been given on this issue are listed below:-

Sl.No	ITA No.s	Name of the assessee	Date of order / judgment
1	1236-1237/K/17 ITAT-Kolkata	Manish Kumar Baid & Others vs ACIT	18.08.2017
2	443/Kol/2017	Kiran Kothari (HUF) vs.ITO	15.11.2017
3	22 of 2009 Calcutta High Court	CIT, Kolkata-III vs. Bhagwati Prasad Agarwal	29.04.2009
4	456 of 2007 Bombay High Court	CIT vs Shri Mukhesh Ratilal Marolia	07.09.2011
5	18 of 2017 Punjab and Haryana High Court	Pr. CIT(Central) Ludhiana vs Sh. Hitesh Gandhi	16.02.2017
6	95 of 2017 Punjab and Haryana High Court	Pr. CIT vs. Prem Pal Gandhi	18.01.2018
7	2281/Kol/2017 ITAT-Kolkata	Navneet Agarwal, Legal Heir of Late Kiran Agarwala vs ITO, Ward-35(3), Calcutta	20.07.2018

5. We are bound by the proposition of law laid down in these case law by the jurisdictional High Court as well as by the ITAT Kolkata. They are squarely applicable to the facts of the case. The Id. Departmental Representative, though not leaving his ground, could not controvert the claim of the Id. 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.”

This tribunal's yet another decision in ITA No.838/Kol/2017 Smt. Nalini Bothra vs. ITO decided on 16.11.2018 qua the very scrip reads as follows:-

“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 LTCG 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 generalisation, human probabilities, suspicion, conjectures and surmises. We have in all cases deleted such additions. Some of the cases were detailed finding which are listed below:-

Sl. No.	ITA Nos.	Name of the Assessee	Date of order / judgment
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		18.01.2018 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 LTCCG and STCCG, 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 LTCCG 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 imply 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) AyaaubkhanNoorkhan 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 alterampartem.*

*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 LTTCG, 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 LTCG. 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 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."

We adopt the above detailed reasoning *mutatis mutandis* to conclude that CIT(A) has rightly reversed assessment findings treating the assessee's impugned LTCEG to be unexplained cash credits. The Revenue fails in its sole substantive grievance therefore.

5. This Revenue's appeal is dismissed.

Order pronounced in the open court 26/12/2018

Sd/-  
(लेखा सदस्य)  
(Dr. A.L. Saini)  
(Accountant Member)  
Kolkata,  
\*Dkp, Sr.P.S

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

दिनांक:- 26/12/2018 कोलकाता ।

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

1. अपीलार्थी/Appellant-ITO Ward-40(2), 2<sup>nd</sup> Fl. 3, Govt. Place West, Kolkata-700001
2. प्रत्यर्थी/Respondent-Shri Suresh Chand Gupta, 16 Tara Chand Dutta, St. Kolkata-73
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
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 ।