

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "SMC" KOLKATA*

Before **Shri S.S, Godara, Judicial Member**

ITA No.1918/Kol/2018
Assessment Year:2014-15

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| Smt. Sangita Jhunjhunwala, 77/79 Sri Arobinda Road, Salkia, Howrah-711106 [PAN No.AEYPJ 0474 M] | बनाम/ V/s. | Income Tax Officer, Ward-47(2), 3, Govt. Place (West), Kolkata- 700 106 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

ITA No.1919/Kol/2018
Assessment Year: 2014-15

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| Shri Sanjeev Jhunjhunwala, 61 Ashutosh Mukherjee Lane, Salkia, Howrah-711106 [PAN No.ACPPJ 8989 E] | बनाम/ V/s. | Income Tax Officer, Ward-36(3), Aayakar Bhawan Poorva, Kolkata-700 106 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

ITA No.1920/Kol/2018
Assessment Year: 2014-15

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| Shri Sanjeev Jhunjhunwala (HUF), 77/79 Sri Arobinda Road, Salkia, Howrah- 711106 [PAN No.AAEHS 5311 Q] | बनाम/ V/s. | Income Tax Officer, Ward-48(4), 3, Govt. Place (West), Kolkata- 700 101 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

ITA No.1921/Kol/2018
Assessment Year: 2014-15

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| Shri Ashok Jhunjhunwala, 109, Netaji Subhas Road, Goyee House, Kolkata-001 [PAN No.ACPPJ 8990 D] | बनाम/ V/s. | Income Tax Officer, Ward-34(2), Aayakar Bhawan, Poorva, Kolkata-700 107 |
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| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |
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ITA No.1922/Kol/2018
Assessment Year: 2014-15

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| Smt. Nita Jhunjhunwala 77/79 Sri Arobinda Road, Salkia, Howrah-711106 [PAN No.ACKPJ 9346 E] | बनाम/ V/s. | Income Tax Officer, Ward-47(2), 3, Govt. Place (West), Kolkata- 700 101 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

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| आवेदक की ओर से/By Assessee | Shri B.K. Poddar, FCA |
| राजस्व की ओर से/By Revenue | Shri Arindam Bhattacharya, Addl. CIT-DR |
| सुनवाई की तारीख/Date of Hearing | 01-01-2019 |
| घोषणा की तारीख/Date of Pronouncement | 04- 01-2019 |

आदेश /O R D E R

These five assessees have filed their respective appeals for assessment year 2014-15 against the Commissioner of Income-tax (Appeals)-14-10, Kolkata's separate order(s) dated 21.06.2018, 29.06.2018 & 12.07.2018 passed in case No(s) 104/CIT(A)/14/Ward-47(2)/2016-17,105/CIT(A)-14/Ward-47(2)/2016-17/171/CIT(A)-14/Ward-48(4)/2016-17, 408/CIT(A)-10/Ward-36(3)/14-15 & 398/CIT(A)-10/Ward-34(2) 2014-15/2016-17/Kol affirming the Assessing Officer's identical action treating their Long Term Capital Gains of ₹9,40,715/-, ₹9,37,290/-, ₹9,12,979/-, ₹9,89,150/- & ₹9,15,209/-; respectively to be unexplained cash credit u/s 68; involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard all the assessees as well as the department reiterating their respective stands against and in support of the impugned unexplained cash credits addition(s).

2. It emerges at the outset that all these assessees have claimed to have derived LTCG from sale of shares held in M/s Unno Industries Ltd. (after amalgamation) in the relevant previous year to be exempt u/s 10(38) of the Act. The CIT(A)'s identical

discussion in all these cases affirms Assessing Officer's action treating the same to be unexplained cash credits u/s 68 of the Act as follows:-

5. निणय/ Decision:

5.1. Grounds I. 2 and 4: As all the grounds relate to the lone effective issue of addition of Rs 9,40,715 made by the AO under section 68 of the IT Act, they are considered together. During the assessment proceedings, the AO noted that the appellant carried out sale transactions for an amount of rupees 9,95,200 in respect of 32,000 shares of Unno Industries Ltd. in the relevant financial year. The learned AD looked into the various details of the said transaction. The appellant submitted that the resultant LTCG (Long Term Capital Gains) flowing out of the impugned transaction was exempt under section 10(38) of the IT Act. The AD observes that the appellant does not show substantial trading activity or investment in shares of listed companies. The appellant has earned income- under the head other sources' only during the relevant year besides impugned long-term capital gains. The AO further notes that in the absence of such expertise and experience, the move to acquire the shares of M/s Baviscon Vincom Pvt. Ltd.(since merged with M/s Unno Industries Ltd.) was a predetermined move which had the sole aim to bring back unaccounted money. He further observes that the purchase of shares, made when the company had no proven financial results, was an indicator to the events to be occurring in the future. He infers that in spite of being a novice in share market and there being no substantial transactions in the earlier years and subsequent years, the appellant's decision to purchase the shares, when the financial results of M/s Baviscon Vincom Ltd. were not splendid with no chance of any lucrative gains at the stage of purchase of its shares, was a predetermined action on the part of the appellant leading to the objective to acquire LTCG by way of dubious methods. He further infers that this predetermined action with specific intention was one of the circumstantial evidence leading to the conclusion that LTCG was not a genuine one.

5.1.1. Considering the financials and fundamentals of the company M/s Unno Industries Ltd., in the context of no significant corporate announcements or any big orders of purchase, the AO found the price movements of the scrip M/s Unno Industries Ltd. quite abnormal compared to the rise of the index i.e. BSE Sensex during the corresponding period. Add to this, the learned AO analysed the information received from the investigation wing of the Department.

5.1.2. The AO further analysed the statement of one Shri Anil Kumar Khemka deposed before the Authorised Officer in which the former gave details of the Penny Stocks which were used for facilitating pre-arranged bogus LTCG/STCL (Short Term Capital Loss) along with 'jama-kharchi' clients. He notes that M/s Unno Industries Ltd. was one such Penny stock which was used for such purposes as admitted by the above referred deponent.

5.1.3. Thus, considering all the facts and circumstances, the AO reached the conclusion that everything i.e., from purchase of stock to receiving of cheque for its sale was done in a systematic and organised manner to give it a real and legal colour by a group of persons (being the operators) on receipt of cash from the appellant. He, therefore, on consideration of the circumstantial evidences, natural human conduct and preponderance of probabilities reached a conclusion that the apparent in this case was not real and that these financial transactions were no real but sham ones and the entire edifice was a colourable device used to evade tax. In view the fact that the appellant failed to prove the source of the credit, and genuineness of the credit of the entire sum received in the garb of alleged capital gains, the AO proceeded to add the entire-sum received of rupees 9,40,715 as unexplained cash credit under section 68 of the IT Act.

5.1.4. During the appellate proceedings, the appellant submitted written submissions dated 22.02.2018 and 07.05.2018. The appellant primarily contends that as the purchase of the

impugned shares have been effected by payment of cheque .through banking transaction and as the sales are corroborated by contract notes, the AO was legally not justified in treating the transaction as a sham transaction. It is therefore, contended that the impugned LTCG flowing out from the transaction should be treated as exempt under section 10(38) of the IT Act. Appellant's contentions were carefully considered and submissions were meticulously gone through.

5.1.5. I observe that the appellant has submitted copy of a bank statement of SB Account Number 072001000011216 in the name of the appellant as the evidence towards alleged purchase of the shares of M/s Baviscon Vincom Ltd. The entry reads as follows-

| DATE | Chq. No. | PARTICULARS | Debit |
|------------|----------|---|-------|
| 31/03/2012 | | To NEFT FVG FESTINO VINCOM PVT LTD50,006" | |

5.1.6. Besides these entries in the bank account, the appellant has submitted share bills from M/s FESTINO VINCOM PVT LTD.I observe that the share bill is not sales bill or any acknowledgement by the seller. Bill is not numbered and does not mention the actual acknowledgement of receipt of the consideration in respect of the Shares sold if any. These bills merely mention a communication to the appellant about the cost of the shares. In view of this, this communication can in no way conclude that the sales have actually been done from the party mentioned in the bill to the appellant. It is also noteworthy that even though the bill in respect of M/s FESTINO VINCOM PVT LTD. is dated 07.10.2011, the actual debit of the purported sum is on 31.03.2012 and the alleged credit of the shares is on 02.03.2012. The share bill does not mention the individual distinctive numbers of share certificates that has been sold. It is also noteworthy to mention here that even though the share bill dated 07.10.2011 mentions about the sale of shares of a private limited company viz. M/s Baviscon Vincom Pvt. Ltd., the appellant has ultimately sold the shares of M/s Unno Industries Ltd. which was in fact a merged entity in which the shares of M/s Baviscon Vincom Ltd. (a public limited company) got amalgamated. The appellant has not been able to produce any proof with respect to the folio number or distinctive share certificates evidencing the transfer of the shares in physical format through endorsement from the alleged seller,

5.1. 7. Whether the purchase of shares have been made through a broker 15 also not confirmed through production of any broker note or copies thereof. If the transaction of purchase has been carried out directly with the party the copy of the transfer deed has also not been submitted. Thus, in the absence of any broker note, deed of transfer etc., the appellant has not been able to produce any evidence as to the actual purchase of the share. That the sum of Rs 50,000 has gone from the appellant's bank account does not in any way prove the acquisition of such shares consequent to actual purchase by the appellant or actual delivery of the shares on the said date or thereafter in the absence of the acknowledgement by the seller of actual receipt of the funds in respect of actual delivery of shares from his demat account or folio evidencing receipt of the shares in appellant's name. Moreover, an equivalent amount of Rs. 50,000 has been deposited through transfer on the same day in the bank account. Thus, on facts, acquisition and holding of shares of M/s Baviscon Vincom Ltd. by the appellant from the said date of debit of alleged purchase sum from the bank account remains gravely in doubt. The fact that share bills show purchase of shares of a private limited company in contrast to the ultimate transfer of public limited company, leads to the unequivocal conclusion that the credit of such shares is from a bogus purchase. It is not any actual purchase but a mere arrangement for credit of such shares.

5.1.8. The exact acquisition of these shares, the period of holding of the shares by the appellant has not been proven by tendering necessary evidences. Thus, the facts that ooze out from the evidences submitted are that a debit of Rs 50,000 has been made from the appellant's bank account, that appellant has received 40 shares of M/s Baviscon Vincom Ltd and that credits of Rs 9,90,378.52 have been made to the appellant's bank account. The fact of credit of the shares to the appellant's demat account or in physical form pursuant to a genuine

purchase, the genuineness of the purchase itself and the duration of holding of such shares in appellant's demat account for the period as contended have not been proven.

5.1. 9. I further observe, that the company M/s Baviscon Vincom Ltd. has offered bonus shares in the ratio of 79: 1 on the record date 23.03.2012. This is to be contrasted with alleged transfer of shares in the appellant's name before that date actually on 02.03.2012 whereas the consideration for the alleged purchase was debited from the appellant's bank account on 31.03.2012. The record date for bonus offering was known to the seller and yet even before the receipt of the consideration sum, it parted with the shares knowing very well that substantial amount of bonus is to be foregone. This itself leads to the unequivocal conclusion that the appellant's contention with respect to the purchase of shares is not in the domain of normal human conduct. It is also significant to mention here that another company viz. M/s Pinnacle Vintrade Ltd. also declared bonus issuance on the same record date. That both these companies namely M/s Pinnacle Vintrade Ltd. and M/s Baviscon Vincom Ltd applied for amalgamation with M/s Unno industries within the next 2 months also points to a well-designed planning. In providing accommodation to bogus long term capital gain seekers through the artifice of creating a private company, converting the same to a public company, issuing bonus shares, declaring split of the shares and thereby increasing the share-holding and ultimately amalgamating with a listed company which is very thinly traded and having no business name its worth: M/s Baviscon- Vincom Ltd. was Incorporated on 29.07.2009 but subsequently applied for amalgamation with M/s Unno Industries Ltd. In the year 2012 itself. Thus, during the brief period since its incorporation, the appellant allegedly purchased the shares of the said unlisted company which had no other purpose but to amalgamate with another company within first few months of its incorporation. The appellant has no past history or expertise of share trading and as per the AO, from the case records and returns the appellant does not show substantial trading activity. This has not been rebutted with any evidence by the appellant during the appellate proceedings. Thus, picking a script of a company which is just incorporated a few months back without having knowledge of any financials or past record, without any insider information and yet timing to get the advantage of a bonus declaration and waiting to watch the company applying for amalgamation with another and ultimately selling it with an astronomical profit of an unusual 2,200 percent of its purchase price requires an expertise which the appellant is badly lacking. The appellant has dabbled with the share transactions occasionally, few and far between, having transacted only in a few scripts during the year of the impugned purchases. The appellant has not produced any proof of having acquired any shares with similar gains prior to the year of impugned purchases.

5.1.10. I further observe the statement made by Shri Anil Kumar Khemka as referred to by the AO. The weight of the evidence in the face of unequivocal admission by the concerned accommodation provider that the shares of Unno Industries Ltd. has been rigged through in-paper-only jama-kharchi companies to provide LTCG/STCL through arranged tradings, cannot be brushed aside. Similarly, the astronomical increase in the share price of Unno Industries Ltd. without any ostensible reason either by dint of its financials or by dint of the future probability of abnormal profitability through orders of purchase or agreements/contracts as against the Sensex cannot be lost sight of. The fact of abnormal and arranged increase in the share price has actually been corroborated by the statement of Shri Anil Kumar Khemka.

5.1.11. UIL (Unno Industries Limited) had filed a Scheme of Arrangement before the Hon'ble High Court of Bombay between Unno Industries Limited, Pinnacle Vintrade Limited, Basuklnath Realestate Limited and Baviscon Vincom Limited under Section 393 of the Companies Act, 1956. The Hon'ble High Court, had vide Order dated July 13, 2012 directed that a meeting of the Equity Shareholders of UIL be convened to consider and approve the proposed Scheme of Arrangement. Accordingly a meeting of the Equity Shareholders of UIL was convened on Monday, August 13, 2012, and the meeting approved the Scheme of

Arrangement. It is noteworthy to mention also that as on date 31.03.2011, the net profit after tax and earning per share of M/s Unno Industries Ltd. was in the negative and yet the appellant continued to hold the shares of the same even when the company M/s Baviscon Vincom Ltd. applied for amalgamation with M/s Unno Industries Ltd. within a few months. It is also noteworthy to mention that even taking into account the bonus shares received, the net purchase value per share to the appellant was almost Rs.16 per share whereas from the table mentioned below it can be seen that net worth of one share of M/s Unno Industries Limited. Was only Rs.7.87 as on 31.03.2011. And yet, the appellant continued to hold the shares of M/s Baviscon Vincom Ltd. till the date of amalgamation and did not sell it. This is beyond the natural conduct of any rational shareholder.

“Brief Audited Financial data of UIL for the last two years and Certified Financials as on 31st March 2012 are given hereunder:

(Rs. In Lacs)

| | | | |
|---|-------------------|-------------------|-------------------|
| <i>Profit & Loss Statement</i> | <i>31.03.2012</i> | <i>31.03.201</i> | <i>31.03.2010</i> |
| <i>Income from operations</i> | <i>67.98</i> | <i>70.82</i> | <i>67.94</i> |
| <i>Other Income</i> | <i>1.87</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Total income</i> | <i>69.85</i> | <i>70.82</i> | <i>67.94</i> |
| <i>Expenditure</i> | | | |
| <i>Cost of goods sold</i> | <i>3.29</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Administrative, personnel and other expenses</i> | <i>38.87</i> | <i>31.94</i> | <i>32.46</i> |
| <i>Loss on F & O Transaction</i> | <i>25.28</i> | <i>30.98</i> | <i>25.28</i> |
| <i>Long Term Capital Loss</i> | <i>0.00</i> | <i>.32.50</i> | <i>0.00</i> |
| <i>Provision for NPA written back</i> | <i>(14.11)</i> | <i>(34.64)</i> | <i>5.22</i> |
| <i>Profit before depreciation, interest and tax</i> | <i>16.52</i> | <i>10.04</i> | <i>4.97</i> |
| <i>Depreciation</i> | <i>1.02</i> | <i>0.98</i> | <i>1.02</i> |
| <i>Interest & Fin charges</i> | <i>5.02</i> | <i>5.67</i> | <i>10.45</i> |
| <i>Profit/(Loss) Before Tax</i> | <i>10.48</i> | <i>3.38</i> | <i>(6.50)</i> |
| <i>Add: Deferred Tax adjustment</i> | | | <i>23.83</i> |
| <i>Less: Provision for tax</i> | <i>0.90</i> | <i>14.30</i> | <i>0.08</i> |
| <i>Less: Deferred tax</i> | <i>0.00</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Profit / (Loss) After tax for the year</i> | <i>9.58</i> | <i>(10.92)</i> | <i>17.24</i> |
| <i>Balance sheet statement</i> | <i>31.03.2012</i> | <i>31.03.2011</i> | <i>31.03.2010</i> |
| <i>Sources of funds</i> | | | |
| <i>Paid up equity shares capital</i> | <i>650.00</i> | <i>650.00</i> | <i>650.00</i> |
| <i>Reserves & surplus</i> | <i>(71.13)</i> | <i>20.04</i> | <i>20.04</i> |
| <i>Profit & loss account debit balance</i> | | <i>158.27</i> | <i>147.35</i> |
| <i>Net worth</i> | <i>578.87</i> | <i>511.77</i> | <i>522.69</i> |
| <i>Secured loans</i> | <i>0.00</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Unsecured loans</i> | <i>43.99</i> | <i>278.87</i> | <i>330.81</i> |
| <i>Deferred tax liability</i> | <i>0.00</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Unsecured loans</i> | <i>43.99</i> | <i>278.87</i> | <i>330.81</i> |
| <i>Deferred tax liability</i> | <i>0.00</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Total source of funds</i> | <i>622.86</i> | <i>790.64</i> | <i>853.50</i> |
| <i>Uses of funds</i> | | | |
| <i>Net fixed assets</i> | <i>4.49</i> | <i>5.47</i> | <i>6.46</i> |
| <i>Other non current assets</i> | <i>0.32</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Investments</i> | <i>4.92</i> | <i>16.20</i> | <i>101.20</i> |
| <i>Net current assets</i> | <i>601.74</i> | <i>757.58</i> | <i>722.01</i> |
| <i>Deferred tax assets</i> | <i>11.38</i> | <i>11.38</i> | <i>23.83</i> |
| <i>Total</i> | <i>622.86</i> | <i>790.64</i> | <i>853.50</i> |
| | <i>31.03.2012</i> | <i>31.03.2011</i> | <i>31.03.2010</i> |

| | | | |
|--|--------------|----------------|--------------|
| <i>Other financial data</i> | | | |
| <i>Dividend (%)</i> | <i>0.00</i> | <i>0.00</i> | <i>0.00</i> |
| <i>Earnings per share (Rs) for the year, fully diluted, annualized</i> | <i>0.14</i> | <i>(0.176)</i> | <i>0.13</i> |
| <i>Return on net worth (%) (profit after tax x 100 / net worth)</i> | <i>1.65%</i> | <i>(2.13)%</i> | <i>3.30%</i> |
| <i>Book value per share (Rs) of FV Rs.10/- (net worth/No. of shares)</i> | <i>8.91</i> | <i>7.87</i> | <i>8.04</i> |

5.1.12. Thus, on the basis of human probabilities and conducts, the picking of shares of a company by the appellant, subsequent amalgamation of the same within a short period of time and subsequent sale of such shares leading to astronomical gains is highly coincidental and well-nigh impossible without there being any insider information or prearranged trading. It is noteworthy to quote the excerpts from the few case laws in this

5.1.13. It is noteworthy to quote the excerpts from the few case laws in this regard-

"The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below: The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence." (Commissioner of Income Tax Vs. P. Mohanakala)(SC)

5.1.14. In identical circumstances, the Nagpur bench of the ITAT In the case of Sanjay Bimalchand Jain versus the ITO in LT.A. No. 61/Nag/2013 observed as below-

"All the authorities below, in particular the Tribunal, have observed in unison that the assessee did not produce any evidence to rebut the presumption drawn against him under Section 68 of the Act', by producing the parties in whose name the amounts in question had been credited by the assessee in his books of account. In the absence of any cogent evidence, a bald explanation furnished by the assessee about the source of the credits in question viz., realisation from the debtors of the erstwhile firm, in the opinion of the assessing officer, was not satisfactory. It is well settled that in view of Section 68 of the Act, 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." (Vijay Kumar Talwar Vs. CIT)(SC).

"I have heard both the counsel and perused the records. The facts of the case clearly indicate that the assessee has indulged in penny stock transaction. The assessee is a senior citizen. On purported advice of an Income-tax Consultant, she purchased shares of two penny stock Calcutta based companies at Rs.5. 50 per share and Rs.4/- per share respectively in 2003. Both the companies had no standing and the AO found their existence of dubious characters. Both purportedly merged with other company, namely, Khoobsurat Ltd. and the assessee received shares in Khoobsurat Ltd. in lieu of her shares in earlier companies. The assessee was able to sell the shares at the price of Rs.486.55 and Rs.85.65 respectively in 2005. The purchase by the assessee of shares of two unknown companies whose details were not at all known by the assessee can by no stretch of imagination be said to be an investment transaction. The company whose shares rose from Rs.5/- to Rs.485/- within extremely short span has no worthwhile position and balance sheet and is not at all dividend paying company. The broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee. In these circumstances it is a clear case where the

assessee had indulged in bogus and dubious share transaction meant to account for the bogus and undisclosed income in the garb of long term capital gain.

In this regard I may gainfully refer to the decision of Hon'ble jurisdictional High Court in the case of Major Metals Ltd. vs. Union of India and others in Writ Petition No. 397 of 2011 vide order dated 22nd February, 2012. The Hon'ble jurisdictional High Court in this case has held that a company cannot command disproportionate and huge share premium and such receipt of bogus share application money even though through banking channel can be held to be assessee's undisclosed income received in the garb of unjustified share application money. In the present case I find that there is no justification whatsoever that the shares of an unknown company of Rs.5/- can be sold within two years' time at Rs.485/- without there being any reason on record. This unexplained spurt in the value of unknown company shares is beyond preponderance of probability. It has been held by Hon'ble Apex Court in the case of Durga Prasad More and Sumati Dayal that the test of human probabilities have also to be applied by the authorities below. In the case of Sumati Dayal 214 ITR 801, it was held that during the year 1970-71 (pertaining to the assessment year 1971-72) between April 6, 1970, and March 20, 1971, the appellant claims to have won in horse race a total amount of Rs.3,11,831/- on 13 occasions out of which ten winnings were from jackpots and three were from treble events. Similarly in the year 1971-72, the appellant won races on two occasions and both times the winning were from a jackpot. These receipts were tested on the touch stone of human probability and it was found that apparent was not real. That it was contrary to statistic al theory and experience of the frequencies and probabilities. The exceptional luck enjoyed by the assessee was held to be beyond preponderance of probability. Hence, the Hon'ble Apex Court has affirmed the view that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

When the present case is examined on the touch stone of above case law, it is clear that these transactions of the assessee can by no stretch of imagination be considered as investment transactions. They are only make believe transaction. Hence I do not find any infirmity in the ,revenue taxing. The receipt in this regard, the entire amount of the so called receipt of share shlles could well also 'lie treated as unexplained credit u/s 68 of the IT. Act as it has all the ingredients of attracting the rigours of the said section. Section 68 of the I. T. Act provides that where any sum is found credited in the books of the assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the AO satisfactory, the sum so credited may be charged to income tax as income of the assessee of that year. In the present case the assessee's explanation that the said receipt is on account of investment in shares whereby share of Rs.5/- of unknown company has jumped to Rs.485/- in no time has been totally rejected by the authorities below. The assessee has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for the sale price of these shares. The so called purchaser of these shares has not been identified despite efforts of the AO. The broker company through which shares were sold did not respond to queries in this regard. Hence the fantastic sale price realisation is not at all humanly probably, as there is no economic or financial basis, that a share of little known company would jump from Rs. 5/- to 485/-, In these circumstances, I do not find any infirmity in the orders of the authorities below. Accordingly I affirm the same and decide the issue against the assessee. “

5.1.15. It is noteworthy to mention that the above referred decision has since been affirmed by the honourable Nagpur bench of the Bombay High Court in INCOME TAX APPEAL NO. 18/2017 in the case of SANJAY BIMAICHAND JAIN L/H SHANTIDEVI BIMALCHAND JAIN ,VERSUS THE PR.COMMISSIONER OF INCOME TAX-I,NAGPUR & ANOTHER.

5.1.16. On identical circumstances, the Honourable Mumbai Tribunal in the case of Ratnakar M. Pujari versus ITO in I. T. A. No.995/Mum/2012 observes as follows-

"We have considered the rival contentions and also perused the material available. We have observed that no scrutiny assessment has been framed for the impugned assessment year by the Revenue u/s 143(3) of the Act originally, while based on information received from Addl.CIT(Inv.), Unit-v, Mumbai that the assessee is indulging in non-genuine and bogus capital gains from transaction of sale and purchase of shares of M/s Shiv Om Investment and Consultancy Limited which was penny stock company and pre-dated contract notes were issued by the Brokers to manipulate and introduce long term capital gains in favour of the assessee which are exempt from tax u/s 10(38) of the Act leading to escapement of income from taxation / which led to issue of notice dated 07-04-2008 u/s 148 of the Act which is within four years from the end of the relevant assessment year, the receipt of afore-stated information from Addl. CIT(Inv) in our considered view is fresh and tangible material which has live link and nexus with the formation of belief that the income of the assessee has escaped assessment, and keeping in view that the original assessment was not framed u/s 143(3) of the Act and no opinion was ever formed by the AD and hence there is no change of opinion keeping in view the ratio of decision of Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri Stock Brokers Private Limited (2007) 291 ITR 500(SC), we uphold the re-opening of the assessment u/s 147/148 of the Act. We have observed that the assessee has made purchases of 4000 shares of M/s Shiv Om Investment and Consultancy Limited for Rs.4,080/- on 11th May, 2004 in the previous year relevant to the assessment year 2005-06. The said shares were purchased in off market transactions for which payments were made in cash. The said purchases have been treated as bogus and sham transactions by the Revenue as it is alleged that certain brokers have manipulated and issued pre-dated contract notes which even did not have details such as time of contract, trade number, transaction details etc and payments were also made in cash by the assessee against such sham and bogus purchase with the objective of introducing by manipulating tax free exempt long term capital gains u/s 10(38) of the Act leading to escapement of income from taxation, and the said findings of the AO with respect to bogus and sham purchases have become conclusive and final as the assessee has not challenged the findings of the learned AO made in the assessment order dated 24.12.2009 passed by the AO u/s 143(3) read with Section 147 of the Act in the first appeal filed with learned CIT(A) for the assessment year 2005-06 and hence the finding of the AO has attained finality. Since the said findings of the AO with respect to purchases of 4000 shares of M/s Shiv Om Investment and Consultancy Limited in assessment year 2005-06 have become conclusive having attained finality, the sales in consequence thereof the sham and bogus purchases cannot be accepted as genuine. The assessee has explained that the purchases were backed with contract notes of the brokers and payments were made in cash will not be of any help at this stage as the said findings of the AO treating the purchase of shares as sham and bogus in the assessment year 2005-06 has attained finality. Since, purchases are held to be bogus and sham which has attained finality, the sale in consequence thereof whereby payments are received through cheque or shares being sold through stock exchange are not of any help to the assessee for claiming the exemption as long term capital gains as the allegation of the Revenue is that the assessee has in collusion with the Brokers has manipulated and camouflaged the entire transactions of sale and purchase of shares in getting issued pre-dated contract notes for purchases of shares for which payments were also made for these purchases in cash and hence these purchases never existed at that relevant time. It is the allegation of the Revenue that the entire sale and purchase of shares were manipulated by the assessee in collusion with the brokers in order to earn tax free exempt long-term capital gains on sales of shares u/s 10(38) of the Act whereby unaccounted cash of the assessee has been introduced in disguise in lieu of sale proceeds of shares. Keeping in view facts and circumstances of the case and as per our discussions and reasoning as set out above, we find no infirmity in the orders of the learned CIT(A) which we uphold and sustain" assessee relied upon the decision of

the ITAT , Hyderabad in the case of ITO v, Smt Aarti Mittal (2014) 41 taxmann.com 118(Hyd.-Trib) whereby the Tribunal has arrived at the decision that sale and purchase was genuine even though purchase was off-market transaction which was routed not through stock exchange but backed by physical delivery of shares which was later de-mated and under the circumstances the ITAT held the transactions as genuine in nature and the assessee claim was found to be in order, but in the instant case there is a conclusive and final finding of fact that purchases of shares were bogus and sham as was held by the Revenue in the assessment year 2005-06 which has not been dislodged so far as the assessee accepted the said findings which became conclusive, thus the facts in the instant case are distinguishable as against the relied upon case of the assessee in Smt Aarti Mitta/(supra) on that ground itself. Similarly, contentions of the assessee that the Revenue has accepted the gains on sale of 1500 shares of M/s Shiv Om Investment and Consultancy Limited in the succeeding assessment year 2007-08 as long term capital gains while processing of return u/s 143(1) of the Act is not of help to the assessee as every assessment year is separate assessment year and merely because the Revenue has not selected the case under scrutiny by issuing notice u/s 143(2) of the Act and framing detailed scrutiny u/s 143(3) of the Act instead chose to process the return u/s 143(1) of the Act without scrutiny will not entitle the assessee to get the well- reasoned assessment orders and appellate orders of the learned CIT(A) dislodged in the absence of the cogent material and evidences to demolish the findings of the authorities below. The Revenue in the case of the assessee's brother has also declared the purchase and sale of shares as bogus but brought to tax, gains arising from sale of shares as short term capital gains. This in our considered view, is also not of help as the Revenue in the instant case has come to the conclusive finding which attained finality that the transactions of purchase of shares are sham and bogus transactions camouflaged with an intention to evade taxes . We order accordingly. "

5.1.17. In similar circumstances, the Honourable Ahmedabad Tribunal in the case of Kamalchand Nathmal Lunia Vs. ITO, Ward-S(2), Surat in ITA number ITA 436/Ahd/2013 observed as follows-

"After hearing both the sides and considering the totality of the facts and circumstances of the case, we are also of the opinion that the purchase as well as the sale transactions of the scrips in question was not genuine. The reason for taking this view is that the purchase rate had not tallied with the rate as per BSE website and that the purchases have also been made in cash. Only paper transactions have been made because there was no evidence of physical delivery of the shares. The AO was right in asking the details of the dividend if any received during the holding period. But no such information was provided at any stage of proceeding. Even, the entries in the Demat Account were not sacrosanct because the AO had found on investigation that those were all "**off market**" transactions. It was also noted by the AO that Hon'ble ITAT Mumbai Bench had held that those companies were nothing but entry providers. Rather, it was proved beyond doubt that Mahasagar Group was engaged in the business of issuance of fraudulent bills. We, therefore, affirm the findings of the Revenue Authorities and dismiss the ground of the assessee. "

5.1.18. In similar circumstances, the following decisions are also noteworthy to mention-

- i) Chandan Gutpa vs. CIT - Hon'ble Punjab & Haryana High Court (2015) 54 taxmann.com 10 (P&H)/ (2015) 229 Taxman 173.
- ii) Balbir Chand Maini vs. CIT - Hon'ble Punjab and Haryana High Court (2011) 12 taxmann.com 276
- iii) Usha Chandresh Shah vs. ITO, ITAT Mumbai 2014-TIOL-1459-ITAT-MUM.

5.1.19, It is a well-settled principle of law as declared by Honourable Supreme Court in the case of Sumathi Dayal Vs CIT 214 ITR 801 (SC) that the true nature of transaction has to be ascertained in the light of surrounding circumstances. It needs to be emphasised that even though the standard of proof consisting of proving beyond reasonable doubt has no applicability in determination of matters under taxing statutes, yet it is also a well settled principle that taxing authorities are entitled to look into the surrounding circumstances to find out the reality of the transactions by applying the test of human probabilities. This was also the principle laid down by Honourable Supreme Court in the case of CIT versus Durgaprasad More 82 ITR 540 (SC) wherein The Hon'ble Court held 'It is true that the apparent must be considered to be real until it is shown that there are reasons to believe that the appellant is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of these recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party in rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to the evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.'"

5.1.20. On going through the case-laws relied upon by the appellant, I observe that all of them are distinguishable on facts as the genuineness of the purchase of shares Is not proven in the Instant case and the period of holding as stated is not also proven with any verifiable evidence.

5.1.21. Thus, from the facts and circumstances of the case and the Catena of case laws referred to above, I come to the conclusion that on the basis of documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities what appears to be apparent in this case is actually not real. I affirm the conclusion reached by the AO in this regard that the financial transactions are actually sham and the entire edifice is only a colourable device meant to be a smoke screen to defraud the revenue and evade taxes. The abnormal profits and consequent long-term capital gains on sale of shares has 'actually not arisen from investment in shares In natural or in ordinary way but due to a designed, preplanned, arranged trading made through a camouflaged artifice in cahoots with operators. I also come to the conclusion that the appellant has failed in giving any evidence to prove' the genuineness of the purchase of the alleged shares leading to LTCG which qualify for exemption under section 10(38) of the IT Act. As the appellant has failed to' identify the source of the credit and its genuineness, the addition made by the AO of the entire receipt purportedly to have been received out of sale of shares, under section 68 of the IT Act is legally justified and does not call for any interference. Appellant's grounds fail."

I further find that brokerage commission also stands disallowed in both the lower proceedings in some of the cases.

3. I have given my thoughtful consideration to rival contentions. Identical paper book(s) comprising of relevant purchase bills of shares, allotments certificates, contract notes, brokerages details ledger, demat statement etc., stand perused. Mr. Bhattacharjya vehemently contends during the course of hearing that all these assesseees have acted in collusion with various entry operators for availing the impugned LTCG entries claimed to be exempt s. 10(38)of the Act. He strongly

supports both the lower authorities' action seriously doubting genuineness of the impugned capital gains more particularly as analyzed in assessment order as per scrip price movement in stock exchange, profit and loss account, balance-sheet and business activities. Mr. Bhattacharjya's case is that the impugned LTCG derived from sale of contract scrip which has not seen any profitable business activity during the relevant holding period which defies all commercial prudence which has been rightly treated as non-genuine both in assessment as well as lower appellate proceedings. He quotes case law of *Sumati Dayal vs. CIT* (1995) 80 Taxmann. 89/214 ITR 801 (SC) and *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) various tribunal decisions as well as hon'ble high court's judgments adding similar sums to be unexplained cash credits are also cited in support.

4. I find no merit in either of the Revenue's above stated submissions. It emerges that this tribunal's co-ordinate bench's decision in *Sanjay Mehta vs. ACIT* **ITA No.1089/Kol/2018** decided on 28.09.2018 has deleted identical addition of LTCG treated as unexplained cash credits regarding the very scrip as follows:-

"5. We have given our thoughtful consideration to rival contentions. Case file as well as a compilation of judicial precedent stand perused. Learned Departmental Representative emphasizes time and again that the instant issue of bogus LTCG has rightly been decided against the assessee in both assessment as well as lower appellate proceedings raised pertaining to artificial manipulation of share prices in both M/s Unno Industries Ltd. & Sharp Trading Finance Ltd. We find no force in Revenue's instant argument. This tribunal co-ordinate bench's decision in *ITA 2394/Kol/2017 Prakash Chand Bhutoria vs. ITO* decided on 27.06.2018 for AY 2014-15 itself upholds such a share prices increase to be genuine qua the above former entity as under:-

5. In response to the queries raised by the assessing officer on the issue of the fact that the assessee received Rs. 31,62,372/- from sale of once scrips i.e. 'Unno Industries Ltd.' the assessee submitted the following facts:

"Details of Purchase of share for Long Term capital Gain F.Y.2013-14 (A.Y.2014-15):

1. *I state that I had purchased 100 equity shares of Pinnacle Vintrade Ltd. on 20.01.2012 from Uniglory Developers Pvt. Ltd. Pinnacle Vintrade Ltd. was merged with Unno Industries Ltd. and there was change of management and control of Unno Industries ltd. pursuant to scheme of arrangement sanctioned by the Hon'ble High Court at Bombay.*
2. *Payment for the purchase of aforesaid 100 equity of Pinnacle Vintrade Ltd. was made by Account Payee Tamilnad Mercantile Ltd. Bank Cheque no. 736027.*
3. *Bank statement of Tamilnad Mercantile Ltd. Bank reflecting payment (cheque no. 736027) for purchase of the said investment in equity shares of Pinnacle Vintrade Ltd. is enclosed (highlighting the said entry). **Annexure-I.***
4. *The equity shares of Unno Industries Ltd. were allotted pursuant upon merger of Pinnacle Vintrade Ltd. with Unno Industries Ltd. pursuant to sanction of scheme of*

arrangement by the Hon'ble High Court at Bombay, I was issued 91000 equity shares of Unno Industries Ltd. in lieu of my shareholding in Pinnacle Vintrade Ltd. The relevant gist of the scheme of arrangement sanctioned by the Hon'ble High Court was communicated by the company to the Bombay Stock Exchange vide letter dated 12th February, 2013. A copy of the said letter downloaded from BSE website is enclosed for your ready reference. I also enclose Unno Industries Ltd. letter dated 12th February, 2013 and 7th March, 2013 communicating the issuance of shares in lieu shares of Pinnacle Vintrade Ltd. upon sanction of scheme of arrangement by the Hon'ble Court. **Annexure II**

5. As the equity shares of Pinnacle Vintrade Ltd. purchased were not listed, hence no Contract Notes were issued. However, copy of bill indicating purchase of said equity shares is enclosed. **Annexure III**
6. Equity shares of Pinnacle Vintrade Ltd., were directly purchased from Uniglory Developers Pvt. Ltd. 209, Vireshwar Chambers, M.G. Road, Nera Shan Talkies Vile Parle (E), Mumbai, Maharashtra-400057.
7. Equity shares of Pinnacle Vintrade Ltd. were purchased in Physical Form.
8. I have three Demat Accounts as follows-
 - a) Name of DP- **Ashika Stock Broking Ltd. (DP ID No. 12034500)**
Demat account No. 1203450000003128
Address of DP-Trinity, 7th Floor, 226/1, A.J.C. Bose Road, Kolkata-700020.
DP Account opened on-31.08.2004
 - b) Name of DP- **Guinness Securities Ltd. (DP ID No. IN302898)**
Demat account No. 10350406
Address of DP-Guinness House, 18, Deshpriya Park Road, Kolkata-700026.
DP A/c opened on-25.05.2013
 - c) Name of DP- **Tamilnad Mercantile Bank Ltd. (DP ID No. IN303069)**
Demat account No. 10051996
Address of DP-Pearl Towers DPS Cell, AC 16, III Floor, II Avenue, Anna Nagar West, Chennai-600040.
9. Demat Statements of M/s Ashika Stock Broking Ltd. and Guinness Securities Ltd. for f.y. 2013-14 and 2014-15 in respect of long term capital gains are enclosed. **Annexure IV.**
10. The Equity Shares of M/s Unno Industries Ltd. were submitted for dematerialization on 01.04.2013 and credited to my Demat A/c No. 1203450000003128 with M/s Ashika Stock Broking Ltd. (DP ID No. 12034500) on 12.04.2013 (91000 shares).
Details of Sale of Share for Long Term Capital Gain financial year 2013-14(A.Y.2014-15):
 1. The equity shares of M/s Unno Industries Ltd. are listed at Bombay Stock Exchange (BSE), a recognized Stock Exchange of India since last so many years and even during the time of sale by me. The security code of the said equity shares at BSE is 519273 and ISIN No. is INE 142N01023.
 2. Equity shares of Unno Industries Ltd. were sold on Bombay Stock Exchange through SEBI registered stock broker Ashika Stock Broking Ltd. and Guinness Securities Ltd. whose details are as under:
 - a) Name: **Ashika Stock Broking Ltd.**
Address: Trinity, 7th Floor, 226/1, A.J.C. Bose Road, Kolkata-700020.
Contact No. 033 22839952.

- b) Name: **Guinness Securities Ltd.**
Address: Guinness House, 18, Deshpriya Park Road, Kolkata-700026
Contact No. 033 30015555.
3. Contract Notes issued regarding sale of equity shares of Unno Industries Ltd. on Bombay Stock Exchange by SEBI registered brokers- Ashika Stock Broking Ltd. and Guinness Securities Ltd. are enclosed. **Annexure V.**
 4. The relevant Demat Account statements of Ashika Stock Broking Ltd. and Guinness Securities Ltd. reflecting the debit of shares of Unno Industries Ltd. upon sale are enclosed. (entries highlighted). **Annexure VI.**
 5. The Ledger of the brokers of Ashika Stock Broking Ltd. and Guinness Securities Ltd. for the financial year 2013-14 are enclosed. **Annexure VII.**
 6. Tamilnad Mercantile Ltd. bank Statement reflecting the receipts of sale consideration from the SEBI registered stock brokers (highlighting the said entries) is enclosed. **Annexure VIII.**
 7. Out of sale consideration money of Rs. 3151423.00 from Unno Industries Ltd. a sum of Rs. 3150000.00 has been invested in equity shares of Glow Diam Designs Pvt. Ltd.

All the evidences were attached as annexures as stated above.

6. The Assessing Officer in his order did not refer to any of these evidences. Instead at para 6 and 7 he concluded held as follows:

“6. The details of purchase and sale of this particular scrip i.e. ‘Unno Industries Ltd.’ (hereinafter referred as The Scrip) were examined in which shares were sold in June/August, 2013 at the price of Rs. 31,62,379/- and purchased Rs. 1,00,000/- i.e. a humongous rise of over 3100% over a very short period of just 24 months. These facts demanded a deeper study of the price movements and share market behavior of the entities involved in trade, of the scrip as the share price movements and the profit earned by the beneficiaries were beyond human probabilities. Thus a deeper study was needed to ascertain whether the transactions were genuine investment transaction of sham ones and colorable device only to convert the unaccounted cash into tax exempt.

7. Apart from this, the directorate of income tax, Kolkata various enquiries have been made on project basis, which has resulted into the unearthing of huge syndicate of entry operators, share brokers and money lender involved in providing bogus accommodation entries of Long Term Capital gain and short term capital loss. It has come to the light that large scale manipulation has been done in market price of shown of certain companies listed in the BSE by certain beneficiary is utilized to purchase shares of such company at a very high artificially inflated market price. Some of the listed companies directly or in directly owned by operators and whose shares price have been apparently manipulated by the syndicate of operators. Out of the above enquiry made by DIT(Inv.), Kolkata has established that one of the main manipulated company which you had availed is also under this syndicate. Hence, it is crystal clear that Sharp Trading Company is one of the main manipulated company (Penny listed) to convert unaccounted cash of beneficiary through long term capital gain with claim a certain percentage of commission.”

7. Thereafter the AO made an addition under 68 of the Act. Aggrieved the assessee carried the matter an appeal. The 1st. First appellate authority confirmed the action of the AO on the ground that, the transaction in question comes within the ambit of ‘Suspicious Transaction’ and therefore, the rules of ‘Suspicious Transaction’ would apply to the case. He further stated

that the payments through bank of processing of transaction through stock exchange and other such features are only apparent features and that the real feature are the manipulation and abnormal price raise and the sudden dip thereafter. Based on surrounding circumstances and circumstantial evidence and the order of the Tribunal in the case of “Bhag Chand Chabra (HUF) vs. ITO”, in I.T.A. No. 3088& 3107/2007 dated 31.12.2010, the addition made by the AO was confirmed. Aggrieved the assessee is in appeal before us.

8. A perusal of the order of the AO demonstrates that this addition was made merely on “suspicion” and in a routine and mechanical manner. This is clear from the fact that the AO refers to some ‘Sharp Trading Company as one of the main ,manipulated company and whereas the assessee sold scrips in Unno Industries Ltd. The AO refers to various enquiries made by “The Directors of Income Tax”, Kolkata on project basis and that this resulted into unearthing of a huge syndicate of entry operators and share brokers and money lenders involved in providing of bogus accommodation entries. The report as the so-called project and the evidence collected by the DIT (Inv.), Kolkata etc have not been brought on record. It is well settled that any document relied upon by the AO for making an addition has to be supplied to the assessee and an opportunity should be provided to the assessee to rebut the same. In this case, general statements have been made by the AO and the addition is made based on such generalizations. The assessee has not been confronted with any of the evidence collected in the investigation done by the DIT(Inv.), Kolkata. Evidence collected from third parties cannot be used against the assessee without giving a copy of the same to the assessee and thereafter giving him an opportunity to rebut the same.

9. The AO further relies on the shop increase of 31000% of the value of shares over the period of 2 years. Though this is highly suspicious, it cannot take the place of evidence. The Hon'ble Supreme Court has stated that suspicion however strong cannot be the basis for making an addition. The evidence produced by the assessee listed above proves his case and the AO could not controvert the same by bringing on record any evidence. The evidence said to have been collected by the DIT (INV.), Kolkata and the report is not produced before this Bench.

10. I now discuss the case law on the subject. The Hon'ble Calcutta High Court in the case of CIT, Kolkata-III vs. Smt. Shreyashi Ganguli reported in [2012] (9) TMI 1113 held as follows:

“1. Whether on the facts and circumstances of the case, the order of the Ld.. Tribunal is perverse in law as well as on facts in deleting the addition made by the Assessing Officer as unexplained cash credit under section 68 of the Income Tax Act, 1961, by ignoring the facts on record.

The ld. Tribunal after considering the material and hearing came to a fact finding which is as follows:

The Assessing Officer has doubted the transaction since the selling broker was subjected to SEBI's action. However, the demat account given the statement of transactions from 01.04.2004 to 31.03.2005 i.e. relevant for the assessment year under appeal (2005-06) are before us. There cannot be any doubt about the transaction as has been observed by the assessing officer. The transactions were as per norms under controlled by the Securities Transaction Tax, brokerage service tax and cess, which were already paid. They were complied with. All the transactions were through bank. There is no iota of evidence over the above transactions as it were through demat format. Hence, we agree with the given findings of the ld. Commissioner of Income Tax (Appeals) in accepting the transactions as genuine too.

In view of the fact findings we cannot reappreciate, recording is such, cannot be said to be perverse as it is not fact finding of the ld. Tribunal alone. The commissioner of Income Tax came to the same fact finding. Concurrent fact finding itself makes the story of perversity, unbelievable.”

The "D" Bench of the Kolkata Tribunal in the case of Gautam Kumar Pincha vs. ITO, in I.T.A. No. 569/Kol/2017 dated 15.11.2017 at para 19 onwards held as follows:

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

(ii) **CIT V. Lakshmanarh Estate & Trading Co. Limited [2013] 40 taxmann.com 439 (Cal)** – In this case the Hon'ble Calcutta High Court held that on the basis of a suspicion howsoever strong it is not possible to record any finding of fact. As a matter of fact suspicion can never take the place of proof. It was further held that in absence of any evidence on record, it is difficult if not impossible, to hold that the transactions of buying or selling of shares were colourable transactions or were resorted to with ulterior motive.

(iii) **CIT V. Shreyashi Ganguli [ITA No. 196 of 2012] (Cal HC)** – In this case the Hon'ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI's action. However the transactions were as per norms and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

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

(v) **CIT V. Andaman Timbers Industries Limited [ITA No. 721 of 2008] (Cal HC)** – In this case the Hon'ble Calcutta High Court affirmed the decision of this Tribunal wherein the loss suffered by the Assessee was allowed since the AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

(vi) **CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009]** – In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the AO, based on the information received by him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He therefore held that the transactions were bogus. The Hon'ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the chain of transactions entered into by the assessee have been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

8.4. 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. For coming to such a conclusion we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008 wherein the High Court held as follows :

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

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

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

8.5. *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.*

9. *In the result the appeal of the assessee is allowed.”*

The “A” bench of the Kolkata Tribunal in the case of ITO vs. Shaleen Khemani in I.T.A. No. 1945/Kol/2014 dated 18.10.2017 at para 9.1. to 9.4 held as follows:

9.1 *We further find that the transaction of sale of shares by the assessee was duly backed by all evidences including Contract Notes, Demat Statement, Bank Account reflecting the transactions, the Stock Brokers have confirmed the transactions, the Stock Exchange has confirmed the transactions, the Shares have been sold on the online platform of the Stock Exchange and each trade of sale of shares were having unique trade no. and trade time. It is not the case that the shares which were sold on the date mentioned in the contract note were not traded price on that particular date. The ld AO doubted the transactions due to the high rise in the stock price but for that, the assessee could not be blamed and there was no evidence to prove that the assessee or any one on his behalf was manipulating the stock prices. The stock exchange and SEBI are the authorities appointed by the Government of India to ensure that there is no stock rigging or manipulation. The ld AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation against the assessee and or the brokers and or the Company. In absence of any evidences it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It is also to be seen that in this case, the shares were held by the Donors from 2003 and sold in 2010 thus there was a holding period of 7 years as per Section 49 of the Act and it cannot be said that the assessee and the Donors were making such plans for the last 7 years to rig the stock price to generate bogus capital gains that too without any evidences whatsoever.*

9.2 It is also pertinent to note that the assessee and / or the stock broker M/s P Didwania & Co and Toshith Securities P Ltd., both registered share and stock brokers with Calcutta Stock Exchange had confirmed the transaction and have issued legally valid contract notes under the Law and such contract notes are available in pages 41-52 of the Paper Book. We find that the Hon'ble Calcutta High Court in the case of Pr CIT Vs Rungta Properties Private Limited ITAT No 105 of 2016 dated 8th May 2017 in a similar issue dismissed the appeal of the Department by making the following observations:

(11) On the last point, the Tribunal held that the Assessing Officer had not brought on records any material to show that the transactions in shares of the company involved were false or fictitious. It is finding of the assessing officer that the scrips of this company was executed by a broker through cross deals and the broker was suspended for some time. It is assessee's contention on the other that even though there are allegations against the broker, but for that reason alone the assessee cannot be held liable. On this point the Tribunal held –

“As a matter of fact the AO doubted the integrity of the broker or the manner in which the broker operation as per the statement of one of the directors of the broker firm and also AO observed that assessee had not furnished any explanation in respect of the intention of showing trading of shares only in three penny stocks. AO relied the loss of Rs.25,30,396/- only on the basis of information submitted by the Stock fictitious. AO has also not doubted the genuineness of the documents placed on record by the assessee. AO's observation and conclusion are merely based on the information representative. Therefore on such basis no disallowance can be made and accordingly we find no infirmity in the order of ld. CIT(A), who has rightly allowed the claim of assessee. Thus ground No. 1 of the revenue is dismissed.”

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

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. We also find that the ld CITA rightly relied on the decision of the Hon'ble High Court at Calcutta in the case of ALPINE INVESTMENTS in ITA No. 620 of 2008 dated 26th August 2008 wherein the Hon'ble Court held as follows:

“It appears that the share loss and the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of

the Calcutta Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee instruments, which were also filed in accordance with the assessment.

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

9.4. We also find that the various other case laws of Hon'ble Jurisdictional High Court and other case laws also relied upon by the ld AR and findings given thereon would apply to the facts of the instant case. The ld DR was not able to furnish any contrary cases to this effect. Hence we hold that the ld AO was not justified in assessing the sale proceeds of shares of SOICL as undisclosed income of the assessee u/s 68 of the Act and therefore we uphold the order of the ld CITA and dismiss the appeal of the revenue. Accordingly the grounds raised by the revenue are dismissed.”

Applying the proposition of law laid down in all the above referred cases, the facts of this case, I find force in the submission of the assessee and there are backed by evidence. I also find that the revenue has not based its finding on in any evidence. In view of the above discussion the addition made u/s 68 of the Act is hereby deleted.”

6. Learned Departmental Representative vehemently contends at this stage that the DIT(Inv) has carried out a detailed investigation in various entry operators cases. They have been found to have rigged such kind scrip's prices rise. There is not even a single material during the course of hearing which could suggest the assessee to have engaged in any kind of foul play. This tribunal's another co-ordinate bench decision in ITA No.2281/Kol/2017 *Navneet Agarwal vs. ITO* decided on 20.07.2018 has rejected Revenue's all these arguments as follows:

9. The ld. DR on the other hand, relied on the order of the assessing officer and reiterated the findings made therein and submitted that the same be upheld. He vehemently argued that merely because the assessee has produced all the evidences required to prove his claim, the same cannot be accepted as these are organized and managed transactions. He took this bench through the modus operandi mentioned by the AO and submitted that in all cases where the shares of these companies are purchased and sold, additions have to be made, irrespective of the evidence produced as there are cases where manipulation has taken place. He reiterated each and every observation and finding of the ld. AO as well as the Ld. CIT(A) and prayed that the same be upheld.

10. After careful consideration of the rival submissions, perusal of the papers on record and order of the lowers authorities below, as well as case law cited, we hold as follows.

11. The assessee in this case has stated the following facts and produced the following documents as evidences:

1. The assessee had made an application for allotment of 50000 equity shares of “Smart champs IT and Infra Ltd.” and she was allotted the share on 3rd December 2011 (copy of Application form, intimation of allotment and share certificate Paper Book at page 8 to 10).
2. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money and payment made to “Smart

- Champs IT & Infra Ltd.” for such shares allotted is placed in the Paper Book at page no. 11).
3. Annual return no. 20B was filed with Registrar of companies by “Smart Champs IT & Infra Ltd” showing the assessee’s name as shareholder (copy of annual return no. 20B filed with Registrar of companies by “Smart Champs IT & Infra Ltd. “is placed in the Paper Book at page no. 12 to 18.)
 4. The assessee lodged the said shares with the Depository M/s. Eureka Stock & Share Broking Services Ltd. with a Demat request on 11th February, 2012. The said shares were dematerialized on 31st March, 2012 (copy of demat request slip along with the transaction statement is placed in the paper book at page no. 19 to 21).
 5. On 24.01.2013, the Hon’ble Bombay High Court approved the scheme of amalgamation of “Smart Champs IT and Infra Ltd.” with “Cressanda Solutions Ltd.” In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of “M/s. Cressanda Solutions Ltd.” The demat shares are reflected in the transaction statement of the period from 1st November 2011 to 31st December, 2013 (A copy of the scheme of amalgamation alongwith copy of order of the Hon’ble Bombay High Court and a copy of the letter to this effect submitted by “Cressanda Solutions Ltd”. to Bombay Stock Exchange is placed in the Paper Book at page no 22 to 43.)
 6. The assessee sold 50000 shares costing Rs. 500000/- through her broker “SKP Stock Broking Pvt. Ltd” which was a SEBI registered broker and earned a Long Term Capital Gain of Rs. 2,18,13,072/-. (Copy of the bank statement, brokers contract note together with the delivery instructions given to the DP and broker’s confirmation is also placed in the paper book at page no 44 to 65).
 7. Copy of Form No. 10DB issued by the broker, in support of charging of S.T.T. in respect of the transactions appearing in the ledger is placed in the paper book at page no. 66.
 8. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days.

12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to “*Modus Operandi*” of persons for earning long term capital gains which his exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assesseees. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing.

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 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 recording 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) Ayaaubkhan Noorkhan 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 Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton 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 ad 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 LTCG, it was held as follows:

a) The CALCUTTAHIGH COURT in the case of BLBCABLES & CONDUCTORS[ITA No. 78 of2017] dated19.06.2018. 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 off acts 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 JAIPURITAT in the case of VIVEKAGARWAL[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 Assessing Officer 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 KOLKATAITAT 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 Assessing Officer 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 SHALEENKHEMANI [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."

7. We adopt all this reasoning mutatis mutandis to conclude in this factual backdrop that both the lower authorities have erred in treating assessee's LTCG to be bogus. The impugned addition(s) of ₹93,19,895/- and ₹4,65,995/1- are deleted."

5. Coming to Revenue's arguments that department had searched / surveyed various entry operators alleged to have engaged in giving bogus LTCG regarding very scrip, I put a specific question to Mr. Bhattacharjee as to whether any of the said entry operators had ever quoted assessee's name or not. The replies is received in negative. Coupled with this, there is no substance in Revenue's argument that similar addition(s) stand affirmed in various judicial precedents (supra) for the reason that sec. 68 addition is a factual issue requiring the taxpayer to prove the identity, genuineness and creditworthiness of the relevant sum credited. I make it clear that all these assesseees have placed sufficient materials on record indicating them to have derived the impugned LTCG from sale of shares held in M/s Unno Industries Ltd.

only. I therefore delete the impugned addition(s) respectively. Brokerage commission disallowance, if any, thereupon shall automatic stood as a necessary corollary.

6. These assessee's appeals are allowed.

Order pronounced in open court on 04/01/2019

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

Kolkata,

*Dkp/Sr.PS

दिनांक:- 04/01/2019 कोलकाता

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

1. आवेदक/Assessee-Smt. Sangita Jhunjhunwala/Shri Sanjeev Jhunjhunwala (HUF)/
Smt. Nita Jhunjhunwala 77/79, Sri Arobinda Rd, Salika, Howrah-711106/
Sh. Sanjeev Jhunjhunwala, 61, Ashutosh Mukherjee Lane, Salkia,
Shri Ashokh Jhunjhunwala, 109, Ne.S. Rd. Goyee House, Kolkata-001
2. राजस्व/Revenue-ITO Wd.(47(2), Govt. Place (W) Kolkata-106/ITO Wd-36(3),
Poorva,Kolkata-106/ ITO Wd-48(4), 3 Govt. Place (W), Kol-101/
ITO Wd-34(2), Poorva, Kolkata-7000107
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 ।