

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
 (समक्ष)Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)  
 [Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

**I.T.A. No. 317/Kol/2018**  
**Assessment Year: 2014-15**

L. K. Prahladka, HUF (PAN: AAAHL5309M)	Vs.	Income-tax Officer, Wd-35(3), Kolkata
Appellant		Respondent

For the Appellant	S/Shri S. Jhajharia, AR & Sujoy Sen, AR
For the Respondent	Shri Sankar Halder, Addl. CIT, Sr. DR

Date of Hearing	13.11.2018
Date of Pronouncement	16.01.2019

**ORDER**

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

This appeal of the Assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals) -10, Kolkata for AY 2014-15 dated 16.11.2017.

2. Though the assessee had raised several grounds of appeal the main issue is as to whether on the facts and circumstances of the case, the Id CITA was justified in upholding the addition made by the Id AO u/s 68 of the Act in respect of sale proceeds of shares of M/s Kailash Auto Finance Limited (KAFL) treating the same as income from undisclosed sources after rejecting the assessee's claim of Long Term Capital Gains (LTCG) on sale of those shares.

3. The brief facts of the issue as has been recorded by the AO in the Assessment Order are that the assessee claimed long term capital gains from sale of shares of M/s. Kailash Auto Finance Limited (KAFL). The AO found that the assessee had purchased 2,00,000 shares of the face value of Rs.1 each in M/s. Careful Projects Advisory Limited (CPAL) for

a total consideration of Rs.2,00,000/- which later got amalgamated with M/s. KAFL. The AO took note that M/s. CPAL was amalgamated with M/s. KAFL by virtue of an order of Hon'ble High Court and in pursuance to such amalgamation, the assessee was allotted 2,00,000 shares of M/s. KAFL of the face value of Rs.1 each. The AO noted that the said shares were sold by the assessee through a broker named M/s. Ratnabali Capital Markets Ltd. on different dates falling within the previous year 2013-14 corresponding to the Asst Year 2014-15 at a price of Rs.76,34,233/-. The aforesaid transactions, according to assessee, resulted in Long Term Capital Gains and the assessee claimed exemption u/s 10(38) of the Act for Rs.74,34,233/-.

4. However, the AO did not agree with the assessee's claim of LTCG and exemption thereof claimed by the assessee. The AO taking note of the study conducted by the Investigation Wing of the department about 84 BSE listed penny stock discusses from para 4 of assessment order, the general observations/study/modus operandi from pages 2 to 10 of the assessment order goes on to state about the scrips assessee purchased and sold. According to AO, it is unbelievable that the assessee can make a fantastic gain in a span of 22 months. According to AO, the price movement of the scrip in the span of 22 months raised doubts in his mind and that profit earned by the assessee were beyond human probabilities. The AO noticed that the company, M/s. CPAL, was incorporated on 18.09.2010 with authorized and paid up share capital of Rs.1 lakh. The company increased its authorized share capital to Rs.34.50 lakhs and thereafter issued 330155 shares of the face value of Rs.10 each at the premium of Rs.590 to different entities. The AO also observed that during the FY 2011-12, M/s. CPAL increased its authorised share capital to Rs.29 crores and then the shares of Rs.10 each were split into 1:10 i.e. each shares of Rs.10 into shares of Re.1 each. The said company CPAL thereafter issued bonus shares to the existing equity shareholders in the ratio of 1:55. The AO suspected the issue of bonus shares in the unrealistic ratio of 1:55. He was of the opinion that the probable reasons were with a view to provide large amount of LTCG in the hands of beneficiaries after amalgamating the said company with KAFL. The AO concluded that CPAL was incorporated with a dubious plan and premeditated arrangement and artifice to increase number of shares therein through sham and non genuine transactions of its shares which resulted in fetching exorbitant and

unrealistic considerations in the scheme of amalgamation. The AO takes note of the Investigation Wing's study report of a company M/s. Vindhyaassini Niketan Pvt. Ltd. which had dealt with the shares of M/s. KAFL scrips and the statement of its director Mr. Gaurav Kumar which was recorded at pages 28 and 29 of the assessment order. And that of the Statement of Mr. Atul Agarwal of M/s. Korp Securities (Broker's) statement was recorded to expose the role of brokers in unscrupulous practice of laundering of black money which facts were confronted to assessee vide show cause notice dated 14.12.2016 and after receipt of reply, the AO was of the opinion that he was not satisfied with the reply of assessee and added Rs.76,34,233/- u/s. 68 being claimed from bogus share sale consideration.

5. The AO referred to three separate orders passed by SEBI dated 29<sup>th</sup> March, 2016, 15<sup>th</sup> June, 2016 and 31<sup>st</sup> October, 2016 in support of his adverse conclusions drawn against the assessee that several entities related/connected to KAFL rigged the prices by 230% during the period of January, 2013 to June, 2013 (Patch-1), created artificial demand and thereafter provided exit to the beneficiaries during the period of July 2013 to November, 2014 (Patch-2). The said orders passed by SEBI contained list of related/connected parties of KAFL and also the list of beneficiaries. Some of these were restrained from accessing the securities market and buying, selling or dealing in securities. The AO concluded that the in depth analysis done by SEBI in the three orders is direct evidence against the assessee to hold that the prices of KAFL were manipulated and artificially hiked to create non-genuine LTCG in the transactions of KAFL. The AO further concluded that confessions given on oath by the promoters/brokers/operators are the circumstantial evidence against the assessee that the LTCG was arranged one.

6. The AO relying on the various decisions *Sumati Dayal v. CIT 214 ITR 801 (SC)*, *Durga Prasad More v. CIT*, *Mcdowell & Co. V. CTO*, *CIT v. P. Mohankala*] observed that tax liabilities can be assessed by revenue authorities on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/evidence available on record. The AO ultimately concluded that in such clandestine operations and transactions, it is impossible to have

direct evidence or demonstrative proof of every move and also referred to the report of SIT on black money.

7. The AO concluded that the assessee's transactions resulting in LTCG on sale of shares of KAFL were bogus and that the assessee ploughed back his unaccounted money in the books of accounts which is assessable under section 68 of the Act.

8. On first appeal, the CIT(A) dismissed the grounds raised by the assessee against his claim of exemption u/s 10(38) of the Act and he also confirmed the additions made by the AO under section 68 of the Act. Aggrieved, the assessee is in appeal before us.

9. We have heard rival submissions and gone through the facts and circumstances of the case. At the time of hearing it was brought to our notice by the Ld. AR that though the AO referred to Investigation Wing's report made after search of M/s. Vindhywasin Niketan Pvt. Ltd. which was supposed to have indulged in providing accommodation entries for sale of M/s. KAFL and has recorded the statement of its Director Mr. Gaurav Kumar, which relevant portions have been recorded by AO at pages 28 and 29 of his order, neither anywhere the name of assessee nor his broker has been mentioned by the said director. And the Ld. AR drew our attention to the page 31 of AO's order which reproduces the statement of Shri Anuj Agarwal of M/s. Korp Securities which according to AO exposes the role of brokers in this bogus transaction. The Ld. AR drew our attention to the statement and contended that no whisper of assessee's name or its broker's role has been adversely commented/mentioned by this person. And the Ld. AR submitted that neither the study conducted by the Investigation Wing of Department nor the SEBI has found any adverse material/adverse remark against the assessee or its broker who dealt with the transaction in Bombay Stock Exchange. So, according to Ld. AR, the AO on general statement/study report/modus operandi carried out by some unscrupulous players have painted the assessee also bad and held the LTCG claim as bogus. Therefore, according to Ld. AR in the light of all supporting evidence to show genuine LTCG claim which has not been found to be false or concocted or fabricated, the claim need to be allowed. And he took an attention to page 106 to 112 of paper book which is the latest order of SEBI dated 29.03.2016 revoking the

ban of 244 entities out of 246 entities which were all earlier banned after trading scrips of M/s. KAFL. So, according to Ld AR, SEBI after investigation has found only 2 entities were infact involved in some nefarious practice and not the other 244 entities and the AO has heavily relied on the earlier interim order of SEBI to draw adverse inference against the assessee so, according to Ld. AR, the edifice upon which the AO made the addition has fallen down, so the addition should be deleted. The Ld. AR also brought to our notice that this Tribunal in the following cases have decided that the scrips of KAFL are not bogus and the LTCG claim of the assessee needs to be allowed:

- i) Manish Kumar Baid Vs. ACIT, ITA Nos. 1236& 1237/Kol/2017 dated 18.08.2017
- ii) Rukmini Devi Manpria Vs. DCIT, ITA No.1724/Kol/2017 dated 24.10.2018
- iii) Jagmohan Agarwal Vs. ACIT, ITA No.604/Kol/2018 dated 05.09.2018.

10. The Ld. DR for the Revenue vehemently opposed the contentions of the assessee and took us through the AO's order and Ld. CIT(A)'s order and submitted that scrips of M/s. KAFL was artificially rigged to provide LTCG to the assessee which cannot be allowed and supported the impugned order and relied on the order of Hon'ble Bombay High Court in the case of Binod Chand Jain in Tax Appeal No. 18 of 2017 and so he does not want us to interfere with the impugned order.

11. We note that similar issue arose in Manish Kumar Baid (supra) wherein the Tribunal allowed the claim of assessee in respect of LTCG from sale of scrips of M/s. KAFL has held as under:

*“6. We have heard both the rival submissions and perused the materials available on record. We find lot of force in the arguments of the ld AR that the ld AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct, and preponderance of probability without bringing on record any legal evidence against the assessee. We rely on the judgement of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for this proposition. The various facets of the arguments of the ld AR supra, with regard to impleading the assessee for drawing adverse inferences which remain unproved based on the evidences available on record, are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the ld AR are also not reiterated for the sake of brevity. We find that the amalgamation of CPAL with KAFL has been approved by the order of Hon'ble High Court. The ld AO ought not to have questioned the validity of the amalgamation scheme approved by the Hon'ble High Court in May 2013 merely based on a statement given by a third party which has not been subject to cross –examination. Moreover, it is also pertinent to note that*

*the assessee and / or the stock broker Ashita Stock Broking Ltd name is neither mentioned in the said statement as a person who had allegedly dealt with suspicious transactions nor they had been the beneficiaries of the transactions of shares of KAFL. Hence we 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 lower authorities apart from placing the copy of SEBI's interim order supra. We find that the SEBI's orders relied on by the ld AO and referred to him as direct evidence against the assessee did not contain the name of the assessee and/or the name of Ashika Stock Broking Ltd. through whom the assessee sold the shares of KAFL as a beneficiary to the alleged accommodation entries provided by the related entities / promoters / brokers / entry operators. In the instant case, the shares of CPAL were purchased by the assessee way back on 20.12.2011 and pursuant to merger of CPAL with KAFL, the assessee was allotted equal number of shares in KAFL, which was sold by the assessee by exiting at the most opportune moment by making good profits in roder to have a good return on his investment. We find that the assessee and / or the broker Ashita Stock Broking Ltd was not the primary allottees of shares either in CPAL or in KAFL as could be evident from the SEBI's order. We find that the SEBI order did mention the list of 246 beneficiaries of persons trading in shares of KAFL, wherein, the assessee and / or Ashita Stock Broking Ltd's name is not reflected at all. Hence the allegation that the assessee and / or Ashita Stock Broking Ltd getting involved in price rigging of KAFL shares fails. We also find that even the SEBI's order heavily relied upon by the ld AO clearly states that the company KAFL had performed very well during the year under appeal and the P/E ratio had increased substantially. Thus we hold that the said orders of SEBI is no evidence against the assessee, much less to speak of direct evidence. The enquiry by the Investigation Wing and/or the statements of several persons recorded by the Investigation Wing in connection with the alleged bogus transactions in the shares of KAFL also did not implicate the assessee and/or his broker. 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 bonafide 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 various case laws of Hon'ble Jurisdictional High Court relied upon by the ld AR and findings given thereon would apply to the facts of the instant case. The ld DR was not able to furnish any contrary cases to this effect. Hence we hold that the ld AO was not justified in assessing the sale proceeds of shares of KAFL as undisclosed income of the assessee u/s 68 of the Act. We accordingly hold that the reframed question no. 1 raised hereinabove is decided in the negative and in favour of the assessee."*

12. Coming back to the brief facts of the instant case, we note that assessee is a regular investor in shares and securities including mutual funds, which is undisputed fact and evident from balance sheet as on 31.03.2014 wherein the amount of investment in shares is Rs.86,64,810/- and mutual funds Rs.2,58,000/-. The assessee made a long term capital gain of Rs.74,34,233/- by selling quoted equity shares on Bombay Stock Exchange which

suffered STT and claimed exemption u/s. 10(38) of the Act. The sale proceeds of Rs.76,34,233/- was credited in his bank account.

13. We note that the following documents were produced by the assessee to substantiate its claim of exempt LTCG before AO/Ld. CIT(A):

- i) Purchase Bill evidencing the purchase of 2,00,000 shares containing the PAN of both parties along with other details (paper book page 40)
- ii) Certificate of Book Value of shares purchased of M/s. Careful Projects Advisory Ltd. at the Break Value of Re. 1/- as certified by the Chartered Accountant ant (Mr A.K. Jain, Membership No.. 05393) (paper book page 41).
- iii) Bank statement reflecting payment made for purchase through cheque vide cheque No. 737263 which is clearly evident duly highlighted (paper book page 42).
- iv) Confirmation letter from M/s Wondrous Marketing Pvt. Ltd. (formerly known as M/s Jatadhari Marketing Pvt. Ltd.) confirming the said transaction proving the purchase of equity shares of M/s Careful Projects Advisory Ltd. payment made and delivery of shares of directly in the D-Mat Account (paper book page 43).
- v) D-Mat statement evidencing the receipt of delivery of shares from Client ID 10415082 belongs to M/s Wondrous Marketing Pvt. Ltd. (formerly known as M/s Jatadhari Marketing Pvt. Ltd.) (paper book page 44).
- vi) D-Mat statement of M/s Wondrous Marketing Pvt. Ltd. (formerly known as M/s Jatadhari Marketing Pvt. Ltd.) showing the delivery of shares to assessee's account no. (paper book page 45).
- vii) Balance Sheet showing investment in shares and securities proving regular investor. (paper book page 46). -
- viii) High Court Merger order evidencing purchased shares were merged with M/s Kailash Auto Finance Ltd. (paper book pages 47 to 55).
- ix) Merger letter received from M/s Kailash Auto Finance Ltd. showing the statement of shares of M/s Kailash Auto Finance Ltd. in lieu of shares of M/s Careful Projects Advisory Ltd. upon merger. (paper book page 56).
- x) D-Mat statement showing the automatic conversion of shares of M/s Careful Projects Advisory Ltd. to M/s. Kailash Auto Finance Ltd. (paper book page 57-58).

- xi) BSE Notice showing the listing of 38,05,900 equity shares of Re.1/- each as per the Bye-Law 33 of the Rules, Bye Laws and Regulations of the Exchange. (paper book page 59).
- xii) BSE Notice showing the listing and trading permission for equity shares of M/s. Kailash Auto Finance Ltd. (paper book pages 60-61).
- xiii) Time Stamped Contract Notes.95 Contract Notes) showing order no., order time, trade no., STT and other charges gross rate per security of shares purchased were sold through Guinness Securities Ltd. , a SEBI Registered Broker Member of the Bombay Stock Exchange. (paper book pages 62-66).
- xiv) Delivery slips showing the delivery of shares made to the broker M/s. Guinness Securities Ltd. (paper book pages 67-71)
- xv) D-Mat statement showing the delivery of shares to the broker M/s Guinness Securities Ltd. (paper book pages 72).
- xvi) Bank statement showing the amount received on sale of shares from M/s Guinness Securities Ltd., duly highlighted. (paper book page 73)
- xvii) Form No. 10DB (STT Certificate) issued by the broker M/s Guinness Securities Ltd. (paper book page 74).

14. We note from a perusal of the relevant documents to support the purchase and sale transaction the copies of purchase bill (p-40), bank statement showing the payment (p-15), confirmation by the seller of purchased shares (P-42), delivery of shares received in d-mat a/c directly from the seller's d-mat account (p-44), time stamped sale contract note which suffered STT (p-62 to 66), delivery of sold shares to the stock exchange through the registered member (p-67 to 71), receipt of sale proceeds in bank account from stock exchange through registered member (p-73), STT paid certificate (p-74), among other documents. Thus the transaction was carried out as per the stock exchange rules guided by SEBI. We note that the sale was through a genuine member of recognized Bombay Stock Exchange (BSE) and in de-mat form and sale consideration passed on to assessee through proper banking channel.

15. We note that the AO has not refuted any of the documents/evidences substantiating the whole transaction. The AO just relied upon the general study made by investigation

report and we note that the assessee's name nowhere appears in the D.I. Investigation report nor the assessee claims that those alleged shares were sold through so called entry operators.

16. We further note that the AO/Ld. CIT(A) completely ignored the following relevant material facts:

- a) that 2,00,000 shares were purchased on 03.11.2011 from M/s. Jatadhari Marketing Pvt. Ltd. which is a ROC registered company having PAN, and the payment was made through account payee cheque No. 737263 and delivery of purchased shares were received in d-mat account directly.
- b) That the dealing was with respect to the shares of a listed company.
- c) That the company, (having BSE Code 511357) had satisfied all the stringent norms of the SEBI & Bombay Stock Exchange with respect to listing.
- d) That the appellant had acquired the shares in its own name.
- e) That the shares were transacted through HDFC Bank D-Mat account (DP ID: IN300476, Client ID: 40434996) substantiating the aspect of ownership and genuineness of movement of shares under the custodianship of National Securities Depository Limited (NSDL).
- f) That the appellant sold the shares through M/s. Guinness Securities Ltd a SEBI-registered (Regd. No: INB 011146033) broking company.
- g) That the stock-broker is a member of BSE (No: 3027).
- h) That the stock-broking company had to comply with all the requirements with respect to the Companies Act, Securities Contract Act and SEBI Regulations.
- i) That the stock-broking company was not debarred by BSE/SEBI/MCA even as on today from carrying out its operations.

17. We note that the AO in his assessment order, has tried to explain the modus operandi of so called bogus pre-arranged LTCG, in which he goes on to mention *"The operator asks the beneficiary to deliver the unaccounted cash. Once the unaccounted cash has been delivered by the beneficiary the same is then routed by the operator to the books of various paper/bogus companies which ultimately buy the shares belonging to the companies at high*

*prices*". However, we note that AO failed to expose the wrong doing if any on the part of the assessee by bringing out or unraveling any nexus of assessee/broker with the purchase of shares. Further, we note that AO has not brought any evidence/material to suggest that the appellant knows any of the so-called entry operators/broker/paper companies or they have named the appellant in particular, that they have dealt with the appellant. So, it is upon mere surmise and assumption that AO says that assessee's own unaccounted cash have been given to purchasers in order to claim bogus LTCG.

18. We note that in order to create a tax liability in a case of this nature, the AO has to prove and establish the cash trail and the allegations, particularly in respect of the appellant, which is yet to be proved in the instant case. Similar view has been pronounced by Hon'ble Delhi High Court in the case of Pr. CIT vs Jatin Investment (P) Ltd. wherein it was observed "*A transaction cannot be treated as fraudulent if the appellant has furnished the documentary proof and proved the identity of the purchaser and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) of the Act to verify the genuineness of the claim and cannot proceed on surmises. The AO must establish that cash has changed hands. There is no material or evidence even to suggest that the cheques directly or indirectly emanated from the appellant so that it could be said that the appellants' own money was brought back in the guise of sale proceeds*".

19. In the case of CIT vs. Lavanya Land Pvt Ltd. the Hon'ble Bombay High Court ruled that the allegations made by the authorities have to be supported by actual cash passing hands or actually has changed hands.

20. In the case of DOLARRAI HEMANI vs. ITO, this Tribunal held that the fact that the stock is thinly traded & there is unusually high gain, is not sufficient to treat the LTCG as bogus when all the paperwork is in order. The revenue has to bring material on record to support its findings that there has been collusion/connivance between the Broker & the Appellant for the introduction of unaccounted money.

21. In the case of DCIT Vs. Sunita Khemka, ITAT Kolkata ruled that the AO cannot treat a transaction as bogus only the basis of suspicion or surmises. He has to bring material on record to support his findings that there has been a collusion/connivance between the Broker and the Appellant for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and d-mat statements and account payee cheques cannot be treated as bogus.

22. In the case of KAMALA DEVI S DOSHI VS. ITO ITAT MUMBAI, vide it's order dated 22.5.2017 held that statement u/s 131 of the Act implicating Appellant is not sufficient to draw adverse inference where documents in the form of Contract Notes, bank statements, STT payment etc. proves the genuineness of purchase and sale of Penny Stock. Failure to provide cross examination is a fatal error.

23. So, as the facts of the case are very similar, the AO has failed to establish any link and therefore the order is based on surmises, predetermined, solely relying upon the investigation report which is general in nature and no concrete material has been brought on record proving otherwise.

24. We note that the AO in his order has mentioned that SEBI has given adverse report on so many scrips including that of Kailash Auto. Further, we note that SEBI, in its two reports on the said scrip, has named and banned/suspended the beneficiaries in particular. However, we note that the appellant's name does not appear in this list. And that the SEBI did not stop/suspend the trade of sale of M/s. KAFL when assessee sold the scrip. We note that M/s. KAFL was very much listed on the stock exchange and trading in the said scrip was permissible on the stock exchange. Moreover SEBI report against certain beneficiaries of Kailash Auto was in public much after the appellant has sold the shares, and we note that on 29.03.2016 SEBI has revoked the ban on such entities which implies that there was no evidence against them.

25. We note that at Para -18 of the assessment order AO mentions about the role of brokers in allowing entry operators to register their bogus companies as their client and also

certain admission made by some brokers about their involvement in so called Jama kharchi companies. In the said para some names of few brokers and Jama Kharchi operators have been mentioned. However, we note that the name of assessee's broker, M/s. Guinness Securities Ltd., through whom the assessee sold his shares, does not appear at all in that report.

26. We note that M/ s Guinness Securities Ltd was not named in the assessment order / D.I. report as a broker who was involved in price rigging of penny stocks. On the other hand, we note that M/s. Guinness Securities Ltd is a SEBI registered stock broking company having registration no. INB 011146033 and also is a member of Bombay Stock Exchange having membership no. 3027; Neither during the time of execution of the contract in FY 2013-14 nor even today, this stock-broking company was suspended by SEBI or BSE on any charge of irregularities like price rigging etc as alleged by the AO. We note that AO failed to bring on record any material to connect the assessee to any of the alleged entry operators/ brokers who are a part of this so called price rigging group or LTCG Generator Group.

27. We note that in an identical/similar case, wherein the AO made addition of the LTCG claim made on sale of M/s. KAFL scrips on similar reasoning based on the SEBI interim report, investigation report of the Wing of the Department and certain statements recorded by the Department in the case of Sanjiv Shroff Vs. ACIT in ITA No. 1197/Kol/2018 Dated 02,01.2019 wherein the same Bench observed as under and gave relief to the assessee:

“We note that shares of M/s. KAFL were sold by assessee through recognized broker in a recognized Bombay Stock Exchange. The details of such sale and contract note have been submitted before AO/Ld. CIT(A). We take note that when the transactions happened in the Stock exchange, the seller who sells his shares on the stock exchange does not know who purchases shares. According to our knowledge, the shares are sold and bought in an electronic mode on the computers by the brokers and there is also no direct contact at any level even between the brokers. We note that as and when any shares are offered for sale in the stock exchange platform, any one of the thousands of brokers registered with the stock exchange is at liberty to purchase it. As far as our understanding, the selling broker does not even know who the purchasing broker is. This is how the SEBI keeps a strict control over the transactions taking place in recognized stock exchanges. Unless there is a evidence to show that there is a breach in the aforesaid process which fact has been unearthed by meticulous investigation, we are of the opinion that the unscrupulous actions of few players exploiting the loopholes of the Stock

Exchange cannot be the basis to paint the entire sale/purchase of a scrip like that of M/s. KAFL as bogus without bringing out adverse material specifically against the assessee.

17. The fact of holding the shares of M/s. KAFL in the D-mat account cannot be disputed. Further, the Assessing Officer has not even disputed the existence of the D-mat account and shares credited in the D-mat account of the assessee. Therefore, once, the holding of shares in D-mat account cannot be disputed then the transaction cannot be held as bogus. The AO has not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee, therefore, once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of statement of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani recorded by the Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee.

18. The assessee has requested the cross examination of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani which was not provided to the assessee by the AO. Thus, in view of the decision of Hon'ble Supreme Court in case of [CCE vs. Andaman Timber Industries](#) 127 DTR 241(SC) the assessment based on statement without giving an opportunity to assessee to cross examine the maker of the adverse statements relied on by the AO, is not sustainable in law. We find that the statement cannot be used by the AO without giving an opportunity to cross examination of Shri Sunil Dokani, Shri Bidyoot Saral, Shri Narendra Basin and Shri Amit Dokani. Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special of the Tribunal in case of *GTC Industries vs. ACIT* (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in par 46 as under:-

*“46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that*

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

19. Since, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Rajasthan High Court dated 11-09-2017 in case of [CIT vs. Smt. Pooja Agrawal](#) [ ITA no 385/2011 ] has upheld the finding of the Tribunal on this issue in para 12 as under:-

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

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

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

*the transaction in question in statement of Sh. Pawan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were non genuine. Considering all these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) [ ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."*

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

20. We note that the sale of shares of M/s. KAFL which was dematerIALIZED in Demat account has taken place through recognised stock exchange and assessee received money through banking channel. So, assessee has explained the nature and source of the money with supporting documents and thus has discharged the onus casted upon him by producing the relevant documents mentioned in para 15 (supra), accordingly, the question of treating the said gain as unexplained cash credit under section 68 of the Act cannot arise unless the AO is able to find fault/infirmity with the same. We note that the source of the receipt of the amount has been explained and the transaction in respect of which the said amount has been received by assessee has not been cancelled by the stock exchange/SEBI. So, it is difficult to countenance the action of AO/Ld. CIT(A) in the aforesaid facts and circumstances explained above.

21. Even assuming that the brokers may have done some manipulation then also the assessee cannot be held liable for the illegal action of the brokers when the entire transactions have been carried out through banking channels duly recorded in the Demat accounts with a Government depository and traded on the stock exchange unless specific evidence emerges that the assessee was in hand in gloves with the broker for committing the unscrupulous activity to launder his own money in the guise of LTCG is brought on record by the AO.

22. There is also nothing on record which could suggest that the assessee gave his own cash and got cheque from the alleged brokers/buyers. The assessment is based upon some third parties statements recorded behind the back of the assessee and the assessee has not been allowed to cross examine those persons, so the statements even if adverse against the assessee cannot be relied upon by the AO to draw adverse inference against the assessee in the light of the documents to substantiate the claim of LTCG, which has not been found fault with by the AO.

23. Let us look at certain judicial decisions on similar facts:-

24. The case of the assessee's is similar to the decision of Hon'ble Bombay High Court, Nagpur Bench in CIT vs. Smt. Jamnadevi Agrawal & Ors. dated 23rd September, 2010 reported in (2010) 328 ITR 656 wherein it was held that:

*"The fact that the assesseees in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary ITA Nos. 93 to 99/RPR/2014 & C.O. Nos. 12 to 18/RPR/2014 . A.Y. 2004-05 10 produced to establish the genuineness of the claim. From the documents produced, it is seen that the shares in question were in fact purchased by the assesseees on the*

*respective dates and the company has confirmed to have handed over the shares purchased by the assesseees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assesseees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assesseees. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions. The statement of the broker P that the transactions with the H Group were bogus has been demonstrated to be wrong by producing documentary evidence to the effect that the shares sold by the assesseees were in consonance with the market price. On perusal of those documentary evidence, the Tribunal has arrived at a finding of fact that the transactions were genuine. Nothing is brought on record to show that the findings recorded by the Tribunal are contrary to the documentary evidence on record. The Tribunal has further recorded a finding of fact that the cash credits in the bank accounts of some of the buyers of shares cannot be linked to the assesseees. Moreover, in the light of the documentary evidence adduced to show that the shares purchased and sold by the assesseees were in conformity with the market price, the Tribunal recorded a finding of fact that the cash credits in the buyers' bank accounts cannot be attributed to the assesseees. No fault can be found with the above finding recorded by the Tribunal. Therefore, the decision of the Tribunal is based on finding of facts. No substantial question of law arises from the order of the Tribunal.—Asstt. CIT vs. Kamal Kumar S. Agrawal (Indl.) & Ors. (2010) 41 DTR (Nag) (Trib) 105: (2010) 133 TTJ (Nag) 818 affirmed; Sumati Dayal vs. CIT (1995) 125 CTR (SC) 124: (1995) 80 Taxman 89 (SC) distinguished.”*

*12. The Hon'ble High Court of Rajasthan in CIT vs. Smt. Pushpa Malpani - reported in (2011) 242 CTR (Raj.) 559; (2011) 49 DTR 312 dismissed the appeal of department observing 'Whether or not there was sale of shares and receipt of consideration thereof on appreciated value is essentially a question of fact. CIT(A) and Tribunal have both given reasons in support of their findings and have found that at the time of transactions, the broker in question was not banned by SEBI and that assessee had produced copies of purchase bills, contract number share certificate, application for transfer of share certificate to demat account along with copies of holding statement in demat account, balance sheet as on 31st March, 2003, sale bill, bank account, demat account and official report and quotations, of Calcutta Stock Exchange Association Ltd. on 23rd July, 2003. Therefore, 'the present appeal does not raise any question of law, much less any substantial question of law.’*

25. The Hon'ble High Court of Punjab and Haryana in the case of Anupam Kapoor 299 ITR 0179 has held as under:-

*“The Tribunal on the basis of the material on record, held that purchase contract note, contract note for sales, distinctive numbers of shares purchased and sold, copy of share certificates and the quotation of shares on the date of purchase and sale were sufficient material to show that the transaction was not bogus but a genuine transaction. The purchase of shares was made on 28th April, 1993 i.e. asst. yr. 1993-94 and that assessment was accepted by the Department and there was no challenge to the purchase of shares in that year. It was also placed before the relevant AO as well as before the Tribunal that the sale proceeds have been accounted for in the accounts of the assessee and were received through account payee cheque. The Tribunal was right in rejecting the appeal of the Revenue by holding that the assessee was simply a shareholder of the company. He had made investment in a company in which he was neither a director nor was he in control of the company. The assessee had taken shares from the market, the shares were listed and the transaction took place through a registered broker of the stock exchange. There was no material before the AO, which could have lead to a conclusion that the transaction was simpliciter a device to camouflage activities, to defraud the Revenue. No such presumption could be drawn by the AO merely on surmises and conjectures. In the absence of any cogent material in this regard, having been placed on record, the AO could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the AO. --Therefore, the AO could not have added income, which was rightly deleted*

*by the CIT(A) as well as the Tribunal. It is settled law that suspicion, howsoever strong cannot take the place of legal proof. Consequently, no question of law, much less a substantial question of law, arises for adjudication.— C. Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC), M.O. Thomakutty vs. CIT (.1958) 34 ITR 501 (Ker)) and Mukand Singh vs. Sales Tax Tribunal (1998) 107 STC 300 (Punjab) relied on; Umacharan Shaw & Bros. vs. CIT (1959) 37 ITR 271 (SC) Applied; Jaspal Singh vs. CIT (2006) 205 CTR (P & H) 624 distinguished”*

26. The Co-ordinate Bench of Ahmedabad in ITA Nos. 501 & 502/Ahd/2016 had the occasion to consider a similar issue which was wherein the assessment was framed on the strength of the statement of a broker. The relevant part reads as under:-

“14. The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon’ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

“6. *The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders.*”

15. The Hon’ble Apex Court held as under:-

“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 exfactory 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.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

*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.*

*We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”*

16. On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.

17. Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.

18. In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.

19. Accordingly, we direct the A.O. to treat the gains arising out of the sale of shares under the head capital gains- “Short Term” or “Long Term” as the case may be. The other grievance of the assessee becomes infructuous.”

27. The assessee has furnished all evidences in support of the claim of the assessee that it earned LTCG on transactions of his investment in shares. The purchase of shares had been accepted by the AO in the year of its acquisition and thereafter until the same were sold. The off market transaction for purchase of shares is not illegal as was held by the decision of *Co-ordinate Bench of this Tribunal in the case of Dolarrai Hemani vs. ITO in ITA No. 19/Kol/2014 dated 2.12.2016* and *the decision by Hon'ble Calcutta High court in PCIT Vs. BLB Cables & Conductors Pvt. Ltd. in ITAT No. 78 of 2017 dated 19.06.2018 wherein all the transactions took place off market and the loss on commodity exchange was allowed in favour of assessee.* The transactions were all through account payee cheques and reflected in the books of accounts. The purchase of shares and the sale of shares were also reflected in Demat account statements. The sale of shares suffered STT, brokerage etc. In the facts and circumstances of the case, it cannot be held that the transactions were bogus. The following judgments of Hon'ble Jurisdictional High Court:-

(i) The Hon'ble Calcutta High Court in the case of [Principal Commissioner Of Income vs M/S. Blb Cables And Conductors](#); ITAT No.78 of 2017, GA No.747 of 2017; dt. 19 June, 2018, had upheld the order of the Tribunal by observing as follows:-

"4. We have heard both the side and perused the materials available on record. The ld. AR submitted two papers books. First book is running in pages no. 1 to 88 and 2nd paper book is running in pages 1 to 34. Before us the ld. AR submitted that the order of the AO is silent about the date from which the broker was expelled.

There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.

4.1 From the aforesaid discussion we find that the assessee has incurred losses from the off market commodity transactions and the AO held such loss as bogus and inadmissible in the eyes of the law. The same loss was also confirmed by the ld. CIT(A). However 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."

**ii) 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.

**iii) 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.

**iv) 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.

**v) 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.

**vi) 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.

**vii) 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.

28. We note that since the purchase and sale transactions are supported and evidenced by Bills, Contract Notes, Demat statements and bank statements etc., and when the transactions of purchase of shares were accepted by the Id AO in earlier years, the same could not be treated as bogus simply on the basis of some reports of the Investigation Wing and/or the orders of SEBI and/or the statements of third parties. In support of the aforesaid submissions, the Id AR, in addition to the aforesaid judgements, has referred to and relied on the following cases:-

- (i) *Baijnath Agarwal vs. ACIT* – [2010] 40 SOT 475 (Agra (TM))
- (ii) *ITO vs. Bibi Rani Bansal* – [2011] 44 SOT 500 (Agra) (TM)
- (iii) *ITO vs. Ashok Kumar Bansal* – ITA No. 289/Agra/2009 (Agra ITAT)
- (iv) *ACIT vs. Amita Agarwal & Others* – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)
- (v) *Rita Devi & Others vs. DCIT* – IT(SS)A Nos. 22-26/Kol/2p11 (Kol ITAT)
- (vi) *Surya Prakash Toshniwal vs. ITO* – ITA No. 1213/Kol/2016 (Kol ITAT)
- (vii) *Sunita Jain vs. ITO* – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)
- (viii) *Ms. Farrah Marker vs. ITO* – ITA No. 3801/Mum/2011 (Mumbai ITAT)
- (ix) *Anil Nandkishore Goyal vs. ACIT* – ITA Nos. 1256/PN/2012 (Pune ITAT)
- (x) *CIT vs. Sudeep Goenka* – [2013] 29 taxmann.com 402 (Allahabad HC)
- (xi) *CIT vs. Udit Narain Agarwal* – [2013] 29 taxmann.com 76 (Allahabad HC)
- (xii) *CIT vs. Jamnadevi Agarwal* [2012] 20 taxmann.com 529 (Bombay HC)
- (xiii) *CIT vs. Himani M. Vakil* – [2014] 41 taxmann.com 425 (Gujarat HC)
- (xiv) *CIT vs. Maheshchandra G. Vakil* – [2013] 40 taxmann.com 326 (Gujarat HC)
- (xv) *CIT vs. Sumitra Devi* [2014] 49 Taxmann.com 37 (Rajasthan HC)
- (xvi) *Ganeshmull Bijay Singh Baid HUF vs. DCIT* – ITA Nos. 544/Kol/2013 (Kolkata ITAT)
- (xvii) *Meena Devi Gupta & Others vs. ACIT* – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)
- (xviii) *Manish Kumar Baid* ITA 1236/Kol/2017 (Kolkata ITAT)
- (xix) *Mahendra Kumar Baid* ITA 1237/Kol/2017 (Kolkata ITAT)

29. The Id AR also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of *Hon'ble Supreme Court in the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be

strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The Id AR submitted that similar view has been taken in the following judgments while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

(i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*

(ii) *ACIT vs. J. C. Agarwal HUF – ITYA No. 32/Agr/2007 (Agra ITAT)*

30. Moreover it was submitted before us by Id AR that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in CSE. The Id AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit under section 10(38) of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

(i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*

(ii) *ACIT vs. Amita Agarwal & Others - ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*

(iii) *Lalit Mohan Jalan (HUF) vs. ACIT – ITA No. 693/Kol/2009 (Kol ITAT)*

(iv) *Mukesh R. Marolia vs. Addl. CIT – [2006] 6 SOT 247 (Mum)*

31. We note that the Id. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the Id. D.R, we find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the Id. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

32. It is clear from the above that the facts of the case of the assessee are identical with the facts in the cases wherein the co-ordinate bench of the Tribunal has deleted the addition and allowed the claim of LTCG on sale of shares of M/s KAFL. We, therefore, respectfully following the same, and set aside the order of Ld. CIT(A) and direct the AO not to treat the long term capital as bogus and delete the consequential addition.

33. The next issue in confirming the addition of Rs.1,83,020/- as unexplained expenditure towards commission charges of sale of such shares by the operator. We have already held that the transactions relating to LTCG were genuine and not the accommodation entries as alleged by the AO. Consequently the addition of Rs.1,83,020/- is hereby directed to be deleted. We accordingly hold that the issue is allowed in favour of the assessee.”

28. In the light of the documents filed by the assessee before the AO/Ld. CIT(A) and before us, which could not be controverted by any material by AO, so respectfully following the ratio laid by the Hon'ble jurisdictional High Court and other High Courts and the ratio laid by the Hon'ble Supreme Court and this Tribunal, we allow the claim

of the assessee in respect of Long Term Capital Gain in respect of sale of shares of M/s. KAFL and direct deletion of addition of Rs.76,34,233/-. Ground of appeal of assessee challenging the addition made on this issue is allowed.

29. Ground no. 5 is general in nature, therefore, it is dismissed.

30. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 16/01/2019

Sd/-  
(J. Sudhakar Reddy)  
Accountant Member

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

Dated: 16th January, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – L. K. Prahladka, HUFC/o Salarpuria Jajodia & Co., 7, C. R. Avenue, Kolkata-700072.
- 2 Respondent –ITO, Ward-35(3), Kolkata.
- 3 CIT(A)-10, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary