

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

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

**ITA No.2417/Kol/2017**  
Assessment Year:2013-14

Shruti Mohta Calcutta Stock Exchange Building, Room No.4C, 2 <sup>nd</sup> Floor, 7, Lyons Range, Kolkata-700001 [PAN No.AJHPM 7128 H]	<u>बनाम</u> / V/s.	DCIT, Circle-36 Aayaka Bhawan, Poorva, 8 <sup>th</sup> Floor, 110, Shanti Pally, Kolkata- 107
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

**ITA No.2418 & 2469/Kol/2017**  
Assessment Year:2014-15

Shruti Mohta Calcutta Stock Exchange Building, Room No.4C, 2 <sup>nd</sup> Floor, 7, Lyons Range, Kolkata-700001	<u>बनाम</u> / V/s.	ACIT, Circle-36 Aayaka Bhawan, Poorva, 8 <sup>th</sup> Floor, 110, Shanti Pally, Kolkata- 107
ACIT, Circle-36 Aayakar Bhawan, Poorva, 8 <sup>th</sup> Floor 110, Shantipally, Kolkata-107	<u>बनाम</u> / V/s.	Smt. Shruti Mohta Shri Raghvendra Mohta, Calcutta Stock Exchange, Room-4C, 2 <sup>nd</sup> Floor, 7, Lyons Range, Kolkata-001
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri P.J. Bhide, FCA
राजस्व की ओर से/By Revenue	Shri C.J. Singh, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	22-01-2019
घोषणा की तारीख/Date of Pronouncement	31-01-2019

**आदेश /ORDER**

PER S.S.Godara, Judicial Member:-

These set of three appeal(s) pertains to a single taxpayer Smt. Shruti Mohta. The assessee has filed her former appeal ITA No.2417/Kol/2017 for assessment year 2013-14 against the order dated 11.08.2017 of Commissioner of Income Tax (Appeals)-10, Kolkata's passed in case No. 38 CIT(A)-10/Cir-36/16-17/Kol partly affirming the Assessing Officer's action invoking Sec. 14A r.w.s. 8D disallowance of ₹27,89,404/- to the extent of ₹6,54,128/-. Her latter appeal and Revenue's cross-appeal ITA No. 2418 & 2469/Kol/2017 for assessment year 2014-15 are directed against the very CIT(A)'s order dated 26.09.2017 passed in case No.472/CIT(A)-10/Cir-36/2016-17/Kol affirming the Assessing Officer's action treating the former's LTCG of ₹66,72,894/- to be unexplained cash credits along with commission disallowance / addition thereupon amounting to ₹2,39,595/- and restricting sec. 14A r.w.s 8D disallowance from ₹49,48,378/- to ₹1,30,597/- only. Relevant proceedings in both assessment year(s) are u/s143(3) of the Income Tax Act, 1961; in short 'the Act'

Heard both the parties. Case file(s) perused.

2. We notice at the outset that assessee's former ITA No.2417/Kol/2017 suffers one day's delay in filing. She has placed on record her condonation petition dated 18.12.2017 attributing reasons thereof to communication gap with the arguing counsel and non-compliance of necessary documents within the limitation prescribed. The Revenue is very fair in not disputing correctness of these solemn averments. We thus condone the impugned one day's delay in filing of the instant appeal as neither intentional nor deliberate. This case is now taken up for adjudication on merit.

3. A perusal of all these case file(s) reveals that both parties raise identical issue of correctness of sec. 14A r.w.s. 8D disallowance with regard to taxpayer having derived exempt income of ₹2,64,701/- in former and ₹2,58,154/- in latter assessment year. The Assessing Officer invoked Rule 8D disallowance to compute the corresponding disallowance to the tune of ₹27,89,404/- in former and ₹49,48,378/- in latter assessment year. The CIT(A) has restricted the same to ₹6,54,128/- and

₹11,30,593/-; respectively. His identical lower appellate discussion in former assessment year reads as under:-

*“4. I have duly considered the action of the Ld. AO as well as the submissions made out by the se-appellant. In the impugned order, the Ld. AO observed that the appellant had derived tax free dividend income during the year but no expenses were attributed to earning of such income. The Ld. AO therefore required the appellant to explain as to why provision of Rule 8D should not be invoked. The appellant furnished its explanation vide letter dated 18.12.2015 which has been elaborately set out in the impugned order. The main thrust of the appellant’s argument before the AO was that the own funds was sufficient to cover the cost of investments and therefore no interest expenditure was to be disallowed. No explanation appears to have been furnished by the appellant with regard to applicability of Rule 8D(2)(iii) before the AO. The Ld. AO thereafter dealt with in great detail the explanation furnished by the appellant and recorded his dissatisfaction with reference to the claim made by the ape. The Ld. AO found that the appellant held shares by way of investments and stock-in-trade, both of which yielded exempt income. it was further noted that the aggregate cost of shares held by the appellant exceeded her own funds and therefore the inevitable conclusion was that borrowed funds were utilized to purchase shares by way of investments & stock-in-trade. Referring to the decision of ITAT, Delhi (SB) in the case of **Cheminvest Ltd Vs. ITO (121 ITD 318) and CBDT Circular No. 5/2014**, the Ld. AO rejected the assessee’s explanation and invoked and applied Rule 8D.*

*5. From the submissions of the Ld. AR, I find that the appellant has put forth two-fold contention. First being that the provision of Section 14A read with Rule 8D do not apply to shares held by way of stock-in-trade. The second contention is that the major portion of loan was utilized to purchase shares by way of stock-in-trade and the own capital balance of Rs.11,034,672/- was utilized towards acquisition of investments and therefore in that view of the matter no interest disallowance was warranted under Rule 8D(2)(ii) with reference to the investments.*

*6. With regard to the first claim that provision of Section 14A do not apply to stock-in-trade, I find that the issue now stands squarely covered by the judgment of the Hon’ble Calcutta High Court in the case of **CIT Vs GKK Capital Markets Ltd (GA No. 1150 of 2015) dated 10.02.2017** wherein the High Court dismissed the Revenue’s appeal against the Hon’ble ITAT’s order holding that where the assessee holds share by way of stock-in-trade, the provision of Section 14A is not applicable. Similar view has also been expressed by Punjab & Haryana High Court in the case of **Principal CIT –vs- State Bank of Patiala, reported in 391 ITR 218**. In view of the forgoing and respectfully following the judgment of Hon’ble jurisdictional Calcutta High Court and Hon’ble Punjab & Haryana High Court, I am of the considered view that the Ld. wrongly invoked and applied Rule 8D to shares held by way of stock-in-trade.*

7. As regards the question of disallowance of proportionate interest expense under Rule 8D(2)(ii) with reference to the shares held by way of investments, I am not inclined to agree with the submissions of the Ld. AR of the appellant. In the written submissions, the Ld. AR has made a general statement that separate books of account are maintained by the appellant but no such separate books appears to have been furnished before the Ld. AO nor the same was produce during the appellate proceedings. In absence of separate books of account, it was not possible to verify the appellant's claim and identify the exact allocation and utilization of borrowed funds between shares held by way of stock-in-trade and investments. The Ld. AR has merely made a sweeping remark that loans were utilized to purchase shares in trading business and not investments. However such statement is not backed by any evidence or proof. Instead, from the jurisdictional facts, I note that the own funds of the appellant as on 31.03.2013 was Rs.11,034,672/- and the investments in shares as well as stock-in-trade was Rs.4,16,15,586/-. This clearly shows that own funds were not even remotely sufficient to cover the cost of shares which were capable of yielding exempt income. Form the audited accounts, it is further discernible that the own funds of the appellant had substantially reduced from Rs.22,694/-, 349/- to Rs.11,034,672/- whereas the borrowed funds had increased from Rs.30,044,839/- to Rs.66,799,004/-. Correspondingly the investments had also undergone an increase of Rs.70,64,685/- [**Rs.1,043,891 – Rs.3,979,206**]. In absence of any cash flow statement or separate books, the only inference from these jurisdictional facts is that the borrowed funds were utilized to make investment in shares. For the reasons set out in the foregoing therefore, I uphold the Ld. AO's action of disallowing proportionate interest under Rule 8D(2)(ii) with reference to investments.

8. In view of the above, the disallowance under Section 14A read with Rule 8D(2)(ii) is re-computed as follows:

$$= (\text{Interest}) \text{ Rs.}53,78,617 \times \frac{(\text{Avg. value of investments}) 75,11,548}{(\text{Avg. of total assets}) 6,55,26,530}$$
$$= \text{Rs.}6,16,571/-$$

9. As regards applicability of Rule 8D(2)(iii) to shares held by way of investments, impugned order find that the appellant neither raised any objection before the AO nor any submission for explanation was put forth in this regard in the appellate proceedings. Accordingly the disallowance of administrative expenditure made under Rule 8D(2)(iii) with reference to investments is upheld. Accordingly the disallowance under Rule 8D(2)(iii) s directed to be restricted to:

$$= 0.5\% \text{ of } 75,11,548 \text{ (Avg value of investments)} = \text{Rs.}37,557/-$$

10. In view of the above, the Ld. AO is directed to restrict the disallowance of interest under Rule 8D(2)(ii) to Rs.6,16,571/- and administrative expenses under Rule 8D(2)(iii) to Rs.37,557/-. The appellant therefore gets partial relief to the extent of Rs.21,35,276/-. Ground Nos. 1 & 3 are therefore **partly allowed**.

4. We have given our thoughtful consideration to rival contentions. The assessee's only case before us is that both the lower authorities ought to have restricted the impugned sec. 14A r.w.s. Rule 8D disallowance to the extent of exempt income only as per hon'ble Delhi high court's judgment in *Joint Investments Pvt. Ltd. Vs. CIT* (2015) 372 ITR 694 (Del) and *PCIT vs. M/s Empire Package Pvt. Ltd.* (2016) 286 CTR 4 57 (P&H). The Revenue's sole argument on the other hand is that CIT(A) has erred in law in holding that sec. 14A r.w.s. Rule 8D disallowance does not apply in a case of investments held as "stock-in-trade". We find that the Revenue's sole legal plea carries merit as per hon'ble apex court's latest decision in *Maxopp Investments Ltd. vs. CIT* (2018) 91 taxmann.com 154 (SC). We therefore reject assessee's arguments challenging application of sec 14A in principle. We further find that the taxpayer's grievance seeking to restrict the impugned disallowance to the extent of exempt income also carries substance. The foregoing judicial precedents make it clear that the impugned sec.14A r.w.s. Rule 8D disallowance cannot exceed the exempt income amount itself. The Revenue has not quoted any case law to the contrary. We therefore accept assessee's substantive ground in both assessment year(s) and direct the Assessing Officer to restrict sec. 14A r.w.s Rule 8D disallowance to the extent exempt income only reading figure(s) of ₹2,64,701/- and ₹2,58,154/-; respectively. The assessee gets part relief in its corresponding substantive ground in both appeal(s). Her former appeal ITA 2417/Kol/2017 raising these sole substantive issue is partly accepted. The Revenue's cross appeal ITA No.2469/Kol/2017 in assessment year 2014-15 raising the very sole substantive ground stand declined on merits.

5. We all now left with assessee's former substantive grievance in the latter appeal ITA No.2418/Kol/2017 seeking to reverse both the lower authorities action treating its LTCG of ₹66,72,894/- as unexplained cash credits lacking genuineness / creditworthiness followed by commission disallowance / addition thereupon to the tune of ₹2,39,595/-. The assessee had claimed to have purchased 30,000 shares of Ashika Credit Capital Ltd. on 13.04.2012 for ₹18.81 lac. She therefore sold the same shares to various parties on various dates between 28.11.2012 and 20.12.2013 for ₹66,72,894/- resulting in LTCG of ₹47,91,894/-. The Assessing Officer dealt with the

said scrip's balance-sheet, profit and loss a/c, assets, business activities, stock price during holding period vis-à-vis the stock exchange's trading pattern as well as SEBI's action taken in case of fictitious LTCG cases to conclude that the same lacked of genuineness / creditworthiness. He held in assessment order dated 29.12.2016 that the department had carried out search / survey action in case of various entry operators which indicated that many investors alike assessee have colluded with the corresponding promoters in artificial rigging of script prices giving rise to astronomical capital gains. He was of the view that all this circumstantial evidence was sufficient to treat assessee's LTCG in issue to be unexplained cash credits u/s 68 of the Act.

6. The CIT(A) has confirmed the Assessing Officer's findings as follows:-

“06, DECISION:[ Grounds 1 and 2 )

1. I have carefully considered the action of the Ld. AO in making an addition of Rs.66,72,898/-, as unexplained credit u/s 68 of the Income Tax Act, 1961. After an exhaustive discussion and elaborating the factual and legal matrix, I find that the Ld. AO has held that the claim of long Term Capital Gain u/s 10(38) was to be denied to the assessee- individual, and was to be assessed as unexplained cash credit u/s 68 of the IT Act. The ld. AO has placed on record the entire gamut of findings, and there is, in my considered view no further requirement for elaboration from this forum. In my view of the facts there are elaborate and direct evidence to clearly indicate that that the entire transactions undertaken by the appellant were merely accommodation entries taken for the purpose of such bogus long Term Capital Gain made by the assessee during the previous year. It is apparent that, in the grab of alleged LTCG, the assessee "earned" exempt income of Rs,66,72,894/-, and huge amount brought into the books without paying a single rupee of tax. The ld. AO has very carefully analyzed the information received from the Investigation Wing, and has recorded the noteworthy features of the Company whose shares were purchased I sold by the assessee-individual. The economic parameters of the said company over the impugned period has also been brought on record, in the analysis. The rise and fall of the prices as recorded had been brought out by the Ld. AO to be artificial and not commensurate with the normal market, as the Company had no business at all. The Ld. AO has also brought forth information that the Regulatory Authority SEBI has also after investigating such abnormal price increases of certain stocks investigated the matter and suspended trading In certain scripts. It is very dear that the prices of these scripts sharply after the offloading of these scripts by pre-arranged and manipulated transactions. The entire transactions were carried out on the Stock Exchange to give it a color of real transactions.

Consequently, I find that the Ld. AO has also rightly made another corresponding addition of unexplained expenditure of Rs2,39,59S/- u/s 69C of the Income Tax Act, 1961, being an account of commission expenses paid by the appellant to procure the impugned accommodation entries.

2. I also find that all the submissions made by the appellant during the course of the appeal point towards the elaborate documentation, meaning thereby that the appellant has produced papers relating to application for the shares, the allotment of the shares, the Share certificates, payments by cheque and the necessary papers filed before the Registrar of companies, where the name of the assessee has been reflected as a shareholder. The appellant has also filed proof of amalgamation of the companies wherein the shareholding has changed hands. It is also the contention of the appellant that It has provided copies of the bank statement, bank contract notes and delivery instructions to the broker by way of proof that all these transactions were genuine. However, in my considered view of the matter, It is precisely tills elaborate paperwork that strengthens the matter relating to the bogus benefit of the LTCG, which dearly has been schemed, pre-planned and executed with mala fide intelligence and precision. Therefore all these papers are mere documents and not any evidence. The whole gamut of transactions are unnatural and highly suspicious, and therefore the rules of SUSPICIOUS TRANSACTIONS ought to apply in the instant case. There are grave doubts in the story propounded by the assessee before the authorities below. None of the material produced before the Ld. AO by the assessee-appellant are enough to justify the humongous gains accruing to the assessee by way of Capital Gains. In my considered view the banking documents are mere self serving recitals. The law in the matter of self- serving recitals has been long established by the Hon'ble apex Court, in the case of CIT vs P. Mohankala 291 ITR 278, the Hon'ble Supreme Court held that "the money came by way (if bank cheque and was Paid through the process of banking transactions was not by Itself of any consequences." The burden of proof is on the assessee In the matter of justification of receipts which are of suspicious and dubious nature. In the case of CIT vs, Durga Prasad More (1971) 82 ITR 540 (SC) their Lordships laying down the significance of human probabilities held as under: "in a case where a party relied on self serving recitals in documents; it was for that party to establish the truth of those recitals: the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals." Similarly in the case of Sumati Dayal Vs, CIT (1995) 214 ITR 801 (SC), their Lordships held as under: "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. In such a case, there is prima facie, evidence against the assessee viz., the receipt of money, and if he fails to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature.:" In the case of Sajjan Das & Sons vs. CIT (2003) 264 ITR 435 (Delhi), their Lordships of the High Court of Delhi, while considering a case in which gifts were received by the assessee through banking channels laid importance on the capacity of the donor for making the gift and his identity as well as importance of relationship between the donor and done in determination of genuineness of gift held as under: "That a mere identification of the donor and showing the movement of the gift amount through banking channels was not sufficient to prove the genuineness of the gift. Since the claim of the gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it had actually been received as a gift from the donor." In my considered view wherever document are relied upon they should pass the test of normal behavior of the assessee in the course of business viz., human conduct, preponderance of probability and surrounding

circumstances. In my considered view, even if documentary evidence is produced, the same must pass the test of human probabilities and surrounding circumstances if they do not, then addition justified. Reliance on such matters is placed on the case of Smt. Phoolwati Devi 314 ITR (AT) 1 (Del).

3. It must also be stated here that in Commissioner of Income Tax vs NR Portfolio Pvt Ltd on 22 November, 2013, the Hon'ble Delhi High court has held....

“The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the Assessing Officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particular. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witness. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the Assessing Officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the Assessing Officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons from whom confirmation or verification is enquired. The verification and investigation should be one with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee the ultimate finding of the Assessing Officer should reflect due application of mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the Assessing Officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings, Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant suspects. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken.”

4. In this connection, I would also wish to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y 1983-84) in the case of M/s Mont Blane Properties and Industries Pvt. Ltd., which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal held that the word '**evidence**' as used in sec. 143(3) covered circumstantial evidence also. The word '**evidence**' as used in sec. 143(3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word '**evidence**' might recall the oral and documentary evidence as may be admissible under the India Evidence Act the use of word '**material**' in Sec. 143(3) showed that the Assessing Officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial notice of certain facts which need not be proved before them. The plain reading of section 142 and 143 clearly suggest that the Assessing Officer may also act on the material gathered by him. The word '**material**' clearly shows that the Assessing Officer is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in court of law.

5. The Hon'ble Supreme Court in CIT v. Durga Prasad More [1971] 82 ITR 540 at pages 545-547 made a reference to the test of human probabilities in the following fact situation:-

".... .. It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent 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 those recitals. Otherwise it will be very easy to make self-serving statement in document either executed or taken by a party and rely on those recitals. If all that an assessee who want 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 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....

6. It is a well settled principle of law as declared by the Hon'ble Supreme Court in the case of Sumati Dayal Vs CIT (214 ITR 801) (SC) that the true nature of transactions have to be ascertained in the light of surrounding circumstances. It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability in determination of matters under taxing statutes. In the present case, it is clear that apparent is not the real as evidenced from the investigation report. Further, the Hon'ble Supreme Court, in the case of Chuhar Mal V CIT (1988) 172 ITR 250, highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills v. CIT (1954) 261 ITR 775. The Hon'ble Supreme Court, in the case of Chuhar Mal V CIT (supra) held that what was meant by saying that evidence Act did not apply to the proceedings under Income-tax Act, 1961, was that the rigors of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of

invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex court that all that Section 10 of the Evidence Act, 1872 did, was to embody a salutary principle of common law, jurisprudence viz., where a person was found in possessing anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

7. I am in agreement with the Ld. AO that the transactions relating to the claim of LTG as made by the Ld. AO come within the ambit of "suspicious transactions, and therefore the rules of suspicious transactions would apply to the case. Payment through Banks, performance through stock exchange and other such features are only apparent features. The real features are the manipulated and abnormal price of offload and the sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld. AO fall in the realm of "suspicious" and "dubious" transactions. The Ld. AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of Win Chadha Vs CIT (International Taxation) in ITA No.30888 & 3107/Del/2005, the Hon'ble Delhi ITAT "B" Bench has observed, on 31.12.2010 as under:-

"SUSPICIOUS AND DUBIOUS TRANSACTIONS HOW TO BE DEALT WITH:

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

6.12 In the case of Sumati Dayala V CIT (1995) 8900 Taxman 89 (SC), the Hon'ble Supreme Court has dealt with the relevant factors of human conduct, preponderance of probabilities and surrounding circumstances, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:

"... It is, no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act *lis* upon the assessee. But in view of section 68, where any sum is found credited in the books of assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is *prima facie* evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being un-rebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.

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

appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence.”

#### CIRCUMSTANTIAL EVIDENCE HOW TO BE USED

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

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

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

6.15. The Assessee’s technical contentions about admissibility and reliance on material available on the Assessing Officer's record are in the nature of contentions challenging criminal or civil liabilities in a court of law. we are dealing with a process of adjudication of assessee tax liability. i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon'ble Supreme Court in the case of S.S. Gdgil (supra) no ‘lis’ is involved in adjudication of tax liability. The Assessee’s contention that there was no new material before the AO after the CIT(A)’s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, in a sensitive matter like this, even a

single clue or revelation can be of great importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of investigation agencies like CBI, DRI, ED whose were in the offing, as the relevant investigation were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf. The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that it cannot be relied on by the AO, are devoid of any merit and re rejected outright...."

In view of the above discussion, I find no infirmity in the orders of the Ld. AO, and I confirm the same. Grounds 1 taken by the appellatant stand dismissed."

7. We have heard rival contentions. There is no dispute that the assessee has duly placed on record all relevant particulars of the her script (supra) vis-à-vis bank statement, contract notes, demat account, broker details in support of her LTCG claim. Both the lower authorities are very fair in holding that the assessee has placed on record all the relevant documentary particulars. Their only case is that assessee has derived her LTCG in suspicious surrounding circumstances. We find no merit in Revenue's instant stand. This tribunal's co-ordinate bench's decision in *Navneet Agarwal vs. ITO* in **ITA No. 2281/Kol/2017** decided on 20.07.2018 has declined Revenue's identical argument after quoting all the relevant facts, evidence available in the case file and legal position as on date as follows:-

"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 3<sup>rd</sup> 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 11<sup>th</sup> February, 2012. The said shares

- were dematerialized on 31<sup>st</sup> 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 1<sup>st</sup> November 2011 to 31<sup>st</sup> December, 2013 (A copy of the scheme of amalgamation along with 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 implies that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from income tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by

the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

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

*28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses*

*produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.*

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

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

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

*“4. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the Assessee, and Mr. K.Radhakrishnan, learned senior counsel who appeared for the Revenue.*

*5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.*

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005[2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice.”

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

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

“.....we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee’s appeal.” [quoted verbatim]

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

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

“We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee

*in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account.”*

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

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

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

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

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

*“In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the ld. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act.”*

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

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

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

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

*“..... We find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence.*

It further held as follows:

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

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

*“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or*

*fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bona fide and genuine and therefore the ld AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act"*

g) The BENCH "H" OF MUMBAI ITAT in the case of ARVIND KUMAR 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 OF 2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

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

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

*"The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax (Appeal) the*

*contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”*

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

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

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

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

8. We adopt above detailed discussion mutatis mutandis since having considered the hon'ble jurisdictional high court's various decisions / citations to line on this very issue to delete the impugned unexplained cash credits addition of ₹66,72,894/- as well as commission thereupon of ₹2,39,595/- as a necessary corollary. The assessee instant latter appeal ITA No.2418/Kol/2017 is partly allowed in above terms.

10. The assessee's two appeal(s) ITA No.2417 and 2418/Kol/2017 are partly allowed whereas Revenue's appeal ITA No.2469/Kol/2017 is dismissed.

Order pronounced in open court on 31/01/2019

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

दिनांक:- 31/07/2018

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

कोलकाता / Kolkata

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

1. आवेदक/Assessee-Shruti Mohta, Calcutta Stock Exchange Building, Room No. No. 4C, 2<sup>nd</sup> Floor, 7, Lyons Range, Kolka-001
2. राजस्व/Revenue-DCIT/ACIT, Cir-36, Aayakar Bhawan, Poorva, 8<sup>th</sup> Floor, 110 Shantipally, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।