

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

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

ITA No.256/Kol/2019
Assessment Years :2012-13

Soumitra Choudhury 28C, Satish Mukherjee Road, Kolkata-700026 [PAN No.ACNPC 4627 Q]	V/s.	ACIT, Circle-12 54/1, Rafi Ahmed Kidwai Road, Kolkarta-16
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Miraj D Shah, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Sankar Halder, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	13-03-2019

ITA No. 2421/Kol/2018
Assessment Year :2015-16

Purushottam Das Agarwal C/o Balaji Enterprises, 83/85 N.S. Road, Ground Floor, Kolkata [PAN No.ACTPA 9138 Q]	V/s.	Income Tax Officer, Ward-35(1), Aayakar Bhawan Porva, 110, Shantipally, Kokata- 107
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Subash Agarwal Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Sankar Halder, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	14-03-2019
घोषणा की तारीख/Date of Pronouncement	15-03-2019

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These two assessees have filed their instant appeal(s) for assessment year(s) 2012-13 & 2015-16 against the Commissioner of Income Tax

(Appeals)-6 & 10 Kolkata's separate order dated 08.02.2019 & 21.08.2018, passed in case No(s). CIT(A), Kolkata-6/10503/2018-19-957/CIT(A)-10/W-35(1)/2015-16/2017-18/Kol upholding Assessing Officer's identical action treating their Long Term Capital Gains (LTCG) as exempt u/s 10(38) amounting to ₹70,25,200/- and ₹32,11,451/-; respectively to be unexplained cash credits u/s 68, involving proceedings u/s 143(3), r.ws. 147 and Sec. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

We have heard the parties reiterating their respective stands. Relevant case file(s) of the former assessee comprising of Assessing Officer section 148 notice dated 23.03.2018 reopening reasons supplied on 13.08.2018, objections filed before the Assessing Officer against reopening in issue dated 26.11.2018, LTCG statement forwarded letter dated 23.08.2018 in respect of LTCG transactions, purchase bills dated 25.07.2009, share certificates of M/s Twenty First Century India Ltd. with transfer advice, bank statement, hon'ble jurisdictional high court's amalgamation order dated.24.12.2010, allotment advice regarding issue of shares by merged companies (Twenty First Century India Ltd.) alongwith share certificates allowing 22,800 equity shares application demat statement of share alongwith affidavit, contract notes regarding sale of shares, bank statement in relation to receipt of shares sale consideration company master data, statement of Shri. Sajendra Mookim dated 01.04.2017, statement of Shri Pradeep Kr. Garg dated 17.04.2017 with ROC master data and PAN, statement of Shri Shailendra Kr. Sharma with ROC master data, statement of Shri Abhijit Basu with ROC master data and summons u/s. 131, assessee's deposition, statement of owner of the brokerage firm and reply with supporting evidence to the Assessing Officer in response to u/s 133(6) notice from M/s Sargam Dealers Pvt. Ltd. dated 11.12.2018; respectively stand perused in the "lead" case herein ITA No.256/Kol/2019.

2. We notice at the outset that the CIT(A)'s detailed discussion in above "lead" case upholding the Assessing Officer's action treating the assessee's profits derived from sales of shares reads as under:-

"5. Apropos the sole issue raised covering Ground nos. 9 to 15 is concerned, the facts are that that the appellant had purchased 600 shares of M/ s Sarathi Dealers Private Limited for a total consideration of Rs.2,40,000/- from M/s. Sargam Dealers Pvt. Ltd. Subsequently, M/s. Sarathi Dealers Private Limited was merged with Twenty First Century India Ltd by an order of the Hon'ble Calcutta High Court. In fact, Twenty First Century India Ltd allotted 22,800 equity shares in M/s. Twenty First Century India Ltd in lieu of 600 shares of M/s. Sarathi Dealers Private Limited. These shares were sold by the appellant on different dates during the relevant previous year at a total consideration of Rs.72,64,675 and thus, an amount of Rs. 70,25,200/- was disclosed as Long-term Capital gains from sale of these shares which the appellant has claimed to be totally exempt under the provisions of section 10(38) of the Act in his return. The A.O. disallowed appellant's claim of Long Term Capital Gain u/s 10(38) and held it as bogus Long Term Capital Gain for Rs.70,25,200/-. The A.O. has discussed the facts of the case on Page No. 2 to 13 of his assessment order. The sale was made through broker M/s. H M Fathepuria, a member' of the Calcutta Stock Exchange and also. registered with SRBI as a stock broker. The A.O. in the meanwhile had received information from DTT(Inv.), Kolkata that they have investigated and identified 84 Penny Stock Companies. Search and Survey were also conducted in the office premises of 32 share brokers who accepted that they were involved in bogus LTCG/STCG Scam. One such penny stock company identified by the DIT(Inv.), Kolkata is M/s. Twenty First Century India Ltd. Basic trading pattern of all these 84 penny stock scrips represented a bell shaped trading i.e. prices start at a low range and rise rapidly, stays there for a while and then decreases rapidly. This makes a bell shaped pattern. The A.O. on page no.3 of his order has demonstrated this phenomenon by a giving the data of the share price of M/s. Twenty First Century India Ltd from FY 2001-2002 to FY 2013-2014. Such movement of share is not supported by actual financial credentials as the company concerned has almost no fixed asset, no turnover, no profitability and do not pay taxes. Hence, such companies were designed only for the limited purposes of bogus LTCG/STCG to willing beneficiary. The AO after giving due opportunity to the appellant of being heard held that the sale value of shares increases by almost 38 times of its purchase value within a span of around 2 years is nothing but booking of bogus LTCG. Accordingly, the entire amount of LTCG of Rs.70,25,200/- was added back to the income of the appellant. During the appellate proceedings, the AR of the appellant filed a paper book with numbered page and an index. The appellant had reiterated the following which are summed up in the statement of facts filed with the appeal, which is as follows:

(i) That the assessee had purchased 600 shares of Ms Sarathi Dealers Private Limited from Sargam Dealers Pvt. Ltd. for a consideration of Rs.240,000/- which Was paid by account payee cheque at Rs.230,000/- and Rs.10,000/- on 29.03.2010.

(ii) That there was a scheme of Amalgamation by which Sarathi Dealers Private Limited was merged with M/ s. Twenty First Century India Ltd. This order was passed by Hon'ble Calcutta High Court on 24.12.2010. in Company Petition No 409 of 2010 connected with Company Application No. 453 of 2010.

(iii) That as a result of the Amalgamation order passed by the Hon'ble Calcutta High Court the assessee was allotted 22,800 shares in M/s. Twenty

First Century India Ltd in lieu of 600 shares of M/s. Sarathi Dealers Private Limited. These shares were allotted in Demat Form in the account of the assessee and were credited to his account on 19.01.2011.

(iv) That the assessee sold these shares during AY 2012-2013 through his old and regular share broker M/ s. H. M. Fatehpuria member of Calcutta Stock Exchange Association Ltd and received the sale consideration by account payee cheque.

(v) The share were delivered to the broker to the demat account of the assessee.

(vi) That the assessee filed the following documents in support of the transaction:

(a) Purchase Bill Dated 25.07.2009.

(b) Copy of share certificate of Sarathi Dealers Private Limited

(c) Bank Statement reflecting payment of purchase on 29.03.2010

(d) Amalgamation order passed by the Hon'ble Calcutta High Court

(e) Demat Statement showing credit of shares in assessee demat account

(f) Contract note for sale

(g) Bank Statement reflecting receipt of payment on 18.5.2011, 23.5.2011 & 27.5.2011.

(h) Demat Statement showing Debit of shares in assessee demat account

(vii) That the assessee sold the shares through M/ s. H.M. Fatehpuria, a SEBI registered Share Broker who was a member of Calcutta Stock Exchange. All the evidences in support of the transactions were produced. The assessee was summoned u/s 131 of the IT Act 1961 and his statement was recorded. The broker of the assessee was summoned u/s 131 of the IT Act 1961 and his statement was recorded. All the parties- confirmed the transaction and there was no adverse material or evidences collected in the assessee case.

(viii) That the assessee sold these shares during AY 2012-2013 through his old and regular share broker M/s. H. M. Fatehpuria member of Calcutta Stock Exchange Association Ltd and received the sale consideration by account payee cheque.

(ix) That the Ld Assessing Officer based on a survey report prepared by the Investigation Department and on statement of some unconnected persons came to a conclusion that the assessee brought back his own income in the form of Long Term Capital Gains and the transaction was held not be genuine.

(x) That the assessing officer did not provide any cross examination of any person whose statement were recorded and were used against the assessee.

(xi) That there was no finding against the assessee or his stock broker in the investigation report.

(xii) That the finding were made in survey proceedings by the investigation wing and hence these evidences are not admissible as evidences in assessment proceedings of third parties including that of the assessee.

The appellant during the appellate proceeding submitted various judgments to demonstrate that the AO has erred in holding the LTCG of Rs.70,25,200 as bogus. The cases are listed as below:

- a. Jatin Chhadwa in ITA No. 8573/Mum/2010
- b. Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC)
- c. GTC Industries Limited vs. ACIT reported in (2017) 164 ITD 1
- d. Kiron Kothari HUF vs. ITO, ITA No. 443/Kol/2017
- e. Gautam Kr Pincha vs. ITO, ITA No. 569/Kol/2017
- f. ITO vs. Shale en Kemani, ITA No. 1945/Kol/2014
- g. Hon'ble Calcutta High Court in the case of Pr CIT Vs Rungta Properties Private Limited ITAT No 105 of 2016
- h. Smita S Patil v. ACIT (ITA No.1407-1409/PN/2012),
- i. ITAT Kolkata in the case of DCIT v. Sunita Khemka (ITA No 714 to 718/Kol/2011)
- j. CIT vs. Shyam R Pawar [2015] 54 taxmann.com 108, (Bombay High Court)
- k. CIT v. Smt Sumitra Devi, ITA No. 54/2012, Hon'ble High Court of Rajasthan
- l. CIT Vs. Udit Narain Agarwal, ITA 560 of 2009, Hon'ble High Court of Allahabad
- m. CIT v. Mahesh Chandra G. Vakil [2013] 40 taxmann.com 326 (Gujarat)

6. I have fully considered the assessment order wherein an addition of Rs.70,25,200/- was made by the Ld. AO on account of bogus Long Term Capital Gain by treating the same as fictitious claim. I find that the Ld. AO had completed the assessment proceedings after analyzing various information received from the Investigation Wing. Some of the observations which come to light upon examination of the records of the appellant are as below:

- a. There is a common pattern in the trading of such scrips and the pattern is that they represent a bell shape in their trading.
- b. In the Balance Sheet of the listed penny stocks it is found that they have no actual financial credentials to support their share, movement pattern. Almost all the companies have no fixed assets. no turnover. and no profitability.
- c. No such event of growth happened during the sale period of the said Script for which the investment in shares could have jumped almost 38 times in a very short span of time of 2 years.
- d. In the whole project total 84 listed penny stock companies were identified and worked upon. After that, number of search and surveys were conducted in the Office premises of more than 32 share broking entities who have accepted that they were involved in the bogus LTCG/STCL scam. Surveys were also conducted in the office premises of many "accommodation entry providers and their statements recorded. All have accepted their role in the scam.
- e. Out of 84 listed penny stocks which have been used for generating bogus LTCG. M/s. Twenty First Century India Limited which had been sold by the present assessee is one of them.

6.1 A deeper examination gives a much clear picture of the entire process being staged managed. The most vital aspect to be considered is how did he appellant get to know of the existence of M/s Sarathi Dealers Private Limited. and what prompted him to make a decision for investment in this company. The investment made by the appellant in such a company which does not have any credentials, does not match with the nature of investment of the appellant. The appellant could also not explain as to how he came to know that the shares of M/s.Sarathi Dealers Private Limited were privately available for sale with one Sargam Dealers Pvt. Ltd. During the assessment proceedings the AO for verification send notice u/s.133(6) to Sargam Dealers Pvt. Ltd. but the same was returned back by the Postal Authorities with the remarks

"Addressee moved/Not Known". The Assessing Officer also issued notices to the persons who ultimately purchased the shares sold by the appellant, these notices were not served, and therefore the parties were not traceable. It is apparent that both purchase and sale of shares of M/s Twenty First Century Ltd. has been arranged by intermediaries who are also known as entry operators. Even the Director of M/s Twenty First Century Ltd. Mr. Pradeep Kumar Garg has accepted that he in league with Mr. Anil Kumar Khemka who was also involved in price manipulation of shares, in order to provide bogus LTCG to various beneficiaries; During the appellate proceedings, the appellant also could not explain as to why against all prudence, he invested in M/s Sarathi Dealers and that too at a huge premium of Rs. 390 per share of face value of Rs. 10/- . M/s Sarathi Dealers Pvt. Ltd was actually a loss making company.

6.2 The main contention of the appellant is that all the supporting evidences in the form of bank statement, contract notes, De-mat statement, proves the genuineness of the transactions. In my view, all these documents as referred to by the appellant are mere documents and not any evidence. The transactions are not natural at all. In my opinion, payment made through banking channel does not constitute the transactions to be genuine transaction since the banking documents are merely self serving recitals. None of the material produced by the appellant is enough to justify the huge gains as claimed under the head Capital Gains.

6.3 In a penny stock which has no business activity or any plan or initiative or any prospect for growth, investor normally sell off such stock whenever price has appreciated to some extent and there is total uncertainty to hold such stock for fabulous appreciation when the investment is not backed by any fundamental of the company, its business policy and future prospect. In absence of any such fact the person who knows beforehand that its price is being manipulated in a concerted way and he is part of such system will benefit. Price movement and volume movement of this stock indicates such fact. The said transaction defies all logic of human probability. In this context the Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More (82 ITR 540) has held that the surrounding circumstances must be seen to find out the reality of the recitals made in the document. This principle was reaffirmed by the Hon'ble Supreme Court in 214 ITR 801 where in it was held that the apparent can be rejected where there are reasons to believe that the apparent is not the real fact.

6.4 I find all the judgements relied upon by the appellant fall flat in the face of the facts of the case and preponderance of probability against the assessee. In fact, the decision of the Hon'ble Bombay High Court in the case of Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 TAXMANN.COM 196 (Bom) is quite relevant for deciding the issue. It was held that where the assessee had purchased shares of penny stocks companies at lesser amount and within a year sold such shares at much higher amount and assessee had not tendered cogent evidence to explain as to how shares in an unknown company had jumped to such higher amount in no time and also failed to provide details of person who purchased said shares, said transactions were attempt to hedge undisclosed income as Long term Capital gain. Applying the aforesaid ratio, I conclude that the appellant had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain since she has not tendered any cogent evidence to explain how the price of shares of an unknown company has jumped in no time. In support of this finding, I also garner support from the following judgements which are as under:-

1. Chandan Gupta Vs CIT (2015)229 Taxman 173 (P&H) Where the assessee could not explain receipt of alleged share transaction profits credited in his bank accounts, then sale proceeds had to be added as income under section 68.
2. Bazpir Chand Maini Vs CIT (2012) 340 ITR 161 (P&H)

Section 69 of the Income-tax Act, 1961 - Unexplained investment - Assessment year 1998-99 - During assessment proceedings, Assessing Officer found that assessee had purchased certain shares of a company at rate between Rs. 2.50 and Rs. 3.40 per share in month of April, 1997 and part of those shares were sold through a broker at Rs. 55 per share - he came to opinion that value of said shares could not be as high as Rs.55 per share - He recorded statement of broker who admitted to have purchased shares in question but failed to produce books of account and other relevant documents - He also found that alleged sale of shares had not taken place through any stock exchange - On scrutiny of books of account of broker, it was found that there were cash deposits in its bank account preceding issue of cheques in name of assessee for purchase of shares claimed to be sale proceeds of same shares received in advance - Broker could not give details of purchaser of share - Moreover, shares claimed to have been sold through broker had not been transferred even at time of making enquiry by Assessing Officer and same continued to be registered in name of assessee - In those circumstances, Assessing Officer held that transaction of sale of shares was an ingenuine transaction and made addition of alleged sale consideration to assessee's income as income from undisclosed sources - Whether on facts, addition made by Assessing Officer was justified - Held, yes.

3. Usha Chandresh Shah Vs ITO (2014-TIOL-14S9-ITAT-MUM)

Where the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of the company was declared as "**Penny Stock**" by SEBI and the broker Sanju Kabra; through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. The tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee. The CIT(A) was justified in confirming the order of the AO by applying the test of human probabilities.

4. Ratnakar M Pujari Vs ITO (2016-TIOL-1746-ITAT-MUM)

Where a transaction of 'off market purchase of share for which payments were made in cash and the brokers had issued pre dated contract notes, is liable to be treated as bogus transaction, and hence such cash receipts are liable to be treated as 'unexplained cash receipts'.

5.M.K. Rajeshwari vs. ITO (2018) 99 TAXMANN.COM 339 (Bang)

Where assessee claimed exemption under section 10(38) in respect of capital gain arising from sale of shares, in view of fact that financial worth of said company was meagre and, moreover, there was abnormal rise in price of shares, it could be concluded that assessee introduced her own unaccounted money in garb of long term capital gain and, thus, claim raised by her was to be rejected.

6 ITAT, SMC-C Bench, Bangalore ITA No. 1723/Beng/ 2018, A.Y. 2015-16 in Smt. M.K. Rajeshwari -Vs- ITO dated 12-10-2018 Has held at Para 8 & 9.

"8. The AO has also examined the SEBI's findings about the accommodation entry providers obtained on the basis of various investigations and has brought out sufficient material on record to demonstrate that the transactions are not genuine and he accordingly concluded that the long term capital gain booked by the assessee in the books were pre-arranged method to evade taxes and laundered money. The findings and observations of the AO were not controverted by the assessee by placing any evidence. He placed

reliance upon the various judicial pronouncements in support of his contention that once the assessee has placed the evidences with regard to payments and the identity of the persons and the credit worthiness of the creditors, no addition under section 68 is called for. Since the assessee has placed the contract note, payment through cheques identifying the company whose shares were transacted, the genuineness of claim of long term capital gain should not have been doubted. We do not find merit in these contentions of the assessee in the light of the facts that there is prevalent practice in the country through which unaccounted money is converted into long term capital gain by circuitous means. While dealing with the issue of long term capital gain accrued to the assessee in short span, one has to examine the financials of the company whose shares were inflated within a short period and after the sharp rise in the price of shares it again comes down. In the instant case, financials were examined by us and we find that the financial worth of the company is meagre and not at all worth to be invested therein. With such financials, we are unable to understand how there can be manifold increase in the shares. In the light of the duration of transactions and the financials of the company whose shares were transacted, we find that the Revenue has brought sufficient material on record to demonstrate that unaccounted money was introduced in the books of accounts through long term capital gain by adopting such method. Whatever judicial pronouncements are relied on, these are in those cases where the transactions are genuine. Under these circumstances, we are of the view that Revenue authorities have rightly adjudicated the issue and no interference is called for in the order of the CIT(A).

9. In the result, appeal of the assessee stands dismissed.

7. ITAT, Chennai A-Bench, ITA No. 1413/CHNY I 2018, A.Y. 2014-15 in M/s Pankaj Agarwal & Sons (HUF) -Vs- ITO, Non-Corporate Ward-10(3) Chennai, dated 06-12-2018 has held at Para 7 & 8.

"7. Before us the Ld.AR submitted that the assesseees were not provided with an opportunity to cross-examine the witness who were relied by the Revenue and further failed to furnish. the investigation report of the intelligence wing of the Revenue before concluding the assessment. The Ld.AR further argued that the assesseees were not provided with proper opportunity of being heard. It was therefore pleaded that the matter may be remitted back to the file of Ld.AO for fresh consideration. The Ld. DR strongly opposed to the submission of the Ld.AR and requested for confirming the orders of the Ld. Revenue Authorities.

1. We have heard the rival submissions and carefully perused the materials on record. At the outset we must say that the Ld. AR could not justify before us any of their claims made before the Ld. Revenue Authorities that the transaction was genuine. Further the Ld.AR could not successfully controvert to any of the findings of the Ld. Revenue Authorities before us which are against the assesseees. Instead the Ld.AR has only come out with the plea that the assesseees were not provided with opportunity of cross-examining the witness, the investigation report was not furnished and proper opportunity was not provided of being heard. However we find that all these arguments raised by the Ld.AR before us was never alleged before the Ld. Revenue Authorities when the matter was before them. In this situation. we do not have any other option but to confirm the orders of the Ld. Revenue Authorities in the case of all the assesseees because

the Ld.AO as well as the Ld. CIT(A) have arrived at their respective decisions after considering the issues in the appeal in detail and there is nothing before us to disturb their findings. Accordingly we hereby confirm the Order of the Ld. Revenue Authorities on this issue. Thus the first ground raised by the assessee herein above in all the appeals are held against the assessee.

8. The order dated 04-01-2019 passed by the ITAT Pune 'B' Bench, Pune, ITA No.1648&1649/PUN/15, A.Y.-2005-06 & 2006-07 in Rajkumari B Agarwal Vs. DCIT, Central Circle 1(2), Pune dated 04-01-2019 has held at Para 15 to 17.

15. It is further pertinent to note that it was not only the assessee who booked short term capital gain on the sale of shares of PIL to the above extent, but his family members were also not left behind. They also indulged in the similar paper transactions by allegedly purchasing and selling shares of PIL from the same brokers and showing huge amounts of short term capital gains, for which addition of Rs.18, 71,906/- has been made in the hands of his son Sh. Bharat Rajkumar Agarwal and Rs.20,21,001/- in the hands of his wife Ameeta Rajkumar Agarwal for the same assessment year, the appeals of which are being disposed off through this batch of cases.

16. In view of the factual and legal position discussed above, it is crystal clear that PIL is a penny stock company and the assessee obtained only accommodation entries in the garb of short term gain from transfer of shares of PIL, for which an appropriate addition has rightly been made and upheld by the authorities below. We, therefore, countenance the impugned order on this score.

17. Before parting with this issue, we want to record that the Id.AR has relied on certain decisions in which the additions made on account of accommodation entries got deleted. In the opposition, Id. DR has also relied on certain decisions, including those referred to in the impugned order, in which the addition on account of accommodation entries got confirmed. We are not separately referring to those decisions as the factual position prevailing in such case varies with the facts of the instant case as recorded above. Even a single slightest variation in the factual matrix of two apparently similar cases changes the entire complexion of the decision. As the factual panorama obtaining in the extant case is different from those relied on by the rival parties, we are, therefore, desisting from distinguishing such cases separately. These grounds are, therefore, dismissed.

8. The latest order dated 08-01-2019 passed by the ITAT Delhi 'SMC' Bench New Delhi, ITA No.3810/DEL/2018, A.Y.-2015-16 in Anju Rastogi Vs. ITO Ward 1(1), Meerut dated 08.,01-2019 has held at Para 7 to 9.

7. I have heard both the parties and perused the records especially the impugned order. I note that the assessee has shown Long Term Capital Gain amounting to Rs.22,28,172/- earned during the FY 2014-15 and exempt u/s. 10(38) of the IT. Act, 1961. The assessee was asked to explain the source of aforesaid Long Term Capital Gain during the course of scrutiny proceedings. The explanation offered that it is sale proceeds of shares are found to be unsatisfactory. The explanation of the assessee is general in nature that as the transaction is through stock Exchange and the payment is by cheque, the transactions should be treated as genuine. Further, regarding the statement of Sh: Jai Kishari Poddar the assessee has only stated that in the statement there is no specific link with the claim of exemption in respect of Long Term Capital Gain of Rs. 22,78,172/- u/s. 10(38) by him. He has not stated a thing with respect to the statement of Sh Jai Kishan Poddar in which he has accepted that facilitation of accommodation entries of long term capital gain /

long term capital loss through his share banking firm has been done to few beneficiaries with the help of different accommodation entry operators, promoters of the scripts of various penny stocks other brokers etc. Sh Jai Kishari Poddar also gave details of different bogus scripts/ penny stocks which have been used for providing the accommodation entries of LTCG and LTCL to different beneficiaries using his brokerage company Consortium Capital Pvt. Ltd. and the name of CCL International Limited having scrip name CCL Inter appears in the list whose shares were sold by the assessee and exemption on LTCG amounting to Rs. 22,28,172/- claimed u/ s. 10(38) of the Act. After perusing the records, I find that in the instant case the investment in shares made by the assessee reveals that he has not been dealing in shares on a regular basis and the entries of LTCG have also been taken by other members of the assessee company and the purchase of these shares were claimed to be through off market deals and not through Stock Exchange. The financials of - penny stock company M/s CCL International Ltd. and movement of its price are abrupt, unrealistic and based upon any realistic parameters. From the perusal of financial statements of the aforesaid company M/s CCL International Ltd. from the Ministry of Corporate Affairs website (MCA) examining the information available in the public domain from where it was observed that there is no extraordinary increase in the profits of the company to justify the increase in value of the shares. I further note that Investigation Wing had recorded the statement of Sh. Jai Kishan Poddar who is one of the Director of M/ s Consortium Capital Pvt. Ltd. which is one of the entities utilised for providing entry of bogus long term capital gain of M/ s - CCL International Ltd. who had admitted that he was involved in seam of providing bogus long term capital gains through shares of M/s CCL International Ltd. had also admitted that they were also involved in trading of these Jamakharchi Companies through which manipulative transactions in securities to either artificially raise or lower the market rate of the shares are being done. I also note that the independent findings of the AO, which are - corroborated by the information given by the Investigation Wing, the assessee has failed to substantiate the genuineness of alleged share transactions in respect of long term capital gain u/s. 10(38) of the Act. In view of above discussions, the landmark decision of the Hon'ble Supreme Court in the case of McDowell and Company Limited, 154 ITR 148 are squarely applicable in this case wherein it has been held that tax planning may be legitimate provided it is Within the framework of the law and any colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. However, the case laws cited by the Ld. counsel for the assessee are on distinguished facts, hence, not applicable in the instant case. The assessee has not argued' any other ground mentioned in the grounds of appeal, but only argued on- merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench. In view of above discussions, I am of the considered opinion that Ld. CIT(A) has rightly confirmed the addition in dispute, which does not need any interference on my part, therefore, I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the Assessee. In the result, the appeal of the assessee is dismissed.

8. Since in other appeal i.e. in the case of Anju Rastogi, ITA No. 3810/Del/2018 (AY 2015-16), similar facts are permeating and same finding has been given, therefore, my finding given above will apply mutatis mutandis in this appeal also, because the nature - of transactions, evidences and documents are exactly the same. Thus, both the appeals are treated as dismissed

9. In the result, both the Appeals of the different Assesseees are dismissed."

6.5 In view of the above discussion, I find no infirmity in the order of the Ld. A.O. and I confirm the action of the Ld. A.O. in holding the Long Term Capital Gains of Rs.70,25,200/- to be bogus. Accordingly, Ground No. 9 to 15 are dismissed."

3. Mr. Shah vehemently contends during the course of hearing that the Assessing Officer had conducted a detailed exercise during the course of re-assessment in question in order to test genuineness / creditworthiness of the assessee's LTTCG in issue. He refers to the above detailed paper book's contents narrated in preceding paragraph to this effect. His case therefore is that there is not even a single evidence with either of the lower authority in support of the impugned addition. He particularly refers to the brokerage firm's statement made before the Assessing Officer during scrutiny denying any cash component in furtherance to assessee's share transactions. The Revenue's case on the other hand is that both the lower authorities have rightly gone by the circumstantial evidence indicating assessee to have acted in collusion with various entry operators for artificial rigging of scrip prices in the relevant holding period in light of various case laws (supra) fails to dispute the clinching fact that assessee's voluminous evidence forming part of case file has nowhere been controverted either in the course of assessment or his lower appellate proceedings. This tribunal's co-ordinate bench's decision in *Sanjay Mehta vs. ACIT* in **ITA No.1089/Kol/2018** decided on 28.09.2018 has deleted identical addition with the following detailed discussion:-

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

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

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

1. I state that I had purchased 100 equity shares of Pinnacle Vintrade Ltd. on 20.01.2012 from Uniglory Developers Pvt. Ltd. Pinnacle Vintrade Ltd. was merged with Unno Industries Ltd. and there was change of management and control of Unno Industries Ltd. pursuant to scheme of arrangement sanctioned by the Hon'ble High Court at Bombay.
2. Payment for the purchase of aforesaid 100 equity of Pinnacle Vintrade Ltd. was made by Account Payee Tamilnad Mercantile Ltd. Bank Cheque no. 736027.
3. Bank statement of Tamilnad Mercantile Ltd. Bank reflecting payment (cheque no. 736027) for purchase of the said investment in equity shares of Pinnacle Vintrade Ltd. is enclosed (highlighting the said entry). **Annexure-I.**
4. The equity shares of Unno Industries Ltd. were allotted pursuant upon merger of Pinnacle Vintrade Ltd. with Unno Industries Ltd. pursuant to sanction of scheme of arrangement by the Hon'ble High Court at Bombay, I was issued 91000 equity shares of Unno Industries Ltd. in lieu of my shareholding in Pinnacle Vintrade Ltd. The relevant gist of the scheme of arrangement sanctioned by the Hon'ble High Court was communicated by the company to the Bombay Stock Exchange vide letter dated 12th February, 2013. A copy of the said letter downloaded from BSE website is enclosed for your ready reference. I also enclose Unno Industries Ltd. letter dated 12th February, 2013 and 7th March, 2013 communicating the issuance of shares in lieu shares of Pinnacle Vintrade Ltd. upon sanction of scheme of arrangement by the Hon'ble Court. **Annexure II**
5. As the equity shares of Pinnacle Vintrade Ltd. purchased were not listed, hence no Contract Notes were issued. However, copy of bill indicating purchase of said equity shares is enclosed. **Annexure III**
6. Equity shares of Pinnacle Vintrade Ltd., were directly purchased from Uniglory Developers Pvt. Ltd. 209, Vireshwar Chambers, M.G. Road, Nera Shan Talkies Vile Parle (E), Mumbai, Maharashtra-400057.
7. Equity shares of Pinnacle Vintrade Ltd. were purchased in Physical Form.
8. I have three Demat Accounts as follows-
 - a) Name of DP- **Ashika Stock Broking Ltd. (DP ID No. 12034500)**
Demat account No. 1203450000003128
Address of DP-Trinity, 7th Floor, 226/1, A.J.C. Bose Road, Kolkata-700020.
DP Account opened on-31.08.2004
 - b) Name of DP- **Guinness Securities Ltd. (DP ID No. IN302898)**
Demat account No. 10350406
Address of DP-Guinness House, 18, Deshpriya Park Road, Kolkata-700026.
DP A/c opened on-25.05.2013
 - c) Name of DP- **Tamilnad Mercantile Bank Ltd. (DP ID No. IN303069)**
Demat account No. 10051996
Address of DP-Pearl Towers DPS Cell, AC 16, III Floor, II Avenue, Anna Nagar West, Chennai-600040.
9. Demat Statements of M/s Ashika Stock Broking Ltd. and Guinness Securities Ltd. for f.y. 2013-14 and 2014-15 in respect of long term capital gains are enclosed. **Annexure IV.**
10. The Equity Shares of M/s Unno Industries Ltd. were submitted for dematerialization on 01.04.2013 and credited to my Demat A/c No. 1203450000003128 with M/s Ashika Stock Broking Ltd. (DP ID No. 12034500) on 12.04.2013 (91000 shares).

Details of Sale of Share for Long Term Capital Gain financial year 2013-14(A.Y.2014-15):

1. *The equity shares of M/s Unno Industries Ltd. are listed at Bombay Stock Exchange (BSE), a recognized Stock Exchange of India since last so many years and even during the time of sale by me. The security code of the said equity shares at BSE is 519273 and ISIN No. is INE 142N0 1023.*
2. *Equity shares of Unno Industries Ltd. were sold on Bombay Stock Exchange through SEBI registered stock broker Ashika Stock Broking Ltd. and Guinness Securities Ltd. whose details are as under:*
 - a) *Name: **Ashika Stock Broking Ltd.***
Address: Trinity, 7th Floor, 226/1, A.J.C. Bose Road, Kolkata-700020.
Contact No. 033 22839952.
 - b) *Name: **Guinness Securities Ltd.***
Address: Guinness House, 18, Deshpriya Park Road, Kolkata-700026
Contact No. 033 30015555.
3. *Contract Notes issued regarding sale of equity shares of Unno Industries Ltd. on Bombay Stock Exchange by SEBI registered brokers- Ashika Stock Broking Ltd. and Guinness Securities ltd. are enclosed. **Annexure V.***
4. *The relevant Demat Account statements of Ashika Stock Broking Ltd. and Guinness Securities Ltd. reflecting the debit of shares of Unno Industries Ltd. upon sale are enclosed. (entries highlighted). **Annexure VI.***
5. *The Ledger of the brokers of Ashika Stock Broking Ltd. and Guinness Securities Ltd. for the financial year 2013-14 are enclosed. **Annexure VII.***
6. *Tamilnad Mercantile Ltd. bank Statement reflecting the receipts of sale consideration from the SEBI registered stock brokers (highlighting the said entries) is enclosed. **Annexure VIII.***
7. *Out of sale consideration money of Rs. 3151423.00 from Unno Industries Ltd. a sum of Rs. 3150000.00 has been invested in equity shares of Glow Diam Designs Pvt. Ltd.*

All the evidences were attached as annexures as stated above.

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

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

7. Apart from this, the directorate of income tax, Kolkata various enquiries have been made on project basis, which has resulted into the unearthing of huge syndicate of entry operators, share brokers and money lender involved in providing bogus accommodation entries of Long Term Capital gain and short term capital loss. It has come to the light that large scale manipulation has been done in market price of shown of certain companies listed in the BSE by certain beneficiary is utilized to

purchase shares of such company at a very high artificially inflated market price. Some of the listed companies directly or in directly owned by operators and whose shares price have been apparently manipulated by the syndicate of operators. Out of the above enquiry made by DIT(Inv.), Kolkata has established that one of the main manipulated company which you had availed is also under this syndicate. Hence, it is crystal clear that Sharp Trading Company is one of the main manipulated company (Penny listed) to convert unaccounted cash of beneficiary through long term capital gain with claim a certain percentage of commission.”

7. Thereafter the AO made an addition under 68 of the Act. Aggrieved the assessee carried the matter an appeal. The ld. First appellate authority confirmed the action of the AO on the ground that, the transaction in question comes within the ambit of ‘Suspicious Transaction’ and therefore, the rules of ‘Suspicious Transaction’ would apply to the case. He further stated that the payments through bank of processing of transaction through stock exchange and other such features are only apparent features and that the real feature are the manipulation and abnormal price raise and the sudden dip thereafter. Based on surrounding circumstances and circumstantial evidence and the order of the Tribunal in the case of “Bhag Chand Chabra (HUF) vs. ITO”, in I.T.A. No. 3088& 3107/2007 dated 31.12.2010, the addition made by the AO was confirmed. Aggrieved the assessee is in appeal before us.

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

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

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

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

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

The Assessing Officer has doubted the transaction since the selling broker was subjected to SEBI’s action. However, the demat account given the statement of transactions from 01.04.2004 to 31.03.2005 i.e. relevant for the

assessment year under appeal (2005-06) are before us. There cannot be any doubt about the transaction as has been observed by the assessing officer. The transactions were as per norms under controlled by the Securities Transaction Tax, brokerage service tax and cess, which were already paid. They were complied with. All the transactions were through bank. There is no iota of evidence over the above transactions as it were through demat format. Hence, we agree with the given findings of the ld. Commissioner of Income Tax (Appeals) in accepting the transactions as genuine too.

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

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

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

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

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

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

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

(vi) CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009] – In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the AO, based on the information received by

him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He therefore held that the transactions were bogus. The Hon'ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the chain of transactions entered into by the assessee have been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

8.4. In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT(A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act. For coming to such a conclusion we rely on the decision of the Hon'ble Calcutta High Court in the case of M/s. Alipine Investments in ITA No.620 of 2008 dated 26th August, 2008 wherein the High Court held as follows :

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

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

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

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

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

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

9.1 We further find that the transaction of sale of shares by the assessee was duly backed by all evidences including Contract Notes, Demat Statement, Bank Account reflecting the transactions, the Stock Brokers have confirmed the transactions, the Stock Exchange has confirmed the transactions, the Shares have been sold on the online platform of the Stock Exchange and each trade of sale of shares were having

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

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

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

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

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

9.3. We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find

that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bona fide and genuine and therefore the ld AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act. We also find that the ld CITA rightly relied on the decision of the Hon'ble High Court at Calcutta in the case of ALPINE INVESTMENTS in ITA No. 620 of 2008 dated 26th August 2008 wherein the Hon'ble Court held as follows:

"It appears that the share loss and the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of the Calcutta Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee instruments, which were also filed in accordance with the assessment.

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

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

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

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

9. The ld. DR on the other hand, relied on the order of the assessing officer and reiterated the findings made therein and submitted that the same be upheld. He vehemently argued that merely because the assessee has produced all the evidences required to prove his claim, the same cannot be accepted as these are organized and managed transactions. He took this bench through the modus operandi mentioned by the AO and submitted that in all cases where the shares of these companies are purchased and sold, additions have to

be made, irrespective of the evidence produced as there are cases where manipulation has taken place. He reiterated each and every observation and finding of the Id. AO as well as the Ld. CIT(A) and prayed that the same be upheld.

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

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

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

12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to "*Modus Operandi*" of persons for earning long term capital gains which is 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 assessee. 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 import laid down by the Courts of law.

15. In our view, just the *modus operandi*, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (SC) 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 inference 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) Ayaabkhan 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; Biocco 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 denial of the right to be heard i.e. audi alterampartem.

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

29. In Rajiv Arora v. Union of India and Ors. AIR 2009SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its

impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

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

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

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

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

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

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

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

a) The CALCUTTAHIGH COURT in the case of BLBCABLES & CONDUCTORS [ITA No. 78 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 off acts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed.”

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

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

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

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

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

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

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

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

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

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

“..... We find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee

that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence.

It further held as follows:

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

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

“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or fabricated. The facts of the case and the evidences in support of the assessee’s case clearly support the claim of the assessee that the transactions of the assessee were bona fide and genuine and therefore the ld AO was not justified in rejecting the assessee’s claim of exemption under section 10(38) of the Act.”

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

“.....We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transactions in M/s Ramkrishna Fincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A).”

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

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

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

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

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

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

4. We adopt the above extracted detailed discussion *mutatis mutandis* to conclude that the assessee has successfully proved genuineness of the share

profits in issue claimed as LTCG u/s 10(38) of the Act. We accordingly direct the Assessing Officer to delete the impugned addition of ₹70,75,200/- as unexplained cash credits u/s 68 of the Act. Commission expense disallowance; if any shall also follow suit as a necessary corollary.

5. Learned counsel no more presses assessee's latter substantive ground challenging validity of re-opening / re-assessment in issue. This former lead appeal ITA No.256//Kol/2019 is partly allowed on merits in above terms.

6. Same order follow in latter assessee Purushottam Das Agarwal's case involving identical LTCG added as unexplained cash credits amounting to ₹32,11,451/- u/s. 68 of the Act.

7. These two assessee's appeals are allowed on merits in above terms.

Order pronounced in the open court 15/03/2019

Sd/-

Sd/-

(लेखा सदस्य)

(न्यायिक सदस्य)

(Dr.A.L. Saini)

(S.S.Godara)

(Accountant Member)

(Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 15/03/2019 कोलकाता ।

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

1. अपीलार्थी/Appellant-Soumitra Choudhury 28C, Satish Mukherjee Road, Kolkata-26/
Purushottam Das Agarwal, C/o Balaji Enterprises, 83/85 N.S. Road,
Gr. Floor, Kolkata
2. राजस्व/Revenue-ACIT Cir-22, 54/1, Rafi Ahmed Kidwai Road, Kolakta-16/ITO Wd.35(1)
Aayakar Bhawan, Poorva, 110, Shantipally, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।