

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

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

**ITA No.729/Kol/2018**  
Assessment Year:2014-15

Mangilal Jain C/o Advocate Pradip Lakhotia, 2 <sup>nd</sup> Floor, Metro Plaza, SF Road, Siliguri-734005 [PAN No.AFKPJ 4178 D]	बनाम/ V/s.	Income Tax Officer, Ward-3(3), Nr. Lal Kothi, Darjeeling
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Dhiraj Lakhotia, A.R
प्रत्यर्थी की ओर से/By Respondent	Shri C.J. Singh, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	05-03-2019
घोषणा की तारीख/Date of Pronouncement	15-05-2019

**आदेश /O R D E R**

This assessee's appeal for assessment year 2014-15 arises against the Commissioner of Income-tax (Appeals)-Siliguri's order dated 22.03.2018 passed in case No.69/CIT(A)/SLG/2016-17, involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee's sole substantive grievance raised in the instant appeal seeks to reverse both the lower authorities findings treating his Short Term Capital Loss (STCL) arising from sale of shares after payment of Security Transaction Tax (STT), amounting to ₹1,92,320/- as bogus unexplained cash credits. The CIT(A)'s detailed discussion to this effect reads as under:-

"4. Decision :-

I have perused the Assessment Order, the Grounds of Appeal and the submissions made by the Ld.. A/R on behalf of the appellant. My observations & findings are as under :-

4.1. The present appeal emanates after disallowing Rs. 11,92,320/- arising out of shares transaction and treated the same as bogus. In this case the assessee purchased 32000 shares of Global Infratech & Finance Ltd. through Eureka Stock and Shares Broking Services Limited @ Rs. 77.37 per share aggregating to Rs. 24,79,714/- on 11.02.2014 and further sold the

32000 shares of Global Infratech & Finance Ltd. through the same broking house @ Rs. 40.11 per share to the tune of Rs. 12,83,520/- on 27.03.2014. Thereby, claiming Short Term Capital Loss of Rs. 11,92,320/-.

The A/R on behalf of the assessee, during the appellate proceedings, has stated that since the shares were held for less than 12 months, therefore, as per Sec 2(42A), these shares were Short Term Capital Asset. Moreover the selling price (Le. 12,83,520) being less than the purchase price (Le. 24,75,840) giving rise to Short Term Capital Loss amounting to Rs. 11,92,320/-.

The Ld. A/R has further stated that It was claimed by the Ld.. AO that the amount claimed as capital loss is bogus in nature since the shares are penny stock which were used for accommodation of bogus Short Term Capital Loss through of stock market.

4.2 The AO during the assessment proceedings, issued on the information uploaded by the DDEIT(Inv.), Kolkata where the modus operandi of Bogus Short Term Capital Loss is explained. In view of the facts and information collected from DDIT (Inv.), Kolkata, the A.O. issued show cause notice enquiring from the assessee the detail explanation along with documentary evidences to substantiate the claim of Short Term Capital Loss. A show cause letter requiring explanation on the points raised was issued which reads as under:

"During the year under consideration, you have shown to have accrued Short Term Capital Loss on account of sale of 32000 shares of Global Infratech & Finance Limited booked through Eureka Stock and Shares Broking Services Limited listed in Bombay Stock Exchange.

On perusal of records, it is found that one of the director of Global Infratech & Finance Limited, Shri Mahendra Sethia has recorded his statement u/s. 131 of the I. T. Act, 1961 on 22.04.2014 wherein he has clarified that the Global Infratech & Finance Limited is a paper company managed by him to accommodate entries for accruing Long Term Capital Loss and Short Term Capital Loss in the form of Share Capital to beneficiaries.

Further, the statement of oath of Shri Rakesh Ram Somani, one of the director of Eureka Stock and Shares Broking Services Limited recorded during the course of survey operation u/s 133A of the I. T. Act, 1961 conducted on 30.03.2015 at the business premises of Eureka Stock and Shares Broking Services Limited also confirms that the company provides transactions in bogus scrips/penny stocks through their broking house to these paper companies.

In view of the findings as recorded by the Investigation Wing, you are being show caused to explain as to why the amount of Rs. 24,79,714/- invested in Global Infratech & Finance Limited through Eureka Stock & Share Broking Services Ltd. should not be treated as bogus and added back to the income as unexplained investment u/s 69 of the IT. Act, 1961."

In response to the show cause notice, the assessee filed a submission explaining that the shares were purchased through Eureka Stock & Share Broking Services Ltd. online and the payments were made through a/c payee cheques. Further, the assessee stated that the investment in the shares were made from advance against sale of flat which were also received through a/c payee cheques.

4.3 After accumulating all the facts and circumstances of the case, the A.O, believed that the sale and purchase of the shares of "Global Infratech & Finance Ltd. made by the appellant is nothing but a sham transaction, From the various statements recorded and the facts on record, the A.O. has pointed out the following abnormalities:

"It is observed that the plea of the assessee is that all the payments for purchase and sale of shares were made through a/c payee cheques. But, the fact that these share were purchased from a paper company has not been explained. It is pertinent to mention here that the statement of Shri Mahendra Sethia recorded on oath u/s 131 of the I. T. Act, 1961 confessing at Question No. 19 at SI. No. 7 that M/s. Global

Infratech and Finance Limited is a paper company managed by him before the DDIT(Inv.J, Unit-II(3), Kolkata cannot be overlooked and denied. Further, the statement of oath recorded u/s. 133A of the 1. T. Act, 1961 of Shri Rakesh Somani, Director of M/s. Eureka Stock and Shares Broking Services Limited confessing before the DDIT(Inv.J, Kolkata that the company provided transactions in bogus scrips/penny stocks through their broking house to these paper companies viz. M/s. GlobalInfratech and Finance Limited cannot also be ignored.

On careful analysis of all the facts and circumstances stated above, it appears that the assessee had purchased and sold the scrip at pre-determined price, pre-determined time and to pre-determined buyers with the help of accommodation entry providers, share broker etc. to bring Short Term Capital Loss which the assessee has set off during the A. Y 2015-16 with the Long Term Capital Gain of Rs. 13,20,800/- on sale of flat.

In view of the above discussion, the claim of STCL of Rs.11,92,320/- is treated as bogus and is disallowed to be carried forward to the succeeding assessment year. "

4.4 I concur with the finding of the Assessing Officer the appellant failed to prove that the transaction leading to Short Term Capital Loss was not genuine but represented a part of series of transaction to create Short Term Capital Loss in the books of account through share transaction. It may also be pertinent to mention here that the issue of manipulation of stock market with the connivance of blocs to generate LTCG/STCL was also noticed and red flagged by SIT headed by eminent judge of Supreme Court, Hon. Justice M.V. Shah (Retd.) and Hon. Justice Hari Das (Retd.) for necessary action by Enforcement Agency. The STCL of the assessee through transaction in the shares of Global Infratech & Finance Ltd which is a penny stock is very much part of the wider seam operating in shadow economy highlighted by SIT. This confirms the finding of the A.O. that shares of this company were being manipulated in order to provide undue benefit to various persons.

4.5 The A.O. has clearly highlighted the Investigation Report of the DDIT, Unit- 2(3), Kolkata where in the name of the script Global Infratech & Finance Ltd. figures prominently as one of the penny stock manipulated by brokers to provide LTCG/STCL.

The A.O. has already highlighted that the number of entities involved in arranging this transaction were investigated by investigation wing, Kolkata through survey u/s 133A and recording of statement u/s 131. It has been pointed out by the A.O. that it has been admitted by a number of persons involved in running such entities of their role in arranging these share transaction.

It has been revealed that the shares of Global Infratech & Finance Ltd. have been used by different share brokers for providing bogus LTCG by creating artificial market and price manipulation. It was also revealed that the method followed for providing entry of LTCG was the same in the Assessee's case. It is therefore clear that the said entries of LTCG in the Assessee's case are nothing but payments made in cash out of the Assessee's own undisclosed income to bring back income in genuine form under the guise of LTCG.

4.6 With respect to the circumstantial evidence and in the matter related to the discharge of 'onus of proof' and the relevance of surrounding circumstances of the case, the relevant observations and findings of Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More, are:

"that though an appellant's statement must be considered real until it was shown that there were reasons to believe that the appellant was not the real, in a case where the party relied on self-serving recitals in the documents, it was for the party to establish the transfer of those recitals, the taxing authorities were entitled to look into the

surrounding circumstances to find out the reality of such recitals. Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and the Tribunals have to judge the evidence before them by applying the test of human probability. Human minds may differ as to the reliability of piece of evidence, but, in the sphere, the decision of the final fact finding authority is made conclusive by law. "

4.7 The above ratio laid down by the Hon'ble Supreme Court has been reiterated and applied by the Hon'ble Apex Court in the case of Sumati Dayal V CIT 214 ITR 801 (S.C). It is essential on the part of the AO to look into the real nature of transaction and what happens in the real word and contextualize the same to such transactions in the real market situation. It is pertinent to state here, the wisdom of Hon'ble Supreme Court in CIT V Arvinda Raju (TN) (1979) 120 ITR 46 (S.C) wherein it was held that-

"One day, in our welfare state geared to social justice, this clever concept of '**avoidance**' as against '**evasion**' may have to be exposed"

4.8 Hon'ble Supreme Court in the case of McMowell & Co Ltd. (1985) 154 ITR 148 (S.C), wherein the Hon'ble Supreme Court has denounced tax avoidance, if not bona fide. The relevant part of the observation of the Hon'ble Supreme Court is reproduced hereunder:

"Tax planning may be legitimate provided it is within the framework of law. 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 resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. "

Every person is entitled to so arrange his affairs as to avoid taxation but the arrangement must be real and genuine and not a sham or make believe.

4.9 Mumbai ITAT in the case of Ratnakar M. Pujari vs ITO in I.T.A. No.99 5/Mum/2012 where the facts of the case are identical to that in the present case, has held that-

"F) PENNY SHARE"

The shares in which the assessee has claimed to have made a deal, are identified as Penny Shares by the investigation wing of the department because rates of these shares are not based on business results of the companies but same are fluctuated by insider's trading from zero value (negligible price) to very high price and vice versa without any reason or basis to accommodate or generate bogus capital gain or loss.

5.9 In the instant case, all the above features are present in the transaction of shares made by the assessee. Moreover, there is also a specific information that assessee is indulged in non-genuine & bogus capital gain obtained from the transactions of purchase and sale of shares of M/s Shiv Om Investments & Consultancy Ltd., a Kolkata based company. In this respect, it is also pertinent to mention that even assessee has failed to furnish the proof of payment for these transactions.

Subject to the above discussion, it is held that the so called purchase of shares is a fabricated transaction and hence the same are held as bogus.

The said purchases have been treated as bogus and sham transactions by the Revenue as it is alleged that certain brokers have manipulated and issued pre-dated contract notes which even did not have details such as time of contract, trade number, transaction details etc and payments were also made in cash by the assessee against such sham and bogus purchase with the objective of introducing by manipulating tax free exempt long term capital gains u/s 10(38) of the Act leading to escapement of income from taxation, and the said findings of the AO with respect to bogus and sham purchases have become conclusive and final as the assessee has not challenged the findings of the learned AO made in the assessment order dated 24.12.2009 passed by the AO u/s 143(3) read with Section 147 of the Act in the first appeal filed with learned CIT(A) for the assessment year 2005-06 and hence the finding of the AO has attained finality. Since the said findings of the AO with respect to purchases of 4000

shares of M/s Shiv Om Investment and Consultancy Limited in assessment year 2005-06 have become conclusive having attained finality, the sales in consequence thereof the sham and bogus purchases cannot be accepted as genuine. The assessee has explained that the purchases were backed with contract notes of the brokers and payments were made in cash will not be of any help at this stage as the said finding of the AO treating the purchase of shares as sham and bogus in the assessment year 2005-06 has attained finality. Since, purchases are held to be bogus and sham which has attained finality, the sale in consequence thereof whereby payments are received through cheque or shares being sold through stock exchange are not of any help to the assessee for claiming the exemption as long term capital gains as the allegation of the Revenue is that the assessee has in collusion with the Brokers has manipulated and camouflaged the entire transactions of sale and purchase of shares in getting issued pre-dated contract notes for purchases of shares for which payments were also made for these purchases in cash and hence these purchases never existed at that relevant time. It is the allegation of the Revenue that the entire sale and purchase of shares were manipulated by the assessee in collusion with the brokers in order to earn tax free exempt long term capital gains on sales of shares u/s 10(38) of the Act whereby un-accounted cash of the assessee has been introduced in disguise in lieu of sale proceeds of shares. Keeping in view facts and circumstances of the case and as per our discussions and reasoning as set out above, we find no infirmity in the orders of the learned CIT(A) which we uphold and sustain. The assessee relied upon the decision of the ITAT, Hyderabad in the case of ITO v. Smt Aarti Mittal (2014) 41 taxmann.com 1/8(Hyd.-Trib) whereby the Tribunal has arrived at the decision that sale and purchase was genuine even though purchase was off-market transaction which was routed not through stock exchange but backed by physical delivery of shares which was later de-mated and under the circumstances the ITAT held the transactions as genuine in nature and the assessee claim was found to be in order, but in the instant case there is a conclusive and final finding of fact that purchases of shares were bogus and sham as was held by the Revenue) in the assessment year 2005-06 which has not been dislodged so far as the assessee accepted the said findings which became conclusive, thus the facts in the instant case are distinguishable as against the relied upon case of the assessee in Smt Aarti Mittal (supra) on that ground itself. Similarly, contentions of the assessee that the Revenue has accepted the gains on sale of 1500 shares of M/s Shiv Om Investment and Consultancy Limited in the succeeding assessment year 2007-08 as long term capital gains while processing of return u/s 143(1) of the Act is not help the assessee as every assessment year is separate assessment year and merely because the Revenue has not selected the case under scrutiny by issuing notice u/s 143(2) of the Act and framing detailed scrutiny u/s 143(3) of the Act instead chose to process the return u/s 143(1) of the Act without scrutiny will not entitle the assessee to get the well reasoned assessment orders and appellate orders of the learned CIT(A) dislodged in the absence of the cogent material and evidences to demolish the findings of the authorities below. The Revenue in the case of the assessee's brother has also declared the purchase and sale of shares as bogus but brought to tax, gains arising from sale of shares as short term capital gains. This in our considered view, is also not of help as the Revenue in the instant case has come to the conclusive finding which attained finality that the transactions of purchase of shares are sham and bogus transactions camouflaged with an intention to evade taxes. We order accordingly.

12. In the result, the appeal filed by the assessee in ITA NO. 995/Mum/2012 for the assessment year 2006-07 is dismissed.”

4.10 Reference is also made to the decision of ITAT Chandigarh in the case of ACIT vs Som Nath Maini (2006) 100 TTJ Chd 917 where in the Hon'ble tribunal has observed as under:

"6. After hearing the rival submissions, going through the orders of authorities below and paper book. we find that M/s Ankur International Ltd, although it is a quoted company, its shares were not being transacted at Ludhiana Stock Exchange at, the relevant time. Shares have been purchased and sold through the brokers and payments have been received in cheque on different dates as per the statement of account of M/s SK. Sharma & Co, Factual matrix of the case from start of the purchase of shares

at the rate of Rs. 3 to the sale of shares at Rs. 55 in a short span of time and shares being not, quoted at Ludhiana Stock Exchange and the way in which different, instalment payments have been received from the brokers and non-availability of the records of the brokers and the shares remaining in the name of assessee even long after the sale of the shares does not stand the test of probabilities. As rightly pointed out by the learned Departmental Representative, these types of companies function in the capital market whose sale price is manipulated to astronomical height only to create the artificial transaction in the form of capital gain. Surrounding circumstances differ from the normal share market transactions in which they are ordinarily carried out. Taking all the steps together, final conclusion does not accord with the human probabilities. The Hon'ble Supreme Court in the case of CIT v. Durga Prasad More held as under:

"It is a story that does not accord with human probabilities. It is strange that High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found and in our opinion, rightly that the decision remains that the consideration for the sale proceeded from the assessee and therefore, it must be assumed to be his money.

It is surprising that the High Court has found fault with the ITO for not examining the wife and the father-in-law of the assessee for proving the Department's case. All that we can say is that the High Court has ignored the facts of life. It is unfortunate that, the High Court has taken a superficial view of the onus that lay on the Department ."

6. The learned CIT(A) only got swayed by the issuance of notice by the AO under Section 131 to both the brokers from whom shares were purchased and sold and came to the conclusion that share transactions were genuine overlooking the material gathered by the AO from the statements recorded of broker M/s SK. Sharma & Co. and the other facts and circumstances that volume of transactions of Jaipur Stock Exchange is only 600 shares and 1000 shares. Payments have been received from the brokers only in instalments over a period of 6-7 months. It is true that when transactions are through cheques, it looks like real transaction but authorities are permitted to look behind the transactions and find out the motive behind transactions. Generally, it is expected that apparent is real but it is not sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine, it is highly improbable that share price of a worthless company can go from Rs. 3 to Rs. 55 in a short span of time. Mere payment by cheque and receipt by cheque does not render a transaction genuine. Capital gain tax was created to operate in a real world and not that of make believe. Facts of the case only lead to the inference that these transactions are not genuine and make believe only to offset the loss incurred on the sale of jewellery declared under VDIS. In the totality of facts and circumstances of this case and material on record, we are of the considered view that the CIT(A) was not justified in deleting the impugned addition. We, accordingly set aside the order of the CIT(A) and restore that of the AO."

4.11 While confirming the decision of ITAT Chandigarh Bench (SOMNATH MAINI vs. CIT, Hon'ble P & H High Court has held as under-

"The assessee incurred capital loss on account of sale of gold jewellery and also had short-term capital gain of almost equal amount. The AO observed that short-term gain was not genuine inasmuch as assessee had purchased 45,000 shares of M/s Ankur International Ltd at varying rates from Rs. 2.06 to Rs. 3. f per share and sold them within a short span of six-seven months at the rate varying from Rs. 47.75 paise to Rs. 55. These shares were purchased through a broker, Munish Arora & Co. and sold

through another broker, M/s SK Sharma & Co. The AO was taken by surprise by the astronomical rise in share price of a company from Rs. 3 to Rs. 55 and started further enquiry. The AO after enquiry made addition to the income of the assessee, which was upheld by the CIT(A) as well as by the Tribunal.

4. Learned counsel for the assessee submitted that the view taken by the Tribunal is perverse. The assessee having discharged the burden of proving the transactions of sale and purchase of the shares to be genuine, burden of proving that the said transactions were not genuine, was on the Department and in the absence of any material on record, holding the transactions to be not genuine, was not permissible. We are unable to accept the submission made. The burden of proving that income is subject to tax is on the Revenue but on the facts, to show that the transaction is genuine, burden is primarily on the assessee. The AO is to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of evidence that the transaction was genuine, cannot be conclusive. Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected even if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. In view of the above, we are of the view that the finding recorded by the Tribunal is a finding of fact and cannot be held to be perverse. No substantial question of law arises. The appeal is dismissed."

4.12 As stated by the Hon'ble P&H High Court in the above mentioned case, mere leading the evidence that the transaction was genuine, cannot be taken as conclusive. Such evidence is required to be assessed by the AO in a reasonable way. Genuineness of the transaction can be rejected if the assessee leads evidence which is not trustworthy, even if the Department does not lead any evidence on such an issue. In the present case, prima facie the appellant has produced the documents showing the details of the transaction, but he miserably fails to satisfy the test of human probabilities as discussed by the AO in detail in the assessment order.

4.13 Reliance is also place on the decision of the Hon'ble Supreme Court in the case of CIT vs P. Mohankala (15/05/2007) wherein the SC held that-

"The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "**the assessee offers no explanation**" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

In this case the Hon'ble Supreme Court has reversed the decision of the Hon'ble Madras High Court and upheld the findings of the lower authorities regarding the transactions of gift received by assessee even though these were done through banking channels, to be though apparent but not be real one.

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

4.15 It must also be stated here that in CIT vs NR Portfolio Pvt Ltd on 22 November, 2013, the Hon'ble Delhi High court has held that-

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

intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken ". ,

4.16 Similar decision has been taken in following cases:

Saniay Bimalchand Jain L/H Shandtidevi Bimalchand Jain Vs PCIT (ITA No. 18/2017 Bombay High Court (Nagpur Bench) (Copy Enclosed)

The assessee had purchased shares of two penny stocks of Kolkata based companies i.e., 8000 shares at the rate of Rs. 5.50 per share on 08.08.2003 and 4000 shares at the rate of Rs. 4/per share on 05.08.2003. The assessee sold 2200 shares at an exorbitant rate of Rs. 486.55 per share on 07.06.2005 and 800 shares on 20.06.2005 at the rate of Rs. 485.65. The authorities held that the assessee had not tendered cogent evidence to explain as to how the shares in an unknown company worth Rs. 5/had jumped to Rs.485/in no time. Addition confirmed.

In case of Chandan Gupta Vs CIT (20115) 54 taxmann.com 10 (Punjab & Haryana)/(2015) 229 Taxman 173 Hon'ble Punjab & Haryana High Court held that where assessee could not explain receipt of alleged share transactions profits credited in his bank accounts, then sale proceeds had to be added as income of assessee under section 68.s

In case of Balbir Chand Maini Vs CIT (2011) 12 taxmann.com 276 (Punjab & Haryana)/(2011) 201 Taxman 94 (Punjab & Haryana) (MAF.)/[2012] 340 ITR 161 (Punjab & Haryana)/[2012] 247 CTR 468 (Punjab & Haryana) where in Section 69 of the Income Tax Act, 1961 is upheld. In this case in Assessment year 1998-99 ,the, 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 shares. 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.

In case of Usha Chandresh Shah Vs ITO [I.T.A. No. 6858/Mum/2011] Hori'ble ITAT .Mumbai held that in this case 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 declares as "**Penny Stock**" by SEBI and the broker Sanju Kabra, through whom the shares were sold by the assessee was indicated 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.

4.17 It is further observe that Hon. Delhi High Court in the case of CIT V Empire Builtech P Ltd 361 ITR 258 (Del), has held that when the assessee does not produce evidence or tries to avoid the appearance before the Assessing authority it necessarily creates difficulties and prevents ascertainment of the truth and correct facts as the Assessing Officer is denied the advantage of the attendance or factual assertion by the assessee before him. If an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the

desire to prevent enquiry or investigation an adverse opinion should be drawn. The assessee had not discharged the initial onus to establish the identity, creditworthiness of the share applicants and the genuineness of the transactions. The additions made by the Assessing Officer were justified and sustainable. “

4.18 The reliance can also be placed upon the decisions of Hon'ble ITAT, Pune in the case of Sh. Zikrullah Chaudhary in ITA.No.669/PN/2012 dated 04.03.2014, Hon'ble ITAT, Mumbai in the case of Sh. Arvind M. Kariya in I.T.A. No.7024/Mum/2010 dated 16.01.2013 and Hon'ble ITAT, Delhi Bench 98 ITD 285 in the case of M/s Napar Drugs Limited.

All these cases are applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the circumstances and not getting influenced by the picture shown by the appellant which is colored by the use of sham devices and layering of transactions.

The case laws relied upon by the AR have been perused. It cannot be denied that the decisions in these cases are in favour of the assessee but it appears that the Hon'ble Tribunals/Courts which have passed these judgments have not been made aware of the entirety of the circumstances. Moreover, the fact that the assessee in these cases fail to clear the test of human probabilities, has not been brought to the knowledge of these judicial authorities. Therefore, these cases are not being found relevant in the present case where the AO has gone to the very root of the transactions after doing deep analysis of the facts and circumstances and after taking into account the various inputs available with him from different sources, some of which the AO has found himself with the help of online resources available on internet.

4.19 In the present case, there is an obvious and plain transaction of tax evasion which has been clothed with the smoke-screen of subterfuges, by the appellant. The facts of the present case clearly reveal that the transactions of purchase and sale of shares had been effected to create bogus loss under the head STCG. Such transactions are not genuine and natural transactions, but preconceived transactions, resulting in creation of bogus loss. Such transactions are mutually self-serving to the parties to the transactions. I have come to conclude on the basis of above analysis, documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities that what is apparent in this case is not real, that these financial transactions were sham ones and that this entire edifice was only a colourable device. used to evade tax. Moreover, the impugned transactions of shares are preordained one, not for legitimate purpose in view but for the purpose of creating non-genuine and artificial profits, with a view to reduce valid tax liability. Keeping in view of various decisions, fact of the case and observations made by undersigned, the additions made by the AO is hereby confirmed on account of bogus Short Term Capital Loss and the appeal of the appellant is **dismissed.**”

3. I have given my thoughtful consideration to rival contentions against and in support of the impugned addition as per respective stands of the parties. There is hardly any dispute that Revenue has placed on reliance of the circumstantial evidence on statement of an alleged entry operator indicating artificial rigging of scrip prices in issue. The Assessing Officer as well as CIT(A) are of the view that the said clinching evidence in the nature of search statement make it clear that the assessee's STCL is not genuine. Learned Departmental Representative places strong reliance on hon'ble

apex court's landmark decisions in *Sumati Dayal vs. CIT* (1995) 80 Taxmann. 89/214 ITR 801 (SC) and *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) that suspicious circumstances highlighted in the lower appellate discussion extracted hereinabove deserves to be upheld as per the human probabilities by removing all blinkers. This tribunal's co-ordinate bench's decision in **ITA No.2477/Kol/2018 Mahavir Jhanwav vs. ITO** decided on 01.02.2019 holds that such circumstantial carries no significance as under:-

"5. After hearing both sides, I find that in a number of cases this bench of the Tribunal and Jurisdictional Calcutta High Court has consistently held that, decision in all such cases should be based on evidence and not on generalisation, human probabilities, suspicion, conjectures and surmises. In all cases additions were deleted. Some of the cases were, detailed finding have been given on this issue, are listed below:-

Sl.No	ITA Nos.	Name of the Assessee	Date of order /Judgment
1.	ITA No.714 to 718/Kol/2011 ITAT, Kolkata	DICT vs. Sunita Khemka	28.10.2015
2	214 ITR 244 Calcutta High Court	CIT vs. Carbo Industrial Holdings Ltd.	-
3.	250 ITR 539	CIT vs. Emerald Commercial Ltd.	23.03.2001
4.	ITA No.1236-1237/KOI/2017	Manish Kumar Baid vs. ACIT	18.08.2017
5.	ITA No.569/Kol/2017	Gautam Pincha	15.11.2017
6	ITA No.443/KOI/2017	Kiran Kothari HUF	15.11.2017
7	ITA No.2281/Kol/2017	Navneet Agarwal vs. ITO	20.07.2018
8	ITA No.456 of 2007 Bombay High Court	CIT vs. Shri Mukesh Ratilal Marolia	07.09.2011
9	ITA No.95 of 2017 (O&M)	PCIT vs. Prem Pal Gandhi	18.01.2018
10	ITA No.1089/Kol/2018	Sanjay Mehta	28.09.2018

6. Regarding the case laws relied upon by the ld. Departmental Representative, I find that, in the case of *M/s. Pankaj Agarwal & Sons (HUF)*(supra), the issue was decided against the assessee for the reason that, the assessee could not justify his claim as genuine by producing evidence and was only arguing for the matter to be set aside to the lower authorities on the ground of natural justice. As similar arguments were not raised before the lower authorities by the assessee, the ITAT rejected these arguments. In the case on hand, all evidences were produced by the assessee. In the case of *Sanjay Bimalchand Jain*, legal heir of Santi Devi Bimalchand Jain, the Hon'ble High Court upheld the stand of the Revenue that the

transaction in question is an adventure in nature of trade and the profit of the transactions is assessable under the head of 'Business Income'. In the case on hand, the Id. Assessing Officer has not assessed this amount as 'Business Income'. In any event, I am bound to follow the judgment of the Jurisdictional High Court in this matter. I find that the assessee has filed all necessary evidences in support of the transactions. Some of these evidences are (a) evidence of purchase of shares, (b) evidence of payment for purchase of shares made by way of account payee cheque, copy of bank statements, (c) copy of balance sheet disclosing investments, (d) copy of demat statement reflecting purchase, (e) copy of merger order passed by the High Court, (f) copy of allotment of shares on merger, (g) evidence of sale of shares through the stock exchange, (h) copy of demat statement showing the sale of shares, (i) copy of bank statement reflecting sale receipts, (j) copy of brokers ledger, (k) copy of Contract Notes etc.

7. The proposition of law laid down in these case laws by the Jurisdictional High Court as well as by the ITAT Kolkata on these issues are in favour of the assessee. These are squarely applicable to the facts of the case. The Id. Departmental Representative, though not leaving his ground, could not controvert the claim of the Id. Counsel for the assessee that the issue in question is covered by the above cited decisions of the Hon'ble Jurisdictional Calcutta High Court and the ITAT. I am bound to follow the same."

I adopt the above extracted detailed discussion *mutatis mutandis* to delete the impugned addition.

4. This assessee's appeal is allowed.

Order pronounced in open court on 15/05/2019

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

Kolkata,  
\*Dkp/Sr.PS

दिनांक:- 15/05/2019 कोलकाता

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

1. अपीलार्थी/Appellant-Mangilal Jain, C/o Advocate Pradip Lakhota, 2<sup>nd</sup> Floor, Metro Plaza, SF Road, Siliguri-734005
2. प्रत्यर्थी/Respondent-ITO Ward-3(3), Nr. Lal Kothi, Darjeeling
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार  
आयकर अपीलीय अधिकरण, कोलकाता ।