

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B', JAIPUR

श्री रमेश सी. शर्मा, लेखा सदस्य एवं श्री विजय पाल रॉव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 550/JP/2019
निर्धारण वर्ष/Assessment Year : 2014-15.

The Income Tax Officer, Ward 2(3), Jaipur.	बनाम Vs.	Shri Gaurav Bagaria, 100-101, Hari Nagar, CBI Colony, Jagatpura, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AMQPB 6942 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri PC Parwal (CA)
राजस्व की ओर से / Revenue by: Shri KC Meena (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 03.07.2019.
घोषणा की तारीख / Date of Pronouncement : 10/07/2019.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the revenue is directed against the order dated 3rd January, 2019 of Id. CIT (A), Kota for the assessment year 2014-15. The revenue has raised the following grounds :-

1. Whether on the facts and circumstances of the case and in law, the Id. CIT (A) was justified in deleting the addition of Rs. 75,93,444/- made on account of unexplained credit u/s 68 of the Act when the assessee was unable to justify equity trading by nitpicking the shares of specific companies with poor net worth.
2. Whether on the facts and circumstances of the case and in law, the Id. CIT (A) was justified in deleting the addition of Rs. 75,93,444/- by holding the transaction as genuine because transaction is through stock exchange and payment is by cheque, completely ignoring the fact that this is the basic guise

to provide accommodation entry, only to layer the sham transaction as genuine ?

3. Whether on the facts and circumstances of the case and in law, the Id. CIT (A) was justified in deleting the addition of Rs. 1,51,869/- being commission to acquire such accommodation entry ?
4. Whether on the facts and circumstances of the case and in law, the Id. CIT (A) was justified in deleting the additions made on the basis of corroborative information received from Investigation Wing, Kolkata which is a law enforcement agency under the Ministry of Finance and accordingly the case falls under exception clause 10(e) of Circular 03 of 2018 dated 20.08.2018 ?
5. The appellant craves the right to amend alter or add to any of the grounds of appeal given above.

2. The relevant facts leading to the controversy of treating the long term capital gain on sale of shares as sham/bogus transaction and addition under section 68 of the IT Act which was deleted by the Id. CIT (A) is that the assessee purchased 2,00,000 shares of face value of Re. 1/- each of M/s. Careful Projects Advisory Ltd on 24.11.2011 from M/s. Sanskriti Vincom Pvt. Ltd. for a consideration of Rs. 2,00,000/-. The shares were dematerialized and later on the said company M/s. Careful Projects Advisory Ltd. merged with M/s. Kailash Auto Finance Ltd. (KAFL) in pursuant to the amalgamation plan approved by the Hon'ble Allahabad High Court vide Judgment dated 9th May, 2013 with effect from 01.04.2012. Pursuant to such amalgamation, the assessee was allotted 2,00,000 shares of M/s. Kailash Auto Finance Ltd. of the face value of Re. 1/- each and accordingly the same were credited in the demat account of the assessee in lieu of the shares of erstwhile company M/s. Careful Projects Advisory Ltd. The assessee sold these shares

between 13.08.2013 to 30.01.2014 in the Stock Exchange for a sale consideration of Rs. 77,93,444/- and earned long term capital gain of Rs. 75,93,444/- on the sale of these shares which was claimed as exempt under section 10(38) of the IT Act. The AO on the basis of the report of the Investigation Wing, Kolkata based on the statement of Shri Sunil Dokania recorded under section 131/133A wherein he admitted to have engaged in providing accommodation entries of Long Term Capital Gain in the shares of various entities including M/s. Kailash Auto Finance Ltd. treated the claim of Long Term Capital Gain as sham and bogus and made the addition of Long Term Capital Gain under section 68 of the IT Act as undisclosed cash credit as well as an addition of Rs. 1,51,869/- being commission paid for acquiring such accommodation entry. The assessee challenged the action of the AO before the Id. CIT (A) and referred to the documentary evidence of purchasing of shares against the payment through banking channel. The shares were duly dematerialized in the demat account of the assessee and thereafter the erstwhile company M/s. Careful Projects Advisory Ltd. was merged with M/s. Kailash Auto Finance Ltd. by virtue of a judgment of Hon'ble Allahabad High Court and consequently the shares of M/s. Kailash Auto Finance Ltd. were allotted to the assessee in lieu of the shares of M/s. Careful Projects Advisory Ltd. On considering all these facts and evidences, the Id. CIT (A) has deleted the addition made by the AO. Aggrieved by the order of Id. CIT (A), the revenue has filed this appeal.

3. Before us, the Id. D/R has submitted that during the survey operations carried out by the Investigation Wing of the Department, Kolkata, Shri Sunil Dokania admitted that he is aware of suspicious transactions done by some companies in the script of M/s. Kailash Auto Finance Ltd. through the broker houses. The Id. D/R has

referred to the statement of Shri Sunil Dokania recorded under section 131 on 12.06.2015 as well as the statement recorded on 06.03.2013. The assessee has shown huge capital gain earned from purchase and sale of the shares of M/s. Kailash Auto Finance Ltd. within a very short period of time. Thus it is a case of investment in penny stock of a company whose shares were used for the purpose of providing accommodation entries by the persons involved in such activity. The Id. D/R has referred to the assessment order and submitted that the AO has discussed the modus operandi of such transactions of accommodation entries in the script of paper/bogus companies and thus the unaccounted money of the beneficiary is routed back in the shape of Long Term Capital Gain claimed as exempt under section 10(38) of the IT Act. Though the assessee has purported to have received the sale consideration on sale of shares, however, in reality it was his own cash which he received back through some clandestine deals. The AO has referred to the report of the SIT as well as the statement of Shri Sunil Dokania recorded by the Investigation Wing Kolkata which proved the transaction as sham/bogus and the AO in the assessment proceedings is not required to establish the finding through full proof documentary evidence but the income tax liability is ascertained only on the basis of material available on record, surrounding circumstances, human conduct and preponderance of probabilities. All these criteria have been satisfied by the AO while passing the assessment order as there were material available with the AO, the circumstances clearly indicated the non-genuineness of the transaction and, therefore when the strict rule of evidence as per Evidence Act is not applicable in the matter of taxation, then the material as brought on record by the AO is sufficient to hold that the assessee has availed the benefit of accommodation entry by creating

bogus Long Term Capital Gain against the payment of his own unaccounted income. He has relied upon the order of the A.O.

4. On the other hand, the Id. A/R has submitted that the assessee has established the genuineness of the transaction by producing all the relevant evidences including the purchase of 2,00,000 shares of M/s. Careful Projects Advisory Ltd. against the payment of Rs. 2,00,000/- through banking channel. He has referred to the bank account statement at pages 26 & 27 of the paper book and submitted that the payment is reflected in the bank statement. The Id. A/R has then referred to the demat account at page 55 of the paper book and submitted that the shares of M/s. Careful Projects Advisory Ltd were dematerialized and credited in the demat account on 24th January, 2012. Subsequently the said company merged with M/s. Kailash Auto Finance Ltd. as per the judgment of Hon'ble Allahabad High Court dated 09.05.2013. The assessee was allotted 2,00,000 shares of M/s. Kailash Auto Finance Ltd. in lieu of the shares of M/s. Careful Projects Advisory Ltd. which were also credited in the demat account of the assessee on 22nd July, 2013. Thus the genuineness of the purchase of shares is establish by producing all the relevant evidences. The sale of the shares is also not in dispute as these were sold in the Stock Exchange on which STT was paid through M/s. Anand Rathi Share & Stock Brokers Ltd., a registered share broker of SEBI. The Id. A/R has referred the Contract Note for sale of shares at pages 35 to 43 of the paper book as well as the ledger account of the assessee in the books of M/s. Anand Rathi Share & Stock Brokers Ltd. at page 44 of the paper book. He has also referred the bank statement showing the sale consideration received in the bank account of the assessee. Thus when the assessee was holding the shares since 24th November, 2011 and sold

between 13.08.2013 to 31.01.2014 then holding period of these shares is about 2 years and in some cases more than 2 years. Hence, the Id. A/R has submitted that when the assessee has purchased the shares of M/s. Careful Projects Advisory Ltd. then the statement of Shri Sunil Dokania recorded by the Income Tax Department, Kolkata cannot be a relevant material to hold the transaction of purchase as bogus. Further, in the said statement he has not mentioned the name of the assessee or the company from whom the assessee purchased the shares. Therefore, a general statement made by Shri Sunil Dokania cannot be used against the assessee. He has supported the order of the Id. CIT (A) and submitted that the Id. CIT (A) has discussed all the relevant facts and evidences as well as the observations of the AO while passing the impugned order. The Id. A/R has relied upon the following decisions :-

Mahesh Kumar Baid vs. ACIT
(ITA No. 1236/Kol/2017 dated 18.08.2017 (Kol. Trib.))

DCIT vs. Saurabh Mittal
53 CCH 530 (Jaipur Trib.)

CIT vs. Smt. Pooja Agarwal
160 DTR 198 (Raj. HC)

5. We have considered the rival submissions as well as the relevant material on record. We have also carefully gone through the documentary evidence produced by the assessee before the AO and copy of which is also produced before us in the paper book filed by the assessee. The assessee has produced the share purchase bills dated 24.11.2011 and 28.11.2011 issued by M/s. Sanskriti Vincom Pvt. Ltd. for purchase of 1,00,000 shares each total 2,00,000 shares of M/s. Careful Projects Advisory Ltd. of face value of Re. 1/- each for a total consideration of Rs. 2,00,000/-.

The payment was reflected in the bank statement with State Bank of India, Malviya Nagar, Jaipur, of Rs. 2,00,000/- vide two cheques no. 457443 and 457444. These cheques were cleared on 30.11.2011. Thus the payment of purchase consideration through banking channel is proved from the record which can be verified independently and assessee has no role to manipulate the bank account with State Bank of India. Thus it is clearly established that the assessee has purchased the shares of M/s. Careful Projects Advisory Ltd on 24.11.2011. These shares were duly dematerialized in the demat account of the assessee on 24th January, 2012. The holding of these shares of M/s. Careful Projects Advisory Ltd by the assessee as credited in the demat account of the assessee cannot be disputed as the demat account is also an evidence which can be verified independently. It is also not in dispute that the said company M/s. Careful Projects Advisory Ltd was subsequently merged with M/s. Kailash Auto Finance Ltd. and the scheme of the merger/amalgamation was approved by Hon'ble Allahabad High Court vide Judgment dated 9th May, 2013 with effect from 01.04.2012. In pursuance to the merger of M/s. Careful Projects Advisory Ltd. with M/s. Kailash Auto Finance Ltd., the assessee was allotted 2,00,000 shares of M/s. Kailash Auto Finance Ltd. in lieu of the equal number of shares of M/s. Careful Projects Advisory Ltd. These shares were also credited to the demat account of the assessee as reflected in the demat account. Therefore, the purchase of shares by the assessee of M/s. Careful Projects Advisory Ltd cannot be disputed due to the reason that certain persons were indulged in providing accommodation entries in the shares of M/s. Kailash Auto Finance Ltd. It is not the case of purchase of shares of M/s. Kailash Auto Finance Ltd. but the assessee was allotted the shares of the said company by virtue of merger and in lieu

of the shares of M/s. Careful Projects Advisory Ltd. Further, the AO has given much emphasis to the statement of Shri Sunil Dokania recorded by the Investigation Wing Kolkata on 06.03.2013 and 12.06.2015 whereas the shares of M/s. Careful Projects Advisory Ltd. were purchased on 24.11.2011. Therefore, even if Shri Sunil Dokania has accepted the activity of providing accommodation entries in the shares of M/s. Kailash Auto Finance Ltd., but when the assessee has not purchased the shares of the said company, then the transaction of the assessee cannot be doubted on the basis of the said statement. Even otherwise, when the assessee has produced documentary evidence which is neither found to be bogus or the correctness of the same is doubted by the AO, the said documentary evidence is otherwise not assessee's own record but it is the record of Bank, Depository Services and third party documents being bills, ledger account etc. The AO has not even whispered or doubted the correctness of these documents filed by the assessee. Once the assessee has produced the documentary evidence which established the fact of purchase of shares of M/s. Careful Projects Advisory Ltd and thereafter the dematerialization of shares in the demat account of the assessee and subsequently allotment of the shares of M/s. Kailash Auto Finance Ltd. due to the merger as approved by the Hon'ble Allahabad High Court which were also credited to the demat account of the assessee, then the documentary evidence cannot be ignored or brushed aside merely on the basis of the statement of some third person recorded by the Investigation Wing, Kolkata. The Id. CIT (A) has discussed this issue at pages 57 to 68 as under :-

“ I have gone through assessee's submission and AO's findings.

As regards **Grounds no 1 & 2**, it is observed in this case that equity shares of Careful Projects Advisory Ltd. were purchased on 28.11.2011 from M/s Sanskriti Vincom Pvt. Ltd., Kolkatta for Rs. 2,00,000/- through cheque payment. The above Company got amalgamated in the Company Kailash Auto Finance Ltd. by an order of the Allahabad High Court. Accordingly the shares got allotted to the assessee from Kailash Auto Finance Ltd. These shares were sold through stock exchange and STT was paid on the same. However, based on certain observations and the findings in certain cases referred by the Investigation Wing, The SEBI enquiry and the recommendations of SIT on black money, the A.O has held the transaction of sale of shares as "accommodation" entry taken by the assessee showing unusual gains in "Penny Stocks" and has disallowed the claim of deduction u/s 10 (38) and added the Capital Gains amount u/s 68 of the I.T. Act.

In several similar cases, the issue of '**Penny Stock**' trading was taken up by the department relying on action carried out on certain entities by the Investigation Directorates at Kolkata, Mumbai & Delhi etc. and SEBI enquiry into the genuineness of such companies who have allegedly provided route for 'accommodation' entries by the methodology of buying 'Penny' shares 'off' market, getting them dematerialized-86 then overpriced sale through these companies to obtain bogus capital gain/loss.

In most of such cases where the department has initiated proceedings u/s 148 & made additions by disallowing capital gains benefit claimed u/s 10(38) & treating it as unexplained credit u/s 68, the higher judicial authorities have not agreed & taken a view adverse to the department, based on facts in such cases.

The main finding in such decisions is that if the transaction is supported by documents like contract notes, demat statements etc. and is routed through the stock exchange and if the payments are by account-payee cheques and there is no evidence that the cash has gone back to or from the assessee's or recipient's account, it has to be treated as a genuine transaction and cannot be treated as unexplained credit.

In the case of *DCIT vs. Rakesh Saraogi & Sons (HUF)*, *ITAT, Raipur* clarified that even assuming brokers may have done manipulation, assessee cannot be held

liable when the entire transaction is done through banking channels duly recorded in demat accounts with Government depository and traded on the stock exchange. Nothing on record to suggest assessee gave cash 86 purchased cheque from broker.

The jurisdictional. *ITAT Jaipur in bench in the case of Pramod Kumar Lodha* held recently that where prior to sale, shares were held for certain period 86 sale transactions were not disputed, LTCG could not be held to be a means to introduce unaccounted money.

The assessment order is broadly based on the modus operandi 86 SEBI findings as circulated by the Investigation wing. However, in order to drive home the applicability of this theory in the appellant's case, the A.O should have supplemented it with relevant 86 concrete findings.

Though the assessee has furnished the details of purchases of shares, merger and other relevant evidences, the Assessing Officer has not examined them. When the assessee is furnishing the necessary details available with him and if the Assessing Officer feels that they are not reliable then he should have conducted further investigation and brought any other material on record to disprove the claims put forth by the assessee. However, the Assessing Officer has taken adverse inferences against the assessee without causing further examination of the materials furnished by the assessee.

The issue to be examined is thus whether, the sale consideration of the sale of shares is to be considered as exempt Long term Capital Gains as covered u/s 10 (38) or unexplained cash credit within the purview of section 68 of the I.T. Act, 1961 treated as undisclosed income of the assessee.

The transaction of the assessee is duly supported by proper evidences. However, on his part The AO has not brought any evidence which indicates that assessee has given cash in lieu of the capital gain or that there was a direct nexus with the broker or Company in whose shares the assessee showed trading. No enquiry report of the SEBI/any broker/ investigation wing were confronted to the assessee which contains name of the assessee. In the extract of statement of Sh. Sunil Dokania recorded by the Investigation Directorate, Kolkatta provided to

him, there is no name of the assessee but of the Company Kailash Auto Finance Ltd. who is "alleged" to have traded in such shares which are "Penny Stock". The assessee has clarified that he neither purchased nor sold the shares in question through these persons.

As regards the off market purchase of shares initially, off-market transaction for purchase of shares is not illegal. The transactions were all through account payee cheque and the sale of shares suffered STT, brokerages, etc. The allegedly Penny stock company Kailash Auto Finance Limited, shares of which were traded on BSE, however the operations of the company have been suspended after the order of SEBI, though **later on vide orders dt.21.09.2017 SEBI after making necessary investigation concluded that no adverse findings were there against the 244 entities which were alleged to be involved in manipulation of the scrip of company M/s Kailash Auto (as alleged by the department). These parties included the names of Sh. Anand Rathi who was the broker in appellant's case also.**

There are certain points on which the A.O. needed to do independent verifications to drive home his theory-

(i) Whether any cash entries were there in the broker's account or routed through another account to his account which could be related to the appellant, thus confirming it to be a bogus claim.

(iii) Whether SEBI had confirmed a 'price rigging' finding in the case of the company whose shares the appellant had allegedly overpriced in the short span in collusion with the broker so as to get accommodative capital gains exempt u/ s 10(38) of the I.T. Act, 1961. In fact the SEBI has later absolved the Company from such rigging or manipulating related allegations vide its order u/s 11,11(4) and 11(B) dated 21/09/2017 revoking its ad interim order restraining 246 entities of the Kailash Auto Group (including Kailash Auto Finance Limited) from market trading etc. Further, the assessee sold the share at 38 to 40/- per share, which cannot be termed as an exorbitant price.

(iv) Whether the contract notes issued by the broker were non-genuine?

(v) though- the statements relied upon by the A.O have mentioned the name of the Company in whose stocks the appellant has traded as Penny stock, but no one has mentioned the appellant's transaction to be non genuine. In fact in the A.O relied on "many" persons declarations made under the IDS, 2016 to generalize his finding that all transactions in the said company were accommodation based. Thus, the assertion that certain beneficiaries have offered their income under the IDS 2016 scheme is also presumption based and not adversely conclusive against the assessee.

(vi) The A.O has not referred the statements for cross verification to the appellant before using them against her. The A.O's presumption on connivance with entities is without bringing on record any evidences where assessee is directly found involved. All the evidences brought on record are 'third party' statements not linked to assessee but to the scrip & the findings are also inconclusive.

(vii) The A.O. has again presumed receipt of 'cash' back through clandestine deals which once unproved cannot be a basis for burdening the assessee with an adverse finding on the share dealings & denial of benefits u/s 10(38) when all the conditions for the claim are otherwise satisfactorily met.

In fact, the A.O. has not on his part, brought out by proactive enquiry, anything to disprove the contentions of the appellant. He has not established any cash payments being routed for regularization through the Share Gains route; he has not denied the transactions being through regular banking channels or the broker being in connivance anywhere etc.

Various case laws are discussed as relevant in similar such cases which are as under :

THE ITAT AHMEDABAD BENCH 'B' in Pratik Suryakant Shah v. Income-tax Officer Ward- 10 (3), Ahmedabad, 77 taxmann.com 260 (Ahmedabad - Trib.) in IT APPEAL NOS, 810 TO 815 86 922 TO 926 (AHD.) OF 2015 & others - Tula! 11 Appeals for A Ys 2006-07 & 2008-09 Date of Hearing : 20/10/2016 / Date of Pronouncement: 21/10/2016 held as under:

Section 10(38), read with section 147, of the Income-tax Act, 1961 - Capital gains - Income arising from transfer of long-term securities (Bogus transactions) - Assessment year 200607 - Assessee purchased 3000 shares of company 'T' through a stock broker - These shares were transferred to assessee's demat account - However, said stock broker submitted before authorities that 1w was providing accomodation entries for taking profit or loss by showing purchase or sales of shares and securities commission from beneficiary parties and that assessee was one of beneficiary of such accommodation entries - Assessing authorities reopened assessment of assessee - Whether since shares of said company was listed in BSE/ NSE and these were also transferred to demat account of assessee, assessee's claim of exemptions of long-term capital gain on sale of shares could not be denied on basis of submission of said broker - Held, yes.

(Relevant extract)

2. *As agreed by the Representatives of both the sides, we have considered the facts of ITA No.810/ Ahd/ 2015 for AY 2006-07 in the case of Shri Pratik Suryakant Shah.*

3. *The common grievance in all these appeals relates to the treatment of Long Term Capital Gains as undisclosed income of the assessee, denying the exemptions of Long Term Capital Gains on sale of shares.*

... 13. Having heard the rival contentions, we have carefully perused the orders of the authorities below. As mentioned elsewhere, we have considered the facts in ITA No.810/ Ahd/ 2015. We find that the assessee had purchased 3000 shares of Telant Info Ltd from M/ s. Mahasagar Securities Put Ltd on April 2004. The consideration was paid and the payment of consideration is not in dispute. The shares of Telant Info Ltd were listed in the Bombay Stock Exchange at that point of time. The shares so purchased were sold through M/ s. Alliance Intermediateries & Network Pvt Ltd and the consideration was received by cheque.. It would be pertinent to mention here that though the shares were purchased in physical form, the same were sent to the company with share application form and the shares were transferred by the company in the name of the purchaser. Thereafter, the shares were transferred in the demat account, from where they were sold. It is not the case of the Revenue that

the consideration paid by the assessee at the time of purchase of shares was received back in cash, nor it is the case of the Revenue that the sale consideration received by the assessee was returned back in cash. It is also not the case of the Revenue that the shares in question are still lying with the assessee, nor it is the case of the Revenue that the amounts received by the assessee on sale of the shares is more than what is declared by the assessee.

14. *The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the Assessing Officer/ CIT(A). **The Hon'ble Supreme Court in the case of Andaman Timber Industries [Civil Appeal No. 4228 of 20061** was seized with the following action of the Tribunal:--*

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

15. *The Hon'ble Apex Court held as under:—*

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious fate 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.

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 9n an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

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

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

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

17. *For the sake of the completeness of the adjudication, even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that*

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

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

19. *As mentioned elsewhere and as agreed by the Representatives of both the sides; since the facts are common in all the impugned appeals, all the appeals by the assesseees are allowed. The Assessing Officer is directed to treat the surplus as Long Term Capital Gains and allow the exemption as claimed by the assesseees.*

20. *In the result, all the appeals filed by the assesseees are allowed.*

Income Tax Appellate Tribunal " SMC " BENCH Ahmedabad in another decision in the case of Vaishal Suryakant Shah and others vs Income Tax Officer, vide order dated on 20 March, 2017 in ITA No. 1499 to 1502/Ahd/ 16 AY 2007-08 Appellants- Shri Vaishal Suryakant Shah; Shri Pratik S. Shah, Shri Suryakant P. Shah, Shri Suryakant P. Shah(HUF) **Respondent ITO, Lid- 5(2)(3), Ahmedabad** and reiterated the findings of the coordinate bench of the Tribunal referred above in the case of Pratik Suryakant Shah after a gap of 5 months again.

THE ITAT JODHPUR BENCH in Ramesh Kumar Jain (HUF) v. Deputy Commissioner of Income-tax 36 taxmann.com 524 (Jodhpur - Trib.) held-

Section 10(38), read with section 153C, of the Income-tax Act, 1961 - Capital gains - Income arising from transfer of securities 'Burden of proof] - Assessment year 2008-09 - Assessee.-HT IF derived long-term capital gain from sale of shares of two companies and such capital gains was claimed as exempt under section 10(38) - Assessing Officer having found that alleged purchaser of shares from assessee` was engaged in fraudulent billing activities, treated transaction of shares as bogus and accordingly denied exemption under section 10(38) - Whether since entire proof of purchase and sale of these shares were found in books of account of assessee and sale of shares was found genuine when Assessing Officer made enquiries from stock exchange directly, addition on account of undisclosed income and denial of exemption under section 10(38) could not be sustained Held, yes

THE ITAT JODHPUR BENCH in Deputy Commissioner of Income-tax v. Smt. Hansa Choudhary 23 taxmann.com 302 (Jodhpur - Trib.) (referred in the above case law also), held-

Section 68 of the Income-tax Act, 1961 - Cash credit - Assessment years 2002-03 and 2004-05 - Where purchase of shares in question was not in dispute and evidence on record showed that said shares were sold through a broker and consideration for transfer was received through cheque, sale consideration could not be treated as assessee's own undisclosed funds.

ITO vs. Indravadan Jain (HUF) (ITAT Mumbai) (Date of pronouncement May 27, 2016) held as under-

S. 68: Long-term capital gains arising from transfer of penny stocks cannot be treated as bogus merely because SEBI has initiating an inquiry with regard to the Company & the broker if the shares are purchased from the exchange, payment is by cheque and delivery of shares is taken & given.

This view has also been confirmed by the jurisdictional **Rajasthan High Court** in the case of *Pooja Agarwal in D.B. Income Tax Appeal No 385/2011* which case

was also referred by the jurisdictional ITAT, Jaipur in the recent case of **Pratnod Jain and others in ITA No. 368-372/JP/2017.**

In its order the ITAT has specifically dealt with this issue of Penny stock shares related addition and held as under-

(relevant extract)

Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case. of CIT vs: Smt. Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under:-

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

"Contention of the AN is considered. One of the main reasons for not accepting the genuineness of (1u transactions declared by the appellant that at the time of survey the appellant in his statement denied having made any, transactions in shares. However, subsequently the facts came on record that the appellant had transacted not only in the shares which are disputed but shares of various other companies like Satyam Computers, I ICI,, IPCI,, LIPCL and Tata Tea etc. Regarding the transactions in question various details like copy of contract note regarding purchase and sale of shares of Limtex and Konark Commerce & Ind. Ltd., assessee's account with P.K. Agarwal & co. share broker, conwany's master details from registrar of companies, Kolkata were filed.

Copy of depository a/c or demat account with Alankrit Assignment Ltd., a subsidiary of NSDL was also filed which shows that the transactions were made through demat a/c. When the relevant documents are available the fact of transactions entered into cannot be denied simply on the ground that in his statement the appellant

denied having made any transactions in shares. The payments and receipts are made through a/c payee cheques and the transactions are routed through Kolkata Stock Exchange. There is no evidence that the cash has gone back in appellants's account. Prima fade the transaction which are supported by documents appear to be genuine transactions. The AO has discussed modus operandi in some sham transactions which were detected in the search case of B.C. Purohit Group. The AO has also stated in the assessment order itself while discussing the modus operandi that accommodation entries of long term capital gain were purchased as long term capital gain either was exempted from tax or was taxable at. a lower rate. As the appellant's case is of short term capital gain, it does not exactly fall under that category of accommodation transactions. Further as per the report of DCIT, Central Circle-3 Sh. P.K. Agarwal was found to be an entry provider as stated by Sh. Pawan Purohit of B.C. Purohit arid Co. group. The AR made submission before the AO that the fact was not correct as in the statement of Sh. Pawan Purohit there is no mention 'of Sh. P. K. Agarwal. It was also submitted that there was no mention of Sh. P. K. Agarwal in the order of Settlement Commission in the case of Sh. Sushil Kumar Purohit. Copy of the order of settlement commission was submitted. The AO has failed to counter the objections raised by the appellant during the assessment proceedings. Simply mentioning that these findings are in the appraisal report and appraisal report is made by the Investing Wing after considering all the material facts available on record does not help much. The AO has failed to prove through any independent inquiry or relying on some material that the transactions made by the appellant through share broker P.K. Agarwal were non-genuine or there was any adverse mention about the transaction in question in statement of Sh. Pa wan Purohit. Simply because in the sham transactions bank a/c were opened with HDFC bank and the appellant has also received short term capital gain in his account with HDFC bank does not establish that the transaction made by the appellant were ~~wm~~ genuine. Considering ull these facts the share transactions made through Shri P.K. Agarwal cannot be held as non-genuine. Consequently denying the claim of short term capital gain (6 of 6) ITA-385/2011] made by the appellant before the AO is not approved. The AO is therefore, directed to accept claim of short term capital gain as shown by the appellant."

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

In the recently cited case by the appellant of **Om Prakash Modi** and others, *ITAT Jaipur vide its order dated 25/ 05/ 2018* has held that in the absence of cogent material to show that the assessee has introduced his own unaccounted income in the shape of Long term Capital Gain, the addition made u/s 68 cannot be sustained.

The A/R also cited the case of **DCIT v. Saurabh Mittal** (ITA No. 16/JP/2018 in its order dated 29/08/2018 where the tribunal confirmed the order of CIT (A) Alwar deleting the addition made by the A.O on account of Capital Gain earned by that assessee from sale of shares of Kailash Auto Finance Limited .

Thus in the light of the plethora of judgements highlighted above including those of the jurisdictional High Court followed by ITAT, Jaipur bench, it is seen from the facts involved in the present case is that the appellant has made payment for the purchase of shares vide cheque which the A.O. has not disputed. He has shares allotment on merger of the company by court's order with the Kailash Group and scheme of merger is showing the details of share allotment.

Shares were sold through the broker's contract note on stock exchange and sales consideration was received entirely in cheques. The STT has also been duly deducted on all the sales transactions. No adverse finding has been sent by the Investigation Unit regarding the Broker indulging in manipulations and how he could rig the trades in which sale prices were market and exchange based to give undue advantage to the assessee.

The A.O. has thus ignored the documentary evidences and relied upon '*circumstantial and theoretical evidences*' and in this case merely report and statements forwarded by the Investigation Directorate to reach the conclusion that the entire transaction was bogus and related to penny stock trading for denying the appellant's claim of long term Capital Gains.

The A.O ignored the basic premise involved in the addition that once the assessee discharged the initial burden of proof in an involved transaction, it was his duty to establish beyond doubt that the documents/proof presented by the assessee was bogus, false or fabricated.

Thus, the assessing officer's order appears to be based on presumption that since the scrip in which the assessee traded, was mentioned by SEBI in a report sent by the investigation wing, all the transactions of the Company could be treated as sham & non-genuine. Thus in my view as per the facts involved and the legal precedents discussed above, the claim of the assessee cannot be denied merely on the basis of presumption and surmises in respect of penny stock trade by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels, More so when later the SEBI has not found the allegations substantiated against the alleged "Penny Stock" company as discussed in the order above.

The addition of Rs. 75,93,444/- (resulting out of Capital gains on sale of shares by the assessee) made u/s 115BBE as income from other sources is accordingly directed to be deleted.

This Ground of appeal is **allowed**.

As regards **Ground no 2**, In view of the findings in respect of Ground no. 1 above, the addition of Rs. 1,51,869/- which was made on account of commission presumed to have been paid by the assessee for obtaining the accommodation entry in the form of the bogus long term capital gain to the broker would also not hold. The Assessing Officer was not able to bring anything on record that it was the assessee's own money, therefore holding that the assessee would have paid commission which he did not record in his books and making the subsequent

addition is based on presumption and also since I have held the Capital gains to be allowable, consequently the A.O's addition on account of commission payment for such transaction amounting to Rs. 1,51,869/-also cannot sustain and the addition made u/s 115BBE of the I.T.Act,1961 is directed to be deleted.

This ground of appeal is treated as **allowed.**“

Thus the Id. CIT (A) has discussed all the relevant facts as well as documentary evidence filed by the assessee in support of the claim. We further note that in case of Manish Kumar Baid vs. ACIT (supra), the Kolkata Bench of the Tribunal while considering an identical issue of Long Term Capital Gain on sale of shares of M/s. Kailash Auto Finance Ltd. has held in para 6 as under :-

"6. We have heard both the rival submissions and perused the materials available on record. We find lot of force in the arguments of the Id AR that the Id AO was not justified in rejecting the claim of the assessee on the basis of theory of surrounding circumstances, human conduct, and preponderance of probability without bringing on record any legal evidence against the assessee. We rely on the judgement of Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. (supra) for this proposition. The various facets of the arguments of the Id AR supra, with regard to impleading the assessee for drawing adverse inferences which remain unproved based on the evidences available on record, are not reiterated for the sake of brevity. The principles laid down in various case laws relied upon by the Id AR are also not reiterated for the sake of brevity. We find that the amalgamation of CPAL with KAFL has been approved by the order of Hon'ble High Court. The Id AO ought not to have questioned the validity of the amalgamation scheme approved by the Hon'ble High Court in May 2013 merely based on a statement given by a third party which has not been subject to cross –examination. Moreover, it is also pertinent to note that the assessee and / or the stock broker Ashita Stock Broking Ltd name is neither mentioned in the said statement as a person who had allegedly dealt with suspicious transactions nor they had been the beneficiaries of the transactions of shares of KAFL. Hence we hold that there is absolutely no adverse material to implicate the

assessee to the entire gamut of unwarranted allegations leveled by the Id AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the Id DR could not controvert the arguments of the Id AR with contrary material evidences on record and merely relied on the orders of the lower authorities apart from placing the copy of SEBI's interim order supra. We find that the SEBI's orders relied on by the Id AO and referred to him as direct evidence against the assessee did not contain the name of the assessee and/or the name of Ashika Stock Broking Ltd. through whom the assessee sold the shares of KAFL as a beneficiary to the alleged accommodation entries provided by the related entities / promoters / brokers / entry operators. In the instant case, the shares of CPAL were purchased by the assessee way back on 20.12.2011 and pursuant to merger of CPAL with KAFL, the assessee was allotted equal number of shares in KAFL, which was sold by the assessee by exiting at the most opportune moment by making good profits in order to have a good return on his investment. We find that the assessee and / or the broker Ashita Stock Broking Ltd was not the primary allottees of shares either in CPAL or in KAFL as could be evident from the SEBI's order. We find that the SEBI order did mention the list of 246 beneficiaries of persons trading in shares of KAFL, wherein, the assessee and / or Ashita Stock Broking Ltd's name is not reflected at all. Hence the allegation that the assessee and / or Ashita Stock Broking Ltd getting involved in price rigging of KAFL shares fails. We also find that even the SEBI's order heavily relied upon by the Id AO clearly states that the company KAFL had performed very well during the year under appeal and the P/E ratio had increased substantially. Thus we hold that the said orders of SEBI is no evidence against the assessee, much less to speak of direct evidence. The enquiry by the Investigation Wing and/or the statements of several persons recorded by the Investigation Wing in connection with the alleged bogus transactions in the shares of KAFL also did not implicate the assessee and/or his broker. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the Id AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the Id AO was not justified in rejecting the assessee's claim of exemption under section 10(38) of the Act. We also

find that the various case laws of Hon'ble Jurisdictional High Court relied upon by the Id AR and findings given thereon would apply to the facts of the instant case. The Id DR was not able to furnish any contrary cases to this effect. Hence we hold that the Id AO was not justified in assessing the sale proceeds of shares of KAFL as undisclosed income of the assessee u/s 68 of the Act. We accordingly hold that the reframed question no. 1 raised hereinabove is decided in the negative and in favour of the assessee."

Thus the Tribunal after considering all the material, which were relied upon by the AO including the order of SEBI held that the order of SEBI is no evidence against the assessee. Further, when the assessee furnished all evidences in the form of bill, contract note, demat statement, bank account statement to prove the genuineness of the transaction, then in the absence of any finding by the AO to show that these documents are either bogus or fabricated, the claim of the assessee cannot be treated as bogus. The Coordinate Benches of the Tribunal in case of DCIT vs. Saurabh Mittal (supra) has also considered this issue in para 6 as under :-

"6. We have heard the rival submissions as well the relevant material on record. The assessee stated to have purchased three lacs shares of Careful Projects Advisory Ltd. for a consideration of Rs. 3.00 lacs vide invoice dated 12/3/2012. We find that M/s Sanskriti Vincom Pvt. Ltd. has issued the invoice dated 12/3/2012 for the purchase made by the assessee of three lacs shares of Careful Projects Advisory Ltd.. The payments of the consideration of Rs. 3.00 lacs was made by the assessee through his bank account with ICICI bank and the statement of bank account reflected said payment of Rs. 3.00 lacs on 14/3/2012. Thus, the payment of consideration through bank account for purchase of shares is not in dispute as the same has been proved by the evidence which can be verified independently without even any scope of manipulation or control by the assessee. Similarly, the purchase

transaction of four lacs shares of M/s Panchshul Marketing Ltd. vide invoice dated 12/7/2012 issued by M/s Sanskriti Vincom Pvt. Ltd. is also established to the extent that the assessee made payment of purchase consideration of Rs. 4.00 lacs through his bank account with ICICI bank and the payment is duly reflected in the bank account statement. Therefore, the payment of purchase consideration has been established beyond any doubt. The only question which can be raised for this transaction of purchase of shares of these two companies is the suppression of purchase price so as to create an artificial capital gain of maximum amount. However, the Assessing Officer has not given any finding that the purchase price was artificial suppressed by the parties with intention to maximize the capital gain through the modus operandi of bringing the assessee unaccounted income in the shape of long term capital gain exempt U/s 10(38) of the Act. The Assessing Officer has given much emphasis on the report of DDIT(inv.), Kolkata and some statements were recorded during the investigation proceedings by Kolkata wing wherein three persons who were brokers namely Shri Anil Khemka, Shri Devesh Upadhyay and Shri Pankaj Agarwal were examined by the DDIT(Inv.), Kolkata and in their statements recorded U/s 131(1) and 133A of the Act, they admitted their indulgence in providing accommodation entries of bogus capital gain in some of the scripts including the scripts of M/s Kailash Auto Finance Ltd. However, we find that in the entire report of investigation Wing of which the relevant part is reproduced by the Assessing Officer as well as the statements of these persons, there is no mention either of the assessee or M/s Sanskriti Vincom Pvt. Ltd. through whom the assessee purchased these shares. Thus, even if three persons are considered to have indulged in the transaction of providing accommodation entries, it would not automatically lead to the conclusion that each and every transaction in purchase and sale of shares of those companies are bogus transactions, which were between the some other parties not connected with those operators. Even otherwise in the case in hand, the assessee did not purchase the shares of M/s Kailash Auto Finance Ltd. but the assessee purchased the shares of Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd.. These two companies were subsequently amalgamated with M/s Kailash Auto Finance Ltd. in pursuant to the scheme of amalgamation approved by the

Hon'ble Allahabad High Court as well as the Hon'ble Bombay High Court vide their respective decisions dated 09th & 10th May, 2013. Consequently, the assessee was allotted equal number of shares of the amalgamated entries of M/s Kailash Auto Finance Limited in lieu of the shares held by the assessee in erstwhile two companies namely Careful Projects Advisory Ltd. and Panchshul Marketing Ltd.. The allotment of these shares are duly reflected in the record through the correspondence of the allotment and the same company M/s Kailash Auto Finance Ltd. is a listed company in the stock exchange, therefore, the allotment of shares by the said company is verifiable transaction from an independent record. The assessee has also produced DEMAT account showing the shares held in the dematerialized form and therefore, the holding of the shares by the assessee after the dematerialization cannot be questioned from any angle. During the financial year relevant to the assessment year under consideration, the assessee sold these shares through stock exchange and from his DEMAT account. The sale transaction of shares through stock exchange is not in doubt and the shares were sold from the DEMAT account of the assessee is also cannot be doubted. The sale price as on the date of transaction is also the prevailing price in the stock exchange. Hence it is not a case of the Assessing Officer that the assessee has shown an inflated sale price which is not as per the prevailing market price of the shares of M/s Kailash Auto Finance Ltd.. It is pertinent to note that the shares of M/s Kailash Auto Finance Ltd. were issued to the assessee only in lieu of the shares of erstwhile two companies M/s Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd. and it is not a transaction of acquiring the shares of M/s Kailash Auto Finance Ltd against the consideration. Thus, the allotment of shares by M/s Kailash Auto Finance Ltd. in pursuant to the scheme of amalgamation established the fact that the assessee was already holding the equal number of shares in the erstwhile companies namely M/s Careful Projects Advisory Ltd. and M/s Panchshul Marketing Ltd. Thus the holding of shares by the assessee and allotment of shares of M/s Kailash Auto Finance Ltd. are the material facts emerging from the records, which cannot be disputed. The allotment of shares of M/s Kailash Auto Finance Ltd. itself is a proof of holding of shares by the assessee in the erstwhile companies which got amalgamated into new

entity. Hence, all these facts go to prove beyond any doubt that the assessee was holding the shares in question and the payment of consideration was duly made through banking channel, which is also not in dispute. The Assessing Officer has treated the transaction as bogus only on the basis of the statements recorded by the Investigation Wing, Kolkata, however, even if those statements are considered and taken into account, it cannot lead to the conclusion or establish the fact that the assessee was part of the said racket of providing accommodation entries of bogus capital gain. The Id. CIT(A) while considering all these facts, have decided the issue in para 5.4 and 5.5 as under:

“5.4 I have considered the above mentioned facts of the case. It is my considered view that the assessee needs to maintain and produce following documents/evidence to prove the genuineness of the share transaction. To conclude assessee need to maintain the following documents in order to prove genuineness of the investments:-

Basic documents

- Source of the investments made.
- Business activity of the investor.
- Contract note for purchase of investment made and sale of investment.
- Bank statement reflecting payment and receipt of sale of investments.
- Demat statement to prove delivery of shares.
- Ledger copy of share broker a/c.
- Copy of ledger a/c of source of investment.

Additional Documents/information which can even help during investigation

- To prepare the justification/ reason to buy shares of that company?
- Name and address of the person who has recommended the purchase of shares.
- Analysis of financial performance before purchase of share.
- Copy of share purchase agreement, if any.
- Reason for selling the shares. Business of the investor/company investing the shares?
- The frequency of analysis of performance of the investee company and kinds of analysis assessee did.
- How did assessee place the purchase orders with broker? To whom did he speak / instruct for placing the orders?
- How was the payment made/received to/from broker?
- What is the status of that demat account?
- Justification in case of delay in dematerialization of shares, since it is one of the main ingredients to prove backdated purchase of shares.

So far as the basic documents are concerned, they have been filed before the A.O and also during the appellate proceedings.

Additional informations as stated above have also been provided by the appellant. In this regard I have taken note of the fact that the appellant is himself a founder and promoter of Raghunandan group and is a management graduate having experience of more than 19 years in financial market and financial products. In this regards, the appellant has submitted as under;

- 1. He has an in depth knowledge and strong understanding of various intricacies of financial market. The Appellant has been investing in the share market based on various reports, analysis and studies made by experts in the field, which are published in newspapers, trade magazines etc. as also on the basis of knowledge gained through acquaintances.*
- 2. During the period April 2013 to April 2016, the Appellant had traded in several other securities as well through the stock exchange mechanism. In or about February 2012, the Appellant came to know from Mr. Anuj Goyal that shares of Careful Projects Advisory Ltd. ("CPAL") were available with one Sanskriti Vincom Pvt. Ltd. Mr. Anuj Goyal also impressed upon the Appellant that CPAL was engaged in to the business of investment in various companies and were holding shares of various companies. The Appellant was informed that these investment made by CPAL would grow and could yield good profits to the Appellant. In view of the same the Appellant thought it fit and presumed it to be a good investment opportunity and decided to purchase shares of CPAL. Accordingly in March, 2012, the Appellant purchased 300000 shares of CPAL at the price of Rs. 1 per share for a total consideration of Rs. 3,00,000/-.*
- 3. Further in May 2012 the Appellant came to know that CPAL and one Panchshul Marketing Ltd. ("PML") had purchased in Kailash Auto Finance Ltd. ("KAL") and once the company is acquired by the PML and CPAL they would infuse fresh capital in KAL and they would be revamping the business drastically. Accordingly in July 2012, Our Client again approached Sanskriti Vincom Private Limited and purchased 400000 shares of PML at the price of Rs. 1 per share for a total consideration of Rs. 4,00,000/-.*
- 4. Following the amalgamation of CPAL and PML with Kailash Auto Finance Ltd. pursuant to the Scheme of Amalgamation sanctioned by the Hon 'ble Allahabad High Court and the Hon'ble Bombay High Court on 9th and 10th May 2013 respectively, and on July 22, 2013 the Appellant was allotted 7,00,000 shares of Kailash Auto Finance Ltd. for the 3.00.000 and 4.00,000 shares held by him in CPAL and PML. The Appellant had therefore, not directly invested in the shares of Kailash Auto Finance Ltd. but was allotted shares of Kailash Auto as a result of the amalgamation of CPAL and PML with Kailash Auto Finance Ltd. Between January 2013 and Jane 04. 2013 the shares of Kailash Auto Finance Ltd. were trading on the stock exchange in the price range of Rs. 11/- to Rs. 44.35/-. Seeing this as a good opportunity to earn a good return on his investment, the Appellant*

sold the 7,00,000 shares of Kailash Auto Finance Ltd. held by him on the stock exchange mechanism

I have also taken note of the fact that the appellant has sold the scrip of KAFL through recognized stock exchange on various dates from 29/07/2013 to 23/10/2013 and through registered stock broker. When sale of the shares have been recognized as genuine then corresponding purchase of such shares in the demat form is also recognised. The A.O has particularly raised the issue of exorbitant price of the share at which they are sold as compared to very low purchase price. If there any manipulation is done to rig the price of the shares then the SEBI is the competent body to investigate it. SEBI in its order dated 21/09/2017 has stated that no adverse finding against the aforementioned 244 entities with respect to their role in the manipulation of the scrip of Kailash Auto. Accordingly SEBI has revoked the suspension of the said entities including KAFL. Merely sharp increase in share price cannot be the reason for treating sale/purchase of such shares as dubious in nature.

I have also considered various reasons given by the A.O to treat the share transaction as sham transaction. Merely, basing the judgment on the basis of statement given by 3rd parties without corroborating it with evidences on record is neither tenable nor reasonable inference. The A.O has not brought on record any evidence that any cash amount were transferred , from the appellant to the share brokers/intermediaries in lieu of money received through cheque by way of sale of shares at an exorbitant price.

It is also my considered view that purchase of shares through off-market is not an illegal transaction. In this regard, Hon'ble ITAT at Mumbai in case of ACIT Vs Shri Ravindrakumar Toshiwal in ITA nos. 5302/Mum/2008 has held that:-

We find that the issue is covered by the decision of the Tribunal in the case of Mukesh R. Marolia wherein it has been held that off market transaction is not a unlawful activity and there is no relevance in seeking details of share transaction from stock exchange when the sale was not on stock exchange and relying upon it for making addition.

Further, sale of such shares have neither been disputed nor any evidence are on record which shows them as sham transaction. A.O's casting doubt on the

appellant's credential as director in M/s Raghunandan Capital Pvt. Ltd, which is the broker company through which the shares were sold is not tenable in the eyes of the law as the appellant is a separate entity and is well qualified also to take decisions on his own. Further, the A.O has failed to bring on record any wrong doings on the part of the broker company in the transaction.

Therefore, on factual matrix of the case, I failed to find any discrepancy right from the purchase of shares and till its eventual sale.

I have also taken into account Hon'ble Rajasthan High Court Judgment at Jodhpur in case of CIT Vs. Smt Sumitra Devi in ITA 54/2012 has held that:-

True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the IT AT, the AO had failed to show that the material documents placed on record by the assessee like broker's note, contract note, relevant extract of cash book, copies of share certificate, de-mat statement etc. were false, fabricated .or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO. like the notice under Section 136 to the company having been returned unserved; delayed payment to the brokers; and dematerialisation of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in absence of any cogent evidence to the contrary.

In a recent judgment, Jurisdictional Rajasthan High Court has dismissed the revenue case in the case of CIT-1 Vrs Smt. Pooja Agarwal and Jitendra Kumar Agarwal in the Appeal No.385/2011. Hon'ble High Court in its order dated 11/09/2017 has upheld the decision of CIT(A) and Hon'ble ITAT, Jaipur Bench, in giving relief to the assessee. Hon'ble Court has recorded as under;

8. the assessee submitted reply to the show cause notice contending that the share transactions are genuine and the short term capital gain of Rs.98,56,872/- has been earned from purchases and sales of shares of Konark Commercial limited and Limtux Investment Ltd. Investigation revealed that the entire share transactions were bogus and mere accommodation entries obtained from an entry provider Sh P K Agarwal from Kolkata. The said facts were revealed during search carried out by the Investigation wins, Jaipur in the case of B C Purohit Group.

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

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

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

13. The same was confirmed by CIT appeal, in view of this we are of the opinion that the view taken by the Tribunal as well as CIT is correct.

In that view of the matter, the issues are answered in favour of the assessee and against the department.
The appeals stand dismissed.

Therefore, in the above mentioned judgments by the jurisdictional Rajasthan High Court, the Hon'ble Court has upheld the decision taken by the ITAT/CIT(A) that if the assessee files the copy of contract note regarding purchase and sale of shares, assessee accounts with the brokers, copy of depository a/c or demat a/c, payments

and receipts are made through a/c payee cheques and the transactions are routed through recognized stock exchange and no evidence that the cash has gone back to appellant's account then the share transactions cannot be denied as bogus and not genuine.

5.5 Therefore, taking into account all factual matrix, judicial rulings including jurisdictional Rajasthan High Court judgments, it is my considered view that the appellant in this case has reasonably discharged its onus by providing all necessary details/evidences and the A.O has not been able to bring on record any credible evidences (except 3rd part statements but the assessee has not been given proper opportunity to cross examine such persons who has given statement) to disprove the appellant's contention and claims. In view of the foregone, it is my considered view that the share transaction by the appellant involving KAFL shares cannot be treated as sham and not genuine. Accordingly, the share transaction resulting in capital gains of Rs.2,60,17,995/- as valid transaction and subjected to the provisions of section 10(38) of the Act. Accordingly the addition of Rs.2,60,17,995/- u/s 68 of the Act is deleted. Appellant's ground of appeal on this issue is allowed."

We further note that this Tribunal has also considered the similar issue in the case of Shri Pramod Jain Vs DCIT (supra) and Shri Meghraj Singh Shekhawat Vs DCIT (Supra). In the case of Shri Meghraj Singh Shekhawat Vs DCIT (supra), the Tribunal vide order dated 07/3/2018 has held in para 5 and 6 as under:-

"5. We have considered the rival submissions as well as relevant material on record. The assessee has produced record of allotment of 3,50,000 equity shares of M/s Rutron International Ltd. under preferential issue at par of face value of Rs. 10/- each vide allotment letter dated 08.03.2012. The Assessing Officer has not disputed the genuineness of the letter of allotment issued by the company to the assessee wherein it has been communicated that the assessee has been allotted 3,50,000 equity shares vide allotment letter dated 08.03.2012 against the application of the assessee at par of face value of Rs. 10/- each without any premium. The assessee has also produced the bank statement showing the payment of consideration of the acquisition

of shares on 29.02.2012. It appears that the said payment was made by the assessee at the time of applying for allotment of shares and subsequently the shares were allotted by the company on 01.03.2012. Thus, it is clear that the shares acquired by the assessee is not a trading transaction but these were allotted directly by the company under the preferential issue and hence, the role of intermediate is ruled out. Once, the shares were directly allotted by the company M/s Rutron International Ltd. against the consideration paid by the assessee through cheque. Then the role of any intermediately particular of Shri Anil Agrawal is said allotment does not appear from any of the record. Even as per the statement as reproduced by the Assessing Officer in the assessment order Shri Anil Agrawal has stated that he is having business nexus with the companies including M/s Rutron International Ltd. The department put a question about the association with as many as 13 companies and in response to that he has accepted that he is having business nexus with these companies including M/s Rutron International Ltd. The nature of service was also explained by Shri Anil Agrawal as the consultancy services. For ready reference we quote question No. 4 and 5 and answer, thereto in the statement of Shri Anil Agarwal as reproduced as under:-

Q 4. *Whether M/s Comfort Securities Pvt. Ltd. or you have any association with the following companies or have ever had any business transactions with the companies as mentioned below:*

1. *First Financial Services Ltd. (FFSL)*
2. *Splash Media and Infra Ltd. (SPMIL)*
3. *D B (International) stock Brokers Ltd. (DBSBL)*
4. *Unisys Softwares & Holdings Industries Ltd. (USHL)*
5. *Fact Enterprises Ltd. (FEL)*
6. *Parikh Herbal Ltd. (now Safal Herbs Ltd)*
7. *Premier Capital Service*
8. *Rutron Internationa Ltd.*
9. *Radford Global Ltd*
10. *JMD Telefilms Industries Ltd*
11. *Dhanleela Investments & Trading Co. Ltd.*
12. *SRK Industries Ltd.*
13. *Dhenu Buildcon Infra Ltd.*

Ans. *M/s Comfort Securities Ltd. has business nexus with the following companies*

Name of the Company	Nature of Business Transaction
1. First Financial Services Ltd.	Brokerage and Consultancy Services
2. Splash Media and Infra Ltd.	Brokerage, Share Holding and Consultancy Services
3. Fact Enterprises Ltd	Broking as well as share holding
4. Rutron International Ltd.	Consultancy Services
5. D.B. (International) Stock Brokers Ltd.	Consultancy Services
6. Unisys Software & Holding Industries Ltd.	Broking Services

Apart from the above mentioned companies neither I nor M/s Comfort Securities Ltd. has any business nexus with the companies mentioned supra.

Q5. *Do you know the promoters and directors of the above said companies? Whether M/s Comfort Securities Pvt. Ltd. or you have any association with the promoters and directors of the above said companies or have ever had any business transactions with the promoters and directors of the above said companies.*

Ans. *Sir, I know some of the directors of the First Financial Services Limited, Splash Media & Infra Services Ltd, Rutron International Limited and FACT enterprise Ltd. Regarding other companies I am not aware who are the directors of these companies."*

Thus, it is clear from the relevant part of statement of Shri Anil Agrawal as reproduced by the AO that he has stated having business nexus with these companies and nature of business being consultancy services. Hence, he has not stated anything about providing bogus long term capital gain in respect of the equity shares of M/s Rutron International Ltd. A business nexus with any company will not automatically lead to the conclusion that the shares allotted by the other company is bogus transaction. As per question no. 5 and answer thereto it is clear that Shri Anil Agrawal was not the Director of M/s Rutron International Ltd. but he has stated to know some of the directors of these companies including M/s Rutron International Ltd. Hence, from this relevant part of the statement of Shri Anil Agrawal it cannot be inferred that he has provided the bogus long term capital gain from purchase and shares of equity shares of M/s Rutron International Ltd. much less the specific transaction of preferential issue allotment of shares by the company itself to the assessee. Further, though he has explained the modus operandi of providing bogus long term capital gain entries in the equity shares however, when the transaction was not routed through Shri Anil Agrawal and the shares were allotted directly by

the company to the assessee at par on face value then the same cannot be considered as a penny stock transactions. The assessee has produced the D-mat account and therefore, as on 18.06.2012 the assessee was holding 3,50,000 equity shares of M/s Rutron International Ltd. in D-mat account. This fact of holding the shares in the D-mat account as on 18.06.2012 cannot be disputed. Further, the Assessing Officer has not even disputed the existence of the D-mat account and shares credited in the D-mat account of the assessee. Therefore, once, the holding of shares in D-mat account cannot be disputed then the transaction cannot be held as bogus. The AO has not disputed the sale of shares from the D-mat account of the assessee and the sale consideration was directly credited to the bank account of the assessee, therefore, once the assessee produced all relevant evidence to substantiate the transaction of purchase, dematerialization and sale of shares then, in the absence of any contrary material brought on record the same cannot be held as bogus transaction merely on the basis of statement of one Shri Anil Agrawal recorded by the Investigation Wing, Kolkata wherein there is a general statement of providing bogus long term capital gain transaction to the clients without stating anything about the transaction of allotment of shares by the company to the assessee. Further, Shri Anil Agrawal was not a director of M/s Rutron International Ltd. as perceived by the AO and therefore, the entire finding of the AO is without any corroborative evidence or tangible material.

6. *The assessee has specifically demanded the cross examined to Shri Anil Agrawal which was denied by the AO as under :-*

“(ii) The assessee’s pleas that effective opportunity may be provided to cross examination. In this regard, it is pointed out that the Hon’ble Supreme Court in the case of C.Vasantlal & Co. v/s CIT 45 ITR 206 (SC) (3 Judge Bench) has observed that “the ITO is not bound by any technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by Private enquiry.”

Thus, in view of the decision of Hon’ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) the assessment based on statement without giving an opportunity is not sustainable in law. We further note that the assessee produced copy of affidavit of Shri Anil Agrawal who has retracted his statement before the Investigation Wing, Kolkata however, without going into controversy of the retraction of the statement we find that the statement cannot be used by the AO without giving

an opportunity to cross examination of Shri Anil Agrawal. The Coordinate Bench of this Tribunal in case of Pramod Jain and Others vs. DCIT (supra) whole dealing with an identical issue as held in para 6 to 8 as under:-

“6. We have considered the rival submissions as well as relevant material on record. The assessee purchases 800 equity shares M/s Gravity Barter Ltd. for a consideration of Rs. 4 lacs the assessee has produced the purchase bill of the shares purchase from M/s Winall Vinimay Pvt. Ltd. which shows that the assessee purchase 800 equity shares having face value of Rs. 10/- each M/s Gravity Barter Pvt. Ltd. in allots of 400 each for a consideration of Rs. 2 lacs each total amount to Rs. 4 lacs @ Rs. 500 per shares. The purchase price of Rs. 500 per share itself shows that it was not a transaction of purchase of penny stock. These shares were duly reflected in the balance sheet as 31.03.2011. The payment of the purchase consideration was made by the assessee vide cheque on 17.05.2011 which is evident from the bank account of the assessee at page 40 of the paper book. In the mean time the said M/s Gravity Barter Pvt. Ltd. changed its status from private limited to a public limited and fresh certificate was issued by the Registrar of company on 05.02.2011 which is placed at page 43 of the paper book. Therefore, there is no reason to disbelief the fact of fresh certificate issued by the Registrar of companies on 05.02.2011 and hence, the date mentioned in the order of the Hon’ble Kolkata High Court as 18.04.2011 appears to be typographical mistake. Even otherwise these two dates do not have any effect on the genuineness of the transactions of purchase of equity shares by the assessee of M/s Gravity Barter Pvt. Ltd. The assessee though produced all the relevant records and evidences right from the purchase bills, certificate issued by the Registrar about the change of name, the communication between the assessee and the seller of the shares and thereafter, the amalgamation of M/s Gravity Barter Ltd. with M/s Oasis Cine Communication Ltd. which was duly approved by the Hon’ble High Court vide order dated 28.8.2011. The assessee in the mean time got the physical share certificate dematerialized into Demat account on 16.02.2012. There is no reason to doubt the allotment of the shares to the assessee after amalgamation took place between M/s Gravity Barter Ltd. and M/s Oasis Cine Communication Ltd. and subsequent to amalgamation the assessee was allotted shares of M/s Oasis Cine Communication Ltd. on 04.02.2012. Hence, the allotment of 35,200 equity shares of M/s Oasis Cine Communication Ltd. cannot be doubted or disputed as these shares were issued post amalgamation and by a listed company. It is also not in dispute that these shares of M/s Oasis Cine Communication Ltd. were issued in exchange of the shares held by the assessee of M/s Gravity Barter Ltd. Therefore, once the shares issued by M/s Oasis Cine Communication Ltd. cannot be doubted then the holding of the shares of the M/s Gravity Barter Ltd. by the assessee correspondingly cannot be doubted because of the reasons that the shares of M/s Oasis Cine Communication Ltd. could be allotted only in exchange of shares of M/s Gravity Barter Ltd. The holding the shares of M/s Gravity Barter Ltd. and the allotment of shares M/s Oasis Cine

Communication Ltd. are directly interconnected. In the absence of holding of shares M/s Gravity Barter Ltd. the shares of the M/s Oasis Cine Communication Ltd. could not be issued or allotted to the assessee. Therefore, holding of the shares by the assessee at least at time of amalgamation took place and shares of the M/s Oasis Cine Communication Ltd. on 04.02.2012 cannot be doubted. Moreover, these shares were dematerialized by the assessee in the Demat account, therefore, on the date of allotment of share of M/s Oasis Cine Communication Ltd the assessee was holding these shares and prior to that the assessee was holding the shares of M/s Gravity Barter Ltd. on exchange of the same the shares of M/s Oasis Cine Communication Ltd. were issued to the assessee. The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd. is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee. Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipant the exceptional appreciation in the share price due to extraordinary event of merger/amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

7. *In case of equity shares M/s Paridhi Properties Ltd. the assessee purchase 50,000 equity share on 26.03.2011 by paying share application money of Rs. 5 lacs which is duly reflected in the bank account of the assessee as paid on 28.03.2011. Therefore, the payment of share application money has been duly established by the assessee through his bank account for allotment of shares of 50,000 equity shares of M/s Paridhi Properties Ltd. The share allotted in private placement as per of Rs. 10/- cannot be termed as penny stock. The AO doubted that the entire process of application and allotment of shares as it have been*

completed within a short duration of 5 days, which in the opinion of the AO is not possible in ordinary course. However, when the assessee has produced the record including the share application, payment of share application money, allotment of share then merely because of a short period of time will not be a sufficient reason to hold that the transaction is bogus. The shares allotted to the assessee vide share certificate dated 31.03.2011 were dematerialized on 21.10.2011, therefore, on the date of dematerialization of the shares the holding of the shares of the assessee cannot be doubted and hence the acquisition of the shares of the assessee cannot be treated as a bogus transaction. Nobody can have the shares in his own name in demat account without acquiring or allotment through due process hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

8. *As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain. It is also pertinent to note that the shares of M/s Oasis Cine Communication Ltd. are still held by the assessee in its demat account to the extent of 17,200 shares and therefore, the holding of the shares by any parameter or stretch of imagination cannot be doubted. The AO has passed the assessment year based on the statement of Shri Deepak Patwari recorded by the Investigation Wing of Kolkata however, the assessee has specifically demanded the cross examination of Shri Deepak Patwari vide letter dated 15.03.2016 specifically in paras 3 and 4 as reproduced by the AO at page No. 7 of the assessment order as under:-*

"3. Since, the shares were allotted by the company through private placement after completing the formalities of ROC and were sold through the recognized Bombay Stock Exchange (BSE) there is no question of knowing individual persons or company official personally in the whole process, so the assessee is not in position to produce any one for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the Income tax Act 1961 to the concerned individual persons or company

officials for cross examination. Please note that the assessee is ready to bear the cost of their travelling in this regards.

4. As regard your opportunity given to us to read the recorded statement of Shri Deepak Patwari and to produce him from the cross examination before your good self, we have to submit that from the reading of the statements of Shri Deepak Patwari it is clear that he has never taken the name of the assessee, nor the assessee is aware of any Shri Deepak Patwari neither he has made any transaction with him, so in what capacity he can call him for cross examination before your good self. Since your good self has got the authority, we humbly request you to kindly issue the notice u/s 131 of the income Tax act 1961 to him also for cross examination. We also request your good self to kindly provide us the copy of statements of Shri Deepak Patwari along with the other relevant documents. Please note that the assessee is ready to bear the cost of his travelling in this regard.”

It is manifest from the assessee’s reply to show cause notice that the assessee had specifically demanded the cross examination of Shri Deepak Patwari however, the Assessing Officer did not offer the opportunity to the assessee to cross examine Shri Deepak Patwari. Further, the AO asked the assessee to produce the Principal Officers of the M/s Gravity Barter Ltd. and M/s Paridhi Properties Ltd. However, in our view if the Assessing Officer wanted to examine the principal Officers of those companies he was having the authority to summon them and record their statements instead of shifting burden on the assessee. It is not expected from the assessee individual to produce the principal Officers of the companies rather the AO ought to have summoned them if the examination of the officers were considered as necessary by the AO. Hence, it was improper and unjustified on the part of the AO to asked the assessee to produce the principal Officers of those companies. As regards the non grant of opportunity to cross examine, the Hon’ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:

“5. 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.

6. 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.

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

8. 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.”

Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in par 46 as under:-

“46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very

strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

Therefore, when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. The Hon'ble Jurisdiction High Court in case of CIT vs. Smt. Pooja Agrawal (supra) has upheld the finding of the Tribunal on this issue in para 12 as under:-

"12. However, counsel for the respondent has taken us to the order of CIT(A) and also to the order of Tribunal and contended that in view of the finding reached,

which was done through Stock Exchange and taking into consideration the revenue transactions, the addition made was deleted by the Tribunal observing as under:-

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

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

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

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

Thus, it is clear that the Tribunal in the said case has analyzed an identical issue wherein the shares allotted in the private placement @ Rs. 10 at par of face value which were dematerialized and thereafter sold by the assessee and accordingly the Tribunal after placing reliance on the decision of Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra) as well as the decision of Hon'ble jurisdiction High court in case of CIT vs. Smt. Pooja Agarwal (supra) as held that when the Assessing Officer has not brought any material on record to show that the assessee has paid over and above purchase consideration as claimed and evident from the bank account then, in the absence of any evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Similar in the case in hand the assessee has produced the relevant record to show the allotment of shares by the company on payment of consideration by cheque and therefore, it is not a case of payment of consideration by in cash. But the transaction is established from the evidence and record which cannot be manipulated as all the entries are part of the bank account of the assessee and the assessee dematerialized the shares in the D-mat account which is also an independent material and evidence cannot be manipulated. Therefore, the holding of the shares by the assessee cannot be doubted and the finding of the AO is based merely on the suspicion and surmises without any cogent material to show that the

assessee has introduction his unaccounted income in the shape of long term capital gain. We find that the Id. CIT(A) has also referred to SEBI enquiry against the M/s Anand Rathi Share and Stock Brokers Ltd. However, we note that the said enquiry was regarding financial irregularities and use of fund belonging to the clients for the purpose other than, the purchase of shares on behalf of the clients. Therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain. The decisions replied upon the Id. DR in case of Sanjay Bimalchand Jain vs. Pr. CIT (supra) is not applicable in the facts of the present case as the said decision is in respect penny stock purchase by the assessee from a persons who was found to be indulged in providing bogus capital gain entries whereas in the case of the assessee the shares were allotted to the assessee by the company at par of face value. Hence, in view of the facts and circumstances when we hold that the order of the Assessing Officer treating the long term capital gain as bogus and consequential addition made to the total income of the assessee is not sustainable. Hence, we delete the addition made by the AO on this account.

Therefore, on analyzing of the facts as well as the evidence produced by the assessee, we find that the Assessing Officer has not brought any material on record to controvert the fact duly established by the supporting evidence of purchase bills, payment of consideration through bank, dematerialization of shares in the DEMAT account, allotment of the shares amalgamated new entity in lieu of the earlier two companies of equal number of shares. Sale of shares from the DEMAT account through stock exchange and at the prevailing price as on the date of sale and further payment of STT on the transaction of sale has been duly established. In absence of any contrary fact, the mere reliance by the Assessing Officer on the report of Investigation Wing, Kolkata is not sufficient to establish the fact that the transaction is bogus. The finding of the Assessing Officer is based merely on the suspicion and surmises without any tangible material to show that the assessee has introduced his own unaccounted income in the share of long term capital gain even otherwise the reliance of the statements recorded by the Investigation Wing, Kolkata wherein without giving an opportunity of cross examination is a complete violation of principles of natural justice as held by the Hon'ble Supreme Court in the case of CCE Vs Andaman Timber Industries (Supra).

The Coordinate Bench has also followed the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Pooja Agarwal order dated 11/09/2017 wherein the Hon'ble High Court has duly considered the fact that the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account. Therefore, in absence of any evidence, it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Accordingly, in view of above facts and circumstances, we do not find any error or illegality in the order of the Id. CIT(A) qua this issue. Hence, this ground of revenue's appeal is dismissed."

The same facts were considered in the above cited cases regarding purchase of shares of M/s. Careful Projects Advisory Ltd which was subsequently merged with M/s. Kailash Auto Finance Ltd. and after analyzing the relevant documentary evidence which includes purchase bill, payment consideration through bank, dematerialization of shares, allotment of the shares amalgamated new entity in lieu of earlier company, the Tribunal has held that in the absence of any contrary evidence it cannot be held that the assessee has introduced his own unaccounted money by way of bogus Long Term Capital Gain. The Tribunal has also followed the decision of Hon'ble Jurisdictional High Court in case of CIT vs. Smt. Pooja Agarwal (supra) wherein the Hon'ble High Court has also upheld the finding of the Id. CIT (A) and this Tribunal when the assessee produced all the relevant details and evidence in support of the transaction of purchase and sale of shares. Accordingly, in view of the facts and circumstances as discussed above, when the assessee has produced all the relevant documentary evidences to establish the genuineness of the transaction and there is no contrary evidence to doubt the correctness of the evidences

produced by the assessee then treating the transaction of purchase and sale as sham by the AO is not justified. The assessee has also produced the financial statements of M/s. Kailash Auto Finance Ltd. to show that the company has earned a handsome profit. Further, the alleged SEBI order was also subsequently revoked. Therefore, all these facts established the genuineness of the transaction. Hence we do not find any error or illegality in the order of the Id. CIT (A) in deleting the addition made by the AO under section 68 of the IT Act by treating the Long Term Capital Gain on sale of shares as unexplained cash credit. The addition of Rs. 1,51,869/- being the deemed commission for taking the accommodation entry, is consequential to the main issue. Hence, the same is also not sustainable.

6. In the result, appeal of the revenue is dismissed.

Order is pronounced in the open court on 10/07/2019.

Sd/-
(रमेश सी. शर्मा)
(RAMESH C. SHARMA)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल रॉव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 10/07/2019.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- The ITO Ward 2(3), Jaipur.
2. The Respondent – Shri Gaurav Bagaria, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 550/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

