

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं/ ITA No. 3429/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं/ ITA No. 3428/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं/ ITA No. 3427/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

Shri Vijayrattan Balkrishan Mittal
A-403, Meghdoot Apt., Raheja Township,
Malad East, Mumbai-400 097

..... Appellant
/ अपीलार्थी

स्थायी लेखा सं / PAN – AKAPM9809R

v/s

Dy. Commissioner of Income Tax
Central Circle-8(1), 6th Floor, Room No. 679
Aayakar Bhavan, M.K. Road, Mumbai-400 020

.....Respondent
/ प्रत्यर्था

आयकर अपील सं/ ITA No. 3311/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं/ ITA No. 3312/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं/ ITA No. 3313/Mum/2019



(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं/ ITA No. 3314/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

Smt. Pooja Mahendra Mittal

A-403, Meghdoot Apt., Raheja Township, Malad
East, Mumbai-400 097

..... Appellant
/ अपीलार्थी

स्थायी लेखा सं / PAN – ACHPB0564H

v/s

Dy. Commissioner of Income Tax Central
Circle-8(1), Aayakar Bhavan, M.K. Road,
Mumbai-400 020

.....Respondent
/ प्रत्यर्था

आयकर अपील सं/ ITA No. 3426/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

Shri Mahendra B. Mittal HUF

A-403, Maghdoot Apt., Raheja Township, Malad
East, Mumba-400 097

..... Appellant
/ अपीलार्थी

स्थायी लेखा सं / PAN – AADHM8670B

v/s

Dy. Commissioner of Income Tax
Central Circle-8(1), 6th Floor, Room No. 679
Aayakar Bhavan, M.K. Road, Mumbai-400 020

.....Respondent
/ प्रत्यर्था

आयकर अपील सं/ ITA No. 3264/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं/ ITA No. 3247/Mum/2019



(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं/ ITA No. 3265/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं/ ITA No. 3248/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

Shri Mahendra Balkrishan Mittal

A-403, Meghdoot Apt., Raheja Township, Malad
East, Mumbai-400 097

..... Appellant
/ अपीलार्थी

स्थायी लेखा सं / PAN – AEBPM1654H

v/s

Dy. Commissioner of Income Tax

Central Circle-8(1), 6th Floor, M.K. Road,
Mumbai-400 020

.....Respondent
/ प्रत्यर्थी

अपीलार्थी की ओर से / Appellant by	:	Shri Madhur Agarwal, Jay Bhansali, ARs
प्रत्यर्थी की ओर से / Respondent by	:	Shri R. Manjunatha Swamy, CIT DR

सुनवाई की तारीख / Date of hearing:	27.08.2019
घोषणा की तारीख / Date of pronouncement :	01.10.2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

These twelve appeals of different assesseees are arising out of the orders of Commissioner of Income Tax (Appeals)-50, Mumbai in Appeal Nos. CIT(A)-50/10032 ,10263, 10264,10265,



10266, 10267,10268,10270,10271,10273/2017-18, 2018-19 of even date 28.03.2019. The Assessments were framed by the Dy. Commissioner of Income Tax (Central Circle)-8(1), Mumbai (in short DCIT/ITO/ AO) for AYs 2012-13,2013-14, 2014-15, 2015-16 of even dated 22.12.2017, under section 143(3) read with section 153A of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these appeals of four different assessee's is as regards to the order of CIT(A) confirming the action of the AO in treating transactions of sale of shares of listed companies as bogus thereby making addition under section 68 of the Act being sale proceed of such transactions treating the same as unexplained income under section 68 of the Act. Consequently, also on second interconnected issue, the CIT(A) confirmed the action of the AO in making addition on the basis of presumption that the assessee has paid commission for alleged accommodation entries of long term capital gain and added the same under section 69C of the Act. For this, all these assessee's have raised identical grounds and the facts and circumstances in all the cases are also identical. Both, the learned counsel for the assessee's as well as leaned CIT DR fairly stated that facts on merits in all these appeals are same. Hence, only one appeal was argued and all will be adjudicate accordingly. The lead appeal on merits is ITA No. 3248/Mum/2019 for the AY 2015-16 and the grounds raised are the following ground Nos. 2 to 4: -

"2. a. The AO/ CIT(A) erred in law and facts in treating the transaction of sale of shares of listed company as bogus and thereupon making an addition of Rs. 14,19,36,826/- under section 68 of the Act, being the sale proceeds of such transaction, treating the same as unexplained income. The reasons given are wrong, contrary to facts of the case and against the provision of law;

b. The CIT(A) erred in upholding the action of the AO in making an addition of Rs. 14,19,36,826/- under section 68 of the Act, being the sale proceeds of sale of shares of a listed company through recognized stock exchange even when the identity and nature of the source of the said credit were explained and proved. The reasons given are in the realm of assumption and presumption upon which no addition is sustainable:

c. The AO/ CIT(A) erred in law and facts in relying on certain data, information from BSE. findings of the general investigation in unrelated cases and also

third party statements without, establishing connection or involvement to or of the Appellant that too without allowing the Appellant any opportunity to cross examine those parties/ information:

d. The AO CIT(A) failed to appreciate that nowhere do the information and statements. identify the Appellant as a beneficiary of the alleged accommodation entries:

e. The AO/ CIT(A) erred in law and facts in treating the transaction of sale of shares of listed company as bogus and undisclosed income merely the suspicion and assumption that the prices of the shares of listed company were manipulated and appreciation in the value was very high even when the market regulator, SEBI, has not found any manipulation or involvement of appellant;

f. The AO/ CIT(A) erred in making addition u/s 68 of the Act disregarding the final orders passed by SEBI, related to share transactions of listed company on the stock exchange and the fact that the

said order nowhere alleged the involvement of appellant or his broker as the beneficiary of the alleged scheme.

g. Without the prejudice, the CIT(A) failed to appreciate that Rs. 14,16,80,449/- has been credited to the Appellant's account being sale proceeds of shares as against the addition of Rs. 14,19,36,826/-.

3. The AO/ CIT(A) erred in law and facts in making an addition of Rs. 42,58,104/- under section 69C of the Act on the presumption that commission @ 3% was paid for alleged accommodation entries of long term capital gain.

4. The AO/ CIT(A) erred in law and facts in passing the assessment order Solely on the basis of assumptions. presumptions. surmises and conjecture without any cogent material or evidence hence it is illegal and contrary to the principles of natural justice."

3. Brief facts of the case are that the assessee filed his return i.e. original return of income on 28.08.2015 [wrongly mentioned by CIT(A) as 17.07.2014], whereas the correct date



is written by the AO) for AY 2015-16 declaring the total income of ₹ 45,80,790/-. A search and seizure action under section 132 of the Act was carried out by the Income Tax Department on 03.12.2015 at the resident and office premises of the assessee and its group companies and other associates. Consequent to the search action under section 132 of the Act, a notice under section 153A of the Act was issued by the AO on 16.01.2017. In response to notice under section 153A of the Act, the assessee filed its return of income on 30.02.2017 declaring a total income of ₹ 47,38,420/-. The assessment was framed vide order dated 22.12.2017 under section 143(3) read with section 153A of the Act on a total income of ₹ 15,10,08,650/-. The AO made addition under section 68 of the Act amounting to ₹ 14,19,36,826/- on account of unexplained cash credit under section 68 of the Act being sale proceed of transactions of sale of shares as bogus. Consequently, the AO also made addition of ₹ 42,58,104/- under section 69C of the Act being commission paid on accommodation entries paid by the assessee.

4. Brief Facts relating to this issue are that the assessee had applied for 1,50,000 equity shares of Rs. 10/- each of Pine Animation Limited (PAL) in the preferential issue of shares. The payment was made to PAL through an account payee cheque vide cheque no. 147952 dated 09.03.2013 of Axis Bank for Rs. 15,00,000/- which was debited in the assessee's bank a/c on 13.03.2013. The assessee before AO and CIT(A) and also now before us filed copies of share application form, relevant bank



statements showing payment and shares allotment advice. These are enclosed in Assessee Paper Book (APB) at page 73-75. The company allotted 1,50,000 equity shares of Rs. 10/ each at par on 15.03.2013 and credited the shares to his demat account. The purchase of shares was duly disclosed in the balance sheet for the year ended 31st March, 2013 and after verification of all documents there is no observation of the AO relating to acquisition of shares of PAL and payment thereof in assessment order u/s 143(3) r.w.s. 153A for AY 2013-14. Subsequently, the shares were split into Re. 1/- per share by PAL on 21.05.2013. Copy of demat statement showing the allotment and split enclosed at page 192 of APB. Further, in FY 2014-15 (AY 2015-16) the assessee sold the above shares of PAL on BSE Platform through his regular broker M/s Geojit, who is registered with BSE and SEBI, the market regulator. The assessee has been dealing in shares through his broker Geojit for last 10 years. The assessee received sale proceeds of shares directly from his broker Geojit by credit to his Axis bank a/c on the date of settlement. Copies of contract notes along with summary and relevant bank statements showing the amount credited are enclosed in APB (Pages 77-186, pages 195-198 & Pages 188-190). Copies of broker's ledger and Form 10DB is also enclosed (pages 199-215). The sale transactions of shares have suffered expenses like brokerage, service tax, STT, stamp duty, exchange and SEBI turnover charges, etc. which are specifically shown in the contract notes issued by the Broker.

5. The assessee during the year under consideration has earned long term capital gain (LTCG) amounting to ₹14,00,76,815/- on sale of shares of Pine Animation Ltd. (PAL) a company listed on Bombay Stock Exchange. The assessee had 15 lacs equity shares of PAL in earlier years and after holding more than one year sold those shares during the year of consideration for a sum of ₹14,16,80,449/-. The assessee sold these shares on BSE network and paid STT, service tax, stamp duty, etc. The assessee claimed this LTCG as exempt under section 10(38) of the Act. During the course of assessment proceedings, the AO required the assessee to prove his claim of LTCG on sale of shares of PAL vide letter dated 20.11.2017. The assessee filed various details in support of his claim but AO rejected relying on report of investigation wing and held that receipt of sale proceeds from BSE broker or clearing system is unexplained cash credit and made addition under section 68 of the Act. The AO has concluded his finding and which are summarized as under: -

- i) The assessee has mainly traded in one scrip which is suspicious.
- ii) The assessee traded in single scrip and has made huge profits.
- iii) To prove genuineness, proof of physical transfer of shares, reasons to trade off-market when options to online market trading through demat account were available,

trading pattern of market transactions for the last three years, have not been submitted by the assessee.

iv) The assessee earned long term capital gain in the current year and claimed it as exempt u/s 10(38) of the Act. This quantum of huge long term capital gain was found suspicious and detailed investigation of this issue was undertaken. Various tools available were examined including ITD data, BSE data, money control website, taxman, court rulings, internet as well as investigation wing report and findings of the SEBI.

v) Long term capital gains booked by assessee in his books were prearranged method to evade taxes and launder money. Following are the findings and the reasons which substantiates the findings.

a) Mode of acquisition of the shares & period of holding: Mahendra Mittal was allotted 1,50,000 preference shares of M/s Pine Animation Ltd. at the rate of Rs. 10/- per share on 10.04.2013 vide allotment letter 10.04.2013. This shareholding increased to 15,00,000 number of shares after splitting of shares in the ratio of 1:10 as per the decision of the Board on 20.05.2013. The assessee sold all the shares of PAL between 02.04.2014 to 12.06.2014, thereby earning an exempt bogus LTCG.



b) Unrealistic `return on Investments: It is seen that Assessee has sold shares of these three companies and have earned unbelievable returns. Normal returns on savings were around 7% for F.Y. 2014-15 and around 16% for BSE/Sensex. It is seen- that you have earned 9362% of returns on investments when sensex gold returns are far behind the strong performance of these three companies without having any supporting financial results itself is a circumstantial evidence to show that your LTCG is not genuine one.

c) Findings of investigation wing: The findings of the Directorate of Investigation of Mumbai and Kolkata as discussed above have proved that Shri Narendra Shah and associated brokers, entry operators and the assessee had worked out an arrangement in which the shares were Acquired by the assessee, the share prices were rigged and then with the help of entry operators by routing the cash, shares were sold at high price to arrive at tax free capital gains.

d) Analysis of transactions: Facts revealed that such trading transactions of purchase and sale of shares are not been effected, for commercial purpose but to create artificial gains, with a view to evade taxes -

- i) Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were product of design and mutual connivance on part of assessee and the operators.
- ii) The assesses resorted to a preconceived scheme to procure long-term capital gains by way of price difference in share transactions not supported by market factors.
- iii) Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence, impugned long term capital gain is not allowable.
- iv) The order of SEBI referred above has also given the similar finding that the prices of the shares were determined artificial by manipulations and cannot be a product of market factors and commercial principals.
- v) Failure of Assessee to discharge his onus: The assessee has not been 'able to prove the unusual rise and fall of share prices to be natural and based on the market forces. It is evident that such share transactions were closed circuit transactions and clearly structured one.



vi) Ignorance of the assessee about shares and penny stock companies: Assessee has failed to show of having any knowledge about the shares traded and 'having any knowledge about the fundamentals off the penny stock companies.

Though the assessee has denied to have any knowledge about the shares traded and having any knowledge about the fundamentals of the penny stock companies but considering, the above findings and the fact that the transactions are arranged in such a manner to gain astronomical gains, doubts the claim of assessee

vii) Financial analysis of the penny stock companies: The net worth of the penny stock company is negligible. Even though the net worth of the company and the business activity of the company is negligible the share prices have been artificially rigged to unusual high.

ix) Order of the SEBI: SEBI order has been passed in the case of PAL vide dated 08.05.2015 which directs that the trading in the securities of shall he suspended till further directions. Vide this order, SEBI has noted that the shares of PAL have been manipulated and rigged thereafter the shares have been sold by the beneficiaries of bogus LTCG/STCG on the stock exchange to avail accommodation entry.

x) Cash trail in the accounts of the entry providers: The investigations in the fund flow analyzed in the accounts of the entry providers have established that the cash has been routed front various accounts to provide accommodations to assessee.

xi) Arranged transactions: The transactions entered by the assessee involve the series of preconceived steps, the performance of each of which is depending on the others being carried out. The true nature of such share transactions lacked commercial contents, being artificially structured transactions, entered into with the sole intent, to evade taxes.

xii) Non-compliance from exit providers: Further, notice under section 133(6) of the Act was issued to the exit providers to furnish details related to the above said transactions but no compliance was received from the said parties.

xiii) The income tax liability is ascertained on the basis of the material available on record, the surrounding circumstances, human conduct and preponderance of probabilities.

xiv) After considering the findings of the search/survey, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the

nature of transaction entered into by the assessee the LTCG claimed exempt u/s 10(38) of the act by the assessee cannot be allowed and the amount received back as sales proceeds on sale of shares is required to added back towards his taxable income under section 68 of the Act.”

Aggrieved, against the order of the AO, assessee preferred the appeal before CIT(A).

6. The CIT(A) also confirmed the action of the AO by observing (the relevant paras are being reproduced) as under: -

"Details of the Penny Stock Transaction

12.0 During the year under consideration, the Appellant had claimed LTCG on the shares of PAL, as exempt u/s 10(38) of the Act. As per the details placed on record, the sale consideration of the shares of M/s Pine Animation Ltd. for the year under consideration is amounting to Rs.14,19,36,826.50/- and the same had been added back by the AO, as unexplained cash credit u/s 68 of the Act.

12.1 The facts are that the Appellant had got allotted 1,50,000 preference shares of PAL at the rate of Rs. 10/- per share on

10.04.2013, vide allotment letter dated 10.04.2013 of the said company. The Appellant had stated that it had paid an amount of Rs. 15,00,000/- on 13.03.2013 from its Axis Bank Account. This initial of shareholding of ₹ 1,50,000 preference shares of PAL of the Appellant had increased to 15,00,000 shares, after there was a splitting of shares in the ratio of 1:10, as per the decision of the Board of PAL on 20.05.2013.

12.2 Finally, the Appellant had sold the entire shareholding of 15,00,000 shares of M/s PAL between 02.04.2014 to 12.06.2014 on BSE through the broker namely M/s Geojit BNP Paribas Financial Services Ltd. for a consideration of ₹ 14,19,36,826.50/-.

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Share capital of PAL

24.0 The PAL share is listed on Bombay Stock Exchange with the Scrip ID 511421 formerly known as "Four K Animation Limited". On September 30, 2012, PAL

had a share capital of Rs. 3,00,00,000 comprising 30,00,000 equity shares of ₹10 each, with the promoters holding 9,27,400 shares i.e. 30.91% of the total share-holding.

24.1 On December 13, 2012, PAL made a preferential allotment of 1,50,00,000 equity shares at the price of ₹ 10 per share (hereinafter referred to as the "1st preferential allotment) to 49 entities. Thereafter, the promoters namely, M/s First Entertainment Private Limited and M/s Unique Image Production Pvt. Ltd. who were holding shares in the physical form, transferred their entire holdings i.e. 9,27,400 shares to 6 entities (hereinafter referred to as "Promoter related entities).

24.2 Subsequently, on March 15, 2013, PAL made another preferential allotment of 97,00,000 equity shares at the price of Rs. 10 per share (hereinafter referred to as the "2 preferential allotment") to 48 entities, which included 5 entities who were allotted shares in the 1" preferential allotment.

24.3 In total, PAL had allotted 2,47,00,000 equity shares to 92 entities. The equity shares allotted on preferential basis to aforesaid allottees were locked-in for a period of one year i.e. up to December 12, 2013 for the 1 preferential allotment and March 14, 2014 for the 2nd preferential allotment in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

24.4 On May 20, 2013 the equity shares of PAL were split in the ratio of 1:10. Consequently, the paid up share capital of PAL increased to 27,70,00,000 comprising of 27,70,00,000 shares of Rs. 1 each, as on May 20, 2013.

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26.4 The Appellant's statement was recorded during the course of search proceedings u/s. 132 of the Act, wherein he had stated that all his affairs related to share markets were managed by his father, Shri Balkrishan Mittal. The Appellant had contended that they had

got some information about some scrips, where there were reasonable chances of getting good return in short terms. But the source of information, basis of information, documentary evidence in support of such a claim had not been furnished by the Appellant. Thus, the Appellant had only made general and vague observations on the issue of allotment of preference shares. Hence, the make believe story of the Appellant can't be accepted in the absence of any documentary evidence.

26.5 These contentions of the Appellant had also been brush aside by SEBI in it's confirmatory order dated 2nd June 2016 and the relevant excerpt of the said order are reproduced hereunder, for ready reference: -

"13. In the instant case, it is undisputed that trading in the scrip of Pine was suspended from November 09, 1998 till June 21, 2012 and during the financial year 2011-12, it had incurred a loss of

₹7,08,037 and thereafter earned a meagre profit of ₹15,60,007 during FY 2012-13. It does not appeal to reason that the Notices, who claim to be regular investors in the securities market, invested their hard-earned money in a company like Pine with such poor fundamentals and background without having any connection / relation with the promoters/directors of Pine. When asked during personal hearing, the Notices' authorized representatives failed to give any plausible explanation as to how the company could make allotment to the Notices if they were not known to it or its promoters/directors and if they had no nexus/connection with them. I am unable to accept the explanation of the Notices that they invested in Pine to on the advice / tips of some random public sources. I note that the Notices have not been able to furnish any satisfactory documentary evidence to explain

how they were approached by Pine for the preferential allotment, or in providing the details of the offer made by Pine to them and other details of communication between them and Pine in that regard. It is important to note that financing of a company by way of preferential allotment, as found in this case, presupposes a nexus and prior understanding amongst the issuer, its promoters/directors and the allottees."

26.6 The Appellant had failed to substantiate the claim that it had made investment in preferential allotment of PAL, as a genuine investor. A stranger cannot make large investment in a preferential allotment merely on the basis of an advice or presentation without having any connection direct or indirect, and prior understanding with the company. Further all the Preferential Allottees were involved in a similar series of acts, starting from the preferential allotment of shares to their exit from the

company. Further, the similar modus operandi adopted by almost all the Preferential Allottees is not a mere coincidence and leaves no doubt their involvement in the bogus LTCC Scam.

Poor Financials of Pine Animation Ltd.

27.0 A perusal of the audited accounts of PAL indicate its poor financial condition and razor thin profit for several years in continuity. Before the audited accounts of PAL are examined and commented upon in details, it is important to reproduce some of the important figures contained in the balance-sheets & profits and accounts for the years ending from March, 2011 to March 2015, as under: -

<i>Balance sheet (Figures in Rs. Cr.)</i>					
<i>Description</i>	<i>Mar' 15</i>	<i>Mar' 14</i>	<i>Mar 13</i>	<i>Mar' 12</i>	<i>Mar' 11</i>
<i>Total Share Capital</i>	27.70	27.70	27.70	3.00	3.00
<i>Reserves</i>	-1.40	-1.91	-2.50	2.62	-2.55
<i>Inventories</i>	21.78	22.67	16.34	0.00	0.00
<i>Loans and advances</i>	8.69	9.58	11.25	0.06	0.06
<i>Book value (Rs)</i>	0.95	0.93	9.10	1.27	1.51
<i>Profit & Loss Account (Figures in ₹ Cr.)</i>					
<i>Description</i>	<i>12mths</i>	<i>12mths</i>	<i>12mths</i>	<i>12mths</i>	<i>12mths</i>
<i>Operating Profit</i>	-0.02	-0.53	0.11	-0.06	0.03
<i>Earning Per</i>	0.02	0.02	0.06	-0.24	0.03



Share (Rs)					
Equity Dividend	0	0	0	0	0
Book Value (Rs)	0.95	0.93	9.1	1.27	1.51

27.1 A perusal of the above tabular data clearly shows that the Reserves of PAL for the period March Ending 2011 to March Ending 2015 had been always negative. Thus, PAL virtually had no Reserve & surplus continuously for the last so many years, which itself shows its precarious financial health.

27.2 Further, a perusal of the critical Balance-sheet figures of PAL reveals that the entire funds raised by way of share capital had been transferred out of the company through investments in shares reflected under the heading 'Inventories' and by way of advancing of 'Loans and Advances'. Thus, no worthwhile business activity had been carried out by PAL continuously for several years. The financials of PM. itself clearly shows that it is a paper company with no real business activity.

27.3 The above tabular data also clearly shows that the operating profit of PAL is also negative or negligible for almost all the years. From the Annual Report for the F.Y. 2012-13 it was observed that for the F.Y. ending 2012, the EPS of PAL was negative (i.e. Rs. 0.24) and for the FY ended March 31, 2013, EPS was Rs. 0.15. For the current year under consideration the EPS was as low as 0.02. In conclusion, the Earning per Share (EPS) is also either negligible or negative for all the 5 years, tabulated above. As per the above data, no dividend had been declared for any of the 5 years. In-fact, there were no reserves available with the company to declare dividend to the shareholders. To sum up, the financials of PAL doesn't inspire any confidence and no prudent person will invest in it's shares unless and until the scrip oilers illegal & illegitimate gains by price manipulation.

27.4 As per the above data, the Book Value of the shares ranges from a minimum of Rs. 0.93 per share to a maximum of Rs. 9.10 per share. On the

other hand, the appellant had sold the shares on BSE from Rs. 94.0 per share to Rs. 95.8 per share for the current year under consideration. The pre-arranged and pre-meditated nature of these transactions is apparent from the fact that the Book Value of the /share for the year under consideration was just Rs. 0.95 per share, as against the average ESE price of Rs. 95 per share. Thus, the BSE price of PAL is 100 times more than the Book Value of the share. All this clearly reveals that the share price of BSE had been highly manipulated upwards by the Operators and Exit Providers for the purpose of providing a golden exit to the beneficiaries, like the Appellant.

Poor Track Record of PAL Scrip on BSE

28.0 The material on record reveals that the scrip was earlier listed on BSE from March 25, 1994 and trading was suspended in the scrip w.e.f. November 09, 1998. Thus, the dubious nature of the PAL scrip was quite evident from the several undisputed historical facts. A

prudent investor will never invest in such a suspicious nature of scrip, which had been found to be involved in manipulations on the Stock Exchange and hence, banned from trading.

28.1 However, the suspension of trading in the scrip was revoked w.e.f June 22, 2012 and soon after, PAL was able to raise substantial fund, through preferential allotment of shares. The sudden spurt in the activity and inflow of hinds in PAL, just after the suspension was revoked is not at all based on any real or genuine consideration, but for ulterior motives by interested parties.

28.2 In spite of the poor fundamentals, tarnished track record, exit by the promoters of the company etc., PAL was still able to raise funds aggregating to Rs. 24,70,00,000 from 92 entities at a premium of Rs. 10 per share within a short span of few months from the revocation of suspension. The preferential share investment in PAL by the 92 entities including the Appellant cannot be prima-

fade termed as a rational investment behavior looking into the extremely poor fundamentals and track record of PAL.

Share Price not in consonance with the Fundamentals

29.0 Contrary to the extremely poor financials and dubious past, the share price of PAL had significantly moved upwards from April 2013 and had remained high till December 2014. During the period April 2013 to December 2014, when the share price of PAL had remained high, there was no material corporate announcement by the Board of PAL. Thus, the high price of the scrip of PAL during the said period was neither supported by its fundamentals nor by any other genuine factor. No rational thinking person will dump its hard earned money in such a stock without being able to make illegal gains.

Extremely Thin Volume, during the Price Rise in the PAL Scrip

30.0 A perusal of the trading data of the PAL scrip for the period, when the scrip was zooming is also quite revealing. The general trend is that when the scrip price rises, the volume of trade in that scrip also increases. However, it is noted that during the steep price rise in the PAL scrip, the volumes had still remained extremely thin. This clearly reveals that the Operators were jacking up the prices on a daily basis by just executing a few trades on the Exchange Platform. Naturally, the beneficiaries who were holding the bulk of the shareholding were not interested in executing any transaction during this period, as they were fully aware that the price of the scrip is going to rise further.

30.1 To buttress the above observations, the data relating to the sharp price rise in the PAL scrip was examined. On May 22, 2013, the price of the scrip was Rs. 47.2 per share. However, in just 19 trading days, between May 22, 2013 to June 19, 2013, the price of the scrip jumped to Rs. 100.6. The average volume during the

period was 62 shares, with 405 shares traded on May 28, 2013 being the he entire price rise was stage managed by certain Scrip Operator Entities. It was noticed that such entities by executing 1 or 2 trade(s) per day of meagre quantity were able to increase the price of the scrip in a significant manner.

30.2 Thus, it is highly surprisingly that none of the preferential allottee had come forward to sell the shares, during the price rise period. The fact that no preferential allottee had offloaded its PAL shareholding, though the share price of PAL was rising rapidly, is in itself a strong circumstantial residence about the prearranged transaction of LTCG. All the beneficiaries waited for the price rise to achieve the nadir and also waited for the completion of the one year lock in period, which as per the understanding with the Operators was bound to happen together for a sufficient period of time, though at a later stage.

High Price of the Scrip, still Volumes Low

31.0 The LTCC Scam is evident from the fact that even when the price was quite high and plateaued, still none of the Beneficiary had offloaded his shareholding in PAL before the lock in period of 1 year was over. This is evident from the fact that during the period of June 20, 2013 to December 16, 2013, the price of the PAL scrip had remained at a very high price level in a consistent manner. The price of PAL scrip was Rs. 100.6 on June 20, 2013 and was Rs. 91 on December 16, 2013. However, the volume continued to be insignificant, the highest being 200 shares on June 24, 2013 and the gross traded volume being 1254 shares. Also, the scrip traded only on 13 trading days during this period.

31.1 The reason for such an unusual behavior of the shareholders of PAL gives a further insight into the Bogus LTCC Scan). It may be noted that the preferential allotment of shares to the various beneficiaries had been made by PAL on December 13, 2012 & March 15, 2013. To get the benefit of exemption

from taxation of the LTCG, one had to hold the shares for at-least 1 year. So, till December 2013, none of the Beneficiaries, who were holding majority of the shares of PAL were eligible for exemption u/s 10(38) of the Act. This clearly shows that none of the Beneficiary was looking for only a good price for the PAL Scrip, but they were looking for a combination of good price with exemption from taxation.

31.2 The Operators of the Scrip have ensured the Beneficiaries that the price of the scrip will be maintained at high levels, till they become eligible for tax exemption. Further, the high price will be maintained for a sufficient time period, so that they are able to offload their shareholding. It is this assurance from the scrip operators that none of the Beneficiaries, who were holding a whopping 24,70,00,000 shares of PAL had offloaded their holding even during the period when the plateau of high price had been reached by the scrip.

31.3 The fact that none of the 92 preferential allottee had sold the PM. shares either during the price rise period or during the high price plateau period can't be stated to be mere coincidence, but actually was a part of a larger design of the LTCG Scam.

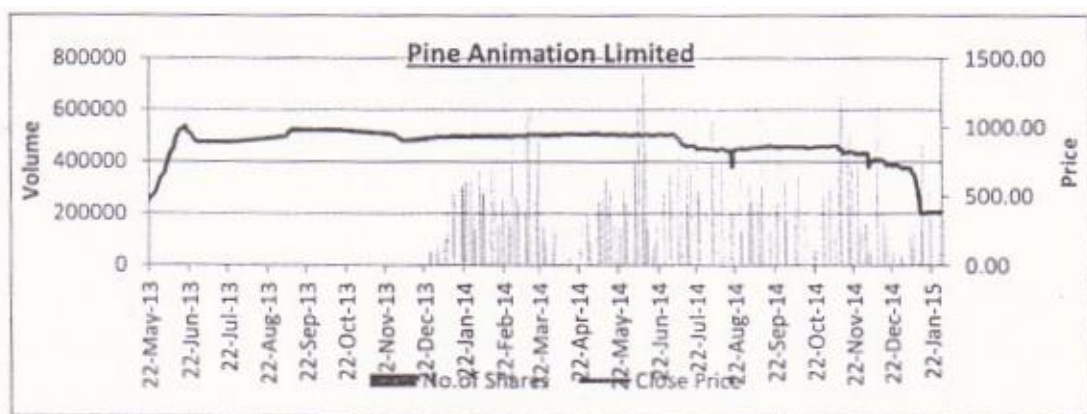
Booking of LTCG by Beneficiaries

32.0 The offloading of the PAL scrip by the 'Beneficiaries' started from Dec 2013 & continued till Jan 2014, as the mandatory holding of the shares for 1 year for preferential allotment was over by then.

32.1 On December 17, 2013 the price of the scrip was Rs. 92.1 and the 'Beneficiaries' started offloading the PAL shares during this period. This offloading activity by the 'Beneficiaries' continued for around a year and after that finally, the stock started falling down. Thus, on January 30, 2015, the price of the scrip fell to just Rs. 38.5. During the period starting from December 17, 2013 to January 30, 2015, the scrip was traded

with an average volume of 2,74,922 shares per day and total volume of 7,36,79,112 shares were traded in 268 days. Thus, the volumes / during this period were extremely high and the Beneficiaries booked the LTCG during this period of time.

32.2 A graphical Presentation of the simultaneous high price & high volume movement in the scrip of PAL during the period December 17, 2013 to January 30, 2015 is represented, as below: -



(copy of above image is taken from CIT(A) order for AY 2015-16 in the case of Mahender B. Mittal)

32.3 In the above pictorial representation, the continuous line represents the closing price of the PAL scrip and the graph in the form of manhattans represent the volume in the PAL scrip.

32.4 Thus, after the expiry of the lock-in period, the average volume increased astronomically by 4433 times. During this period, the trading volume of the shares increased to 274,922 shares per day from just 62 shares per day in the period prior to December 31, 2013.

32.5 Such high volumes in the PAL scrip was mainly on account of matched and synchronized transactions amongst the 'Preferential Allottees' and Exit Providers'. During the said period, it was observed that the 'Exit Providers' had acted as counter-parties to the sale transactions carried out by the 'Beneficiaries'. Thus, the 'Exit Providers' have provided a very profitable exit to the 'Preferential Allottees' in a pre-arranged manner. The 'Exit Providers' were mainly entities floated by the 'Scrip Operator' / Promoter backed entities / Shell Companies / Accommodation Entry providing entities / Bogus Companies etc.

*Beneficiaries Net Sellers & Exit Provider
Net Buyers- during High Price & High
Volume Period*

33.0 During the period of December 37, 2013 to January 30. 2015, the 'Beneficiaries' were the net 'Sellers' and the 'Exit Providers' were the net 'Purchasers'. This itself shows that the transactions of sale by beneficiaries was fixed with the Exit Providers, who had provided them with very lucrative and profitable exit. The data tabulated by SEBI regarding 'Exit Providers', as a result of investigation into the bogus LTCG Scheme had been tabulated in its order dated 08.05.2015 the same is reproduced hereunder: -

	No. of shares sold	% of total allotted/ received shares	Shares purchased by Exit Providers from preferential allottees/ promoted related entities	Total No. of shares purchased by the Exit Providers	% volume of shares purchased by exist providers from preferential allottees/ Promoter related entities	Shares purchased by Exit Providers as % of market gross buy volume
<i>Preferential allottees</i>	5,23,08,076	21.18				
<i>Promoter related</i>	50,78,455	54.76				

<i>entities</i>						
<i>Exit Provider Group</i>			2,82,65,949	3,47,34,934	81.38%	47.14%

Unrealistic return of 9362% reaped by the appellant

34.0 It had been noted that Preferential Shares of PAL had been allotted at a rate of Rs. 10 per share. The Appellant had got allotted 1,50,000 Preference Shares for an amount of Rs 15,00,000/-, which after split of 1:10 were finally sold at an amount of Rs. 14,19,36,826.50. Thus, the Appellant had got astronomical return on the investment made in PAL, which is worked, as under: -

$$\frac{(14,19,36,826.50 - \text{Rs } 15,00,000) * 100}{\text{Rs. } 15,00,000} = 9362.45\%$$

34.1 It is clear that the Appellant along-with other 'Beneficiaries' had made a killing by getting a return of 9362.45% on the investment made for a period of one year. The unrealistic 9362% rate of return on investment for an year, itself proves the bogus and arranged nature of the LTCG transactions. Hence by taking into

the account the split of 1:10 in the scrip, it had been noted that the original share of Rs. 10 had been sold by the Appellant at an average price of Rs. 946.24 per 34.2 Such huge rate of return, obviously is not genuine but had been arranged by the Exit Providers, who had provided a lucrative exit to the Preferential Share allottees. This was only possible because the PAL management, promoters & directors, Preferential allottees, Promoter related entities and the Exit Providers were hand in glove with each other. In the whole process, the principle of price discovery was kept aside and the market lost its purpose.

34.3 It is now a proven fact on record that the Beneficiaries had routed their unaccounted money through the Exit Providers and claimed the same to be an exempt LTCG. The LTCG and the bumper return on investment earned by the Mittal Group in the PAL scrip is worked out below, for ready reference: -

<i>s. N</i>	<i>Name of the</i>	<i>No. of shares</i>	<i>No of shares</i>	<i>Cost of shares</i>	<i>Gross sale value (In ₹)</i>	<i>Profit earned on the sale of</i>	<i>Return on Investmen</i>
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o	Beneficiary	allotted	sold	(In ₹)		shares (IN ₹)	t (In %)
1.	Mahendra B. Mittal	150000	150000	150000	141936826.	14,04,36,826.	9362%
			0	0	5	5	
2.	Pooja Mahendra Mittal	150000	150000	150000	142097414.	14,05,97,414.	9373%
			0	0	5	5	

No change in the overall shareholding, during the entire LTCG Scheme

35.0 I have noted that there was no change in the beneficial ownership of PAL, though substantial number of shares were traded on the Exchange Platform. The reason for this lies in the fact that both the buyers and sellers were part of the common group and were acting in concert to provide LTCG benefits to the Preferential Alotees and Promoter related entities. The share-holding at various points of time had been held by mainly these three broad groupings: -

Promoter related entities

35.1 Though, inter-se the percentage shareholding amongst the three grouping might have varied at various points of time, but as a whole these three groups only had held the entire shareholding of

PAL. This is due to the fact that the entire cartel of LTCEG Scam had never allowed the general public to trade in the shares of PAL.

.....

36.5 On this particular aspect, it is made clear that the Revenue had never imputed the charge of price manipulation / volume manipulation on the Appellant. The charge on the Appellant is that it is one of the beneficiary of the bogus Long Term Capital Gain of the PAL scrip. The charge on the Appellant is that it had laundered its unaccounted money through bogus Long Term Capital Gain in PAL scrip. Thus, the Appellant had failed to appreciate that the non-violation of provisions of SEBI Act, SCRA, PFUTP regulations, etc. doesn't absolve him from the charge of bringing his undisclosed income into books through bogus Long Term Capital Gain.

36.6 Further, on these contentions of the Appellant, it is stated that the appellant

had not reproduced the Para 12 of the said order of SEBI, which is quite relevant in this context and the same is reproduced hereunder, for ready reference: -

12. The revocation of the directions issued vide the abovementioned orders (at paragraph 11) is only in respect of the entities mentioned at paragraph 9 of this order in the matter of Pine Animation Limited. As regards remaining Regulations, etc., were observed and SEBI shall continue its proceedings against them. Hence, the directions issued vide orders dated July 05, 2016, August 22, 2016 and June 02, 2017 against the remaining 62 entities shall continue.”

36.7 A perusal of the above Para 12 of the SEBI's order makes it clear that the adverse orders passed against the remaining 62 entities shall continue. Hence, the investigations of SEBI into the

trading transactions of PAL are still continuing. Hence, the reliance of the Appellant on the SEBI's order dated 19.09.2017 is totally misplaced, as the SEBI's order had not dealt at all with the issue of routing of the unaccounted money into books of account by taking accommodation entry of bogus LTCG.

7. We have heard the rival contentions and gone through the facts and circumstances of the case.

8. Before us, the learned Counsel for the assessee Shri Madhur Aggarwal stated the fact that assessee purchased the shares of listed company and held them for more than one year. He sold his shares on Bombay stock exchange platform through his broker Geojit and STT was paid on sale transactions. Thus, all the conditions of Sec 10(38) of the Act are fully complied. Hence, assessee being eligible, rightly claimed exemption of Long Term Capital Gains under Section 10(38) of the Act. He stated that the AO nowhere in the assessment order pointed out nor discussed non fulfillment or non-compliance of any conditions of Section 10(38) of the Act. Hence, rejecting the claim under section 10 (38) of the Act without giving reasons is wrong and contrary to the provisions of law. He then stated that the CIT(A) also confirmed the action of the AO just on the basis of conjunctures and surmises. He

assailed the orders of the lower authorities. He argued and pointed out that Section 10(38) of the Act was inserted by Finance Act 2 of 2004 providing for exemption to long-term capital gains arising on sale/ transfer or equality shares in listed company, or unit of an equity oriented fund provided such transactions have suffered securities transaction tax under the said Chapter. If shares of listed companies purchased are sold on the exchange platform within one year paying STT then gain or loss is treated as short term capital gain taxable at concessional rate of tax as per the provisions of Income Tax Act and if these shares are sold on stock exchange after holding for exceeding one year paying STT then resultant gain or loss is treated as long term gain/ loss which is exempt from tax u/s 10(38) of the Act.

9. He referred that to the order of the AO and that of the CIT(A) and stated that both the authorities did not accept the above referred evidences filed by the assessee in support of his claim and by relying on the general study report of the investigating wing rejected the claim and held that the entire transactions undertaken by the assessee were merely an accommodation entries taken for the purpose of securing bogus long term capital gains and to claim exempt income and consequently assessed the sale proceed as an unexplained cash credit under section 68 of the Act. The AO has referred to the findings in the general study report of the Investigation Wing of Kolkata and Mumbai, wherein it laid down the purported modus

operandi of converting unaccounted money into exempt LTCG. It is stated that a person acquires shares of penny stocks trading at low price either through private placement or on merger of private limited company of which such person is a shareholder with a penny stock company. Thereafter unaccounted money flows to operator's / exit providers who artificially raise the prices of penny stocks on stock exchange. Thereafter, the penny stocks are sold to earn huge exempt LTCG.

10. In regards to the present case the learned Counsel referred to the observations of AO regarding PAL script in his show cause notice:

"In the case of M/s Pine Animation Ltd, the Investigation Wing Mumbai has conducted a survey action on M/s Saraf Equity Services Pvt. Ltd. on 03.12.2015, an exit provider in script Pine Animation Ltd. During the course of survey proceedings, statement on oath of Shri. Mandar Dilip Naik, Director of M/s. Saraf Equity Services Pvt. Ltd. was recorded wherein he has stated that M/s. Saraf Equity Services Pvt. Ltd. has indulged in providing exit to the beneficiaries in collusion with operator for making bogus

LTCG transactions for a commission of 1%.

Further, on verification of the script M/s Pine Animation Ltd. it is seen that the other exit providers i.e. Dhriti Traders Pvt. Ltd, Dream valley Trading Pvt. Ltd., Dwarka purl Constructions P Led, Olympia Sales Agencies P Ltd, Particle Industries P Led, Signet Vinimay P Ltd, Winall Vinimay P Ltd and Spice Merchants P Ltd have purchased shares of M/s Pine Animation Ltd to provide accommodation entry in the terms of LTCG. These entities are operated by entry operators whose statement has been recorded by the Investigation Wing wherein they have stated that they are an entry operator and is into the business of providing accommodation entries by managing and controlling various bogus entities, either directly or through his dummy directors."

AO observed that the persons listed above in the notice have purchased the shares of PAL and are exit providers and entry operator and are in the business of providing accommodation entries and relied upon their statements

viz. Anil Khemka, Sanjoy Dey & Mandar Naik (director of Saraf Equity). The relevant observations in the assessment order reads as under: -

Para 7.2: "The assessee has mainly traded in mainly in one scrip during the year which is suspicious"

Para 7.3: "As discussed above, the assessee traded in single scrip and has made huge profits."

Para 9: "Further, a SEBI order has been passed in the case of Pine Animation Ltd order vide dated 08.05.2015 which directs that the trading in the securities of shall be suspended till further directions.....The shares are sold by the beneficiaries have been purchased by paper/ bogus entities (e)it providers)

Para 11.3:to prove genuineness, proof of physical transfer of shares, reasons to trade off-market when options to online market trading through demat account were available, trading pattern of market transactions for the last three

years, have not been submitted to this office Submissions on above:

11. The learned Counsel argued that the findings of the Investigation Department are general in nature and it is basically a study report and not known which cases are investigated. As understood from the assessment order the assessee's name or his transactions are not referred in such reports and the AO has not established any link between that report and assessee's transactions. This is also fatal as reliance on such investigation report, without confronting the assessee with the same, renders the assessment bad in law. The Investigation in assessee's case by way of search did not reveal any connection with the findings or evidences as referred to in such reports.

12. He stated that the statements of Anil Khemka & Sanjay Dey and Mandar Naik relied upon the AO does not establish that the assessee has paid any unaccounted money to these parties. None of the replies to the question posed indicate that they received any unaccounted money from the assessee or that they received or utilized the unaccounted money received from the assessee with reference to shares of PAL. It is also not established that they had any arrangement or dealings or relation with the assessee leave apart the alleged accommodation or exit provided who has not stated any dealing with them against the principles of natural justice. Further, as

regards the parties listed by AO in the assessment order (abstract reproduced above) as exit providers and entry operators i.e. Dhriti Traders Pvt. Ltd., Dream valley Trading Pvt. Ltd, Dwarkapuri constructions P Ltd, Olympia Sales Agencies P Ltd, Particle Industries P Ltd, Signet Vinimay P Ltd, Winall Vinimay P Ltd, Spice Merchants P Ltd and Saraf Equity Services Pvt. Ltd., the assessee categorically denied the same and confirmed that, he did not know or had any relation with any of the above said parties and he never dealt with or had any business or personal relations with any of them. He further confirmed that as he did not know them, hence knowing their business or activities is out of question.

13. He argued that the assessee has neither taken exit nor accommodation entries from any party for purchase or sale of shares of the company, nor has any evidence provided by AO nor statements of such persons revealed any dealing with the assessee. All transactions done by the assessee are through BSE and Bank account in the normal course. Even otherwise also the statement of the persons referred by the AO as exit or accommodation providers (Anil Khemka, Sanjay Dey & Mandar Naik) were not recorded in the presence of assessee nor has he been provided to cross examine them before using these statements against the assessee. Hence reliance on such statements made in back of assessee cannot be admissible as evidence and makes the assessment order invalid. In the present facts, the assessee at first was allotted shares through

preferential issue by the Company. The allotment of shares by the Company was made after obtaining prior approval of BSE as per SEBI Issue of Capital and Disclosure Requirements Regulation, 2009. The sale of shares of PAL is through a reputed broker Geojit. All necessary supporting evidence have been submitted to establish the genuineness of the transactions. On investigation, the role of Geojit was not found to be suspicious or questionable. Therefore, reliance on the findings of the Investigation Wing in some other cases which bears no connection with the case of the assessee irrelevant.

14. It was contended further that there is no evidence that implicate the assessee to have entered into any arrangement with any operators /exit providers or involvement of unaccounted money. The assessee took strong objections to AO linking him or his transactions with so called alleged exit providers and accommodation entry providers without any evidence or involvement mentioned in such investigation reports and statements of such persons. The seamless process of transactions at BSE as explained hereafter does not identify and provide us the identity of persons who have purchased those shares sold by assessee. The assessee has ordered his broker to sell the shares of PAL who in turn sold the shares on BSE platform. The assessee/his broker were not aware about the buyers or their brokers who purchased the shares of PAL sold by the assessee. The allegation of AO in para 7.2 and 7.3 of the Assessment order that that the assessee mainly traded in

one script (PAL) which is suspicious is completely incorrect and not supported by facts. During FY 2014-15 (AY 2015-16) the assessee also traded in following scripts:-

STCG:

a) ICICI Bank, b) Guj NRE, c) Gitanjali Gems, d) HFCL. E) Wondrella, f) Hind Motors, g) Tata Chem, h) Cr. Griev., i) Coal India, j) Unitech, k) Infosys, L) Tech Mahindra, m) HCL Techno

LTCG:

a) Pine animation, b) Sundaram Inv. C) Care rating, d) Kolte Patil, e) IDEA, f) Balmer Lawr, g) S. Clayton, h) GFL Finance, i) Sun Pharma

15. Further, the learned Counsel also narrated the fact that the assessee also incurred losses in few scripts out of the above. With regard to the observations of AO in Para 9 relating to suspicion for trading in PAL shares by SEBI vide ad-interim ex-parte order dated 08.05.2015, it was argued that the assessee and his wife along with more than 100 others entities were exonerated of all allegations as detailed in ad-interim ex-parte order for manipulation of price and volume of the script

and also any arrangement by the assessee with the company or its promoters, exit providers, or SEBI Regulations etc. vide SEBI in its Final Order dated 19.09.2017.

16. The learned Counsel further narrated that the allegation of AO in para 11.3 that proof of physical transfer of shares, reasons for off market trading and trading pattern of market transactions for the last three years have not been submitted is also unfounded and contrary to the facts. The assessee during course of assessment submitted complete documents of preferential allotment of shares and trading in shares of seven years vide its reply dated 23.11.17. There was no physical transfer of shares during the year under appeal except one in which company has bought back shares of Sundram investment for Rs. 5,257/-. Therefore, observations regarding off market trading are absolutely wrong and contrary to the facts.

17. Ld Counsel for the assessee explained the process at Stock Exchange Network, which is filed in the shape of note as under: -

"> As per Stock Exchange Regulations, shares or securities of any of the listed companies who has signed listing agreement with SE are dealt on the stock exchange platform through a registered broker only. The purchase and sale transactions on the stock exchange (SE)

platform are with the stock exchange and settled through the clearing system and payment is received from brokers or paid to brokers online to or by the exchange clearing system.

> When any customer orders the broker to sell any script, the stock broker sells the shares on trading system through the exchange terminal and generate contract note. On sale, the shares are delivered from the customer's demat a/c to the stock broker's demat a/c who in turn transfers the shares to stock exchange pool a/c, who on settlement day delivers to the buyer's demat a/c. On the other side, the buyer pays the price as per contract note to his broker who pays to the SE who then transfers the amount to the seller's broker on settlement day. Thus, the seller and the buyer or their brokers does not have direct relation nor dealing with each other. Nor they know the buying or selling parties or the brokers. The customers deal with their respective brokers and brokers deal with SE or the clearing system.

> In nutshell, the buyer's broker makes payment to SE and seller's brokers deliver shares to the SE. Thereafter, settlement is done by clearing system and transfer of amounts online to seller's brokers bank account and shares to buyer's brokers demat account who in turn pays to the sellers and transfers shares to the demat account of the buyer. Hence sellers and buyers does not deal directly or come in contact nor their broker come in direct contact and neither of them know the contra party.

> The whole system of buying and selling of shares done on the stock exchange platform is faceless and SE platform deal with brokers only and parties deal with their brokers. For example, shares sold by X through its broker bought by ABCD broker for XYZ or vice a versa are not known to each other. Even the broker does not know, the shares sold by him are delivered to which brokers or which buyer. The broker can act only for the parties who are registered with him after necessary KYC and due diligence. Nobody

can directly deal in shares on stock exchange.”

18. Further, the learned Counsel stated that the assessee has sold these shares through his broker Geojit who is registered broker of Bombay Stock Exchange (BSE), National Stock Exchange (NSE) and other exchanges. The broker Geojit is an old and reputed share broker and is in this business for years. The assessee is dealing with it for more than 10 years and sold equity shares of PAL on BSE platform through his regular broker Geojit and delivered the shares from his demat account and received sale proceeds directly in his designated bank account as explained in the facts of the case. STT, brokerage, Stamp duty, SEBI and other charges were duly paid on transactions done on BSE platform. The AO has accepted all the documents filed by the assessee without any doubt on its authenticity or genuineness. The relevant documents and evidence of these transactions are also submitted before us. The broker Geojit also does not know to whom the shares were sold. Only SEBI or stock exchange knows who bought these shares and these authorities do not supply such information unless called by Government Authority. Therefore, the assessee or his broker did not have any record or knowledge of the purchasers at the time of sale. However, during the course of investigation by SEBI, the information was supplied by BSE to the assessee in the form of a CD to offer his reply on the ex-parte order issued by SEBI on 08.05.2015. From the CD, the assessee came to

know that his shares of PAL were bought by 50 buyers through multiple brokers. The delivery of shares is given to Geojit by the assessee from his demat account. Copy of demat statement is already filed in assessee paper book before us. The broker in turn transfers the shares to BSE Clearing account. The sale proceeds of sale of shares is settled by exchange settlement system and directly credited to broker's bank accounts by the BSE and the assessee received payment from Geojit i.e. directly into his designated bank account. Copy of bank statement is filed in assessee's paper book (APB).

19. Further, the assessee has no connection or nexus with the buyers as also the activities of the buyers. Even if the buyers are doubtful or of suspicious character that does not affect the transactions of sale of shares by the assessee through proper channel i.e. on the recognized stock exchange through the registered broker and payments were received. He argued that during search itself and in the course of investigation the department had made exhaustive survey and enquiry for these transactions from Geojit and other brokers and nothing incriminating was found against the assessee. The details, documents and third party evidences supporting the sale transactions and payments received have been filed by the assessee. The transactions were done at prices prevailing on the date of transaction and STT was paid on such transactions cleared through exchange clearance system.

20. The learned Counsel further referred to SEBI Investigation in case of PAL. It was argued that in case of PAL, the whole time member of SEBI the market regulator, on a preliminary report of its surveillance department has passed ad interim ex-parte order no. WTM/RKA/ISD/36/2015 dated 08.05.2015 against PAL and 177 entities including assessee. However, despite no charge against the assessee, the whole time member of the SEBI confirmed the ex-parte order vide passing Confirmatory order no. WTM/RKA/ISD/61/2016 dated 02.06.2016. The assessee went in appeal before the Securities Appellate Tribunal against the confirmatory order of the SEBI. While the assessee's appeal with SAT was at hearing stage, the investigation department of the SEBI completed investigation in PAL and passed final order vide order no. SEBI/WTM/MPB/EFD-I-DRA-III/28/09/2017 dated 19.09.2017. Relevant para no.9, 10, and 11 of SEBI order are reproduced herein below:

"9) "Upon completion of investigation by SEBI, the following are noted as regards 14 entities who were identified as Preferential Allottees, Exit providers and LTP Contributors vide the interim order:

SEBI's investigation did not find any adverse evidence against them to show any connection / nexus with PAL or its Promoters/ Directors or Promoter related

entities or any role in price manipulation volume manipulation in the scrip of PAL. Hence, violation of provisions of SEBI Act, SCRA, PSUTP regulation, etc. were not observed in respect of the following 114 entities.

.....21. Mahendra B Mittal

.....32. Pooja Mahendra Mittal

and other 112 entities as per SEBI order

10) "Considering the fact, that there are no adverse findings against the aforementioned 114 entities with respect to their role in the manipulation to the scrip of PAL, I am of the considered view that the directions issued against them vide interim order dt 08.05.2015 which were confirmed vide Orders dt. June 02, 2026, July 05, 2016, August 22, 2016 and June 02, 2017 need not be continued."

11) In view of the foregoing, I in exercise of the powers conferred upon me under Section 19 of SEBI Act, 1992 read with section 11, 11(4) and 11B of the SEBI Act, hereby revoke the Confirmatory

*Orders dt.02.06.2026, 05.07.2016,
22.08.2016 and 02.06.2017 qua aforesaid
the 114 entities with immediate effect."*

21. Thus, the SEBI's final order dated 19.09.2017 clearly came to the conclusion that SEBI's investigation did not find any adverse evidence against the 114 entities including the assessee and given finding that the assessee has no connection/nexus with PAL or its promoters/directors or promoters related entities nor any role in price manipulation, volume manipulation in the script of PAL. No violation of provisions of SEBI Act, SCRA, PFUTP regulation's, etc. were observed in respect of 114 entities (including the assessee). The list of 114 entities referred in the SEBI Order also includes following alleged exit providers discussed in show cause notice and referred to in the assessment order as under: -

<i>Sr. No.</i>	<i>Name of Exit Provider</i>
<i>121</i>	<i>Dhriti Traders PL</i>
<i>127</i>	<i>Dreamvalley Trading FL</i>
<i>162</i>	<i>Signet Vinimay PL</i>
<i>165</i>	<i>Spice Merchants FL</i>
<i>172</i>	<i>Winall Vinimay P L</i>

22. These alleged exit providers were also exonerated by the SEBI Order and the remaining alleged exit providers viz. 1) Dwarkapuri Constructions P Ltd., 2) Olympia Sales Agencies P Ltd. and 3) Particle Industries P Ltd. were neither referred in

the SEBI ex-parte order dated 08.05.2015 nor in the final order dated 19.09.2017 which goes to prove that neither the assessee nor the exit providers alleged by the AO were involved in any arrangement or accommodation and hence, allegations of AO are wrong and without any evidence. Copies of SEBI ad-interim ex-parte order dated 08.05.2015, confirmatory order dated 02.06.2016 and final order dated 19.09.2017 are enclosed at pages 217-277 of APB. Subsequently, the SAT disposed-off the appeal of the assessee as infructuous and passed order accordingly vide order no. nil dated 26.09.2017. Copy enclosed at pages 278-283 of APB.

23. In view of the above the assessee has been exonerated by SEBI in the case of PAL stating that he had no nexus/connection or collusion with the company, its directors, or promoters and was not involved in price manipulation & volume manipulation, etc. Further, the alleged exit providers for the script have not played any role in assessee's transactions in the script as he has neither taken any accommodation nor entry or exit from any of the alleged parties.

24. On the other hand, the learned CIT DR Shri Manjunatha Swami, argued that the entire transaction is bogus. He stated that he is relying on the elaborate order written by the AO and that of the CIT(A).

25. We have noted that PAL made a preferential allotment of equity shares in the year 2013. The assessee on application for

shares was allotted the same at Rs. 10 per share. The company had split the face value of its shares in 2013. Due to this, assessee received 15,00,000 shares against 1,50,000 shares allotted earlier. The assessee acquired the shares on the basis of guidance from his father and friends. The purchase and sale of shares was neither pre-planned nor under any arrangement with the company or any party related to it. The allotment of shares by PAL was made after obtaining prior approval of BSE as per SEBI Issue of Capital and Disclosure Requirements Regulation, 2009. We noted from the facts that as per the financials provided in the assessment order, it can be seen that the company had incurred a loss in FY 11-12 of Rs. 7 lakhs and has earned profit of 16 lakhs in FY 12-13. The fact that PAL was turned from loss making to profit earning itself demonstrates the fact that there was potential in PAL due to which the assessee purchased the shares. Further, the turnover, in the FY 2013-14 increased by 10 times as compared to the preceding previous FY and increase in the net profit after tax was almost around 4 times than that of the net profit recorded in the year of purchase. Moreover, the prices of the company were almost constant for a year. When the assessee thought that the prices had reached its peak, he slowly sold all the shares in a time span of 3 months. To prove the genuineness of the transactions, the assessee provided all the supporting evidences like, share application form, bank statement highlighting the

transactions, contract notes, broker's ledger, demat statement Form 10DB, SEBI's final order, SAT Order, etc.

26. However, the AO made addition under section 68 of the Act and CIT(A) confirmed the addition by ignoring all the facts and evidences and without providing any proof of assessee's involvement in the manipulation of price or volume of the shares of the company or pointing out any defect or deficiency in the process of transactions or its eligibility to deduction u/s 10(38) of the Act. We noted that the AO in his Assessment Order in para 7 and 8 has exhaustively mentioned in detail the financials of PAL, preferential allotment of shares, price of PAL, Exit providers, etc. Following paras have been ditto /copied from SEBI ad-interim ex-parte order dated 08.05.2015. Although after Investigation, SEBI in its final order exonerated the assessee and the alleged exit providers but the AO failed to consider the SEBI final order in the assessment order. It means that the AO and CIT(A) also relied on the order of SEBI dated 08.05.2015 mainly for drawing inferences and deciding the issue on the basis of conjunctures and surmises and not on evidences.

27. In view of the above, we noted that it is SEBI who monitors and regulates the stock exchanges & stock market and when their investigation did not reveal any price or volume manipulation by the assessee and these transactions are in the normal course through proper & legal channels. Then the

allegations of the IT Department fall flat and denial of deduction u/s 10(38) of the Act is arbitrary and addition of sale proceeds of shares of PAL u/s 68 is against the provisions of Act. The assessee in his reply dated 20.11.2017 submitted to the AO that the allegations mentioned in paras of show cause notice are based entirely on SEBI ad-interim ex-parte order dated 08.05.2015 which was reversed after detailed investigation wherein SEBI has exonerated the assessee of all the allegations without any qualification. A copy of SEBI Final order dated 19.09.2017 was also enclosed with the APB. But the AO has failed to refer to assessee's submissions and SEBI's final order dated 19.09.2017 in the assessment order inspite of the fact that assessee's submissions and SEBI's final order were already on its record thereby contravening the principles of natural justice.

28. We also noted that as per provisions of section 68 of the Act, where any sum is found credited in the books in any previous year and assessee offers no explanation about the nature and source thereof or the explanation offered is not satisfactory to the AO, the sum credited may be charged to tax under Sec. 68 of the Act. The assessee is required to prove: (i) the identity of the creditor (ii) Source of the credit and (iii) genuineness of the transaction to the satisfaction of the AO. To prove the identity of the creditor, the nature of transactions, source of payments and the genuineness of the transactions of

sale of shares of PAL, the assessee has submitted following documents/ evidences: -

a) To prove the identity of creditor and nature of transaction the assessee submitted copy of Contract note on sale by Geojit on BSE platform. The contract notes shows the quantity, rate, time stamp, value, taxes and charges viz. STT, brokerage, SEBI and exchange turnover charges, service tax and stamp duty incurred on all the transactions done on BSE platform, a stock exchange recognized by the market regulator SEBI. The documents have been accepted by the AO.

b) Bank statement showing sale proceeds credited by the broker Geojit. Demat account of the assessee showing sold shares debited / transferred to broker.

c) The sale consideration is received by assessee from Geojit, a registered broker of SEBI/BSE, with who has been dealing with Geojit for more than 10 years as per contract note directly in the bank account after shares are delivered from demat account and received by the assessee. Copy of demat account and bank statements where sale proceeds are received are submitted as discussed above. Geojit has also been examined and interrogated by the Investigation Department during search proceedings. Geojit's source is BSE settlement system. This explains identity of the creditor and source of

money paid by assessee for genuine transaction of sale of shares.

d) Sale is done at prevailing price quoted on the BSE. (BSE published quotations daily and rate list of the relevant dates can be produced if required)

e) The shares are sold by assessee's broker on BSE platform and not off market to any buyer hence source is BSE's clearing system and broker. The transactions on the BSE platform and settlement system who are responsible for the transactions of the demat account and prevailing price on public domain prove the genuineness of the transactions.

f) SEBI's final order dt. 19.09.2017 relating to PAL is enclosed. SEBI after detailed investigation into the transactions in the shares of these companies held that the parties to the investigation including assessee and alleged exit providers are having no nexus or connection with the company, their directors, promoters etc. and there is no price or volume manipulation in these scripts. This also explains the genuineness of the transactions and discards the theory of manipulation or accommodation to take tax advantage illegally.

29. We have also noted the facts further that the assessee has received total amount of Rs. 14,16,80,449/- on account of sale

of shares of PAL during the year, in the account with Axis Bank from Geojit, registered broker of BSE with whom the assessee is dealing from last more than 10 years. The assessee has been regular investor in shares & securities and his portfolio comprises of various shares and the aggregate value of investments for 5 years have been as under: -

AY (as on date)	Total investment in shares – Amount (in Rs.)
31.03.2011	3,77,21,394
31.03.2012	3,33,40,018
31.03.2013	2,66,87,649
31.03.2014	2,91,24,876
31.03.2015	2,58,84,431

Copies of Balance Sheet of the assessee for the above mentioned years showing the investments made in shares were submitted to the AO vide submission dated 15.03.17 as well as before CIT(A) and even now before us. This adds to the bonafide of the assessee's transactions. In view of the above facts and circumstances of the case, we have to go through the expression of "nature and source" and has to understand the requirement of identification of the source and its genuineness. Sec. 68 of the Act places the burden of proof on the tax payer, to explain the nature of source of any credit but not the source of the source. Hence when an assessee gives evidences of identity of the payer, source of the credit, evidences of the transactions to prove the genuineness, the assessee is said to have discharged his initial burden. In view of the above, we are

of the view that the assessee has explained and submitted evidences to prove identity, nature and source of the cash credit on account of sale proceeds credited / received in the bank account of the assessee and also furnished all evidences comprising contract notes, brokers, banking details in support of the genuineness of the transactions. The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence. The AO did not produce any evidence whatsoever to prove the allegation that unaccounted money changed hands between the assessee and the broker or any other person including the alleged exit provider nor proved that the assessee has taken any type of accommodation from any person or so called exit providers to introduce unaccounted money into books by way of LTCG. With the purchase and sale transactions of shares of PAL are proved genuine by third party evidences - bank, broker; DP-demat account, and in the absence of any material to prove cash changing hands in the transaction, the addition made by the AO under section 68 of the Act, by treating the sale consideration as unexplained, sham, non-genuine is baseless. The addition under section 68 of the Act made merely of the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating appellant's involvement in any kind of manipulation is illegal and cannot sustain. The findings of

investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc. For making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. The assessee has discharged his onus by establishing the identity of the payer, source of the credit and genuineness of the transactions.

30. We noted that the learned CIT Departmental Representative also relied on the decision of the Hon'ble Bombay High Court, Nagpur Bench in the case of Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 taxmann.com 196 (Bom), wherein the decision on the impugned issue was discussed. Hon'ble High Court has considered the facts of Sanjay Bimaichand Jain supra from where we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash (iii) The address of both the companies were interestingly the same (iv) The authorized signatory at both the companies were also the same person (v) The purchase of shares of both the companies was done by that

assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court supra is factually distinguishable.

31. Now we will discuss the modus operandi, preponderance of probability and human behavior. We noted that the AO as well as CIT(A) have rejected all evidences filed by the assessee by referring to 'Modus Operandi' of persons for earning long term capital gains which is exempt from Income tax under section 10(38) of the Act. All these observations are general in nature and are applied across the board to all including the assessee. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected by the AO from third parties is confronted to assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, it provided to the assessee. The addition is made based on a general report from the investigation wing.

32. The issue for consideration before us is whether in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the

modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee's action giving his involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is exempt from income tax, by way of cheque through banking channels. This allegation that cash had changed hands has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on recording each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

33. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submissions of the assessee that he is just an investor and as he received some tips and he chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that he is not party to the scam etc., has to be controverted by the revenue with evidence when a person claims that he has done these transactions in a bona fide manner, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are many beneficiaries of LTCG. Each case has to be assessed based on principles of legal import laid down by the Courts of law.

34. In our view, just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT v.

Daulat Ram Rawatmull [1973] 87 ITR 349 (SC) (SC) the Hon'ble Supreme Court held that, the onus to prove that the apparent is not real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT (1959) [1959] 37 ITR 271 (SC) held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale prices are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisation. Courts of law are bound to go by evidence.

35. But in the present case, we noted that the assessing officer has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. The assessing officer has not brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a pan of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons



investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such findings how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making Investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter would be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any findings specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, the AO at best could have considered the investigation report as a starting point of Investigation. The report only Informed the AO that some persons may have misused the scrip: for the purpose of collusive transactions. The AO was duty bound to make inquiry from all concerned parties relating to the transactions and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. However, the AO has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise

supported by proper third party documents are collusive transactions.

36. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon'ble Court held:

"Adverting to the various probabilities which weighed with the ITO might be observed that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by 'S' and the notoriety achieved by 'D' as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the ITO and the fact that the appellant indulged in

speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,—this also was a pure conjecture or surmise on the part of the ITO. As regards the disclosed volume of business in the year under consideration in the head office and in branches the ITO indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The ITO indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the

record of the proceedings. If the conclusion of the ITO was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each."

37. The observations of the Hon'ble Apex Court are equally applicable to the case of the assessee. The AO and CIT(A) both, having failed to bring on record any material to prove that the transactions of the assessee were collusive transactions could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department and hence under these circumstances nothing can be implicated against the assessee. In view of the above, the findings / allegations of the AO and CIT(A) are baseless, without any evidence, contrary to the facts

and circumstances of the case and provisions of the Act. Hence, we delete the addition made by the AO by setting aside the order of Id. CIT(A) based upon such findings. This common issue as regards to addition under section 68 of surplus arising out of sale of shares of listed companies and consequent addition under section 69C on the presumption that commission at the rate of 3% was paid is hereby deleted. Accordingly, this common and interconnected issue of the four assessee's appeals is allowed.

38. Similarly, common and inter-connected issues in the cases of Vijay Ratan Balkrishan Mittal in ITA Nos. 3427-3429/Mum/2019 for AYs 2012-13 to 2014-15, Mahendra B Mittal (HUF) in ITA No. 3426/Mum/2019 for AY 2013-14, Pooja Mahendra Mittal in ITA Nos. 3311-3314/Mum/2019 for AYs 2012-13 to 2015-16 & Mahendra B Mittal in ITA Nos. 3264 & 3265/Mum/2019, 3247/Mum/2019 AY 2012-13, 2014-15 & 2013-14 respectively, hence, taking consistent view in these appeals also, we allow the same.

39. The next common issue in these appeals, in the cases of Vijay Ratan Balkrishan Mittal in ITA Nos. 3427-3429/Mum/2019 for AYs 2012-13 to 2014-15, Mahendra B Mittal (HUF) in ITA No. 3426/Mum/2019 for AY 2013-14, Pooja Mahendra Mittal in ITA Nos. 3311-3313/Mum/2019 for AYs 2012-13 to 2014-15 & Mahendra B Mittal in ITA Nos. 3264 & 3265/Mum/2019, 3247/Mum/2019 AY 2012-13, 2014-15 & 2013-14 respectively,

is as regards to the assumption of jurisdiction by the AO despite the fact that no incriminating material was found during the course of search qua these assessor's on 03.12.2015. According to the learned Counsel, this issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of continental CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom) The learned Counsel for the assessee stated that this is common issue in all these 9 appeals. For the sake of brevity and better understanding ,the issue raised in the case of Mahendra B Mittal in ITA No. 3264/Mum/2019 for AY 2012-13 taking this as lead case so far as this issue is concerned reads as under: -

"1. The Commissioner of Income Tax (appeals) [hereinafter referred to as "the CIT(A) / Assessing Officer [hereinafter referred to as "the AO] failed to appreciate that the assessment order under section 143(3) read with section 153A framed in the absence of any unaccounted cash, jewellery or any incrementing material found in the course of search was bad in law;"

40. The facts of the case have been given hereinabove; however, the relevant facts are being reiterated for the sake of convenience. The assessee filed the return of income for the instant year on 17.07.2013 which was processed under section 143(1) of the Act. The search and seizure action under section 132 of the Act was conducted 03.12.2015. The notice under section 153A was issued on 16.01.2017 and the return was filed in response thereto on 20.02.2017. Now, the assessee has raised issue that the additions as made by the AO in the assessment as framed under section 143(3) read with section 153A of the Act dated 22.12.2017 without referring to incriminating material found during the course of search are without legal jurisdiction and have to be deleted.

41. The CIT(A) dismissed the ground raised by the assessee on this legal issue by holding that material obtained by issuing notice under section 133(6) of the Act to Bombay Stock Exchange (BSE) and on the basis of information filed by the BSE sale transactions of shares of M/s BML & M/s RGL were synchronised trades and prearranged for obtaining bogus LTCG. The learned CIT(A) further observed that BSE data and material on record had proved beyond doubt that counter parties to whom the shares of M/S BML and M/s RGL were sold were all Exit Provider/ Entry Provider/ Shell companies and constituted incriminating materials and were rightly used by AO in framing assessment under section 143(3) r.w.s 153A of the Act.

42. The learned AR vehemently argued that additions as made by the AO in the assessment framed under section 143(3) r.w.s 153 of the Act dated 22.12.2017 were without jurisdiction as the assessment has not abated on the date of search. The learned AR submitted that in case of unabated assessment on the date of search, the addition has to be made with reference to incriminating material seized during the course of search and if no such material is seized, the addition to the income of the assessee in unabated assessment is beyond the authority of the AO. The learned AR while drawing our attention to provision of section submitted that there where search is conducted under section 132 of the Act, the notice under section 153A of the Act is to be issued in respect of six assessment years falling prior to the date of search. The learned AR submitted that so far as the unabated assessment years are concerned , the AO has very limited jurisdiction so far as the scope of the assessment of the assessee's income is concerned. In other word, the addition can only be made in case of unabated assessment on the basis of incriminating material, if any, seized during the course of search whereas the power of the AO to make addition in the case of abated assessment is co-terminus to the powers of the AO under the normal assessment proceedings under section 143(3) of the Act. The learned AR therefore submitted that the order of CIT(A) upholding the order of AO by holding that information gather from BSE by issuing notice under section 133(6) of the Act qua the share transactions of M/s BML and

M/s RGL scripts constituted incriminating materials is against the spirit of law as the section envisages the incriminating material during the course of search and not during the course of assessment or appellant proceedings. In defense of argument, the learned relied on the decision of Bombay High Court in the case of Continental CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom).

43. The learned DR on the other hand relied heavily on the order of learned CIT(A) by submitting that the evidences were gathered after issuing notice under section 133(6) of the Act that the assessee was carrying on a systematic activity in the shares of BML and RGL to secure bogus long term capital gain and the learned CIT(A) clearly held that such a material constituted incriminating material and rightly used in making the addition in the order passed under section 143(3) r.w.s 153 of the Act. The DR prayed before the bench to uphold the order of Id CIT(A) on this issue.

44. After hearing both the parties and perusing the facts on record, we observed that undisputably the assessment in the instant year has not abated on the date of search. We further find that the evidences were gathered after issuing notice under section 133(6) that assessee has carried out synchronized trades for obtaining bogus LTCG. In our opinion, the said information / data is collected after the date of search and does not constitute incriminating material found and seized during the course of search. Keeping in view the said facts and

circumstances, we are of the considered view that addition to the income of the assessee can only be made on the basis of incriminating record found during the course of search . In the present case, there is no such incriminating material and therefore, the AO has no jurisdiction to make addition in the unabated assessment . The case of the assessee is squarely covered by the decision of Hon'ble Bombay High Court decision in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein the Hon'ble Bombay High Court held as under: -

“a) Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the Assessing Officer, as it was not based on incriminating material found during the course of search.

d) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of ₹ 3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the assessing officer without appreciating the fact that the decision of continental warehousing

corporation & the decision in the case of All Cargo Global Logistics have not been accepted by the department and an SLP has been filed in the Supreme Court in both the cases decided by the High court i.e. Continental Warehousing Corporation as well as all Cargo Global Logistics vide appeal civil 8546 of 2015 and SLP civil 5254-5265 of 2016 respectively.”

45. Since, there is no incriminating material found during the course of search, we therefore respectfully following the ratio laid down by the Hon'ble Bombay High Court in the above decision, set aside the order of the CIT(A) and direct the AO to delete the addition. Resultantly, the appeal of the assessee on jurisdictional issue is allowed.

46. Similarly, this decision will apply in above all appeals as regards to jurisdiction.

47. In the Result, all the appeals of the different assessee's are allowed.

Order pronounced in the open court on 01.10.2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 01.10.2019

सुदीप सरकार, व. निजी सचिव / Sudip Sarkar, Sr.PS

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai