

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.3186/M/2018
Assessment Year: 2014-15**

Shri Anurag Agarwal, C-303, Orchid Enclave, J.B. Nagar, Andheri (E), Mumbai - 400059 PAN: ADTPA6534H	Vs.	ITO – 24(1)(3), 4 th Floor, Piramal Chambers, Lal Baug, Parel, Mumbai - 400012
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Hari Raheja, A.R.
Shri Mani Jain, A.R.

Revenue by : Shri Michael Jerald, D.R.

Date of Hearing : 04.03.2020

Date of Pronouncement : 06.08.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 31.03.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. The grounds raised by the assessee are reproduced as under:

“1. On the facts and circumstances of the Appellant's case and in law, Id. CIT (A) erred in confirming the action of Assessing Officer in treating the long term capital gains earned by the appellant as non-genuine and bogus transaction, as per the grounds stated in the order or otherwise.

2. On the facts and circumstances of the Appellant's case and in law, Id. CIT (A) erred in confirming the action of Assessing Officer in making an addition of Rs.4,55,75,099/- (subsequently revised to Rs.4,55,14,762/-) by invoking provisions

of Sec. 68 of the Income Tax Act 1961, being the amount of sale value of shares as per the grounds stated in the order or otherwise.

3. On the facts and circumstances of the Appellant's case and in law, Id. CIT(A) erred in confirming the action of Assessing Officer in making an addition of Rs.13,67,252/- as alleged commission @ 3% paid on bogus share transaction, as per the grounds stated in the order or otherwise.

The appellant prays this Hon'ble Tribunal to delete the addition/disallowance made by the Learned Assessing Officer, which is confirmed by the Learned CIT (A).

3. The facts in brief are that the assessee filed the return of income on 26.03.2015 declaring total income of Rs.2,97,090/- which was processed under section 143(1) of the Act. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. Subsequently, the AO on the basis of information available on Actionable Account Information Monitoring System (AIMS) and the investigation conducted by the Kolkata Investigation directorate brought out the fact that assessee is a beneficiary of bogus long term capital gain by making bogus investment in penny stocks which was manipulated in a concerted and structured manner so that the investors in penny stocks are benefited. The said manipulation was confirmed by the statements recorded of various persons during the course of investigation. During the year, the assessee received income from house property, business, capital gain and other sources. The assessee also earned long term capital gain of Rs.4,48,25,089/- on sale of shares of Global Infratech and Finance Ltd. earlier known as Asianlak Capital and Finance Ltd. The said shares were bought on 28.12.2011 at a price of Rs.15 of the face value of Rs.10 per share. The assessee's husband also purchased 90,000 shares of the same stock and kept the shares in the joint D-mat account maintained with the HDFC Bank. These shares were received by way of preferential allotment by the assessee and a payment of

Rs.7,50,000/- was made which is duly appearing in the bank statement of the assessee. On 28.04.2012 all the shares numbering 1,40,000 comprising 50,000/- shares of assessee and 90,000 of assessee's husband Shri Naveen Aggarwal of Global Infra Tech and Finance Ltd. were reflected in the D Mat account. Thereafter, by a resolution dated 26.11.2012 passed by the Board of Directors of the said company the shares of the face value of Rs.10 each was split into 10 shares of Rs.1 each and consequently the assessee's holding in the said company came to 5 lakh equity shares which is evidenced by the resolution passed in EGM and confirmation of shareholder approval in relation to sub division of shares as extracted from BSE website. On 19.01.2013 the joint D-Mat account reflected 14 lakh shares comprising 5 lakh shares belonging to the assessee and 9 lakh shares belonging to assessee's husband which were duly appeared in the D-Mat account with HDFC Bank. The assessee from 1st October 2013 to 8th October 2013 sold 5 lakh shares and received payment in cheque and the sale proceeds were credited in the bank account and form 10 DB (cover notes) were also filed, copies of which are filed at page No.37 and 56 to 68 respectively. The AO rejected all these evidences and treated the capital gain as unexplained cash credit under section 68 of the Act and added the entire sale consideration of Rs.4,55,75,099/- to the income of the assessee. The AO also added notional commission @ 3% on the total sale proceeds and added the same as unexplained expenditure under section 69 of the Act to the income of the assessee by framing assessment under section 143(3) of the Act vide order dated 28.12.2016.

4. The assessee went in appeal before the Ld. CIT(A) who also dismissed the appeal of the assessee by treating the sale proceeds of shares as the transactions entered in the penny stocks in the form of accommodation entries and thus justified the addition of entire sale proceedings of the sale of shares of Global Infra Tech and Finance Ltd. beside making addition @ 3% of the transaction value as unexplained cash credit within the meaning of 68 and thus justified the addition.

5. The Ld. Counsel at the outset pointed out that the issue is squarely covered by the decision of co-ordinate Bench in ITA No.6249/M/2018 A.Y. 2014-15 in the case of Mukesh B. Sharma vs. ITO vide order dated 29.05.2019 wherein the same scripts i.e. Global Infratech and Finance Ltd. were involved and the co-ordinate Bench has under identical facts deleted the addition and held that the sale proceeds of said shares are not unexplained income of the assessee and thus rejected the conclusion drawn by the authorities below that the transactions were mere accommodation entries. The co-ordinate Bench has also deleted the addition towards commission on accommodation entries @ 3% as consequential one. The Ld. A.R. prayed before the Bench that since the facts of the assessee's case are similar to the one as decided by the co-ordinate Bench as stated hereinabove, the appeal of the assessee may kindly be allowed by setting aside the order of the Ld. CIT(A) and the AO may be directed to delete the addition. The Ld. A.R. also relied on a series of decisions as stated below:

- a. Kaushalya Agarwal vs. ITO (Kolkata Tribunal)
- b. Mangilal Jain vs. ITO (Kolkata Tribunal)
- c. Aditya Saraf (HUF) vs. ITO (Kolkata Tribunal)

- d. Vijayrattan Balkrishan Mittal vs. DCIT (Mumbai Tribunal)
- e. Sangita Jhunjhunwala vs. ITO (Kolkata Tribunal)
- f. Kantaben Bhogilal Kubadia vs. ITO (Mumbai Tribunal)
- g. Ramprasad Agarwal vs. ITO (Mumbai Tribunal)

6. The Ld. D.R., on the other hand, while relying heavily on the order of authorities below submitted that the investment by the assessee in the penny stock and subsequent realization of sale proceeds which were many fold higher than the investment in the said stock is nothing but a part of scam conspired and hatched by a group of illegal entities who operated in a concerted and structured manner. The Ld. D.R. referred to the order of AO and also various investigations carried out by the investigation wing which established beyond the doubt these are not actual transactions of sale and purchase of shares but a mode to convert the assessee's own money into exempt income by way of long term capital gain which has been unearthed and revealed in the various investigations and statements recorded of the various individuals individual involved in the scam. The Ld. DR. relying heavily on the order of Ld. CIT(A) submitted that a correct view has been taken by the authorities below as the assessee's investment is tainted as brought out by the investigations into the scam. In this case, the assessee has made investment in penny stocks though the payment was made by cheque and the share allotted were duly appeared in the D- Mat account but in such a short span the share went from a meager investment of Rs.7,50,000 to Rs.4,55,75,099/- which is beyond imagination and is nothing but a sham and bogus transactions in the form of accommodation entries. Therefore, the Ld. D.R. prayed that the appeal of the assessee

may kindly be dismissed and that of the Ld. CIT(A) may be affirmed. In defence of his argument, the Ld. D.R. relied on a series of decisions namely;

1. Satish Kishore vs. ITO (2019) 110 taxmann.com 307 (Delhi -Tri.)
2. Sandeep Bhargava vs. ACIT (2019) 109 taxmann.com 174 (Delhi - Tri.)
3. Smt MK Rajeswari vs. ITO Warda 3 Raichur (2018) 99 taxmann.com 339 (Bangalore -Tri.)
4. Sanjay Bimalchand Jain vs. PCIT (2018) 89 taxmann.com 196 (Bom.)

The Ld. DR. submitted that in all these above decisions it has been held that the investment in penny stock is nothing but accommodation entries in the nature of dubious share transactions meant to account for undisclosed income in the garb of long term capital gain and therefore exemption under section 10(38) could not be granted.

7. We have heard the rival submissions and perused the material on record including impugned order. We find that in this case the assessee has purchased 50000 equity shares of Global Infratech and Finance Ltd. on 28.12.2011 formerly known as Asianlak Capital and Finance Ltd. at price of Rs.15 each of face value of Rs.10 each. The assessee's wife also purchased 90000 equity shares of the same company and shares were held jointly in D-Mat account with the HDFC Bank. The assessee purchased these shares by way of off market preferential allotment at Rs.7,50,000/- and the payment was made by account payee cheque through assessee's bank account, the copy of which is filed at page No.19 of the PB. The assessee has also filed application made for purchase of shares, a copy of which is filed at page No.21 of the PB. The said shares

duly appeared in the D-Mat account held by the assessee with his wife jointly with the HDFC Bank Ltd. Thereafter, by the board resolution, the said shares were split on 26.11.2012 following which one share of the face value of Rs. 10/- each was divided into 10 shares of Rs. 1/- each. Consequently, the assessee came to be held 5 lakh shares in the said company after splitting up. These shares were sold by the assessee from October 1st to 8th October, 2013 and he received a sale proceeds of Rs. 4,55,75,099/-. The sale was carried out on the exchange and the contract notes were also there supporting the sale of shares. The STT was also duly paid. We have also perused the decision of the coordinate bench referred by the Ld. A.R. in the case of Shri Mukesh B. Sharma vs. ITO (supra) wherein identical script i.e. Global Infratech and Finance Ltd. was held by the coordinate Bench to be a genuine one and consequently long term capital gain was held to be genuine. We have also perused the decisions referred to by the ld. DR and found them not to be applicable in the present case. The decision referred by the Ld. D.R. of Hon'ble Jurisdictional High Court (Nagpur Bench) in the case of Sanjay Bimalchand Jain Vs PCIT (Supra) was distinguished in para 6.10 by the tribunal in Mukesh B Sharam Vs ITO (Supra). The operative part of the decision in the case of Shri Mukesh B Sharma Vs ITO (supra) is reproduced as under:

"6. We have heard the rival submissions. The primary facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The assessee submitted the following details with regard to purchase of shares :-

a) Copy of relevant extract of bank statement reflecting the payment of Rs 30 lacs made by the assessee by account payee cheque to the company directly and source thereof along with allotment letter issued by the said company (i.e GIFL) and copy of share certificate issued by GIFL to the assessee on 12.6.2012. These documents are enclosed in pages 71 to 73 of Paper Book.

- b) Demat account held with NKGSB Co-operative Bank Limited reflecting credit of shares purchased (enclosed in page 154 of Paper Book).
- c) Copy of approval letter from GIFL.
- d) Copy of allotment letter from GIFL for shares allotted to the assessee.
- e) Copy of share certificate issued by GIFL.
- f) Various events reported by GIFL to BSE.

6.1. The assessee submitted the following details with regard to sale of shares:-

- a) Copy of demat statement reflecting the sale of shares.
- b) Copies of Contract Notes issued by both the brokers for sale of shares.
- c) Copy of Holding Statement for financial years 2012-13 and 2013-14.
- d) Price chart of GIFL from the date of purchase of shares till the recent period.
- e) Copy of relevant extract of bank statement of the assessee reflecting the sale proceeds received from the broker and credited to the bank account.

6.2. We find that the assessee pleaded that in an online platform, there would be no nexus between the purchasers and the seller and the delivery of shares and payments would be made through their respective stock brokers. Hence the Id AO ought to have summoned the assessee's brokers to examine the authenticity of the sale of shares of GIFL and the amount received on sale of shares. We find that the Id AR also placed evidences on record to prove that the said company GIFL is still listed in the stock exchange and shares of this company are being traded and SEBI had not passed any adverse order against the said company. We find that the details of revenue and profits of GIFL for various years are as under:-

<u>Financial Year ending</u>	<u>Revenue</u>	<u>Profit</u>	
31.3.2012	191 lacs	7.97	lacs
31.3.2013	1515.58 lacs	105.13	lacs
31.3.2014	2487 lacs	161	lacs
31.3.2015	3836 lacs	76	lacs

6.3. We find that the Id AO had placed reliance on certain statements recorded by the Investigation wing of Kolkata Income Tax Department during some survey proceedings conducted in third party cases. We find that in none of those statements, the name of the assessee or the name of the brokers through whom assessee had transacted were mentioned. We also find that there is no mention of any connivance on the part of the assessee with the share broker and stock exchange to launder the unaccounted monies of the assessee and bring it back in the form of sale proceeds of shares and claim exemption u/s 10(38) of the Act for the long term capital gains derived thereon. None of the parties on whom survey actions were conducted in Kolkata were related to assessee or the brokers in any manner whatsoever. We find that the various purchase and sale details together with the supporting evidences were not controverted by the revenue before us. Even the cross examination of the parties mentioned in the show cause notice issued to the assessee by the Id AO were sought by the assessee and the same were refused by the Id AO . We find that the Id AO had also placed reliance on the order passed by SEBI while concluding that the transactions carried out by the assessee in the form of sale of shares as sham and bogus. From the perusal of the SEBI order

dated 25.8.2016 in the case of First Financial Services Ltd, we find that from the extracts thereon, that it was stated that M/s GIFL was involved in providing exit to the sellers of equity shares of First Financial Services Ltd and no where stated that this company was involved in providing accommodation entries in the form of capital gains by transacting its own shares through the alleged bogus operators. We also find that the SEBI had passed an order dated 8.1.2018 in the case of GIFL, wherein it was found that the name of the assessee herein or the brokers through whom the assessee transacted were not even included in the said order as parties against whom any adverse inference / findings were found in respect of violation of provisions of SEBI. We find that SEBI had issued a show cause notice vide Reference SEBI/EAD-12/SM/EE/693/25/2018 dated 8.1.2018 which are enclosed in pages 252 to 266 of the paper book. In pages 257 and 258 of the Paper Book, the list of parties to whom show cause notices were issued by SEBI is listed out. In the entire list, neither the name of the assessee nor his brokers were included. Later there was another show cause notice vide Reference EFD/DRA3/OW/NB/6663/2018 dated 1.3.2018 was issued by Enforcement Department of SEBI mentioning the list of parties to whom show cause notices were issued. Even in this list, the name of the assessee or his broker was not included by SEBI. Hence it could be safely concluded that SEBI did not allege any wrong doing on the part of the assessee or his brokers with regard to carrying out transactions in sale of shares of GIFL in open market in online platform. In this subsequent show cause notice dated 1.3.2018, the SEBI also takes records the fact of issuance of shares on preferential allotment basis on 12.6.2012 by GIFL to various parties (which includes the assessee also though not named in the SEBI show cause notice). In this show cause notice also, the SEBI only accused Notice No. 1 to 7 listed in the said notice which admittedly does not include the assessee or his brokers, to have engaged in manipulation of price of the scrip of GIFL. The said show cause notice dated 1.3.2018 also stated that Notice Nos. 13 to 46 listed in the said notice which admittedly does not include the assessee or his brokers, to have sold the shares at inflated price and booked substantial profit. The said show cause notice dated 1.3.2018 also stated Notices Nos. 8 to 12 (which admittedly does not include the assessee or his brokers) were part of the manipulative scheme to make preferential allotment and manipulate the price, through, entities connected to company and promoter, to benefit promoter, promoter related entities and connected preferential allottees. It is not the case of the revenue that the assessee or his brokers were either the promoters of GIFL, or promoter related entities of GIFL or related to connected preferential allottees thereon. Hence it could be safely concluded that the SEBI had not found any adverse findings with regard to the assessee or his registered share brokers vis a vis GIFL. Hence there is absolutely no iota of evidence linking the assessee or the registered brokers to even remotely allege that they were involved in artificial rigging of price of scrips which were dealt by the assessee herein.

6.4. We find that the Id AO had stated that GIFL is a company of no value. The revenue stream and the profitability chart reproduced hereinabove does not support the case of the Id AO. Moreover, the status reported by the Id AO about GIFL was in Asst Year 2008-09 which is neither the year of purchase of shares by the assessee nor the year of sale of shares in open market. Hence those findings are totally irrelevant for adjudication of the issue before us.

6.5. We find that the revenue had merely disbelieved the entire documentary evidences on record and alleged the share sale transactions made in the open market as bogus based on the statements recorded during survey, which does not have any evidentiary value. Reliance in this regard is placed on the decision of Hon'ble Madras High Court in the case of S.Khader Khan (2008) 300 ITR 157 (MAD) assumes significance, wherein it was held that:-

“An admission is an extremely important piece of evidence , but it cannot be said that it is conclusive and it is open to the person , who made it, to show it has incorrectly been made and the person, making the statement should be given proper opportunity to show that it does not show the correct state of facts.”

The materials found in the course of survey could not be the basis for making any addition in the assessment. The word “may” used in section 133A(3)(iii) makes it clear that the material collected and statement recorded during the survey u/s 133A of the Act are not conclusive piece of evidences by itself. The aforesaid decision was affirmed by the Honourable Supreme Court in CIT , Salem vs S.Khader Khan in Civil Appeal No. 13224 of 2008 & 6747 of 2012 dated 20.9.2012, wherein their Lordships of Supreme Court held as under:-

CIT vs S Khader Khan Son reported in (2012) 25 taxmann.com 413 (SC) / 210 Taxman 248 (SC) and 254 CTR 228 (SC)

“Heard Counsel on both the sides. Leave granted.
The civil appeal filed by the department pertains to Assessment Year 2001-02.
In view of the concurrent findings of fact, this civil appeal is dismissed.”

In any case, we find that these statements were never subjected to any cross examination by the assessee despite the request made by the assessee in this regard, which has been summarily rejected by the Id AO. This fact is also recorded by the Id AO in his assessment order. Hence in these circumstances, we hold that no addition could be made merely based on the statements recorded during survey.

6.6. One more excruciating factor which goes in favour of the assessee is that the assessee had sold only 883000 shares out of 2000000 shares held by him and the remaining shares were retained by the assessee. Hence the allegations leveled on the assessee that assessee had converted his unaccounted money in the form of long term capital gains claimed as exempt does not hold water . Even these 883000 shares were sold after holding the same for a substantial minimum period of 26 months by the assessee from the date of its purchase. Moreover, when the purchase of shares made by the assessee has been accepted as genuine which was done in Asst Year 2013-14, the sale of the very same shares in part in Asst Year 2014-15 in open market at prevailing market prices after suffering STT should not be doubted . None of the documents filed by the assessee with regard to purchase and sale of shares have been found to be deficient in any manner whatsoever by the revenue. From the turnover chart stated hereinabove, it could be seen that the revenue of GIFL had increased from Rs 191 lacs as on 31.3.2012 to Rs 2487 lacs as

on 31.3.2014. This goes to prove that the projections given by the said company in its invitation letter to the assessee requesting for making preferential application of shares had proved to be correct and cannot be doubted.

6.7. We find that the Id AO had furnished certain list of parties who were alleged purchasers of shares from the assessee when it was sold in the open market by the assessee. The assessee had pleaded that since the shares were sold in the open market in online platform, he is not aware of the name of the parties as to who had bought the same in the open market. The Id AO sought to issue summons to those alleged purchasers of shares u/s 131 of the Act, which remain uncomplied by those parties. Based on this, the Id AO had drawn an adverse inference against the assessee disregarding the entire documentary evidences on record and the prevailing market practices with regard to purchase and sale of shares in the open market in online platform. It is not in dispute that the assessee had received the sale proceeds of shares from the registered broker through the stock exchange only and not from the alleged purchasers of shares directly. Moreover, the Id AO states that the assessee had sold the shares at Rs 211.76 per share whereas the average sale price of the assessee was only Rs 89 per share.

6.8. We find that the Id DR made general submissions with regard to the investigations carried out by Kolkata Income Tax Department after identifying 84 scrips to be penny stocks and the modus operandi adopted by those scrips with the connivance of various entry operators, brokers and stock exchange. We find that the Id DR was not specifically able to controvert the documentary evidences filed by the assessee for purchase and sale of shares and various other documents referred to in the Paper Book more particularly the SEBI show cause notice as detailed hereinabove, except stating that SEBI show cause notice was issued in the name of GIFL, the scrip in which assessee dealt. The Id DR also sought permission from the Bench to grant time for filing his written submissions with regard to the entire appeal. No such written submission was filed by the Id DR till the date of dictation of this order. The Id DR drew our attention to the statement recorded from the assessee by the Id AO during the course of assessment proceedings on 19.12.2016, the gist of which is mentioned in page 31 of Assessment Order. We have gone through the same and we find that the assessee had stated before the Id AO that he had made investment in shares of GIFL without looking into the fundamentals of the said company and based on information given by a family friend. We have already seen the documentary evidences available on record wherein the assessee in response to an invitation letter issued by GIFL for making investment in preferential allotment basis, had issued account payee cheques and got the shares allotted in his name on preferential allotment basis. These facts have also been noted by SEBI in the second show cause notice dated 1.3.2018 which has been discussed hereinabove. Merely because the assessee himself is engaged in independent manufacturing business, it cannot be said that all his investment decisions would be prudent and would be done only after analyzing the entire fundamentals and financials of the investee company. It is in everybody's knowledge, that an investor would try to take calculated risks by investing his money on an unknown scrip based on certain information from friends, relatives, or in some stock market related websites and take a chance. Since the scrip purchased by the assessee was showing considerable growth from the time of purchase, the

assessee being a gullible investor, continued to hold it for a period of 26 months and later sold it in open market in online platform at prevailing market prices.

6.9. We find that the co-ordinate bench of Kolkata Tribunal in ITA No.354/Kol/2018 in Sanjeev Goel (HUF) vs. ITO dated 24.08.2018 on similar set of facts and circumstances had held as follows:-

“4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5. In identical cases, the submission of the assessee, findings of the Assessing Officer, findings of the Id. CIT(A) and the conclusion of the Tribunal have been brought out as under:-

6. The addition was made by the Assessing Officer by observing as under:-

- i. The initial allotment of shares to beneficiaries is generally done through preferential allotment.
- ii. The market price of shares of these companies rise to very high level within a span of one year.
- iii. The trading volume of shares during the period, in which manipulations are done to raise the market price, is extremely thin.
- iv. Most of the purported investors are returned their initial investment amount in cash. Only small amount is retained by the operator as security. Thus, an enquiry would reveal that most of the capital receipts through preferential allotment or other means would have found their way out of system as cash.
- v. Most of these companies have no business at all. Few of the companies which have some business do not have the credentials to justify the sharp rise in Market Price of their shares.
- vi. The sharp rise in market price of the shares of these entities is not supported by fundamentals of the company or any other genuine factors.
- vii. An analysis in respect of persons involved in transactions apparently carried out in order to jack up the share prices has been done in respect of 84 companies. It has been noted that many common persons/entities were involved in trading in more than 1 LTCG companies during the period when the shares were made to rise which implies that they had contributed to such price rise.
- viii. Names of most of the LTCG companies are changed during the period of the scam.
- ix. Most of the companies split the face value of shares [this is probably done to avoid the eyes of market analysts].
- x. The volume of trade jumps manifold immediately when the market prices of shares reach at optimum level so as to result in LTCG assured to the beneficiaries. This maximum is reached around the time when the initial allottees have held the shares for one year or little more and thus, their gain on sale of such shares would be eligible for exemption from Income Tax.

- xi. An analysis of share buyers of some of LTCG companies was done to see if there were common persons/entities involved in buying the bogus inflated shares. It was noted that there were many common buyers [which were paper companies].
- xii. The prices of the shares fall very sharply after the shares of LTCG beneficiaries have been off loaded through the pre-arranged transactions on the Stock Exchange floor/portal to the Short Term Loss seekers or dummy paper entities.
- xiii. The shares of these companies are not available for buy/sell to any person outside the syndicate. This is generally ensured by way of synchronized trading by the operators amongst themselves and/or by utilizing the mechanism of upper/lower circuit of the Exchange.

7. Aggrieved the assessee carried the matter in appeal.

8. The First Appellate Authority upheld the order of the Assessing Officer by giving his findings as follows:-

- a) The AO had placed on record the entire gamut of finding and there is no further requirement for elaboration.
- b) There is direct evidence to clearly indicate that the entire transaction undertaken by the assessee was merely an accommodation taken for the purpose of bogus long term capital gains to claim exempt income. The authorities such as SEBI have after investigating such abnormal price increase of certain stocks, suspended certain scrips.
- c) The submissions of the assessee pointed out towards elaborate documentation such as :
 - i) Application of shares.
 - ii) Allotment of shares.
 - iii) Share Certificates
 - iv) Payment by cheques
 - v) Filings before Registrar of Companies.
 - vi) Proof of amalgamation of companies.
 - vii) Copies of bank statement,
 - viii) Bank contract notes.
 - ix) Delivery instruction to the broker etc.
- d) The elaborate paper book is filed to strengthen the matter relevant to bogus claim of LTCG, and this is clearly been schemed and pre-planned with malafide intention. Therefore, all these documents are not evidence.
- e) The transactions are unnatural and highly suspicious. There are grave doubts in the story propounded by the assessee before the authorities below. Banking documents are mere self-serving recitals.

9. Thereafter he referred to a number of judgments relating to human behavior and preponderance of human probabilities and upheld the addition made by the Assessing Officer by relying on what he calls rules of "Suspicious transactions".

10. The assessee in this case has filed the following evidence before the Assessing Officer in support of his contentions:-

- a) Copies of bills, evidencing purchase of shares
- b) Copies of contract notes of sale of shares
- c) Bank statement copies
- d) Copy of Ledger A/c of broker
- e) Demat Statement etc.

The Assessing Officer has just relied on general observations. No evidence was controverted by the Assessing Officer.

11. The Kolkata Bench of the ITAT in a number of decisions have, on similar facts and circumstances of the case, decided the issue in favour of the assessee. We list some of these decisions:-

- Shri Gautam Kumar Pincha vs. ITO, ITA No. 569/Kol/2017, dt. 15/11/2017
- ITO vs. Shri Shaleen khemani, ITA No. 1945/Kol/2014, dt. 18/10/2017
- Mahendra Kumar Baid vs. ACIT, Circle-35; ITA No. 1237/Kol/2017; order dt.18/08/2017
- Kiran Kothari HUF vs. ITO, ITA No. 443/kol/2017, order dt. 15/11/2017

The Hon'ble Jurisdictional High Court on similar facts, had in the following cases, upheld the claim of the assessee:-

- CIT vs. Shreyashi Ganguli (ITA No. 196 of 2012) (Cal HC) 2012 (9) TMI 1113
- CIT vs. Rungta Properties Private Limited (ITA No. 105 of 2016) (Cal HC) dt. 08/05/2017
- CIT vs. Bhagwati Prasad Agarwal (2009 TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.04.2009

11. Recently, the Kolkata 'C' Bench of the Tribunal in the case of Navneet Agarwal, vs- ITO, Ward-35(3), Kolkata; I.T.A. No. 2281/Kol/2017; Assessment Year: 2014-15, while dealing with identical issue of sale of shares of M/s. Cressenda Solutions Pvt. Ltd., decided the issue in favour of the assessee by relying upon a plethora of judgments of various Courts. It held as follows:-

"12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to "Modus Operandi" of persons for earning long term capital gains which is exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to

the assessee. The addition is made based on a report from the investigation wing.

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

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

15. In our view *modus operandi*, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence.

16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However we do not find that, the assessing officer as well as the Ld. CIT(A), have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, in our view, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record

any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

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

“Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities

and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each”

The observations of the Hon’ble Apex Court are equally applicable to the case of the assessee. In our view the assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence in our view under these circumstances nothing can be implicated against the assessee.

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:

a) *Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.*

“23. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan* AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: *Union of India v. T.R. Varma*, AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen*, AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors.*, AIR 1964 SC 708; *New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr.* AIR 2008 SC 876; *Rachpal Singh and Ors. v. Gurmit Singh and Ors.* AIR 2009 SC 2448; *Biecco Lawrie and Anr. v. State of West Bengal and Anr.* AIR 2010 SC 142; and *State of Uttar Pradesh v. Saroj Kumar Sinha* AIR 2010 SC 3131).

24. In *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked

to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

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

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

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

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

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

Radhakrishnan, learned senior counsel who appeared for the Revenue.

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

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

17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

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

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

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

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

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal’s finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is

any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed.”

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

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

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

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

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

“Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer

relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no correlation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises.”

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

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

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

“We note that the Id. AR cited plethora of the case laws to bolster his claim which are not

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

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

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

It further held as follows:

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

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

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

g) The BENCH “H” OF MUMBAI ITAT in the case of ARVIND KUMAR JAIN HUF [ITA No.4682/Mum/2014]

order dated 18.09.2017 held as under vide Page 6
Para 8:

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

h) The Hon'ble Punjab and Haryana High Court in the case of VIVEK MEHTA [ITA No. 894 OF 2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

“On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of

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

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

“The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”

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

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

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

12. Consistent with the view taken therein, as the facts and circumstances of this case are same as the facts and circumstances of the cases of Navneet Agarwal (supra), we delete the addition made u/s 68 of the Act, on account of sale of shares in the case of both the assessees. The consequential addition u/s 69C is also deleted. Accordingly both the appeals of the assessee are allowed.”

6.10. It would be pertinent to address the case law relied upon by the Id DR before us on the decision of Hon’ble Bombay High Court (Nagpur Bench) in the case of Sanjay Bimalchand Jain vs Pr.CIT (Nagpur) reported in (2018) 89 taxmann.com 196 (Bombay) dated 10.4.2017 on the impugned issue. From the facts of Sanjay Bimalchand Jain supra, 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 of 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.

6.11. We find that the Hon’ble Jurisdictional High Court in the case of CIT vs Mukesh Ratilal Marolia in ITA No. 456 of 2007 dated 7.9.2011 had held as under:-

5. On further appeal, the ITAT by the impugned order allowed the claim of the assessee by recording that the purchase of shares during the year 1999- 2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recoded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the

decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

6. Similarly, the sale of the said shares for Rs 1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt Ltd and M/s Scorpio Management Consultants Pvt Ltd cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s Richmond Securities Pvt Ltd regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s Richmond Securities Pvt Ltd held that the sale transaction was genuine.

7. In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs 1,41,08,484/- represented unexplained investment under section 69 of the Income Tax Act, 1961 cannot be faulted.

8. In the result, we see no merit in this Appeal and the same is dismissed with no order as to costs.

6.12. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the Id CITA was not justified in upholding the action of the Id AO in bringing the sale proceeds of shares of GIFL in the sum of Rs 7,88,77,854/- as unexplained income of the assessee treating the same as just an accommodation entry. Consequentially, the addition made towards commission on such accommodation entry at the rate of 5% in the sum of Rs 39,43,898/- is also hereby directed to be deleted. Accordingly, the grounds raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.”

8. Since the facts involved in the present case are similar to the facts of the case as discussed hereinabove, therefore, we respectfully following the decision of the co-ordinate Bench, set aside the order of Ld. CIT(A) and direct the AO to delete the addition made of Rs.4,55,75,099/- made as unexplained cash credit under section 68 of the Act.

9. Consequently, the addition confirmed by the ld CIT(A) of Rs. 13,67,252/- as made by the AO towards the commission paid to operators @ 3% on the total sales consideration of shares of Rs. 4,55,75,099/- has to be deleted as we have held the long term capital gain to be genuine. Accordingly, we direct the AO to delete the addition of Rs.13,67,252/-.

10. However, before we part with the matter, we would like to deal with one procedural issue as well. While hearing of this appeal was concluded on 4th March 2020, the order is being pronounced today on 6th day of August, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides for the same within a period of 90 days of the conclusion of the hearing.

11. It is quite clear that ordinarily the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing as the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] and has been duly considered by the Coordinate bench in the case of Joint Commissioner of Income Tax Vs M/s. Kansai Nerolac Paints Ltd. ITA No.3743/Mum/2016 Assessment year: 2010-11 wherein it has decided that for the extraordinary period the period of 90 days shall stand extended.

12. Accordingly we exclude the period of Covid -19 being extraordinary period from the period of 90 days in terms of Rule 34(5) of the ITAT Rules.

13. In the result, the appeal of the assessee is allowed.

Order pronounced on 06.08.2020 under Rule 34(4) of the ITAT Rules.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 06.08.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.