

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE HON'BLE MANISH BORAD, ACCOUNTANT
MEMBER AND
HON'BLE MADHUMITA ROY, JUDICIAL MEMBER

ITA No.889/Ind/2018
Assessment Year 2014-15

Shri Shiv Narayan Sharma : Appellant
12C, Mechanic Nagar,
Scheme No.54,
Indore
PAN : AOMPS9249F

V/s
ACIT-3(1),
Indore : Respondent

ITA No.474/Ind/2019
Assessment Year 2015-16

Shri Sapan Shah, : Appellant
Shah Marketing,
25-26 Electronic Complex,
Pardeshipura,
Indore
PAN : ADUPS8961M

V/s
ACIT-4(1),
Indore : Respondent

ITA No.206/Ind/2019

Assessment Year 2014-15

Shri Prayank Jain, : Appellant

12, Clerk Colony,

Indore

PAN : AEEPJ6593F

V/s

ACIT-5(1),

Indore : Respondent

ITA No.60/Ind/2019

Assessment Year 2014-15

Govind Harinaraya Agrawal HUF : Appellant

482 Goyal Nagar,

Indore

PAN : AAAHA9669P

V/s

ITO-2(1),

Indore : Respondent

ITA No.61/Ind/2019

Assessment Year 2014-15

Manish Govind Agrawal HUF : Appellant

482 Goyal Nagar,

Indore

PAN : AAIHM5401M

V/s

ITO-2(1),

Indore : Respondent

ITA No.987/Ind/2019
Assessment Year 2011-12

Shri Darshan Kumar Pahwa : Appellant

103, Mishika Tower,

28 Patel Nagar,

Indore

PAN : ABSPP2810N

V/s

DCIT-5(1),

Indore

: Respondent

Revenue by	Shri Harshit Bari, Sr.DR
Assessee by	Shri Girish Agrawal, Shri Vijay Bansal & Miss Nisha Lahoti, ARs
Date of Hearing	06.04.2021
Date of Pronouncement	28.06.2021

ORDER

PER MANISH BORAD, A.M

The above captioned appeals filed at the instance of the assessee(s) are directed against the orders of Ld. Commissioner of Income Tax(Appeals)-II (in short 'Ld. CIT], Indore dated 28.02.2019 and 31.08.2020 which are arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 14.12.2016,

06.12.2016, 17.12.2018 and 21.12.2018 framed by ITO-4(2),
Indore.

2. Assessee(s) has raised following grounds of appeal:-

Shivnarayan Sharma ITA No.889/Ind/2018 A.Y 2014-15

That the order passed by learned CIT(A) is bad in law and on facts.

The learned CIT(A) has erred in confirming the addition of Rs.28,47,833/- u/s 68 without considering the fact of the case by relying on certain decision, the fact of which are different from the case of the appellant, which is quite unjust, illegal and against the facts of the case.

3. *The learned CIT(A) has erred in confirming the addition of Rs.28,47,833/- based on the enquiry of the investigation wing of Kolkata and statement of one Vipul Vidur Bhatt without providing such document to the appellant and to cross examine the Vipul Vidur Bhatt, which is quite unjust, illegal and against the facts of the case.*

4. *That learned CIT(A) has erred in conforming the addition of Rs.28,47,833/- without considering the various judicial proceedings submitted before him, which are directly related to facts of the appellant, which is quite unjust, illegal and against the facts of the case.*

5. *That learned CIT(A) has erred in addition of Rs.89,935/- being 3% on the amount of sale consideration of Rs.29,97,833/- under section 69C without any documentary evidence against assessee which is quite unjust illegal and against the facts of the case.*

Sapan Shah ITA No.474/Ind/2019 A.Y 2015-16

1. *On the facts and in the circumstances of the case and applicable law,*

- Ld. CIT(A)-II, Indore erred in sustaining the order passed by Ld. AO u/s 143(3) which is contrary to the material on record and provisions of the Act, unjust and bad in law.*
- 2. On the facts and in the circumstances of the case and applicable law, Ld. CIT(A)-II, Indore erred in sustaining the addition of Rs.83,94,034 under Section 68 of the Act as unexplained cash credit towards Long Term Capital Gain earned on sale of shares on stock exchange, by holding it as bogus.*
 - 3. On the facts and in the circumstances of the case and applicable law, Ld. CIT(A)-II, Indore erred in sustaining the addition of Rs.83,94,034 034 under Section 68 of the Act as unexplained cash credit towards Long Term Capital Gain earned on sale of shares on stock exchange, by holding it as bogus, more particularly when Ld. A.O relied merely on third party information and failed to bring any positive, direct and cogent material on record to substantiate the impugned treatment for making the addition.*
 - 4. On the facts and in the circumstances of the case and applicable law, Ld. CIT(A)-II, Indore erred in confirming the addition of Rs.83,94,034 034 made by the Ld. AO who did so merely on the basis of suspicion, presumptions, surmises and conjectures, more particularly without giving opportunity to the appellant to cross examine the third parties on whose statements reliance has been placed for taking an adverse view, even though specifically asked for.*
 - 5. On the facts and in the circumstances of the case and applicable law, Ld. CIT(A)-II, Indore erred in sustaining the addition of Rs.4,19,702 under Section 69C of the Act as unexplained expenditure in respect of estimation of commission expense made by the Ld. AO @5% on the amount of Long Term Capital Gain of Rs.83,94,034 034.*
 - 6. On the facts and in the circumstances of the case and applicable law,*

Ld. CIT(A)-II, Indore erred in not considering the facts and documents available on record in proper perspective in respect of additions made by Ld. A.O by applying provisions of Section 68 and 69C of the Act.

The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal.

Prayank Jain ITA No.206/Ind/2019 A.Y 2014-15

That the order passed by learned CIT(A) is bad in law and on facts.

- 1. That learned CIT(A) has erred in conforming the addition of Rs.56,02,384/- u/s 68, whereas section 68 is not applicable on the transaction entered into by the assessee, which is quite unjust, illegal and against the facts of the case.*
- 2. That learned CIT(A) has erred in holding the genuine income of Long Term Capital Gain exempted u/s 10(38) of Rs a sham transaction, by applying test of human probability, without any evidence against the assessee, which is quite unjust, illegal and against the facts of the case.*
- 3. That the Ld. CIT(A) has erred in confirming the disallowance of claim of assessee of exempted LTGC based on information/ statement gathered by investigation wing of the department, without any opportunity to cross examine such persons and without providing such documents for assessee's comments, which is quite unjust, illegal and against the facts of the case.*
- 4. That the Learned CIT(A) erred in confirming the disallowing of claim of exempted income based on wrong analysis of the financial and prices of the shares, which is quite unjust, illegal and against the facts of the case.*
- 5. That the Learned CIT(A) erred in mentioning the fact that learned AO has tried to conduct enquiries during assessment proceedings, in confirming disallowance, whereas no such inquiries have been carried out, which is quite unjust, illegal and against the facts of the case.*
- 6. That the Learned CIT(A) erred in mentioning the fact without any evidence that the assessee has collusion with brokers to earn LTCG, which is quite unjust illegal and against the facts of the case.*
- 7. That the Learned CIT(A) erred in concluding that the purchases have been made in cash, which is quite unjust, illegal and against the facts of the case.*
- 8. That the Learned CIT(A) erred in ignoring the fact that the 2 companies*

were merged by the order of the Hon'ble Bombay High Court, by considering the company as bogus, which is quite unjust, illegal and against the facts of the case.

9. That the Learned CIT(A) erred in ignoring the various judgments quoted by the assessee, which is quite unjust illegal and against the facts of the case.

10. On the facts and in the circumstances of the case and in law, Ld. AO erred in alternative treatment of the Long Term Capital Gain of Rs.56,02,384 as adventure in the nature of trade for which the Ld. CIT(A) has given the finding 'as consequential in nature'.

Appellant craves to leave, add, amend, alter or modify of any ground before filing date of hearing.

Govind Harinarayan Agrawal HUF ITA No.60/Ind/2019
Assessment Year 2014-15

That the order passed by learned CIT(A) is arbitrary, bad in law and on facts.

- 1. That the learned CIT(A) has erred in confirming the addition of Rs.8,29,555/- under section 68, whereas section 68 is not applicable on the transaction entered into by the assessee, which is quite unjust, illegal and against the facts of the case.*
- 2. That the learned CIT(A) has erred in holding that the genuine income of Long Term Capital Gain exempted u/s 10(38) of Rs.8,29,555/- is a sham transaction, by applying test of human probability, without any evidence against the assessee, which is quite unjust, illegal and against the facts of the case.*
- 3. That the learned CIT(A) has erred in considering the script from which the assessee has earned Long Term Capital Gain as "penny stock", a term nowhere define under the Income Tax Act and under any other law for the time being in force, which is quite unjust, illegal and against the facts of the case.*
- 4. That the learned CIT(A) has erred in ignoring the decision of Hon'ble*

Delhi Bench of ITAT in case of Shikha Dhawan (Appeal No.ITA No.3035/Del/2018) wherein the similar transaction of Turbotech Engineering is considered as genuine, which is quite unjust, illegal and against the facts of the case.

- 5. That the learned CIT(A) has erred in wrongly applying the decision of Hon'ble Supreme Court in case of the assessee wherein the facts of the case of the assessee is altogether different, which is quite unjust, illegal and against the facts of the case.*
- 6. That the learned CIT(A) has erred in holding that the capital gain earned by the assessee, based on some inquiries but not on the assessee, is bogus and/or managed affairs, which is quite unjust, illegal and against the facts of the case.*
- 7. That the learned CIT(A) has erred in not providing the copy of the report of the investigation wing and further not providing any opportunity to cross examine the persons mentioned in the report, which is quite unjust, illegal and against the facts of the case.*
- 8. That the learned CIT(A) has erred in concluding that the purchases have been made in cash, which is quite unjust illegal and against the facts of the case.*
- 9. The learned CIT(A) has erred in enhancing the income of Rs.24,866/- under section 69C, without any evidence against the assessee, which is quite unjust illegal and against the facts of the case.*

Appellant craves to leave, add, amend, alter or modify of any ground before final date of hearing.

Manish Govind Agrawal HUF ITA No.61/Ind/2019
Assessment Year 2014-15

That the order passed by learned CIT(A) is arbitrary, bad in law and on facts.

1. That the learned CIT(A) has erred in confirming the addition of Rs.9,39,230/- under section 68, whereas section 68 is not applicable on the transaction entered into by the assessee, which is quite unjust, illegal and against the facts of the case.
2. That the learned CIT(A) has erred in holding that the genuine income of Long Term Capital Gain exempted u/s 10(38) of Rs.8,29,555/- is a sham transaction, by applying test of human probability, without any evidence against the assessee, which is quite unjust, illegal and against the facts of the case.
3. That the learned CIT(A) has erred in considering the script from which the assessee has earned Long Term Capital Gain as “penny stock”, a term nowhere define under the Income Tax Act and under any other law for the time being in force, which is quite unjust, illegal and against the facts of the case.
4. That the learned CIT(A) has erred in ignoring the decision of Hon’ble Delhi Bench of ITAT in case of Shikha Dhawan (Appeal No.ITA No.3035/Del/2018) wherein the similar transaction of Turbotech Engineering is considered as genuine, which is quite unjust, illegal and against the facts of the case.
5. That the learned CIT(A) has erred in wrongly applying the decision of Hon’ble Supreme Court in case of the assessee wherein the facts of the case of the assessee is altogether different, which is quite unjust, illegal and against the facts of the case.
6. That the learned CIT(A) has erred in holding that the capital gain earned by the assessee, based on some inquiries but not on the assessee, is bogus and/or managed affairs, which is quite unjust, illegal and against the facts of the case.
7. That the learned CIT(A) has erred in confirming the disallowance of claim of assessee exempted LTGC based on information/statement

gathered by investigation wing of the department, without any opportunity to cross examine such persons and without providing such documents for assessee's comments, which is quite unjust, illegal and against the facts of the case.

- 8. That the learned CIT(A) has erred in mentioning the fact that learned AO has tried to conduct inquiries during assessment proceedings, in confirming disallowance, where as no such inquiries have been carried out, which is quite unjust illegal and against the facts of the case.*
- 9. That the learned CIT(A) has erred in concluding that the purchases have been made in cash, which is quite unjust illegal and against the facts of the case.*
- 10. The learned CIT(A) has erred in ignoring the various judgments quoted by the assessee, which is quite unjust illegal and against the facts of the case.*
- 11. The learned CIT(A) has erred in enhancing the income of Rs.28176/- under section 69C, without any evidence against the assessee, which is quite unjust illegal and against the facts of the case.*

Appellant craves to leave, add, amend, alter or modify of any ground before final date of hearing.

Darshan Kumar Pahwa ITA No.987/Ind/2019 A.Y 2011-12

Re-opening of assessment u/s 147/148 is unjustified and improper

That re-opening of assessment u/s 147/148 is unjustified and improper. The assessment was re-opened u/s 148 on the ground that the assessee has earned suspicious long term capital gain by taking bogus entries through manipulation in stock market. It was further inferred that the assessee has taken benefit of section 10(38) by engaging in long term capital gain on sale of shares of VAS Infra. The has neither earned any

long term capital gain nor taken benefit of section 10(38). (Tax Effect Rs. 205916/-)

2. Addition of Rs. 7,43,099/- on account of loss in trading in shares of VAS Infra is unjustified.

That addition of Rs. 7,43,099/- on account of loss in trading in shares of VAS Infra is unjustified and improper. The learned CIT(A) has confirmed addition of Rs. 7,43,099/- on the ground that the assessee has earned long term capital gain on sale of shares. He failed to appreciate that the appellant did not earn long term gain but incurred business loss on trading in shares of VAS Infra. There was no evidence to show that the assessee has pre-arranged any profit/loss through these shares. The appellant has been carrying on business of dealing in shares treating such activity as business activity. He traded in various shares including shares of VAS Infra incurred loss in some shares and earned profit in other shares. (Tax Effect Rs. 205916/-)

3. Addition is based on wrong representation of facts of the case.

That the learned AO has wrongly presented the facts of the case. He ought to have appreciated that sales of VAS Infra increased from Rs. Nil in AY 2009-10 to Rs. 18.37 crores in AY 2010-11 and Rs. 34.74 crores in AY 2011-12. Net profit before interest and depreciation increased from loss of Rs. 0.89 crores in AY 2009-10 to 4.49 crores in AY 2010-11. The appellant purchased shares of VAS Infra on the basis of quarterly results of the company showing drastic increase in sales. (Tax Effect Rs. 205916/-)

4. Addition made on the basis of suspicion without any material on record

The Id AO has made additions in respect of trading in shares of VA Infra

relying on report of searches u/s 132 surveys u/s 133A conducted on brokers and companies at Mumbai. These statements are not equivalent to material much less incriminating material in eyes of law and they are not corroborated by any iota of independent material. These statements cannot bind assessee who was not subject matter of any parallel survey operation. These statements are pre-existing and were recorded during search and survey and no where independently re-examined by the Id AO. The assessee has not made any transaction with VAS Infra but has purchased and sold shares of VAS Infra. Accordingly, the company has correctly denied having any transactions with the assessee. (Tax Effect Rs.205916/-)

5. Brought forward loss ought to have been adjusted against addition made

That the appellant was dealing in shares as business activity. The learned AO has disallowed loss incurred in trading of shares of VAS Infra. Such disallowance has I consequently increased business income. There were brought forward business losses available with the appellant and addition made ought to have been adjusted against brought forward business loss. (Tax Effect Rs. 205916/-)

6. Any other ground may be permitted to be taken later

That the appellant further craves leave to add, to alter and or to amend any of the foregoing grounds of appeal as and when necessary. (No Tax Effect)

3. From perusal of the above grounds we find that following

two common issues have been raised :-

(i) Genuineness of Long Term Capital Gain from sale of equity shares of M/s Sunrise Asian Limited claimed exempt u/s 10(38) of the Act and whether the Ld. CIT(A) was justified in confirming the addition of alleged LTCG u/s 68 of the Act and also confirming the addition for estimated brokerage expenses deemed to have been incurred to procure LTCG.

(ii) Whether the additions are liable to be deleted as they were made without affording opportunity of cross examination to the assessee thus violating the principles of natural justice.

4. From perusal of the grounds on merits, we find that additions by the Ld. A.O has been made denying the exemption u/s 10(38) of the Act for Long Term Capital Gain from sale of shares adding estimate brokerage expenses and in case of assessee Shri Darshan Kumar Pahwa rejecting the claim of Short Term Capital loss treating it as other income. Following chart provides the details of

the addition under dispute.

Name	Particular	Name of Company	LTCG claim denied (In Rs.)	Brokerage expenses (In Rs.)
Shivnarayan Sharma	Long Term Capital	Swift IT Infra (merged with SAL)	28,47,833/-	89,935/-
Sapan Shah	Long Term Capital	-do-	83,94,034/-	4,19,702/-
Prayank Jain	Long Term Capital	Conart Traders (merged with SAL)	56,02,384/-	-
Govind Harinarayan Agrawal (HUF)	Long Term Capital	Turbotech	8,29,555/-	24,866/-
Manish Govind Agrawal HUF	Long Term Capital	Turbotech	9,39,230/-	28,176/-
Darshan Kumar Pahwa	Bogus Loss	Vas Infra-structure	7,43,099/-	-

5. The impugned additions made by the Ld. A.O are on a common reasoning that the alleged capital gain/ loss have been earned/incurred are from sale of equity shares of penny stock companies which have seen abnormal price rise in short span

without any major financial growth.

6. As the issues raised and facts are common, we will take up the facts of the assessee namely Shri Shivnarayan Sharma ITA No.889/Ind/2018 to adjudicate the common issues and our decision shall apply *mutandis mutandis* in the case of another assessee(s) namely Sapan Shah, Prayank Jain, Govind Harinarayan Agrawal (HUF), Manish Govind Agrawal (HUF) and Darshan Kumar Pahwa. All the assessee(s) as well as Ld. Departmental Representative has raised no objection in case the common issues are adjudicated in the light of the facts of assessee namely Shri Shivnarayan Sharma.

7. Brief facts in the case of Shri Shivnarayan Sharma are that the assessee is an individual engaged in the business of bus body building. E-return of income for Assessment Year 2014-15 filed on 29.9.2014 declaring income at Rs.15,80,150/-. Case was selected for complete scrutiny assessment through CASS followed by issuance of notice u/s 143(2) and 142(1) of the Act. While examining the records

and details filed by the assessee, Ld. A.O observed that the assessee has claimed exemption u/s 10(38) of the Act at Rs.28,47,833/- on sale of equity shares in the name of the company Sunrise Asian Ltd. 6,000 equity shares of M/s. Conart Traders Ltd were purchased on 22.10.2011 at Rs.1,50,000/- from P. Saji Textiles Limited. Pursuant to the order of Hon'ble Bombay High Court M/s. Conart Traders Limited was merged with M/s Sunrise Asian Limited. Thereafter 6000 equity shares of M/s SAL were received in lieu of the shares of M/s Conart Traders Limited. Subsequently assessee sold the shares of M/s SAL on the recognised stock exchange through a registered broker and against the sale consideration received, the cost of purchase was deducted giving rise of LTCG at Rs.28,47,833/-. However, Ld. A.O was not satisfied since in his view the extent of growth and financials of the company were not sufficient to justify the abnormal increase in the share price within a short span of time, which were very low in December, 2012 and then increased continuously up to April and May, 2015 and

felled thereafter. Ld. A.O also gave reference to various searches conducted u/s 132 and survey u/s 133A of the Act carried out by the department on various brokers of stock exchange and other companies where the investigation team came across various bogus transactions of providing accommodation entries to give benefit to various persons to convert their unaccounted cash into accounted money in the form of bogus LTCG. Ld. A.O also took statement of the assessee and came to the conclusion that the assessee had no knowledge about the company. He concluded the assessment observing that M/s SAL is a penny stock company and the alleged transaction of earning LTCG is bogus and sham and the alleged LTCG is liable to be added as unaccounted cash credit u/s 68 of the Act and accordingly he added Rs.28,47,833/- and denied the benefit of exemption u/s 10(38) of the Act at Rs.28,47,833/- and also made addition for estimated brokerage expenses of Rs.89,935/- for arranging bogus LTCG. Income assessed at Rs.45,17,920/-

8. Aggrieved assessee preferred appeal before Ld. CIT(A)

against the addition made u/s 68 of the Act at Rs.28,47,833/- and addition of brokerage expenses at Rs.89,935/-. Again complete details of purchase and sales were filed along with the Demat account and bank statement. However, Ld. CIT(A) was not satisfied and he confirmed the view taken by Ld. A.O observing that the assessee is indulged in arranging bogus LTCG, the appellant had made investment through the derecognised broker and have earned excessive return within a short span of time which is extremely unfair. Placing reliance on the decisions Ld. CIT(A) held that the transactions of sale of equity shares giving rise to the alleged LTCG at Rs.28,47,833/- are sham which could not stand the test of human probability.

9. Aggrieved assessee is now in appeal before the Tribunal.

10. Ld. Counsel for the assessee filed paper book containing from page 1 to 63. It was also submitted that the issue raised in this appeal are squarely covered by the decision of Coordinate Bench, Mumbai in the case of *Dipesh Ramesh*

Vardhan Vs DCIT ITA No.7648/Mum/2019 dated 11.08.2020

which has been subsequently followed by the Co-ordinate Bench of Jaipur in the case of *Ashok Agrawal V/s ACIT ITA No.124/JP/2020 dated 18.11.2020*. He also submitted that there was no evidence found which could indicate that the assessee was engaged in the alleged racket of providing accommodation entries. Reliance was also placed on the judgment of Hon'ble Supreme Court in the case of *M/s Andaman Timber Industries V/s CCE* contending that no opportunity of cross examination was provided which thus violates the principles of natural justice and the addition so made is liable to be deleted.

11. Ld. Counsel for the assessee also argued referred to the following written submissions:-

A. Addition made by Ld. AO is vague, based merely on surmises and conjectures and without any basis

1. Assessment Order page 2 para 3.1, Ld. AO has stated –

“3.1 The department has conducted various searches u/s 132 /surveys u/s 133A/enquiries conducted by the department on the various brokers of stock exchange and various assessee/companies. The investigation carried out by the department has proved that a scheme was hatched by various players to obtain/provide accommodation

entry of bogus LTCG through manipulation of stock market. Various syndicates have arranged accommodation entry of bogus Long Term Capital Gain, bogus Short Term Capital Gains and bogus Short Term Capital Loss/ bogus business loss through trading of shares of penny stocks”

From the above, following is made out –

- a. Ld. AO has made a very general and vague reference to conduct of search by the Department by using the term ‘various’ for all the stakeholders involved in the stock market operations / transactions.
- b. Ld. AO failed to make reference to any specific search/survey having a direct nexus with the assessee.
- c. Ld. AO failed to make reference to any specific statement which was recorded during the search/survey operations on the basis of which claim of LTCG was rejected.

2. Neither the report of Investigation by Directorate, Kolkata nor the statement recorded under oath of some ShriVipulVidurBhat as referred by Ld. CIT(A) has been made available to the assessee. This is gross violation of principles of natural justice as assessee never got an opportunity to go through these references and make his submission on the same. Such a reliance on these material by the Ld. CIT(A) vitiates the entire proceedings and the order so made is ought to be quashed. [CIT(A) Page 21, Para 4.1.3]

3. Reliance is placed on the decision of Hon’ble Supreme Court in the case of Sona Builders – [2001] 119 Taxman 430 – order pronounced on 24.07.2001 –

Para 7 –“ Having regard to the statutory limit within which the appropriate authority has to act and his failure to act in conformity with the principles of natural justice, we do not think we can remand the matter to the appropriate authority. We must set his order aside.

Para 8 – “The appeal is, accordingly, allowed. The judgment and order under appeal is set aside. The order of the appropriate authority dated 31-5-1993 is quashed.” [emphasis supplied]

In the instant case, the documents on the basis of which the claim of LTCG is rejected are not confronted to the assessee. Adverse view

taken without confronting the documents is against the principles of natural justice. The addition made on the basis of such a document not confronted to assessee is illegal, void and the impugned order ought to be quashed.

4. Ld. AO has stated at page 2 that – “.....*These transactions are accommodation entries mostly in lieu of cash of equal amount and commission charged over and above at certain fixed percentage for providing such accommodation entry.....*” [Para 3.1]

In the instant case, Ld. AO erred in not considering the fact that the shares were purchased through banking channel and cheque was issued to M/s. P. Saji Textiles Limited. [PB 16, 18]

5. Ld. AO failed to bring on record any positive material to establish that the shares were purchased in lieu of cash. Nothing was brought on record to establish that assessee is having any source of income other than the reported sources of income. Also, no material was found to establish that the transaction was a cash transaction merely to convert unaccounted money into accounted money. Ld. AO made an allegation without bringing on record any cogent material that assessee has brought back his unaccounted money in the books of accounts by way of managing bogus LTCG. Ld. AO did not bring on record any specific instance of the assessee having earned any undisclosed income or unexplained investment. Ld. AO failed to bring on record any live link to establish any collusion on the part of assessee to generate the alleged bogus LTCG.

Ld. AO has brought nothing on record to establish if assessee has paid any commission for the alleged accommodation entry.

6. For the allegation of Ld. AO on cash element, reliance is placed on the decision of Hon'ble Bombay High Court in the case of Uttamchand Jain – [2009] 182 taxman 243 – order pronounced on 02.07.2009

Para 18 – “*Assuming the revenue is right in its contention that the sale did not involve actual delivery of diamond jewellery, then, unless it is established that the assessee had passed on his undisclosed income to Mr.Trivedi, it cannot be said that the amount received by the assessee from Mr.Trivedi represented the undisclosed income of the assessee. In the present case neither Mr.Trivedi in his statement recorded on 31-3-2000 had stated that the assessee had given the cash amount of Rs. 10,35,562 nor in the reassessment proceedings the Assessing Officer*

has gathered any evidence to that effect. In fact, in the statement recorded on 31-3-2000, Mr.Trivedi had stated that he used to receive cash through Mr. Sanjay Saxena. There is nothing on record to suggest that the assessee had given cash to Mr. Sanjay Saxena. The Assessing Officer has not chosen to examine Mr. Sanjay Saxena to establish that cash was given by the assessee to Mr.Trivedi through Mr. Sanjay Saxena. Perusal of the reassessment order shows that the Assessing Officer has not made any efforts to link the cash received and deposited by Mr.Trivedi in his bank account was in fact paid by the assessee. In other words, the decision of the Assessing Officer in discarding the sale and holding that the amount received by the assessee from Mr.Trivedi represented the undisclosed income of the assessee is based on conjectures and surmises and is not based on any independent evidence gathered prior to or during the course of reassessment proceedings. In these circumstances, in the absence of any cogent evidence brought on record, the decision of the Tribunal in holding that the Assessing Officer has failed to establish the nexus between the cash amount deposited in the bank account of Mr.Trivedi is attributable to the cheque issued by Mr.Trivedi in favour of the assessee cannot be faulted. Consequently, the decision of the Tribunal in deleting the addition of Rs. 10,35,562 cannot be faulted.” [emphasis supplied]

In the instant case, no cogent material has been brought on record by Ld. AO to establish nexus if the transaction is executed in lieu of cash.

7. Ld. AO erred in stating that – “.....These shares have a lock in period of 1 year as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. Another route to acquire the shares is through Amalgamation or merger. In this route, the beneficiaries of LTCC are allotted shares of a private limited company which is subsequently amalgamated with a listed penny stock and the beneficiaries receive shares of the listed penny stock in exchange of the shares of private limited company.....” [AO page 3, 1st line]

From the above following is made out –

- a. Ld. AO erred in mentioning grossly incorrect fact that the shares have a lock in period of one year as per the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR regulations). The ICDR regulations do not mention that the shares have a lock in period of

one year in respect of shares in the impugned transaction of the assessee.

b. Process for amalgamation is prescribed under the law which requires it to be carried out in accordance to the directions issued by the order of Hon'ble High Court. In instant case, the process of amalgamation was carried out through the order of Hon'ble Bombay High Court. Thus, the legal sanctity of the both the amalgamating company and amalgamated company is evidently established from the order of Hon'ble Bombay High Court. One arm of the Government has accepted the legal sanctity of both Sunrise Asian Limited (amalgamated company) and Conart Trader's Limited (amalgamating company). [PB 37-42]

1.

c. Assessee received the scheme of amalgamation from Conart Trader's Limited by speed post. [PB 21-36]

d. Ld. AO has mentioned that the shares of 'listed penny stock' are allotted to the beneficiaries. It is submitted that the term 'listed penny stock' has not been defined under the law. Strong objection is placed on record for the use of term 'penny stock' by the Ld. AO while rejecting the claim of exemption u/s 10(38) and alternatively treating it as 'adventure in the nature of trade' and making the addition. It is not a term of law and tainting a genuine transaction executed on recognized stock exchange operating under regulator i.e. SEBI is not warranted.

8. Ld. AO has made reference to Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR regulations 2009). The instant case is not case of issue of capital. Accordingly, reference made by Ld. AO to these regulations is irrelevant.

9. However, in these regulations, various terms have been defined. For the terms which are not explicitly defined under this regulation, shall have the meaning as per the Companies Act, 2013, the Securities Contracts (Regulation) Act, 1956 and Depositories Act, 1996 and the rules/regulations there under. The term 'penny stock' has not been defined either under ICDR Regulations, 2009 or under the Companies Act, 2013; Securities Contracts (Regulation) Act, 1956 and Depositories Act, 2013.

It is stated by Ld. AO that the shares are generally allotted through the route of preferential allotment (private allotment) or off market transaction. The ICDR Regulations, 2009 have specifically defined the term 'preferential issue'. In the instant case, assessee has purchased shares of Conart Trader's Limited under an off market transaction which is a valid transaction. Subsequently, due to amalgamation of Conart Trader's Limited with Sunrise Asian Limited the shares were replaced in the name of Sunrise Asian Limited. Shares are not allotted to assessee through 'preferential allotment' as mentioned in the ICDR Regulations, 2009. The ICDR Regulations, 2009 do not require that the shares have a lock in period of one year.

10. In the ICDR Regulations, 2009 the term 'listed issuer' has been defined to mean any issuer whose equity shares are listed on a recognized stock exchange. The term 'listed penny stock' has not been defined.

11. SEBI is the market regulator for the operations of stock exchanges in India. SEBI also ensures protection of interest of the investors transacting on stock exchanges. In order to protect the interest of the investors, SEBI has issued – SEBI (Investor Protection and Education Fund) Regulations, 2009. Assessee is an investor who has acted bonafidely on the recognized stock exchange and has complied with all the regulatory requirements while making the impugned transactions. Ld. AO has jeopardized the interest of assessee by making an addition for the acts, if any, of the market operators which were not in compliance with the market regulations. Ld. AO has acted against the objective of SEBI in protecting the interest of investor.

12. Ld. AO erred in stating in Page 3, 1st para –

“Thereafter, the prices of the shares of the penny stock companies are rigged and are raised through circular trading. This is managed by the “operator” of the scrip. An “Operator” is a person who is managing the overall affairs of the scheme and he is the one who contacts the entities who wish to take entry of bogus LTCG/STCL in their books and arranges the same through the scrip’s of penny stock companies. The operator manages many paper/bogus companies and uses them to do circular transactions to rig the price of the shares. The shares of these penny stock companies, although listed on exchange are always closely held and are controlled by the promoter of the Penny Stock Company.....”

No evidence has been brought on record to establish if the assessee –

- a. is involved in rigging of the prices of the shares of the impugned company.
- b. has acquaintance with any ‘operator’ as stated by Ld. AO that the scrip’s are managed by the ‘operator’.
- c. is promoter/director/key management person of Conart Trader’s Limited (amalgamating company) or Sunrise Asian Limited (amalgamated company)

The observations of Ld. AO are vague, without any basis and merely surmises and conjectures. It is pertinent to mention here that the transactions of purchase and sale of shares are executed through banking channel on the recognized stock exchange.

13. Ld. AO erred in mentioning grossly incorrect fact “.....*He has also not knowing to the company very well i.e. M/s Sunrise Asian.....*”[AO Page 8 para 3.5]

- a. The assessee had purchased shares of Conart Trader’s Limited. The shares of Sunrise Asian Limited allotted due to amalgamation of Conart Trader’s Limited with Sunrise Asian Limited through the order of Hon’ble Bombay High Court.
- b. Assessee has knowledge about the company which is narrated by him in his statement recorded by the Ld. AO in the course of assessment proceedings, vide answer to question no. 5 and 6. [AO Page 07-08]

14. Above submission of the assessee is fortified by the decision of Hon’ble Supreme Court in the case of LalchandBhagatAmbica Ram [1959] 37 ITR 288 (SC) -

Section 143 of the Income-tax Act, 1961 - Assessment - Addition to income - Assessment year 1946-47 -.....Whether, therefore, it was clear that Tribunal in arriving at its conclusion indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of facts which could not reasonably be entertained or finding was perverse which could not be sustained and Supreme Court was entitled to interfere with such finding - Held, yes - Whether, therefore, addition made was liable to be deleted - Held, yes

Ld. AO being quasi-judicial authority must not base his findings on no-material or no-evidence. This is a fundamental rule of justice and established legal proposition that there may be something more than bare suspicion, to support the findings, in the assessment order, as held by the Hon'ble Supreme Court, in the case of –

- a. Omar Salav Mohamed Sait – [1959] 37 ITR 151
- b. Umacharan Shah & Bros – [1959] 37 ITR 271

15. In the instant case, Sunrise Asian Limited (the amalgamated company) is neither included in the list of Shell Companies nor has been struck off from the Registrar of Companies.

Hon'ble Mumbai Bench of ITAT in the case of Shakti Hardware Collections Private Limited – ITA No. 6301/MUM/2014 – order pronounced on 31.01.2018 had raised a specific query on the existence of the name of the company in the list prepared by MCA based on which positive conclusion was drawn in favour of the assessee.

Para 8 – *“We have heard the rival contentions and gone through the facts and circumstances of the case. We have also made enquiry from the learned Sr. Departmental Representative, whether the investors or this company is a Shell company or in the list prepared by the Ministry of Corporate Affairs, Govt. Of India.....Further, we made enquiry from the learned Counsel for the assessee whether this company has been strike off from the Registrar Of Companies or not, the learned Counsel stated that it is very much on the register of Registrar Of Companies. In view of these facts, we reach to a conclusion that this is existing company and even the investors are existing.”* [emphasis supplied]

16. From the above, it is evidently clear that Ld. AO erred in rejecting the claim of LTCG u/s 10(38) of Rs. 28,47,833 which is vague, based on surmises and conjectures.

B. Submission along with documentary evidences not considered both by Ld. AO and Ld. CIT(A)

1. In compliance to the notice issued u/s 142(1), assessee submitted the details of shares purchased and sold during the impugned year i.e. AY 2014-15. Copy of DMAT account was also submitted.

2. Assessee had purchased 6,000 shares of Conart Trader's Limited on 22.10.2011 i.e. AY 2012-13 from P. Saji Textiles Limited for a consideration of Rs. 1,50,000. This consideration was paid by cheque, duly reflected in the bank statement placed on record. Shares were purchased in physical form and it is an off- market transaction. Copy of share certificate from Conart Trader's Limited, duly endorsed for transfer to assessee is also placed on record. [PB 19]

3. Ld. AO failed to consider the various documents submitted by the assessee substantiating the share transaction. Ld. AO failed to bring on record any cogent material to negate the claim of assessee. Claim of the assessee is ought to be allowed.

4. Both before Ld. AO and Ld. CIT(A), copy of the ledger account of the assessee for the DMAT account maintained with share broker – Swastika Investmart Limited for AY 2014-15, share certificate from Conart Trader's Limited, duly endorsed in the name of assessee were submitted. The documents have not been established to be bogus, sham or fictitious. The documentary evidences and explanations given through statement under oath are uncontroverted which demonstrates the acceptability of the impugned transaction. [PB 43, 19]

5. In the assessment proceedings, Ld. AO made a very general reference by using the term 'various' in relation to conduct of search/survey by the Department. Ld. AO has not made reference to any specific search/survey carried out in case of any specific assessee or broker or company. No document/report has been provided to the assessee on the basis of which the claim of LTCG has been rejected. Ld. AO has mentioned that various syndicates have arranged accommodation entry of bogus LTCG. No such specific instance has been brought on record to establish if assessee is involved in such transactions of accommodation entries. It is pertinent to mention here that the no reference has been made to name of assessee. [AO page 2]

6. Ld. AO merely on surmises and conjectures and without bringing on record any cogent material to establish that assessee was engaged in price rigging of the impugned script rejected the claim of exemption of LTCG u/s 10(38).

7. Transaction of purchase of shares was executed on 22.10.2011 i.e. AY 2012-13 and the shares were sold in AY 2014-15 (impugned year).

This transaction of purchase of shares has been accepted and no doubt has been raised. Ld. AO has accepted one limb of the transaction i.e. investment in shares and on the other hand has treated LTCG arising on sale of same shares as deemed income of assessee u/s 68.

8. In AY 2012-13, in addition to the shares of Conart Trader's Limited, assessee also invested in the shares of Anax Com Trade Limited. This fact is further corroborated from the statement of assessee recorded under oath. Where in response to question number 7 assessee has submitted that he has also invested in other scrip's namely Anax Com Trade Limited. [AO page 8]

9. Reliance is placed on following judicial precedents wherein it is held that no addition can be made when all documents to substantiate the transaction were submitted and the onus was discharged by the assessee –

a. Hon'ble Mumbai Bench (SB) of ITAT in the case of GTC Industries Limited – [2017] 80 taxmann.com 284 – order pronounced on 07.03.2017 –

Para 47 – “.....It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee.”
[emphasis supplied]

In the instant case, nothing has been proved against the assessee with respect to the sale of shares.

b. Hon'ble Mumbai Bench of ITAT in the case of Dipesh Ramesh Vardhan – ITA No. 7648 of 2019 – order pronounced on 11.08.2020 –

Para 11 – *“The Ld. AR has relied on plethora of judicial pronouncements in support of various submissions, which we have duly considered. These decisions would only support the conclusions drawn by us that once the assessee has discharged the onus of proving the genuineness of the transactions, the onus would shift on the revenue to dislodge assessee’s claim and bring on record contrary evidences to rebut the same. Until and unless this exercise is carried out, the additions could not be sustained in the eyes of law.”*

Para 13 – *“Therefore, considering the entirety of facts and circumstances, we are not inclined to accept the stand of Ld.CIT(A) in sustaining the impugned additions in the hands of the assessee. Resultantly, the addition on account of alleged Long-Term Capital Gains as well as estimated commission against the same, stands deleted. The grounds of appeal, to that extent, stand allowed.”* [emphasis supplied]

In the instant case, assessee has submitted copy of contract notes, bank statement, share certificate before Ld. AO. Ld. AO failed to consider these documents which establish the genuineness of the transaction.

c. Hon’ble Delhi Bench of ITAT in the case of RiazMunshi – ITA no. 8314/DEL/2018 – order pronounced on 11.03.2020 –

Para 6.1 – *“.....The A.O. did not make any further investigation or enquiry into the matter and merely relied upon the interim order of the SEBI and investigation carried out by the Kolkata Wing. Further, it is not clear from the assessment order whether Investigation Wing report have been confronted to the assessee or any right of cross-examination have been allowed to any statement recorded at the back of the assessee. The assessee asked for the cross-examination of any statement which is used against the assessee for making the addition. But, the assessment order is silent on ITA.No.8314/Del./2018 ShriRiazMunshi, New Delhi. this aspect. Therefore, the above facts clearly show that assessee entered into the genuine transaction and as such the profit on sale of scrip was exempt from tax. The Ld. D.R. relied upon decisions of the ITAT, Delhi Benches, Delhi in the cases of SumanPoddar vs., ITO (supra) and UditKalra vs., ITO (supra), in which the findings of the Tribunal had been that these are cases of penny stock companies which fact is not there in the present case. Therefore, these decisions would not support the case of the*

Revenue as having distinguishable on facts. The authorities below have not rebutted the explanation of assessee that he has indulged in dealing in scrips in earlier year as well as in subsequent years. It would, therefore, show that assessee is regularly dealing in scrips. The A.O. has not brought any adverse material against the assessee so as to make the above additions. Considering the totality of the facts and circumstances of the case and financials of M/s EBFL as reproduced above and other years [PB-76], we set aside the Orders of the authorities below and delete both the additions.” [emphasis supplied]

In the instant case, addition has been made by Ld. AO without considering the documents on record and without bringing any adverse material against the addition so made. Also, Ld. AO did not confront the material relied upon him for rebuttal by the assessee. Addition so made ought to be deleted.

d. Hon’ble Delhi Bench of ITAT in the case of Anoop Jain – [2020] 114 taxmann.com 550 – order pronounced on 10.01.2020 – HEAD NOTE - Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealing) - Assessment year 2015-16 - During relevant assessment year assessee sold certain shares of company LDPL and generated exempted long term capital gains - Assessing Officer drawing support from report of investigation wing came to conclusion that steep rise in share price was jacked up by a cartel of brokers to allow benefit of long term capital gains to various persons and assessee had deliberately got involved in that process, in order to book his unaccounted income in his books of account, without paying any taxes - He, therefore, treated long term capital gain as not genuine and made addition under section 68 - Whether since Assessing Officer failed to produce any material evidence to dislodge or controvert genuineness of conclusive documentary evidences produced by assessee in support of his claim that he was a genuine investor from past many years, addition made under section 68 was to be deleted - Held, yes [Paras 24,25 and 31] [In favour of assessee]

In the instant case, Ld. AO has not brought on record any specific report or documents relating to any search/survey on the basis of which claim of LTCG has been rejected. No material has been brought on record to controvert the genuineness of the documentary evidences produced by assessee. Addition made by Ld. AO ought to be deleted.

e. Hon'ble Mumbai Bench of ITAT in the case of Vijay Ratan Mittal – ITA No. 3429 of 2019 order pronounced on 01.10.2019 –

Para 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 ld. 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.” [emphasis supplied]

In the instant case, both Ld. AO and Ld. CIT(A) have brought nothing on record to prove that the shares transactions of the assessee were collusive transactions. No document or material has been brought on record to establish the live link of the assessee with the so called search/surveys. Addition made by Ld. AO ought to be deleted.

f. Hon'ble Delhi Bench of ITAT in the case of KarunaGarg – [2019] 109 taxmann.com 403 - order pronounced on 06.08.2019 –

Para 30 – “Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand.”

Para 31 – *“We accordingly direct the Assessing Officer to accept the long term capital gains declared as such.”* [emphasis supplied]

In the instant case, assessee has discharged his onus. The onus shifted on the revenue to establish if the claim of the assessee is not genuine which the Ld. AO failed to discharge. Accordingly, addition made by Ld. AO by rejecting the claim of LTCG ought to be deleted.

g. Hon’ble Delhi Bench of ITAT in the case of Swati Luthra – [2020] 115 taxmann.com 167 – order pronounced on 28.06.2019 –

Para 17 – *“We also find that the Ld. AO has raised objection regarding the cash purchase of shares and that shares were dematerialised few days back only from the date of sale. There is no law which prohibits the purchase of shares in cash, however in the present case, assessee had filed copies of bills of purchase, copy of share certificates and transfer forms etc. before Ld. AO and no adverse inference could be drawn only because the shares were purchased in cash. Regarding Demat of shares, we hold that it is the option of the buyer of shares to keep the shares either in Demat form or in paper form. Merely because the shares were dematted at a later stage, no adverse inference could be drawn. The Learned Counsel for the Assessee has taken us through various documents filed in the paper book as referred to above which specifically prove the purchase of shares made by assessee genuinely which were also sold genuinely. The transactions were carried through Demat account and banking channel on which STT has been paid by assessee. The report of the SEBI was not adverse in nature against the assessee because name of the assessee did not appear therein for conducting dubious transaction. The report of the Investigation Wing and other material was neither confronted to assessee nor there was any inquiry from where it transpired that assessee was beneficiary of any bogus long-term capital gain; therefore, the same cannot be read in evidence against the assessee. A specific material against the assessee should have been brought on record to put assessee under liability. However, in the present case, the entire documentary evidence on record has not been disputed by the authorities below and there is no rebuttal to the explanation of assessee. No other adverse materials have been brought on record against the assessee. Further, no proper enquiry has been conducted by the A.O. on the documentary evidences filed by assessee. Whatever statements have been referred to in the order was general in nature with whom assessee did not have any*

transaction. Considering the totality of the facts and circumstances of the case, we hold that assessee has entered into genuine transaction of sale and purchase of shares and therefore, satisfied the conditions of Section 10(38) of the I.T. Act. The assessee is entitled for exemption under the same provision. We accordingly, set aside the orders of the authorities below and delete the addition of Rs. 41,85,762/-. Appeal of assessee is allowed.” [emphasis supplied]

In the instant case, the transaction was carried out through DMAT account and banking channel on which securities transaction tax (STT) was paid. The report on which Ld. AO has placed his reliance was never confronted to the assessee. Ld. AO has failed to consider the documentary evidences submitted by the assessee relating to the purchase and sale of shares. These documents have not been disputed both by Ld. AO and Ld. CIT(A) and there is no rebuttal to the explanation of the assessee. No specific material has been brought on record to put assessee under liability.

h. Hon'ble Delhi Bench of ITAT in the case of VidhiMalhotra – [2019] 101 taxmann.com 361 – order pronounced on 20.12.2018 – HEAD NOTE – “Section 69, read with section 10(38), of the Income-tax Act, 1961 - Unexplained investments (Long-term capital gain) - Assessment year 2014-15 - Assessee had purchased and sold shares of a company which amalgamated into another company (Kailash) by order of High Court - Assessing Officer noticed that scrips of Kailash were used by entry providers for providing bogus accommodation entries and that in some other matter in course of proceedings before Investigation Wing, one Chartered Accountant had confirmed that he had provided accommodation entry in scrip of Kailash and, consequently, he treated long-term capital gain under section 69 - Assessee had duly shown transaction in cheques right from purchase to sale of shares and all transactions had been routed through DMAT account in Bombay Stock Exchange as per quoted price as on that date - SEBI did not find any prima facie material for manipulation in price of scrip of Kailash - Further, statement of Chartered Accountant could not be sole ground to implicate assessee and justify additions especially when, nowhere assessee had been found to be beneficiary of any kind of accommodation entry in any inquiry by Investigation Wing or any such material had been unearthed by department - Whether, on facts, long-term capital gain shown by assessee was genuine and, consequently liable for exemption under section 10(38) - Held, yes [Para 8] [In favour of assessee]

In the instant case, nothing has been brought on record to justify the additions made especially when assessee has not found to be beneficiary of any kind of accommodation entry in any inquiry conducted or any material unearthed by Department. Addition made by Ld. AO ought to be deleted.

i. Hon'ble Jaipur Bench of ITAT in the case of Saurabh Mittal – ITA No. 16 of 2018 – order pronounced on 29.08.2018 -

Para 6 – “.....Therefore, on analyzing of the facts as well as the evidence produced by the assessee, we find that the Assessing Officer has not brought any material on record to controvert the fact duly established by the supporting evidence of purchase bills, payment of consideration through bank, dematerialization of shares in the DEMAT account, allotment of the shares amalgamated new entity in lieu of the earlier two companies of equal number of shares. Sale of shares from the DEMAT account through stock exchange and at the prevailing price as on the date of sale and further payment of STT on the transaction of sale has been duly established. In absence of any contrary fact, the mere reliance by the Assessing Officer on the report of Investigation Wing, Kolkata is not sufficient to establish the fact that the transaction is bogus. The finding of the Assessing Officer is based merely on the suspicion and surmises without any tangible material to show that the assessee has introduced his own unaccounted income in the share of long term capital gain even otherwise the reliance of the statements recorded by the Investigation Wing, Kolkata wherein without giving an opportunity of cross examination is a complete violation of principles of natural justice as held by the Hon'ble Supreme Court in the case of CCE Vs Andaman Timber Industries (Supra). The Coordinate Bench has also followed the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. PoojaAgarwal order dated 11/09/2017 wherein the Hon'ble High Court has duly considered the fact that the Assessing Officer has not brought any material on record to show that the assessee has paid over and above the purchase consideration as claimed and evident from the bank account. Therefore, in absence of any evidence, it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain. Accordingly, in view of above facts and circumstances, we do not find any error or illegality in the order of the ld. CIT(A) qua this issue. Hence, this ground of revenue's appeal is dismissed.”
[emphasis supplied]

In the instant case, Ld. AO nothing on record to controvert the fact duly established by supporting evidences for payment of consideration through bank, share certificate, dematerialization of shares in DMAT account, allotment of shares on amalgamation, sale of shares through recognised stock exchange on which STT has been paid. In absence of any evidence that the assessee has introduced his own unaccounted money by way of bogus LTCG is not sustainable.

j. Hon'ble Jaipur Bench of ITAT in the case of Pramod Kumar Lodha – [2018] 100 taxmann.com 8 – order pronounced on 16.07.2018 – HEAD NOTE – “Section 69B, read with section 10(38) of the Income-tax Act, 1961 - Undisclosed investments (Share transactions) - Assessment year 2010-11 - It was alleged that in name of long-term capital gain from sale of shares, assessee had introduced his own unaccounted money - However, it was found that after purchase, shares were held for some time and were dematerialized in D-mat account - Whether once holding of shares prior to sale and sale transaction itself were not in dispute, then same could not be held as bogus transaction - Held, yes - Whether, in absence of any material or fact to show that assessee had introduced his own unaccounted money in name of long-term capital gain, mere suspicion was not enough to deny claim of assessee - Held, yes [Para 3] [In favour of assessee]

In the instant case, nothing has been brought on record to establish that assessee has introduced his own unaccounted money by way of LTCG. No addition can be made merely on the basis of surmises and conjectures.

k. Hon'ble Calcutta High Court in the case of Rungta Properties – ITA No. 105 of 2016 order pronounced on 08.05.2017 – HELD – “on the last, the tribunal held that the AO had not brought relevant material to show that the transactions in shares of the company involved were false or fictitious. It is the finding of the AO that the scripts of this company was executed by a broker and the broker was suspended for some time. It is the assessee's contention that even though there are allegations against the broker, and for that reason the assessee cannot be held liable on this point.....”

In the instant case, nothing has been brought on record to establish that the transaction in shares of the impugned company were false or fictitious. It is not a case that broker through whom the scripts of the impugned company were executed was

suspended for some time. No addition can be made in absence of any positive material on record.

l. Hon'ble Calcutta High Court in the case of M/s. Alpine Investments – ITA No. 620 of 2018 – order pronounced on 26.08.2008 – “.....It appears that the share loss and the whole transactions were supported by contract notes, bills and were carried out through recognized stockbroker of the Calcutta Stock Exchange and all the payments made to the stockbroker and all the payments received from stockbroker through account payee instruments, which were also filed in accordance with the assessment.

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

In the instant case, the entire transaction of purchase and sale of impugned shares is supported with all documentary evidences. These documents cannot be brushed aside merely on surmises and conjectures. No addition can be made in absence of any material negating the submissions of assessee.

10. Ld. AO erred in stating that the transaction of sale of shares is bogus more particularly when the Profit and Loss Account of Sunrise Asian Limited (amalgamated company) is reproduced in the impugned order at page 4. From this, it is evidently clear that the company has earned profit of Rs. 1.03 crores (profit before taxes) for AY 2014-15 against revenue of Rs. 113.46 crores.

11. Ld. AO erred in considering only the Profit and Loss Account of Sunrise Asian Limited (amalgamated company) and not considering the Balance Sheet. The comparative data of the Profit and Loss Account as reproduced in the impugned order is as available on the internet.

Referring to the profit and loss account as reproduced in the impugned assessment order, it is evident that the turnover of the company is showing an increasing trend for the period March 2012 at Rs. 0.38 Crores to Rs. 113.46 Crores in March 2014. The profit before tax (PBT) for March 2014 was Rs. 1.03 crores. PBT is showing an increasing trend and thus the profits are available with the company. There is an increasing trend even in the next year i.e. March 2015. [AO Page 4]

12. Ld. AO erred in stating that company is either in loss or has earned very minimal profit during the period. From the profit and loss account of the amalgamated company as reproduced in the assessment order at page 4 it is evidently clear that for the period ended on 31st March 2014 i.e. AY 2014-15 (impugned year), it has earned profit before tax of Rs. 1.03 crores.

13. Ld. AO has alleged that the company has incurred losses during the period FY 2010-11 and FY 2011-12 i.e. relevant to AY 2011-12 and AY 2012-13. The correct fact being that during the period in which shares were purchased by assessee, the company was at break even. No profit and no loss incurred by assessee. [AO page 5 & PB 66]

14. Ld. AO in the impugned order has reproduced the share price pattern of Sunrise Asian Limited from the website www.moneycontrol.com which is readily available in the public domain. Ld. AO has made his observations on the share price pattern and stated that the prices were rigged on the basis of this chart. Ld. AO further stated that this chart/graph reveals bogus LTCG. Assessee contends that no such pattern is enunciated in the Act or its rules as legislated by the Parliament. Nor any standards of procedure have been formulated stating the guidelines as given by the CBDT to this effect.

15. The share price pattern of Sunrise Asian Limited as reproduced in the impugned order relates to the period January 2011 to July 2016. Assessee had purchased the shares in October 2011 and were sold in period October 2013 to March 2014.

16. From the share price pattern it can be made out that –

- a. The share price continued to be in the range of Rs. 400 - Rs. 500 till March 2015 from Jan. 2013 i.e. for a period of almost 27 months.
- b. The share price increased to Rs. 600 per share in April 2015 i.e. after the date on which shares were sold by assessee.
- c. The shares were sold by the assessee in the price range of Rs. 450 to Rs. 505 during the month of August 2013. [PB 45-48]

The assessee is aware of the above mentioned facts relating to the increase in the price of the impugned shares. This is corroborated from response of the assessee to question no. 12 in his statement recorded during the assessment proceedings. [AO page 8]

Not even an iota of doubt has been raised by Ld. AO on the detailed and exhaustive replies given by the assessee in the statement recorded during the course of assessment which is reproduced in the impugned assessment order.

As alleged by the Ld. AO, if assessee was involved in price rigging, he would have sold his shares in the later period wherein he would have received the best appreciation for his investment. Further, one fails to understand how the price range of Rs. 400 – 500 was maintained for an elongated period of almost 27 months. The allegation of Ld.AO is vague, without any basis and merely surmise and conjecture.

C. All the conditions enumerated in section 10(38) are complied with in the impugned transaction of sale of shares of listed company on recognized stock exchange

1. Section 10(38) reads –

“any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where –

The transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and

Such a transaction is chargeable to securities transaction tax under that Chapter.....”

Following conditions are to be satisfied to claim income exempt u/s 10(38) –

- a. Asset transferred should be a long term capital asset
- b. Asset transferred should be either equity share or units of equity oriented fund or units of a business trust
- c. Transaction of sale of such equity share or units of equity oriented fund or units of a business trust is entered into on or after 01st October 2014
- d. Securities transaction tax (STT) is paid

In the instant case, assessee all the above mentioned conditions are duly fulfilled. Assessee is entitled to claim LTCG income exempt u/s 10(38). Claim of the assessee is bonafide, lawful and complies with the provisions of section 10(38).

2. It is a settled law that charge has to be clear and it cannot be presumed on the basis of evidence. Reliance is placed on the decision of Hon'ble Apex Court in the case of Dilip Kumar and Company &Ors – Civil Appeal no. 3327 of 2007 – order pronounced on 30.07.2018 – Para 43 – *“.....There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation.....”* [emphasis supplied]

3. All the conditions of section 10(38) are fulfilled. As in the case of estoppel, it cannot operate against the provisions of statute. If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either eligible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. The law

empowers the ITO to assess the income of an assessee according to law and determine the tax payable thereon. In doing so he cannot assess an assessee on an amount, which is not taxable in law, even if the same is shown by an assessee. There is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law.

4. Principles of estoppels will not operate against the Income-tax Act as held by Hon'ble Supreme Court in the case of CIT v. V.MR.P Firm [1965] 56 ITR 67 (SC). The relevant observations are extracted as under –

“The contention is that the assessee having opted to accept the scheme, derived benefit there-under, and agreed to have their discharged debts excluded from the assets side in the balance-sheet subject to the condition that subsequent recoveries by them would be taxable income, they are now precluded, on the principle of "approbate and reprobate", from pleading that the income they derived subsequently by realization of the revived debts is not taxable income. The doctrine of "approbate and reprobate" is only a species of estoppel ; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either eligible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income.” [emphasis supplied]

5. Principles of estoppels were also dealt by Hon'ble Bombay High Court in the case of BalmukundAcharya 310 ITR 310 (Bom) and it held in –

Para 33 – *“This Court in the case of Nirmala L. Mehta v. A. Balasubramaniam, CIT [2004] 269 ITR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field.”*

Similar view was taken by Hon'ble Calcutta High Court in the case of CIT v. BhaskarMitter 73 Taxman 437.

D. Provisions of section 68 not applicable on the impugned transaction of sale of shares of listed company on recognized stock exchange

1. Without prejudice to the claim of exemption u/s 10(38), as per the provisions of section 68, identity, genuineness and creditworthiness can be established as under –

a. Identity – Shares were sold on recognized stock exchange through the stock broker (Swastika Investmart Limited) from the DMAT account of the assessee. It is not possible to identify the purchaser of the shares so sold by assessee. The entire sale consideration has been received through the stock broker in the bank account of the assessee. [PB 45-48]

b. Genuineness – The shares were purchased in AY 2012-13. The payment was done through cheque. No doubt has been raised on the genuineness of the purchase transaction. One limb of the transaction i.e. purchase is undisputed and uncontroverted.

c. Creditworthiness – The shares are sold on the recognized stock exchange through the stock brokers. The identity of the purchaser of the shares so sold cannot be revealed and the sale consideration being received directly in the bank account of the seller of the shares (assessee), creditworthiness is established.

Provisions of section 68 are not attracted. Addition made by rejecting the LTCG of Rs. 28,47,833 and treating it as deemed income u/s 68 ought to be deleted.

E. Addition made on account of unexplained expenses u/s 69C of Rs. 89,935

1. Ld. AO has estimated commission expense @ 3% on the entire sale consideration of Rs. 29,97,831 amounting to Rs. 89,935 by applying the provisions of section 69C.

2. Ld. AO has merely alleged that assessee has paid commission for the above mentioned share transaction. The estimation has been made merely on surmises and conjectures without bringing on record

any cogent material to establish that if assessee has paid any commission. [AO Page 16, Para 10]

2.

3. Addition of Rs. 89,935 is merely a presumption without any corroborative evidence. Thus, the addition made without any cogent material ought to be deleted.

3.

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedents, disallowance of LTCG made by Ld. AO of Rs. 28,47,833 by rejecting the claim of LTCG and treating it as deemed income u/s 68 and addition of Rs. 89,935 u/s 69C made by Ld. AO on account of commission expense ought to be deleted.

12. Reliance was also placed on the decision of Co-ordinate Mumbai Bench in the case of *Dipesh Ramesh Vardhan Vs DCIT dated 11.08.2020*, Co-ordinate Bench of Jaipur in the case of Ashok Agrawal ITA No.124/JP/2020 order dated 18.11.2020, Co-ordinate Bench of Delhi in the case of *Swati Luthra ITA No.6480/Del/2017 order dated 28.06.2019*, Co-ordinate Bench of Lucknow in the case of *Achal Gupta ITA No.501/Lkw/2019 order dated 16.12.2020*, Co-ordinate Bench of Indore in the case of *Aditya Mundra ITA No.632/Ind/2019 dated 13.01.2021* and in the case of *Shewta Agrawal ITA No.280/Ind/2019 21.12.2020* and also recent judgment of Hon'ble High Court of Delhi in the case of *PCIT V/s Krishna Devi & others*.

13. In case of remaining assessee(s) in the instant appeals, Ld. Counsel for the assessee has filed similar type of submissions along with paper book containing the facts and documents placed before lower authorities which are almost identical except the change in the name of the company and the amount of addition.

14. Per contra Ld. Departmental Representative vehemently argued supporting the orders of both the lower authorities and decisions referred and relied by Ld. CIT(A). Reliance was also placed on the judgment of Hon'ble High Court in the case of *Suman Poddar V/s ITO, ITA No.841/2019 dated 17.09.2019*.

15. We have heard the rival contentions and perused the records placed before us and carefully gone through the judgments referred relied by all the parties. There are two common issues raised in the instant appeals. Firstly challenging the finding of Ld. CIT(A) confirming the action of the Ld. A.O denying the benefit of exemption u/s 10(38) of the Act for Long Term Capital Gain from sale of equity shares and holding it to be Bogus allegedly earned from dealing in penny stock companies and also making addition for estimated brokerage expenses for arranging bogus capital gain.

Second common grievance is by way of raising the legal issue contending that since no opportunity was awarded to the assessee to cross examine the third persons, whose statement were taken as a base to make additions, the impugned additions are liable to be deleted.

16. Since we are adjudicating the above stated common issue on the basis of above assessee namely Shri Shivnarayan Sharma, we note that the assessee purchased 6000 equity shares of Conart Traders Ltd on 22.10.2011 at a cost of Rs.1,50,000/- . There is no restriction under the law to purchase equity shares on off line mode. Vide order dated 22.3.2013 of the Hon'ble Mumbai High Court M/s Conart Traders Limited was merged with M/s SAL and in lieu there of 6000 shares of M/s SAL were received by the assessee in its demat account. After holding the equity shares for more than 12 months since purchased on 22.10.2011, assessee sold the shares of M/s SAL during the period April 2014 to June 2014 through a registered broker and all the transactions of sale of shares took place on the recognised stock exchange. Sale consideration was received in the bank account attached with the

Demat account. The detail of the persons purchasing the shares is not provided on the portal of SEBI and all the transactions of purchase and sale took place on the portal through registered brokers under the control of SEBI. M/s SAL has not been struck off as a shell company. Trading of shares of M/s SAL was permitted by SEBI. *Prime facie*, all the conditions provided u/s 10(38) of the Act seems to have been fulfilled by the assessee.

17. As regards the second issue raised is that assessee was not provided opportunity of cross examination, we observe that Ld. A.O has referred to some investigation carried out by the Department in the case of some brokers and other assessee(s) located at Kolkata and other places and there is a reference of the company M/s SAL. However it is not disputed that name of the assessee is not appearing in such report nor any evidence was found by the Ld. A.O which could indicate that assessee was also a part or connected to the alleged racket of providing accommodation entry of bogus LTCG nor any proof of any agreement between the assessee and other persons mentioned in the report has been found. So the basis of addition is primarily on the statement of third party as well as the

information gathered from other sources. Perusal of the records shows that the assessee has not been provided any access to such report nor any opportunity was provided to cross examine those persons who accepted to have provided accommodation entries for the bogus LTCG, to the assessee.

18. We observe that all the above stated facts and the issue of genuineness of LTCG and failure of the Ld. A.O to provide opportunity to cross examination by the assessee with regard to the addition made u/s 68 of the Act for the sale consideration received from sale of equity shares of M/s SAL and addition for estimated brokerage expenses has been dealt by the Co-ordinate Bench of Mumbai Tribunal in the case of *Dipesh Ramesh Vardhan V/s DCIT (supra)* and the same is squarely applicable on the instant appeals.

The relevant extract of the decision of Co-ordinate Bench, Mumbai is reproduced below:-

6. We have carefully heard the rival submissions and perused relevant material on record. So far as the factual matrix is concerned, there is no substantial dispute regarding the same. The perusal of record would reveal that the assessee purchased certain shares of an entity namely M/s STL as early as September, 2011. The shares were converted into demat form in assessee's account during the month of March, 2012. The transactions took place through banking channels. The investments were duly reflected by the assessee in financial statements of respective years. The copies of financial statements of M/s STL for FYs 2009-10 & 2010-11

which led to investment by the assessee in that entity was also furnished during the course of assessment proceedings. Subsequently, M/s STL got merged with another entity viz. M/s SAL pursuant to scheme of amalgamation u/s 391 to 394 of The Companies Act, 1956. The Scheme was duly approved by Hon'ble Bombay High Court vide order dated 22/03/2013, a copy of which is on record. Consequently, the shares of M/s STL held by the assessee got swapped with the shares of M/s SAL and new shares were allotted to the assessee during June, 2013 pursuant to the approved scheme of amalgamation. M/s SAL is stated to be listed public company Group 'A' shares signifying high trades with high liquidity. The assessee has sold these shares through its stock broker namely M/s Unique Stockbro Private Limited in online platform of the recognised stock exchange during the month of March, 2014. The selling price was in the range of Rs.489/- to Rs.491/- per share. The transactions took place through online mechanism after complying with all the formalities and procedure including payment of STT. The delivery of the shares was received through banking channels. The transactions are duly through clearing mechanism of the stock exchange and sale consideration evidenced by contract notes, demat statements, bank statements and other documentary evidences. The key person of assessee group, in his statement, maintained the position that trading transactions were genuine transactions carried out through stock exchange following all process and legal procedures. The assessee also filed trading volume data and price range of the scrip for a period of more than 2 years i.e. from Jan, 2013 to July, 2015. The shares reflected healthy trading volume and the price range reflected therein was in the range of Rs.360/- to Rs.600/- per share. The price range was stated to be in the same range for 15 months after the period of sale of shares by the assessee, which has not been disputed by the revenue. On the basis of all these facts, it could be gathered that the assessee had duly discharged the onus casted upon him to prove the genuineness of the stated transactions and the onus had shifted on revenue to rebut the same.

7. As against the assessee's position, the primary material to make additions in the hands of assessee is the statement of Shri Vipul Bhat and the outcome of search proceedings on his associated entities including M/s SAL. However, there is nothing on record to establish vital link between the assessee group and Shri Vipul Bhat or any of his group entities. The assessee, all along, denied having known Shri Vipul Bhat or any of his group entities. However, nothing has been brought on record to controvert the same and establish the link between Shri Vipul Bhat and the assessee. The opportunity to cross-examine Shri Vipul Bhat was never provided to the assessee which is contrary to the decision of Hon'ble Supreme Court in M/s Andaman Timber Industries V/s CCE (CA No.4228 of 2006) wherein it was held that not allowing the assessee to cross

examine the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounts to violation of principal of natural justice because of which the assessee was adversely affected. The whole basis of making the addition is third party statement without there being any tangible material. It is trite law that additions merely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law as held by Hon'ble Supreme Court in Omar Salay Mohamed Sait V/s CIT (1959 37 ITR 151). The suspicion however strong could not partake the character of legal evidence as held by Hon'ble Supreme Court in Umacharan Shaw & Bros. V/s CIT (1959 37 ITR 271). Therefore, we find that onus as casted upon revenue to corroborate the impugned additions by controverting the documentary evidences furnished by the assessee and by bringing on record, any cogent material to sustain those additions, could not be discharged by the revenue. The allegation of price rigging / manipulation has been levied without establishing the vital link between the assessee and various entities of Shri Vipul Bhat. We find that the whole basis of making additions is third party statement and no opportunity of cross-examination has been provided to the assessee to confront the said party. As against this, the assessee's position that that the transactions were genuine and duly supported by various documentary evidences, could not be disturbed by the revenue.

8. *The allegations of Ld.AO that the assessee was part of the group which indulged in rigging or manipulation of prices of shares in connivance with Shri Vipul Bhat is not backed by any independent material. Firstly, there is nothing on record which establishes the fact that the assessee was acquainted with Shri Vipul Bhat or any of his entities and secondly, the onus casted upon assessee to prove the genuineness of the transactions was already discharged by the assessee. Shri Vipul Bhat, in his statement, stated that one Shri Sandeep Maroo acted as intermediary who introduced Vardhan family to him. However, no further investigations have been carried out to establish this vital link between the assessee and Shri Vipul Bhat. We do not find any independent investigations by Ld. AO to bring on record any tangible material to corroborate the same. There are no evident or even allegation of any cash exchange between the assessee and group entities of Shri Vipul Bhat. This is further evidenced by the fact that no substantial incriminating material / wealth of that magnitude has been found during the course of search operations on assessee which would corroborate such presumption and prove that the transactions were sham transactions, in any manner.*

9. *The fact that the assessee could not produce the concerned person of M/s SAL was rightly controverted by submitting that the aforesaid entity was not under the control of the assessee and the assessee was under no obligation to do so. The existence of M/s SAL is beyond doubt since it was*

a listed corporate entity and secondly, it was subject matter of scheme of amalgamation u/s 391 to 394. The scheme of amalgamation was duly been approved by Hon'ble Bombay High Court. Therefore, the existence of the said entity could not be doubted, in any manner.

10. The above conclusion is further fortified by the fact that in share sale transactions through online mode, the identity of the buyer of the shares would not be known to the assessee. Therefore, the adverse conclusion drawn by Ld. AO merely on the basis of the fact that the buyer of the shares were group entities of Shri Vipul Bhat, could not be sustained. The fact that there were independent buyers also would rebut the same and weaken the conclusion drawn by Ld. AO.

11. The Ld. AR has relied on plethora of judicial pronouncements in support of various submissions, which we have duly considered. These decisions would only support the conclusions drawn by us that once the assessee has discharged the onus of proving the genuineness of the transactions, the onus would shift on the revenue to dislodge assessee's claim and bring on record contrary evidences to rebut the same. Until and unless this exercise is carried out, the additions could not be sustained in the eyes of law.

12. To enumerate the few, the Hon'ble Bombay High Court in CIT V/s Shyam S.Pawar (54 Taxmann.com 108 10/12/2014) declined to admit revenue's appeal since the revenue failed to carry forward the inquiry to discharge this basic onus. The co-ordinate bench of this Tribunal in Mukesh R.Marolia V/s Addl. CIT (6 SOT 247 15/12/2005) held that personal knowledge and excitement on events should not lead the Assessing Officer to a state of affairs where salient evidences are overlooked. When every transaction has been accounted, documented and supported, it would be very difficult to brush aside the contentions of the assessee that he had purchased shares and had sold shares and ultimately purchased a flat utilizing the sale proceeds of those shares and therefore, the co-ordinate bench chose to delete the impugned additions. We find that this decision was firstly been approved by Hon'ble Bombay High Court vide ITA No. 456 of 2007 on 07/09/2011 and thereafter, special leave petition against the said decision has been dismissed by Hon'ble Supreme Court vide SLP No. 20146 of 2012 dated 27/01/2014 which is reported as 88 CCH 0027 SCC.

The SMC Bench of Tribunal in Anraj Hiralal Shah (HUF) V/s ITO (ITA No. 4514/Mum/2018 dated 16/07/2019) held that in the absence of any evidence to implicate the assessee or to prove that the transactions were bogus, the Long-Term Capital Gains declared by the assessee could not be doubted with. This case was dealing with gains earned by the assessee on sale of same scrip i.e. M/s Sunrise Asian Ltd.

13. Therefore, considering the entirety of facts and circumstances, we are not inclined to accept the stand of Ld.CIT(A) in sustaining the impugned

additions in the hands of the assessee. Resultantly, the addition on account of alleged Long-Term Capital Gains as well as estimated commission against the same, stands deleted. The grounds of appeal, to that extent, stand allowed.

19. Subsequently Co-ordinate Bench of Jaipur in the case of *Ashok Agrawal V/s ACIT in ITA No.124/JP/2020 dated 18.11.2020* has followed the decision of Hon'ble Mumbai Tribunal in the case of *Dipesh Ramesh Vardhan (supra)* while dealing with the same issue of Long Term Capital Gain from sale of equity shares of M/s Sunrise Asian Limited claimed to be exempt u/s 10(38) of the Act and decided in favour of the assessee observing as follows:-

"23. In the aforesaid decision, it has been held 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. In the case in hand, the Id. AO has referred to SEBI enquiry against M/s Sunrise Asian Ltd. However, we note that the said enquiry was regarding failure to comply with certain disclosure requirements and therefore, the subject matter of the enquiry has no connection with the transaction of bogus long term capital gain and has no bearing in judging the genuineness of the transaction undertaken by the assessee or for that matter, the price and realization on sale of shares so undertaken by the assessee through the stock exchange. Further, it has been held in the aforesaid case that 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 and 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. In the instant case, as we have discussed earlier, there is no finding which proves assessee's connection, involvement or collusion with so called accommodation entry providers. Further in the aforesaid case, the issue

as to whether 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 has been discussed at length. And referring to legal proposition laid down by the Hon'ble Supreme Court that the burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidence held that 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. We are in complete agreement with the said view and in the instant case, we find that evidence produced by the assessee in support of his claim of purchase and sale of shares on the stock exchange have not been refuted by any adverse findings or material which could demonstrate involvement of the assessee or collusion with so called accommodation entry providers to obtain bogus LTCG as so alleged by the authorities below.

24. We also find that while analyzing sale of shares of similar scrip of M/s Sunrise Asian Ltd and claim of exemption of long term capital gains u/s10(38), the Mumbai Benches of the Tribunal in case of Anraj Hiralal Shah (HUF) vs ITO (supra) has upheld the claim of the assessee's claim of exemption under section 10(38) of the Act and the relevant findings of the Coordinate Bench contained at Para 8 read as under:-

"8. The assessee has earned speculation profit in the immediately preceding year through M/s Eden Financial Services also and the said profit has been used to purchase the shares of M/s Sunrise Asian Ltd. The assessee has offered the speculation profit for income tax purposes in the immediately preceding year and It has been accepted. Further the assessee has shown the purchase of impugned shares as investment in the Balance Sheet. Hence the purchase of shares has been accepted. Further the shares have been received in the D-mat account of the assessee and they have been sold through the Dmat account only. Hence the delivery of shares a/so stand proved. The AO has not brought any material on record to show that the assessee was part of fraudulent price rigging. Accordingly, in the absence of any evidence to implicate the assessee or to prove that the transactions are bogus I am of the view that the capital gains declared by the assessee cannot be doubted with. In that View of the matter the addition made towards expenses is not also sustainable.

25. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions of the Hon'ble jurisdictional High Court and of that of the Coordinate Benches in cases referred supra, we are of the considered view that the assessee has discharged the necessary onus cast on him in terms of claim of exemption of long term capital gains u/s 10(38) of the Act

by establishing the genuineness of transaction of purchase and sale of shares and satisfying the requisite conditions specified therein and the gains so arising on sale of shares therefore has been rightly claimed as exempt u/s 10(38) of the Act. Accordingly, in the facts and circumstances of the case, we set-aside the order of the Id. CIT(Appeals) and the claim of the assessee u/s 10(38) is allowed. The matter is thus decided in favour of the assessee and against the Revenue. In the result, the ground of appeal so taken by the assessee is allowed.

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

20. We have also observed that the above referred decision of Co-ordinate Bench of Mumbai and Jaipur has dealt in the issue of relating Long Term Capital Gain eared from sale of equity shares of M/s SAL holding it to be a genuine gain and in this context we also note that in the case of Shri Shivnarayahn Sharma and Prayank Jain the alleged company is M/s Conart Traders Ltd subsequently merged with M/s SAL under the order of Hon'ble Mumbai High Court and therefore the above stated decision will be squarely applicable in the case of these two assessee(s).

21. Further we observe that in the case of Govind Harinarayan Agrawal HUF, Manish Govind Agrawal HUF alleged issue of gain from share is from sale of equity shafes of Turbotech. Similar type of issue of the alleged bogus of Long Term Capital Gain from sale of shares of Turbotech came up before the Co-ordinate Bench held in

the case of Swati Luthra wherein the Co-ordinate Bench has decided in favour of the assessee allowing both the grounds raised on merits as well as legal observing as follows:-

12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. We find that the transactions of the assessee of purchase of shares of M/s Esteem Bio and M/s Turbotech., holding of the shares for more than one year and the sale of shares through a registered share broker in a recognized Stock Exchange and payment of Securities Transaction Tax thereon, all were supported by documentary evidences which were placed before the lower authorities. The Revenue could not point out any specific defect with regards to the documents so submitted by assessee. In our considered view, effect of a transaction which is supported by documentary evidences cannot be brushed aside on suspicion or probabilities without pointing out any defect therein.

13. In the instant case, the Assessing Officer himself observed that the movement in price of shares of M/s Esteem Bio and M/s Turbotech were without any backing of financial performance of the said companies. In our considered view, the above factor at best was a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. Further, we also find from record that Ld. AO also didn't confront copies of statements recorded by Investigation Wing, Kolkata of Sh, Nikhil Jain, Sh. Sanjay Vora, Sh. Rakesh Somani, Sh. Anil Kumar Khemka and Sh. Bidyoot Sarkar to the appellant during assessment proceedings and merely extracted copies of their statement in the assessment order only. The Ld. AO has not confronted any material to the assessee nor provided any adequate opportunity to the assessee to defend her case. Since the statements were not confronted to the assessee, she was deprived of her right to cross examine the witnesses. Also whatever they have stated in their statement is no gospel truth and cannot be applied blindly to all the persons who have brought the scrips in the entire country. Thus, under these circumstances, atleast some inquiry should have done from these persons, whether they have provided any entry to the assessee, if the request for cross examination was not possible at that stage. Cross examination of a

person in whose basis any adverse inference is drawn, then it cannot be primary evidence or material to nail the assessee and simply based on the statement no addition can be made. This has been held so by various courts, and also by Hon'ble Apex Court in the case of [M/s Andaman Timber Industries vs. CCE \(SC\)](#) reported in 127 DTR 241 has held as follows:

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

22. As regards the judgment of Hon'ble Delhi High Court in the case of *Suman Poddar V/s ITO (supra) delivered on 17.09.2019* relied by Ld. Departmental Representative, we find that Hon'ble High Court of Delhi in its recent judgment dated 15.1.2021 in the case of *PCIT V/s Krishna Devi & Others ITA No.125/2020* dealing with the similar issue of claim of exemption u/s 10(38) of the Act for Long Term Capital Gain from sale of equity shares has duly considered the judgment of Hon'ble Delhi High Court in the case of *Suman Poddar V/s ITO (supra) and* has decided against the revenue confirming the order of the Tribunal stating it to be the last fact finding authority who on the basis of evidence brought on record has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. Relevant extract of the judgment of Hon'ble Delhi High Court in the case of *PCIT V/s Krishna Devi & Others* is reproduced below:-

"10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites, the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a pre-planned manner to evade taxes. The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares

were dematerialized and the sales have been routed from de-mat account and the consideration has been received through banking channels.” The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

*12. Mr. Hossain’s submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on *Suman Poddar v. ITO (supra)* and *Sumati Dayal v. CIT (supra)* is of no assistance. Upon examining the judgment of *Suman Poddar (supra)* at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of *Sumati Dayal v. CIT (supra)* too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.*

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order.

14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

15. Accordingly, the present appeals are dismissed.

23. We therefore in the light of above judgments which are squarely applicable in the issues raised in the instant appeals are of the considered view that the claim of Long Term Capital Gain made by the respective assessee(s) deserves to be allowed as they have entered into the transactions of purchase and sales duly supported by the documents which have not found to be incorrect. The conditions provided u/s 10(38) of the Act have been fulfilled by the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF) as they have sold the equity shares held in Demat account and transactions performed on a recognised stock exchange through registered broker at the price appearing on the exchange portal and at the point of time of sale of equity shares, companies were not marked as shell companies by SEBI and nor the trading of these scrips were suspended. The assessee also deserves to succeed on the legal ground as no opportunity was awarded to cross examination the third person which were allegedly

found to be providing accommodation entries and therefore no addition was called for in the hands of the assessee without providing opportunity of cross examination in view of the ratio laid down by Hon'ble Apex Court in the case of *Andaman Timber Industries vs. CCE 281 CTR 241 (SC)* that *“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”*.

24. We accordingly in view of our above discussions, facts and circumstances of the case and respectfully following judicial precedents and the decisions of Co-ordinate benches squarely applicable on the instant cases, are of the considered view that in the case of the assessee(s) namely Shivnarayan Sharma, Sapan Shaw, Prayank Jain, Govind Harinarayan Agrawal (HUF) and Manish Govind Agrawal (HUF), the claim of exempt income u/s 10(38) of the Act of Long Term Capital Gain from sale of equity

shares deserves to be allowed and no addition is called for the estimated brokerage expenses made in the hands of the assessee(s). Thus finding of Ld. CIT(A) is set aside and the Grounds raised by the assessee(s) in ITA Nos.889/Ind/2018, 474/Ind/2019, 206/Ind/2019, 60/Ind/2019, 61/Ind/2019 and 987/Ind/2019 are allowed.

25. As regards ITA No.987/Ind/2019 in the case of Darshan Kumar Pahwa we note that the assessee had claimed to have incurred Short Term Capital loss at Rs.7,43,099/- from purchase/sale of shares of VAS Infrastructure and VAS animation Ltd. Ld. A.O classified these companies as penny stock company. Ld. A.O has treated this loss as bogus loss and disallowed the same.

26. We however on going through the submissions made by the assessee before the lower authorities and before us note that the alleged loss is actually Short Term Capital Loss and the same has not been set off against any income in the return nor any such loss

has been carried forward. Also similar type of transaction carried out in the case of assessee's mother namely Parvesh Rani Pahwa is claimed to have been accepted by the revenue authorities. Further the basis of addition is the investigation carried out in the case of third parties. No documentary evidence have been brought on record by the revenue to show that the assessee is indulged into such activity. Opportunity of cross examination was also not allowed. We therefore in view of the judgment of Hon'ble Supreme Court in the case of *Andaman Timber Industries vs. CCE (supra)* which is squarely applicable on the case of assessee are of the considered view that the addition of Rs.7,43,099/- is liable to be deleted. We therefore set aside the finding of Ld. CIT(A) and allow ground raised by the assessee namely Darshan Kumar Pahwa.

27. In the result, appeals of the assessee(s) namely Shri Shivnarayan Sharma, Sapan Shah, Prayank Jain, Govind Harinarayan Agrawal (HUF), Manish Govind Agrawal (HUF) & Darshan Kumar Pahwa vide ITANos.889/Ind/2018, 474/Ind/2019,

Shivnarayan Sharma & Ors

ITA Nos. 889/Ind/2018,474,206,60,987/Ind/2019

206/Ind/2019, 60/Ind/2019, 61/Ind/2019 and 987/Ind/2019 respectively are allowed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 28.06.2021.

Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 28.06. 2021
/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore