

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI S. RIFAUZ RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.1462/MUM/2020
(Assessment Year: 2011-12)**

Kamlesh Gupta
59, Mount Unique 62-A,
Peddar Road,
Mumbai – 400 026

Dy. Commissioner of
Income-tax (13)(3)(1)
Room No. 229, Aayakar Bhavan,
M.K. Road,
Mumbai – 400 020

PAN No. AEGPG6788R

(Assessee)

(Revenue)

Assessee by : Shri Hitesh Shah, A.R
Revenue by : Shri Vivek Kanandan, D.R

Date of Hearing : 11/10/2021
Date of pronouncement : 25/11/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 31.10.2019, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 27.12.2016 for A.Y 2011-12. The assessee has assailed the impugned order on the following effective grounds before us:

"GROUND NO. 1 - AGAINST REOPENING THE ASSESSMENT FOR THE YEAR UNDER APPEAL AND ORDER PASSED PURSUANT THERETO.

- a) The Commissioner of Income-tax (Appeals) - 21, Mumbai [hereinafter referred to as "the CIT (A)"] has erred in upholding the reassessment proceedings initiated and conducted by the Assessing Officer ("the AO") on the basis of "borrowed satisfaction" and the order passed by

him, though there was no failure on the part of the appellant to disclose fully and truly all material facts.

- b) The appellant respectfully submits that the AO initiated reassessment proceedings on the basis of suspicion, conjectures and surmises, without any concrete material or evidence to support the same and also without satisfying himself about reliability of the investigation report received by him from the Director of Investigation, Kolkata and applicability of the same to the facts in the case of the appellant.
- c) The appellant, therefore, prays that the very basis of initiating the reassessment proceedings, being vague and unreliable, the said proceedings be held as void ab initio and order passed pursuant thereto be quashed as bad in law.

GROUND NO. 2 - AGAINST DENIAL OF S. 10 (38) EXEMPTION FOR LONG-TERM CAPITAL GAINS OF Rs.5,93,45,030/- FROM SALE OF QUOTED SHARES OF JMD TELEFILMS LIMITED

- a) The CIT (A) has erred in confirming denial of exemption under Section 10(38) of the Act claimed by the appellant, though all the conditions stated in that section are satisfied, by alleging "bogus and manipulated" share prices without leading any evidence in support of such assumption and/or suspicion.
- b) The appellant humbly submits that the transactions of investment in the shares of JMD Telefilms Limited were genuine and real ones, carried out on the recognised stock exchange and executed through proper and valid D'Mat Accounts. Therefore, there can be no doubt about genuineness of such transactions, much less on the basis of any vague and general report.
- c) The appellant prays that since the capital gain had arisen from sale of the shares in which the appellant had actually invested and the transactions were supported by various third party evidences, it can by no stretch of imagination be regarded as bogus or manipulated and since all the conditions of section 10 (38) of the Act are satisfied, the capital gain of Rs.5,93,45,030/- earned from such sale be held as eligible for exemption under that section.

GROUND NO. 3 - AGAINST ADDITION OF Rs. 6,06,49,780/- UNDER SECTION 68 OF THE ACT RELATING TO PROCEEDS FROM SALE OF SHARES IN JMD TELEFILMS LIMITED

- a) The CIT (A) has erred in confirming the addition made by the AO for the entire amount of proceeds received by the appellant from sale of shares in JMD Telefilms Limited as unexplained cash credit under Section 68 of the Act.
- b) The appellant vehemently submits that the addition under Section 68 can be made only if the appellant offers no explanation or the explanation offered by him is not satisfactory. The view taken by the AO is purely based on suspicion, conjecture and surmises, which is not supported by any concrete evidence and without proper appreciation of the explanation offered by the appellant.
- c) The appellant, therefore, prays that the addition of Rs. 6,06,49,780/- for the proceeds received on sale of shares in JMD Telefilms Limited be deleted, as the same are properly explained and the assumption of the AO is not sustainable on facts and in law.

GROUND NO. 4 SECTION 69C OF THE ACT IN RESPECT OF ALLEGED "COMMISSION PAID" FOR SALE OF THE SHARES IN JMD TELEFILMS LIMITED

- a) The CIT (A) has erred in disallowing Rs. 36,38,987/- as alleged commission for sale of shares in JMD Telefilms Limited, though no such commission is actually paid by the appellant nor has he claimed any such deduction.
- b) The appellant very respectfully submits that the AO has disallowed an "imaginary commission payment" for sale of the shares based on suspicion, conjectures and surmises. The sale transactions were carried out by the appellant through Motilal Oswal Securities Limited, the well-known broker registered with recognised stock exchanges and their brokerage/commission is duly charged in their bills which fact is totally ignored. The appellant has not paid any other amount to them or any other party as alleged. Since there is no valid basis or concrete evidence for his assumption about payment of commission for sale of the said shares, such disallowance is not sustainable - on facts and in law.
- c) In the above background, the appellant prays that the disallowance of Rs.36,38,987/- as the imaginary expenditure (by way of commission for sale of the shares in JMD Telefilms Limited), which is neither paid nor claimed by the appellant, be deleted.

GROUND NO. 5 - AGAINST LEVY OF INTEREST OF Rs.1,60,35,802/- UNDER SECTION 234B OF THE ACT

- a) The CIT (A) has erred in confirming interest charged under Section 234B of the Act.
- b) The appellant politely submits that the denial of exemption under Section 10(38) of the Act and additions made by the AO and sustained by the CIT (A) could never have been imagined or predicted by the appellant. Hence, the appellant could not have made payment of advance tax with reference to those amounts.
- c) The appellant further submits that commission, if paid, would have been subject to deduction of income-tax at source under Section 194H of the Act and, consequently, the tax relevant to that amount cannot constitute default in payment of advance tax. Therefore, interest under Section 234B on the amount of tax relevant to that amount cannot be levied.
- d) Further, the appellant is confident that the issues taken up by him in this appeal will be decided in his favour. In that case there will not be any default in payment of advance tax on his part. Consequently, there will be no case for levy of interest under section 234B of the Act.
- e) The appellant, therefore, prays that since the appellant has not defaulted in payment of advance tax, which has to be paid on the estimated "current income" as contemplated in section 209 of the Act (such denial of exemption and additions/disallowances, being not possible to estimate when the advance tax was payable), the charge of interest under section 234B, charged by the AO, be kindly deleted."

2. Briefly stated, the assessee had filed his return of income for A.Y 2011-12 on 30.01.2012, declaring an income of Rs.41,17,920/-. The return of income filed by the assessee was processed

as such u/s 143(1) of the Act. Subsequently, on the basis of information gathered by the A.O that the investigations undertaken by the Directorate of Investigation, Kolkata, inter alia, revealed that the assessee, viz. Shri Kamallesh N. Gupta as a beneficiary had obtained bogus entries of Long Term Capital Gain (LTCG) of a scrip viz. M/s JMD Telefilms Industries Ltd., a penny stock company, the case of the assessee was reopened u/s 147 of the Act. Notice u/s 148 was issued by the A.O on 31.03.2017. In response, the assessee vide his letter dated 25.04.2017 stated that his original return of income filed on 30.01.2012 may be treated as a return filed in response to the aforementioned notice issued u/s 148 of the Act. As requested by the assessee, the A.O vide his letter dated 30.05.2017 made available to him the copy of the 'reasons to believe' on the basis of which his case was reopened u/s 147 of the Act. Objecting to the validity of the jurisdiction assumed by the A.O for reopening of his case the assessee vide a letter dated 16.06.2017 filed his objections. However, the A.O not finding favour with the objections raised by the assessee qua the validity of the reassessment proceedings dismissed the same vide his letter dated 05.07.2017.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee in his return of income had claimed LTCG on sale of shares of a scrip, viz. M/s JMD Telefilms Industries Ltd. (formerly known as Avtar Finance and Management Consultants) and subsequently known as M/s JMD Ventures Ltd. (Scrip Code: 511092) as shown below:

Name of security	Qty	Date of purchase	Purchase amount	Date of sales	Qty	Sales amount	LTCG
JMD Telefilms Inds. Ltd. (Avtar Finance)	35000	26.02.09	59500	01.04.10	35000	2280950	2221450
JMD Telefilms Inds. Ltd. (Avtar Finance)	60000	26.02.09	102000	06.04.20	6000	3695400	3593400
JMD Telefilms Inds. Ltd. (Avtar Finance)	50000	26.02.09	85000	21.04.10	50000	2487500	2402500
JMD Telefilms Inds. Ltd. (Avtar Finance)	110000	26.02.09	187000	20.05.10	110000	9845000	9658000
JMD Telefilms Inds. Ltd. (Avtar Finance)	120000	26.02.09	204000	25.05.10	120000	10650000	10446000
JMD Telefilms Inds. Ltd. (Avtar Finance)	54376	26.02.09	92439	03.06.10	35000	3586800	3527300
JMD Telefilms Inds. Ltd. (Avtar Finance)	35000	26.02.09	59500	08.06.10	35000	3586800	3527300
JMD Telefilms Inds. Ltd. (Avtar Finance)	20000	26.02.09	34000	12.06.10	20000	2089400	2055400
JMD Telefilms Inds. Ltd. (Avtar Finance)	15000	26.02.09	25500	14.06.10	15000	1673100	1647600
JMD Telefilms Inds. Ltd. (Avtar Finance)	10	26.02.09	17	21.06.10	10	1185	1168
JMD Telefilms Inds. Ltd. (Avtar Finance)	41490	26.02.09	70533	22.06.10	41490	4976726	4906193

JMD Telefilms Inds. Ltd. (Avtar Finance)	37000	26.02.09	62900	09.07.10	37000	4449250	4386350
JMD Telefilms Inds. Ltd. (Avtar Finance)	100000	26.02.09	170000	21.10.10	100000	5089000	4919000
JMD Telefilms Inds. Ltd. (Avtar Finance)	89624	26.02.09	152361	22.10.10	89624	4397260	4244899
Total	767500		1304750		767500	60649780	59345030

The A.O vide his notice issued u/s 142(1), dated 13.09.2017 called for certain details w.r.t the LTCG on sale of shares of M/s JMD Telefilms Industries Ltd. that was claimed by the assessee as exempt u/s 10(38) of the Act. Also, notices u/s 133(6), dated 02.11.2017 were issued by the A.O to the so called exit providers i.e the parties who had purchased the scrip of M/s JMD Telefilms Industries Ltd. from the assessee through broker on the floor of BSE, details as regards which a/w the compliance effected by the said respective parties is culled out as under:

Sr. No.	Name of the Parties	Remarks
1.	M/s BP Fintrade P. Ltd.	Reply received on 10.11.2017 stated therein that "We had been dealing through BP Equities P. Ltd."
2.	Shri Dipak Kumar Agarwal	Reply received on 09.11.2017 stated therein that "I do not have any transaction with Shri Kamlesh N. Gupta in shares/securities or otherwise before, during and after A.Y. 2011-12"
3.	M/s Navdurga Investment Consultants P. Ltd.	Reply received on 04.12.2017 stated therein that "Purchased from the stock exchange and no such purchases were made on personal level. No transaction of any sort or means has been carried out with the said individual in respect of whom the notice is sent to us therefore the said point is not applicable to us."
4.	M/s North Eastern Publishing & Advertising Co. Ltd.	Served on the party but till the finalization of the assessment reply was not filed.
5.	Harsh Dhanuka (HUF)	Served on the party but till the finalization of the assessment reply was not filed.
6.	M/s Zodiac Commotrade P. Ltd.	Sent through Postal authorities and same were returned back remarked as "Left".
7.	M/s Neelanchal Mercantile P. Ltd.	Sent through Postal authorities and same were returned back remarked as "Not Known".
8.	M/s Ranisati Dealer P. Ltd.	Sent through Postal authorities and same were returned back remarked as "Not Known".
9.	M/s Runicha Construction Co. P. Ltd.	Sent through Postal authorities and same were returned back remarked as "Left".

Further, the A.O issued summons u/s 131 of the Act for personal attendance of two of the aforementioned exist providers, viz. (i). M/s Runicha Contructions Co. P. Ltd; and (ii). M/s BP Fintrade P. Ltd., which were complied with by the said parties as under:

Sr. No.	Name of the Persons	Remarks
1.	M/s Runicha Construction Co. P. Ltd.	Called for personal attendance on 11.12.2017 and produce the documents and sent through postal authorities and same were returned back remarked as "Left".
2.	M/s BP Fintrade P. Ltd.	Called for personal attendance on 11.12.2017 and produce the documents but reply received on 22.12.2017 stated therein that "We reiterate that the said Kamlesh Gupta is not known to us and we have never dealt with him ever."

Also the A.O summoned the assessee u/s 131 of the Act and recorded his statement on 18.12.2017.

4. After collecting the aforesaid details and carrying out necessary verifications, the A.O deliberated at length on the modus operandi that was adopted by the accommodation entry operators for providing bogus LTCG/STCL entries to various beneficiaries and, concluded, that the LTCG on the sale of shares of M/s JMD Ventures Ltd. shown by the assessee in his return of income was a pre-arranged method that was employed by him to evade taxes in connivance with the operators/brokers/promoters etc. The A.O while arriving at the aforesaid view referred to the statements that were recorded by the investigation wing of the department of certain persons who were stated to have played a role in manipulating the scrip of M/s JMD Telefilms Industries Ltd. for generating bogus LTCG/STCL. Also, the A.O had drawn support from the statement of Shri. Pravin Aggarwal, Director: Gateway Financials Services Ltd., a broker, that was recorded in the course of the survey conducted u/s 133A on the said latter concern. As stated by the A.O, the aforementioned person had in his statement admitted that he was providing accommodation entries of LTCG/STCL in lieu of commission. Also, he had admitted of having provided accommodation entries of M/s JMD Telefilms Industries Ltd. Also, statement of Shri Kailash Purohit, Director of JMD Telefilms Industries Ltd. was recorded u/s 132(4) of the Act. Further, the statement of Shri Dhruv Narayan Jha, promoter of M/s Warner Multimedia Ltd. and Shri Anuj Aggarwal, entry operator, were recorded u/s 131 of the Act during the course of the respective survey operations which were conducted at their office premises u/s 133A on 21.01.2015 and

30.03.2015. Backed by the aforesaid facts, the A.O after carrying out an analysis of the scrip in question, viz. M/s JMD Telefilms Industries Ltd., therein observed that the market price of its share which was Rs.7.93 in October, 2008 was jacked up to Rs.145 in 8 months i.e till June, 2009. It was noticed by the A.O that within a time span of 16 months the price of the share of the aforementioned company in question was jacked up nearly 19 times. As observed by the A.O, the price of the share was thereafter maintained in the range of Rs. 62 to Rs.145, which as per him was with a purpose that the interested beneficiaries were able to book the LTCG on sale of the shares held by them. Thereafter, as noticed by the A.O, the price of the share of the aforementioned company was made to fall freely so that the interested beneficiaries who had purchased at a high market price could avail bogus Short Term Capital Loss. It was observed by the A.O that the price of the shares had thereafter gone down to merely Rs.7.50/-. It was inferred by the A.O that in the course of the aforesaid exercise the LTCG beneficiary would pay cash to exit entry provider or a person who wants to book a loss and in return would get a cheque. The A.O was of the view that the operator would thereafter take his commission qua the aforesaid accommodation entry in cash. Also, he was of the view that thereafter as price of the share would crash the loss taking beneficiary would sell his holding that was purchased at a high value for a small price which would result in an artificial loss. In order to fortify his conviction that the price of the scrip in question viz. JMD Telefilms Industries Ltd. was artificially rigged to facilitate provision of bogus LTCG/STCL the A.O referred to the financials of the assessee company as were gathered by him from the data available in the public domain, as under:

F.Y.	Share capital	Gross Turnover	Expenses	PAT	Earnings Per Share
2009-10	7.01	84.65	84.34	1.55	0.22
2010-11	7.21	99.79	99.99	2.86	0.40
2011-12	7.21	248.39	247.15	1.87	0.26
2012-13	7.21	249.73	250.09	0.71	0.10
2013-14	7.21	381.97	382.06	0.68	0.95
2014-15	14.43	802.79	501.80	0.84	0.06

In the backdrop of the aforesaid 'net worth' of the assessee company which as per the A.O was negligible, it was therein inferred by him that the share prices had been artificially rigged by the group of the operators to accommodate beneficiaries seeking LTCG and STCL. It was observed by

the A.O that no prudent businessman and particularly a trader who was investing in stock would have invested in the scrip of such a company which was defunct and inoperative. Further, the A.O referred to certain infirmities which had emerged from the statement of the assessee that was recorded u/s 131 of the Act on 18.12.2017, viz. that the assessee had no understanding of the company in which he had claimed to have made the investment; that the assessee had never in the past invested as a preferential share allottee; that the assessee did not understand the meaning of preferential allotment and stock split; that the assessee had invested only in a few shares besides M/s JMD Telefilms Industries Ltd and; that the gains claimed by the assessee to have earned from the purchase/sale of shares of M/s JMD Telefilms Industries Ltd. were abnormal. Backed by his aforesaid deliberations, the A.O was of the view that the LTCG shown by the assessee in his return of Income from sale of shares of M/s JMD Venture Ltd. was a result of a pre-arranged method that was employed by him in connivance with the operators/brokers/promoters etc. with the sole intent to evade taxes. The A.O in order to substantiate his aforesaid conviction culled out the reasons for stamping the purchase/sale of shares of M/s JMC Ventures Ltd. as an artificially arranged transaction which was carried out by him in connivance with operators/brokers/promoters etc to evade taxes, as under :

- a. Mode of acquisition of share:** Assessee had purchased 100000 equity shares on preferential basis of M/s JMD Telefilms Industries Ltd. for sRs.17,00,000/- on 26.02.2009. This was an off-market transaction and these shares were later dematerialized. Owing to share split, the number of shares with assessee swelled to 10,00,000 on 13.07.2009. Subsequently, the assessee sold 767500 of these shares on BSE through broker in F.Y. 2010-11.
- b. Sale of shares and unusual rise in the price:** Further the assessee has sold 767500 shares for sale consideration of Rs.6,06,49,780/- which is 4543% gain and as discussed the rise in share prices is not holding to any commercial principles and market factors.
- c. Findings of Investigation wing:** The findings of the Directorate of Investigation as discussed above have proved that several share brokers, entry operators and the assessee had worked out an arrangement in which the shares were acquired by the assessee, the share prices were rigged and then with the help of operators by routing the cash, shares were sold at high price to arrive at tax free capital gains.

- d. **Analysis of transactions:** Facts revealed that such trading transactions of purchase and sale of shares are not been effected, for commercial purpose but to create artificial gains, with a view to evade taxes:-
 - i. Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were product of design and mutual connivance on part of assessee and the operators.
 - ii. The assessee resorted to a preconceived scheme to procure long-term capital gains by way of price difference in share transactions not supported by market factors.
 - iii. Cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bonafide and, hence, impugned long term capital gain is not allowable.
- e. **Failure of Assessee to discharge his onus:** The assessee has not been able to explain the unusual rise and fall of share prices to be natural and based on the market forces. It is evident that such share transactions were closed circuit transactions and clearly structured one.
- f. **Ignorance of the assessee about shares and penny stock companies:** Assessee has failed to show of having any knowledge about the shares traded and having any knowledge about the fundamentals of the penny stock companies.
- g. **Financial analysis of the penny stock companies:** The net worth of the penny stock company is negligible. Even though the net worth of the company and the business activity of the company is negligible the share prices have been artificially rigged to unusual high."

Observing, that considering the findings of the search/survey inquiries conducted in the case of assessee, broker/operators and the entry providers a/w the nature of transaction entered into by the assessee, the A.O was of the view that the LTCG of Rs. 5,93,45,030/- that was claimed by the assessee as exempt u/s 10(38) of the Act did not merit acceptance. Backed by his aforesaid observations, the A.O held the sale proceeds of shares of Rs. 6,06,49,780/- as an unexplained cash credit u/s 68 of the Act. Also, the A.O holding a conviction that the assessee would have paid commission for facilitating the aforesaid transaction of bogus LTCG, thus, made a further addition of Rs.36,38,987/- i.e @6% of the impugned sale proceeds of Rs.6,06,49,780/-. Accordingly, the AO vide his order passed u/s 143(3) r.w.s 147, dated 27.12.2017 assessed the income of the assessee at Rs.6,84,06,690/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that the gain of Rs.5,93,45,030/- derived by the assessee from the sale of share of M/s JMD Telefilms Industries Ltd. was derived from bogus and manipulated share prices which were nothing but unexplained investment/income of the assessee that was converted under the garb of share market investment, the CIT(A) upheld the view taken by the A.O. Accordingly, the CIT(A) sustained the addition of Rs.5,93,45,030/- that was made by the A.O u/s 68 of the Act a/w the addition of Rs.36,68,987/- made by him u/s 69C of the Act. The CIT(A) while upholding the view taken by the A.O held as under:

“10 Decision:

I have considered the facts of the case and submissions made by the appellant. Crux of the matter taken up in the ground of appeal no. 5 to 18 is whether the amount of long term capital gains of Rs.6,06,49,780/- claimed as exempt under Section 10(38) of the Act I. T. Act, 1961 are taxable as unexplained cash credits u/s 68 of the I.T. Act, 1961 and a sum of Rs.36,38,987/- is taxable as unexplained commission u/s 69C of the I.T. Act, 1961 or not in facts of the case and in law. It appears from the records that assessee became owner of 1700000 equity shares of JMD Telefilms by subscription and by splitting up of shares by the company from F.Y. 2009 onwards as follows:

Documentation in support of the transaction undertaken:

Event	Date	Back up document	Annexure
a) 1,00,000 equity shares of JMD Telefilms Ltd. (JMD) Rs.10/- each at premium of Rs.7/- per shares total consideration of Rs.17,00,000/- (1,00,000 shares + Rs.17/-) purchased as a preferential allotment in physical form	26.02.2009	1) share application form along with copy of cheque payment and bank statement; 2) Share allotment letter 3) share certificate	1
b) 1,00,000 shares were converted into demat form via Motilal Oswal Securities.	30.06.2009	Extracts of transaction statement	2(i)
c) The said shares were split in the ratio of 10:1 and hence total number of shares were then 10,00,000	13.07.2009	Extracts of transaction statement	2(ii)
d) Out of the above 10,00,000 shares 1,32,500 shares were sold on which long term capital gain (LTCG) of Rs.1,08,60,974 was earned which was exempt under Sec. 10(38) of the Act.	March 2010	1) Contract notes for relevant shares sold. 2) Transaction statement (extracts) from broker. 3) Copy of bank statement reflecting payment received from against sale of such shares	2(iii)
e) Out of balance shares 8,67,500 shares 1,00,000 shares were transferred to his spouse Mridulla Gupta (MG) (during financial year 2010-11) through an unregistered gift deed.	21.10.2010	4) -	-
f) Balance 7,67,500 shares were sold during the financial year 2010-11 assessment year 2011-12) on which assessee has earned LTCG of Rs.5,93,15,038/- which was exempt under Sec. 10(38) of the Act.	June October, 2010	1) Contract notes for the relevant period. 2) Transaction statement for the said period	Refer Annexure 2(iii)

10.2 Analysis of the purchase and sale of shares reveals that the assessee applied for the shares in January 2009, paid for the shares and was issued shares in February 2009 and dematted the same in June/July 2009. Assessee started selling his shareholding from March 2010 and initially sold 132500 shares in March 2010, transferred 100000 shares to his wife Mrudula Gupta on 31 October 2010 and sold of the balance 767500 shares from April 2010 to October 2010 and claims to have earned sale proceeds of Rs.6,06,49,780/- and derived profits of Rs.5,93,45,030/- which were claimed as exempt under Sec. 10(38) of the I.T. Act. 1961.

10.3 Assessee company and its CAs were specifically informed to file details and documents relating to the bank account copies and copies of utilization of funds, however, the CAs have not filed details and documents, especially copies of bank accounts for the entire financial year 2010-11 relevant to AY 2011-12, however these are not filed till date.

10.4 It appears from the details of share trading account that assessee traded and/or invested in shares of Justdial Company in 2014, that is, two and a half years after the last transaction in the share of JMD Telefilms Limited in October 2010.

10.5 Assessee has not revealed the user of the funds derived from the sale of shares of JMD Telefilms Limited.

10.6 Prima facie it would appear that the share market prices were going up in the shares of JMD Telefilms Limited for persons like the assessee and others who were lucky and fortunate enough to visualise the potential in shares of JMD Telefilms Limited which started going up from March 2010 and collapsed in October 2010 to its original levels, Assessee is a director of several West Coast Group Companies and invested in JMD Telefilms Ltd, Moreover it also appears that ' assessee did not invest his surplus funds during FY 2009-10 relevant to AY 2010-11 in any of the companies in which he was a director but only in this specific company whose antecedents were not even known to him. It is claimed and seen that, assessee and his family members have always invested in the West Group Of Companies and/or in Private Limited Companies promoted by the West Coast Group Companies and/or by the three family members, namely himself, his wife and his son¹ and this policy has continued even after these so called transactions in purchase and sale of shares of JMD Telefilms Limited by the assessee. It appears from the records and internet that assessee and his family members were/are directors of nearly 17 public limited and private limited companies, either promoted by them and/or promoted by their relatives as on the date of this appellate order. Thus this investment of Rs.17 lakhs made in January/February/March 2009 appears to be an aberration where assessee appears to have derived phenomenally abnormal profits by selling share at average prices of 3800% higher than the purchase price within a period of nearly one to one and a half year. Assessee does not appear to have derived such abnormal profits in any of the other investments and in/from any of its West Coast Group / Private Companies till date except in AY 2010-11 and during AY 2011-12.

10.7 Prima facie it appears that assessee wanted funds in bank accounts for either investing in shares of other companies and/or in investing in immoveable properties and/or for some other purposes from March 2010 onwards till October 2010 and hence went ahead with this plan jointly with persons like Purohits and/or others persons/ companies to derive the benefit of availing of claiming tax exemption for long term

capital gains u/s. 10 (38) of the I.T. Act, 1961 and executed it with finesse and hence converted his unexplained income as 'long term capital gains through so called share market operations in shares of JMD Telefilms Limited and claimed tax exemption u/s. 10 (38) of the I.T. Act, 1961. Assessee does not appear to have derived such benefits in later and/or earlier assessment years. This is further confirmed by the statements of the Purohits, the directors and persons associated with the JMD Telefilms limited and the investigations made by the investigation wing of the income tax department at Kolkata. In nutshell, the entire profits of Rs.5,93,45,030/- derived from the so called sale of JMD Telefilms Limited were derived from bogus and manipulated share prices and were nothing but unexplained investments/income of the assessee which was converted under the garb of share market investments and purchase/sale and hence the profits of Rs. 5,93,45,030/-were correctly and legally taxed as income u/s.68 of the I.T. Act, 1961. Assessee does not have any case in this regard and hence its appeals from grounds of appeal no. 5 TO 18 are **dismissed**. Similarly, all such transactions must have been executed at a cost and hence the addition of Rs. 36,38,987/- at the rate of 6% of Rs. Sale price of Rs.6,06,49,780/- u/s, 69C of the I.T. Act, 1961 are also confirmed and assessee's appeal is dismissed on this count as well.

10.8 It is noteworthy to rely on the following judicial pronouncements to decide on the assessee's involvement in the scam of bogus LTCG unearthed by the Kolkata Investigation Wing.

Ratnakar M Pujar Vs ITO [ITAT Mumbai] **ITA No. 995/Mum/2012** dated 03.08.2016. The assessee has purchased 4000 shares of M/s. Shiv Om Investments on 11th May, 2004 for a consideration of Rs.4,080/- and out of the same, 1000 shares were sold on 16th May, 2006 and 2500 shares were sold on 27th January, 2006 for a total consideration of Rs.6,89,750/- and claimed exemption u/s 10 (38). The AO denied the exemption. The ITAT upheld the decision.

Usha Chandresh Shah Vs. ITO [Mumbai ITAT] **IT. A. No.6858/Mum/2011** dated 26.09.2014. The assessee purchased shares of Rs.5.1/- each and sold for Rs.279.57/- each. The AO could not verify the purchase transactions as the notice issued to the person from whom the shares are purchased by the assessee returned unserved. The ITAT held that the test of human probabilities was applied to reject the claim of profit realized on sale of penny stocks.

10.9 Bombay High Court in the case of Sanjay **Bimalchand Jain Vs. Pr.CIT** [ITA 18/2017] recently held;

"The assessee has not tendered cogent evidence to explain how the shares in an unknown company worth Rs.5 had jumped to Rs.485 in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to justify the price rise. The assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. The gain has accordingly to be assessed as undisclosed credit u/s. 68".

10.10 In view of the facts mentioned above and also the case laws cited above, the additions of Rs.5,93,45,030/- made by the AO u/s.68 and Rs.36,38,987/- u/s.69C are confirmed and the grounds of appeal of the appellant no. 5 to 18 are **dismissed**."

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We have heard the Id. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. As the assessee has assailed the validity of the jurisdiction assumed by the A.O for reopening his case under Sec. 147 of the Act, therefore, we shall first deal with the maintainability of the said claim. As is discernible from the records, information regarding bogus LTCG/STCL and its beneficiaries was uploaded by the Directorate of Systems, which in turn was based on the in-depth investigations that were carried out by the Directorate of Investigation, Kolkata. As stated by the A.O, the name of the assessee had figured in the list of the beneficiaries of bogus LTCG/STCL. On the basis of the aforesaid information the case of the assessee was reopened by the A.O u/s 147 of the Act. The reasons to believe on the basis of which the case of the assessee was reopened read as under :

“2. The Directorate of Investigation, Kolkata, has undertaken an in-depth investigation into the accommodation entry activity that has taken place in Long Term Capital Gain (LTCG)/Short Term Capital Loss (STCL) on a larger scale. As a result, numerous beneficiaries of bogus transactions have been identified who have altogether availed the benefit of huge value of bogus entries of LTCG/STCL. In the investigations carried out by the Investigation Directorates, the approach was to target the individuals and thereafter identify the penny stocks and eventual beneficiaries. This method yielded substantial results and penny stocks were identified. The data which was procured during the course of Search and Survey action conducted on various penny stocks at several locations all over the country has been processed painstakingly and it was found that the entry operators pre-arranged the bogus LTCG to evade tax for various beneficiaries. During the course of such search and survey, the operators of the penny stocks companies are found to have devised a modus operandi to reap the bogus LTCG to evade tax.

3. All such data related to bogus LTCG/STCL and its beneficiaries have been uploaded by the Directorate of Systems. From a perusal of the same, it is noticed that the name of assessee KAMLESH NEMICHAND GUPTA figures in this data. Further, a company, namely M/s JMD Telefilm, is declared to be a scrip in which bogus trade was carried out for availing bogus LTCG/STCL. The transactions shown against the assessee in the same data are that the assessee has sold the shares of M/s JMD Telefilm. During the assessment year under consideration, the assessee has sold the shares of M/s JMD Telefilm. During the assessment year under consideration, the assessee has sold the shares of M/s JMD Telefilm. During the assessment year under consideration, the assessee has sold the shares of aforesaid scrip amounting to Rs. 6,09,55,512/- and claimed Long Term Capital Gain amounting to Rs. 5,95,15,091/- in his return of income for A.Y 2011-12. M/s JMD Telefilm is scrip listed on BSE/NSE and was established that

the same is a 'Penny Stock' and was used for artificial trading. This finding has been given by the Investigation Directorate after recording statements of various persons like promoters/operators/brokers connected with transactions of this scrip at various places located across India.

4. Taking into consideration the investigation done by the Investigation wing of Income-tax department and in depth analysis of data by undersigned, I believe that KMLESH NEMICHAND GUPTA has availed bogus entry of long term capital gain through unfair means.

5. In view of the above facts, I have reason to believe that the income of at least Rs. 5,95,15,091/- chargeable to tax has escaped assessment for A.Y 2011-12 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year and it is fit case for issuing notice u/s 148 of the Income Tax Act, 1961."

Before us, the Id. Authorized Representative (for short "A.R") for the assessee has assailed the validity of the jurisdiction assumed by the A.O for reopening the case of the assessee on two fold reasons, viz. (i) that the case of the assessee had been reopened on the basis of borrowed satisfaction of the Directorate of Investigation, Kolkata; and (ii). that the reassessment proceedings had been initiated on the basis of suspicion, conjectures and surmises, without there being any concrete material or evidence to support the same. Per contra, it is the claim of the Id. Departmental Representative (for short "D.R") that as the A.O had after duly applying his mind to the information pertaining to bogus LTCG/STCL as was uploaded by the Directorate of Systems arrived at a bonafide belief that the income of the assessee chargeable to tax had escaped assessment, therefore, no infirmity emerges from the assumption of jurisdiction for reopening of the assessee's case by the A.O. Id. D.R in order to drive home his aforesaid claim took us through the 'reasons to believe' on the basis of which the case of the assessee was reopened by the A.O u/s 147 of the Act.

7. After hearing at length the Id. authorized representatives for both the parties qua the aforesaid issue in hand, we are unable to persuade ourselves to subscribe to the contentions advanced by the Id. A.R as regards the validity of the jurisdiction assumed by the A.O for reopening the case of the assessee under Sec. 147 of the Act. As stated by the Id. D.R, and rightly so, as is discernible from the 'reasons to believe' the case of the assessee was reopened by the A.O after duly applying his mind to the information pertaining to bogus LTCG/STCL that was

uploaded by the Directorate of Systems (wherein the assessee's name had figured as one of the beneficiaries) and, arriving at a bonafide belief that the income of the assessee chargeable to tax had escaped assessment. Insofar the claim of the Id. A.R that the case of the assessee had been reopened on the basis of a 'borrowed satisfaction', we find the same to be devoid and bereft of any substance. On a perusal of the 'reasons to believe', we find that the A.O after referring to the information pertaining to bogus LTCG/STCL that was uploaded by the Directorate of Systems, which in turn was based on the in-depth investigations carried out by the Directorate of Investigation, Kolkata, had observed, that the name of the assessee figured as one of the beneficiary of the bogus LTCG/STCL. Backed by the aforesaid information and analyzing the data, we find that the A.O had arrived at a bonafide belief that at least the LTCG of Rs. 5,95,15,091/- which the assessee in his return of income had claimed to have earned from sale of shares of M/s JMD Telefilm Industries Ltd., had escaped assessment, by reason of the failure on his part to disclose fully and truly all material facts necessary for assessment. In the backdrop of the aforesaid factual position, we are unable to comprehend as to on what basis it is claimed by the Id. A.R that that A.O had reopened the case of the assessee on the basis of a borrowed satisfaction and/or on the basis of suspicion, conjectures and surmises, de hors any concrete material. As observed by us hereinabove, the A.O had before him sufficient material/information on the basis of which he had arrived at a bonafide belief that the income of the assessee chargeable to tax had escaped assessment. We may herein observe that at the stage of reopening of a case u/s 147 of the Act, the A.O is only required to have a cause or justification to know or suppose that income of the assessee chargeable to tax had escaped assessment and, no obligation is cast upon him to have finally ascertained the said fact by legal evidence or conclusion. Our aforesaid view is as per the mandate of the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500, wherein the Hon'ble Court had observed as under :

16. Sec. 147 authorises and permits the AO to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally

ascertained the fact by legal evidence or conclusion. The function of the AO is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. vs. ITO* (1991) 98 CTR (SC) 161 : (1991) 191 ITR 662 (SC), for initiation of action under s. 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction [see *ITO vs. Selected Dalurband Coal Co. (P) Ltd.* (1996) 132 CTR (SC) 162 : (1996) 217 ITR 597 (SC); *Raymond Woollen Mills Ltd. vs. ITO* (1999) 152 CTR (SC) 418 : (1999) 236 ITR 34 (SC)]".

On the basis of the facts of the case before us read a/w the settled position of law, we are of the considered view that the A.O had validly assumed jurisdiction u/s 147 of the Act and reopened the case of the assessee. We, thus, finding no infirmity in the validity of the jurisdiction assumed by the A.O for reopening the case of the assessee u/s 147 of the Act, uphold the same. The **Ground of appeal No. 1** is dismissed.

8. We shall now advert to the claim of the assessee that the lower authorities had erred in declining the assessee's claim for exemption u/s 10(38) of LTCG of Rs. 5,93,45,030/- on sale of quoted shares of M/s JMD Telefilms Industries Ltd., and had further erred in adding the sale proceeds of Rs. 6,06,49,780/- as an unexplained cash credit u/s 68 of the Act. Controversy involved in the present appeal hinges around the declining of the assessee's claim for exemption of the LTCG of Rs. 5,93,45,030/- on sale of shares of M/s JMD Telefilms Industries Ltd. [formerly known as Avtar Finance and Management Consultants) and subsequently known as M/s JMD Ventures Ltd. (Scrp Code : 511092) u/s 10(38) of the Act. Shorn of unnecessary details, the assessee had in his return of income for the year under consideration claimed to have sold 7,67,500 shares of M/s JMD Ventures Ltd. for a consideration of Rs. 6,06,49,780/- after holding the same for a period of more than 1 year. Long Term Capital Gain (LTCG) of Rs. 5,93,45,030/- on the aforesaid sale transactions was claimed by the assessee as exempt u/s 10(38) of the Act.

Information was gathered by the A.O from the data related to bogus LTCG/STCL that was uploaded by the Directorate of Systems, which in turn was based on the in-depth investigations as regards accommodation entry activities qua bogus LTCG/STCL carried out by the Directorate of Investigation, Kolkata, wherein the name of the assessee is stated to have figured as a beneficiary of such bogus transactions. Backed by the aforesaid information the case of the assessee was reopened by the A.O u/s 147 of the Act. After deliberating at length on the facts of the case, the A.O in the course of the reassessment proceedings dubbed the assessee's claim of LTCG as an accommodation entry and added the entire sale consideration of Rs. 6,06,49,780/- as an unexplained credit u/s 68 of the Act. Also, the A.O made a further addition u/s 69C of Rs. 36,38,987/- i.e @6% of the amount of the sale proceeds of shares towards unaccounted commission which as per him the assessee would have paid for obtaining the aforesaid accommodation entry. Accordingly, the A.O vide his order u/s 143(3) r.w.s 147, dated 27.12.2017 assessed the income of the assessee at Rs. 6,84,06,690/-.

9. As observed by us hereinabove, the case of the assessee was reopened by the A.O on the basis of information that was gathered by him from the data related to bogus LTCG/STCL that was uploaded by the Directorate of Systems, which in turn was based on the in-depth investigations as regards accommodation entry activities qua bogus LTCG/STCL carried out by the Directorate of Investigation, Kolkata, wherein the name of the assessee was stated to have figured as a beneficiary of bogus LTCG of Rs. 5,95,15,091/- on sale of shares of M/s JMD Telefilms Industries Ltd, a penny stock company. On a perusal of the return of income, it was observed by the A.O that the assessee during the year had claimed to have sold 7,67,500 shares of M/s JMD Telefilms Industries Ltd. for a consideration of Rs. 6,06,49,780/- on which he had earned a LTCG of Rs. 5,93,45,030/-. As is discernible from the orders of the lower authorities, we find that the A.O in order to verify the authenticity of the aforesaid tainted transaction of sale of shares of M/s JMD Telefilms Industries Ltd. had issued notices u/s 133(6) to 9 parties who had purchased the scrip of M/s JMD Telefilms Industries Ltd. from the assessee through broker on the floor of BSE. Out of the aforesaid parties in case of six parties either the notices issued by the A.O u/s 133(6) were returned back unserved or were not replied, while for the balance three parties complied with the

said notices and either declined of having carried out any transaction with the assessee ; or stated that they had purchased the shares from the stock exchange and had not made any purchase on any personal level from the assessee. The replies furnished by the aforementioned three parties in compliance to notices issued to them u/s 133(6), read as under :

Sr. No.	Name of the Parties	Remarks
1.	M/s BP Fintrade P. Ltd.	Reply received on 10.11.2017 stated therein that "We had been dealing through BP Equities P. Ltd."
2.	Shri Dipak Kumar Agarwal	Reply received on 09.11.2017 stated therein that "I do not have any transaction with Shri Kamlesh N. Gupta in shares/securities or otherwise before, during and after A.Y. 2011-12"
3.	M/s Navdurga Investment Consultants P. Ltd.	Reply received on 04.12.2017 stated therein that "Purchased from the stock exchange and no such purchases were made on personal level. No transaction of any sort or means has been carried out with the said individual in respect of whom the notice is sent to us therefore the said point is not applicable to us."

The A.O further issued summons u/s 131 of the Act to two of the aforementioned parties who had purchased the scrip of M/s JMD Telefilms Industries Ltd. from the assessee, viz. (i). M/s Runicha Construction Co. P. Ltd; and (ii). M/s BP Fintrade P. Ltd. Although, the notice u/s 133(6) sent to M/s Runicha Construction P. Ltd. was as in the past returned unserved, however, the other party, viz. M/s BP Fintrade P. Ltd. vide its reply dated 22.12.2017 reiterated that the assessee was not known to it and it had never dealt with him ever. In fact, to the extent information was gathered by the A.O from some of the purchasers of the scrip of M/s JMD Telefilms Industries Ltd., the same revealed that they had purchased the aforesaid shares from the stock exchange and had no link with the assessee. In the backdrop of the aforesaid facts, we find, that it remains as a matter of fact borne from the record that the A.O had failed to establish any nexus between the aforementioned parties who through their broker had purchased the scrip of M/s JMD Telefilms Industries Ltd. from the assessee on the floor of BSE. Although the A.O while referring to the modus operandi that was adopted by the entry providers for providing bogus LTCG/STCL, had observed, that a LTCG beneficiary pays cash to an exit entry provider or a person who wants to book a loss and in return gets the cheque and, as prices crash, the loss taking beneficiary sells these shares bought at high value for small value resulting in artificial loss, but then, as observed

by us at length hereinabove, he had failed to establish any nexus between the assessee and the parties who had purchased the shares from the assessee through a broker on the floor of BSE, which allegedly as per the A.O were exit providers or loss taking beneficiaries. In sum and substance, as the A.O had failed to prove that the assessee was a part of a chain, wherein he as a beneficiary had obtained an entry of bogus LTCG, while for the party who had purchased the shares from him was either a loss taking beneficiary or an exit provider, therefore, the very foundation of his allegation that the assessee as a beneficiary had obtained bogus LTCG does not hold ground.

10. On a perusal of the orders of the lower authorities, we find, that it is the claim of the A.O that as per the information received from the Directorate of Investigation, Kolkata, M/s JMD Telefilm Industries Ltd., a scrip listed on BSE/NSE, as per the statements of various persons like promoters/operators/brokers etc. who were connected with the transactions of the said scrip at various places located across India, was a penny stock company, that was used for artificial trading. During the course of the assessment proceedings, the A.O after referring to the modus operandi that was adopted by accommodation entry providers for providing bogus LTCG/STCL entries to the beneficiaries had referred to a list comprising of 28 brokers/6 operators/2 promoters who as per the information made available to him by the Directorate of Investigation, Kolkata had played a role in manipulating the scrip of M/s JMD Telefilms Industries Ltd. Out of the aforementioned list of persons the A.O recorded the statements of a select few, viz. (i). Shri. Pravin Kumar Agarwal, Entry Operator; (ii). Shri. Dhruv Narayan Jha, Promoter; (iii). Shri. Kailash Purohit, Promoter; and (iv). Shri. Anuj Aggarwal, Broker. On a perusal of the respective statements of the aforementioned persons (which forms part of the assessment order), we find that in neither of the said statements any allegation as regards obtaining of any accommodation entry by the assessee, viz. Kamlesh Nemichand Gupta finds any mention. In fact, in neither of the said statements the name of the assessee had even figured. For a fair appreciation of the statements of the aforementioned respective persons we deem it fit to briefly cull out the contents of the same, as under :

(A) Shri. Pravin Kumar Aggarwal :

Statement of Shri. Pravin Kumar Aggarwal, stated by the A.O to be an entry operator, was recorded in the course of the survey proceedings conducted u/s 133A of the Act. It was admitted by him that he in lieu of commission was engaged in providing bogus share capital, bogus billing, bogus sub-contract, bogus commission, accommodation entries, purchase and sale of un-quoted shares .

(B). Shri. Dhruv Narayan Jha :

Statement of Shri. Dhruv Narayan Jha, Promoter of JMD Telefilms Industries Ltd. was recorded by the DDIT(Inv.), Kolkata on two occasions on 21.01.2015, viz. (i). In the course of survey conducted u/s 133A on M/s Warner Multimedia Ltd, Kolkata; and (ii). In the course of the survey conducted u/s 133A on M/s Blue Circle Services Ltd. It was stated by him that he was working as an accountant with the group companies of B.C Purohit & Company which were controlled and managed by S/sh. Jagdish Prasad Purohit & Sushil Kumar Purohit and was in receipt of salary of Rs. 15,000/- p.m from M/s Warner Multimedia Ltd., a company in which he was a director. It was further stated by him that he was as per the directions of Shri. Jagdish Purohit made a dummy director in M/s Warner Multimedia Ltd. and also many other companies. On being queried as regards the use of his e-mail id for filing of the returns in ROC/Income-tax department of 259 companies (including JMD Telefilms Industries Ltd.), he had stated that the same was done as he was working as an employee with the group companies of S/shri. Jagdish Purohit & Sushil Purohit.

(C). Shri. Kailash Prasad Purohit :

Statement of Shri. Kailash Prasad Purohit, Director of JMD Telefilms Industries Ltd. was recorded in the course of the search proceedings u/s 132(4) of the Act on 21.01.2015. It was stated by him that he was director in 22 companies (including JMD Telefilms Industries Ltd). It was further stated by him that he was looking after the audio/video CD & DVD business of JMD Telefilms Industries Ltd. In fact, it was stated by him that except for financial activities he was looking after the other business activities of JMD Telefilms Industries Ltd. On being queried as regards the modus operandi that was adopted for providing accommodation entries a/w the beneficiary companies to

whom the same were provided, he refrained from answering the same and stated that the same would be explained by Shri. Jagdish Purohit.

(D). Shri. Anuj Aggarwal :

Statement of Shri. Anuj Aggarwal, broker, was recorded u/s 131 of the Act on 21.03.2015 by the DDIT(Inv.), Kolkata during the course of the survey conducted u/s 133A on certain concerns, viz. M/s Korp Securities Ltd.; M/s Divyadrishti Traders Pvt. Ltd; and M/s Divyadrishti Merchants Pvt. Ltd. It was stated by him that he was engaged in the business of share trading & share broking through Korp Securities Ltd. On being queried as regards the nature of the business activities carried out by the companies in which he was a director, viz. Korp Securities Ltd; Asteroids Infra LLP; and Silky Moon Infra LLP, it was stated by him that while for Korp Securities Ltd. was a share trading company, no actual business was being carried out by the other companies which were created for the sole purpose of providing accommodation entries in form of LTCG to various beneficiaries. On being further queried about the names of the listed companies/scrips in which he was providing accommodation entries of LTCG, he gave names of 20 companies which also included the name of JMD Telefilms Industries Ltd.

On a perusal of the aforesaid statements of the abovementioned promoters/broker/entry operator a common aspect that emerges therefrom, as stated by the Id. A.R, and rightly so, is that neither of them had at any stage ever alleged that the assessee, viz. Shri. Kamlesh Nemichand Gupta had taken any accommodation entry of bogus LTCG. In fact, the name of the assessee had not even figured at all in the statements of either of the aforementioned persons. In the backdrop of the aforesaid facts, we are of the considered view that the specific observation of the A.O recorded in the assessment order, i.e *“the findings of the Directorate of Investigation, Kolkata, proved that several share brokers, entry operators and the assessee had worked out an arrangement as per which shares were acquired by the assessee, the share prices were rigged and then with the help of operators by routing the cash the shares were sold at a high price to arrive at tax free capital gains”* remain seriously unproved and is nothing less than an allegation raised in the thin air. Alternatively, we may herein observe, that insofar the statements of Shri. Anuj Agarwal (supra) and Shri. Jagdish Purohit, promoter (though retracted on 30.01.2015), are concerned, wherein they had

stated that JMD Telefilms Industries Ltd. was used for providing accommodation entries to the beneficiaries, we find substance in the contention of the Id. A.R that as the said respective statements were recorded in the year 2015 and there was no mention of the period when the said company was used for providing accommodation entries, therefore, no adverse inferences could safely be drawn as regards the transaction of purchase/sale of shares of JMD Telefilms Industries Ltd. by the assessee which were purchased by him on 26/02/2009 under the SEBI approved process of preferential issue, at the rates arrived at a formula laid down by SEBI, and were thereafter sold by him way back between the period 01/04/2010 to 22/10/2010. Be that as it may, we may herein observe, that though nothing incriminating in context of the assessee emerges from the statements of the aforementioned persons, however, as stated by the Id. A.R, and rightly so, the said statements could not have been pressed into service by the A.O for drawing of adverse inferences against the assessee without confronting the same to him a/w affording of an opportunity to cross-examine the said persons. In this regard, it would be relevant and pertinent to point out that the assessee vide his letter dated 18.03.2020 (Page 71 of 'APB') had specifically requested for full legible copies of the statements of all the 32 parties that were relied upon by the A.O. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC). In its aforesaid judgment, it was observed by the Hon'ble Apex Court that not allowing the assessee to cross-examine witnesses by the Adjudicating Authority though statements of those witnesses were made as basis of the impugned order amounted to a serious flaw which rendered the impugned order nullity as it amounted to violation of principles of natural justice.

11. We shall now advert to the documentary evidence/material that was placed on record by the assessee in order to drive home his claim of having carried out genuine transactions of purchase/sale of shares of JMD Telefilms Industries Ltd. As is discernible from the orders of the lower authorities, we find that the assessee had on 26.02.2009 by way of an off-market transaction purchased one lac equity shares of JMD Telefilms Industries Ltd. of a face value of Rs.10/- each at a premium of Rs. 7/- per share i.e for a total consideration of Rs. 17 lac by way of a preferential allotment in physical form. The payment of the purchase consideration of Rs. 17 lac was made by

the assessee vide account payee Cheque no. 168253, dated 15.01.2009 drawn on his Saving Bank A/c No. 06130100003249 with Bank of Barod, Branch: Mittal Tower, Nariman Point, Mumbai in favour of JMD Telefilms Industries Ltd. Our attention was drawn by the Id. A.R to the copy of the share application form, copy of the bank account a/w the copy of the cheque vide which payment of the purchase consideration of the aforementioned shares was made. Also, the assessee had filed before the lower authorities the copy of the share allotment letter and share certificate as regards allotment of one lac shares bearing distinctive nos. 3214601 to 3314600. On 30.06.2009 the one lac shares were dematerialized by the assessee via Motilal Oswal Securities. Thereafter, the aforesaid shares were split in the ratio of 10:1 and the assessee had 10 lac shares. Out of the 10 lac shares the assessee had in March, 2010 i.e in the period relevant to the immediately preceding year sold 1,32,500 shares and the LTCG arising on the same was claimed by him as exempt u/s 10(38) of the Act. On a specific query by the bench as regards the treatment given by the department to the LTCG on sale of 1,32,500 shares of JMD Telefilms Industries Ltd. by the assessee in the immediately preceding year i.e A.Y 2010-11, it was submitted by the Id. A.R that the department had on a similar footing declined the assessee's claim for exemption u/s 10(38) of the LTCG arising from the sale of shares during the said year and, had added the sale consideration of shares as an unexplained cash credit u/s 68 of the Act. It was submitted by the Id. A.R that the assessee had challenged the said assessment order and the same as on date is pending before the CIT(A). Out of the balance 8,67,500 shares the assessee had transferred 1,00,000 shares to his wife Mrs. Mridulla Gupta through an unregistered gift deed. The balance 7,67,500 shares were sold by the assessee during the year under consideration i.e over the period June, 2010 to October, 2010 and the LTCG of Rs. 5,93,15,038/- arising therefrom was claimed by him as exempt u/s 10(38) of the Act. Copies of the contract notes and the transaction report of Motilal Oswal Securities Ltd. evidencing the aforesaid transaction of sale of shares was filed by the assessee before the lower authorities. As regards the initial off-market purchase of one lac shares of JMD Telefilms Industries Ltd. by the assessee, we may herein observe that an off-market transaction for purchase of shares is not illegal. As observed by us hereinabove, the purchase transaction of shares was carried out by the assessee vide account payee cheque and the sale of shares have suffered STT, service tax, total turnover tax, stamp duty charge etc. As is discernible

from the orders of the lower authorities, we find that neither of them had dislodged the authenticity of the aforesaid documentary evidence that was filed by the assessee to support his claim of having carried out genuine transactions of purchase/sale of shares of JMD Telefilms Industries Ltd.

12. As stated by the Id. A.R, and rightly so, the observations of the A.O are found to be more or less backed by information received by him from the Directorate of Investigation, Kolkata and the unsubstantiated statements of third parties who are not connected with the assessee. Insofar the third party statements relied upon by the A.O are concerned, the same, as observed by us hereinabove, do not raise any allegation qua the authenticity of the transactions of purchase/sale of shares of JMD Telefilms Industries Ltd. by the assessee. Also, the A.O instead of disproving the contents of the aforesaid documentary evidence that were filed by the assessee in support of his claim of having made genuine purchase/sale of shares in question, had rather in disregard of the same chosen to remain guided by assumptions, presumptions, surmises and principles of preponderance of human probabilities. Insofar the observation of the A.O that the statement of the assessee recorded u/s 131 of the Act in the course of the assessment proceedings revealed, viz. that the assessee had no understanding of the company in which he had claimed to have made the investment; that the assessee had never in the past invested as a preferential share allottee; that the assessee did not understand the meaning of preferential allotment and stock split; and that the assessee had invested only in a few shares besides M/s JMD Telefilms Industries Ltd., are observations which though would reveal that the assessee was not that well informed about the stock market, but then, we are afraid that the said fact on a standalone basis cannot justify holding the transaction of purchase/sale of shares by the assessee as a bogus transaction. At this stage, we may herein observe or in fact not lose sight of the fact, that as observed by the CIT(A), the assessee is a director of several West Coast Group Companies and he and his family members were/are directors in 17 public limited and private limited companies which are either promoted by them and/or promoted by their relatives. As regards the observations of the A.O that the information received from the Directorate of Investigation, Kolkata revealed the modus operandi that was adopted by the promoters/operators/brokers a/w the beneficiaries for obtaining bogus LTCG/STCL entries, we find that the same are only in the nature of general observations and the

same on a standalone basis in the absence of any material/evidence proving that the assessee had colluded with the promoters/brokers/operators for laundering his unaccounted money in the garb of tax exempt LTCG, cannot justify drawing of any adverse inferences as regards the transaction of purchase/sale of shares in question by the assessee. As is discernible from the assessment order, one of the major aspect that had weighed in the mind of the A.O for stamping the transaction of purchase/sale of shares of JMD Telefilms Industries Ltd. by the assessee as a structured transaction with a purpose of facilitating tax evasion in the garb of a bogus claim of tax exempt capital gain u/s 10(38) of the Act and laundering of his ill-gotten money; was the fact that within a short span there was a steep rise in the price of shares of JMD Telefilms Industries Ltd., i.e by 19 times in 8 months i.e from Rs. 7.93 in October, 2008 to Rs. 145 in June, 2009, which trade pattern of the aforesaid company as per the A.O did not move along with the commercial principles and market factors; and the financials of the company also did not show any reason for the extraordinary performance of its stock. In our considered view, though the aforesaid data gathered by the A.O being based on the facts cannot be faulted on our part, but we are unable to persuade ourselves to concur with him that for the said reason the assessee is to be held to have evaded taxes and laundered his unaccounted money by booking a bogus claim of LTCG that is exempt u/s 10(38) of the Act. Although, the A.O had at length discussed in his order the information that was shared with him by the Investigation wing of Kolkata i.e the modus operandi adopted by beneficiaries with the help of entry operators to obtain tax free capital gains, however, we are afraid that nothing concrete has been brought on record which would prove to the hilt the falsity of the assessee's claim of having carried out genuine transactions of purchase/sale of shares under consideration, and therein prove that he in the garb of a bogus transaction had only procured a bogus entry of capital gain. On the contrary, we find that the assessee had duly substantiated the purchase of shares under consideration on the basis of supporting documentary evidence. Admittedly, the assessee had paid for the purchase consideration of the shares to the company, viz. JMD Telefilms Industries Ltd. through account payee cheque, and the said fact had duly been substantiated by him by placing on record the copy of the cheque a/w copy of his bank account reflecting the said transaction. Further, we find that the aforesaid one lac shares of JMD Telefilms Industries Ltd which were purchased by the assessee by way of a preferential allotment on the

basis of an off-line transaction were thereafter dematerialized by him on 30.06.2009 via Motilal Oswal Securities Limited and were thus credited in the said account much prior to their sale. Thereafter, the aforesaid one lac shares were split in the ratio of 10:1 and the total number of shares increased to 10 lac. Out of the 10 lac shares, the assessee after selling 1,32,500 shares in the immediately preceding year was left with 8,67,500 shares. Out of the 8,67,500 shares the assessee had during the year under consideration gifted 1,00,000 shares to his wife Smt. Mridulla Gupta. The balance 7,67,500 shares were sold by the assessee on the floor of BSE through his broker Motilal Oswal Securities Limited for a consideration of Rs. 6,06,49,780/-. Backed by the substantial documentary evidence filed by the assessee which beyond doubt substantiates the genuineness of the transaction of purchase and sale of shares of JMD Telefilms Industries Ltd. by him, we are afraid that the unsubstantiated claim of the A.O that the assessee had converted his unaccounted money by taking fictitious LTCG in a pre-planned manner cannot be accepted. At this stage, we may herein observe, that the very basis adopted by the CIT(A) for sustaining the view of the A.O that the assessee had obtained a bogus entry of LTCG, viz. that the assessee had only after a period of 2 ¼ years i.e in the year 2014 invested in shares of another company, i.e Justdial company; that the assessee had not revealed the user of the sale proceeds of the shares of JMD Telefilms Industries Ltd; that the assessee did not derive such gain from purchase/sale of shares in the preceding/succeeding years; that why did the assessee not invest the surplus funds in the any of the companies in which he was a director and had invested the same in a company whose antecedents were not even known to him, are observations wherein the CIT(A) had tried to put himself in the arm chair of the assessee and indirectly had called for an explanation as to why the investments were not made by him or; if they were so made, then, why they were not made in a desired manner. At this stage, we may herein observe that the prudence of the assessee qua the manner of making of investments remains his sole prerogative and cannot be interfered with by the department. Insofar the invoking of the principle of preponderance of human probability is concerned, the same, in our considered view would come into play after disproving and dislodging to the hilt the documentary evidence that had been placed on record by the assessee to substantiate the genuineness of the transaction of purchase/sale of shares in question. Our aforesaid view that in the absence of any evidence, whatsoever, to allege that money had changed

hands between the assessee and the broker or any other person, or that some person provided the entry to convert unaccounted money for getting benefit of LTCG, the unsubstantiated claim of the department that the assessee had taken recourse to a structured transaction for evading his taxes and laundering his unaccounted money in the garb of exempt LTCG u/s 10(38) of the Act, cannot be accepted, is supported by the judgment of the Hon'ble High Court of Delhi in the case of Pr. CIT & Ors. Vs. Krishna Devi & Ors. (2021) 110 CCH 9 (Del). In its aforesaid order it was observed by the Hon'ble High Court, as under :

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 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 conjectures 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 provision 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."

Also, a similar view had been taken by the Hon'ble High Court of Bombay in the case of *CIT Vs. Shyam R. Pawar (2015) 229 Taxman 256 (Bom)*. In its aforesaid judgment, the Hon'ble High Court referring to the facts of the case before them observed, that while for the department had extensively referred to the correspondence and the contents of the report of the Investigation, what was however important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. It was observed by the Hon'ble High Court, that if the purchase and sale of shares that were reflected in the assessee's de-mat account were to be termed as arranged transactions, and projected to be real, then, such conclusion of the CIT(A) and the A.O required a deeper scrutiny. It was further observed that the Tribunal had rightly concluded that there was something more which was required, which would connect the assessee to the transactions and which are attributed to the Promoters/Directors of the two companies. Observing,

that the Tribunal after extensively referring to certain facts/documents, viz. the sale of 20,000 shares of Mantra Online Ltd for a total consideration of Rs.25,93,150/- by the assessee a/w the details as to how they were sold, on what dates and for what consideration, and the fact that the sale consideration was received vide account payee cheques; copy of de-mat account of the assessee showing the share transactions; contract notes of the brokers (which are system generated documents prescribed by the stock exchange) giving details of transactions; the Hon'ble High Court observed that the Tribunal had rightly concluded that the transaction of purchase/sale of shares was not an accommodation transaction for conversion of cash into accounted or regular payment. Insofar the discrepancy as pointed out by the stock exchange as regards the client code was concerned, the Hon'ble High Court upheld the view taken by the Tribunal that the same would not suffice to prove that the share transactions were bogus or sham.

13. We, thus, in the backdrop of our aforesaid deliberations are of the considered view that de hors any cogent material made available on record by the department which would prove to the hilt that the assessee had not carried out any genuine transaction of purchase/sale of shares of JMD Telefilms Industries Ltd. and, in the garb of bogus entry of a tax exempt LTCG u/s 10(38) of the Act, laundered his unaccounted money, the assessee's duly substantiated claim of having carried out genuine transaction of purchase/sale of shares of JMD Telefilms Industries Ltd. which is duly supported by him on the basis of documentary evidence, could not have been dislodged. Accordingly, for the reasons discussed at length by hereinabove, not finding favour with the view taken by the lower authorities, we herein set-aside the orders of the lower authorities qua treating the transaction of purchase/sale of shares of JMD Telefilms Industries Ltd. by the assessee as a bogus transaction and, consequently vacate the addition made by the A.O under Sec. 68 of Rs. 6,06,49,780/-. The **Grounds of appeal Nos. 2 & 3** are allowed in terms of our aforesaid observations

14. As we have held the transaction of purchase/sale of shares of JMD Telefilms Industries Ltd by the assessee as a genuine transaction, therefore, the addition made by the A.O u/s 69C of Rs. 36,38,987/- towards alleged commission which the assessee as per him would have paid for

facilitating the bogus transaction of purchase/sale of shares has to meet the same fate and, is resultantly vacated. The **Ground of appeal No. 4** is allowed in terms of our aforesaid observations

15. The assessee has further assailed the levy of interest u/s 234B of the Act. As the levy of interest as per the judgment of the Hon'ble Supreme Court in the case of CIT vs. Anjum M.H Ghaswala (2002) 252 ITR 1 (SC) is mandatory, therefore, the A.O is directed to rework out the same while giving appellate effect to our order. The **Ground of appeal No. 5** is allowed for statistical purposes in terms of our aforesaid observations.

16. Resultantly, the appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 25/11/2021.

Sd/-
(S.Rifaur Rahman)
ACCOUNTANT MEMBER
Mumbai;
Dated: 25.11.2021
PS: Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai