

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)  
"G" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND  
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 619/MUM/2020 (A.Y. 2014-15)  
ITA NO. 1336/MUM/2020 (A.Y. 2011-12)**

Shri Shripal Raj Lodha C/o. G.P. Mehta & Co. CAS 807, Tulsiani Chambers Nariman Point Mumbai - 400021  <b>PAN: AAJPL2949L</b>	v.	DCIT – Central Circle – 4(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point, Mumbai – 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 618/MUM/2020 (A.Y. 2014-15)  
ITA NOs. 236 & 237/MUM/2021 (A.Ys. 2010-11 & 2016-17)**

Smt Sarita Lodha C/o. G.P. Mehta & Co. CAS 807, Tulsiani Chambers Nariman Point Mumbai - 400021  <b>PAN: AAJPL2956P</b>	v.	DCIT – Central Circle – 4(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point, Mumbai – 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 620 & 621/MUM/2020 (A.Ys. 2013-14 & 2014-15)**

Smt Shruti Lodha C/o. G.P. Mehta & Co. CAS 807, Tulsiani Chambers Nariman Point Mumbai - 400021  <b>PAN: ACXPL8394F</b>	v.	DCIT – Central Circle – 4(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point, Mumbai – 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri Madhur Agarwal</b>
<b>Department by</b>	<b>:</b>	<b>Shri Rakesh Garg</b>
<b>Date of Hearing</b>	<b>:</b>	<b>26.10.2021</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>05.01.2022</b>

## **ORDER**

### **PER BENCH**

1. These appeals are filed by different assessees of same family against different orders of the Learned Commissioner of Income Tax (Appeals)-52, Mumbai [hereinafter in short "Ld.CIT(A)"] for the Assessment years 2010-11, 2011-12, 2013-14, 2014-15 and 2016-17.

2. First we take up the appeal of the assessee, Shripal Raj Lodha in ITA.No. 619/Mum/2020 (A.Y. 2014-15) and the brief facts relevant to the grounds raised are that, the Assessee is an individual deriving income from salary, house property, capital gains and other sources. The Search and seizure action under section 132 of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') was conducted on 8<sup>th</sup> of May 2014 on the premises of the Assessee, and the companies in which the Assessee is a director and other group companies.

3. The Assessee e-filed the return of income for the A.Y. 2014–15 on 27.02.2015 on 8<sup>th</sup> June 2015 declaring total income at ₹.1,92,95,160. In the return of income, the Assessee had claimed ₹.2,39,89,575 as exempt under section 10(38) of the Act, which was the gains arising from sale of shares by the Assessee of Sunrise Asian Ltd., and these shares were held by the Assessee as investments. The Assessing Officer passed the assessment order dated 30.12.2016 u/s. 143(3) r.w.s. 153A of the Act for AY 2014-15. The Assessing Officer disallowed the claim of exemption claimed under section 10(38) of the Act, treating the same as a non-genuine gain. The Assessing Officer further added an amount of ₹.14,39,370/- as commission at the rate of 6% on the amount of capital gains claimed as exempt by the Assessee. The Assessing Officer *inter alia* held as under –

- a) The Directorate of Investigation, Kolkata had carried out some investigation, and as per the said investigation 84 companies were designated as Penny stock Companies. It is further stated by the Assessing Officer that Sunrise Asian Ltd is one such Penny stock company.

- b) Based on above findings of investigation wing and after considering the assessee's submissions, the Assessing Officer held that the Assessee has never submitted any supporting documents like copy of the bill in support of purchase of shares of STL (Santoshima Tradelinks Ltd.). Further, STL and certain other companies amalgamated with Sunrise Asian Ltd. pursuant to such amalgamation, the Assessee received the shares of Sunrise Asian Ltd.
- c) The Assessing Officer further referring to the price of Sunrise Asian Ltd. held that there was an astronomical increase in the price of Sunrise Asian Ltd from ₹.63 to ₹.456 within about 6 months and there was no basis for such an increase. Considering the fact that Sunrise Asian Ltd has been treated as the penny stock company by the Investigation Wing, Kolkata and considering the increase in the share price of the company, the capital gain earned by the Assessee from the sale of shares of Sunrise Asian Ltd is not genuine.
- d) The Assessing Officer alleged that a list was obtained from BSE of the corresponding purchase counter parties to the sales undertaken

by the assessee in the scrip of Sunrise Asian Ltd, some of which had common addresses.

- e) The Assessing officer also observed that assessee's own cash is introduced and comes back in the form of long term capital gain thereby claiming concessional tax rate.
- f) The Assessing Officer further referred to certain statements of alleged brokers/entry operators, which were stated to have been recorded by Investigation Wing, Kolkata. By relying on the said statements, the Assessing Officer held that Sunrise Asian Ltd is a penny stock company and, therefore, the capital gain earned by the assessee from transaction in the shares of Sunrise Asian Ltd is not genuine transaction. And, hence, he treated the income as unexplained income of the Assessee.
- g) The Assessing officer held that evidences gathered have to be evaluated in the background of what the Hon'ble Supreme Court referred to as the test of preponderance of human probability judged on the basis of surrounding circumstances. The Assessing officer relied upon the decisions of Apex Court in the cases of

Commissioner of Income Tax West Vs Durga Prasad More 82 ITR 540 and also Sumati Dayal v. CIT (1995) 214 ITR 801 (SC).

4. The Assessing Officer further held that for earning the said income the Assessee must have incurred certain expenditure, in the form of commission which would have been charged by the alleged entry operators with respect to the transaction of capital gains. The Assessing Officer accordingly estimated 6% of the total capital gain as the expenditure incurred by the Assessee and added the same under section 69C of the Act.
5. Aggrieved assessee preferred appeal before the Ld.CIT(A). The Ld.CIT(A) vide order dated 13.12.2019, sustained the addition made by the Assessing Officer and dismissed the appeal filed by the Assessee. The Ld.CIT(A) *inter alia* held as under –
  - a) The Assessing Officer has analysed the price movement of the script of Sunrise Asian Ltd and has also referred to the investigation carried out by the Investigation Wing, Kolkata. The Commissioner of Income-tax (Appeals) also referred to the statements as referred to by the Assessing Officer to hold the script of Sunrise Asian Ltd as

a penny stock. Ld.CIT(A) further held that merely because the Assessee has submitted all the relevant documentary evidence with respect to the transaction of purchase and sale of shares of Sunrise Asian Ltd, it cannot be concluded that the capital gain earned by the Assessee is genuine. Further, in any case, the Assessee has not been able to establish with documentary evidence that the shares of Sunrise Asian Ltd were allotted to the Assessee in view of the shareholding in M/s Conart Traders Ltd. Therefore, the Assessee has failed to prove with documentary evidence the genuineness of the transaction in respect to earning of capital gains.

- b) The Ld CIT held that online trading by itself cannot be held to be sacrosanct and there is no sanctity attached to the transactions conducted online on a stock exchange platform if material on record points to the contrary.
- c) Insofar as the Assessee's claim of Cross examination is concerned, the Ld.CIT(A) held that the exemption has been claimed by the Assessee, therefore, the onus to prove the same is on the Assessee and the Assessee is free to produce the said persons as part of its defense. The fact that the Assessee has failed to produce any such

person involved in the transaction clearly shows that it has no bona fide case in the matter. Further, it is to be noted that the persons whose statement have been relied upon by the Assessing Officer, were examined by the Investigation Wing and there are very elaborate and detailed statement, and the Assessee has not been able to rebut a single affirmation. Therefore, asking for physical presence of these persons is only to delay the matter and also as no basis has been brought out effectively by the Assessee, the request for cross examination has rightly been rejected by the Assessing Officer. The Ld.CIT(A) also confirmed the finding with respect to the disallowance of expenses under section 69C of the Act as well. Accordingly, the Ld.CIT(A) confirmed the finding given by the Assessing Officer in the assessment order.

6. Aggrieved assessee preferred appeal before us and assessee filed

following grounds in his appeal: -

*"1. The order passed by the learned lower authorities are bad in law and bad in facts.*

*2. The assessment order passed by the learned Assessing Officer and upheld by the learned Commissioner of Income Tax (Appeals) under section 143 (3) r.w.s. 153 A of the I.T. Act, 1961, is ab-initio void, inasmuch as, no incriminating material was found during the course of search. Whether assessment is abated one or non abated one, no addition can be made without there being any incriminating material.*

3. *The learned lower authorities have grossly erred in treating the sell transaction of sale of 487500 shares of a listed company as bogus and in 3 making an addition of Rs. 2,39,89,575/by recourse to sec. 68 of the I.T. Act, 1961. The reasons assigned for impugned addition are wrong arbitrary and in contradiction to the facts of the case and provisions of law.*

4. *The learned CIT (A) has grossly erred in upholding the impugned addition of Rs. 2,39,89,525/- under section 68 of the Act, even though there was no finding about examination of books of account by the Assessing Officer.*

5. *The learned CIT (A) has grossly erred in confirming the impugned addition, of Rs. 2,39,89,525/- even though, no material or evidence was brought on record to discard the explanation of the appellant. The impugned addition is merely a work of fiction.*

6. *The learned lower authorities have grossly erred in relying on certain data / informations and proceedings in the case of different unrelated assesseees and testimony of third parties without showing even the remotest link of the appellant with the alleged hawala operators.*

7. *The learned tower authorities have grossly erred in making impugned addition of Rs. 2,39,89,575/- on account of alleged bogus capital gain even though there was no order or proceedings initiated by the stock market regulator SEBI implicating the appellant for resorting to unfair means to reap the alleged bogus gain.*

8. *The order passed by the learned lower authorities are void ab-initio OO inasmuch as, neither the appellant was provided with the evidences / documents / statements related to third parties relied upon to counter the same, nor he was granted an opportunity to cross examine the parties whose testimony was heavily relied upon.*

9. *The learned Commissioner of Income Tax (Appeals) has grossly erred in relying on the informations gathered at the back of the appellant and has further erred in drawing adverse inferences without confronting the same to the appellant.*

10. *The learned lower authorities have grossly erred in passing the impugned orders merely by relying on the theories of preponderance*

*of probabilities and human behaviour only and ignoring all the material and evidences, placed by the appellant before them in support of his claim. Under the*

*11. The learned lower authorities have grossly erred in rejecting appellant's claim under section 10 (38) of the Act, through the cost of purchase of shares Rs. 4,87,500 was neither disputed nor found as non existent. The details filed in support not having been controverted, the rejection of appellant's claim is wholly unjustifiable.*

*12. The learned lower authorities have grossly erred in making / confirming the addition of Rs. 14,39,374/- on account of alleged payment of commission by recourse to section 69C of the Act without showing as to how that section was applicable when the impugned addition was made without there being any concentrate evidence.*

*13. Having regard to the facts of the case, provisions of law and judicial propositions, the impugned addition of aggregated sum of Rs.254,28,949/- is wholly untenable in law and unwarranted on facts.*

*14. The appellant may please be permitted to raise any additional or alternative ground on or before the hearing of the appeal.*

7. At the time of hearing, Ld. Counsel for the assessee submitted that the Assessing Officer and the Commissioner of Income-tax (Appeals) erred in not allowing long term capital gain of ₹.239,89,575/- earned by the Assessee from the sale of shares of Sunrise Asian Ltd. Ld. AR submitted that the lower authorities were not justified in rejecting the claim of the Assessee of long-term capital gain of ₹.239,89,575/- earned by the Assessee from the sale of shares of Sunrise Asian Ltd during the relevant financial year and he made the following submissions:-

Ld. Counsel for the assessee submitted that the Assessee had submitted complete documentary evidence with respect to the transaction of purchase and sale of shares of Sunrise Asian Ltd (**page 7 – 39 of paper book**). The documents submitted and the details are:

- (i). *Purchase bill dt 25.01.2011 from Conart Traders (P) Ltd (PAN AACC12990), for purchase of 100000 Equity Shares of Sunrise Asian Ltd showing full identity of selling party (**Page No 08 of Paper Book**).*
- (ii). *Bank statement showing payment of Rs. 10,00,000/- plus bank commission of Rs. 56/- by RTGS made through cheque No. 657509 of State Bank of Bikaner & Jaipur, City Branch, Jodhpur against purchase consideration (**Page 09 of Paper Book**).*
- (iii). *Demat account maintained with Stock Holdings Corporation of India Limited showing credit of above shares on 23/02/2011 as per DP statement submitted at **page No 37 to 39 of Paper Book** .*
- (iv). *Contract notes of **SEBI registered share broker M/S Mehta Equities Limited, Mumbai** for sale of shares on recognised Bombay stock exchange (**Page No. 26 to 29 of Paper Book**).*
- (v). *Bank statement (**Page No. 30 to 34 of Paper Book**) showing receipt of sale consideration through banking channel on various dates from 06.11.2013 to 11.03.2014.*
- (vi). *Demat account (**Page 39 of Paper Book**) showing sale of shares.*

8. The Ld. Counsel for the assessee submitted that all the aforesaid documentary evidences have not been disputed by the lower authorities. In fact, the lower authorities have erred in proceeding on the basis that the documentary evidence has not been submitted by the Assessee. The Assessing Officer at page 16 of the assessment order erroneously stated

that the Assessee had originally purchased the shares of STL and received the shares of Sunrise Asian Ltd pursuant to merger of STL and certain other companies with Sunrise Asian Ltd. The Ld. AR submitted that the Assessee had directly purchased the share of Sunrise Asian Ltd and, therefore, the Assessing Officer has proceeded on a completely erroneous understanding of fact as the Assessee had never purchased the shares of STL as is clear from the purchase bill at page 8 of the paper book. Therefore, Ld. AR submitted that complete documents with respect to the transaction of purchase and sale of shares were submitted by the Assessee and hence the exemption claimed by the Assessee cannot be disallowed. As soon as the shares were purchased on 29.01.2011, these were immediately transferred to Demat Account on 23.02.2011. Since after delivery of shares, these were dematerialised and credited into demat account, question of submission of share certificates should not have been raised by Assessing Officer. It is also evident from the Demat Account so submitted, the assessee is a regular investor in shares of various companies and the transaction of purchase and sale of shares in Sunrise Asian Ltd is not for the first time made. Ld. CIT(A) in his appellate order apprehended the holdings of shares of Sunrise Asian Ltd by the Conart Traders (P) Ltd which cannot be doubted since soon after purchase

of shares by the Assessee on 29.01.2011 from Conart Traders (P) Ltd, these were dematerialized and transferred to Demat Account on 23.02.2011.

9. Ld AR submitted that the alleged Investigation Wing report / documents on the basis of which the addition has been made, has not been given to the Assessee either during the course of the original assessment proceedings or at the time of the proceedings before the Commissioner of income tax appeals. Therefore, the Ld AR submitted that such documents cannot be relied upon by the lower authorities to make an addition against the Assessee.

10. Ld AR submitted the Assessee had only been given statements of certain brokers / entry operators on 27<sup>th</sup> of December 2016 at 7 PM being the statements recorded by the Investigation Wing, Kolkata. In the letter dated 28 December 2016 (**Pg. 40 of paper book**), the Ld. AR has submitted that from the perusal of the statement it appears that these people have dealt with stock exchange at Kolkata whereas the Assessee has entered into transaction in the script of Sunrise Asian Ltd in Bombay stock exchange. Further, from the perusal of the statement as recorded by the Investigation Wing, it is clear that none of the people have

mentioned the name of the Assessee or even stating that they have carried out any transaction for and on behalf of the Assessee. Therefore, there is no question of the statement being relevant for the purpose of making an addition or doubting the genuineness of the long term capital gain earned by the Assessee.

11. Ld AR submitted it has been alleged by the Ld.CIT(A) that the Assessing Officer at Page 50 related to para 20(xiv) of his assessment order, has examined the financials of M/s Sunrise Asian Ltd to conclude that it has hardly any net worth. The AO further observed that M/s Sunrise Asian Ltd had hardly any turnover till FY 2011-12, negligible employees cost and the earning per share were negative. He submitted that it is surprising that the Ld. CIT totally ignored the increase in turnover of Rs. 73.84 Cr and Rs. 113.46 Cr and the profit of Rs. 41 Lacs and Rs. 1 Cr respectively for FY 2012-13 and 2013-14. Therefore, the Ld.CIT(A) was absolutely wrong in holding that scrip of Sunrise Asian Ltd as a "Penny Stock" company. Further he ignored the fixed assets shown in the Balance sheet of the Sunrise Asian Ltd.

12. Ld AR submitted that the request of the Assessee to seek cross examination of these people have not been acceded to either by the

Assessing Officer or the Commissioner of Income-tax (Appeals). In fact, the Ld.CIT(A) has erroneously held that there is no need to give cross examination of these people to the Assessee. The Ld CIT(A) has further erroneously held that it is the obligation of the Assessee to produce these people and that the Assessee has not discharged its burden of claiming exemption under section 10(38) of the Act. He submitted that by producing all the documentary evidence necessary to show the transaction of purchase and sale of shares by the Assessee along with the bank statement reflecting the entries with respect to purchase and sale of shares, the Assessee has discharged its burden to establish its claim of exemption under section 10(38) of the Act. The Ld CIT(A) has failed to appreciate that the Assessee is not relying on the statements of these people who were allegedly investigated by the Investigation Wing. In fact, the Assessee is not even aware as to who these people are. According to the Assessee, these people are not at all concerned with the transaction of the Assessee and therefore, there is no need to go into any of their statements to decide the claim of the Assessee. However, if the Assessing Officer or the Commissioner of Income-tax (Appeals) are of the view that their statements are detrimental to the Assessee and they want to rely on their statement to disallow the claim of the Assessee, then it is their

obligation to provide a cross examination to the Assessee of these people, before their statement would have been relied upon to disallow the claim of exemption. The Ld. AR submitted that as cross examination is clearly not been granted to the Assessee, the alleged statement should be completely disregarded.

13. Ld. AR relied on the following decisions for the proposition that without granting a cross examination, statement of a person cannot be relied upon to make an addition in the case of an assessee-

- (i). Dhakeshwari Cotton Mills Ltd (26 ITR 775)
- (ii). Andaman Timber Industries Ltd (281 CTR 241) and
- (iii). CIT v H.R Mehta (ITA No. 58/2001)

14. Without prejudice, the Ld. AR submitted that from the perusal of the statement as extracted in the assessment order, it is clear that none of these people have made any statement about the transaction of the Assessee or transaction with the Assessee therefore the statements are not incriminating insofar as the transaction of the Assessee are concerned. The statement of the broker through whom the Assessee has traded has certainly not been recorded and no fault has been found with the transaction of the Assessee. Therefore, the Ld AR submitted that revenue has not been able to produce any material evidence which would justify

rejection of the claim of the Assessee for exemption under section 10(38) of the Act.

15. The Ld. AR submitted that, merely because there are changes in the price of the scripts, that by itself cannot be held to be a reason to disallow the claim of exemption. He submitted that even if it was the case of the revenue that certain people have artificially increased or reduced the price of the shares of a company, there has been no material to show that the Assessee has involved in any of such activity. Therefore, the claim of exemption cannot be disallowed merely because the share price of Sunrise Asian Ltd has been alleged to have increased abnormally.

16. Ld. AR submitted that during the course of the hearing, Ld DR had filed an order passed by the Security and exchange board of India (SEBI). The said order was passed by SEBI to investigate as to whether there was any violation of SEBI guidelines by 89 people/entities while dealing/trading in the shares of Sunrise Asian Ltd. The Ld AR submitted that the Assessee is not referred to as one of the entities/people against whom the investigation was carried out by SEBI. SEBI has concluded after conducting the investigation that, the notices therein i.e. the 89 people/entities had manipulated the trades in the script of Sunrise Asian

Ltd to artificially change the price of the shares. SEBI had accordingly debarred certain people from the list of 89 people from not carrying on any trading activity for a period of one year and 6 months as stated in the order. The Ld. AR submitted that the order of the SEBI clearly supports the contention of the Assessee that the Assessee has not been engaged in any price manipulation of the shares of Sunrise Asian Ltd as no notice has been received by the Assessee from SEBI and the name of the Assessee is also not mentioned in the SEBI report. Therefore, the Ld. AR submitted that the SEBI report cannot be relied upon to make any allegation against the Assessee. Further as submitted above, the assessee had no connection either with the persons/entities named in the above SEBI report or with their business activities. Even if the buyers are doubtful or of suspicious character, that would not affect the transactions of sales of shares made at prevailing market prices, by the assessee through proper channel i.e., recognised stock exchanges which are known for their transparent working. Even during the course of search operation, the gravest mode of investigation, carried out in group cases of the assessee, nothing adverse material was found which could give rise to any sort of suspicion on the transactions so entered in Assessee's case.

17. Ld. AR submitted that the question therefore arises is whether in such cases, the legal evidence produced by the assessee has to guide 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. The Ld AR submitted that an alleged scam might have taken place on LTCG etc. but it has to be established in each case, by the party alleging so, that a particular assessee in question was part of this scam. The Ld. AR further submitted that chain of events and the live link of the assessee's action giving his involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is exempt from income tax, by way of cheque through banking channels. This allegation that cash had changed hands has to be proved with evidence, by the revenue. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the

basis for the addition. The evidence based on which the DDIT report is prepared, as submitted above, not brought on record by the AO nor it is put before the assessee. The Ld AR submitted that the assessee is just an investor and as he received some tips and he chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that he is not party to the scam etc., has to be controverted by the revenue with evidence. The Assessee submitted that when a person claims that he has done these transactions in a bona fide manner, one cannot reject this submission based on surmises and conjectures.

18. Further, Ld AR submitted that the modus operandi, generalization, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 (SC) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 (SC) (SC) the Hon'ble Supreme Court held that, the onus to prove that the apparent is not real is on the party

who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT (1959) [1959] 37 ITR 271 (SC) held that suspicion however strong, cannot take the place of evidence.

19. Ld AR submitted that as regards the decision of the Hon'ble Supreme Court in the case of Suman Poddar's case, as relied by the Revenue, the Ld. AR submitted that the Apex Court had simply dismissed the SLP of the assessee and, therefore, the same cannot be said to be a decision of the Apex Court. In so far as the decision of the High court, the Ld AR submitted that the said decision has been considered subsequently by the same court i.e. Delhi High Court in the case of Principle CIT-12, Vs Krishna Devi (ITA No. 125/2020)(Delhi HC)(page 28-37 of Legal Paper book) and even after reliance by the department of the Suman Poddar's case of Delhi High Court, the appeal was decided in favour of the assessee stating that the above decision is based upon the finding of the ITAT framed on the basis of the peculiar facts of that case and it cannot be

applied to the facts of the present case in hand. Further, the Ld. AR submitted that the financials of Sunrise Asian Ltd are quite different than Cressanda Solutions Ltd case as was considered by the ITAT in the case of Suman Poddar.

20. Ld. AR submitted that it is well established that in the screen based transaction on share stock exchanges, purchaser and seller parties are totally unknown to each other and these parties could not have any identity of each other when the transactions are entered into. In such a fact the AO as well as the Ld.CIT(A) both are not justified to doubt the transactions entered into in such a manner.

21. The Ld. AR relied on the following decisions wherein the Hon'ble Courts and the Tribunal have granted exemption under section 10(38) of the Act to the assessee therein on the facts similar to the assessee's case.

- (i). Dipesh Ramesh Vardhan Vs DCIT Central Circle-2(2), Mumbai, (ITA.No. No. 7648/Mum/2019 decided on 11.08.2020
- (ii). Smt Anjana Sandeep Rathi, Thane Vs ACIT, Circle-1, Thane (ITA No. 4369/Mum/2018) decided on 20.07.2020
- (iii). Principle CIT-12, Vs Krishna Devi (ITA No. 125/2020) (Delhi HC)
- (iv). CIT-13 Vs Shyam R. Pawar (2015) 229 Taxmann 256 (Bombay HC)
- (v). Madhu Killa Vs. ACIT, Kolkata (ITA No. 834/Kol/2018) decided on 02.11.2018
- (vi). CIT Vs Jamnadevi Agarawal (2010) 328 ITR 656 (Bom HC)
- (vii). CIT Vs Mukesh Marolia Bom (ITA No. 456 of 2007 Decided on 07.09.2011

22. The Ld. AR further submitted that during the course of search proceedings, no incriminating material was unearthed to discredit the documentary evidences submitted by the Assessee in support of the share transactions relating to the script Sunrise Asian Ltd and therefore the Ld.CIT(A) was not at all justified in confirming the addition made treating the sale consideration received from sale of shares in question as not genuine and further not justified in denying exemption claimed u/s 10(38) by the Assessee.

23. Ld. AR submitted that Ld.CIT(A) is also not justified in confirming the addition made u/s 69C for alleged payment of commission to the brokers by holding that some commission might have been paid for arranging the alleged accommodation entry. The genuineness of the transactions have already been established in submission above and there is no evidence of making such commission payment available or brought on record by AO/CIT, the addition u/s 69C does not survive and is liable to be deleted.

24. The Ld AR submitted that the aforesaid arguments in the case of Shripal Raj Lodha would be equally applicable to the following cases wherein identical additions have been made by the Assessing Officer: -

<b>SI.NO.</b>	<b>Name of the assessee</b>	<b>Assessment year</b>
(i).	Sarita Lodha	AY 2014-15
(ii).	Sarita Lodha	AY 2016-17
(iii).	Shruti Lodha	AY 2013-14
(iv).	Shruti Lodha	AY 2014-15

25. The Ld AR submitted that in the following two cases, the original assessments have not been abated as on the date of the search. The Ld. AR submitted that A.Y. 2011-12 and A.Y. 2010-11 in the case of Shripal Raj Lodha and Sarita Lodha respectively are not abated at the time of search.

26. The Ld AR submitted that for A.Y. 2010-11 and A.Y. 2011-12, in view of the proviso to section 153A of the Act, the assessment proceedings had not abated at the time of the search. He further submitted that in case where the assessment proceedings have not abated, the jurisdiction of the Assessing Officer to make any addition is restricted only to issues where any incriminating material has been found during the course of the search, as held by the Special Bench in the case of All Cargo Logistics Ltd. v ACIT 137 ITD 287 (Mum) (SB) and as affirmed by the jurisdictional High Court in the case of Continental Warehousing Corporation Ltd. (*supra*). He further submitted that the decision of the

Hon'ble Jurisdictional High Court has been consistently followed in subsequent case as below: -

- (i). Pr. CIT vs. Reynold Shirtings Ltd. (ITA No. 830 of 2017) (Bom)
- (ii). Pr. CIT vs. JWC Logistics Park Ltd. (ITA No. 465 of 2017) (Bom)
- (iii). JCIT vs. Benco Finance and Investments Pvt. Ltd. (ITA No.2071/Mum/2018) (Mum)

27. The Ld AR submitted that the jurisdictional High Court has held that incriminating material would be (i) books of account, other documents found in the course of search that were not produced in the course of the original assessment; and (ii) undisclosed income or property discovered in the course of search. He submitted that in the facts of the present case, the books of account which recorded the transaction of receipt of share capital and share premium were already disclosed before the Assessing Officer and the same were also produced during the assessment proceedings, for the years where there were scrutiny assessment. Further, there is no undisclosed income or property which was discovered during the course of the search which has any bearing on the issue of receipt of share capital and share premium by the Assessee from the investee companies in various years.

28. On the other hand, Ld. DR submitted by relying on Page No. 9 of the CIT(A) order that the scrip of Sunrise Asian Ltd., was controlled by **Shri Vipul Vidhur Bhatt** and during search/survey **Shri Vipul Vidhur Bhatt** accepted that he has involved in manipulating the prices of the scrips. Further, he brought to our notice Page No. 3 of the SEBI report and submitted that Ld.CIT(A) has clearly highlighted from the SEBI report that time involved in manipulating the prices are 16.12.2010 to 30.09.2015 from Page No. 5 of the SEBI report, the list highlights the details of manipulators and name of **Shri Vipul Vidhur Bhatt** is given at Page No. 13 of the SEBI report and this company is suspended by the SEBI. As the assessee has purchased and sold the scrips and taken huge advantage. He submitted that the AO has rightly applied the concept of preponderance of the probability by relaying on the Hon'ble Supreme Court decision in the case of Sumati Dayal (214 ITR 801). He vehemently argued and supported the orders passed by lower authorities in this regard.

29. In the rejoinder Ld. AR submitted that assessee was never given opportunity to cross verify **Shri Vipul Vidhur Bhatt** and further he submitted that **Shri Vipul Vidhur Bhatt** never named the assessee as

the persons neither involved or taken direct advantage and he submitted that the case of Sumati Dayal is distinguishable to the facts of the present case.

30. Considered the rival submissions and material placed on record, we noticed that there was a search operation carried in the group concerns of Uma Polymers and the assessee also searched along with other members of the family i.e., Smt Sarita Lodha and Smt Shruti Lodha in search operation. With regard to case of the assessee and Smt Sarita Lodha for the Assessment Year 2010-11 and 2011-12 which are not abated. We observed from the record that there was no incriminating material found during the search in relation to addition made in these two appeals. It is fact on record that whatever addition made by the Assessing Officer relating to share capital and share premium which are already available on record and assessee has already disclosed the same while filing the return of income and balance sheet. There is nothing on record which shows that new incriminating material was found during search. Therefore, the courts have held that no addition can be made in the case of unabated assessment years without there being incriminating material found during search. We observe from the various decisions and

particularly the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645 (Bom), which observed that the expression 'incriminating material' would mean any evidence or material found during search which were not submitted or produced in the course of filing return of income / original assessment and any undisclosed income or property discovered during search. But in the given case, we observe that no such material or income was found during search but AO relied completely on the information forwarded by the investigation wing post search. Therefore, the assessments made in A.Y. 2011-12 in the case of Shripal Raj Lodha and in A.Y. 2010-11 in the case of Smt Sarita Lodha , being unabated assessments, and hence no addition towards denial of exemption u/s 10(38) could be done. Accordingly, the additions made thereon are hereby deleted. In the result, appeals filed by the assessee i.e. Shri Shripal Raj Lodha and Smt Sarita Lodha are partly allowed.

**31.** With regard to other appeals, first let us deal with the case of Shri Shripal Raj Lodha in ITA.No. 619/Mum/2020 (A.Y. 2014-15). We observed from the record that assessee has purchased and sold the shares of Sunrise Asian Ltd., and earned long term capital gain and claimed the

exemption u/s. 10(38) of the Act. Since the scrip involved in which assessee has dealt are having chequered history considering the fact that investigation wing, Kolkata carried on investigation on penny stock cases and certain brokers and entry operators' statements were recorded and one of the entry operator Shri Vipul Vidhur Bhatt has accepted that he is involved in transactions relating to shares of Sunrise Asian Ltd., Just because this scrip was part of the investigation carried on by the investigation wing and the SEBI has listed the same as doubtful scrip, the Assessing Officer sought to carry on certain investigations in Kolkata and came to the conclusion that the assessee is one of the beneficiary of these manipulated transactions. From the record, we observe that there is no incriminating material found by the Assessing Officer against the assessee during the search or afterwards. The Assessing Officer carried on the investigations in Kolkata and observed that assessee is one of the direct beneficiary and by relying on the concept of preponderance of human probability and theory of human behavior, he proceeded to make the addition. However, the assessee made a written request for cross-examination and the same was denied by the Assessing Officer and further we observe that even Ld. CIT(A) had rejected the grounds raised by the assessee on cross examination. We observe that Ld. CIT(A) held

that the exemption has been claimed by the assessee, therefore, the onus to prove the same is on the assessee and the assessee is free to produce the said persons as part of its defence and since the assessee failed to produce any such persons involved in these transactions, it clearly shows that it has no bonafide case in the matter. We find that it is difficult to comprehend that Ld.CIT(A) merely confirmed the addition without considering the issue seriously. We observe that Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd [26 ITR 775] has held as under: -

"As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab'.

In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions, Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income-tax Officer and the Tribunal, seems to be based on surmises, suspicions and conjectures. It is somewhat surprising that the Tribunal took from the representative of the department a statement of gross profit rates of other cotton mills without showing that statement to the assessee and without giving him an opportunity to show that that statement had no

relevancy whatsoever to the case of the mill in question. It is not known whether the mills which had disclosed these rates were situated in Bengal or elsewhere, and whether these mills were similarly situated and circumstanced. Not only did the Tribunal not show the information given by the representative of the department to the appellant, but it refused even to look at the trunk load of books and papers which Mr. Banerjee produced before the Accountant Member in his chamber. No harm would have been done if after notice to the department the trunk had been opened and some time devoted to see what it contained. The assessment in this case and in the connected appeal, we are told, was above the figure of Rs. 55 lakhs and it was meet and proper when dealing with a matter of this magnitude not to employ unnecessary haste and show impatience, particularly when it was known to the department that the books of the assessee were in the custody of the Sub-Divisional Officer, Narayanganj. We think that both the Income-tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion. It is thus a fit case for the exercise of our power under Article 136."

**32.** From the above decision, it is clear that any evidences which is collected behind the back of the assessee and any such statement sought to be relied by the revenue against the assessee, then proper opportunity of cross examination of the witnesses need to be given to the assessee in the manner known to law. The law is very well settled on this issue that assessee should be given proper opportunity to cross examine the witnesses who had furnished some statement against the assessee, failing which the entire assessment would be in gross violation of principles of natural justice. Reliance in this regard has been rightly placed by the AR on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries Ltd reported in 281 CTR 241 (SC). In the given case, it clearly shows that no such opportunity was given to the assessee and further we observe that the Assessing Officer decided to proceed by relying on

information contained in the SEBI report without establishing the connection of direct or indirect involvement of the assessee in the tainted transactions and proceed to apply concept of preponderance of human probability. Therefore, in our considered view, assessee has submitted all the information relating to buying and selling of the scrips and the Assessing Officer has not found any discrepancies in the documents submitted by the assessee and it is a case of the Assessing Officer that assessee is involved in directly or indirectly in manipulation of the prices of the scrips and taken direct or indirect benefit by manipulation of the above said scrips. However, assessing officer has not brought or proved anything on record that the assessee was involved in manipulation of prices or taken benefit by having any relationship with the persons involved in such activities. Even the SEBI order does not mention the name of the assessee to have been involved in the artificial price rigging of shares. Hence the entire addition has been made in the hands of the assessee merely by surmise and conjecture and not backed by any evidence. Therefore, we do not find any reason to sustain the addition made by the Assessing Officer and confirmed by the Ld.CIT(A). Accordingly, the grounds raised by the assessee are allowed.

**33.** Since facts in the case of other appeals are mutatis mutandis Therefore the decision taken in ITA.No. 619/Mum/2020 (A.Y. 2014-15) are applied for the case of Smt. Sarita Lodha in ITA.No. 618/Mum/2020 A.Y. 2014-15, ITA.Nos. 236 & 237/Mum/2021 (A.Ys. 2010-11 and 2016-17) and in the case of Smt Shruti Lodha in ITA.Nos. 620 & 621/Mum/2020 (A.Ys. 2013-14 & 2014-15).

34. In the result, appeals filed by the assesseees are partly allowed.

Order pronounced on 05.01.2022 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

Mumbai / Dated 05.01.2022  
Giridhar, Sr.PS

Sd/-  
**(MAHAVIR SINGH)**  
**VICE PRESIDENT**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**