IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, KOLKATA

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member

I.T.A. No. 1530/KOL/2018
Assessment Year: 2014-2015

Neelam Dugar,.....Appellant
75, BBD Road, Eliza 3, 4th Floor,
HindMotor, Hooghly-712233
[PAN: AHHPD6956A]
-Vs.-
Income Tax Officer,.....Respondent
Ward-35(2), Kolkata,
Aayakar Bhawan Poorva,
7th Floor,
110, Shanti Pally,
Kolkata-700107

Appearances by:
Shri A.N. Keshri, A.R., appeared on behalf of the assessee
N o n e, appeared on behalf of the Revenue

Date of concluding the hearing : January 09, 2023
Date of pronouncing the order : January 19, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax (Appeals)-10, Kolkata dated 18.04.2018 passed for A.Y. 2014-15.

2. The assessee has taken five grounds of appeal. In Ground No. 1, she has submitted that ld. CIT(Appeals) has erred in confirming the addition of Rs.69,57,000/-, which was added by the ld. Assessing Officer under section

68 of the Income Tax Act. In Ground No. 2, she has pleaded that ld. CIT(Appeals) has erred in confirming the addition of Rs.1,66,794/- and in Ground No. 3, the assessee has challenged charging of interest under section 234A & 234B of the Income Tax Act. In Grounds No. 4 & 5, the assessee has raised supporting argument *qua* earlier three grounds of appeal.

3. With the assistance of ld. Representative, we have gone through the record carefully. A perusal of the assessment record would reveal that assesese has filed her original return of income on 19.03.2015 declaring total income of Rs.3,09,070/-. The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the ld. Assessing Officer that assessee has earned capital gain from sale of shares of M/s. Unno Industries Limited to the tune of Rs.66,71,743/-. She has purchased these shares for a sum of Rs.2,50,000/- and sold them for a consideration of Rs.69,57,000/-. Thus she claimed exempt income under section 10(38) of Rs.66,71,743/-. Apart from these, there were certain other small activities. The ld. Assessing Officer has noticed that there is a jump of almost 2669 percent in a span of 29 months in the value of such shares. Hence, he made a detailed analysis and held that it is a bogus penny stock held by the assessee and the game is stage managed. The ld. Assessing Officer has recorded a detailed finding and made the addition of Rs.69,57,000/-.

4. On appeal, the ld. 1st Appellate Authority has reproduced the assessment order and thereafter recorded the following finding:-

06. FINDINGS & DECISION:

1. I have carefully considered the action of the Ld. AO in making an addition of **Rs.69,57,000/-** as unexplained credit u/s 68 of the Income Tax Act, 1961. After an exhaustive discussion and elaborating the factual and legal matrix, I find that the Ld. AO has held that the claim of Long Term Capital Gain u/s 10(38) was to be denied to the assessee-individual, and was to be assessed as unexplained cash credit u/s 68 of the I T Act. The Ld. AO has placed on record the entire gamut of findings, and there is, in my considered view no further requirement for elaboration from this forum. In my view of the facts there are elaborate and direct evidence to clearly indicate that that the entire transactions undertaken by the appellant were merely accommodation entries taken for the purpose of such bogus Long Term Capital Gain made by the assessee during the previous year. It is apparent that, in the grab of alleged LTCG, the assessee "earned" exempt income of **Rs.69,57,000/-**, and huge amount brought into the books without paying a single rupee of tax. The Ld. AO has very carefully analyzed the information received from the Investigation Wing, and has recorded the noteworthy features of the Company whose shares were purchased / sold by the assessee-individual. The economic parameters of the said company over the impugned period has also been brought on record, in the analysis. The rise and fall of the prices as recorded had been brought out by the Ld. AO to be artificial and not commensurate with the normal market, as the Company had no business at all. The Ld. AO has also brought forth information that the Regulatory Authority SEBI has also after investigating such abnormal price increases of certain stocks investigated the matter and suspended trading in certain scripts. It is very clear that the prices of these scripts fell sharply after the offloading of these scripts by pre-arranged and manipulated transactions. The entire transactions were carried out on the Stock Exchange to give it a color of real transactions.

2. I also find that all the submissions made by the appellant during the course of the appeal point towards the elaborate documentation, meaning thereby that the appellant has produced papers relating to application for the shares, the allotment of the shares, the share certificates, payments by cheque and the necessary papers filed before the Registrar of companies, where the name of the assessee has been reflected as a shareholder. The appellant has also filed proof of amalgamation of the companies wherein the shareholding has changed hands. It is also the contention of the appellant that it has provided copies of the bank statement, bank contract notes and delivery

instructions to the broker by way of proof that all these transactions were genuine. However, in my considered view of the matter, it is precisely this elaborate paperwork that strengthens the matter relating to the bogus benefit of the LTCG, which clearly has been schemed, preplanned and executed with malafide intelligence and precision. Therefore all these papers are mere documents and not any evidence. The whole gamut of transactions are unnatural and highly suspicious, and therefore the rules of **SUSPICIOUS TRANSACTIONS** ought to apply in the instant case. There are grave doubts in the story propounded by the assessee before the authorities below. None of the material produced before the Ld. AO by the assessee-appellant are enough to justify the humongous gains accruing to the assessee by way of Capital Gains. In my considered view the banking documents are **mere self serving recitals.** The law in the matter of **self-serving recitals** has been long established by the Hon'ble apex Court. In the case of **CIT vs P.Mohankala 291 ITR 278**, the Hon'ble Supreme Court held that *" the money came by way of bank cheque and was paid through the process of banking transactions was not by itself of any consequences."* The burden of proof is on the assessee in the matter of justification of receipts which are of suspicious and dubious nature. In the case of **CIT vs. Durga Prasad More (1971)82 ITR 540 (SC)**, their Lordships laying down the significance of **human probabilities** held as under: *"in a case where a party relied on self serving recitals in documents, it was for that party to establish the truth of those recitals: the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals."* Similarly in the case of Sumati Dayal vs. CIT **(1995) 214 ITR 801 (SC**), their Lordships held as under: *"In view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assesses of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case, there is prima facie, evidence against the assessee viz. the receipt of money, and if he fails -to rebut, the said evidence being un-rebutted, can be used against him by holding that it was a receipt of an income nature."* In the case of Sajjan Das & Sons vs. CIT **(2003) 264 ITR 435 (Delhi),** their Lordships of the High Court of Delhi, while considering a case in which gifts were received by the assessee through banking channels laid importance on the capacity of the donor for making the gift and his identity as well as importance of relationship between the donor and donee in determination of genuineness of gift held as under: *"That a mere identification of the donor and showing the movement of the gift amount through banking channels was not sufficient to prove the genuineness of the gift. Since the claim of the gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it had actually been received as a gift from the donor."In my considered view wherever documents are relied upon they should pass the test of* normal behavior of the assessee in the course of business viz., human conduct, preponderance of probability and surrounding circumstances. In my considered view, even if documentary evidence is produced, the same must pass the test of human probabilities and surrounding circumstances if they do not, then addition justified. Reliance on such matters is placed on the case of **Smt Phoolwati Devi 314 ITR (AT) 1 (Del.)**

3. It must also be stated here that in **Commissioner of Income Tax vs NR Portfolio Pvt Ltd on 22 November, 2013, the Hon'ble Delhi High court has held**.....

"The Assessing Officer is both an investigator and an adjudicator. When a fact is alleged and stated before the Assessing Officer by an assessee, he must and should examine and verify, when in doubt or when the assertion is debatable. Normally a factual assertion made should be accepted by the Assessing Officer unless for justification and reasons the assessing officer feels that he needs/requires a deeper and detailed verification of the facts alleged. The assessee in such circumstances should cooperate and furnish papers, details and particulars. This may entail issue of notices to third parties to furnish and supply information or confirm facts or even attend as witnesses. The Assessing Officer can also refer to incriminating material or evidence available with him and call upon the assessee to file their response. We cannot lay down or state a general or universal procedure or method which should be adopted by the assessing officer when verification of facts is required. The manner and mode of conducting assessment proceedings has to be left to the discretion of the assessing officer, and the same should be just, fair and should not cause any harassment to the assessee or third persons form whom confirmation or verification is required. The verification and investigation should be one with the least amount of intrusion, inconvenience or harassment especially to third parties, who may have entered into transactions with the assessee. The ultimate finding of the assessing officer should reflect due application or mind on the relevant facts and the decision should take into consideration the entire material, which is germane and which should not be ignored and exclude that which is irrelevant. Certain facts or aspects may be neutral and should be noted. These should not be ignored but they cannot become the bedrock or substratum of the conclusion. The provisions of Evidence Act are not applicable, but the assessing officer being a quasi judicial authority, must take care and caution to ensure that the decision is reasonable and satisfies the canons of equity, fairness and justice. The evidence should be impartially and objectively analyzed to ensure that the adverse findings against the assessee when recorded are adequately and duly supported by material and evidence and can withstand the challenge in appellate proceedings. Principle of preponderance of probabilities applies. What is stated and the said standard, equally apply to the Tribunal and indeed this Court. The reasoning and the grounds given in any decision or pronouncement while dealing with the contentions and issues should reflect application of mind on the relevant aspects. When an assessee does not produce evidence or tries to avoid appearance before the Assessing Officer, it necessarily creates difficulties and prevents ascertainment of true and correct facts as the Assessing Officer is denied advantage of the contention or factual assertion by the assessee before him. In case an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent inquiry or investigation, an adverse view should be taken".

4. In this connection, I would also wish to refer to the decision of the Hon'ble ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y. 1983-84) in the case of **M/s. Mont Blane Properties and Industries Pvt. Ltd**., which was upheld by the Hon'ble Supreme Court. The Hon'ble Tribunal held that the word 'evidence' as used in sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec.143 (3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word 'evidence' might recall the oral and documentary evidence as may be admissible under the Indian Evidence Act the use of word 'material' in Sec.143(3) showed that the assessing officer, not being a court could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. Court often took judicial

notice of certain facts which need not be proved before them. The plain reading of section 142 and 143 clearly suggests that the assessing officer may also act on the material gathered by him. The ward 'material' clearly shows that the assessing officer is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in court of law.

5. The Hon'ble Supreme Court in **CIT v. Durga Prasad More[1971] 82 ITR 540** at pages 545-547 made a reference to the test of human probabilities in the following fact situation :-

"..... It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals. Otherwise it will be very easy to make self- serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favor then the door will be left wide-open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.....

6. It is a well settled principle of law as declared by the Hon'ble Supreme Court in the case of **Sumati Dayal Vs.CIT"(214 ITR 801)(SC)** that the true nature of transaction have to be ascertained in the light of surrounding circumstances. It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability in determination of matters under taxing statutes. In the present case, it is clear that apparent is not the real as evidenced from the investigation report. Further, the Hon'ble Supreme Court, in the case of **Chuhar Mal V CIT (1988) 172 ITR 250,** highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills v CIT (1954) 261 TR 775. The Hon'ble Supreme Court, in the case of Chuhar Mal V CI T (supra) held that what was meant by saying that evidence Act did not apply to the proceedings under Income-tax Act,1961, was that the rigors of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held buy the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law, jurisprudence viz, where a person was found in possessing of anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

7. I am in agreement with the Ld. AO that the transactions relating to the claim of LTCG as made by the Ld. AO come within the ambit of "suspicious transactions", and therefore the **rules of suspicious transactions** would apply to the case. Payment through Banks, performance through stock exchange and other such features are only apparent features. The real features are the manipulated and abnormal price of off load and the

sudden dip thereafter. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the Ld.AO fall in the realm of "suspicious" and "dubious" transactions. The Ld. AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done in a very meticulous and careful manner. In the case of **Win ChadhaVs CIT (International Taxation) in ITA No.3088& 3107/Del/2005**, the Hon'ble Delhi ITAT "B"-Bench has observed, on **31.12.2010** as under:

> ***"SUSPICIOUS AND DIBIOUS TRASANCTION HOW TO BE DEALT WITH:***
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> ***6.11**. The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.*
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> ***6.12.** In the case of **SumatiDayal V. CIT (1995) 80 Taxman 89 (SC),** the Hon'ble Supreme Court has dealt with the relevance of human conduct, preponderance of probabilities and surrounding circumstance, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:*
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> *"..... It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being un-rebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.*
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> *..... Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record, an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence."*
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> ***CIRCUMSTANTIAL EVIDENCE HOW TO BE USED***
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> ***6.13**. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so*

associated with the fact in issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact. In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are —

(1) the circumstances alleged must be established by such evidence, as in the case of other evidence
(2) the circumstances proved must be of a conclusive nature and not totally inconsistent with the circumstances or contradictory to other evidence.
(3) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced ; some of these links may have to be inferred from the proved facts ;
(4) in drawing those inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.
(5)The circumstantial evidence can, with equal facility, be resorted to in proof of a fact in issue which arises in proceedings for the assessment of taxes both direct and indirect, circumstantial evidence can be made use of in order to prove or disprove a fact alleged or in issue. In fact, in whatever proceedings or context inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth."

***6.14**. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance in the income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable inferences and estimation of facts is inevitable. Courts generally will not interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious.*
***6.15**. The Assessee's technical contentions about admissibility and reliance on material available on the AO's record are in the nature of contentions challenging criminal or civil liabilities in a court of law. We are dealing with a process of adjudication of assesses tax liability i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings. As held by the Hon'ble Supreme Court in the case of S.S. Gadgil (supra) no 'lis' is involved in adjudication of tax liability. The Assessee's contention that there was no new material before the AO after the CIT(A)'s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, in a sensitive matter like this, even a single clue or revelation can be of great importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of investigation agencies like CBI, DRI, ED whose were in the offing, as the relevant investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf. The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that it cannot be relied on by the AO, are devoid of any merit and are rejected outright....."*

When the impossible is projected as possible through a plethora of well arranged documents, it would be very reasonable to reject the documents outright as make believe and self serving. In the Case of **Usha Chandresh Shah Vs ITO, Ward-**

19(1)(2), Mumbai, the Hon'ble ITAT- "F"-Bench Mumbai by their Order for A.Y 2006-07 dated **26th September, 2014** have, in the operational portion adjudicated as under:

[Quote]

9. *We have heard the rival contentions and perused the record. The pertinent points are that the assessee has claimed to have purchased the impugned shares through Off market transaction. The purchase price was not paid by cheque, but it was claimed to have been adjusted against the speculation profit claimed to have been made by the assessee. The small difference of Rs.324/- was claimed to have been paid by way of cash. It is also pertinent to note that the alleged Speculation transaction carried out earlier to the purchase of shares of Prime Capital Markets Ltd was also claimed to have been carried in off market transaction. Another important point is that the assessee did not possess copies of Share certificates or copies of Share transfer forms. The broker M/s Khandelwal & Co., has expressed its inability to furnish copies of contract notes available with it and also failed to furnish its books of account to substantiate the transactions of purchase of shares by the assessee. Since the impugned transaction was an off market transaction, the purchase transaction could not be confirmed by the Kolkatta Stock exchange. The said shares were earlier held by M/s Brightsun Merchants (P) Ltd and the assessee had purchased the shares from them. The notice issued to M/s Brightsun Merchants (P) Ltd was returned unserved by the postal authorities with the remark "unknown". In this regard, the assessee had replied that the name of the company was wrongly mentioned by the AO as M/s Brightsuns (P) Ltd and hence the notice got returned. But there is not comment about the address, meaning thereby, the AO had issued notice to the correct address only and hence the slight variation in the name of the company would not normally make any difference. Hence the fact that the notice was returned back only shows that the seller of the shares could not be identified. All these discussions would show that the purchase transaction could not be cross verified by the assessing officer.*

10*. One more point to be noted here is that the speculation transactions can be entered only on payment of margin money. But the details of said payment are not available. With regard to the query raised by the AO relating to Margin money, the broker M/s D.K. Khandelwal & Co has replied in the context of purchase of shares of M/s Prime Capital markets Ltd and not in the context of speculation transactions. Thus, it is seen that the question of keeping margin money for speculation transactions remains unanswered both by the assessee as well as by the Share broker cited above. Further the speculation transaction is also claimed to be an off market transaction, which further casts shadow of doubt over the claim put forth by the assessee.*

11. *Though the assessee has claimed to have purchased the shares in physical format in May, 2004, she chose to D-Mat the same only in June 2005, just two months prior to its sale. The shares were sold through a share broker named Sanju Kabra, who is indicted by SEBI for rigging the prices of penny stock shares. It is pertinent to note that the share prices of M/s Prime Capital Markets Ltd went from Rs.5.17 (May, 2004) to Rs.279.50 (Sep., 2005). The assessee could not furnish any reasons or at-least stock market news to support the abnormal increase in the prices of the above said shares. The financial statements of the above said company were also not produced. Though M/s Prime Capital Markets Ltd has confirmed the entries in its books of*

account with regard to the purchases made by the assessee, it could not identify the name of purchaser to whom the shares were sold by the assessee.

***12**. We have already seen that the tax authorities have applied the test of human probabilities explained by the Hon'ble Supreme Court in the cases of Sumati Dayal and Durga Prasad More (supra) to disbelieve the claim of Long term Capital gains put forth by the assessee. We notice that the test of human probabilities was not applied by the co-ordinate benches of Tribunal in the case of Shri Avinash Kantilal Jain (supra) and Mr. Shyam R Pawar (supra). Hence, in our view, the assessee cannot take support from the above said decisions. We further notice that the ld CIT(A) has placed reliance on the decision dated 04.1.2011 rendered by ITAT Delhi in the case of Haresh Win Chaddha Vs. DDIT, wherein the Tribunal has expressed the view that there is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record.*

***13.** In the case of Smt. Jamnadevi Agrawal (supra), the Hon'ble Bombay High Court has upheld the order of Tribunal on the reasoning that no fault can be found with the findings recorded by the Tribunal. A perusal of the above said order would show that the revenue in the above said case had contended that the assessees in the group have purchased and sold shares of similar companies through the same broker. Further the purchase prices and sale prices were supported by producing the evidences to show that the said transactions were undertaken at the rates prevailing on the respective dates. Under these set of facts, the High Court held that the findings given by the Tribunal cannot be found fault with and further held that the decision rendered by Hon'ble Supreme Court in the case of Sumati Dayal (supra) was not applicable. In the case of Shri Mukesh Ratilal Marolia (Supra), the Hon'ble Bombay high Court has observed that the assessee has furnished copies of Share certificates to show that the shares were in fact transferred to the name of the assessee before it. Further there was no allegation that the prices of shares purchased by the assessee in the case before High Court were manipulated.*

***14**. However, in the instant case, the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of M/s Prime Capital Markets Ltd was declared as "Penny Stock" by SEBI and the broker Sanju Kabra, through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. Hence, in our view, the tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee.*

***15.** We notice that the Mumbai D bench has considered an identical issue in the case of Shri Ramesh Kumar D Jain in ITA No.3192/Mum/2010 relating to assessment year 2006-07. The Tribunal, vide its order dated 15-06-2011, rejected the claim of making speculation gains on the reasoning that speculation transactions could not have been entered into by the assessee therein without paying margin money to the broker. Accordingly, the claim of purchase of shares was rejected by the Tribunal and consequently the claim of sale of shares was also rejected. It is pertinent to note that,*

in the decisions relied upon by the assessee, the claim of speculation profits was not considered by the Tribunal. In yet another case of Shri Araving M Kariya considered by "A" bench of Mumbai ITAT, the test of human probabilities was applied to reject the claim of profit realized on sale of penny stocks. There should not be any dispute that the onus to produce necessary evidences to convincingly show that the shares were purchased and sold at the prices claimed always lies upon the assessee. Our view finds support from the decision rendered by Hon'ble Guwahati High Court in the case of CIT Vs. Smt. Jasvinder Kaur (357 ITR 638).

***16**. In view of the foregoing discussions, we are of the view that the decisions relied upon by the assessee cannot be taken support of by the assessee for the reasons discussed supra. Accordingly, we are of the view that the Ld CIT(A) was justified in confirming the order of the assessing officer by applying the test of human probabilities.*

***17.** In the result, the appeal filed by the assessee is dismissed*

[Unquote]

9. Reliance is also placed in the case of **Somnath Maini Vs ITO (226) 100 TTJ 917** wherein the Hon'ble Chandigarh bench of ITAT held that **if facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have to be held to be non-genuine.**

[Quote]

3. The relevant facts briefly stated are that during the course of assessment proceedings, the AO observed that assessee had incurred a long-term capital loss on account of sale of gold jewellery declared under the VDIS, 1997, amounting to Rs. 19,87,705 and also there was a short-term capital gain near to this amount of long-term capital loss amounting to Rs. 20,36,700 resulting into net capital gain of Rs. 48,995. The AO on perusal of record further observed that in the case of a family member of the same assessee Shri D.C. Maini, in the same assessment year, similar exercise has been done by the assessee wherein a long-term capital loss of Rs. 11,59,066 had been incurred on account of sale of gold jewellery declared under the VDIS and short-term capital gain of Rs. 11,75,100 resulting into a net gain of Rs. 16,034. On going through the nature of transactions, the AO doubted the genuineness of the short-term capital gain in the case of the assessee and he made further inquiry that during the year assessee had purchased 45,000 shares of M/s Ankur International Ltd. At varying rates from Rs. 2.06 to Rs. 3.1 per share and sold them within a short span of six-seven months at the rate varying from Rs. 47.75 to Rs. 55. These shares were purchased through a broker Munish Arora & Co. and sold through another broker M/s S.K. Sharma & Co. The AO took by surprise the astronomical rise in share price of a company from Rs. 3 to Rs. 55 and started further inquiry. The AO issued notice under Section 131 to both the brokers from whom shares were purchased and sold and statements were recorded. The AO also analyzed the balance sheet of- M/s Ankur International Ltd. To justify as to how the share price of a company can go up from a mere Rs. 3 to Rs. 55 in a short span of six to seven months' time. The AO made detailed and extraneous exercise of finding the fundamental of the share of the company by different methods and concluded that these shares were not genuine and transactions were so arranged so as to cover up the loss incurred on account of sale of jewellery only. The AO also recorded the finding that transactions were done at Ludhiana where also the share price of the company is quoted but maximum value of

the share quoted was Rs. 17 but that was only in July, 1997, i.e. long before the shares were sold by the assessee to M/s S.K. Sharma & Co. in the months of February and March, 1998. The AO also recorded the finding that although the shares were transferred in the name of the assessee, they were still lying in the name of assessee much after the sale to M/s S.K. Sharma & Co. The learned CIT(A) deleted the addition on the ground that both the brokers from whom the shares have been purchased and sold were called under Section 131 by the AO. Both have confirmed the sale and purchase of said shares. Other aspect of the facts and circumstances raised by the AO was not discussed by the CIT(A) in his order.

4. In appeal before us, the learned Departmental Representative contended that it is highly improbable that shares of a company go up so high in few months' time. The learned Departmental Representative took us through various pages of the assessment order and the paper book wherein sale bill of the shares with the said M/s S.K. Sharma &' Co. were also filed. The learned Departmental Representative pointed out that shares have been sold at Ludhiana when actually stock exchange was not functional – a fact which is also recorded by the AO. The learned Departmental Representative also pointed out that shares have been sold to M/s S.K. Sharma & Co. on 9th Feb., 1998 and 23rd March, 1998, whereas from the statement of account of M/s S.K. Sharma & Co., payments have been received by the assessee from 31st March, 1998 to 27th July, 1998, meaning thereby that had the transactions been genuine, payment could have been received in one go by S.K. Sharma & Co. The learned Departmental Representative pointed out that any such type of transactions relating to these types of company operating on stock exchanges payments are received in piecemeal whereas in normal market share transactions, contract notes are issued by the broker and payments are received in one go. The learned Departmental Representative also argued that as per the statement of S.K. Sharma & Co. recorded at the time of inquiry, he did not produce any books of account and identity of persons to whom the shares have been sold. Ordinarily, when brokers are enquired about share transactions, they keep proper books of account from whom shares have been purchased and sold. However, in this case, S.K. Sharma & Co. failed to provide the names of purchasers of the shares and identity of the purchasers.

5. On the other hand, the learned Authorised Representative contended that in the share market, share price does not move according to the fundamentals of a company. They go up and down as per sentiments prevailing at that time. To controvert, the argument of the learned Departmental Representative, he argued that share prices are quoted at Jaipur Stock Exchange and were quoted on the relevant date of sale at the same price on which shares were sold to M/s S.K. Sharma & Co. However, the learned Departmental Representative controverted his argument by saying that volume of transactions on the relevant dates is only 600 shares on 9th Feb., 1998 and 1000 shares on 23rd March, 1998 whereas number of shares involved in the transactions with S.K, Sharma & Co. are 45000 shares.

6. After hearing the rival submissions, going through the orders of authorities below and paper book, we find that M/s Ankur International Ltd., although it is a quoted company, its shares were not being transacted at Ludhiana Stock Exchange at, the relevant time. Shares have been purchased and sold through the brokers and payments have been received in cheque on different dates as per the statement of account of M/s S.K. Sharma & Co, Factual matrix of the case from start of the purchase of shares at the rate of Rs. 3 to the sale of shares at Rs. 55 in a short span

of time and shares being not, quoted at Ludhiana Stock Exchange and the way in which different, instalment payments have been received from the brokers and non-availability of the records of the brokers and the shares remaining in the name of assessee even long after the sale of the shares does not stand the test of probabilities. As rightly pointed out by the learned Departmental Representative, these types of companies function in the capital market whose sale price is manipulated to astronomical height only to create the artificial transaction in the form of capital gam. Surrounding circumstances differ from the normal share market transactions in which they are ordinarily carried out. Taking all the steps together, final conclusion does not accord with the human probabilities. The Hon'ble Supreme Court in the case of CIT v. Durga Prasad More held as under :

> It is a story that does not accord with human probabilities. It is strange that High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found and in our opinion, rightly that the decisions remains that the consideration for the sale proceeded from the assessee and therefore, it must be assumed to be his money.
> It is surprising that the High Court has found fault with the ITO for not examining the wife and the father-in-law of the assessee for proving the Department's case. All that we can say is that the High Court has ignored the facts of life. It is unfortunate that, the High Court has taken a superficial view of the onus that lay on the Department.

7. The learned CIT(A) only got swayed by the issuance of notice by the AO under Section 131 to both the brokers from whom shares were purchased and sold and came to the conclusion that share transactions were genuine overlooking the material gathered by the AO from the statements recorded of broker M/s S.K. Sharma & Co. and the other facts and circumstances that volume of transactions of Jaipur Stock Exchange is only 600 shares and 1000 shares. Payments have been received from the brokers only in instalments over a period of 6-7 months. It is true that when transactions are through cheques, it looks like real transaction but authorities are permitted to look behind the transactions and find out the motive behind transactions. Generally, it is expected that apparent is real but it is not sacrosanct. If facts and circumstances so warrant that it does not accord with the test of human probabilities, transactions have been held to be non-genuine, it is highly improbable that share price of a worthless company can go from Rs. 3 to Rs. 55 in a short span of time. Mere payment by cheque and receipt by cheque does not. Render a transaction genuine. Capital gain tax was created to operate in a real world and not that of make belief. Facts of the case only lead to the inference that these transactions are not genuine and make believe only to offset the loss incurred on the sale of jewellery declared under VDIS. In the totality of facts and circumstances of this case and material on record, we are of the considered view that the CIT(A) was not justified in deleting the impugned addition. We, accordingly set aside the order of the CIT(A) and restore that of the AO.

8. In the result, the appeal of the Revenue is allowed.

[Unquote]

Moreover, all the judgments relied upon by the appellant fall flat in the face of the facts of the case, and the preponderance of probability against the assessee. In a decision of the Hon'ble Bombay High Court in the case of **Sanjay Bimalchand Jain Vs Pr.CIT** by

their order **dated 10th April, 2017** have upheld the orders of the Hon'ble ITAT, Nagpur Bench dated 18.07.2016 in ITA No. 61/Nag/2013 in **Sanjay Bimalchand Jain Vs ITO,** Ward-4(2), Nagpur, wherein it was held that on the facts emergent in the case, and the preponderance of probabilities, entire Capital Gains claims were to be treated as fictitious and bogus.

Bogus LTCG from Penny stocks: 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.

In view of the above discussion, I find no infirmity in the orders of the Ld. AO, and I **confirm** the same, holding the claim of LTCG of **Rs.69,57,000/-** to be bogus. As a natural corollary, I also hold that the Ld. AO was also correct in adding back an amount of **Rs.1,66,794/-** under Sec 69C of the Income Tax act. The same also stands confirmed.

Therefore these grounds are **dismissed.**

5. With the assistance of ld. Representative, we have gone through the record carefully. We find that both the authorities have recorded exhaustive finding of fact narrating the circumstances as to how investment made by the assessee in the shares of M/s. Unno Industries Limited was a bogus penny stock company, which has artificially enhanced the value of shares in a short span of time. This aspect is fully covered by the latest decision of the Hon'ble Calcutta High Court rendered in the case of Swati Bajaj & Others (2022) 139 taxmann.com 352(Cal.) pronounced on 14.06.2022. We respectfully following the decision of the Hon'ble Calcutta High Court, we do not find any merit in this ground of appeal, hence, it is rejected.

6. As far as Ground No. 2 is concerned, the ld. Assessing Officer has estimated payment of commission for getting bogus long-term capital gain @ 2.5% and he worked out such commission at Rs.1,66,794/-. Since we have confirmed the conclusions of the revenue authorities that the total claim of long-term capital gain was a bogus one, therefore, this commission payment is also to be disallowed and required to be added back. The ld. Assessing Officer has rightly made the addition, which has been confirmed by the ld.

1st Appellate Authority. We do not find any merit in this ground of appeal also. It is rejected.

7. As far as Ground No. 3 is concerned, charging of interest under section 234A and 234B is consequential in nature to the first ground of appeal, which we have already decided.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 19th January, 2023.

Sd/-	Sd/-
(Rajesh Kumar)	**(Rajpal Yadav)**
Accountant Member	**Vice-President (KZ)**

Kolkata, the 19th day of January, 2023

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(3) Commissioner of Income Tax (Appeals)-10, Kolkata;
4) Commissioner of Income Tax- ;
(5) The Departmental Representative
(6) Guard File
TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.