

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 6489/Mum/2019
(A.Y: 2013-14)

Dy. CIT, CC-7(4) Room No. 659, Aayakar Bhavan, MK Road, Mumbai – 400020.	Vs.	Shri Sawankumar T 501, Salar Gokul CHSL Salasar Bhoomi, Opp Maxus Mall, Temba Road, Bhayander (W) Mumbai – 401101.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADCPJ2044G		
Appellant	..	Respondent

Appellant by :	Ms.Richa Gulati.DR
Respondent by :	Mr.Gaurav Bansal.AR

Date of Hearing	23.12.2022
Date of Pronouncement	13.03.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed an appeal against the order of the Commissioner of Income Tax (Appeals)-49, Mumbai passed u/s 143(3) r.w.s 153A and 250 of the Act. The revenue has raised the following grounds of appeal.

1. "On the fact and circumstances of the case, the Learned CIT(A) has erred in deleting the addition of Rs. 4,33,71,4681- made by the AO on account of unexplained

- 2 -

cash credit u/s. 68 of the I. Act, 1961 without appreciating the fact that the assessee failed to discharge the onus cast upon it to prove that the LTCG claimed as exempt u/s 10(38) was genuine."

2. " On the fact and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 4,33,71,4681- made by the AO without appreciating the fact that there was abnormal rise in the price of shares of scrip Wagend Infra venture Ltd., which against the human probability in view of the fact that the company was neither making any profit nor declared dividend."

3. "On the fact and circumstances of the case, the Learned CIT(A) has erred in deleting the addition of Rs. 4,33,71,4681- made by the AO on account of unexplained cash credit u/s. 68 of the I. Act, 1961 without appreciating the fact that the Hon'ble Supreme Court in the case Sumati Dayal Vs CIT (1995) 214 ITR 801 (SC) has held genuineness could validity be tested on the ground or principle of preponderance of human possibilities which form a valid ground or parameter for determining the genuineness."

2. The brief facts of the case are that the assessee is an individual and derives income from capital gains and income from other sources. The assessee has filed the return of income for the A.Y 2013-14 on 16.09.2014 with a total income of Rs. 1,08,070/-.The return of income was processed u/s 143(1) of the Act. The search operations U/sec132

- 3 -

of the Act conducted at the residential premises of the assessee as he is engaged in obtaining bogus long term capital gains on sale of shares and claimed exempt U/sec10(38) of the Act and a statement was recorded U/sec132(4) of the Act and the notice u/s 153A of the Act was issued on the assessee on 06.12.2016, in response to notice the assessee has filed the return of income on 08.08.2017 with a total income of Rs.1,08,070/-, subsequently notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and furnished the clarifications. The Assessing Officer (AO) on perusal of the financial statements found that the assessee has obtained long term capital gains on sale of shares of M/s Wagend Infra Ventures Ltd (earlier known as M/s Agarwal Holdings Ltd) and where there is an abnormal increase in share price within short span of time and dealt on facts of sale and issued show cause notice referred at Para 3.2 of the order. In compliance to the show cause notice, the assessee

- 4 -

has filed the detailed submissions referred at Page 12 Para 4 of the order as under:

4. In response to the same the assessee vide letter dated nil submitted as under:

In respect of the above said matter, as desired by your goodself vide notice under Section 142(1) of the Act dated 07/11/2017 and under the instructions of the assessee, in respect of the Long Term Gain of Rs. 4,33,71,4681- the following is submitted.-

1. The assessee applied for allotment of 1,65,000 equity shares of M/s Aggarwal Holdings Limited in November 2010. A copy of the application form filed by the assessee for the said allotment is enclosed for your kind perusal.

2. From the perusal of the share application form it is evident that the shares applied for by the assessee were to be allotted in the Demat Account No. 1204940000038156 operated and maintained by him with M/s Indianivesh Securities Limited and the purchase consideration Jar the same was paid vide account payee cheque dt. 08/11/2010 bearing number 893887 drawn on his Indian Bank Account No. 446432706. A copy of bank statement in this regard has already been furnished.

3. The said shares applied by the assessee were allotted in his demat account operated and maintained by him with M/s indianivesh Securities Limited and copies of the statements of stated demat account are enclosed your kind perusal.

4. The assessee during the F Y 2012-13 liquidated his investment and the long term capital gain of Rs. 4.33. 71,468/- accrued to him. Copies of statement of demat

- 5 -

account operated and maintained by the assessee share brokers evidencing the sale are also enclosed /or your kind perusal.

Copies of ledger account of the share brokers evidencing payment of STT on the sale, bank statements evidencing receipt of sale consideration as well as computation of long term capital gain have already been furnished yet the same are being enclosed again.

From the above stated facts it is evident that complete details verification of claim of Long Term Capital Gain by the assessee have been furnished.

The assessee has been issued and served a show cause notice whereby he has been asked to explain as to why the Long Term Capital Gain accrued to him shall not be treated as undisclosed income and taxed as cash credit under Section 68 of the Act. The stated show cause notice has been issued alleging that the claim of Long Term Capital Gain of the assessee is not simple or lucid and your goodself are in possession of certain circumstantial direct as well as direct evidences to show that the Long Term Capital Gain claimed by the assessee is not genuine and on that basis your goodself have termed Ms Wagend Infra Ventures Limited to be a penny stock.

At the very outset it is submitted that the term penny stock is not defined under the statute and the term was devised by investors who used to invest in equity of companies which were available for trade in market at low prices and there is no bar under the statute to invest in such companies.

Following are being claimed to be direct as well as circumstantial evidences by your goodself in the case of the assessee.-

A. Circumstantial Evidences

1. General Preface of the oilier companies which were niaiaaed by operators and which were found to be so by the Investu.utwii Win j, of the department.

- 6 -

2. *Modus operandi adopted by penny stock companies (111) their common features.*

In this regard the following is submitted.-

1. The investigations carried out by Investigation Wing of department which has unearthed the organized racket of generating bogus entries of Long Term Capital Gain and the modus operandi unearthed in investigation has been alleged to be the circumstantial evidence in the case of the assessee company.

Although no specific reference regarding involvement of M/s Wagend Infra Ventures Limited has not been made by your good self yet in this regard it is submitted that as a result of enquiries conducted by the department reports are compiled and information are forwarded to the concerned AO's of the beneficiaries. The said reports are appearing in the AIR report of the said persons as "Information related to Trade in Penny Stock".

It is not of place to mention here that your good self has provided us with a copy of AIR report which has specific information related to Trade in the quoted shares of certain companies in the case of the assessee which have been found amid held to be Penny Stock companies. From the bare perusal of the said information it is evident that the name Wagend Infra ventures Ltd does not appear in the said list. A copy of AIR report provided by your good self to us is enclosed for your kind perusal and reference.

Thus, the allegation of M's Wagend Infra Ventures Limited to be a penny stock company is only based upon suspicion and more likely for the purpose of verification due to increasing cases of non-genuine claim of exemption these days. However, it is most humbly clarified that the company Mis Wagend Infra Ventures Limited is not a penny stock company and has not been found or held to be so.

Thus, drawing adverse cognizance only upon the basis of suspicion is against the principles of natural justice and law and thus, it is most humbly requested that no adverse

cognizance may be drawn in this regard.

2. Your goodself in Para 2.4 (ii) has stated that the result of enquiry was also shared with SEBI and SEBI after investigating some of the cases have found the allegation to be correct.

In this regard it is most humbly submitted that recently certain restrictions were imposed by SEBI and stock exchanges on transactions in shares of 331 companies which were found and alleged to be indulged in the stated pernicious practice of generating bogus Long Term Capital Gain. A copy of the list of said entities is enclosed for your kind perusal.

From the perusal of the stated list it is evident that even from the part of SEBI and stock exchange there has been no allegation in respect of the shares of M/s Wagend Infra Ventures Limited.

Since the show cause notice issued by your good self is based solely upon surmises and conjectures it is most humbly requested that a specific enquiry may be conducted with SEBI and a report may be called for in this regard to ascertain whether there exists any allegation of operation of the prices of shares of M/s Wagend Infra Ventures Limited.

B. Direct Evidences

I. Suspicion on Rise in price of share.

In this regard at the very outset it is submitted that the rise in price of shares of any company is not the criteria of deciding whether the said company is penny stock company or a company operated by price manipulators. For alleging any scrip to be operator driven it has been necessitated by the law that there must be some enquiry which leads to such conclusion. However, no adverse report has been generated in the case of M/s Wagend Infra Ventures Limited and necessary evidences in this regard have been discussed supra.

2. Statement of the assessee in respect of introducing certain

persons to Sh. Akash Aggarwal

In this regard it is clarified that during the course of search action the assessee was confronted with the statement of Sh. Akash Agarwal and the assessee was shocked to see his statement wherein he has accepted to be indulged in such a pernicious practice. The assessee thereafter on the basis of statement of Sh. Akash Agarwal and his general understanding about the financial market explained the transactions of his acquaintances in the terms of the statement of Sh. Akash Agarwal.

It is pertinent to mention here that neither the assessee nor Sh. Akash Agarwal was found to be involved in operating the prices of shares of M/s Wagend Infra Ventures Limited. Thus, drawing adverse cognizance in this regard only upon suspicion is against the settled principles of law.

3. It is not out of place to mention here that vide Point No. 3(d) of the notice your goodself has enumerated the striking feature of said penny stock companies to be of returning the amount of initial investment in cash and it further understood that at the time of booking of capital gain, bogus capital gain could be recognized only upon payment of equivalent cash to operators.

The case of the assessee could easily be distinguished from the modus operandi explained supra. In this regard it is clarified that no evidence of any cash transaction has been found or seized from the assessee even after the conduct of extensive search action at his premises.

The importance of incriminating material found during the course of search has been referred to by several courts in several judicial pronouncements. Relevant extract of one of such judicial pronouncements of Hon 'ble Delhi High Court in the case of CIT vs Kabul (2016) 380 ITR 0573 (HC)(Delhi) is reproduced hereunder:-

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges

is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six A Ys immediately preceding the previous year relevant to the A Y in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as afresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant A Y in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders/or each of six years. In other words there will be only one assessment order in respect of each of the six A Ys "in which both the disclosed and the undisclosed income would be brought to tax "

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search or other post- search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each A Y on the basis of the findings of the search and any other material existing or brought on the record of the AO.

• vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

Several other judicial pronouncements in this regard as under:-

a) M/s All Cargo Global Logistics Ltd vs DCIT, 2012-TIOL-391-ITAT-MUM-SB

ACIT vs. M/s Pratibha Industries Ltd, ITA No. 2197 to 2199/Mum/2008

c) CIT vs Gurinder Singh Bawa (2016) 386 ITJ?

483 (HC)(Bom)

d) *Pr. CIT vs MS. Lata Jain, (2016) 384 IT1? 0543 (HC)(Del)*

e) *Pr. CIT vs Saumya Construction Pvt Ltd. (2016) 387 ITR 0529 (HC)(Gui)*

fi *Sanjay Aggarwal vs. DCIT, ITA No. 3184/De1/2013*

• *ACIT vs. Manoj Narain Aggarwal, ITAN No. 5518/De1/2012*

ii,) *Jakson Engineering Ltd. vs. ACIT, 2014-TIOL-194-ITAT-DEL*

i) *ACIT vs. PACL India Ltd, 2013-TIOL-734-ITAT-DEL*

Though it is understood that all these judicial pronouncements cited above are related to the assessment proceedings which have abated as a consequence of search and could easily be distinguished yet these are being referred to take cognizance and moot of the judiciary on the importance of incriminating material found during the course of search action.

It is not out of place to mention here that in some of the judicial pronouncements the search action have been referred to as the final action taken by the department to find out the truth and facts of an assessee.

In the case of the assessee neither any incriminating material evidencing the rigging of prices of M/s Wagend Infra Ventures Limited nor any evidence indicating any generation of of/icr income commensurate to the quantum of Long Term Capital Gain accrued to the assessee was found and seized.

Thus, in the absence of other income which would have been routed by the assessee in the form of Long Terni Capital Gain alleging the capital gain accrued to the assessee to be penny stock transactions is only based

upon surmises and conjectures not backed by any evidence.

By now it has been judicially settled that no addition shall be made to the income of the any assessee only on the basis of surmises and conjectures because the same is against the provisions of law as well as against the principles of natural justice.

In view of the above stated facts, circumstances and evidences furnished in the case of the assessee it is most humbly requested that no adverse cognizance may be taken in the case of the assessee.

We shall be highly obliged with your favour in this regard.

In case any other information/ details are desired we may kindly be informed accordingly, so that the may be furnished in the office of your good self

3. Whereas the AO has discussed on modus operandi at page 18 Para 5.3 to 6.3 of the order in respect of sale of shares and observed that the assessee has obtained artificial long term capital gains. Further the AO has relied on the statement of Mr. Rajkumar Kedia recorded by the DDIT, Delhi Investigation Wing u/s 132(4) of the Act and has referred to the statements and proceedings at page 36 to 40 of the order. Further the AO has dealt on the statement of other operators and the various facts and has issued show cause notice and the assessee has filed the details and explanations referred at Para 8.1 to 8.5 of the AO order. The AO considered the statement

- 13 -

recorded under 132(4) of the Act of Mr. Rajkumar Kedia and various transactions and observed that the claim of the exemption of the assessee u/s 10(38) of the Act cannot be accepted and assessed the total income after making addition of Rs.4,33,71,468/- as unexplained cash credit u/s 68 of the Act and assessed the total income of Rs.4,34,79,540/- and passed the order u/s 143(3) r.w.s 153A of the Act dated 30.12.2017.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A), whereas the appellate authority on the first disputed issue in respect of validity of assessment u/s 143(3) r.w.s 153A of the Act has observed that there is no violation in the procedures or law in completing the assessment proceedings and dismissed the assessee's ground of appeal. On the second disputed issue with respect to the additions u/s 68 of the Act in ground No. 2 to 5 of the grounds of appeal, the CIT(A) has dealt elaborately on investment pattern, submissions, material information, judicial decisions and for the same assessment year in the assessee's father case the long term capital gains on the sale of shares of

M/s Wagent Infra Venture was accepted by the department. Finally Ltd.CIT(A) has also relied on the Honble High Court and Hon'ble Tribunal decisions and followed the judicial precedents and observed that the action of the AO is not tenable and allowed these grounds of appeal by deleting the addition and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Honble Tribunal.

5. At the time of hearing, the Ld.DR submitted that the CIT(A) has erred in granting relief to the assessee by deleting addition and overlooking the findings of the A.O on the statement recorded in sale of shares and the evidences. The Ld.DR supported the order of the AO and prayed for allowing the revenue appeal.

6. Contra, the Ld. AR submitted that the CIT(A) has considered the facts, information, transactions of sale of shares and judicial decisions of the Honble High Court and Hon'ble Tribunal and for the same assessment year in the assessee's father case the long term capital gains on the sale of shares of M/s Wagent Infra Venture was accepted by the

department. The Ld.AR emphasized that the assessee has genuinely sold the shares after holding for a longer period of time through recognized stock exchange and sale consideration is received through the banking channels and was subjected to STT. The Ld. AR substantiated the submissions with chart, synopsis, factual paper book and judicial decisions and relied on the order of the CIT(A).

7. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue as envisaged by the Ld.DR that the CIT(A) has erred in granting the relief irrespective of the facts that the assessee ventured into bogus long term capital gains on sale of shares and claim exempted u/s 10(38) of the Act. The Ld. DR also submitted that the price of the shares has gone beyond the human probabilities and the AO has considered these facts and made an addition u/s 68 of the Act. Whereas the CIT(A) has took a different view overlooking the AO findings and granted the relief. We find that the Assessee has challenged action of the AO before the CIT(A) on the validity of assessment where no incriminating material was found in the search

operations. Further the assessee has obtained the long term capital gains on sale of shares after holding for more than 12 months and claimed exempt. The submissions of the Ld.AR are that 1,65,000 equity shares of Rs.10/- paid up at a premium of Rs.2/- per share were purchased by cheque for Rs.19,80,000/- and were allotted on 7-1-2011 on preferential basis and were reflected in the demat account. Subsequently, in June 2012 the company has split these shares @Rs.2/- each paid up (share split ratio 1:5) and the aggregate 8,25,000 shares are allotted to the assessee. The assessee has sold the above shares in the F.Y 2012-13 for aggregating sale value of Rs. 4,53,51,446/- and after claiming deduction of the cost of acquisition, the Long Capital gains of Rs. 4,33,71,468/- was claimed exempted u/s 10(38) of the Act. Whereas the CIT(A) has dealt on the first issue and confirmed the validity of the assessment. Further on the merits of the case, the Ld. AR submitted that the CIT(A) has considered the factual aspects that the AO has relied on the statement of third party and made the addition based on the statement u/s 132(4) of the Act of Mr. Rajkumar

- 17 -

Kedia mentioning that the assessee was involved in providing accommodation entries and no such statement was confronted to the assessee and opportunity of cross examination was provided to the assessee. Further not providing an opportunity to cross examination and statement is violation of principles of natural justice. The assessee has substantiated before the AO with the documents with respect to allotment of shares of M/s Wagend Infra Venture Pvt Ltd (formerly known as M/s Agarwal Holdings Ltd) referred to page 31 to 33 of the paper book. The assessee has filed the details, evidences on the disputed issue before the AO in lieu of the notice issued u/s 142(1) of the Act, whereas the AO based on the conjunctions and surmises has treated the LTCG as unexplained cash credit u/s 68 of the Act. The assessee has submitted the details in respect of allotment of shares with supporting share application form, bank statement, demat statement and broker ledger accounts and discharged the onus cast upon the assessee and demonstrated the information placed at page 34 to 50 of the paper book.

- 18 -

8. Whereas the AO has made the addition solely on the ground that the scrip is a penny stock and whereas the Ld. AR demonstrated that the shares of the company in which the assessee has invested does not appear in the AIR report of the revenue /A.O which related to trading in penny stocks and referred to page 51 to 54 of the paper book. Further name of the alleged company did not appear in the list of 331 suspended companies and no adverse inferences drawn by the SEBI referred at page 55 to 64 of the paper book. The AO was suspicious on the rise of share price and there is no investigation conducted on the alleged share price. Further it was wrongly assumed that the price of the scrip of M/s. Wagent Infra ventures Pvt Ltd has increased to more than 150 times. It is clearly a mistake apparent on the observations of the AO. Actually the share price has increased to Rs.263/- (before split). The assessee has sold the shares after split at average price of Rs. 54.91/- per share and the AO has dealt on the modus operandi and drawn adverse inferences. The assessee has invested in the shares of this company because of his father, who is a old share holder of this company

and who has sold the shares and claimed exemption of LTCG and was accepted. Further no evidence was brought on record on the allegations by the A.O except relying on the report of the investigation department and statement recorded. Further the Ld. AR emphasized that there is no opportunity was provided for cross examination as alleged by Mr. Rajkumar Kedia statement that the assessee is involved in activity of obtaining bogus long term capital gains and without providing opportunity of being heard the AO has made the addition u/s 68 of the Act. We found that the assessee is regularly making investments in shares and claiming exemption of long term capital gains u/s 10(38) of the Act. Further the Ld.AR has demonstrated that in the assessee's father case Mr. Tuljaram Jaju, who has claimed exemption of long term capital gains on shares and referred to page 9 to 13 of the paper book.

9. Whereas the AO has issued show cause notice and the assessee has filed the details substantiating the claim and the transaction of the assessee are not in the nature of speculation and the assessee has purchased the scrip for a long term holding. The

Ld.AR emphasized that the assessee has discharged the burden by submitting the details where the payments and receipts are through banking channel and the identity, genuineness of the transaction and creditworthiness have been proved. The assessee has made elaborate submissions before the CIT(A) along with evidences, facts and judicial decisions. The Ld. AR further submitted that the CIT(A) has considered the factual aspects and information satisfying the three ingredients u/s 68 of the Act and the assessee has discharged his burden by submitting the details, but the AO has not made any independent enquiry or conducted any inspection of facts and only relied heavily on the statement recorded. Whereas the assessee has purchased the shares in the normal course of business and claimed exemption u/s 10(38) of the Act. We found that the assessee has submitted voluminous information before the AO to substantiate the claim of exemption u/s 10(38) of the Act and also before the CIT(A) which cannot be overlooked. Further the CIT(A) has dealt extensively on the disputed issue and relied on the catena of judicial decisions, at this juncture we consider it appropriate

to refer to the findings of the CIT(A) in granting relief to the assessee dealt at Para 7.0 to 7.7 of the order read as under:

7.0 The second, third, fourth and fifth grounds of appeal are against the addition of Rs.4,33,71,468/- made u/s. 68 of the Act on the basis of surmises, presumptions and conjectures and without providing an opportunity of cross examination. The assessee had invested in 1,65,000 shares of M/s. Waqent Infra Venture Ltd. The shares were applied for preferential allotment. The same were allotted to the assessee on 07.01.2011. They were applied on 08.11.2010 and the payment has been made on the same day vide cheque no. 893887. In June, 2012 with the approval of SEBI, the shares were split 1:5 and so 1,65,000 shares of the assessee were converted into 8,25,000 shares. These were sold by the assessee during November, 2012 and February and March, 2013. The sale has resulted in a long term capital gain of Rs.4,33,71,468/-. The AO discussed the modus operandi of penny stock shares. The AO relying upon the theory of preponderance of probability and the judgments of the Apex Court in Sumati Dayal vs CIT (1995) 214 ITR 801 (SC) and CIT vs Durgaprasad More 82 ITR 540, held that the transactions made by the assessee are akin to the penny stock transactions and treated the long term capital gain declared by the assessee as income u/s. 68 of the Act.

7.1 Aggrieved with this addition, the assessee filed present ground of appeal and made the following submissions:

1. "Ground No. 2 - LTCG assessed as unexplained cash credit u/s 68 only on surmises and presumptions without any incriminating evidences in this regard.

a) The appellant during the course of assessment proceedings furnished complete details of the purchase and sale of the equity shares of Investee Company for which the sale proceeds were credited in the bank account of the appellant

and thus the onus cast upon him under Section 68 of the Act was duly discharged.

b) The appellant during the course of the assessment proceedings stated that the essential feature of availing Bogus Capital Gain is settlement of transaction in cash. However, no evidence substantiating the same was found even after conducting the extensive search action in the case of the appellant and the judgement of Hon'ble High Court of Delhi in the case of CIT vs. Kabul Chawla (2016) 380 ITR 0573 (HC)(Delhi) was relied upon.

2. Ground No. 3 - Additions made on surmises despite the fact that the features of bogus capital gain seekers were distinguishable from the facts of the case of the appellant

a) A comparative chart showing difference between the modus operandi adopted by the bogus capital gain seekers as narrated in the assessment order and that of appellant is as under:-

or relation with an assessee. appellant because the father of the I appellant was an old shareholder of the stated company.

2 The purported investors are returned No evidence substantiating the same their initial investment amount in was found or ever brought on record in

cash. the case of the appellant.

3 The transaction of sale is settled by Neither evidence of any such cash providing unaccounted cash which is payment was found nor any income routed through paper companies, commensurate to said capital gain found in the case of the appellant.

Further, the appellant didn't had income commensurate to the capital gains which he could have routed in the form of capital gains.

b)It is further pertinent to mention here that the Long Term Capital Gain accrued to the father of the appellant is assessed as genuine and no adverse cognizance was drawn by the Ld. AO in his case.

This conclusively proves that the Ld. AO has acted only upon surmises, presumptions and conjectures to assess the Long Term Capital Gain accrued to the appellant as non- genuine and to assess the same under Section 68 of the Act.

3. Ground No. 4 - Use of third party statements without allowing any opportunity of rebuttal That the Ld. AO while completing the assessment proceedings relied upon the statements of Sh. Raj Kumar Kedia and Sh. Praveen Aggarwal. However, the said statements were never provided to the appellant for rebuttal thereof which is against the principles of natural justice and law and no addition could be made to the income of the appellant without allowing an opportunity for rebuttal thereof. Reliance is placed on the following:-

- a) Dhakeswari Cotton Mills Ltd. vs. CIT, (1954) 26 ITR 0775.*
- b) Andaman Timber Industries vs. CIT (2015) 127 DTR 0241 (SC)*
- c) H. R. Mehta vs. ACIT, (2016) 289 CTR 0561 (Bom)(HC)*
- d) KishinchandChellaram vs. CIT, (1980) ITR 0713 (SC)*

Ground No. 5 - Submissions rejected only on presumptions and surmises

In this regard it is clarified that the Ld. AO has rejected the submissions of the appellant mechanically only on surmises/ conjectures and presumptions. The appellant during the course of assessment proceedings stated that he didn't had income commensurate with the amount of capital gain which he could have routed using the alleged modus operand!. It was further stated that no incriminating evidence in this regard was found during the course of search.

The Ld. AO with a predetermined mind to make additions to the income of the appellant presumed that he being evident of the probable search action might have kept the incriminating evidences at some other place. The stated assertion arises out of the presumptions of the Ld. AO and is not tenable under the law.

That we have further relying upon the following judgments wherein it has been held that unless and until the Assessing Officer has not received / possessed any adverse material against the appellant, no additions if any could be made only on the basis of general information received / collected from the CIT(A)-49/IT-177/2017-18

Investigation Wing of the Deptt., as such the legitimate and bonafide claim, cannot further be disallowed, only on the basis of presumption and guess work if any attributed in the course of assessment proceedings:-

i.

Pr. CIT vs. Prem Pal Gandhi, (2018) 401 ITR 0253 (P&H)

Pr. CIT v/s. Hitesh Gandhi, ITA No. 18 of 2017(0 & M)

iii. Farrah Marker Vs. ITO (2016) 46 CCH 0535 (Mum Tribunal)

iv. Sh. Prakash Chand Bhutoria vs. ITO, ITA No. 2394/Ko1/2017

v. DCIT vs. SunitaKhemka, LTA Nos. 714 to 718/Ko1/2011

vi. Principal CIT v/s. Prempal Gandhi, ITA-95-2017(0& M)

vii. ITO 24(3)(1) v/s, M/s. Indravadan Jain HUF ITA - 4861/Mum/2014

ACIT 24 (3) v/s. Shri.Indravan Jain ITA No. 5168/Mum/2014

viii. Smt. DurgadeviMundra v/s ITO 21(1)(1) ITA No. 1175/Mum/2012

ix. Shri. Mahesh Mundra V/s. ITO 21(1)(1) ITA No. 1175/Mum/2012

x. Shri. Pramod Kumar Lodha v/s. ITO ITA No. 826/ JP/2014

xi. Mr. NavneetAgrawal, Legal Heir of Late KiranAgrawal v/s. ITO Wd 35 (3), ITA No. 2281/Ko1/2017

MeenuGoyal v/s. ITO Ward 31(1), ITA No. 6235/ Del/2017

xiii. Shri. Anil NandkishoreGoyal v/s. ACIT, Central Circle, ITA No. 1256/PN/2012

xiv. ITO 24(3)(1) v/s. M/s. Arvind Kumar Jain-HUF, ITA No. 4862/Mum/2014

xv. CIT V/s. Smt. Jamnadevi Agrawal & ORS., 328 ITR 0356"

7.2 The submissions of the Learned Counsel have been carefully considered. The Learned Counsel affirmed that the transactions were genuine and the company M/s. Wagent Infra Venture Ltd. has not been notified as a penny stock company either by the department or by SEBI. The assessee's father is an old investor in the said company and the capital gain derived by him from the sale of the shares of the said company has been accepted by the department. The Learned Counsel tried to distinguish the facts in his case from the other penny stock transactions. In penny stock Sawankumar Totaram Jajoo AY 2013-14 CIT(A)-49/IT-177/2017-18 transactions investments are made in unknown companies and the,- purported investors are rendered their initial investments in cash. Transaction of sale is settled by providing unaccounted cash which is routed through paper companies. In the case of the assessee, in spite of a search none of these could be brought out. There was no case of cumulation of cash by the assessee nor cash being routed through any paper company. The AO countered this argument by stating that 'Mr. Sawankumar Jajoo being in the same line was aware of the facts and he knew that any time he may also be searched by the Income-Tax Department. He was cautious and might have kept the incriminating material at some other premise". This is a mere suspicion and presumption of the AO and an addition cannot be made on the basis of mere presumptions. In this case, the assessee had got the allotment through application and preferential allotment, payment was made on the same day of application, the shares were dematted immediately and were lying in the demat account of the assessee till they were sold. Sale consideration was also received through cheque. The shares price has risen many times in a span of one year, is a fact but treating the sale consideration received as unexplained cash credit merely on the basis of the suspicion cannot be made in view of the overwhelming evidences provided by the assessee.

While it is true that the AO should look into the surrounding circumstances to find out the reality, the AO should have reasons to believe that the apparent is not the real. In this case, the assessee has provided all the evidences. The AO has not brought anything contrary on record to prove the assessee wrong. He heavily relied upon the assessment order. Even though the AO stated that Rajkumar Kedia mentioned the assessee as an entry operator, there is no such reference to the assessee in his statement. Even in the search, no contrary evidences could be detected. In view of the above, the addition made by the AO cannot be upheld.

7.3 The AO has heavily relied upon the statement of Shri Rajkumar Kedia and Shri Pravin Agarwal. It was stated by the AO that Shri Rajkumar Kedia has said that the appellant was a well-known entry operator of Mumbai. However, extract of the statement which is a part of the assessment order, do not mention the name of the assessee anywhere. This, again, appears to be presumption made by the AO. The assessee had asked for copies of the statement where the assessee's name was mentioned and also to provide for cross examination of both Rajkumar Kedia and Pravin Agarwal, which has not been provided by the AO. It is a fact that during the course of search no incriminating material was found with the assessee. Moreover, the assessee has not admitted to indulging in any manipulation of long term/short term capital gain. He had only admitted to refer a few people who are in need of entries to one Mr. Akash Agarwal. Mr. Akash Agarwal, who was also searched said in his statement that Mr. .Jajoo controls and manages some companies. When the assessee was confronted with this, he had promptly denied and this was not controverted by the department. The assessee has explained the source of long term capital gain and it cannot be said to be an unexplained cash credit which can be taxed u/s. 68. Not providing an opportunity of cross examination when reliance is placed n certain statement, violates the principle of natural justice as is being held by the Hon'ble Apex Court in the case of Andaman Timber Industries Ltd. Vs, CIT(2015) 127

DTR 0241(SC) and H R Mehta vs ACIT 289 CTR 0561(Bom). The Hon'ble Apex Court in Andaman Timber Industries held as under:

"According to us, not allowing the assessee to cross examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee.

However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal. H.R. Mehta vs AcIT, (2016) 289 CTR 0561(Bom)(HC)

In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders

the orders passed by the CIT(A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal on this very issue."

7.4 The Hon'ble ITAT, Mumbai in the case of Ms. Farrah Marker ITA No. 3801/Mum/2011 held as under:

"From the appreciation of the facts of the case, the material evidence placed on record by the assessee and in the light of the discussion of the factual and legal matrix of the case as discussed from para 3.1 to 3.4.7 of this order (supra), we are of the considered opinion that the authorities below i.e. AO/CIT(A) have made the addition u/s. 68 of the Act merely on presumptions, suspicions and surmises in respect of penny stocks; disregarding the direct evidences placed on record and furnished by the assessee in the form of brokers contract notes for purchases and sales of the 'said shares' of Constructions Ltd., copies of the physical share certificates and her D-MAT account statement establishing the holding of the shares in her name prior to the sale thereof; confirmation of the transactions of buying and selling of the 'said shares' by the respective stock brokers, receipt of sale proceeds through banking channels, etc. As observed earlier in this order, we are of the view that the statement recorded from ShriNirajSanghvi on 31.12.2007, the day the order of assessment was passed, would have no evidentiary or corroborative value to be the basis for coming to an adverse view in the case on hand, since it was recorded behind the assessee's back, from a person who was not involved in the purchase of the said shares and also since the assess.,-:,e was not afforded opportunity for rebuttal of the

same and to cross- examine the said person. We are also of the view that the ratio and the factual matrix of the decisions in the cited case, i.e. JatinChhadwa (supra), Harkhchand K. Gada(HUF) & others (supra) and Andaman Timber Industries (supra) would be applicable and support the case of the assessee since no adverse finding has been rendered in respect of the direct material evidence placed on record in respect of her transactions of purchase and sale of the 'said Shares' of (4/s. Shukun Constructions Ltd. which stand duly disclosed in her audited Balance Sheet filed with the return of income of assessment years 2004-05 and the current year under consideration. In this factual and legal matrix of the case, as discussed above, we find that the addition of Rs.95,12181211- -/s. 68 of the Act made by the authorities below to be unsustainable and therefore direct the AO to delete the said addition and accept the LTCG income of Rs.93,00,012/- shown as exempt u/s. 10(38) of the Act. Consequently, ground No. 1 of the assessee's appeal is allowed."

7 . 5 The Hon'ble ITAT, Kolkata in the case of Mr. Navneet Agarwal ITA No. 228/Ko1/2017 held as under:

"11. The assessee in this case has stated the following facts and produced the following documents as evidences:

1. The assessee had made an application for allotment of 50000 equity shares of "Smart champs IT and Infra Ltd." and she was allotted the share on 3rd December

2011 (copy of Application form, intimation of allotment and share certificate Paper Book at page 8 to 10).

2. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money and payment made to "Smart Champs IT & Infra Ltd." for such shares allotted is placed in the Paper Book at page no. 11).

3. Annual return no, 20B was filed with Registrar of companies by "Smart Champs IT & Infra Ltd" showing the

assessee's name as shareholder (copy of annual return no. 20B filed with Registrar of companies by "Smart Champs IT & Infra Ltd. "is placed in the Paper Book at page no. 12 to 18.)

4, The assessee lodged the said shares with the Depository M/s. Eureka Stock & Share Broking Services Ltd. with a Demat request on 1st February, 2012. The said shares were dematerialized on 31st March, 2012 (copy of demat request slip along with the transaction statement is placed in the paper book at page no. 19 to 21).

5. On 24.01.2013, the Hon'ble Bombay High Court approved the scheme of amalgamation of "Smart Champs IT and Infra Ltd." with "Cressanda Solutions Ltd."

In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of "M/s. Cressanda Solutions Ltd." The demat shares are reflected in the transaction statement of the period from 1st November 2011 to 31st December, 2013 (A copy of the scheme of amalgamation along with copy of order of the Hon'ble Bombay High Court and a copy of the letter to this effect submitted by "Cressanda Solutions Ltd". to Bombay Stock Exchange is placed in the Paper Book at page no 22 to 43.)

6. The assessee sold 50000 shares costing Rs. 500000/- through her broker "SKP Stock Broking Pvt. Ltd" which was a SEBI registered broker and earned a Long Term Capital Gain of Rs. 2,18,13,072/-. (Copy of the bank statement, brokers contract note together with the delivery instructions given to the DP and broker's confirmation is also placed in the paper book at page no 44 to 65).

7. Copy of Form No. 10DB issued by the broker, in support of charging of S. T. T. in respect of the transactions appearing in the ledger is placed in the paper book at page no. 66.

8. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days.

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

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

has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

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

15. In our view, just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Sa/av Mohamed Salt reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Centra/), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'b/e Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact

of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisations. Courts of law are bound to go by evidence.

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

at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

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

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single

transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,—this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each".

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

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

a) *AyaaubkhanNoorkhanPathan vs. The State of Maharashtra and Ors.*

"23. A Constitution Bench of this Court in *State of M.P.v. ChintamanSadashivaVaishampayan* AIR 1961 SC1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: *Union of India v. T.R. Varma*, AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen*, AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors.*, AIR 1964 SC708; *New India Assurance Co. Ltd. V. NusliNevilleWadia and Anr.* AIR 2008 SC 876; *Rachpal Singh and Ors, v. Gurmit Singh and Ors.* AIR 2009 SC 2448; *Blecco Lawrie and Anr. v. State of West Bengal anclAnr.* AIR 2010 SC 142; and *State of Uttar Pradesh v.Saroj Kumar Sinha* AIR 2010

24. In *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. *audialterampartem*.

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

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

30. *The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-*

examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in

accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

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

"4. We have heard Mr.KavinGulati, learned senior counsel appearing for the Assessee, and Mr.K.Radhakrishnan, learned senior counsel who appeared for the Revenue.

5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amount edto violation of principles of natural justice because of which the Assessee was adversely affected. It is to be come in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It- would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rej9cti2n of this plea is totally untenable The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony fo rwhich purpose it wanted to avail the opportunity of cross -exam in ation. That

apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above.

We may also point out that on an earlier occasion when the matter came before this Court Appeal No. 2216 of 2000, order dated 17-3- 2005[2005 (187) E.L. T. A33 (S. C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

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

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

a) The CALCL/7TAHIGH COURT in the case of BLBCABLES &CONDUCTORS[ITA No. 78 of20i 7] dated 9. 06.2018. The High Court held vide Para 4.1:

we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and

bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal," [quoted verbatim] This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed."

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

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

c)The Hon'ble Punjab and Haryana High Court in the case of PREMPAL GANDHI[ITA95-2017(O&M)] dated18.01.2018 at vide Page 3 Para 4 held as under:

„..... The Assessing Officer in both the cases added the appreciation to the assessee's' income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's' income from undisclosed

sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner."

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

"Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation

between the amounts sought to be added and the entries in those documents. This

was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises."

d) The BENCH "D" OF KOLKATA ITAT in the case of GAUTAM PINCHA [ITA

No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:

"In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered

gamut of unfounded/unwarranted allegations leveled by the AO against the assessee which in our considered opinion has no legs to stand and there fore has to fall. We take note the id. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of

material evidence the allegations that the assessee/brokers got involved in price rigging /manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by theAO nor by the Id. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act."

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

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

f) The BENCH "A"OF KOLKATAITAT in the case of SHALEENKHEMANIUTA No.1945/Ko1/2014Jorder dated 18.10.2017 held as under vide Page 24 Para 9.3:

"We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the Id AOagainst the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the Id DR could not controvert the arguments of the Id AR with contrary materi,-31 evidences on record and merely relied or the orders of the AO. We find that the allegation that the assessee and / or Brokers

getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the Id AO to be false or fabricated. The facts of the case and the evidences in support of the assessee's case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the Id AO was not justified in rejecting the assessee s claim of exemption under section 10(38) of the Act."

g) The BENCH 'H"OF t4UMBAITAT in the case of ARVINDKUMAR JAINHUF[ITA No.46821Mum12014]order dated 18.09.2017 held as under vide Page 6 Para 8:

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

genuine Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A)."

h)The Honlble Punjab and Haryana High Court in the case of VIVEK MEHTA[TTA No. 894 OF2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

"On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the

valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in

appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed."

i) The Horrble Jurisdictional Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Ko1/2009 dated 29.04.2009 at para 2 held as

follows:

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

j) *The Honible Supreme Court in the case of PCIT vs. TejuRohitkumarKapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon'ble*

Gujrat High Court as under:

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

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

21. Under the circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question."

7.6 Similar view has been held by the ITAT, Mumbai in the case of ITO vs Indravadan Jain, HUF ITA No. 4861/Mum/2014 wherein it was held:

"We have considered rival contentions and carefully gone through the orders of authorities below and found from the record that the AO has treated the share transaction as bogus on the plea that SEBI has initiated investigation in respect of

Ramkrishna Fincap Pvt. Ltd. The AO further stated that investigation revealed that transaction through Mjs Basant Periwal and Co. on the floor of stock exchange was more than 83%. We found that as far as initiation of investigation of broker is concerned, the assessee is no way' concerned with the activity of the broker. Detailed finding has been recorded by CIT(A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingénue transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s. Basant Periwal and Co. never stated any of the authority that transaction in M/s. Ramkrishna Fincap Pvt. Ltd. on the floor of the stock exchange is in genuine or mere accommodation entries. The CIT(A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction enteric by the assessee was genuine. Detailed finding recorded by CIT(A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT(A). Moreover, issue is also covered by the decision of jurisdictional High Court in the case of Shyam R. Pa war (supra), wherein under similar facts and circumstances, transactions in shares were held to be genuine and addition made by AO was deleted. Respectfully following the same vis-a-vis findings recorded by CIT(A) which re as per material on record, we do not find any reason to interfere in the order of CIT(A)." The facts of the present case are exactly identical.

7.7 In view of the facts and circumstances discussed above and the judicial precedents two of which are of the jurisdictional ITAT and are binding, the addition made by the AO cannot be upheld. These grounds of appeal are ALLOWED.

10. Further the Ld. AR has demonstrated BSE notice with respect to suspension of trading of the scrip as a surveillance measure in notice dated 28.03.2016 where the name of the company at Sr.No.30 is mentioned. Subsequently by another BSE notice dated 12.07.2016 trading in the company (M/s Wagend Infra Venture Limited has resumed with effect from 15-7-2016 and both these notices were brought to the knowledge of the revenue and are not disputed. The fact remains that the share/scrip in which the assessee has traded and made long term capital gains, is not subject any investigation by the SEBI but as a surveillance measure, the scrip trading was suspended and was resumed on 15.07.2016 and there were no adverse findings on this issue by the appellate authorities. We found that the AO has not provided material used adverse on the assessee and there was no cross examination was allowed to the assessee of a person whose statement was recorded. The assessee has sold the scrip in recognized stock

exchange through SEBI registered stock broker at a prevailing market price, which was subject to collection of security transaction tax (STT). Further the assessee has submitted the details of allotment of shares, source of acquisition of the year, proof of name change, share split and demat account statement reflecting the debit and credit of purchases and sale transactions, contract notes of SEBI registered stock broker with STT and bank account, receipts of sale proceeds were produced. We find that the Jurisdictional High Court on the similar facts on the allegations that the assessee has obtained bogus accommodation entries allotment of shares and earning long term capital gains, the Hon'ble High Court of Bombay in the case of CIT Vs. Shyam R Pawar, [2015] 54 taxmann.com 108 (Bom)

Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 - Assessee declared capital gain on sale of shares of two companies - Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted

addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus - Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted - Held, yes [Para 7] [In favour of assessee]

11. Similarly, the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Ziauddin A Sidhique, ITA No. 2012 of 2017 has observed at page 1 to 5 as under:

1. *The following question of law is proposed:*

"Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs.1,03.33.925/- made by AO u/s 68 of the I.T. Act, 1961, ignoring the fact that the shares were bought/acquired from off market sources and thereafter the same was demated and registered in stock exchange and increase in share price of Ramkrishna Fincap Ltd. is not supported by the financials and, therefore, the amount of LTCG of Rs.1,03,33,925/- claimed by the assessee is nothing but unaccounted income which was rightly added u/s 68 of the I. T. Act, 1961?"

2. *We have considered the impugned order with the assistance of the learned Counsels and we have no reason to interfere. There is a finding of fact by the Tribunal that the transaction of purchase and sale of the shares of the alleged penny stock of shares of Ramkrishna Fincap Ltd. ("RFL") is done through stock exchange and through the registered Stock Brokers. The payments have been made through banking channels and*

even Security Transaction Tax ("STT") has also been paid. The Assessing Officer also has not criticized the documentation involving the sale and purchase of shares. The Tribunal has also come to a finding that there is no allegation against assessee that it has participated in any price rigging in the market on the shares of RFL.

3. Therefore we find nothing perverse in the order of the Tribunal.

4. Mr. Walve placed reliance on a judgment of the Apex Court in Principal Commissioner of Income-tax (Central)-1 vs. NRA Iron & Steel (P) Ltd.' but that does not help the revenue in as much as the facts in that case were entirely different.

5. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raised any substantial question of law.

6. The appeal is devoid of merits and it is dismissed with no order as to costs.

12. The Honble High court of Bombay in the case of CIT Vs. Smt. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bom) has observed as under:

Section 68 of the Income-tax Act, 1961 - Cash credit - Assessment year 2001-02 - Fact that assesseees in group had purchased and sold shares of similar companies through same broker could not be a ground to hold that transactions were sham and bogus, especially when

documentary evidence was produced to establish genuineness of claim [In favour of assessee]

The assessee had claimed/offered long-term capital gains on sale of shares of various listed companies, which was accepted by the Assessing Officer. Subsequently, there was a search action in the case of various assessees belonging to a group known as Haldiram group. The group offered additional income of Rs. 2 crores, out of which Rs. 3 lakhs were offered in the hands of the assessee.

The Assessing Officer on the basis of the seized material issued notice under section 153A and subsequently, passed an assessment order under section 153A wherein he computed the total income by disallowing the long-term capital gain and added the entire sale proceeds received on sale of shares as income from undisclosed sources under section 68. The revenue was of the opinion that most of the sales of the shares effected by the group were of the same companies and through the same brokers. The Commissioner (Appeals) as well as the Tribunal deleted the addition.

13. Further the Hon'ble High Court in the case of Pr. CIT Vs Smt. Renu Agarwal Income Tax appeal No. 44 of 2022, where the High Court has confirmed the order of the Tribunal and first appellate authority observed as under:

This appeal under Section 260 'A of the Income Tax Act, 1961 has been filed challenging the order dated 17.01.2022, passed by the Income Tax Appellate Tribunal, Lucknow Bench "SMC" Lucknow in ITA No.205 of 2020 (A.Y. 2014- 15).

The basic question involved in the present appeal is with regard to deletion of some amount which was added by the Assessing Officer on the allegation of penny stock.

The appeal of the respondent - assessee was allowed against the assessment order. The appeal filed by the assessee was allowed by the CIT (Appeal). Against the appellate order the Revenue had filed the aforesaid Income Tax Appeal which has been dismissed by the ITAT.

After detailed discussion, the ITAT has recorded the following findings of fact:

"The above findings recorded by Id. CIT(A) are quite exhaustive whereby he has discussed the basis on which the Assessing Officer had made the additions. While allowing relief to the assessee, the Id. CIT(A) has specifically held that there is no adverse comment in the form of general and specific statement by the Pr. Officer of stock exchange or by the company whose shares were involved in these transactions and he held that Assessing Officer only quoted facts pertaining to various completely unrelated persons whose statement were recorded and on the basis of unfounded presumptions. He further held that the name of the appellants were neither quoted by any of such persons nor any material relating to the assessee was found at any place where investigation was done by the investigation Wing. The Id. CIT(A) relying on various orders of Lucknow Benches and other Benches has allowed relief to the assessee by placing reliance on the evidences filed by the assessee before Assessing Officer. I do not find any adversity in the order of Id. CIT(A) specifically keeping in view the fact that Lucknow Benches in a number of cases after relying on the judgment of Hon'ble Delhi High Court in the case of

Krishna Devi and others had allowed relief to various assessees."

The concurrent findings of fact has been recorded by the first appellate authority and the ITAT. Thus, no substantial question of law is involved in the present appeal. The matter is concluded by findings of fact.

14. The Honble Tribunal in the case of Nishith Rameshchandra Shah Vs. ITO, ITA No. 1116/Mum/2022 has observed at Para 5 of the order as under:

5. Having heard the rival submissions and perused the materials available on record, we are of the considered opinion that the AO has reopened the assessee's case based on the information received from the investigation wing. It is pertinent to point out that the assessment order in the present case does not have any mention about the independent inquiry that was conducted by the AO relevant to the impugned transaction. It is also observed that the AO has failed to examine the alleged Directors of M/s. Diamant Infrastructure Limited as to the nature of business carried out by the said company nor has the AO examined the alleged brokers involved in the impugned transactions. We would like to place our reliance on the decision cited by the assessee in the case of DCIT Vs. Sunita Khumka ITAT, (Cul.) (2016) ITRV- ITAT-CUL.-057 which held that the transaction cannot be held to be bogus merely on the basis of suspicion or surmise and that the AO has to substantiate his finding by bringing material on record to prove collusion/connivance between the broker and the assessee for introducing unaccounted money. We would also like to place our

reliance on the decision of Hon'ble jurisdictional Bombay High Court in the case of Commissioner of Income Tax-13 Vs. Shyam R. Pawar wherein it was held that where D-MAT account and contract note showed details of share transaction, and AO had not proved said transaction as bogus, capital gain earned on said transaction could not be treated as unaccounted income u/s 68. It is pertinent to point out that we have also considered the recent decision of Hon'ble Calcutta High Court in the case of Principal Commissioner of Income Tax Vs. Swati Bajaj on similar issue which held that the AO should conduct enquiry on the impugned transaction to substantiate that the claim of the assessee for LTCG/STCL is non genuine and further held that the AO can rely on circumstantial evidence based on the doctrine of preponderance of probabilities in such cases where it is beyond the reach to carve out direct evidences. But, in the present case we find that the AO has made no enquiry other than relying on the report of the investigation wing and the steep increase in the price of the shares. We are of the considered opinion that the AO should have done a further analysis and enquired into the genuineness of the alleged transaction. We place our reliance for this proposition on the decision of the Hon'ble Apex Court in the decision of Principal Commissioner of Income Tax Vs. NRA Iron and Steel Private Limited (2019) 412 ITR 161 (SC). In the present case in hand the assessment order is flawed by lack of enquiry by the AO.

6. From the above observation and by respectfully following the decision cited above, we hereby direct to delete the addition made u/s 68 of the Act.

15. We find the AO has not conducted any investigation or enquiry in respect of the information

submitted by the assessee and relied on the information of the third party whose statement was not cross examined. We follow the Judicial precedents of the Jurisdictional Honble High court and Honble Tribunal and further the CIT(A) has considered the detailed facts, submissions and the financial transactions and catena of judicial decisions to test check the creditworthiness and identity of the investee company. The CIT(A) has also observed that the assessee has discharged its burden on submitting the information in the proceedings. Further in the case of the assessee's father case, the long term capital gains on sale of same scrip/shares was accepted as dealt in the above paragraphs and the CIT(A) opined that there cannot be two different actions by the revenue in respect of same scrip/shares. Further the AO has failed to make further enquiries/investigations and relied on the statement of third party. We found the CIT(A) has dealt on the facts and provisions of law and judicial decisions and the applied the ratio of decisions to the present case and deleted the addition. Further the Ld. DR could not controvert the findings of the CIT(A) with any new

- 56 -

cogent material or information to take different view. We considered the facts, circumstances, submissions as discussed above are of the view that the CIT(A) has passed a reasoned and conclusive order. Accordingly we do not find any infirmity in the order of the CIT(A) on this disputed issue and uphold the same and dismiss the grounds of appeal of the revenue.

16. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 13.03.2023.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 13.03.2023

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

ITA No. 6489/Mum/2018
Shri Sawankumar T , Mumbai.

- 57 -

(Asst. Registrar)
ITAT, Mumbai