

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No.275/JP/2020
निर्धारण वर्ष / Assessment Year : 2015-16

Shri Arnav Goyal 141, Vidyut Nagar-A, Prince Road , Ajmer Road,Jaipur	बनाम Vs.	The ITO Ward 2(4) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ARBPG 7921 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal, CA
राजस्व की ओर से / Revenue by: Shri Chandra Prakash Meena, Addl.CIT

सुनवाई की तारीख / Date of Hearing : 05/01/2023
उदघोषणा की तारीख / Date of Pronouncement: 03 / 04/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the Id. CIT(A)-1, Jaipur dated 23-01-2020 for the assessment year 2015-16 wherein the assessee has raised the following grounds of appeal.

"1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the addition of Rs. 31,70,080/- made by Ld. AO u/s 68 of the I. T. Act, 1961 by alleging that the long term capital gain claimed as exempt income u/s 10(38) was a bogus accommodation entry without appreciating the facts and circumstances of the case and the submissions made as well as the details submitted before him. Thus, the addition of Rs. 31,70,080/- so uphold deserves to be deleted.

1.1 That Ld. CIT(A) has further erred in ignoring the fact that shares were purchased on premium and payment was made through banking channel as well as impugned shares were duly received by the appellant which were later credited in his DMAT account, thus purchase and ownership of shares with assessee is established and cannot be doubted, therefore the profit from sale of such shares cannot be held as bogus.

1.2 That the Ld. AO and also CIT(A) failed to appreciate that shares of M/s Kappac Pharma Ltd. are quoted in recognized stock exchange and its shares were sold by the assessee through authorised share broker on the online portal of the recognized stock exchange after paying STT and payment was received through banking channels as well as shares were duly debited in D-Mat account and thereby sale of shares is established and not at all doubtful and therefore consequent LTCG is not at all non-genuine and thus the addition made u/s 68 deserves to be deleted.

1.3 That the above mentioned addition made by the A.O. after interalia observing that the financial transaction effected by the assessee were sham ones and confirmed by Ld CIT(A) without rebutting the documentary evidences of purchase, banking channel payment, D-Mat account and subsequent sale on on-line portal at market price and payment received through banking channels after due payment of STT and merely on presumptions and assumptions and relying on uncorroborated and general statement of some broker not related with assessee is most arbitrary, unjust and untenable in fact and in law and liable to be deleted.

1.4 That the addition of Rs. 31,70,080/- made by the AO and confirmed by Ld. CIT(A) by holding the Long Term Capital Gain on sale of shares as unexplained credit, after placing reliance on some information and statements of third parties recorded by some other officials, in some other case and behind the back of assessee that too without having any) specific mention therein of either the name of assessee or his broker and moreover without allowing the cross-examination those persons to the assessee, is totally against the principles of natural justice and thereby unlawful and therefore the addition so made deserves to be deleted.

1.5 That Ld. CIT(A) has erred in ignoring the fact that all the allegations are without independent application of mind by the AO and based merely on the borrowed information supplied by other authorities, which are not even factually co-related and thereby addition made based on such allegations deserves to be deleted.

1.6 On the facts and in circumstances of the case the Ld. CIT(A) has erred in ignoring the decision of Hon'ble Rajasthan High Court and Hon'ble ITAT Jaipur Bench despite the facts of case being similar and placing reliance on decision of Delhi High Court and other benches of Hon'ble ITAT is contrary to judicial discipline.

2. On the facts and in the circumstances of the case Ld. CIT(A) has further erred in confirming addition by observing that:

- (i) Purchases of shares was offline without the payment of STT;
- (ii) At the time of purchases debit note is issued instead of sale bill;
- (iii) Payment has been made after two months;
- (iv) shares were credited in DMAT account after a lapse of 3 months;

Such observations of Ld. CIT (A) since related to the genuine purchases made in earlier year when no action is taken by the department thus the same deserve to be ignored and excluded and consequent addition based on these allegations deserves to be deleted.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the addition of Rs.63,402/- made by Ld. AO u/s 69C of the I. T. Act, 1961 on whims and fancies and baselessly alleging that the assessee has paid commission at the rate of 2% of the long term capital gain to the entry provider without appreciating the facts and circumstances of the case and the submissions made and further bringing no evidence on record for saying so. Thus, the addition of Rs. 63,402/- deserves to be deleted.”

2.1 Apropos Ground No. 1 to 1.6 and 2 of the assessee, brief facts of the case are that the assessee is an individual and during the year under consideration has derived Income from Salary, Income from Share trading and Income from other sources. Return of Income for the year was filed on 26.08.2015 declaring total income at Rs. 5,48,200/-. The case of assessee was selected for scrutiny by issue of notice u/s 143(2) of the Act. Details and information sought by AO were furnished and assessment was completed u/s 143(3) of the Act after making addition u/s 68 to the tune of Rs.31,70,080/- by treating the long term capital gain [claimed exempt u/s 10(38)] as accommodation entry and thus bogus, and further addition of Rs.63,402/- u/s 69C that assessee might have paid commission for obtaining such accommodation entry. The relevant para of AO at page 52 and 53 making total addition of Rs.31,70,080 +Rs.63,402= 32,33,482/- is mentioned as under:-

Page 52: The reply by the assessee laws considered carefully but not found tenable in view of the elaborate discussion made above. Hence, addition of Rs.31,70,080/- is made to the income of the assessee treated as bogus long term capital gain.....’’

Page 53: Looking to the facts and circumstances of the case, it is held that the assessee has paid commission @ 2% of sale value of shares of M/s. Kapac Pharma Limited and paid a sum of Rs.63,402/- (2% of 31,70,080/- sale value) and the assessee has not offered any explanation about the source of the same. This sum of Rs.63,402/- is treated as unexplained expenditure u/s 69C of the Income Tax Act, 1961 and added to the total income of the assessee for the year under consideration.....’’

2.2 Aggrieved of the addition so made, assessee preferred appeal before Id. CIT(A), who dismissed the appeal primarily relying upon observation of AO. Present appeal has been filed against the order so passed by Id. CIT(A). The relevant observation as to the additions of Rs.31,70,080 +Rs.63,402= 32,33,482/- is mentioned at para 41 to 44 para is reproduced as under:-

“41. On perusal of the above observation of the ITAT, it is clear that in the above case the AO did not conduct any independent investigation or enquiry and simply made the addition based on the appraisal report and order of settlement commission passed in another assessee. The AO also relied upon the statement of the assessee recorded during survey proceedings wherein she denied of making any investment in shares. However, no enquiry about the financials and trading patterns of the share traded was made. The above approach was not in conformity with the key principle laid down by the Apex Court in case of NRA Iron Steel (supra). However, in the present appeal, detailed investigation of facts regarding purchase of shares, demat holding, price movement of shares EPS and P/E of shares were made besides the statements recorded during search/survey. Thus, in case of Pooja Agarwal (supra), the full facts were not before the Hon’ble ITAT, therefore the ratio of the above case is not applicable to the present appeal. Therefore, the said decision does not help the assessee in the

present case. In the case of Suman Poddar vs ITO (supra), full facts were put up before the Hon'ble ITAT who has decided the issue in favour of the Revenue. The above decision has been upheld by the Hon'ble High Court of Delhi and Hon'ble Apex Court. Therefore, the same becomes the guiding principle in taxing such sort of transactions.

(42) As I mentioned at several places that the issue relating to penny stock of share capital is a very critical issue from both taxation point of view as well as from the economic point of view. These practices of converting unaccounted money into white money was running through several years and it is only in 2013 and onwards the various agencies of Government of India as well as Income Tax Department acted on this and busted the racket. Therefore, these issues need to be decided in the context and background not otherwise. It is the substance of the transaction which is more important than the form of transaction i.e. simply showing that the assessee has earned exempt long term capital gain and there are umpteen number of facts which suggest that entire design or form of the transaction is fishy or suspicious. The decision of SC in Sumati Dayal (supra) and Durga Prasad More (supra) does not lay down the principle of surmises and conjectures and rather it provides a golden principle which is applicable in certain situations, where the authorities have reasons to believe that the apparent is not real and in such case human behavior or preponderance of probability principle should be applied and present case is the fit case for application of said principle. Further, in view of decision of SC in NRA Iron & Steel (supra), onus u/s 68 cannot be discharged by merely submitting contract notes, bank statement etc. The assessee has to establish genuineness by giving proper reply and justifying the transaction. Thus, it can be held that the appellant failed to discharge the onus to establish the genuineness of transaction regarding long term capital gain from sale of shares.

(43) Therefore, in view of the above discussion and finding the direct decision of the Hon'ble Apex Court in the case of Suman Poddar vs ITO (Supra) on identical facts and decision of Hon'ble Apex Court in the case of NRA Iron & Steel (supra) regarding taxing of credit entries and principle laid down by the Hon'ble Apex Court in the case of Sumati Dayal (supra), the addition made by the AO u/s 68 of the Act is confirmed.

Commission Expenditure

(44) During the appellate proceedings, the appellant challenged the addition made by the AO on account of estimation of commission for obtaining alleged accommodation entries long term capital gain. In the earlier part of the order, I have held that the transaction of sale of shares were only accommodation entry provided by the brokers. Such entries are obviously provided against certain commissions. Considering the entire facts and circumstances of the case, no interference is called for. The addition made by the AO on account of commission payment by considering the rate of commission at 2% is upheld. Hence, the addition made by the AO amounting to Rs.63,402/- is confirmed. Thus, the ground of appeal is dismissed.”

2.3 During the course of hearing, the ld. AR of the assessee prayed that the ld. CIT(A) has erred in sustaining the additions of Rs.31,70,080 +Rs.63,402= 32,33,482/- made by the AO for which the ld. AR filed the following written submission.

Ground-wise submission is as under:

Ground of Appeal No. 1 to 1.6 and 2:

In all these grounds of appeal, assessee has challenged the action of ld. CIT(A) in confirming addition of Rs.31,70,080/- made by ld.AO u/s 68 of the Act by treating genuine Long Term Capital Gain earned by assessee as mere accommodation entry and bogus and thereby withdrawing exemption u/s 10(38). As all the grounds of appeal are interrelated, the same are dealt with together for the sake of convenience. Brief facts pertaining to these grounds of appeal are that assessee was holding 12500 shares of M/s Kappac Pharma Ltd., acquired by him in F.Y. 2012-13 on 16.1.2013 (APB-32) for Rs.1,87,500/-, which were sold during the year for consideration for Rs.31,58,765/-[in Nov.- Dec., 2014] (APB 42-44) after holding the same for more than twelve months. Accordingly, Long term capital gain of Rs.29,71,725/- earned from the sale of such shares was declared in the return of income filed. As shares sold were of a listed public limited company i.e. M/s Kappac Pharma Ltd. and were sold through recognised stock exchange after holding for a period of more than one year and the STT was paid on sale, the profit earned being long term capital gains was claimed as exempt u/s 10(38) of the Act. These shares were purchased by the assessee after making payment through payees account cheque which stood debited in the bank account of the assessee (APB 35-36). These shares stood sold via transaction executed through Bombay stock exchange after payment of STT (Securities

Transaction Tax) and other incidental charges. However, Ld. AO during the course of assessment proceedings, based on some information received from Investigation Wing of the Income Tax Department (obtained by them during searches/surveys conducted by them at various places throughout the country but none of them was related or connected in any way to the assessee), issued show cause notice dated 17.11.2017 proposing to make addition to the tune of Rs.31,70,080/- (alleging as undisclosed income in the form of LTCG) (**APB 49-50**). Assessee filed reply dated 23.11.2017 in response to show cause notice (**APB 49-50**), whereby entire transaction was explained and it was also submitted that assessee had earned LTCG of Rs.29,71,725/- and not Rs.31,70,080/- as mentioned in show cause notice. However, ld.AO without rejecting any of the documentary evidences furnished by assessee, made addition of Rs.31,70,080/- alleging the same as unaccounted income in the form of LTCG (which was not the figure of LTCG earned and declared in Return of Income) and surprisingly the ld. CIT(A) also upheld the said addition without considering the said mistake. At this juncture, it is submitted that for making addition, ld.AO has relied upon some information received from Investigation Wing Kolkata and statements recorded of one Sh. Jai Kishan Poddar during survey conducted u/s 133A on 11.09.2015 at the business premises of some M/s Consortium Capital Pvt. Ltd., and another Shri Anil Kumar Khemka of M/s Devshyam Stock Broking Pvt. Ltd., who had stated to have admitted to be engaged in providing accommodation entries in the guise of LTCG through their stock broking companies named above. As these two persons had stated that Kappac Pharma is also one of the company used for providing entries, it was concluded that the transactions of assessee in the scrip of Kappac Pharma are also not genuine and assessee had introduced his undisclosed income in the guise of LTCG which was claimed exempt from tax in terms of the provisions of section 10(38). Further, ld.AO had referred some order of SEBI having no direct reference of the assessee. During the course of assessment proceeding, opportunity for cross examination of the witnesses of the department i.e. the above named two persons whose statements were solely relied upon to conclude that the assessee has obtained accommodation entries, was demanded but the same was not allowed nor there was any whisper in the assessment order as to why such opportunity was denied to the assessee.

In first appeal, ld. CIT(A) without appreciating the evidences and details submitted, confirmed the action of the ld. AO by primarily quoting numerous case laws on human probabilities, however again no defect whatsoever was pointed out in the documentary evidences furnished by assessee and these document evidences were not rebutted by ld. CIT(A) also. Ld. CIT(A) on his own theories and assumptions has denied the opportunity of cross examination and further tried to deviate his finding from the direct judgment of Hon'ble jurisdictional high court on this issue where the Hon'ble court has confirmed the order passed by the Hon'ble Jaipur bench of ITAT.

In this regard, at the outset, it is submitted that neither information nor the statements relied upon by ld.AO for making addition were supplied to assessee despite of specific request made by assessee. In fact, request of assessee seeking cross examination of such parties whose statements were relied upon was also turned down in arbitrary manner, which is absolutely against the principle of natural justice (**APB-53**). Ld. CIT(A) also ignored this vital issue and confirmed the addition made by ld.AO. With this background, following facts are submitted for your honours' kind perusal and the sake of convenience:

The Transaction: As stated above, Assessee had purchased 12500 equity shares of M/s Kappac Pharma Ltd., a public limited company listed in BSE (**APB-32**) and the necessary payment was made by account payee cheque (**APB-36**). The said shares were got dematerialized on 26.6.2013 (12000 shares) and 26.8.2013 (500 shares) (**APB 38-41**). After holding the shares for a period of more than one year, when the assessee felt to book the profits since the investment yielded good returns, assessee sold such shares during F.Y.2014-15 through online trading at BSE portal through the registered broker M/s KIFS Securities Ltd. as per contract notes of respective dates i.e. in Nov. and Dec., 2014 (**APB 42-44**).

At this juncture attention of the hon'ble bench is invited to the fact that the shares were neither purchased nor sold through the Sh. Jai Kishan Poddar or Sh. Anil Khemka or their broking firm/ companies who have been alleged as engaged in providing accommodation entries and whose statements were made basis for making the additions. Rather the shares were purchased through offline and sold through a broker M/s KIFS Securities Ltd. who was never alleged as part of the racket involved in providing accommodation entry.

The allegation: As per the information referred by the Ld. AO, survey actions were conducted in the case of Sh. Jai Kishan Poddar and Sh. Anil Khemka and in their statements recorded u/s 133A, they stated that they were involved in providing accommodation entries on commission basis by arranging purchase and sale of shares of various companies, including M/s Kappac Pharma Ltd. The relevant extracts of the statements of these two persons were reproduced by the Ld. AO in the assessment order in pages 26 to 32 (but not supplied during the course of assessment proceedings to the assessee despite of specific request). From the perusal of the said statements, it is noticed that none of these two persons had stated that assessee has taken any accommodation entry from them nor any reference of the assessee was made in any manner that assessee has approached them for providing accommodation entry. Further they had not stated that the broker M/s KIFS Securities Ltd. through whom the assessee has sold the scrips was involved in arranging accommodation entries. However, relying upon the statements of Shri Jai Kishan Poddar and Sh. Anil Khemka, ld. AO concluded that M/s Kappac Pharma ltd. is a bogus entity and further went on holding that long term capital gain earned by assessee on sale of shares of M/s Kappac Pharma Ltd. is merely an accommodation entry and exemption claimed u/s 10(38) was denied (even though assessee has neither purchased nor sold the shares of this company through broking firms of Sh.Jai Kishan Poddar or Sh. Anil Khemka).

It would not be out of place to mention here that apart from the so called information received from Investigation Wing, Kolkatta containing statements of Shri Jai Kishan Poddar and Sh. Anil Khemka, there was no corroborative material available with the Ld. AO or referred to by him in the assessment order found as a result or gathered during the course of assessment proceedings in support of the impugned addition made by him except analysis of financial statements as taken from money control website and a SEBI report (generalized) where the SEBI had made enquiries in respect of unexpected fluctuations / gains in the price of shares of few companies. The Ld. CIT(A) also confirmed the addition on the findings of ld.AO by ignoring the fact and the legal position that such generalized analysis/report could not

have been relied upon by Id. AO for treating the well documented transaction as bogus without bringing on record specific material against assessee.

During the course of assessment proceedings, a specific request was made by assessee before Id.AO vide letter dated 23.11.2017 (**APB 53, PARA 3**) for providing copies of statements of persons whose statements were relied upon for making addition and their cross examination. However such request was turned down by Ld. AO in summary manner, though Sh. Jai Kishan Poddar and Sh. Anil Khemka were the witnesses of the department and before relying upon the same opportunity of cross examination should have been allowed to assessee in the interest of natural justice. In the backdrop of above facts and circumstances, following submission is made:

The Assessment Order is per se illegal and bad in law:

It is submitted that the impugned assessment order is prima facie illegal in as much as it is solely based on the so called statements of third parties who are completely unknown and unrelated to the assessee. It must be noted that the statements of the said third parties were not recorded by the Assessing Officer of assessee during the course of assessment proceedings, but were recorded in some other proceedings carried out by the Investigation Wing of Kolkata. In the present case, the Ld. AO has based his entire assessment order upon the statements of third parties which were recorded by some other authorities and that too behind the back of the assessee. As a matter of fact, and as can be seen from the assessment order itself no corroborative material mentioning name of assessee being beneficiary of accommodation entry, was brought on record either by the Ld. AO during the course of assessment proceedings or by the Ld. CIT(A) in appellate proceedings in support of the conclusion drawn by them that the assessee had earned bogus LTCG in connivance with Shri Jai Kishan Poddar or Sh. Anil Khemka. On the other hand the assessee has filed various documents duly evidencing purchase of shares, copy of D-mat Account, payments being made by account payees cheque and similarly also the evidence related to sale, which was made online on the Bombay Stock Exchange and through recognized stock exchange broker namely M/s KIFS Securities Ltd. However all these evidences were just ignored and not rebutted by the AO before making addition. In view of these facts, it is submitted that the impugned addition being solely based upon such uncorroborated statements of third parties is clearly bad in law.

It would not be out of place to mention here that Id. AO has completely followed casual approach and has ignored the facts of the case, which is evident from the observations of Id. AO at page 25 para 3.5 that “It was found that the shares of the company were scarcely traded in the past but all of a sudden after the purchases by the assessee, the prices of the shares increased abnormally for almost one year without any reason whatsoever. As soon as the assessee sold last of its shares, the price and volume again became disproportionate to real financial position of the company.” Your honours would appreciate that the prices of Kappac Pharma were at all time high between January to May 2014 (upto 708/- per share), whereas assessee has not sold shares during that period as he was expecting further increase in prices. It was only after prices of share started declining, assessee sold shares in November 2014 at Rs.251/- and Rs.255/-, i.e. at almost 1/3rd of the highest prices. Had there been any sort of pre planning, it would not have happened. Also, the very fact that assessee was holding 12500 shares bought for Rs.1,87,500/- out of share capital of Rs.3.03 crores

of Kappac Pharma, assessee, by no stretch of imagination was in position to control the share price of company.

Kind attention of hon'ble bench is also invited to the holding statements of assessee as on 01.07.2015, (APB-37), which also shows various scrips of reputed companies, which also proves that assessee was regular investor in shares and investment in Kappac Pharma was not the only instance of investment. It is therefore submitted that the transaction entered into by assessee was completely genuine by no stretch it can be regarded as bogus and therefore addition made by ld.AO is not in accordance with law.

At this juncture, it is submitted that ld. CIT(A), while confirming the addition, has relied upon the judgement of Hon'ble Apex Court in the case of Securities and Exchange Board of India Vs. Rakhi Trading Pvt. Ltd. From perusal of order of Hon'ble Supreme Court, it is observed that it was delivered in the case, where parties were involved in synchronized trading of shares, whereas so far as case of assessee is concerned, sale of shares was made online through portal of stock exchange, where parties were completely unknown to each other and share prices were determined by market forces of demand and supply and transaction could not be a pre-arranged by any stretch of imagination. It is thus submitted that reliance placed by ld. CIT(A) is misplaced.

Ld. CIT(A) has also relied upon judgement of Hon'ble Apex court delivered in the case of CIT vs. NRA Iron and Steel Pvt. Ltd. by stating that decision provides guidelines for additions u/s 68 of the Act and has then summarised principles laid down by Hon'ble Apex Court. From perusal of decision, it is apparent that the facts of impugned case were completely different than facts of case of the assessee. Most important finding in said judgement is that ld. AO has to independently make enquiries/issue summons to lenders and verify the identity/creditworthiness of such lenders, whereas in the case of assessee, ld.AO has simply relied upon the information readily available on various websites and without verifying the same with regards to assessee. Even ld. AO has not provided the opportunity to cross examine his witness nor statements of such persons were ever supplied thus such action of the AO is contrary to the principle laid down by hon'ble Apex court who clearly held that proper and sufficient enquiries should have been made before reaching to the conclusion. Your honours' would appreciate that a judgement may render certain principles, however the same cannot be blatantly applied in any and every case unless facts involved are same. In the instant case of assessee, there was no search/survey action conducted in the premises of assessee and no specific information was collected, rather enquiries conducted in some other case were relied upon that too without supplying the copies of the same to the assessee, thus decision of Hon'ble Supreme Court is not applicable in the case of assessee.

Ld. CIT(A) has also relied upon decision of Hon'ble Delhi Bench of ITAT in the case of Satish Kishore vs ITO in ITA No. 1704/Del/2019, which is again misplaced as in that case, shares were purchased for cash, whereas assessee has entered into transactions through banking channels , thus the case is distinguishable on facts.

Ld. CIT(A) has also relied upon decision of Hon'ble Delhi high court in the case of Suman Poddar, which is again misplaced as in that case, price of the shares were increased abnormally in a short span of 5 months (491% profit) however, in our case the increase is merely 17 times that too in a period of 39-40 months which is quite normal. It is further observed that the SLP against the said order was dismissed by hon'ble Apex court but while dismissing the SLP hon'ble Apex court has not decided the issue on merits and by mere dismissal of SLP it cannot be said that the ratio laid down by hon'ble high court become final.

Moreover, the judgment given in the case of Suman Poddar 423 ITR 480, has already been distinguished by hon'ble Delhi high court itself in the case of **PCIT Vs. Krishna Devi in ITA No. 125/2020**, wherein it is held that:

“S. 10(38) Bogus Capital Gains from Penny Stock: The fact that there was an astounding 4849.2% jump in the share price within two years, which is not supported by the financials, does not justify the AO's conclusion that the assessee converted unaccounted money into fictitious exempt LTCG to evade taxes. The finding is unsupported by material on record & is purely an assumption based on conjecture. The theory of human behavior and preponderance of probabilities, based on Sumati Dayal v. CIT 214 ITR 801 (SC), cannot be cited as a basis to turn a blind eye to the evidence.”

Going further, Id.CIT(A) has relied upon various judgements on “preponderance of human probabilities” for confirming. In this regard, it is submitted that such cases cannot at all be relied upon to draw adverse inference in the case of assessee as assessee's transaction is duly supported by all the requisite documentary evidences. In this regard, reliance is placed on decision of **Hon'ble Special bench of Mumbai ITAT** in the case of **ITO Vs. M/s. GTC Industries Limited Tobacco House (Caselaws paper Book Pages 144-236)** where the Hon'ble Special Bench of ITAT after considering all the aspects of “preponderance of human probabilities” and other issues has held that:

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

The aforesaid judgement of Hon'ble Special Bench was followed by **Hon'ble Kolkatta ITAT** in the case of **Mahendra Kumar Baid Vs. ACIT dated 18.08.2017**.

Hon'ble SC in the case of **[Umacharan Shaw & Bros. v. CIT (1959) 37 ITR 271 (SC)]** has held that “There was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine and further observed that the conclusion is the result of suspicion which cannot take the place of proof in these matters. In the present case too, the Assessing Officer had rejected the evidence

produced and based his conclusion only on surmises; there was hardly any material for him to conclude that the amount in question was not a gift.”

In case of **Dhakeswari Cotton Mills Ltd. Vs. CIT 26 ITR 775** Hon’ble Supreme Court held that there must be something more than bare suspicion to support the assessment u/s 23(3).

At this juncture, attention of the Hon’ble Bench is invited to the recent judgement of **Hon’ble jurisdictional High Court** in the case of **CIT vs Pooja Agrawal (Caselaws paper Book Pages 8-11)**, wherein it has been categorically held by Hon’ble Court that so far as assessee has furnished all the supporting documents in the shape of copy of contract notes regarding purchase and sale of shares, copy of D-mat account etc, the fact of transaction entered into cannot be denied simply on the ground that in his statements appellant denied having made any transactions. Further as payments and receipts were made through account payee cheques and transactions were routed through Kolkata Stock Exchange and there was no evidence that the cash has gone back in appellant’s account, it was held by the Court that simply mentioning that findings were on the basis of appraisal report prepared by Investigation wing after considering all the material facts available on record is not sufficient. It was thus observed by the Hon’ble Court that “The AO has failed to prove through any independent enquiry or relying on some material that the transactions made by the appellant through share P.K. Agrawal were non genuine or there was any adverse mention about the transaction in question in statement of Sh. Pawan Purohit.”

In view of above, it is submitted that heavy reliance placed by the Lower Authorities on the so called statements of Sh. Jai Kishan Poddar and Sh. Anil Khemka without making any direct inquiry is not in accordance with law laid down by Hon’ble Rajasthan High Court.

At this juncture, it is submitted that Id. CIT(A) has disregarded the judgement of Hon’ble Rajasthan High Court on the premise that in that case additions were made by Id.AO solely on the basis of appraisal report and order of Settlement commission passed in some other case and moreover in that case no independent EPS/PE analysis was done by Id.AO. In this regard, it is submitted that in present case also, Id.AO has simply relied upon information related to third parties passed on by investigation wing that too of Kolkata and some EPS/PE analysis data available on internet and no independent enquiry has been made by Id.AO. Thus, facts in the case of Pooja Agarwal (cited supra) are identical to present case and action of Id.AO in not considering the same is against the principle of judicial precedence.

Hon’ble Jaipur bench of ITAT in the case of **ACIT vs Saroj Parwal in ITA No. 753/JP/19** has also decide the issue in favour of the assessee.

Recently Hon’ble Jaipur bench of ITAT vide order dated 31.08.2022 in the case of **Manohar Lal Chug vs. ITO** in **ITA No. 312/JP/2021** has held that:

“6.3. The issue of penny stock and consequent additions made has elaborately dealt with by ITAT Jaipur Bench in the case of Pramod Jain & Others (supra) and relying on the decision of Hon’ble Rajasthan High Court in the case of CIT vs. Pooja Agarwal, 160 DTR 0198 (Raj.) deleted the addition by observing as under :- "In view of the above facts and

circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any 30 ITA No. 312/JP/2021 Shri Manohar Lal Chugh, Jaipur. cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/ merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account." On further appeal by the department to the Hon'ble Rajasthan High Court, the Hon'ble High Court by referring to the decision of CIT vs. Pooja Agarwal in DB IT Appeal No. 385/2011 dated 11.09.2017 (Raj)(HC) held that no substantial question of law arise in this case. 6.4. Thus in view of the above discussion and taking into consideration various documentary evidences produced by the assessee in support of his claim and further relying upon various decisions of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court including the decision in case of CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra), we allow the claim of exemption under section 10(38) of the Act and accordingly delete the addition made by the AO. The order of ld. CIT (A) is set aside."

Hon'ble Jaipur bench of ITAT vide order dated 14.10.2021 in the case of **Lt. Sh Satpal Singh vs ACIT in ITA No. 289/JP/2020** has also decided the issue on favour of assessee.

Reliance is also placed on judgement delivered by **Hon'ble Punjab and Haryana High Court** in the case of **The Pr. CIT vs Sh. Hitesh Gandhi**, wherein it has been observed that when:

- *shares were actually purchased as these were reflecting in D-mat accounts ;*
- *AO rejected the contention of purchase on the basis of suspicion arising out of reckless/ casual replies given by assessee during assessment proceedings ;*
- *No post search enquiries were conducted in the form of recording statements of broker so as to bring on record any evidence of the said transaction being an accommodation entry ;*
- *STT has been on sale of shares and shares had been sold through National Stock Exchange ;*
- *Payment for sale of shares was received through banking channels;*

Thus, when all the documentary evidences filed before the Ld. AO were in favour of assessee, solely on the basis of some casual replies given by assessee, transactions cannot be held as sham.

It is pertinent to note here that in the case before Hon'ble Punjab and Haryana High Court, shares were purchased for cash, then too, transaction was held as genuine as all the documents were in favour of assessee,. Thus instant case of assessee is far better as payment for purchase of such shares was made by account payee cheques.

As has been submitted that the statements of Shri Anil Kumar Khemka were recorded behind the back of assessee, therefore vide reply dated 23.11.2017, a specific request was made before the Ld. AO that such person be confronted and assessee may be allowed to cross-examine him so as to verify the veracity / truthfulness of the statements made by him (APB 51-58 para 3 at page 53). However, in spite of the dire necessity of cross-examination in the circumstances of the case, the assessee's request for cross-examination was turned down in an arbitrary manner, without specifying any justifiable reason. Ld. CIT(A) also affirmed such action of Id.AO in not affording opportunity of cross examination by placing reliance on some judicial pronouncements, which all are not at all relevant and ignored the binding judgement of the Hon'ble Apex court in the case of CCE Vs. Andaman Timber Industries, (copy at case law PB page 1-7) (324) ELT 641 wherein it has been held as under:

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

7. *As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above."*

Hon'ble Apex Court in the case of **CIT vs Odeon Builders Pvt. Ltd. in Civil Appeal No. 9604-9605 of 2018** has held as under:

S. 68/69 Bogus Purchases: Disallowance cannot be made solely on third party information without subjecting it to further scrutiny. The assessee has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. The AO has also not provided a copy of the statements to the assessee, thus denying it opportunity of cross examination.

In this regard, it is further submitted that:

i. Impugned addition have been made solely on the basis of statements of third parties i.e. Shri Jai Kishan Poddar and Anil Khemka who are completely unknown and unrelated to the assessee. There is no corroborative evidence found either during the course of search or brought on record during the course of assessment proceedings. No other material has been referred to by the Ld. AO or by ld. CIT(A);

ii. The said statements were not even recorded by Assessing Officer himself, but were recorded by some other authority. Thus, such statements could not have been simply used against assessee without at least examining such person by AO himself during the course of assessment proceedings.

iii. Statements of Shri Jai Kishan Poddar and Sh. Anil Khemka were recorded behind the back of assessee by some other officer and opportunity of cross examination was not allowed to the assessee in spite of the specific requests made by assessee and request was turned down in arbitrary manner.

iv. Even in the said statements, nothing adverse has been stated against assessee by Shri Jai Kishan Poddar and Sh. Anil Khemka. A perusal of the statements shows that they had made general remarks about how he provided bogus LTCG to certain persons. However, they had no where taken the name of assessee that the assessee got accommodation entry from them.

v. Purchases of shares were made through payees account cheque and CIT(A) has doubted the same without properly appreciating the debit note issued and the purchases consideration paid and the fact that seller is not at all related to the assessee.

vi. Transactions of sale are routed through recognized stock exchange where trading is done on online system and it is impossible for a person to have the knowledge about the buyer who can be any person on this planet.

vii. The requirement of allowing cross-examination of witnesses, whose statements are sought to be used against the assessee, is a sine qua none for validity of adjudication proceedings. The Ld. AO has unlawfully tried to dispense with this requirement by stating that he is not bound by the Technical Rules of Evidence Act. In this regard, it is submitted that such requirement is not a technical rules of evidence, but is one of the principles of natural justice which the Assessing Officer being a quasi-judicial authority is bound by law to follow. In the present case however, the impugned assessment order has been passed in violation of the principles of natural justice and therefore, is bad in law.

Hon'ble Jaipur Bench of Tribunal in the case of **Sh. Pramod Jain vs. DCIT (Case law Paper Book Pages 35-39)** has relied upon the view taken by Hon'ble Apex Court in **Andaman Timbers** and held that the statements of witness cannot be made sole basis of making assessment without giving an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity.

Hon'ble Jaipur Bench of Tribunal in the case of **DCIT vs Saurabh Mittal** ITA No. **16/JP/18** has deleted the additions made on similar issues. Excerpts of decision are as under:

S. 68 Bogus capital gains from penny stocks: Reliance by AO on statements recorded by the Investigation Wing to conclude that the capital gains are bogus without giving an opportunity of cross examination is a complete violation of principles of natural justice as held in CCE Vs Andaman Timber Industries 127 DTR 241(SC). The AO has not controverted the evidence of purchase bills, payment of consideration through bank, DEMAT account, allotment of amalgamated shares, sale of shares through stock exchange at prevailing price, payment of STT etc.

Hon'ble Ahmedabad bench of ITAT also in the case of **Smt. Sunita Jain vs ITO (Case law Paper Book Pages 134-143)** quashed the assessment order by placing reliance on Apex Court judgement in the case of **Andaman Timber** (cited supra) as entire assessment was based upon the statements of Sh. Mukesh Choksi, which were neither supplied to assessee nor was opportunity of cross examination was provided.

The Ld. AO as well ld. CIT(A) have placed reliance on some judicial pronouncements to hold that right to cross examine is not absolute, however such judgements have been passed in different set of facts and furthermore have been superseded by Hon'ble Apex Court judgement in the case of **Andaman Timber Industries** (supra) which now governs the field.

Thus, in light of the above, it is submitted that the impugned assessment order is clearly bad in law and deserves to be set aside.

The capital gain declared by assessee is completely genuine:

It is submitted that the transactions of purchase and sale of shares by the assessee are completely genuine and duly supported by respective evidences and thus, could not have been held as bogus in view of the following:

1. The assessee had purchased 12500 shares at the rate of Rs. 15/- per share

ii. In consideration of purchase of shares, payment was made through account payee cheque, which stood debited in the bank statement of the assessee. Copy of documents evidencing purchase as well as payment of shares was submitted before lower authorities, however were not considered. The same are enclosed at **APB 36** for your honours' ready reference.

iii. After the purchase of shares, the shares were got dematerialized and were credited in the assessee's D-mat account (500 shares on 04.09.2013 and 12000 shares prior to that) maintained with independent and reputed D-Mat service provider duly approved by various regulatory authorities. These shares continued in the D-mat account till the sale of the shares subsequently (**APB 38-41**).

iv. The shares were then sold online on various dates in the Bombay Stock Exchange through the broker **M/s KIFS Securities Ltd.**, which is not related to the appellant in any manner. It is pertinent to mention that these shares were not sold through the broking concern of Jai Kishan Poddar / Anil Khemka, through which they have been allegedly indulged in providing accommodation entries. Thus the sale of shares of assessee is totally independent and unrelated with brokers engaged in providing accommodation entries (on whom the AO is relying).

v. The sales of these shares made by assessee is duly backed by contract note cum bill of the share broker namely M/s KIFS Securities Ltd. which also contain the order No., the order timing, trade No. and trade time (**APB 42-44**). Thus sale of share on each occasion is duly backed by date and time stamp and other necessary details as prescribed and mandated by the Bombay Stock Exchange as evident from the contract note issued by its member brokers to the assessee in relation to the online transaction of these shares done on Bombay Stock Exchange. Obviously as the sale was made online, the sales of share was at prevailing market rate at that time and it cannot be manipulated by assessee by any means.

vi. Further, at the time of sale STT had been paid. Thus the assessee fulfilled all the conditions of section 10(38) to claim such profits as exempt income.

It is further submitted that assessee has been regularly investing in shares and in fact during the year under consideration is also holding scrips of other companies which is evident from the copy of statement of holding (APB 37). The assessee had been regularly investing in shares.

In this regard, reliance is placed on decision of Hon'ble Jaipur bench of ITAT in the case of Hon'ble Jaipur bench of tribunal in the case of **Sh. Pramod Jain vs. DCIT** wherein it has been categorically held that

Para No. 6

"The Assessing Officer has doubted the genuineness of the transactions however, once the holding of shares of the assessee at the time of the same were issued by M/s Oasis Cine Communication Ltd., is not in dispute then the holding of shares of M/s Gravity Barter Ltd. also cannot be dispute because of the fact that without holding of the same the shares of M/s Oasis Cine Communication Ltd. could not be issued to the assessee, Once, the shares were held by the assessee then, the question of genuineness of the transaction does not arise however, the purchase consideration can be doubted by the AO if the shares were claimed to have been purchased against consideration paid in cash which is not in case of the assessee. The assessee has paid purchase consideration through cheque and therefore, even if the said consideration is found to be very less in comparison to the sale price at the time of sale of shares in the absence of any material or other facts detected or brought on record by the AO that the assessee has brought back his own unaccounted money in the shape of long term capital gain and has used the same as a device to avoid tax, the purchase consideration paid by the assessee cannot be doubted in the absence of any corroborating evidence. The Assessing Officer has not disputed that the fair market value of the shares of M/s Gravity Barter Ltd. was more than the purchase price claimed by the assessee. It may be a case that ensuring merger/amalgamation of the said company with M/s Oasis Cine Communication Ltd. the assessee might have anticipated the exceptional appreciation in the share price due to extraordinary event of merger/ amalgamation. However, the same cannot be a reason for doubting genuineness of the transaction if the motive of purchase of the share is to earn an extraordinary gain because of some internal information available to the assessee.

Para No. 7

"Nobody can have the shares in his own name in D-mat Account without acquiring or allotment through due process hence, except the purchase consideration paid by the assessee holding of shares cannot be doubted when the assessee has produced all the relevant record of issuing of allotment of shares, payment of share application money through bank, share certificate and demat account showing the shares credited in the demat account of the assessee on dematerialization. The said company M/s Paridhi Properties Ltd. was subsequently merged with M/s Luminaire Technologies Ltd. vide scheme approved by the Hon'ble Bombay High Court order dated 27.07.2012. Hence, the assessee got allotted the equity shares of M/s Luminaire Technologies Ltd. as per swap ratio approved in the scheme and consequently the assessee was allotted 5 lacs share of Rs. 1/- each on M/s

Luminaire Technologies Ltd. The evidence produced by the assessee leave no scope of any doubt about the holding of the shares by the assessee.

Para No. 8

As regards the purchase consideration when the assessee has shown the share application money paid through his bank account and the AO has not brought on record any material to show that apart from the share application money paid through bank account the assessee has brought his own unaccounted money back as long term capital gain.

The facts of assessee's case are identical to the case of Shri Pramod Jain (supra). The assessee has purchased shares, for which the payment of Rs. 1,87,500/- was made through banking channels for allotment of these shares, which stood debited in the bank account of the assessee on 04.04.2013. Assessee got them converted in D-mat and shares stood credited in the D-mat account of the assessee many months before the sale. From the above, it is evident that assessee has paid purchase consideration for shares through cheques which stood debited in bank account of assessee. This payment through banking channel cannot be doubted. In lieu of payment assessee got the shares and these stood credited in D-mat Account of assessee which is maintained by independent third party / agency of repute. Without actually owning the shares, these cannot be reflected in D-mat Account.

Thus, purchase and owning of share is fully proved no material has been brought on record by ld. AO or ld. CIT(A) which can disprove the purchase of shares. Once purchase of shares is established, only thing remained to be proved by assessee is that whether these shares were sold after 12 months and were sold at the prevailing market rates. It has been established by assessee that sale has been made at on-line terminal of Bombay Stock Exchange through recognised broker namely M/s KIFS Securities that too not in one go but on three different dates i.e. 10.12.2014 (Settlement No.1415170), 25.11.2014 (Settlement No. 1415159), 24.11.2014 (Settlement No. 1415158) which is evidenced by Contract Notes having unique trade number and duly time stamped with date by Bombay Stock Exchange. All these sales have been made at the prevailing market rate in on Bombay Stock Exchange as these all were made on on-line platform of BSE. Thus, sale of shares as well as rate at which these are sold, is also duly proved by documentary evidences and these have not at all been rebutted by ld. AO and / or ld. CIT(A) except generalized report about non-genuine Long Term Capital Gain (LTCG) which is required to be ignored in view of overwhelming evidences furnished by assessee and statement of third party recorded in some other proceedings by some different officer behind the back of assessee for which opportunity of cross-examination by assessee was also denied.

Thus, decision of Hon'ble Jaipur Bench of ITAT in the case of Shri Pramod Jain (supra) fully supports the case of assessee and squarely applies in the instant case of the appellant, as the facts of this case are very similar to the above cited case decided by Hon'ble ITAT, Jaipur Bench.

Further, ld.AO has failed to substantiate his case by conducting any independent enquiry or by bringing any material on record to prove that assessee has received his money back. Thus doubts regarding genuineness of transaction are nothing more than suspicion.

SEBI enquiry cannot be a basis for addition:

The main reason of addition is the enquiry made by SEBI that these companies are involved in price rigging and thereby helping others in purchasing the capital gain. This cannot be considered as conclusive evidence to hold the assessee as liable for making addition in the income tax proceedings.

In this regard reliance is placed on the decision of Hon'ble Jharkhand High Court in the case of **CIT v. Arun Kumar Agarwal (HUF) (2013) 085 DTR 0219** wherein it has been held as under:

10. We have considered the submissions of the learned counsel for the parties and we are of the considered opinion that the learned Assessing Officer was much influenced by the enquiry report which may has been brought on record by the efforts of the Assessing Officer and that enquiry report was prepared by the SEBI and from the observations made by the Assessing Officer himself, it is clear that after getting that enquiry report, the SEBI prima facie found involvement of some of the share brokers in unfair trade practices. Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he show his bonafide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of S.E.B.I and Stock Exchange, then merely because of that fact a person who bonafidely entered into share transaction of that company through such broker then only by mere assumption such transactions cannot be held to be a sham transaction. Fact of tinted broker may be relevant for suspicion but it alone necessarily does lead to conclusion of all transaction of that broker as tinted. In such circumstances, further enquiry is needed and that is for individual case. Such further enquiry was not conducted in that case.....”

In the case of assessee, no material was found which could support the allegation of the Ld. AO that assessee has converted his undisclosed money in the guise of LTCG. Therefore, in the circumstances, it is humbly submitted that the assessee had entered into a genuine transaction of purchases and sales of shares routed through the recognized stock exchange and the funds have been transacted through banking channels and the shares were kept by the assessee in D-mat account maintained by independent third party and the sales were subject to STT. Thus all the conditions enumerated in section 10(38) for holding the profit from the sale of shares as exempt have duly been fulfilled by the assessee, thus in no circumstances it could be held as bogus or sham transaction more particularly when no corroborative evidence was brought on record by the department to hold that assessee had introduced his undisclosed income in the garb of long term capital gain.

It is further submitted that recently the Hon'ble Calcutta High Court in the case of Swati Bajaj has observed that the report of Investigation Wing was available on online portal from where the same could be assessed by the appellant also, therefore, it cannot be said the report was not confronted before making the

assessment. In this regard, kind attention of the Hon'ble Bench is invited to the fact that the said report was available on online portal from 30.12.2017 and prior to that it was available with the department only. The assessment in this case was completed on 05.12.2017, therefore, there was no occasion for the assessee to consider the report of Investigation Wing. Further the Id. AO also has not referred nor relied upon the report of Investigation Wing which is the primary focus of the Hon'ble Calcutta High Court while deciding the appeal against the assessee. Further the case of Swati Bajaj is distinguishable on other counts also for which a detailed note is appended alongwith this written submission for perusal and record.

The reliance is also placed on the following decisions:

Pr. CIT vs Jatin Investment Pvt. Ltd. (Delhi High Court) (Caselaws PB Pages 12-16)

S 68 Bogus Capital Gains: A transaction cannot be treated as fraudulent if the assessee has furnished documentary proof and proved the identity of the purchasers and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) to verify the genuineness of the claim and cannot proceed on surmises."

CIT vs Mukesh Ratilal Marolia (Bombay High Court) (Caselaws PB Pages 17-28)

S.10(38)/69: Fact that a small amount invested in "penny" stocks gave rise to huge capital gains in a short period does not mean that the transaction is "bogus" if the documentation and evidences cannot be faulted.

Surya Prakash Toshniwal HUF vs ITO (ITAT Kolkata) (Caselaws PB Pages 85-93)

Bogus capital gains from penny stocks: Long Term capital gains claimed exempt u/s 10(38) cannot be treated as bogus unexplained income if the paper work is in order. The fact that the company whose shares were sold has violated SEBI norms is not traceable does not mean that the assessee is at fault.

Farrah Marker vs ITO (ITAT Mumbai) (Caselaws PB Pages 94-106)

S. 10(38)/68: Long Term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE. Denial of right of cross-examination is fatal flaw which renders the assessment order a nullity.

Dolarrai Hemani vs. ITO (ITAT Kolkata) (Caselaws PB Pages 107-117)

Penny Stocks: The fact that the stock is thinly traded and there is unusually high gain is not sufficient to treat the long term capital gains as bogus when all the paper work is in order. The revenue has to bring material on record to support its finding that there has been collusion/ connivance between the broker and the assessee for the introduction of its unaccounted money.

Identical issue has been decided in favour of assessee in the following cases:

- i. Mahesh Mundra Mumbai vs ITO 21(1)ITA No. 1176/Mum/2012
- ii. ITO ward 20(1) vs Naveen Gupta in ITA No 696 (Delhi) SOT 2006 94 Delhi
- iii. Mayur M Shah HUF Mumbai vs ITO 25(3) ITA No.2390/Mum/2013
- iv. ITO v SmtKusumlata in ITA No. 387 105 TTJ (2006) 265 Jodhpur

- v. Chandrakant Babulal Shah vs ITO 16(2)(4) ITA No.6108/Mum/2009
- vi. Dalpat Singh Choudhary vs ACIT (2012) 143 TTJ 500 (Jodhpur Trib)
- vii. ACIT v Shri Ravindra Kumar Toshnival ITA No. 5302/Mum/2008
- viii. Jafferli K Rallonse v DCIT Central 5 in ITA No. 68/Mum/2009
- ix. Mrs Rajinidevi A. Chowdhary v ITO ITA No. 6455/M/07 dated 30/04/2008
- x. DCIT v Shri Pinakir L Shok in ITA No. 3030 & 3453/M/08 Dated 14/07/2009
- xi. CIT Vs. Shyam R. Pawar reported in [2015] 54 taxmann.com 108 (Bom)
- xii. ITO Vs. M/s Indravadan Jain, HUF, ITA No. 4861 & 5168 / Mum / 2014
- xiii. Purushottam Soni vs ITO (Jaipur ITAT) ITA No. 288/JP/2017
- xiv. Dipesh Ramesh Vardhan vs DCIT (Delhi ITAT) ITA No. 7648/Mum/2019

Therefore, in light of the submissions made above and case laws cited, it is prayed that the addition of Rs. 31,70,080/- made u/s 68 may please be directed to be deleted.

Ground of Appeal No. 3:

Under this ground of appeal, assessee has challenged action of ld.CIT(A) in confirming the addition of Rs. 63,402/- made by ld.AO by alleging that assessee has paid commission at the rate of 2% of the long term capital gain to the entry provider.

In this regard, it is submitted that while holding the capital gain declared by assessee as bogus merely on the basis of statements of a third party, the Ld. AO has further presumed that a commission of the above mentioned amount @ 2% might have been paid by assessee as a consideration for arranging such accommodation entry. In fact, ld. CIT(A) has confirmed the addition stating the same is covered by ground of appeal relating to long term capital gain transaction.

It is submitted that firstly, the transaction entered into by the assessee and the LTCG arising therefrom is completely genuine as has been submitted above in detail in grounds of appeal above. Thus, in view of the same there arises no question of any commission payment.

Secondly, this addition also is solely based upon the statement of third party absolutely uncorroborated in much as there is no material available on record to show any such payment. No such material has been referred by the Ld. AO and merely on the basis of assumptions and presumptions; the impugned addition has been made.

Therefore, when the capital gain has already been established as genuine which was treated as bogus by Ld. AO solely on the basis of uncorroborated statements of a third party, no further addition could have been made solely on the basis of such statements on assumptions and presumptions. Hence, it is prayed that the addition of Rs. 63,402/- deserves to be deleted.”

2.4 On the other hand, the ld. DR supported the orders of the ld. CIT(A) and also relied upon the following case laws.

- (i) Udit Kalra vs ITO, Ward 50(1)(ITA No. sd220/2019 & CM No. 10774/2019 dated 08-03-2019) (Delhi High Court).
- (ii) Ms.Manvi Khandelwal vs ITO, Ward 46(4), New Delhi (ITA No. 3212/Del/2018 dated 26-11-2019 – ITAT Delhi)
- (iii) PCIT vs Krishna Devi, 138 Taxmann.com 150 (SC)
- (iv) Pooja Ajmani vs ITO, Ward, 20(4), New Delhi (ITA No. 574/Del/2018 dated 25-04-2019)
- (v) Securities And Exchange Board of India vs Rakhi Trading Private Ltd. (Civil Appeal No. 1969 of 2011-SC)

2.5 As regards Ground No. 1 to 1.6. and 2 of the assessee, the Bench has have considered the rival contentions, perused the material available on record and gone through findings of the lower authorities recorded in their respective orders as well as gone through the various judicial rulings placed before me by both the parties to drive home their contentions. Brief facts pertaining to the issue are that assessee was holding 12500 shares of M/s KappacPharma Ltd. which were acquired by him in F.Y. 2012-13 on 16.01.2013 for Rs. 1,87,500/-, which were sold during the year under consideration for Rs. 31,58,765/- [in November – December 2014], after holding the same for more than 12 months [more particularly around 22 months]. Consequent long term capital gain of Rs. **29,71,725/-** earned from sale of these shares was declared in the return of income and as shares were of listed public limited company, sold through recognized stock exchange after holding for a period of more than one year and due STT [Securities Transaction Tax] was paid, long term capital gain was claimed exempt u/s 10(38) of Income Tax Act, 1961. These shares were

purchased after making payment through account payee's cheque which stood debited in the bank account of the assessee. These shares were credited in the D-mat account of the assessee maintained with independent third party. Subsequently, these shares were sold online through registered share broker and sale proceeds were received through banking channels. However, the AO, based on some information received from Investigation Wing, Calcutta particularly the statement of one Shri Jai KishanPoddar of some M/s Consortium Capital Pvt. Ltd. and of Shri Anil Kumar Khemka of M/s Dev Shyam Stock Broking Pvt. Ltd. wherein they have admitted to be engaged in providing accommodation entries in the guise of LTCG through their stock broking companies named above, has considered the transaction of sale of shares of M/s KappacPharma Ltd. made by assessee, as bogus. It is uncontroverted fact that assessee has furnished copy of bank statement showing payment so made for purchase of shares, copy of statement of holding of shares reflecting the impugned equity shares, copy of contract notes regarding sale of shares, copy of D-MAT account reflecting shares as sold, copy of bank passbook of the assessee reflecting sale consideration received, before the Id. AO. However, Id. AO has not controverted any of these evidences furnished before him in support of the long term capital gain so claimed exempted. The Id. AO has narrated the modus operandi of the various entry providers which is a general statement and also referred to the statement of one Shri Jai KishanPoddar and another Shri Anil Kumar Khemka wherein also these persons have not particularly stated the

assessee to be beneficiary of their arrangement of providing accommodation entry. In fact the assessee has neither purchased nor sold shares of M/s KappacPharma Ltd. either through these two persons or through their broking companies. Considering the aforesaid facts, it is clear that these observations and findings of the AO in the assessment order is based on generalized statement of third party recorded behind the back of the assessee, recorded in some other case and not in the case of assessee, cannot constitute tangible evidence to lead to the conclusion that transaction of sale of share shown by the assessee is bogus being an accommodation entry. The AO has though referred to the statement of these two persons who have operated as entry providers but there is no reference in those statements about the assessee being one of the beneficiary, nor any material has been brought on record, otherwise also by the AO, to prove the assessee being beneficiary through them. There is no doubt that if the assessee has claimed LTCG from purchase and sale of shares, as exempt u/s 10(38) of I.T. Act, 1961, the primary onus is on the assessee to substantiate his claim by producing supporting evidences. On perusal of the details so submitted by the ld. AR of the assessee, it is seen by me that the assessee has furnished various documentary evidences in support of purchase and subsequent sale of the shares leading to earning of LTCG by the assessee, as mentioned in brief just herein above and mentioned in detail in the submission of the ld. AR. The assessee has purchased 12500 shares for Rs. 1,87,500/- and made payment through banking channel which stood debited in

the bank account of the assessee. These shares were dematerialized on 26.06.2013 [12000 shares] and 26.08.2013 [500 shares] and deposited in the D-MAT account maintained by Alankit Assignment Ltd., the independent third party. Thus it is clear that 12500 shares were purchased by the assessee and same is quite evident not only from the books on accounts of the assessee but also D-MAT account of the assessee maintained by independent third party, duly recognized by the concerned authorities. The amount of purchase consideration stood debited in the bank account of assessee. These facts and evidences more particularly the shares being reflected in D-MAT account of the assessee maintained by independent third party clearly lead to infer that holding of the share and consequently also the purchase of these shares by assessee cannot be disputed.

2.5.1 Now coming to the sale of share, it is seen that assessee has sold these shares through online transaction via recognized stock broker M/s KIFS Securities Ltd. Transaction of sale is supported by contract notes and as per the contract notes, these shares were sold on three different dates namely 24.11.2014, 25.11.2014 and 10.12.2014. These contract notes are having time stamped, different trade numbers, order time and trade time etc. As the sale of shares have been made through online system on stock exchange, obviously same has been made at the prevailing market rate of the shares. Accordingly, the sale rate so shown by the assessee cannot be doubted. Moreover, security

transaction tax has also been deducted and paid and the assessee has received the net sale consideration through banking channels. These evidences leave no doubt about the sale of shares made by the assessee at the prevailing market rate. Once the assessee has produced all the supporting evidences not only of sales but also of the purchase of the shares which include purchase bill, bank account showing payment of the purchase consideration, D-MAT account reflecting holding of the shares in the D-MAT account of the assessee, sale of shares through online on stock exchange which are also reflected in the D-MAT account, contract notes for sale and receipt of sale consideration in the bank account of the assessee as is evident from the bank account, then in absence of any contrary material or evidence brought on record by the ld. AO, the transaction of purchase and sale of shares in question cannot be held as bogus merely on the basis of investigation carried out by the department in some other case behind the back of the assessee where some persons were found to be indulged in providing accommodation entry and more particularly when even those persons have not specifically stated anywhere in their statement that the assessee is one of the beneficiary of arrangement of accommodation entry provided by them. In the entire assessment order the AO has not made any reference to any documentary evidence which can be said to be an incriminating material against the assessee which may reflect that the assessee has availed the accommodation entry of bogus long term capital gain. Mere uncorroborated statement of third person with which assessee has not at all dealt with in

purchase and sale of share and even the person has not named the assessee being beneficiary from him / them or through his / their companies cannot be a ground for treating the transaction of purchase and sale of shares so made by the assessee as bogus, in absence of any cogent evidence or material brought on record by the AO. The statement of those third person about accommodation entry may be the starting point for doubting the transaction (though it is evident that assessee has not carried out any transaction through these persons or their companies) but for converting a doubt into certainty, the AO is required to produce the contrary material evidence and evidence produced by the assessee need to be controverted, but the AO has failed to do so. It is to mention here that evidence produced by the assessee is otherwise independently verifiable being the document in the shape of bank account, D-MAT account maintained by independent third party, bills of purchase and also of the sales on which assessee has no control or say and therefore said evidences cannot be manipulated by assessee. Once the evidences produced by assessee is neither prepared by it nor is any scope of manipulation by him, then transaction of purchase and sale of shares and consequent capital gain shown by the assessee cannot be doubted. It is reiterated that all the various evidences were filed by the assessee before the ld. AO and are now also filed before us in paper book in support of long term capital gain shown on sale of shares, which are as under:-

S.No.	Particulars	Paper book Page No.
1.	Copy of contract notes dated 10.12.2014, 25.11.2014 and 24.11.2014 regarding shares sold	42-44
2.	Copy of bank passbook of the assessee reflecting sale consideration received	45-48
3.	Copy of D-MAT account reflecting shares sold	40-41
4.	Copy of statement of holding of shares	37
5.	Copy of request for D-MAT of shares	38-39
6.	Copy of bank pass book reflecting payment for purchase of shares	35-36
7.	Copy of debit note dated 16.01.2013 for purchase of shares	32-34

On the other hand, the AO has merely relied upon the statement of third person recorded behind the back of the assessee and without giving any opportunity to the assessee to cross examine the person before using these statement against the assessee. The ld. AR has submitted that despite specific request opportunity of cross examination was not provided, which is against the ratio of decision of Hon'ble Supreme Court in the case of **Andman Timber Industries Vs. CCE (324) ELT 641**, wherein Hon'ble Court has stated that not allowing the opportunity to cross examine the witness though the statement of those witness were made the basis of impugned order, is a serious flaw which makes the order nullity is as much as it amounted to violation of principle of natural justice. Ld. AO and also the ld. CIT(A) has ignored this binding decision of Hon'ble Supreme Court. The ld. AR has also submitted that the ld. CIT(A) while confirming the addition has relied upon the judgement of Hon'ble Apex Court in the case of SEBI Vs. Rakhi Trading Pvt. Ltd. However, the facts of the case

are quite different then the instant case of the assessee. In that case parties were involved in synchronized trading of shares whereas assessee has sold the shares through recognized broker and on online portal of stock exchange, where parties are completely unknown to each other and share prices are determined by market forces. Thus, facts being different, the aforesaid caselaw so relied upon by the ld. CIT(A) is not applicable in the case of appellant. Ld. AR has also rightly submitted that facts in the case of CIT Vs. NRA Iron & Steel Pvt. Ltd. so relied upon by ld. CIT(A) are also different then the facts of the case of the assessee and moreover within the same judgment, there is finding that AO has to independently make enquiries / issue summons to the lender and verify the identity / creditworthiness of such lenders, whereas in the instant case of the assessee, the AO has simply relied upon the information stated to have been available with him without independently verifying the details. The ld. AR has also brought to my notice through its written submission that judgment in the case of SumanPoddar 423 ITR 480 has already been distinguished by Hon'ble Delhi High Court itself in the case of PCIT Vs. Krishna Devi in ITA No. 125/2020 and issue was decided in favour of assessee. During the course of hearing ld. D/R has placed heavy reliance on the decision of the Swati Bajaj of hon'ble Calcutta High Court and submitted that the report of Investigation Wing was available on online thus it cannot be said that relevant information was not supplied and therefore, the judgement of Andman Timber is not applicable to the facts of the case. In this regard ld. AR submitted that the assessment in the

present case was completed much before the date when the report of Investigation Wing, Calcutta was available online and thus the judgment of Hon'ble Apex Court in the case of Odeon Builders still hold the water which says that the no addition could be made unless the material available with AO is not confronted to the assessee and opportunity of the cross examine the witness is not provided. In this regard the coordinate bench of ITAT, Jaipur 'A' bench in the case of ACIT Vs. Meverick Share Brokers Pvt. Ltd. in ITA Nos.27/JP/20dt. 26.9.2022 has dealt this issue and considered the contention of the revenue as well as the submission of the assessee wherein a detailed note distinguishing the judgement of Swati Bajaj of hon'ble Calcutta High court was filed and held the transaction of sale of shares as genuine. Such note as reproduced in Para 15 fo the said order is reproduced as under:

15. Since, ld. DR has cited the recent judgment in the case of Ms. Swati Bajaj case which was in favour of revenue. The ld. AR has filed a note 43 ITA No. 27/JP/2020 & others M/S Maverick Commodity Brokers Pvt. Ltd.& others showing as to why the said judgment is not relevant in the present set of cases. The same is reiterated here in below :

Distinguishing Note

The reliance on the judgment of Hon'ble Calcutta High Court in the case of Swati Bajaj is misplaced for the following legal and factual reasons:

- 1. That in the case of Swati Bajaj, the Hon'ble Calcutta High Court in para 47 which starts from page 86 in last line of page 87 has distinguished the decision of Hon'ble Supreme Court in the case of Odeon Builders by observing that when the information was confronted with the assessee, the department has prima-facie discharged his burden. However, in the present case as is admitted by the ld. AO himself in the remand report that no report whatsoever was available with him at the time of making the assessment, thus there is no question of supplying the copy of report now relied upon by the department of*

Investigation Wing, Calcutta which has been made the vary basis for holding the transaction of sale and purchases of shares by the assessee as bogus. The Hon'ble SC in the case of Odeon Builders Pvt. Ltd. has clearly stated that not providing the copy of the third party information to the assessee who has prima-facie discharged the initial burden of substantiating the purchases through various documents is a serious error and entire addition was deleted. As in the present case, no such report was supplied, therefore, the judgment of Hon'ble Calcutta High Court in the case of Swati Bajaj is not applicable to the case of assessee.

2. *The assessee is based in Rajasthan. All the Courts/Tribunals within the jurisdiction of Hon'ble Rajasthan High Court are bound by the decision of Hon'ble Rajasthan High Court.*
3. ***Hon'ble Rajasthan High Court in the case of PCIT vs Sanjay Chhabra D.B. ITA No. 22/2021 noted that prejudice is caused to the assessee when material used against him is not provided and opportunity of cross examination is not provided:***

It was submitted before the Hon'ble Court that the Tribunal erred in holding that the information and statements recorded by Investigation Wing could not be taken into consideration while making assessment as such material was not disclosed nor an opportunity was accorded for cross-examination of the assessee. It was submitted before the Hon'ble Court that Tribunal did not examine the case on touchstone of human probability. However, Hon'ble High Court upheld the order of the Tribunal. It was considered that prejudice was caused to the assessee as he should have been allowed an opportunity of being heard and of rebutting the evidences against him. It was also impliedly held that direct evidences weigh more than circumstantial evidences and human probabilities. The relevant extract of order is as under:

"..The Tribunal by impugned order has categorically held that the material information received by the Assessing Officer from the investigation wing alongwith certain statements recorded by DBIT Investigation, Calcutta could not be taken into consideration as that material was not disclosed nor an opportunity was accorded for cross-examination of the Assessee. This finding recorded by the Tribunal cannot be said to be perverse or suffering from any patent illegality. Learned counsel for the Revenue could not satisfy us with reference to any judgment on this aspect that even without disclosing any material to the Assessee and without allowing him proper cross-examination, such undisclosed and unverified material could be taken into consideration for the purposes of addition..." ...

"..Learned counsel for the Revenue relying upon the judgment passed by the Supreme Court in the case of SumatiDayal Versus Commissioner of Income Tax, Bangalore reported in AIR 1995 SC 2109 would submit that the Tribunal has not examined the case on the touchstone of human probability..."

“..In view of the above consideration, we are of the view that this appeal does not involve any substantial question of law and is, therefore, dismissed...”

4. *Hon’ble Rajasthan High Court in the following cases held that proof of transactions being evidences have to be given weightage over presumptions*

4.1 ***Pooja Agarwal, ITA 385/2011,***

In the said case it was held that no addition can be made if the following conditions are satisfied:

- i. There is no trail which could substantiate that the cash has flown back to the assessee.*
- ii. The transactions is supported by documents appear to be genuine transaction.*
- iii. The statements recorded do not have a clear and a distinct remark about the assessee so as to challenge the genuineness of the transaction.*

4.2 ***PCIT vs Pramod Jain, DB ITA No. 209/2018***

The decision in case of Pooja Agarwal was followed

4.3 ***CIT vs Sumitra Devi [2014] 49 taxmann.com 37 (Rajasthan)***

Hon’ble Rajasthan High Court has held that in the said there were several suspicious circumstances as indicated by AO, however, the findings of AO were more on presumption rather than on cogent proof. Further, AO failed to show that documents placed on record by the assessee were false, fabricated or fictitious.

4.4 ***CIT vs PushpaMalpani [2012] 20 taxmann.com 597 (Rajasthan)***

“...3. Upon hearing learned counsel for Revenue and perusing impugned order, we find that whether or not sale of shares and receipt of consideration thereof on appreciated value is essentially a question of fact. CIT(A) and Tribunal have both given reasons in support of their findings and have found that at the time of transactions, the broker in question was not banned by SEBI at the time of transaction and that assessee had produced copies of purchase bills, contract number share certificate, application for transfer of share certificate to demat account along with copies of holding statement in demat account, balance sheet as on 31st March, 2003, sale bill, bank account, demat account and official report and quotations of Calcutta Stock Exchange Association Ltd. on 23rd July, 2003. In our view, present appeal does not raise any question of law, much less any substantial question of law...”

5. *Hon’ble Calcutta High Court has mainly decided the case against the assessee for the reason that factual position in any of the 89 appeals forming part of the bunch was not discussed by the Hon’ble ITAT (para 40, Page 80).*

In the instant case it is submitted that assessee's case was not part of any bunch of cases and, therefore, there cannot be any situation that facts were not properly discussed and appreciated by the appellate authority.

6. *Hon'ble Calcutta High Court has not held that the report of Investigation Wing can be conclusive for making additions in any assessment proceedings. Hon'ble Calcutta High Court has simply held that such report of Investigation Wing can be a starting point for probing the matter further. Hon'ble Calcutta High Court has not at all held that the evidences submitted by the assessee need to be totally ignored.*
7. *In respect of right of Cross Examination, Hon'ble Calcutta High Court has simply held that if the persons have not deposed specifically against a particular assessee then the said assessee has no vested right of Cross Examination (Para 61 page 100). Reliance is placed on the following decisions of Hon'ble Supreme Court wherein it has been observed that prejudice is caused to the assessee when the documents relied upon are not confronted and the assessee is not provided opportunity of Cross Examination:*
 - 7.1 ***Hon'ble Supreme Court in the case of PCIT vs ParasbenKasturchandKochar [2021] 130 taxmann.com 177 (SC)** dismissed the SLP filed against the decision of Hon'ble Gujarat High Court in the case of **PCIT vs ParasbenKasturchandKochar [2021] 130 taxmann.com 176 (Gujarat)**. Hon'ble Gujarat High Court held that there was no substantial question of law and upheld the finding of the Tribunal (in Para 4). Hon'ble Tribunal held that in a case where assessee produced all the evidences and addition was made on the basis of statements recorded by Investigation Wing, which were neither confronted nor the assessee was allowed opportunity to cross examine, such addition could not be sustained (Para 2):*
 - "9. *In our considered opinion, in such case assessee cannot be held that he earned Long Term Capital gain through bogus company when he has discharged his onus by placing all the relevant details and some of the shares also remained in the account of the appellant after earning of the long term capital gain.*
 10. *Learned A.R. contention is that no statement of the Investigation Wing was given to the assessee which has any reference against the assessee.*
 11. *In support of its contention, learned A.R. also cited an order of Coordinate Bench in ITA No. 62/Ahd/2018 in the matter of Mohan Polyfab (P.) Ltd. v. ITO wherein ITAT has held that A.O. should have granted an opportunity to cross examine the person on whose statement notice was issued to the assessee for bogus long term capital gain. But in this case, neither statement was supplying to the assessee nor cross examination was allowed by the learned A.O. Therefore, in our considered opinion, assessee has discharged his onus and no addition can be sustained in the hands of the assessee."*

7.2 ***CIT vs Odeon Builders (P.) Ltd [2019] 110 taxmann.com 64 (SC)***

Hon'ble Supreme Court held that if the addition was based on third party information gathered by Investigation wing then addition cannot be made unless such information is provided to the assessee and opportunity of cross examination is provided moreso when assessee placed on record all the evidences. The relevant findings are as under:

Headnote: Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Bogus purchase) - Certain portion of purchases made by assessee was disallowed - Commissioner (Appeals) found that entire disallowance was based on third party information gathered by Investigation Wing of Department, which had not been independently subjected to further verification by Assessing Officer and he had not provided copy of such statements to appellant, thus, denying opportunity of cross examination to appellant, who on other hand, had prima facie discharged initial burden of substantiating purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and fact of payment through cheques, VAT Registration of sellers and their Income-tax Return - He held that purchases made by appellant was acceptable and disallowance was to be deleted - Tribunal dismissed revenue's appeal - High Court affirmed judgments of Commissioner (Appeals) and Tribunal being concurrent factual findings - Whether no substantial question of law arose from impugned order of Tribunal - Held, yes [Para 4] [In favour of assessee]

7.3 ***SunitaDhadda, order dated 28.03.2018, SPECIAL LEAVE PETITION (403 ITR 183)***

The ratio laid down by Hon'ble Rajasthan High Court and also Hon'ble ITAT, Jaipur Bench as below was upheld:

*"Their Lordships ADARSH KUMAR GOEL and ROHINTON FALL NARIMAN Ji.- dismissed the Department's special leave petition against judgment dated July 31, 2017, of the Jaipur Bench of the Rajasthan High Court in D.-B,L_TA. No. 197 of 2012 whereby the High Court held that the Tribunal was justified in deleting the addition of Rs. 4,07,00,000 of "on money" said to have been received with respect to subject land of the assessee holding that the question what was the price of the land at the relevant time, was a pure question of fact and that unless it was established on record by the Department, that as a matter of fact, the consideration did pass to the seller from the purchaser, **the Department had no right to make any additions, especially since none of the witnesses were examined before the Assessing Officer, and the assessee did not have any opportunity to cross-examine them**" [Emphasis Supplied]*

7.4 ***Andaman Timber Industries (CIVIL APPEAL NO. 4228 OF 2006)***

"...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"

8. *It is submitted that the court cannot turn blind eye to the evidences unless proved wrong and decide on the basis of assumptions and presumptions. Reliance is placed on the decision of Hon'ble Supreme Court in case of PCIT vs Krishna Devi [2022] 138 taxmann.com 150 (SC) wherein SLP filed against the decision of Hon'ble Delhi High Court in the case of PCIT vs Krishna Devi [2021] 126 taxmann.com 80 (Delhi) was dismissed. Hon'ble Delhi High Court categorically noted that the Court has to decide the issue on the basis of evidence and proof and not suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the assessee. If the revenue has failed to bring evidence on record that money changed hands and there was agreement to convert unaccounted money mere reliance on the report of investigation without further corroboration does not justify the conclusion that the assessee obtained an accommodation entry. Relevant extract is as under:*

“11.The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income-tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. **However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries.** We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort. The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. **The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO.** This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received

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

12. *Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however **the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent.** With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. Lastly, reliance placed by the Revenue on SumanPoddar case (supra) and SumatiDayal case (supra) is of no assistance. Upon examining the judgment of SumanPoddar case (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of SumatiDayal (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue.*
13. *The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order...” [Emphasis Supplied]*

9. *Attention is drawn towards para 65 page 103 of the order of Hon'ble Calcutta High Court wherein following observation was made by the Hon'ble Calcutta High Court:*
"...Nothing prevented the assessee from mentioning that unless and until the report is furnished and the statements are provided, they would not in a position to take part in the enquiry which is being conducted by the assessing officer in scrutiny assessment under Section 143(3) of the Act.."
- In the instant case specific request was made for copy of report as well as copies of statements recorded of different persons.*
10. *In respect of the circumstantial evidences the Hon'ble Calcutta High Court has not disturbed the settled position of law that circumstantial evidences can be looked into only when direct evidences are not available (Para 69 page 108). In the instant case direct irrefutable evidences were made available to the ld. AO and, therefore, ignoring the direct evidences and jumping to circumstantial evidences is not justified even in reference to the decision of Hon'ble Calcutta High Court.*

Recently, on similar facts and circumstances, the Hon'ble ITAT Jaipur Bench in the case of ManoharLal Chug Vs. ITO in ITA No. 312/JP/2021 vide its order dated 31.08.2002 has decided the issue of long term capital gain on sale of shares in favour of assessee. While deciding the issue all aspects have been considered in detail. Hon'ble ITAT has mainly followed the decision of ITAT Jaipur Bench itself in the case of Pramod Jain &Ors. in ITA No. 368 to 372/JP/2017 dated 31.01.2018. This decision of Pramod Jain &Ors. of ITAT Jaipur Bench has mainly relied upon the jurisdictional Rajasthan High Court decision in the case of CIT Vs. Pooja Agarwal, 160 DTR 198. The relevant para 6.2, 6.3 & 6.4 of decision in the case of ManoharLal Chug is reproduced below wherein relevant paras of the case of Pramod Jain &Ors. on the issue of non-granting of cross examination as well as on other issues are incorporated :-

6.2. *Further, the Ld. A/R has also taken a legal plea that no cross examination of the person, whose statement was relied upon, was granted despite specific request made to the AO. The aspect of not granting cross examination has specifically been answered by the Hon'ble ITAT Jaipur in the case of Shri Pramod Jain & Others in ITA Nos. 368 to 372/JP/2017 dated 31.01.2018. The relevant extract on the issue at page 24 to 28 are as under:*

"As regard the non grant of opportunity to cross examine, the Hon'ble Supreme Court in case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under:-

"5. We have heard Mr.KavinGulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnana, learned senior counsel who appeared for the revenue.

6. According to us, not allowing the assessee to cross-examine the witness 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 as 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 as 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. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which could not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was no for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealer and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross — examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to

the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.2.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. 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."

Therefore, the statement of witness cannot be sole basis of the assessment without given an opportunity of cross-examination and consequently it is a serious flaw which renders the order a nullity. The Mumbai Special Bench of the Tribunal in case of GTC Industries vs. ACIT (supra) had the occasion to consider the addition made by the AO on the basis of suspicion and surmises and observed in para 46 as under:-

"46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expense and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will bear out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee-company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control

of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses Smt. Nirmlala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee-company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

Therefore, in the absence of any contrary material or evidence brought on record by the AO, the transaction of purchase and sale of the shares in question cannot be held as bogus merely on the basis of Report of the Investigation Wing of the Department in some other cases where some persons were found indulged in providing accommodation entry, and further it cannot be held that the assessee has introduced his own unaccounted money by way of bogus long term capital gain.

- 6.3. *The issue of penny stock and consequent additions made has elaborately dealt with by ITAT Jaipur Bench in the case of Pramod Jain & Others (supra) and relying on the decision of Hon'ble Rajasthan High Court in the case of CIT vs. Pooja Agarwal, 160 DTR 0198 (Raj.) deleted the addition by observing as under :-*

"In view of the above facts and circumstances of the case, we are of the considered opinion that the addition made by the AO is based on mere suspicion and surmises without any cogent material to show that the assessee has brought back his unaccounted income in the shape of long term capital gain. On the other hand, the assessee has brought all the relevant material to substantiate its claim that transactions of the

purchase and sale of shares are genuine. Even otherwise the holding of the shares by the assessee at the time of allotment subsequent to the amalgamation/ merger is not in doubt, therefore, the transaction cannot be held as bogus. Accordingly we delete the addition made by the AO on this account."

On further appeal by the department to the Hon'ble Rajasthan High Court, the Hon'ble High Court by referring to the decision of CIT vs. Pooja Agarwal in DB IT Appeal No. 385/2011 dated 11.09.2017 (Raj)(HC) held that no substantial question of law arise in this case.

- 6.4. *Thus in view of the above discussion and taking into consideration various documentary evidences produced by the assessee in support of his claim and further relying upon various decisions of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court including the decision in case of CIT vs. Pooja Agarwal (supra) as well as in case of PCIT vs. Pramod Jain & Others (supra), we allow the claim of exemption under section 10(38) of the Act and accordingly delete the addition made by the AO. The order of ld. CIT (A) is set aside.*

Considering the above facts and circumstances and taking into consideration, the various documentary evidences furnished by the assessee in support of his claim and further relying upon the decisions of this tribunal as well as decision of Hon'ble Jurisdictional High Court including the decision in the case of CIT Vs. Pooja Agarwal (supra) and in the case of PCIT Vs. Pramod Jain &Ors. (supra), it is held that claim of long term capital gain of exemption u/s 10(38) of I.T. Act do not suffer from infirmities and cannot be held as bogus and accordingly addition so made by the AO and confirmed by the CIT(A) is hereby deleted.

2.6 As regards Ground No. 3 of the assessee, the Bench after hearing both the parties finds that this ground relates to addition of commission paid for

accommodation entry and is therefore consequential to the issue involved in earlier grounds. As the transaction of purchase and sale of shares and consequent long term capital gain so earned has been held to be not bogus, therefore, addition made by the AO on account of notional commission allegedly paid, is not sustainable and is therefore deleted.

3.0 In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 03 /04/2023.

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 03 /04/2023

*Mishra

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

1. The Appellant- Shri Arnav Goyal,, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 2(4), Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 275/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar